PERSONAL INJURY DAMAGES IN CANADA

Second Edition

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substitute services may put the plaintiff in a position to offer a financial contribution comparable to that which he or she would have been able to offer absent the accident. Hence, the careful and balanced consideration of this issue in *Reekie* is welcome.

3. Loss of Homemaking Capacity

(a) Introduction

An important component of a damages claim may be the claim for loss of capacity to perform homemaking functions.[137] Although some compensation for this loss is often provided under the head of pre-trial expenses (as a "positive" loss), it is now clear that the essence of many home-related expenses is a replacement-cost valuation of lost homemaking capacity (a "negative" loss).[138] These expenses should therefore be considered a sub-head of "loss of pre-trial working capacity" or "the value of lost pre-trial work", or they should be grouped under a separate head of damages titled "loss of homemaking capacity" (or some such).[139] If the expenses were incurred to replace tasks and services a plaintiff would have performed absent injury, then they are more properly claimable under the head of loss of homemaking capacity. If, on the other hand, they are for additional tasks and services now needed over and above those that would have been performed absent the accident, then they should be assessed as part of the "cost of care" sub-head. However, aside from a point of intellectual integrity — and the important recognition and legitimation of the value of work performed inside the home — very little turns on the classification. The calculations can be done accurately either way, although treatment under the head of pre-trial expenses tends to produce an undervaluation of what was lost.[140] Nevertheless, since expenses in managing and running a home in the post-accident scenario will fall under both heads and merge into one another, convenience may sometimes dictate their subsumption under the head of cost of care. In some provinces the claim can alternatively be made by a third party who has provided substitute homemaking.[141]

The claim for the value of lost homemaking services has been given recent impetus and focus, principally through the judgment of Vancise J.A. in *Fobel v. Dean*,[142] which has been widely followed.[143] It is securely grounded on the compensatory principle, is unchallengeable from an economic standpoint, and implements a much-needed gender equality in damages assessment. The claim is in relation to a loss "personal to the plaintiff", although the joint beneficiary of homemaking is the plaintiff's significant

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137 See Chapter 5, "Loss of Homemaking Capacity".

138 *Supra*, "Nature of Loss and Terminology". And see Chapter 3, "Positive and Negative Losses".

139 *E.g. Fobel v. Dean* (1991), 83 D.L.R. (4th) 385 at 395 (Sask. C.A.), where the heading "Loss or Impairment of Housekeeping Ability" is used, and pre-trial loss is segregated into a sub-head.

140 Chapter 5, "Loss of Homemaking Capacity". For future losses the classification may be extremely important if there is reduced life expectancy.

141 *Infra*, "Third Party Claims".

142 (1991), 83 D.L.R. (4th) 385 (Sask. C.A.).

143 Chapter 5, "Loss of Homemaking Capacity".

other.[144] Homemaking now stands on the same footing as earned income in this respect, since the beneficiaries of earnings are also the plaintiffs' significant others, yet the damages are claimable by the primary victim.

(b) Difficulty in Performing Tasks

The claim for loss of homemaking capacity is *prima facie* a pecuniary loss. If a replacement expense has actually been incurred, or other pecuniary gains have been lost by lack of homemaking work, these losses are *de facto* pecuniary, and are now recognized as such *de jure*. They were always treated this way in fatal accident cases. However, if specific pecuniary losses have not actually been incurred, the conclusion reached thus far is that the loss remains technically located in the area of non-pecuniary loss. Where the plaintiff did not actually hire replacement services — where she or he continued to perform homemaking functions, albeit more slowly and with greater difficulty than before — the loss has been held to be non-pecuniary. This was the view of the English Court of Appeal in *Daly v. General Steam Navigation Co.*,[145] which was followed by the Saskatchewan Court of Appeal in *McCallum v. Ritter* and *Fobel v. Dean*.[146] In *McCallum*, Bayda C.J.S. summarized the effect of *Daly* as follows:[147]

> [I]n regard to the pre-trial period, it is not correct to evaluate the loss of housekeeping ability by reference to the amount it would have cost to employ the necessary help when the disabled person had not in fact employed such help. The pre-trial loss properly falls to be assessed as part of the person's general damages for pain, suffering and loss of amenity by considering to what extent her difficulties in performing her housekeeping duties due to her disability had increased those damages.

What happens, from a theoretical standpoint, is that, by not hiring replacement services for homemaking tasks in the post-accident scenario (frequently through financial inability to do so), the plaintiff converts a potential pecuniary loss into a non-pecuniary one[148] — the pain and discomfort of doing the work, and the discomfort of functioning without the usual amenities and living conditions. What should not be forgotten, however, is that there may be significant homemaking tasks *not* completed at the time they would otherwise have been. If tasks have been delayed for completion later, there has been a loss of valuable work which can only be restored by use of the plaintiff's future valuable time or by the hiring of replacement labour. The injured employee is not asked to work

144 See the endorsement of this rudimentary conceptual shift from third-party loss to plaintiff loss by Vancise J.A. in *Fobel v. Dean, supra*, note 142, at 395, following *Daly v. General Steam Navigation Co.*, [1980] 3 All E.R. 696 (C.A.), and *Hodges v. Frost* (1984), 53 A.L.R. 373 (Fed. Ct.).

145 [1980] 3 All E.R. 696 (C.A.).

146 (1991), 83 D.L.R. (4th) 385 at 396 (Sask. C.A.).

147 (1990), 72 D.L.R. (4th) 49 at 54 (Sask. C.A.).

148 This is the exact reverse of effective medical treatment, which converts a non-pecuniary loss (pain and suffering) into a pecuniary one (cost of the treatment).

overtime when she or he recovers sufficiently to mitigate pre-recovery loss of work, and neither should the injured homemaker be asked to do so.

As far as assessing the non-pecuniary award for the added difficulty and discomfort in performing tasks, Vancise J.A., for the majority of the Saskatchewan Court of Appeal in *Fobel v. Dean*,[149] held that "the replacement cost is a relevant component or element in arriving at a dollar value of that loss of amenity". The pain, suffering and increased time taken in performing the homemaking functions may in fact be valued at a figure similar to the figure that would be computed if substitute services had been hired. This might be said to appropriately recognize a plaintiff's painful efforts at mitigation.[150] Furthermore, it was held preferable to set this aspect of the non-pecuniary award apart, so that it does not get lost in a global sum, and can therefore be examined on appeal. In *Fobel*, Vancise J.A. approached the matter as follows:[151]

> Mrs. Fobel's housekeeping capacity was diminished by approximately 15 hours per week, which would amount to approximately $100 per week for the cost of substituted housekeeping services — which is only one element or component of the loss of housekeeping capacity. Thus, while she is not entitled to receive compensation based on the cost of substituted services, she is entitled to be compensated by some monetary measure for the increased difficulty that she encountered in performing those tasks and in performing the managerial or indirect housekeeping tasks.

(c) Pecuniary Loss

The pecuniary aspects of pre-trial loss of homemaking capacity can be analyzed by the method used in *Fobel v. Dean*[152] for future losses. This involves a substitute homemaker/catalogue of services approach. As an evidential matter it is useful to organize and list tasks that would have been performed as components of the homemaking function, using, if convenient, the headings of "direct labour" and "management". Both categories will include daily, weekly, monthly and even yearly functions. Subitems might encompass meal preparation, house cleaning, laundry, mending, shopping, painting, decorating, renovating, lawn care, gardening, auto repair, childcare, chauffeuring, tutoring, school attendance, recreational support, medical care and so forth.

In some cases the expenses of replacement cost may have materialized and can be isolated and itemized separately. Since, as indicated, the claim for loss of homemaking capacity is *prima facie* pecuniary, if the expense of replacement work by others has been incurred, or if the lack of work caused the loss or diminution in value of a material

149 *Supra*, note 146 at 401.

150 Economic analysis might view the plaintiff as having priced the discomfort as economically worthwhile and therefore at a lesser cost than expenditure of money, but this "willingness to pay" thesis ignores the plaintiff's inability to pay, or the fact that the plaintiff would be using sparse or marginal resources if help were hired. Subjective cost-benefit analysis is an unfair approach unless there was a clear, voluntary and unpressured choice.

151 *Supra*, note 146 at 401-02.

152 *Supra*, note 146. See for detail Chapter 5, "Loss of Homemaking Capacity".

D. Loss of Homemaking and Shared Family Income

1. Introduction

Two relatively new sub-heads of pecuniary loss have emerged that are wholly or partly aspects of loss of working capacity. They are (a) *loss of homemaking capacity*, involving any loss or impairment of the ability to perform both manual and management tasks in the context of the home environment; and (b) *loss of shared family income*, involving loss of the benefits of joint income and shared expenses in a permanent interdependency relationship.[808] The first of these is incontestable in principle and now seems relatively well established, particularly as a result of the judgment of Vancise J.A. of the Saskatchewan Court of Appeal in *Fobel v. Dean*.[809] The second was given recent currency by Lambert J.A. of the British Columbia Court of Appeal in *Reekie v. Messervey*,[810] and follows from a proper application of the compensatory principle, although it has been said that there is as yet no "definitive judgment" on this sub-head of damages.[811] The economic implications of impaired homemaking capacity are now working themselves out; but those for loss of shared family income still require careful examination in light of the fact that there will almost certainly be savings involved in the destruction of any potential permanent interdependency relationship, and these may have to be off-set against any potential losses. However, where the injuries cause the *breakdown* of an existing interrelationship, the loss may be substantial, mirroring that in a fatal accident claim.[812]

The new sub-heads have particular importance for injured women, but they are not exclusive to women — rightly emphasized by Picard J. in *McLaren v. Schwalbe*[813] with respect to loss of homemaking capacity. They are also a primary reason for changing the title of the general head of damages to "loss of working capacity" from "loss of earning capacity".[814] The sub-heads will need careful integration to ensure appropriate recovery and to avoid overlap.[815]

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808 A third sub-head which would follow theoretically from the previous two, is *loss of shared family homemaking work*, involving the loss of the benefits of joint homemaking responsibilities and shared homemaking expenses in the family context.

809 (1991), 83 D.L.R. (4th) 385 (Sask. C.A.).

810 (1989), 59 D.L.R. (4th) 481 (B.C.C.A.).

811 *Tucker (Guardian ad litem of) v. Asleson* (1993), 102 D.L.R. (4th) 518 at 536-37 (B.C.C.A.).

812 Claims for loss of "shared family income" are familiar in fatal accident cases (Chapter 11). The losses there are from premature *termination* of a permanent interdependency relationship, by contrast with losses from diminished chances for the *creation* of such a relationship. The major difference is that in fatal accident cases the claim is additionally needed to provide support for *existing* children, whereas in the personal injury context only rarely will the interests of children be involved.

813 (1994), 16 Alta. L.R. (3d) 108 at 136 (Q.B.). See also *Knoblauch v. Biwer Estate*, [1992] 5 W.W.R. 724 at 740 (Sask. Q.B.) *per* Noble J. *Cf.* the disparaging remarks on this issue by Somers J. in *Vykysaly v. Jabowski* (1992), 8 O.R. (3d) 181 at 198 (Gen. Div.).

814 *Supra*, "Earnings, Earning Capacity or Working Capacity".

815 *Infra*, "Integration of Sub-heads". If the sub-heads are viewed separately, thus retaining the traditional terminology "earnings" or "earning capacity" for the head that deals with lost income, it remains critical to consider the interrelationship of the heads.

Even where a plaintiff's adult life situation has not yet developed, it is now incumbent on the court to estimate the various possibilities for a plaintiff's entire working future, and to blend damages for loss of earnings with those for loss of homemaking capacity, and, if appropriate, loss of shared family income such that, as far as possible, the plaintiff will have resources and replacement services that mirror his or her pre-accident prospects. Since the possibilities may range widely, it will likely be necessary to use a "composite approach" to assessment[816] which employs common assumptions for the various sub-heads,[817] as proposed in *Reekie v. Messervey*.[818] The measure of full compensation in these cases is complicated by the fact that the damages may help the plaintiff to contribute more fully to any potential interdependency relationship, thereby increasing the likelihood of its occurrence. If the plaintiff is already married, the award may assist in holding together an unsteady partnership.[819]

Quantification, including some controversial issues of set-off for compensating advantages in some cases,[820] should be guided by the concept that the plaintiff is entitled to enjoy a standard of living comparable to the one he or she would have experienced absent the accident. Factors considered to off-set the losses under these sub-heads should be no more extensive than those considered for loss of earnings *simpliciter*.[821] If there is a reduction of life-expectancy because of the injuries, an award under the new sub-heads during the "lost years" should complement the loss of earnings claim, deducting only the portion that the plaintiff her- or himself would have used during those years.[822]

2. Loss of Homemaking Capacity

(a) Recognition of Claim

The claim for the value of lost homemaking services was given dramatic and important impetus by the seminal judgment of Vancise J.A. for the majority of the Saskatchewan Court of Appeal in *Fobel v. Dean*.[823] It is here that attention was first given not merely to the legitimacy of the claim but also to the detail of its quantification, involving "a combination of the substitute homemaker/catalogue of services approach".

816 *Infra*, "The Composite Approach to Assessment".

817 *Supra*, "Work Patterns and Consistent Assumptions".

818 (1989), 59 D.L.R. (4th) 481 at 496-98 (B.C.C.A.).

819 See, *e.g.*, the comments in *Hill v. Ontario (Minister of Highways)* (1973), 33 D.L.R. (3d) 530 at 532 (Ont. C.A.).

820 Chapter 9.

821 Loss of homemaking capacity being a gender-dominated head of damages, any inconsistency here appears discriminatory.

822 *Infra*, "The Lost Years". In some instances this may eliminate the claims under these sub-heads altogether.

823 *Ibid.*, following the same court's earlier treatment in *McCallum v. Ritter* (1990), 72 D.L.R. (4th) 49 (Sask. C.A.).

This respects both the "direct labour" and "management" components of the homemaking role. The decision was recently commended by Rawlins J. in *Korpela v. March*[824] as "perhaps the cornerstone case in Canada for the principle of awarding damages for loss of household services".

Although the claim for impaired homemaking should always have been an important component of many personal injury claims, as pointed out by Picard J. in *McLaren v. Schwalbe*:[825] "It is only recently that the courts have awakened to the right of the homemaker who has been injured to claim for the loss of her capacity to do the labour and management functions associated with her role." Without doubt, as the judge later concluded, the majority judgment in *Fobel v. Dean* "reflects a modern approach and an appreciation of the realities of the home and the position of the injured homemaker".[826] *Fobel* was built on a foundation laid by the English Court of Appeal in *Daly v. General Steam Navigation Co.*,[827] which had been applied by the Saskatchewan Court of Appeal in *McCallum v. Ritter*.[828] *Daly* had also been adopted by an Australian court in *Hodges v. Frost*.[829] Considerable pressure from the academic community also helped in recognition of the claim.[830]

Fobel has now been accepted and followed in almost all Canadian jurisdictions. Most notable is *McLaren v. Schwalbe*,[831] where Pickard J. gave thoughtful and detailed consideration to the head of damages, leading to a $30,000 award for pre-trial losses, and $229,181 for the post-trial period. Other important decisions include *Johnston v. Murchison*,[832] where Matheson J. awarded a total of $182,635 for loss of homemaking capacity to a woman who had also worked full-time outside the home, and who received very large awards for loss of earnings and pension income as well. *Johnston* was then fully endorsed by the Prince Edward Island Court of Appeal in *Cairns v. Harris*,[833] where Carruthers C.J.P.E.I. stated that:

824 (1993), 9 Alta. L.R. (3d) 117 at 132-33 (Q.B.).

825 (1994), 16 Alta. L.R. (3d) 108 at 134 (Q.B.).

826 *Ibid.*, at 135.

827 [1980] 3 All E.R. 696 (C.A.).

828 (1990), 72 D.L.R. (4th) 49 (Sask. C.A.).

829 (1984), 53 A.L.R. 373 (Fed. Ct.).

830 See particularly R. Graycar, "Compensation for Loss of Capacity to Work in the Home" (1985), 10 Sydney L. Rev. 528; K. Cooper-Stephenson, "Damages for Loss of Working Capacity for Women" (1978-79), 43 Sask. L. Rev. (No. 2) 7; F.J. Pottick, "Tort Damages for the Injured Homemaker: Opportunity Cost or Replacement Cost?" (1978), U. of Colorado L. Rev. 59; J. Cassels, "Damages for Lost Earning Capacity: Women and Children Last!" (1992), 71 Can. Bar Rev. 445; D. Réaume, "Rethinking Personal Injury Damages: Compensation for Lost Capacities" (1988), 67 Can. Bar Rev. 82; J. Yale, "The Valuation of Household Services in Wrongful Death Actions" (1984), 34 U.T.L.J. 283; M. Brazier, "The Cost of 'Women's' Work" (1981), 44 M.L.R. 725.

831 *Supra*, note 825. The judge's earlier decision in *Acheson v. Dory* (1993), 8 Alta. L.R. (3d) 128 (Q.B.) [affirmed (1994), 24 Alta. L.R. (3d) 187 (C.A.)], is also of note.

832 (1993), 112 Nfld. & P.E.I.R. 181 at 217-21 (P.E.I.T.D.) [reversed in part (1995), 127 Nfld. & P.E.I.R. 1 (P.E.I.C.A.)].

833 (1994), 117 Nfld. & P.E.I.R. 216 at 223-30 (P.E.I.C.A.); followed by MacDonald C.J.T.D. in *Paine v. Donovan* (1994), 118 Nfld. & P.E.I.R. 91 at 196-99 (P.E.I.T.D.).

> The law . . . now appears to be well settled that [the plaintiff] can be compensated for her lost capacity to do the housework she used to do even though she has not been directly paid for doing it in the past and even though someone has done the housework, or a portion of it, since the accident without remuneration. The real issue is how the compensation is to be determined.

The court went on to approve the analysis in *Fobel* which focusses on labour and management tasks, noting that the "direct labour component" included "such things as shopping, cooking, cleaning, physical child care, gardening etc." and that the "management or indirect labour component" included "such things as meal planning, marketing, and budgeting, tutorial child care etc." The other notable case giving this sub-head of damages impetus and proper focus is *Korpela v. March*,[834] where Rawlins J. awarded a total of $130,000 for pre-trial and post-trial loss of household services.[835]

The claim for loss of homemaking capacity is for the loss of the value of work which would have been rendered *by the plaintiff*, but which because of the injuries cannot now be performed. The plaintiff has lost the ability to work in a manner that would have been valuable to her- or himself as well as to others.[836] The claim is not the same as that under future cost of care, which is for the value of services that must now be rendered *to the plaintiff*.[837] It is true that the two claims may overlap — just as the normal claim for loss of earnings and cost of care may do so[838] — because the cost of care claim may include items which the plaintiff-homemaker would have performed but for the accident. However, a large portion of homemaking involves the performance of work for others, namely, the family unit, and in many cases the claim for loss of homemaking capacity is wholly distinguishable from that for cost of care, particularly if the plaintiff is hospitalized. The loss is a "negative" loss,[839] in the sense that it is the loss of something the plaintiff would have had (her homemaking work) but which she now does not have because of the accident. This places it squarely under the head of loss of working capacity. In contrast, the expense of services provided by others to care for the plaintiff are "positive" losses — the addition of an extra expense — and they clearly fall under cost of care.[840]

The claim for future loss of homemaking capacity is clearly for pecuniary loss.[841] Although the essence of the parallel claim for pre-trial loss is the same, if the plaintiff

834 (1993), 9 Alta. L.R. (3d) 117 at 132-33 (Q.B.).

835 Surely not coincidentally, the judges in *McLaren*, *Johnston* and *Korpela* were all women.

836 The loss is the plaintiff's own loss, just as loss of income is, even though it would have been used by others, *infra*, "Homemaker's Own Loss".

837 Chapter 6.

838 Chapter 9.

839 Chapter 3, "Heads of Damages".

840 This distinction is additionally important if the plaintiff's lifespan has been shortened, and there is thus a "lost years" problem: *infra*, "The Lost Years".

841 *Infra*. The solution adopted in *Moriarity v McCarthy*, [1978] 2 All E.R. 213 (Q.B.) of awarding non-pecuniary damages for loss of marriage prospects is no longer remotely defensible. In retrospect, it seems extraordinary that inability to perform tasks such as those described in *Johnston v. Murchison* (1993), 112 Nfld. & P.E.I.R. 181 at 219 (P.E.I.T.D.) would be conceived as a non-pecuniary loss.

did not in fact hire substitute services, or suffer a diminution in some item of value from the lost capacity, the claim has been held to be for non-pecuniary loss to compensate for the discomfort and difficulty of performing homemaking tasks.[842] As regards the future, however, the claim is pecuniary and is cumulative with any award for non-pecuniary loss. There is no duty on the plaintiff to continue performing tasks that exacerbate pain and suffering. Furthermore, as with respect to loss of earnings, there is no need for the plaintiff to convince the court that he or she will actually spend the money to provide substitute homemaking services. Vancise J.A. in *Fobel v. Dean*[843] held that: "The trial judge properly noted and concluded that the authorities (notably *Daly*) establish that it was not necessary for [the plaintiff] to prove that someone will be employed to do the work in the future in order to be entitled to an award for loss of future housekeeping capacity . . .". And it makes no difference if there is a likelihood that tasks will continue to be performed by family and friends, since there should be no obligation on them to do so, and the plaintiff is entitled to damages that will reward them.[844]

(b) Homemaker's Own Loss

The claim for loss of homemaking capacity is personal to the plaintiff and is directly equivalent to the income-earner's claim for loss of earnings or earning capacity. It alone justifies the shift in the title of this head of damages, the very naming of the head having caused some of the problems.[845]

For the most part the courts used to evaluate homemaking only within the ambit of the *actio per quod servitium amisit* or in fatal accident claims. In both instances the award was to the spouse (usually a husband) or to a surviving partner (usually a widower). The awards reflected the value of homemaking services *to the other (male) member of the marriage partnership*.[846] Furthermore, the awards were generally low by comparison with awards for loss of income, the basis of evaluation usually being the cost of replacement "housekeeping". The husband's action under the *actio per quod*

842 Chapter 4, "Loss of Homemaking Capacity". Quantification may however give consideration to the value of the tasks that could legitimately have been avoided.

843 (1991), 83 D.L.R. (4th) 385 at 402 (Sask. C.A.), referring to *Daly v. General Steam Navigation Co.*, [1980] 3 All E.R. 696 (C.A.).

844 Chapter 4, "Voluntary Services". The point is good for both cost of care and loss of homemaking capacity. For cases dealing with the latter head, see *Roberts v. Johnstone*, [1988] 3 W.L.R. 1247 at 1259-60 (C.A.); *Gerow v. Reid* (1988), 88 N.S.R. (2d) 34 at 43 (T.D.); *McCallum v. Ritter* (1990), 72 D.L.R. (4th) 49 (Sask. C.A.); *Kraft v. Robbins* (1992), 7 Alta. L.R. (3d) 91 at 102 (Q.B.); *Korpela v. March* (1993), 9 Alta. L.R. (3d) 117 at 132 (Q.B.). *Cf.* the appalling treatment of this issue by Somers J. in *Vykysaly v. Jabowski* (1992), 8 O.R. (3d) 181 at 193, 197 (Gen. Div.).

845 *Supra*, "Earnings, Earning Capacity and Working Capacity". See, *e.g.* R. Graycar, "Compensation for Loss of Capacity to Work in the Home" (1985), 10 Sydney L. Rev. 528 at 540: ". . . for damages purposes, the relevant focus should be upon the capacity to work, for it is impairment of that capacity which causes need and consequential financial loss."

846 Or to children and other dependants under fatal accidents legislation. See generally for the Australian position, Graycar, *ibid.* at 530-36; *Maiward v. Doyle*, [1983] W.A.R. 210 (C.A.). For a review of the *actio per quod*, see M.D. Popescul, "Action Per Quod Consortium Amisit" (1978-9), 43 Sask. L. Rev. (No. 2) 27.

was of antiquated origin, and was rightly described as "sexist" by the common law's leading writer in the area of tort law.[847] The action was originally based on a husband's supposed proprietary interest in his wife. In reality, of course, when a homemaker is disabled the loss is effectively suffered by all members of the plaintiff's family, just as it is when there is a loss of income by one member of a family. However, no claim was ever allowed on the part of spouses in personal injury actions for loss of their share in the benefits of a husband's income. That the loss is to the injured victim personally is of further significance if a marriage or other permanent interdependency relationship should break down, because the victim then needs to carry the compensation for lost capacity to enable her or him to provide the relevant substitute services that were the *raison d'etre* of the award in the first place. In any event, there are numerous circumstances where the *actio per quod* or an equivalent statutory action is unavailable. For one thing, there are an increasing number of single parents who must be compensated personally if homemaking capacity is impaired. There is also the problem of the prospective homemaker who has as yet no spouse or other life-partner to claim under a third party action.

No wonder, then, that the approach which treated the loss as that of a third party "has now changed", as ruled by Vancise J.A. in *Fobel v. Dean*.[848] This was followed by Matheson J. in *Johnston v. Murchison*,[849] where she stated that awarding compensation to a third party "was never satisfactory, because the loss is personal to the plaintiff and the plaintiff is entitled to be compensated in her own right for the loss she suffered". The change was judicially initiated by the English Court of Appeal in *Daly v. General Steam Navigation Co.*,[850] which was applied by Bayda C.J.S. in *McCallum v. Ritter*,[851] and by the Australian Federal Court in *Hodges v. Frost*.[852] An earlier Australian *dictum* of Murphy J. in *Sharman v. Evans*[853] was as follows:

> A woman who loses her capacity to make the usual contributions of a wife and mother in a household suffers great economic deprivation. Actions for loss of services correctly treat this as economic injury, but as a loss to the husband on the archaic view of the husband as master or owner of the wife. The economic loss is one of the wife and mother. It is her capacity to work, either in the household or outside, which is affected . . .".

847 J.G. Fleming, *The Law of Torts*, 5th ed. (1975), p. 218, noted by Vancise J.A. in *Fobel v. Dean* (1991), 83 D.L.R. (4th) 385 at 395 (Sask. C.A.).

848 *Ibid.*

849 (1993), 112 Nfld. & P.E.I.R. 181 at 218 (P.E.I.T.D.).

850 [1980] 3 All E.R. 696 (C.A.).

851 (1990), 72 D.L.R. (4th) 49 (Sask. C.A.).

852 (1984), 53 A.L.R. 373 (Fed. Ct.). See R. Graycar, "Compensation for Loss of Capacity to Work in the Home" (1985), 10 Sydney L. Rev. 528 at 536-40.

853 (1977), 138 C.L.R. 563 at 598. See Graycar, *ibid.* at 540.

In the United States the landmark decision was *Rodgers v. Boynton*,[854] which shifted the right of recovery for home services "from the spouse to the homemaker".[855]

(c) The Compensatory Principle and Causation

Recovery of damages for impaired homemaking was specifically justified by the compensatory principle in *Fobel v. Dean*,[856] where, after referring to *Admiralty Commissioners v. "Susquehanna" (The)*[857] and *Andrews v. Grand & Toy Alberta Ltd.*,[858] Vancise J.A. emphasized that: "The plaintiff ought to be put, in so far as money can do so, in the same position she would have been in prior to the accident. In other words, full compensation for pecuniary loss." The replacement cost measure of damages, promoted in the case as the primary quantification mechanism, is even linguistically synonymous with "putting the plaintiff back" in her pre-accident position.[859] That the basic compensatory principle, representing in essence a straightforward causal inquiry, justifies a full award for the value of work in the form of unpaid labour was also clearly espoused by McLachlin J.A. in *Johnson v. Shelest*,[860] where in awarding damages to an injured woman, a dairy farmer who worked on the farm as well as on household tasks and the books for the business, she said: "the question is . . . whether as a result of the accident [the plaintiff] was unable to do work which other persons then did on her behalf. If that is established she is entitled to damages for the value of that work . . .".[861] A subsequent implementation of the compensatory principle in straightforward fashion is evidenced in *Johnston v. Murchison*,[862] where Matheson J. held that: "The better approach is to determine how many hours of housekeeping the plaintiff would normally have done and by how much this capacity has been reduced by her injuries." She then carefully applied the principle in reducing the damages because the plaintiff was able

854 52 N.E. 2d 576 (Mass., 1943).

855 F.J. Pottick, "Tort Damages for the Injured Homemaker: Opportunity Cost or Replacement Cost?" (1978), 50 U. of Colorado L. Rev. 59 at 61-64. The author traces the evolution of homemakers' tort damages in the United States.

856 (1991), 83 D.L.R. (4th) 385 at 401 (Sask. C.A.).

857 [1926] A.C. 655 (H.L.).

858 (1978), 83 D.L.R. (3d) 452 (S.C.C.).

859 For an economic analysis see E. Quah, "Compensation for Loss of Household Services" (1986), 24 Osgoode Hall L.J. 467 at 477, which makes reference to "lost welfare", where, from a family's point of view, the goal is to award the amount which "when paid to the family, returns their level of welfare to the level enjoyed before the accident". Nothing seems to be gained here by conversion to the economic terminology.

860 (1988), 22 B.C.L.R. (2d) 230 at 233 (C.A.).

861 The trial judge had erred in suggesting "that damages for these losses were payable only if the [plaintiff] could establish some actual financial or business loss." Whether or not the plaintiff's sons "did more than other farm children did" was irrelevant. *Johnson* is consistent with a wealth of authority awarding damages for the value of voluntary services by plaintiffs' families: *supra*, "Homemaker's Own Loss". It, was (rather reluctantly) followed by Wallace J.A. in *Feng v. Graham* (1988), 44 C.C.L.T. 52 at 61-67 (B.C.C.A.).

862 (1993), 112 Nfld. & P.E.I.R. 181 at 220 (P.E.I.T.D.).

to do 25% of her work after the accident, and again because prior to the accident the plaintiff had employed help to free up her weekends for recreational activity.

A proper understanding of the compensatory principle had earlier led to the occasional inclusion of compensation for loss of homemaking capacity under the head of cost of care. A good example is *Waterhouse v. Fedor*,[863] where Legg J., guided by a report from a noted rehabilitation expert, awarded the cost of "homemaker services" and "child care and tutorial care", the latter because the plaintiff "was less available as a mother and was definitely impaired in her ability to function as a mother for her 3-year-old boy". Again, it is clear that the emphatic judgment of Huband J.A. in *McLeod v. Pulardy*,[864] insisting on the legitimacy of the provision of a home with running water and associated facilities in order that the plaintiff could perform homemaking functions as the single parent of young children, is driven by the compensatory principle.[865] Indeed, as the judge pointed out, principle here required such an award because it served to mitigate the number of hours required for substitute homemaking help. Earlier in *Rietze v. Bruser (No. 2)*,[866] it was felt that "the most important consideration" in an award of $15,000 was the plaintiff's "loss of function to the left hand which curtailed, and in some cases, prevented her performing such simple household tasks as sewing, knitting, washing dishes, etc."

Denial of the pecuniary value of the claim cannot now be made on the basis that no direct monetary reward is paid to the homemaker.[867] As Picard J. stated in *McLaren v. Schwalbe*:[868] "It matters not that [a homemaker's] work is not carried out in the marketplace or that she is not paid in money. The reality that her services may be beyond price does not mean they cannot be valued and a loss reflected in an award as damages in a proper case." An arbitrary and unprincipled measure of damages, such as that proposed by the Ontario Law Reform Commission, should be soundly rejected.[869]

(d) Historical Problems in Recognition

Some of the problems with respect to recognition of the claim for loss of homemaking capacity were related by Picard J. in *McLaren v. Schwalbe*:[870]

863 (1986), 11 B.C.L.R. (2d) 56 at 66-7 (S.C.).

864 (1981), 124 D.L.R. (3d) 506 at 532-33 (Man. C.A.).

865 The trial judge had not included the item "as a sudden burst of generosity on his part" nor simply "on the basis that it would be more convenient". *Cf.* the judgment of Monnin J.A. who, in dissent, seemed unwilling to apply the compensatory principle to the needs of a single mother living in rural Manitoba.

866 [1979] 1 W.W.R. 31 at 54 (Man. Q.B.). See also *Strong v. Laughlin*, [1973] 1 W.W.R. 289 at 300 (B.C.S.C.).

867 Over-focus on monetary payment is attributable in part to the law-and-economics theorists, where "willingness to pay" is a prominent concept: Chapter 1, "Jurisprudential Theory".

868 (1994), 16 Alta. L.R. (3d) 108 at 135 (Q.B.). See also Quah, *supra*, note 859 at 474.

869 *Report on Compensation for Personal Injuries and Death*, Ontario Law Reform Commission (1987) at 48, "influenced more by practical than by theoretical considerations". The different treatment of homemakers than earners under such a scheme might be challengeable as *de facto* discriminatory against women under s. 15 of the *Canadian Charter of Rights and Freedoms*, particularly since in fatal accident claims the loss of homemaking services has been carefully quantified, largely for the benefit of surviving male spouses.

870 (1994), 16 Alta. L.R. (3d) 108 at 136 (Q.B.).

> The claim for loss of capacity to perform homemaking services presents a challenge to some courts. There are a number of reasons for this: the services are provided outside the marketplace; they are specialized to the situation and encompass a mind-boggling range of functions; there is both a labour and management function; there is a "loss of enjoyment of life" aspect for some of the claimants; the claim requires that a proper evidentiary base be set out; expert evidence is usually necessary to assist the court; often there has been no payment out because there has been no true replacement of the services but a "making do" with lowered standards and assistance from family and friends; there is disagreement on how to categorize and award for pre-trial loss. These potential problems in determining a just and fair compensation for the claim can no longer be used to deny it exists.

Many of these problems remain to this day, despite the fact that for over a century generous awards have been made to men in fatal accident claims for the replacement cost of lost work of deceased spouses.[871] Furthermore, where the loss of the value of homemaking work was legally recognized during a woman's lifetime, it was recognized as of value to men, rather than of intrinsic value to women themselves as an impairment of women's working capacity.[872] The point was made by Vancise J.A. in *Fobel v. Dean*[873] at the outset of his treatment of the subject:

> The compensation of a victim for loss of capacity to work in the home was traditionally accomplished by awarding compensation to a third party (a husband or a family) for loss of the services provided to the third party victim. The husband was compensated for loss of consortium. This has never been a satisfactory approach. . . . [It] is antiquated if not sexist.

When recognized as a potential loss to the homemaker herself, the courts not only undervalued the loss,[874] but frequently cut the loss down on the thesis that husbands and

871 *St. Lawrence & Ottawa Railway v. Lett* (1885), 11 S.C.R. 422 at 426. See Chapter 11, "Loss of Dependency on Valuable Services". See also E. Quah, "Compensation for Loss of Household Services" (1986), 24 Osgoode Hall L.J. 467 at 467-70. For a random recent example, see *Kwok v. British Columbia Ferry Corp.* (1987), 20 B.C.L.R. (2d) 318 at 358 (S.C.), where the loss on the death of a wife and mother who worked full-time was estimated as $190,000 for lost dependency on earnings, and $225,000 for loss of "home care services". Even the latter figure was the result of pairing down the detailed estimates of a rehabilitation consultant.

872 *Supra*, "Homemaker's Own Loss". See also S.M. Waddams, *The Law of Damages*, 2nd ed. (1991) at para. 3.820 (view still expressed in December 1992 Supp.): ". . . it is not easy to demonstrate what loss is caused to the housekeeper by that person's own inability to render household services." A recent judicial manifestation of this outdated view is found in *Vykysaly v. Jabowski* (1992), 8 O.R. (3d) 181 at 197 (Gen. Div.), where Somers J. denied the homemaker's personal claim partly on this ground.

873 (1991), 83 D.L.R. (4th) 385 at 395 (Sask. C.A.), where reference is made to J.G. Fleming, *The Law of Torts*, 5th ed. (1977) at 218, note 16. For similar difficulties in recognition in Australia, conceptualizing the loss as either (a) to third parties, (b) as non-pecuniary, or (c) as the loss of "voluntary" work, see Graycar, *supra*, note 852 at 530-36, 548-51.

874 *Infra*, "Quantification of Claim". See *e.g.*, *Dhaliwal v. Morrisette* (1981), 32 B.C.L.R. 225 at 226-27 (S.C.); *Blatz v. Wong* (1989), 60 Man. R. (2d) 287 at 291-92 (Q.B.). And see *Fobel v. Dean* (1991), 83 D.L.R. (4th) 385 at 397 (Sask. C.A.), *per* Vancise J.A.: The recognition of "care and management of the household" in damages awards, "has not . . . resulted in compensation being awarded for such loss of

children should chip in and do the work.[875] On the other hand, judges have quite frequently recognized as a loss to male plaintiffs the value of spare-time work within the home context, such as the inability "to do the maintenance to [a] home and property as usually done by the average man".[876]

Even in recent years some judges have failed to see the loss involved where there is impairment of homemaking capacity. In long-term cases, the damages for loss of future earnings have been cut down without substitution where women supposedly left the "workforce".[877] In other cases, a full award for loss of earnings has seemingly been taken as a substitute for impaired homemaking capacity, although the damages for cost of care may sometimes include provision for the care of family members,[878] or the seriousness of the injuries precludes the possibility of a future family for whom homemaking tasks will be needed.[879] Some cases show a dogged refusal to respect the value of women's work to women themselves, and show a defensiveness on the issue that is, to say the least, disappointing.[880] A sudden shift that awards damages based on some notion of formal equality, resulting in a token and equal award for impairment of homemaking capacity to men and women alike, regardless of the actual workload that would have been performed, also misunderstands *de facto* social reality.[881]

capacity to care and manage for the family. Awards tend to minimize the importance of such contribution and work by homemakers."

875 *E.g. De Marco v. Toronto Transit Commission* (1978), 19 O.R. (2d) 691 at 694 (Co. Ct.); *Thorsell v. Hoem* (1984), 54 B.C.L.R. 35 at 48 (S.C.); *Dhaliwal v. Morrisette, supra*, note 874 at 226; *Smith (Next Friend of) v. McNabb* (1993), 14 Alta. L.R. (3d) 214 at 221 (Q.B.); *Vykysaly v. Jabowski, supra*, note 872 at 193, where the family "picked up the slack", doing "what most families would do". So no real loss, not even for the future. Anyway, "doing the housework" was not the plaintiff's "major economic contribution to this family". Damages only for loss of "major" contributions, not "minor" ones?

876 *Borbely v. Mryglod* (1981), 9 Sask. R. 61 at 66 (Q.B.), where MacPherson J. awarded $1,000 (1980 dollars) per year. See also, *e.g., Boyles v. Landry* (1981), 34 N.B.R. (2d) 466 (Q.B.) ($2,500 for inability to apply exterior siding to home).

877 See, *e.g. Thring Estate v. Vecchioli* (1990), 83 Sask. R. 137 at 141 (C.A.), where Tallis J.A. approved a "liberal deduction for contingencies such as the possibility of being out of the work force to raise a family . . .".

878 See, *e.g. Simonson v. Wood* (1990), 118 N.B.R. (2d) 9 at 13-14 (Q.B.); *Gerow v. Reid* (1988), 88 N.S.R. (2d) 34 at 43 (T.D.). In *Marcoux v. Martineau* (1989), 102 A.R. 84 at 87-88 (Q.B.) very large awards for lifelong loss of earnings and cost of care to a young quadriplegic parent may have served to cover the ground.

879 *E.g. Reekie v. Messervey* (1989), 59 D.L.R. (4th) 481 (B.C.C.A.); *Tucker v. Asleson* (1993), 102 D.L.R. (4th) 518 (B.C.C.A.); *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital* (1992), 73 B.C.L.R. (2d) 116 (C.A.).

880 *Vykysaly v. Jabowski, supra*, note 872 at 191-99. The comment that most judges have been "homemak*ees* rather than homemak*ers*" is likely still justified: K. Cooper-Stephenson, "Past Inequities and Future Promise: Judicial Neutrality in Charter Constitutional Tort Claims", in S.L. Martin & K.E. Mahoney, *Equality and Judicial Neutrality* (1987) at 226. Some judges will now themselves have been full-time homemakers at some point in their lives, and many, if not most will have shared more equally in homemaking functions, and may have daughters and sons who have assisted in the educational process.

881 *Benko v. Eliuk* (1991), 95 Sask. R. 161 at 165, 169 (Q.B.) *per* MacLeod J.: "a nominal average $300 per year" for the lifetime of male and female plaintiffs alike.

Nevertheless, a turning point has been achieved by *Fobel v. Dean*[882] and the cases which have followed.[883]

(e) The Range of Potential Claimants

The claims by injured homemakers or potential homemakers have covered the full spectrum of lifestyles and family relationships. The traditional family situation is now exceptional. If, however, the evidence is that, relying on her partner for income, the plaintiff would have worked almost exclusively as a homemaker without any employment outside the home, the damages for loss of homemaking capacity should reflect this, as was the case in *Korpela v. March*.[884] In contrast, if damages are assessed on the basis of a lifetime of full employment, there may still be an extensive award for loss of homemaking capacity, because many women, and some men, spend a large portion of the remainder of their waking hours in the homemaking role, as was the case in both *Fobel v. Dean*[885] and *McLaren v. Schwalbe*.[886] In the latter case the plaintiff was described as "a meticulous homemaker and an excellent cook who looked after three children, a home and worked full-time outside the home". Indeed, at the time of her accident she was "working with her husband-to-be toward their goal of full-time ranching". Even those who no longer care for children, as in *Johnston v. Murchison*,[887] may spend long hours working at home. The loss of homemaking ability by retirees and senior citizens may also be significant.[888]

It is now recognized that there are "increasing expectations that husbands will do more of the housekeeping than was the case even a few years ago".[889] A secondary homemaker may perform a wide range of tasks while carrying on employment at the same time. And the phenomenon of single parents, both men and women, is on the rise.[890] The range of family work responsibility is diverse, and the roles are not gender-specific, as described by Picard J. in *McLaren v. Schwalbe*:[891]

882 (1991), 83 D.L.R. (4th) 385 (Sask. C.A.).

883 *Supra*, "Recognition of Claim".

884 (1993), 9 Alta. L.R. (3d) 117 at 130-31 (Q.B.).

885 (1991), 83 D.L.R. (4th) 385 (Sask. C.A.).

886 (1994), 16 Alta. L.R. (3d) 108 (Q.B.). See also *Mayes v. Ferguson* (1992), 102 Sask. R. 250 (Q.B.) (modest lifetime award for whiplash).

887 (1993), 112 Nfld. & P.E.I.R. 181 at 220-1 (P.E.I.T.D.). See also *Logozar v. Golder* (1992), 136 A.R. 363 at 374 (Q.B.) [affirmed (1994), 157 A.R. 102 (C.A.)] (statistical 22.2 hours per week amended to 18 hours on evidence); *Mayes v. Ferguson* (1992), 102 Sask. R. 250 at 255-56 (Q.B.) (couple without children both working outside the home would have employed a housekeeper absent the injuries when they became older).

888 *E.g. Simonson v. Wood* (1990), 118 N.B.R. (2d) 9 at 13-15 (Q.B.).

889 *Knoblauch v. Biwer Estate*, [1992] 5 W.W.R. 724 at 740 (Sask. Q.B.) *per* Noble J.

890 *E.g. Gerow v. Reid* (1988), 88 N.S.R. (2d) 34 at 42 (T.D.). Also noted by Picard J. in *McLaren v. Schwalbe, supra*, note 886 at 136.

891 *Ibid.*, at 136.

> There are men who carry out many of the functions traditionally ascribed to women as homemakers. I think particularly of those men who as single parents work outside the home but also maintain a home, prepare meals and provide child care. There are households in which there is a sharing of responsibility for homemaking services. The fact that there are so many possible arrangements underlines the need for evidence . . . and highlights the caution that the court be careful about making assessments based on assumptions which may be erroneous.

Sometimes, normal pre-accident family practice will indicate what has been lost, such as in *Blatz v. Wong*,[892] where children in an unusually large family had helped in homemaking before the accident and continued to do so afterwards, with the result that the plaintiff could not claim damages with respect to those functions that had previously been performed, and continued to be performed by the children.

(f) The Quality and Range of Work

Although situations differ, homemaking services were described by Picard J. in *McLaren v. Schwalbe*[893] as "specialized to the situation" and encompassing "a mind-boggling range of functions". Care must be taken not to over-evaluate them by comparing the tasks performed with those conducted by persons of specialized competence.[894] On the other hand, a homemaker's services to the family are unique in character. They are specialized in the sense that they are geared to the particular needs and desires of the family; and they have an almost unmatched quality which emanates from the personal interest and motivation of the provider.[895] In *Pennsylvania Railway v. Goodman*,[896] for example, the court made reference to: "the frugality, industry, usefulness, attention and tender solicitude of a wife and mother of children . . ."; and in *Continental Bus Systems Inc. v. Toombs*[897] the court indicated that "the value of her services in counselling, advising, inspiring, comforting" should be included in assessment of the

892 (1989), 60 Man. R. (2d) 287 at 292 (Q.B.).

893 (1994), 16 Alta. L.R. (3d) 108 at 134, 136 (Q.B.).

894 See E. Quah, "Compensation for Loss of Household Services" (1986), 24 Osgoode Hall L.J. 467 at 471. However, economic analysis almost always undervalues homemaking, because it instructs us to ignore as "third party effects" or "consumer surplus" what is not capable of precise economic evaluation.

895 See now, J. Yale, "The Valuation of Household Services in Wrongful Death Actions" (1984), 34 U.T.L.J. 283 at 293, 295; See also F.J. Pottick, "Tort Damages for the Injured Homemaker: Opportunity Cost or Replacement Cost?" (1978), 50 U. of Colorado L. Rev. 59 at 67-68, quoting *Spangler v. Helms N.Y. — Pittsburgh Motor Express*, 153 A. 2d 490 at 492 (1959): "There are services performed by a wife-mother which no housekeeper can supply." Some Canadian courts have recognized these elements as matters of pecuniary loss in fatal accident cases: Chapter 11.

896 62 P. 329 at 339 (1869).

897 325 S.W. 2d 153 (1959).

loss of a homemaker. The range of homemaking activity is well illustrated in *Johnston v. Murchison*.[898]

Statistics are available on the number of hours that are spent on homemaking by the average male or female in different life situations.[899] A survey of some of the available American and Canadian material prompted the following conclusions by a Canadian economist:[900]

> As one would expect, all of the surveys indicate that more time is devoted to household activities: by women than men; by women who do not work in the labour market than by those who do; and by individuals who have young children than by those who do not. Although there are some notable differences among the various studies . . . it would appear that the following conclusions are justified:
>
> (i) Men whose wives are not working and who have no young children spend approximately 7-10 hours per week on housework, while men with young children can spend as little as 9 hours on housework but as much as 20 (if they actively assist in child care).
>
> (ii) Among all males, approximately 40-50 percent of housework involves repair and maintenance activities.
>
> (iii) Employed women average approximately 18-20 hours per week on housework if they have no young children, and approximately 30-35 hours in that activity if they do have young children.
>
> (iv) Women who do not work in the labour market spend appreciably more hours on housework than do those who have entered the labour market: approximately 35-40 hours if they do not have young children and 40-50 hours if they do have.
>
> (v) . . . retired men and women spend approximately 4-6 more hours per week on housework than do working men and women.

The author presents some additional material concerning the effects of age, education, and numbers and ages of children.

898 (1993), 112 Nfld. & P.E.I.R. 181 at 218-19 (P.E.I.T.D.): "Prior to the accident, on a daily basis the plaintiff picked up her daughter . . . at school, prepared the family dinner, cleaned up after dinner, and prepared her school work. . . . She regularly scrubbed floors, made beds, dusted, mowed the lawn, raked leaves, stacked wood, painted the house, ironed and generally performed those tasks which led to the smooth running of the family home. She was also very involved in her daughter's life and she and her husband did the family financial planning together." See also *McLaren v. Schwalbe* (1994), 16 Alta. L.R. (3d) 108 at 138 (Q.B.): "cleaning including washing of floors, vacuuming, laundry, meal preparation, food planning, child care and gardening, as well as ranch work and doing the ranch books."

899 *Infra*, "Evidence and Statistics". See particularly C.J. Bruce, *Assessment of Personal Injury Damages*, 2nd ed. (1992) at 209-16.

900 *Ibid.*, at 214-15. Why the conclusions order the treatment of men in this area before that of women is not clear.

(g) Labour and Management Functions

Perhaps the most significant feature of the judgment of Vancise J.A. in *Fobel v. Dean*[901] is its adoption of a systematic method of computing damages for loss of homemaking capacity, involving an initial classification of functions, followed by an economic model for assessment of their value. First it was "necessary to identify the various elements of components of homemaking". To do that, the homemaking function could be separated into two parts: "(i) direct labour, and (ii) management."[902] The learned judge continued as follows:

> Included under the heading of direct labour are those elements which are traditionally known as "ordinary housekeeping matters" which are readily capable of replacement by paid domestic help. This category includes such things as: food preparation, cleaning, clothing and linen care, maintenance, gardening, and physical child care. The heading of management includes intangible items such as the management and organization of the household, which would include the following matters, which is not intended to be an exhaustive list: marketing (in the broadest sense including shopping for all items required for the efficient organization and operation of a home), food planning (including the determination of menus and quality and amount of food), tutorial child care, activity co-ordination, health care and counselling.

The judge then pointed out that it would be "for the trial judge to determine on the facts of each case which elements or components have been impaired or lost", noting that in many cases a disabled person might be able to perform some of the managerial functions even if physically incapacitated from doing any of the direct labour components.

The labour/management classification of tasks has been followed in a number of decisions. In *Cairns v. Harris*,[903] there had been no impairment of management functions, but in *Johnston v. Murchison*[904] an active and vigorous homemaker and parent was held to be 75% incapacitated in both her labour and management roles. It was noted by Rawlins J. in *Korpela v. March*[905] that together with the plaintiff's reduced physical capacity, her ability to undertake management tasks had been impaired "perhaps to the extent she did not have the requisite energy and attention required to do it without chronic pain". In fatal accident actions, of course, the claim by a surviving

901 (1991), 83 D.L.R. (4th) 385 at 397-400 (Sask. C.A.).

902 *Ibid.*, at 398. The distinction is traceable to D.K.S. Kalesnikoff, "Assessing Income Losses of Grain Farmers" (1990), Sask. Trial Lawyers Assoc., and to the author's testimony as forensic accountant in *Fobel*. For earlier attempts at breaking down the homemaking function, see particularly J. Speiser, *Recovery for Wrongful Death* (1966); Segalla, "Unemployed Housewife-Mother: Fair Appraisal of Economic Loss in Wrongful Death Actions" (1970), 20 Buffalo L.Rev. 205.

903 (1994), 117 Nfld. & P.E.I.R. 216 at 226-28 [45-50, 54] (P.E.I.C.A.). See also *Mayes v. Ferguson* (1992), 102 Sask. R. 250 at 255-56 (Q.B.); *Knoblauch v. Biwer Estate*, [1992] 5 W.W.R. 724 at 739 (Sask. Q.B.).

904 (1993), 112 Nfld. & P.E.I.R. 181 at 218-19 (P.E.I.T.D.).

905 (1993), 9 Alta. L.R. (3d) 117 at 132 (Q.B.).

partner will span the whole range of activity, as recognized by Matheson J. in *Taguchi v. Stuparyk*.[906]

The division between labour and management tasks is not a rigid one. For one thing, management is frequently done as part of "marginal thinking time" — mental activity while engaged in more menial tasks such as driving, grocery shopping or raking leaves. In *McLaren v. Schwalbe*,[907] Picard J., "recognizing the efforts of the plaintiff to identify the management functions which she [continued] to perform" as a ranch wife, made an adjustment for "the overlap in the labour and management functions".[908] She also dealt with the potential overlap with non-pecuniary damages,[909] holding that: "For this plaintiff her garden was planned to be an adjunct to her role as homemaker and not per se a hobby," and recognized it "as part of the loss of future homemaking capacity".

(h) Quantification Alternatives

Building on a range of suggested quantification alternatives,[910] Vancise J.A. in *Fobel v. Dean*[911] outlined them and commented as follows:

> . . . a number of approaches to quantify the loss of housekeeping capacity have been suggested:
>
> (1) Replacement of earning capacity
>
> The injured homemaker is compensated for earnings based on what she would have been able to earn had she worked outside the home. The difficulty with this approach is that compensation is determined by reference to outside activities.
>
> (2) Opportunity cost
>
> The value of homemaking is calculated in terms of benefits that the victim gave up, that is, the alternative career, in order to be able to remain or to devote time to homemaking. The obvious difficulty with such a theory is that the value of homemaking activity is determined not by the homemaking activity itself but by some extraneous activity that could lead to widely disparate results.
>
> (3) Replacement cost
>
> The homemaker is compensated for the replacement cost of substituting the functions which the homemaker would have performed had she been able to do so. Such value is determined by the marketplace.
>
> (4) Substitute homemaker

906 (1994), 16 Alta. L.R. (3d) 72 at 86 (Q.B.), varied (1995), 29 Alta. L.R. (3d) 175 (C.A.).

907 (1994), 16 Alta. L.R. (3d) 108 at 136-37 (Q.B.).

908 *Ibid.*, at 140.

909 For detail, see Chapter 8, "Loss of Working Capacity and Non-Pecuniary Loss".

910 As summarized in the first edition of this treatise, where reliance was placed particularly on F.J. Pottick, "Tort Damages for the Injured Homemaker: Opportunity Cost or Replacement Cost?" (1978), 50 U. of Colorado L. Rev. 59 at 64-68.

911 (1991), 83 D.L.R. (4th) 385 at 397-98 (Sask. C.A.).

The homemaker is compensated for what it would cost to replace an injured homemaker to perform "all of the tasks", not just domestic labour, performed by a person of equal ability and qualifications.

(5) Catalogue of services

A homemaker's time is assigned to a number of occupations such as chef, nurse, counsellor, etc. and that time is then multiplied by the community's fair market salary of each occupation and totalled to arrive at a weekly salary. This is an attempt to quantify non-economic activities performed inside the home by reference to comparable activities in the marketplace.

In result Vancise J.A. adopted features of the last two, "a combination of the substitute homemaker/catalogue of services approach".

Although economists tend to distinguish evaluation methods in the manner outlined in *Fobel* — in some instances with even greater refinement — their concern is different.[912] For the purposes of damages assessment there are really three primary choices: (1) *Opportunity Cost* (the first two alternatives in *Fobel*, both making reference to what activity the homemaker would have undertaken had she or he not been homemaking); (2) *Replacement Cost* (the next two alternatives in *Fobel*, the "substitute homemaker" being a more sophisticated model covering the full range of tasks to be replaced); and (3) *Catalogue of Services*, involving a more objective evaluation rather than a specific replacement cost.

(i) Substitute Homemaker/Catalogue of Services

In *Fobel v. Dean*,[913] Vancise J.A. introduced his approach to quantification with the statement that: "In my opinion, a combination of the substitute homemaker/catalogue of services approach would permit the courts to fairly value homemaking services and award realistic compensation for such loss". The nature of these two measures needs amplification. Furthermore, by operation of the duty to mitigate, the two measures can be seen as a coordinated quantification mechanism.

The "substitute homemaker" approach is a composite replacement cost method of evaluating homemaking. Value in the open market is determined by ascertaining the cost of substituting the exact functions which the injured homemaker would have performed.[914] Such an assessment is familiar to Canadian courts in fatal accident cases.[915] If the plaintiff is minimally injured, the assessment will reflect replacement

912 Frequently to determine the contribution of homemaking to the gross national product. See the judgment of Haines J. in *Franco v. Woolfe* (1974), 52 D.L.R. (3d) 355 at 360-61 (Ont. H.C.), varied (1976), 12 O.R. (2d) 549 (C.A.). See, however, C.J. Bruce, *Assessment of Personal Injury Damages*, 2nd ed. (1992), who compares "opportunity cost", "market value" and "housekeeper".

913 (1991), 83 D.L.R. (4th) 385 at 397-98 (Sask. C.A.).

914 See K.A. Clarke & A.I. Ogus, "What is a Wife Worth?" (1978), 5 Br. J. of Law & Society 1 at 21-22: Replacement cost method reflects the view of labour economic theorists: "The capacity to work, like any other commodity, has a value which is reflected in its price-wages."

915 Chapter 11.

cost of the tasks that she or he can no longer perform; if the injuries are more serious, the assessment will reflect the cost of combined substitute performance in a housekeeper or other assistant; and in cases of complete disablement, the valuation will be as described in *Fobel*: the cost of a "substitute homemaker" capable of performing the full range of manual, clerical and professional tasks. A market replacement cost may have an element of "administrative overhead and profit", but if a commercial housemaid or homemaker service will have to be used, the compensatory principle requires reference to commercial rates, as held by Matheson J. in *Taguchi v. Stuparyk*.[916] Indeed, care must be taken to ensure an evaluation of the full range of tasks involved,[917] and that a proper projection for future work is incorporated.[918]

The "catalogue of services" approach was developed to determine the hidden contribution of homemakers to the gross national product.[919] In accepting the validity of such an approach, Vancise J.A. in *Fobel* made reference to the remarkable judgment of Haines J. in the fatal accident case of *Franco v. Woolfe*,[920] where an early analysis of Canadian statistics was introduced,[921] and studies by other researchers were relied upon.[922] Canadian economic studies have for a long time attempted to value the work of homemakers by the catalogue of services method.[923] The hours devoted to various labour and management tasks are computed on a daily, weekly, monthly or yearly basis.

916 (1994), 16 Alta. L.R. (3d) 72 at 86 (Q.B.). However, as the judge noted, if the rate includes supplies that would normally have been paid for by the plaintiff, it should be reduced accordingly. The critique in C.J. Bruce, *Assessment of Personal Injury Damages*, 2nd ed. (1992) at 205 that the market value "assumes that the individual valued his or her services at the market rate" is misplaced. This critique accepts the legitimacy of "opportunity cost" measure, and presumes the individual had the ability to pay for market rates, and that there was a realistic "choice" to be homemaker. The proper test is what will put the plaintiff back into the position she or he would have been in absent the injuries, and that is manifestly a position *with homemaking functions*, not merely with some subjective evaluation of them.

917 See now the excellent treatment in J. Yale, "The Valuation of Household Services in Wrongful Death Actions" (1984), 34 U.T.L.J. 283 at 297-300. The suggested undervaluation in E. Quah, "Compensation for Loss of Household Services" (1986), 24 Osgoode Hall L.J. 467, is because the author occasionally slips into "opportunity cost" reasoning.

918 J. Cassels, "Damages for Lost Earning Capacity: Women and Children Last!" (1992), 71 Can. Bar Rev. 445 at 487-88. The author rightly points out that the reference to the market will nevertheless reproduce gender discrimination in wages, prevalent in the domestic sector.

919 The approach is well described in Yale, *supra*, note 917 at 293; Quah, *supra*, note 917 at 470-71.

920 (1974), 52 D.L.R. (3d) 355 (Ont. H.C.), varied (1976), 12 O.R. (2d) 549 (C.A.).

921 See O. Hawrylyshyn, "A First Approximation of Value or Household Work, Canada 1972" (1974) Working Paper #3, Non-Market Activity Project, Statistics Canada; O. Hawrylyshyn, "The Value of Household Services: A Survey of Empirical Estimates", Review of Income and Wealth, Sept. 1976, 101; O. Hawrylyshyn, "Estimating the Value of Household Work, Canada 1971", A Report Prepared for Statistics Canada, Office of the Senior Advisor on Integration, Ottawa, 1977.

922 The "well-accepted Walker-Gauger studies": K.E. Walker & W.G. Gauger, "Time and Its Dollar Value in Household Work" (1973), Family Economic Review 8-13.

923 See for other early studies P. Kome & M. Pringle, *About Face: Towards a Positive Image of Housewives* (1977), The Ontario Status of Women Council; H.J. Adler & O. Hawrylyshyn, "Estimates of the Value of Household Work, Canada 1961 and 1971" (1977), Office of the Senior Advisor on Integration, Statistics Canada: Monique Proulx, *Women and Work: Five Million Women, A Study of the Canadian Housewife* (1978), Advisory Council on the Status of Women.

The studies adopt the average wage paid in equivalent occupations in order to value each function, including where appropriate manual, clerical and professional rates.[924] The figures are often taken from two or three occupations requiring degrees of skills that range from very high to very low for the particular function.[925] Personalized evidence can then be given as to which functions are impaired. Where the award stretches into the future, data are now available for calculation with respect to different family circumstances, including full-time homemakers, situations where two parents are both employed outside the home, and single parents. Absent direct evidence, the number of years where these conditions may prevail can be estimated. And the figures are calibrated according to the number and age-range of children. As earlier suggested, care needs to be taken with respect to the overlap of independently catalogued services if they can be performed simultaneously or in unison.[926]

Although the objective value of homemaking services is properly indicated by the "catalogue of services" approach, the effective loss will be the cost of hiring a "substitute homemaker" or the replacement cost of individual functions, if such substitute or replacement will be available at the time the services are needed.[927] This is defensible conceptually as a kind of notional market mitigation of the loss as valued under the catalogue of services approach.[928] Even the cost of replacement divided between two or three persons would be a more appropriate measure. However, the catalogue of services approach is the base measure. It provides a benchmark or check for exactly what has to be replaced in both range and quality, and will clearly be used in conjunction with replacement cost in some cases, as, for example, it was in *Logozar v. Golder*[929] with respect to a farm situation. Where no substitute is or will be available, it is the most accurate measure of what has been lost.[930]

924 A good example is J. Speiser, *Recovery for Wrongful Death* (1966), who lists nine conventional functions of the homemaker with equivalent occupations: (i) Housekeeper = household worker/domestic help; (ii) nurse = registered nurse; (iii) counsellor = teacher/psychotherapist; (iv) money manager = bookkeeper/accountant/home economist; (v) family chauffeur = chauffeur/taxi driver; (vi) "Mrs. Fixit" = carpenter/plumber/electrician; (vii) cook = cook/chef/dietician; (vii) dishwasher = dishwasher, (ix) clothes washer = launderer/laundry worker. See also *Har-Pen Truck Lines v. Mills*, 378 F. 2d 705 (1967). See in general on American approaches Segalla, "Unemployed Housewife-Mother: Fair Appraisal of Economic Loss in Wrongful Death Actions" (1970), 20 Buffalo L. Rev. 205.

925 See, *e.g.* M. Proulx, *Women and Work: Five Million Women, A Study of the Canadian Housewife* (1978) at 38. Seemingly not understood by C.J. Bruce, *Assessment of Personal Injury Damages*, 2nd ed. (1992) at 206.

926 *Supra*, "Labour and Management Functions". See particularly *McLaren v. Schwalbe* (1994), 16 Alta. L.R. (3d) 108 at 140 (Q.B.), where Picard J. made adjustment for overlap.

927 Noted by Quah, *supra*, note 917 at 471.

928 Illustrated, in effect, by *Kwok v. British Columbia Ferry Corp.* (1987), 20 B.C.L.R. (2d) 318 at 359 (S.C.), where in the circumstances Cumming J. did not think it useful to specify the award under different functions, as the rehabilitation consultant had done.

929 (1992), 136 A.R. 363 at 374 (Q.B.), affirmed (1994), 157 A.R. 102 (C.A.).

930 The need for both measures is supported in Yale, *supra*, note 917 at 293-94.

(j) Rejection of Opportunity Cost and Earning Capacity

The "opportunity cost" or "earning capacity" approach to assessment of lost homemaking capacity was summarily rejected in *Fobel v. Dean*,[931] as, indeed, it should have been in this context.[932] It represents the view of neoclassical or utilitarian economists as to the proper evaluation of expended time.[933] The value of time or life is calculated in terms of benefits forgone in order to attain other benefits, or in order to function in a chosen way. The measure employs a host of unsustainable assumptions familiar in economic analysis,[934] such as the homemaker's free choice and ability to bargain for alternative uses of time. It leads to unequal compensation for plaintiffs who would have performed the same tasks.[935] It requires evidence of the availability of employment alternatives. And it assesses homemaking work by reference to a hypothetical *scenario* of non-existent employment outside the home. To grant damages on the basis of such an artificial hypothesis avoids recognition that the homemaking function has its own intrinsic value, which may exceed in monetary terms the value of external income opportunity.[936] And it has been generally rejected by Canadian economists,[937] and by legal commentators.[938]

931 (1991), 83 D.L.R. (4th) 385 at 397-98 (Sask. C.A.).

932 There are circumstances where the method seems appropriate in evaluating voluntary services by third parties, if a family member has actually given up paid work to care for the plaintiff, such as in *Blatz v. Wong* (1989), 60 Man. R. (2d) 287 at 291 (Q.B.). Even here, it needs to be checked for over or under-compensation. See Chapter 4, "Voluntary Services".

933 K.A. Clarke & A.I. Ogus, "What is a Wife Worth?" (1978), 5 Br. J. of Law & Society, 1 at 20.

934 See K. Cooper-Stephenson, "Economic Analysis, Substantive Equality and Tort Law" in K. Cooper-Stephenson & E. Gibson, eds., *Tort Theory* (1993) 131.

935 See H.J. Adler & O. Hawrylyshyn, "Estimates of the Value of Household Work, Canada 1961 and 1971", Office of the Senior Advisor on Integration, Statistics Canada (1977) at 7: "... negation of the opportunity-cost approach is intuitively obvious in the following example. Suppose two women doing household work are known by omniscient observation to produce an equivalent value of housework per week employing the same amount of time, but one of them has an opportunity-cost of $10/hour as a lab technician, and another an opportunity-cost of $5/hour as a stenographer. Here the naive Becker approach would imply at the micro level that the first produced twice as much as the second." See now D. Réaume, "Rethinking Personal Injury Damages: Compensation for Lost Capacities" (1988), 67 Can. Bar Rev. 82 at 100-01.

936 For similar reasons, there should be rejection of the use of some notion of the average industrial wage as proposed by the *Report on Compensation for Personal Injuries and Death*, Ontario Law Reform Commission (1987) at 48.

937 See *e.g.* Robert A. Pollack & Michael L. Wachter, "The Relevance of the Household Production Function and its Implications for the Allocation of Time", (1975) 83 Journal of Political Economy 255; O. Hawrylshyn, "Towards a Definition of Non-Market Activities," Review of Income and Wealth, March 1977; Allen C. De Serpa, "A Theory of the Economics of Time", Economic Journal, Dec. 1971, s. 828; and J. Muelbauer, "Household Production Theory, Quality, and the Hedonic Technique," American Economic Review, Dec. 1974, 977. The support of this measure in C.J. Bruce, *Assessment of Personal Injury Damages*, 2nd ed. (1992) at 202-04 is extraordinary. The hypotheticals used in argument are counter-factual and wholly inconsistent with the author's subsequent analysis of statistical data (at 210-15).

938 See now J. Cassels, "Damages for Lost Earning Capacity: Women and Children Last!" (1992), 71 Can. Bar Rev. 445 at 481-84; J. Yale, "The Valuation of Household Services in Wrongful Death Actions" (1984), 34 U.T.L.J. 283 at 292; E. Quah, "Compensation for Loss of Household Services" (1986), 24

(k) Evidence and Statistics

One factor which deterred meaningful assessment under this head of damages was a difficulty of proof not present in the case of an income-earner, where employer and tax records are readily available in most cases. However, it is now realized that evidence of a plaintiff's particular situation can be effectively produced, and that personalized evidence can be assisted by that of rehabilitation consultants, occupational therapists, home economists and labour economists, and that the probabilities for the future can be estimated with some accuracy, using statistics, forensic accountants and actuarial computation.[939] As stated by Vancise J.A. in *Fobel v. Dean*:[940]

> What one needs to do is to provide meaningful evidence to the court which enables it to evaluate the homemaking capacity in all its aspects so as to fully compensate the victim for the loss suffered. There is ample economic statistical evidence available of the amount of time spent by homemakers in the home and the economic benefit which they provide to a family which would permit a court using the [substitute homemaker/catalogue of services] approach . . . to properly assess the damages and award fair and just compensation.

Furthermore as Picard J. pointed out in *McLaren v. Schwalbe*,[941] "[t]he fact that there are so many possible [homemaking] arrangements *underlines the need* for evidence to be put before the court and highlights the caution that the court be careful about making assessments based on assumptions which may be erroneous." Hence:[942]

> There must be evidence by the claimant of lifestyle, duties and responsibilities, standards, the nature of the family unit and, in some cases, goals and aspirations. The evidence must be as precise as possible while recognizing that a "job description" analysis alone is inappropriate . . .
>
> The challenge for the court is to balance the common knowledge of the critical role played by the homemaker with evidence in the case.

Osgoode Hall L.J. 467 at 472; *Report on Compensation for Personal Injuries and Death*, *supra*, note 936 at 45-47. See, however, in the United States, F.J. Pottick, "Tort Damages for the Injured Homemaker: Opportunity Cost or Replacement Cost?" (1978), 50 U. of Colorado L. Rev. 59 at 68-74. For critique of the "earning capacity" measure generally, see *supra*, "Earnings, Earning Capacity and Working Capacity".

939 Although the available statistics were reviewed in the first edition of this treatise, it now seems appropriate to transfer the task to the appropriate experts. See, e.g., the useful data reported by C.J. Bruce, *Assessment of Personal Injury Damages*, 2nd ed. (1992) at 210-15.

940 (1991), 83 D.L.R. (4th) 385 at 400 (Sask. C.A.).

941 (1994), 16 Alta. L.R. (3d) 108 at 136 (Q.B.).

942 *Ibid.*, at 135, 136. See also the judge's earlier plea for more particularized evidence in *Acheson v. Dory* (1993), 8 Alta. L.R. (3d) 128 at 146 (Q.B.). Claims for isolated components of homemaking may have to be rejected for want of evidence. See *e.g. Mayes v. Ferguson* (1992), 102 Sask. R. 250 at 258 (Q.B.) (loss of "exterior homemaking capacity" rejected because spouse did most of the yard work.); *Logozar v. Golder* (1992), 136 A.R. 363 at 374 (Q.B.) (garden claim again not proved).

> Experts called to deal with this evidence, such as labour economists and home economists, can provide great assistance but their evidence should not become the adjudication. The court must exercise its discretion here as in all damage assessment.

Sometimes a deficiency in evidence has been overlooked,[943] although it is likely that courts will not now be so generous, given full recognition of the sub-head. It is also probable that lack of evidence will lead to minimalist assumptions.[944]

The leading cases demonstrate the availability of the necessary material. In *Fobel v. Dean*,[945] for example, a home economist had given evidence of the average time spent on homemaking by working mothers and on the wage rates for domestic services, and Vancise J.A. amended the assessment because the plaintiff's youngest child would shortly reach adulthood.[946] In *McLaren v. Schwalbe*,[947] the plaintiff had given detailed summaries of the hours spent on various functions, and these were used by a chartered accountant as the basis of the calculations. As well, her husband testified about her work on ranch functions. The plaintiff's evidence had been countered by a labour economist and home economist called by the defendant. Picard J. then carefully assessed the strengths and deficiencies of the conflicting views in a manner familiar in personal injury suits. *Johnston v. Murchison*[948] is another good example. A home economist using figures from Statistics Canada combined with an actuary to produce the appropriate figures. In *Knoblauch v. Biwer Estate*,[949] an occupational therapist had gone to the plaintiff's farm and assessed her abilities and limitations. A doctor, who was likely not "as familiar with the motions and body use that a housewife must possess to carry out her household duties as the occupational therapist", "conceded that he would have to bow to the therapist's opinion".[950] Evidence may be required of both the market value of different homemaker functions and replacement cost rates, including, in some cases, commercial housemaid or homemaker service rates.[951]

On the other hand, cases caution against the improper use of notional statistical figures from actuarial reports. Sometimes, as in *Blatz v. Wong*,[952] "such figures are recognizably utopian at first glance and have to be reduced substantially". In this area

943 *E.g.* Vancise J.A. in *Fobel v. Dean, supra*, note 940 at 403; MacDonald C.J.T.D. in *Paine v. Donovan* (1994), 118 Nfld. & P.E.I.R. 91 at 196-97 (P.E.I.T.D.).

944 *Fobel v. Dean, ibid.* at 404: "It may well be that services related to the higher management of the home should be compensated for at a higher rate or compensated for on some other economic basis . . . , but there is no evidence in this case on which such a finding can be made."

945 *Ibid.*, at 403-04.

946 On the other hand, no evidence had been led on the value of non-domestic and managerial functions.

947 (1994), 16 Alta. L.R. (3d) 108 at 138 (Q.B.).

948 (1993), 112 Nfld. & P.E.I.R. 181 at 220-21 (P.E.I.T.D.), reversed in part (1995), 127 Nfld. & P.E.I.R. 1 (P.E.I.C.A.).

949 [1992] 5 W.W.R. 724 at 735-37 (Sask. Q.B.).

950 The actual quantification was done by a home economist and an actuary.

951 *Taguchi v. Stuparyk* (1994), 16 Alta. L.R. (3d) 72 at 85-86 (Q.B.), varied (1995), 29 Alta. L.R. (3d) 175 (C.A.).

952 (1989), 60 Man. R. (2d) 287 at 291 (Q.B.).

as others, the experts must not become "the tail wagging the dog".[953] Furthermore a labour economist's "anecdotal references" about his wife's experiences in hiring help will clearly not be enough, as held in *Korpela v. March*.[954] And both *McLaren v. Schwalbe*[955] and *Cairns v. Harris*[956] provide warning against exaggerated personalized evidence of the number of hours that were usually devoted to the homemaking role, and some of the statistical studies might support this tendency.[957] However, in the absence of evidence to the contrary, one might sometimes question the simple rejection of expert or personal testimony in this field, it being an area of work with which some judges are not particularly familiar.

(l) Period of Loss and Computation Adjustments

The period of loss will be specific to the facts of each case and may extend to the plaintiff's pre-accident life expectancy. Having determined the relevant period and the basic figures for quantification, damages for loss of homemaking capacity are then subject to similar computation adjustments as those for loss of earnings *simpliciter*, subject, however, to the additional need for a tax gross-up.[958]

(i) Period of Loss

The period of loss will be both injury-specific and task-specific.[959] If the injuries are temporary in character, then the period is the expected duration of incapacity caused by the injuries. If the incapacity is permanent, then the period is either the pre-accident life expectancy or the joint life expectancy of the plaintiff and the person or persons for whom the homemaking would have been done. The latter period will be the relevant one if the damages for cost of care already compensate for those homemaking tasks the plaintiff would have done for her- or himself. If the plaintiff's life expectancy has been reduced, then damages for the "lost years" should reflect the value of homemaking services that would have been accomplished for the benefit of others during those years, although if those others will not now emerge as dependants (the plaintiff will not now

953 *Knoblauch v. Biwer Estate*, [1992] 5 W.W.R. 724 at 740 (Sask. Q.B.). See Chapter 3, "The Actuarial Method".

954 (1993), 9 Alta. L.R. (3d) 117 at 132 (Q.B.).

955 *Supra*, note 947 at 139: 16.69 hours per day on homemaking together with "a full recreational life which included polo, horseback riding, swimming, camping and work with the 4H organization". Not much time for sleep?

956 (1994), 117 Nfld. & P.E.I.R. 216 at 223-24 (P.E.I.C.A.): 69.51 hours per week for older couple. See also *Blatz v. Wong*, *supra*, note 952 at 290.

957 C.J. Bruce, *Assessment of Personal Injury Damages*, 2nd ed. (1992) at 213. The disparity between the "reported" number of hours on particular functions and the "average" number may be explicable by a failure to account for overlap in functions. It seems likely also to have been influenced by the fact that those who did more work replied to surveys more frequently than those who did not.

958 See for a full treatment of various adjustments *McLaren v. Schwalbe* (1994), 16 Alta. L.R. (3d) 108 at 141 (Q.B.).

959 See generally *infra*, "Period of Loss".

have children) or interdependents (the plaintiff will not now marry or form any other interdependency relationship), this amount may not be awarded.[960] As for the loss being task-specific, the cases already recognize the different amount and type of functions necessary where children are involved, and that they depend on the age of the children. A year-by-year method of calculation, or at least a calculation in life segments, therefore seems essential.[961]

(ii) Contingencies

The contingencies with respect to homemaking may be even more variable than for earnings. There will be positive as well as negative contingencies to consider both with respect to the pre-accident prospects and the post-accident *scenario*. If the plaintiff's family situation has not yet developed or clarified, there will be possibilities to account for with respect to the size of family which would have been involved, the permanency of any interdependency relationships, the prospect of spousal contribution and/or paid assistance in the home, or of single parenthood, and so forth. Even where there was an established family situation, the possibilities for different eventualities need to be accounted for, including marital breakdown or the termination of any other interdependency relationship — whether the result of the injuries or otherwise.[962] It may be that, on balance, a reduction of 5% (particularly for illness) will often prove appropriate.[963] On the other hand, the contingency of illness of children and spouses is one which would *increase* the homemaking time, and it might well out-balance plaintiff illness, unless, of course, such a factor has already been built into the initial calculations. However, a specific contingency, such as the possibility of a plaintiff's more speedy recovery, may cut across all heads of damages equally, as was the case in *Johnston v. Murchison*.[964] And contingencies may be specific to particular functions, as held by Noble J. in *Knoblauch v. Biwer Estate*,[965] where the possibility of improvement of the plaintiff's health was one factor which resulted in a 20% reduction of the award for "the 'housekeeping' part" of the sub-head; and the possibility that she and her husband would give up farming because of the latter's poor health, and that age and diminishing energy might have lessened the plaintiff's outside work, resulted cumulatively in a 25% reduction of "the farm work aspect".

As with respect to the computation of lost earnings, if a plaintiff was an enthusiastic and hard worker in the home, the effect can work in both directions. Such was the position in *McLaren v. Schwalbe*,[966] where Picard J. held as follows:

960 See generally *infra*, "The Lost Years".

961 *Infra*, "Period of Loss". See, *e.g. McLaren v. Schwalbe*, *supra*, note 958.

962 For the possible arguments relating to *novus actus interveniens*, see Chapter 14, "Extent of Harm and the Thin Skull Rule, Religious, Cultural and Socio-Economic Factors".

963 Used by the defendant's expert in *McLaren v. Schwalbe*, *supra*, note 958 at 141.

964 (1993), 112 Nfld. & P.E.I.R. 181 at 221 (P.E.I.T.D.).

965 [1992] 5 W.W.R. 724 at 743 (Sask. Q.B.).

966 (1994), 16 Alta. L.R. (3d) 108 at 141 (Q.B.).

> The plaintiff's positive and energetic nature cuts both ways. It has been a basis for my positive conclusions about how many hours she worked as a homemaker and ranch wife before the accident but it also convinces me that she will not be inclined to do any less than she absolutely can in the future.

(iii) Discount and Gross-Up

The discount rate for the damages under this sub-head will normally be the one prescribed by provincial legislation, or in its absence will correspond to the one used for loss of earnings. However, evidence may show that replacement cost of homemaking functions will increase beyond that for other areas of employment. It might be shown that the equalization of male-female wage rates will produce such a result. If so, and insofar as provincial legislation allows it, the discount for this head may be different than for others, since the rate is supposed to reflect the difference between the expected investment interest rate for a relatively safe portfolio and the expected inflation rate of the costs that form the basis of the damages award.[967]

Because the value of services or their replacement cost is, from the plaintiff's point of view a "net" figure, there must be a gross-up to account for the fact that the interest earned by the lump sum will be subject to tax. The matter was dealt with explicitly and clearly in *Fobel v. Dean*,[968] where Vancise J.A. held that the ruling in *Watkins v. Olafson*[969] on this issue "[b]y extension . . . would also apply to a self-liquidating award for future housekeeping assistance". In addition the judge rightly concluded, as had been done in dealing with the cost of care, that the compensatory principle required that the plaintiff's other income be taken into account in calculating the impact of taxation.[970] The reasoning in *Fobel* was followed by Pickard J. in *McLaren v. Schwalbe*,[971] who also accepted the plaintiff expert's figure of 20.4% for gross-up based on a mixed investment portfolio.[972] And in *Giannone v. Weinberg*,[973] the Ontario Court of Appeal grouped together the awards under those heads of damages subject to gross-up, including "housekeeping help", and made the calculation on the total of all heads, a process which accomplishes the same result and avoids the problem of which income to treat as "first income".[974]

(iv) Overlap of Heads and Reduced Need

Similar issues with respect to overlap of heads, reduced need and off-setting advantages arise with respect to damages for loss of homemaking capacity as for loss

967 *Infra*, "The Discount Rate".

968 (1991), 83 D.L.R. (4th) 385 at 405-07 (Sask. C.A.).

969 (1989), 61 D.L.R. (4th) 577 (S.C.C.).

970 The matter was referred back to trial for quantification. However, in *Knoblauch v. Biwer Estate*, [1992] 5 W.W.R. 724 at 747 (Sask. Q.B.), Noble J. simply declined a gross-up for lack of evidence.

971 (1994), 16 Alta. L.R. (3d) 108 at 141 (Q.B.). See also, *e.g. Acheson v. Dory* (1993), 8 Alta. L.R. (3d) 128 at 145 (Q.B.).

972 The defendant's expert had actually recommended 31%.

973 (1989), 33 O.A.C. 11 at 21 (C.A.).

974 See Chapter 6, "Tax Gross-Up".

of earnings.[975] If the cost of care damages provide basic necessities, these may cover services that the plaintiff would have undertaken as homemaker.[976] In fact, items that theoretically fall under loss of homemaking, such as the cost of childcare, are often awarded as cost of care under both special and general damages.[977] There may also be a decrease in the stress of working.[978] In cases where the plaintiff will not now form a permanent interdependency relationship, or where such a relationship ends because of the injuries, it may be right to reduce damages under this head as well as under damages for loss of shared family income.[979] Increase in spare time because of inability to earn may diminish the impact of loss of homemaking capacity, since homemaking functions can then be performed over a longer period of time.[980] And it is not clear whether a reduction in the need for homemaking by third parties, for example, because of the plaintiff's hospitalization, should be off-set against the loss of the plaintiff's own work.[981] Some of these issues may be of considerable significance in cases of serious injury, but for the most part they will have minimal impact on the run-of-the-mill case.

3. Loss of Shared Family Income

(a) Nature of Claim

The claim for "loss of shared family income" has now been recognized in a number of decisions culminating in the ground-breaking judgment of Lambert J.A. in *Reekie v. Messervey*.[982] The learned judge specifically addressed "the place of family income in the scheme of the whole award". The perimeters of the claim were subsequently argued in the Supreme Court of Canada in *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*,[983] but the trial record was insufficient for proper consideration.[984] As noted by Lambert J.A. in *Reekie*, the claim is grounded on the compensatory principle: "[T]he plaintiff is entitled to be compensated for her full pecuniary loss caused by the accident. The cases where loss of opportunity to marry is discussed did not suggest otherwise."

In *Cherry (Guardian) v. Borsman*,[985] Skipp J. summarized the law in British Columbia as follows:

975 See generally Chapter 8.

976 *Ibid.*, "Cost of Care and Loss of Working Capacity, Impaired Homemaking".

977 *Ibid.*

978 *Ibid.*, "Loss of Working Capacity and Non-Pecuniary Loss".

979 *Ibid.*, "Reduced Need".

980 *Ibid.*, "Off-Setting Advantages".

981 *Ibid.*

982 (1989), 59 D.L.R. (4th) 481 (B.C.C.A.).

983 (1994), 110 D.L.R. (4th) 289 at 295 (S.C.C.).

984 For general comment and some useful statistical information, see E. Gibson, "Loss of Earning Capacity for the Female Tort Victim: Comment on *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*" (1994), 17 C.C.L.T. (2d) 78 at 96-100.

985 (1990), 75 D.L.R. (4th) 668 at 713 (B.C.S.C.). Sustained on appeal, (1992), 94 D.L.R. (4th) 487 (B.C.C.A.).