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Docket: Rudd v. Hamiota FeedLot Ltd.
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(Brandon Centre)

# COURT OF QUEEN'S BENCH OF MANITOBA

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| **BETWEEN:** | ) |
| | ) |
| JENNA KATHLEEN RUDD | ) Mr. Glen Harasymchuk |
| Plaintiff | ) Counsel for the Plaintiff |
| | ) |
| and | ) |
| | ) |
| HAMIOTA FEEDLOT LTD. | ) Mr. Michael Finlayson |
| Defendant. | ) Counsel for the Defendant. |
| | ) |
| | ) |
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| | ) |
| | ) |
| | ) **JUDGMENT DELIVERED:** |
| | ) **January 31, 2006** |

## MENZIES, J.

**[1]** While employed as a pen-rider for the Defendant, the Plaintiff fell off her horse causing permanent injuries. The Plaintiff brings an action in negligence against the Defendant.

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## FACTUAL BACKGROUND

[2] The Plaintiff grew up in rural settings in Manitoba and Alberta. She began riding horses at the age of 14 months and has ridden horses all her life. The Plaintiff has been taught about basic care and riding of horses by her parents, through attendance at 4-H, and to a lesser extent, in riding lessons. The Plaintiff graduated from high school in Alberta in June 2000. She began her first job at Triple 7, a custom feed lot in Alberta. At that job she was herding cattle into the pens for treatment and care. This job did not involve separating cows from the herd on horseback but rather dealing with the cattle in herds. The Plaintiff held this job for four months.

[3] During Christmas of 2000, the Plaintiff came to visit her father who lives near Crandall, Manitoba and decided to stay with him. The Plaintiff's father had offered to help the Plaintiff out financially if she wished to continue her education.

[4] The Plaintiff knew she would need money to go to school and applied to the Defendant Hamiota Feedlot Ltd. for a job as a pen-rider. The Plaintiff's father arranged a meeting Defendant's owner, Larry Schweitzer. The Plaintiff provided a job resume to Mr. Schweitzer. This resume read in part:

> "I have also helped out at the Triple 7 Ranches at Ponoka, Alberta. My job was to help process the calves (duties included were giving injections, dehorning, castrating, tagging, implanting, treating for parasites) at their 20,000 head feed lot."

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[5] This job as a pen-rider would involve viewing the cattle in pens to determine if they needed treatment, singling out the particular cow from the heard and leading that cow out of the pen for treatment. Although the Triple 7 job involved work on horseback, the job with the Defendant would require horsemanship at a higher level.

[6] The Plaintiff rode with the head pen-rider, Alan Nykoliation, for three days in order for him to assess her ability to do the job. This was done on February 5, 6 and 7, 2001. At the end of the three days, the Plaintiff was offered a job as a pen-rider.

[7] As a pen-rider, the Plaintiff was required to provide two horses for work, her own tack, pay for all veterinarian fees and provide for the basic care of the horses. The Defendant would provide $250.00 a month to help cover the expenses of the horses, a barn for shelter, feed, as well as arranging for and paying for farrier services. A farrier is someone who provides hoof care to the horse including the fitting and repair of shoes.

[8] Initially the Plaintiff rode a horse named Blaze which was owned by the Defendant. The Plaintiff acquired two horses namely Blackshoe and Kathy to ride at work.

[9] Each rider must provide two horses because the nature of the pen-rider's work is so demanding on the horses that the rider should rotate their

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horses on a regular basis to give them a rest. In addition, the work requires a high degree of communication between rider and horse. For that reason, each horse must be trained to react to the rider's commands. With Blackshoe and Kathy, the Plaintiff was able to perform her job to the satisfaction of the Defendant.

**[10]** The Plaintiff was not provided with a job description, instruction on horsemanship, written procedures for work or any safety guidelines. Every morning the pen-rider would lead the horse for the day to the barn, groom it check its hooves and saddle up for the day. The regular work day lasted between 5-7 hours per day.

**[11]** One of the Plaintiff's horses, Kathy, was pregnant. Eventually, the Plaintiff could no longer use this horse. On or about June 8th, the Plaintiff, bought another horse named Rocky. Rocky was not trained for this type of work and had to be trained.

**[12]** About 7-10 days after the Plaintiff acquired Rocky, Blackshoe lost the left front shoe and pulled up lame. This left the Plaintiff with only Rocky to do her work. The Plaintiff testified she told Alan Nykoliation that Blackshoe had lost a shoe. Nykoliation indicated to her he would contact the farrier. The Plaintiff claims she again spoke to Alan Nykoliation a few days later about Blackshoe. Alan Nykoliation did not testify. Although the Plaintiff was aware there were other horses available for her to ride, she did not ask to use someone

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else's horse nor did anyone offer to let her use one of their horses, including any representative of the Defendant.

[13] As a result, the Plaintiff rode Rocky on a daily basis for work. There is some dispute as to whether Blackshoe lost his shoe on June 14 or later. Whichever it was, the Plaintiff would have rode Rocky for between 4-8 work days. The Plaintiff testified the stress of the work had caused Rocky to go 'sour'. This is a term used to describe a horse that would no longer follow directions. In other words Rocky had become fatigued.

[14] As a result of the injury, the Plaintiff has no memory of the day of the accident. Although the Plaintiff denies knowing the farrier was at the Defendant's premises June 26, the evidence is clear she would have been told the day before that the farrier would be available the day of the accident. The evidence discloses, the Plaintiff chose to ride Blackshoe for work the day of the accident. She proceeded to check the pens as usual. Upon selecting a cow to be singled out in the pen, the Plaintiff rode after it, Blackshoe fell, and the Plaintiff was injured.

## THE ACCIDENT

[15] Pen riding is an inherently dangerous occupation. The occupation involves riding a horse at various speeds, anticipating the actions of the cattle, and reacting to them in a coordinated manner with the horse. It is not unusual for the horse and rider to fall. In fact, the evidence is all the other pen-riders

had fallen off their horses while in the employ of the Defendant. What is also clear from the evidence is that the Plaintiff was a particularly skilled rider. In her six months at the feedlot, the Plaintiff was the only rider who had not fallen off her horse. This included Alan Nykoliation, the head pen-rider.

**[16]** The Plaintiff maintains the accident occurred because Blackshoe was missing a shoe. The Defendant's position is that horses fall during this type of work on a regular basis and there is no proof the missing shoe contributed to the fall in any fashion. It is trite law to say that the onus is on the party who asserts to prove.

**[17]** The evidence of the accident cannot come from the Plaintiff as she has no memory of that day. The Plaintiff does however testify that she has been taught and was aware that one should not ride a horse which is missing a shoe.

**[18]** The Plaintiff called Dr. Moore as an expert. Dr. Moore is a doctor of veterinary medicine specializing in equine care as well as an experienced rodeo rider. He was qualified as an expert in the area of horse-rider communication and the use of shoes for horses. Dr. Moore testified horse riding is an inherently dangerous activity. Dr. Moore explained that shoes are used on horses to protect the wall and soles of the hoof and to provide traction.

**[19]** Dr. Moore testified the front hooves of a horse are always shod as they bear the bulk of the weight of a horse as it moves. Dr. Moore advised it

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was important to shoe both sides of the horse to provide balanced weight and comfort in gait. Dr. Moore indicated that while at a lope, there will be times the entire weight of the horse will be on the front hoof. Dr. Moore stated that during a turn, the inner front hoof will bear the entire weight of the horse. On a left turn, that would be the left front hoof.

**[20]** Dr. Moore explained that if only one shoe was missing, there is an imbalance problem for the horse. One hoof is lighter by the weight of the missing shoe and the 'leg' is shorter by the width of the shoe. A horseshoe increases the 'cup' size of the under-hoof which provides better traction for the horse. Dr. Moore felt it was a bad practice to ride a horse missing a shoe. I found Dr. Moore to be a credible witness.

**[21]** Julie Preston was also a pen-rider employed by the Defendant. She was the sole witness to the accident. She described the Plaintiff riding in a pen at a trot to single out an animal. While pursuing the animal, she turned left and Blackshoe fell. Ms. Preston testified that as Blackshoe turned left, all four legs came out to the side towards the middle of the pen and the horse fell.

**[22]** The surfaces of the pens are clay. Both Julie Preston and the Plaintiff's father Larry Rudd confirmed that on the day of the accident, the clay was wet and covered with a layer of mud.

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[23] No one contests the importance of traction for the horse in the task of pen riding. The evidence is satisfies me that on the day of the accident, the conditions were such that the clay surface would have been slippery. Blackshoe was missing the left front shoe and fell while negotiating a left turn at a lope or trot speed. Blackshoe's feet came out from under him. I am aware it is not unusual for horses and riders to fall in the course of the job of pen riding. However, the Plaintiff had been the exception to the rule until the date of the accident. She was obviously a skilled and careful rider. The accident took place during a left turn when the horse was missing the left front shoe. On the evidence before me, the missing shoe was a material contributing factor to the fall and injury suffered the Plaintiff.

## DUTY OF CARE

[24] The Plaintiff claims against the Defendant in negligence. To establish a claim in negligence, the Plaintiff bears the onus to prove the existence of a duty of care owed to her by the Defendant. The Plaintiff must also prove the Defendant breached that duty of care and that the breach caused the Plaintiff injury.

[25] The test for the existence of a duty of care between two parties was established by the Supreme Court of Canada in ***City of Kamloops v. Nielson***, [1984] 2 S. C. R. 2; 5 W. W. R. 1, following the English House of Lords in ***Anns v. Merton London Borough Council***, [1978] A. C. 728 (H. L.). The

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Court must determine if the Plaintiff's relationship with the Defendant was of sufficient proximity that it was reasonably foreseeable that the Defendant's negligence could cause injury to the Plaintiff and whether there were any considerations which ought to negative or limit the scope of the duty and the class of persons to whom a duty is owed or the damages to which a breach of it may rise.

**[26]** That an employer owes a duty of care to their employees is well established law. In ***Manitoba the Workplace Safety and Health Act*** contains the following provisions:

> "4 (1) Every employer shall in accordance with the objects and purposes of this Act
> (a) ensure, so far as is reasonably practicable, the safety, health and welfare at work of all his workers;
>
> 4 (2) Without limiting the generality of an employer's duty under subsection (1), every employer shall
> (b) provide to all his workers such information, instruction, training supervision and facilities to ensure, so far as is reasonably practicable, the safety, health and welfare at work of all his workers;
> (h) ensure that all of the employer's workers are supervised by a person who
>
> (i) is competent, because of knowledge, training or experience, to ensure that work is performed in a safe manner."

**[27]** Despite the apparent clarity of the duty imposed on an employer by this statute, a breach of a statutory obligation does not always constitute negligence.

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**[28]** The duty of an employer to an employee has been defined in the common law as well. In ***Carriere et al. v. Board of Gravelbourg School District No. 2244 of Saskatchewan,*** (1977) 79 D. L. R. (3d) 662 (Sask. C. A.) Brownridge J. A. made the following observations:

> "It is the duty of the master to take reasonable precautions to provide and maintain a reasonably safe place of work for his servants and reasonably safe access thereto."

**[29]** I would refer also to the statement of Duff C. J. C., in ***Regal Oil & Refining Co. et al. v. Campbell,*** [1937] 2 D. L. R. 609, [1936] S. C. R. 309 at p.312:

> "By the common law, an employer is under an obligation arising out of the relation of master and servant to take reasonable care to see that the plant and property used in the business in which the servant is employed is safe. That is well settled and well known law."

**[30]** This duty of care was expanded upon by the learned author Fridman in *The Law of Torts in Canada* (2nd ed.) Carswell (2002) at page 603:

> "The master or employer must adopt whatever reasonable precautions may be necessary to protect his servant or employee from dangers inherent in the work the latter is performing, whether such danger arises from the premises where the work is undertaken, or from the machinery or the tools which the servant is using...the employer's duty is "to provide a proper system of work and to select properly skilled persons to manage and superintend the operations, or even more succinctly, "to maintain a safe working environment". Broadly speaking,

therefore, the employer is obliged to take reasonable care for the safety of his employee.

> The employer is under a common law obligation merely to use reasonable care to prevent injury or harm from foreseeable danger, that is danger of which the employer is aware or of which he ought, as a reasonable man, to be aware."

[31] It is not contested that the job of a pen-rider is an inherently dangerous activity due to the nature of the reliance on horses to do the job. The job entails chasing cattle in pens with clay surfaces, negotiating sharp turns at varying speeds. Even experienced riders have accidents.

[32] In the decision of ***Canadian Northern Railway Co. v. Anderson*** (1911) 45 S. C. R. 355, the Chief Justice stated at p. 359:

> "The master must use all reasonable and proper precautions to safeguard his servant from dangerous conditions of his property, machinery and tools; and it is certainly well established by the authorities that the law takes notice that there are things which, in their nature, are so highly dangerous that, unless they are managed with great care, they are likely to injure people with whom they come into contact; and, while there is no disability on the master to utilize those dangerous substances for his profit and advantage in the prosecution of his work, there is a clear duty upon him to adopt every reasonable precaution which science and experience provide to reduce the risk of accident to the workmen who are obliged to handle them; and there can be no doubt that, on the evidence here, the respondents failed in that duty. Citizens Light and Power Co. v. Lepitre, 29 Can. S. C. R. 1."

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[33] Davies J. made the following comment in the same decision at page 366:

> "That duty is, as laid down by the Court of Appeal in two late cases of Cribb v. Kynock, Limited [1907] 2 K. B. 548 and Young v. Hoffman Manufacturing Co. [1907] 2 K. B. 646, to give the necessary and proper instructions to young or inexperienced or ignorant workmen employed by them in dangerous work to guard against preventable dangers or accident,..."

[34] In ***Carl v. Warren and Warren*** (1960) 23 D. L. R. (2d) 156 (Ont C. A.) the Court stated at page 158:

> "The employer's duty to provide a proper system of work and to select properly skilled persons to manage and superintend the operations is an obligation which is personal to the employer who cannot escape his duty by mere delegation: Wilson & Clyde Coal Co. v. English, [1938] A. C. 57; Marshall v. Borgstom, [1942], 4 D. L.R. 1, S. C. R. 374."

[35] Stratton J. commented on an employer's duty in ***Shebansky v. Kapchinsky*** (1981) 28 A. R. 451 at paragraph 19:

> "The duty of an employer, however, may be stated more generally than simply to provide a safe system of work. It is to take reasonable precautions to safeguard his employees from injury. This duty also includes the requirement to issue proper instructions where instructions might reasonably be thought to be required to secure him from danger of injury."

[36] I endorse the comments of Bray J. in Cribb v. Kynoch Ltd., [1907] 1 K. B. 548, at page 558:

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> "The proposition of law laid down in those cases is one which has been clearly established—namely, that it is the duty of the master to warn young and inexperienced persons of any danger that existed in relation to the work in which they are employed."

[37] Based on the common law, I am satisfied there was a duty on the Defendant to ensure a safe system of work and that the employees were properly supervised. The duty to supervise includes the duty to provide instructions and to provide monitoring of the employees in their daily activities. Three of the pen-riders were quite young. The Plaintiff and one other rider, Julie Preston, were both about 18 years of age. Another rider, Ashley Mitchell, was younger. The Plaintiff's previous experience involved at most four months working for Triple 7 feedlot in Alberta. The Plaintiff was hired after riding with the head pen-rider for just three days.

[38] There is no evidence that any representative of the Defendant discussed the dangers of pen riding or how to avoid them with the Plaintiff. There was no evidence the employees were given any instruction on the proper care of their horses. There is no evidence the head pen-rider supervised the Plaintiff in any way. The evidence establishes that once Blackshoe lost his shoe, the Plaintiff notified Alan Nykoliation of her situation. The Defendant called no evidence of any actions taken to assist the Plaintiff by providing another horse for her to ride or of advising her not to ride Blackshoe until the farrier had re-shoed him.

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[39] On the day of the accident, the evidence shows each pen-rider was to bring one horse to the barn for the farrier to work on. The fact the Plaintiff was riding Blackshoe for work meant she would have brought Rocky for the farrier to work on. The evidence was that Alan Nykoliation was in the barn preparing for the arrival of the farrier. Alan Nykoliation knew Blackshoe had lost a shoe. There is no evidence Alan Nykoliation advised the Plaintiff not to ride Blackshoe, offered her another horse, or offered her other duties while the farrier worked on Rocky.

[40] The evidence from the Plaintiff and Julie Preston was that Rocky had gone sour from continual work in the pens. The evidence was that pen riding was hard on horses and they could not do it day in and day out. The Defendant was aware that Blackshoe was missing a shoe and therefore the Plaintiff had only Rocky for pen riding. There is no evidence the Defendant took any steps to monitor if Rocky was going sour, whether the Plaintiff had an available horse suitable for work or to offer another horse to the Plaintiff to enable her to safely perform her duties. The evidence points to a complete lack of supervision and instruction which could have prevented the accident of June 26, 2001.

[41] The Plaintiff has satisfied me the Defendant owed her a duty of care and it breached that duty of care to take reasonable steps to provide a safe

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work environment. I am unaware of any considerations which would cause me to limit the scope of the duty owed by the Defendant to the Plaintiff.

[42] The next step in determining if the Plaintiff has established a cause of action in negligence is the determination of whether the Defendant's breach of duty to the Plaintiff caused injury.

[43] Causation is proven where the Plaintiff shows the Defendant's breach of its duty of care materially contributed to the occurrence of the injury: ***Myers v. Peel County Board of Education*** [1981] 2 S. C. R. 21. As was said in ***Athey v. Leonati*** [1996] 2 S. C. R. 458 [1996] S. C. J. No. 102 at paragraph 17:

> "It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury...As long as the defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury.
>
> (para. 19) The law does not excuse a defendant from liability merely because other casual factors for which he is not responsible also helped produce the harm: Fleming, supra at p. 200. It is sufficient if the defendant's negligence was a cause of the harm: School Division of Assiniboine South, No. 3 v. Greater Winnipeg Gas Co., [1971] 4 W. W. R. 746 (Man. C. A.), at p. 753, aff'd [1973] 6 W. W. R. 765 (S. C. C.), [1973] 3 S. C. R. vi; Ken Cooper-Stephenson, Personal Injury Damages in Canada (2nd ed. 1996) at p. 748."

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**[44]** The onus on the Plaintiff is to prove that the Defendant created a risk of harm and that the injury occurred within the area of risk. (***Snell v. Farrell***, [1990] 2 S. C. R. 311, [1990] S. C. J. No. 73). The failure of the Defendant to provide proper instruction and supervision created the risk of the Plaintiff riding a horse that was not fit to perform the duties required to complete her assigned tasks. The risk of harm was the potential to suffer an injury as a result of the lack of instruction or supervision. The injury to the Plaintiff occurred within that area of risk. I am satisfied the Plaintiff has proven causation.

## VOLENTI NON FIT INJURIA

**[45]** The Defendant raises the doctrine of *volenti non fit injuria* as a defence to the claim raised by the Plaintiff. This particular defence has not been readily accepted by courts in Canada. The nature of this defence was discussed in ***Dube v. Labar***, [1986] 1 S. C. R. 649, [1986] S. C. J. No. 29 at paragraph 6:

> "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 risk may be express or may arise by necessary implication from the conduct of the parties, but will arise, in cases such as the present, 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 that the plaintiff did not expect him to.

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Common sense dictates that only rarely will a plaintiff genuinely consent to accept the risk of the defendant's negligence. Glanville Williams wrote in Joint Torts and Contributory Negligence (1951), at pp. 307-308, that:

> The defence must be restrictively construed and ...rarely applies in negligence actions. In almost every negligence action of modern times where the defence of volens has been raised it has failed. This is because the cases in which a person truly consents to run the risk of another's negligence are altogether exceptional.

Glanville Williams also said at page 308 of the same publication:

> To put this in general terms, the defence of volens does not apply where as a result of a mental process the plaintiff decides to take a chance but there is nothing in his conduct to show a waiver of the right of action communicated to the other party. To constitute a defence, there must have been an express or implied bargain between the parties whereby the plaintiff gave up his right of action for negligence."

**[46]** I am also aware of the comments of Wilson J. in ***Crocker v. Sundance Northwest Resorts Ltd.***, [1986] 1 S. C. R. 1186:

> "Since the volenti defence is a complete bar to recovery and therefore anomalous in an age of apportionment, the courts have tightly circumscribed its scope. It only applies in situations where the plaintiff has assumed both the physical and the legal risk involved in the activity..."

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[47] There is no evidence of any action by the Plaintiff to show a waiver of any right of action against the Defendant either express or implied. There is also no evidence to show that any waiver by the Plaintiff was communicated either expressly or impliedly to the Defendant. I am not persuaded the Plaintiff assumed any legal risk by her actions of June 26th 2001 *vis à vis* the Defendant.

## CONTRIBUTORY NEGLIGENCE

[48] The Defendant pleads the Plaintiff was guilty of contributory negligence in the causation of her injuries.

[49] To determine that the Plaintiff was contributorally negligent, I must first find she was negligent. This is not difficult to do. The Plaintiff testified she knew it was dangerous to ride a horse which was missing one shoe. She elected to do so in any event. This constitutes negligence.

[50] The process to be undertaken in determining contributory negligence was best described by Fruman J. in the decision of ***Heller v. Martens*** (2002) 213 D. L. R. 124; 9 W. w. R. 71, 303 A. R. 84 (Alta. C. A.) beginning at paragraph 30:

> "The comparative blameworthiness approach requires a court to examine all the circumstances of the parties' misconduct to determine their relative negligence. Ultimately, this requires "an assessment of relative misconduct from the perspective of departures from standards of reasonable care": Klar, supra at 374.

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> (para. 32) Apportionment is affected by the weight of the fault that should be attributed to each of the parties, not the weight of causation: Ottosen v. Kasper (1986), 37 C. C. L. T. 270 (B. C. C. A.) at 277; see also Dao v. Sabatino (1996), 29 C. C. L. T. (2d) 62 (B. C. C. A.) at 75. Basing fault on the extent to which each person's conduct caused the damages confuses the threshold requirement for establishing contributory negligence (damage caused by the fault of two or more persons) with the apportionment requirement (make good the damages in proportion to the degree in which each person was at fault, based on all the circumstances) CAN s. 1(1)"

**[51]** As such it is necessary for the court to assess the comparative blameworthiness of each party. The Court must undertake an assessment of the extent that each party's negligence fell short of the standard of care required by each of them.

**[52]** Regarding the Plaintiff, she undertook to ride Blackshoe knowing he was missing one shoe. She did so knowing that riding a horse missing one shoe was dangerous and that the farrier was present on the day of the accident. This is a considerable departure from any standard of care for her own safety. I find she was a knowledgeable experienced recreational horseman; however I am mindful that she had limited experience in the position of a pen-rider.

**[53]** Respecting the Defendant, I find they have failed to elicit any evidence they took steps to live up to their duty of care to the Plaintiff. The Defendant was contractually obligated to provide farrier services for the pen-riders. There is no evidence that the Defendant did anything to assist the

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Plaintiff when Blackshoe lost a shoe. There is no evidence the Defendant's even contacted the farrier to see if he could attend to Blackshoe earlier than his next scheduled attendance to the Defendant's premises. Having been told of the problem the Plaintiff had, there is no evidence the Plaintiff offered the use of another horse to spell off Rocky or monitored if Rocky was capable of continuing to work on a daily basis. There was no discussion with the Plaintiff as to the dangers of using Blackshoe for pen riding without the shoe, or of what other options the Plaintiff had if Rocky was unable to continue. This was a young employee who was left on her own to resolve her difficulties while engaging in an inherently dangerous occupation. The Defendant must bear the majority of the blame.

[54] In all of the circumstances, I find that the Plaintiff is 33% responsible for the injuries suffered while the Defendant must accept 67% responsibility.

## NON-PECUNIARY DAMAGES

[55] The Plaintiff was severely injured as a result of this accident. It is a testament to her determination that she has recovered to the extent she has.

[56] The Plaintiff was unconscious as a result of the accident of June 26th, 2001. She was sent by medi-vac to Winnipeg. Initially she was non-responsive. On admission she registered a reading of 4-5 on the Glascow Coma

Scale. This scale is used to measure the severity of brain injury. The scale gives ratings between 3 and 15. 3 is the lowest possible reading representing the most severe brain injury. Any reading between 3 and 8 connotes a severe injury.

[57] The Plaintiff suffered a diffuse axonal brain injury which causes swelling and haemorrhaging in the brain. She suffered from 6-7 weeks of post-trauma amnesia. Initially she was unable to move or talk. She began whispering after 6 weeks in hospital. The Plaintiff underwent physiotherapy and was released on October 17th, 2001. She spent almost 4 months in hospital.

[58] Upon her release, the Plaintiff still required supervision in the accomplishment of daily tasks. Her father built a bathroom on the main floor of his house as she was not permitted climb stairs.

[59] Prior to the accident, the Plaintiff could only be described as a physically active person. Although the Defendant tried to make much of the Plaintiff's statement that she would come home from school and sit on the couch because she was tired, her lifestyle was an active one. She was a very social person who enjoyed playing high school sports. She was an avid rider of horses and enjoyed being outdoors. She was not however the best student. The Plaintiff admitted she did not like school and skipped a lot of classes. However she did manage to graduate. The very nature of the jobs she undertook for the

short period between graduation and the accident speaks to her energy and love of both animals and the outdoors.

[60] Because of the brain injury, the Plaintiff has undergone considerable therapy and testing. Every medical specialist who worked with the Plaintiff was impressed with her determination and dedication to her own recovery. Without such dedication, the permanent repercussions of this injury would have been far more severe.

[61] However, after 4 years of dedication at her recovery and reintegration into society, there are some permanent effects she will have to deal with.

[62] The Plaintiff initially had lost the use of her voice. After six weeks she began to whisper. At the time of the trial the Plaintiff was able to communicate quite well. She is unable to project her voice or control its tone. She also has trouble aspirating and therefore coughs from time to time.

[63] The Plaintiff suffered from severe psychomotor speed and dexterity impairment on her right side. She had little control of her right hand, a noticeable limp when she walked and a facial droop. At the time of the trial, this had improved considerably. The Plaintiff still suffers mild un-coordination of her right hand which is not expected to further improve. Her gait is still slightly asymmetric and her face drops slightly.

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**[64]** Shortly after the accident, the initial diagnosis of the Plaintiff showed significant cognitive deficits. The Plaintiff exhibited marked difficulties in the areas of complex attention, language, memory, multi-tasking and executive functioning. As of the date of trial, she still shows moderate impairment in attention capacity and multi-tasking. The Plaintiff carries a palm pilot with her to help her remember her daily tasks. She can function in a structured environment. She is slow to learn new things and is easily distracted. Novel situations present a challenge for her to cope with. The Plaintiff experiences frustration easily and has a low tolerance level for frustration. Typical to a brain injury, the Plaintiff suffers from fatigue and cannot be expected to work more than 4-5 hours a day.

**[65]** In 2002, the Plaintiff moved back to Alberta to live on her own. She lives with assistance from the Province of Alberta. Initially, the Plaintiff got a job at La Senza as a sales clerk for two hours a week. She worked at this job for one and one-half years. In April of 2004, the Plaintiff started working at Ricki's as a sales clerk three days a week between 4-6 hours a day. According to the neuropsychologist, Dr. Pachet, this is likely as much work as she can cope with in a week.

**[66]** The Plaintiff no longer runs due to back pain but does swim three days a week. The Plaintiff has surrendered her driver's license as she feels she is unable to react appropriately if a dangerous situation should arise. This is a self imposed limitation but indicative of her own assessment of her physical

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disabilities. She enjoys her work but admits she is tired at the end of a work day. She is a good sales clerk but is unable to operate the cash register as the multi-tasking of dealing with the customer and operating the cash register is too difficult. The Plaintiff does not have an active social life as a result of the fatigue and changes in her personality.

**[67]** The objective of assessing non-pecuniary damages was discussed by Dickson J. in ***Andrews v. Grand & Toy Ltd.***, [1978] 1 W. W. R. 577, [1978] 2 S. C. R. 229, 3 C. C. L. T. 225, 19 N. R. 50, 8 A. R. 182, 83 D. L. R. (3d) 452 at paragraph 25:

> "Obviously, a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, restitution in integrum is not possible. Money is a barren substitute for health and personal happiness, but to the extent within reason that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim.
>
> ...There cannot be "complete" or "perfect" compensation. An award must be moderate and fair to both parties. Clearly, compensation must not be determined on the basis of sympathy, or compassion for the plight of the injured person. What is being sought is compensation, not retribution.
>
> (para. 89) Money is awarded because it will serve a useful function in making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in a direct way."

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[68] I have had the opportunity of reviewing the following cases on the issue of non-pecuniary damages.

[69] ***Konopada v. Blais*** (2001), 155 Man. R. (2d) 294, (Q. B.): In this decision the Plaintiff suffered permanent disabilities from a traumatic brain injury. The Plaintiff was left with cognitive defects which reduced her efficiency, caused her to tire more easily and reduced the quality of her life. She had to reduce her daily physical activities and could no longer work long hours. She remained emotionally stable, generally happy and took pleasure in her interpersonal relationships with her customers and family. The Court awarded the Plaintiff $80,000.00.

[70] The affects of the injuries in the ***Konopada*** case are not as severe as the affects suffered by the Plaintiff in this case. The Plaintiff in this case has been severely restricted in her ability to work. She has been able to obtain and maintain part time employment but is restricted in the duties she can accomplish as a result of her inability to successfully multi-task. Her personal life has deteriorated considerably in that she has little interaction with persons of her own age.

[71] ***Bourbonnais v. Gauvreau*** [2003] A. J. No. 1429 (Q. B.): In this case, Bourbonnais suffered a severe head injury. He suffered a total loss of his sense of smell. He suffered from 3 weeks of post traumatic amnesia, reduced amnesia and fatigue. Prior to the accident the Plaintiff was a high level

computer technician. His ability to continue in that job was in serious jeopardy as his ability to learn new tasks was impaired. It was unlikely he would be able to continue in that job for long. He also suffered permanent injury to his right shoulder. The court awarded him $180,000.00. I believe the severity of his injuries exceed that of the Plaintiff in this case.

[72] ***Abou-Marie v. Baskey*** (2001) Carswell Ont. 4337 (Ont. S. C.): In this case Abou-Marie suffered a brain injury which resulted in her hospitalization less than a month. The Plaintiff suffered cognitive impairment in the fields of memory, higher reasoning, and verbal skills and suffered a personality change. She as well suffered from fatigue. Despite the injury, she was able to graduate from high school and follow an engineering degree. The Plaintiff could no longer participate in gymnastics but could still walk and run. The Court awarded the Plaintiff $100,000.00. The Plaintiff in this case suffered more severe injuries requiring longer hospitalization. In addition, while the Plaintiff's future aspirations were probably not as high as the Plaintiff in the ***Abou-Marie*** , the Plaintiff's daily functioning has been more severely curtailed.

[73] ***Chui v. Chui*** (2002) 8 B. C. L. R. (4th) 227 (C. A.): In this case Chui suffered a mild traumatic brain injury resulting in poor memory and concentration, depression, sleep dysfunction and difficulty in multi-tasking. The Court awarded $100,000.00. The Plaintiff Rudd suffered a severe brain injury resulting in more severe permanent effects.

[74] ***Crackel v. Miller*** [2003] A. J. No. 1160 (Q. B.): Crackel suffered a severe traumatic brain injury resulting in permanent disabilities. His daily memory was affected, lost his anger control and suffered from heightened irritability. However, he was able to cope with basic work responsibilities working 5 days a week. He was hospitalized for 2 ½ months and suffered 2 weeks of amnesia. The court awarded $180,000.00. I have difficulty reconciling this case with the Plaintiff currently before the court except to say that the amount of damages awarded in this case appear to be higher than the trend exhibited in other cases.

[75] ***Jones v. Cheesebrough*** [2003] ABQB 196: Jones suffered a severe brain injury. At the time of trial, the symptoms claimed were of memory problems, slower cognitive reasoning, occasional balance problems, and mildly severe verbal and memory disability. The assessment of damages in this case was hampered by a concern the Plaintiff was exaggerating his injuries. Jones did not follow through on the recommended therapy for his injuries. The Court awarded $80,000.00. In this case, the Plaintiff is left with permanent disabilities despite a concerted effort to rehabilitate herself. Her disabilities are real with a permanent reduction of her style of life.

[76] I have also considered the decisions of ***Walker v. Ritchie*** [2003] O. J. No. 18 (O. S. C. J.) and at [2005] O. J. No. 1600 (Ont. C. A.) as well as Goldsmith, Damages for Personal Injury and Death.

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**[77]** After giving consideration to all of these authorities and reflecting on the injuries suffered by the Plaintiff, I have come to the conclusion that a fair and reasonable assessment of the non-pecuniary damages in this case would be $125,000.00.

## ACTUARIAL EVIDENCE

**[78]** Respecting wage losses and loss of future income, two actuarial reports were presented to the court. The Plaintiff filed and relied upon a report prepared by Gregory Gillis (Exhibit #1, tab 22). The Defendant filed and relied upon the report of Douglas Hyatt (Exhibit #1, tab 25). Both actuaries testified before the court.

**[79]** In order for a court to justify damages for past and future loss of income, the standard of proof to meet was set out in ***Schrump et al. v. Koot et al.*** (1977), 82 D. L. R. (3d) 553 ( Ont. C. A.) at p. 566:

> "...[S]ubstantial possibilities based on such expert or cogent evidence must be considered on the assessment of damages for personal injuries in civil litigation. This principle applies regardless of the percentage of possibility, as long as it is a substantial one, and regardless of whether the possibility is favourable or unfavourable. Thus, future contingencies which are less than probable are regarded as factors to be considered, provided they are shown to be substantial and not speculative: they may tend to increase or reduce the award in a proper case."

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**[80]** In ***Graham v. Rourke*** (1990), 74 D. L. R. (4th) 1 (Ont. C. A.) the court stated:

> "A plaintiff who establishes a real and substantial risk of future pecuniary loss is not necessarily entitled to the full measure of that potential loss. Compensation for future loss is not an all-or-nothing proposition. Entitlement to compensation will depend in part on the degree of risk established. The greater the risk of loss, the greater will be the compensation. The measure of compensation for future economic loss will also depend on the possibility, if any, that a plaintiff would have suffered some or all of these projected losses even if the wrong done to her had not occurred. The greater this possibility, the lower the award for future pecuniary loss: Personal Injury Damages in Canada, op. cit., at 91-2."

**[81]** And finally as was said in ***Hay v. Hoffman*** (1999), 61 B. C. L. R. (3d) 275 (C. A.), at 298:

> "I believe that a consistent theme running through the authorities is that a trial judge, in deciding on an award for damages under the heading of anticipated future loss, whatever term one actually uses, ought to endeavor to make an informed estimate or assessment of anticipated loss as opposed to merely undertaking to do a computation. Because one is considering the future which has about it always an aspect of the unknowable, contingencies positive and negative fall to be considered. Ultimately, a best estimate is required and while there will almost invariably be mathematical calculations to be considered, a purely mathematical approach will usually not be appropriate because such an analysis is too limited in scope."

**[82]** This leads the court to an analysis of the two actuarial reports presented to the court. The Plaintiff's expert, Mr. Gillis prepared a report based on the instructions he received. The instructions given were to project the lost

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income assuming the Plaintiff had pursued a career in the Provincial Park Services, in other words as a Natural Resources Officer. Based on that assumption, Mr. Gillis determined the Plaintiff's income loss prior to January 1st 2005 to be $37,746 and gross future income and employee benefits loss after January 1st 2005 to be $1,353,146.

**[83]** It is unfortunate the Plaintiff chose to evaluate her losses on such a career path. It is difficult to come to the conclusion the Plaintiff would have succeeded in this career path based on her past.

**[84]** To pursue this career, the Plaintiff would have been required to take and complete a program in renewable resources which is offered at the Community College level. The Plaintiff's high school performance record does not give much hope for her to successfully complete such a program. The renewable resources program involves studies in the fields of English, Biology, Chemistry and Mathematics. The Plaintiff had difficulty passing Grade 12 in Alberta. She related being interviewed in her school and being told she was in danger of not graduating. Her high school transcript shows a mark of 50% in English, 52% in Mathematics and 59% in Biology. She did not take high school Chemistry.

**[85]** In addition, there is considerable doubt that this was even an option the Plaintiff was considering at the time of the accident. The Plaintiff was questioned about her intended career path at the examination for discovery held

on July 23rd, 2003 and did not mention natural resources as a possible career. There is ample evidence the Plaintiff loves to be outdoors and is not afraid of hard work. She is experienced with firearms and is an excellent swimmer. However, it would be difficult to foresee her successfully completing the scholastic requirements to pursue this path. For those reasons, I have disregarded the report provided by Mr. Gillis.

[86] In contrast, the report prepared by Dr. Hyatt presents a more realistic future career path for this individual plaintiff. I have found his report to be well researched with a fair allowance for contingencies.

## PAST LOSS OF EARNINGS

[87] At page 8 of Hyatt's report, he outlines the calculations undertaken to determine the loss of income to January 1st, 2005. Hyatt bases his calculations on the assumption the Plaintiff would continue to work as a pen-rider up to and including December 31st, 2004. On these assumptions, Hyatt determined the loss of future income to December 31st, 2004 to equal $29,992.00.

[88] Unfortunately, the trial took longer to complete than was hoped and I have taken longer than I would have wished to render a decision. I agree with Dr. Hyatt's calculations for loss of past earnings. I have added the sum of approximately $12,000.00 for the year 2005. This is fairly consistent with his

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calculation of loss of earnings for 2004. Accordingly, I will award a sum of $42,000.00 for loss of past earnings to January 1st, 2006.

**LOSS OF FUTURE EARNINGS**

**[89]** On the present value of future loss of earnings, Hyatt provided three scenarios for consideration by the court. Hyatt calculated a future loss of income based on future employment as a pen-rider, as a female retail sales clerk and as a female Alberta high school graduate.

**[90]** Hyatt assumed that the Plaintiff would continue in her employment as a retail sales clerk working 20 hours a week at $7.50 per hour. This is a reasonable assumption. With that salary base, Hyatt determined the loss of future earnings for the Plaintiff if she continued as a pen-rider in the future, to be $90,973.00. The loss of future earnings should the Plaintiff be employed as a retail sales clerk was calculated to be $160,475.00. The loss of future earnings as a female Alberta high school graduate was calculated to be $295,943.00.

**[91]** As a starting point I am satisfied the appropriate level for which a determination of the loss of future income would be the level of the high school graduate or $295,943.00. It is not realistic to presume the Plaintiff would have remained as a pen-rider on a permanent basis. It was accepted that this was a temporary situation to earn income for future endeavours. Likewise, the plaintiff is a retail sales clerk as a result of her injury. It is difficult to imagine the Plaintiff

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becoming a retail sales clerk except for the fact of her accident. The Plaintiff is a female high school graduate from Alberta.

**[92]** There are two comments I must make about Dr. Hyatt's calculations.

**[93]** Firstly, Hyatt did not include an allowance for a management fee in his calculations. It was his opinion there was no need to do so as the current available interest rates would provide a sufficient return to the Plaintiff. It was Hyatt's opinion an investment manager was unnecessary. I disagree.

**[94]** The Plaintiff is unsophisticated when it comes to money. One of her symptoms from her injury is a difficulty to learn new concepts quickly. She also has difficulty remember her daily tasks. The evidence was that her current employer did not permit her to operate the cash register at work. For the Plaintiff to manage her own investments without the aid of an investment manager is unrealistic. An allowance of 0.5% should have been added to the final determination under this head of damages.

**[95]** The other issue of concern with Hyatt's report is his reliance on gender specific statistics. Finch J. (as he then was) commented in ***Tucker v. Asleson***, [1991] B. C. J. No. 954 beginning at p. 42:

> "The basic question in this case is whether the measure of the plaintiff's capacity to earn income should be based upon statistics for her sex, or

whether the measure of her capacity is, as her counsel contends, the same as for a male person.

I accept, as a starting point, that the measure of the plaintiff's earning capacity should not be limited by statistics based on her sex. ...in Canada, no educational or vocational opportunities were excluded to her.

I accept the assertion advanced on the plaintiff's behalf that the measure of her lost capacity to earn income is the equivalent of the average university educated B. C. male..."

[96] In ***Terracciano v. Etheridge,*** [1997] B. C. J. No. 1051 Saunders J. said at page 14:

> "In this case the statistics of average female earnings were pressed on the court by the defendants as the best predictor of Ms. Terracciano's future at the time of the injury.
>
> Apart from the fact that these statistics perpetuate historical inequality between men and women on average earning ability, and that they have hidden them serious discounts for lower and sporadic participation in the labour market which are duplicated by many of the negative contingencies used by economists to massage the numbers downward, such statistics may provide little assistance in predicting the future of a particular female plaintiff:...
>
> Indeed it may be as inappropriately discriminatory to discount an award soley on statistics framed on gender as it would be to discount on consideration of race or ethnic origin. I am doubtful of the propriety, today, of this court basing an award of damages on a class of characteristic such as gender..."

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[97] And finally in ***Gray v. Macklin*** [2000] O. J. No. 4603 (S. C.) at para. 197:

> "...I am mindful that it is inappropriate for an assessment of damages to reflect historic wage inequities. The courts must ensure as much as possible that the appropriate weight is given to societal trends in the labour market in order that the future loss of income properly reflects future circumstances. The court must embrace pay equity, given our fundamental right to equality as entrenched in the constitution..."

[98] These sentiments were adopted as well in the decision of ***Walker v. Ritchie*** [2003] O. J. No. 18 (S. C.) which decision was upheld by the Ontario Court of Appeal at [2005] O. J. No. 1600.

[99] I wholeheartedly adopt the comments of Saunders J. in his decision of ***Terricciano***, supra. Unfortunately, I have no evidence which would allow me to make the appropriate allowance for the use of gender specific statistics. Accordingly, I am unable to do so.

[100] The Plaintiff argues she should not be limited to the earnings of a high school graduate. The Court cannot ignore the Plaintiff's past performance in scholastic endeavours. She did not do well at school. Although the evidence is clear the Plaintiff is not afraid of hard work, the likelihood of her succeeding in furthering her education is precarious at best. The Plaintiff is someone who has shown a determined ability to succeed in life, but not in the classroom.

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However, I do not think it is realistic to come to the conclusion the Plaintiff would have remained as a pen-rider or in retail sales the remainder of her life.

**[101]** For that reason I have adopted the loss of future earnings calculated by Dr. Hyatt as a high school graduate. This calculation best represents the realistic career path of the Plaintiff while allowing for future contingencies. Although the amount is determined for January 1st, 2005, I believe in light of the failure to allow for a management fee and the unknown contingency of gender neutral statistics, the proper award as of January 1st, 2006 is the figure of $296,000.00.

## CONCLUSION

**[102]** In summation, I have found the Plaintiff's general damages to equal $125,000.00. The present value of the loss of past income is set at $42,000.00. The present value of the Plaintiff's future loss of income is set at $296,000.00. The total award equals $463,000.00.

**[103]** The Plaintiff must accept responsibility for 33% of these losses as a result of her contributory negligence. The Defendant is responsible for 67% of the loss.

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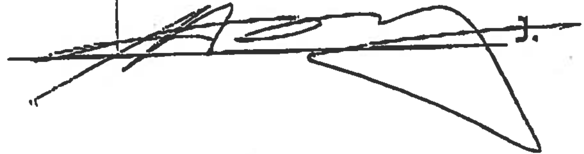
**[104]** The judgment shall bear interest at the rate prescribed in the prejudgment and post-judgment interest table of the ***Court of Queen's Bench Act*** C.C.S.M. c.C280 from January 1st, 2006 until date of payment.

## COSTS

**[105]** If the parties cannot agree as to the issue of costs, I would be prepared to hear submissions. Any party requesting costs will be required to submit a bill of costs outlining the quantum of their request.


J.

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