Alberta Court of Queen's Bench
Acheson v. Dory
Date: 1993-02-26

B. Scott and P. MacNaughton, for plaintiff.

W. Benkendorf and B. Stratton, for defendant.

(Doc. Edmonton 8803-05986)

February 26, 1993.

[1] PICARD J.:– The plaintiff was riding a horse when she was bitten by another horse owned and ridden by the defendant. Her claim is founded both on the doctrine of scienter and in negligence. Liability and damages are in issue.

ISSUES

1) Is the defendant liable on the basis of scienter?

2) Was the defendant negligent?

3) Did the plaintiff accept the risks of the activity, that is to say does the doctrine of volenti non fit injuria apply?

4) Was the plaintiff contributorily negligent?

FACTS

1) *Background*

[2] The plaintiff and the defendant first met during the winter of 1985-86. In the spring of 1986 the defendant assisted the plaintiff by training her horse. Because of this the plaintiff spent some time around the defendant and at the place where he boarded his horses. The defendant was an experienced horseman while, to his knowledge, the plaintiff was a novice.

[3] Early in July of 1986 the plaintiff expressed an interest in purchasing a gelding named "Slim" owned by the defendant's son. One day the plaintiff and defendant rode together. The plaintiff was mounted on "Slim" while the defendant rode his stallion, a registered quarter-horse named "Doctor Barit", but referred to as "the Bear". They left from the Pivcovski property where the defendant boarded his horses and rode into the City of Edmonton to a townhouse where the defendant lived, a journey of three miles each way. At some point early in the ride the plaintiff allowed her horse, the gelding, to get close to the stallion. The defendant was alerted by the stallion's ears going back and warned the plaintiff to stay back. The defendant said he warned the plaintiff not to get too close before the ride began while the plaintiff says this was the first warning. Either way, it is clear that

the plaintiff received a warning from the defendant. She said she was warned that the stallion might kick and so she rode down the other side of the road from the defendant. The defendant agreed with plaintiff's counsel that he never mentioned the possibility that the stallion might bite. The defendant did say that he told the plaintiff to stay 25 to 30 feet away. It seems to me to be unlikely that the defendant would have been so specific but there is no doubt that during the ride that was the approximate distance kept by the plaintiff.

[4] An incident occurred while the parties rested in front of the defendant's residence. The defendant's wife and his son allege that the plaintiff began to lead the gelding in the direction of the stallion. The defendant's wife and son immediately warned the plaintiff not to do so. The plaintiff denies this ever happened. I found the defendant's wife to be a very credible witness and accept her evidence. I find that she did warn the plaintiff, albeit not quite as dramatically as the defendant would have me believe. Again, it is clear that the plaintiff was warned about the danger of the gelding getting too close to the stallion. The parties returned to the Pivcovski property without incident.

2) *The Accident*

[5] On July 10, 1986 the plaintiff and defendant set out to do the same ride that they had done a few days earlier. The defendant says he again warned the plaintiff to keep her distance. Whether he did or did not, it was a concern of the plaintiff and she testified that once again during the ride into the city she maintained her distance by riding across the road from the stallion. About a block away from the townhouse the stallion shied at a motorbike covered with a tarpaulin requiring the defendant to "straighten him out".

[6] Finally the parties were in the parking lot and at a point just in front of a curb at the head of the parking lanes, the defendant testified that he had stopped the stallion because some women and children were admiring the horse and he was waiting for them to move. The plaintiff said the stallion was resisting the attempts by the defendant to get him to go over the curb, but the defendant denies this. At some point the plaintiff stopped the gelding. She testified that she believed she saw the defendant having a problem with the stallion because she saw the stallion rearing up so she started to turn the gelding to her left and away from the stallion. The defendant said he had no indication of a problem from the stallion. Both agree that the stallion suddenly wheeled around, lunged toward the gelding and closed his mouth around the right leg of the plaintiff near the knee. She suffered a serious injury.

[7] How far away was the plaintiff when the stallion lunged at her? The following evidence is relevant on this important point. A parking stall was measured to be sixteen and a half feet long. This evidence was provided by the defendant's son and was not challenged by the plaintiff. The defendant's expert on horses testified that a quarter-horse is generally about eight feet long. Deducting the length of the horse from the length of the stall results in the conclusion that the plaintiff was about eight feet behind the stallion. The parties agree that there were two empty parking stalls and the stallion was in the front of the one to the plaintiff's right while she had the gelding at the end of the other stall and on the far left side. The plaintiff was on the diagonal from the defendant. It is difficult to estimate this distance. The uncontroverted evidence of the defendant's son was that the stalls were each four and one-half feet wide. This means that the distance was approximately nine feet less the width of the stallion assuming the stallion was to the far right side of the stall he was in.

[8] Perhaps all that can be derived from this evidence is that the plaintiff was roughly eight feet behind and as much as six feet to the left and on the diagonal from the defendant. The plaintiff said she was four or five yards behind, or at least at a distance where she felt there was no danger of being kicked. The defendant testified that he had no idea where the plaintiff was just before the accident occurred, but "hoped she was a safe distance."

3) *The Nature of Stallions*

[9] Each party called an expert on the care, handling and behaviour of horses, especially stallions. There was no significant difference in their evidence. I conclude from their evidence that a stallion is aggressive and unpredictable. He likes to dominate his territory and reacts quickly to a perceived intruder. His primary means of attack is to bite. Although he may kick, I note that the expert called by the defendant said that a stallion is generally not a kicker. The experts agreed that where a stallion is kept apart from geldings, as was the stallion in this case, he will dislike geldings. The expert for the defendant said that stallions have a natural hatred for geldings. The experts said that the rider of a stallion must be attuned to the horse and in control. They agreed that the rider of a stallion should warn other riders of the risk of being bitten or being kicked and to maintain a safe distance. The expert for the defendant put this distance at about twenty feet based on her reasoning that this would give the rider enough time to regain control of a stallion who reacted to a challenge. Both agreed that the situation the stallion is in during a horse show is different

than that when he is on a ride. As well, both agreed that instinctive reactions in a stallion may override training.

[10] The expert for the plaintiff recommended the use of a shank bit and possibly a martingale and even a cavesson on a stallion. A martingale keeps the horse from raising his head too high which makes the bit less effective, while a cavesson goes around the mouth, aids the operation of the bit and may discourage biting. The expert for the defendant felt that a snaffle bit, a less severe bit, was adequate and a cavesson could not stop biting. The stallion in this case was being ridden with a snaffle bit, no martingale and no cavesson. However, I find that nothing turns on this point.

4) "*The Bear*"

[11] The stallion who bit the plaintiff was a well trained horse who had been shown at horse shows and won ribbons. The defendant had owned and worked with him regularly and daily for two years before the accident and found him to be gentle and affectionate with people. He had taken the horse to a trainer for a three-month period and she testified that "The Bear" was "good for a stallion". The horse had once bitten, or as the defendant said "nipped," a gelding, but it had never bitten a person. The defendant posted a sign over his stall saying the horse would bite. He said this was to discourage feeding of the horse.

[12] The defendant knew well the attributes of a stallion. He testified: "A stallion is not predictable. You can never be too safe with a stallion." A number of witnesses testified that he warned them repeatedly to keep a safe distance from his stallion. A friend who frequently rode with the defendant testified that if she got closer than eight to ten feet from the stallion the defendant would warn her away. The defendant testified that he knew that his stallion would bite a gelding that got too close. He also said that was why he warned others to stay twenty-five to thirty feet away. I find that the defendant was sensitive to the risk of the stallion biting a gelding and I find that he regularly warned others to stay a distance from the stallion. I do not believe that the defendant included a precise distance in his warning. I do believe that he generally kept watch and that he read the signs coming from his stallion and warned anyone who came too close, especially when the stallion was reacting. Indeed, he testified to exactly this taking place on the first ride the parties had together. The defendant admitted that he did not warn the plaintiff of the risk of the stallion biting or attempting to bite.

5) *The Sign and Note*

[13] I find that there was a sign placed on the Pivcovski property by the owner and the defendant. It read "RIDE AT YOUR OWN RISK. Not responsible for loss or injury." I find that the plaintiff was aware of that sign or an earlier one to the same effect.

[14] A handwritten note signed by the parties was put in evidence. It referred to a different property and said that the defendant would not be responsible for any loss or injury to anyone riding while in the pasture or roadway. The plaintiff signed, agreeing to those conditions. I shall examine the legal consequences of the sign and note later.

LAW

[15] The plaintiff submits that the defendant is liable on the basis of scienter, or alternately, negligence. In order to prove scienter, the plaintiff must show that the stallion had mischievous or vicious propensities, and that these were known to the defendant.

[16] Scienter liability is strict liability. Finding liability without fault is becoming the exception in tort law. Professor Klar in his text *Tort Law* (1991), said at pp. 391-92:

> Strict liability, as a basis of liability, is relatively insignificant in contemporary tort law. It is clearly somewhat at odds with the values and objectives of fault-based compensation to hold a person liable for faultless behaviour. Different goals and values, other than the traditional ones associated with tort law, such as deterrence, education, and the punishment of wrongdoers, the creation of acceptable standards of conduct, and the assertion of the moral principle of the accountability of wrongdoers, must be advanced in support of strict liability …
>
> There has been little room, and less need, for the development of strict liability torts. Most accidentally caused injuries which merit compensation have been comfortably encompassed by the welcoming arms of negligence law.

[17] It is reasonable and appropriate that in 1992 a claim, such as that advanced by the plaintiff, be resolved within the more modern and flexible parameters of negligence law.

[18] I shall determine liability on the basis of the plaintiff's claim that the defendant was negligent. In order to prove negligence the plaintiff must prove on a balance of probabilities that the defendant owed her a duty of care, that he breached the standard of care of a reasonable person in the circumstances and that the result of the breach was that she suffered an injury which was reasonably foreseeable to the defendant.

[19] There is no doubt that negligence can be a basis for liability where the injury suffered was caused by an animal owned and under the control of the defendant as was the case here. As Lord Atkin said in *Fardon v. Harcourt-Rivington* (1932), 48 T.L.R. 215 at 217 (H.L.):

> … quite apart from the liability imposed upon the owner of animals or the person having control of them by reason of knowledge of their propensities, there is the ordinary duty of a person to take care either that his animal or his chattel is not put to such a use as is likely to injure his neighbour.

[20] See also *Caine Fur Farms Ltd. v. Kokolsky*, [1963] S.C.R. 315 [45 W.W.R. 86]; *Draper v. Hodder*, [1972] 2 Q.B. 556 (C.A.).

[21] Such a negligence action was the issue in the *Draper v. Hodder* case. The words of the English law lords in the case have been often cited in Canadian judgements. See *Bates* (*Guardian of*) *v. Horkoff* (1991), 84 Alta. L.R. (2d) 236 (Q.B.); *Sgro v. Verbeek* (1980), 28 O.R. (2d) 712 (H.C.); *Gill v. MacDonald* (1977), 2 C.C.L.T. 249 (P.E.I.S.C).

[22] In *Draper v. Hodder* Davies L.J. said at p. 566;

> … certain modern authorities show clearly that an owner or keeper of an animal may, quite apart from the scienter rule, be liable for damage done by that animal if the owner or keeper puts it or allows it to be in such a position that it is reasonably foreseeable that damage may result.

[23] That would seem to say it all and is consistent with the basic principles of negligence law stated earlier. However, the learned law lord refers to two cases which seem to place qualifications on the application of the principles of negligence law to cases involving damage done by animals. At p. 567 of the *Draper* case he quotes Pearson L.J. in the case of *Ellis v. Johnstone*, [1963] 2 Q.B. 8 at 29-30 (C.A.):

> For the action of negligence, it is sufficient if the defendant knew or ought to have known of the existence of the danger, which does not necessarily arise from a vicious propensity of the animal, *although perhaps some special propensity is required.* (emphasis supplied)

[24] Davies L.J. at p. 567 of *Draper* also cites Lord du Parcq in *Searle v. Wallbank*, [1947] A.C. 341 at 360 (H.L.):

> Nevertheless, Lord Atkin's proposition [see above] will be misunderstood if it is not read as subject to two qualifications: first, that where no such special circumstances exist negligence cannot be established merely by proof that a defendant has failed to provide against the possibility that a tame animal of mild disposition will do some dangerous act contrary to its ordinary nature, and, secondly, that even if a defendant's omission to control or secure an animal is negligent *nothing done by the animal which is contrary to its ordinary nature can be regarded*, *in the absence of special circumstances*, *as being directly caused by such negligence."* (Emphasis and commentary supplied)

[25] In an attempt to explain these qualifications or gloss on the application of negligence criteria Davies L.J. says at p. 567:

> These authorities leave no doubt that an owner or keeper of a tame animal may be liable in negligence for damage done by the animal, quite apart from any liability under the scienter rule. *But what perhaps is not entirely clear in this connection is what is meant by "special propensity"* (*per Pearson L.J.*) *or "special circumstances"*

(*per Lord du Parcq*). It is to be supposed that the answer to that question must depend on the particular facts of each individual case … [Emphasis added.]

[26] In summary, while the principles of negligence apply there seems to be a requirement that a special propensity or special circumstance be found. It is difficult to see the justification for this restriction although its source is likely the requirements of the old scienter rule. Perhaps this is an example of what Professor Glanville Williams refers to at p. 344 in *Liability for Animals* as the "contagion of scienter."

[27] Considering the wide range of situations which have been successfully resolved within the "welcome arms" of the negligence action, it would seem appropriate that these restrictions be critically reviewed. It may be that they are merely an example of one of the means the courts used to restrict liability prior to the more modern approach of controlling liability through the use of remoteness or proximate cause.

[28] As a trial judge I shall proceed on the same basis as my colleagues in Canada and while applying the principles of negligence I shall assume that I must find in the case before me those "special circumstances" or a "special propensity".

ANALYSIS

1) *Negligence*

[29] Applying the requirements of a negligence action to the facts as I have found and stated them it is clear that the defendant owed a duty of care to the plaintiff. They were riding together. He owned and knew both horses and was an expert. She was a novice and he knew it. He owed a duty to her to conduct himself as a reasonable person in the circumstances, i.e., to meet the standard of care required of him in the circumstances.

[30] What was the appropriate standard of care? It is construed by reviewing the defendant's attributes, those of the person to whom he owed a duty and the circumstances. As has already been mentioned, the defendant was an expert horseman and the plaintiff was, to his knowledge, a novice. She had been told by him that the stallion might kick and she ought to keep her distance. She did keep a distance of the width of a road until some point in the parking lot. He knew the importance of the gelding being kept at a distance of 20 to 25 feet from the stallion. He knew that stallions were always unpredictable and aggressive and they had a propensity to bite. He knew that the stallion he was riding had previously bitten a gelding. He knew that the stallion he was riding hated geldings. He knew that within the city there were a number of distractions possible, including the presence of other people.

[31] I find that the risk which was the result of the activity of the plaintiff riding a gelding and the defendant riding a stallion together was that the gelding would get close enough that the stallion would attempt to bite the gelding or a person on it. I find that the defendant did not warn the plaintiff of the risk of biting. If he warned of a specific risk at all it was the risk of being kicked. I find that he did warn her to keep a distance away, but did not give her a precise measure. He knew that the risk was that the stallion might react to the gelding if it came too close and that reaction would probably be to bite and that it could bite a person.

[32] A reasonable person in those circumstances would take such measures as necessary to be certain that the gelding and stallion did not get close enough for the stallion to react by biting. To put it another way, the reasonable person would assure that he had the stallion far enough away from the gelding so that there was the space to bring the stallion under control if he reacted to a situation such as the presence of the gelding.

[33] What did the defendant here do? He did watch the distance between the two horses until the parties got into the parking lot. Certainly at the time he had stopped the stallion, by his own admission he did not know where the gelding was. At some point he was distracted by the people interested in the stallion. He may well have been so distracted that he did not notice the reaction of the stallion to the approach of the gelding. He said he noticed no reaction by the stallion and yet according to the expert evidence the horse always communicates in such situations and the rider must be attuned to that and ready to react to the unpredictable nature of a stallion in particular.

[34] What are the "special circumstances" or the "special propensity" in these facts? The marked difference between the parties in knowledge and ability with respect to horses and the fact that the plaintiff depended on the defendant and he knew it. Also, the well-known propensity of stallions to bite which the defendant was aware of. Lastly, the defendant knew that his stallion hated geldings and had bitten a gelding in the past. I find that these facts satisfy the requirement.

[35] I find that the defendant breached the standard of care required of him in the circumstances.

[36] The plaintiff suffered damages as a result of the horse biting her and this was the very action by the horse that was reasonably foreseeable according to the evidence of the experts.

[37] The defendant was negligent and is liable for the loss suffered by the plaintiff.

2) *Defences*

a) *Volenti non fit injuria*

[38] The defendant raises two defences: *volenti non fit injuria* and *contributory negligence.* If applied, the defence of volenti completely exonerates the defendant. The defence has been described by Professor Klar in his book *Tort Law* as follows (at p. 317):

> The defence as it relates to an action for negligence arises when there is an agreement between two or more parties that they will participate in an activity which involves a risk of injury, and will give up their right to sue in the event that one of these risks eventuates. The agreement, whether made expressly by words, or implicitly by conduct, is entered into before the activity commences. [footnotes omitted]

Professor Klar cites the words of Estey J. in *Dubé v. Labar* (1986), 36 C.C.L.T. 105 at 114 [[1986] 3 W.W.R. 750] (S.C.C.):

> Thus, volenti will arise only where the circumstances are such that it is clear that the plaintiff, knowing of the virtually certain risk of harm, in essence bargained away his right to sue for injuries incurred as a result of any negligence on the defendant's part. The acceptance of the risk may be express or may arise by necessary implication from the conduct of the parties, but it will arise … only where there can truly be said to be an understanding on the part of both parties that the defendant assumed no responsibility to take due care for the safety of the plaintiff, and the plaintiff did not expect him to.

[39] The defendant says that the fact that the plaintiff acknowledged seeing the sign and signing the note referred to earlier is evidence to support this defence. I totally discount the note which referred to activities on a different property than the Pivcovski property where the stallion and gelding were kept and from whence the parties commenced their ride on the day of the accident. The plaintiff did admit seeing a sign on the Pivcovski property which she remembered as saying "Ride at your Own Risk" and which may have also said "Not Responsible for Loss or Injury". I find that even if she saw a sign with those two warnings that it is not evidence of an agreement of the sort required for a finding of volenti. The plaintiff could not be said to "know of the virtually certain risk of harm" or to have "bargained away her right to sue". She was a novice and had not been informed of the main risk and the one that materialized; that the stallion would try to bite the gelding. The defence of volenti non fit injuria has no application.

[40] There has never been an allegation that there was a contract between the parties to this action, such that the warning sign could be said to have become an implied term of the agreement. This is not a case where the plaintiff has rented a horse from the defendant and suffers an injury.

b) *Contributory Negligence*

[41] The defendant also alleges that the plaintiff has been contributorily negligent. A plaintiff has a duty to herself or himself to meet the standard of a reasonable person in the circumstances. It is relevant to this issue to review certain evidence. The plaintiff knew that she was a novice. She had been warned a number of times to keep her distance from the stallion and she showed that she knew the importance of that advice because she did maintain a distance of the width of the road during the ride into the city. That advice had come from the defendant who she knew was an experienced horseman and who knew the two horses they were riding. I have found that, in fact, the plaintiff allowed the gelding to come to a point approximately eight feet behind and six feet to the side of the stallion. That this was too close is evident from what happened. The accident could have been avoided if she had kept a distance of 20 to 25 feet. On the other hand, she had in her mind a distance sufficient to prevent the occurrence of the only risk she had been alerted to; the stallion kicking. I find that a reasonable person would have been more cautious and would have stopped the gelding further back. The plaintiff was contributorily negligent. I set it at 33 1/3%.

INJURIES

[42] The plaintiff described the manner in which she was injured by the stallion. She said the horse suddenly had his teeth in her right leg above the knee. She saw her leg going back and forth. She pulled it from the horse's mouth and saw that a piece of her flesh was gone. She dismounted and collapsed. Her immediate concern was that she might never walk again.

[43] The plaintiff was treated by a number of doctors: her family doctor, Dr. Katz, monitored her recovery; a plastic surgeon, Dr. Campbell, repaired her leg; an orthopaedic surgeon, Dr. James, treated her and a specialist in rehabilitation medicine, Dr. Feldman, assessed her continuing problems. At the suggestion of these doctors she pursued a course of physiotherapy treatments. Before the accident she had taken chiropractic treatments which she continues, but these have no effect on the assessment of damages in this case.

[44] As a result of the injury, the plaintiff was in hospital for twelve days and underwent surgery twice. Upon discharge, she was in a leg cast and bandages and in a wheelchair for one month. She had considerable pain and had to take painkillers. Then she was on crutches for six months. Finally she used a leg brace on which she was very dependent for about six months. She had to have two further surgical procedures to

alleviate pain and she had difficulties with a cartilage. Throughout, she suffered pain and weakness in her knee and leg.

[45] Her condition now is stabilized. She said that she has some pain all the time although it can be slight. She has problems with cramping, pinching and a feeling that the area of the injury is cold. If she overdoes it she has problems and may have to limp to compensate, which throws her weight in a direction that causes problems in her hip. Changes in the weather affect her. She still uses her leg brace from time to time and heat therapy. She discontinued physiotherapy after three years because it gave her more pain and seemed to aggravate and not help the injury.

[46] She is left with an ugly scar in the area of the knee. She testified that she dresses so that it cannot be seen because it is noticed and that embarrasses her. However, she has made no decision on whether to undergo further surgery to improve the appearance of her leg.

[47] Before this accident the plaintiff was an energetic, active person who participated in many sports and had a physically demanding job with a bright future. She has tried to resume that lifestyle, but has found she cannot do so. She continues to ride horses and can do so for three or four hours, but says that eventually her leg gives out. She can no longer do racquet sports, ski or play softball. As for other aspects of her personal and home life, she says that she can do work in the house and yard, but there are some jobs she cannot do associated with keeping her horses. In her own words, "Most things I can do to some extent, but if I don't listen to my leg I have major pain."

[48] The accident has greatly affected her career and her future. At the time of the accident she was a second assistant manager at a McDonald's restaurant with the likelihood of becoming a manager. But even at the managerial level with McDonald's there is a requirement of physical fitness. The plaintiff returned to her post at McDonald's five months after the accident, in December of 1986, but found she was not physically able to fulfil her job and was in extreme pain trying to do so. She entered into studies to complete her high school diploma and completed it in 1988. She then obtained employment with the government as a clerk where she remained for two years. In October of 1990 she returned to the fast food industry, which is her preferred career, and eventually became the owner/operator of a franchise with Harvey's. In this position she does not have to be on her feet as much and can take breaks as she needs them. Her husband, who also works for Harvey's, can and does come in to assist her if necessary. The volume at Harvey's is

much less and therefore the work is less demanding. The plaintiff testified that a day's sales at certain McDonald's outlets would be equal to one week's sales at Harvey's.

[49] The treating doctors testified, with the exception of Dr. Campbell, whose report went in by agreement. Dr. Campbell operated on the plaintiff on the day of the accident and described her injury as a major soft tissue injury requiring surgery. Shortly afterwards further surgery was required to graft skin onto the injured area. He performed surgery on two later occasions to alleviate pain from neuromas. A neuroma was described during the trial as a knob which forms at the end of a nerve and causes pain. In June 1989 he stated that the wound was well healed although she still had pain from a small neuroma. His conclusion was that the plaintiff had a major contour deformity over the lateral and posterior aspect of her knee as a result of the soft tissue injury. He noted that this meant she had a persisting cosmetic deformity obvious unless she wore long pants. In the result he stated that the plaintiff has a permanent cosmetic disability and a very minor functional disability related to some local sensitivity in the region of the scar.

[50] Dr. James dealt with the musculoskeletal problems caused by the injury. He first saw the plaintiff in September of 1986 as a result of her complaint that her injured knee was giving way. He found a restricted range of motion in her knee and was concerned that there was an internal derangement which affects the manner in which the knee joint is tracking. He prescribed a special support called a Jones bandage. He saw her on three further occasions and found patellar crepitus or joint noises, and sensory neuritis for which he prescribed a patellar support brace, the use of a nerve stimulator and physiotherapy. At the last examination he concluded that the plaintiff had a continuing musculoskeletal disability from the persisting quadriceps weakness as a result of the soft tissue loss. He also noted a slight restriction of range of motion compared to the normal left knee. He concluded that the plaintiff had sustained a 3% whole person, permanent, partial disability. He said this was not cosmetic or sensory based and not functional, but related to the loss of muscle power in the quadriceps which affects the tracking of the kneecap or patella.

[51] Dr. Feldman saw the plaintiff in April of 1987 when she complained of pain and a decrease in her ability to be active. He concluded from testing that she was in pain from certain areas of her leg and knee and he observed irritation and swelling. He found a neuroma which was causing pain. He prescribed medication, ultra sound therapy and the excision of the neuroma. He found an improvement in November of 1987, but remained concerned about the tracking of the knee and prescribed a brace. He concluded that she had a severe injury to the knee. On cross-examination he said he believed he was able to

give evidence as to the use of the muscles and joints in horseback riding. He testified that the quadriceps in the thigh are in constant contraction which varies depending on the angulation. He was asked if the knee was involved and he said that it was, constantly, and the quadriceps respond to the movement of the knee.

[52] Dr. Katz had been the plaintiff's family doctor for six years prior to the accident. He first saw her after the accident in September of 1986. He monitored her progress, observed her and came to certain conclusions. He testified that he found her to be direct, truthful, not histrionic and not a malingerer. Dr. Katz indicated that he was sensitive to the difficulty of assessing complaints of pain by a patient, but he said that he judged the credibility of the patient and used his experience to come to his conclusions. He believed the plaintiff when she told him she was suffering pain.

[53] He said that she was diligent in attempting to rehabilitate herself and that she went to physiotherapy "religiously". He was aware of her attempts to work at McDonald's after the accident and of the pain, insomnia and depression she suffered when it became clear that she was not able to continue. His observations about her before the accident were that she was healthy, and very athletic. He had observed her on the job, before the accident, and testified to the demanding physical nature of the work and her excellent performance. His last assessment was done in April of 1992. He said the plaintiff complained of pain in her kneecap with activities and weather change and of tightness of the skin over the graft area. She told him she was using a knee brace and heat. She also complained of pain in her right hip.

[54] Dr. Katz concluded that the plaintiff suffered a diminution in the quality of her life qualitatively and quantitatively. As to the former, he pointed out the pain that she suffers when trying to do sports or other activities and as to the latter he said she is unable to work on her feet for longer than three hours and thus could never again work as she did before the accident. In his opinion she is disabled and is unable to carry on the work that she did prior to the accident.

[55] I accept the conclusions of the various doctors in describing the scope of her injury. I found the plaintiff to be a credible witness and I do not believe she is overstating her injury nor is she a malingerer. The conclusion which I draw from this evidence is that the plaintiff suffered a serious, permanent injury to her right knee from which she continues to suffer a reduction in her physical abilities and pain and because of the scarring, embarrassment. I do not believe her damages should be reduced because she has not

pursued further plastic surgery. There are risks associated with any surgical procedure and the results of plastic surgery are rarely guaranteed.

DAMAGES

[56] The plaintiff is claiming damages under a number of heads: general damages, damages for loss of housekeeping ability prior to and after trial, loss of income prior to the trial and future loss of income. There is also a claim for special damages.

a) *General Damages*

[57] I have reviewed the cases provided by counsel and found them to be of assistance. I set general damages at $40,000.

b) *Special Damages*

[58] The defendant takes no issue with the claim of the Hospital Services Commission and I award it in the amount of $4,634 with interest of $2,373.76 to January 20, 1992.

[59] Likewise, the defendant does not dispute the claim of the plaintiff for the amounts paid by her as user fees for physiotherapy and I award that sum, $388.

[60] The plaintiff claims for various bandages and braces including a custom made brace. The total is $952.90 and I award that sum.

[61] The plaintiff made 194 trips for physiotherapy and submits two figures for my consideration: $1,747.20 on the basis of $.21 per kilometre or $748.08 based on $.09 being the amount paid for witness attendance. I accept her figures and award $1,747.20.

[62] The total of special damages excluding the hospital claim and interest is $3,088.10. The plaintiff claims prejudgment interest on the special damages from the date the expenses were incurred and I award it.

c) *Loss of housekeeping ability before and after trial*

[63] The evidence relevant to this claim is that the plaintiff said she was unable to fulfil her household responsibilities until four months after the accident. During this time her husband, brother, sister and niece helped her. Her brother continued to help her until six or seven months before the trial. She gradually began to do housework and now does so, but requires assistance from her husband, which I believe she testified took about four to five hours per week. She testified that she can start work, but can only go so far before she has to stop because of her injuries. There was no evidence before me of any amount paid out for housekeeping assistance to the plaintiff.

[64] I was referred to the decision of the Saskatchewan Court of Appeal in *Fobel v. Dean*, [1991] 6 W.W.R. 408, where the court dealt with the manner of calculating an award for a loss of housekeeping ability prior to trial. Vancise J.A. writing for the majority said at p. 429:

> … it is not proper to evaluate the loss of housekeeping ability by reference to the replacement cost when the disabled person has not in fact employed that replacement labour. One must assess that loss as a loss of amenity, but in so doing the replacement cost is a relevant component or element in arriving at the dollar value of the loss of amenity. It is, in my opinion, only one element in the calculation of loss of housekeeping capacity - but an important one.

[65] The only expert evidence before me on this point was that of Dr. Jenkins, a labor economist called by the plaintiff. He calculated the cost of household assistance at $7.50 per hour for 5 hours per week from the date of the accident to trial as being $12,515 or, with prejudgment interest, $16,255. I find this is an important element in my calculation. Also relevant is the length of time she was totally and then partially incapacitated and the quantum and nature of the assistance required. I would prefer to have had more evidence before me on some of these elements. I set the damages under this head at $8,000 inclusive of prejudgment interest.

[66] As to the claim for housekeeping assistance in the future, the only evidence before me was from the plaintiff's expert, Dr. Jenkins. His calculation was based on 5 hours per week at $8.50 per hour until a date at which the plaintiff would be 81 years old. He applied a 3.5% real annual discount rate. The figure so calculated is $53,400. Adding a tax gross-up (assuming 40% taxation of the interest yield of the compensation award and a 3% future annual inflation) and applying a 5% negative contingency for premorbid disability the figure increases to $86,300. Dr. Jenkins used for his hourly rates *Alberta Pay and Benefit Rates* for homemakers. The validity of grossing-up the calculation of an award for loss of future housekeeping capacity was accepted in *Fobel v. Dean* (see p. 435).

[67] Dr. Jenkins' calculations are based on an assumption that the plaintiff would require five hours of assistance per week. The evidence on this point came from the plaintiff and her husband who testified that he now spends four to five hours working in the house and yard where he assists with the keeping of the plaintiff's horses. There are other factors which are relevant to establishing an appropriate number of hours: the specific tasks the plaintiff can no longer accomplish or only with assistance, the standard of housekeeping she has maintained and seeks to continue, the modifications she can make to allow her to achieve her standards, the number of hours she and her husband worked in her home prior to the accident and the number she now works, the number of hours she

believes she will need assistance. It would have been helpful to have had some evidence on these factors.

[68] All other of Dr. Jenkins' assumptions and calculations were tested by cross-examination and not shaken. I accept his evidence, but find the plaintiff has not proven on a balance of probabilities that she requires five hours assistance per week. I am convinced that she does and will require some assistance. On the basis that the quantum would be approximately one-half of what her partner, her husband, now works I grant damages of $43,000, or approximately one-half of what the plaintiff claimed for assistance for five hours per week.

d) *Loss of wages before and after trial*

[69] Besides the plaintiff and her husband, a number of witnesses testified as to the effect of the injuries on the wage earning capacity of the plaintiff up to the trial and in the future. Dr. Katz, the family doctor, observed the plaintiff at work at McDonald's and treated her when she tried to return. He continues to monitor her health. Mr. Bluett, a person who worked as an executive with McDonald's and with Harvey's, and who worked with the plaintiff in both organizations, testified that he believed the plaintiff would have become a manager at McDonald's by mid 1988 because she was an excellent employee who would have risen in the organization. He testified as to the benefit package at McDonald's and a number of exhibits were entered to describe them. After he became an executive with Harvey's, Mr. Bluett hired the plaintiff when she decided to return to the fast food industry in 1990. He assessed her as a very successful employee who quickly made a name for herself. He compared the nature of the work in a management position with McDonald's to that of Harvey's. He said the former was a "go-go-go" situation with rigorous physical demands, even at the management level, whereas because of the significantly lower volume at the latter the plaintiff could run her restaurant with comfort.

[70] Counsel for the defendant subjected Mr. Bluett and Dr. Jenkins to rigorous cross-examination, but their evidence stood. I accept the evidence of these witnesses and find that the plaintiff has had to modify her career and thereby reduce her wage earning capacity.

[71] Dr. Jenkins made certain assumptions based on this evidence and the exhibits. After the evidence given by Mr. Bluett it seemed that his assumptions were conservative. Dr. Jenkins then calculated the pre-trial loss of wages to be $80,090 with prejudgment interest of $28,895 for a total of $108,985. I award the plaintiff $108,985.

[72] He calculated the future loss to be $302,000. On the basis of his assumptions and comparing the plaintiff's work profile at McDonald's and Harvey's he calculated an annual earnings deficit of $9,347 increasing to $15,000 (in 1992 dollars) by 1998 and until retirement at age 65. He applied a real annual discount rate, net of inflation and economy-wide wage growth of 3%. He reduced the final calculation by 5% in balancing the risk of unemployment, other disability and death with employer's contributions to fringe benefits. I accept Dr. Jenkins' evidence and set the figure for loss of future wages at $302,000.

SUMMARY OF DAMAGES

General damages	$40,000	
Special damages	$3,088.10 plus prejudgment interest	
Alta. Hosp. Comm.	$4,634 plus prejudgment interest	
Housekeeping assistance		
	Pre-trial	$8,000
	Future	$43,000
Wages	Pre-trial	$ 108,985 ($80,090 plus prejudgment interest of $28,895)
	Future	$302,000

[73] 75 In view of my decision that the plaintiff was 33 1/3% responsible for her injuries her recovery will be reduced by that amount and by my calculation her recovery will be $336,715 plus prejudgment interest on the special damages. I have not included the Alberta Hospitals Commission claim in this figure.

[74] The plaintiff shall have costs on the appropriate scale with all reasonable disbursements, no limiting rule to apply and prejudgment interest.

Action allowed in part.