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Remarriage and Wrongful Death: A Model for Voir Dire Examination

Few rules have gained the degree of acceptance accorded the principle that the fact of remarriage of a surviving spouse is inadmissible for the purpose of mitigating damages in a wrongful death action.[1] The English common law rule,[2] that the fact of remarriage is admissible as a factor influencing the determination of damages, has received little support in American decisions.[3] Furthermore, while some commentators have expressed support for a rule allowing the fact of remarriage to enter into consideration in determining damages,[4] it is difficult to reconcile this

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[1]The general rule that the remarriage of a surviving spouse in a wrongful death action does not affect the damages recoverable has been adopted in at least twenty-one jurisdictions. Furthermore, a number of jurisdictions have extended the general rule to hold that evidence of the remarriage of the surviving spouse is not admissible where offered only for the purpose of mitigating damages. *See* Annot. 87 A.L.R.2d 252 (1963 & Supps. 1968, 1975) (Cases cited at §§ 4,5). *See generally* S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 6.12 (1966).

Recent decisions have established the continuing validity of the exclusionary approach. *See, e.g.*, Luddy v. State, 30 App. Div. 2d 993, 294 N.Y.S.2d 87 (1968), *aff'd*, 25 N.Y.2d 773, 303 N.Y.S.2d 522, 250 N.E.2d 581 (1969); Stuart v. Consolidated Foods Corp., 6 Wash. App. 841, 496 P.2d 527 (1972). *See also* cases cited at note 27 *infra*.

There are two types of wrongful death statutes which allow death damages to be recovered by a surviving spouse. Broadly classified, these are "survival statutes," which treat the deceased as if he survived to have his own day in court, and "wrongful death" statutes, patterned after the English Fatal Accidents Act, 1846, 9 & 10 Vic., c.93, commonly known as Lord Campbell's Act, which provide for a new cause of action to vest in the survivors. *See* RESTATEMENT OF TORTS § 925, Comment a (1939). This note will focus upon voir dire examination under statutes modeled after Lord Campbell's Act. The Indiana wrongful death statute is an example of such a legislative enactment. *See* IND. CODE § 34-1-1-2 (1976).

It would appear that the same problems which arise under "wrongful death" statutes may also arise under "survival" type legislation since the defendant may still seek to introduce the remarriage to assure an unbiased jury, while the plaintiff will still be apprehensive about the effect of such evidence on the jury's determination of damages. Note, however, that under the survival statutes no serious contention can be made that the fact of remarriage should serve to mitigate damages since the statute does not seek to create a new cause of action in the survivors. *Cf.* notes 16-17, *infra*, & text accompanying.

[2]*See* Hall v. Wilson, [1939] 4 All E.R. 85, where the court stated:

> Although this lady is quite firmly of the opinion and perhaps rightly of the opinion, that she will never marry again, she is an attractive young woman who might marry again; one cannot ignore the possibility that she may marry again, and I take that into consideration.

Id. at 87. *See also* Mead v. Clarke Chapman & Co., [1956] 1 W.L.R. 76, [1956] 1 All E.R. 44 (C.A.) (allowing the *possibility* of remarriage to be shown as a factor mitigating damages). The common law rule has been overruled by statutory enactment. *See* Law Reform Act, 1971, c.43, § 4(1), *construed in* Howitt v. Heads, [1972] 2 W.L.R. 183 (Assize).

[3]*See* notes 10-13 *infra* & text accompanying. Nevertheless, the common law rule still finds support in the case law of certain other nations. *See, e.g.*, Lefebvre v. Dowdall & McLean, [1965] 1 Ont. 1 (Canada); Willis v. Commonwealth, 73 C.L.R. 105 (1946) (Australia).

[4]*See, e.g.*, Comment, *Remarriage and the Illinois Wrongful Death Act: The Effect of*

approach with the most basic tenets of the collateral source rule.[5] In light of this fact some commentators have been forced to direct their criticisms at the collateral source rule itself.[6]

The exclusionary rule, or "rule of inadmissibility," is subject to challenge from a procedural perspective as well as to challenges directed at its substantive bases. Although designed to assure the plaintiff a proper determination of statutory damages, application of the rule may have undersirable tangential consequences. It has been argued that application of the rule infringes upon the defendant's fundamental right to an unbiased jury, to such an extent, and in such a manner, that policy demands that the rule be either modified or discarded.[7] Moreover, continued adherence to the rule raises questions concerning the integrity of the judicial process itself.[8]

This note will examine the general rule of inadmissibility as it applies to voir dire examination of prospective jurors in a wrongful death action. It is in the context of voir dire examination that courts are often first urged to exclude the fact of remarriage from jury consideration and, thus, first faced with the admissibility dilemma.[9] It is at this stage of the proceedings that the interests of the parties are first crystallized. From a discussion of the conflicting considerations involved and an examination of the alternatives available, this note will attempt to resolve the admissibility dilemma by suggesting a uniform procedure to be employed in wrongful death actions where the admissibility of the fact of the plaintiff's remarriage is in dispute.

THE RULE OF INADMISSIBILITY

Among those courts which have faced the question, only those of

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Changes in Status of Beneficiaries on Damages in Wrongful Death Actions, 7 J. MAR. J. PRAC. & PROC. 395, 412-15 (1974) [hereinafter cited as *Remarriage and the Illinois Act*]; Comment, *Remarriage and Wrongful Death*, 50 MARQ. L. REV. 653 (1967).

[5]Briefly stated, the collateral source rule provides that compensation from collateral sources, *e.g.* insurance, does not diminish the damages recoverable. C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 90 (1935). *See generally*, 22 AM. JUR. 2d *Damages* § 206 (1965) which states that "benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer." *See also* Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669 (1962); Averbach, *The Collateral Source Rule*, 21 OHIO ST. L.J. 231 (1960).

[6]*See, e.g.*, Comment, *Remarriage and Wrongful Death*, 50 MARQ. L. REV. 653 (1967); Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741 (1964).

[7]*See* Brief for Appellant at 36-42, State v. Cress, 22 Ariz. App. 490. 528 P.2d 876 (1974). *But see* Brief for Appellee at 33-39. [On file at the INDIANA LAW JOURNAL]

[8]*See* notes 32-33, *infra*, & text accompanying.

[9]The term "voir dire" is employed generically to include pre-trial procedures in addition to the actual examination of prospective jurors. This is made necessary by the fact that the plaintiff will often seek to exclude the fact of remarriage via a motion *in limine* or a motion for a protective order.

Wisconsin[10] and Mississippi[11] have held that the remarriage of the surviving spouse, or the possibility thereof, is admissible for the purpose of mitigating the damages recoverable in an action for the wrongful death of the plaintiff's deceased spouse. In addition, two other states have adopted this rule through legislative action,[12] while one state, which previously followed the minority rule, recently adopted the general rule of inadmissibility.[13]

In general, courts have offered two justifications for the rule of inadmissibility:

(1) Since the cause of action arises at the time of death, damages are determinable at that time and subsequent events are not to be considered by the finder of fact in determining the damage award;[14] and

(2) Any rule which provides for mitigation would be highly speculative and conjectural in nature as it would necessitate a comparison of the prospective value of the earnings and services of the deceased spouse with those of the new spouse.[15]

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[10]Jensen v. Heritage Mutual Ins. Co., 23 Wis. 2d 344, 127 N.W.2d 228 (1964).

[11]Campbell v. Schmidt, 195 So. 2d 87 (Miss. 1967). In *Campbell*, a wrongful death action arising out of a collision between a southbound motorist and an eastbound truck, the court held the southbound motorist negligent as a matter of law but remanded on the damage issue stating:

> Since this case must be retried, we feel that is is necessary to point out that the testimony showing any change in the conditions on which the suit is based is competent as against the rights of the person or persons affected; therefore, we hold that testimony may be introduced to show the remarriage of the widow, after the death of the husband, for which the suit is brought.

Id. at 90 (citations omitted).

[12]*See* FLA. STAT. ANN. § 768.21(6)(c) (West 1975) which states that "[e]vidence of remarriage of the decedent's spouse is admissible." *See also* TEX. REV. CIV. STAT. ANN. art. 4675a (Vernon Supp. 1976) which provides:

> In an action under this title evidence of the actual ceremonial remarriage of the surviving spouse is admissible, if such is true, but the defense is prohibited from directly or indirectly mentioning or alluding to any common-law marriage, extramarital relationship, or marital prospects of the surviving spouse.

See also Seaboard Coastline R. R. v. Hill, 270 So. 2d 359, 361-63 (Fla. 1972) (dissenting opinion).

[13]*See* Bunda v. Hardwick, 376 Mich. 640, 138 N.W.2d 305 (1965), *overruling* Jones v. McMillan, 129 Mich. 86, 88 N.W. 206 (1901); Stuive v. Pere Marquette R. Co., 311 Mich. 143, 18 N.W.2d 404 (1945); Sipes v. Michigan C. R. Co., 231 Mich. 404, 204 N.W. 84 (1925).

[14]*See, e.g.*, Gulf, C. & S.F. Ry. v. Younger, 90 Tex. 387, 391, 38 S.W. 1121, 1122 (1897). Inherent in this rationale is the policy that a wrongdoer should not be relieved of the burden of compensating his victim by the fortuity of available collateral avenues of compensation. This "collateral source rule" is usually presented as part of the first justification presented in the text. *See, e.g.*, McFarland v. Illinois C.R.R., 241 La. 15, 19, 127 So. 2d 183, 186 (1961). It has also been suggested as a separate and distinct rationale for the rule of inadmissibility. *See, e.g., Remarriage and the Illinois Act, supra* note 4, at 409. *See also* note 5 *supra*.

[15]*See, e.g.*, Hardware State Bank v. Cotner, 55 Ill. 2d 240, 302 N.E.2d 257 (1973); Smith v. Wells, 258 S.C. 316, 188 S.E.2d 470 (1972).

These justifications for the majority rule have been set forth in the oft cited case of *The City of Rome*[16] where the court reasoned:

> 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. Moreover, adherence to the rule followed by the commissioner seems essential to consistency with the holding that, upon the death of the first husband, there was "an immediate, final and absolute vesting" in his widow, if the statutory beneficiary, of a cause of action on that account.[17]

Despite the apparent force of these arguments a number of cases have recognized exceptions to the general rule.[18] One court has summarized the exceptions to the rule of inadmissibility which have evolved as follows:

> Plaintiff further maintains, and correctly so, that in several of the cases from other jurisdictions cited by the trial court in its findings denying plaintiff's motion for a protective order on the question of remarriage, evidence of remarriage by a surviving spouse has been admitted only where the circumstances differed greatly from those presented in this case. In the cases cited, such evidence was allowed (1) when coupled with evidence of previous marital difficulties in an action for loss of consortium, (2) for purposes of impeachment, where the question of remarriage was not objected to when the spouse answered in the negative when asked if she had remarried, and (3) where both marital misconduct and subsequent remarriage by a surviving spouse were involved.[19]

In *Jensen v. Heritage Mutual Insurance Co.*[20] the Supreme Court of Wisconsin examined the exclusionary rule and rejected its most basic premise — that the finder of fact may only consider those facts which existed at the time of death of the plaintiff's decedent. As to the relevancy of the plaintiff's remarriage the court stated:

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[16]48 F.2d 333 (S.D.N.Y. 1930) (claim under the Death on the High Seas Act).

[17]*Id.* at 343. *See* Benwell v. Dean, 249 Cal. App. 2d 345, 57 Cal. Rptr. 394 (1967). *But see* Appellant's Brief at 38-39, State v. Cress, 22 Ariz. App. 490, 528 P.2d 876 (1974) [on file at the INDIANA LAW JOURNAL].

[18]*See, e.g.*, Rayner v. Ramirez, 159 Cal. App. 2d 372, 383, 324 P.2d 83, 91 (1958) (where the question of remarriage was not objected to and the widow testified she had not remarried, an authenticated copy of the marriage license was admitted over objection "at least for the purpose of impeachment, and did have some bearing on the question of loss of comfort, society and support. . . ."); McGuire v. East Ky. Beverage Co., 238 S.W.2d 1020, 1022 (Ky. App. 1951) (remarriage "incompetent for any purpose" in wrongful death action, but admissible in husband's suit for loss of consortium). *Cf.* Wood v. Alves Serv. Trans. Inc., 191 Cal. App. 2d 723, 13 Cal. Rptr. 114 (1961) (defense attorney's reference to probability of remarriage in opening statement did not constitute prejudicial error when made in good faith).

[19]Thompson v. Peters, 26 Mich. App. 590, 182 N.W.2d 763, 766 (1970), *rev'd* 386 Mich. 532, 194 N.W.2d 301 (1972) (reversed on the basis that the jury never reached the issue of damages in its deliberations and so was not influenced by the disclosure of the fact of remarriage).

[20]23 Wis. 2d 344, 127 N.W.2d 228 (1964). *See* note 10 *supra*.

> Defendant stresses the early remarriage of the plaintiff wife. The possibility of marriage or remarriage is always an element which it is proper for the jury to consider in determining damages in a wrongful death action. . . . This being so, [it] necessarily follows that where the possibility has become an actuality by time of trial the jury should be permitted to consider such fact in assessing damages. We are not impressed with the rationale . . . that a jury, in fixing damages for wrongful death, must consider only the facts that exist at date of death, and may not take into account a remarriage before trial.[21]

Support for this view has been found in statutes analogous to Lord Campbell's Act and in the very history and wording of the act itself.[22]

The majority rule has been subject to criticism from academic commentators, as well as from members of the bench and bar.[23] A recent article by two trial lawyers presents the most scathing attack on the inadmissibility rule.[24] The authors noted:

> The refusal of most courts to admit evidence of remarriage in cases where mitigation or an absence of monetary loss can be shown by the defendant is but a small part of the eclipse of reason. The fundamental misfeasance of the Collateral Source Rule is that it promotes and legalizes "bigamy" in the courtroom. The remarried spouse is allowed to reap the benefits of the monetary value of the lives of two wives, one technically alive in terms of her replacement value, the other actually alive and rendering the services of a wife.[25]

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[21]*Id.* at 355, 127 N.W.2d at 234 (citations omitted). *But see* text accompanying note 17 *supra.*

[22]Lord Campbell's Act, as it is popularly known, was enacted as the Fatal Accidents Act, 1846, 9 & 10 Vict., c.93. For a view of statutes analogous to Lord Campbell's Act *see generally,* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 24.2 at 1285-88 (1956). *See also* Comment, *Remarriage and Wrongful Death,* 50 MARQ. L. REV. 653 (1967), in which the writer challenges the validity of the majority rule which does not allow the jury to consider remarriage as an element in determining damages and concludes that statutory construction leads inescapably to the conclusion that death damages should be mitigated. *Id.* at 657. The writer argues that the history of the act itself supports this conclusion:

> The purpose of this statute was to provide the decedent's dependents with a sufficient monetary award against the person whose negligent or wrongful acts caused the decedent's death in order to enable them to subsist without becoming wards of society. It is quite apparent that it was not within the reason of this statute to provide the dependents with an award so that they could live more prosperous lives than they would have had the decedent lived.

Id. at 658. Finally, the writer finds support by analogy in workmen's compensation legislation which often provides that the marital status of the surviving spouse has an effect on the death benefits allowable. *See, e.g.,* MD. ANN. CODE art. 101, § 36(8)(I) (1957).

[23]*See, e.g., Remarriage and the Illinois Act, supra* note 4, at 408-15; note 22 *supra.* It has even been contended that to allow a jury to consider one change of status (death) in mitigation but not to consider others (*e.g.* marriage) "is arbitrary and violative of due process and equal protection." Hardware State Bank v. Cotner, 55 Ill. 2d 240, 248, 302 N.E.2d 257, 263 (1973). The Supreme Court of Illinois easily disposed of this argument. *Id.* at 249, 302 N.E.2d at 263. *See generally Remarriage and the Illinois Act, supra* note 4, at 399-401.

[24]Shields and Giles, *Remarriage and the Collateral Source Rule,* 36 INS. COUNS. J. 354 (1969) [hereinafter cited as *Remarriage and the Collateral Source Rule].*

[25]*Id.* at 354.

The basic inconsistencies of the collateral source rule are not easily dismissed. While the jury is told to consider the probable length of life of the deceased and the services he or she would have rendered, they are forced, by lack of information, to ignore the fact that a new spouse has replaced the deceased and that this new spouse may provide care, comfort and services even in excess of those which the deceased spouse could have been expected to provide. Moreover, while the law permits intangible factors such as loss of companionship, comfort and guidance to be translated into pecuniary terms for the purpose of calculating *recovery* they are removed from the jury's consideration for the purpose of determining *mitigation.*[26]

Despite the force of these criticisms it is now apparent that an ever increasing number of courts are finding the logic of the majority rule to be persuasive.[27] This trend is perhaps best exemplified by the recent decision

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[26]*See id.* at 357-58 where the authors point to Davis v. Guarneri, 45 Ohio St. 470, 15 N.E. 350 (1887), as illustrative of the problem. In *Davis,* the authors report, counsel for the defendant asked:

> If it be true that it was proper for the jury to take into account the probable length of life of the deceased wife, and the services she would probably render, was it not also proper to consider that another woman occupied the same relation towards the husband and children, rendered the same services, and in the accumulation of property, and became to them precisely what the deceased woman would have been had she lived? . . . Can it be that he could recover for years of loss of these services by reason of the death . . . when during the same years the same pecuniary services were being rendered him by another woman? Suppose the first woman had been an unsuitable person to rear his children, negligent in the discharge of her duties to him and to them, which as a wife and mother she should have done, and upon her death another woman came into the same relations with him and his children but rendered valuable services to both, shall it be said that his loss cannot be mitigated by proof of such a state of facts? Should not the jury have been put in possession of all facts surrounding this husband and these children during the years that followed the death of the wife and mother, so that they could have better determined what the real pecuniary loss to both was?

Remarriage and the Collateral Source Rule, supra note 24, at 357. The authors continue by declaring that

> [t]he court's only reply to this eloquent statement was that 'while this reasoning was not without plausibility it was wholly unsupported by adjudication.' The defendant had pointed out, to the court's chagrin, that the remarried spouse had been allowed to translate into pecuniary terms, dollars and cents, the so-called intangibles for the purposes of *recovery* that the defendant was told were beyond evaluation and measurement for purposes of mitigation. No precedents could be found because courts generally have not been willing to face up to the inescapable logic of the very doctrine, compensation for actual pecuniary loss, that was espoused but irrationally rejected.

Id. at 357-58. In Indiana the measure of damages is not restricted to pecuniary damages but includes allowance for loss of companionship, comfort and guidance. *See, e.g.,* New York Cent. R.R. v. Wyatt, 135 Ind. App. 205, 184 N.E.2d 657 (1962); American Carloading Corp. v. Gary Trust & Sav. Bank Admr., 216 Ind. App. 642, 25 N.E.2d 777 (1940).

[27]During the past twenty years alone nineteen jurisdictions have adopted or reaffirmed the majority view that evidence of remarriage may not be employed to mitigate damages or that such evidence is not admissible if offered only for the purpose of mitigation. These

of the Supreme Court of Michigan in *Bunda v. Hardwick*[28] overturning nearly seventy years of judicial decisions and adopting the majority rule.

ADMISSIBILITY ON VOIR DIRE

A classic extension of the rule that evidence of remarriage, or the possibility thereof, is inadmissible for the purpose of mitigating damages, holds that such evidence is inadmissible for any purpose in a wrongful death action. This is apparently the express command of a number of earlier cases and the implied logic of at least one quite recent decision.[29]

When the subject of analysis turns from the actual trial of a wrongful death action to the conduct of proper voir dire examination of prospective jurors, those factors which arguably militate against the extension of the exclusionary rule to this aspect of the litigation become evident.[30] These considerations may be summarized as follows:

First, disclosure of the remarriage of the plaintiff is necessary to the selection of an unbiased jury. It is quite conceivable that the prospective juror is only familiar with the plaintiff, or with the plaintiff's past activities or reputation, through the newly acquired surname. Thus, failure to disclose this new name to the jury allows for the possibility of

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jurisdictions include: Ariz., Cal., Del., Fal., Ga., Ill., Ind., La., Md., Mich., Mo., N.J., N.Y., Pa., R.I., S.C., Tenn., Tex., and Wash. *See, e.g.*, Bell Aerospace Corp. v. Anderson, 478 S.W.2d 191 (Tex. Civ. App. 1972); Smith v. Wells, 258 S.C. 316, 188 S.E.2d 470 (1972); Phelps v. Magnavox Co., 497 S.W.2d 898 (Tenn. App. 1972); Wright v. Dilbeck, 22 Ga. App. 214, 176 S.E.2d 715 (1970); Central Ind. Ry. v. Anderson Banking Co., 143 Ind. App. 396, 240 N.E.2d 840 (1968); Benwell v. Dean, 249 Cal. App. 2d 345, 57 Cal. Rptr. 394 (Ct. App. 1967); Curnow v. West View Park Co., 220 F. Supp. 367 (D.C. Pa. 1963). Of these, ten jurisdictions have permitted such evidence, in some form, to be admitted on voir dire. *See* State v. Cress, 22 Ariz. App. 490, 528 P.2d 876 (1974); Watson v. Fischbach, 54 Ill. 2d 498, 301 N.E.2d 303 (1973); Rodak v. Fury, 31 App. Div. 2d 816, 298 N.Y.S.2d 50 (1969); Wiesel v. Cicerone, 106 R.I. 595, 261 A.2d 889 (1970); Cherrigan v. City and County of San Francisco, 262 Cal. App. 2d 643, 69 Cal. Rptr. 42 (1968); Dubil v. Labate, 52 N.J. 255, 245 A.2d 177 (1968); Glick v. Allstate Ins. Co., 435 S.W.2d 17 (Mo. App. 1968); Helmick v. Netzley, 40 Ohio Op. 2d 104, 229 N.E.2d 476 (C.P., Montgomery County 1967) and FLA. STAT. ANN. § 768.21(6)(c) (West Supp. 1975); TEX. REV. CIV. STAT. ANN. art. 4675a (Vernon Supp. 1976).

Indiana is among the jurisdictions which endorse the rule that remarriage should not be considered in determining the measure of damages for the death of the decedent. *See, e.g.*, Central Ind. Ry. v. Anderson Banking Co., 143 Ind. App. 396, 240 N.E.2d 840 (1968); Evansville & Ohio Valley Ry. v. Woosley, 120 Ind. App. 570, 93 N.E.2d 355 (1950); Wabash Ry. v. Gretzinger, 182 Ind. 155, 104 N.E. 69 (1914); Consolidated Stone Co. v. Morgan, 160 Ind. 241, 66 N.E. 696 (1903).

[28]376 Mich. 640, 138 N.W.2d 305 (1965). *See* note 13 *supra.*

[29]*See, e.g.*, Evansville & Ohio Valley Ry. v. Woosley, 120 Ind. App. 570, 93 N.E.2d 355 (1950) (not material to any of the issues); McGuire v. East Ky. Beverage Co., 238 S.W.2d 1020 (Ky. 1951) ("incompetent for any purpose"). The recent decision in State v. Cress, 22 Ariz. App. 490, 528 P.2d 876 (1974), can be defended on the grounds that prior decisions, dealing only with the issue of admissibility on the question of damages, impliedly determined that evidence of remarriage is inadmissible for any purpose and thus may not be employed on voir dire. For a fuller discussion of *Cress* and its predecessors, *see* notes 46-52, *infra*, & text accompanying.

[30]In adopting the limited availability model, *see* text accompanying notes 41-52 *infra*, the court in Wiesel v. Cicerone, 106 R.I. 595, 261 A.2d 889 (1970) stated:

subsequent juror recognition of the plaintiff. Obviously the thrust of such a contention is directed to those instances in which the plaintiff is a female who has adopted the surname of her new spouse.[31] However, it is not difficult to postulate a case in which an empaneled juror realizes, at some intermediate point in the presentation of evidence, that he knows, or has had dealings with, the plaintiff's new wife but never connected the identical surnames during voir dire. In such a case it is the *fact* of remarriage which, when disclosed to the jury, will go far toward assuring an unbiased panel.

Second, the integrity of the judicial process itself is arguably at stake. It has been argued that adherence to the rule prohibiting evidence of remarriage perpetrates a fraud upon the jury by requiring the female plaintiff to use the surname of her first marriage, rather than the name she presently employs, throughout the litigation.[32] After taking an oath to tell the truth, the witness' first response, *i.e.* her name, will be a court sanctioned misrepresentation. It would appear that "[n]o meritorious goal is served by

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> The argument against an exclusionary rule can be summarized as follows:
> 1. The integrity of the judicial process requires that plaintiff's true name and remarriage be made known to the jury.
> 2. Such knowledge by the jury is essential for an adequate voir dire examination of prospective jurors.
> 3. Any risk of prejudice to the plaintiff is negated by proper instructions stating that the remarriage should have no part in their deliberations as to the amount of damages.
> 4. It must be assumed that a jury will follow the instructions of the court.
>
> An exclusionary rule, however, would preclude any reference to or evidence of remarriage and by so doing avoid the danger that evidence of remarriage or the possibility thereof, irrelevant to the amount of damages recoverable, might unduly prejudice the jury, in arriving at the amount of damages, against the surviving spouse. Such a rule impliedly rejects the efficacy of a limiting instruction in such a case.

Id. at 601-02, 261 A.2d at 893.

[31]For the purposes of this discussion, we assume that the plaintiff is female and has remarried since the allegedly wrongful death of her first husband and has adopted the surname of her second marriage. Perhaps at this point the reader will find it to his benefit to refer to the facts of a "model" wrongful death action. For this purpose see the cautionary instruction in the text accompanying note 60 *infra*.

[32]*See* Watson v. Fischbach, 54 Ill. 2d 498, 503, 301 N.E.2d 303, 306 (1973); Dubil v. Labate, 52 N.J. 255, 261-62, 245 A.2d 177, 180 (1968). In *Watson* the court dismissed the "limited availability model," concluding:

> There is, to us, a patent offensiveness in a rule which countenances false statements made under oath in a judicial proceeding on the theory that, unless false testimony is permitted, jurors will disregard the instructions of the court to the prejudice of the plaintiff.
>
> We believe the judicial process in its search for truth need not resort to the condonation of perjury to accomplish its objective, and we accordingly hold that prospective jurors may be told by the judge that a plaintiff has remarried.

54 Ill. 2d at 503, 301 N.E.2d at 306.

resorting to half-truths and falsehoods in order to supposedly render plaintiff her just reward."[33]

Other factors must also be considered in evaluating the applicability of the exclusionary rule to voir dire. For example, proponents of the exlusionary aproach are likely to contend that even a limited exposure, perhaps tempered by an appropriate instruction, to the fact of remarriage on voir dire is likely to prejudice the jury in its ultimate determination of liability and damages. Such a contention exhibits two basic failings. First, it assumes that a jury is incapable, or unwilling, to follow instructions on the proper procedure for determining liability or the measure of damages. In addition, it ignores the reality that a number of factors inherent in any case tend to "prejudice" a jury. It is arguable that if potential prejudice of jury deliberations is the true basis of the exclusionary rule, there is little justification for even permitting the jury to learn the sex of the plaintiff. A defense attorney might argue that, in determining damages, a jury is likely to be more sympathetic to a female plaintiff than to a similarly situated male.[34]

Finally, the proponents of admissibility for a limited purpose on voir dire have argued that the exclusionary rule cannot be equated to the collateral source rule since that rule does not require resort to misrepresentation. Furthermore, it is argued that the the risk of prejudice in the "limited purpose" rule may be negated by a properly framed jury instruction.[35] It is against these contentions that the arguments in favor of exclusion must be weighed and, it should be noted, that a growing number of courts which have faced the issue have determined that introduction of evidence establishing the remarriage of the plaintiff, or implementation of an alternative procedure designed to minimize potential jury prejudice, is a proper aspect of voir dire examination. Attention can now be directed to applying these observations to procedures which have been proposed.

ALTERNATIVE PROCEDURES

There is no unanimity among the courts which have considered the appropriate procedure for introducing the remarriage of a surviving spouse

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[33]Brief for Appellant at 40, State v. Cress, 22 Ariz. App. 490, 528 P.2d 876 (1974) [on file at the INDIANA LAW JOURNAL].

[34]Of course, the same logic can be extended to hide race, religion or even physical appearance from the jury. If the true aim of exclusion is to prevent jury prejudice because the jury will be less sympathetic to a remarried plaintiff, it is difficult to explain why this factor is kept from the jury while a virtual barrage of potentially prejudicial characteristics is made available for jury consideration. *See generally* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 193-218 (1966), dealing with jury sympathy for criminal defendants. *See also id.* at 211, Table 65 which illustrates that the "sympathy index" is greater for females than males, for whites than non-whites and for the young as compared to the middle aged and the elderly.

[35]*See, e.g.*, Brief for Appellant at 41-42, State v. Cress, 22 Ariz. App. 490, 528 P.2d 876 (1974) [on file at the INDIANA LAW JOURNAL].

to the jury in the context of a voir dire examination.[36] While countless alternative procedures may be suggested for permitting the prospective jurors to be informed of the plaintiff's remarriage, only two proposals have received significant recognition and these may be employed as analytical models. The first, or limited availability model, is based on the recent decision of the Supreme Court of Rhode Island in *Wiesel v. Cicerone*[37] and has most recently found acceptance in the decision of the Arizona Court of Appeals in *State v. Cress.*[38] The second model, employing a cautionary instruction, parallels the procedure adopted by the Supreme Court of New Jersey in *Dubil v. Labate*[39] and the Supreme Court of Illinois in *Watson v. Fischbach.*[40]

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[36]*See generally* the discussion in Watson v. Fischbach, 54 Ill. 2d 498, 301 N.E.2d 303 (1973). *Compare* Wiesel v. Cicerone, 106 R.I. 595, 261 A.2d 889 (1970) and text accompanying notes 41-52 *infra, with* Dubil v. Labate, 52 N.J. 255, 245 A.2d 177 (1968) and text accompanying notes 53-56 *infra.*

[37]106 R.I. 595, 261 A.2d 889 (1970).

[38]22 Ariz. App. 490, 528 P.2d 876 (1974).

[39]52 N.J. 255, 245 A.2d 177 (1968). *See also* Glick v. Allstate Ins. Co., 435 S.W.2d 17 (Mo. App. 1968), involving a proceeding on a petition for declaratory judgment to determine whether, in the trial of a death action, the defense would be permitted to disclose the fact of remarriage of one of the plaintiffs. The circuit court dismissed the petition and the appellate court affirmed that decision. In strongly worded *dicta* the court adopted the view set forth in *Dubil* and quoted extensively from that opinion. The court concluded:

> Even if the trial court had not dismissed the plaintiff's petition, but instead had assumed jurisdiction to render a declaratory judgment laying down "guidelines" for trial of the death actions, the court could not properly have granted plaintiffs the relief they had prayed for. Clearly it would have been error for the court to have declared that knowledge of the widow's remarriage should be withheld from the jury in the trial of such actions. In our opinion such procedure would not be consistent with the high standards of integrity which the judicial process should maintain.

435 S.W.2d at 22-23.

[40]54 Ill. 2d 498, 301 N.E.2d 303 (1973). *See also* Hardware State Bank v. Cotner, 55 Ill. 2d 240, 302 N.E.2d 257 (1973); Mulvey v. Ill. Bell Tel. Co., 5 Ill. App. 3d 1057, 284 N.E.2d 356 (1972), *aff'd,* 53 Ill. 2d 591, 294 N.E.2d 689 (1973); Kissell, *Sympathy in Wrongful Death Litigation,* 58 ILL. B.J. 442 (1970).

In *Watson* the court noted that the propriety of reference to the remarriage of the surviving spouse must be examined in terms of its relevancy to the selection of a fair and impartial jury as well as in the traditional terms of relevancy in the determination of damages. 54 Ill. 2d at 500-01, 301 N.E.2d at 304-05. In permitting defendant's counsel to mention the remarriage on voir dire, the court stated:

> We are not persuaded that jurors will so far abdicate their responsibilities as to consider a remarriage in determining liability, assuming a properly restrictive and cautionary instruction has been requested and given [citations omitted]. And the possibility that the amount of damages awarded may be affected by knowledge of the fact that plaintiff has remarried, if it exists, must be weighed against what seems to us an element essential to the integrity of the jury trial process: that the parties to the litigation have a reasonable opportunity to ascertain that the fact-finding body is free from influence-producing relationships unfavorable to them.

54 Ill. 2d at 501, 301 N.E.2d at 305. *But see* Wiesel v. Cicerone, 106 R.I. 595, 607, 261 A.2d 889, 896 (1970).

The Limited Availability Model

The basis of the "limited" model of admissibility is the view that a cautionary instruction informing the prospective jurors that the fact of remarriage is not to be considered in determining damages would not outweigh the likelihood of misuse of that information by the jury.[41] This view has been adopted by the Supreme Court of Rhode Island as well as by the trial and appellate courts of Arizona, California, New York and Ohio.[42]

Under this restrictive procedure no actual disclosure of the fact of remarriage is permitted. That fact is only available to the defendant on voir dire in the sense that he may introduce the new spouse, by name or in person, to the jury for the limited purpose of uncovering any potentially prejudicial acquaintance, but he is prohibited from disclosing the remarriage itself. Any comment indicating that the plaintiff has remarried would seem to constitute reversible error in the case where the jurors who heard the disclosure were empaneled, and an ethical impropriety even where the jury was dismissed and a new group of prospective jurors selected.[43] Such a

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[41]In rejecting the cautionary instruction model, *see* text accompanying notes 53-56 *infra*, the court in Wiesel v. Cicerone, 106 R.I. 595, 261 A.2d 889 (1970) held:

> To inject information concerning a widow's remarriage would, in our judgment, not only introduce irrelevant matter, but what is more important, it would be admitting evidence which could very well have a tendency to confuse the jury and adversely prejudice the plaintiff. This would in our opinion be putting a premium on form and overlooking substance. Nor do we believe that an instruction to the jury at the inception of the trial, or during the trial, saying that evidence of remarriage is not to be considered by them will outweigh likelihood of misuse of such evidence by the jury [citation omitted]. For the same reason, neither do we believe that the presumption that the jury will follow the trial judge's instructions will outweigh the likelihood of misuse of such evidence.

Id. at 606-07, 261 A.2d at 895.

One writer has suggested that a rule allowing disclosure on voir dire, because the jury is presumed capable of following a cautionary instruction, is based on a "dubious premise." *Remarriage and the Illinois Act, supra* note 4, at 315.

[42]*See, e.g.*, State v. Cress, 22 Ariz. App. 490, 528 P.2d 876 (1974); Rodak v. Fury, 31 App. Div. 2d 816, 298 N.Y.S.2d 50 (1969); Cherrigan v. City and County of San Francisco, 262 Cal. App. 2d 643, 69 Cap. Rptr. 42 (1968); Helmick v. Netzley, 40 Ohio Op. 2d 104, 229 N.E.2d 476 (1967).

[43]*See, e.g.*, Dubil v. Labate, 52 N.J. 255, 245 A.2d 177 (1968), where the court concluded:

> It would be offensive to the integrity of the judicial process if the plaintiff, after taking an oath to be truthful, were permitted to misrepresent her marital status to the jury. Of course, the defendants may not inquire into the details of the remarriage nor may they offer evidence concerning it. However, the desirable exclusion of evidence relating to the remarriage may not be carried to the point of affirmatively misrepresenting the truth to the jury.

Id. at 261-62, 245 A.2d at 180 (quoted with approval in Watson v. Fischbach, 54 Ill. 2d 498, 501-02, 301 N.E.2d 303, 305 (1973), where the court also noted that "[b]eyond the *voir dire*, questions comments or arguments relating to the remarriage will, ordinarily, be improper." 54 Ill. 2d at 503, 301 N.E.2d at 306).

view of the attorney's improper behavior accords with the principles previously developed under the collateral source rule.[44]

Under this model the defendant is protected from biased or partial jurors by permitting voir dire examination of prospective jurors regarding their acquaintance with the new spouse, while not permitting the disclosure of the relationship of that person to the plaintiff. The limited availability model also provides that witnesses related to the new spouse could be presented in a similar fashion to the prospective jurors, or properly framed questions might be posed to those persons concerning their backgrounds or businesses, in order to determine whether the prospective jurors are in any way acquainted with them.[45] Nevertheless, it is well accepted that under this model disclosure of the *fact* of remarriage is not permitted.

The utility of this approach is best exemplified by the case of *State v. Cress*[46] in which the Arizona Court of Appeals recognized that the defendants' right to an unbiased jury requires some form of disclosure of the fact of remarriage on voir dire. The court proceeded to adopt the procedures embodied in the limited availibility model of voir dire.[47] *Cress* is particularly significant because the appellate court, after recognizing the logic and force of the more liberal cautionary instruction model of disclosure, felt constrained by its prior decisions to adopt the more restricted limited availability model.[48] Examination of the earlier cases which the court relied upon discloses that they dealt only with the

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[44]For example, introduction of evidence establishing the existence of liability insurance in a personal injury action has been held to constitute grounds for reversal. *See, e.g.*, Ellison v. Wood & Bush Co., 153 W. Va. 506, 170 S.E.2d 321 (1969); Hope Windows Inc. v. Snyder, 208 Va. 489, 158 S.E.2d 722 (1968); J.C. Penney Co. v. Barrientez, 411 P.2d 841 (Okla. 1966); Bsichoff v. Koenig, 100 N.W.2d 159 (N.D. 1959); Finch v. Conley, 422 S.W.2d 128 (Ky. 1957). *See generally* McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE, (E.W. Cleary ed. 1972) § 201.

[45]*See, e.g.*, Rodak v. Fury, 31 App. Div. 2d 816, 817, 298 N.Y.S.2d 50, 53-54 (1969).

[46]22 Ariz. App. 490, 528 P.2d 876 (1974).

[47]*Id.* at 496-97, 528 P.2d at 882-83.

[48]Illinois and New Jersey have approached the problems in a persuasive manner. These courts have recognized two opposing objectives: prohibition of the juries' consideration of the remarriage in arriving at damages and informing the jury that a second marriage did exist, thereby obviating the need to refer to the plaintiff by a prior name. These jurisdictions have accomplished the compromise by allowing the judge, prior to *voir dire* examination of prospective jurors, to inform the prospective panel that the plaintiff has remarried but that such fact cannot be used in arriving at damages [citations omitted]. While we approve of both the logic and procedure enveloped by this approach, we believe it transcends the statement of Hing and accordingly abstain from approval.

22 Ariz. App. at 496-97, 528 P.2d at 882-83.

Further analysis of the court's opinion seems to reveal that this reasoning is self contradictory. The court succinctly summarized the rule in Hing v. Youtsey, 10 Ariz. App. 540, 460 P.2d 646 (1969):

> On balance we believe that Hing v. Youtsey, supra, is correct in *prohibiting evidence of remarriage as it relates to damages* and abide by that decision.

admissibility of remarriage on the issue of damages and did not address the question of admissibility for other purposes.[49] Furthermore, the Arizona Supreme Court has expressly declined to consider whether the fact of remarriage can have relevance as a factor mitigating damages under the Arizona Wrongful Death Statute.[50] Thus, the court's decision that prior cases compelled adoption of the restrictive approach appears misplaced.[51]

Cress is defensible only by the broadest reading of prior Arizona decisions. Nevertheless, the case may be significant as a harbinger of the attitude which other courts will adopt when faced with a similar question. That is, courts may conclude that prior decisions adopting the rule of inadmissibility on the issue of damages are to be construed so as to prohibit the admissibility of the fact of remarriage on voir dire. If this analysis is correct it may be anticipated that the limited availibility model will gain widespread acceptance as the only available alternative to the rule of absolute exclusion. Implementation of this model would permit these courts to balance the interests of the litigants while remaining faithful to the "command" of prior decisions. Note, however, that at least one court

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22 Ariz. App. at 496, 528 P.2d at 882 (emphasis added).

This conclusion is then cited by the court as compelling the decision that the fact of remarriage cannot be disclosed to the jury on voir dire, and that the cautionary instruction model, *see* text accompanying notes 53-56 *infra*, must be rejected. But this cannot be correct since the court had previously noted:

> Adherence to the rule prohibiting evidence of remarriage in relation to the issue of damages does not dispose of appellants' contention that reference to a widow by the surname of her prior marriage perpetrates a fraud upon the jury.

22 Ariz. App. at 496, 528 P.2d at 882. Thus, there are two separate and distinct inquiries and the court apparently confused them. It appears that the reliance upon the "command" of *Hing* is misplaced and adoption of the cautionary instruction model would not have been contrary to the prior decisions of the Arizona courts.

[49]*See, e.g.*, Hing v. Youtsey, 10 Ariz. App. 540, 460 P.2d 646 (1969); City of Phoenix v. Whiting, 10 Ariz. App. 189, 457 P.2d 729 (1969). In fact, the appellants in Brief for Appellant at 56, State v. Cress, 22 Ariz. App. 490, 528 P.2d 876 (1974), recognized the general rule against admitting evidence of the remarriage of the surviving spouse, but contended that that rule was "not absolute or unequivocal."

[50]*See* State v. Stone, 104 Ariz. 339, 452 P.2d 513 (1969) *supp. opinion* 104 Ariz. 344, 452 P.2d 518 (1969), where the court stated:

> The confusion seems to stem from the sentence "The fact of remarriage can only have relevance as a factor mitigating damages under the 1956 statute." This was not intended to imply that evidence of remarriage would be proper under the 1956 statute, but only to indicate that defendant claimed that under the 1956 statute the fact of remarriage of a plaintiff, had some relevance. Since we held that the 1956 statute was inapplicable we did not deem it necessary to discuss the defendant's position.

The Arizona wrongful death statute is found at ARIZ. REV. STAT. § 12-613 (1956).

[51]*See* note 48 *supra*. In order to explain *Cress*, *Hing* must be construed to hold that evidence of remarriage is inadmissible for any purpose. Little support for this view can be found in the precise wording of the *Hing* opinion where the court adopted the statement of 87 A.L.R.2d 252, 255 to the effect that

that has faced the question of the scope of prior decisions has adopted the more defensible view that the general rule of inadmissibility on the issue of damage mitigation does not require that the trial court bar mention of the fact of remarriage as it relates to identification of the parties during voir dire.[52]

The Cautionary Instruction Model

The cautionary instruction model of voir dire is based upon the premise that the jury is capable of accepting information for a limited purpose and that a properly framed cautionary instruction would protect the plaintiff from prejudice resulting from the disclosure of the fact of remarriage. Under this model either the trial judge or the defense counsel will inform the jurors of the fact of remarriage, identify the new spouse, and question the prospective jurors as to their acquaintance with the new spouse or the plaintiff in her newly acquired name. The judge will then explain the purpose of the disclosure and instruct the jurors that the plaintiff's remarriage is not to be considered in determining liability or assessing damages. Of course, cross examination as to the fact or circumstances of remarriage would be highly prejudicial and constitute reversible error.[53]

The cautionary instruction necessitated by this model would normally be given sua sponte by the trial judge in his initial indentification of the parties. Nevertheless, the judge might choose to allow the defense counsel to disclose the fact on examination of the prospective jurors and then

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> [t]he majority of American jurisdictions which have considered the question hold the remarriage of a surviving spouse, or the possibility thereof, does not affect the *damages recoverable* for wrongful death of the deceased spouse.

10 Ariz. App. at 543, 460 P.2d at 649 (emphasis added). The court in *Hing* noted that this rule had been followed in City of Phoenix v. Whiting, 10 Ariz. App. 189, 457 P.2d 729 (1969), and stated: "We hearken to this precedent and conclude likewise that the issue of marriage was properly excluded." 10 Ariz. App. at 543, 460 P.2d at 649 (footnote omitted).

[52]*See* Mulvey v. Ill. Bell Tel. Co., 5 Ill. App. 3d 1057, 284 N.E.2d 356 (1972), *aff'd*, 53 Ill. 2d 591, 294 N.E.2d 689 (1973). The appellate court affirmed the trial court's procedure and the defense counsel's contention that there was a right, on voir dire, to identify the parties by their actual names. The statutory basis of this right was found in Illinois Supreme Court Rule 234, ILL. REV. STAT., ch. 110A, para. 234 (1969), which provides: "The judge shall initiate *voir dire* examination of jurors by identifying the parties. . . ."

[53]*See, e.g.*, Watson v. Fischbach, 54 Ill. 2d 498, 301 N.E.2d 303 (1973), where the Illinois Supreme Court refused to extend the rule admitting evidence of remarriage on voir dire which had been adopted in Mulvey v. Illinois Bell Tel. Co., 5 Ill. App. 3d 1057, 284 N.E.2d 356 (1972), *aff'd*, 53 Ill. 2d 591, 294 N.E.2d 689 (1973). The court stated:

> [The] cross-examination . . . clearly exceeded the scope of the direct examination. Its purpose was to and it did emphasize plaintiff's remarriage. . . . The questions and resulting answers were clearly irrelevant under earlier decisions. . . .

54 Ill. 2d at 503-04, 301 N.E.2d at 306. *See also* note 43 *supra*.

interrupt, or conclude, the voir dire with the appropriate instruction. Such a "theatrical" approach might help to assure the impact of the instruction. It can be anticipated that a good number of plaintiffs will choose to forego their right to have the instruction repeated at the conclusion of the trial.[54]

Under the cautionary instruction model the plaintiff may be addressed throughout the trial by the name she acquired through remarriage following the alleged wrongful death of her first husband. In this manner the cautionary instruction model would eliminate the "perpetration of fraud" upon the jury through court sanctioned misrepresentations which critics assert are necessitated by the limited availability model. At the same time, however, this more liberal procedure presents the jury with information which is unnecessary for their propr deliberations and which might be employed, perhaps unconsciously, to the prejudice of the plaintiff. In response, proponents of the cautionary instruction model can point to the fact that courts, in other contexts, have recognized the desirability of presenting certain facts to the jury with instructions that it would be improper for them to consider these facts in their deliberations.[55] In essence, the cautionary instruction model must still find its validity in the basic presumption "that the jury, after proper instructions by the court, will be capable of returning a verdict uninfluenced by the plaintiff's remarriage."[56]

Evaluation of Alternatives

The two alternative models presented must be evaluated against the

[54]The reasons for such a decision are evident. Counsel may determine that reiteration of the cautionary instruction at the close of the trial would operate to compound the supposed prejudicial effects of the initial disclosure and that silence at this point would best serve the interests of his client. It must be remembered that the defendant will not be permitted to refer to the fact of remarriage during the presentation of evidence or in his closing argument. Thus, if plaintiff refrains from requesting an instruction at the close of the case the only reference to the remarriage would have occurred during the initial phases of voir dire, an event which may have occurred weeks or months prior to the jury's ultimate deliberations. It is at least debatable whether such a time lapse would operate to the benefit of the plaintiff or the defendant. In any event, such a discussion is merely academic if one accepts the premise that the jury will follow the instructions they are initially given.

[55]*See, e.g.*, Moore v. Atchison, Topeka & Santa Fe R. R., 28 Ill. App.2d 340, 171 N.E.2d 393 (1960), where the court, in an action brought under the Federal Employer's Liability Act (FELA), noted:

> Plaintiff complains that he was prejudiced by controversy over treatment of the fact that Adair's widow had remarried again to a man named Lary. At the outset of the case the court ruled that evidence of the subsequent marriage of the widow would not be competent, and instructed the jury that the fact that any beneficiary may have married or remarried, "if such appears in evidence or has been suggested to you is immaterial and should be disregarded by you in your deliberation."

Id. at 355, 171 N.E.2d at 400. *See* Seaboard Airline R. R. v. Conner, 261 F.2d 656 (4th Cir. 1958) (FELA action). *See also* Dubil v. Labate, 52 N.J. 255, 262, 245 A.2d 177, 180 (1969), *citing* State v. White, 27 N.J. 158, 178-79, 142 A.2d 65, 85 (1958).

[56]Dubil v. Labate, 52 N.J. 255, 262, 245 A.2d 177, 180-81 (1969).

generalized aims which any procedure must attempt to satisfy. These may be summarized as (a) to allow for selection of an unbiased jury; (b) to avoid misrepresentation and to preserve the integrity of the judicial process; and (c) to protect the plaintiff from jury prejudice which might result from disclosure of her remarriage.

Judged against these criteria it can be seen that the limited availability model of voir dire examination fails to accomplish these goals. While this model has advantages, when compared to a rule of exclusion, in that it facilitates the selection of an unbiased jury, it falls short of total effort to guarantee that result. The principal objection to the exclusionary rule is that the plaintiff may only be known to a juror through her newly acquired surname. Even though the new spouse may be introduced to the jury, the fact of remarriage is not disclosed under the limited availability model. It may be presumptuous to assume that a juror will be able to establish the link between this person and the plaintiff. Thus, there is no guarantee that a jury will be selected which is unfamiliar with the plaintiff or the plaintiff's associates.

If the limited availability model has deficiencies when evaluated with respect to the first criteria, one can only conclude that these deficiencies are compounded when the analysis focuses on the second criteria. As noted, the plaintiff, having just concluded an oath to tell the "whole" truth, misrepresents her name and thereby misrepresents her marital status by responding to the first question posed with the surname of her prior marriage, a name which she no longer employs. Such a procedure is institutionalized by the limited availability model. Thus, the presentation of an honest, factual picture to the jury is avoided and the misrepresentations are sanctioned by the court.

The limited availability model is defensible only on the basis of the third criteria proposed. This, of course, is the rationale for the general exclusionary rule. It is based on the premise that the jury will be unable to restrict use of the knowledge of remarriage and will, instead, employ the fact of remarriage to mitigate damages and, perhaps, deny liability. Even granting the validity, or partial validity of this contention, it must be noted that the determination of an appropriate procedure for voir dire must be based on a balance of these considerations. In *State v. Cress,* discussed above, the appellants, arguing against the extension of the exclusionary rule to voir dire, sought to balance these considerations as follows:

> [A]ppellants contend that honesty and realism and integrity in the judicial process is more important than the fact of a possible prejudice that the plaintiff may not receive the full measure of her rightful damages. It is submitted that the exclusionary rule is anachronistic, being punitive in nature and serves no realistic purpose in view of the falsehoods which must be perpetrated in order to protect the exclusionary rule.[57]

[57]Brief for Appellant at 42, State v. Cress, 22 Ariz. App. 490, 528 P.2d 876 (1974) [on file at the INDIANA LAW JOURNAL].

Analyzed against these criteria the cautionary instruction model presents a more suitable alternative. Admittedly, this procedure presumes that a jury is capable of returning a verdict uninfluenced by facts which they have been expressly instructed to ignore. For example, this was the presumption made by the trial court in *Thompson v. Peters* and eventually rejected on appeal.[58] More important, however, is the fact that the cautionary instruction model amply satisfies the first two suggested criteria for a model procedure. First, by permitting the fact of remarriage to be disclosed on voir dire, the procedure goes as far as possible to assure that no juror has any association with, or bias with regard to, the plaintiff or her associates. Furthermore, introduction of this fact allows the plaintiff to be referred to by her present married name thereby avoiding misrepresentation and assuring, to the extent possible, that the integrity of the judicial process will be preserved. Finally, the cautionary instruction is designed to impress upon the jury the limited purpose for which they are to employ their knowledge of the plaintiff's present marital status. Thus, the cautionary instruction model goes far to satisfy the goals of judicial integrity without sacrificing the plaintiff's interest in a determination of liability and damages free of prejudice imposed by informing the jury of the remarriage of the plaintiff.

PROPOSED: A MODEL CAUTIONARY INSTRUCTION

The time at which the cautionary instruction is to be given has received little attention. undoubtedly, this derives from the view that the instruction must necessarily follow the disclosure of the fact of remarriage and postponement to a later point in the trial, *e.g.* the close of the case, would render the instruction too remote to induce proper jury obedience. A delayed instruction would allow the jury to hear the evidence presented in the case colored by its knowledge of the present marital status of the plaintiff without any warning by the court that this fact is not to affect their deliberations. Thus, the cautionary instruction is properly employed at voir dire immediately following the disclosure of the fact of remarriage, or by the judge in his opening remarks to the prospective jurors, identifying the parties to the litigation. Moreover, if the plaintiff requests that the instruction be incorporated in the charge to the jury at the conclusion of the evidence, that request should be granted.

Examination of cases employing cautionary instructions,[59] particularly

[58]26 Mich. App. 590, 182 N.W.2d 763 (1970). Eventually the supreme court reversed the decision of the appellate court on the grounds that the jury's behavior indicated that the admission of evidence of remarriage, if error, was not grounds for reversal. *See* Thompson v. Peters, 386 Mich. 532, 194 N.W.2d 301 (1972).

[59]59 *See, e.g.*, Mulvey v. Ill. Bell. Tel. Co., 5 Ill. App. 3d 1057, 284 N.E.2d 356 (1972), *aff'd*, 53 Ill. 2d 591, 294 N.E.2d 689 (1973); Thompson v. Peters, 26 Mich. App. 590, 182 N.W.2d 763 (1970), *rev'd*, 386 Mich. 532, 194 N.W.2d 301 (1972). *Cf.* cases cited at note 55 *supra*. *See generally Remarriage and the Illinois Act, supra* note 4.

the decisions of the Illinois courts, suggests that the following four elements must be incorporated in a model instruction:

(1) the instruction must properly inform the jury of the present marital status of the plaintiff;

(2) the jury must be informed that the fact of remarriage is not a material factor to be considered in its deliberations;

(3) the fact of remarriage should not affect the determination of liability;

(4) the fact of remarriage should not be considered by the jury as a factor diminishing or mitigating damages.

A model instruction incorporating these factors is best presented by illustration. Suppose that Mr. Charles Smith was killed in a job related accident on January 5, 1973. On April 5, 1974, the surviving spouse, Joan, married Robert Jones and thereafter became known as Joan Jones. At the *commencement* of the voir dire examination the following instruction should be given to the prospective jurors:

> [I am going to ask you] [Counsel for the defendant is planning to ask you] if any of you know the plaintiff Joan Smith. In order to answer this question truthfully it is necessary for me to inform you that on April 5, 1974 Joan Smith married Robert Jones and thereafter became known as Joan Jones. It is important that in answering this question you determine whether you know the plaintiff and the fact that you know her as either Mrs. Smith or Mrs. Jones is not important. [The Court] [Counsel] is merely trying to determine if you have any personal familiarity with the plaintiff and for this purpose, and for this purpose only, it is necessary to inform you that she has remarried and assumed the name Joan Jones. At the conclusion of this case, I will give you instructions concerning the law to be applied. [You will be told that the fact that the plaintiff has remarried is immaterial and that you are not to use such a fact in determining either liability or damages.] The fact of remarriage should be dismissed from your minds and should have no effect on your deliberations.

The following instruction should be given at the *conclusion of the evidence* if requested by the plaintiff:

> [The Court] [Counsel] has informed you that the widow of Mr. Charles Smith remarried sometime between the death of her husband and the commencement of this lawsuit. You are instructed not to consider this fact in determining either liability or damages in this case. This cause of action arose on January 5, 1973 and damages, if any, are to be determined as of that date. The fact of remarriage is not to be used to increase, diminish, or mitigate damages, if any, which the plaintiff might otherwise be entitled to receive. You are instructed to determine the damages, if any, as of the date this cause of action arose and any event subsequent to that date is not to enter into your consideration.[60]

[60]The model instruction suggested is based in large part on the instruction employed by the trial court in Thompson v. Peters, 26 Mich. App. 590, 182 N.W.2d 763 (1970), *rev'd*, 386

Such an instruction would go farther to satisfy the court's desire to preserve the integrity of the judicial process and to protect it from fraud and misrepresentation while protecting the plaintiff from improper diminution of the damage award.

CONCLUSION

Whether or not one accepts the validity of the general rule of exclusion of the fact of remarriage it is clear that different considerations affect the choice of procedure to be employed in the conduct of a proper voir dire examination. The persuasive force of the exclusionary rule pales when compared to the necessity of assuring the parties a fair and unbiased jury and the relevant policy considerations which are embodied in the notion of judicial integrity. In the context of voir dire examination the fact that the plaintiff has remarried since the alleged wrongful death of her previous spouse may have to be disclosed to the prospective jurors.

The determination of the proper procedure by which to disclose the fact of remarriage is influenced by a number of somewhat abstract considerations. Perhaps it is for this reason that alternative models have developed. Nevertheless, the paramount considerations of any procedure must be the preservation of the integrity of the judicial process and the guarantee of an unbiased jury to the defendant. One must recall that it is these considerations which have caused the courts initially to remove voir dire from the scope of the general exclusionary rule. The cautionary instruction model, embodying full disclosure of the fact of remarriage and a cautionary instruction to assure its proper employment, appears best structured to accomplish these ends.

The cautionary instruction model, however, runs contrary to the presumption of past decisions that the jurors, once informed of a fact, cannot erase that fact from their memory in deciding subsequent issues. Therefore, it would come as little surprise if the adoption of such an uniform procedure is welcomed by the defense bar and scorned by plaintiff oriented practitioners.

It must also be recognized that the strongest argument against disclosure

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Mich. 532, 194 N.W.2d 301 (1972). The instruction was disapproved by the appellate court which held that in an action for wrongful death, the plaintiff, who has remarried, should have identified throughout the entire trial by her name before remarriage.

A similar instruction was employed in Mulvey v. Ill. Bell Tel. Co., 5 Ill. App. 3d 1057, 284 N.E.2d 356 (1972), where the trial court instructed the jury as follows:

> Under our Supreme Court Rules, however, at this time I would like to instruct you that it has been suggested that Mrs. Mulvey has remarried. You are instructed now that remarriage, if such is the fact, is immaterial and is not to be considered by you.

Id. at 1060, 284 N.E.2d at 358. *See* the same case on appeal, 53 Ill. 2d 591, 294 N.E.2d 689 (1973) (finding jury never reached the damage issue so could not be prejudiced by the instruction).

on voir dire is that the integrity and impartiality of the jury selection process can be adquately protected by a thorough voir dire conducted within the guidelines of present rules. Admittedly, it is difficult to construct a situation where proper voir dire would not disclose the hidden bias of familiarity which the cautionary instruction model is meant to prevent. Nevertheless, courts and commentators have been moving away from the rigidity of the collateral source rule. Decisions like *Dubil, Wasel,* and *Watson* indicate that the courts perceive a problem with the present procedures. The cautionary instruction model offers no more, and no less, than an alternative.

GARY L. BIRNBAUM