REPORT

ON

COMPENSATION FOR PERSONAL INJURIES AND DEATH

ONTARIO LAW REFORM COMMISSION



Ministry of the
Attorney
General

1987

has intrinsic and significant economic value. We are concerned that any reform proposal should clearly recognize this value. Moreover, the law should be framed in such a way that litigation costs and elements of subjectivity are minimized. With these goals in mind, we set out our specific recommendations in the next section.

(c) Recommendations

In arriving at our recommendations respecting household services, we are influenced more by practical than by theoretical considerations. We do not endorse the opportunity cost approach, primarily for reasons of fairness, outlined above.[169] With respect to the replacement cost approach, we are mindful that results in individual cases can be reached only after a great deal of evidence, at considerable expense, has been adduced. Moreover, we have already explained that the levels of compensation achieved in this way could easily be either inadequate or excessive.

While market approximations may be found for household services, there is in fact no paid labour market for the full array of household services performed by people in their homes and for their families. Thus, any assessment of the value of such services must be, to some extent at least, arbitrary and artificial. We favour, therefore, an approach to valuation that has reference to a standard that is both fair, in its recognition of the inherent value of household work, and simple to apply. We believe that the average weekly earnings statistics for Ontario provide such a standard. Accordingly, we recommend that compensation for loss of capacity to perform household services should be assessed with reference to the average weekly earnings in Ontario (industrial aggregate).[170]

Thus, in the case of a full time homemaker, compensation for complete loss of capacity to perform household services would be assessed on the basis of the full average weekly earnings figure. We believe that compensation on a weekly, as opposed to hourly, basis, would be appropriate. Average Ontario weekly earnings would also be the benchmark when valuing loss of capacity to perform household services by persons other than full time homemakers. It would be up to the courts to assure fair proportionality of awards as between full time and part time providers of household services, on a case by case basis.

Similarly, it would be up to the courts to achieve fair proportionality of awards in cases of partial, as opposed to complete, loss of capacity to

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169 We recognize that this diverges from the position taken in this Commission's *Report on Motor Vehicle Accident Compensation* (1973), at 93, and 109, Recommendation 17. However, for the reasons that we have stated, we feel obliged to depart from the earlier position.

170 Draft Compensation Act, s. 5(2)(b). The average weekly earnings (industrial aggregate) for Ontario is published monthly by Statistics Canada.

perform household services. Again, awards would be made with reference to average weekly earnings. However, we anticipate the possibility that, in cases of slight incapacity, replacement cost valuation might be more appropriate than selecting some fraction of the average weekly earnings figure. We consider that our recommendation is flexible enough to permit the courts to assess damages according to the replacement cost method of valuation in such cases.

In fact, our recommendation is in general terms precisely to permit this sort of flexibility. We considered recommending a more detailed statutory scheme. Such a scheme might, for example, distinguish between full time and part time homemakers, and between complete and partial loss of capacity to perform household services. However, it is our view that such distinctions are best left to be drawn by the courts, as cases come before them. A detailed legislative scheme in this area would not provide the latitude needed to respond appropriately to the varied fact situations that will undoubtedly arise.

We realize that difficulties may arise from time to time in distinguishing between care and guidance, on the one hand, and household services, on the other. Again, we would not wish to fix any rules on this question in legislation. Rather, we leave it to the courts to draw the appropriate distinctions in response to the cases that come before them.

Finally, we would emphasize that implementation of this recommendation would not alter or limit existing rights to compensation for loss of earnings or earning capacity in respect of any period of time during which an injured or deceased person would have, but for the injury or fatality, participated in the paid labour force.

7. DEDUCTIONS FROM WORKING CAPACITY

In a previous section of this chapter,[171] we made recommendations respecting the principles governing compensation for loss of an injured person's working capacity, which will apply regardless of whether death ensues from that injury. Determination of working capacity in accordance with these proposals, however, does not conclude the process of calculating this head of damages. This determination is but an initial step that renders a gross amount; certain deductions must be made in order to reflect more accurately the loss to the injured person or the estate, as the case may be. In this section, we shall discuss the treatment that should be given to the following three items: income taxation; the cost of earning; and personal living expenses. We turn first to the question of taxation.

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[171] *Supra*, this ch., sec. 4(d).