

Editors' note: Memorandum released July 15, 2009. Original judgment has been corrected, with text of memorandum appended

## IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Deiter v. Briggs*,  
2009 BCSC 914

Date: 20090610  
Docket: M073332  
Registry: Vancouver

Between:

**Doris Deiter**

Plaintiff

And:

**Ryan J. Briggs and Carol A. Briggs**

Defendants

**Corrected Judgment: The text of the judgment was corrected at page 3, paragraph 7, and page 1 (paragraph numbering).**

Before: The Honourable Madam Justice Griffin

### **Oral Reasons for Judgment**

June 10, 2009

Counsel for the Plaintiff

Wesley D. Mussio

Counsel for Defendants

John P.C. Miller

Date and Place of Trial:

May 11-14, 2009  
Vancouver, BC

Date and Place of Judgment:

June 10, 2009  
Vancouver, BC

## INTRODUCTION

[1] Doris Deiter had the misfortune to be involved in two accidents caused by other drivers. The first accident was on July 19th, 2006, (the “first accident”), and the second was on September 30th, 2007 (“the second accident”). She claims she suffered soft tissue injuries in the first accident which were temporarily aggravated by the second accident.

[2] The defendants have admitted their negligence in causing the accidents.

[3] Two proceedings subject to Rule 68 were commenced in relation to the two accidents and have been tried together before me.

[4] The issues are:

- a) What, if any, injuries did the plaintiff, Ms. Deiter, sustain in the first accident and the second accident?
- b) What, if any, award of damages is she entitled to as a result of any injuries suffered in the two accidents?

## INJURIES

[5] Doris Deiter was a healthy active woman prior to the first accident. Born on July 1st, 1963, she was 43 at the time of the first accident and 44 at the time of the second accident. She is currently approaching 46 years of age. She has been married for almost 17 years and has two children: Samuel born in 1999 and currently 9 years old, and Natalie born in 2004 and currently 5 years old.

[6] Prior to the first accident, Ms. Deiter was very active. She jogged two times per week, usually 30 to 40 minutes at a time. She went to the gym three days a week where she did aerobic exercises for 45 minutes, (such as a stationary bike or stair climber or treadmill), and lifted weights for approximately 20 minutes each time. As well, she regularly used exercise equipment at home.

[7] In addition to her regular exercise routine, Ms. Deiter enjoyed other recreational activities such as skiing in the winter, although that had not been frequent since the birth of her daughter. She also enjoyed canoeing in the summers with her husband and children. As well, she enjoyed riding her bicycle. Usually she rode her bicycle a few times a week. She had set a goal for herself to ride her bicycle from Vancouver to Calgary for her 45th birthday. As well, prior to the birth of her children, she and her husband enjoyed vigorous hikes that would sometimes last two or three days.

[8] On July 19th, 2006, Ms. Deiter and a couple of her friends had walked up the trail on Grouse Mountain known as the Grouse Grind. They were returning from that exercise and driving eastbound along Lougheed Highway in Coquitlam when the first accident occurred. The plaintiff was a passenger in the rear right passenger seat of an Audi A-4 sedan being driven by her friend. Another vehicle struck them from behind while they were driving on the highway sending the Audi into an out-of-control spin. The Audi spun into the meridian on the right side of the highway and then spun around again and hit the meridian on the other side of the highway before coming to a stop. The Audi car sustained serious damage.

[9] Although an ambulance came to the scene and all of the people in the Audi car were taken to hospital, Ms. Deiter did not remain at hospital and went home. She preferred to see her own family doctor the next day, Dr. Theresa Cordoni.

[10] On Ms. Deiter's visit to Dr. Cordoni, the day after the first accident, Ms. Deiter had a bruised left shin and a bruised inner right knee. She also had some transient tingling and numbness on the right side of her face. She could not recall whether she hit her face against the car window in the collision but assumed she must have done so. She had a bruise over her right sacral junction. However, her family doctor noted that on that day she did have a good range of motion of her neck and lower back.

[11] Ms. Deiter reported that she had no lasting effects from the bruising on her shin and knee. However, she began to experience more and more pain in her upper

back area particularly the right side shoulder area and neck. As well, she had frequent headaches, often several times a week.

[12] At first, the pain in Ms. Deiter's neck and shoulders was daily. She felt that when she worked at the computer she aggravated the pain and so she had to limit her time at the computer.

[13] In an effort to get over the pain in her neck and shoulders and her headaches, Ms. Deiter undertook various forms of treatment. She started with more passive types of therapy such as massage therapy and physiotherapy but gradually increased the treatment to more active forms of exercise and stretching.

[14] In April of 2007, Ms. Deiter's family physician, Dr. Cordoni, referred her to a pain clinic. Because of a wait list, she did not receive treatment at the pain clinic until a year later in April 2008. There she has received some treatment that blocks the pain for a few hours in the troubled joints and muscles. These treatments have given her some temporary relief from the pain.

[15] On September 30th, 2007, Ms. Deiter was driving in her car when the second accident occurred. A Jeep Cherokee vehicle was driven into the rear of her vehicle. Although there was only a relatively minor scratch to the bumper of Ms. Deiter's car, she felt that the impact immediately caused her some pain in her shoulders and lower part of her neck. She felt this set her back in her recovery from the first accident. According to her evidence, this aggravation lasted approximately until April 2008 when she felt she had returned to the state she was just prior to the second accident.

[16] Ms. Deiter called two medical experts who gave opinion evidence: Dr. Cordoni and Dr. Rhonda Shuckett, a rheumatologist.

[17] Dr. Cordoni prepared three opinions that were filed as exhibits, dated April 16th, 2007, March 3rd, 2008, and February 15th, 2009 respectively. As well, she testified at trial. Dr. Cordoni closely followed the plaintiff as she attempted to rehabilitate from the accidents. Her evidence is consistent with the evidence of Ms.

Deiter as to her reported symptoms. In cross-examination, Dr. Cordoni agreed that her opinions to a large extent rely on the subjective complaints of her patient Ms. Deiter. This is not surprising because the nature of her injuries, as soft tissue injuries, are not detectable in an objective mechanical way by means such as an X-ray or CT scan.

[18] In her last report of February 15th, 2009, Dr. Cordoni concluded that the plaintiff will likely have some ongoing neck pain given the length of time since the motor vehicle accident. She also offered the opinion that the continuing symptoms were related to the motor vehicle accident of July 19th, 2006. Dr. Cordoni said:

In summary, Doris continues to exhibit signs of chronic myofascial pain syndrome primarily affecting her neck, upper back, and interscapular area. She has been extremely compliant and diligent with treatment and I suspect that she is going to continue to have some ongoing neck pain given the length of time that it has been since the initial motor vehicle accident. I have no doubt that her symptoms are all related to the above motor vehicle accident.

The last comment refers to the first accident.

[19] Dr. Cordoni diagnosed the plaintiff with chronic myofascial pain on the right side of the neck and right trapezius area. Dr. Cordoni also saw the possibility of some continued improvement for the plaintiff.

[20] Dr. Rhonda Shuckett prepared an opinion dated December 1st, 2008, that was filed as an exhibit at trial, and she testified. Her expertise is in internal medicine and rheumatology. In this field, she has impressive credentials in patient care, research, and teaching. Her busy clinical practice allows her to treat patients with many rheumatologic conditions including soft tissue pain, fibromyalgia, and neck and back pain.

[21] Dr. Shuckett examined Ms. Deiter in December 2008. Based on the patient's own description of her history and Dr. Shuckett's physical examination of her, Dr. Shuckett arrived at the following diagnosis as set out in her report:

1. Cervicogenic headaches.
2. Mechanical neck pain, mainly due to musculo-ligamentous injury with bilateral neck pain and some modest decrease of neck mobility. She may very well have zygapophyseal joint capsular injury of the neck.
- 3a. Myofascial pain syndrome of the left neck and shoulder girdle region with palpable muscle spasm.
- 3b. Myofascial pain syndrome of right shoulder girdle region with palpable muscle spasm.

There is some myofascial pain syndrome with spasm of the muscle and rounding of the muscle adjacent to the right medial scapula.

3. Right shoulder impingement and rotator cuff tendonitis suspected (appears to be mild).

[22] Dr. Shuckett gave the opinion that the symptoms suffered by the plaintiff were related to the first accident and but for the accident, Ms. Deiter would not have these symptoms or diagnoses. As to the future prognosis, Dr. Shuckett reported that the prospect of further recovery is guarded now that two and a half years have passed since the accident. Dr. Shuckett gave the opinion that:

It is really not possible to measure degree of disability or impairment from work in an objective sense with chronic soft tissue pain. I cannot rule out that she may find herself unable to pursue fulltime work in the longer term future due to her injuries, but this is not something I can predict. However, based on her current status, it appears that she finds it difficult to contemplate increasing her work hours.

And further:

She may not improve from her current status as her pain is chronic by this time.

[23] The defendants did not call any expert opinion evidence.

[24] Ms. Deiter testified that her symptoms have improved since the accident but she still feels pain on a daily basis, especially when she is working with a computer. The pain is primarily in her neck and right shoulder and there is some pain in her

upper back. She no longer gets headaches as often but instead gets a headache once every two or three weeks.

[25] The nature of the injuries in this case are such that the proof of the injuries depends on Ms. Deiter's evidence. I found her to be a credible witness. She was objective and never took an opportunity to exaggerate or embellish. She readily conceded where her injuries had improved. She was straightforward and never evasive. When the medical doctors examined her they did not find her to complain of limitations or pain in all areas of her neck or upper back or shoulders but rather the areas of pain were quite precise and restricted in scope.

[26] I was also very impressed with the medical evidence offered as part of the plaintiff's case. Both physicians, Dr. Cordoni and Dr. Shuckett, were professional in their approach and neither appeared as advocates. They were independent and gave their evidence in a thoughtful and objective way.

[27] Counsel for the defendants argues that I should not accept the plaintiff's evidence. He suggests that her evidence is tainted because she did not produce all of her expenses in relation to her business. I will return to this criticism later but I find it to be of no merit. Simply put, the defendants were unable to point to any significant inconsistency in Ms. Deiter's evidence. Ms. Deiter's evidence of pre- and post-accident conduct was entirely consistent with her evidence as to the symptoms she suffered as a result of the accident. As well, the defendants did not challenge her medical evidence by calling contrary medical evidence.

[28] The defendants suggested in argument that Dr. Shuckett was an advocate but I do not accept that characterization. I found her to be very clear and objective in her evidence which she was well qualified to give. I pause here to note that the defendants appeared to me to show a lack of objectivity when assessing the role of physicians in litigation of this nature. The defendants stated in written and oral argument:

In contrast to Dr. Shuckett, Dr. Cordoni presented as a *[sic]* impartial and unbiased physician which is highly unusual for a general practitioner.

[29] This submission is what is known as a back-handed compliment. It is a gratuitous attack on Dr. Shuckett to suggest that she was not impartial, a proposition which is entirely unfair on the evidence. It is a suggestion that appears to praise Dr. Cordoni while it insults general physicians as a group, as if to say they are typically not able to provide independent medical evidence in soft tissue injury cases. This cynical submission is outrageous and unduly partisan.

[30] This court hears many cases involving plaintiffs with claims that someone else's negligent action caused them personal injuries. These are persons who are entitled to damages under the common law of this country if their claims are proven. These are persons who may be suffering greatly from their injuries. This court could not perform its function of determining these important claims without the help of treating medical physicians including general practitioners.

[31] Thus, physicians who do testify despite the inconvenience are performing a very important professional and public duty. Coming to court to testify and to face cross-examination may be the last thing a busy physician wants to do, faced with the burdens of practice. Often a general physician is the one physician who knows the patient best and who will have the longest history of treating the plaintiff before and after the incident giving rise to the claim. This court is extremely appreciative of the role physicians play in giving evidence. I sincerely hope that counsel for the defendants in this case reflected only his views, and not a general culture amongst legal counsel who represent defendants or defendant's insurers, when he decided to advance his submission which was so disrespectful of the important role of family doctors in personal injury cases. It is true that in some cases a medical practitioner may be impartial but it reflects poorly on the defendants to simply advance this as a general proposition.

[32] Having considered Ms. Deiter's own evidence and that of the physicians who testified, I conclude on review of all of the evidence and on a balance of probabilities

that Ms. Deiter was injured in the first accident and that these injuries were temporarily exacerbated by the second accident. The injuries from the first accident have continued through to trial although they have diminished in their severity. It is more likely than not that there will be some continuing chronic pain condition suffered by Ms. Deiter in the future for an uncertain period of time.

## **DAMAGES**

[33] Ms. Deiter claims the recognized categories of damages for personal injuries, namely non-pecuniary damages, loss of past income, loss of future earning capacity, cost of future care, and special damages. I will deal with each of these in turn.

### **Non-Pecuniary Damages**

[34] While Ms. Deiter's injuries are not severe or catastrophic, they are very real. I have no doubt that she has suffered pain and loss of enjoyment of life as a result of both accidents. As well, although the pain has diminished, it is very likely that it will continue into the future given that it has not been eliminated through all of her attempts at rehabilitation.

[35] Ms. Deiter has young children and a long life ahead of her. Prior to the accident, she was very active and enjoyed recreational athletic activities. Her injuries and pain, and the treatment she needed to undertake to rehabilitate from these injuries, kept her from enjoying normal activities she used to enjoy since the date of the first accident to trial. Some restrictions in the plaintiff's activities were due to plantar fasciitis which she suffered for approximately six months in 2008. Currently she is trying to return to running but has to start off one minute at a time, gradually increasing up to four or five minutes at a time. She has also gone out in the canoe with her husband but he has to do the paddling.

[36] While the plaintiff has attempted to recommence some of her former activities, it is likely that she will continue to be restricted for some time if not for the rest of her life to some degree in respect of the scope of activities she would have enjoyed but for the first accident. However, the plaintiff will have opportunities to

participate in some recreational athletic activity and to increase the scope of that activity over time.

[37] I have considered the numerous authorities dealing with chronic pain and soft tissue injuries cited by both parties. The defendant suggests that the authorities support an award of non-pecuniary damages if it is accepted that Ms. Deiter suffered an injury, in the range of \$3,000 to \$5,000. The plaintiff suggests that the appropriate award is closer to \$70,000 supported by case law which illustrates a range between \$45,000 and \$100,000 in relation to the first accident and \$12,000 in relation to the second accident.

[38] While every case is different, I consider that the plaintiff's injuries and loss of enjoyment of life due to the first accident are similar to that experienced by the plaintiffs in *Wery v. Toulouse*, 2006 BCSC 823 and *Romanchych v. Vallianatos*, 2009 BCSC 669, each of whom was awarded \$45,000 in non-pecuniary damages.

[39] Considering all the activities Ms. Deiter used to enjoy and the limitations she has suffered since the accident due to her pain, I conclude that she is entitled to damages for pain and suffering and loss of enjoyment of life in the amount of \$50,000. Of this, I attribute \$45,000 to the more severe first accident and \$5,000 to the second accident.

### **Past Wage Loss**

[40] With respect to the plaintiff's claim for loss of earnings, the burden of proof on the plaintiff is to establish on a balance of probabilities the fact of her injuries and that they were caused by the accident and that this impaired her ability to work. Once she has proven this, and I find that she has, then the burden of proof for damages based on hypothetical past or future losses is one of proving a real and substantial possibility. If the plaintiff establishes that there is a real and substantial possibility of the event having occurred but for the accident, then I must assess the likelihood of it and award damages accordingly (see *Smith v. Knudsen*, 2004 BCCA 613 at paragraphs 36 to 37.)

[41] Ms. Deiter graduated from high school in 1981. She took a year off before she began her post-secondary education at Simon Fraser University. She graduated from SFU in 1987 with a bachelor of business administration. She worked in Japan as an English teacher for one year and then began working in marketing at CP Rail. Ms. Deiter then worked at *Yellow Pages* for 17 years, ten years full-time and the later seven years part-time. She worked part-time by way of two days per week at the office and the remainder at home. Her hours were between 25 to 60 hours each week, depending on the project she was working on, and she earned \$35 an hour. She chose to work part-time to be more involved in looking after her children. However, she says that her plan was to return to full-time work so that she could make a larger financial contribution to the family's needs once her youngest child would reach four or five, depending on how well the child was doing.

[42] In May 2006, the company Ms. Deiter was working for underwent a corporate transaction and restructuring of employment positions. Ms. Deiter was given a choice to either work full-time at the office in Burnaby or take a severance package. She chose to take the severance package. Her intention was to take the summer off to spend more time with her children and then to begin looking for work in September 2006.

[43] There are two components to Ms. Deiter's claim for past wage loss. First, she claims that the injuries caused by the accident caused her to delay commencing her part-time employment for four months as she was delayed in her job search from September 2006 to December 2006. Second, she claims that her injuries caused by the accident prevented her from working full-time in accordance with her plans from January 2008 to trial during which time she was only able to work part-time. For most of that time from May 2008 forward, she was self-employed working together with her sister Anita Deiter in their own consulting business related to marketing.

### **Past Wage Loss - Delay in Commencing Part-Time Work**

[44] Following the first accident, the plaintiff felt that she was not in a position to begin looking for work in September 2006. It was very painful for her to sit at the computer to work on her job search, go to interviews, or start a job that would involve a full day of computer work. She did not want to begin work with a new employer unless she was fully capable of doing the job. Thus, she continued to work on her rehabilitation and did not seriously begin her job search until December 2006. Once she began her job search, she was fortunate enough to find a position, through a networking contact of hers, with a company now called Concerto Marketing Group. She commenced work with Concerto on February 5th, 2007.

[45] Ms. Deiter claims that she lost four months of income due to her delay in her job search from September to December 2006. I accept her evidence and find on a balance of probabilities that Ms. Deiter's injuries from the accident were such that they prevented her from returning to work for four months.

[46] As to the measure of Ms. Deiter's damages, I must take into account any real or substantial possibilities. One real or substantial possibility is that Ms. Deiter would not have found a job as quickly as she did. Another possibility is that if she did find a job earlier, it would have paid less than what she ended up earning at Concerto. The chance that another job would have paid less is, in my view, offset by the chance that another job would have paid more. However, I do find that there was a real and substantial possibility that Ms. Dieter would not have found a job as quickly as she actually did when she did begin her job search in December 2006.

[47] The earnings Ms. Deiter made at Concerto for the first four months were \$3,500 a month. As well, during the 15 months she worked there from February 5th, 2007, to April 20th, 2008, she earned bonuses totalling \$10,756.28 which works out to approximately \$717 per month on average. Thus, in the first four months that she was employed at Concerto she earned approximately \$3,500 per month plus \$717 per month for a total of \$4,217 per month times four months, totalling \$16,868.

[48] There was no evidence at trial as to the Concerto job opportunity being available four months earlier. Ms. Deiter had worked previously in one position for 17 years and was only looking for a part-time position, and there was no evidence as to what would be a reasonable length of time for her to find a new job. In my view, there is a 40 percent chance, or real possibility, that Ms. Deiter would not have obtained the employment earlier had she been able to start her job search four months earlier. I therefore reduce the four month's income of \$16,868 by 40 percent, namely a reduction of \$6,747. The net is \$10,120.80. I assess this first component of Ms. Deiter's past loss of income due to her injuries from the first accident as \$10,120.

### **Loss of Past Earnings From Self-Employment**

[49] Ms. Deiter's evidence was that she planned to return to full-time work as of January 2008. By this time her youngest daughter was doing well in preschool.

[50] However, Ms. Deiter testified that due to her injuries she was unable to sustain full-time work. This is because she spends much of her work day on the computer and sitting at the computer aggravates her pain so significantly that she cannot keep working for full-time hours.

[51] Ms. Deiter thus adds to her loss of past income claim, the difference between full-time earnings and part-time earnings from January 2008 to commencement of trial in May 2009, less one month of full-time work she did try in approximately February 2008.

[52] This part of the loss of past earnings is made up of two segments. First, from January 2008 through April 2008 when Ms. Deiter worked at Concerto part-time and during which period she said she would have also worked part-time with her sister but did not because of the two accidents; and from May 2008 when Ms. Deiter was self-employed working with her sister but working only part-time, during which period Ms. Deiter said she would have worked full-time but for the accident.

[53] During the time that Ms. Deiter worked at Concerto she was able to observe her sister earning a better living in her own marketing consulting company. Her sister, Anita Deiter (who I will refer to as "Anita" and I will continue to refer to the plaintiff as Ms. Deiter), was running her own communications business from her home. Because of Anita's success, Ms. Deiter also began to take on some consulting work with the knowledge of her employer Concerto. She took on this work as referrals from her sister Anita. The business name for Ms. Deiter's consulting work was her business name "Cornel Marketing".

[54] Ms. Deiter tried working full-time five days a week from mid-January to mid-February 2008 but felt she could not keep it up due to the discomfort. Ms. Deiter soon found that working two jobs, her part-time with Concerto on the one hand and doing consulting work for her sister on the other hand, was too much for her in terms of her ability to manage her neck and shoulder pain caused by the accidents. Thus she ceased her own consulting work until she quit Concerto as of May 2008. At that time she began to work solely with her sister Anita as a marketing consultant.

[55] As well, once Ms. Deiter left Concerto to work solely as a private consultant with her sister in May 2008, her evidence was that she would have been able to and would have chosen to work full-time hours but for her injuries sustained in the first accident. Instead, because of her injuries, she worked approximately half of what she otherwise would have worked.

[56] I accept that it is more likely than not that Ms. Deiter would have worked more hours in the private marketing consulting business in 2008 were it not for the injuries she sustained in the first accident. As well, she likely would have worked more hours in the private marketing consulting business in the months of 2009 leading up to this trial but for the injuries she sustained in the accident. I accept Ms. Deiter's evidence and find that she would have worked twice as many hours from effectively mid-February 2008 through to trial in May 2009 than she did work, but for the injuries that she sustained in the first accident.

[57] In short, I find that Ms. Deiter probably worked approximately 50 percent less hours in self-employment from 2008 to the time of trial than she would have but for the injuries she sustained in the accidents.

[58] It is very difficult to assess damages for the pre-trial loss of self-employment earnings as there is no pre-accident comparable for Ms. Deiter's self-employment earnings and the post-accident information is incomplete.

[59] Anita testified that she had enough work as a private marketing consultant to keep her sister Ms. Deiter working at full-time hours had she been able.

[60] The starting approach to this aspect of damages should be to consider what Ms. Deiter did earn from her part-time self-employment. For their private consulting work, each of the Deiter sisters bills out their services at an hourly rate and then collects the billings attributable to their own hours. In 2008, Ms. Deiter's portion of billings in the private consulting practice amounted to \$22,484. This represents her billings for nine months of part-time work, the one month of mid-January to mid-February and the eight months from May 2008 through December 2008. This averages out to billings of \$2,498 per month.

[61] A simple approach would be to consider that Ms. Deiter would have been able to work twice as much in her private consulting practice from 2008 to trial but for the injuries sustained in the first and second accidents. That would mean she would have been able to bill an additional \$2,498 per month in the 11 months of 2008 that she was not able to work full-time (recalling her evidence that she did try to work full-time one month mid-January to mid-February), and for the first five months of 2009, for a total of \$39,968 of additional billings she probably would have earned but for the accidents. Of this, two months of not working full-time were when Ms. Deiter was suffering from both the effects of the first and second accidents, that is February and March 2008. The rest of the time her symptoms were due to the first accident only. It therefore may be fair to assess one month's income loss to the second accident, namely \$2,498, and the remainder to the first accident, namely \$37,470.

[62] Before concluding that this approach is fair, I must consider a number of other possibilities which could either raise or lower the assessment of damages for loss of past self-employment income.

[63] For example, in 2009, there was some evidence that Ms. Deiter was able to bill clients at least \$17,714.50 in the first three months of 2009. This would average out to roughly \$5,900 per month, much higher than in 2008. This may be based on the fact that there is less time devoted to non-billable activities now that the business has been up and running for a year, and so more of Ms. Deiter's part-time work is fruitful in terms of earnings.

[64] As well, there was evidence that Anita Deiter's private billings for all of 2008 were \$120,000 (not including billings paid to Ms. Deiter or other consultants). The plaintiff argued that she too would have been able to earn this level of income but for the accident. Interestingly, in support of this theory of damages was the defendant's suggestion in cross-examination of Ms. Deiter and of her husband that Ms. Deiter earns twice as much in her present capacity as a marketing consultant than she did at Concerto. Ms. Deiter and her husband agreed with this proposition. The defendants repeated this position and relied on it in final argument stating that Ms. Deiter works the same amount of hours that she did at Concerto and has doubled her income.

[65] If I was to accept this is so, by the time Ms. Deiter left Concerto she was earning \$3,666 per month in salary and approximately \$717 per month in bonuses for a total of \$4,383 per month. Taking the defendant's argument that she is effectively now making approximately double this and given my finding of fact that the plaintiff is working at half capacity due to her injuries, then she has some support for an argument that she was losing \$8,766 per month due to her injuries. This would be the equivalent of approximately \$105,192 annually which is closer to her sister Anita's annual billings of \$120,000.

[66] Off-setting this possibility of higher earnings is the possibility that Ms. Deiter would have incurred expenses in earning this income and earned much less net

income then her billings reveal. The defendants criticize the plaintiff for not producing any evidence of her actual business expenses for 2008 or 2009. The 2008 income tax return had not yet been prepared for Ms. Deiter as of the time of trial as it is not due until June 2009 given that she is self-employed. No records of expenses were produced. In my view, the lack of evidence of actual business expenses is a valid criticism because the onus of proof for this loss is on the plaintiff and this is a significant gap in her evidence. However, this criticism does not go too far as the defendant chose not to pursue this issue in any detailed way on cross-examination of Ms. Deiter or her sister Anita, and I did not find it to impact on Ms. Deiter's overall credibility.

[67] Ms. Deiter's 2007 tax return identified that she incurred business expenses of \$13,618 in relation to her business income of only \$300. However, in 2007 she had just begun to pursue doing some consultancy work and billed very few hours.

[68] All in all, considering all the real possibilities, both negative and positive, I consider the assessment of loss of past self-employment earnings for both 2008 and 2009 to be reasonable if calculated on the basis I have set out above, namely based on her monthly earnings from self-employment in 2008 which is a loss of \$2,498 per month. Of this \$2,498 is attributable to the second accident and a loss of \$37,470 is attributable to the first accident.

### **Loss of Future Earning Capacity**

[69] I have concluded that the injuries caused by the first accident have left Ms. Deiter with a chronic pain condition which is likely to continue in the future for an uncertain period of time.

[70] An award of damages for a loss of future earning capacity is based on the fact that a plaintiff's earning capacity is a capital asset and any impairment of that asset by a tortfeasor entitles a plaintiff to compensation: see *Rosvold v. Dunlop* 2001 BCCA 1 at paragraphs 8 to 11. The standard of proof to be applied when considering future events is that of a real and substantial possibility, not the balance

of probabilities, with the possibilities to be given weight according to the possibility they would have happened.

[71] One approach to assessing the value of loss of earning capacity is to consider the plaintiff's annual income and to assess the loss as some factor of that income: see *Pallos v. Insurance Corporation of British Columbia*, (1995), 100 B.C.L.R. (2d) 260 (C.A.).

[72] I conclude that the plaintiff has been rendered less capable overall from earning income from all types of employment due to her chronic pain at least for some uncertain period of time: see *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at paragraph 8 (S.C.).

[73] I accept the plaintiff's evidence that it has been difficult for her from the date of the first accident to the date of trial, to work full-time. I accept that these difficulties will continue for some time in the future. However, by now, Ms. Deiter probably has a good idea of her abilities and is spending less time in rehabilitation. In my view there is a substantial possibility that by running her own consultancy business from her home she will be able to increase her hours in a way that does not frequently set her back, either by simply working through her pain, or taking many breaks for exercise and stretching, and due to these breaks, working occasionally at night and on weekends. In the circumstances of this case, I prefer the approach of the British Columbia Court of Appeal in *Pallos* in assessing loss of future earning capacity. I find there is a substantial possibility that Ms. Deiter will be able to increase her work hours gradually and will be able to reach full-time hours within the next two years. There are a number of ways to approach calculations of these damages but considering all of the figures referred to above and assessing past loss of income, I conclude that a fair assessment of loss of future earning capacity caused by the first accident is \$40,000. This is roughly the same as her past loss of income and takes into consideration both the fact that without the accident her earnings would be increasing in her private consulting business but because of the accident they will not be increasing as fast as they otherwise would.

### **Future Care Expenses**

[74] While Ms. Deiter has made considerable effort to rehabilitate from the injuries suffered in the accident, rehabilitation is now more likely to have plateaued or to be determined by moderate exercise. This was the view of Dr. Cordoni. I assess no damages for cost of future care.

### **Failure to Mitigate**

[75] The defendants had the burden of proving that Ms. Deiter failed to mitigate her damages. The defendants were not able to point to any medical recommendation that Ms. Deiter failed to follow or to any evidence that suggests if she had done so her damages would be less. The evidence was just the opposite, namely, that Ms. Deiter has tried numerous things in a very reasonable, determined and disciplined approach to get better, and she continues to investigate recommendations from physicians. To borrow from Dr. Cordoni's report, I find that the plaintiff has been extremely diligent in her efforts to get better, following a careful and structured plan for recovery with graduated degrees of therapy and exercise. The defendants have not established any failure to mitigate.

### **Special Damages**

[76] The special damages claimed include expenses for massage therapy, physiotherapy, and exercise classes recommended by the physiotherapist, one session of acupuncture, an MRI examination, and mileage to and from the various forms of treatment. I am persuaded that all of these expenses were reasonably and necessarily incurred as a result of the injuries sustained in the two accidents. It is reasonable to assess 90 percent of these out-of-pocket expenses as attributable to the first accident and 10 percent as attributable to the second accident. These expenses total \$3,568 plus \$805.14 for a grand total of \$4,373.14. Of this, as mentioned, I assess 90 percent to the first accident or \$3,936. The special damages attributable to the second accident are \$437.

## CONCLUSION

[77] Ms. Deiter sustained injuries in the first and second accidents. The injuries in the first accident left her with a condition causing her chronic pain which was exacerbated by her normal activities. Because of her injuries, she suffered pain and loss of enjoyment of life, past wage loss, and she is likely to suffer loss of future earning capacity. She also incurred out-of-pocket expenses as a result of her injuries.

[78] In conclusion, I award the following damages to Ms. Deiter in respect of the two accidents:

### **First Accident**

1. Non-pecuniary damages: \$45,000
2. Past wage loss and loss of earnings from self employment:  
 $\$10,120 + \$37,470 = \$47,590$
3. Loss of future earning capacity: \$40,000
4. Cost of future care: \$0
5. Special damages: \$3,936

**Total \$136,526**

### **Second Accident**

1. Non-pecuniary damages: \$5,000
2. Past wage loss: \$2,498
3. Special damages: \$437

**Total: \$7,935**

[79] The total damages awarded to Ms. Deiter from the two accidents is \$144,461.

“Griffin J”

The Honourable Madam Justice S. Griffin

THE SUPREME COURT  
OF BRITISH COLUMBIA



THE LAW COURTS

## MEMORANDUM

TO:

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CC:            All Legal Publishers

FROM:        Superior Courts Judgment Office

DATE:        July 15, 2009

RE:            **Case Name: Deiter v. Briggs**  
**Neutral Citation: 2009 BCSC 914**  
**Registry: Vancouver**  
**Docket: M073332**

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Please be advised that the attached Oral Reasons for Judgment of Madam Justice Griffin dated June 10, 2009 have been edited.

- On page 3, paragraph 7, 5<sup>th</sup> line down the word “road” has been replaced with the word “rode”.
- On page 2, the additional paragraph numbering “1” has been deleted.

A copy of this memorandum and attached Reasons for Judgment will be placed in the court file. The original Reasons for Judgment which were previously distributed will be retained in the court file.

Please direct any enquires to the Superior Courts Judgment Office at:  
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