

**CLAIMS FOR LOSS OF HOUSEKEEPING
CAPACITY/SERVICES IN
PERSONAL INJURY AND FATAL ACCIDENT CASES**

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INTRODUCTION

1. When a person suffers an injury that limits their physical abilities in some way (whether temporarily or permanently), they experience a number of losses for which the law provides compensation. One loss which has received attention in recent years is that associated with the loss of housekeeping ability.

2. Courts have always recognized both the importance of the role played by the homemaker (who was and still is usually a woman); and the fact that that role had a pecuniary aspect. As Ritchie, CJC observed in *The St Lawrence & Ottawa Railway v. Lett* (1885) 11 SCR 422 (a fatal injuries case) at p.435:

“I must confess myself at a loss to understand how it can be said that the care and management of a household by an industrious, careful, frugal and intelligent woman, or the care and bringing up by a worthy loving mother of a family of children, is not a substantial benefit to the husband and children; or how it can be said that the loss of such a wife and mother is not a substantial [pecuniary] injury but merely sentimental ...”

3. The problem, of course, has always been how to value such a loss. The difficulty arises because the service of a homemaker, while it may have an “obvious” economic value, is not provided in a market. It is a non-market service provided for “natural love and affection,” as the saying goes. Attempting to determine a market rate for a non-market is an inherently artificial process that is plagued with pitfalls. As Ormrod, LJ noted in *Daly v. General Steam Navigation Co. Ltd.* [1980] 3 All ER 696 (CA) (“*Daly*”) at p.701,

“[i]n trying to assess what is a fair compensation in an internal family situation, it is not necessarily at all reliable to have regard to

market values of housekeepers or other comparable people. It introduces a wildly artificial concept if one resorts to that and talks about compensating the husband in this case at a rate of a daily woman at so many hours a week. It simply does not represent reality at all.”

4. Having said this, it is also true that mere difficulty in assessment is never a ground to deny an otherwise valid claim. And this is true in the area of claims for loss of housekeeping ability as well as any other. What has changed is the willingness of courts to recognize, as noted by the trial judge in the *Daly* case, that

“Where the person concerned is a housewife, who is disabled wholly or partly from doing housekeeping in her own home, she does not suffer an actual loss of earnings, and unless a substitute is employed, she may not suffer any pecuniary loss at all. Nevertheless, she is just as much disabled from doing her unpaid job as an employed person is disabled from doing his paid one, and I think that she is, in principle, entitled to be compensated separately for her loss in a similar way.”¹

5. Our own Court of Appeal recognized this approach in *Carter v. Anderson* (1998) 168 NSR (2d) 297 (CA) (“*Carter*”), where Justice Roscoe noted at p.306 that: “Managing one’s home and keeping it clean and organized is important and necessary for the health and safety of the family. The partial or total loss of that ability has economic value which should be recognized.”
6. This presentation hopes to detail the development of what I have called the “*Daly* principle” in Canada; and outline its affect on damage awards in personal injury and fatal accident cases. It will also touch on question concerning how one may prove (or limit) such claims, as well as how they are (or might be) calculated.

¹ See *Daly* at p.700d-e.

PART I: CLAIMS FOR LOSS OF HOUSEKEEPING ABILITY IN PERSONAL INJURY CASES

7. In a personal injury case involving a claim for loss of housekeeping capacity the “typical” fact scenario at trial runs along the following lines. The plaintiff (usually a woman)² has been injured. The injuries limit or prevent her from performing some or all of the homemaking tasks she would normally have performed (for example, light or heavy housecleaning, laundry, cooking or cleaning, childcare). Prior to trial the plaintiff either “soldiered on,” doing what she could (often finding that it took her longer to perform the tasks); or received the assistance of her spouse, parents, other relatives or friends. Usually that assistance was volunteered, although sometimes there is an “agreement,” either moral or contractual, to repay the volunteer out of the proceeds of judgment. In addition, the plaintiff often alleges that the situation will continue that way after trial, and that she will need an award for future expenses to enable her to pay for such services in the future.

8. In England, prior to the decision of the Court of Appeal in *Daly* in 1980, such a claim would be dealt with as follows:
 - a. In respect of the past loss, services that were provided *voluntarily* were generally not subject to compensation at trial;
 - b. Services that were provided under an agreement would often generate an award, “in trust,” for the benefit of the person who provided the service;
 - c. Where the plaintiff had actually paid for outside services, an award by way of special damages was made for such as were reasonable; but

² Men can and have made similar claims, but they generally meet with little or no sympathy: see, for example, *Roemer v. Griffin* (1999) 182 NSR (2d) 175 (TD), where nothing was awarded; and *Plummer v. Irving Ltd* (2000) 184 NSR (2d) 364 (TD), where \$1,000 was awarded as “more than reasonable” for his limitations in carrying out household tasks as a result of a knee injury.

- d. Where the plaintiff did not receive any outside help, and simply struggled along as best she could, no award would be made (outside of or in addition to the award of general damages for pain and suffering).
9. All that changed with the decision of the English Court of Appeal in *Daly*. As will be discussed below, the Court of Appeal there concluded that the above approach was wrong; that it fostered sham agreements with “volunteers;” and that it unfairly penalized female homemakers by refusing to recognise the value associated with the extra hours they were forced to devote to homemaking.

LOSSES PRIOR TO TRIAL: PAST LOSS OF HOUSEKEEPING EXPENSES

10. We deal here with a plaintiff who has suffered an impairment of her housekeeping ability. Whether and how he or she is compensated depends upon the nature of the loss being claimed.

The Plaintiff Has Paid for Independent Outside Services

11. The law is clear that expenses that are actually incurred by the plaintiff to purchase outside, independent housekeeping expenses are, if reasonable, recoverable as special damages. Usually, however, plaintiffs do not or have not purchased such services (most often because they lack the funds so to do).

The Plaintiff Has *Not* Paid for Replacement Services, Either Because He or She Struggled On, or Because Assistance was Obtained from Family Members or Friends on a Volunteer Basis

12. In the days before *Daly* and *Carter v. Anderson* (1998) 168 NSR (2d) 297 (CA) (“*Carter*”), the fact that someone voluntarily assisted the plaintiff in the performance of his or her household tasks was usually considered to be unrecoverable. It was a gift volunteered by a third party, who had no claim against the defendant. Similarly, if the plaintiff simply tried to do the work him- or herself, no award was made (outside of the normal award for pain and suffering).
13. However, the law evolved, first in England, then in Canada (with the acceptance here of the *Daly* reasoning). In *Donnelly v. Joyce* [1973] 3 All ER 475 (CA) the English Court of Appeal held that notwithstanding that services had been volunteered by a third party, it was *the plaintiff* who had suffered a loss. The plaintiff’s loss was “the existence of *the need for* those ... services.”³ That being the case, it did not matter whether, in supplying

³ Per Megaw, LJ at p.480 (emphasis added).

that need, the “cost” (*i.e.* the labour) was borne by the plaintiff, or by his or her friends or relatives. As the same Court later observed in *Daly*, it was in fact immaterial whether the plaintiff got someone else to do his or her work, or simply struggled on as best he or she could. In either event, so long as there was a disablement or impairment of his or her ability to do the work there was an entitlement to claim damages.⁴

14. This reasoning has been accepted in Canada, perhaps first in the decisions of the Saskatchewan Court of Appeal in *McCallum v. Ritter* (1990) 72 DLR (4th) 49 (Sask CA)⁵ and in *Fobel v. Dean* (1991) 83 DLR (4th) 385 (Sask CA);⁶ *Cairns v. Harris* [1994] PEIJ No. 25 (CA).
15. It is clear then that the loss of capacity to perform housekeeping tasks is to be compensated, and is to be compensated *separately*, regardless of whether or not replacement help has actually been paid for prior to trial.⁷

Valuing the Loss: General or Special Damages

16. Assuming that the plaintiff has not paid for replacement services (either because others stepped in, or because he or she struggled on without help), the question becomes this: how is such a “loss” (that is, the “need for those services”) to be assessed? Is it a claim

⁴ *Daly v. General Steam Navigation*, per Bridges, LJ at p.701.

⁵ At DLR (4th) at 51.

⁶ At DLR (4th) 400-401.

⁷ *Carter v. Anderson* (1998) 168 NSR (2d) 297 (CA); *Miller v. Folkertsma Farms Ltd* (2001) 197 NSR (2d) 282 (CA) at para.49; *Leddicote v. Nova Scotia (AG)* (2002) 203 NSR (2d) 271 (CA) at para.51. Of course, the question of whether or not the claim is supported *on the evidence* is a separate issue: the mere fact that there has been a *physical* injury or limitation does not, in and of itself, translate automatically into an impairment of the *capacity* to perform housekeeping services (and hence, automatically into an award): see *Leddicote, ibid.*, at para.71 for this important observation, one often forgotten by plaintiff’s counsel.

for general damages, or for special damages? The answer, at least in Canada, depends on whether the services were performed by others or by the plaintiff.

17. The origin of the distinction is found in the English Court of Appeal's decision in *Daly*. That case involved a 34-year old woman who had two children, aged 10 and 11. Her injuries were reasonably severe, and left her unable to do many of the housekeeping tasks that she had done in the past. Her husband and daughter pitched in; and she struggled on as best she could with the rest. The trial judge awarded her £2,691 for her past loss, calculating the loss on the basis of the value of the work performed for her by her husband and daughter. The Court of Appeal held that this was the wrong approach. It was incorrect to value "what is essentially an element of the plaintiff's pain and suffering and loss of amenity caused by the additional difficulties she has had in doing her housekeeping work ... [by taking a figure] which it would have cost her to employ someone whom she has not in fact employed."⁸
18. The correct approach was to ask "to what extent the difficulties which the plaintiff had to had to contend with in performing her housekeeping duties in the face of the disabilities from which she suffered, ought to have increased the sum awarded to her for pain and suffering and loss of amenity."⁹ However, since the Court of Appeal considered the trial judge's award of £8,000 for pain and suffering to be "rather parsimonious," it was able to support the trial judge's award for past lost housekeeping by suggesting that if it were made part of the overall general damage claim the "global figure" was ultimately correct.
19. The decision in *Daly* has been subsequently interpreted by Canadian courts as representing a case where the plaintiff continued to struggle with her household tasks (even though on the facts it is clear she in fact received help from her husband and

⁸ *Daly*, per Bridge, LJ at p.701h-j.

⁹ *Ibid.*, at p.702a-b.

daughter). In such a case, where the claim relates “to difficulty in actual performance,” the plaintiff’s claim is for general damages only.¹⁰

20. On the other hand, where replacement services have in fact been provided (even if “for free”) by someone else, then the loss becomes one of special damages (or at least, *pecuniary* general damages).¹¹ And, as noted by Huddart, JA in *McTavish v. MacGillivray* [2000] BCJ No. 507 (BCCA), when friends or family members “by their gratuitous labour replace costs that would otherwise be incurred or themselves incur costs, their work can be valued by a replacement cost or opportunity cost approach as the case may be. That value provides a measure of the plaintiff’s loss.”¹²

Quantification: The Lump Sum Approach

21. Appellate courts have indicated that trial judges should, in normal course, separate an award for general damages for past loss of housekeeping ability from the award for general damages for pain, suffering and loss of amenities (or at least make clear that the former is a specific consideration in assessing the latter).¹³
22. The courts have been equally clear, however, that the existence of a physical injury alone does not *ipso facto* translate into an award. Not all physical limitations caused by an

¹⁰ See *Roberts v. Johnstone* [1988] 3 WLR 1247 (CA) at 1259-60; and see *McCallum* at p.56 and *Beam v. Pittman* [1997] NJ No. 8 (Nfld CA) at paras.34-38.

¹¹ *Ibid.*

¹² See *McTavish* at para.68.

¹³ See, for example, *Carter v. Anderson* (1998) 168 NSR (2d) 297 (CA); *Miller v. Folkertsma Farms Ltd* (2001) 197 NSR (2d) 282 (CA) at para.49; *Leddicote v. Nova Scotia (AG)* (2002) 203 NSR (2d) 271 (CA) at para.51.

injury translate into an impairment of the ability or capacity to perform housekeeping tasks; and where there is not such impairment there should be no award.¹⁴

23. Often, however, there is some evidence that the plaintiff is, because of his or her injuries, not able to do as much housekeeping as formerly; or that it takes longer to do what is done. The evidence may be, however, vague, and not supported by any objective evidence. In such cases the courts have tended to avoid actuarial approaches, and opt instead for a lump sum award (which is often said to include “an allowance” for gross up).¹⁵
24. The awards under such a category are generally relatively low, a fact which should not be surprising, since it is premised on a fact scenario in which the plaintiff is in fact doing the work (albeit slowly or with pain). In *Lazeo v. Hill* [1994] BCJ No. 67 (SC) the court awarded a plaintiff \$35,000 for non-pecuniary general damages, an award which included a component for her increased difficulty in doing her housework. In *Wall v. McGrath* [1996] NJ No. 94 (TD) the plaintiff “either struggled for herself or had her husband do the work;” she was awarded \$6,000 for “pre-trial loss of ability to perform household tasks.”¹⁶ In *Plummer v. Irving Ltd* (2000) 184 NSR (2d) 364 (TD) the plaintiff suffered a minor injury, for which he received \$8,500 general damages and \$1,000 for the associated limitations in his ability to perform household tasks. In *Beam v. Pittman* [1997] NJ No. 8 (Nfld CA) the plaintiff, who developed fibromyalgia, was able to do her light housework, though heavy housework lead to muscle spasms and increased pain. The Newfoundland Court of Appeal held that an award in the range of \$4-\$6,000 would have been appropriate for such increased difficulty in performing the work. And in *Kroeker v. Jansen* (1995) 123 DLR (4th) 652 (BCCA) the BC Court of Appeal reduced an award of \$23,000 to \$7,000, in a case involving a plaintiff whose husband had taken over a few of

¹⁴ The best current exposition of this point is found in Saunders, JA’s decision (concurrent with by the court) in *Leddicote v. Nova Scotia (AG)* (2002) 203 NSR (2d) 271 (CA) at paras.36-52; 69-72.

¹⁵ See, for example, *Cashen v. Donovan* (1999) 173 NSR (2d) 87, and *Baker v. O’Hanley* (2001) 191 NSR (2d) 179 (TD), at paras.52, 60.

¹⁶ *Ibid.*, at para.69.

the tasks that she would otherwise have done, where the evidence indicated that in most respects they did the tasks together.

25. On occasion, courts have awarded higher figures for what appear to be non-pecuniary general damages in respect of impaired housekeeping ability. For example, in *Brouwer v. Grewal* [1995] AJ No. 535, a case involving a husband and wife who were both injured, the court found that the accident had deprived the wife of the assistance she normally would have received from her husband. She herself was restricted in what she could do, and could not garden. The trial judge awarded her \$40,000 in general damages for her loss of homemaking capacity.¹⁷ In *Paine v. Donovan* [1994] PEIJ No. 40 (TD) the plaintiff's capacity to perform household tasks was reduced by 75%. She initially received help from her husband and two daughters, but the later eventually moved out of the home. She was able to do light housekeeping, but had difficulty with complicated meals or heavy housekeeping. She was awarded \$35,000 non-pecuniary damages for loss of pre-trial housekeeping abilities.¹⁸
26. In *Hill v. Ghaly* [2000] NSJ No. 215 (TD) the plaintiff's injuries were said to have been similar to those of the plaintiff in *Carter*, but counsel provided no evidence on quantum. For example, no actuary gave evidence. There was evidence that while she had difficulty around the home, she was doing more that she had been earlier. Justice Davison fixed the future loss of housekeeping services at \$25,000 (rather than the \$45,000 set in *Carter*). Similarly, in *Baker v. O'Hanley* (2001) 191 NSR (2d) 179 (TD), the plaintiff had had two operations, involving nail fixation, to repair a fractured tibia/fibia. The evidence established that she had difficulty kneeling and squatting; and hence was restricted in her ability to do certain household tasks (such as cleaning bathtubs and floors); and was slowed down in her ability to perform other such tasks. The trial judge awarded a lump sum of \$20,000, which included an allowance for gross up.

¹⁷ *Ibid.*, at paras.45-46.

¹⁸ *Ibid.*, at paras.472-73.

Quantification: Pecuniary General Damages

27. When pre-trial housekeeping services have been provided by friends or family, several issues arise:
- a. How does one value those services?
 - b. Should one discount the services provided by a spouse (or child) by some degree to recognize that some part of the services provided merely represent a discharge of their *own* responsibility to the home?

Valuing the Replacement Services

28. While there are theoretically (at least in the world of economists) a number of different ways to value homemaking services, two are most often discussed by the courts: lost opportunity costs; and replacement cost. Of these, replacement cost is by far the most often used.

Lost Opportunity Cost

29. A valuation based on lost opportunity cost will value the replacement labour on the basis of the value of what the service provided *could* have been doing had he or she not chosen to provide housekeeping services instead. For example, if a spouse gives up a part-time job (or a job opportunity) to provide housekeeping services, an award could be based on what the spouse would have earned had he or she taken the job.¹⁹

¹⁹ This was suggested in *Daly* at p.701-702. See also *Roach v. Yates* [1937] 3 All ER 442 (CA), where the wife and sister-in-law of a gravely ill man gave up their jobs to nurse him; damages based on their foregone income were awarded.

30. The difficulty (and risk) of such an approach, however, is that “the opportunity cost to the volunteer may bear no relationship to the value of the services provided.”²⁰ To take an extreme example, the opportunity cost of a doctor who have up her practice to care for her injured husband would far outweigh the reasonable cost of acquiring competent outside help to provide the household services normally provided by the husband.
31. Accordingly, while in certain cases a court might accept a claim based on lost opportunity cost where the period of time is relatively short, *or* the opportunity cost does not differ much from the replacement cost, it is more likely to value the loss through reference to what it would have cost to replace the lost service on the open market. Most appellate courts in Canada, when faced with the issue of valuing the impairment of household services (particularly in cases of future loss), have adopted some form of the replacement cost analysis.²¹

Replacement Cost

32. Valuing a claim for diminished housekeeping capacity, particularly in the case of claims for future loss, requires the following determinations:
- a. How many “extra” hours of housekeeping capacity were made necessary by the injury?
 - b. How long should the loss be calculated; and
 - c. How should the replacement cost of those hours be measured?

²⁰ *McTavish*, per Huddart, JA, at para.31.

²¹ See, for example, *Fobel* at pp.398, 402-404; *Carter* at pp.307-308; *McTavish* at paras.67-68.

A: Determining How Many Extra Hours are Necessary

33. How does one determine the number of hours “necessary” to replace the lost or impairment homemaking hours of the plaintiff? Even a casual review of the caselaw indicates the existence of three important sources of evidence as to the number of lost housekeeping hours:
- a. The plaintiff (and his or her relatives or friends);
 - b. Statistical evidence (particularly from Statistics Canada) as to the “average” number of hours spent by people in various circumstances on unpaid household work; and
 - c. Expert evidence (usually but not always from actuaries) as to the statistical evidence, and as to calculations of the resulting loss.
34. As was noted in *Simmie v. Parker* [1994] AJ No. 908 (QB) at para.12:
- “At a minimum, the Court requires [statistics from] Statistics Canada in this area for the age and circumstances of a particular Plaintiff, whether married, single, with a family or dependents ... It is essential [too] that plaintiffs provide specifics as to the tasks and responsibilities there were normally undertaken prior to the accident and those that were attempted post-accident which the Plaintiff is unable to continue in the time required to undertake these tasks and whether any outside help was required. ... If the work is undertaken by other members of the family, it would be of some assistance to have those members provide evidence as to the specific things that they have undertaken as a result of the injuries to the Plaintiff.”
35. The use of such evidence is not, however, free from issue.

36. First, let us take the evidence of the plaintiff. The plaintiff may say that prior to the accident he or she could do their housework in 2 hours, but that it now takes 4 hours.
37. One should be aware, however, that assessments of time, particularly when they are based on estimates as opposed to daily diaries, are notoriously unreliable. Studies have suggested that people who are asked to estimate the amount of time they spend on a task generally overestimate the time required by 20%.²² A diary is a more accurate method of tracking time, but since plaintiffs rarely keep time diaries before they are injured, one is still left with the difficult task of determining how long the tasks in question took before the accident.²³
38. There is a related problem, which stems from the fact that the time spent on homemaking depends on two things: the plaintiff's gender; and the plaintiff's position in his or her life cycle. Statistical surveys demonstrate again and again that the number of hours spent on homework:
- a. Is greater for women than for men;
 - b. Is greater for women who are at home as opposed to being employed full- or part-time outside the home; and
 - c. Is greater when there are small children in the home.
39. Accordingly, the fact that a woman might not be able to complete two of the four hours housework required of her when her children are young does not mean that she will not be able to complete the two hours required of her later, when her children are grown.

²² Cara L. Brown, "Exposing and remedying vexing problems in Housekeeping Claims for Personal Injury and Wrongful Death Cases: An Economist's View," (1997) 19 *Advocate's Quarterly* 83 at 91-92.

²³ In *Labbee v. Peters* [1997] AJ No. 176 (QB) McIntyre, J made the following comment at para.57: "Because families do not attribute financial value to household services, it is difficult to reconstruct the time spent. Time clocks are not punched. Pay cheques are not issued."

40. Statistics (many of which are provided by Statistics Canada) can be useful in providing insight and evidence in respect of some of these issues. For example, in *Brouwer* the court was not willing to accept an expert's evidence that a plaintiff would still spend 36 weeks per week in housework once she returned to the workforce after her children were in school, in the face of Statistics Canada surveys that indicated women in such positions generally spent *less* time on housekeeping.²⁴
41. Having said that, one must also take care when dealing with statistics. One needs to know the definitions employed²⁵ One also needs to know how the information was collected, and what the rate of reply was.²⁶ Courts do on occasion express concern about a too-rigid reliance upon statistics. As Justice Goodfellow noted in *Cashen v. Donovan* (1999) 173 NSR (2d) 87 (TD) at p.129:
- “There seems to be a growing practice of assuming that blind reliance can be placed upon Statistics Canada or other statistical information that is not tested by cross-examination. Often, the statistical information is based upon surveys that are advanced and collected in part, to advance political agendas ... [hence] some caution should be exercised into readily accepting Statistics Canada and other sources as gospel and in replacement of evidentiary base in each case.”
42. Finally, there is the issue of efficiency. The plaintiff may say that there are some things that she used to be able to do (washing walls and ceilings, for example), but that she

²⁴ See para.50 of the decision.

²⁵ For example, what do the words “married” or “unpaid work” or “housework” mean in the context of the statistical analysis which employs them.

²⁶ For example, was the information collected by telephone survey based on estimates (an approach which, as noted above, tends to overemphasis the time spent on socially valued tasks), or on diaries? Is it based on independent observation, or subjective report?

cannot do at all. It would not be appropriate, however, to use the plaintiff's estimate of the length of such tasks took her as a basis for calculating the number of replacement hours required from an outside cleaner. This is because the outside experts whose work is to be employed are presumably better skilled and more efficient (since that is all they do), and would accordingly take *less* time to do the necessary replacement work. Such outside workers might, for example, be able to achieve in one hour what the plaintiff could achieve in two. Hence one needs to know not only what the plaintiff says she cannot do, but how long the outside service provider (as opposed to the plaintiff herself) would take to do the task or tasks in question. In such a case to base an award on the length of time it would have taken the plaintiff to do the task, as opposed to the outside service provider, would be to overcompensate the plaintiff.²⁷

43. Some of these issues also arise when determining the length of the future loss, and they will be discussed in further detail below. However, it should be noted here that this area appears to be resistant to equity arguments. That is, the fact that men and women “should” contribute equally to the home’s household services cannot be used to limit a plaintiff’s claim for lost housekeeping services. For example, in both *Fobel* and *DiGiacomo v. Murphy* [1995] BCJ No. 1886 (SC) the court dealt with woman in traditional relationships which had them doing virtually all of the housework before the accident. In neither case was the plaintiff’s claim defeated or limited because she was doing more than her “fair share” of the housework; or that she was attempting to do work that in terms of gender equity ought to be done by the husband.

B: Determining How Long the Loss Should be Calculated (the Termination Date)

44. One issue that arises concerns the projected termination date of the plaintiff’s loss of housekeeping services: should it be for the rest of the plaintiff’s life? Or should it be for some lesser period? And if the latter, how does one determine what that lesser period should be?

²⁷ See, for example, *Wall v. McGrath* at para.71; and *Smith v. Penney* [1999] NJ No. 122 (TD) at paras.102-103.

45. One approach is to say that since the plaintiff's loss flows from an impairment of a physical ability; and since that ability will, by definition, be permanent (*i.e.* it will last the plaintiff's lifetime), then the period of the loss should match the plaintiff's lifespan.²⁸ In *Dillon v. Kelly* (1996) 150 NSR (2d) 102 (CA), for example, the plaintiff, a 42-year old mother of 4, was at trial awarded 23 years of lost future housekeeping to age 65.²⁹ On appeal, however, the late Justice Pugsley³⁰ stated that there was "no basis in reason, or in the evidence, to terminate the assessment of the amount of future care at any point before her life expectancy is reached."³¹ His Lordship accordingly increased the period of future loss to 37.75 years, being the balance of the plaintiff's life expectancy.³²
46. It is respectfully submitted, however, that this approach is neither logically nor factually appropriate. There are at least two principle reasons for saying this.
47. First, logic as well as statistical studies suggest that as people age their ability to perform housework (and in particular, heavy housework) decreases over time. People become weaker as they age; and they become increasingly subject to an expanding range of physically disabling (or at least limiting) conditions such as osteoporosis, arthritis or Alzheimers. All of these factors increase the likelihood that the plaintiff, even if he or she had not been injured, will require some assistance in any event as he or she ages. Some

²⁸ In *Fobel Vancise*, JA awarded a loss based on the plaintiff's life expectancy without addressing the issue of whether this was in fact appropriate: see p.404.

²⁹ See the Court of Appeal decision in *Dillon* at p.123.

³⁰ Roscoe and Matthews, JJ.A. concurring.

³¹ *Ibid.*, at p.123.

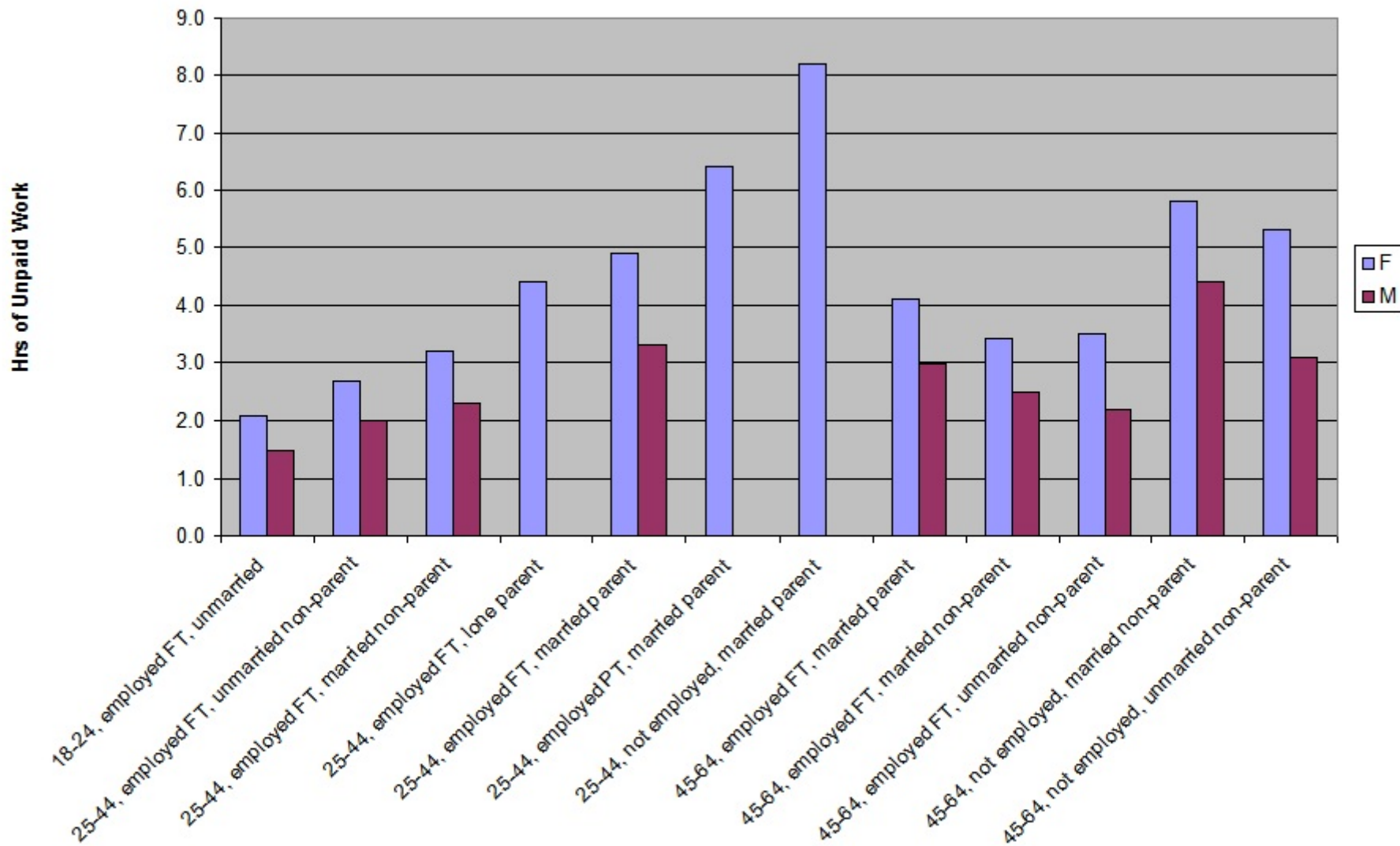
³² It is noted that in *Daly* the English Court of Appeal seemed to have accepted the trial judge's conclusion that the plaintiff should have her loss calculated on the basis of her life expectancy: see p.701. However, the issue was not really addressed in that case, since the issues before the Court related to the viability of the claim (and its proper characterization as either general or special) rather than to whether the claim should run for the plaintiff's lifetime or not.

reduction must accordingly be made in the future award to take account of this likelihood, since the defendant is not obligated to compensate the plaintiff for a loss that would have occurred in any event.

48. Second, logic as well as statistical studies also suggest that the amount of housekeeping required of a person is a function of two things: their gender; and their position in the “normal” life cycle. As the chart³³ on the next page suggests, it is likely that a female plaintiff who is married, and is a full-time homemaker with young children, will need to devote more time to unpaid work in the home than will a woman who is employed full-time outside the home and who has no children (or whose children have grown up and left the home). Accordingly, the fact that the former is not able to do all of the housekeeping required of her in a day does not necessarily mean that she would continue to experience a loss once her children left the home. For example, the loss of a homemaker (with young children) who can do only 2 of the 4 hours housekeeping required of her may diminish or evaporate when her children leave, if their departure reduced the required housekeeping to 2 hours.

³³ The source for which is Statistics Canada, General Social Survey , “Overview of the Time Use of Canadians in 1998,” Catalogue No. 12F0080XIE, Table 3. It should be noted that “unpaid work” is defined in the study to include “all work directed toward non-market oriented activity. It comprises household work and related activities (including shopping and child care), *as well as* social support, civic and voluntary activities” (emphasis added). The latter presumably accounts for the *increase* in unpaid activity after the children begin to leave the home, but before the respondents retire. If true, the fact that there is an increase (after the earlier decrease) would not reflect an increase in housekeeping in the later years. Rather, it would reflect an increase in outside volunteer or social activities. This accordingly may be an example of the care which must be devoted to the analysis of statistics.

Average Time Spent on Unpaid Work Canada 1998



49. A review of the case law suggests that the courts are sensitive to such arguments, and have on occasion used them to reduce the period of future expectancy to something less than the plaintiff's life expectancy.
50. For example, in *Carter v. Anderson* (1998) 168 NSR (2d) 297 (CA) Justice Roscoe noted that the existence of children increased the need for housekeeping services; and that this need would decrease over time as the children aged. She accordingly restricted the claim to 15 years.³⁴
51. Similarly, in *Brouwer v. Grewal* [1995] AJ No. 535 (QB), the plaintiff had four young children (all 5 or under). The trial judge was satisfied that if the plaintiff "were in a position that where she had no children at home now she could carry out all housework required of one parent." The plaintiff was accordingly awarded a future loss calculated on the basis of 10 hours a week *until* the youngest entered school; and thereafter 5 hours a week until the youngest left high school, when it would cease.
52. In *McTavish* the BC Court of Appeal had no difficulty with a trial judge's decision to terminate the loss at age 60 because, in the trial judge's view, the plaintiff "would be able to perform what services she then needed by herself."³⁵
53. Finally, in *Beam v. Pittman* [1997] NJ No. 8 (Nfld CA) the Court of Appeal agreed with the trial judge's conclusion that the plaintiff's loss should only be calculated to age 60, since by that time she "would not have been doing her own housekeeping in any event." This was, as Cameron, JA noted, "merely a reflection of the principle that the plaintiff should not be placed in a better position than she would have been had the injuries not occurred."³⁶

³⁴ See *Carter* at p.307. See also *McTavish*, where the trial judge awarded damages up to age 60, after which age he assumed the plaintiff "would be able to perform what services she then needed by herself:" per Gibbs, JA in the Court of Appeal, at para.5.

³⁵ See para.5 of the decision.

³⁶ *Ibid.*, per Cameron, JA at para.50.

C: Determining the Hourly Rate to be Assigned to the Housekeeping Services

54. The determination of the hourly rate to be employed can be a difficult process, in part because housekeeping services are available in several different ways:
- a. Private employment in a person's home;
 - b. "Private" cleaners who come to the home on a per visit basis; and
 - c. Commercial cleaners employed by a cleaning companies or agencies.
55. The "rate" attached to each of these ways of providing household services is different.
56. First, statistical surveys suggest that housekeepers employed in private homes in general earn less than light cleaners (\$7.21 vs \$11 in 1996).³⁷ Second, the rate charged by companies or agencies is generally higher again. One study, for example, noted that the average province wide agency rate for commercial household services in Alberta in 1997 was in the vicinity of \$14.28.³⁸
57. There are conceptual difficulties with using any of these types of rates.
58. For example, it might not be appropriate to use the rates for private employment in the home, since those rates are generally premised on full-time employment in the home, whereas a plaintiff may need only one or two hours' service a day.³⁹ Nor is it appropriate

³⁷ Brown (1997) at pp.108-109.

³⁸ Brown (1997) at p.106.

³⁹ It is for this reason that using the statutory minimum wage might not be appropriate either, since that wage is (presumably) premised on full-time employment.

to use the charge out rate of commercial agencies, since they include the overhead of advertising, office staff and so on.

59. The courts, when they have used an express hourly rate, have tended to choose rates somewhere in the higher end of the range between the two extremes. For example, *Carter* (1998; NS) used a rate of \$10.14 an hour for 5 hours a week; *Fobel* (1991; Sask) used \$5.50 an hour for 15 hours a week; in *Kroeker* (1995; BC) the trial judge used \$10 an hour; and in 1994 the Alberta Court of Appeal suggested a rate of \$8-\$8.50 at a time when the average agency rate was \$14.28.⁴⁰ However, the courts also sometimes avoid the issue by simply fixing an *annual* “cost” for such services, rather than fixing a particular hourly rate. So, for example, *Dillon* (1996; NS) chose a rate of \$4,000 a year; *Beam v. Pittman* [1997] NJ No. 8 (Nfld CA) chose an rate of \$4,000 a year.

The Importance of Providing Evidence

60. The fact that evidence surrounding loss of housekeeping services may be difficult to gather or present may lead some counsel to rely on submissions alone, as if the “fact” that the plaintiff says he or she has difficulty is enough to get the claim within the “authority” of cases such as *Carter*. Such seems to have been the approach in *Hill v. Ghaly* [2000] NSJ No. 215 (TD). The plaintiff’s injuries were said to have been similar to those of the plaintiff in *Carter*, but counsel provided no evidence on quantum. For example, no actuary gave evidence. There was evidence that while she had difficulty around the home, she was doing more that she had been earlier. Justice Davison fixed the future loss of housekeeping services at \$25,000 (rather than the \$45,000 set in *Carter*).⁴¹

⁴⁰ Brown (1997) at p.106.

⁴¹ See also *Miller v. Folkertsma Farms Ltd* (2001) 197 NSR (2d) 282 (CA), where the Court of Appeal upheld a trial judge’s award of \$20,000 for past and future housekeeping services where there was evidence that the plaintiff had difficulty performing certain tasks; and required assistance in others.

61. Moreover, the approach of counsel in *Hill* (that is, to assume that physical injury translates automatically into an award of some type) was emphatically rejected by the Court of Appeal in *Leddicote v. Nova Scotia (AG)*.⁴² The court there held (in the decision of Saunders, JA) that the inquiry in such claims had to focus not on the injury itself, but “on the repercussions of such injury, that is to say whether their effect has impaired the claimant’s ability to complete the tasks and fulfill the responsibilities undertaken around the home before the accident.”⁴³ Where the evidence did not support the existence of such an impairment, there was no room for an award.

Gross-Up

62. Where the court is satisfied with the sufficiency of the evidence, and chooses to assess the loss in an actuarial fashion, it will usually include an amount for tax gross-up. The actual rate depends on the plaintiff’s tax bracket (and Ottawa’s current budget), but can be expected to add at least 20%-25% to the final award.

Putting It All Together

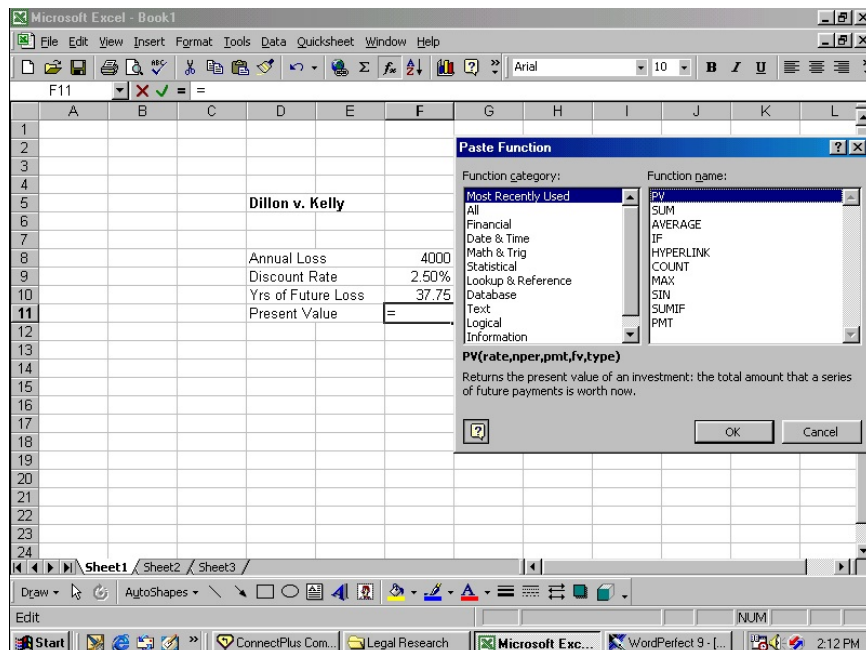
63. If one has:
- a. The number of hours of “lost” housekeeping that is performed by others; and
 - b. The rate for such hours,

one can then calculate the annual loss. Once one has the annual loss, one can calculate the present value (lump sum) of the future loss, using the appropriate discount rate (2.5%) and the number of years of future loss. By way of example, we will use the figures determined by the N.S. Court of Appeal in *Dillon* (\$4,000/yr for 37.75 years).

⁴² (2002) 203 NSR (2d) 271 (CA).

⁴³ *Ibid.*, para.49.

64. The formula is available in most if not all spreadsheet programs. (It is called “PV” in Excel.) An example appears this page.
65. Once the appropriate values are plugged into the formula, the result – \$97,006 – is obtained.
66. The Court of Appeal in *Dillon* indicated that the final figure had to be grossed up by an appropriate figure. Using 23%, we arrive at \$22,311, for a total future loss in respecting of housekeeping services of \$120,318. These calculations, if no other, ought to demonstrate how significant a claim for loss of housekeeping can be.



PART II: CLAIMS FOR LOSS OF HOUSEKEEPING/VALUABLE SERVICES IN FATAL INJURY CASES

67. Under s.5(1) of the *Fatal Injuries Act*, RSNS 1989, C.163, the court may award “such damages as [it] think proportioned to the injury resulting from such death to the persons respectively for whose benefit such action was brought.” Under s.5(2), “damages” are defined to include “pecuniary and non-pecuniary damages.”
68. As noted at the very beginning of this presentation, the loss by a working husband of a homemaker wife *was* considered a pecuniary loss. However, the only reported case in Nova Scotia dealing with such a claim was rendered before *Daly* became so current.
69. In *Atkinson v. Whiting* (1987) 79 NSR (2d) 189 (TD) a 60-year old man claimed his pecuniary loss as a result of the death of his 61-year old wife. Justice Hallett, as he then was, noted while the deceased had not been working at the time of the accident, the plaintiff had nevertheless sustained a real loss giving rise to pecuniary damages: “The loss of his wife’s services as a homemaker is just as real a loss as occurs when an income-earning husband’s death gives rise to a claim for ... loss of part of his income.”⁴⁴
70. Although the plaintiff failed to call any evidence as to the cost of engaging a full-time homemaker in rural Nova Scotia, Justice Hallett was still prepared to make an award. He took into account the possibility that the deceased might have become disabled in any event; and that the plaintiff might remarry in the future. He awarded \$20,000 for the loss of the deceased’s housekeeping abilities.⁴⁵
71. The development of the loss of housekeeping claim in non-fatal injury cases in recent years, and the acceptance of *Daly* by the N.S. Court of Appeal in *Carter*, raises the question of how such claims may be handled under the new “regime” after *Carter*. Given that Justice Hallett in *Atkinson* accepted all of the elements necessary to establish a *Daly*-

⁴⁴ See para.31.

⁴⁵ See paras.32-33 of the decision.

type analysis (evidence of commercial replacement services, mortality and remarriage statistics, actuarial evidence), it is likely (at least based on developments in other provinces) that awards for loss of housekeeping services will increase in the future.⁴⁶

72. Such a development can be expected for three reasons.
73. First, the valuation of a loss of unpaid housekeeping services provides a new head of damage in those cases involving “traditional” families where one spouse remained at home full time. Traditionally, such a case would generate a relatively small award in respect of the loss of the spouse who remained at home, because the principle focus was on the unquantifiable loss of companionship. Now that the courts are prepared to value unpaid housekeeping services *as if they were paid for* in the open market, surviving spouses now have a new and potentially significant head of damage.
74. Second, this new form of valuation of household services is applicable *even* in the case of dual income families where both parents work. Now the loss of the surviving spouse will involve not only the loss of the deceased’s supporting income (loss of dependancy), but also a loss of their contribution to the unpaid housekeeping services of the family. Even if the number of hours devoted to housework by such spouses is less than when they stay at home, there is still a contribution – a contribution that can now be valued commercially.
75. Finally, the fact that a loss of housekeeping is valued as *an expense* rather than as lost income means that gross-up is applicable. Applying a gross-up to compensate for the tax consequences of an award for loss of housekeeping services will increase even further the amount otherwise recoverable.

⁴⁶ While I am aware of no reported cases on this point in New Brunswick, Prince Edward Island or Newfoundland, I suspect that they would/will follow suit as well. Note that this approach was followed, in a non-fatality, disability case, in *Johnston v. Murchison* [1993] PEIJ No. 134 (TD), where the court awarded \$162,635.00 for loss of housekeeping capacity in the disabled wife. However, this decision was overturned on appeal on the grounds that the plaintiff had failed to prove causation; this issue was not addressed by the appellate division: see *Johnston v. Murchison* (1995) 112 Nfld & PEIR 181 (PEISC, AD).

76. While there are no reported cases that I am aware of in Nova Scotia, Prince Edward Island, New Brunswick or Newfoundland that have had to deal with the *Daly* analysis in a fatal injuries case, developments in other provinces suggest that this prognosis will be borne out.
77. For example, in *Wilson v. Martinello* [1993] OJ No. 3361 (OC(GD)) the plaintiff, aged 44, claimed, *inter alia*, for loss of housekeeping services resulting from the death of his 41-year old wife. In addition to working 30 hours as a teacher's aid, and 5 hours as a tutor, she had performed almost all of the household tasks. They had been married for 22 years, and had two daughters, only one of whom was living at home at the time. (She was 15 years old.) The plaintiff worked outside the home as a teacher.
78. The trial judge heard evidence from a commercial maid (who had provided services in the plaintiff's house) to the effect that it would cost \$600 a month (at a rate of \$15 an hour) to keep the house clean, and the laundry and ironing done. The trial judge thought that this figure was questionable, given that there were only two people living in the house ("and from the evidence, not for very long in each day"). He was held that since spouses had a *joint* responsibility for child care and house management he could be expected to assume some of it himself. The judge accordingly held that the plaintiff was entitled to calculate his future loss of housekeeping services on the basis of \$500 per month, or \$6,000 per year. (At \$15.00 an hour, this worked out to approximately 1 hour a day.) The future loss was calculated to be \$109,000 (exclusive of gross up, which was later calculated).⁴⁷
79. In *Taguchi v. Stuparyk* [1994] AJ No. 28 (QB), var'd [1994] AJ No. 464 (CA); leave to appeal ref'd [1995] SCCA No. 258, the 43-year old plaintiff sought damages for the death of his 38-year old wife. They had been married for 8 years. They had no children, and had never intended to have any. They were both employed at the time of the accident.
80. The trial judge considered the contingencies. Insofar as they affected the housekeeping claim, he considered that the likelihood of the plaintiff forming a relationship with

⁴⁷ See paras.40-45.

someone who would “at least partially” replace the loss of housekeeping services provided by his wife to approach “the normal range.”⁴⁸

81. After hearing evidence that the plaintiff had hired a teenage to assist him occasionally with the housework (at \$7.00 per hour); and that the local commercial rates for maids ran between \$21 and \$23.00 per hour, trial judge chose an hourly rate of \$8.50 per hour prior to trial, and \$12.00 per hour after trial.⁴⁹ The judge then set the pre-trial loss of housekeeping at \$18,870, and the future loss at \$184,140. Unfortunately, he did not explain in his reasons how he reached that figure; how long the loss was calculated; nor how many hours per week were being used.⁵⁰
82. In *Labbee v. Peters* [1997] AJ No. 176 (QB) the deceased was a 54-year old farmer and skilled mechanic. The trial judge did not accept his surviving wife’s estimate of the time he spent on duties around the house (70 hours a year) because she did not keep track of his time. Nor did he accept the average figures generated by Statistics Canada (400 until age 59, and 284 thereafter), because he was not “average.” He settled on 300 hours per year, at \$10.00 per hour.⁵¹

⁴⁸ See para.27 of the decision. Given the nature of housekeeping services, it is difficult to understand why the new partner would only “partially” replace the deceased’s services. One would have thought in the circumstances that the replacement would be total.

⁴⁹ The Court of Appeal subsequently ruled that there was no reason to use a different post-trial rate, and reduced this to \$8.50.

⁵⁰ With respect, this figure seems inordinately high. There were no children of the marriage, and both had worked. Moreover, the “loss” to the husband was surely not the *entire* amount of the deceased’s household services, but only that time over and above the time he would have in ordinary course spent on his own needs.

⁵¹ See para.68 of the decision. A final figure is not reported (nor are the number of years of future loss set out), since the trial judge sent the matter back to the actuaries to calculate the total award. However, a PV calculation reveals a lump sum of \$37,000 if the loss was calculated for 15 years; \$46,700 if 20; and \$55,200 if 25.

83. Finally, in *Dhillon v. Mischki* [2000] BCJ No. 260 (BCCA) the Court of Appeal heard an appeal by the plaintiff from a jury award. The 41-year old plaintiff had claimed, *inter alia*, the value of lost housekeeping services arising from the death of his 37-year old wife. They had three teenaged children (at the time of the accident) who were in their late teens by the time of trial. The deceased had been hard working, both inside and outside the house. An actuary had valued the plaintiff's loss (based on 2.8 hours per day at \$10.75 until age 70) between \$68,000 and \$137,000 (depending on whether or not the contingencies of divorce or remarriage were factored into the equation). Using only the contingency of remarriage the result was \$77,000.
84. The jury awarded only \$3,800. The Court of Appeal called this "inexplicable," and perverse, and set aside the award. It fixed the plaintiff's loss at \$75,000.
85. What these decisions suggest is that when the issue does come up again in Atlantic Canada, one can expect a significant increase in this area of damages.
86. So, for example, in *Murray Estate v. Advocate Contracting* (2001) 195 NSR (2d) 313 (TD) the court awarded \$21,000 for past loss; and \$145,000 (including gross up) for future loss to a man who lost his spouse to a fatal accident.

SUMMARY

IN CASES OF PERSONAL INJURY

87. Where a plaintiff suffers personal injury that interferes with his or her ability to perform housekeeping or homemaking tasks, the following principles apply:
- a. With respect to pre-trial (*i.e.* past) losses,
 - i. If the plaintiff struggles on, then he or she is entitled to an award of general damages, under a separate heading;
 - ii. If a friend or family member steps in and takes over those tasks on a voluntary basis, the plaintiff is entitled to an award of *pecuniary* general damages. The award may be assessed by reference to (though not exclusive reliance upon) what those services would have cost had they been acquired on the open market; and
 - iii. If the plaintiff actually pays for outside, replacement services, then he or she is entitled to recover that payment as special damages (provided they are reasonable).
 - b. With respect to future losses,
 - i. If the evidence does not go beyond establishing that there has and will be an impairment in the plaintiff's ability to perform household tasks, a simple lump sum award may be made;
 - ii. If there is more detailed evidence concerning the particular tasks that the plaintiff cannot do; and there is admissible evidence as to the cost of those tasks in the open market; then the court may employ a more actuarial approach;

- iii. The loss will be calculated on the basis of an estimate of the number of hours a year “lost” by reason of the injury, multiplied by an hourly rate that will be less than commercial rate, but likely more than minimum wage;
- iv. The annual loss may be calculated on an actuarial basis (*i.e.* present value), for a number of years into the future;
- v. The number of years of future loss may be the life expectancy of the plaintiff, or some lesser figure (for example, till age 60 or 65); the latter is probably on balance the better approach, since it recognizes that the amount of work required of a homemaker rises and falls with the number of children in the house; their age; and whether or not the plaintiff works outside the home; it also recognizes that as people age they often require assistance in any event;
- vi. The fact that the plaintiff may not actually spend the award to acquire housekeeping services is wholly irrelevant, either as an absolute bar or as a contingency; he or she is entitled to the full amount of the award as otherwise calculated.

IN CASES OF FATAL INJURY

- 88. The *Daly* analysis will be applied in cases involving the loss of a spouse.
- 89. It will be applied regardless of whether the deceased was employed outside the home, or was a “stay-at-home” (though in the latter case the loss will in all likelihood be larger, to reflect the larger number of hours spent on housekeeping).
- 90. The analysis will be the same as that for a future loss of housekeeping claim in a personal injury case (as summarized above); and
- 91. The loss will be subject to gross-up.

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