

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Augusta-Mansfield v. Yun*,
2023 BCSC 1633

Date: 20230913
Docket: M192887
Registry: Vancouver

Between:

Tercel Kim Augusta-Mansfield

Plaintiff

And

Seagu Yun and Brian Smith

Defendants

Before: The Honourable Mr. Justice Brongers

Reasons for Judgment

Counsel for the Plaintiff:

N.J. Hartney

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Place and Dates of Trial:

Vancouver, B.C.
May 1-5, 2023

Place and Date of Judgment:

Vancouver, B.C.
September 13, 2023

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INTRODUCTION

[1] Tercel Augusta-Mansfield (the “Plaintiff” or “Mr. Augusta-Mansfield”) seeks damages in connection with personal injuries sustained in a motor vehicle accident that took place on April 27, 2018 (the “Accident”). Liability for the Accident is admitted by Seagu Yun and Brian Smith (collectively referenced as the “Defendants”). At issue is the amount of damages to which Mr. Augusta-Mansfield is entitled in compensation for his injuries.

BACKGROUND

The Plaintiff’s Circumstances Prior to the Accident

[2] Mr. Augusta-Mansfield was born in 1991 and grew up in Merritt. He is a member of the Boston Bar First Nation.

[3] Mr. Augusta-Mansfield had a challenging childhood. His parents separated when he was three years old, and his mother raised him mostly alone with his four siblings. He attended elementary, middle, and secondary school but dropped out in Grade 9 and left Merritt. He did some further schooling in Esquimalt and in Moses Lake (Washington State) but never graduated from high school. Instead, he joined the labour force and performed a variety of jobs over the years.

[4] Much of Mr. Augusta-Mansfield’s work was done in the roofing industry. He took on jobs in various British Columbia locations, such as Merritt, Kamloops, and Surrey. He worked for a number of companies, including one owned by his brother-in-law, Sheldon Bradley. According to Mr. Bradley, Mr. Augusta-Mansfield was an excellent roofer – hard working, strong, and fast. Mr. Bradley even stated that Mr. Augusta-Mansfield and his brother were the two best roofers he ever worked with.

[5] About a year before the Accident, Mr. Augusta-Mansfield began employment with Arbutus Roofing and Drain Ltd. (“Arbutus Roofing”), doing roofing work primarily in and around Surrey. His rate of pay was \$27 per hour, and he earned about \$50,000 during the period from July 2017 to July 2018. His supervisor,

Jackson Sutherland, also felt that Mr. Augusta-Mansfield was a particularly skilled roofer.

[6] Mr. Augusta-Mansfield has two biological children: a son born in 2011 and a daughter born in 2016. He was not residing with either at the time of the Accident, although he would spend time with his younger child when visiting Merritt.

[7] Perhaps not surprisingly given his profession, Mr. Augusta-Mansfield was in good physical shape. While he admits to having had issues with alcohol when he was younger, he effectively got them under control after the birth of his second child. Otherwise, Mr. Augusta-Mansfield had no relevant pre-existing health issues before the Accident.

The Accident

[8] During the morning of April 27, 2018, Mr. Augusta-Mansfield was driving his 2013 Subaru Legacy southbound on the Pattullo Bridge between New Westminster and Surrey. He had purchased the car just the day prior. He was on the inside lane of the bridge when he experienced a collision with a 2010 Chevrolet Cobalt that was being driven northbound by the defendant Brian Smith. The Chevrolet had apparently strayed into the oncoming lanes after being struck by another northbound car, a 2007 Jeep Compass driven by the defendant Seagu Yun.

[9] Mr. Augusta-Mansfield's newly acquired car sustained considerable damage and was eventually written off as a total loss. It nevertheless could still be driven after the collision, which Mr. Augusta-Mansfield did at the urging of the first responders who wanted to clear the bridge. However, Mr. Augusta-Mansfield did not go to hospital or otherwise seek any medical attention that day.

The Plaintiff's Injuries and Treatment

[10] Following the Accident, Mr. Augusta-Mansfield's began to feel pain in his neck and back, as well as numbness and weakness in his hands and fingers. He also experienced symptoms of depression, headaches, and had difficulties sleeping.

[11] It apparently took Mr. Augusta-Mansfield some time before he consulted a doctor. He was eventually diagnosed with soft tissue injuries affecting his back, neck, arm, and leg. His symptoms included pain, numbness, and tingling. It was also noted that he was having trouble sleeping and was depressed.

[12] With respect to treatment, Mr. Augusta-Mansfield did some chiropractic therapy, massage therapy, and kinesiology. He also took medication for pain and to deal with his sleep issues.

The Plaintiff's Circumstances After the Accident

[13] Mr. Augusta-Mansfield continued to work at Arbutus Roofing for two and half months following the Accident. However, he could no longer easily climb ladders and carry heavy material onto roofs, and found nailing especially difficult because of the discomfort he experienced in his hand and fingers. Mr. Augusta-Mansfield quit his job at Arbutus Roofing on July 10, 2018, and returned to live in Merritt.

[14] While the move enabled Mr. Augusta-Mansfield to spend more time with his daughter, it also meant that he had to deal with her mother's substance abuse problems. The situation deteriorated such that Mr. Augusta-Mansfield sought and obtained legal custody of their child. She is now 6 years old, and he still cares for her today. Mr. Augusta-Mansfield also became the primary caregiver of his daughter's 9 year old aunt (she is the younger sister of the mother of Mr. Augusta-Mansfield's daughter). Mr. Augusta-Mansfield now lives with the two girls in rental accommodations in Merritt. By all accounts, Mr. Augusta-Mansfield is an excellent parent.

[15] In February 2020, Mr. Augusta-Mansfield enrolled in the Social Services Worker – Professional program offered at Vancouver Career College's Surrey campus. He completed it in August 2021, graduating with a 87.55% grade average.

[16] Mr. Augusta-Mansfield also did a practicum in the field of addictions with the Nicola Valley Shelter and Support Society in Merritt. He was subsequently employed as a peer support worker for several months, but resigned in January 2022 after an

incident with a client made him feel unsafe. Mr. Augusta-Mansfield earned \$8,080.80 from this job, over the period from August 2021 to February 2022.

[17] In May and June 2022, Mr. Augusta-Mansfield worked for Coastal Restoration Society, an organization tasked with cleaning up debris in Merritt in the wake of the significant flooding that occurred in the Nicola Valley the previous fall. He was paid \$7,500 for his labour.

[18] By this point in time, Mr. Augusta-Mansfield felt able to return to roofing work. He did so through his own company working with others, and secured contracts with the Lower Nicola Indian Band for five housing projects which were completed in late 2022. Mr. Augusta-Mansfield testified that he personally earned about \$7,500 from these jobs, after paying project-related expenses.

[19] Mr. Augusta-Mansfield is also attempting to regain the physical fitness he enjoyed prior to the Accident. He particularly enjoys road cycling and has a goal of riding up to 20 kilometers per day, which he sometimes achieves.

[20] While Mr. Augusta-Mansfield has made significant progress since the Accident, he has also faced challenges. For a time, he was unable to find any suitable work and was effectively homeless, sleeping in his vehicle. He also experienced a relapse in May 2021, becoming severely intoxicated and texting a photograph which raised concerns about self-harm. However, the emergency doctor who assessed Mr. Augusta-Mansfield was satisfied that this was an unfortunate one-time incident which did not require any further formal intervention.

ANALYSIS

Overview and Issues

[21] While liability for the Accident has been admitted on behalf of the Defendants, the parties dispute the quantum of the total damage award to which Mr. Augusta-Mansfield is entitled.

[22] Mr. Augusta-Mansfield claims damages under the following headings:

- non-pecuniary (general) damages;
- past loss of income;
- future loss of earning capacity;
- cost of future care; and
- special damages.

[23] Commendably, the parties have agreed that Mr. Augusta-Mansfield ought to receive \$7,960.00 in respect of his cost of future care and \$529.96 in respect of his special damages. Awards in these amounts will be issued on consent.

[24] As for the three remaining heads of damage, an analysis of the parties' respective positions is set out below following a description of the nature of the evidence that was presented at trial.

Factual Evidence

[25] The factual evidence before the Court consisted of an agreed chronology, documentary material entered into evidence in accordance with the parties' document agreement, and the testimony of five witnesses, all of whom were called by the Plaintiff. The factual witnesses were (set out in order of appearance):

- 1) Tercel Augusta-Mansfield: the Plaintiff himself;
- 2) Allison Bradley: the Plaintiff's sister;
- 3) Sheldon Bradley: the Plaintiff's brother-in-law;
- 4) Jackson Sutherland: the Plaintiff's former co-worker; and
- 5) Shtumpb Jo-Anne Mansfield: the Plaintiff's mother.

[26] Mr. Augusta-Mansfield was, of course, the primary and most significant of the Plaintiff's witnesses. He testified comprehensively about his background, work experience, the Accident, his injuries, the treatments he has received, and his post-Accident circumstances. In doing so, he listened carefully to questions from counsel, and provided answers that were cogent and forthright. He readily admitted the gaps

in his knowledge and was not prone to exaggeration. In sum, I found Mr. Augusta-Mansfield to be a generally credible and reliable witness.

[27] Counsel for the Defendants argue that Mr. Augusta-Mansfield has credibility issues, but only in relation to certain gaps in the Plaintiff's documentary evidence regarding his earnings and benefits. I address these concerns in the analysis below.

[28] Counsel for the Defendants also ask the Court to prefer the evidence of Jackson Sutherland to that of Sheldon Bradley with respect to the amount of income that can be earned by roofers, for two reasons. First, Mr. Sutherland is not related to Mr. Augusta-Mansfield is therefore a "disinterested witness". Second, only Mr. Sutherland is currently working in the roofing industry. Ultimately, however, I do not find it necessary to address this argument. Neither Mr. Sutherland nor Mr. Bradley were qualified as experts capable of giving economic evidence regarding the average rate of pay for roofers in British Columbia, and I have disregarded their opinions on this question in adjudicating Mr. Augusta-Mansfield's claim.

Expert Evidence

[29] Three expert witnesses testified at trial. The first is a doctor, Lawrence Kei, who was called by the Plaintiff. The other two are occupational therapists: (1) Sandra Hale, who was called by the Plaintiff; and (2) Sabrina White, who was called by the Defendants. Their reports were entered without objection, and they were all qualified as experts in their respective fields. This expert evidence can be summarized as follows.

Dr. Lawrence Kei

[30] Dr. Kei is a psychiatrist who was retained by the Plaintiff to prepare an expert report on the extent of Mr. Augusta-Mansfield's injuries. Dr. Kei was qualified without objection as a medical doctor capable of giving expert evidence in the field of physical medicine and rehabilitation. His examination of Mr. Augusta-Mansfield was conducted on January 9, 2023.

[31] Dr. Kei opines in his report that Mr. Augusta-Mansfield has injuries which he described as: (1) post-traumatic cervical sprain-strain injury consistent with whiplash injury and associated headaches; and (2) post-traumatic lumbar sprain-strain injury.

[32] It is Dr. Kei's view that the Accident caused these injuries. While Mr. Augusta-Mansfield's condition has since improved significantly, Dr. Kei feels that Mr. Augusta-Mansfield's prognosis for returning to his pre-Accident state is poor. Dr. Kei also opined that Mr. Augusta-Mansfield's ability to sustain jobs requiring repetitive motions of the neck or back, prolonged postures, or lifting is guarded.

[33] With respect to future treatment, Dr. Kei's primary recommendations are for Mr. Augusta-Mansfield to obtain a functional capacity evaluation, and to work on further strengthening of the neck and back with kinesiology. Dr. Kei also accepts that Mr. Augusta-Mansfield will still need to take oral pain medications into the future.

Sandra Hale

[34] Ms. Hale is an occupational therapist who was retained by the Plaintiff to prepare a functional capacity evaluation. She was qualified to provide expert evidence in this regard without objection. Her assessment of Mr. Augusta-Mansfield was conducted on December 13, 2022.

[35] Ms. Hale's report states that she found that Mr. Augusta-Mansfield partially demonstrates the capacity to meet the physical demands of working as a roofer. He also demonstrates the capacity to meet the physical demands of working as a social and community service worker. More generally, however, Ms. Hale opines that the scope of occupations once viable from a physical perspective for Mr. Augusta-Mansfield is reduced, leaving him with reduced competitive employability. She also notes that Mr. Augusta-Mansfield is likely at or near maximum physical rehabilitation, and the gains he will make going forward will likely be small.

Sabrina White

[36] Ms. White is an occupational therapist who was retained by the Defendants to prepare a second functional capacity evaluation. She was qualified without objection

as an expert capable of giving opinion evidence in respect of functional capacity evaluation and cost of future care. Her assessment of Mr. Augusta-Mansfield was conducted on January 17, 2023.

[37] Ms. White opines generally that Mr. Augusta-Mansfield is suitable for work where sitting, standing, and walking are the primary postures. She rates his strength capability as “medium” for lifting and carrying, and “heavy” for pushing/pulling abilities. More specifically, it is Ms. White’s view that Mr. Augusta-Mansfield is not suited to working as roofer full-time given his limitations for both low-level work and stooping. However, he is functionally able to continue full-time work in a supervisory capacity in the roofing industry. Ms. White also feels that Mr. Augusta-Mansfield is suited for social and community service peer support work.

Issue 1: General (Non-Pecuniary) Damages

Legal Principles

[38] The legal principles applicable to assessing non-pecuniary damages designed to compensate a plaintiff for the pain and suffering and loss of enjoyment of life caused by a defendant tortfeasor are well established and not in dispute. The plaintiff bears the burden to show that there is a substantial connection between the accident caused by a defendant and the plaintiff’s injuries: *Thompson v. Helgeson*, 2017 BCSC 927 at paras. 28–30. If causation is established, the court will then consider a number of factors when determining an appropriate quantum for non-pecuniary damages. In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, a non-exhaustive list of these factors was set out. It includes:

- a) age of plaintiff;
- b) nature of the injury;
- c) severity and duration of the pain;
- d) disability;
- e) emotional suffering;

- f) loss or impairment of life;
- 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 penalize the plaintiff).

Plaintiff's Position on Non-Pecuniary Damages

[39] Counsel for the Plaintiff submits that Mr. Augusta-Mansfield's injuries were caused by the Accident. Counsel highlights his client's relative youth at the time of the Accident, noting that Mr. Augusta-Mansfield was only 26 years old. He had just found a career that he enjoyed, was good at, and would allow him to provide for his young daughter. However, that was all taken away by the Accident. Now 31 years old, Mr. Augusta-Mansfield is in pain, has reduced physical abilities, and has lost the career he used to have.

[40] With respect to quantum, the Plaintiff's position is that an appropriate monetary amount of compensation for Mr. Augusta-Mansfield's non-pecuniary damages is \$150,000. Five jurisprudential authorities are cited in support of this submission:

- *Broomfield v. Lof*, 2019 BCSC 1155: \$130,000 award;
- *Clayton v. Barefoot*, 2018 BCSC 239: \$131,000 award;
- *Lock v. Floreani*, 2017 BCSC 1313; \$115,000 award;
- *Teunissen v. Hulstra*, 2017 BCSC 1569: \$110,000 award;
- *Lee v. MacLean*, 2022 BCSC 312: \$130,000

[41] Counsel for the Plaintiff argues that the fact patterns in these cases are comparable to what occurred in the case at bar. Therefore, a similar amount of

damages, albeit with an adjustment for inflation, should now be awarded to Mr. Augusta-Mansfield.

Defendants' Position on Non-Pecuniary Damages

[42] The Defendants do not dispute that the Accident caused Mr. Augusta-Mansfield to suffer ongoing chronic pain symptoms and to lose some functional capacity to do physical labour. However, they question the severity of these injuries and submit that the quantum of non-pecuniary damages that ought to be awarded should be less than what Mr. Augusta-Mansfield is claiming.

[43] In particular, counsel for the Defendants highlight a doctor's note entered into evidence indicating that Mr. Augusta-Mansfield was fit to work as of November 14, 2018. That note was prepared by Mr. Augusta-Mansfield's family doctor, Dr. McLeod. They point further to the expert reports of Ms. Hale and Ms. White indicating that Mr. Augusta-Mansfield's current pain ratings are of relatively low intensity. In their submission, Mr. Augusta-Mansfield's cycling ability is also indicative of the marked recovery he has made from the Accident.

[44] The Defendants rely on four decisions in support of their position on non-pecuniary damages:

- *Carleton v. Warner*, 2020 BCSC 436 [*Carleton*]: \$60,000 award;
- *Palidwor v. De Vries*, 2021 BCSC 85 [*Palidwor*]: \$60,000 award;
- *Stocking-Pearson v. Vinette*, 2019 BCSC 2182: \$80,000 award; and
- *Brown v. Gill*, 2021 BCSC 1734: \$90,000 award.

[45] While they do not propose a specific amount in respect of Mr. Augusta-Mansfield's award, counsel for the Defendants suggest that a range from \$60,000 to \$90,000 would be appropriate.

Analysis of Non-Pecuniary Damages

[46] I find that Mr. Augusta-Mansfield's soft tissue and psychological injuries were caused by the Accident and that they have affected his enjoyment of life.

[47] In particular, he has suffered pain as a result of the Accident and will continue to do so into the future. It is true that Mr. Augusta-Mansfield has been able to further his education and find employment following the Accident. However, these efforts are only partially reflective of his recovery; they are also a demonstration of Mr. Augusta-Mansfield's stoicism and ability to power through discomfort. It is also apparent that while Mr. Augusta-Mansfield has regained much of his ability to productively manage his home and work life, it has been diminished by the Accident.

[48] With respect to quantum, I have reviewed the nine cases that counsel for the parties referred to me for assistance in determining an appropriate amount for non-pecuniary damages. I found those cited by counsel for the Plaintiff to be less helpful as they involved plaintiffs whose apparent injuries were more severe and whose apparent recoveries were less extensive than that of Mr. Augusta-Mansfield. On the other hand, the decisions in *Carleton* and *Palidwor* that were cited by counsel for the Defendants appear to involve plaintiffs whose situations were more comparable to that of Mr. Augusta-Mansfield. Both Ms. Carleton and Ms. Palidwor suffered soft tissue injuries causing chronic pain, but were both able to resume much of their pre-accident activities, albeit on a more limited basis. They were each awarded \$60,000 in non-pecuniary damages. I conclude that a similar amount, adjusted for inflation, would also represent fair compensation to Mr. Augusta-Mansfield for his pain, suffering and loss of enjoyment of life,

[49] In sum, Mr. Augusta-Mansfield will be awarded \$75,000 in respect of his non-pecuniary damages.

Issue 2: Past Loss of Income

Legal Principles

[50] The legal principles that apply to the calculation of damages in relation to an injured plaintiff's past loss of income from the time of the accident to the time of trial are also well established. Such calculations are challenging because they necessarily involve a consideration of hypothetical events in order to answer a speculative question, namely, what income would the plaintiff have earned but for the injuries that resulted from the accident? The burden of proof to demonstrate these hypothetical events lies on the plaintiff, but the standard of proof is the real and substantial possibility threshold rather than the more onerous balance of probabilities standard: *Grewal v. Naumann*, 2017 BCCA 158 at paras. 48 and 49; *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21; *Perren v. Lalari*, 2010 BCCA 140 at para. 30; and *Rousta v. MacKay*, 2018 BCCA 29 at para. 17.

[51] Furthermore, it should also be noted that s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 provides that a plaintiff is entitled to recover damages for income loss suffered after the accident and prior to the date of trial, but not more than the net income loss they suffered in that period as a result of the accident.

Plaintiff's Position on Past Lost of Income

[52] The Plaintiff claims damages for past income loss incurred from his last day of employment at Arbutus Roofing (July 10, 2018) until the date of the trial (May 1, 2023), a period of approximately 4.75 years.

[53] His counsel hypothesizes that but for the injuries suffered as a result of the Accident, Mr. Augusta-Mansfield would have continued to work at Arbutus Roofing and earn a similar wage to what he was earning previously. In particular, Plaintiff's counsel notes that Mr. Augusta-Mansfield was paid \$50,079 by Arbutus Roofing from July 10, 2017 until July 10, 2018. Accordingly, a conservative estimate of Mr. Augusta-Mansfield's hypothetical earnings over the following 4.75 years is \$237,500 (i.e., \$50,000 X 4.75).

[54] The Plaintiff acknowledges that his compensation for past loss of income must account for money he in fact earned during this period. Counsel for the Plaintiff submits that those earnings totalled \$23,080.30, derived from the following sources:

- a) Nicola Valley Shelter and Support Services: \$8,080.80;
- b) Coastal Restoration: \$7,500.00; and
- c) Lower Nicola Indian Band: \$7,500.00.

TOTAL: \$23,080.80.

[55] Mr. Augusta-Mansfield's total gross claim for past income loss is therefore \$214,419.20 (i.e., \$237,500.00 - \$23,080.80).

[56] The Plaintiff also acknowledges that a further deduction to this amount must be made in respect of income tax, social assistance, and Persons with Disabilities (PWD) assistance. As there is inadequate evidence in the Court record to determine the amount of that deduction, counsel for the Plaintiff proposes that the Court simply order that this amount be agreed to by counsel, failing which the matter will be referred to the Court for determination.

Defendants' Position on Past Loss of Income

[57] The Defendants take the position that the Plaintiff is only entitled to damages for past loss of income in respect of the period from his last day of employment at Arbutus Roofing (July 10, 2018) until the date his family doctor - Dr. McLeod - issued a note certifying that Mr. Augusta-Mansfield is fit to return to work (November 14, 2018). This is a period of approximately 4 months.

[58] In terms of calculating the quantum of these damages, the Defendants accept that the starting point is Mr. Augusta-Mansfield's gross income of \$50,079 that he earned from July 10, 2017 to July 10, 2018. The Defendants say that this equates to a net annual income after tax of \$40,027, or approximately \$3,335.58 per month.

Mr. Augusta-Mansfield is therefore entitled to a damages award for past loss of income of \$13,342.32 (i.e., \$3,335.58 X 4).

[59] Alternatively, if the Court finds that Mr. Augusta-Mansfield's past wage loss extends beyond November 14, 2018, the Defendants submit that the amount should be reduced to account for both the employment income earned by Mr. Augusta-Mansfield, and the social assistance/PWD benefits he received. Counsel for the Defendants have not, however, proposed a specific amount for this adjustment.

[60] Finally, counsel for the Defendants also suggest that there has been some failure by Mr. Augusta-Mansfield to mitigate his past wage losses. The Defendants say that Mr. Augusta-Mansfield could have further mitigated by attempting to obtain work as a roof inspector, or else as a social worker after he quit his job with Nicola Valley Shelter and Support Services. However, counsel for the Defendants have not indicated what impact this alleged failure to mitigate should have on the calculation of Mr. Augusta-Mansfield's damages.

Analysis of Past Loss of Income

[61] On my assessment of the evidence presented, I am of the view that the Plaintiff has shown that there is a real and substantial possibility that, but for Mr. Augusta-Mansfield's injuries caused by the Accident, he would have continued to work at Arbutus Roofing until trial. This is supported by Mr. Augusta-Mansfield's testimony, as well as that of his former supervisors and co-workers, Jackson Sutherland and Sheldon Bradley. It is evident that Mr. Augusta-Mansfield was a particularly talented roofer whose skills were respected and appreciated by his colleagues and customers alike. Accordingly, Mr. Augusta-Mansfield has experienced a loss in respect of past income he would have earned had the Accident not occurred. This loss was caused by the Defendants.

[62] I also accept counsel for the Plaintiff's proposed calculation of the quantum of this loss, which is reasonable, cogent, and supported by the evidence presented. In particular, I agree that an appropriate mathematical anchor for assessing Mr. Augusta-Mansfield's hypothetical gross earnings at Arbutus Roofing from July 2018

to May 2023 had there been no Accident is \$50,000 per year. This approximates what Mr. Augusta-Mansfield actually earned from July 2017 to July 2018. It also fairly reflects positive and negative contingencies in relation to such factors as potential wage increases and unexpected work interruptions. I also accept counsel for the Plaintiff's proposal that a deduction of \$23,080.80 be made from the damage award to reflect Mr. Augusta-Mansfield's actual earnings from Nicola Valley Shelter and Support Services, Coastal Restoration, and Lower Nicola Indian Band during the post-Accident period up until trial.

[63] In making these findings, I have considered the Defendants' arguments that this award should be limited to the four month period from July to November 2018, but do not find them persuasive.

[64] First, I do not agree that Dr. McLeod's November 14, 2018 handwritten note that simply states "[t]his man is fit to return to work" provides a basis for concluding that the Accident did not cause a loss in respect of Mr. Augusta-Mansfield's past earnings. Dr. McLeod was not called as a witness, and this document does not undermine the expert evidence of Dr. Kei, Ms. Hale, and Ms. White regarding Mr. Augusta-Mansfield's functional limitations.

[65] Second, I am not prepared to draw an "adverse inference" from the Plaintiff's failure to produce income tax documentation for 2021 and 2022, or documentation providing particulars to support Mr. Augusta-Mansfield's testimony that he earned \$7,500 from the Lower Nicole Indian Band for roofing jobs in 2022, as counsel for the Defendants have requested me to do. To the contrary, I accept as sufficient the documentary evidence of Mr. Augusta-Mansfield's 2021 and 2022 earnings obtained from Nicola Valley Shelter and Support Services, and from Coastal Restoration. I am also satisfied that Mr. Augusta-Mansfield's unchallenged \$7,500 estimate of his net earnings from the Lower Nicola Indian Band is a reasonable one given the documentary evidence tendered of the payments made by the Band for the roofing work. These documents show that Mr. Augusta-Mansfield received a gross total of \$16,539.37 for the projects. In my view, there is no reason to reject Mr. Augusta-

Mansfield's evidence to the effect that he was able to retain approximately 45% of this sum after paying for material and the wages of those who assisted him with the labour.

[66] Third, I do not find that the Defendants have met their burden to show that Mr. Augusta-Mansfield failed to further mitigate his past lost income by finding other work as a roofing inspector or a social worker. The only evidence they have identified in support of this argument is Mr. Augusta-Mansfield's testimony to the effect that he was capable of performing inspections with customers and had received a number of calls back in respect of his practicum, as well as Mr. Bradley's testimony that he would sometimes just conduct inspections on buildings rather than perform physical roofing labour. This evidence falls far short of showing that Mr. Augusta-Mansfield had realistic opportunities for additional work that he ought reasonably to have pursued in order to mitigate his losses. I also note that the Defendants have not quantified the impact of this alleged failure to mitigate in their submissions to the Court. In my view, it was incumbent upon them to do so if they intended to seriously pursue this argument.

[67] In sum, I find that the total appropriate award of damages for Mr. Augusta-Mansfield's past loss of income is \$214,419.20, less an adjustment for income tax, social assistance, and Persons with Disabilities (PWD) assistance. I also note that counsel for the Plaintiff's proposal regarding how this adjustment should be determined was not opposed by counsel for the Defendants. Accordingly, I will direct the parties to discuss this issue with a view to reaching an agreement on the adjustment. If they are unable to do so, they are at liberty to request such a determination from the Court.

Issue 3: Future Loss of Earning Capacity

Legal Principles

[68] Assessing a plaintiff's prospective loss of earning capacity requires an examination of two hypothetical futures: one in which a plaintiff is assumed to be living with the aftermath of the injuries caused by a defendant, and another in which

a plaintiff is assumed to be living as if these injuries had never been sustained. As stated by our Court of Appeal in *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32:

... An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8. ...

[69] The Court of Appeal prescribed a three-step test for assessing future loss of earning capacity in a trilogy of cases decided in 2021 indexed as: *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345 [*Rab*]; and *Lo v. Vos*, 2021 BCCA 421. The questions to be asked at these three steps were summarized in *Rab* at para. 47 as follows:

- 1) Is there a potential future event that could lead to a loss of earning capacity?
- 2) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss?
- 3) If there is a such a possibility, what is its value?

[70] Valuation of the loss can be done using either the “earnings approach” or the “capital asset approach”: *Brown v. Golaij* (1985), 26 B.C.L.R. (3d) 353 (S.C.) [*Brown*] at para. 7; *Perren v. Lalari*, 2010 BCCA 140 at paras. 11–12. The earnings approach involves a calculation of the present value of a plaintiff’s annual loss of income over the remaining years of employment, and is more appropriate when the loss is more easily measurable: *Westbroek v. Brizuela*, 2014 BCCA 48. The capital asset approach involves consideration of a person’s lost ability to work in a certain position in their field of work as the loss of an income earning asset, and is more appropriate where the loss is less easily measurable: *Park v. Targonski*, 2017 BCCA 134 at para. 123. Under either approach, the plaintiff must prove that there is a real and substantial possibility of various future events leading to an income loss (*Perren*

at para. 33), and damages are assessed, not calculated (*Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18).

Plaintiff's Position on Future Loss of Earning Capacity

[71] Counsel for the Plaintiff effectively submits that the first two steps of the *Rab* analysis are satisfied. Counsel argues that the Plaintiff is now unable to work as a roofer, and that, but for the Accident, Mr. Augusta-Mansfield would have pursued his chosen career successfully.

[72] As for the valuation of this loss of earning capacity, counsel for the Plaintiff proposes using a rate of \$35 per hour to calculate his client's hypothetical future earnings had the Accident not taken place. This figure is proposed as a mid-point between \$39.50 (the hourly wage Mr. Sutherland earns as a roofing foreman) and \$31.55 (the inflation adjusted hourly wage Mr. Augusta-Mansfield was earning as a roofer in 2018). Assuming Mr. Augusta-Mansfield would work 40 hours per week for 50 weeks every year, counsel for the Plaintiff posits that Mr. Augusta-Mansfield would make an annual salary of \$72,800 ($\$35 \times 40 \times 50$).

[73] Counsel for the Plaintiff then submits that pursuant to s. 56 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and the *Law and Equity Regulation*, B.C. Reg. 352/81, as amended by B.C. Reg. 74/2014, the discount rate that should be used to calculate the present value of future earnings is 1.5%. Furthermore, he notes that the Civil Jury Instructions multiplier for a 33-year period at 1.5% is 25.8790. The 33-year period is proposed on the assumption that Mr. Augusta-Mansfield has that many working years ahead of him, as he is almost 32 years old and will likely retire at age 65. Applying the 25.8790 multiplier to the proposed \$72,800 gross annual future income estimate, counsel for the Plaintiff argues that the present value of Mr. Augusta-Mansfield's anticipated earning stream without the Accident is \$1,883,991.20.

[74] Counsel for the Plaintiff acknowledges that both negative and positive contingencies must be applied to the calculation. The negative contingencies relate to the possibility that Mr. Augusta-Mansfield will get sick or die from other causes.

The positive contingencies relate to the possibility that Mr. Augusta-Mansfield's roofing company will be exceptionally successful. Ultimately, however, the Plaintiff suggests that a 20% negative general contingency would be appropriate given Mr. Augusta-Mansfield's young age. This reduces the present value of the without-Accident earning stream estimate to \$1,507,192.

[75] Turning to an assessment of the Plaintiff's actual post-Accident earning capacity, his counsel proposes using an annual income figure of \$15,000. He says that this is arguably generous given that Mr. Augusta-Mansfield may never work again due to a combination of physical and psychological injuries. Applying the 33-year multiplier of 25.8790 to the \$15,000 annual income figure results in a present valuation of \$388,185. Adjusted downward by 20% to reflect the same general negative contingency applied earlier, the final suggested present value of the Plaintiff's estimated with-Accident earning stream is \$310,548.

[76] Therefore, counsel for the Plaintiff ultimately submits that Mr. Augusta-Mansfield's future loss of earning capacity award should be \$1,196,644 (i.e., \$1,507,192 - \$310,548).

Defendants' Position on Future Loss of Earning Capacity

[77] Counsel for the Defendants argue that if the Court finds that a pecuniary loss arises from Mr. Augusta-Mansfield's functional limitations, it should be assessed using the loss of capital asset approach rather than the loss of future earnings approach. This is because Mr. Augusta-Mansfield is a young plaintiff with a limited work history and an unclear career trajectory.

[78] With respect to quantum, the Defendants say that an award of one or two years' worth of annual income – calculated by reference to Mr. Augusta-Mansfield's average earnings in the five years prior to the Accident - would be appropriate. The basis for this position is that Mr. Augusta-Mansfield has already retrained to more suitable professions in line with his likely long-term goals had the Accident not occurred, namely, as a social worker or as an entrepreneur/business owner. His

future loss of earning capacity is therefore not nearly as great as what is suggested by counsel for the Plaintiff.

[79] By reference to Mr. Augusta-Mansfield's tax returns from the years 2013 to 2017 inclusive, the Defendants note that his average annual income was \$12,405.60. Accordingly, they suggest that an award of between \$12,500 (one year of average annual income) and \$25,000 (two years of average annual income) would be appropriate.

[80] Finally, counsel for the Defendants also suggest that a further \$15,000 could be awarded to Mr. Augusta-Mansfield for future loss of earning capacity for the purpose of allowing him to pursue additional training in the field of social work.

Analysis of Future Loss of Earning Capacity

[81] In *Rab*, our Court of Appeal explained that the first aspect of the three-step process for considering claims for loss of future earning capacity is to examine whether the evidence discloses a potential future event that could lead to a loss of capacity. This gives rise to the four considerations set out in *Brown* at para. 8. They are whether the plaintiff is: (1) less capable overall of earning income from all types of employment; (2) now a less attractive employee; (3) less able to take advantage of all job opportunities open to the plaintiff; and (4) less valuable in terms of earning income in a competitive labour market.

[82] On my assessment of the evidence, all four of these considerations are met. In particular, I find that Mr. Augusta-Mansfield has functional limitations that inhibit him from performing and receiving remuneration for physical roofing work to the same extent he was able to prior to the Accident. This finding is supported by both the testimony of Mr. Augusta-Mansfield and the expert opinions of Dr. Kei, Ms. Hale, and Ms. White. It also justifies a conclusion that Mr. Augusta-Mansfield has satisfied the second step of the *Rab* analysis, namely, that there is a real and substantial possibility of a future event related to the Accident that will cause a pecuniary loss.

[83] The third and final step of the *Rab* analytical framework is to value the plaintiff’s lost capacity. I agree with counsel for the Defendants that this is a case where the capital asset approach should be employed, and that it would be appropriate to quantify the loss by reference to Mr. Augusta-Mansfield’s annual income “for one or more years”: *Pallos v. Insurance Co. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.) at para. 43.

[84] Mr. Augusta-Mansfield is still relatively young and has a significant number of working years ahead of him. I therefore find that an award that would approximate two years’ worth of his annual salary would be equitable in this case. However, I do not agree with counsel for the Defendants’ apparent position that I must use a hypothetical annual income based on an average of Mr. Augusta-Mansfield’s earnings over the five year period prior to the Accident. While I accept that past income averages were used to assess lost earning capacity in *Rab* at paras. 75 to 80, I do not understand the Court of Appeal to have mandated such an approach, particularly since this is not a mathematical exercise. In my view, it would be most appropriate to use the \$50,000 approximation of Mr. Augusta-Mansfield’s gross annual income he was actually earning at the time of the Accident in order to assess his lost capacity to earn income in the future. This figure also better reflects the applicable positive and negative contingencies noted at paragraph 62 above.

[85] Accordingly, I conclude that an appropriate amount that would compensate Mr. Augusta-Mansfield for his future loss of earning capacity is \$100,000.

CONCLUSION

[86] Mr. Augusta-Mansfield is awarded damages under the following headings:

- Non-pecuniary damages: \$75,000.00
- Past loss of income: \$214,419.20
(subject to adjustment)
- Future loss of earning capacity: \$100,000.00
- Cost of future care: \$7,960.00
- Special damages \$529.96

[87] The total amount awarded to Mr. Augusta-Mansfield is therefore \$397,909.16 less a deduction for applicable income tax and the assistance payments that he received prior to trial. Counsel for the parties are directed to discuss and agree upon the amount of that deduction. If such an agreement proves not to be possible, they are at liberty to request that the amount be determined by the Court instead.

[88] Similarly, if the parties are unable to agree on the form of a costs order, they may contact Supreme Court Scheduling to schedule a hearing on this issue before me.

“Brongers J.”