IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20090828
Docket: 37261
Registry: Vernon

Between:

Robyn Dalziel

Plaintiff

And

Michael Appleby

Defendant

Before: The Honourable Madam Justice Beames

Oral Reasons for Judgment

Counsel for Plaintiff	Wesley D. Mussio
Counsel for Defendant	Leigh A. Pedersen
Place and Date of Trial/Hearing:	Kelowna, B.C. July 20-24 and 27-29, 2009
Place and Date of Judgment:	Kelowna, B.C. August 28, 2009

Introduction

[1] This is an action for damages arising from a motor vehicle accident which occurred on August 25, 2003. The accident took place on Highway 97, which is also known as 32nd Street as it travels through Vernon, British Columbia. The plaintiff was southbound, stopped and waiting for northbound traffic to clear so that she could turn left onto 21st Avenue in Vernon, which is the street that is used to access the Vernon Jubilee Hospital. She was intending to visit a friend who was in the hospital. She was alone in her pickup truck and was wearing her seatbelt. Without warning, the plaintiff's truck was struck from behind by the vehicle being driven by the defendant. Both vehicles sustained significant damage. The defendant admits liability for the accident.

Pre-accident History

[2] At the time of the accident, the plaintiff was 46 years old. She had been injured in two motor vehicle accidents that occurred in close proximity in time to each other in 1991. Following those two accidents, she had stopped all of her previous employment endeavours, except those related to the horse industry. In 1992, she bought an 8-acre farm in Lavington, British Columbia. In 1996, she was diagnosed as suffering from fibromyalgia and she was also told that she had chronic fatigue syndrome. As early as 1995, according to some of the documents and records which have been put before me in the course of the trial, she was in receipt of social assistance benefits. In 1996, she settled her actions with regard to the 1991 motor vehicle accidents. In the mid to late 1990s and continuing until 2002, the plaintiff applied for and launched various appeals in order to qualify for provincial disability benefits. She was accepted for provincial disability benefits in 2002 and was in receipt of those benefits at the time of the 2003 motor vehicle accident.

[3] From the time the plaintiff purchased the farm in Lavington up to the date of the accident in question, the plaintiff was actively involved in the horse industry. She raised, bred, boarded, trained, bought and sold Quarter horses, Appendix Quarter Horses, and Thoroughbreds. Although she had some income from these

endeavours, she also had significant expenses, both specifically related to the horses and generally with regard to maintenance and capital improvements on her farm in Lavington. She testified, and I accept, that she supported herself and her daughter on her social assistance benefits. With regard to the farm and horse expenses, she was unable to pay for all of them from her horse farming activities so she supplemented her gross farm earnings by hauling hay for others, hauling horses for others, working at the race track either ponying or outriding, working occasionally as an animal rescuer during forest fires and the like, selling puppies and other miscellaneous and very occasional activities.

[4] Despite the fact that the plaintiff was in receipt of provincial disability benefits, she was able to do virtually all of the activities required to run her farm. She had assistance with some of her work, but she was able to construct and maintain fences; she handled, broke and rode horses; she ran a tractor; she gardened; and she hayed, including throwing hay bales weighing up to 70 or 80 pounds into trucks. By all accounts, her farm and her horses were well maintained. In addition to her farm activities, the plaintiff also worked room by room and project by project on improving her home. She had done some painting, floor sanding and other renovating, but her home was only partially renovated by the time of the subject accident.

[5] For all of her accomplishments, the plaintiff clearly did have limitations and disabilities. She testified that when she over-extended herself, and particularly this occurred in the winter, she would exacerbate her symptoms and be unable to do anything for a period of time. She also suffered from periodic headaches and back aches and she had fatigue.

[6] In 2002, in support of her qualifications for disability benefits, the plaintiff's then family doctor, Dr. Barr, completed a form saying that the plaintiff was having gradually worsening symptoms from chronic fibromyalgia, chronic fatigue and chronic depression. He said that her condition was likely to continue for more than five years and that she was certainly unable to be employed as of January 24, 2002,

which is the date that he completed the form. He indicated that she needed "considerable" assistance for home chores and that she was incurring extra costs for over-the-counter medications and home help.

[7] The plaintiff in her application said that she "sometimes needs help with the yard and with cleaning chores" and that her daughter did most of the chores and most of the cooking. The plaintiff testified that her application made in January of 2002 was intended to be a summary of the problems she had had since she first applied for disability benefits, dating back to the mid 1990s, as opposed to how she was doing in 2002 at the specific time of her final application, and that at the time she saw Dr. Barr in January 2002 to obtain his support for the application, she was having a severe exacerbation of her problems due to over-exertion. Certainly the clinical records do not show any doctor attendances by the plaintiff between August 1, 2000, and January 22, 2002, nor do they show any related attendances from April 19, 2002 until the date of the accident.

[8] Until the fall of 2002, the plaintiff's daughter, who is now 25, lived with the plaintiff. The daughter described herself as a "farm kid" who did a lot of chores, particularly inside the house, including laundry, cleaning and cooking. She also exercised, rode and showed horses.

[9] I will pause here to note that I found the plaintiff and all of the plaintiff's witnesses to be very credible and forthright. In particular, I found that the plaintiff's daughter, Rebecca Dalziel, was an exceptionally good witness and I accept her evidence without reservation. The same applies to the evidence given by the plaintiff's sister-in-law, Monica Dalziel, who I also found to be an excellent witness.

[10] The plaintiff's daughter testified that between the time she left home in the fall of 2002 and the time of the subject motor vehicle accident, she visited the plaintiff on the farm in Lavington periodically. She found that the farm remained well-run and well-maintained, as it had been prior to her move from the family home to Princeton.

[11] In summary, I conclude that prior to the subject motor vehicle accident, the plaintiff had health problems and disabilities, but she was certainly capable of functioning and running her horse-farming operations with minimal assistance, aside from times when she was having an exacerbation of her symptoms. According to her records, in 2003 she had a total of 20 horses of various ages on the farm, including one born that year, as well as two cows, two calves and a yearling steer on the farm.

Post Accident

[12] Immediately after the accident occurred, the plaintiff panicked about oncoming cars in both directions, and she jumped out of her truck to wave vehicles around the accident site. She felt disoriented. The ambulance attended and she was transported to the hospital, a very short distance away. According to the hospital and ambulance records, she had pain in her neck and her shoulders, a decreased range of motion, and numbness, tingling and aching in her left arm. She was discharged from hospital some hours later after she had had a CT scan of her neck. Upon discharge, she was in a soft collar and had been given a prescription for Tylenol 3 medication. The plaintiff was picked up from the hospital by her mother and taken to her mother's home. She testified that she felt dizzy, had a really bad headache, and was gagging when she tried to eat or drink.

[13] On August 27, 2003, the plaintiff went to the office of Dr. James Barr. Dr. Barr had unfortunately retired by that point in time and she saw someone else in the office. That doctor recorded that she had tender areas in her C-spine and between her shoulder blades and that she had reported that she was finding it difficult to swallow.

[14] The plaintiff's next visit to a doctor was to another family physician, Dr. Alex Barss, on September 2, 2003. She saw Dr. Barss a total of three times and then decided not to go back to him. Based on his examinations of the plaintiff, he believed that she had suffered from a musculoligamentous strain of the cervical area and a strain of the rhomboid and trapezius musculature. He also formed the opinion that she had strained her biceps muscle in the motor vehicle accident. Given that she

was a new patient and that he only saw her three times over just under one month, he was unable to offer a prognosis. On the plaintiff's last visit, Dr. Barss suggested that the plaintiff see an exercise rehabilitation consultant for stretching and strengthening, and the plaintiff admits that she did not follow up on that recommendation, in part because she had had a negative experience with a rehabilitation program after her 1991 accidents, and in part because of the pain and exhaustion she was suffering from.

[15] The plaintiff did not see a medical doctor again until just over two years later when she started to see Dr. Wheeldon as her family doctor. She has continued to see him as her family doctor and he has made several referrals for her, including to a surgeon for removal of a lump on her throat, a sleep disorder specialist with regard to her fatigue, and an internal medicine specialist for her dizziness. No expert reports were tendered, authored by Dr. Wheeldon or the specialists he referred the plaintiff to, although all the clinical records have been filed. I will say, with regard to Dr. Wheeldon, that I prefer the plaintiff's evidence about her first visit with Dr. Wheeldon, and specifically I accept that she told him of the subject motor vehicle accident. His chart notes, upon which he is forced to rely for his evidence, are relatively brief, and it is clear that the first appointment quickly became focussed on the potentially cancerous lump which had been found on the plaintiff's throat.

[16] Returning then to the plaintiff's symptoms after the motor vehicle accident, the plaintiff's evidence, which is corroborated to a large extent by family, friends and acquaintances, is that after the accident she was unable to care for the horses, the farm or her home. She found that she was completely exhausted, in pain and having issues with dizziness. Initially, and until mid November 2003, she had a friend come to the farm daily to feed the horses and to do chores. Her mother attended the farm to clean the floors, vacuum and do dishes. Her mother also mowed the lawn periodically for the plaintiff.

[17] With regard to the farm work, when the plaintiff was no longer able to pay for her friend's assistance, she decided that she had to send some of her horses

elsewhere in hopes that she could cope with a reduced workload, recover, and then take her horses back. Two horses were taken to a friend and sometimes partner in horses, four horses were sent to Princeton to be cared for by the plaintiff's daughter, and one leased horse was returned to its owner. By 2004, as the plaintiff was still not able to care for her farm and for her horses, she took some horses to auction to be sold. This was obviously a very difficult decision for her as she was and is passionate about horses, and in fact she referred to some of the horses as her "babies".

[18] As a result of her concerns that her mother was unable to function on her own, the plaintiff's daughter decided that she had to quit her jobs in Princeton and return home. She testified that when she came home at Christmas 2003, the farm was already starting to fall apart. There was no hay for the horses, there was no wood chopped, and the house was freezing. Once the plaintiff's daughter was back in the Vernon area, she looked for and found work, and she looked after the farm and the horse-related chores, as well as doing inside chores. Friends of the plaintiff and friends of the plaintiff's daughter also provided assistance with such things as chopping wood, fence repairs and the like. In addition to providing physical assistance to the plaintiff, the plaintiff's daughter was using her own money to care for the horses by paying for hay, grain, salt and other necessities.

[19] The plaintiff's daughter remained in Lavington until 2006 when she moved to Alberta, taking most of the plaintiff's horses with her, as the plaintiff was still unable to care for her horses. While the plaintiff's daughter was at home, she had ample opportunity to observe the plaintiff. She testified that the plaintiff complained of dizziness, which prevented her from helping with the horses or doing much else around the farm. She said the plaintiff, formerly a very hard worker, had "zero ambition to do anything". It was difficult to motivate the plaintiff to even go to her own mother's house for dinner and she would not otherwise socialize.

[20] The plaintiff's daughter testified that the plaintiff was depressed, cried a lot, and was a difficult person to live with between 2004 and 2006. She also noted that

the plaintiff had lost a significant amount of weight. The plaintiff had been very muscular and very strong before the accident. However, after the accident, the plaintiff's daughter says that the plaintiff had lost a lot of muscle and became "way too skinny".

[21] By the time the plaintiff's daughter left for Alberta in 2006, the farm was run down. The plaintiff had been unable to do any of her usual work on the property, and even with occasional assistance, the plaintiff's daughter could not, in addition to her paid employment, keep up the farm maintenance, in addition to caring for the horses, in the way that the plaintiff had been able to prior to the accident.

[22] A few horses were left on the farm with the plaintiff when the plaintiff's daughter went to Alberta, but most of the horses were taken to Alberta by the plaintiff's daughter. Two of the horses taken to Alberta had been sold by the time of trial, and one had died as a result of a horse van accident. Most of the other horses are for sale and have been for a significant period of time but have not yet sold. The plaintiff's daughter finds that the horses are too much for her, but she took them because she was unable to say no to her mother. Her mother needed help as she was not able the care for the horses from the time of the accident and up to the time that she left the family property in 2006. While the plaintiff's daughter has had the horses and while she lived on the farm from approximately 2004 to 2006, the plaintiff's daughter has paid for the upkeep of the horses. The plaintiff has told her that she will be reimbursed, although they haven't discussed a specific dollar amount for horse care.

[23] The plaintiff testified that her symptoms of pain, dizziness, headaches, arm weakness, occasional leg weakness and exhaustion were at their worst in approximately 2005. From 2005 to 2008, she had some gradual improvement. She was able to do some limited chores as long as she took breaks. Her mother and others continue to provide her with inside and outside assistance. Although she was unable to care for all 8 acres of the farm, she is able to take care of the yard and she is able to provide reasonable care for the few animals she has left on the farm.

[24] She has not done any capital improvements on the farm, but she has been able to do a little painting. Between the middle of 2008 and the date of trial, the plaintiff's difficulties with dizziness worsened. She has also had activity related increases in pain, headaches a couple of times a week, and migraine types of headaches approximately twice a year, as well as continuing exhaustion. Overall, she says that she has definitely improved now over the year following the accident. Although she has more pain from time to time, she attributes that to the fact that she is doing more. She has also learned to ignore things around her, including the fact that her horses are not with her, and her depression and anxiety have lessened.

Expert Evidence

[25] In 2008, the plaintiff saw Dr. Shuckett, a rheumatologist, at the request of her counsel. Dr. Shuckett's opinion is that the plaintiff suffers from:

1. Cervicogenic headaches and migraines headaches

2. Neck pain and shoulder girdle pain likely related to soft-tissue injury...

3. Mechanical low back pain likely reflecting connective tissue musculoligamentous injury

4. Vasovagal type fainting episodes likely related to postural hypotension and deconditioning and low body weight since the subject MVA

...

5. Possible chronic pain syndrome with disability and depression, although to some degree this likely antedated the subject MVA

[1] Dr. Shuckett is of the opinion that the plaintiff no longer has fibromyalgia syndrome, or at least did not when she saw the plaintiff in 2008. Quoting further from Dr. Shuckett's report, she says:

> [The plaintiff] has been in two prior MVAs in 1991 and she never quite got back to her prior level of function after those MVAs. She never got back to her night time job bartending and she had to gear down her horse training to

> some degree but she adapted and created a modified but full life for herself. She looked after and trained about 20 horses. In 2001 she finally got on provincial disability. She had some episodic neck and headache pain and she had been told she had fibromyalgia syndrome after that. She ended up on disability in 2001, which is around two years or so before the subject MVA. She does not have FMS today. She has been far more compromised in her activities of daily living since the 2003 MVA and she has had to go down to looking after seven horses rather than over 20 horses since this subject MVA. She had gone on LTD two years before the subject MVA. However her quality of life and her ability to carry out activities is quite compromised since the subject MVA. The near fainting spells and the pain with increased activity leave her quite fearful since the 2003 MVA. The pre existing history before the 2003 MVA is duly noted but FMS is not even an issue at the present time from my exam today. It seemed that she learned how to cope with her pre existing conditions only to decompensate and lose ground after the 2003 MVA. If not for the 2003 MVA, I believe that she would have been able to continue looking after more than 20 horses. Her level of function sounds considerably compromised since the 2003 MVA...I do not feel she will improve significantly from her current status and she is likely to continue to be at least this impaired for the long term future. If not for the MVA she likely would be able to maintain the activity she had maintained prior to the subject MVA...Now that 4.5 years have ensued since the subject MVA, I feel there is a high chance that she will not improve from her current status.

[26] In terms of treatment, Dr. Shuckett said that she did not consider that medications are advisable, and some of them could serve to worsen the lightheaded spells. She recommended that the plaintiff continue to control her activities and continue doing the exercises which sounded appropriate. It was her opinion that the plaintiff's main course should be to adjust and pace her activities.

[27] The defendant obtained expert reports from a physiatrist, Dr. Apel, and from a psychiatrist, Dr. Davis. Dr. Apel's diagnostic conclusions were:

> At present the patient has no clinical features consistent with the criteria necessary for diagnosis of fibromyalgia. Neither is her clinical picture consistent with the criteria put forward...of chronic fatigue syndrome. Possibly she has some idiopathic fatigue. The clinical picture was most consistent with:
>
> 1. Myofascial pain in the upper quadrants, including upper Trapezius and Levator scapula muscles.
> 2. Myofascial pain of the Gluteus medius and Tensor fascia lata with secondary sacroiliac ligamental "dysfunction", worse on the right side.
> 3. Significant deconditioning and poor fitness.

4. *Significant psychosomatic complaints.*
5. There was clinical presentation of possible postural hypotension. Such is likely related to deconditioning and decreased fitness, though the patient has not yet been evaluated for low blood pressure or other clinical or metabolic conditions, potentially causing such.

[28] Dr. Apel recommended active rehabilitation through stretching, counselling by a psychiatrist or psychologist, medication for headaches with a migrainous component and, if necessary, active release therapy, trigger point injections or intramuscular stimulation.

[29] In terms of prognosis, Dr. Apel said that "...prognosis depends on the patient's compliance with a well-rounded exercise program and further to be established psychosomatic conditions by appropriately trained health care professionals as described".

[30] As for causation, Dr. Apel opined:

> I found no clinical symptoms or signs suggesting that the motor vehicle accident in question caused any significant or permanent damage as visible at present and causationally or materially related to the accident.
>
> Giving the patient the benefit of the doubt and evaluating the circumstances of the accident it is quite likely that Ms. Dalziel had her symptoms temporarily aggravated by impact. Nevertheless, these difficulties appeared at present to be fairly similar to the state she was in prior to this collision since at least 1992. The only difference is the significance of psychosomatic changes, again noted in the past including more formal psychiatric treatment, unfortunately not specifically reported in the chart as per diagnosis.

[31] With regard to Dr. Davis, the psychiatrist, much of his report is based on information which was not put before this court in the form of evidence and, therefore, cannot be given any weight. However, based on his administration and interpretation of the MMPI-2, I do find that there is a foundation for his opinion that the persistence and prolongation of the plaintiff's physical complaints can be at least partially ascribed to a Somatoform Disorder, with stress being converted into physical symptoms.

[32] All three of the specialists retained by the plaintiff and the defendant found the plaintiff to be pleasant and cooperative. Neither of the physiatrists found any signs of pain behaviour. Dr. Apel is of the opinion that the plaintiff is not malingering. Dr. Davis said that, on one occasion, the plaintiff stood and stretched, which he called pain behaviour, but he did not report any other issues with respect to the plaintiff's forthrightness or reliability, and specifically he did not suggest any inconsistencies or any invalidities on any of the scales of her MMPI 2 test results.

[33] In addition to the medical reports which are in evidence, the plaintiff tendered a functional capacity evaluation and a cost of care report, both authored by Alison Henry. During the functional capacity evaluation, the plaintiff gave full and consistent effort. Ms. Henry's conclusion with respect to the functional capacity evaluation was as follows, and this relates to employability:

> Feasibility is concerned with those basic factors which affect a worker's acceptability to an employer in the labour market. Feasibility depends on meeting minimal employability standards as outlined by the Ministry of Skills, Training and Labour...Competitive employment also is dependent, to a large extent, on collective agreements made between the employer and employee. These productivity and work place safety issues will be addressed by this evaluator in determining whether Ms. Dalziel is competitively employable.
>
> Productivity standards include having the ability to stand or sit for 2-hour periods before rest allotment. The employee must also attend the work place, generally, for 8 hours a day, 5 days a week. The employee must demonstrate a physical competence to perform basic work tasks to the quantity and quality as stipulated by the employer.
>
> Workplace safety is concerned with the employee's ability to perform the job tasks within the work environment in a manner which is safe to himself and fellow workers.
>
> Ms. Dalziel has physical limits that affect her ability to perform some work activities and decreased activity tolerance and needs to select occupations that are within her physical capacity and/or insure that there is accommodation for her limitations. Therefore, she is not considered to be competitively employable.
>
> Based on her performance, Ms. Dalziel has the physical capacity to be considered employable but in a restricted range of occupations. That is, she is probably capable of working part time in limited or light strength occupations where she is able to alternate between sitting and standing, most work is performed in her mid range, so that she does not have to reach or bend to any significant extent and where job demands do not require fast speed of work in performing fine work. She would be best suited to work

where there were a variety of activities and varied physical demands and where she had the autonomy to change activities or postures as needed.

Conclusion

[34] Based on all of the evidence that I heard, including the expert evidence, I am satisfied that the plaintiff was injured in the motor vehicle accident of August 25, 2003. The defendant is liable for injuries that he caused or contributed to. The general test for causation is the "but for" test. The plaintiff must show the injury or damage would not have occurred but for the defendant's negligence. Where a plaintiff's injuries are unexpectedly severe due to a plaintiff's pre-existing condition, the defendant is still liable (the "thin skull rule"), unless the plaintiff would have experienced any debilitating effects of the pre-existing condition even if the accident had not occurred, in which case the plaintiff will only be entitled to the additional damage, but not the pre-existing damages, which is referred to as the "crumbling skull rule" (*Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-14, 34-35).

[35] In essence, the purpose of a damage award should be to restore a plaintiff to her original pre-accident position, in other words, as if the accident had not occurred. In this case, the plaintiff was clearly suffering from some ongoing disability at the time of the accident. However, she had learned to accommodate and work around her limitations. From time to time, her symptoms would be exacerbated to the point that she was able to do very little for varying periods of time. After the accident, the plaintiff immediately suffered, and ever since the accident has suffered, from neck pain, shoulder pain, arm numbness, headaches and dizziness. She has had periods of depression and anxiety. Functionally, there has been an overall and very significant worsening of the plaintiff's disability, and I am satisfied that that would not have occurred but for the defendant's negligence in driving his vehicle into the rear of the plaintiff's vehicle.

[36] While I accept that there may well be a psychological component to the plaintiff's ongoing pain, as suggested by Drs. Apel and Davis, that does not mean that the pain and disabling symptoms experienced by the plaintiff are any less real to the plaintiff than if an objective cause for the pain and other symptoms could be

found on an x-ray or an MRI. I reject Dr. Apel's opinion that all of the plaintiff's problems were caused by or related to the 1991 accidents. I find that the plaintiff has pain and is more disabled than she was before the accident, and I find that the plaintiff is not in any way deliberately or consciously feigning, distorting or exaggerating her complaints.

Non-Pecuniary Damages

[37] The plaintiff has suffered significant loss of enjoyment of life. While she had limitations before the accident, she has had a significant deterioration in her functionality. She used to be very social, active and outgoing when she was able to manage her symptoms. She has had a life-long passion for horses, and since the accident, she has been unable to properly care for all of her horses and has had to reduce her day-to-day interaction to just a few of the many horses she owns. She has been unable to continue her farming activities to her previous level or to continue to maintain and build her farm, which obviously causes her great distress. She has more pain, headaches and fatigue than she had before the accident, and I accept that she has dizziness associated with deconditioning related to the accident. She has also had periods of depression and anxiety.

[38] Taking all of those factors into account and having regard to the case authorities, which were provided to me by both counsel, I award the plaintiff non-pecuniary damages of $90,000.

Past Wage Loss

[39] While the plaintiff was on social assistance disability benefits before the accident, and has continued to be in receipt of those benefits since the accident, she also says that she previously earned income associated with the breeding, training, boarding and selling of horses and for miscellaneous other jobs as I listed earlier. Her counsel submits that I ought to find that she earned $10,000 to $15,000 per year over and above her disability benefits before the accident, and that she should be awarded wage loss based on that amount for each year since the accident occurred.

[40] The defendant says that the plaintiff can only demonstrate income, on average, of approximately $6,700 per year from her horse business over approximately a 12-year period, which the defendant submits was not even enough to cover the cost of the horses. The defendant also submits that the disability benefits received by the plaintiff should be fully deductible from any past income loss, so that unless I am satisfied that the plaintiff's loss of income, if any, exceeds the amount of the benefits she has received, which have been in the range of $10,000 per year, then the plaintiff should receive no award for past loss of income.

[41] I will deal first with the issue of deductibility. It is clearly the law in this province that social assistance benefits as a form of wage replacement are deductible from any award of past loss of wages which the benefits replaced (*M.B v. British Columbia*, [2003] 2 S.C.R. 477 at para. 28). However, in this case, the plaintiff was in receipt of benefits before the accident and she was continuing to be, and has continued to be, in receipt of the exact same benefits after the accident. The wage loss claim here relates to income she earned over and above the support she received from the government in the form of disability benefits. In other words, the disability benefits that the plaintiff has received since the accident do not replace the income that she could have earned from her horse business and her miscellaneous activities if the accident had not occurred. Consequently, on the unique facts of this case, I find that the disability benefits received by the plaintiff since the motor vehicle accident are not deductible from any past wage or past loss of income claim.

[42] I will also address the issue of the plaintiff's record keeping and non-reporting of income, both of which have been raised by the defendant. The plaintiff's record keeping, at least to the extent that it was disclosed during the trial, was clearly inadequate. She was able to summarize some of her income from breeding, training, boarding and selling horses, but she has provided no records with regard to her income generated from hauling horses and hay, performing fire rescue, or working at the race track. She has also provided no basis on which I could determine the kind of expenses she incurred in order to earn that income or to run her horse operations.

[43] Based on all of the evidence I heard, however, I am satisfied that the plaintiff did earn some income from her various activities. I accept that after all of the deductions that she would have no doubt been entitled to claim against that income, including upkeep of the farm and capital improvements to it, as well as the care of the horses, she likely would not have had a "net profit" on which to pay taxes if she had declared all of her income and expenses. However, she did receive a benefit from her income-generating activities in that she was able to maintain her horses and maintain and improve her property without having to use her disability benefits, which she required to support herself and, in earlier years, her daughter.

[44] The plaintiff is not entitled to an award based on the income she could have earned without a deduction for the out-of-pocket direct expenses she would have incurred to earn the income. For example, in order for the plaintiff to earn income from ponying at the race track, she had to incur the expense of hauling her horses to and from the track. That is what I mean by a direct expense. On the other hand, some of the expenses, such as feeding the horses, providing vet and farrier services to the horses, and keeping up the farm with respect to such matters as fencing, continued to be incurred after the accident, even though the plaintiff was unable to earn income. I will pause here to note that the plaintiff claims past wage loss based on her full estimated income, which she put back into her business in the way of paying for horse care, et cetera, but she also claims the cost of boarding many of her horses with her daughter and a couple of her horses with a friend. To award both special damages for horse care, such as feed, vet and farrier, and a gross income loss which before the accident was used to pay for horse care, such as feed, vet, and farrier would be double counting.

[45] The evidence at the trial does not permit me to make an accurate calculation of past loss of income. However, I am satisfied that the plaintiff lost income as a result of this accident and has continued to incur expenses, including obligations to pay, when she is able, for boarding, that would otherwise have been paid for by the income she would have earned. Consequently, I am satisfied that she has thereby suffered a loss for which she should be compensated. That loss cannot be

mathematically calculated. Consequently, I assess the plaintiff's loss, including consideration of out-of-pocket expenses for horse care such as feed, vet and farrier to be $20,000. The defendant's disability benefits, as I said earlier, are not deductible from that award.

Future Loss of Income/Loss of Capacity to Earn Income

[46] The plaintiff says that she has suffered a loss of capacity to earn income. The defendant says that the plaintiff, being disabled and in receipt of disability benefits before the accident, was unlikely to ever return to work and consequently she cannot demonstrate a loss of earning capacity.

[47] If a plaintiff suffers a loss of capacity to earn income as a result of the defendant's negligence, then the defendant is liable for the loss of that capital asset. As the Court of Appeal said in *Reilly v. Lynn*, 2003 BCCA 49 at para. 101:

> The relevant principals may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood...A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring...The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition...However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered...Moreover, the task of the Court is to assess the losses, not to calculate them mathematically...Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong...[case citations omitted]

[48] Had the 2003 motor vehicle accident not occurred, I find that the plaintiff could, and would, have continued to breed, train and sell horses and to work at occasional side jobs to assist in paying for the expenses of the horses and the farm. It is possible that her horse business would have started to show better earnings as the horses she had bred on the farm in the several years leading up to the accident became fully trained and, therefore, marketable at a better price. However, given that the plaintiff had started her farm 11 years before the accident and had yet to

turn a profit, I think the likelihood of the plaintiff's horse farm eventually turning a profit to be relatively low.

[49] I find that the plaintiff has suffered some further impairment, beyond the impairment she already had at the time of the accident, in her capacity to earn income. On the basis of my reasons earlier with respect to the plaintiff's past side jobs and her use of revenue to pay expenses, as well as a consideration of the ongoing expenses that have to be borne, whether the plaintiff is earning side income or not, and based on an assessment of the loss to the plaintiff's capital asset, albeit an impaired previous ability to earn income, I award the plaintiff $30,000 for the further impairment of her capital asset, that being her capacity to earn income.

Special Damages

[50] With reference to Exhibit 5 filed at the trial, I find that the plaintiff is entitled to special damages as follows: paid to Dr. Miller, $155.17; paid to transport horses, $1,880; and farm expenses, including delivery, snow removal, firewood and the like, $4,995. Further, I consider that the plaintiff is entitled to be paid special damages with regard to the boarding of the horses by her daughter, less of course the actual out-of-pocket expenses for such things as feed, vet and farrier, which costs I have taken into account and factored into my past wage loss assessment. Based on the evidence I heard, including from the plaintiff and her daughter, as well as many others associated with the horse industry, I will assess the special damages that are related to horse care provided by the daughter at $10,000. I make no award of special damages with regard to horse boarding provided by Mr. Wilson, as the plaintiff and Mr. Wilson were partners in horse ownership from time to time and had previously, and over a number of years, cared for each other's horses without expectation of pay. Consequently, the total special damages I award are $17,030.17.

Cost of Future Care

[51] The plaintiff's cost of care expert, Ms. Henry, has provided a list of services and equipment which are said to be necessary as a result of the accident. The defendant says that most of the items were required by the plaintiff even before the

accident or are not medically necessary. I have reviewed the cost of care report, as well as considered all of the medical evidence put before me. I conclude that as a result of the accident, the plaintiff requires an exercise program and some counselling. I also accept that she needs more indoor and outdoor help in maintaining her residence and farm than she required before the accident, although she did have some help from time to time before the accident. She is also, as a result of the accident, in need of someone to supply her with firewood as she can no longer collect her own, and I accept that she has a slightly increased cost per year for hay, that is, per year per horse for hay, compared to her cost when she was able to perform most of the physical labour herself. I do not consider a horse trainer to be necessary and the plaintiff required a farrier before the accident. The equipment which has been costed out by the expert, namely, the electric bed, the recliner chair and the tractor and attachment are all things the plaintiff had, and presumably needed, before the subject motor vehicle accident. Consequently, no award can be made for those items. Taking into account those items which I find are properly compensable, adjusting the cost of services downward, given the plaintiff's pre-existing need for periodic assistance and the apparent overstatement of the costs of firewood, and bearing in mind the multipliers provided by PETA Consultants, and bearing in mind that even if the accident had not occurred, as the plaintiff aged, she may well not have continued to run a horse farm or gather her own firewood.
I assess the plaintiff's cost of future care at $20,000.

Summary

[52] The damages the defendant must pay to the plaintiff are as follows:

Description of Damage	Amount of Award
Non-pecuniary	$90,000.00
Past Wage Loss	20,000.00
Loss of Capacity to Earn Income	30,000.00
Special Damages	17,030.17
Future Cost of Care	20,000.00

[53] Unless there are matters of which I am not aware, the plaintiff will have her costs of the action.

Beames J.