

DAMAGES FOR LOST EARNING CAPACITY: WOMEN AND CHILDREN LAST!

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This article identifies and analyzes gender bias in personal injury awards to women. Based on a study of cases involving serious injuries to women and men, it finds that, despite some significant advances, there is still substantial downward bias in awards to women. The article analyzes the way in which such bias occurs including the devaluation of women's capacities and talents, special deductions from awards to women that are not applied to men, a failure properly to value work in the home, and a reliance on labour market data which reproduces in court the discrimination against women that occurs in the workplace. The article concludes by identifying and critically analyzing possible reforms.

Dans cet article l'auteur recherche et analyse le parti pris sexuel dans les dommages et intérêts accordés aux femmes pour blessures corporelles. D'une étude de décisions sur des blessures graves subies par des hommes et des femmes, il conclut que malgré certains progrès notables le parti pris contre les femmes est encore très marqué dans les dommages et intérêts qui leur sont accordés. L'auteur remarque en particulier que les aptitudes et talents des femmes sont dévalorisés, que les dommages et intérêts qui leur sont accordés subissent des déductions qui ne s'appliquent pas dans le cas des hommes, qu'on ne donne pas sa vraie valeur au travail fait à la maison et qu'on se base sur des données du marché du travail qui introduisent au tribunal la discrimination contre les femmes existant sur le marché du travail. En conclusion l'auteur mentionne des réformes possibles dont il fait l'analyse critique.

Introduction

Assessing damages for lost earning capacity remains one of the most difficult challenges in personal injury law and raises profound social justice issues. The most acute problems arise when the courts must grapple with injuries to children, women, homemakers, and individuals who are voluntarily out of the waged workforce. Ordinarily reliant upon the victim's prior working history and market wage rates to determine earning capacity, courts are

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frequently at a loss as how to deal with children who have no earnings history, or other individuals, most often women, who do not fit the traditional social stereotype of the "productive worker".

In their pathbreaking work on personal injury damages, Kenneth Cooper-Stephenson and Iwan Saunders demonstrated the persistent under-compensation of women in the area of lost earning capacity. They concluded:¹

Even though the low level of awards may sometimes reflect current socio-economic reality, the general picture appears to evidence a discriminatory attitude on the part of the judiciary towards women, and certainly perpetuates a philosophy of inequality in their job opportunity and remuneration in the labour force.

The present article explores further the problems of damages assessment in the case of women and female children. It examines the advances made by the courts in the ten years since Cooper-Stephenson exposed the pervasive discrimination against women, and assesses the current state of the law in this area. The article relies upon an analysis of a large sample of relevant British Columbia decisions, both reported and unreported,² as well as several decisions from other jurisdictions for comparative and illustrative purposes. To eliminate other variables, apart from gender, I have focused primarily upon cases involving catastrophic injuries resulting in total, or near total, incapacity.

The article finds significant qualitative evidence that, despite some real advances, there is still a substantial downward bias in awards to women and female children. It identifies several interrelated reasons for this bias, which can be traced to historical patterns in labour markets and wages, and traditional assumptions and attitudes about women. One important reason women receive lower awards is because of the near exclusive reliance on the market as the measure of value and loss. This reliance on the market gives rise to two problems. First, it excludes, or at least depresses, the valuation of productive activities carried on outside of the market and not rewarded by a wage. The most prominent manifestation of this is the economic invisibility of housework and the corresponding devaluation, or non-valuation, of losses to homemakers. Second, reliance on the market simply introduces into court the systemic inequalities faced by women in the workforce. Even where a woman is, or is likely to be, a wage

¹ K. Cooper-Stephenson and I. Saunders, *Personal Injury Damages in Canada* (1981), p. 212. The material on gender bias in this book is based on Cooper-Stephenson's earlier article, *Damages for Loss of Earning Capacity for Women* (1978-79), 43 *Sask. L. Rev.* (No. 2) 7.

² This article deviates somewhat from traditional scholarship in its heavy emphasis on unreported decisions. I have attended to these in order to obtain a somewhat more comprehensive understanding of how the "run of the mill" case is being treated. Moreover, while unreported, these cases are nevertheless prominent as precedents, obviously circulating widely. Of course, this methodology still only scratches the surface. A more thorough study would focus on settlements and lawyer attitudes as well as judicial decisions.

earner, she is likely to earn far less than a man. By using existing wage rates as the basis of assessment, personal injury awards will thus reproduce the large wage differentials and gender biases that occur in labour markets. These problems are compounded by other gender-related biases, including the conservative assessments made in many cases about the pre-accident talents, capacities and opportunities of female plaintiffs.

It should be noted at the outset that the patterns revealed by this article are neither universal nor fixed. The law in this area is in considerable flux and there are many cases in which there is no identifiable problem when measured against standards of formal equality. It should also be said that the remaining bias in the law is not traceable solely to judicial attitudes and assumptions. In many of the cases studied the bias is built into the very arguments that are made (or more often not made) by lawyers representing injured women. Most importantly, bias is simply entrenched in legal doctrine that is too often taken for granted.

The article identifies, illustrates and criticizes the specific legal doctrines which reveal or introduce gender bias in damage assessment. It concludes by examining a variety of proposed solutions and suggests some modest avenues of appropriate reform.

A. *Earning Capacity: General Principles*

An important component of any personal injury award, in addition to the cost of care and non-pecuniary damages for pain and suffering, is the award for lost earning capacity. What the court must do is assess the severity of the victim's disability, estimate the extent to which that disability has impaired the victim's ability to work over the remainder of her working life, and determine a present lump sum amount that properly reflects that economic loss.

The hard question in these cases is to determine the appropriate conceptual basis for assessing damages. The choice is usually said to be between two options: (a) placing a value upon the actual *probable earnings* that have been lost as a result of the accident; or (b) placing a value upon the diminished *earning capacity* of the victim.³ This distinction, which may initially seem quite subtle, has extremely important practical consequences. To illustrate the difference most starkly, if in the case of persons who work in the home, or in some other non-waged occupation, we adopt the first method, we are forced to conclude that when injured, the plaintiff suffers no economic loss. If we adopt the second approach, we are able to say that actual earnings are irrelevant (or at least not determinative)

³ See S.M. Waddams, *The Law of Damages* (2d ed., 1991), para. 3.710; Cooper-Stephenson and Saunders, *op. cit.*, footnote 1, p. 196; Denise Reaume, *Rethinking Personal Injury Damages: Compensation for Lost Capacities* (1988), 67 Can. Bar Rev. 82.

and we are therefore free to explore other methods of evaluating the loss to the productive capacity of persons who are not recognized by the market.

The earning capacity approach, with its focus on human capital as opposed to mere market wages, is the one that is affirmed in at least the *language* of most judgments. As the Supreme Court of Canada has stated in *Andrews v. Grand and Toy Alberta Ltd.*,⁴ "[i]t is not loss of earnings but, rather, loss of earning capacity for which compensation must be made. . . . A capital asset has been lost: what was its value?" Lost earnings, therefore, are not treated as a series of future losses, but as a present loss of a capital asset: the ability to work. The task of the courts is to value that capital asset at the time it was destroyed by the defendant.

The earning capacity approach implies that the relevant question is not what the plaintiff *would* have earned, but what the plaintiff *could* have earned had she or he not been injured. Nevertheless, in the case of full-time employees, existing wages are usually taken as the starting point for the assessment of lost earning capacity, since they provide the best (or simplest) evidence of what the plaintiff could have earned. However, because the court is not replacing existing wages, but rather seeking to value an asset, the salary of the plaintiff at the time of injury is not determinative. A person's earning capacity may be underestimated if existing wages are taken as conclusive. Accordingly, the courts frequently accept evidence about the plaintiff's chance of future promotion, career changes, productivity increases and other positive contingencies (though these may still be understood as factors affecting probable future earnings).⁵

Notwithstanding the language of the law, when we examine cases involving injuries to persons who are not part of the market workforce, most often women, we see that awards are based primarily upon estimates of actual probable earnings. As will become apparent, this method, which assumes that the market is the only reliable measure of the productive

⁴ [1978] 2 S.C.R. 229, at p. 251, (1978), 83 D.L.R. (3d) 452, at p. 469.

⁵ Cases illustrating the court's approach to "lost chances" of promotion, career change, etc., include: *Conklin v. Smith*, [1978] 2 S.C.R. 1107, (1978), 88 D.L.R. (3d) 317; *Clarke v. Kieroff* (1983), 43 B.C.L.R. 157 (B.C.C.A.); *Hearndon v. Rondeau* (1984), 54 B.C.L.R. 145 (B.C.C.A.); *Freitag v. Davis*, [1984] 6 W.W.R. 188 (B.C.C.A.); *Steenblock v. Funk* (1991), 46 B.C.L.R. (2d) 133 (B.C.C.A.); leave to appeal to S.C.C. refused, (1991), 51 B.C.L.R. (2d) xxxv. The chance of promotion or productivity increase may be factored into the discount rate (by lowering it). See, for example, *Lewis v. Todd*, [1980] 2 S.C.R. 694, (1980), 115 D.L.R. (3d) 257 (in which the Supreme Court affirmed the decision of the trial judge to reduce the discount rate to 2% in order to take into account a 2% productivity factor). In British Columbia, the discount rate for lost earnings is 2.5% as opposed to 3.5%. The difference is due to a recognition of a 1% productivity factor in wage increases. It is important to note that these principles do not necessarily demonstrate that the courts are pursuing an "opportunity cost" approach to the measurement of earning capacity (how much the plaintiff *could* have earned), but are in fact consistent with a "probable earnings" approach (how much the plaintiff would have been likely to earn).

capacities of individuals, is one of the major factors that works against women in personal injury actions.

B. *Women and Tort Law: Historical Background*

Historically at common law, many women could recover nothing for their personal injuries.⁶ Prior to the married women's property laws⁷ a married woman could not sue solely in her own name, and any recovery would, at any rate, become her husband's property. The primary action available in respect of injuries suffered by a married woman was a claim by her *husband* for loss of services (*actio per quod servitium amisit*) and for loss of consortium. These actions, which still exist in some common law jurisdictions, were premised on the patriarchal and proprietary understanding of women's status and value.⁸ The right of recovery was not reciprocal: a married woman could not make a claim for loss of her husband's services when he was injured. It was also exclusive: where a woman's husband claimed for her injuries, she could claim nothing herself. This regime essentially denied any claim to a married woman on the basis that her husband was not only the beneficiary, but the legal owner of her labour power.

Married women gradually gained civil rights under the married women's property reforms of the nineteenth century.⁹ Yet the husband's claim did not fade away even with the development of a separate action for women. The actions for loss of services and loss of consortium continued to exist. For at least three decades the courts have recognized the anomalous and sexist nature of this regime and it has now been altered in most

⁶ For a comprehensive description of the common law regime affecting married women, see M. McCaughan, *The Legal Status of Married Women in Canada* (1977); L. Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth Century England* (1985).

⁷ See, for example, Married Woman's Property Act, R.S.B.C. 1979, c. 252. This particular legislation has now been repealed; Charter of Rights Amendment Act, S.B.C. 1989, c. 68, s. 84. See Law and Equity Act, R.S.B.C. 1979, c. 244, s. 55, enacted by Charter of Rights Amendment Act, *ibid.*, s. 80.

⁸ See the discussion in *Woelk v. Halvorson*, [1980] 2 S.C.R. 430, (1980), 114 D.L.R. (3d) 385. Recognizing that the common law action did not extend to wives, McIntyre J., at pp. 437 (S.C.R.), 390 (D.L.R.), acknowledged that it was based on the "mediaeval concept that a husband had a proprietary interest in his wife...". Considering the statutory extension of the action in Alberta (by a 1973 amendment to s. 35(1) of the Domestic Relations Act, R.S.A. 1970, c. 113) he concluded, at pp. 438 (S.C.R.), 319 (D.L.R.), that "...judicial opinion in this country has been, on balance, that the remedy is open to husbands only...; that the remedy is anomalous in today's world and should not be extended; when applied, damage awards, except in exceptional cases, should be modest; and that an impairment, as distinct from a destruction of the consortium, should suffice to found the action".

⁹ These reforms are described by C. Backhouse, *Married Women's Property Law in Nineteenth-Century Canada* (1988), 6 *Law and History Rev.* 212.

jurisdictions. In some, the actions for loss of services and loss of consortium have been extended to allow claims by women for injuries to their husbands. In others, including British Columbia, they have been abolished altogether, based on the sound proposition that the loss to an injured person is her own personal loss.¹⁰

Notwithstanding these reforms, and the appearance in the law of formal equality, older attitudes and assumptions continue to echo in modern law. The following sections examine the variety of ways in which awards to women, whether married or not, continue to be significantly depressed as a result of prevailing attitudes about their roles in society and the value of their work.

I. Modern Echoes: Woman's Work and the Law

Bias against injured females appears in a variety of forms in modern law. In the first place, while difficult to prove, it would appear that judicial assessments of female earning capacity are occasionally significantly reduced by reason of gender stereotyping. Women's economic capacities are under-rated because they are women. Secondly, traditional assumptions about women's roles and family responsibilities result in further deductions from awards to female plaintiffs. In particular, it is frequently assumed that they would have left the workforce to assume family responsibilities and that this reduces their earning capacity. Thirdly, while women are frequently assumed to bear the primary burden of household support, their work in the home is not properly conceptualized or adequately valued. While housework is viewed as a valuable service performed for the benefit of domestic partners and other family members, it is still not treated as evidence of personal earning capacity. Finally, even when women are treated with formal equality, the current approach to damages measurement simply reproduces the discrimination they suffer in the marketplace. The following sections canvass each of these problem areas.

A. Conservative (Gendered) Assumptions

Where a woman is not in the waged workforce, but instead works in the home or has no earnings record, there has been a tendency to minimize her lost earning capacity by making modest assumptions about her pre-accident talents and opportunities. In a series of cases in the late 1970s involving female plaintiffs, the courts set wage loss levels at the poverty line, or awarded nothing for lost earning capacity beyond the amount that had already been awarded for the cost of future care.

¹⁰ In British Columbia the action for loss of consortium has been abolished by s. 75(1) of the Family Relations Act, R.S.B.C. 1979, c. 121. The action for loss of services has been abolished by s. 59 of the Law and Equity Act, R.S.B.C. 1979, c. 224.

In *Toews v. McKenzie*,¹¹ a twenty-one year old woman was rendered paraplegic in an accident. The trial court refused to make any award for lost earnings over and above the cost of future care. The only reason given was that "... the plaintiff, if she had not been injured, would not have been a large wage earner.... The underlying assumption in this approach is that over her working life the plaintiff would not have earned more than sufficient for her daily needs".¹²

In *Arnold v. Teno*,¹³ three levels of courts considered the problem of assessing the pecuniary loss suffered by a severely injured four-and-a-half year old girl. In the absence of any reliable evidence to assess this loss, the trial judge and the Ontario Court of Appeal accepted Diane Teno's mother's salary as a teacher as fair proxy and suggested a figure of \$10,000 per year. The Supreme Court of Canada, however, reduced this amount to \$6,000. Spence J. rightly pointed out that "[t]here can be no evidence whatsoever which will assist us in determining whether she ever would have become a member of the work force or whether she would have grown up in her own home and then married".¹⁴ Yet in the absence of such evidence Spence J. seemed prepared to assume that Diane Teno *would not* achieve even the modest success of her mother. "I do not see how this Court could approve the course taken by Zuber J.A. which simply amounted to assuming ... the infant plaintiff would have followed the course of her mother who was a primary school teacher with an income of \$10,000 per year."¹⁵ The court settled on a figure of \$6,000 after a contingency deduction: an amount just \$1,000 above the poverty line.¹⁶

Ironically, *Teno* was considered by some to be an advance in the law. It probably was. Diane Teno at least received some compensation for her loss. Yet it must be asked why, in the admitted absence of evidence one way or another, Spence J. was willing to assume that she would not have achieved even the modest success in the workforce that her mother had. Several commentators have contrasted the decision in *Teno* with the other two cases which accompany it in "the trilogy",¹⁷ noting the relatively

¹¹ (1977), 81 D.L.R. (3d) 302, [1977] 6 W.W.R. 725 (B.C.S.C.), aff'd (1980), 109 D.L.R. (3d) 473, [1980] 4 W.W.R. 108 (B.C.C.A.).

¹² *Ibid.*, at pp. 315 (D.L.R.), 741 (W.W.R.) (S.C.).

¹³ [1978] 2 S.C.R. 287, (1978), 83 D.L.R. (3d) 609.

¹⁴ *Ibid.*, at pp. 329 (S.C.R.), 636 (D.L.R.).

¹⁵ *Ibid.*

¹⁶ It is important to note that the award for lost earning capacity was not in addition to any award for the cost of care covering ordinary living expenses. Spence J., at pp. 321 (S.C.R.), 631 (D.L.R.), remarked: "It should also be noted that such calculations for cost of care make no provision for the ordinary costs of living such as food, clothing and shelter but are for special care alone."

¹⁷ *Andrews v. Grand and Toy Alberta Ltd.*, *supra*, footnote 4; *Thornton v. Prince George School District*, [1978] 2 S.C.R. 267, (1978), 83 D.L.R. (3d) 480.

more generous treatment of the two young male plaintiffs in those cases.¹⁸ It seems probable that in the admitted absence of evidence one way or another, Spence J. was relying on certain unstated assumptions based on Diane Teno's gender.

The poverty line approach adopted in *Teno* is not confined exclusively to female plaintiffs. It has been applied in some cases to very young male children.¹⁹ Yet it is most prominent in the case of females, whether children, or adult homemakers with little or no earnings record.²⁰

These cases appear to illustrate the proposition that awards to women are depressed because courts sometimes make conservative assumptions about their pre-accident talents, abilities and opportunities in comparison to men. Yet it is very difficult to prove this proposition, and some qualifications should be introduced at this point. Estimates of earning capacity are based on the individual characteristics of different plaintiffs, expert evidence, and the judge's impression of the witnesses (especially the plaintiff) in the witness stand. These estimates of personal potential are presented as findings of fact. Because no two cases are identical, it is not possible to show that the only difference between two cases is the plaintiffs's gender. Without "re-trying" the cases, it is simply not possible to prove qualitatively that assessments of women's potential is depressed solely by reason of gender-biased assumptions. This article, therefore, does not dwell extensively on this aspect of the problem. Instead, it focuses more on identifiable legal doctrines that *do* more clearly reveal gender bias.

Nevertheless, it would be wrong to pass over this dimension entirely. While for the reasons stated above, further comparative examples will not be offered to "prove" the existence of negative assumptions, two empirical propositions may be stated with some confidence. First, while further quantitative analysis should be done, women *do* receive lower awards than men for lost earning capacity. Secondly, scientific research supports the view that women, solely by reason of their gender, are often considered to be less talented than men.

¹⁸ Cooper-Stephenson and Saunders, *op. cit.*, footnote 1, p. 211; Reaume, *loc. cit.*, footnote 3, at p. 90.

¹⁹ In *Wipfli v. Britten*, [1984] 5 W.W.R. 385, (1984), 56 B.C.L.R. 273 (B.C.C.A.), leave to appeal granted, [1985] 1 W.W.R. lviii (S.C.C.), the court rejected a young male child's wage as a standard and set a level of earnings between the average wage for males 20-24 (\$15,000) and the poverty level (\$10,000). The resulting figure of \$12,500 was further reduced by 70% to avoid overlap with the award for care.

²⁰ See *Fenn v. Peterborough* (1979), 104 D.L.R. (3d) 174, 25 O.R. (2d) 399 (Ont. C.A.), *aff'd sub nom. Consumer's Gas Company v. City of Peterborough*, [1981] 2 S.C.R. 613, (1981), 129 D.L.R. (3d) 507 (discussed *infra*, at footnote 49 and accompanying text); *Webber v. Lowrie and Bernard* (1979), 15 B.C.L.R. 289 (B.C.S.C.); *Penso v. Sollowan*, [1982] 4 W.W.R. 385, (1982), 35 B.C.L.R. 250 (B.C.C.A.) (discussed *infra*, at footnote 42 and accompanying text).

It does not seem unreasonable to suggest that unintentional gender stereotyping can play a role in the judicial assessment of earning capacity. "Facts" do not exist in uninterpreted form. They are filtered through, and supplemented by, assumptions and generalizations that are widely used to understand the world. Numerous studies have revealed that gender is one of the more important of these filters.²¹ These studies show how various evaluators of individual potential consistently use gender as a basis of assessment. For example, in one experiment researchers sent eight curriculum vitae to 147 university administrators, asking them to rank the candidates for a job. Half the curriculum vitae were identified as belonging to women and half to men. The average rank for hiring the men was associate professor. The average rank for women was at the lower assistant professor level.²² The following sections move on to show how similar negative assumptions based on gender appear in specific legal doctrines and practices.

B. Contingency Deductions

It is common practice for the courts to make a deduction from all personal injury awards for "negative contingencies". The basis for this deduction is to take into account the adverse hazards and vicissitudes of life—the chance that the plaintiff would not achieve maximum earnings because of sickness, injury or unemployment. The figure commonly employed is between 10% and 20%. This deduction, which is applied against both male and female plaintiffs, is problematic for a number of reasons. First of all, it seems to assume an extraordinary level of bad luck. A 20% deduction is equivalent to assuming that the plaintiff would be unemployed one full year out of every five, with no income whatsoever, receiving no private or public insurance or welfare. It also assumes, as some judges have pointed out, that this bad luck is not offset by good luck.²³

There is also a category of cases, most often involving women and children, where the contingency deduction is especially problematic because it may represent a double deduction. These are the cases where the plaintiff's earning capacity is not assessed on a personal basis (that is, by reference to her own salary and work history), but rather on the basis of statistics. In some cases, because the plaintiff has no prior earning history, the courts

²¹ For a summary of some of the relevant studies, see F.L. Geis, M.R. Carter, D.J. Butler, *Seeing and Evaluating People* (1982).

²² *Ibid.*

²³ In *Blackstock v. Patterson*, [1982] 4 W.W.R. 519, at p. 533, (1982), 35 B.C.L.R. 231, at pp. 243-244 (B.C.C.A.), Anderson J.A. quoted Dickson J. in *Andrews v. Grand and Toy Alberta Ltd.*, *supra*, footnote 4, at pp. 253 (S.C.R.), 470 (D.L.R.), who pointed out that "...not all contingencies are adverse ... [and] ... in modern society there are many public and private schemes which cushion the individual against adverse contingencies". See also *Lewis v. Todd*, *supra*, footnote 5.

may accept as a starting point the average earnings for a population group of which the plaintiff is a member. For example, in the case of a female university student, the court may start with a figure for average earnings of the group of which she is a member. To make a further contingency deduction in these cases is inappropriate because the average figures already account for many adverse contingencies. They are figures drawn from the *actual* earnings of the relevant population and therefore already include the diminished earnings of persons who have become sick, unemployed and suffered from other forms of bad luck.

Some courts and lawyers have recognized this problem,²⁴ but the error continues to be made. The arguments made by defence counsel in the 1991 case of *Tucker v. Asleson*²⁵ are illustrative of this problem. The plaintiff, an eight-year old girl, was rendered permanently unemployable as a result of an accident. The defence submitted that her earning capacity should be assessed on the basis of average female earnings. But counsel additionally argued that because this figure included university graduates and full-time employees, it should be further reduced to reflect the contingency that the plaintiff in this case might not have attended university and might not have been a full-time employee. This argument is clearly wrong. The average figures include both university graduates and non-university graduates, both full-time and part-time employees. Thus, it already discounts for the contingencies asserted by counsel. This article returns to other similar statistical problems in a later section.

1. *The Marriage Contingency Deduction*

There is another, and very important, contingency deduction which depresses the earnings of women. It is frequently explicit, but perhaps more often implicit, and is therefore difficult to identify or quantify. This is the marriage contingency.

²⁴ In *Lewis v. Todd*, *ibid.*, the Supreme Court upheld a trial decision to deduct less than 10% for contingencies. Dickson J., at pp. 714 (S.C.R.), 272 (D.L.R.), said: "A trial judge should consider whether there is *any* evidence which takes the deceased's situation outside the 'average'; whether there are any features on which an account was taken in the actuarial tables, either because the feature is purely individual to the individual or, because the 'average' is not adapted for the category or class to which the person belongs . . .". See also *Blackstock v. Patterson*, *ibid.*, per Anderson J., at pp. 533 (W.W.R.), 243 (B.C.L.R.), again citing Dickson J. in *Andrews v. Grand and Toy Alberta Ltd.*, *ibid.*, at pp. 253 (S.C.R.), 470 (D.L.R.): "...in many respects, these contingencies implicitly are already contained in an assessment of the projected average level of earnings of the injured person, for one must assume that this is a projection with respect to the real world of work, vicissitudes and all."

²⁵ Unreported, April 25, 1991, Vancouver Reg. B871616 (B.C.S.C.); decision on additional issues reported (1992), 62 B.C.L.R. (2d) 78. Related proceedings reported (1991), 53 B.C.L.R. (2d) 194 (B.C.C.A.).

The key to understanding the award to Diane Teno may lie in Spence J.'s comment that, while Diane Teno may have become a member of the workforce, she may also "have grown up in her own home and then married".²⁶ This suggests that awards to women should take into account the possibility that, but for the accident, they might have married and left the workforce, presumably to assume family responsibilities, thus reducing their income. This is the marriage contingency deduction.

The clearest example of this deduction is the oft-cited case of *Caco v. Maple Lodge Farms Ltd.*²⁷ The plaintiff was a young woman who, at the time of the accident, was employed as a senior X-ray technician with the prospect of receiving a promotion. Notwithstanding this promising future, the judge refused to base the award on her lost earning capacity, stating:²⁸

Had she not been injured it is quite possible, in fact probable, within at least a few years she would have married and I assume, as is very common now, that after marriage she would continue to work for a time. This would still give her in all likelihood an expectancy much less than the working life expectancy of 37.8 years mentioned earlier. Had she been able to marry it is quite likely, on the basis of the evidence given before me, that she would have had a family of children and therefore the likelihood of her continuing in her position as an X-ray technician would be problematical.

This deduction from a woman's award to reflect the probability of marriage and family responsibilities occurs in a large number of cases.²⁹ It is often expressed, but may also be implicit in large contingency deductions that are left unexplained.³⁰

There are a number of reasons why this deduction is arguably inappropriate. First, it is inconsistent with the theoretical "earning capacity" approach. A voluntary choice to leave the paid labour force does not

²⁶ *Supra*, footnote 13, at pp. 329 (S.C.R.), 636 (D.L.R.).

²⁷ (1967), 66 D.L.R. (2d) 126, [1968] 1 O.R. 217 (Ont. H.C.). For a discussion, see Cooper-Stephenson and Saunders, *op. cit.*, footnote 1, pp. 209-210.

²⁸ *Ibid.*, at pp. 137 (D.L.R.), 228 (O.R.). It appears that the judge in this case thought that his ruling was in fact favourable to the plaintiff. The preceding sentence to the above quote states: "It is my view that I should not take as a basis for computing part of the damages the future loss of earnings as an X-ray technician. To do so would result in calculating an amount less than would be fair compensation in the circumstances."

²⁹ See, for example, *Johnston v. Bustraan*, Mar. 3, 1980, Chilliwack Reg. 57/78 (B.C.S.C.); *Bourton v. England*, June 29, 1987, Merritt Reg. 7/84 (B.C.S.C.); *Downing v. Public Trustee*, Sept. 1, 1988, Prince George Reg. 0152/84 (B.C.S.C.); *Botero v. Kiss*, Mar. 11, 1991, Van. Reg. B861207 (B.C.S.C.); *Wright v. Mason*, Mar. 22, 1991, Van. Reg. B893695 (B.C.S.C.); *Oppen v. Johnson Estate*, Oct. 29, 1991, Van. Reg. B874366 (B.C.S.C.); *Waterhouse v. Fedor* (1986), 11 B.C.L.R. (2d) 56 (B.C.S.C.); *Sanderson v. Betts*, Nov. 29, 1990, Kamloops Reg. 5620.

³⁰ See, for example, *Tucker v. Asleson*, *supra*, footnote 25, in which a 63% deduction was applied to the award to an eight-year old female plaintiff. See also *Pryma v. Buckler*, Apr. 2, 1990, Vict. Reg. 2402/88 (B.C.S.C.).

extinguish a person's earning *power* or working capacity (though in some sectors it may in the long run). The choice to leave the workforce in order to raise a family is a decision about how best to *utilize* one's earning power. Second, even if earning capacity is set by reference only to economically measurable values, the deduction ignores entirely the value of housework which, while unpaid, is economically productive. In other words, any wage loss is (at least partially) offset by enhanced household production.

It is important to note that no such deduction has ever been made from a man's award. Indeed, marriage may enhance the court's assessment of a male plaintiff's earning capacity. In the 1988 case of *Lang v. Porter*³¹ the plaintiff, a twenty-year old male, had a very poor school record and work history. This led the trial judge to a low assessment of his lost earning capacity. But on appeal, the award was increased, partly by reason of the plaintiff's recent marriage.³² McEachern C.J.B.C. rejected the argument that his past work history should be held against him, stating:³³

With respect, this ignores the likelihood that a young man who has now taken on the responsibilities of a wife and family would probably settle down to a conventional economic life-style. Such is a far more likely scenario than the one inferred by the defence from the plaintiff's spotty teenage work history or to respond immediately to the economic realities he faced following his accident.

In the result, assumptions about, and interpretations of, conventional social roles work in favour of men and against women. Awards to men are never reduced by reason of the fact that but for the injury they might have married and raised children, which would be costly, either in terms of direct expenses or foregone income. It seems reasonable to suppose that some men may leave the workforce temporarily, or work at less demanding jobs, while they share the burden of childraising. Even more commonly, there is a strong possibility that many young men, but for their injuries, would have spent a large portion of their income on their families. Their awards, however, are never reduced by reason of the fact that because of their injury they will not incur this expense. And this is how it should be. Having a family *is* expensive and may result in reduced wealth. But it does not necessarily affect earning capacity; it only affects how one spends one's income or, in the case of men and women who temporarily leave the workforce, how one utilizes one's working capacity itself.

The difference that the marriage contingency deduction makes in awards to women is difficult to determine. Just what portion of the total deduction is attributable to the possibility of marriage is usually not stated,

³¹ Aug. 19, 1988, Campbell River Reg. 84/104 (B.C.S.C.).

³² (1991), 57 B.C.L.R. (2d) 253 (B.C.C.A.).

³³ *Ibid.*, at p. 261.

and the deduction will sometimes be included in the plaintiff's own figures themselves. However, in a study of a small sample of British Columbia cases (twenty-six female/thirty-three male), it was found that while the average express deduction from awards to men was 14.4%, the average deduction from awards to women was 19.4%.³⁴ The gap is, in fact, much larger than this when it is recognized that the deduction is more often contained in the plaintiff's own figures or included in the statistical participation rates utilized to determine the length of working life. The deduction therefore usually passes unremarked.

In the case of women who, at the time of the accident, are full time members of the paid workforce, an express deduction for marriage is less frequent. In the case of *Blackstock v. Patterson*,³⁵ the plaintiff was a twenty-four year old woman who, at the time of the accident, had one university degree and had just completed the first year of a two year training program. The trial court accepted average teacher salaries as a starting point, resulting in a lump sum earnings figure of \$510,000. This amount, however, was reduced to \$250,000 on the basis that it was "too much". Among the reasons for the deduction were the usual contingencies (sickness, unemployment), the contingency of marriage, and the additional probability of unemployment due to the plaintiff's love of travel.

The Court of Appeal increased the award to \$360,000, stating that in the absence of statistical evidence awards should not be adjusted for the contingency of marriage. It is significant, however, that the court maintained a 30% contingency deduction, accepting that the likelihood of voluntary unemployment for the purpose of travel was relevant. The court stated that it would be "illogical to treat earning capacity in the abstract without giving consideration to the projected work habits of the plaintiff".³⁶

This decision reveals that the courts do not consider earning capacity in the abstract, but are in fact concerned more with probable earnings. The case also leaves open the possibility that evidence of marriage prospects might still be introduced to reduce the award. *Blackstock* certainly did not put an end to the marriage contingency.³⁷

2. The Implicit Marriage Contingency Deduction

Even in the absence of an express deduction for the contingency of marriage, there remains the possibility that this same deduction is built into the plaintiff's own calculations. Where the estimate of the plaintiff's pre-accident earning capacity is based on statistics, the statistics themselves,

³⁴ J. Fraser, *Gender Bias in Lost Earning Capacity Awards: An Empirical Study of British Columbia Cases* (unpublished, November 1991, available from author).

³⁵ *Supra*, footnote 23.

³⁶ *Ibid.*, at pp. 536 (W.W.R.), 247 (B.C.L.R.).

³⁷ See the cases noted *supra*, footnote 29.

if they are gender-specific, may already discount for marriage. This is particularly true in cases involving female children. Gendered earning statistics for women already incorporate a marriage contingency. For example, women are approximately 44% of the workforce, yet they earn only 35% of all income (or to put it another way, women earn 54%-60% of what men earn).³⁸ Some of the reasons for this large gap are that fewer women are wage earners, those who are wage earners are less likely to have full-time jobs, and those who have full-time jobs still earn less. Only 51% of women earners are full-time, full-year employees, as opposed to 68% of men.³⁹ One of the reasons for these different participation rates is that many women work only part-time, or leave the waged workforce (either temporarily or permanently), in order to assume family responsibilities. To use these statistics to estimate earning capacity (and they are so used) thus incorporates into the calculation a marriage contingency deduction and discounts entirely the value of work done in the home, and the earning capacity evidenced by that work.⁴⁰ Actuarial and statistical methods thus reinforce the invisibility of women's economic contributions and vastly understate their productive capacities.⁴¹

³⁸ This figure is for *all* workers, as opposed to full-year, full-time workers: National Council of Welfare, *Women and Poverty Revisited* (1990), p. 20. The figures vary, but only slightly, with different analyses. See, for example, Statistics Canada, *Total Income: Individuals* (1989), which reports that average income of men in 1985 was \$23,265 and for women the corresponding figure was \$12,615 (54%). See also Statistics Canada, *Earnings of Men and Women in 1990* (1991). The data here indicate that women (all earners), earn 59.9% of what men do or (full-year, full-time) 67.6%. The full data (pp. 10 and 13) are:

Men: (a) university graduates (full-year, full-time): \$51,172; (b) all men (full-year, full-time): \$36,863; (c) less than grade 9 education (full-year, full-time): \$29,407; (d) all men (with any reported earnings): \$28,609.

Women: (a) university graduates (full-year, full-time): \$37,236; (b) all women (full-year, full-time): \$24,923; (c) less than grade 9 education (full-year, full-time): \$18,362; (d) all women (with reported earnings): \$17,141.

³⁹ Statistics Canada, *Earnings of Men and Women*, 1988, (1989). See also National Council of Welfare, *ibid.*, pp. 20-21.

⁴⁰ One example of this problem is the case of *Twine v. Cyr* (unreported) Feb. 12, 1990, Victoria Reg. 88/161 (B.C.S.C.). In this case the plaintiff, a married woman, was a full-time employee at the time of the accident. The plaintiff's own claim was based on actuarial evidence that took "account of the non-participation rate of wives with post-secondary non-university education". This modest claim was then reduced by a further 40% to account for the plaintiff's particular employment history and personality. See also *Oppen v. Johnson Estate*, *supra*, footnote 29, in which the plaintiff's actuary and the judge both applied a 30% discount including "time off for family purposes" and "an economic family union that would allow the plaintiff to devote time from paid employment to her children...". See also *Scarff v. Wilson* (1986), 10 B.C.L.R. (2d) 273, at p. 304 (B.C.S.C.), *aff'd* (1988), 55 D.L.R. (4th) 247, 33 B.C.L.R. (2d) 290 (B.C.C.A.), in which average female earnings were used to assess damages for the plaintiff (awarding \$140,000).

⁴¹ For a critique of Statistics Canada's census methodology, on the basis that it reinforces the invisibility of women's unpaid labour, see M. Waring, *If Women Counted* (1988), pp. 118-130.

3. The Re-Marriage Contingency Deduction

A different type of marriage contingency appears to have been applied against women plaintiffs in other personal injury cases. In these cases the reasoning is not that the plaintiff might have married, but rather that the plaintiff may still marry. In *Penso v. Sollowan*⁴² the plaintiff was a thirty-eight year old single woman with what the court described as a spotty employment record.⁴³ The court noted that in the past she had "been supported in a large measure by her husbands or by the men with whom she lived".⁴⁴ Adopting the *Teno v. Arnold* approach the court accepted as a base for lost earning capacity the figure of \$6,000 annually (a lump sum of \$92,600). It then discounted this amount by a further 20% for contingencies, including the possibility "that the plaintiff may seek to live on welfare or form a lasting relationship with another man".⁴⁵

Several problems deserve to be pointed out. First, the court in this case appears to have erred in starting with a figure of \$6,000 before discounting for contingencies. This figure was arrived at in *Teno* only *after* making the contingency deduction. Therefore, the court in *Penso* made the usual contingency deduction twice over, thus reducing the damage award below the poverty line figure set four years earlier in *Teno*.⁴⁶ More importantly, for present purposes, it is difficult to comprehend the relevance of the contingency that the plaintiff might in the future live on welfare (a self-fulfilling prophecy?) or form a relationship with a man. The deduction in *Penso* is different from the usual contingency deduction. Ordinarily, the deduction is based upon the notion that, had the accident not occurred, the plaintiff might have married and left the workforce. However, in *Penso* the deduction is for the fact that the plaintiff might still get married. The court may have had in mind that this might improve the plaintiff's material welfare because she would be supported by her husband. But it is difficult to see how this would repair her damaged earning capacity, which is the loss being compensated.

⁴² *Supra*, footnote 20.

⁴³ In 1973 the plaintiff had earned \$5,000 and in 1975 she had earned just \$2,900.

⁴⁴ *Supra*, footnote 20, at pp. 391 (W.W.R.), 256 (B.C.L.R.).

⁴⁵ *Ibid.*, at pp. 393 (W.W.R.), 257 (B.C.L.R.). It may be that Anderson J.A. was in fact referring only to the usual unemployment contingency here (the chance that she would have been unemployed rather than the fact that she might still seek to live on welfare). Earlier in the judgment, *ibid.*, at pp. 392 (W.W.R.), 257 (B.C.L.R.), he stated "we must make some moderate deduction for the unlikely chance that the plaintiff might have sought to live on welfare or that she may again find a lasting relationship with another man".

⁴⁶ The court was aware of the fact that the poverty line may have risen in the four years since *Teno v. Arnold* was decided and regretted the fact that counsel had adduced no evidence in this regard.

Another illustration of this deduction is the case of *Clarke v. Clarke*.⁴⁷ The British Columbia Supreme Court here reduced the award to a twenty-two year old divorced woman on the basis that she might remarry (and depend on her husband for income). McKenzie J. stated:⁴⁸

The prospect of remarriage has to be considered. . . . She says she does not look forward to bearing more children as she doubts her capacity to handle one properly. I cannot predict with any certainty her marriage prospects. She says she will not remarry. Despite her prediction I think she might very well remarry. She remains an attractive woman and her clothing covers her scars. She appears to me to be a devoted mother.

The combined effect of the two marriage contingency deductions seems most unfair. On the one hand, the possibility that a woman might have married but for the accident is held to reduce her earning capacity. On the other hand, the remaining possibility that she still might get married is held to reduce it further.

C. *The Effect of Marriage and the Value of Women's Work*

The marriage contingency deduction is based upon the assumption that there is a chance that women will leave the workforce to assume family responsibilities and that this somehow reduces their earning capacity. Not surprisingly, when, at the time of the accident, a female plaintiff is already married and a full-time homemaker, marriage is no longer treated as a contingency. It is in fact a certainty and appears always to depress the amount of the award. The problem, of course, is that women are assumed to carry the primary burden of housework, yet that work is not properly valued as evidence of productive capacity.

1. *The Invisibility of Household Production*

Women who, at the time of the accident, are full-time homemakers, seldom receive significant compensation for lost earning capacity. The problem is that unpaid work in the home is still valued little as evidence of earning capacity. In *Fenn v. Peterborough*⁴⁹ the plaintiff was a twenty-four year old married woman at the time of the accident. Following the accident her marriage dissolved. As the court said:⁵⁰

⁴⁷ Unreported, Feb. 25, 1987, New Westminster Reg. C842157 (B.C.S.C.). Application for extension of time to file appeal allowed (1989), 34 B.C.L.R. (2d) 133 (B.C.C.A.). The possibility of remarriage (in the case of a divorced woman) is also referred to in *Bourton v. England*, *supra*, footnote 29. It is unclear from the context whether this is the usual marital contingency or the remarriage contingency.

⁴⁸ *Ibid.*, at p. 14.

⁴⁹ *Supra*, footnote 20.

⁵⁰ *Ibid.*, at pp. 228-229 (D.L.R.), 454 (O.R.) (C.A.).

Prior to the explosion, Sandra Fenn was not employed in the sense that she earned a wage from an outside source. She was, however, employed, and one might say gainfully, in the care of her family and the management of her household.

The court, following *Teno v. Arnold*, awarded only \$6,000 for her loss, as a "reasonable, if somewhat arbitrary, estimate of her basic living expenses".⁵¹ This amounted essentially to awarding nothing for lost earning capacity over and above her daily living needs.

Several cases involving homemakers have expressly followed this approach.⁵² In no British Columbia case encountered in this study is there any evidence that the courts attempt explicitly to place a value on the earning capacity of women *qua* homemakers and to assess the economic loss of the destroyed or diminished capacity.

This is not to say that work in the home is entirely ignored. In some cases, modest conventional sums will be awarded (as in *Fenn*). In others, the victim will receive funds to pay for home care services, which may partially replace the lost capacity to do housework. Similarly, where a spouse or close relative has taken on nursing duties and other tasks in the home formerly performed by the victim, some compensation may be forthcoming.⁵³ However, these awards fall under the cost of future care and are available equally to men and women. They are not considered to represent lost earning capacity and are unlikely to provide full compensation. Such awards are the exception rather than the rule, and are usually restricted to providing for the increased needs of the victim, rather than replacing all of the work she previously performed for herself and others. In many of the cases canvassed in this article, in which the plaintiff's award has been reduced by reason of the fact that she is, or would likely be, a homemaker, no additional compensation has been awarded for her lost ability to do this work. These issues are discussed further in a later section.

The result of the refusal to assess the value of homemaker services is this: where the plaintiff was not, at the time of the accident, in the waged workforce, in order to demonstrate lost earning capacity, she must prove that she would in fact have *left* the home and entered the workforce at some future date. This is, of course, very difficult to establish. So, for example, in *Quick v. Nicholls*,⁵⁴ a married woman was awarded only \$75,000

⁵¹ *Ibid.*, at pp. 230 (D.L.R.), 455 (O.R.). Note that the award for cost of future care included nothing for daily living expenses (that is, the smallness of the resulting sum cannot be explained by a deduction to avoid overlap between the cost of care and lost income).

⁵² *Waterhouse v. Fedor*, *supra*, footnote 29, at p. 73: "... her loss should not be measured on the basis of statistics applicable to the British Columbia resident women generally with some high school education when I consider the limited intellectual achievement, family responsibilities and limited pre-accident work history of this lady."

⁵³ See the cases discussed *infra*, at footnotes 116 *et seq.*, and accompanying text.

⁵⁴ Unreported, June 18, 1990, Vict. Reg. 89/166 (B.C.S.C.).

for lost earning capacity, partly on the basis that, at the time of the accident, she was a homemaker and not, therefore, "gainfully employed". The court explained:⁵⁵

Hers is not the case of one who has had a proven track record of continuous employment outside the home. She struck me as a very home and family centered person who had been, for long enough, the mistress of her own time and activities. It is far from certain that she would have been able and willing to continue until age sixty-five to submit to the capricious yet exacting demands of what may fairly be described as assembly line work having among its consequences the disruption of family life and the substantial diminution of time spent together with her husband.

The 1991 case of *Oppen v. Johnson Estate*⁵⁶ in which a thirty-five year old single parent (a homemaker) was awarded \$400,000 for lost earning capacity was celebrated in the press as a recognition of the value of housework. It was not such a recognition. The trial judge accepted that the plaintiff had intended to pursue a career in the clerical/accounting profession and that she probably would have succeeded. The final award was based on actuarial earning projections, discounted by 30% to reflect the usual contingencies as well as the possibility that she might decide to stay in the home.⁵⁷

Even where a married woman is a full-time employee at the time of the accident, and beyond childbearing years, her marital status may nevertheless operate to reduce her award because of a presumed likelihood of early retirement. In *Boughey v. Rogers*,⁵⁸ for example, a fifty-year old plaintiff had been in the workforce twelve years prior to the accident. Low L.J.S.C., however, reduced the requested award for lost earning capacity on the ground that she would have been unlikely to remain a full-time employee until retirement:⁵⁹

With her husband continuing to earn a good income she may have decided at some point to cease employment outside the home and direct her energies to non-remunerative pursuits. There is also the possibility that she may have to devote her time in the future to the care of her husband whose health is not good.

Once again, marriage is assumed to shorten a woman's working life, and the domestic work that replaces the waged employment is not valued.

⁵⁵ *Ibid.*, at pp. 18-19.

⁵⁶ *Supra*, footnote 29. See "Housework recognized by court, lawyer says of \$400,000 award", Vancouver Sun, Thurs., Oct. 31, B5.

⁵⁷ The contingency figure, *ibid.*, "... included time off for family purposes; an economic family union that would allow the plaintiff to devote time from paid employment to her children who are of great concern to her; sickness or injury; early retirement...".

⁵⁸ Unreported, June 22, 1989, Prince George Reg. 5455/85. See also *Friesen v. Wood*, May 11, 1990, Vanc. Reg. B882918 (B.C.S.C.). The plaintiff, a 39 year old hospital worker, was assumed to retire at age 60 because of the physically demanding nature of that work. Paradoxically, her award for lost earnings was also reduced because of the likelihood of future earnings based on a very positive assessment of her work ethic.

⁵⁹ *Ibid.*

By way of contrast, it again merits mention that in the case of male plaintiffs the fact of marriage may enhance the award for lost earning capacity.⁶⁰ The assumption in such cases is reversed. By reason of his marriage, the plaintiff would have been likely to assume the economic responsibilities of marriage, and to work hard and productively.

The marriage contingency deduction, and the more general depression of awards to women, can be traced to a variety of sources. Most superficially (or legalistically), it is a failure to take the conceptual approach to earning capacity seriously. It narrows the focus to actual (or probable) earnings, and ignores the fact that when a person chooses to work in the home rather than in the waged workforce the value of her earning capacity is not necessarily diminished, at least when assessed by an opportunity cost measure.⁶¹ More profoundly, the focus on actual wages reflects an over-reliance on the market as the measure of all things—the notion that human values and productive capacities have no value if they are not fully recognized by the market. Gender bias aside, there is a deep-rooted cultural commitment to the market as an objective and fair measure of human value. As Hobbes said of justice:⁶²

As if it were Injustice to sell dearer than we buy; or to give more to a man than he merits. The value of all things contracted for, is measured by the Appetite of the Contractors: and therefore the just value is that which they are contented to give.

While it may be administratively simpler to rely on market values (that is, wages), to measure what an accident victim has lost, market values are an imperfect and extremely partial measure of that loss. Merely because a person is not earning a wage does not mean that they do not have a valuable earning capacity. It simply means that that capacity is not being deployed in the market.

The final, and perhaps most important reason for the depression of awards to women is gender bias, particularly in the form of a failure to acknowledge the full economic value of housework or, for that matter, “woman’s work” generally.⁶³ The historically disparaging connotation of this phrase (at least when used by men) reveals the undervaluation that has usually been accorded to what many economists now refer to as “household production”.⁶⁴ While now acknowledged to be of

⁶⁰ See *supra*, footnote 31 and accompanying text.

⁶¹ Over time, especially in certain skilled occupations, a prolonged absence from the workforce may, of course, reduce earning capacity.

⁶² Thomas Hobbes, *Leviathan*, (C.B. MacPherson (ed.), 1968), Ch. 15, p. 208.

⁶³ For an excellent analysis of the devaluation (indeed non-valuation) of women’s work, see Waring, *op. cit.*, footnote 41. See also M. Proulx, *Women and Work: Five Million Women, A Study of the Canadian Housewife* (Advisory Council on the Status of Women, 1978).

⁶⁴ G. Becker, *A Theory of the Allocation of Time* (1965), 75 Ec. J. 493; first applied to personal injury questions by N. Komesar, *Toward a General Theory of Personal Injury Loss* (1974), 3 J. Leg. Stud. 457.

great economic importance, and to reveal the high working capacity of the women who do it,⁶⁵ housework is performed in the "private sphere" rather than in the robust arena of the market. It has been thought to be the "natural" function of women, quite easily done and not particularly productive. These ideas about the natural role of women in the private sphere, while often expressed in romantic terms, are the same notions that historically kept women out of public office, prevented them from becoming lawyers, confined them to the home, and enforced their economic dependence upon men.⁶⁶

Perhaps related to the devaluation of household production is an echo of the historical proprietary approach of the law in this area: the idea that even if the work is of value, that value accrues to the household generally, or specifically to the male of the household. It is not really a loss to the plaintiff herself. The action for loss of consortium, available only to men, was expressly based on the view that the husband "owned" the productive capacity of his wife and that the loss in household services caused by an injury to her was, in fact, a loss to him.

It should be noted that, in the case of full-time homemakers, discrimination is the result of the *combination* of gender bias and market reliance. Where a person is being *paid* to perform household services at the time of the accident, they will, of course, receive an award for their lost earnings. In *Ferguson v. Petropolous*,⁶⁷ the plaintiff, a fifty-five year old woman who had spent her working life in "low-paying, domestic type work including cooking, housekeeping, a position as waitress..." was awarded damages based on her present salary (\$19,000 as a housekeeper in a lodge).⁶⁸ It is hard to see why, when a woman does the same type of work in the home, her earning capacity somehow vanishes. As one

⁶⁵ Numerous attempts to measure the value of household production have been carried out. In Canada, see, for example, O. Hawrylyshyn, *The Value of Household Services: A Survey of Empirical Estimates* (1976), *Review of Income and Wealth* 101; O. Hawrylyshyn, *Estimating the Value of Household Work*, Canada, 1971, Report Prepared for Statistics Canada (1977). Estimates of the contribution of household work to the G.N.P. (though this work is not included in the official G.N.P.) range between 30% and 40% (for a summary, see Proulx, *op. cit.*, footnote 63, pp. 35-49).

⁶⁶ See F. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform* (1982-83), 96 *Harv. L. Rev.* 1497; H. Lessard, *The Idea of the "Private": A Discussion of State Action and Separate Sphere Ideology* (1986-87), 10 *Dalhousie L.J.* 107; J. Fudge, *The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles* (1987), 25 *Osgoode Hall L.J.* 485.

⁶⁷ Unreported, Feb. 26, 1987, Victoria Reg. 86/0385 (B.C.S.C.).

⁶⁸ See also *House v. Collier*, unreported, May 2, 1986, Victoria Reg. 84/1045 (B.C.S.C.) (\$8,000 per year); *Friesen v. Wood*, *supra*, footnote 58 (hospital domestic work—award of \$22,644 less probable future earnings and 20% contingencies); *Shaw v. Clark* (1987), 11 B.C.L.R. (2d) 46 (B.C.S.C.).

economist stated, the reasoning behind this disappearing work capacity is reminiscent of the joke that:⁶⁹

... when the economics professor marries his housekeeper the gross national product goes down because while a housekeeper she was being paid a salary and it was counted and the gross national product included it. As soon as she marries the man for whom she is working she does not get a salary and the national income statisticians do not consider something that goes on outside the market is properly to be included in the gross national product.

2. *Women's Work and Men's Losses: Double Standards?*

Ironically, but perhaps not surprisingly, courts first began to recognize the value of household production in cases where husbands were claiming for loss of their wife's services. In contrast to their treatment of women's personal claims, courts have frequently demonstrated an ostensibly enlightened understanding of the value of household services when compensating survivors. Over one hundred years ago Ritchie C.J.C. in the Supreme Court of Canada said, in the context of a claim by a husband for an injury to his wife, that "the loss of a mother may involve many things which may be regarded as of a pecuniary character".⁷⁰ He concluded:⁷¹

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

The evidence in this case shows that the husband was receiving benefits and advantages from the services of his wife capable of pecuniary computation, and had such reasonable expectation of pecuniary benefit from the continuance of such services by the continuance of the wife's life as would entitle him to damages. . . .

A more contemporary example is the fatal accident claim in *Franco v. Woolfe*.⁷² There the trial judge rejected the defendant's argument that there was no, or only a very small, financial loss to the family. He stated:⁷³

Marriage is not the acquisition of a cheap servant willing to perform countless tasks seven days a week for husband and family. While the husband may not be able to pay her, it does seem to me that her contributions demand recognition. . . . She

⁶⁹ O. Hawrylyshyn, testifying in *Franco v. Woolfe* (1974), 52 D.L.R. (3d) 355, at p. 361, 6 O.R. (2d) 277, at p. 233 (Ont. H.C.), varied (1976), 69 D.L.R. (3d) 501, 12 O.R. (2d) 549 (Ont. C.A.).

⁷⁰ *St. Lawrence and Ottawa Railway Co. v. Lett* (1885), 11 S.C.R. 422, at p. 426.

⁷¹ *Ibid.*, at pp. 435-436.

⁷² *Supra*, footnote 69.

⁷³ *Ibid.*, at pp. 360-361 (D.L.R.), 232-233 (O.R.) (H.C.). The trial court measured the loss to the family by reference to gross national product figures and the cost of substitute labour. The Court of Appeal varied the amount on the basis that the damages should be more individualized. For a commentary, see Cooper-Stephenson and Saunders, *op. cit.*, footnote 1, pp. 221-223.

is a coequal partner in marriage and is entitled to recognition of that equality. . . . Fortunately, economists are reconsidering whether the activities which entail the housewives' work in the household should now be evaluated in some ways in terms of dollars and cents.

In the 1988 case of *Kwok v. B.C. Ferries*⁷⁴ (also a fatal accident) the British Columbia Supreme Court assessed the value of housework of a woman who also held down a full time job (described as a "truly remarkable wife and mother"), at \$15,000 per year. Other cases have adopted a similar approach.⁷⁵ It is important to note that these figures do not even measure the full value of a homemaker's services, but only the portion of that value that has been lost to her family. The empirical question is, of course, whether men receive more for the loss of a wife than female homemakers receive themselves when they are merely injured. If *Kwok* is the standard of measurement, the answer to this question would frequently be in the affirmative.

3. A Comparison With "Men's Work"

It is interesting to contrast the court's approach to different types of work in the home—work which may typically be associated with the gender of the worker. There are a number of cases in which victims have been compensated for their inability to do the "manly chores" around the home, including household renovations, painting, home repairs, and tending the garden for food.⁷⁶ And when women do unpaid work that resembles that done by men they too may recover similar damages. In the 1988 case of *Johnson v. Shelest*,⁷⁷ the plaintiff was a woman who, prior to the accident, worked on the family farm caring for the animals, doing the bookkeeping and housework. Following the accident the family hired part time workers for a short period, and thereafter the sons took

⁷⁴ (1987), 20 B.C.L.R. (2d) 318 (B.C.S.C.), aff'd (1989), 37 B.C.L.R. (2d) 236 (B.C.C.A.).

⁷⁵ See also *Grant v. Jackson* (1985), 68 B.C.L.R. 212 (B.C.C.A.); *Jantz v. Mulvahill*, Dec. 22, 1989, Vernon Reg. 311/88 (B.C.S.C.) (value of homemaking services to the family set at \$1,500 per month or \$16,800 per year in addition to lost financial benefits); *Rhemtulla Estate v. Pal*, Nov. 24, 1989, Vanc. Reg. B880117 (B.C.S.C.).

⁷⁶ *Gehrmann v. Lavoie*, [1976] 2 S.C.R. 56, (1975), 59 D.L.R. (3d) 634 (a fatal accident case in which the surviving wife was awarded the costs of completing renovations); *Boyles v. Landry* (1980), 30 N.B.R. (2d) 1 (N.B.Q.B.), varied on another point (1981), 34 N.B.R. (2d) 466 (N.B.C.A.) (male plaintiff awarded the cost of siding in place of painting house every three years); *Urbanski v. Patel* (1978), 84 D.L.R. (3d) 650 (Man. Q.B.) (female plaintiff no longer able to do farmwork). These cases are discussed by Reaume, *loc. cit.*, footnote 3, at p. 93. See also *Winkler v. Tracy Douglas Monych Transcontinental Commodities Ltd.*, May 17, 1991, Van. Reg. B882196 (B.C.S.C.) in which a young male plaintiff was awarded a modest sum for home maintenance expenses, and *Busche v. Connors*, Mar. 10, 1987, Van. Reg. CA006020 (B.C.S.C.), in which a female plaintiff was awarded a sum for home maintenance and repairs.

⁷⁷ (1988), 22 B.C.L.R. (2d) 230 (B.C.C.A.).

over the chores formerly performed by their mother. The trial judge awarded special damages for the hired help, but no damages for income loss after the sons took over her duties, reasoning that there was no actual financial loss or payment of monies. No damages were awarded for loss of future earning capacity. This decision was overruled on appeal. The court held that the plaintiff was entitled to compensation for past income loss and loss of future earning capacity based approximately upon what the hired help had been paid.

The point of these cases is to suggest that courts do, on occasion, include amounts for unpaid work in the home, but usually when that work is in the nature of "man's work". As Reaume notes:⁷⁸

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.

This attitude may be changing. As already indicated, women and men will now sometimes receive damages for homemaker services where, because of the accident, they are no longer capable of caring for their home. This is particularly true when, at the time of the trial, they have already hired a homemaker. As discussed below, this is a significant, if imperfect advance on the traditional approach.⁷⁹

D. *The Burden of Household Support*

It is clear from the foregoing analysis that women are frequently assumed to bear the primary burden of housework (true), yet that burden is not economically productive (false). These assumptions appear in other forms as well. In particular, it is sometimes assumed that the responsibility for, and cost of, caring for children and spouses is that of the female spouse, and that these responsibilities reduce earning capacity.

1. *The Cost of Children*

In *Boutin v. Newman*⁸⁰ the plaintiff was a married woman who, at the time of the accident, was nineteen years old and employed as a hospital technician. The trial judge had instructed the jury to make a deduction from her award for the ordinary contingencies affecting earning power, but had said nothing about her being a married woman. The Saskatchewan Court of Appeal reduced the trial award on the basis that, unlike a male breadwinner, women have the additional disability of marriage and

⁷⁸ *Loc. cit.*, footnote 3, at p. 93.

⁷⁹ See *infra*, footnotes 116 *et seq.* and accompanying text.

⁸⁰ (1963), 42 W.W.R. 677 (Sask. C.A.), *rev'd* (1963), 46 W.W.R. 64 (S.C.C.)

motherhood. The court concluded that even if the plaintiff might have stayed at work while raising a family, this "would probably involve the expense of hiring someone to look after the children . . .".⁸¹ The trial decision was restored by the Supreme Court of Canada, though unfortunately without reasons. The decision of the Court of Appeal is, however, worth analyzing for the assumptions that it contains. In addition to the usual assumptions about the relation between motherhood and labour-force participation, the Saskatchewan Court of Appeal states that even if the plaintiff might have re-entered the workforce, her earnings would be affected by the cost of childcare.

The fact that a parent in the workforce might have to pay for childcare is something that has never been considered in the case of a male plaintiff ("but for the accident he might have got married and spent much of his income on his family"). Theoretically, it should not be. The cost of childcare does not affect earning capacity. It affects the disposition of income. There is no doubt that the choice to have children does affect income and wealth. The point is that it is not taken to be relevant in the case of men because the courts adhere to the theoretical model of earning capacity. In the case of women, however, some courts are willing to depart from the model. Perhaps they are willing to do so because they are making assumptions about the "natural" roles and duties of husbands and wives. In the case of the latter they seem to be affirming that the primary burden of childcare must necessarily fall upon her shoulders.

While the argument that childcare costs should be deducted from a woman's award has been made in recent British Columbia cases it has not been accepted,⁸² and the error in *Boutin* has not been perpetuated. However, the assumption that women carry the burden of household support appears in another context. This is in the area of claims for loss of the financial benefits of marriage. Some imaginative counsel, aware of gender discrimination in damage awards, have tried to counter the anticipated reduction of the award by accepting the traditional assumptions about family roles and following through on their economic implications. The argument goes like this: assume that women do get married. Assume also that upon marriage they leave the workforce and depend for their financial security on their husbands. As a result of a serious accident, an unmarried woman may lose the prospect of marriage and thus of the financial support (income)

⁸¹ *Ibid.*, at p. 682 (C.A.). It appears that the award may have been reduced at least partly, by the fact that the plaintiff may not have been entirely disabled and had some prospect of future work. This would not, of course, account for a complete denial of any award under this head.

⁸² See, for example, *Mackenzie v. Van-Kam Freightways*, Apr. 17, 1990, Victoria Reg. SC880871, Van. Reg. B881060 (B.C.S.C.).

that goes along with it. This loss should be compensated.⁸³ While there is no consistency in this area of the law, this argument has, on occasion, been successful in British Columbia.⁸⁴

This argument was considered but rejected in *Newell v. Hawthorth-waite*.⁸⁵ The plaintiff, a fifteen year old female, was seriously injured. In addition to her claim for lost income she also sought damages for lost marriage prospects (both non-pecuniary loss of opportunity to marry and have children, and lost economic advantages of marriage). Evidence was adduced to demonstrate the economic gains of marriage to women: that women marry men who, on average, earn a higher salary; that two can live more cheaply than one; and that the women are entitled to a share of increased family income. Taylor J. rejected the claim for lost pecuniary benefit of marriage on the basis that while marriage may enhance economic prospects in some ways, the cost of raising children also reduces economic prospects. He stated:⁸⁶

... I feel compelled to the view that it would be improper for the present purpose to ignore the fact that were she to be married and to have children the plaintiff would be exposed to the costs of child-raising, and that from these costs she will now probably be spared. To approach the matter in the present context, as counsel for the plaintiff wishes—to treat marriage, in this context, as a cost-free pecuniary gain—would in my view be to ignore basic principles of our compensation system, and to grant “overlapping” or “double” compensation.

This seems incorrect. Once again, it is certainly true that having children is expensive. Yet the possible cost of childraising is never deducted from a man's award. Why should it be deducted from a woman's award?

2. Spousal Care: Gender Bias in Awards to Men?

The assumption that women bear the responsibility for household support may indirectly be present in awards to men as well as women. This is particularly apparent in the courts' treatment of “collateral benefits” in the form of caregiver services from a family member. The issue here

⁸³ This approach was pioneered in *Moriarty v. McCarthy*, [1978] 1 W.L.R. 155, [1978] 2 All E.R. 213 (Q.B.D.), where the prospect of marriage was thought to reduce the earning capacity of a young woman, but the amount was added back to compensate her for the loss of support from marriage that she might have had but for the accident.

⁸⁴ *Reekie v. Messervey* (1986), 4 B.C.L.R. (2d) 194 (B.C.S.C.), add. reasons (1986), 10 B.C.L.R. (2d) 231 (B.C.S.C.), aff'd (1989), 36 B.C.L.R. (2d) 316 (B.C.C.A.); *Tucker v. Asleson*, *supra*, footnote 25. Argument rejected in *Blackstock v. Patterson*, *supra*, footnote 23; *Abbott v. Silver Star Sports Ltd.* (1986), 6 B.C.L.R. (2d) 83 (B.C.S.C.); *Scarff v. Wilson*, *supra*, footnote 40.

⁸⁵ (1988), 26 B.C.L.R. (2d) 105 (B.C.S.C.).

⁸⁶ *Ibid.*, at p. 112. It should be noted that Taylor J. states that the award of \$60,000 for pain and suffering may partially recognize the lost benefits of marriage (or of childraising). Child care expenses appear also to have been factored into the calculation of this component of the award in *Mackenzie v. Van-Kam Freightways*, *supra*, footnote 82.

is whether a deduction should be made from an award for the cost of care in situations where a spouse (or other family member) is providing "voluntary" support and care to the victim.

In the case of *Pickering v. Deakin*⁸⁷ a male plaintiff was seriously injured. The trial court made no award for the cost of housekeeping services as part of the cost of care, because it assumed that the plaintiff's wife would continue to provide these services. There are serious difficulties with this approach. It assumes that the wife will continue to provide these services without compensation and places her under social or moral pressure to do so. And if she fails to do so, it will leave the plaintiff seriously undercompensated. The Court of Appeal in this case partially recognized these problems and made an award of \$116,000 to take into account the contingency that after twenty years (half the plaintiff's lifespan) he might no longer receive services from his wife due to the possibility of divorce or death. This is clearly an improvement, but it also assumes that for the other twenty years the plaintiff will receive those services and that his spouse is not entitled to payment for them.

In *DeSousa v. Kuntz*⁸⁸ the plaintiff was seriously injured as a result of medical negligence. His wife was forced to give up her employment in order to drive him to and from therapy, to bathe and dress him, and to take over the housework that they used to share. It was argued that an amount should be awarded in trust to compensate for this. The British Columbia Court of Appeal refused to make this award on the basis that:⁸⁹

... household and nursing duties you could expect a husband or wife to perform through natural affection, friendliness and interdependence of the usual marital relationship is not compensable in a tort case as an actionable head of damages. It is only if a spouse has to take on a complete function like full time nursing, a function that is outside the usual concept of what people undertake when they take their marriage vows ... that additional compensation should be granted.

No consistent pattern emerges in these cases. Courts often do compensate family members for their gratuitous caregiver services.⁹⁰ Nevertheless,

⁸⁷ [1985] 1 W.W.R. 289, (1985), 58 B.C.L.R. 145 (B.C.C.A.).

⁸⁸ (1989), 42 B.C.L.R. (2d) 186 (B.C.C.A.). See also *dicta* in *Feng v. Graham*, Mar. 28, 1988, Van. Reg. CA006178 (B.C.C.A.) which, while making an award for spousal care, states:

... whether in awarding damages to the injured party a distinction should be drawn between services performed by a close relative, which are of an extraordinary and demanding nature ... and those which are less demanding and are of a type which are commonly provided for love or out of a sense of familial duty is a question which we have not had the benefit of counsel's submission.

⁸⁹ *Ibid.*, at pp. 196-197. It is not clear from the context of this passage whether what is being claimed is pre-trial expenses only or future costs as well.

⁹⁰ See *Doan v. I.C.B.C.* (1987), 18 B.C.L.R. (2d) 286 (B.C.S.C.); *Semenoff v. Kokan* (1989), 42 B.C.L.R. (2d) 6 (B.C.S.C.); *Feng v. Graham*, *supra*, footnote 88; *Hall v. Miller* (1989), 41 B.C.L.R. (2d) 46 (B.C.C.A.) (special/pre-trial damages); *Lachance v. Davies*, May 23, 1990, Van. Reg. C880145 (B.C.S.C.); *Watson v. Baxter*, May 17, 1990, Nanaimo Reg. CC8389 (B.C.S.C.).

the question should be raised whether the refusal to compensate in a case like *DeSousa* reflects certain outdated stereotypes and assumptions about the "natural" roles and duties of a wife. One also wonders whether this reasoning would apply with equal force if the gender of the parties was reversed and it was the husband who was providing care to his injured spouse.

The approach in *DeSousa* in fact penalizes a married couple who choose to care for one another and provides an incentive not to do so. In a recent Continuing Legal Education seminar, lawyers were advised that "paid help should be substituted for family care givers at the earliest possible moment. While our courts are most willing to award special damages for paid help; it is only the 'luck of the draw' that determines whether family care givers are reasonably remunerated for their time and effort or merely given an honorarium".⁹¹

E. *Formal Equality: Replicating Labour Market Discrimination*

When a woman is a full-time, full-year participant in the waged workforce, she may be treated with formal equality. In other words, the courts will assess her loss in exactly the same way as that of a man: by using present wages as the basis of assessment, making no marriage deduction. Similarly, in the case of young female children the courts may also base their assessment simply upon statistical indicators, making no special deductions. Nevertheless, notwithstanding the appearance of formal equality, there is arguably still a significant amount of substantive inequality built into awards to women.

The difficulty is that wage rates in the labour market continue to reflect gender bias. The wages even of full-time employed women continue to hover at about 67.6% of those of men, and the difference between the wages of *all* male and female earners is even larger.⁹² The explanation for this gap is complex and beyond the scope of this article, but it includes the segregation of women into lower paid sectors and straightforward sex discrimination. As Cooper-Stephenson and Saunders argue, it is questionable that the law of personal injury damages should incorporate illegal (or other) discrimination into its methodology.⁹³ Yet it is most common, indeed standard in cases involving young women, for courts to rely on "average

⁹¹ Continuing Legal Education Society of British Columbia, *Personal Injury: Special Issues* (1988), p. 1.1.02.

⁹² This figure represents the wage gap only between full-time, full-year employees, it does not include part-time workers or non-waged workers; Statistics Canada, *Earnings of Men and Women in 1990* (1991), *op cit.*, footnote 38.

⁹³ *Op. cit.*, footnote 1, p. 212.

female earnings” in computing lost earning capacity, thus reproducing any gender bias in the market.⁹⁴

The issue of “statistical discrimination” was confronted in the 1991 case of *Tucker v. Asleson*.⁹⁵ This case involved a catastrophic injury to an eight year old girl, rendering her essentially unemployable. Anticipating the usual gender-related problems, counsel for the plaintiff introduced earnings figures based on the average lifetime earnings of male university graduates (\$947,000). Counsel for the defendant objected to the plaintiff’s figures, arguing that the appropriate figures were average earnings for women (\$302,000). He stated:⁹⁶

While the province of British Columbia is committed to addressing the issue of wage discrimination on the basis of sex, both as a matter of policy and legislation, any such basic change in the assessment of damages as contended for here by the plaintiff should properly be regarded as a matter for law reform, and not for any “arbitrary judicial fiat”.

In an *apparently* remarkable decision, Finch J. accepted, “as a starting point, that the measure of the plaintiff’s earning capacity should not be limited by statistics based upon her sex”.⁹⁷ He stated:⁹⁸

Before the accident the plaintiff was a bright little girl growing up in a stable home environment. In Canada, no educational or vocational opportunities were excluded to her. She could have become a doctor, lawyer or business person. Or, in line with her childhood wish, a veterinarian.

This would appear to be a preferable approach, though there is, of course, room for debate about whether male statistics should be used or simply ungendered average earning figures. There is also room for debate about how, in the case of very young children, educational attainment levels should be factored in. Indeed, this is the reason for the qualifier “apparently” used above. Acknowledging that there was no guarantee that the plaintiff would have become a university graduate, Finch J. accepted the need to discount the award to reflect this contingency. But by settling on the enormous figure of 63%, the award to the plaintiff was lowered back near the amount of average female earnings argued for by the defendant.

Notwithstanding this criticism, *Tucker* stands out as a remarkable decision. No other case canvassed in this article substituted male for female earnings figures. By far the most common method is to use female earnings figures which, of course, reproduce the market wage gap. The results of an analysis of a relatively small sample of cases (forty-one male/thirty-three female) indicated that the average earnings figures used in personal

⁹⁴ See, for example, *Scarff v. Wilson*, *supra*, footnote 40, and other cases referred to in footnote 40.

⁹⁵ *Supra*, footnote 25.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

injury awards do roughly parallel the gap between men's and women's earnings in the market.⁹⁹

F. Access to Justice and Deterrence

Do women who suffer personal injury have access to justice equal to that of men? Does the law provide equal levels of safety incentives with respect to men and women? While not immediately within the scope of this article, these questions may be related to the subject of damages quantification. It seems probable that the relatively smaller awards to women in personal injury cases have a negative impact upon the availability and quality of legal services they receive. Because the stakes are lower, they may be more likely to settle rather than to expend large amounts on costly litigation.¹⁰⁰ This may be particularly true in a province like British Columbia which relies heavily on contingency fees in personal injury cases. Similarly, insofar as the economic theory of deterrence is true (that standards of care will be based on cost/benefit reasoning), it is at least theoretically true that lower awards to women will result in reduced levels of safety precautions. This will be particularly true where the injury-producing activity is one that disproportionately affects women (as, for example, in the case of certain pharmaceutical products such as the Dalkon Shield and the drug DES).

Empirical evidence from England confirms that female personal injury victims are less likely than men to sue for personal injury. In one survey it was found that while women were 43% of the injured population, legal claims by women amounted to only 30% of all claims.¹⁰¹ The primary explanation for this fact is that women's injuries may more frequently be suffered elsewhere than at work or on the road. Homemakers who suffer their injury in their own workplace (the home) are unlikely to receive any compensation at all through the legal system. Homemakers were 14% of accident victims, but only 5% of successful plaintiffs.¹⁰² Once again, harms

⁹⁹ Fraser, *loc. cit.*, footnote 34. Again, the reader should be warned that the sample size is too small to generate statistically valid conclusions. But the results are suggestive and do indicate that further empirical analysis is more than justified. The study found that the average earnings used in the cases (before contingencies) were: men: \$28,092 / women: \$20,046 (women set at 71% of men). After contingency deductions the figures are: men: \$25,097 / women: \$17,533 (women set at 70% of men).

¹⁰⁰ M. Galanter, Why the "haves" come out ahead: Speculations on the limits of legal change (1974), 9 Law and Society Review 95.

¹⁰¹ D. Harris *et al.*, Compensation and Support for Illness and Injury (1984), p. 51.

¹⁰² *Ibid.*, p. 56. The authors suggest another possible explanation for these figures. It may be that the barriers occur at the "pre-legal" stage: informal consultation with workplace colleagues, union officials and friends which serve to educate and inform an injured person about their rights. This seems confirmed by statistics that indicate that the success rate for injured women is as good as that for men when they actually seek legal advice, *ibid.*, p. 61.

to women are "privatized" and rendered invisible, and the law fails to ensure public responsibility.

G. Conclusion: *The Poverty of the Probable Earnings Approach*

Notwithstanding the use of earning *capacity* language, in the case of persons who are fully employed in the workforce, and indeed, in almost all cases, the courts appear to be basing their awards on the *probable earnings* method. All commentators, regardless of the recommendations that they make, agree that in the case of homemakers, this method is inappropriate.¹⁰³

To take actual, or probable, earnings as the basis of assessment of a person's loss is *unfair*. It *discriminates* between individuals with identical capacities, only on the ground that they are exercising their capacities in different ways. This is particularly clear in the case of homemakers. The fact that a homemaker is not currently earning a wage does not mean that she (or sometimes he) has not suffered a significant economic loss. Consider the case of two identical women. Both have graduated from law school and both are junior associates in a mid-sized law firm without maternity leave. Both have a child at the same time. The first woman chooses to continue her practice and to spend a significant portion of her income on child-care. The second chooses to stay at home for several years to devote her earning *capacity* rather than her *earnings*, to child care. Both have lost the same capacity, but their awards measured by lost earnings, will be very different.

The theoretical point here is that actual earnings do not necessarily have anything to do with the value of earning capacity. The value of a capital asset is set by the *potential* revenue that it can generate rather than the actual revenue it is generating. For example, two identical rental properties on the same street have the same capital value notwithstanding that one is occupied by tenants paying rent, while the other is occupied by family members free of charge.

These considerations suggest an opportunity cost approach to the valuation of earning capacity, and this is discussed in more detail below. However, it should first be noted that there are other, more modest approaches to the problem. The downward bias in earnings awards to women is, in some cases, partially offset by other elements of the award. The three most important techniques are to increase the award to compensate for the lost economic benefit of marriage, to enhance awards to women modestly for non-pecuniary loss, or to include in the award for future care the cost of household services. While representing significant advances, these methods are far from perfect. The following sections examine these and other reform proposals.

¹⁰³ It should be noted that the probable earnings method is unfair not only to homemakers, but to anyone who is not fully exploiting their earning capacity in the workforce.

II. Policy Alternatives

A. Probable Earnings Supplemented by Benefits of Marriage

One possible solution, adverted to above, is to maintain the regime whereby compensation is calculated on the basis of probable earnings, but to supplement the award to women by an amount reflecting the economic benefits of marriage. The theory is that while on the one hand, the earnings of women may be reduced by temporary or permanent absence from the workforce due to family responsibilities, that reduction would be (partially) offset by the economic benefits of marriage or other long-term family relationship.

This approach accepts the assumptions about women that have traditionally been made by the courts. However, it seeks to turn those assumptions to the advantage of the plaintiff. So, for example, in the case of a young unmarried woman, probable earnings will be reduced by reason of the chance of marriage. Yet, using those same statistics, we know that had she entered into a relationship with a man, it is likely that his lifetime income would, for example, be twice that of hers, and that she would likely share in this increased income. Moreover, because two can live more cheaply than one, she has also been deprived of this economic benefit. Finally, because women on average live longer than men, she has been deprived of the likely inheritance of the family wealth. This argument has been successful in a number of cases,¹⁰⁴ and an attempt has been made to "liberalize" compensation under this head by expanding the analysis beyond traditional marital relationships.

In *Reekie v. Messervey*¹⁰⁵ a twenty-one year old woman was awarded only \$200,000 for her lost earning capacity (based upon her scholastic record and probable career as a bookkeeper). At trial she was awarded an additional \$50,000 to compensate for her lost opportunity to marry. This decision was upheld by the British Columbia Court of Appeal, but Lambert J.A. reconceptualized the award in less stereotyped terms. He said:¹⁰⁶

This aspect of the damage award was called "loss of opportunity to marry".... But marriage itself is not the significant point. The significance lies in the loss of an opportunity to form a permanent interdependency relationship which may be expected to produce financial benefits in the form of shared family income. Such an interdependency might have been formed with a close friend of either sex or with a person with whom the plaintiff might have lived as husband and wife, but without any marriage having taken place. Permanent financial interdependency, not

¹⁰⁴ *Moriarty v. McCarthy*, *supra*, footnote 83; *Reekie v. Messervey*, *supra*, footnote 84; *Cherry v. Borsman* (1991), 75 D.L.R. (4th) 668 (B.C.S.C.); *Tucker v. Asleson*, *supra*, footnote 25.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*, at pp. 330-331.

marriage, is the gist of the claim. For the sake of simplicity and consistency, I will now usually call this head of loss: "lost opportunity of family income".

Where accepted, the "lost family income" argument is most effective to counter downward bias in the case of young unmarried women. It can be used to offset, or rule out, the marriage contingency deduction (yes, some women may marry and leave the workforce for a time, but their lost wages are replaced by family income). It can also be used, partially, to close the gap between male and female awards resulting from the statistical gender gap in wages (yes, women may earn less than men, but married women become the beneficiaries of higher male wages).

Enhancing compensation in this fashion certainly represents an advance over traditional approaches, but it is not a complete answer to the problem of gender bias. First, it is noteworthy that at the same time that *Reekie* liberalized the "lost family income" argument, it may also have rendered it (partially) gender neutral. At least one case since *Reekie* has allowed the award to a male plaintiff.¹⁰⁷ Additionally, there is little consistency in the law in this area. The family income argument has frequently been rejected on the basis that valuation of the lost benefits of marriage is too speculative. It requires the court to make guesses about the plaintiff's marriage prospects, the likelihood of divorce, and the difference that marriage makes to family income.¹⁰⁸

Equally important, the family income argument will likely be confined primarily to unmarried women who, by reason of the accident, are unlikely to marry. Where the court concludes that the plaintiff may still marry, no award will be made because no such loss has been suffered.¹⁰⁹ Much effort will thus be expended by defence counsel to establish the "residual marriageability" of the plaintiff. Similarly, in situations where the plaintiff is already married it will be difficult to argue that the accident has deprived her of the economic benefits of marriage (unless courts are prepared to entertain arguments about how the accident has increased the likelihood of marriage breakdown, and reduced the likelihood of remarriage).¹¹⁰

Most importantly, the "lost family income" argument is made necessary primarily by reason of the law's failure to compensate women for their full personal economic loss. The argument, in fact, reinforces the patriarchal assumptions about the value of women's work and their dependency on male breadwinners. Lost family income, whether compensable or not, is not a measure of a person's earning power. The valuation of the economic

¹⁰⁷ *Mackenzie v. Van-Kam Freightways Ltd.*, *supra*, footnote 82.

¹⁰⁸ Argument rejected in *Blackstock v. Patterson*, *supra*, footnote 23; *Abbott v. Silver Star Sports Ltd.*, *supra*, footnote 84; *Scarff v. Wilson*, *supra*, footnote 40; *Lachance v. Davies*, *supra*, footnote 90.

¹⁰⁹ See, for example, *Sanderson v. Betts*, *supra*, footnote 29.

¹¹⁰ See Reaume, *loc. cit.*, footnote 3.

benefits of marriage has practically nothing to do with either the value of work performed in the home or the productive capacities of people who perform that work. It has much more to do with traditional socio-economic patterns, the economic prospects of men, and the economic subordination of women.

B. Probable Earnings Supplemented by Non-Pecuniary Loss

There is some indication in a number of cases that the loss of non-remunerative, but productive capacities of homemakers is being modestly compensated as non-pecuniary loss.¹¹¹ For example, in the case of *Bourton v. England*,¹¹² the court assessed non-pecuniary damages on the basis that after the accident the plaintiff had "difficulty vacuuming, peeling vegetables, cleaning out a bathtub, doing laundry; she can't garden, wash walls or do any overhead tasks ... she is no longer able to knit or sew". The award of \$35,000 in this case was designed partially to ameliorate this "loss of enjoyment of life". Similarly, in *Waterhouse v. Fedor*,¹¹³ a thirty-five year old female full-time homemaker was awarded a very modest amount for lost earning capacity because of evidence of "limited intellectual achievement, family responsibilities, and limited pre-accident work history of the lady". The small pecuniary award was explained, partly on the basis that the "award for non-pecuniary loss and costs of future care is designed to provide the plaintiff with solace for her past, present and future suffering and provide her with all goods and services required for future care. The assessment of her loss of future earning capacity must be assessed with these amounts in mind".¹¹⁴ Implicitly, the plaintiff may be recovering

¹¹¹ The same approach has, occasionally, been applied to men who are voluntarily not working at full capacity. See *Varkonyi v. C.P. Rail* (1980), 26 A.R. 422 (Alta. Q.B.): Kerans J., at p. 441, reduced the pecuniary award on the basis that "... this plaintiff has recently indicated willingness not to work while he pursued the more pleasurable aspects of life ... I should add that the corollary should be higher general damages. If a person chooses to enjoy life more (by not working) and then loses the ability to enjoy life, presumably the loss is greater than if he were zealously to pursue the drudgery of work".

¹¹² *Supra*, footnote 29.

¹¹³ *Supra*, footnote 29, at p. 73. See also *Lefebvre v. Kitteringham* (1985), 39 Sask. R. 308 (Sask. Q.B.); *Vuckovic v. Olah* (1986), 47 Sask. R. 194 (Sask. Q.B.).

¹¹⁴ *Ibid.* The same method appears in different form in the case of *Newell v. Hawthorthwaite*, *supra*, footnote 85, involving a fifteen year old female plaintiff. Anticipating that the court would make a deduction from her award for the marriage contingency, the argument was made that the award for pecuniary loss should be increased for lost marriage prospects. The theory is that while the actual earnings of women might be reduced by reason of leaving the workforce, this loss is offset by the financial benefits of marriage. This claim was rejected by Taylor J. who noted that he had already made an award of \$60,000 for non-pecuniary loss which, he suggested, represented partial compensation for this loss. The non-pecuniary approach has been followed in several cases in Australia as well. See, for example, *Burnicle v. Cutelli*, [1982] 2 N.S.W.L.R. 26; *Maiward v. Doyle*, [1983] W.A.R. 210.

some compensation for her reduced ability to work in the home, either in the non-pecuniary award or in that portion of her award designed to pay for home care.

The non-pecuniary damage approach is unsatisfactory in the case of non-waged workers. In the first place, it is simply demeaning. The lost ability to work in the home is not the loss of leisure time. Nor, any more than the lost ability to work in the labour force, is it a form of lost enjoyment of life. Work in the home is productive and economically valuable. The inability to do this work is an economic loss. Another reason why this approach is inappropriate is because of the "cap" on this head of damages. The Supreme Court of Canada has affirmed on a number of occasions that damages for non-pecuniary loss must be assessed on a "functional" basis and that they must not exceed \$100,000 (adjusted since 1978 for inflation).¹¹⁵ Compared to potential income losses, this head of damages provides only a modest amount of compensation. In the case of a catastrophically injured person, the full amount of non-pecuniary damages is likely to be awarded almost automatically, leaving no room for an additional amount of compensation for lost (non-waged) earning capacity.

C. *Earning Capacity Subsumed in the Cost of Care*

It is sometimes argued, especially in catastrophic cases, that compensation for a homemaker's earning capacity is subsumed in the cost of future care. This would occur in situations where a portion of the award under this head is designed to pay for home care. In such cases, the plaintiff receives probable earnings plus an award for cost of care that may include domestic services. Insofar as this replaces some of the functions formerly performed by the plaintiff, it implicitly compensates at least a portion of her lost earning capacity. This approach has been adopted in a number of cases. In *Waterhouse v. Fedor*,¹¹⁶ a portion of the award to the plaintiff was to pay for fifteen hours of homemaker services per week and childcare for the plaintiff's hyperactive son. Similarly, in the case of *Busche v. Connors*¹¹⁷ the plaintiff (who was twenty-three years old at the time of trial), received a small award for future housekeeping services (six hours per week) and future childcare expenses based on the contingency that she might have children. This decision, which also included an amount for diminished earning capacity, was affirmed on appeal.¹¹⁸ Indeed, it was adjusted moderately upwards to include an amount for house maintenance

¹¹⁵ See *Lindal v. Lindal*, [1981] 2 S.C.R. 629, (1981), 129 D.L.R. (3d) 263.

¹¹⁶ *Supra*, footnote 29. See also *Cherry v. Borsman*, *supra*, footnote 104.

¹¹⁷ Unreported, May 20, 1986, Van. Reg. B841452 (B.C.S.C.).

¹¹⁸ Unreported, Mar. 10, 1987, Van. Reg. CA006020. Note that no marriage contingency deduction appears to have been made in this case.

and repairs. Even more generous is the case of *Quinn v. Lafortune*¹¹⁹ in which the female plaintiff's award included the cost of a live-in housekeeper and gardening services.

This approach appears in other forms as well. Most prominently are those cases in which the victim's spouse (or other close family member) has, following the accident, assumed nursing and other household duties. In such circumstances the courts will, on occasion, award a sum to compensate for this work (sometimes in trust for the family member).¹²⁰ These awards can be conceptualized as partial compensation for the victim's lost working capacity.

As a policy option, the notion of replacement cost represents a significant advance in the law and is discussed more thoroughly below. For present purposes, however, it should simply be noted that in its current form it is not a fully satisfactory or comprehensive solution. First, the award does not always include such a component—perhaps because it is not usually claimed.¹²¹ Moreover, the award would likely include such a component only in cases where the plaintiff will continue to be cared for in her own home, as opposed, for example, to an institution. Secondly, there is no indication even in those cases that do make such an award, that it is a true replacement or valuation of the plaintiff's former working ability, rather than primarily an award for increased expenses due to injury. To be a true replacement, it would have to provide for all of the services previously performed by the plaintiff for herself and others, and that would have been performed in the future. It would also have to replicate the same levels of time and quality. Thirdly, to grant the award as a portion of the cost of care is to limit its duration to the victim's post-accident lifespan (in contrast to the lost earnings award which is for the victim's pre-accident lifespan). In cases where the accident has shortened the plaintiff's lifespan this can make a very significant difference. Fourthly, in the case where household work has been taken over by a spouse, compensation may sometimes be restricted to situations in which the duties are somewhat extraordinary, going beyond what is "expected" in a family situation.¹²² Finally, given that this same type of award is made also to

¹¹⁹ Aug. 19, 1991, New Westminster Reg. C880742.

¹²⁰ See cases cited, *supra*, footnote 90.

¹²¹ Such an award is, in fact, rare. For example, in *Quick v. Nicholls*, *supra*, footnote 54, the plaintiff was awarded only a modest amount of compensation because she was a very "home and family centered person". There was also evidence that she could no longer perform her domestic chores as in the past. Yet no award was made. Similarly, in *Boughey v. Rogers*, *supra*, footnote 58, the plaintiff's income loss was reduced because it was assumed that she would retire early (perhaps to care for her husband). There was also evidence of significant damage to her ability to perform domestic work. No award was made for this diminished capacity. See also *Friesen v. Wood*, *supra*, footnote 58.

¹²² *DeSousa v. Kuntz*, *supra*, footnote 88.

male plaintiffs,¹²³ this approach does nothing to eliminate the gap between awards to men and women. Male plaintiffs, of course, receive awards for both lost earning capacity and the cost of care including, where necessary, the cost of home care.¹²⁴

D. *Earning Capacity as Opportunity Cost*

Many commentators have suggested that the only solution to the problems discussed here is to take the Supreme Court of Canada's conceptual approach to damage assessment seriously—to value earning capacity as a capital asset. The value of a capital asset has nothing to do with the way in which it is currently employed. It is valued by the amount that it could command if put to its highest use in the market. This suggests an opportunity cost approach.¹²⁵ In the case of people who are not in the workforce at the time of the accident, the question is not what they *would* have earned had they not been injured, but what they *could* have earned in the workforce, regardless of whether they would in fact have chosen to enter the workforce or to work in the home. As Barwick C.J. of the High Court of Australia stated, assessing lost earning capacity is:¹²⁶

...not an exercise in replacing the wages which were currently being earned by the injured person. . . . The problem is to value the capital asset of the injured person, namely, his capacity to earn money. Whilst it is true that what that capital asset by its exercise may produce in the form of money will quite properly be an element and perhaps in some cases a dominant element in that valuation, the exercise is not, in my opinion, one in which it is sought merely to replace the wages themselves.

While, by and large, courts pay only lip service to the opportunity cost approach, there are several cases in which it seems to have been

¹²³ In *Winkler v. Tracy Douglas Monych Transcontinental Commodities Ltd.*, *supra*, footnote 76, a young male plaintiff was awarded a sum for housekeeping services (two hours per week increasing over the plaintiff's life to ten hours) as well as home maintenance expenses. See also *Pickering v. Deaking*, *supra*, footnote 87 and accompanying text.

¹²⁴ I have not, however, examined the level of these awards. It is, of course, possible that awards to men under this head are lower than awards to women.

¹²⁵ See N. Komesar, *Towards a General Theory of Personal Injury Loss* (1974), 3 J. Leg. Stud. 457; R. Posner, *Economic Analysis of Law* (3d ed., 1986), p. 178. Waddams, *op. cit.*, footnote 3, para. 3,869, also endorses this approach:

If the plaintiff has held a paid job before the accident, or has been trained for a trade or profession, the pre-accident earnings or the average earnings in the particular trade or professions will provide a guide. In the absence of any evidence, it is suggested that it would not be unfair to base the award on the average national wage.

¹²⁶ *Cullen v. Trappell* (1980), 146 C.L.R. 1, at p. 7 (H.C. Aust.). This does not mean that the Australian courts have adopted the opportunity cost approach. By and large, they base their awards on probable earnings. See, for example, *Mann v. Ellbourn* (1974), 8 S.A.S.R. 298.

applied (though not in the case of homemakers).¹²⁷ In the case of *Turenne v. Chung*¹²⁸ the plaintiff had been working as a teacher in a religious order, returning her entire salary to the order each year. Because of this arrangement, the defendant argued that as a result of the accident the plaintiff had suffered no real loss. The court rejected this argument on the basis that it was irrelevant how the person chooses to spend her money. As Waddams argues, the result in such a case should not turn on whether the plaintiff returns her salary to her employer, or waives it altogether.¹²⁹ The logical outcome of this approach is that a person working for a nominal wage, or no salary at all, should be compensated for her lost earning capacity so long as she can prove what she might have earned on the market.

In only a few cases encountered in this article is there a hint that the opportunity cost approach might be applied in the case of female plaintiffs. In *Watson v. Baxter*,¹³⁰ as a result of injuries to the female plaintiff, her husband left his job to care for the house and their two children. A portion of her award included compensation for her *husband's* (pre-trial) diminished income as a result of his assumption of the role of full-time homemaker. In other words, the plaintiff's loss was measured by her husband's opportunity cost (or their joint-family cost). In several cases involving young girls the opportunity cost approach may also have been applied. These are cases where the loss has been assessed on a statistical basis with no express deduction for the marriage contingency.¹³¹

1. Problems with the Opportunity Cost Approach

While initially attractive, the opportunity cost approach is not without its critics. Some writers have objected on conceptual grounds, rejecting the analogy between earning capacity and other capital assets on the basis that even if a capital asset "is not being put to its most productive use by its current owner, it is readily transferable to someone who will do

¹²⁷ In *Craig Bros. v. Les Soeurs de Charité de la Providence*, [1940] 4 D.L.R. 561, [1940] 2 W.W.R. 80 (Sask. K.B.), aff'd [1940] 4 D.L.R. 561, [1940] 3 W.W.R. 336 (Sask. C.A.), the plaintiff was taking less than a full salary from his firm. The court declined to limit his damages to present salary and sought to assess them at their market value. In *Forsberg v. Maslin*, [1968] S.A.S.R. 432, the plaintiff had forsaken better (or more intensive) employment to race motorcycles (which was not remunerative). The court refused to limit his award for lost earning capacity to probable earnings, emphasizing the theoretical approach. This case was, however, overruled by *Mann v. Elbourn*, *ibid.*, (the plaintiff in this case was a single mother). For a discussion of these cases, see Reaume, *loc. cit.*, footnote 3, at p. 87.

¹²⁸ (1962), 36 D.L.R. (2d) 197, 40 W.W.R. 508 (Man. C.A.).

¹²⁹ *Op. cit.*, footnote 3, para. 3.800, note 260.

¹³⁰ *Supra*, footnote 90.

¹³¹ See, for example, *Toneguzzo-Norvell v. Burnaby Hospital*, June 27, 1991, Van. Reg. C893067: "It is not "future earnings" that Jessica has been deprived of ... it is the loss of the capacity to earn ...".

so. . . . A human being's work capacity, however, is not transferable to another who may put it to a better use".¹³² This objection seems wrong. While not transferable outright, the value of labour power, like any other capital asset, is in fact based upon what it can command when traded or rented to another person (an employer) in the market.

A more practical objection is that the opportunity cost approach may be unworkable because opportunity costs are too difficult to measure. This is not entirely true. In cases where the plaintiff had a relatively sound prior work history before leaving the workforce, that history could be used to form the basis of the assessment. In the case of individuals with no such history (children, for example), statistical and actuarial techniques can be brought to bear to determine their prospects. Nevertheless, damages assessment must trade off between accuracy and efficiency. Accuracy is both elusive and expensive. Predicting the value of a person's earning capacity is enormously complicated. This suggests that in the case of individuals with no earnings history, the wiser policy option would be simply to adopt some conventional sum calculated in relation to average wages.

There are other, more normative objections to the opportunity cost approach. The Ontario Law Reform Commission has rejected it on the basis that it is unfair, because it compensates the same work at different rates.¹³³ In other words, two homemakers, doing identical work in the home, would receive very different awards where their previous education and work history were different. Another normative objection is that the opportunity cost approach may not be fair as between waged and non-waged workers—that it may in fact treat the latter more favourably! This objection rests on the proposition that even full-time employees may not be fully exploiting their earning capacity, yet are unlikely to receive an additional award representing the difference between their probable earnings and their full capacity. The concern is that almost all personal injury victims could, and would, argue that their current level of earnings do not provide accurate evidence of the value of their earning capacity. Many employees have the opportunity to work overtime, yet prefer leisure. Others have the opportunity of promotion or transfer to a more high paying job, yet choose to turn down these opportunities for lifestyle reasons. Theoretically, the opportunity cost approach would require that these individuals receive pecuniary compensation for these lost opportunities, even though they might never exercise them. Indeed, even many full-time employees could argue that they too perform household services after work and that their award should be grossed up to reflect this. While these claims may be true, consistency is not the only value at stake here. So long as present earnings

¹³² Reaume, *loc. cit.*, footnote 3, at p. 100.

¹³³ Ontario Law Reform Commission, *Compensation for Personal Injuries and Death* (1987), p. 46.

produce a relatively adequate sum in the case of full-time employees, there is no need to calculate an additional amount to reflect their "additional un-waged capacity". Where the injury prevents such a person from performing household services for herself as she had in the past, the cost of care should provide an amount to offset this loss.

Similarly, some object that the opportunity cost approach does not value the actual *work* done by the plaintiff and fails to distinguish between productive and unproductive activities. Denise Reaume argues against the opportunity cost approach on this ground. She says, it "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".¹³⁴ Similarly, Cooper-Stephenson and Saunders state that the earning capacity head of damages "is intended to reflect 'pecuniary loss'. The person who would have chosen not to work at all has suffered no such loss".¹³⁵ The argument is that the law should distinguish between work and leisure. Where a non-waged worker has lost the ability to perform household services, she should be compensated for this as an economic loss. But where, at the time of the accident, she was not working, what has been lost is simply the non-pecuniary satisfaction that the plaintiff is gaining by not working. This, both Reaume, and Cooper-Stephenson and Saunders argue, should be compensated, if at all, as a non-pecuniary loss. As Cooper-Stephenson and Saunders conclude: "If this solution is adopted, it can be seen that the proposed thesis, valuing prospective work, does not unduly reflect the puritan work ethic. Those who choose not to work to their limit are compensated for the loss of what they themselves have valued highly—the non-pecuniary rewards of life."¹³⁶

This debate goes well beyond the scope of this study for it involves a consideration of all potential victims of personal injury. However, a few points should be noted. In the first place, the distinction between "economically productive work" and "mere leisure" is quite elusive, and may be based on a partial view of the relationship between time, money and human satisfaction. For many people, income (money) is not an end in itself, but is in fact merely an instrument to satisfy needs and desires. Some people work in order to buy food, other people forsake higher earnings in order to grow their own food. Some people work in order to buy a sailboat, other choose to forsake higher earnings in order to build a sailboat. It is difficult to see why these people should be treated differently. The task of drawing a bright line between leisure and non-waged work will also be complicated and controversial. What test can clearly separate

¹³⁴ *Loc. cit.*, footnote 3, at p. 100.

¹³⁵ *Op. cit.*, footnote 1, p. 203.

¹³⁶ *Ibid.*, p. 205.

different facets of a person's life into "productive" and "unproductive" categories? And what judge will relish the task of making such judgments about contested social facts?

The suggestion that only "work" should be compensated as a pecuniary loss, and that other losses should be compensated as non-pecuniary injuries, may also run up against the fixed approach to non-pecuniary loss. As was noted earlier,¹³⁷ the Supreme Court of Canada has affirmed on a variety of occasions that such damages must be assessed only on a functional basis, and that they must not exceed \$100,000 (adjusted since 1978 for inflation). In the case of a catastrophically injured person, this amount is likely to be awarded almost automatically. The cap leaves no room for an additional amount of compensation for underutilized earning capacity. The suggestion that it is somehow possible to value leisure (except in terms of opportunity costs) is also problematic, running into the classical utilitarian dilemma of making interpersonal comparisons of utility. The suggested approach does not, therefore, so much solve the problem as banish it.

2. *Replicating Injustice?*

The opportunity cost approach has the advantage that it does not discriminate against persons who could, but choose not to, exploit their labour power in the market. However, like the probable earnings approach, it still affirms that the market is and should be the measure of all things. The opportunity cost approach measures the value of earning capacity on the basis of what that person *could* have earned on the market. This itself builds back into the process significant forms of discrimination insofar as opportunities in the market are not necessarily distributed "fairly". If the market is not "fair", there seems little point in attempting to reproduce its results when a person is injured.

This possibly radical sounding statement perhaps deserves some elaboration. If we adopt statistics about market wages in order to determine earning capacity, the statistics themselves will reintroduce enormous gender (and other) biases. Consider the case of a young girl when faced with the following "facts". Women are less likely than men to be full-time employees and thus, over the entire population, earn far less than men.¹³⁸ Even when women are full-time employees, they still earn only about 67% of what men earn—and the gap has not significantly closed in the last several years.¹³⁹ Thus, an opportunity cost approach, which measures lost earning capacity by market prices, reproduces discrimination against women. Particularly in the case of women with no prior

¹³⁷ *Supra*, footnote 115.

¹³⁸ See *supra*, footnote 38 and accompanying text.

¹³⁹ See Statistics Canada, *Earnings of Men and Women in 1990*, *op. cit.*, footnote 38. Since 1980 the ratio has increased from 64.2% to 67.6%.

earning history, the use of statistical averages (if they are gendered), will simply incorporate into the award all of the discrimination against women that presently occurs in the marketplace. The case of *Tucker v. Asleson*,¹⁴⁰ referred to earlier, provides a dramatic illustration of this problem. In the case of a young girl, the statistics indicated that lifetime earnings for women were only \$302,000 as opposed to \$947,000 for male university graduates.

Gender is not the only objectionable correlation. If we attempt scientifically to replicate the market in assessing wage loss we will also be reproducing race and class distinctions. This point is made most clearly in the case of young children. In one case, a court sought the aid of a developmental psychologist to determine the "life prospects" of a severely injured child.¹⁴¹ Important traits which may be predictive include parental education and income, family socio-economic status, birth order, family stability. The particular child had much going against him. He was from a broken home, with low family income, and the middle child of a large number of siblings. Statistically, all of these factors would have counted against him had he not been injured. Should they also count against him in court? When race is factored into the equation the results are even more troubling.¹⁴²

What remains, then, is the issue of whether the law of damages should seek to replicate with precision the results that would have been achieved in an egalitarian and fair society. While there may be good reasons to rely on market pricing in the allocation of resources in the market, should this system be extended in its entirety to the way in which society provides care for the victims of accidents? Why should the concern, care and respect to which an injured person is entitled turn on a guess about how they would have fared in the unfair lottery of life?¹⁴³ These considerations indicate that individualized measures of opportunity costs may not be desirable. Perhaps a more appropriate solution would be the adoption of a conventional sum representing some proportion of average provincial earnings of men and women.

¹⁴⁰ *Supra*, footnote 25.

¹⁴¹ *Houle v. City of Calgary* (1983), 26 Alta. L.R. (2d) 34 (Alta. Q.B.). For a commentary, see J.A. Sutherland, *Predicting a Child's Future Wage Loss* (1984), 42 *The Advocate* 169.

¹⁴² See also the fatal accident case of *Parker v. Richards*, Aug. 10, 1990, New Westminster Reg. C872133. The claim was made on behalf of the daughter of a 17 year old native Canadian single mother, from a broken home. These factors placed the deceased in "one of the lowest socio-economic prospects in the country" and operated significantly to reduce the award.

¹⁴³ For a similar argument regarding the inappropriateness of using "merit" or "talent" as a basis of distributive justice, see John Rawls, *A Theory of Justice* (1971), pp. 100-104.

E. *The Objective Valuation of Household Production*

Cooper-Stephenson and Saunders¹⁴⁴ and Reaume¹⁴⁵ both reject the opportunity cost approach on the basis that it is too difficult to apply, and may result in overcompensation to persons who are voluntarily underemployed and not engaged in productive work (the well-educated but idle lawyer who prefers to stay at home and read books). Alternatively, argue Cooper-Stephenson and Saunders,¹⁴⁶ the opportunity cost approach may undercompensate the homemaker: "... to grant damages on the basis of an artificial hypothesis avoids recognition that the homemaking function has its own intrinsic value, which may exceed in monetary terms the value of external income opportunity."

These authors prefer a method that values non-waged work on an objective basis. Cooper-Stephenson and Saunders call this approach the "value of prospective work", based on an assessment of the actual value of the work done. They state:¹⁴⁷

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.

They suggest that in the case of homemakers the courts should adopt a replacement cost approach. This would involve developing a "catalogue of services" in the home and measurement of their value by their replacement cost in the market.

Reaume advocates a similar approach to solve the problem of homemakers and other plaintiffs engaged in productive, but non-remunerative work. While she rejects the opportunity cost approach, she also criticizes the probable earnings approach because, in the case of homemakers, "the unpaid nature of the work obscures the fact that it is nevertheless economically valuable".¹⁴⁸ In place of either of these approaches she advocates a "hybrid" measure whereby the focus is shifted from "earnings" to "work". She suggests that "[w]hat the plaintiff has lost, then, is the ability to engage in economically productive activity. For the sake of brevity we can refer to this as the 'capacity to work'."¹⁴⁹ Like Cooper-Stephenson and Saunders, Reaume suggests that unpaid work should be compensated on a replacement cost basis using market prices. She concludes:¹⁵⁰

¹⁴⁴ *Op. cit.*, footnote 1.

¹⁴⁵ *Loc. cit.*, footnote 3.

¹⁴⁶ *Op. cit.*, footnote 1, p. 217.

¹⁴⁷ *Ibid.*, p. 204.

¹⁴⁸ *Loc. cit.*, footnote 3, at p. 105.

¹⁴⁹ *Ibid.*, at p. 101.

¹⁵⁰ *Ibid.*, at pp. 102-103.

This approach has in common with the loss of earning capacity approach that it is not concerned primarily with whether or what the plaintiff was actually earning. . . . It differs from the earning capacity approach, though, in that the focus is on what activities the plaintiff was actually engaged in, rather than the hypothetical question of to what activities the plaintiff could have devoted her talents and capacities.

The replacement cost approach has been used in many fatal accident cases and also in several Canadian and English cases involving personal injuries to women.¹⁵¹ Most recently, in the case of *Fobel v. Dean*,¹⁵² the Saskatchewan Court of Appeal expressly adopted Cooper-Stephenson and Saunders' approach and assessed the homemaking earning capacity loss to the plaintiff at about \$5.50 per hour (on a monthly basis for "direct labour" only, without including a valuation for "management" services). As a methodology the replacement cost approach is, of course, vastly preferable to making no award. The inclusion of these amounts under lost earnings as opposed to the cost of care is also a significant advance. However, the approach is not entirely without its problems.

Like the opportunity cost measure, objective valuation solves some problems, while creating others. In the first place, it is by no means as "objective" or accurate as it sounds. As indicated before, this approach assumes an easily drawn line between "economically productive work" and "mere leisure". Just what activities in the home will be characterized as "work" as opposed to "leisure"? Even when all the activities in the home have been properly characterized, the measurement of the value of those which are considered work is by no means simple. As Janet Yale points out,¹⁵³ the measurement exercise would require (a) an accurate measurement of all the functions performed by a homemaker (cook, cleaner, household maintenance and repairs, child-care, chauffeur, nurse, finance management, dishwasher, clothes washer, shopping, etc.); (b) an accurate assessment of the time devoted to each of these tasks; (c) the identification of appropriate market wage-rates for each of these tasks; (d) some adjustment for quality differentials. Engaging in this calculus, especially if it is to be tailored to the precise circumstances of each individual case, will be controversial and costly.

Secondly, the replacement cost approach simply is not a measure of the plaintiff's earning capacity, nor even the value of the plaintiff's

¹⁵¹ *Lefebvre v. Kitteringham*, *supra*, footnote 113; *Vuckovic v. Olah*, *supra*, footnote 113; *McCallum v. Ritter* (1990), 72 D.L.R. (4th) 49, [1990] 5 W.W.R. 660 (Sask. C.A.); *Daly v. General Stream Navigation Co. Ltd.*, [1981] 1 W.L.R. 120, [1980] 3 All E.R. 696 (C.A.); *Roberts v. Johnstone*, [1989] Q.B. 878 (C.A.).

¹⁵² Aug. 27, 1991, C.A. 371. Leave to appeal to the S.C.C. denied, [1991] SCCA No. 433, 3/5/92.

¹⁵³ J. Yale, *The Valuation of Household Services in Wrongful Death Actions* (1984), 34 U.T. Law J. 283. See also J. Knetsch, *Legal Rules and Measurement of Economic Values: Household Production and Damage Estimates* (1982), U.T. Law and Economics Workshop Series WSV-6.

work in the home. It is a measurement of what other people earn in the domestic sector. It is a measure of the cost of *housekeeping* services rather than the value of *homemaking* services.¹⁵⁴ The figures might be more individually tailored to individual cases, but individualizing households will likely be as costly and speculative as determining opportunity cost. Economists have battled for years over the appropriate method for valuing household labour—testimony to the fact that there is no neat and objective formula that can be applied.

Thirdly, the replacement cost approach focuses too closely upon the actual work being done by the plaintiff at the time of the injury. It is conceivable, in fact probable in many cases, that after a disabling injury, a homemaker might remain able to perform some domestic work, though with added difficulty, even though her career prospects have been destroyed. In such a case, she would be entitled to no damages for diminished earning capacity unless she could demonstrate that she would likely have left the home in the future to seek waged employment. This is difficult to prove.

Finally, while Cooper-Stephenson and Saunders suggest that the replacement cost approach has the merit of avoiding the gender-discrimination that may be inherent in other methods of valuation, this may not be the case. The difficulty is that present wages in this sector (domestic work) may be particularly depressed as a result of the massive amount of volunteer and vulnerable labour provided by women, often immigrants.

III. *Some Tentative Conclusions*

This article is designed primarily to identify and illustrate the problem of gender bias in injury compensation law. It supports the suspicion shared by many that this area of the law is still in need of reform, but it does not purport to supply all the answers. While the previous sections canvassed the pros and cons of a variety of solutions, the final design of the appropriate reforms awaits another occasion. Nevertheless, the evidence is more than adequate to support a number of immediate suggestions. First, the *qualitative* analysis supports the conclusion that there is a problem, and suggests the desirability of a further *quantitative* study directed especially towards the development of a more thorough appreciation of the extent to which bias affects personal injury awards. In the meantime, the existing evidence is also sufficient to justify the maintenance and extension of professional and judicial education programs directed towards the elimination of gender bias. Such programs must identify all those stages at which bias may be introduced. They must interrogate the way in which lawyers frame their clients' claim, the way in which experts are instructed and the assumptions

¹⁵⁴ F. Pottick, *Tort Damages for the Injured Homemaker: Opportunity Cost or Replacement Cost* (1978-79), 50 U. Colorado L.R. 59.

and methods that they bring to bear, the way in which facts about individual plaintiffs are presented and evaluated, and the way in which certain legal arguments and doctrines incorporate and reproduce bias against women.

Clearly, more fundamental reform is also desirable. The direction of that reform will depend upon answers to a variety of normative questions about what constitutes "bias" and the extent to which we accept the market as "fair". Indeed, one option would be to abandon the effort to individualize compensation for lost earning capacity altogether. Instead, conventional sums could be fashioned with an eye to need. While extreme, this option should not be rejected out of hand. Individualizing damage awards is speculative and expensive. As I have argued, we should at least question whether the results are worth the effort, especially when the fairness of wage markets is questioned. Moreover, any liability-insurance system that focuses so heavily on individualized earnings capacity is regressive. While the costs are borne equally by all, the compensation benefits are distributed towards higher income (male) Canadians.¹⁵⁵

More modestly and in the shorter term, the marriage contingency should be eliminated from all calculations. The fact that a female plaintiff might have married (but for the accident) should be irrelevant to her entitlement to compensation. There should simply be a presumption that, while the plaintiff might have left the workforce for a period (thus reducing her wages), her working capacity remains unaffected, or the reduced wages would have been offset by the increased value of household production. Similarly, the remarriage contingency should also be eliminated. The fact that the plaintiff might still get married after the accident is irrelevant, as it does not affect her loss. Finally marriage should not be taken as evidence that female plaintiffs would have retired early. The assumption is gendered, and even if true, once again, the wage loss may be assumed to be offset by the increased value of household production. Thus, where the victim of an injury is, at the time of the accident, in the workforce or has a reliable recent working history, gender should be ignored entirely and no additional contingency deductions should be made.

Beyond this, matters become more difficult for there is argument on the extent to which the market should be abandoned as the appropriate measure of loss. In the case of women who are full-time employed, abandoning the marriage contingency will not eliminate the gender gap in awards. In these cases we must still confront the fact that their pre-accident wages may have been depressed by reason of discrimination in the market. Such discrimination would be partially offset if the courts

¹⁵⁵ The point I am making here is that liability insurance is generally paid for by all consumers equally (either in direct premiums or increased product prices), yet the benefits are distributed according to income.

recognized the dual role of women in assessing compensation.¹⁵⁶ So, for example, in addition to awarding future wage loss the courts could also include a sum representing diminished capacity to perform housework. Alternately, awards to female plaintiffs could be modestly "grossed up" to eliminate or reduce the gender gap. If justification is required, in the case of unmarried women, the "lost family earnings" rationale could still be deployed. More generally, a modest increase in awards to all women might be defended on the basis of the future contingency that public policy will ultimately result in a reduction of the wage gap.

Even more difficult are situations involving female plaintiffs with no earnings history (that is, children and full-time home workers). Here we must confront the invisibility of household production and the fact of "statistical discrimination". In these cases, use of either the probable earnings approach or opportunity cost approach may still reproduce gender bias. In the case of young children especially, the use of actual market data, if individualized, will replicate gender (or other) bias. Instead, it seems desirable to establish conventional sums, based in some way on average provincial earnings, as the basis for compensation. This would enhance fairness and efficiency, avoiding the very costly task of individualizing damages. If an individualized approach must be retained, the most objectionable factors at least should be eliminated so that the statistical basis of the calculations does not incorporate gender and other bias. Race and gender, while perhaps an accurate indicia of later income prospects, should, as a matter of public policy, simply be rejected as irrelevant. The approach adopted in *Tucker v. Asleson*,¹⁵⁷ rejecting gendered earnings statistics should be nourished, though precisely which alternate statistics should be used (average male or average male/female) is controversial.

In the case of adult women (or men) who are full-time homemakers and have no reliable earnings history, the value of work in the home should be fully recognized as evidence of earning capacity. In the short term, the replacement cost method adopted in cases like *Fobel v. Dean*¹⁵⁸ should be supported and encouraged. Compensation should not be reduced in such cases in situations where the work is taken over by the spouse or another family member, for this does not reduce the plaintiff's loss when understood as a loss of working capacity. In the longer term, more fundamental reform should be investigated. Again, while legislative action may be necessary, conventional sums, related to average earnings (and perhaps adjusted by family size and time allocations) could be used as the basis for such awards. This approach, which has been endorsed by

¹⁵⁶ This suggestion is made in Manitoba Association of Women and the Law, *Gender Equality in the Courts* (1988), pp. 145-149.

¹⁵⁷ *Supra*, footnote 25.

¹⁵⁸ *Supra*, footnote 152.

the Ontario Law Reform Commission,¹⁵⁹ avoids the costly task of individualizing damages and re-inventing the arguments and evidence in every case, yet leaves the courts with some flexibility to adjust the award to the circumstances of each case.

Reform is clearly in order. The law in this area is both unfair and uncertain. Untested and controversial assumptions, both factual and normative, play too large a role. It is time to reexamine and challenge those assumptions, and the doctrines to which they give rise. The law is also in a state of some confusion. The cases run in different and often conflicting directions. Most optimistically, this represents the dissolution of the previous consensus, and the opening of an opportunity for change.

¹⁵⁹ Ontario Law Reform Commission, *op. cit.*, footnote 133, pp. 48-49.