ESSENTIALS OF
CANADIAN LAW

REMEDIES: THE LAW OF DAMAGES

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G. COMPENSATION FOR LOST HOMEMAKING CAPACITY AND LOST FAMILY INCOME

1) Introduction to the Claim

To a large extent, much of the bias in awards to women results from assuming that many women leave the paid workforce to take on family responsibilities (which is true), and that this reduces their economic value or their earning capacity (which is false). While leaving the workforce certainly reduces *income*, it does not necessarily reduce the value of a person's economic *capacity* or the value of their work (as a parent or homemaker). While courts have by and large rejected the opportunity-cost approach, there is an alternative approach that does recognize the economic value of work in the home.

Even if the focus is on *actual work*, as opposed to earning capacity, leaving the workforce to work in the home (for free) does not eliminate a person's economic productivity. The work that she performs has substantial economic value and can be valued in order to arrive at a measure of her earning capacity.[128] In areas other than personal injury law, courts have recognized the unpaid contributions of homemakers. For example, in family property disputes the Supreme Court of Canada has strongly reaffirmed the economic value of household work. In *Peter* v. *Beblow*[129] the Court imposed a constructive trust on property to recognize the unpaid contribution of the plaintiff, who had acted as wife and mother for the previous twelve years. The Court strongly rejected the argument that such services should not be valued. McLachlin J. stated:

> The notion that household and childcare services are not worthy of recognition by the court fails to recognize the fact that these services are of great value. . . . The notion, moreover, is a pernicious one that systematically devalues the contributions which women tend to make

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128 Statistics Canada has estimated that the total value of unpaid household labour in Canada in 1992 amounted to somewhere between 31 percent and 46 percent of gross domestic product. The estimated annual replacement cost of the unpaid work performed by a woman is $16,580 ($9,960 for men): B. Chandler, *The Value of Household Work in Canada, 1992* (Statistics Canada, 1994); *General Social Survey, The 1992 General Social Survey — Cycle 7, Time Use: Microdata File Documentation and User's Guide* (Statistics Canada, 1993); *General Social Survey, Initial Data Release from the 1992 General Social Survey on Time Use* (Statistics Canada, 1993).

129 [1993] 1 S.C.R. 980.

to the family economy. It has contributed to the phenomenon of the feminization of poverty.[130]

It follows that awards for personal injury compensation might also reflect the economic value of housekeeping and caregiving capacity, even when unpaid. Ironically, recovery for the economic loss of housekeeping and caregiving has long been available to surviving family members in fatal accident cases.[131] Awards to the surviving spouse and children of a deceased mother solely for lost housekeeping can be in the order of $15,000 per annum.[132] Only recently has such recognition been extended to claims by women themselves when they are injured.

The leading case in the personal injury area is *Fobel* v. *Dean*.[133] The fifty-one-year-old female plaintiff was severely injured in an automobile accident. Prior to the accident she had worked full time in the family bakery business and was also the primary caregiver in the home. At trial no award was made specifically for lost homemaking capacity. On appeal, the award was increased on the basis that the ability to perform unpaid labour in the home should be fully compensated when lost. The Court based the award on the replacement cost of such work and, using time-use studies, estimated a diminution in capacity of about fifteen hours per week, and the value of such lost capacity at $5.50 per hour.[134]

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130 *Ibid.* at 993.

131 *St. Lawrence & Ottawa Railway Co.* v. *Lett* (1885), 11 S.C.R. 422. See discussion in chapter 5.

132 See, for example, *Kwok* v. *British Columbia Ferry Corp.* (1987), 20 B.C.L.R. (2d) 318 (S.C.), aff'd (1989), 37 B.C.L.R. 236 (C.A.) in which the British Columbia Supreme Court assessed the value of housework of a woman who also held down a full-time job (described as a "truly remarkable wife and mother") at $15,000 per year. See also *Grant* v. *Jackson* (1986), 24 D.L.R. (4th) 598 (C.A.); *Jantz* v. *Mulvahill*, [1989] B.C.J. No. 2346 (S.C.) (QL), value of homemaking services to the family set at $1,500 per month or $16,800 per year in addition to lost financial benefits. Appeal dismissed (1992), 11 B.C.A.C. 127 (C.A.).

133 (1991), 83 D.L.R. (4th) 385 (C.A.) [*Fobel*].

134 There was evidence that domestic services cost approximately $7.50 on a straight hourly basis, but that this amount could be reduced by 30 percent if the services were performed on a monthly basis. The judge further held that, while compensation for loss of home management services should be compensated for at a higher rate or on some other basis than the above calculation, there was no evidence before the Court upon which to make such a finding. Therefore, he was confined to only being able to quantify the loss on the basis of the direct labour component. The plaintiff was awarded a total of $79,698.24 for loss of future housekeeping capacity.