# Valuing Women's Work in the Home: A Defining Moment

Kim Brooks

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# Valuing Women's Work in the Home: A Defining Moment

Kim Brooks*

*Over the last twenty years, feminists interested in law reform have struggled with the difficulty of reaching consensus on a method for valuing women's unpaid work in the home. This article highlights the significance of* Fobel v. Dean *as a defining moment in legal recognition of the value of women's unpaid labour in the home in tort law. It reviews the reasons why* Fobel v. Dean *presents a breakthrough in the case law on damage awards in tort for women's unpaid work in the home. It also suggests changes to the methods adopted by courts to quantify the value of women's unpaid work in the home that might be endorsed in cases that will become future defining moments.*

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*Durant les vingt dernières années, les féministes qui s'intéressent à la réforme du droit ont eu beaucoup de difficultés à trouver un terrain d'entente sur une méthode pour évaluer le travail domestique non rémunéré accompli par les femmes. Le présent article met en lumière l'importance de l'arrêt* Fobel c. Dean *qui marque la reconnaissance judiciaire, en droit de la responsabilité civile, de la valeur du travail non payé des femmes à la maison. L'article explique en quoi l'arrêt* Fobel c. Dean *représente une percée dans la jurisprudence touchant les dommages accordés en responsabilité civile pour le travail non rémunéré des femmes. L'auteure suggère également des modifications aux méthodes adoptées par les tribunaux pour quantifier la valeur du travail domestique non rémunéré accompli par les femmes en vue d'assurer que la jurisprudence en cette matière continue de progresser.*

> Work filled the time. I worked like a dray horse, thinking: *At least nobody will ever be able to say I didn't keep a clean house.*
>
> Margaret Laurence, *The Stone Angel*[1]

* Thanks to the helpful comments of two anonymous reviewers and to Helene Wheeler for her excellent research assistance. Particular thanks to Christine Boyle, who drew my attention to this case.

1. M. Laurence, *The Stone Angel* (Toronto: Seal Books, 1964) at 98.

Women do more unpaid work in the home than men[2]—a fact that has troubled feminist scholars across disciplines for more than forty years.[3] Feminists grapple with the challenge of ensuring gender equality in a world that has historically categorized the work environment into the private sphere of the home and the public, or market, sphere of the workplace. Work in the market sphere is easily valued, while work in the private sphere often remains unvalued, despite the fact that many of those activities have market prices, even if they are not actually paid in a particular context. The unpaid nature of work in the home has historically created excuses for policy-makers to ignore the value of work in the home—work that is predominantly undertaken by women.

Despite numerous leading articles on the issue of women's unpaid work in the home, it is striking how few concrete legal policy recommendations have been made by feminists seeking to address the unequal allocation of this kind of labour.[4] Generally, feminists and other scholars and activists interested in promoting an accurate representation of productive activities

2. M. Hamdad, "Valuing Households' Unpaid Work in Canada, 1992 and 1998: Trends and Sources of Change" (lecture provided at the Statistics Canada Economic Conference, May 2003) 1 at 10 [unpublished], looks at the Statistics Canada General Social Survey on Time Use until 1998. She summarizes that women accounted for 62.6 per cent of the total estimated value of unpaid work in 1998. Women undertake clothing care almost exclusively (88.6 per cent). Women contributed to almost three-quarters of meal preparation (71.6 per cent) and cleaning (71 per cent) and for more than two-thirds of the help and care of children and adults within the household (67.9 per cent).

3. See, for example, work in the political economy by M. Benston, "The Political Economy of Women's Liberation" (September 1969) 21 Monthly Review 24; or I. Bakker, *Unpaid Work and Macroeconomics: New Discussions, New Tools for Action* (Ottawa: Status of Women Canada, 1998); work in sociology by P. Armstrong, "Restructuring the Public and Private: Women's Paid and Unpaid Work," in S. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) at 37; work in economics by M. Bittman, "Parenthood without Penalty: Time Use and Public Policy in Australia and Finland" (1999) 5 Feminist Economics 27; L. Beneria, "The Enduring Debate over Unpaid Labour" (1999) 138 International Labour Review 287; and M. Macdonald, "Feminist Economics: From Theory to Research" (1995) 28(1) Canadian Journal of Economics 159.

4. Lack of consensus about appropriate policy vehicles for addressing the inequities women face in the home undoubtedly are inspired by concerns that any attempt to recognize the unpaid labour in the home will reinforce and exacerbate the public/private divide between the marketplace and the domestic sphere. The risk, however, in not being able to propose policies that might seek to either compensate women for their labour in the home or equalize the sharing of that labour between women and men, is that women's work will continue to go unnoticed and unrewarded—a result that has led to the significant impoverishment of women, particularly single mothers and older women. Using the characterizations of the interrelated phenomenon that constitute the public/private divide suggested by S. Boyd, "Introduction," in S. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997) at 8–10, the tension seems to be between ameliorating the divide between state regulation and family relations at the expence of reinforcing the divide between the marketplace and the home.

agree that measures such as the gross national product ought to include unpaid work in the home.[5] Beyond this step, however, there appears to be little consensus about how society should value productive work performed without remuneration in the home.[6]

The charge for this twentieth anniversary issue of the *Canadian Journal of Women and the Law* was to provide a submission analyzing, critiquing, defending, exploring, setting in context, or telling the story of a defining moment, good or bad, in the feminist engagement with law during the last twenty years. For a number of reasons, the intersection between tort law and feminist concerns about women's unpaid work in the home would appear to be an area where such a moment should be readily identified. First, despite the general lack of consensus among legislators, judges, and other policy-makers around the issue of whether and how women's unpaid work in the home should be valued, feminists are unanimous that personal damages should be awarded for loss of the ability to perform unpaid work in the home when a woman is injured.[7] Second, a number of leading Canadian feminist scholars, many of whom have been actively involved in the *Canadian Journal of Women and the Law*'s first twenty years, have written on the topic.[8] Third, to the extent that it has been identified as an avenue for recognizing women's work, it has piqued the curiosity of

5. The work of Marylin Waring was critical in convincing at least some international organizations of the importance of reforming definitions of gross domestic product, among other macro-economic indicators, to account for women's unpaid labour. See M. Waring, *If Women Counted: A New Feminist Economics* (San Francisco: Harper and Row, 1988).
6. For a few concrete recommendations of possible legal reforms in the areas of employment and labour law, corporate law, tax law, and family law derived from the political economy literature, see L. Philipps, "There's Only One Worker: Toward the Legal Integration of Paid Employment and Unpaid Caregiving," in Law Commission of Canada, ed., *New Perspectives on the Public Private Divide* (Vancouver: UBC Press, 2003).
7. See E. Adjin-Tettey, "Contemporary Approaches to Compensating Female Tort Victims for Incapacity to Work" (2000) 38(2) Alberta Law Review 504; E. Gibson, "Loss of Earning Capacity for the Female Tort Victim: Comment on *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*" (1994) 17 Canadian Cases on the Law of Torts (2d) 78; D. Réaume, "Rethinking Personal Injury Damages: Compensation for Lost Capacities" (1988) 67 Canadian Bar Review 82; and M. Thornton, "Loss of Consortium: Inequality before the Law" (1985) 10 Sydney Law Review 259.
8. See, for example, the work of Adjin-Tettey, *supra* note 7; and Réaume, *supra* note 7. See also R. Graycar, "Compensation for Loss of Capacity to Work in the Home" (1985) 10 Sydney Law Review 528. Although Graycar is Australian, she has been claimed by numerous Canadian feminist academics as an honorary Canadian, and she has published frequently in Canadian journals, including her article "Hoovering as a Hobby and Other Stories: Gendered Assessments of Personal Injury Damages" (1997) 31 UBC Law Review 17. Her 1985 piece was considered by, and undoubtedly influenced, the Saskatchewan Court of Appeal in *Fobel v. Dean* (1991), 83 D.L.R. (4th) 385 at 396, [1991] 6 W.W.R. 408 (Sask. C.A.), rev'g (1989), 78 Sask. R. 127 (Ct. Q. B.), leave to appeal to S.C.C. refused [1992] 1 S.C.R. vii, (1992), 87 D.L.R. (4th) vii [*Fobel*].

scholars across disciplines.[9] Finally, despite the feminist consensus on this important issue, it remains a relatively ignored topic among mainstream tort law scholars.

To underscore this last point—that the topic of the valuation of women's unpaid work in the home has been ignored among mainstream tort law scholars—a few examples might be provided. Gary Schwartz's review of the contributions of feminist scholarship in the area of tort law misses altogether the impact that feminist writing has had on the recognition of unpaid work that women perform in the home.[10] Perhaps surprisingly, Joanne Conaghan's critique of Schwartz's piece also misses this contribution.[11] Canadian casebooks on torts also give this contribution by feminist scholars short shrift.[12] For example, *Canadian Tort Law: Cases, Notes and Materials*, edited by B. Feldthusen, L. Klar, and A. Linden, addresses compensation for the value of women's unpaid work in the home in a footnote.[13] This footnote provides a brief synopsis of *Fobel v. Dean*[14] and contains an error in reporting that the methodology adopted by the court was a "catalogue of services" approach. In *Cases and Materials on the Law of Torts*, edited by R. Solomon, R. Kostal, and M. McInnes, the issue is again addressed in a footnote that simply poses a question about how the lost earning capacity of a woman who has decided to work in the home should be calculated, leaving students to look up the cases cited for the answer.[15] The valuation of household services rendered by homemakers who are injured was also given only a cursory footnote mention in L. Klar's *Tort Law*, where compensation for housekeeping was distinguished from the sexist action for loss of consortium.[16]

9. See, for example, the work of economists such as Cara Brown (C. Brown, "Exposing and Remedying Vexing Problems in Housekeeping Claims for Personal Injury and Wrongful Death Cases: An Economist's View" (1997) 19 Advocates' Quarterly 83; C. Brown, "Valuable Services Trends in Housekeeping Quantum across Canada, 1990–2001" (2003) 27 Advocates' Quarterly 71; or the work of human ecologists such as Brenda Munro (J. Fast and B. Munro, "Toward Eliminating Gender Bias in Personal Injury Awards: Contributions from Family Economics" (1994) 32 Alberta Law Review 1).
10. G. Schwartz, "Feminist Approaches to Tort Law" (2001) 2 Theoretical Inquiries in Law 175.
11. J. Conaghan, "Tort Law and Feminist Critique" (2003) 56 Current Legal Problems 175.
12. However, see J. Cassels, "Damages for Lost Earning Capacity: Women and Children Last!" (1992) 71 Canadian Bar Review 445; and K. Cooper-Stephenson, "Damages for Loss of Working Capacity for Women" (1978–9) 43(2) Saskatchewan Law Review 7, where the topic is given extensive treatment. Both Jamie Cassels and Ken Cooper-Stephenson might be lauded for their early work on this subject.
13. B. Feldthusen, L. Klar, and A. Linden, eds., *Canadian Tort Law: Cases, Notes and Materials*, 12th ed. (Markham: Butterworth's, 2004) at 740, note 1.
14. *Fobel, supra* note 8.
15. R. Solomon, R. Kostal, and M. McInnes, eds., *Cases and Materials on the Law of Torts,* 6th ed. (Scarborough: Thomson Carswell, 2003) at 512, note 3.
16. L. Klar, *Tort Law*, 3rd ed. (Scarborough: Thomson Carswell, 2003) at 249, note 237.

In the struggle to ensure that the value of women's unpaid work in the home was recognized for the purposes of awarding damages in tort law, the most obvious defining moment is the 1991 Saskatchewan Court of Appeal decision in *Fobel*.[17] *Fobel* has been followed, explained, or mentioned in over 120 cases since its release in 1991. Yet, a recent study of housekeeping awards in over 388 cases in which housekeeping damages were awarded between 1990 and 2001 found that the amounts awarded remained modest, averaging $25,000 across Canada. The study also found that the number of awards surged and peaked in the 1994–6 period but declined in 2000 and 2001.[18] So, despite its significant role in changing the Canadian landscape in its explicit recognition of the value of unpaid work in the home, and its articulation of a methodology to employ in calculating that value, it might be argued that *Fobel* has not yet "had its day in court," given the modest nature of the awards women have received and the exclusion of the issue from mainstream torts discourse. Following a summary of the facts of this case and a synopsis of the court's analysis on valuing unpaid work in the home, I review the reasons why Justice William Vancise's judgment reflects a breakthrough in thinking about women's unpaid work in the home. I then conclude by suggesting a number of ways in which the judgment falls short and suggest the changes that are required for further advancement in this area of the law.

## *Vera Fobel's Paid and Unpaid Work*

Vera Fobel started her family business, the Nutana Bakery, in Saskatoon in 1973 with her husband Edward. They each owned one-half of the business. Edward was primarily responsible for the management of the bakery and the production of the bakery's products. Vera was responsible for sales and marketing, human resources, including hiring and training personnel, and maintaining the accounting records, including the payroll. Vera Fobel's work at the bakery consumed approximately eight hours of her day, six days a week.

Not surprisingly, in addition to a forty-eight-hour paid work week, Vera Fobel was also solely responsible for the family housekeeping, including cleaning, cooking, laundry, gardening, maintenance of the family home, and childcare. She worked approximately forty hours a week at this unpaid job. Edward Fobel, recognizing that he was

17. *Fobel, supra* note 8.
18. See Brown, "Valuable Services Trends," *supra* note 9.

"kind of was lucky, I guess," summarized his participation in household tasks as follows:

> I'm not in a position to make apologies for what I do. I work very hard. I put in a lot of hours and I didn't do very many things around the house and that's a fact. There was a time when I used to try and cook one meal a week but I just even couldn't fit that in sometimes and at any given time I was involved in some volunteer work. I might be at meetings and this and that. I did on occasion vacuum or—I never, ever remember doing the laundry. I would help dry dishes from time to time. I would wash windows helping Vera but she was usually not pleased with my quality of my window washing so—anyhow it was—you might say my involvement around the house was quite minimal. I would do little repairs, you know, but as far as the maintenance and the cleaning of the yard and the house, painting and so on, unless I was away from my work station entirely I really didn't put a lot of hours in a week into the household situation.[19]

Vera's capacity to maintain her grueling schedule was permanently impaired as the result of two accidents. In 1984, Vera Fobel, then fifty-one years old, was the passenger in a car that collided with a vehicle driven by Jeanette Dean. There was no question about who was in the wrong. Dean had failed to obey a yield sign. Less than two years later, in 1986, Vera was driving her own car when she stopped at an intersection to allow a pedestrian to cross the street. Nicole MacDonald's vehicle collided with the rear of her vehicle. Again, there was no question about whose fault the accident was. It was clearly MacDonald's.

Before these accidents, Vera Fobel was healthy and active. After the first accident, she had a laceration to the scalp, a chest injury, a partial collapse of the left lung, lower back muscle spasms, rheumatoid arthritis, and continuous headaches. She experienced post-traumatic stress, which resulted in "depression, lack of energy, insomnia, irritability, cognitive distortion in the form of helplessness, lack of concentration, impairment of memory, nightmares, and increased sensitivity to pain."[20] These injuries were aggravated by the second accident.

After the accidents, Vera Fobel was still able to perform the kinds of tasks she could previously perform, both at home and at work.

19. *Ibid.* at 423.
20. *Ibid.* at 389.

However, her work in both places took longer, was more difficult, caused pain and discomfort, and could not be performed continuously. She needed to take frequent rests between tasks. Therefore, she was able to perform less work in the home and at the bakery. At the bakery, although Vera Fobel continued to perform some of her previous work, Edward took over some of her tasks, and other members of the staff assumed others. Edward and Vera's relationship was also strained, and Vera's response to the accident resulted in the cessation of their sexual relationship.

## *Recognizing the Value of Vera Fobel's Unpaid Work*

Traditionally, courts held that if a woman suffered an injury that destroyed or impaired her capacity to perform household services, the loss was not her own but, instead, was a loss that could be attributed to her husband, to whom she provided the services. Moreover, recovery, when permitted, was limited to the simple replacement cost of direct domestic labour. Awards were typically minimal. Reflecting a degree of enlightenment on the value of women's unpaid work in the home, the Saskatchewan Court of Appeal's decision in *Fobel* cast aside these sexist principles. For this reason, the judgment must be regarded as one of the most important breakthroughs in feminist jurisprudence in Canada in the last twenty years.

### *Compensation for Loss or Impairment of Housekeeping Capacity*

Vera Fobel sought damages for her injuries under several heads. First, she sought pecuniary damages to reflect the impairment of homemaking functions and the loss of earning capacity, arguing in favour of a replacement cost approach to valuing her losses. Given this valuation approach, Vera Fobel requested a pre-trial loss valued at $52,961 and an expected discounted loss of $159,856 for the remainder of her life. Responding in particular to the approach to valuing the pre-trial losses, counsel for the defendants argued that an amount equal to only the actual expenses incurred should be awarded. Since Vera Fobel had only paid $65 as an actual pre-trial expense for a housekeeper, the defendants argued that only that amount should be recoverable.

In an important breakthrough relating to damage awards for loss or impairment of housekeeping ability, the Saskatchewan Court of Appeal rejected the defendant's argument. The court labeled the traditional approach of granting damage awards for loss or impairment of housekeeping damages to a third party (generally the injured party's husband),

as "antiquated if not sexist."[21] The court further noted that the challenge presented by the case was determining the appropriate definition of housekeeping capacity and the criteria to be used to calculate or quantify the loss of that capacity.

Relying on the synthesis of previous scholarship provided by K. Cooper-Stephenson and I. Saunders in their leading text *Personal Injury Damages in Canada,*[22] the court reviewed the five methods that could be employed to quantify the loss of housekeeping capacity. First, under the replacement of earnings capacity method, the homemaker could be compensated based on the earnings she would have been able to earn had she worked outside the home at the same tasks. Second, under the opportunity cost method, the value of the work could be determined based on the value of what the woman could have earned had she chosen to work in the paid labour force. Third, under the replacement cost method, compensation could be based on the cost of paying someone to perform the household functions. Fourth, under the substitute homemaker method, the cost of a substitute homemaker who would perform all of the tasks the injured person previously performed, not just the domestic labour, could be used. Finally, under the catalogue of services method, the injured woman's time could be assigned to a number of occupations, for example, chef, nurse, counsellor, and so on, and a fair market salary for each of those tasks could be imputed to the injured woman.

The Court of Appeal adopted an approach that it stated combined the substitute homemaker and the catalogue of services approach. In applying this approach, Vancise J. divided homemaking activities into two types—direct labour and management. Direct labour activities included food preparation, cleaning, clothing and linen care, maintenance, gardening, and physical childcare. Management activities included those activities relating to the management and organization of the household such as marketing, food planning, tutorial childcare, activity coordination and organization, healthcare, and counselling. Vancise J. concluded that a physically injured party may not be able to undertake direct labour homemaking activities but may well be able to undertake the management functions.

After assessing the various methods for valuing unpaid work and outlining which activities were properly considered, the court determined Vera Fobel's actual loss in ability before the time of the trial. The trial judge

21. *Fobel, supra* note 8 at 385. This is a relatively mild comment on the previous damage awards regime. Contrast it with the clearly articulated assessment by Regina Graycar, "Compensation for Loss of Capacity," *supra* note 8 at 567, that there is an "insidious structural sexism that underpins the principles governing common law damage awards."
22. K. Cooper-Stephenson and I. Saunders, *Personal Injury Damages in Canada* (Toronto: Carswell, 1981) at 213-25.

had agreed with the defendant counsel's characterization of the proper means of awarding damages, namely where the plaintiff can do housework, but with discomfort or impairment, the trial judge held that damages were properly assessed as general damages, not as pecuniary losses. The Court of Appeal disagreed with this approach. Instead, the Court of Appeal adopted a bifurcated approach that required quantification of both the pecuniary and non-pecuniary pre-trial loss of housekeeping capacity as part of the general damage award. Although the trial judge did not make a finding of fact on the amount of increased difficulty that Vera Fobel experienced in undertaking her household labour, the Court of Appeal concluded that her housekeeping capacity was reduced by at least 75 per cent pre-trial. The next step in the court's analysis was to determine how many hours a week a 75 per cent loss of capacity would translate into and to award a per hour rate for that loss in ability. Although the Court of Appeal was careful to clarify that simply adopting a replacement cost approach to the value of the pre-trial loss was not appropriate when replacement labour had not, in fact, been obtained, the court accepted that replacement cost is a relevant and important component in arriving at a value of the loss of amenity. In valuing the housekeeping services, the Court of Appeal noted that in September 1984, the year when the first accident occurred, the average wage payable for domestic services was $7.54 an hour. The court determined that Vera Fobel's pre-trial housekeeping capacity was diminished by approximately fifteen hours a week.[23] Assuming the hourly cost of domestic services would decrease if a greater number of hours were required to be worked, the court held that a cost of approximately $100 a week (or $6.66 per hour for fifteen hours per week) would be sufficient to provide substitute housekeeping services. The Court of Appeal also held that Vera Fobel's injury did not require her to obtain the services of a substitute worker for her managerial or indirect housekeeping work, only for the directly provided services. Given that Vera Fobel did not obtain substitute service for the household tasks, the court considered these pre-trial losses to be part of the non-pecuniary loss of amenity under general damages.

The Court of Appeal next turned to Vera Fobel's loss of future housekeeping capacity. Again, as the trial judge did not make a finding about the number of hours of assistance Vera Fobel would require, the Court of Appeal sought to quantify the hours of assistance that she would require and the cost of finding replacement services for this time. The Court of Appeal had evidence of an expert in home economics who testified that in

23. This finding is curious because it appears to conflict with the previous two findings; namely, that Vera Fobel worked approximately forty hours per week in the home and that her capacity to work in the home was diminished by 75 per cent.

1981 working mothers with children worked on average twenty-seven hours per week. Given that it was accepted that Vera Fobel worked in the home for forty hours per week, using the replacement cost method, the expert calculated that the discounted future loss was $159,856. If the national average for household work were used, the discounted future loss would have been $131,992.30.

The Court of Appeal accepted that the fifteen hours used for the determination of pre-trial housekeeping service replacement was sufficient for post-trial services as well.[24] Although the evidence was that domestic services generally cost approximately $7.50 per hour at the time, on the basis that Vera Fobel would be able to obtain a discounted rate for work done on a monthly basis, an hourly rate of $5.50 was employed. Again, the court held that only the direct labour component of household services could be compensated on the basis that there was no evidence that Vera Fobel could not perform the management services. Therefore, the court awarded a total amount of $79,698.24 for loss of future housekeeping capacity. Since this comment focuses on the importance of Vancise J.'s holdings on the issue of the damage award for loss of housekeeping ability, I will not review his holdings on the damages to be awarded for loss of earnings and non-pecuniary losses.

## *A Defining Moment*

In the area of compensation for loss of housework capacity, women historically have faced discrimination on two bases. First, since it is not the subject matter of a market transaction, unpaid work in the home has been assumed not to have a value. Second, even when attempts were made to value unpaid work, its value was understated because of the historic disadvantage of women in the workplace. These biases were echoed in judicial opinions that either denied injured women compensation for unpaid work in the home or undervalued that work when compensation was granted.

24. The court justified this figure as follows: "The calculation of pre-trial loss of housekeeping capacity of 15 hours per week would seem to be reasonable in the circumstances. It represents about 35% of the time she [Vera Fobel] spent on housekeeping and managing the home prior to the accident. Her own estimate is that she can do approximately 30% of what she used to do, and when one considers that her youngest child will not, in normal circumstances, remain in the home much longer, there will be a diminution of housekeeping and management of the home required. In my opinion, the 15 hours per week is a reasonable calculation of loss of future housekeeping capacity for 'ordinary housekeeping,' or direct labour costs" (at 404).

*Fobel* qualifies as a defining moment in feminist engagement with the law for a number of reasons. First, it expands the development of tort principles as they apply to women. One of the most fundamental tort law principles is that victims should be compensated in a fashion that restores them to their pre-accident condition to the extent possible.[25] This principle was incompletely satisfied when women did not receive compensation for their lost capacity to perform work in the home. *Fobel* requires courts to take claims for loss or impairment of housekeeping capacity seriously.

Second, *Fobel* contributes to the continuing erosion of the false dichotomy between the public and private spheres.[26] Vancise J. recognized that even though a woman who provides services in the home is not paid directly through the market, her services are nonetheless valuable and productive and are capable of quantification. Prior to the decision in *Fobel*, when judges considered the loss of capacity to work in the home they tended to characterize this loss as a non-economic loss of enjoyment of life. This characterization ensured women were either not compensated or only minimally compensated for their loss. As Regina Graycar observes, the courts appeared to view women's unpaid work in the home as "hoovering as a hobby."[27] Vancise J.'s approach to compensating women for the lost capacity in the home recognizes that a loss of capacity to work, regardless of where that work takes place, is valuable and can be valued.

Third, *Fobel* recognized women's autonomy from their husbands. Before *Fobel*, compensation for a woman's inability to perform unpaid work in the home after injury was claimed by her husband.[28] Vancise J. correctly noted that it was the woman who suffered the loss, not her partner or spouse.[29] He therefore held that compensation should be provided to Vera Fobel for her loss and not to a third party who claimed that he had benefited from her services. In addition, Vancise J. recognized that a monetary award might be made whether the woman's family stepped in to pick up the slack, whether she struggled ahead herself and attempted to undertake the work, or whether she hired a third party. Evidence that a housekeeper would be hired to complete the tasks previously undertaken by the injured party was held not to be necessary for an award to be granted. Under this approach, the choice about how to perform work in the home post-trial is left entirely

25. *Andrews v. Grand and Toy Alberta*, [1978] 2 S.C.R.229 at 241.
26. As noted by Adjin-Tettey, *supra* note 7 at 530, "[t]he focus on capacity to work avoids the public/private dichotomy . . . by recognizing the value of women's work wherever it occurs."
27. Graycar, "Hoovering as a Hobby," *supra* note 8.
28. Previous cases, brought as a claim of *action per quod consortium amisit*, had compensated a husband for his loss of sexual and domestic services when his wife was injured.
29. Feminists had called for this reconsideration of the damage award for some time. See, for example, Réaume, *supra* note 7; and Thornton, *supra* note 7.

to the woman. This holding is consistent with the approach to damages for lost-earning capacity. Under this head of damages, once an injured worker has demonstrated that she will not be able undertake paid employment to the same degree, the damage award is not diminished because it is expected that the injured person's family members will work harder at their paid employment to earn more or because it is impossible to guarantee that the injured person will not attempt to work at least some of the time at some point in the future.

Fourth, Vancise J.'s decision furthers goals of distributive justice. Although there have been significant changes in the kinds of relationships women and men have formed over the years, little has changed in the distribution of unpaid work in the home. This work is still largely untaken by women. Distributive justice is clearly served by a fairer distribution of this work and compensating women who are injured for the unpaid services they provide in the home is at least one small step in the right direction. *Fobel* is unlikely to encourage men to take on more work in the home, but by compensating women for their unpaid work in the home, it is at least legal recognition of the fact that such work is valuable.

Fifth, the decision in *Fobel* serves an educative purpose. Cases on damage awards in tort law can scarcely rank with the heady reading of *Canadian Charter of Rights and Freedoms*[30] cases in terms of their grip on the public's imagination, but the recognition of women's unpaid labour even in an area largely ignored by the media and public serves at least some symbolic purpose. Furthermore, Vancise J.'s judgment provides a breakthrough in the courts' understanding of the work women do in the home. Vancise J. was perhaps the first judge to recognize the complexity of housekeeping tasks and the fact that they might usefully be divided into two types: direct labour and indirect labour, or management, tasks. As Vancise J. states:

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

30. *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

> a home), food planning (including the determination of menus and quality and amount of food), tutorial child care, activity co-ordination and organization, health care and counseling.[31]

Attempting to delineate the kinds of tasks that women perform in the home not only underlines the importance of the tasks but also makes quantifying their value easier and more accurate.

## *Future Directions*

*Fobel* was a breakthrough. However, future cases should take its analysis on unpaid work further in two ways. First, Vancise J.'s conceptualization of the heads of damages could have been more radical and thus further reduced the artificial analytical divide between unpaid productive work in the home and paid work in the market. Second, he could have chosen a method for valuing the loss that would have more fully compensated Vera Fobel for her actual losses.

The result of Vancise J.'s decision is the creation of a separate subhead in the assessment of pecuniary damages for personal injuries: compensation for the loss or impairment of housekeeping capacity. This classification was an improvement on the law governing this area of damage awards. Before *Fobel*, in those cases in which the loss of housekeeping capacity was compensated, it was most frequently considered as a form of non-pecuniary damage. Aside from completely misrepresenting the nature of the loss, this characterization led to difficult issues of valuation (how much does the loss of housekeeping capacity diminish the loss of enjoyment of life?) and restrictions on the monetary awards that could be granted.

However, even categorizing the loss as a separate category of pecuniary loss is problematic and leads to questions of how the loss must be valued. Vancise J. might have taken this classification issue one step farther and considered loss of housekeeping capacity as part of a broader category of loss, namely the loss of working capacity.[32] This approach has several advantages. Characterizing the loss as a loss of working capacity would clearly indicate that the loss of the ability to do unpaid work in the home is

31. *Fobel, supra* note 8 at 398.
32. For a thorough discussion of the appropriate categorization of heads of damage awards in tort compensation, including the suggestion that loss of housekeeping capacity be considered part of a larger head of damages intended to compensate for loss of working capacity, see Adjin-Tetty, *supra* note 7. See also the leading article on the characterization of damages for lost capacity written by Denise Réaume prior to the decision in *Fobel*. Réaume, *supra* note 7. Each scholar advocates for an approach that awards damages on the basis of the loss of working capacity.

pecuniary and capable of being quantified in monetary terms. This broader classification would also remove the artificial division between productive work in and outside of the home. Finally, treating the compensation as compensation for the loss of work capacity would bring the compensatory principle more in line with the judgment in *Andrews v. Grand and Toy Alberta*, which suggested that it is lost capacity as an asset and not lost earnings in and of themselves that should be the court's focus in awarding damages.

Although predictions about future earnings may provide a useful measure of lost capacity, this measure is only an indicia of the lost capacity, not a test in and of itself. If courts adopted a categorization of loss of work capacity—which would include both waged and unwaged work—they would be less likely to conflate measures of lost capacity with measures of lost actual income. This might also operate to reduce the penalty that women with lost earning capacity incur when courts conclude that they would likely exit the paid work force to have families. Presumably, these women would then begin to provide productive (unpaid) services in the home, and the loss of this capacity would need to be quantified.

In valuing the loss of Vera Fobel's unpaid work in the home, Vancise J. relied primarily on the substitute homemaker approach: how much would a substitute homemaker who performed all of the tasks of the injured person cost? However, the catalogue of services, or specialist approach, for valuing homemaker services is more likely to provide a reasonable estimate of the losses suffered, and courts in the future should consider moving in this direction for a number of reasons.

First, the catalogue of services approach diminishes the effect of gender bias on the wages paid to those working in female-dominated jobs. Wage rates for specialists are generally higher than those awarded to generalists. Therefore, adopting a specialist valuation offsets the effect of sex stereotyping that keeps the rates of paid domestic assistance unduly low. In some cases, for example in the case of a chef's wages or wages for maintenance and gardening, many of the participants in the specialty area are men, and, therefore, it might be assumed that these salaries are less likely to reflect the labour market biases against women that a generic rate for domestic services might be expected to reflect. It might also be noted that to the extent that women's work in the home exceeds forty hours per week, consideration should be given to overtime pay.

Second, a generalist approach inevitably ignores or understates the value of the indirect labour. Vancise J.'s recognition that women perform two types of tasks in the home—direct and indirect labour—was a breakthrough, but it may have only a limited impact unless judges are careful to observe the management activities undertaken by women. For the most part, subsequent courts have simply relied on the cost of hiring someone to perform domestic

services in the home. This wage rate will never reflect the required effort of managing and coordinating the activities. An approach that requires explicitly categorizing the activities undertaken by the injured woman and allocating the time spent on each would require judges to explicitly consider each of the possible activities an injured woman has undertaken—direct or indirect—in the home.

Third, the catalogue of services approach is more likely to value the actual losses than the substituted homemaker approach because it accounts for the fact that women who work in the home develop sophisticated skills in at least some of the domestic arts. As recognized by the court in *Fobel*, women who perform unpaid work in the home are chefs and cleaners, as well as counsellors, caregivers, maintenance workers, dieticians, and gardeners. The approach also helps to compensate for the fact that women are likely to develop very special skills in response to their families' needs; for example, homemakers may develop particular ways of preparing their families' favourite foods, cleaning and preparing their clothes, or of providing tutorial services to their children that reflect their unique needs, cultural backgrounds, and specific directions from school teachers and other mentors.[33] A generalist who comes into the home to perform housekeeping services for a few hours a week will never be able to match this kind of specialized delivery of productive services.[34]

A brief review of the problems inherent in the other four possible methodologies for valuing unpaid homemaker services will underline the advantages of the catalogue of services approach. Each of these approaches relies on labour market comparisons that are inevitably both inaccurate and

33. In her piece, Réaume does not choose between the catalogue of services or substitute homemaker approaches. However, she does argue that since there is no market for "tender loving care," no compensation should be awarded for the provision of services with a special degree of affection. I would distinguish this kind of service provision (say, where your mother says "I love you" while she hands you your towel in the morning), from service provision that is specifically tailored (say, where your mother uses the leaner hamburger meat because she knows you prefer it). Generally, we are prepared to pay more in the market for a service that corresponds more directly to our preferences, and, therefore, there is a market value for the provision of services tailored to our preferences (see Réaume, *supra* note 7 at 109).

34. Some commentators have critiqued the catalogue of services approach as too unwieldy or administratively difficult. See, for example, J.Yale, "The Valuation of Household Services in Wrongful Death Actions" (1984) 34 University of Toronto Law Journal 283 at 293–4. However, this critique scarcely seems significant enough to merit abandoning the methodology. While it is true that the injured woman's time would need to be classified according to the tasks she performed, measured based on the time spent on each task, and valued based on an appropriate wage rate for each task identified, these problems are not insurmountable or speculative (like attempting to determine opportunity cost). In fact, one suspects that wage rates for jobs such as chef, gardener, or cleaner are relatively easily accessed. The remaining information is an exercise in fact finding by the court with the assistance of counsel.

biased against women. As is well known, women's market wages relative to men's have been depressed for a number of reasons: women have (at least historically) obtained less formal schooling than their male counterparts; they have been expected to perform more unpaid work in the home and, therefore, have been unable to work as many hours at their paid positions as men; the kind of work women undertake has been paid less than work of comparable value performed by men; and, perhaps most significantly, women's role in child bearing has had a significant effect on their ability to participate as fully in the paid workforce as men, often at a critical time in their careers. These factors, coupled with perception barriers based on employers' beliefs that women will be more committed to their families (and therefore less reliable in the workplace than men), have ensured that women have traditionally remained in lower-paid positions than men in the labour force.[35]

Each of these possible explanations for the gap between women's and men's wages is based on a discriminatory feature of the waged labour market, and each of the four alternative possible valuation methods suffers because they replicate these biases. The replacement of earning capacity and replacement cost are similar approaches—the first considers what the injured woman could have earned performing the services she provided in the home in the market, and the second looks at the cost of bringing someone from the market into the home to perform the services the woman used to perform. Both of these approaches rely on the market value for domestic labour, which is invariably sex-segregated and sex-stereotyped and, therefore, lower paid than comparable work performed by men.[36] These approaches also both completely ignore indirect housekeeping services. Finally, in the case of the replacement of earning capacity, the method requires an assessment of the woman's skills and capacities that may not be possible.

The opportunity cost approach to valuation suffers from a few additional problems. First, it assumes that the value of women's work in the home is only equal to the value of the pay they could receive if they entered the paid labour force. In fact, it may be the case that women choose to work in the home precisely because their labour is more valuable than the

35. P. Armstrong and H. Armstrong, eds., *The Double Ghetto: Canadian Women and Their Segregated Work*, 3rd ed. (Don Mills, ON: Oxford University Press, 2001) at 41. In 1990, if all workers are considered, women are paid just 60 per cent of the wage men are paid. Statistics Canada states that in 1999, women were paid an average of 80 cents for every dollar earned by men. *The Daily*, Wednesday, 19 June 2002, text available online at <http://www.statcan.ca/Daily/English/020619/d020619b.htm>.

36. As argued by Jamie Cassels, reliance on the market to value labour activity "excludes, or at least depresses, the valuation of productive activities carried on outside of the market and not rewarded by a wage." Cassels, *supra* note 12 at 445 and 446.

salary they could command in the marketplace. Second, it would result in significantly different compensatory amounts for women performing identical tasks in the home. For example, if two women both performed the same unpaid labour in the home and were both injured in an identical way, if one was a rocket scientist and the other a cashier, the rocket scientist would receive a significantly higher amount to compensate her for her lost capacity to work in the home. This result violates tort law's distributional justice aims.[37] Third, where the injured woman does not work outside the home at all, determining the wage she has given up to undertake unpaid work in the home is enormously difficult. Presumably, the court would assume that she would not work for periods because of her familial duties and would adjust the award down based on those contingencies as courts do when they are awarding amounts for lost earning capacity. Fourth, over time a woman who has remained in the home has a diminishing ability to command top-rate market compensation. Presumably her skill set in her market-based work will deteriorate the longer she is away from the paid labour force, thereby resulting in the bizarre result that the longer a woman performs unpaid work in the home the less she is compensated for those efforts—the exact reverse of general trends in paid work, which usually compensate more based on years of experience.

The substitute homemaker method, which requires the court to consider the cost of hiring a generalist to perform both the direct and indirect labour in the home, is the closest to the appropriate method. However, as reviewed earlier, it too fails to rectify the problem that women's work in the labour force is undervalued; that it often results in the court ignoring or undervaluing the indirect labour component of work in the home; and that it does not reward women for the special skills they develop in providing services to their families.

Many of the problems with the substitute homemaker approach are reflected in Vancise J.'s judgment. Vancise J. wisely ignored the replacement of earning capacity, the opportunity cost, and the replacement cost approaches for valuing work in the home. Instead, he focused on the substitute homemaker and catalogue of services methods and claimed to apply a mix of the two. However, in fact, he quantified the loss based on a

37. Whether or not the result is distributionally equitable, however, depends on the individuals chosen for comparison. Imagine that both women could command the same (high) wage in the paid labour market. One woman decides, however, to work in the home to raise her children. When she is injured, if we hold her compensation at a rate equivalent to hiring replacement services, for example, rather than the value of the employment she gave up to work in the home, one could argue that distributional equity is violated because she would be compensated less than her comparator, despite the fact that they could command the same wage in the paid labour force.

discounted rate for services provided in the home. There was no real attempt to determine how much time Vera Fobel spent on each of the direct labour tasks and to quantify the value of any of those activities by reference to the salaries earned by specialized market actors who would be paid to perform them. Instead, Vancise J. awarded Vera Fobel an hourly rate of $5.50 for the replacement of her services provided in the home. This rate was only marginally higher than the $5.00 an hour minimum wage at the time of the decision.[38] The low rate reflects labour market bias and stereotypes about the value of work traditionally performed by women.[39] Indeed, if Vera Fobel were to hire someone to provide services in the home, spending only the amounts allotted by the court, she might be hard pressed to find someone. Such a worker would be required to work at a wage that, even assuming she could secure an additional twenty-five hours per week elsewhere, would leave her living below the poverty line. Unfortunately, low wages are frequently paid to contingent and marginalized workers, who are by definition women who live at or below the poverty line and who may be disproportionately immigrant women, women of colour, and women with disabilities who face significant labour market discrimination. It makes little sense to embrace with enthusiasm a level of pay for labour provided in the home that exacerbates this existing bias.[40]

Feminists should remain attentive to the quantum of damages awarded in cases where loss of housekeeping capacity is in issue. For example, in her study of trends in housekeeping awards, Cara Brown[41] determined, among other findings, that awards were significantly statistically linked to the plaintiffs' levels of income and that women received lower housekeeping awards than men. The finding that the housekeeping awards were linked to levels of income might suggest that judges are using an opportunity cost methodology or a replacement of earning capacity methodology. These methods are inappropriate for the reasons reviewed earlier. The finding that women received lower awards than men suggests either that when men are injured judges employ an approach that reflects the catalogue of services methodology or that the ability of the injured party to command a market wage is being considered. These findings mirror what has been identified as a consistent general bias against compensating women for their losses in tort.

38. In fact, the $5.00 minimum wage was increased to $5.35 in 1992, *Minimum Wage Board Order*, R.R.S. c L-4 Reg. 4.
39. Unfortunately, it is not uncommon for women's awards for loss of earning capacity to be fixed similarly close to the poverty line. See Adjin-Tettey, *supra* note 7 at 505.
40. This point was made eloquently by Audrey Macklin in the context of support for childcare expenses in "Child Care Expenses and the Charter: Where Sex Meets Class" (1992) 5 Canadian Journal of Women and the Law 498 at 515.
41. Brown, "Valuable Services Trends," *supra* note 9 at 82–3.

Whether or not tort law's compensation scheme ought to simply mirror the discriminatory features of the labour market has been contested, and feminists have generally argued in favour of a more just approach to damage awards for female plaintiffs.[42] For example, in the context of compensating women for their loss of earnings, feminists have grappled with whether damage awards in tort law are the appropriate place to compensate for salary discrimination. Assertions that tort law should rectify discriminatory imbalances inevitably rest on arguments that tort law should be applied in a way that promotes equality interests and that, given that *Charter* values should inform the interpretation of the common law, damage awards should be made in a way that promotes substantive equality.[43] These arguments are useful, and courts should consider them in the context of the damage awards for injured women when they are considering lost earning capacity. It is not necessary, however, for a court to have recourse to these arguments to determine whether it should promote substantive equality in damage awards for lost housekeeping capacity.

Once we recognize that work in the home is work, something recognized explicitly by Margaret Laurence's protagonist Hagar Shipley in *The Stone Angel*,[44] the only difficult question is its value. By definition, there is no perfect market referent for this loss. Hence, the methodology chosen should be one that best reflects the value of this labour. Market rates for domestic services provide one indicia of this value (and a useful one), but what I have argued here is that they are not perfect. Instead, appreciating that women's productive unpaid labour in the home is enormously valuable—it keeps us fed, clothed, healthy, happy, and promotes social stability—it ought to be valued as accurately as possible. Referring to a market rate provides administrative ease and some guidance on value. The most appropriate market rate, however, is the specialist market rate, and courts seeking to modernize this area of the law further would be wise to consider adopting this methodology. We await another defining moment.

42. See, for example, Adjin-Tettey, *supra* note 7; and Gibson, *supra* note 7.
43. See the arguments made by E. Gibson, "The Gendered Wage Dilemma in Personal Injury Damages," in K. Cooper-Stephenson and E. Gibson, eds., *Tort Theory* (North York, ON: Captus University Publications, 1993), 185 at 200. These arguments are echoed by Adjin-Tettey, *supra* note 7 at 513.
44. Laurence, *supra* note 1.