

**Cleaning Up:
Claiming Housekeeping Inefficiency**

What you need to know about
McIntyre v. Docherty

Richard M. Bogoroch and Sarah Ng
Bogoroch & Associates

Prepared for:

OTLA 2010 Spring Conference
May 28, 2010

**Cleaning Up:
Claiming Housekeeping Inefficiency**

What you need to know about
McIntyre v. Docherty

Richard M. Bogoroch and Sarah Ng
Bogoroch & Associates

1. Introduction

a) Overview of Housekeeping Claims, The Pre-*McIntyre* Approach

The right of an injured plaintiff to advance a claim for loss of housekeeping capacity is well established in Canadian law. In the Supreme Court of Canada decision of *Peter v. Beblow*,¹ the Court affirmed that there is no logical reason to distinguish domestic services from other contributions. The Supreme Court recognized that household services are of significant value to the family of the injured party.

Although *Peter v. Beblow* is a trusts case, the decision is judicial recognition of the fact that unpaid work is a valuable commodity that can be quantified. This principle has extended into the realm of personal injury law where loss of housekeeping capacity is a head of damage routinely claimed by plaintiffs.

However, evaluating housekeeping losses in personal injury cases has not always been straightforward.

¹ (1993), 101 D.L.R. (4th) 621 at pp. 647-8 [1993] 1 S.C.R. 980

In the seminal 1991 decision of *Fobel v. Dean*,² the Saskatchewan Court of Appeal examined the issue of quantification of housekeeping damages.

In *Fobel*, the Plaintiff was able to perform approximately 30% of her housekeeping responsibilities in the period before trial with “diminished efficiency, pain and discomfort.” The balance of her housekeeping tasks remained undone. The trial judge awarded non-pecuniary damages, which included damages for past loss of housekeeping.

The Court of Appeal in *Fobel* held that in the absence of replacement labour, it was incorrect to evaluate a plaintiff’s past loss of housekeeping capacity by reference to replacement value. Where there was no replacement labour, the loss was properly compensated as a component of general non-pecuniary damages. Furthermore, the pecuniary damage claim for future lost housekeeping was based on a replacement cost approach using a combination of the “substitute homemaker” and “catalogue of services” approach, which catalogues the plaintiff’s housekeeping functions and then allocates those functions between direct labour (such as cooking and cleaning) and household management. Each category was then quantified based on the fair market salary of each occupation and totalled to arrive at a weekly salary.

Since 1991, the *Fobel* case has been considered and applied in numerous cases in different provinces and has remained one of the leading cases in the area of loss of housekeeping capacity. However, the *Fobel* approach has been criticized as being “unnecessarily complex”.

In the important 2009 Ontario Court of Appeal decision of *McIntyre v. Docherty*³ the Court of Appeal provided clarification for cases involving housekeeping claims by

² (1991), 83 D.L.R. (4th) 385

³ (2009), 308 D.L.R. (4th) 213, 2009 ONCA 448. Judgement released May 29, 2009

setting out specific types of housekeeping losses and the evidence needed to support these losses.

In *McIntyre*, the Court of Appeal adds a unique dimension to the evaluation of housekeeping claims by affirming the concept of “housekeeping inefficiency” as a legitimate basis for claiming housekeeping losses at trial. *McIntyre* recognizes the notion of the importance of housework as an activity upon which an injured party can derive a sense of pride and self-esteem. Therefore, the reduction in a Plaintiff’s ability to perform housekeeping tasks at pre-accident standards is compensable.

b) Background of *McIntyre*

The Plaintiff, Ms. Claudia McIntyre, was involved in a motor vehicle accident on April 23, 2000. She suffered from chronic pain, fibromyalgia, depression and anxiety. Following the accident, she experienced daily pain. However, she testified at trial, that if she paced herself and moved carefully, she could, with pain, undertake most of her housekeeping responsibilities. The rest of the household work was performed by Ms. McIntyre’s family members.

In regards to the housekeeping claim, at trial, the jury awarded:

\$5,000 for past housekeeping insufficiency damages;
\$10,400 for past loss of housekeeping capacity; and
\$44,535 for loss of future housekeeping capacity.

The jury also awarded \$92,500 for non-pecuniary general damages.

The Defendant appealed the decision on the basis that any amount awarded for housekeeping insufficiency should have been included as part of a non-pecuniary damage award for pain and suffering and should not have been treated as a separate head of damage. The Defendant also appealed the Plaintiff’s entitlement to awards for

past and future loss of housekeeping capacity, on the basis that Ms. McIntyre had not incurred expenses for housekeeping in the pre-trial period and had no plans to incur housekeeping expenses in the future, as her family members were providing these services.

Ultimately, the Court of Appeal upheld the trial judge's award. The Court of Appeal dismissed the appeal for past lost housekeeping damages future lost housekeeping capacity and the unique award for "past housekeeping inefficiency damages". The Court noted that:

"...when viewed globally, bearing in mind the lack of differentiation between inefficiency and third-party damages at trial, the total pecuniary and non-pecuniary housekeeping award of \$59,935 was supported by the evidence."⁴

This case is significant for its recognition of how potentially important housework is to the self-esteem of a an injury party. This case also clarifies the ways in which housekeeping claims should be analyzed and evaluated.

⁴ *Ibid*, at paragraph 73

2. Impact of *McIntyre*

So what does *McIntyre* stand for and what guidance does it offer for other housekeeping claims?

Firstly, the decision sets out which factors are relevant in establishing a claim for housekeeping.

Secondly, it sets out three types of instances in which a plaintiff might incur a loss of housekeeping capacity.

Thirdly, it offers guidance as to how housekeeping claims are to be quantified.

a) Relevant Factors to Establish in Housekeeping Claims:

The Court of Appeal listed the following factors as relevant in establishing housekeeping claims:

1. the extent of the plaintiff's pain and suffering in performing housekeeping tasks;
2. evidence relating to the plaintiff's high housekeeping standards;
3. impact of injuries on these high standards; and
4. evidence regarding his/her loss of ability to do tasks as the plaintiff had previously enjoyed; and
5. evidence about the impact of the plaintiff's pain on his/her relationships with others.⁵

⁵ *Ibid.*, at paragraph 82

In order to make a successful claim for loss of housekeeping capacity, these factors must be demonstrated and linked to the plaintiff.

b) Types of Housekeeping Losses

The Court of Appeal summarized three main instances where a plaintiff might incur a loss of housekeeping capacity:

1. The plaintiff may leave some or all of the housekeeping work undone;
2. The plaintiff may perform some or all of the housekeeping functions, but with increased pain and decreased efficiency;
3. 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.⁶

i) Work Left Undone

Where the plaintiff is unable to perform some or all housekeeping tasks, and a third party (such as a housekeeper) does not complete the work in place of the injured party, then the work is categorized as “undone”. In this situation, the plaintiff will experience two types of compensable non-pecuniary losses.

First, there is a personal loss to the plaintiff since pre-accident housekeeping would have contributed to the person’s sense of self-worth and identity, much in the same way an income-earning plaintiff would view his/her earnings as a valuable contribution to the household.

Second, when work is left undone, the plaintiff is forced to live with the loss of amenity of an orderly and functioning home.

⁶ Ibid, footnote 2, at paragraph 22

ii) Work Done with Difficulty

A plaintiff may continue to perform housekeeping activities, but experiences pain or difficulty in doing so. As described in *McIntyre*, this “inefficiency” occurs when:

“He or she is required to work more hours post accident to accomplish the same amount of pre-accident housekeeping. If a plaintiff thus works “inefficiently” her or his non-pecuniary award would be increased to reflect any increased pain and suffering. To the extent the plaintiff’s inefficiency also results in a less clean and organized household, this is the loss of an amenity that the award for non-pecuniary damages would also take into account”.⁷

In determining the significance of the components of the loss, the court will consider evidence about the plaintiff’s pre-accident and pre-trial housekeeping, the particulars of any increased pain and suffering and diminishment in housekeeping, and the impact of any reduction in the standard of housekeeping on the plaintiff.

iii) Work Done by Third Parties

It is well established that where a plaintiff incurs pre-trial out-of-pocket expenses by hiring a replacement housekeeper, the plaintiff may claim the replacement costs as part of an award for special damages. These types of losses are easy to quantify.

⁷ *Ibid.*, at paragraph 73

To avoid confusion in future cases where different scenarios of housekeeping losses arise, the Court stated that it would helpful for the jury to be specifically instructed regarding the types of loss at issue and the evidence in support of that loss.⁸

c. How to evaluate Housekeeping Claims

The three main points to take away from *McIntyre* in terms of valuating Housekeeping Claims are as follows:

⁸ *Ibid.*, at paragraph 78

1. In the event that there is a pecuniary and non-pecuniary award made with respect to housekeeping losses, **there is no need to separate or itemize sub-categories for different components under the global award for non-pecuniary damages.**⁹
2. An award for **housekeeping inefficiency damages should not be deducted from the award for past loss housekeeping.**¹⁰
3. **Plaintiffs are not required to incur out-of-pocket expenses for housekeepers in order to be successful in claiming an award of housekeeping.**¹¹

These are key factors that any quantum expert should be mindful of when assisting lawyers in quantifying housekeeping losses.

d. How to Prove Housekeeping Claims

Quantification of economic loss claims generally require the assistance of experts. In *McIntyre*, the plaintiff called an economist to assist the jury in quantifying the housekeeping claims. It is essential, in our view, that an economist be retained to prepare a report and give evidence as to the nature and extent of the various housekeeping claims.

⁹ *Ibid.*, at paragraph 55

¹⁰ *Ibid.*, at paragraphs 56-57

¹¹ *Ibid.*, at paragraph 58

3. Conclusion

In sum, in *McIntyre*, the Court of Appeal has confirmed that **both non-pecuniary and pecuniary awards are possible in housekeeping claims**. Non-pecuniary awards can be given for work left undone and work done with difficulty. There is no need create a separate category for these losses under the global heading for non-pecuniary damages. Pecuniary damages can be claimed for the replacement value of work done by a third party.¹²

According to the Court of Appeal:

“...a plaintiff may not be fully compensated by a pecuniary award for past housekeeping losses, even one that provides for the complete costs of a notional or substitute homemaker. Despite such a pecuniary award, for complete compensation, the plaintiff may additionally require recognition in the non-pecuniary award of her or his loss of self-worth resulting from the inability to contribute personally to the well-being of the household.”¹³

In regards to work left undone, *McIntyre* affirms that there are two types of non-pecuniary losses which relate to housekeeping claims:

1. **the loss of identity that is associated with work performed in or out of the home;** and
2. **the loss of amenity of an orderly and functioning home.**¹⁴

¹² See also *Brown, C.L., Damages: Estimating Pecuniary Loss, Chapter 9, “Valuation of Housekeeping Capacity”, December 2009, pages 9-14.9 to 9-14.11.*

¹³ *Ibid.*, at paragraph 60

¹⁴ *Ibid.*, at paragraph 63. However, the Court of Appeal did not rule on **whether work left undone can give rise to a separate claim for pecuniary damages**, as the

Plaintiff in *McIntyre* did not make a claim for work left undone. At paragraph 72, the Court stated “...it is unnecessary to come to a conclusion regarding the factors that ought to be considered in assessing non-pecuniary damages and whether undone work can give rise to a separate claim for pecuniary damages” Determination on this matter has been left to future cases where the Court will have the benefit of a full factual foundation and complete legal arguments.

In terms of work done with difficulty, it should be categorized as an award for non-pecuniary damages similar to the award given when plaintiffs attempt to continue working in an income-earning task, but do so with pain.¹⁵

Lastly, a plaintiff may claim the reasonable replacement cost of hiring third party help as special damages, but are not required to incur out-of-pocket costs to be awarded pre-trial amounts nor are they required to spend a future award on hiring housekeepers in order for the court to make a housekeeping award.

McIntyre will no doubt impact greatly on claims for housekeeping expenses in the future. It has already been followed in Newfoundland¹⁶ and will undoubtedly influence analyses of housekeeping claims in jurisdictions across Canada. *McIntyre* represents a analytical shift in the modern law of damages which now firmly recognizes that employment, whether outside the home or housekeeping inside the home, provides a person with an important sense of purpose and contribution, the loss of which is a personal and compensable loss to an injured party.

¹⁵ *Ibid.*, at paragraphs 73-74

¹⁶ *Courtney v. Cleary*, [2009] N.J. No. 178