12 Housekeeping, Home Maintenance, and Handyman Service Losses

I. Introduction

It's possible that almost every person who lives in today's society engages in some form of daily housekeeping, home maintenance, or handyman tasks. Depending on the person, these activities may range from something as simple as putting dishes in the sink after consuming a meal to something as extensive as having responsibility for all household laundry, shopping, cooking, cleaning, snow removal, and lawn care. The law surrounding losses for housekeeping, home maintenance, and handyman services looks to compensate the victim of an injury—be it an injury resulting from a slip-and-fall accident, motor vehicle accident (MVA), intentional tort, etc.—and to place that victim in the same position that he or she would be in had the injury not occurred.

One would think that this is a relatively simple task: let's say that you're a victim of a car accident in which you break your wrist, and now, as a result, you cannot do the cooking, cleaning, and shopping you did before the accident. What's the problem with calculating this loss and compensating you for it?

Although this may seem like a relatively simple calculation, the law in this area is somewhat nuanced and complicated. To appreciate these nuances and complexities, you must consider three distinct issues at play in assessing these types of damages.

II. The Three Distinct Issues at Play

First, the issue of housekeeping, home maintenance, and handyman services touches on historical social issues, including paid work outside the home versus unpaid homemaking work within the home. Second, because housekeeping, home maintenance, and handyman losses are claimed as damages, the claims made must conform to the law of damages. Finally, in circumstances in which the injury arises as a result of an MVA, any award for housekeeping, home maintenance, or handyman services must comply with the statutory regime in place by operation of Ontario's *Insurance Act*.[1] Each of these considerations is discussed in further detail below.

III. Historical Treatment of These Damages

Historically, damages for loss of housekeeping, home maintenance, and handyman services did not exist. Instead of the injured plaintiff having a direct claim for lost housekeeping, a claim was made by the injured spouse for loss of consortium or *servitium*.[2] This claim was based on the antiquated theory that it was the spouse's interests that were damaged as a result of the plaintiff's injuries.[3] Women's movements in Canada and throughout the world contributed to the courts and legislatures address-

1 RSO 1990, c I8.

2 *McIntyre v Docherty*, 2009 ONCA 448 at para 34.

3 *Ibid*.

ing equality issues. Eventually, claims for loss of consortium/*servitium* were abolished by *The Family Law Reform Act, 1978*.[4]

The issue that the courts continue to struggle with today is the appropriate approach by which to value the services of a stay-at-home parent or spouse who has been injured in an accident.[5] There are competing interests at play, including avoiding overcompensation or double recovery versus placing unpaid domestic work within the home on equal footing with paid work outside the home.

IV. How to Fit These Claims into the Law of Damages

Given that housekeeping, home maintenance, and/or handyman services are a form of loss that the injured plaintiff seeks to recover, the injured plaintiff is asking the court to award *damages* for these losses. *Damages* are typically divided into two categories:

1. special damages, which are intended to compensate a plaintiff for his or her out-of-pocket expenses or losses from the date of the injury to the date of the trial; and
2. general damages, which are themselves divided into pecuniary losses and non-pecuniary losses. Pecuniary losses are monetary losses that can be calculated in a relatively precise manner, for example (in personal injury matters), a loss of future income; a loss of competitive advantage; and the costs of future care, including medical and rehabilitation expenses. Non-pecuniary losses are intangible losses arising from the physical and psychological pain and suffering as well as for any loss of amenities or expectations of life[6] (often simply referred to as damages for pain and suffering).

In asking the court to award losses for housekeeping, home maintenance, and/or handyman services, the plaintiff must fit his or her claims into one of the headings mentioned above: special damages, pecuniary general damages, and/or non-pecuniary general damages. Depending on the particulars of the housekeeping loss, different headings of damages may apply, and the rules for calculating each are also different.

This very issue was considered by the Ontario Court of Appeal in the case of *McIntyre v Docherty*.[7] In this case, the Ontario Court of Appeal observed that an injured plaintiff's housekeeping, home maintenance, and handyman claim will typically fit into one of three categories. The court observed,

4 SO 1978, c 2, s 69(3); see *McIntyre v Docherty*, *supra* note 2 at para 34.

5 *McIntyre v Docherty*, *supra* note 2 at paras 63-72.

6 *Ibid* at paras 31-33.

7 *Supra* note 2.

> Different housekeeping losses may arise in different scenarios. In some households, the injured plaintiff may have been a full-time or sole homemaker whose work permitted a spouse or partner to maintain employment outside the home. In other households, the plaintiff may also have worked outside the home and shared responsibilities for housekeeping with other family members. In one-person households, the plaintiff may have been responsible for both housekeeping and outside employment.
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> Whatever the household circumstances, an injured plaintiff will cope in one or more of the following three ways. First, the plaintiff may leave some or all of the housekeeping undone. Second, the plaintiff may perform some or all of the housekeeping functions, but with increased pain and decreased efficiency. Third, the plaintiff may rely on paid or unpaid third parties on a part or full-time basis to perform some or all of the housekeeping.
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> In each of these scenarios, the plaintiff will suffer losses arising from the inability to do work that she or he previously undertook within the household.[8]

The Ontario Court of Appeal confirmed that the injured plaintiff is entitled to be compensated for the losses sustained in each scenario, but the nature of the compensation depends on the head of damages that applies.

In circumstances in which the plaintiff leaves some or all of the housekeeping undone, although the plaintiff has suffered a loss, it is not a monetary loss. In other words, the plaintiff's loss is in the fact that he or she is unable to engage in the housekeeping he or she did before the accident and the fact that the home is not as clean as it would have been had the accident not happened; however, despite this loss, the plaintiff cannot point to a specific dollar amount and say that he or she has lost this money because he or she cannot do housekeeping.

In the second scenario presented by the Ontario Court of Appeal in *McIntyre*, the plaintiff may perform some or all housekeeping functions after the accident, but with increased pain or decreased efficiency. Once again, while there is clearly a loss here, it is not monetary. Contrast the first two scenarios with the third presented in *McIntyre*, in which the plaintiff hires someone after the accident to do the housekeeping and either pays that person a specific amount of money or agrees to do so. In this third scenario, whatever money the plaintiff has paid out of pocket for home-cleaning services because accident-related injuries prevented him or her from doing those tasks would constitute a monetary loss.

V. How You Frame the Claim Matters

It is important to determine whether or not a plaintiff has sustained a monetary loss because the presence or absence of such loss will be the driving force in determining how the plaintiff's housekeeping damages will be calculated. In circumstances in

8 *Ibid* at paras 21-23.

which there is a monetary loss—that is, when the plaintiff hires someone to do housekeeping—the plaintiff will be in a position to claim that monetary loss from the date of the accident to the date of the trial as special damages. In other words, the plaintiff will be reimbursed for all out-of-pocket expenses for hiring housekeeping/home maintenance/handyman assistance from the date of the accident to the date of the trial.[9]

If the plaintiff has not hired assistance and either has left the work undone or has done it himself or herself in more pain or with less efficiency, then those losses from the date of the accident to the date of the trial would be considered part of the plaintiff's general non-pecuniary damages.[10]

Having the damages calculated on a non-pecuniary basis is disadvantageous to plaintiffs for a number of reasons. The first disadvantage is that they become part of the overall assessment of general non-damages, which includes pain and suffering. Because aspects of non-pecuniary general damages overlap with one another, the plaintiff will almost never not be given the full credit for each component of the non-pecuniary general damages.

For example, let's assume that the plaintiff's pain and suffering is worth $75,000. Let's also assume that the plaintiff's past housekeeping general non-pecuniary damages are worth $25,000 to the date of trial; it is unlikely the plaintiff will receive $100,000 for general non-pecuniary damages. Built into each of these figures is the idea that the plaintiff's injuries affect his or her function—including the ability to engage in pre-accident housekeeping duties. Therefore, to avoid double recovery and overcompensation, when these two forms of general non-pecuniary damages are combined, taking into account the overlap of compensation, the plaintiff in our hypothetical example will probably be awarded less than the full $100,000—perhaps only $85,000.

However, had the plaintiff gone out and hired assistance for housekeeping and spent $25,000 between the date of the accident and the date of the trial, the plaintiff would probably be awarded the full $100,000 in our hypothetical scenario: $25,000 as special damages (given the monetary loss that the plaintiff would have been able to show) and $75,000 for general non-pecuniary damages. Some may argue that this is unfair because it allows those with greater means who are in a position to hire and pay for assistance after an accident to recover more by way of damages than those who cannot afford to hire help.

In *McIntyre*, the Ontario Court of Appeal specifically discouraged judges and juries from compartmentalizing the non-pecuniary general damages award into separate headings—that is, X dollars for pain and suffering and Y dollars for past housekeeping losses. The Ontario Court of Appeal states,

9 *Ibid* at para 75.

10 *Ibid* at paras 63, 73.

> In my view, it is generally inappropriate to create a separate heading for one particular component of a global award for non-pecuniary [general] damages. Such a compartmentalization is both artificial and contrary to the Andrews instruction [*Andrews v Grand & Toy Alberta Ltd*, [1978] 2 SCR 229] that non-pecuniary damages should be assessed globally due to the overlapping nature of the various components. Moreover, it is unnecessary to divide non-pecuniary losses into sub-categories. Juries across Canada have long demonstrated their ability to incorporate a variety of losses into a global award for non-pecuniary damages.[11]

The result is that a plaintiff may not ever know how much of the award was for pain and suffering and how much of the award was for past housekeeping losses.

Practice Tip

When opening a file in which the client may have suffered a housekeeping loss, be sure to encourage the client to obtain paid housekeeping assistance by hiring a cleaning person, snow removal company, and/or lawn maintenance service. By doing this, your client will have receipts and proof of payment for such services. But what do you do when your client legitimately needs this service but cannot afford to pay up front for it? There are a couple of possible solutions. There are rehab clinics and assessment companies that will "run a tab" until the case is resolved, and some of these clinics and companies may include housekeeping services in their mix of services. The other option is for your client to hire a friend or family member who will actually invoice your client. Have your client and that person enter into a contract that states the rate of pay and the fact that payment will be made upon recovery of any settlement or award of damages. Have your client sign an authorization and direction to your firm that gives the person providing the services a charge on any moneys received by you before your client is paid out. Then have the service provider send the client and you an invoice on a weekly or monthly basis for as long as they provide the services. This way you can raise the argument that your client suffered an out-of-pocket loss, since he or she is legally responsible for paying the invoices and was forced into this arrangement due to an inability to pay up front.

VI. MVA-Specific Regime

The other disadvantage to plaintiffs in assessing housekeeping losses on the basis of non-monetary general damages is that in circumstances in which the claim arises from an MVA, any non-pecuniary general damages award is subject to the monetary and injury threshold mandated by statute (as explained in Chapter 2, Motor Vehicle Accidents). A plaintiff may be denied recovery for these damages altogether, or the amount of damages may be significantly reduced. As of the date of writing this chapter, the present monetary deductible on non-pecuniary general damages is $37,385.17.

11 *Ibid* at para 55.

The final criticism of this approach is that it does not place unpaid work inside the home on the same footing as paid work outside the home. It can be argued that this approach makes it more difficult for homemakers (who are still largely women) to recover their accident-related losses than their male counterparts who work outside of the home. The Ontario Court of Appeal recognized this issue, but because the facts in *McIntyre* did not deal with it specifically, the court felt it would be better resolved in a future case.[12]

VII. Future Housekeeping Claims

The scenarios above address a plaintiff's entitlement to housekeeping, home maintenance, and handyman services from the date of the accident to the date of the trial. But what about housekeeping, home maintenance, and/or handyman services that are anticipated to arise after the date of the trial? For the plaintiff to recover such losses, the plaintiff must prove that those losses will probably arise.

In *Sabourin v Dominion of Canada General Insurance Co*,[13] the Superior Court examined the issue through the lens of the standard evidentiary burden applicable to civil cases: that of a balance of probabilities.[14] However, in the more recent decision of *Basandra v Sforza*,[15] the Ontario Court of Appeal noted that only past losses need to be proven on a balance of probabilities; future losses are subject to a more relaxed burden. The Ontario Court of Appeal noted,

> Jury questions in motor vehicle actions related to pecuniary losses typically refer to past losses and to future losses. I make two observations about this distinction. First, separate jury questions for past and future losses are necessary because the plaintiff bears different burdens of proof for each. With respect to past losses, the burden of proof is on the balance of probabilities. For future losses, the burden is somewhat relaxed and can be proven on the basis of "substantial possibilities based on such expert or cogent evidence."[16]

Regardless of whether the standard is on a balance of probabilities or the more relaxed substantial possibilities based on expert or cogent evidence, the onus is still with the plaintiff, and if he or she fails to lead evidence on the issue, he or she will likely not be awarded any amount for future losses. For example, in *Riehl v Hamilton (City)*,[17] the plaintiff was awarded housekeeping losses from the date of her fall to the date of the trial on the basis of assistance provided to date. On the issue of future housekeeping needs, the court declined to make any award whatsoever, noting that

12 *Ibid* at paras 67-69, 72.

13 2009 CanLII 15902 (Ont Sup Ct J).

14 *Ibid* at para 120.

15 2016 ONCA 251.

16 *Ibid* at para 24.

17 2012 ONSC 3333.

the plaintiff had not led any medical evidence regarding her future needs, and that without such evidence, any award would be pure speculation.[18]

VIII. Conclusion

The information in this chapter is intended to illustrate the technical nuances associated with the law of damages pertaining to housekeeping/handyman claims. From a practical perspective, if an injury arises, and a plaintiff intends to seek damages associated with housekeeping losses, it is always prudent to keep detailed records of

1. any out-of-pocket expenses associated with hiring replacement help; and/or
2. any unsuccessful attempts to return to pre-accident activities.

We also suggest clients maintain a diary or logbook, with entries written contemporaneously, of what they can and cannot do along with notes about how they feel immediately before and after these activities. Two years down the road at discovery, or two to three years after that at trial, the client's recollections will often be general and vague, which is not persuasive to the insurer with whom you're trying to settle, or to the trier of fact you're attempting to convince to award these damages. A diary with regular, contemporaneous entries of the client's mental and physical limitations at various points between the accident and trial can be led into evidence, and it can be persuasive. The practical problem that most of us experience, however, is that the majority of clients will not go to the effort of keeping such a log or will do so only for a few weeks or months, at best. Regardless, you should still advise them in writing to do it. That written advice can be equally valuable. Often we must convince our clients to accept less money on settlement than they would like, and a client's failure to heed our advice on matters such as a daily log assists us in convincing the client of why we cannot prove the amount of damages he or she would like.

It is also a good idea for a plaintiff to regularly report any continuing difficulties to all treating practitioners and assessors. More often than not, these practitioners will make clinical notes and records documenting the complaints, which will aid in supporting the plaintiff's position down the road.

18 *Ibid* at paras 61, 62.