RETHINKING PERSONAL INJURY DAMAGES: COMPENSATION FOR LOST CAPACITIES

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This article reexamines the debate about whether personal injury damages are awarded for loss of earnings or loss of earning capacity. It begins by analyzing the leading cases to see if a coherent approach emerges. Discovering none, it then turns to cases in three problematic areas—compensation to homemakers, for lost illegal income, and for lost business income. These areas reveal the unsatisfactory nature of both the loss of earnings and loss of earning capacity approaches. The author suggests a new conceptualization of the issue. It should be recognized that a tort victim frequently suffers the loss of a wide variety of capacities. Some of these have a market value, that is, people do commonly exchange their use for payment. These should be compensated as pecuniary losses. However, the loss of a capacity should be compensated, as a pecuniary loss, only to the extent that the plaintiff would have used it to perform economic activity. This approach is then applied to the three problematic types of case to achieve a more satisfactory solution.

L'auteur de cet article considère à nouveau la question de savoir si la raison de l'octroi de dommages intérêts pour blessure corporelle est la perte de gains ou la perte de la capacité de gagner des revenus. Elle commence par une analyse des arrêts qui font jurisprudence en essayant de voir s'il y a cohérence de vue. N'en trouvant pas, elle examine la jurisprudence de trois domaines qui présentent des difficultés, la compensation pour les femmes qui s'occupent de la famille, pour les revenus illégaux et pour la perte de gains dans les affaires. Dans ces domaines, on peut voir que la perte de gains comme la perte de la capacité de gagner des revenus ne peuvent, de par leur nature, offrir de solutions satisfaisantes. L'auteur propose une nouvelle conceptualisation de la question. Il faudrait alors reconnaître que la victime d'un délit subit la perte d'un grand nombre de capacités. Certaines ont une valeur commerciale, c'est-à-dire que les gens les offrent contre paiement. Il faudrait compenser celles-ci en les considérant comme des pertes pécuniaires. Mais on ne devrait compenser la perte d'une capacité que dans la mesure où le plaignant l'aurait utilisée pour une activité économique. L'auteur applique ensuite cette nouvelle méthode aux trois types d'arrêts qui présentent des difficultés afin d'obtenir une solution plus satisfaisante.

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Introduction

An award of damages in a tort action to recover for personal injury is typically divided into two broad headings—damages for pecuniary loss, and for non-pecuniary loss. Since the 1978 Supreme Court decisions in "the trilogy"[1] these two categories have been governed by different basic principles. In assessing damages for pecuniary losses, the objective is full compensation, that is, the court should attempt to put the plaintiff in the position that she would have enjoyed if the accident had never occurred.[2] In the context of non-pecuniary losses, however, the court has declared full compensation to be impossible and has opted instead for basing such an award on its capacity to provide reasonable solace through a sum of money which can be used to make the plaintiff's life more tolerable.[3] Within the category of pecuniary damages the courts have further differentiated two sub-headings of loss—future care costs, and a heading which has been variously referred to as "(prospective) loss of earnings", "loss of future income", and "loss of earning capacity". Although there are difficulties in determining what the plaintiff is entitled to under the heading of future care costs,[4] there seems to be no difficulty in appreciating what loss is being compensated. The injury has created certain needs, the fulfillment of which creates a financial loss. By contrast, under the heading of loss of earnings/earning capacity there is some confusion as to what exactly the compensation is for, that is, what the loss is that the court is seeking to compensate. In the typical case, which constitutes the paradigm that underlies legal thinking about this issue, this confusion causes no serious difficulties. All would agree on the level of of compensation which is appropriate, although different rationales would be relied upon by different courts. There are some cases, however, which highlight the confusion and require more serious attention to the proper basis for compensation in this area.

The literature on this issue suggests two possible approaches to the problem.[5] The first, usually labelled "loss of earnings", characterizes the plaintiff's loss as the future stream of income that she would have earned over the course of her life and which she will be now unable to earn. In other words, the plaintiff is being compensated for the fact that she will no longer receive the sums of money that she would have received

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[1] *Andrews* v. *Grand and Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, (1978), 83 D.L.R. (3d) 452; *Arnold* v. *Teno*, [1978] 2 S.C.R. 287, (1978), 83 D.L.R. (3d) 609; *Thornton* v. *School District No. 57 Board of Trustees*, [1978] 2 S.C.R. 267, (1978), 83 D.L.R. (3d) 480.

[2] *Andrews* v. *Grand and Toy Alberta Ltd., ibid.*

[3] See the cases cited, *supra*, footnote 1; *Lindal* v. *Lindal*, [1981] 2 S.C.R. 629, (1981), 129 D.L.R. (3d) 263.

[4] These typically revolve around the standard of medical or rehabilitative care the plaintiff is entitled to.

[5] See S.M. Waddams, The Law of Damages (1983), pp. 228ff; Ken Cooper-Stephenson and Iwan B. Saunders, Personal Injury Damages in Canada (1981), pp. 196ff.

as income if the injury had not taken place. The object of the damage award is to replace these payments. The second, referred to as the "loss of earning capacity" approach, treats the loss as one of a capital asset, namely, the capacity to earn. Under this approach, the plaintiff is being compensated for the loss of a certain capacity, the capacity to earn an income. Theoretically, this would involve assessing compensation according to how much the plaintiff could have earned by putting her talents to the most lucrative use possible, whether or not she was doing so at the time of the injury or would have done so in the future. The literature has treated these two approaches as inconsistent with each other, so that there are at least some cases in which one's conclusion will vary depending upon which approach is adopted.

In the paradigm case, that of the salaried employee, it makes no difference whether the plaintiff is regarded as having been deprived of a stream of future income or the capacity to earn that income. There is no need for conceptual clarity in such cases. But not every tort victim is a salaried employee and there are three main types of situation in which the results of the use of these two approaches diverge. The first of these is that of the injured homemaker who, at the time of the accident, was not engaged in paid employment and would not likely have entered the paid workforce. We can consider, under the same rubric, the case of a volunteer worker. The second situation is that of the tort victim who was earning her living through some kind of illegal activity at the time of the accident. Finally, a situation not usually considered in connection with this problem of how to characterize this pecuniary loss is that of the person who is part of a business or partnership and whose productivity outstrips her share of the business' income. In these cases the pure versions of the loss of earnings and loss of earning capacity approaches pull in opposite directions. In a sense, then, such cases provide a testing ground for the two approaches. Assuming that each approach must lead to certain conclusions in these cases, commentators have inferred from the result in certain cases that the court must have been taking one of the approaches rather than the other. I shall argue that the courts have not been as clear and unambiguous in their conceptualization of the plaintiff's loss as have been the academics. Rather the case law seems to reveal a curious blend of the two approaches. This means that it is not possible to identify either the loss of earnings or loss of earning capacity approach merely from the result in a particular case.

A re-examination of these problematic situations will provide the groundwork for a reconceptualization of the basis for compensation. In the process I shall argue that neither the loss of earnings, nor the loss of earning capacity approaches are entirely satisfactory. Rather, I shall argue that the seemingly hybrid approach used by the courts in fact presents, in embryonic form, a third alternative which is capable of resolving these issues. It needs, however, to be reformulated in order to provide a

new understanding of what is being compensated. This alternative approach has the merit of providing a comprehensive basis for this head of pecuniary damages, that is, it offers an understanding of what the loss is that has been suffered and must be compensated, which is applicable to any kind of situation, including the problem cases outlined above. My starting point is an examination of the case law in the paradigmatic personal injury situation in order to see how much support there is in the decisions for each of the loss of earnings and the loss of earning capacity approaches. Both of these will then be tested in what I have referred to as the problem cases involving homemakers and volunteers, illegal income, and business income by contrasting the actual cases with the results which would be achieved by the use of either of these approaches in its pure form. Finally, I will suggest a reconceptualization for the relevant loss in personal injury cases and show how this can be used to provide a better rationale for some of the existing case law and a more satisfactory result in the problem cases.

I. *Loss of Earnings or Loss of Earning Capacity?*

A. *The Current Law*

Canadian law on this point starts with the Supreme Court judgment in *R.* v. *Jennings*,[6] in which it was decided that compensation under this head of damages is for the loss of the capacity to earn income. This is to be treated as a capital asset which must be valued. The issue in *Jennings* was whether tax should be deducted from the damage award and, although it could be argued that it is only for this purpose that the loss is to be viewed in this way, this characterization has tended to set the tone for the general approach to this head of damages. This approach was reiterated more recently in *Andrews* v. *Grand and Toy Alberta Ltd.*,[7] where it was used primarily to justify awarding compensation for the plaintiff's pre-accident working life expectancy. The same justification for awarding compensation for the "lost years" was adopted in the leading English case, *Pickett* v. *British Rail Engineering Ltd.*,[8] as well as the leading Australian case, *Skelton* v. *Collins*.[9] Despite this characterization, the starting point in calculating damages is, in the typical case, what the plaintiff was actually earning at the time of the accident. The court must then determine the probability that the plaintiff would have increased her earnings over the years due to promotion or the benefits of seniority or whether they would have been depressed by lay-off or ill health. In

[6] [1966] S.C.R. 532, (1966), 57 D.L.R. (2d) 644.

[7] *Supra*, footnote 1.

[8] [1980] A.C. 136, [1979] 1 All E.R. 774 (H.L.). See also *Gammell* v. *Wilson*, [1982] A.C. 27, [1981] 1 All E.R. 578 (H.L.).

[9] (1966), 115 C.L.R. 93 (Aust. H.C.). See also *Arthur Robinson (Grafton) Pty Ltd.* v. *Carter* (1968), 122 C.L.R. 649 (Aust. H.C.), per Barwick C.J.; *Faulkner* v. *Keffalinos* (1970), 45 A.L.J.R. 80 (Aust. H.C.); *Tzouvelis* v. *Victorian Railways Commissioners*, [1968] V.R. 112 (S.F.C.).

this respect the task looks as though it is designed to assess how much the plaintiff would actually have earned over her working life if the injury had not occurred. This had led some commentators to argue that despite the court's use of the terminology of "loss of earning capacity", damages are really being determined according to the loss of earnings approach.[10] The loss of earning capacity approach would require the courts to consider what the plaintiff *could* have earned given her capabilities if she were to put her talents to the best possible use. Instead the court is simply asking the hypothetical question "What would this plaintiff probably have earned over the course of her working life?", a question better designed to yield an amount which will replace the actual income lost due to the injury.

This argument that the courts are merely paying lip service to the earning capacity approach is strengthened by a consideration of the dominant tenor of English case law. Although the characterization "loss of earning capacity" is sometimes used, it seems to be regarded as interchangeable with the concept of "loss of earnings".[11] Despite the focus in *Pickett*[12] on earning capacity, there is also dictum to suggest that compensation will be awarded only if the plaintiff's capacities would have been used to earn income.[13] There is certainly an emphasis in the English cases on compensating the plaintiff only for losses which will actually be suffered. This has been very influential in the approach to such issues as whether collateral benefits and income tax should be deducted from the award.[14]

This emphasis can also be seen in recent cases which have begun to give a new, narrower meaning to the term "loss of earning capacity".[15] In *Moeliker* v. *A. Reyrolle and Co. Ltd.*[16] the Court of Appeal held that compensation was due for loss of earning capacity,

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[10] Cooper-Stephenson and Saunders, *op. cit.*, footnote 5, pp. 196-204.

[11] *Browning* v. *War Office*, [1963] 1 Q.B. 750, at p. 758, [1962] 3 All E.R. 1089, at p. 1091 (C.A.), per Lord Denning, M.R. Diplock L.J. preferred to speak of "pecuniary loss", at pp. 767 (Q.B.), 1096 (All E.R.); *Moriarty* v. *McCarthy*, [1978] 1 W.L.R. 155, at p. 159, [1978] 2 All E.R. 213, at p. 217 (Q.B.D.).

[12] *Supra*, footnote 8.

[13] *Browning* v. *War Office, supra*, footnote 11.

[14] *Ibid.*, was a case on collateral benefits. See also *British Transport Commission* v. *Gourley*, [1956] A.C. 185, [1955] 3 All E.R. 796 (H.L.) using this argument as the rationale for awarding damages based on post-tax earnings.

[15] *Fairley* v. *John Thompson (Design and Contracting Division) Ltd.*, [1973] 2 Lloyd's Rep. 40 (C.A.); *Smith* v. *Manchester Corporation (1974), 17 K.I.R. 1 (C.A.); Moeliker* v.*A. Reyrolle and Co. Ltd.*, [1977] 1 W.L.R. 132, [1977] 1 All E.R. 9 (C.A.); *Hoffman* v. *Sofaer*, [1982] 1 W.L.R. 1350 (Q.B.D.); *Foster* v. *Tyne and Wear County Council*, [1986] 1 All E.R. 567 (C.A.).

[16] *Supra*, footnote 15, at pp. 140 (W.L.R.), 15 (All E.R.).

> . . . where as a result of his injury his chances in the future of getting in the labour market work (or work as well paid as before the accident) have been diminished by his injury . . . This head of damage generally arises where a plaintiff is, at the time of the trial, in employment, but there is a risk that he may lose that employment at some time in the future and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. It is a different head of damage from an actual loss of future earnings which can already be proved at the time of trial.

Although in *Fairley* v. *John Thompson (Design and Contracting Division) Ltd.*[17] and in *Smith* v. *Manchester Corporation*[18] it seemed to be contemplated that compensation could be awarded merely for the reduction in the range of employment possibilities open to a plaintiff given her disability whether or not that is likely to result in a diminution of earnings, some doubt has been cast on this in the later cases. In *Moeliker*, Browne L.J. held that damages under this head must be assessed by asking first whether there is a substantial or real risk that a plaintiff will lose her present job and then assessing the present value of the financial loss she will suffer if that risk materializes, taking into account the various contingencies affecting the magnitude of the risk.[19] Following this approach, *Hoffman* v. *Sofaer*[20] declined to award compensation for loss of earning capacity because it was thought to be improbable that the plaintiff would ever actually suffer financial loss from lack of employment resulting from his disability.

Similarly, the Australian courts have used the language of earning capacity at the same time as they have insisted that they must look to how much money the plaintiff would actually have earned to assess damages. For example, in *Mann* v. *Ellbourn*,[21] Bright J. argued:

> True they have all lost a capacity and must be compensated for that loss, but when one looks at the damages flowing from the loss one must surely ask what the likelihood is for the future.

This case expressly overruled *Forsberg* v. *Maslin*[22] in which the plaintiff, who spent part of his time racing motorcycles, was nevertheless awarded damages at the level at which he could have earned if he had been working full time.[23] The same approach is evident in the Canadian case of *Varkonyi* v. *Canadian Pacific Railway*[24] in which the plaintiff

[17] *Supra*, footnote 15, at pp. 140 (W.L.R.), 15 (All E.R.).

[18] *Supra*, footnote 15.

[19] *Moeliker, supra*, footnote 15, at pp. 152 (W.L.R.), 17 (All E.R.).

[20] *Supra*, footnote 15.

[21] (1973), 8 S.A.S.R. 298, at p. 307 (S.C. *in banco*).

[22] [1968] S.A.S.R. 432 (S.A.S.C.).

[23] See also *Graham* v. *Baker* (1961), 106 C.L.R. 340, at p. 347 (Aust. H.C.), which, in the context of the collateral benefits issue, acknowledged that the loss was a loss of earning capacity, but held that recovery was to be had only to the extent that the loss "is or may be productive of financial loss".

[24] (1980), 26 A.R. 422 (Alta. Q.B.).

had been a self-employed drywaller. For several years prior to the accident he had been working only about half the year, devoting the remainder of his time to leisure pursuits. Although the court invoked the concept of loss of earning capacity to describe the plaintiff's loss, Kerans J. declined to award compensation for what he could have earned if he were to work full time, saying: "While he has lost the capacity, the value of that loss to him is lessened substantially if it is not likely that he would have taken advantage of it."[25]

This seems to indicate that the predominant approach is to characterize the loss as that of a capacity, but to assess the damages based on what the plaintiff would actually have earned if not for the injury. In other words, the courts seem to be combining the loss of earnings and earning capacity models. Below I shall address whether or not this combination is incoherent and suggest that one can make sense of it if one keeps in mind that the basic objective of tort damages is to put the plaintiff in the position she would have enjoyed if not for the injury. But first I want to examine three types of cases falling outside the paradigm of the wage-earner plaintiff to see what special difficulties they present and whether the case law can be said to support either the loss of earnings or loss of earning capacity approach. These are cases involving homemakers and volunteers, illegal income, and business or partnership income (in some cases).

B. *Homemakers and Volunteers*

The literature treats the case of a plaintiff engaged in an activity for which she could be paid, but for which no remuneration was, in fact, received as the clearest test case for which of these approaches is being adopted. In the context of volunteers, some support for the loss of capacity approach can be found in *Turenne* v. *Chung*,[26] in which the plaintiff was a teaching sister in a religious order who had directed that her salary be paid to her order. The defendant argued that since she suffered no actual loss of earnings, she should receive no compensation under this head of damages. Damages were nevertheless awarded on the grounds that the plaintiff was entitled to do anything she wished with her earnings, including give them away.[27] However, it is unclear how much one can legitimately make of this case since the plaintiff did nominally receive a wage and therefore the situation has been regarded as different from the case in which no payment is made at all. Furthermore, there are very few cases of this sort reported. A much more frequent occurrence which raises the issue with the same degree of clarity is that of the injured full-time homemaker. In this context, however, the courts have not been prone to overlook the fact that the homemaker was not actually earning

[25] *Ibid.*, at p. 442.

[26] (1962), 40 W.W.R. 508 (Man. C.A.).

[27] *Ibid.*, at p. 509.

income in the assessment of compensatory damages. The tasks of the homemaker are things for which there is a market and some people do earn their livelihood in this way. However, when such tasks are performed for one's own family typically no wages are paid. On the loss of earnings approach such plaintiffs should receive no compensation under this head of damages because they were never wage earners and had no intention of taking paid employment. On the loss of earnings capacity approach, if this is interpreted, as has been suggested,[28] to mean that compensation should be for what the plaintiff could have earned even if she was not actually earning, there should be compensation for these plaintiffs.

Until recently, there has been very little discussion of this issue in the case law. Cooper-Stephenson and Saunders[29] suggest that, in the past, counsel frequently made no claim at all in this respect on behalf of female clients. To the extent that it was considered in the older cases, the results are most consistent with the loss of earnings approach. Courts have routinely awarded married female plaintiffs no damages under this head unless they were in fact in paid employment at the time of the accident; they have neglected to take into account the possibility that a full-time homemaker might have taken employment at some time in the future, and they have assumed that young, as yet unmarried, women would probably have married if not for the accident and have again awarded no damages under this head.[30] In the latter case they have awarded damages for loss of the prospect of marriage, but they have tended to treat this as akin to a loss of amenities of life claim under the heading of non-pecuniary damages. In recent years the courts have become more sensitive to the issue of compensating homemakers fairly, but the grounds upon which the damages are awarded are confused and sometimes do not conform to either of the standard approaches to the issue. This leads one to believe that the courts have been treating the case of homemakers as an issue apart rather then trying to work out a uniform approach capable of application to all cases under this head.

The most obvious changes have been with respect to the treatment of the earning *potential* of homemakers who were not in paid employment at the time the injury occurred and of young unmarried female plaintiffs. With respect to the former situation, it is no longer assumed that a married woman would never have taken paid employment merely because she was not so employed at the time of the accident. In *McLeod*

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[28] Waddams, *op. cit.*, footnote 5, p. 233; Cooper-Stephenson and Saunders, *op. cit.*, footnote 5, pp. 196-197.

[29] *Ibid.*, p. 208.

[30] See Ken Cooper-Stephenson, Damages for Loss of Working Capacity for Women (1978/79), 43 (2) Sask. L. Rev. 7, for a more detailed analysis of these cases.

v. *Palardy*[31] the court estimated the total wages someone with the plaintiff's characteristics would have been likely to earn and then discounted this by the likelihood that she would only have worked part-time for much of her life because of her family responsibilities. This approach is most consistent with the loss of earnings approach because the result is to compensate the plaintiff only for what she probably would actually have earned if not for the injury and not for what she could have earned by devoting herself to full-time paid employment.

Illustrating the new attitude toward young unmarried female plaintiffs, Spence J. held, in *Arnold* v. *Teno*,[32] that:

> I do not think we can assume that a bright little girl would not grow up to earn her living and would be a public charge, and we are not entitled to free the defendants, who have been found guilty of negligence, from the payment of some sum which would be a present value of the future income which I think we must assume the infant plaintiff would earn.

Although the abandonment of the assumption that all women marry and are supported by their husbands is welcome, there is still cause for concern with the Supreme Court's judgment. To begin with, the court settled on a damage award for loss of earnings/earning capacity at half way between the poverty level and the salary that the plaintiff's mother earned as a teacher. This seems significantly lower than a similarly situated male plaintiff would have received.[33] Secondly, Spence J. also seemed to be relying on the alternative ground that ". . . like everyone else, the infant plaintiff has to eat, clothe herself and shelter herself".[34] Although this is true of everyone, both male and female, courts never base damage awards to male plaintiffs merely on the plaintiff's basic necessities. Given that the actual amount of the award in *Teno* merely coincided with the cost of basic necessities there is some cause for suspicion that the court was not deciding on the basis of what income she would actually have earned or on the value of her earning capacity. This reasoning is more explicitly relied upon in *Fenn* v. *City of Peterborough*.[35] The case involved a married woman who had been a full-time homemaker but who had separated from her husband due to the stress created in their relationship because of her extensive disability. The court clearly treated lost earning capacity and basic living expenses as alternative grounds for the award and arrived at a sum of $6,000 per year.

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[31] (1981), 124 D.L.R. (3d) 506 (Man. C.A.). The plaintiff was a thirty-one year old woman with six children.

[32] *Supra*, footnote 1, at pp. 329 (S.C.R.), 636 (D.L.R.).

[33] Cooper-Stephenson and Saunders, *op. cit.*, footnote 5, p. 211, draw the comparison between the award in this case and those in the two other cases in the "trilogy" of 1978, *Andrews* v. *Grand and Toy Alberta, supra*, footnote 1, and *Thornton* v. *School District No. 57 Board of Trustees, ibid.*. Although Diane Teno received $7500 per year the award in *Andrews* was $14,400 per year and in *Thornton* was $10,200 per year.

[34] *Supra*, footnote 1, at pp. 329 (S.C.R.), 637 (D.L.R.).

[35] (1979), 104 D.L.R. (3d) 174 (Ont. C.A.), aff'd (1981), 129 D.L.R. (3d) 507 (S.C.C.) on another point. See also *Towes* v. *MacKenzie*, [1977] 6 W.W.R. 725 (B.C.S.C.).

Different approaches have been taken in the English cases. In *Moriarty* v. *McCarthy*,[36] O'Connor J. acknowledged that the plaintiff was unlikely to earn as much in wages over her lifetime as a man would have because she was likely to have married and withdrawn from the labour market for at least a time. However, he went on to note that this would result in insufficient compensation because it failed to take into account the support the plaintiff would have received from a husband during the time she was not in paid employment. The proposed solution was to compensate the plaintiff for loss of prospects of marriage at approximately the same rate that she would have been compensated for lost earnings. This clearly moves damages for loss of marriage prospects out of the realm of non-pecuniary damages and treats marriage as an alternative source of income for women. On this interpretation, the case is assimilable to the loss of earnings approach with likely loss of support from a spouse substituting for likely loss of wages. It would seem to follow from this that in the case of an already married woman whose marriage does not break down because of the injury, the plaintiff would receive no compensation under this head because her husband continues to support her. *McLeod* v. *Palardy*[37] is consistent with this. The plaintiff, whose marriage had survived her injuries, was compensated only for the reduced time she would likely have worked because of her family responsibilities. Since her husband continued to support her, she suffered no loss on this account. However, in a later unreported English case, *Carrick* v. *Camden London Borough Council*,[38] the same judge who decided *Moriarty*, O'Connor J., took the view that it was simpler to disregard the intervention of marriage because even if the plaintiff had married and ceased paid employment in favour of homemaking, she would still have been working or producing an economic gain. This latter approach was followed in *Hughes* v. *McKeown*,[39] and comes quite close to the conceptualization of this kind of loss that will be proposed below. This may indicate an increasing willingness on the part of the courts to recognize homemaking as an economic activity.

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[36] *Supra*, footnote 11.

[37] *Supra*, footnote 31.

[38] 25 July, 1979. (Q.B.D.), referred to in *Hughes* v. *McKeown*, [1985] 1 W.L.R. 963, [1985] 3 All E.R. 284 (Q.B.D.).

[39] *Ibid.* A similar approach was taken by Murphy J. in *Sharman* v. *Evans* (1977), 138 C.L.R. 563, at p. 598 (Aust. H.C.), but this is a dissenting judgment. The majority also did not reduce the female plaintiff's award for loss of working capacity because of the possibility that she might have married, but they preferred to base this decision on the expediency of ignoring the plaintiff's marriage prospects in view of the speculative nature of such a judgment on the facts of the case. The implication is that if this uncertainty were not present—for example, the case of a young woman who was engaged to be married at the time of the accident—the court would be willing to reduce the loss of working capacity award because she would be unlikely to have remained in paid employment.

In *Daly* v. *General Steam Navigation Co. Ltd.*[40] the English Court of Appeal took yet another approach to this problem. The plaintiff had been a full-time homemaker before her injury which prevented her from performing the full range of tasks that she had previously handled. Although the trial judge had analyzed her loss as one of a capacity that deserved compensation, the Court of Appeal treated the issue as more akin to a future care cost. In the future she would need housekeeping help in order to put her in the position she would have been in but for the accident; therefore, she was entitled to the cost of that help. The court was only partly consistent in pursuing this approach, however. Because the plaintiff had not actually employed anyone in this capacity between the accident and the trial, she was denied compensation for this period because she had incurred no actual expense. Instead, her damages for pain and suffering were increased because of the extra hardship she was put to in carrying out these tasks in her disabled state. This shows the continuing influence in English case law of the idea that recovery should be allowed only for losses actually suffered. Nevertheless, the plaintiff in *Daly* was awarded damages to cover housekeeping costs for the future despite the defendant's argument that she had no firm intention of actually hiring someone in this capacity. It has been argued that this latter ruling is only consistent with a loss of earning capacity approach,[41] but strictly speaking this is not so. The court did not ask what the plaintiff could have earned if she had chosen to work outside her home, but rather how much it would cost to replace the services she used to perform. This result is consistent with the approach that will be suggested below, but must be divorced from its future care costs rationale.

The assimilation of compensation for homemakers to the heading of future care costs also seems to underlie the decisions in *Burnicle* v. *Cuttelli*[42] and in *Maiward* v. *Doyle*.[43] In both cases it was held that the plaintiff's loss of the ability to look after *herself* had created a need that should be compensated. However, both courts took a more restrictive approach than in *Daly*, being less willing to bring the loss of the ability to look after one's family under this rubric. The majority view seems to have been that recovery for this loss will only be allowed if it was reasonable to replace these services with paid help.[44] There is a sugges-

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[40] [1981] 1 W.L.R. 120, [1980] 3 All E.R. 696 (C.A.). This case was followed in the Saskatchewan case of *Lefebvre* v. *Kitteringham* (1985), 39 Sask. R. 308 (Sask. Q.B.).

[41] Waddams, *op. cit.*, footnote 5, p. 236.

[42] [1982] 2 N.S.W.L.R. 26 (C.A.).

[43] [1983] W.A.R. 210 (F.C.).

[44] However, Reynolds J.A. in *Burnicle, supra,* footnote 42, seems to have thought compensation should be awarded only as a loss akin to the non-pecuniary head of loss of amenities. The plaintiff, he thought, had lost a capacity "the exercise of which can give to her pride and satisfaction and the receipt of gratitude, and the loss of which can lead to frustration and feelings of inadequacy", at p. 28.

tion that this will not be reasonable when other members of the family are capable of taking on these tasks,[45] or when the homemaker's tasks merely involved "the normal incidents of family life".[46] The approach of treating the plaintiff's loss of the ability to perform housework as creating a future care cost has been adopted in other cases as well,[47] but without much discussion.

The case law in this area does not unequivocally support either the loss of earnings or the earning capacity model. If anything, the dominant approach seems to be to search for some other basis—future care costs, loss of marital prospects, or loss of amenities—for recovery in these cases. However, this in itself may indicate an implicit acceptance of the loss of earning model, since it is only if one accepted this that one would be driven to search for some other basis in order to be able to provide any compensation at all to a full-time homemaker. In any event, these cases are inconsistent with another line of cases dealing with unpaid domestic work. In *Gehrmann* v. *Lavoie*[48] damages were awarded when the plaintiff had been engaged in unpaid renovations on his own home. In *Boyles* v. *Landry*[49] the plaintiff was compensated for the cost of siding because his injury prevented him from continuing his practice of painting his own home at regular intervals. Finally, in *Urbanski* v. *Patel*,[50] the plaintiff recovered for the loss of the ability to tend a garden and a few animals which had provided food for her family. This provides support for the claim that the courts tend to treat the problem of compensating homemakers as *sui generis*. The courts are able to see the value in repair and restoration work on a home even though it is unpaid labour, but they have traditionally ignored the economic aspect of day to day housework. Yet it is difficult to see why loss of the ability to paint one's own house should be treated any differently than loss of the ability to clean that house. In these cases on unpaid labour lies the kernel of a new approach to these issues, one which is capable of general application to all problems of damages assessment. I will return to this point after examining the two remaining types of cases falling outside the paradigm of the wage-earner plaintiff.

[45] *Burnicle, supra*, footnote 42, per Glass J.A.

[46] *Maiward, supra*, footnote 43, per Kennedy J.

[47] In *Mann* v. *Ellbourn, supra*, footnote 21, the plaintiff, who was working less than full-time in order to be able to take care of her young daughter, was compensated only for two-thirds of a full-time wage, but was also awarded damages to cover the cost of household help that she would probably require in the future. See also *Hodges* v. *Frost* (1984), 53 A.L.R. 373 (Fed. C.A.). In *Fenn* v. *Peterborough, supra*, footnote 35, and *McLeod* v. *Palardy, supra*, footnote 31, an award was also made under the head of future care for household help.

[48] [1976] 2 S.C.R. 56, (1975), 59 D.L.R. (3d) 634. This was, however, a fatal accident case.

[49] *Boyles* v. *Landry* (1980), 30 N.B.R. (2d) 1 (N.B.T.D.), var'd on another point (1981), 34 N.B.R. (2d) 466 (N.B.C.A.).

[50] *Urbanski* v. *Patel* (1978), 84 D.L.R. (3d) 650 (Man. Q.B.).

C. *Illegal Income*

The problem of a plaintiff whose livelihood had been made through illegal activities has resulted in another area of controversy over the correct way to characterize and assess a plaintiff's loss. On the one hand, it might be argued that income from illegal activities does not qualify as earnings so that on the loss of earnings approach no compensation would be awarded. On the other hand, it has been argued that if compensation is for loss of the capacity to earn, this capacity has been lost even if it was not being used, and that its worth should be measured by what the plaintiff could have lawfully earned.[51] Again, the cases are not unequivocal in their approach to this issue. Furthermore it can be very difficult to determine how a court is characterizing the loss in these cases. The difficulty arises out of the operation of a second significant factor — namely, the appropriate scope of the *ex turpi causa non oritur actio* rule. The question is whether it is inappropriate for the courts to involve themselves in calculating damages based on illegal activities. This concern operates quite independently of which characterization of the plaintiff's loss is adopted and can interact with the characterization issue in several ways in order to come to a conclusion about whether damages should be awarded and in what amount.

One approach involves the acceptance of the loss of earnings characterization of the loss but refuses to acknowledge illegal income as "earnings". In *Mills* v. *Baitis*,[52] Gowans J. appeared to take this view, at least in cases involving serious illegality: "A professional burglar does not earn money; he steals it; he does not put his earning capacity to use; he prefers not to use it."[53] This results in no recovery under this head. It does so without reliance on the *ex turpi causa* rule. However, it is possible to adopt the loss of earnings approach and yet take the position that illegal earnings are "earnings" in the everyday sense of the word, and therefore are capable of grounding compensation. This characterization could, however, be combined with the view that to base the assessment of damages on such earnings would bring the judicial process into disrepute. The result would be that although the plaintiff is recognized to have suffered a loss of earnings, no damage award will be made under this head. This appears to be the approach taken in the English case of *Burns* v. *Edman*.[54] Although the issue was whether recov-

[51] Waddams, *op. cit.*, footnote 5, p. 237.

[52] [1968] V.R. 583 (F.C.).

[53] *Ibid.*, at p. 590. However, on the facts of the case, Gowan J. was able to find that the plaintiff's income did count as earnings and his income producing activities as the use of his earning capacity. The plaintiff had a business fixing automobile transmissions in the operation of which he contravened a municipal by-law by running it out of his home. The court held that this was not sufficiently serious to justify invoking either the *ex turpi causa non oritur actio* rule or public policy to deny him recovery.

[54] [1970] 2 Q.B. 541, [1970] 1 All E.R. 886 (Q.B.D.).

ery under fatal accidents legislation was possible, the judge also expressed the opinion that the deceased would also be unable to maintain an action on his own behalf. In this case the reason for denying damages would not be because of the characterization of the loss chosen, but because of the application of the *ex turpi causa* rule. A variation on this approach would follow that outlined above,[55] of characterizing the loss as a loss of capacity, but assessing damages based on what the plaintiff would actually have earned using that capacity. In conjunction with the *ex turpi causa* rule, this might well lead one to conclude that the fact that it would have been used for illegal purposes prevents the courts from placing a value on its loss. This appears to explain the decision in the Australian case of *Meadows* v. *Ferguson*.[56]

Alternatively, one might take the view of Waddams that the loss is of earning capacity, the right to compensation for which does not depend on whether or how the plaintiff put these capacities to work. Some support for this approach is found in *Foster* v. *Kerr*,[57] in which Ewing J. appears to be attempting to compensate for the loss of the plaintiff's earning capacity. This case was followed in *Lepine* v. *Demeule*.[58] This appears to give no weight to the *ex turpi causa* rule, as the court was willing to take into account the plaintiff's illegal earnings as a measure of what he could have earned legitimately although discounted slightly to take account of the fact that, given the risks of criminal activity, it is likely that if the plaintiff could have earned just as much legally, he would have done so. Nevertheless, it might be argued that the *ex turpi causa* rule should apply under this approach to the extent of requiring the court to take no account of the plaintiff's illegal earnings in assessing the value of that capacity, again, out of a concern with the reputation of the courts. On this view, a plaintiff's earning capacity would have to be valued solely by reference to her legitimately marketable skills. As a result, the characterization of the loss as that of a capacity would dictate that the plaintiff be awarded some compensation for that loss, but the assessment of the loss would be qualified by the *ex turpi causa* rule.

However, another interpretation of these cases is possible which casts doubt on whether they constitute authority for the earning capacity approach at all. The court in *Foster* v. *Kerr*[59] discounted the award

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[55] See discussion, *supra*, pp. 85-88.

[56] [1961] V.R. 594 (S.C.).

[57] [1939] 4 D.L.R. 745, [1939] 3 W.W.R. 428 (Alta S.C.), var'd [1940] 2 D.L.R. 47, [1940] 1 W.W.R. 385 (Alta. App. Div.). The actual issue in the case was not whether the injured person, himself, should be awarded compensation, but rather whether a dependent was entitled to damages under fatal accidents legislation.

[58] (1972), 30 D.L.R. (3d) 49 (N.W.T.T.C.), var'd (1973), 36 D.L.R. (3d) 388 (N.W.T.C.A.).

[59] *Foster* v. *Kerr*, *supra*, footnote 57, at pp. 745 (D.L.R.), 432 (W.W.R.). Similarly, the court in *Lepine* v. *Demeule*, *supra*, footnote 58, at p. 56, characterized the plaintiff's illegal income as "precarious".

because of the possibility that "[the plaintiff's] earnings may be interrupted at any time by the arm of the law. . .". This seems more consistent with the approach which characterizes the loss as one of a capacity but then assesses damages according to what the plaintiff was likely to earn through its use, rather than with the loss of earning capacity approach as advocated by Waddams. The former, in the end, still requires an assessment of what the plaintiff would actually have earned rather than asking what the plaintiff *could* have earned by putting her capacities to their best use. On this interpretation, the *ex turpi causa* problem should arguably have been of greater concern to the court. However, Cooper-Stephenson and Saunders[60] interpret both *Foster* and *Lepine* as indicators that the *ex turpi causa* rule applies only to the most serious kinds of criminal offences and argue that the illegality involved was not sufficiently serious to attract the application of the rule.[61]

In conclusion, the cases involving personal injury to someone who had gained her livelihood illegally do not allow us to draw any firm conclusions in support of either the loss of earnings approach or the loss of earning capacity approach. In fact, it is arguable that there too at least some courts are combining the two by characterizing the loss as that of a capacity and then assessing damages based on how much the plaintiff would have earned. The problem of determining whether and on what basis to compensate these plaintiffs is complicated by the operation of the *ex turpi causa* rule. I shall argue below that this problem area too can be integrated into a uniform approach to compensation under this heading.

D. *Business Income*

If the plaintiff is self-employed or involved in a partnership or corporation it is clear that she is entitled to full compensation for the business losses attributable to her inability to work if she was entitled to the business' profits. However, a complication is introduced when a plaintiff is the driving force behind a partnership or corporation, but is not entitled to the full profits of the organization. For example, the plaintiff may be the working half of a partnership such that the profits of the partnership are entirely or substantially due to her efforts, and yet the profits may be split equally between the partners. Similarly, the plaintiff may be the manager of a small business that has been incorporated so that her disablement causes a large loss of profits to the company, yet she may hold only fifty per cent of the company's shares. The question

[60] *Op. cit.*, footnote 5, p. 231.

[61] This would also explain *LeBagge* v. *Buses Ltd.*, [1958] N.Z.L.R. 630 (C.A.). Since this was a fatal accident case the loss had to be characterized as the plaintiff's share of the deceased's lost earnings rather than as earning capacity. Compensation was awarded despite the fact that the deceased's income had been earned in breach of a regulation prohibiting working seven days per week.

arises in these cases whether the plaintiff can recover the total loss of the partnership or company or whether she can recover only for her share of the lost profits. In a case in which the plaintiff runs a corporation which is substantially a one-person company, the problem does not arise because the profit loss to the corporation is a fair measure of the loss to the plaintiff personally.[62] However, in the case of partnerships or more widely held corporations, there can be a substantial difference between the decline in profits of the business as a whole and the personal loss to the plaintiff.

In *Lee* v. *Sheard*,[63] the English Court of Appeal held that the plaintiff was entitled to recover only the loss suffered personally whether the business involved was a partnership or a corporation. This seems to be in line with the loss of earnings approach since the court was primarily concerned with what the plaintiff would actually have earned through his participation in the company. This view seems to be endorsed by Cooper-Stephenson and Saunders who argue that ". . . it is. . . incumbent on the plaintiff to show that his injuries caused him personal loss, not merely that there was a loss to the company".[64] On the other hand, Waddams has criticized this position, arguing for the characterization of the plaintiff's loss as that of her earning capacity:[65]

> A person who is disabled loses earning capacity whether he was intending to work for a salary, or for a corporation or partnership in which he had an interest. The plaintiff's recovery ought not to vary according to the particular way in which he proposed to gain his remuneration for his services.

This approach would result in the plaintiff recovering the full amount of the business' loss if the value of her services were measured by the profits accruing to the company due to her efforts. This amount might well differ from the wages the plaintiff could receive for similar services as an employee.

Again, the cases do not present a united front on the issue of how to characterize this loss. Despite *Lee* v. *Sheard*, the English Court of Appeal had elsewhere been more sympathetic to the argument that full recovery for a company's lost profits is appropriate, even though the plaintiff does not hold all of the shares. In *Ashcroft* v. *Curtin*,[66] the

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[62] Harold Luntz, Assessment of Damages for Personal Injury and Death (2nd ed., 1983), pp. 255-256; Cooper-Stephenson and Saunders, *op. cit.*, footnote 5, p. 126. This was the view explicitly taken in *Kerenicky* v. *Arrow Leasing Ltd.* (1972), 28 D.L.R. (3d) 59 (Ont. Co. Ct.).

[63] [1956] 1 Q.B. 192, [1955] 3 All E.R. 777 (C.A.). See also *Vaughan* v. *Greater Glasgow Passenger Transport Executive*, 1984 S.L.T. 44 (C.S.). The same view seems to have been taken in the early Canadian case of *Green* v. *Town of Melfort* (1920), 53 D.L.R. 63 (Sask. K.B.) and may underlie the decision in the Australian case, *Selby* v. *The Commonwealth* (1946), 47 S.R. (N.S.W.) 150 (F.C.).

[64] *Op. cit.*, footnote 5, p. 127.

[65] *Op. cit.*, footnote 5, p. 232.

[66] [1971] 1 W.L.R. 1731, [1971] 3 All E.R. 1208 (C.A.).

plaintiff held only forty per cent of the company shares in what was essentially a one-man company. In the end the court decided that his accounts were too chaotic to allow an accurate assessment to be made of the alleged lost profits and awarded damages on another basis. However, the judgments seem to indicate that recovery would have been allowed if not for this accounting problem. It may have been significant, however, that the other shareholders were members of the plaintiff's family. This is in line with a number of Australian partnership cases in which the partners were husband and wife.[67] However, the older Canadian case of *Craig Bros.* v. *Sisters of Charity*[68] involved a non-family business in which the plaintiff was a partner. The trial judge awarded damages based on the value of the plaintiff's earning power by which he seems to have meant its value to the company.[69] There is also Australian authority for allowing a plaintiff to recover the entire loss of profit suffered by a non-family business[70] On the other hand, another line of Australian cases has followed the approach recommended in *Lee* v. *Sheard* and awarded damages based on the share of the partnership's profits to which the plaintiff was personally entitled.[71]

It will be argued below that this situation has affinities with the problem of compensating homemakers and is resoluble in the same way. This is especially clear in the cases involving family businesses, but the same approach is extendable to any kind of business. Once again, the objective is to develop a uniform approach to the treatment of all cases for losses which have been dealt with under the rubric of either loss of earnings or loss of earning capacity.

II. *Reconceptualizing the Loss*

A. *The Suggested Approach*

Rather than resolving the confusion evident in the cases dealing with the paradigmatic wage-earner plaintiff, these three problem areas

[67] *Dahm* v. *Harmer*, [1955] S.A.S.R. 250 (S.C.); *Szittner* v. *Harriott*, [1967] 1 N.S.W.R. 233 (C.A.); *Parker* v. *Pahl* (1975), 13 S.A.S.R. 164, at p. 176 (F.C.). Luntz, *op. cit.*, footnote 62, p. 258, notes that many of these cases relate to temporary incapacity and that in cases of total disability the partnership arrangement is likely to be renegotiated so as to make the burden of the loss of the plaintiff's services fall entirely on the plaintiff. In this event, the plaintiff's future loss will be clear.

[68] [1940] 4 D.L.R. 561 (Sask. K.B., Sask. C.A.), [1940] 2 W.W.R. 80 (Sask. K.B.), [1940] 3 W.W.R. 336 (Sask. C.A.).

[69] As he was not satisfied on the evidence that the company's lost profits during the period was the correct measure of that value, however, the award was based on "fair compensation" for the work performed.

[70] *Linke* v. *Howard*, [1967] S.A.S.R. 83 (S.C.); *Schick* v. *Abbott*, [1976] W.A.R. 54 (F.C.).

[71] *Carlon* v. *Allison*, [1964] N.S.W.R. 946 (S.C.); *Bivone* v. *Welfare* (1971), 1 S.A.S.R. 431 (S.C.); *Jacklin* v. *O'Hara*, [1973] Qd. R. 438 (S.C.); *Dal Zotto* v. *Bonnani* (1980), 47 F.L.R. 239 (Fed. Ct. A.). See also *Allen* v. *Dixon*, [1973] 2 N.Z.L.R. 496 (C.A.).

deepen it. The cases do not allow us to say unequivocally whether compensation is for loss of earnings or loss of earning capacity. Some cases seem more consistent with one approach, some with the other. Under these circumstances, the two obvious alternatives for reform are to apply consistently the loss of earnings approach or to apply consistently the loss of earning capacity approach. The former would deny compensation to anyone who would likely have devoted her time and energies to unpaid endeavours regardless of what those endeavours would have been. The latter would allow recovery in all cases for what the plaintiff could have earned if she had put her talents to the most remunerative use possible, regardless of whether the plaintiff was, or ever had any intention of, doing so. Either of these would do away with the hybrid approach described above of characterizing the loss as that of a capacity, but assessing the damages by reference to what the plaintiff would actually have earned. I would argue that neither of those two approaches—the loss of earnings approach or the earning capacity approach—is entirely adequate, and that a solution that is both conceptually and practically more satisfying can be achieved by re-examining first principles. While substantially reconceptualizing the nature of the loss in these cases, my suggestion will build upon the hybrid approach present in some of the case law. The resulting proposal will also provide a clear solution to the question of compensation in the three problem areas examined—homemakers and volunteer workers, illegal income, and business income.

The difficulties of adopting a consistent loss of earnings approach seem obvious. The chief impact would be on full-time homemakers who would be entitled to no compensation because they are not wage earners. This solution has some supporters, including Professor Atiyah[72] and the Pearson Commission,[73] with various proposals being made for other grounds upon which someone who would have had no earnings might be granted something. This attempt to find some alternative ground for compensation constitutes an acknowledgment that it would be unfair to award no compensation to these plaintiffs. But these alternative grounds, such as loss of amenities if the plaintiff used to take significant pleasure in the unpaid activity which has been denied her by accident, or future care costs if one has been rendered unable to care for oneself as one used to, are inadequate for two related reasons. They misunderstand the nature of the plaintiff's real loss and they fail to recognize the economic value of the homemaker's work. I will elaborate on this below. To a certain extent the economic worth of homemaking has been recognized through the practice of the courts in awarding damages to the spouse or children of a homemaker because of the necessity of replacing those

[72] P.S. Atiyah, Loss of Earnings or Earning Capacity (1971), 45 A.L.J. 228, at p. 231.

[73] Royal Commission on Civil Liability and Compensation for Personal Injury, Chairperson, Lord Pearson, Cmnd 7054-1, London: H.M.S.O., 1978, para. 338.

services, but as will become plain below, this attributes the economic loss to the wrong party.

The loss of earning capacity approach is advocated by Waddams who argues that it is more consistent with the conceptualization of the capacity to earn as a capital asset.[74] This assimilation of earning capacity to the idea of a capital asset has some support in the case law and is much preferable to the loss of earnings approach. In particular, it has the virtue of enabling those who were not in fact in paid employment to receive some compensation provided they were capable of earning prior to the injury. But in the case of homemakers, it too seems to avoid acknowledging the economic worth of homemaking. It is not because of what she was actually actually doing with her capacities at the time of the injury that the homemaker recovers, but because she could have used those capacities to do "real" work for a wage. It also leads to the uncomfortable conclusion that someone who has independent means sufficient to support herself and who spends her days lounging around watching television will be entitled to compensation for the full value of her abstract capacity to earn. This would be so even if the injury did not prevent her from continuing her television-watching past-time. It also means that someone who was underemployed before the injury should be compensated according to what the full use of her talents could have earned for her.

Supporters of this approach argue that this is the correct valuation of the capital asset that has been lost. However, this takes the analogy with capital assets a little too seriously. Even if there are some ways in which one's abstract capacities can be fruitfully thought of as akin to a capital asset, there are also differences between them and other things that more easily fit under that description. In particular, the reason why an underutilized capital asset may be valued at the level at which it could produce is because even if it is not being put to its most productive use by its current owner, it is readily transferable to someone who will do so. The market value of the asset is predicated on the assumption that a hypothetical purchaser would put it to a use that is at least more valuable than its current, less than full, use. A human being's work capacity, however, is not transferable to another who may put it to a better use. To this extent, to value it in the same way that an ordinary capital asset would be valued is to engage in a fiction. As I shall argue below, this is a fiction that would result in over-compensation, and therefore should not be allowed.

The source of the difficulty with both of the above proposals is their exclusive focus on *earning* as the activity which the plaintiff either would or could have pursued, but which has been foreclosed by the tortious injury. This focus seems to result from the general division of

[74] *Op. cit.*, footnote 5, pp. 233-236.

damages into pecuniary and non-pecuniary heads. In order to place the kind of compensation at issue here under the head of pecuniary damages, it is thought that is must be tied to earnings, actual or hypothetical. The reason for wanting to include it under pecuniary damages is because of the general principle of full compensation for such losses in contrast to non-pecuniary losses which are incapable of being fully compensated.[75] This focus on earning *per se* is unnecessary, however, as can be seen by reexamining what, as a matter of fact, the plaintiff has lost as a result of the accident, and tying that to the basic principle of compensation.

The basic principle is that damages should, as well as money can do so, put a plaintiff in the position she would have enjoyed but for the injury.[76] How is the plaintiff's position altered in ways that money can put right? Clearly there are many activities that the plaintiff could once participate in but can no longer. To the extent that (some of) these activities are valued by the plaintiff chiefly because of the satisfaction they bring, they are not easily translated into monetary terms. For this reason they are treated as non-pecuniary damages, and although it is conceded that such losses can be deeply significant to the plaintiff and are deserving of compensation, the courts are not primarily concerned with assessing their exact monetary value. Any attempt to do so would arrive at the conclusion that this kind of loss is priceless; no amount of money can fully compensate for it. Therefore, an amount is arrived at on other grounds. Other activities that had occupied the plaintiff's time can be much more accurately assessed in monetary terms, so that they can be fully compensated by a money payment. These are the activities that clearly have an economic value because there is a market for them. The most obvious example is an activity such as carpentry or nursing, in which the plaintiff actually was trading her talents on the labour market for remuneration. If she can no longer engage in this activity, its market price provides a ready assessment of its value in monetary terms which the courts can use in awarding compensation for the loss of that ability. What the plaintiff has lost, then, is the ability or capacity to engage in economically productive activity. For the sake of brevity we can refer to this as the "capacity to work".[77]

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[75] *Philipps* v. *London & South Western Ry.* (1879), 5 Q.B.D. 78, at pp. 83-84 (C.A.); *Andrews* v. *Grand & Toy Alta. Ltd., supra*, footnote 1.

[76] *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25, at p. 39 (H.L.), per Lord Blackburn; *British Transport Commission* v. *Gourley, supra*, footnote 14; *Andrews* v. *Grand Toy Alta. Ltd., supra*, footnote 1.

[77] This term was coined by Cooper-Stephenson, *loc. cit.*, footnote 30. My suggested reconceptualization is similar to the approach he has argued for, but I hope to have provided a more comprehensive argument for it and to show how this results in an integrated approach to recovery under this head of damages rather than merely to a convenient way of conceptualizing the loss of a homemaker.

I would argue, then, that the basic distinction should not be between pecuniary losses, narrowly conceived, and non-pecuniary losses, but rather between losses which are readily translatable into monetary terms and those which are not. It is only the former for which we can use an award of money damages fully to put the plaintiff back in the position she would have enjoyed if not for the injury. Of course, not all the plaintiff's losses will fall neatly and exclusively into one category or the other, and we need not try to make them do so. The plaintiff's loss of the opportunity to pursue a particular activity may have two aspects. It may be an activity that is economically productive, and therefore can be assessed according to its market value, but it may also be an activity in which the plaintiff took special satisfaction, and the loss of which should also be compensated as the loss of an amenity of life. The means of assessing compensation for the latter type of loss is beyond the scope of this paper, but its juxtaposition with the kind of loss I am concerned with here helps to demonstrate that it is unnecessary to focus on earnings to ground compensation for what have been called "pecuniary" losses. We should rather be concerned to distinguish those losses for which money can fully compensate and those for which it cannot and ensure that the former are fully compensated. This would lead us to distinguish between those losses that have a readily quantifiable monetary value and those which do not. Since all activities which have such a value do so independently of whether in a particular instance an individual is actually being paid for engaging in it, we need not think in terms of whether the plaintiff was using, or could have used, her time in order to earn money. We need only ask what, if any, was the economic value of the activities which the plaintiff was, and was likely to continue, pursuing.

This approach, then, proceeds in two steps. First it asks what, in fact, the plaintiff's loss is, that is, what is it that the plaintiff used to be able to do that she can do no longer. The answer will likely produce a wide range of activities that the plaintiff has now been denied. Secondly, it asks what is the value of each of those activities. This requires us to divide the plaintiff's lost opportunities into those which have an ascertainable monetary value and those that do not. Those which do are those for which there is a market and their value can be assessed by how much would be paid in the open market for their performance. I have called these "economically productive activities" or, for short, "work". The remainder corresponds roughly to what has been called non-pecuniary losses. This approach has in common with the loss of earning capacity approach that it is not concerned primarily with whether and what the plaintiff was actually earning and would have likely earned over the space of her working life. It too, therefore, is capable of providing compensation to some plaintiffs who were not, and were not likely to be, in *paid* employment. It differs from the earning capacity approach, though, in that the focus is on what activities the plaintiff was actually engaged

in, rather than on the hypothetical question of to what activities the plaintiff could have devoted her talents and capacities. This means that not all the plaintiffs who would be compensated under the earning capacity approach will receive damages under the proposal here outlined. This change in focus is necessary, I would argue, in order to avoid overcompensating the plaintiff. A few examples will help to explain this approach as well as to illustrate the differences between it and both the loss of earnings and the earning capacity approaches.

To begin with the most common sort of case, suppose that one of the activities that the plaintiff used to but can no longer engage in is performing the functions of a shop clerk for which she had been paid before the accident. Assuming that she would have continued to occupy her time in this way, she should be compensated for losing the ability to participate in this economically productive activity at the rate determined by the market value of that activity. Of course, if there is a possibility that the plaintiff would have turned her energies into another form of endeavour in the future, this too must be taken into account, by assessing the market value of this alternative activity discounted by the chance that the change would not have occurred. The same result would be achieved in this case by either of the alternative approaches so far discussed, but for different reasons. The loss of earnings approach would award similar damages because the plaintiff has been deprived of earnings which she would actually have received if not for the accident. The earning capacity approach would reach the same conclusion on the assumption that the plaintiff was putting her talents and skills to their most remunerative use and that, therefore, the wages that the plaintiff was actually receiving are the best measure of the worth of her earning capacity.

Let us suppose, though, that the plaintiff had just been offered a promotion to manager of her store, but had turned it down because she did not want the additional stress that a managerial position would bring. This would make no difference to an award based on loss of earnings, but would result in an increase in an award for loss of earning capacity because it is good evidence that the plaintiff was capable of earning more than she was, in fact, earning. The approach argued for here requires first the acknowledgment that the plaintiff has been deprived of the capacity to work, including the capacity to work as a manager. Next it requires us to consider the value of that capacity. This assessment should measure that value from the perspective of the plaintiff—how valuable is that capacity to her. This is not a psychological exercise, but an economic one. That is to say, we are not concerned with measuring how much satisfaction the plaintiff obtained from the possession of her talents, but only with how we can put the plaintiff in the same economic position that she would have enjoyed but for the injury. This is the statement of the general objective of tort damages in the context of pecuniary losses. By hypothesis we know that if the injury had never

occurred, the plaintiff would have enjoyed the economic well-being that can be attained on a shop clerk's salary. To award her damages at the managerial salary level because she had the unused ability to earn at this level would leave her better off in economic terms than she would have been had she not been injured. After all, she made the choice to be satisfied with the standard of living of a clerk.[78] There is no reason why a damage award should make her better off by providing her with the means to afford a higher standard of living.

The plaintiff had chosen a life at a certain level of income and with freedom from managerial stress. The injury leaves her without that income, but still able to avoid managerial stress. Therefore, full compensation is achieved by awarding the value of the activity loss. Of course, if the injury is itself the source of other stresses or anxiety, the plaintiff should be compensated for this, but under the head of non-pecuniary damages. A similar result would follow in the case of someone who worked only part-time. If her free time was spent on non-economically productive activity which she could no longer enjoy, this is not the sort of loss which it is possible to compensate fully in money terms. Any compensation should fall under the head of non-pecuniary damages as compensation for the loss of satisfaction suffered. This also provides a basis for the judgment, which seems intuitively plausible to many, that someone who is independently wealthy and spends her time in leisure pursuits should not be compensated except to the extent that her injuries prevent her from pursuing these activities, and even then compensation should be under the rubric of the non-pecuniary head of loss of amenities of life.

This reconceptualization of the loss and the two-stage process of damage assessment makes sense of the hybrid approach that we have seen in some of the case law. It will be recalled that some of the cases referred to the loss as that of the capacity to earn income, but went on to assess damages according to what the plaintiff would actually have earned rather than what she could have earned. This is not inconsistent, nor is it the mere paying of lip service to the earning capacity approach, if we understand this approach merely to be making the distinction between the correct conceptualization of the loss and the proper assessment of the value of that loss. These cases have characterized the loss as that of earning capacity, but have assessed its value by reference to how the plaintiff would have used that capacity. This distinction is made most clearly in *Tsouvelis* v. *Victorian Railways Commissioners*[79] (although the main issue in that case was the effect of inflation on damage awards):

[78] There may be cases in which the plaintiff does not choose the lower paying job, but is rather forced into it due to economic or other circumstances despite higher aspirations and qualifications. This is not a problem that tort law can solve, and it remains the case that even if the injury had not occurred, the plaintiff's position would not have improved.

[79] *Supra*, footnote 9, at pp. 135-136, per Smith J.

> . . . the loss in respect of which [the plaintiff] is entitled to be compensated is not a future loss of earnings, but the present destruction or impairment of a capacity or faculty. . . acceptance of this view is in no way inconsistent with the present practice regarding the assessing of the loss . . . the plaintiff suffers an economic loss because the capacity or faculty destroyed or impaired is a thing of economic value to him. Since such a capacity cannot, of course, be sold outright, its economic value. . . needs to be assessed by reference to the present value of the future economic benefits which it would have produced. It is not, in my view, a matter of what it could have produced, but of what it would, in fact, have produced.

This shows that an approach which is based on a capacity characterization of the loss does not necessarily require compensation according to what the plaintiff *could* have earned. I have argued that the capacity should not be narrowly construed as the capacity to earn, but that the valuation process suggested by these cases is essentially correct. The worth of the capacity should be measured according to how it would have been used because this is necessary in order to avoid overcompensation; to avoid putting the plaintiff in a better economic position than she would have been in if the injury had not occurred.

However, it is important to stress that it is working capacity and not earning capacity that is relevant. This subtle difference has led those courts which have explicitly taken this hybrid approach to under-compensate homemakers because the unpaid nature of the work obscures the fact that it is nevertheless economically valuable. For example, in *Mann* v. *Ellbourn*[80] the plaintiff worked less than full-time in order to spend some time taking care of housekeeping and child-care responsibilities. Because she was not earning a full salary, she was not compensated for a full salary despite the fact that the remainder of her time was spent productively at tasks for which there was a readily ascertainable market value.

This distinction between the characterization of the loss and the value of the loss is obscured in the approach taken by Cooper-Stephenson and Saunders. They argue that compensation should be for the "loss of the value of prospective work" which they describe in the following terms:[81]

> The primary, though not exclusive, basis for quantification would remain the loss of past and prospective earnings which would, as a matter of prediction, have been received by the plaintiff. Alternatively, where work would not have been income-producing, or where the income would not have reflected the true value of the work, quantification should be by objective evaluation of the work which would have been undertaken. It is our view that almost all cases can then be appropriately assessed, with the court thereby able to inject notions of the quality of what has been lost, rather than having to reflect merely its direct financial cost.

[80] *Supra*, footnote 21. A similar attitude is exhibited in *Sharman* v. *Evans, supra*, footnote 39, in which the court decided not to reduce the unmarried female plaintiff's damage award because of the possibility that she might have married only because whether she would have done so was too speculative. The judgment retains a focus on earnings *per se* because the implication of the judgment is that if this practical difficulty did not exist it would be appropriate to reduce the plaintiff's damages because of the likelihood that she would not have remained in paid employment.

[81] *Op. cit.*, footnote 5, p. 204.

Their results coincide with those following from the approach suggested here, but they fail to provide a detailed examination of what, in fact, the plaintiff has lost, that is the ability to pursue a range of activities some of which have an economic value. They also fail to provide an account of why the "work" which the plaintiff has lost the ability to perform should be interpreted as the work which she actually would have done rather than that which she could have performed. It is suggested that this can be best explained by the basic principle of damages law that seeks to put the plaintiff in her pre-accident position—no better and no worse.

Having outlined the operation of this two-stage approach of characterizing the plaintiff's loss as that of the capacity to work, and then assessing the value of the loss by reference to what work the capacity would have been used for, I want to turn to the three problem areas examined above to show how this approach simplifies the damages issue in each.

A. *Homemakers and Volunteers*

From the example above, it might be thought that the results of this approach are identical to those of the loss of earnings approach. That this is not so can be seen by examining its application to the situation of someone who is engaged in economically productive work, but was not being paid for it. The most common example is homemakers. The loss of earnings approach dictates that no compensation be received by such people under this head because they were not, and would not ever have been, in receipt of wages. The loss of earning capacity approach suggests that they should be compensated according to what they could earn in the paid workforce. In contrast to both of these, I would argue that the first step is to recognize that the homemaker has lost the capacity to work.[82] This includes a wide range of economic activities that she had the ability to do in the abstract. The next stage requires us to assess the value of that capacity by reference to the activities in which the plaintiff would have actually participated. This plaintiff would have used her capacities in the performance of all of the tasks involved in running a home and looking after a family.[83] This is an activity which has economic value; it is capable of being translated into monetary terms. A market does exist for the work done by the homemaker, and some people actually do earn their living that way. Since this is the way the plaintiff has chosen to spend her life, it is the loss of the ability to do

[82] This is also the characterization advocated by Regina Graycar, Compensation for Loss of Capacity to Work in the Home (1985), 10 Syd. L. Rev. 528, at pp. 540, 553. See also Cooper-Stephenson, *loc. cit.*, footnote 30.

[83] Of course, if there was a substantial possibility that the plaintiff would have given up homemaking and entered the paid workforce at some point in the future, this must be taken into account and damages assessed on the basis of what other economic activity would have been undertaken.

this for which she should be compensated. This approach makes it plain that even in the case of someone who was not in paid employment, the loss of the relevant capacity is that of the injured person and not the beneficiary of her labour.[84] This means that it is the injured homemaker who should recover the damages rather than her spouse or children. It is she who has lost the capacity.

This is also the best way to put such a plaintiff in the position in which she would have been but for the injury. Prior to the accident, she had been making a gift of her labour to someone else. That gift has a certain economic value. After the accident she can no longer donate her labour, but compensation based on the market value of her labour puts her in a comparable position because she can make an equal gift by paying someone else to continue these services for whomever had been the beneficiary of her efforts in the past. If no compensation is awarded because the plaintiff received no earnings, this possibility will be unavailable and the plaintiff will not have been fully restored to her pre-accident position. Since the value of the plaintiff's work can be readily quantified in such cases, full compensation for its loss is possible. Therefore, there is no excuse to substitute the much less exact attempt to place a monetary value on the emotional suffering caused by the inability to continue donating one's labour. In fact, this may be a further loss that ought also to be compensable. That is, the plaintiff may have derived a special satisfaction out of donating her own labour to her family which will not be fully compensated by merely enabling her to purchase the services of another to perform them. In this case, though, this further loss falls more properly under the rubric of loss of amenities. It is possible, of course, that the plaintiff will refuse to use the damage award to replace her services and her family will have suffered a loss. This, however, will not have been because of the injury, but rather because of the homemaker's decision as to how to spend the money. This is a decision, though, that she is entitled to make, just as she would have been entitled, if she had not been injured, to decide to cease providing unpaid services for her family. How she plans to spend the award should be irrelevant to the assessment of damages.

The same analysis better justifies the results in the cases examined above[85] in which plaintiffs (usually male) were awarded damages for the loss and the ability to do certain household jobs for themselves, such as painting and renovating. This is simply a case of involvement in an unpaid, economically productive activity which benefits oneself. If one can no longer perform such a task one should be compensated for the value of one's labour in performing it at its market value. Again, this puts plaintiffs more nearly in their pre-accident position because they will be able to pay someone else to do this work while retaining the

[84] Graycar, *loc. cit.*, footnote 82.

[85] *Supra*, p. 93.

same standard of living in other areas that they would have been able to afford on their actual earnings if the accident had not occurred. These cases also make clear that recovery should not be confined to full-time unpaid domestic workers. Many people carry on a full-time job and look after a family and household. In the event of tortious injury they should be compensated for the loss of the capacity to perform both jobs. My analysis also provides a rationale for *Carrick* v. *Camden London Borough Council*[86] in which an umarried woman was awarded compensation on the basis that even if she had married and left the paid labour force, she would have continued to produce an economic gain through her work in the home.

This argument provides a conceptual framework for integrating into damages law the recent studies attempting to measure the value of homemaking services.[87] These studies make it clear that homemaking is an economic activity. If we conceptualize the loss to an injured plaintiff as that of the capacity to work, or perform economic activity, homemaking then becomes the proper subject of compensation on the same basis as other economically valuable activities. This is an improvement on the usual approach of those who argue for the compensation of homemakers, which is to argue that homemaking has economic value, but to continue using one of the traditional tests as constituting the general rule while treating homemakers as a special exception.[88] Thus, the compensation of homemakers continues to be treated as a problem *sui generis*.

Furthermore, one upshot of this argument is that it supports the adoption of the replacement cost measure over the opportunity cost measure of the value of these services.[89] The point of compensation under this rubric is to make good the loss of something that has a market value. The homemaker was engaged in a certain activity which has a market value. It may have been worth more to her to be able to engage

[86] *Supra*, footnote 38; and see accompanying text.

[87] O. Hawrylyshyn, A First Approximation of Value of 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; 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; P. Kome and M. Pringle, About Face: Towards a Positive Image of Housewives (1977), The Ontario Status of Women Council; J.J. Adler and 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 at Work: Five Million Women, A Study of the Canadian Housewive (1978), Advisory Council on the Status of Women.

[88] See, for example, Christopher J. Bruce, Assessment of Personal Injury Damages (1985), p. 255.

[89] See N.K. Komesar, Toward a General Theory of Personal Injury Loss (1974), 3 J. Leg. Stud. 457; F.J. Pottick, Tort Damages for the Injured Homemaker: Opportunity Cost or Replacement Cost? (1978-79), 50 U. Col. L. Rev. 59; Bruce, *ibid.*, pp. 256-258; Cooper-Stephenson and Saunders, *op. cit.*, footnote 5, pp. 217-218.

in that activity in the sense that she would rather do that than other activities that have a greater market value, but this is not the appropriate head under which to compensate for this kind of subjective loss. Instead, this might be taken into account under the rubric of non-pecuniary losses. Furthermore, in determining the replacement cost of these services the courts should consider only those services which have a market value. This means that any extra value that is attributed to the fact that the service is carried out by someone who has a special degree of affection for the recipient should be compensated, if at all, only as a non-pecuniary loss to the extent that the homemaker experiences the loss of the ability to provide such special care as the loss of an amenity of life. There is no market for, and therefore no market value for, "tender loving care". However, the courts should be sensitive to the fact that homemakers generally work quite long hours because this is something that can in principle be valued in market terms. This is not a complete answer to the issue of compensation for homemaking services because it does not dictate a choice between the two variations on replacement cost measurement that have been identified in the literature.[90] This, however, is beyond the scope of this paper.

B. *Illegal Income*

The approach proposed here would also have implications for the treatment of cases in which the plaintiff had been making her living in an illegal manner, and was likely to continue to do so. If compensation is for the loss of the ability to pursue various activities, we must ask what loss the thief, for example, has suffered. The answer is that the thief has lost the ability to support herself through stealing. Since I have argued for a basic division into those losses which are translatable into monetary terms, and those which are not, or those which have an economic value and those which do not, the thief is entitled to compensation on the same basis as the lawfully employed person only if the value of stealing is readily translatable into monetary terms. This is, of course, possible because we can simply determine the value of the items the thief would have stolen and can easily come up with a money figure. However, this leads us directly to the *ex turpi causa* problem. It may well be regarded as unseemly for the courts to be involved in judicially determining the value of illegal activities. Whether the *ex turpi causa*

[90] These two are the "substitute homemaker" approach, which seeks to determine how much it would cost to employ a person of the plaintiff's qualifications to do the things she used to do, and the "catalogue of services" approach, which involves identifying all the tasks the plaintiff used to perform and calculating the amount of time spent on each and determining how much it would cost to hire someone on an hourly basis to perform each task. See J. Newsom, How Much is a Good Wife Worth? (1968), 33 Mo. L. Rev. 462; Janet Yale, The Valuation of Household Services in Wrongful Death Actions (1984), 34 U.T.L.J. 283, discussing this issue in the context of fatal accident cases; Bruce, *ibid.*, pp. 258-260; Cooper-Stephenson and Saunders, *ibid.*, pp. 218-225.

rule is justified in this context largely follows from its primary role, that is, as a defence to a tort action. This larger question is beyond the scope of this paper, and it seems unwise to consider whether the rule should be retained in the limited context of damage law without considering its role generally. Therefore, I will only say that so long as the rule has force as a defence it should also give rise to a subsidiary rule in the damage context that the courts not base a damage award on the value of illegal activities. This would mean that the courts would be precluded, in such cases, from assessing the actual value of the plaintiff's lost capacity.

However, this need not result in leaving such a plaintiff destitute, with no means of supporting herself except to the extent that she can do so out of her award for costs of medical care. The *ex turpi causa* rule need not be regarded as a means of punishing the plaintiff for her illegal activity. Rather, it is based merely on the impropriety of a judicial attempt to evaluate the monetary worth of such activity. It does not preclude the awarding of compensation; merely the assessment of that compensation by reference to the value of illegal activities. Two possible bases for compensation seem available. First, it would be open for the courts to take account of the plaintiff's inability to provide for herself in awarding damages for future care costs. In disabling the plaintiff, the defendant has created a need—the need for the basics of life which the plaintiff now has no means of providing for herself. Ordinarily, this need is taken care of in providing compensation for loss of earnings or earning capacity. If, however, it is not taken care of, for whatever reason, the courts are not precluded from considering the issue under the cost of care heading. This would be similar to the justification offered in *Fenn* v. *Peterborough*[91] and as an alternative in *Arnold* v. *Teno*[92] for providing damages for basic needs for an unmarried non-earning woman under the heading of future care costs. However, since the court can only justify providing for basic needs under this head, it may well be that such damages would fall short of providing the standard of living the plaintiff previously enjoyed.

Secondly, one might argue that this kind of case forces one to award damages for the plaintiff's abstract capacity loss rather than her actual one. This raises the question as to how this loss is to be valued. The best option seems to be to base this on what the plaintiff could legitimately have earned. In the absence of any other available basis we must resort to some hypothetical basis. The results would be identical to those of the loss of earning capacity approach in these cases. If one accepts that the purpose of the *ex turpi causa* rule is not to punish the plaintiff, this second alternative seems more appropriate, especially in light of the fact that compensation based on need has been so minimal in those cases relying on this rationale. However, it is important to note

[91] *Supra*, footnote 35.

[92] *Supra*, footnote 1.

that this provides no justification for using the loss of earning capacity approach across the board. It is used here only because no other basis is suitable. Under the circumstances there need be no concern about over-compensating the plaintiff, which is the justification for requiring assessment according to the actual use of the plaintiff's capacities in the normal case, because it is highly unlikely that the plaintiff would be able to earn more legitimately than through her illegal activities.

C. *Business Income*

The problem of compensating the business person whose productivity is greater than her share of the profits has affinities to that of compensating homemakers and is similarly clarified by the characterization of the loss as that of the plaintiff's working capacity. If we take the view that the real loss in all these cases is the loss of the ability to work, it becomes clear that the person who works for a partnership or corporation, but not on salary, is doing economically valuable work. If injured in such a way as not to be able to continue her work she deserves compensation for that loss. The question then becomes what is the value of that work? It could be measured either by reference to what a salaried employee would be paid for similar services, or by the profits it generates for the company. Since, if the plaintiff were in business for herself she would be compensated for her total loss of profits, even if this amounted to more than she would be paid as an employee, it is arguable that the same measure should be used in the corporate or partnership context. There is nothing but a technical difference in the organization of the business between these cases. However, to use this as the measure of value may, in some cases, put the plaintiff in a better position, financially speaking, than she was before the injury. To see why this is so we must pursue the analogy with the homemaker.

If the plaintiff's share of the profits is less than the value of her services, whatever measure of that value is used, she is in a position comparable to that of a homemaker—she is, in essence, donating part of the proceeds of her labour to someone else, whether the other partners or other shareholders. Just like the homemaker, she should be the one to be compensated for this loss because she will then be in a position comparable to that which she enjoyed before the accident. She ought to be compensated at a level which will allow her to go on making a donation of comparable value to her business partners.[93] She may decide not to continue to make this donation to her partners, but she would have been free to decide to stop making such a donation before the

[93] Further thought may, however, have to be given to the tax implications of this proposal. Adjustments may need to be made to take account of the different tax rates applying to companies and individuals. See B.G. Hasken and D.J. Mullan, Private Corporations in Canada; Principles of Recovery for the Tortious Disablement of Shareholder/Employees, in L. Klar (ed.), Studies in Canadian Tort Law (1977), p. 215. Detailed examination of this issue is beyond the scope of this paper.

accident as well by simply refusing to work for the company. In determining what level of compensation would put the plaintiff in this position, we must distinguish between two kinds of cases. In some cases in which the plaintiff's injury is a short-term one and her role in the company is not unique, it may be feasible to hire a replacement to do her job. The proper measure of damages in such a case should be the cost of such a replacement. This would put the plaintiff in a position to use the damage award to replace the services she used to perform for the company in order to continue to produce the same level of profits to be shared with the other partners in the same proportion as before the accident.

In these cases the replacement value of the plaintiff's services should be the measure of damages even though the cost of replacement may be less than the profit which the plaintiff earned for the company through her labour. This is so because if the value of her labour were measured by the profits it earned for the company and compensation were awarded at this level, the plaintiff would be made better off in any case in which that amount is greater than the cost of replacement services. Such a plaintiff would be able to pay someone to replace her, retain the excess for herself, and continue to receive her pre-accident share of the company's profits. For example, suppose the plaintiff's work earned $10,000 in profits for a company in which she held fifty per cent of the shares, and that it would cost $7,500 to hire someone to do her job. This means that before the accident her personal income was $5,000. If her labour is valued at $10,000, she could hire a replacement at $7,500 and retain the extra $2,500 for herself. The replacement would enable the company to continue making a $10,000 profit annually of which the plaintiff would receive $5,000. Her total income after the accident would therefore be $7,500, which is $2,500 more than before the injury. In any case in which replacement of the plaintiff's services is not feasible, however, it seems that full compensation would require that the plaintiff receive the amount which her labour would have produced in profit for the company. In this case, this is what is required to enable the plaintiff to go on as before, including continuing the donation of the fruits of her labour to her business partners.

The solution proposed here is different from that recommended by Mullan and Hansen[94] who suggest that the plaintiff's loss should be assessed by reference to the decline in the market value of the plaintiff's shares in the company caused by the loss in income of the company. However, there is no guarantee that this amount will equal the real value of the plaintiff's work, especially when the plaintiff's share of the work is greater than her share of the profits (or shares). Furthermore, it may give rise to serious evidential problems in determining whether a decline in market value of shares can be attributed to the loss to the company of the plaintiff's services. The approach recommended here avoids these problems and is consistent with that applied in all other contexts.

[94] *Ibid.*

It is perhaps no accident that the cases in which replacement costs or full loss of profits have been awarded have tended to be cases in which the plaintiff worked for a family business. This latter circumstance makes the analogy to the homemaker's situation even clearer. Like the homemaker, the working spouse is essentially donating part of the proceeds of her labour to the other by sharing the profits. Luntz supports this result and argues that the measure of the loss should be:[95]

> (a) where substitute labour is employed, the full cost of that substitute labour. . .; (b) where no substitute labour is employed, the value of the plaintiff's labour (if that can be readily ascertained. . .) or the loss of profits of the partnership as a whole in so far as that can be said to be due to the withdrawal of the plaintiff's labour and not to market conditions.

By analyzing the loss to the plaintiff as that of her working capacity in conjunction with the argument that we should assess the value of that capacity by reference to what will best put the plaintiff in the equivalent of her pre-accident position we can see why this is the correct measure of damages in this context.

Conclusion

In conclusion, it is submitted that a reconceptualization of the head of damages usually referred to as either loss of earnings or loss of earning capacity is needed. It should be recognized that what the plaintiff has lost is the capacity to perform many activities. These can easily be divided into those which have a monetary value and those that do not. The former should be compensable as a pecuniary loss. Therefore, in lieu of either the loss of earning capacity or loss of earnings characterizations it is argued that a more accurate conceptualization of the plaintiff's loss is that of the capacity to *work*, where the term "work" designates any activity which has a market value. This would enable courts to award fair compensation to non-earners such as homemakers within the same rubric that applies to those in paid employment. In other words, this approach provides a uniform rationale for compensation, eliminating the need for *ad hoc* solutions to what have been considered "problem" cases. These cases cease to be problematic if the loss is characterized as that of the capacity to work.

The value of this capacity should be assessed by reference to how the plaintiff would have used it, in order to put the plaintiff in no better or worse a situation than she would have enjoyed if not for the injury. Once it is determined what work it is the plaintiff would likely have done over her life, its value can be ascertained by reference to market rates for that kind of work. This analysis shows that the connection between the characterization of the loss and the measure of its value is not as straightforward as is frequently assumed.[96] In particular it is often

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[95] Luntz, *op. cit.*, footnote 62, p. 259.

[96] Waddams, *op. cit.*, footnote 5, p. 228; Cooper-Stephenson and Saunders, *op. cit.*, footnote 5, pp. 199-200.

thought that the choice of a loss of capacity approach inevitably means that the loss must be measured by reference to what the plaintiff could have earned by putting her capacities to the most remunerative use possible. This ignores the fact that the basic objective of tort law damages is to restore the plaintiff to the position she would have been in but for the injury. From the point of view of restoring the plaintiff to her pre-injury financial position this can be accomplished merely by measuring the value of the use to which she actually put her talents rather than the value of their potential use. This result is fully compatible with regarding the plaintiff's loss as the loss of a capacity rather than the loss of actual earnings. Understood in this way, the so-called "hybrid" approach present in some of the cases makes more sense. The courts need only shift their focus from earnings *per se* to the capacity to perform economically valuable work to have a workable and satisfactory basis for the award of damages.