

# Liability for Loss of Housekeeping Capacity in Switzerland

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## I. General Part

### A. Compensable Harm and the Right to Sue

*(1) Can a person (V = victim) with housekeeping responsibilities obtain compensation from a tortfeasor (D = defendant) if s/he is prevented from performing household tasks or able to perform them only to a limited extent as a result of the injury and s/he thus incurs the expense of a replacement or sustains other financial harm?*

According to widely held opinion, pecuniary harm as defined by tort law is the involuntarily incurred difference between a person's pecuniary situation after the tort and the pecuniary situation if the tort had never occurred (*Differenztheorie*).<sup>1</sup> Thus, pecuniary harm is defined in terms of a difference in pecuniary situation; however, it is calculated as the sum of the individual items of harm which are legally seen to arise from the harmful occurrence. According to the theory of pecuniary loss, a victim with housekeeping responsibilities can only obtain compensation for the expense of an actual replacement.

No compensation has to be paid if the victim is still able to perform household tasks for some time or if a third person (eg spouse, relative, neighbour, etc) gratuitously takes over household duties which the injured person or deceased can no longer perform. A deterioration in health or a loss in functional capacity does not constitute pecuniary harm according to this definition. Only when the deterioration in health or functional performance capacity causes some financial detriment is harm (within the meaning of the theory of pecuniary loss) deemed to exist.<sup>2</sup> According to

<sup>1</sup> Theory of pecuniary loss, Entscheidungen des Schweizerischen Bundesgerichts (Decision of the Swiss Federal Court, BGE) 120 II 423 para 7a.

<sup>2</sup> BGE 127 III 403 para 4a and 95 II 255 para 7a.

the theory of pecuniary loss, harm – consisting of a lost capacity to work gratuitously for oneself or for third parties after the tort – is borne by the party concerned without compensation.

- 3 Initially, the Federal Court did not consider that gratuitous work, particularly housekeeping, gave rise to a compensation entitlement, on the grounds, if nothing else, that men were exclusively responsible for providing for the family.<sup>3</sup> Gradually, gratuitous work and housekeeping were recognised as giving rise to a right of compensation.<sup>4</sup> The old case law imposed a restrictive approach, in that compensation was owed subject to ‘the circumstances’.<sup>5</sup> In upper-middle class relationships, however, a compensation obligation was generally excluded.<sup>6</sup>
- 4 Since the *Blein*<sup>7</sup> decision – which concerned the compensation claim of a man whose wife had been killed – an unrestricted compensation obligation in respect of gratuitous household tasks performed by the injured or deceased person exists.<sup>8</sup> Both the pecuniary household loss and the normative household loss are to be compensated.<sup>9</sup> Recognition of a compensation obligation for the loss of household task performance is widely,<sup>10</sup> but in

3 BGE XVIII 394/400.

4 BGE 53 II 125, 57 II 180/182, 66 II 175/177, 82 II 36 para 4 and 82 II 132 para 3, 101 II 257 para 1a and 102 II 90 para 2a.

5 BGE 53 II 123/125.

6 BGE 82 II 36 para 4a; to mention only one: *HP Walter*, Die Rechtsprechung des Bundesgerichts zum Haushaltschaden, in: A Ileri (ed), Die Ermittlung des Haushaltschadens nach Hirnverletzung: Geldwert der Haushaltarbeit im Versicherungsrecht (1995) 15 ff.

7 BGE 108 II 434.

8 BGE 131 III 360, 131 III 12, 129 II 145 and 129 III 135.

9 See in this respect no 19 f.

10 See eg *R Geisseler*, Der Haushaltschaden, in: A Koller (ed), Haftpflicht- und Versicherungsrechtstagung 1997, Tagungsbeiträge, St Gallen 1997, 59 ff; A Ileri, Die Ermittlung des Haushaltschadens nach Hirnverletzung. Geldwert der Haushaltarbeit im Versicherungsrecht (1995); C Kissling, Haushaltschaden und Ausfall anderer unentgeltlicher Tätigkeiten. Begründungsansätze und Grundsätze der Schadensberechnung, in: S Weber (ed), Personen-Schaden-Forum 2007, Zürich/Basel/Genf 2007, 15 ff; C Kissling, Dogmatische Begründung des Haushaltschadens. Ein Beitrag zur haftpflichtrechtlichen Behandlung unentgeltlicher Tätigkeiten. Dissertation Bern, 2005; V Pribnow/R Widmer/A Sousa-Poza/T Geiser, Die Bestimmung des Haushaltsschadens auf der Basis der SAKE. Von der einsamen Palme zum Palmenhain, Zeitschrift für Haftung und Versicherung (HAVE) 2002, 24 ff; A Sousa-Poza/R Widmer, Monetäre Bewertung des Haushaltsschadens, in: Verein Haftung und Versicherung (ed), Personen-Schaden-Forum 2002, Zürich 2002, 23 ff; A Sousa-Poza/R Widmer, Die Berechnung des Haushaltschadens – Mittelwert oder Median? HAVE 2005, 85 ff and R Widmer/T Geiser/A Sousa-Poza, Gedanken und Fakten zum Haushaltschaden aus ökonomischer Sicht, Zeitschrift des Bernischen Juristenvereins (ZBJV) 2000, 1 ff.

respect of the normative household loss not entirely,<sup>11</sup> supported by the opinions expressed in legal literature.

(2) Is D liable to compensate for losses incurred by a member of V's family (R = relative) as a result of the injury, for example, the cost of a replacement housekeeper or – if R personally takes over housekeeping responsibilities – R's loss of earnings? Who is entitled to claim, V or R? What claims arise if V is killed?

Based on art 46 Swiss Code of Obligations (SCO),<sup>12</sup> the injured person is entitled to claim damages for the investment in time and effort or the loss in household task performance incurred by not only him/herself but also any relatives or friends living in the same household. As regards loss of care and subsistence damages incurred by third parties for whom the injured person performed household tasks, in the opinion of the Federal Court this constitutes a third party damage for which compensation is not normally provided. In cases of loss of housekeeping capacity, the Federal Court does not qualify the damage sustained by relatives or friends living in the same household as a third party damage.<sup>13</sup>

Compensation is awarded for the time and effort that the injured person would presumably have expended for his/her household tasks in a ‘healthy-person’ household, *not* for the time and effort that the injured person is no longer able to provide in a household with a disabled person. Thus, the loss of housekeeping capacity corresponds to the monetary value of the investment in time and effort the injured person is no longer able to provide for housekeeping in a household without a disabled person.<sup>14</sup>

In case of death, the close relatives and friends living in the same household of the deceased can claim compensation from the tortfeasor for loss

11 See eg *G Chappuis*, Le préjudice ménager. Encore et toujours ou les errances du dommage normatif, HAVE 2004, 282 ff; *I Herzog-Zwitter*, Haushaltschaden, normativer Schadenbegriff und der allgemeine Rechtsgrundsatz der Schadenminderung im Haftpflichtrecht, HAVE 2005, 275 ff, and *M Pergolis/C Dürr Brunner*, Ungereimtheiten beim Haushaltschaden, HAVE 2005, 202 ff.

12 ‘Damages for personal injury

Art 46 (1) In the event of personal injury, the victim is entitled to reimbursement of expenses incurred and to compensation for any total or partial inability to work and for any loss of future earnings.

(2) Where the consequences of the personal injury cannot be assessed with sufficient certainty at the time the award is made, the court may reserve the right to amend the award within two years of the date on which it was made.’ Translation by P Loser, Switzerland, in: K Oliphant/BC Steininger (eds), European Tort Law. Basic Texts (2011) 264 f.

13 BGE 127 III 403 para 4b/aa.

14 See *H Landolt*, Kommentar zum schweizerischen Zivilrecht, vol V/1c: Die Entstehung durch unerlaubte Handlungen, 2nd part: Art 5–49 SCO (3rd edn 2007) nos 889 and 983 ff ref art 46 SCO.

of subsistence and care based on art 45 para 3<sup>15</sup> SCO.<sup>16</sup> Such compensation covers monetary loss and work performance loss, which includes loss of housekeeping capacity. Persons for whom the deceased presumably chiefly performed household tasks are entitled to such a claim.

- 8 The factual situation is decisive, *not* the subsistence and care obligations provided for by law.<sup>17</sup> Generally, the requirement of factual subsistence is met by the spouse and the children, up until they have completed their studies or apprenticeship. There was a debate on whether or not co-habiting partners are entitled to compensation. The Federal Court decided that co-habiting partners, but not mere friends, are entitled to compensation.<sup>18</sup>
- 9 Every person presumed to have benefited from performance of household tasks can claim their own share of the damage for loss of subsistence and care.<sup>19</sup> In the case of loss of housekeeping capacity, case law has, however, confirmed that the child's loss of care and subsistence is assimilated. The surviving spouse can claim, in addition to his own share of damages, the entire damages resulting from loss of care and subsistence.<sup>20</sup>
- (3) *Is V entitled to damages for the impairment of his/her ability to perform household tasks even if s/he does not incur monetary expense, for example, if s/he makes up for the impairment by working for longer rather than by hiring a replacement?*
- 10 It is irrelevant whether the injured person performs the housekeeping tasks him/herself over a longer period, leaves out certain chores or arranges for close family or friends or anyone else to perform the housekeeping tasks as a replacement, whether gratuitously or otherwise. The

15 'Damages for homicide

Art 45 (1) In the event of homicide, compensation must cover all expenses arising and in particular the funeral costs.

(2) Where death did not occur immediately, the compensation must also include the costs of medical treatment and losses arising from in-ability to work.

(3) Where others are deprived of their means of support as a result of homicide, they must also be compensated for that loss.' Translation by P Loser, Switzerland, in: Oliphant/Steininger (fn 12) 264.

16 In more detail R Schaer, Der Versorgerschaden in einer sich wandelnden Wertordnung, in: Mélanges Assista (1989) 69 ff, and E Stark, Berechnung des Versorgerschadens – ausgewählte Fragen, Zeitschrift für Schweizerisches Recht (ZSR) 1986, 337 ff.

17 Having a different opinion: P Weimar, Der Begriff des Versorgers nach Art 45 Abs 3 OR, in: Festschrift für Max Keller zum 65. Geburtstag (1989) 337 ff.

18 BGE 114 II 144 para 2b.

19 BGE 66 II 175.

20 BGE 102 II 90 para 2; this view is disputed by the majority in the academic literature, to mention only one: Landolt (fn 14) no 119 ff on preliminary notes on arts 45/46 SCO.

injured person can claim compensation based on art 46 SCO either for the costs actually incurred for domestic help<sup>21</sup> or for the salary costs saved as a result of a gratuitous replacement.<sup>22</sup>

(4) *Is D liable if R takes over the housekeeping and neither incurs monetary expense nor suffers any loss of earnings? Who is entitled to claim, V or R? What claims arise if V is killed?*

As in the injured person's entitlement to compensation, it is irrelevant **11** whether or not a close relative or friend of the deceased takes over the housekeeping or arranges for help from a third party, gratuitously or otherwise.<sup>23</sup>

(5) *Is loss of housekeeping capacity compensable regardless of the sex of the victim?*

The sex of the injured person or the deceased has no bearing on the **12** compensation claim, but it does affect the extent of the housekeeping capacity. According to experience and statistics, men work less often than women in the household.<sup>24</sup>

(6) *Do the above principles (Questions 1–5) also apply in the case of a one-person household?*

The injured person living alone can claim compensation for the one- **13** person household task performance loss. The case law is, however, very restrictive regarding the prospect of an injured person living alone having a larger household in the future. A 30-year-old injured person suffering from a cranio-cerebral injury after a road accident can claim compensation on the basis of a one-person household only and not on the basis of a two-person (couple) or even family household.<sup>25</sup> This case law ignores the statistics that show that people generally live in a one-person household between ages 25 and 35 and live in a four-person household after age 35 until the children create their own one-person household.<sup>26</sup>

21 Concrete loss of housekeeping capacity; BGE 131 III 12 para 4b.

22 Normative loss of housekeeping capacity; BGE 132 III 379 para 3.3.2, 132 III 321 para 3.1 and 131 II 656 para 6.

23 BGE 108 II 434.

24 See in this respect no 33.

25 Judgment of the Zurich Commercial Court of 12.6.2001 (E01/0/HG950440) = plädoyer 2001/6, 66 and 2002/1, 67 = Blätter für Zürcherische Rechtsprechung (ZR) 2002 no 94 = ZBJV 2003, 394 para VII.

26 See Landolt (fn 14) no 993 ff on art 46 SCO and for further statistical information <<http://www.bfs.admin.ch/bfs/portal/de/index/themen/01/04.html>> (last visited 6 February 2011).

(7) Are persons (eg children) who do not currently have housekeeping responsibilities, but may be expected to have them in the future, also entitled to damages for loss of housekeeping capacity?

- 14 Persons who are not yet responsible for housekeeping at the time of the injury can generally not claim loss of housekeeping capacity. As mentioned above, the case law is extremely restrictive in respect of prospective two-person and family households, even if hypothetically the creation of a family would be highly probable. Children and persons living alone are disadvantaged and discriminated against by this practice.<sup>27</sup>

(8) Is the right to compensation in respect of household tasks performed for another person (V) limited to cases where there is a relationship recognised in family law or does it also extend to, for example, non-married partners (including same-sex partners) or casual flat shares?

- 15 The decisive factor is the time and effort the injured person expended or would have expended on housekeeping. It is irrelevant whether the relationship between the household members and the injured person is specifically recognised in family law. Fiancées or co-habiting partners of the injured person or the deceased are entitled to claim compensation.<sup>28</sup> Same-sex partners who are registered in a civil partnership are treated like a married couple.<sup>29</sup> Same-sex partners who are not registered in a civil partnership are entitled to compensation if they are co-habiting partners.

## B. Doctrinal Justifications

(9) What are the doctrinal foundations for the award of damages for loss of housekeeping capacity? Is compensation for such loss consistent with general tort law principles or does it involve deviation from those principles?

- 16 Both social insurance law and tort law recognise the complementary nature of gainful occupations and housekeeping.<sup>30</sup> A person who is gainfully occupied performs little or no housework. Conversely, household

27 Art 8 para 2 of the Federal Constitution of the Swiss Confederation of 18 April 1999 declares that no one may be discriminated against, in particular on grounds of gender, age, social position or because of a physical, mental or psychological disability.

28 BGE 114 II 144 para 2.

29 Federal Act of 18 June 2004 on the registered partnership of same sex couples (Partnership Act, PartG).

30 In more detail C Kissling, *Haushaltschaden und Ausfall anderer unentgeltlicher Tätigkeiten – Begründungsansätze und Grundsätze der Schadensberechnung*, in: Weber (fn 10) 15 ff, and C Kissling, *Dogmatische Begründung des Haushaltschadens. Ein Beitrag zur haftpflichtrechtlichen Behandlung unentgeltlicher Tätigkeiten* (2006).

work keeps one from exercising a gainful occupation. Both types of work are pecuniary in nature. Thus the housekeeping spouse is entitled to compensation from its partner.<sup>31</sup>

Based on the constitutional freedom to choose one's profession,<sup>32</sup> whether a person chooses to manage a household or to have a gainful occupation should be irrelevant. The impaired capacity to perform work in a gainful activity must be compensated – either as a loss of earnings or as loss of housekeeping capacity – and gives rise to a claim for a disability pension.<sup>33</sup>

When calculating the damage for future loss of housekeeping capacity or lost earnings, the same hypothetical situation is considered. In the case of loss of earnings where for example, it is assumed that the injured person would have reduced their full-time gainful activity altogether in connection with starting a family or, continued to work only part-time, both a loss of housekeeping capacity and a partial loss of income arise.<sup>34</sup>

The right to compensation arising out of a loss of housekeeping capacity represents an exception to the theory of pecuniary loss and to the basic principle of pecuniary damage compensation.

(10) Is loss of housekeeping capacity considered to be pecuniary or non-pecuniary loss? To what extent is the right to compensation independent of actual pecuniary loss, for example, loss of earnings or the cost of a replacement?

In tort law, the effective loss of housekeeping capacity is a pecuniary loss, whereas the normative loss of housekeeping capacity is a non-pecuniary loss.<sup>35</sup> The damages for effective loss of housekeeping capacity compensate the effective cost of a replacement, whereas the damages for the normative loss of housekeeping capacity compensate for the hypothetical cost of a replacement.<sup>36</sup>

Although damages for loss of housekeeping capacity are measured according to the cost of a replacement (*damnum emergens*), from the view point of the injured person they constitute income compensation for lost income

31 Art 163 para 2 and art 164 SCO.

32 Art 27 BV (Federal Constitution).

33 Art 28a IVG (Bundesgesetz über die Invalidenversicherung, Federal Act on Disability Insurance).

34 See in this respect no 33.

35 The Federal Court defines the non-pecuniary loss of household capacity as a normative damage, see eg BGE 134 III 489 para 4.5.1 and 127 III 403 para 4b.

36 The normative damage must also be compensated by the victim aid of the state who is not a tortfeasor, see BGE 131 II 656 para 6.

(*lucrum cessans*).<sup>37</sup> This differentiated viewpoint is also reflected in tax law. Whereas the disability pension of the insured person having lost housekeeping capacity is considered to be taxable income (*lucrum cessans*),<sup>38</sup> damages in tort for compensation for loss of housekeeping capacity are not taxable (*damnum emergens*).<sup>39</sup>

### C. Assessment of Damages

- 22 After initially considering that unpaid housework did not give rise to compensation,<sup>40</sup> the view that work performed in the household contributes to the care and subsistence of the family in the same way as the income of a gainfully occupied person gradually gained support.<sup>41</sup> Since the *Blein*<sup>42</sup> decision, the obligation to compensate for household tasks performed gratuitously by the homemaker has been recognised without limitation.<sup>43</sup>
- 23 Over a long period of time, and to some degree even today, the question of whether the damage compensation should be measured on the basis of a concrete damage calculation or a statistical calculation was subject to debate. In two new decisions, the Federal Court discusses this issue in depth and clearly favours the court's discretion: it is possible to decide damages solely on a statistical basis even where it is possible to assess the concrete circumstances.<sup>44</sup> However, a reasonable explanation must be provided to demonstrate why the factual circumstances warrant a statistical calculation.
- 24 Equally, the loss of housekeeping capacity can be substantiated in different ways. The practice in this respect is not uniform: in some cases concrete medical assessments are invoked, while other decisions have relied on disability quotas in medical theory or occupational health specialist reports.<sup>45</sup> Such disparity is the focus of criticism.

37 Holding a different view: V Pribnow, Der Haushaltschaden: *damnum emergens* und nicht *lucrum cessans*, in: Weber (fn 10) 11 ff.

38 BGE 132 II 128 paras 3 and 6.

39 BGE 132 II 128 para 4 and 117 Ib 1 para 2.

40 BGE XVIII 394/400.

41 BGE 53 II 125, 102 II 90 para 2a.

42 BGE 108 II 434.

43 BGE 131 III 360, 131 III 12, 129 II 145, 129 III 135.

44 Judgments of the Federal Court 4A\_19/2008 and 4A\_98/2008.

45 The courts regularly demand a medical report (see eg Landolt (fn 14) no 951 ff on art 46 SCO). The Federal Court considers a report of an occupational health specialist also as sufficient (BGE 129 III 135).

(11) How is loss of housekeeping capacity to be assessed? Please give an overview.

Loss of housekeeping capacity is defined as a loss due to a deterioration in the capacity to perform household tasks.<sup>46</sup> Such deterioration causes a pecuniary or a normative loss. The loss can manifest concretely where expense is incurred for hired domestic help<sup>47</sup> or be calculated by reference to abstract considerations in cases where an injured person is able to arrange for alternative help and temporarily puts up with a deterioration of their standard of living,<sup>48</sup> or accepts the gratuitous help of friends and acquaintances. Mixed forms are also conceivable, where for example, help is hired for child care but not for the housework.

The object of the compensation is always to maintain the standard of living so far, or to be presumed, of the injured person/deceased. In Switzerland, the Swiss Survey of the Active Population (*Schweizerische Arbeitskräfteerhebung*, SAKE) has become the standard for assessing work performance in the household. 'The results of SAKE provide an appropriate base for assessing the effective time spent by the Swiss population on housekeeping and determining the average time invested in each individual case.'<sup>49</sup> The work performance (per week) is multiplied by the incapacity rate and a hypothetical hourly salary and converted into an annual amount using a factor of 52.

(12) By what criteria (medical, economic or other), in which way and by whom is loss of housekeeping capacity established and measured? Are the same criteria employed as in establishing and measuring loss of working capacity generally? Is it possible for the degree of impairment in housekeeping capacity to differ from the degree of impairment in general working capacity in an individual case?

Loss of housekeeping capacity arises when a person is impaired in their capacity to perform household tasks, that is can no longer perform or takes longer to perform household duties. The disability insurance defines the impairment of housekeeping capacity on the bases of medical reports by the regional medical service<sup>50</sup> and a housekeeping assessment performed by a suitable person.<sup>51</sup> The Federal Court differentiates between a physical and a psychological impairment of housekeeping capacity; a medical report is only necessary in the case of psychological impairment

46 BGE 131 III 360.

47 BGE 132 III 321.

48 BGE 131 III 12.

49 BGE 131 III 360 para 8.2.1 and 129 III 135/155.

50 Art 49 para 1 Ordinance of 17 January 1961 on the Disability Insurance (Invalidenversicherung, IVV).

51 Art 69 para 2 IVV.

of housekeeping capacity.<sup>52</sup> There is a debate in tort law whether a medical report is necessary in every case and whether a special assessment has to be made.<sup>53</sup>

**28** Contrary to the loss of housekeeping capacity, in case of loss of earnings, the salary of the healthy person is compared to the disabled person's salary, ie the difference between the earnings of the injured person before and after the accident. In the case of loss of earnings, the concrete, pecuniary loss in the individual case is assessed, whereas loss of housekeeping capacity is assessed to a greater degree on an abstract – statistical – basis.

**29** It is quite possible for the degree of impairment in housekeeping capacity to differ from the degree of impairment in general working capacity, and this often occurs. A lower rate of work incapacity is generally assumed where housekeeping is concerned because household tasks are easier to perform than salary work. The impairment in housekeeping capacity is often qualified as half of the work incapacity of the regular job market.<sup>54</sup>

*(13) Which tasks are deemed to be household tasks in considering housekeeping capacity? Is there a right to damages for, for example, impairment of a person's ability to care for his/her children, do the gardening or organise family life and social relationships?*

**30** Based on comprehensive analysis and extensive inquiries, the Federal Department of Statistics has established a model for a series of tables on time invested in household work and family care, and tables on different salary rates.<sup>55</sup>

**31** The data concerning time spent on household work and family care was obtained through telephone surveys. The questions asked were: 'Did you perform the following tasks yesterday, even if only for 5 minutes?' (yes/no), 'How long did this take you yesterday?' (in hours/minutes), 'Altogether how much time did you spend yesterday on family care and household work?' (in hours/minutes). The questions concerning the amount of time spent on household work and family care related to the following activities: preparation of meals, washing up, putting away the dishes,

laying the table, shopping, clearing up, making beds, washing, ironing, repairing, decorating, sewing, knitting, care for domestic animals, care for plants, gardening, and administrative work.

In two-person (couple) households, the time spent on caring for a household member requiring care is included. In households with children, the amount of time spent on child care was also asked about: giving children their meals, washing them, putting them to bed, playing with them, assisting them with their homework, accompanying them and providing transport for them. **32**

Using statistical methods, the explanatory power of different variables was established. The main factors in addition to the family situation (number of children, age of the youngest child) were sex, age and work status.<sup>56</sup> The following table illustrates the values as a whole, without detailing the individual household tasks and without regard to the age of the children. **33**

[See table overleaf]

<sup>52</sup> Judgment of the Federal Court 9C\_299/2008, para 3.2.

<sup>53</sup> See eg P Kaufmann/U Eschmann/L Hafen, Haushaltassessment – Das Ei des Kolumbus? HAVE 2010, 13 ff; J Sönke/HG Kopp, Die Evaluation der funktionellen Haushaltsfähigkeit, HAVE 2010, 286 ff, and D Weidmann/U Kröpfl, Erhebung und Quantifizierung der Einschränkungen im Haushalt, HAVE 2010, 293 ff.

<sup>54</sup> See eg Landolt (fn 14) no 970 ff on art 46 SCO.

<sup>55</sup> The tables are available at: <<http://www.bfs.admin.ch/bfs/portal/de/index/themen/20/04/blank/dos/haushaltschaden.html>> (last visited on 6 February 2011).

<sup>56</sup> See eg Landolt (fn 14) no 1005 ff on art 46 SCO.

**Time expenditure for household work and family care 2007 according to the household type and gender in hours per week**

	Household type	Women				
		Work status in %				
		0	1-49	50-89	90-100	Total
Person living alone	1	20.8	24.1	19.5	16.3	19.6
Two-person household (or couple)	2	29.1	28.2	23.5	20.1	25.8
Two-person household with one child	3	55.1	46.8	40.8	35.8	44.9
Two-person household with 2 children	4	60.1	49.3	43.5	39.8	49.7
Two-person household with 3 or more children	5	62.6	50.7	47.9	45.3	53.8
Two-person household with children totalling 3-5	3-5	59.4	48.9	43.2	39.1	49.0
Single parent with one child	6	40.9	38.8	35.0	30.4	34.3
Single parent with 2 or more children	6	54.2	45.6	39.2	36.9	41.9
Single parent with children totalling	6	48.5	42.8	37.2	32.5	38.0

	Household type	Men				
		Work status in %				
		0	1-49	50-89	90-100	Total
Person living alone	1	17	20.6	15.9	14.3	15.3
Two-person household (or couple)	2	18.7	17.9	15.1	14.3	16.2
Two-person household with one child	3		30.6		24.4	25.2
Two-person household with 2 children	4		29.5		25.2	25.7
Two-person household with 3 or more children	5		28.9		24.4	24.8
Two-person household with children totalling 3-5	3-5		29.8		24.8	25.3
Single parent with one child	6		(30.5)		24.4	25.2
Single parent with 2 or more children	6		( )		(25.4)	25.4
Single parent with children totalling	6		(27.6)		24.7	25.3

**Values that rely on observations 15-49 are indicated in brackets: (30.8).**

**BFS, Swiss Survey of the Active Population (SAKE) 2007: Unpaid Work Module**

- 34 The boundary between hobby and housekeeping is open to debate: when does gardening contribute to family subsistence and care and when is it leisure-time activity? Is time and effort spent caring for a domestic animal a form of family care and subsistence activity? According to Brehm<sup>57</sup>, time and effort spent on activities that do not constitute care for the family do not fall within the scope of compensation for a normative loss of housekeeping capacity.<sup>58</sup> This would apply to tending a flower garden, care for domestic animals (like taking the dog for a walk), logistical contributions to a family hobby (eg repair work on a sailboat or a tennis court).<sup>59</sup> The loss of satisfaction due to no longer being able to perform such activities can, however, be taken into account in moral damages.<sup>60</sup>

(14) Is the degree of impairment of housekeeping capacity assessed on the basis of the actual circumstances of the individual case or by reference to abstract considerations (eg statistical averages)?

- 35 The damage is assessed concretely in an individual case or by reference to abstract considerations. The standard statistical basis is constituted by the figures of the Swiss Survey of the Active Population (SAKE)<sup>61</sup> that quantify the time required to perform individual household tasks based on representative surveys. The amount of statistically measured time the injured person is still capable of investing is determined for the individual tasks by reference to a medical opinion (housekeeping report). In Switzerland, however, the medical criteria are not transcribed in detailed 'injury tables', as is the case in Germany.
- 36 In the case of long-term harm or long-term work incapacity, loss of housekeeping capacity is increasingly calculated by reference to abstract considerations. In such cases, however, in order to meet the evidentiary burden, one must also demonstrate on the basis of concrete evidence why the use of specific statistical data is desirable<sup>62</sup> or that the concrete housekeeping performance is comparable to the statistical housekeeping performance.<sup>63</sup>

57 R Brehm, Berner Kommentar, Kommentar zum schweizerischen Privatrecht/Obligationenrecht: Allgemeine Bestimmungen – Die Entstehung durch unerlaubte Handlungen, vol VI, ch 1, part 3, subvol 1 (3rd edn 2005) no 19d on art 42 SCO.

58 The courts normally do not qualify gardening work as housework (see eg Landolt (fn 14) no 946 on art 46 SCO).

59 A Sidler, Ehrenamtliche Tätigkeit im Haftpflichtrecht, in: Weber (fn 10) 61 ff.

60 BGE 115 II 474 para 3a.

61 BGE 132 III 321.

62 Judgment of the Federal Court 4A\_19/2008, para 3.2.

63 See also Pergolis/Dürr, HAVE 2005, 202 ff.

The case where a person is not only impaired in their housekeeping capacity but loses their entire capacity for subsistence and care is a special case of loss. In such cases, regard must additionally be had to the fact that an initially four-person household suffering the loss of, for example, the mother cannot be compared to a three-person household. In contrast to Germany, there are no figures in Switzerland on the time and effort expended in 'diminished households'. The amount of time and effort expended by the deceased for him/herself must be assessed and deducted. The Federal Court however relies increasingly on the German figures of Schulz-Borck/Hofmann.<sup>64</sup>

(15) Is the level of damages affected if professional or other paid help is engaged to perform household tasks in place of a person who has been injured or killed?

If a replacement is hired and paid, the expense incurred must be compensated. If the replacement does not perform all of the household tasks that the injured person or deceased is no longer able to perform, these must be claimed and substantiated in addition. The injured person's duty to mitigate damage marks the limit of the compensation obligation.

(16) Is the standard cost of such help relevant to the assessment of damages for loss of housekeeping capacity? If so, is the assessment based on the pay that would be received by a skilled, semi-skilled or unskilled worker? Which activities are considered for the purposes of comparison? Is the level of compensation based on the pay that such a worker would receive or the amount that an employer would charge for the help (gross or net pay)?

There is a debate in tort law concerning the appropriate salary to consider when quantifying the loss of housekeeping capacity. Unpaid housework, by definition, does not have any market value. On the one hand, there is the general worker salary (salary of a domestic worker), and on the other hand there are a number of different salaries relating to specialised professions (small child care, cooking, nursing).

The Federal Department for Statistics establishes the salary rates that are adjusted to inflation through the nominal salary index in the Swiss Salary Structure Survey (*Schweizerische Lohnstrukturhebung*, LSE). The LSE is the biggest, most comprehensive and precise salary survey in Switzerland and is carried out every two years by means of written surveys directly with

64 See H Schulz-Borck/E Hofmann, Schadenersatz bei Ausfall von Hausfrauen und Müttern im Haushalt (6th edn 2000) and H Schulz-Borck/F Pardey, Der Haushaltsführungsschaden (7th edn 2009). For further details: V Pribnow/M Schmid, Die Versorgungsquoten aus Erwerbseinkommen und Haushaltsführung, HAVE 2003, 70 ff, BGE 108 II 434 para 3 and Judgment of the Federal Court 4C.479/1994, para 4b/aa.



companies. It enables a description of the salary structure on a representative base of data for all branches of the economy to be made.

- 41 When determining the future loss of housekeeping capacity, regard should be had to the possibility of a future increase in the salary of the domestic helpers.<sup>65</sup> The question of to what extent a future effective increase in salary should be taken into account was examined by the Federal Court in BGE 132 III 321 para 3 where the court held that an annual increase of 1 % up to the retirement age according to the Federal Act on Old Age and Survivors Insurance (*Alters- und Hinterlassenenversicherung*, AHV) (64 for women, 65 for men) should be taken into account.
- 42 The quality premium is another heavily debated issue. The basic idea is that the housewife performs her work with more commitment, care and engagement than a replacement worker employed in a foreign household, and this should be reflected in an increase of 20–50 % of the salary.<sup>66</sup> Brehm<sup>67</sup> remarks in this respect that evidently only good housewives have accidents. Other authors<sup>68</sup> on the contrary argue the opposite view that most hired domestic helpers would be more efficient than the housewife herself.
- 43 Where no replacement is hired, and thus no salary paid out, the average salary for a specified activity having the closest possible replacement value is used as an assessment basis. Sometimes, educational activities are distinguished from housekeeping activities. The key factor is the average gross salary (including employer contributions) of a qualified replacement worker in the region of residence. The Federal Court considers a compensation of CHF 25 to 30 per hour as fair.<sup>69</sup>
- (17) *Is the level of damages affected if a relative or a third party (eg a neighbour) gratuitously takes over household duties from a person who has been injured or killed? How are the damages, if any, calculated in such a case?*
- 44 The level of damages is not influenced in such case. The harm must also be compensated if a third person (eg spouse, relative, neighbour, etc) gratuitously takes over household duties which the injured person or deceased can no longer perform.

65 M Schaetzle/S Weber, Kapitalisieren (2001) nos 3.434 and 3.520; Judgment of the Federal Court 4C.276/2001, para 7/b.

66 BGE 131 III 360 para 8.3, 131 III 12 para 5.4, 129 II 145 para 3.2.1 und 108 II 434 para 3d.

67 Brehm (fn 57) no 19g on art 42 SCO.

68 V Pribnow/R Widmer/A Sousa-Poza/T Geiser, Die Bestimmung des Haushaltschadens auf der Basis der SAKE, HAVE 2002, 34.

69 BGE 129 II 145 para 3.2.

(18) *What is the relationship between damages for loss of earnings from paid work and damages for loss of housekeeping capacity? Is it possible to accumulate the two claims? If so, how is this effected?*

An injured person can suffer both a loss of earnings and a loss of house- 45 keeping capacity. Both heads of damage must be cumulatively compensated.<sup>70</sup> In case of death as well, the persons receiving subsistence and care can claim compensation for loss of subsistence and care originating in paid work and housekeeping. Where gainfully occupied persons are concerned, generally a smaller loss of housekeeping capacity is assumed. The SAKE statistics take into account the gainful occupation time quota when defining the scope of the housekeeping activity.<sup>71</sup>

(19) *To what extent, if at all, does a loss of housekeeping capacity affect the award of damages for non-pecuniary loss in respect of personal injury or death?*

Non-material inconvenience (moral damage) is independent from loss of 46 housekeeping capacity and is compensated in addition.

(20) *Is compensation for loss of housekeeping capacity to be paid as an annuity or as a lump sum? If both are possible, does the victim have the option to decide between the two methods of compensation?*

The Federal Court has decided that the victim has a right to choose 47 whether s/he prefers a lump sum or an annuity or a combination of both.<sup>72</sup> The choice of the victim is – at least in regular cases – binding for the judge.<sup>73</sup> The annuity has to be indexed either on the basis of the national consumer price index (*Landesindex der Konsumentenpreise*)<sup>74</sup> or the Swiss wage index (*Schweizerischer Lohnindex*).<sup>75</sup>

#### D. Relationship to Social Welfare Law

(21) *What social welfare provision, if any, is made in respect of the loss of housekeeping capacity? Are welfare benefits received set off against the damages payable? What recourse actions, if any, are available to an agency making such provision?*

70 BGE 129 III 135.

71 BGE 129 II 145.

72 BGE 125 III 312 para 6c.

73 Ibid.

74 See <<http://www.bfs.admin.ch/bfs/portal/de/index/themen/05/02.html>> (last visited 6 February 2011).

75 See <<http://www.bfs.admin.ch/bfs/portal/de/index/themen/03/04/blank/data/02.html>> (last visited 6 February 2011).

- 48 Social insurers who provide benefits for the impairment of work capacity in the household are subrogated to the rights of the injured or cared-for person with respect to liable third parties or the personal liability insurance thereof. The disability and survivors' insurers can, however, only take recourse in respect of benefits which correspond in personal, factual and time-specific terms to the loss of housekeeping capacity.<sup>76</sup> The survivors' pensions paid by the AHV do not differentiate between care and subsistence originating in a gainful occupation or housekeeping and therefore the correspondence rule that applies in disability cases cannot be directly applied. Where the victim has engaged in or would have engaged in a gainful occupation, the survivors' pension does not correspond to the loss of housekeeping capacity.

## II. Concrete Assessment Examples

- 49 The following cases have been assessed using the software *Leonardo*. This computer programme is often used in Switzerland to calculate personal damages. It was introduced in 2001 and is updated annually (www.leonardo.ag). Use of this programme is warranted mainly where statistical data is used for calculations given that many calculation periods are defined according to criteria such as the household type, the degree of occupational capacity and the age of the injured person and of close relatives or friends, which are hardly manageable if the calculations are made manually.
- 50 For the sake of clarity and to facilitate comparison, all five examples have been assessed by reference to abstract considerations (see no 35 ff above) on the basis of the Swiss Survey of the Active Population (SAKE). Alternatively, a concrete calculation based on the cost of a replacement would be possible. Under the current legal framework, the injured person can choose between an abstract or concrete calculation. Generally, the calculation is made using statistical values, except where no such values are available for a relevant household type.
- 51 The following assessments correspond to the current practice of the Federal Court.<sup>77</sup> The hourly rate paid for a replacement is – for the sake of simplicity – fixed at CHF 30, which corresponds to the current usual but also maximum amount. The hourly rate is increased by 1 % until the

76 BGE 134 III 489, B *Studhalter*, Leiser Abschied von der Polykongruenz, HAVE 2008, 346.

77 BGE 129 III 135.

time of retirement (currently age 64 for women and age 65 for men) (see no 41 above).

Compensation for personal injury is often made many years later. Thus, in the calculation, the damage so far and the future damage must be differentiated. The damage so far is added and accrues a damage interest of 5 %. The future damage is capitalised. The probability of death and of disability is taken into account based on the capitalisation tables of Stauffer/Schaetzle.<sup>78</sup> The tables are based on a capitalisation interest rate of 3.5 %, which is deemed the real interest rate, thus balancing inflation, which no longer needs to be taken into consideration in the hypothetical factors.

The *Leonardo* software enables the calculation of the damage to an exact date; the hypothetical factors thus no longer need to be rounded to the year. This implies working with data.<sup>79</sup> In the examples, the following hypothetical factors are used: the date of the accident is set at 30.06.2009, the settlement date (so-called invoice date) one year later at 01.07.2010.<sup>80</sup>

The age of the injured person is taken into consideration in the calculations. For the sake of clarity, the age of the children is not taken into consideration separately here, however the relevant statistical values are available.

Additional interest is owed on the damage so far, which, however, is not taken into consideration. Given that the processing of a serious personal injury claim frequently takes years, the damage interest can weigh heavily in terms of the amount.

**Case 1:** married woman, aged 45, with three children (5, 10 and 15 years old); does not work outside the home; fracture of both wrists with residual effects; impairment in the performance of household tasks: on average 33%; detached house in the countryside.

As only rounded-up ages are used in the examples, the dates of birth are chosen in such a way that – as the examples show – they result in full years. For the husband (the woman is married according to the facts of the case) we also used age 45.

78 W Stauffer/T Schaetzle, Capitalisation Tables (5th edn 2001).

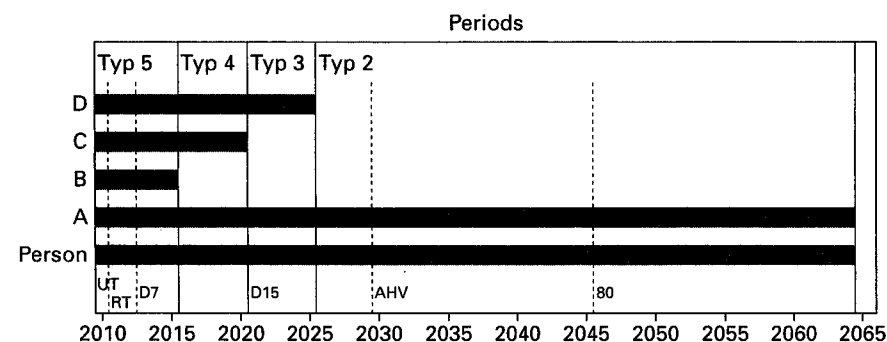
79 The date of the accident and the dates of birth of the injured person and the close relatives or friends must be effectively submitted, as well as an invoice date, which marks the line between the damage so far and the future damage.

80 Further examples of the calculation of loss of housekeeping capacity can be found in Schaetzle/Weber (fn 65) examples 6 f and 29 ff.

- 53 For the calculation, different periods are defined according to the statistical variations. In addition, according to the calculation bases of capitalisation, it is assumed the injured woman would have remained active in the household as long as possible if the accident had not taken place. The relevant activity period is determined based on the statistics which are established by the Swiss Federal Department for Statistics and the Federal Department for Social Insurance.<sup>81</sup> With regard to the children, it is presumed they would have left home at 20.
- 54 At the next stage, periods are defined using the SAKE data and according to the different household types.

Table 1: The determination of periods using the *Leonardo* software. The duration of the pension and of the different types of housekeeping is shown graphically. The longest period lasts until the end of the activity, ie until disablement or death and starts on the date of the accident (UT) or the date of the calculation (RT).

person	date of birth	period starts at	period ends at
Child D	01.07.2005	date of accident	age 20
Child C	01.07.2000	date of accident	age 20
Child B	01.07.1995	date of accident	age 20
Partner A	01.07.1965	date of accident	end of activity
Injured Person	01.07.1965	date of accident	end of activity



- 55 Based on these different periods (with three children, with two children, with one child, only husband and wife), the corresponding time spent on housekeeping by the non-gainfully employed woman is defined.

81 In this respect *ibid*, 533 ff.

Table 2: Time expenditure in example 1

from	until	type of household	gainful activity				Total Ø
			0 %	1–49 %	50–89 %	90–100 %	
30.06.2009	30.06.2010	type 5	67.7	57.0	47.6	(44.3)	59.0
01.07.2010	30.06.2012	type 5	67.7	57.0	47.6	(44.3)	59.0
01.07.2012	30.06.2015	type 5	58.6	48.0	46.0	44.4	49.9
01.07.2015	30.06.2020	type 4	53.2	47.9	43.3	38.7	46.8
01.07.2020	30.06.2025	type 3	41.5	38.5	30.5	25.7	33.8
01.07.2025	30.06.2029	type 2	31.0	28.1	25.3	22.0	27.0
01.07.2029	30.06.2045	type 2	29.1	31.2	(33.3)	(36.6)	29.4
01.07.2045	01.07.2064	type 2	23.4	( )	( )	( )	23.4

The rate of work incapacity (in the example 33 %) and the hourly rate 56 (assumed to be CHF 30 at the time of the accident, for simplicity's sake) are further taken into consideration. According to current case law, from the date of calculation up until the hypothetical retirement age (set at 64 for women, 65 for men) the salary rate is increased by 1 % annually in order to take into account the increase in real costs of a replacement.<sup>82</sup>

Table 3: Rate of work incapacity and hourly rate per period. The line below the first row marks the transition between the damage so far and the future damage.

from	until	h/week	rate of work incapacity	hourly rate	increase
30.06.2009	30.06.2010	67.70	33 %	30.00	0 %
01.07.2010	30.06.2012	67.70	33 %	30.00	1 %
01.07.2012	30.06.2015	58.60	33 %	30.60	1 %
01.07.2015	30.06.2020	53.20	33 %	31.53	1 %
01.07.2020	30.06.2025	41.50	33 %	33.14	1 %
01.07.2025	30.06.2029	31.00	33 %	34.83	1 %

82 BGE 132 III 321.

from	until	h/week	rate of work incapacity	hourly rate	increase
01.07.2029	30.06.2045	29.10	33 %	36.24	0 %
01.07.2045	01.07.2064	23.40	33 %	36.24	0 %

- 57 The loss of housekeeping capacity so far is added and results in this case in CHF 34,947. The future loss of housekeeping capacity, however, is capitalised. The capitalisation factors take into account the probability of death and disability and a compound interest rate of 3.5 %.
- 58 The table below shows extracts of the results of the future damage based on the hypothetical factors.

Table 4: Assumptions for future housekeeping loss

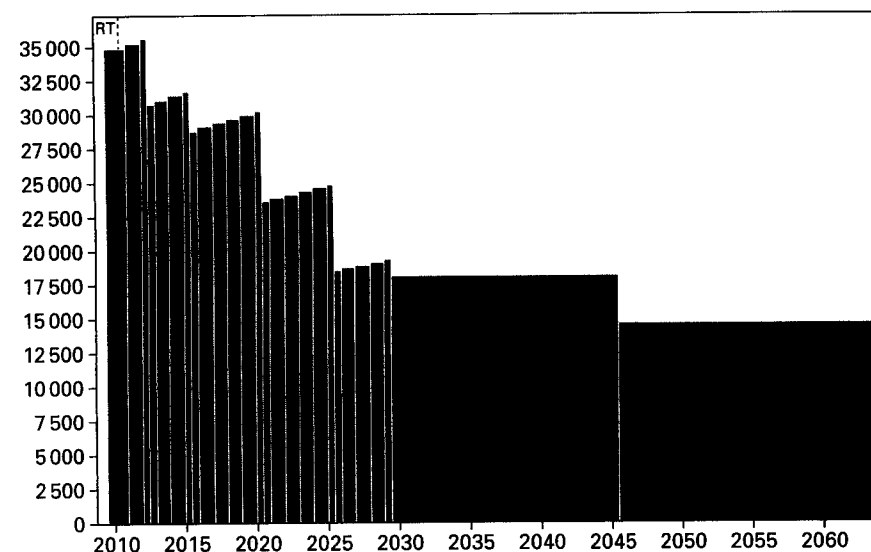
age	damage/year	factor	capitalised damage (CHF)
45	34,852	0.98	34,155
46	35,202	0.95	33,442
47	30,774	0.91	28,004
48	31,084	0.88	27,354
...	...	...	...
91	14,522	0.02	291
92	14,522	0.01	146
93	14,522	0.01	146
94	14,522	0.00	0
95	14,522	0.00	0
96	14,522	0.00	0
97	14,522	0.00	0
98	14,522	0.00	0
19.39			476,188

- 59 The loss of housekeeping capacity according to Case 1 is CHF 511,135 (which corresponds to approximately € 424,242; exchange rate on 15/1/2012: CHF 1 = € 0.83).

A pension can run for various periods of time, eg for the time a person is alive (so-called mortality pension which is calculated on the basis of the extrapolated death tables) or for as long as a person is not disabled, ie remains active (activity pension). In the case of an activity pension, the probability of disability is taken into account in addition to the probability of death.<sup>83</sup>

With regard to the term one currently differentiates according to the item of harm. One bases oneself on the activity period in particular in the case of loss of housekeeping capacity because the future harm is to be compensated for as long as the injured or deceased person would have been capable of working. The loss of earnings is generally structured as a temporary activity pension whereas the loss of care is capitalised as a non-temporary mortality pension.

Table 5: Graphic



**Case 2:** single woman, aged 30; in paid employment; living on her own; comminuted fracture of the heel bone with residual effects, three-room flat:

(a) can no longer perform any household tasks;

As the 30-year-old woman is 100 % incapacitated in the household, she would receive a disability pension that would, however, be deducted when

83 In detail see Schaeztle/Weber (fn 65) 533 ff.

assessing her loss of earnings. From the date of the accident (30.6.2009) up until retirement upon reaching the AHV retirement age (64 years), the injured person would – according to SAKE – if the accident had not occurred, have worked 14 to 22.4 hours per week in the household and subsequently 16.7 hours until her gainful activity ceases. The hourly rate was presumed to be CHF 30, with an increase of 1 % from the date of calculation up to the AHV retirement age.

Table 6: Damage table Case 2a

from	until	h/week	rate of work incapacity	hourly rate	increase	damage (CHF)
30.06.2009	30.06.2010	14.00	100 %	30.00	0 %	21,900
01.07.2010	30.06.2025	14.60	100 %	30.00	1 %	281,475
01.07.2025	01.07.2044	19.10	100 %	34.83	1 %	290,114
01.07.2044	30.06.2060	22.40	100 %	42.08	0 %	142,957
01.07.2060	01.07.2079	16.70	100 %	42.08	0 %	19,622
						<b>756,068</b>

The loss of housekeeping capacity in Case 2a is CHF 756,068 = approx € 627,536.

*(b) is slowed down in the performance of household tasks (needs twice as much time as before the accident) but capacity to continue in paid employment remains unaffected;*

- 63 First, this raises the question as to what extent the continuance of household task performance is still reasonable. In addition to the gainful activity, an increase in time spent on household tasks cannot not be expected of the person concerned. Insofar as no cost savings can be attained through a reorganisation (performance of only certain tasks which the disability does not or hardly affects), a disability rate of 50 % is assumed. Otherwise, the same hypotheses are made as in example 2a.

Table 7: Damage table Case 2b

from	until	h/week	rate of work incapacity	hourly rate	increase	damage (CHF)
30.06.2009	30.06.2010	14.00	50 %	30.00	0 %	10,950
01.07.2010	30.06.2025	14.60	50 %	30.00	1 %	140,737
01.07.2025	01.07.2044	19.10	50 %	34.83	1 %	145,057
01.07.2044	30.06.2060	22.40	50 %	42.08	0 %	71,479
01.07.2060	01.07.2079	16.70	50 %	42.08	0 %	9,810
						<b>378,033</b>

The loss of housekeeping capacity in Case 2b is CHF 378,033 = approx € 313,767.

*(c) is slowed down in the performance of household tasks (needs twice as much time as before the accident) and is no longer able to engage in paid employment;*

A somewhat higher amount of time spent on the performance of household tasks can be expected here as there will be more time available as a result of cessation of the gainful activity. The limitation could thus lead to a lower rate of disability here. A degree of disability of 20 % is taken into consideration where the assumptions are the same as in examples 2a and 2b.

Table 8: Damage table Case 2c

from	until	h/week	rate of work incapacity	hourly rate	increase	damage (CHF)
30.06.2009	30.06.2010	14.00	20 %	30.00	0 %	4,381
01.07.2010	30.06.2025	14.60	20 %	30.00	1 %	56,295
01.07.2025	01.07.2044	19.10	20 %	34.83	1 %	58,023
01.07.2044	30.06.2060	22.40	20 %	42.08	0 %	28,591
01.07.2060	01.07.2079	16.70	20 %	42.08	0 %	3,924
						<b>151,213</b>

The loss of housekeeping capacity in Case 2c is CHF 151,213 = approx € 125,507.

(d) it is planned that she start a family.

- 65** It is assumed that the woman would have given birth to a child in 2012 and that her housekeeping ability after the accident is permanently impaired by 30 %. It is further assumed that, up until the birth of her child in two years, she would have been 100 % gainfully employed. According to SAKE the time spent on housekeeping if the accident had not occurred until the date of invoice is 19.50 hours per week, until the birth of the child 18.2 hours per week, thereafter until age 20 of the child 55.1 hours per week, and thereafter it falls to 31.0. From retirement, the time spent on housekeeping corresponds to 29.1 hours per week or 23.40 hours per week. The hourly rate was again increased by 1 % per year from the date of calculation (30.06.2010) until her presumed date of retirement. It is of course possible that the impairment impacts on the child care differently and that it warrants a higher disability rate. However, this assumption is not made in this calculation.

Table 9: Damage table Case 2d

from	until	h/week	rate of work incapacity	hourly rate	increase	damage (CHF)
30.06.2009	30.06.2010	19.50	30 %	30.00	0 %	9,151
01.07.2010	30.06.2012	18.20	30 %	30.00	1 %	16,541
01.07.2012	01.07.2032	55.10	30 %	30.60	1 %	378,499
01.07.2032	01.07.2044	31.00	30 %	37.34	1 %	79,476
01.07.2044	30.06.2060	29.10	30 %	42.08	0 %	55,715
01.07.2060	01.07.2079	23.40	30 %	42.08	0 %	8,248
						<b>547,630</b>

The loss of housekeeping capacity in Case 2d is CHF 547,630 = approx € 454,533.

**Case 3:** married carpenter, aged 40, with two children of 4 and 6; complex fracture of the right upper arm and the right shoulder with paralysis of the entire upper extremities; living in a four-room flat; no longer able to contribute to household tasks (shopping, simple repairs, maintenance of the garden).

- 66** Assumed housekeeping disability: 100 % and age of the partner also 40. Here as well, one can rely on the SAKE data if proof that household tasks were performed only to a limited degree is lacking. The statistical data are

taken as a normative hypothesis. Only in exceptional cases can one depart from such data as the statistical values also include people who perform little housework as a result of their professional activities.

According to SAKE, the injured person would, if the accident had not occurred, have initially performed housekeeping tasks 25.2 hours a week until the eldest child left home, 24.4 hours a week over the next two years (until the youngest child left home at 20), 14.0 hours a week up until retirement at 65 and 18.9 and 14.2 from the legal retirement age until the end of activity. **67**

Table 10: Damage table Case 3

from	until	h/week	rate of work incapacity	hourly rate	increase	damage (CHF)
30.06.2009	30.06.2010	25.20	100 %	30.00	0 %	39,420
01.07.2010	30.06.2024	25.20	100 %	30.00	1 %	454,034
01.07.2024	01.07.2026	24.40	100 %	34.48	1 %	48,606
01.07.2026	30.06.2035	14.00	100 %	35.18	1 %	100,537
01.07.2035	01.07.2050	18.90	100 %	38.47	0 %	103,119
01.07.2050	01.07.2066	14.20	100 %	38.47	0 %	8,194
						<b>753,910</b>

The loss of housekeeping capacity in Case 3 is CHF 753,910 = approx € 625,745.

**Case 4:** 20-year-old student, living alone; very severe brain damage with serious residual effects; resident in a therapeutic living community; requires care by others; is not able to perform any household tasks.

In the case of a therapeutic living community it is disputed to what extent a loss of housekeeping capacity is to be compensated.<sup>84</sup> According to case law, no compensation is granted if the injured person does not yet have a household or lives only in a one-person household and, also, it is expected there will be no additional persons in the household in the future. In example 4, if an additional loss of housekeeping capacity occurs, the **68**

<sup>84</sup> Landolt (fn 14) no 1293 ff on art 46 SCO; Judgment of the Zurich Commercial Court of 12.6.2001 (E01/0/HG950440) = plädoyer 2001/6, 66 and 2002/1, 67 = ZR 2002 no 94 = ZBJV 2003, 394 para VII = HAVE 2002, 276 ff.

injured person would only be entitled to the cost of care and of the therapeutic living community. The contrary opinion suggests that in the case of younger injured persons, according to statistical probabilities, it is assumed that they lived in a multi-person household, even if this is no longer to be expected due to injury. The calculation would be made based on the foregoing so as to deduct from the probable multi-person household the time spent in a one-person household. The following calculations assume that the person concerned first lived in a two-person household, then together with two children, whose date of birth is set on 1.7.2020.

Table 11: Damage table Case 4a – House with woman and 2 children, total damages CHF 1,069,584

from	until	h/week	rate of work incapacity	hourly rate	increase	damage (CHF)
30.06.2009	30.06.2010	19.10	100 %	30.00	0 %	29,878
01.07.2010	30.06.2020	19.10	100 %	30.00	1 %	259,855
01.07.2020	01.07.2040	29.50	100 %	33.14	1 %	533,401
01.07.2040	30.06.2055	23.50	100 %	40.44	1 %	182,798
01.07.2055	01.07.2070	18.90	100 %	46.94	0 %	58,967
01.07.2050	01.07.2086	14.20	100 %	46.94	0 %	4,685
						<b>1,069,584</b>

Table 12: Damage table Case 4b – one-person household, loss of housekeeping capacity CHF 730,030

from	until	h/week	rate of work incapacity	hourly rate	increase	damage (CHF)
30.06.2009	30.06.2010	13.00	100 %	30.00	0 %	20,336
01.07.2010	30.06.2020	13.00	100 %	30.00	1 %	176,865
01.07.2020	01.07.2035	18.10	100 %	33.14	1 %	261,327
01.07.2035	30.06.2055	18.30	100 %	38.47	1 %	208,853

from	until	h/week	rate of work incapacity	hourly rate	increase	damage (CHF)
01.07.2055	01.07.2070	18.60	100 %	46.94	0 %	58,031
01.07.2050	01.07.2086	14.00	100 %	46.94	0 %	4,618
						<b>730,030</b>

Table 13: Damage table Case 4c – Difference between the hourly rates/week in cases 4a and 4b results in a loss of housekeeping capacity of CHF 337,513.

from	until	h/week	rate of work incapacity	hourly rate	increase	damage (CHF)
30.06.2009	30.06.2010	6.00	100 %	30.00	0 %	9,386
01.07.2010	30.06.2020	6.00	100 %	30.00	1 %	81,630
01.07.2020	01.07.2035	11.40	100 %	33.14	1 %	164,593
01.07.2035	30.06.2040	11.20	100 %	38.47	1 %	40,453
01.07.2040	30.06.2055	5.20	100 %	40.44	1 %	40,449
01.07.2055	01.07.2070	0.30	100 %	46.94	0 %	936
01.07.2050	01.07.2086	0.20	100 %	46.94	0 %	66
						<b>337,513</b>

**Case 5:** 70-year-old woman; married; severe leg injury; impairment of the performance of household tasks: 50 %; three-room flat; two-person household.

According to SAKE, the injured person would have spent 22.4 hours a week on housekeeping until 80 years of age and 16.7 hours a week thereafter. This means an hourly rate of CHF 30 and 50 % work incapacity. The household size is not taken into consideration in the statistical data. The activity is limited by statistical disability probability. It is thus assumed that household tasks are performed to the extent a person's health allows.

Table 14: Damage table Case 5

from	until	h/week	rate of work incapacity	hourly rate	increase	damage (CHF)
30.06.2009	30.06.2010	22.40	50 %	30.00	0 %	17,520
01.07.2010	30.06.2020	22.40	50 %	30.00	0 %	128,957
01.07.2020	01.07.2039	16.70	50 %	30.00	0 %	34,452
						<b>180,929</b>

The loss of housekeeping capacity in Case 5 is CHF 180,929 = approx  
€ 150,171.