
CANADA / JUDGMENT

Dube v. Dube

2019 BCSC 687

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 687 Dube v. Dube

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dube v. Dube,

2019 BCSC 687

Date: 20190502

Docket: M145682

Registry: Vancouver

Between:

Katherine Janet Dube

Plaintiff

And

Joseph Jules Ambroise Dube aka Andre Dube

Defendant

Before: The Honourable Madam Justice Burke

Reasons for Judgment

Counsel for the Plaintiff:

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S. Katalinic

A.W. Schleichkorn

Place and Date of Trial:

Vancouver, B.C.

October 15-19, 22-26, 29-30, 2018

November 1, 2018

Place and Date of Judgment:

Vancouver, B.C.

May 2, 2019

INTRODUCTION

[1] On November 16, 2013, Ms. Katherine Dube was involved in a single motor vehicle accident on the Sunshine Coast Highway in the City of Gibsons, British Columbia. Ms. Dube was a passenger in the vehicle driven by her husband, the defendant Mr. Andre Dube. Mr. Dube lost control of the vehicle and it went off the highway and into a ravine. Airbags deployed and the back window was blown out. The vehicle was ultimately a write-off.

[2] Liability is admitted.

ISSUES

[3] The issues in this matter are:

1. What are the nature, extent and duration of the injuries Ms. Dube suffered in the accident?
2. What is the appropriate award of non-pecuniary damages for pain and suffering?
3. What is the past loss of income earning capacity?
4. What is the future loss of income earning capacity?
5. What amount, if any, should be awarded for cost of future care and loss of housekeeping capacity?
6. What amount, if any, should be awarded for special damages?

BACKGROUND

[4] Ms. Dube is 65 years old and lives on a three-acre property in Roberts Creek, British Columbia with her husband, Mr. Dube, who is 81 years old. The parties have been married since 1967. Each has two children from previous marriages.

- [5] Prior to the accident, Ms. Dube was very socially active. She frequently hosted dinners at her house for friends and family, particularly in the summer months.
- [6] The evidence of Ms. Dube's work history establishes that she was an effective multi-tasker who was well known for her very good memory. She incorporated a construction company and was responsible for all the administrative activities while her husband did the labour.
- [7] In 1992, as she had an interest in the health care field, she took a care aide course through Capilano College. Ms. Dube was hired at Kiwanis Villa, a residential complex for seniors. She assisted elderly patients with activities of daily living. During this time Ms. Dube still worked in her company, Deux-beau Ltd., and picked up shifts at Shorncliffe, another care facility.
- [8] Ms. Dube worked steadily from 1994 to late 2004, early 2005. Once she became aware Kiwanis Villa was going to close, she decided to upgrade her skills and take some courses.
- [9] In 2005, after new management took over Kiwanis Villa, Ms. Dube and a number of other employees went off work for Post-Traumatic Stress Disorder ("PTSD"). She received counselling from Ms. Ruth Armstrong, a registered counsellor. Ms. Armstrong testified that she treated Ms. Dube for approximately 8-10 sessions with no need for follow-up. Ms. Armstrong saw a number of employees from Kiwanis for the same issue.
- [10] Ms. Dube also remained off work due to problems with her left knee. She had an arthroscopy in December of 2006, and qualified for long-term disability ("LTD"). As Kiwanis Villa was closed, in order to upgrade her skills, Ms. Dube took an online program for a nursing unit assistant at Selkirk College from September 2007 to the fall of 2008.
- [11] In 2009, Ms. Dube received a position as a nursing unit clerk at St. Mary's Hospital. Both Ms. Dube and other witnesses described the nursing unit clerk position as a high pace job. Amongst other duties, Ms. Dube was responsible for patient lists, data entry, maintaining charts, arranging schedules and coordinating with the doctors, nurses, staff and patients.
- [12] In October of 2011, Ms. Dube injured her left knee at work and went off work on LTD. This was later accepted by Workers' Compensation ("WCB"). An arthroscopy was administered and eventually Ms. Dube had a total knee replacement in April 2012. For the remainder of 2012, she attended physiotherapy and did exercises in her home and pool.
- [13] By April of 2013, Ms. Dube was ready to go back to work. Unfortunately, there was a delay by her employer and WCB in trying to coordinate and arrange a return back to work. This was due to differences as to whom was responsible to manage that return to work.
- [14] The graduated return to work ("GRTW") eventually started in July 2013. Once starting her GRTW, Ms. Dube experienced right knee pain. Her doctor advised she was overcompensating due to her left knee replacement. As a result her GRTW was slowed down for several weeks. Ms. Dube, however, continued the GRTW on October 6, 2013. By the time of the accident, she was officially working 6 hours a day, 5 days a week. She had a week or two left in her GRTW schedule. Ms. Dube testified by this time she was completing her full

duties and essentially working 7 hours a day.

THE ACCIDENT

- [15] When the accident occurred on November 16, 2013, Ms. Dube recalls the car drifting and Mr. Dube saying "we're gone" as the vehicle slid backwards into the ravine. She remembers hearing noise and then everything going black. When she awoke, she heard her husband say "get out, get out." Mr. Dube told her not to open her passenger's side door (which was directed downwards in the ravine) and assisted her as she crawled over the console to exit the vehicle via the driver's door. She then crawled up the ravine where police officers were waiting to assist.
- [16] Ms. Dube said that immediately after the accident, she was in shock and felt like her head was full of water. She had pain all over her body including contusions down her chest, left shoulder, and collarbone as well as a large hematoma on her right calf. Ms. Dube also described a hallucination she experienced at the scene of the accident.
- [17] Paramedics put Ms. Dube in a collar and transported her to the hospital. At the hospital, she underwent x-rays of her left knee, chest, sternum, and thoracic spine. She also underwent a CT scan of her head in and around that time. She has since undergone a number of ultrasounds and MRIs on various parts of her body. She was ultimately diagnosed with a mild traumatic brain injury ("MTBI").
- [18] The parties generally agree that her physical injuries have largely resolved. The real issue appears to be the extent of her cognitive functioning impairment as a result of the MTBI and her headaches.

DISCUSSION

1. What are the nature, extent and duration of the injuries Ms. Dube suffered in the accident?
- [19] Dr. Suzanne Walter, Ms. Dube's family physician, testified in this matter. Having taken over another doctor's practice, one of her first visits with Ms. Dube was in the fall of 2013 as a result of the accident.
- [20] At that time, Ms. Dube described headache and concussion symptoms, nausea, contusions, a variety of musculoskeletal issues, and a very large and swollen hematoma on her lower leg. She returned to Dr. Walter's office two weeks later and visited her regularly thereafter. Ms. Dube complained of physical pain, memory problems, concentration, multi-tasking issues and problems with focus. She continued to have severe headaches, which Dr. Walter indicated were improved by Advil. The fact that the headaches were resolved by Advil was reassuring and led to Dr. Walter ruling out more serious conditions (such as a bleed on the brain).

[21] Dr. John Du, a registered psychologist with expertise in independent neuropsychological assessments, also testified in this matter. He initially assessed Ms. Dube on July 8, 2014 for rehabilitation purposes. He then assessed Ms. Dube for the purpose of an independent medical assessment on March 17, 2017. In doing so, he assessed Ms. Dube to determine whether there were changes in her cognitive and emotional functioning resulting from the accident. His assessment also addressed issues of causality, psychological limitations, functional impairment, prognosis and present and future care needs. He provided a report dated May 17, 2017.

[22] As part of his opinion, Dr. Du noted (at pages 2 and 3):

Ms. Dube's current neuropsychological profile indicates reduced cognitive functioning. Her reduced cognition is primarily due to the concussion she sustained during the subject MVA; however her two prior concussions are considered pre-existing vulnerability factors that likely rendered her more vulnerable to developing her current post concussive symptoms and complicated her recovery. She warrants a diagnosis of Mild Neurocognitive Disorder due to Traumatic Brain Injury;

Ms. Dube's cognitive symptoms present limitations to her social and occupational functioning; and

Her prognosis is largely negative.

[23] With respect to causality, at page 7 of his report Dr. Du noted as follows:

It is my opinion that Ms. Dube was functioning adequately at work and at home immediately prior to the MVA in question. It is also my opinion that Ms. Dube's reduced cognitive efficiency is likely due to the concussion sustained as a result of the subject MVA. I would consider her concussion to be mild in nature given negative CT head results and a lack of significant loss of consciousness. In general, post-concussive symptoms following a mild concussion typically resolve within 3 to 6 months following head trauma. However; it is probable that Ms. Dube's two prior head injuries have complicated her symptom presentation and contributed to her more protracted recovery.

[24] As part of his assessment, Dr. Du concluded that Ms. Dube was making genuine efforts during cognitive validity testing and was not attempting to over-report or exaggerate her symptoms. Dr. Du indicated that Ms. Dube's overall performance was good but that certain patterns in her testing demonstrated reduced cognitive efficiency and endurance.

[25] Dr. Du was cross-examined extensively on his knowledge of Ms. Dube's occupational and educational experience. While acknowledging that it would have been helpful to know that she had been out of the workplace from 2005-2009 while she was on LTD and retraining, and that she had minimal post-secondary experience and had not fully completed her GRTW, he ultimately indicated that these factors would not change his opinion. He noted that he does not make assessments based on generalized notions such as "the longer someone is out of the workforce, the harder it is for them to return." Rather, his practice is to discern the

reasons behind the unemployment and make an individualized assessment based on that information.

- [26] When taken to the literature in this area, Dr. Du agreed that self-reported symptoms similar to those reported by Ms. Dube could be attributed to other factors such as psychological issues or chronic pain. With respect to Ms. Dube, however, he believed this to be non-applicable because there were no presenting psychological or pain management issues that would have explained her cognitive weaknesses.
- [27] Ms. Dube also participated in tests designed to assess other possible attributable factors but those tests did not indicate any other possible source for the cognitive changes that she was experiencing. Dr. Du indicated that he had carefully considered all other alternative explanations and was able to conclude, more likely than not, that her reduced cognitive performance was due to the effects of a MTBI.
- [28] Dr. Mitchell Spivak, a psychiatrist, also testified in this matter. Dr. Spivak acknowledged Ms. Dube's previous history of anxiety or depression but noted that there was no evidence to suggest that these episodes were continuing. He concurred with the diagnosis of Dr. Du that Ms. Dube suffered from a mild neurocognitive disorder due to traumatic brain injury. He agreed this would impede her from returning to her previous vocational tasks and noted her reduced scope of social functioning.
- [29] Dr. Tony Giantomaso, a physiatrist, testified in this matter. He examined Ms. Dube on May 11, 2017 and made the following diagnoses resulting from the accident:

Mild traumatic brain injury (concussive force through the body or head, reported alteration of consciousness, brief or no loss of consciousness, normal CT head).

Post-traumatic migraine headaches. Chronic.

Post-traumatic cervical sprain/strain injury, consistent with WAD-II injury. Chronic, but mild.

Post-traumatic thoracic sprain/strain injury, grade I-II. Chronic, but mild.

Post-traumatic lumbar sprain/strain injury, grade I-II. Chronic, but mild.

Mild left shoulder impingement syndrome and bursitis.

Multiple abrasions and contusions. Essentially resolved.

- [30] In the discussion of his diagnoses, Dr. Giantomaso noted that the mechanism of action in the accident could reasonably be associated with the above-noted post-traumatic injuries (including the MBTI, ongoing headaches, and injuries to the cervical, thoracic and lumbar spine). He strongly recommended referral to a headache specialist especially due to the "greyness features" (including photophobia, nausea and occasional visual issues) associated with her post-traumatic headaches. These issues have yet to be appropriately addressed.

- [331] Dr. Giantomaso noted that Ms. Dube's most limiting issues are her headaches and her pre-existing psychological symptoms that were exacerbated by the accident. He notes that the vast majority of improvement is expected in the first six to twelve months post-accident or earlier. If recovery has not occurred within the first two years, there is a very high likelihood of ongoing chronic issues in the future. Accordingly, in his opinion, Ms. Dube will continue to experience chronic pain in the long-term. By following his recommendations, she may experience decreased pain and increased function but this should be considered part of a long-term pain management strategy as opposed to a curative solution.
- [32] In cross-examination, Dr. Giantomaso maintained that Ms. Dube's subjective and self-reported account of her symptoms posed no problem with respect to his clinical opinion that she suffered from migraines; the reason being the diagnostic criteria for migraines, in fact, require a consideration of subjective symptoms. He also said that the fact that he did not know about her time off work through 2005-2009 would not affect his opinion because it would not be relevant unless the unemployment related to persisting medical reasons. Her medical records indicate otherwise; that her main problem over the years has been her left knee.
- [33] Dr. Giantomaso noted Ms. Dube to have classic migraine symptoms, such as episodic blurred vision. He also noted that the emergency room records following the accident on November 16, 2013 clearly reflected symptoms of a concussion or MTBI. While it appeared he was not aware of a more recent fall on May 2, 2017, when he saw her on May 11, 2017, he noted it appeared she hit her face and at most this would have indicated an exacerbation of symptoms for a short time.
- [34] Dr. Teal, a neurologist with a specific expertise in acquired brain injury, testified on behalf of the defendant in this matter. He has a particular interest in traumatic brain injury. Approximately five to ten percent of his practice involves patients with headaches. Dr. Teal prepared a medical legal report dated July 19, 2018. He opined at paragraph 12 of that report:

Ms. Dube reports persisting subjective cognitive symptoms subsequent to the 2013 accident. Her recovery has been atypical. It is my opinion it is likely her persisting cognitive symptoms reflect the combination of psychological factors, motivational factors, mild residual sequelae arising from her Mild Traumatic Brain Injury from the 2013 accident, and the sequelae of a subsequent concussion that she experienced in October 2014 that set back her recovery.

- [35] Dr. Teal's opinion differed from that of Dr. Giantomaso in a number of respects. Dr. Teal noted Ms. Dube to have a "very good memory of subsequent details at the accident scene and from her description she appears to have been thinking clearly." In contrast, Dr. Giantomaso noted, amongst other things: "Her recollection of the actual accident is poor. She remembers crawling out of the vehicle and climbing up the embankment to the top. She remembers being disoriented."

[36] Dr. Teal's report also noted at paragraph 24:

In the absence of the motor vehicle accident of November 16, 2013, I am uncertain when and if Ms. Dube would have been able to return to work. Ms. Dube had experienced an extremely prolonged recovery from her left total knee replacement. The surgery was performed on April 13, 2012, and she was still off work at the time of the motor vehicle accident a year and half later.

[37] Contrary to Dr. Teal's view about her employment, however, Dr. Giantomaso noted that "at the time of the accident, [Ms. Dube] was working as a nursing unit assistant at St. Mary's Hospital in Sechelt."

[38] In fact, after her knee replacement, Ms. Dube was completing a GRTW at the time of the accident. This program commenced in April 2013 with an increasing work schedule over time. Her return to work was interrupted when her right knee was impacted, possibly by favouring it, during her recovery from her left knee replacement. Ms. Dube had, however returned to that GRTW. At the time of the accident, she was officially working six-hour days (but in reality, longer, as per her practice) and was within one to two weeks of working her full-time 7.5 hours. Dr. Teal's remarks in his report (that he was uncertain when and if Ms. Dube would have been able to return to work) are simply not accurate.

[39] With respect to headaches, Dr. Teal noted: "the only ongoing treatment issues would be the use of minor analgesics or simple physical modalities to treat headaches as they arise. It is more than four years since the motor vehicle accident. I think it is unlikely Ms. Dube will benefit from ongoing occupational therapy."

[40] In contrast, Dr. Giantomaso noted as follows on page 10 of his report:

I strongly recommend referral to a headache specialist. In my opinion, her post-traumatic headaches would likely be controlled with a combination of pharmacological and interventional management. Medications such as nortriptyline or Topamax could be considered in regards to headache prophylaxis. Trials of Botox in particular could be effective for management of her post-traumatic migraines. This will likely require referral to a neurologist or physiatrist with an interest in headache management.

[41] Dr. John S. Arthur, an orthopaedic surgeon, assessed Ms. Dube on December 4, 2017 regarding injuries sustained in the accident. He concluded that Ms. Dube was not disabled in terms of performing her duties as an administrative nursing unit assistant. He did note, however, that she would need accommodations (as she likewise had prior to the accident due to her knee replacement) related to prolonged sitting and stairclimbing. Overhead reaching would also be difficult for her, particularly if repetitive. He also noted that most if not all these issues were present to some degree prior to the motor vehicle accident and have not changed significantly because of the accident.

- [42] In cross-examination, he agreed that her issues with respect to arthritis were "relatively okay" and were at pre-accident status. Her left ankle had good stability and range of motion. With respect to the ongoing effects of her shoulders, prior to the accident, her situation was asymptomatic and he could not say when that shoulder would have given problems absent the motor vehicle accident.
- [43] Christine Hoh, Ms. Dube's treating occupational therapist, also testified in this matter. Her first meeting with Ms. Dube was in April 2014. Her focus in treating Ms. Dube was on cognitive rehabilitation. When she first met Ms. Dube, she observed her to have difficulty with word finding, maintaining her attention span, short-term memory, multi-tasking, getting overwhelmed and losing her train of thought. Ms. Hoh regularly provided Ms. Dube with "homework" or tasks to help with her cognitive functioning. In 2015, Ms. Dube achieved some improvement. She continued to improve in 2016 and plateaued in 2017. Though her cognitive functioning had improved, she still struggled with multi-tasking and stress-based tasks. Despite Ms. Dube's personal goal to return to work, Ms. Hoh encouraged Ms. Dube to find alternate employment.
- [44] In cross-examination, Ms. Hoh agreed that other family and health stressors in Ms. Dube's life could have impacted her cognitive functioning.
- [45] As noted, Ruth Armstrong, a registered counsellor, has been treating Ms. Dube over a number of years. Initially treating for PTSD in 2005, Ms. Armstrong again treated Ms. Dube as a result of the motor vehicle accident. Ms. Armstrong referred to Ms. Dube as a "vivacious" woman when they first met in the mid-2000s. After the accident, however, Ms. Armstrong described her as "flatter" and more hesitant. Ms. Armstrong also said that Ms. Dube had more difficulty explaining herself.
- [46] In cross-examination, defendant's counsel attempted to elicit evidence from Ms. Armstrong about Ms. Dube's personal and family issues and how these stressors may have impacted her cognitive function. This generalized proposition, however, was not helpful. If, as argued by plaintiff's counsel, it were the case that life stressors impact cognitive function as a matter of course, the general population would largely be cognitively disabled.
- [47] When assessing the medical and economic evidence, a key issue is how to characterize Ms. Dube's past medical and work history. While Ms. Dube has been out of the workforce at various times over the years (some of that time being disability-related), considering these unemployment periods in isolation, without looking at specifics, is not helpful.
- [48] While the absences appear to be long, the evidence shows they were generally for a reason that would enhance employability. Initially, her absence was because of treatment for PTSD; then various retraining efforts, including schooling at a community college, a knee replacement, and finally a return-to-work program. Therefore, I do not find Ms. Dube's time out of the workforce to adversely affect her position. It does not support the proposition that Ms. Dube was unlikely to successfully complete her return to work program. Rather, it demonstrates continuous efforts to remain employed.

- [49] Ultimately, I prefer the majority of the medical evidence as reflected by Dr. Du and Dr. Giantomaso's opinion that Ms. Dube's ongoing limitations would not be present had the accident not occurred. This is consistent with other medical evidence as well as with the testimony of lay witnesses regarding the observed changes in Ms. Dube's personality and behaviour following the accident. Dr. Teal also agreed he would defer to Dr. Du's testing on the two occasions he did them.
- [50] Based on my review of the medical evidence, I find that Ms. Dube suffered a head injury or MTBI, and physical injuries to her head, neck, back, shoulders, right leg, and abrasions and contusions to her chest, abdomen and elbow. The impact of the MTBI has created the debilitating injuries affecting Ms. Dube's cognitive functioning. She has headaches, fatigue, memory issues, speed impediment, multi-tasking issues and anxiety.
- [51] I do not agree with the defence that Ms. Dube's earlier medical or employment history establishes that she was "generally" disabled or reluctant to work. Rather, the evidence establishes that work was an important part of Ms. Dube's active lifestyle. The evidence shows that Ms. Dube was committed to recovery and eager to participate in the workforce.
- [52] Both the medical and lay evidence establish that Ms. Dube has been unable to return to her previous activities and has become socially withdrawn. The only expert who opined that Ms. Dube was not disabled as a result of the accident was Dr. Arthur, who does not have any expertise with respect to cognitive functioning and its impact on Ms. Dube's ability to do her job. Dr. Teal's opinion was undermined by its reliance on an inaccurate fact. Accordingly, I conclude that as a result of the accident, Ms. Dube will continue to suffer from cognitive impairment and chronic pain to some degree.
2. What is the appropriate award of non-pecuniary damages for pain and suffering?
- [53] The plaintiff seeks an award ranging from \$160,000 to \$175,000 in non-pecuniary damages. The defendant submits that an appropriate range for non-pecuniary damages is between \$70,000 and \$100,000.
- [54] The jurisprudence in this area has been stated many times. As noted in *Paterson v. Hindle*, 2017 BCSC 1104:
- [51] A plaintiff is entitled to reasonable damages for her pain and suffering. The plaintiff should be placed in the same position she would have been if the accident had not occurred, but not in a better position: *Parypa v. Wickware*, 1999 BCCA 88 at para. 29.
- [52] In *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45 and 46, the court noted that a non-pecuniary award will vary to meet the specific circumstances of each case, and set out the factors to be considered in making such an award:
- [46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, 2005 BCCA 54).

[55] Ms. Dube relies on *Paterson, Burdett v. Eidse*, 2010 BCSC 219, *Mayer v. Umabao*, 2016 BCSC 506, and *Niessen v. Emcon Services Inc.*, 2018 BCSC 1410 to support her argument that the appropriate award for general damages is \$160,000 to \$175,000.

[56] The defendant relies on *Gillespie v. Yellow Cab Co.*, 2014 BCSC 1745 aff'd 2015 BCCA 450, *Reimer v. Bischoff*, 2015 BCSC 1876 rev'd on other grounds, 2017 BCCA 4, *Rousta v. MacKay*, 2017 BCSC 644 aff'd 2018 BCCA 29, and *Lane v. Pederson*, 2014 BCSC 1302 to support the argument that the appropriate award for general damages is \$70,000 to \$100,000.

[57] The Supreme Court of Canada in *Lindal v. Lindal* at 637 (as cited in *Stapley* at para. 45) noted as follows:

the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury alone but upon its ability to ameliorate the condition of the victim considering his or her particular situation. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury." An award will vary "to meet the specific circumstances of the individual case." [Citations omitted.]

[58] Nancy Horne, a lay witness, worked with Ms. Dube for seven years at Kiwanis Villa in the 1990s. She described Ms. Dube as a very organized and social person. Her job involved a lot of multi-tasking and she "knew everything." Ms. Dube organized the staff parties and regularly hosted social events and dinners at her home. She took pride and enjoyment in preparing food for others. Ms. Horne developed a social relationship with Ms. Dube. She testified that she noticed changes in Ms. Dube following the accident: her speech is slower, she no longer has excitement or passion in her voice, and her "witty sense of humour" is gone.

- [59] Ms. Dube noted her difficulty reading and concentrating. She had difficulties retaining things and had vision and stability issues. She could no longer shop for groceries on her own and did not go anywhere without Mr. Dube.
- [60] Mr. Dennis Regnier, another lay witness and Ms. Dube's former manager at Kiwanis Villa, testified that Ms. Dube was "fabulous" at her job as his administrative assistant. She was very good at anticipating what he needed. She was organized and able to deal with the multi-tasking her job entailed. She took calls, made appointments, prepared notes and agendas, and kept Mr. Regnier informed. She also dealt with staff and families of the residents at Kiwanis Villa. Mr. Regnier also developed a social relationship with Ms. Dube and her husband. They socialized regularly at dinners and parties hosted by Ms. Dube at her home which he described as "immaculate."
- [61] After the accident, Mr. Regnier noticed Ms. Dube to have difficulty answering questions. In responding to questions, she was hesitant and had a "funny look of processing." Her memory was poor. She was "not as sharp as she used to be". Before the accident, he said, "there wasn't a thing she didn't remember."
- [62] Alison Rhodes, a registered nurse and a co-worker and friend of Ms. Dube provided similar testimony. Ms. Rhodes described Ms. Dube as being very social and having an "immaculate" house. Following the accident, she described Ms. Dube as withdrawn and less social. According to Ms. Rhodes, Ms. Dube was also constantly writing notes to herself to help her remember things.
- [63] When they worked together at Sechelt Hospital, Ms. Rhodes described Ms. Dube as the hub of the department. Ms. Dube was very efficient and apparently the best clinical assistant that Ms. Rhodes had ever encountered. On this point, Louise Vella, who was in the job subsequent to Ms. Dube and did not know her, said the position of nursing unit clerk was extremely busy requiring organizational abilities and multi-tasking along with a need to focus and prioritize on the job.
- [64] Mr. Dube testified similarly as did Ms. Dube's adult daughter, Nicole McKee. He also noted her irritability and frustration. Ms. McKee acknowledged that Ms. Dube had improved but that it had become difficult to maintain the relationship with her mother due to repetitive questions and her mother's new sense of frustration after the accident. Ms. McKee described Ms. Dube's socializing post-accident as being very limited -- only with close family and friends.
- [65] As noted earlier, Ms. Dube suffered a variety of injuries in the accident including a MTBI. The witnesses painted a fundamentally different picture of Ms. Dube before and after the accident. She will continue to suffer ongoing cognitive problems (including memory issues) that have contributed to her social withdrawal. These symptoms have impacted her significantly. Her friends and family have corroborated this.

- [66] As noted in *Stapley*, the assessment of non-pecuniary damages depends on the particular circumstances of the individual. I have concluded that the authorities provided by the plaintiff are more useful than the authorities offered by the defendant in assessing the case at bar. This is largely because the types of cognitive impairments that I have found to exist in this case are not particularly evident in the defendant's authorities. I have considered Ms. Dube's age as well as the nature of her injuries and her ongoing symptoms. I make specific note of the evident distress she has experienced due to the cognitive impact of her injuries, her impact of that on her life generally and her withdrawal from social activities. I am of the view that an appropriate award for non-pecuniary damages is \$160,000.
3. What is the past loss of income earning capacity?
- [67] The law is clear that compensation for past loss of income earning capacity is based on what the plaintiff would have earned but for the accident: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 175. Determining past loss of income earning capacity is an "assessment", not a calculation as it involves the consideration of hypothetical events: *Hardychuk* at para. 177. (See also *Smith v. Knudsen*, 2007 BCSC 1270 at para. 39.)
- [68] The plaintiff maintains that past loss of income is \$167,840. This number is based on the calculations of the plaintiff's retained economist, Mr. Darren Benning. The number presumes that Ms. Dube would have worked to age 65 and that her past absences and previous conditions would not have been barriers post-accident.
- [69] The defendant maintains that compensation for past loss of earning capacity is based on what the plaintiff would have earned, not could have earned, but for the accident. Defence urges the court in valuing the award to consider the likely duration of the plaintiff's prospective working life and account for negative and positive contingencies unique to this case.
- [70] In particular, the defendant points to the plaintiff's pre-accident time out of the workforce (2005-2009, 2011-2013). Defence submits that it is highly speculative to assume that the plaintiff would have achieved full-time hours without experiencing another physical or medical setback. The defendant maintains that mere speculation does not meet the "real and substantial possibility" test in order to claim for loss of income earning capacity: *Ostrikoff v. Oliveira*, 2015 BCCA 351 at paras. 15, 21.
- [71] The defendant also points out Mr. Benning's evidence in cross-examination that the participation of women in the workforce starts to decrease between ages 60 -64. Specifically, 57% of women remain in the workforce between ages 60-64. The percentage of women in the workforce then dramatically drops off between the ages of 65-69 with only 26% remaining in the workforce. As a result, defence submits that this contingency should be factored into the total calculation, resulting in a total income of \$74,095.38 up until age 65.

[72] The defendant also relies on Mr. Benning's testimony that the average age of retirement for public sector workers is 61-62 years old. Accordingly, the defendant maintains that it is reasonable to conclude that the plaintiff was more than likely to have retired close to that statistical age. The defendant therefore submits that the net past loss of income is either \$6,592 (retirement at age 61 after contingency reduction) or \$21,081 (retirement at age 62 after contingency reduction).

[73] Derek Nordin, a vocational rehabilitation consultant, interviewed Ms. Dube on May 8, 2018 for the purposes of a vocational assessment. He concluded:

at the time of the November 13 MVA Ms. Dube was completing a graduated return to work [since July 2013] and was up to seven-hour days [and working towards the full 7.5 hour day). As such, it seems likely she would have been able to continue working as a nursing unit assistant absent the motor vehicle accident.

[74] After considering a variety of medical reports (including Dr. Du's diagnosis of a mild neurocognitive disorder due to traumatic brain injury), Mr. Nordin concluded that Ms. Dube would not be capable of returning to her pre-injury job. Additionally, from a vocational rehabilitation perspective, he doubted that Ms. Dube would be able to participate in the workforce at all.

[75] In cross-examination, Mr. Nordin was taken to the numerous medical reports of Ms. Dube's pre-accident status. He agreed these would be pertinent and helpful if he had had them as part of his assessment. He agreed he was less certain of his opinion that it was likely Ms. Dube would have returned to work as a nursing unit assistant absent the motor vehicle accident. He did however agree that if the medical evidence established that these previous issues had stabilized and Ms. Dube was in fact working seven hours a day, despite her schedule of six hours, and within one or two weeks of a full return to work, the evidence that was put to him with respect to her pre-existing injuries was less pertinent.

[76] Jodi Fischer, a registered occupational therapist, assessed Ms. Dube on May 28-29, 2018 for both functional capacity and future care needs. She conducted a variety of tests and interviews. She concluded that Ms. Dube showed physical and cognitive limitations affecting her ability to return to work. Her physical limitations included reduced dexterity and typing speed. Functional cognitive testing identified limitations with memory, information processing speed, and executive function. She showed difficulty on tasks involving organization and prioritization of tasks.

[77] In cross-examination, Ms. Fischer was taken to a number of medical documents relating to Ms. Dube's pre-accident functioning. Ms. Fischer conceded that while past issues may be relevant if they affect current functioning, there was nothing to indicate that Ms. Dube would have been unable to complete the final week of her GRTW.

- [78] After considering these matters, I conclude that the argument that Ms. Dube would have failed her GRTW program or would have retired a few years after the accident due to her health cannot be accepted. As noted, the defendant's own expert opines that prior to the accident, Ms. Dube was physically able to return to her job with accommodations. There were no physical barriers or serious health issues post-accident that would have interfered with her working.
- [79] Furthermore, Ms. Dube had a significant attachment to her position and a definitive desire and motivation to return to work. Ms. Hoh and Ms. Armstrong were clear in their testimony that Ms. Dube never gave up on returning to work, despite her setbacks. Indeed, working was very much part of her overall active social life.
- [80] With respect to the defendant's argument that Ms. Dube was not forthright in recounting her history out of the workforce, there is no doubt Ms. Dube did not consider her retraining efforts to be "out of the workforce." I do not find that she was deliberately trying to conceal any aspect of her prior work history.
- [81] Mr. Benning's past and future income loss report was based on two scenarios: firstly, that in the absence of the accident, Ms. Dube would have maintained employment as a full-time nursing unit assistant with the Vancouver Coastal Health Authority until age 65 and then reverted to casual work until age 70. Alternatively, she would have worked full-time until age 70.
- [82] Importantly, with respect to past loss of income, cross-examination made clear that Mr. Benning did not apply any contingencies for future non-participation in the labour force such as disability, voluntary retirement or temporary absences to care for other family members. Despite this, he agreed that retirement and disability are the biggest issues in people aged 60 to 65 and older.
- [83] Douglas Hildebrand, an economist, provided a report and testified that Mr. Benning applied zero allowance for labour market contingencies in the past period and a 5.9% allowance for contingencies between trial commencement and the plaintiff's age 70.
- [84] He did acknowledge, however, that it is up to the court to determine which contingencies should be applied. Mr. Hildebrand's reference to the average age of retirement from the Municipal Pension Plan Annual Report of 2017 (61 years old), while interesting, is not helpful. A generalized average does not take into account Ms. Dube's specific circumstances.
- [85] Mr. Benning calculated Ms. Dube's wage loss from the date of accident up until her 65th birthday as being \$167,841. As noted by the defendant, this amount does not take into account various labour market contingencies as set out above. I find that those contingencies should be taken into consideration and that therefore, this amount should be reduced. I accept that 57% of women in Ms. Dube's age range (from the time of the accident up until her 65th birthday) remain in the workforce. Accordingly, I conclude that Mr. Benning's \$167,841 calculation be reduced by 43%. The amount for past wage loss is

therefore \$95,669.37.

4. What is the future loss of income earning capacity?

- [86] The defendant maintains that no award should be made for loss of future earning capacity. If one is made, however, the defendant says it should be no more than \$40,000 regardless of whether I use the "earnings approach" or the "capital asset approach." Mr. Benning provided a set of calculations based on casual employment after age 65 to age 70 of \$87,348. Reducing this amount by 74% to reflect the statistic that only 26% of women work past the age of 65 reduces the amount to \$22,710. I base these numbers on a one-year salary of approximately \$40,000.
- [87] The plaintiff submits that there is clear evidence of an intention to work and that there were no real health issues that would have prevented Ms. Dube from working. Ms. Dube relies on the evidence of Mr. Benning that if she were to work casually for ten days per month, the total present value of her annualized earnings would be \$20,000, multiplied by four to account for four years of employment is approximately \$80,000.
- [88] Sharon Turlock, an admitting clerk in the Sechelt Hospital, is now 74. She retired at age 70 and is now on the casual list along with other retired employees. She continues to work at the hospital regularly. Counsel points out that this supports the likelihood that Ms. Dube could have continued to work well past the age of 65.
- [89] The plaintiff says that the averages used to determine age of retirement are more appropriate if there are long-term uncertainties (for example: where the plaintiff is a young person who does not already have a demonstrated work history). Ms. Dube submits that this is not the case here because clear evidence exists to establish her intent to continue working into her 70s.
- [90] While I agree that the evidence of Ms. Turlock indicates opportunities for work for Ms. Dube into her 70s, I agree with the defendant this it is not ultimately helpful in establishing a real and substantial possibility that Ms. Dube herself would continue to work past age 65.
- [91] I agree with the defendant in this case that the earnings approach and the capital asset approach lead to a similar result. As noted earlier, Mr. Benning provided calculations based on casual employment from ages 65-70 of \$87,348. His approach, however, did not incorporate labour market contingencies. Therefore, I reduce his amount by 74% to reflect the statistic that only 26% of women remain in the workforce past the age of 65, leaving a final amount of \$22,710.
- [92] In view of the above, I award \$23,000 for future loss of income.
5. What amount, if any, should be awarded for cost of future care and loss of housekeeping capacity?

- [93] The plaintiff seeks housecleaning of \$14,258 (with a 50% deduction being \$7,129), a rehab driving assessment totalling approximately \$3,700 and counselling as recommended by Ms. Fischer and Dr. Du in the amount of \$1,733. The defendant maintains that none of these expenses were established in evidence. Therefore, the defendant submits that there should be no award for future care at all. Alternatively, if an award for future care is made, \$200 for two counselling sessions is appropriate.
- [94] In terms of the counselling, Ms. Dube's counsellor, Ms. Armstrong, charges \$100 per hour for clients living on the Sunshine Coast. Dr. Du recommends 20 sessions on an as-needed basis. At a cost of \$100 per hour, the total cost would be \$2,000.
- [95] Ms. Dube's counsellor Ms. Fischer also recommended housecleaning services and a driver rehab program. When it was put to Ms. Fischer in cross-examination that Ms. Dube herself identified as a good and "effortless" driver, Ms. Fischer reported that that was not consistent with her interview with her husband, Mr. Dube. Further, she said, individuals with cognitive issues may not have full insight into their limitations. Ms. Fischer would therefore err on the side of caution and recommend the driving program.
- [96] I conclude therefore that driving rehabilitation should be ordered in the amount of \$3,700. Housecleaning is also a requirement especially due to Mr. Dube's ill health. Finally, the evidence supports the effectiveness and need for further counselling for Ms. Dube. This has been and will continue to be a significant component in assisting her recovery efforts.
- [97] I therefore award \$7,000 for housekeeping, \$2,000 for counselling and \$3,700 for driver rehabilitation.
6. What amount, if any, should be awarded for special damages?
- [98] The parties have agreed on special damages with the exception of Ms. Dube's mouth guard (\$367.60) that she has to help with her headaches. I find this to be an appropriate expense and therefore include this amount in the special damages amount giving a total of \$3,472.58.

MITIGATION

- [99] I do not find a failure to mitigate in these circumstances. Ms. Dube was consistently under the care of an occupational therapist (hired by ICBC) to assist in her return to work. Ms. Dube followed the occupational therapist's directions. The defendant argues that because Ms. Dube was unionized and her employer had a duty to accommodate, she should have inquired into whether there were any other reasonable accommodated positions. I find this argument to be too general in nature and it does not persuade me that Ms. Dube failed to mitigate her circumstances.

CONCLUSION

- [100] In summary, I have awarded the following amounts:

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Non-pecuniary damages

\$160,000.00

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Past loss of income

\$95,669.37

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Future loss of income earning capacity

\$23,000.00

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Future cost of care

\$12,700.00

.

Special damages

\$3,472.58

TOTAL

\$294,841.95

The Honourable Madam Justice E. Burke

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Prepared on 26 October 2026 · Esheria