

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Arnbrecht v. Isaac*,
2024 BCSC 2352

Date: 20241223
Docket: S1917354
Registry: Williams Lake

Between:

Paul Arnbrecht

Plaintiff

And

Katherine Ellen Isaac

Defendant

Before: The Honourable Mr. Justice Tindale

Reasons for Judgment

Counsel for the plaintiff:

J.S. Koch

Counsel for the defendant:

D.W. Lindsay
N.M. McFadyen

Place and Date of Trial:

Williams lake, B.C.
June 18 – 21, 2024;
June 24 – 26, 2024

Place and Date of Judgment:

Williams Lake, B.C.
December 23, 2024

[1] The plaintiff Paul Arnbrecht seeks damages as a result of injuries sustained in a motor vehicle accident that occurred on December 26, 2018 (the “MVA”).

[2] The defendant Katherine Ellen Isaac has admitted liability for the MVA.

Plaintiff’s Case

Plaintiff

[3] The plaintiff is 43 years of age having been born on June 6, 1981. He was born in Uzbekistan and moved to Germany when he was 10 years old. He has a high school education and is a red seal chef.

[4] The plaintiff moved to Canada in 2007.

[5] The plaintiff speaks Russian, German and English.

[6] The plaintiff began working again in the construction industry when he first moved to Canada. Later when he learned more English he began working as a chef.

[7] The plaintiff initially moved to Williams Lake, British Columbia in 2014 and currently resides at 5080 Horsefly Road (the “Property”). The plaintiff lives on acreage which his father purchased for him and his siblings to share. The plaintiff has two sisters who live in Germany.

[8] On December 26, 2018 the plaintiff was driving his vehicle when he came around a corner and saw another vehicle fishtailing in front of him. The plaintiff moved his vehicle onto the shoulder of the road and put his right hand on the steering wheel to brace for impact. The other vehicle collided with him. The plaintiff said the impact hurt.

[9] The plaintiff got out of his truck after the collision and saw that the other car had went down a 15 foot embankment. He slid down the embankment to assist the young girl who was the driver of that vehicle.

[10] The plaintiff crawled back up the embankment to his vehicle and grabbed some jackets to put around the other driver to keep her warm. He then went for help.

[11] The plaintiff said that an ambulance was phoned and police, ambulance and fire personnel showed up. They took the driver of the other vehicle to hospital.

[12] The plaintiff was asked by medical personnel if he was okay and he said he thought so. The plaintiff testified that the steering wheel on his vehicle was bent over 2 or 3 inches as a result of the MVA.

[13] The plaintiff did not receive any medical attention on December 26, 2018. It was a couple days later when the plaintiff noticed that his right shoulder was sore.

[14] The plaintiff described that he had pain in his right shoulder and back as well as his neck. The plaintiff testified that he did not have any left shoulder pain at that time.

[15] The plaintiff said that went to see his family doctor Dr. Kriek who prescribed him medication. He eventually went to physiotherapy which he says did not help.

[16] The plaintiff had surgery for a hernia a few weeks after the MVA in January 2019. The hernia operation was unrelated to the MVA. The recovery time for that surgery was 8 to 12 weeks.

[17] The plaintiff testified that he does not have any pain related to the hernia surgery at this point. The plaintiff testified that in the morning when he gets up his right arm and shoulder are stiff and painful. He takes ibuprofen or T3's during the day for the pain in his right shoulder.

[18] The plaintiff testified that on a scale of 1 to 10 when he is working the pain in his shoulder is a solid 7 or 8 and on non-working days the pain is 3 or 4.

[19] The plaintiff testified that he did not experience a lot of pain after the MVA because he was not doing anything for two months as a result of the hernia surgery.

[20] The plaintiff testified that currently when he is working his right arm will become swollen and his pain is a solid 10.

[21] The plaintiff currently works at Allcraft Kitchen and Counters (“Allcraft”) as an installer of kitchen vanities and countertops. Some days he will work in the shop preparing parts to be assembled for a job. The plaintiff testified that he currently works three days a week.

[22] The plaintiff testified that in December 2022 he had right shoulder surgery which was performed by Dr. Hughes. After that surgery the plaintiff was off work for 4 months. He testified that after the surgery his shoulder pain became worse and now he is in constant pain.

[23] The plaintiff testified that currently he takes ibuprofen, T3’s and Flexerol to manage his pain. He says he takes 6 - 12 ibuprofen tablets every day and if he is working he takes 1 or 2 T3’s per day.

[24] The plaintiff testified that he takes Flexerol at night. Currently the plaintiff has difficulty sleeping because he is constantly moving trying to find a comfortable position to sleep in.

[25] The plaintiff is currently in a common-law relationship with Anna Hennessy who he met in 2019 after the MVA. He says that his injuries have impacted his relationship with Ms. Hennessy because they no longer sleep in the same bed together.

[26] The plaintiff testified that he has headaches almost every day and his headaches started after the MVA. The plaintiff testified that working makes his headaches worse.

[27] The plaintiff also testified that he has neck pain which is constant. It starts on the right side of his neck and wraps around his neck and then goes into his head area. The plaintiff also experiences upper back pain.

[28] The plaintiff testified that he overcompensates with his left shoulder which became stiff and painful though it is fine now.

[29] The plaintiff prides himself as being a strong individual who likes to do physical labour and it was always a dream of his to operate a farm on the Property. The plaintiff testified that his right shoulder injury and loss of strength has been devastating for him.

[30] The plaintiff says that he speaks to Ms. Hennessy as a counsellor. She tells him that he is not useless. The plaintiff is frustrated because he does not feel he can provide for Ms. Hennessy.

[31] The plaintiff testified that he currently does not have a family doctor as Dr. Kriek stopped being his doctor last year.

[32] The plaintiff said that since the MVA he has gained 60 pounds. The plaintiff said that he did attend physiotherapy after the MVA however he stopped attending physiotherapy because he had plateaued.

[33] The plaintiff said that he would attend physiotherapy and massage therapy again if he had the opportunity.

[34] The plaintiff testified that he does not currently do stretches because if he is working he gets too sore to exercise.

[35] The plaintiff started to work with Allcraft in June 2016 and worked there until February 2017. He was paid \$19 an hour and he would build and install kitchen cabinets. The plaintiff said that he quit working at Allcraft because it was too long of a drive for him and his truck broke down.

[36] The plaintiff then worked at Titan Built Construction (“Titan”). The plaintiff said that he worked there full-time siding houses and was paid \$27 an hour. The plaintiff worked at Titan from July 2018 until November 2018 when he was fired. The plaintiff said he was fired because he told his employer that he needed to tend to his farm and he could not be working out of town and driving 2 ½ hours a day.

[37] The plaintiff then worked at Kasper Contracting building a seniors residence in Williams Lake. He was paid \$27 an hour and worked there from November 20, 2018 until December 20, 2018. The plaintiff said that he quit that job because he found a better job.

[38] The plaintiff next began work at Salem Contracting Ltd. (“Salem”) on December 28, 2018 and he worked there until January 16, 2019 and was paid \$38 an hour. He stopped working at Salem because that is when he had his hernia surgery

[39] The plaintiff testified that after his hernia surgery he believed that he received Employment Insurance Benefits.

[40] The plaintiff then obtained employment at Country Prime Meats Ltd. (“Country Prime”). He worked there from April 23, 2019 until October 12, 2019. He worked there as a maintenance carpenter.

[41] In November 2019 the plaintiff began to work again for Salem and worked there until February 11, 2020.

[42] The plaintiff was next employed by Lauren Brothers Construction Ltd. (“Lauren Brothers”). The plaintiff worked at Lauren Brothers between August 17, 2020 and October 9, 2020. He was paid \$30 an hour and his employment with Lauren Brothers ended when the job he was working on was completed.

[43] The plaintiff testified that he was then hired by Chilcotin Guns and he worked in their archery department and was paid \$18 an hour. The plaintiff testified that after his shoulder surgery he was not able to use the heavier poundage bows.

[44] The plaintiff testified that he still works at Chilcotin Guns once per week. The plaintiff testified that he did not apply for construction jobs after his shoulder surgery because he did not have the strength to do that type of work.

[45] The plaintiff was then hired again by Allcraft where he works three days a week for six hours a day. Initially the plaintiff was working eight-hour shifts however

he asked to reduce his hours to six-hour shifts because of his physical limitations. The plaintiff is paid \$28 an hour by Allcraft.

[46] The plaintiff testified that his parents own the Property and he pays them \$500 per month for rent. He said that he has to restructure his goals because it is not likely he can build and run his own wood workshop or butcher shop on the Property.

[47] The plaintiff testified that the Property is almost 200 acres in size with 30 or 40 acres of hay fields.

[48] The plaintiff said that before he met Ms. Hennessy he had a few chickens and rabbits on the Property. After Ms. Hennessy moved in they bought some pigs and began raising meat rabbits.

[49] The plaintiff says that because of his physical limitations it is not feasible for him to maintain a farm. The plaintiff still has 6 or 8 pigs which he says will be butchered in the fall. He is not going to raise any more pigs because he cannot physically build or maintain a barn on the farm to house the animals.

[50] The plaintiff says that they tried raising cows however that did not succeed because he needed better fences and he is not able to build fences at this point. He said that he tried to pound fence posts however that did not go well. Before the MVA he could put in 20 or 30 fence posts a day and now it takes him a day and a half to install 5 fence posts.

[51] The plaintiff testified that Ms. Hennessy currently cares for all the animals. He has difficulty cutting the grass, maintaining the driveway and cutting trees in the vicinity of his house for fire mitigation. Ms. Hennessy does most of the yard work.

[52] The plaintiff testified that after his shoulder surgery in 2022 he had difficulty collecting and splitting firewood. After his surgery his father was visiting him and his father who is 65 years of age collected firewood for him.

[53] The plaintiff most of the time uses a truck to clear snow from his driveway which is three quarters of a mile long.

[54] The plaintiff also has a number of gardens which Ms. Hennessy tends to.

[55] The plaintiff testified that before the MVA he would butcher animals for customers. The plaintiff says that he currently has difficulty in moving the animals that need to be butchered because he has no strength in his right arm.

[56] The plaintiff has also been self-employed from time to time and between August through October 2021 he built a number of display cabinets for a client.

[57] The plaintiff testified that prior to the MVA he enjoyed hunting and fishing. Since the MVA the plaintiff hunts less though he still goes to the Lower Mainland a couple of times a year to bird hunt. The plaintiff says that since his shoulder surgery he has not gone bird hunting.

[58] The plaintiff also enjoyed hunting with a bow however he is not strong enough to use a large hunting bow.

[59] The plaintiff testified that he met with Gerard Kerr who evaluated his functionality on the Property.

[60] The plaintiff testified that he would need equipment to assist him in operating a butcher shop. He also testified that his goal was to build a large woodworking shop.

[61] The plaintiff said that he would need a storage barn for animals and their feed. He also testified that he wanted to have a carport built on the Property.

[62] The plaintiff agreed on cross-examination that he had shoulder surgery on December 14, 2022 which was performed by Dr. Hughes.

[63] The plaintiff agreed on cross-examination that after the MVA he built a fence on the Property around the house however he had the assistance of a young person to help him with the fence.

[64] The plaintiff agreed on cross-examination that after Ms. Hennessy moved in they jointly decided to expand the farm on the Property. He agreed that he built stalls for pigs and Ms. Hennessy fed the pigs.

[65] The plaintiff testified that he does “man jobs” and Ms. Hennessy does “women’s jobs” on the Property.

[66] The plaintiff agreed on cross-examination that after the MVA he built and repaired structures on the Property, cut firewood, butchered animals, ran his tractor, pounded fence posts, cut limbs on trees and tilled his garden.

[67] The plaintiff testified that the last time he weighed himself he weighed 390 pounds and he is 6’2” tall.

[68] The plaintiff testified on cross-examination that his goal was to retire as a farmer on the Property. He also said that at one point he had 30 pigs, 150 chickens, 50 rabbits and six cows on the Property.

[69] The plaintiff agreed on cross-examination that he has not disclosed any documentation as to the money he earned from butchering or selling animals. The plaintiff testified that he started butchering animals before his shoulder surgery. He would charge \$150 to butcher a deer or a bear.

[70] The plaintiff agreed on cross-examination that since the MVA he has done all of his regular chores however it takes him longer and he is in pain. He also said that he avoids doing chores.

[71] The plaintiff agreed on cross-examination that since the MVA he has done all of his recreational activities though they cause him pain.

[72] The plaintiff agreed on cross-examination that approximately two years after the MVA he started experiencing pain and weakness in his left arm and shoulder.

[73] The plaintiff agreed on cross-examination that he occasionally had sleep problems prior to the MVA.

[74] The plaintiff agreed on cross-examination that his headaches may have improved.

[75] The plaintiff testified that when he is working he takes 2 - 4 T3's a day. He said that he shares Ms. Hennessy's prescribed T3's with her.

[76] The plaintiff agreed on cross-examination that he has not taken any form of physiotherapy since stopping physiotherapy in 2019.

[77] The plaintiff agreed on cross-examination that he told Dr. Hughes on February 25, 2021 that it was his left arm that was the problem.

[78] The plaintiff agreed on cross-examination that he told Mr. Kerr when Mr. Kerr attended at the Property that he was working two jobs, did farm work, butchers animals and works on chores.

[79] The plaintiff agreed on cross-examination that his parents purchased some of the livestock to raise themselves. In particular his mother raised sheep, chickens and rabbits which were separate from the plaintiff's livestock.

[80] The plaintiff agreed on cross-examination that when he saw Dr. Regan an orthopedic surgeon in May and June 2020 he told Dr. Regan that "he is able to work as a maintenance carpenter 35 - 40 hours per week, but he is limited in his ability to do overhead activities."

[81] The plaintiff agreed on cross-examination that he worked the majority of 2018 both before and after the MVA.

[82] The plaintiff agreed on cross-examination that he collected Employment Insurance benefits since the MVA.

Anna Hennessy

[83] Anna Hennessy is 50 years of age having been born February 23, 1974. She met the plaintiff in April 2019 and they began living together at the Property in November 2019.

[84] Ms. Hennessy testified that she is currently unemployed and her last employment was at Country Prime in 2019.

[85] Ms. Hennessy testified that she is not employed because when she moved in with the plaintiff they decided to expand the farm on the Property and she was going to focus on that. Ms. Hennessy testified that she takes medication for osteoarthritis which includes T3's. Ms. Hennessy testified that the plaintiff on occasion uses her T3's.

[86] Ms. Hennessy testified that she cleans the house, does the laundry and cooking. Both her and the plaintiff go grocery shopping together.

[87] Ms. Hennessy testified that they tried raising cows however their fences were not sufficient to hold the cows in.

[88] Ms. Hennessy testified that since moving on to the Property the number of chickens, rabbits and pigs has increased. Those numbers are now declining because Ms. Hennessy cannot do all the work and keep up by herself. Ms. Hennessy testified that most of the time she cares for the animals.

[89] Ms. Hennessy testified that her responsibilities have changed on the Property because the plaintiff can no longer do some of his chores. She cares for the gardens, cuts grass for the rabbits and helps with snow removal.

[90] Ms. Hennessy testified that the plaintiff's father helped build some fences and gates.

[91] Ms. Hennessy testified that the plaintiff and her like to hunt and fish. The plaintiff taught her how to hunt and she only hunts with the plaintiff.

[92] Ms. Hennessy testified that she shot a bear recently and the plaintiff along with his father helped her carry the bear to their truck and load the bear in the truck.

[93] Ms. Hennessy testified that the plaintiff's right arm bothers him all the time and it disrupts his sleep. When he comes home from work from Allcraft he is exhausted. She said that they do not sleep together in the same bed since he had his shoulder surgery.

[94] Ms. Hennessy testified on cross-examination that she had gardening experience before she met the plaintiff. She has three types of gardens on the Property which includes a greenhouse. Ms. Hennessy testified that the square footage of the gardens has increased every year since she started living there.

[95] Ms. Hennessy testified that the plaintiff takes 2 - 4 T3's a day when he is working and up to 6 - 8 per week.

[96] Ms. Hennessy testified that she helps the plaintiff when he butchers animals. She does the grinding of the meat and the packaging of the meat.

Expert Witnesses

Gerard Kerr

[97] Gerard Kerr is an Occupational Therapist and was qualified to give expert evidence in the areas of work function evaluation and cost of future care assessment and recommendations.

[98] Mr. Kerr provided a work capacity and cost of future care report dated March 19, 2024.

[99] Mr. Kerr initially saw the plaintiff on June 3, 2021 and provided a work capacity evaluation in a report dated September 15, 2021. He provided the within

report dated March 19, 2024 as an update because the plaintiff had surgery on December 14, 2022

[100] Mr. Kerr attended at the Property to assess the plaintiff on November 15, 2023.

[101] Mr. Kerr provided the following opinion on work capacity in his report dated March 19, 2024 at p. 7:

The results of work capacity testing have identified significant functional limitations that in my view will severely impact Mr. Arnbrecht's ability to perform his previous occupations of construction worker, carpenter, chef, and butcher. As will be outlined in the recommendations section of this report, Mr. Arnbrecht's capacity to develop his homestead, maintain his rural property, establish his butchering and cabinetmaking business is also significantly impacted. Many of the labouring/construction tasks and projects he was physically able to do, and by his account had the skills to do, are now well outside of his reasonable physical capacity and activity endurance. This is also the case with many day-to-day tasks and seasonal homestead property maintenance tasks.

Similarly, he remains limited in performing aspects of previously enjoyed leisure and recreational activities including hunting, using firearms, and bow hunting.

My opinion regarding Mr. Arnbrecht's work capacity in relation to his former construction work remains unchanged from 2021. That is, he is NOT capable of resuming construction related work on any durable basis.

[102] Mr. Kerr also provided his recommendations for related Cost of Future Care treatments, services, equipment and/or supplies.

[103] Mr. Kerr on cross-examination agreed that he had the report of Dr. Regan and was aware that the plaintiff said he was working 35 - 40 hours per week as a maintenance carpenter and that the plaintiff had not voiced any complaints of left upper extremity pain or dysfunction nor low back pain.

[104] Mr. Kerr testified on cross-examination that he does not disregard medical reports, he does not use them in determining the functional ability of a client when writing his reports.

[105] Mr. Kerr agreed that for the most part any objective testing of the plaintiff was done on June 3, 2021. Mr. Kerr agreed that the plaintiff was morbidly obese and that he looks at the entire person when conducting his assessment.

[106] Mr. Kerr testified on cross-examination that the plaintiff was capable of crouching and kneeling though conceded that because the plaintiff weighed 375 pounds that may potentially impact his ability to crouch and kneel. Mr. Kerr however testified that he did not see the plaintiff's weight as relevant because it was not a key contributor to his functional problems.

[107] Mr. Kerr acknowledged that he was aware the plaintiff worked after the MVA and he also testified that he did not observe the plaintiff at his work sites.

[108] Mr. Kerr acknowledged on cross-examination that he was aware that the plaintiff did construction work after the MVA however testified that in his experience people with shoulder injuries like the plaintiff's are not able to go back to work as a labourer.

[109] Mr. Kerr testified that the National Occupational Classification ("NOC") and the Dictionary of Occupational Titles ("DOT") are helpful but not definitive in his assessments.

[110] Mr. Kerr agreed that the plaintiff's right knee and feet problems could impact his functionality.

[111] Mr. Kerr on cross-examination testified that he increased some of the costs in relationship to the plaintiff's Property from his first report because he did some research on the topic. He agreed that with regard to the cost of maintaining the Property his numbers were "guesstimates". He also agreed that he did not have any additional information but rather he just had more time to think about the costs for the Property.

[112] Mr. Kerr testified that despite the fact that the plaintiff can do some physical labour he still has a dysfunctional shoulder. He agreed that the plaintiff continues to work and does some carpentry jobs.

[113] Mr. Kerr agreed on cross-examination that he did not do a full battery of tests when he saw the plaintiff in 2021. He also agreed on cross-examination that in terms of his updated report it is primarily based on subjective comments from the plaintiff and Mr. Kerr's observations.

[114] Mr. Kerr agreed on cross-examination that the range of motion tests that he completed on the plaintiff's shoulder is a subjective test. He agreed that in 2023 the plaintiff's left shoulder based on his testing was normal.

[115] Mr. Kerr testified on cross-examination that he was aware that Dr. Kriek had written in her clinical notes that the plaintiff's left arm was worse in March 2021.

[116] Mr. Kerr agreed on cross-examination that he did not do strength capacity testing in 2023 on the plaintiff.

[117] Mr. Kerr testified that the plaintiff's work endurance is subject to the work he has to do. If the plaintiff was provided full-time work in a less demanding job he could reach his potential however Mr. Kerr believes he would have increased symptoms if he did overhead work.

[118] Mr. Kerr opined that the plaintiff could not tolerate work as a commercial butcher and he could not do 40 hours a week as a cabinetmaker.

[119] Mr. Kerr agreed that he was aware that the plaintiff was currently working 5 - 7 days a week.

[120] Mr. Kerr testified that with regard to his recommendations relating to the plaintiff's farm he is not recommending that a barn should be built but rather he is saying the plaintiff was planning on doing that himself.

[121] Mr. Kerr was aware that the plaintiff had not followed up on counselling.

[122] Mr. Kerr recommended that the plaintiff be awarded money to purchase gym equipment at his house because the plaintiff was more likely to use the gym equipment if it was at his home.

[123] Mr. Kerr recommended that a \$146,000 Skid Steer be purchased so that the plaintiff could clear his land himself.

Dr. Scott Hughes

[124] Dr. Scott Hughes is an orthopedic surgeon with a specialty in knee, shoulder and upper body extremity reconstruction.

[125] Dr. Hughes provided a medical legal report dated July 7, 2023.

[126] Dr. Hughes had an initial consultation with the plaintiff on February 24 2021 in relation to his right shoulder. He performed an arthroscopic right shoulder repair on the plaintiff on December 14, 2022.

[127] Dr. Hughes opined that the plaintiff suffered from a Type 3 SLAP injury, neurologic irritability, and myofascial pain disorder.

[128] Dr. Hughes opined to the following at pages 5 and 6 of his July 7, 2023 report:

Mr. Arnbrecht has continued to have ongoing restriction postoperatively with respect to both pain, range of motion and strength. Although he is attempted a return to work he is limited with any shoulder level height and above activity or any repetitive activity using the right arm. His limitations also affect even some more simple day by day activities including housework, yardwork, and hobby farming.

Secondary to some of the negative predictive factors in relation to his shoulder pathology, the prognosis regarding his postsurgical outcome is guarded. Furthermore, the prognosis for a return to his preinjury workplace duties is also guarded. This would be better evaluated by a functional capacity evaluation. It is my opinion that his right shoulder will affect his ability to see competitive employment.

...

I do not believe that Mr. Arnbrecht is at risk of ongoing degenerative changes of the shoulder. I do not believe that Mr. Arnbrecht will require further Orthopedic surgical intervention.

[129] Dr. Hughes testified that he does surgeries on shoulders every day.

[130] Dr. Hughes testified that chronic myofascial pain disorder is chronic pain in a generalized area.

[131] Dr. Hughes testified that a Type 3 SLAP injury creates a small flap as a result of a tear at the labrum and the biceps area.

[132] Dr. Hughes agreed that smoking typically interferes with a patient's recovery from surgery and he discusses that with his clients.

[133] Dr. Hughes agreed that that the plaintiff was morbidly obese.

[134] Dr. Hughes agreed that there was no issue with the plaintiff's rotator cuff.

[135] Dr. Hughes was aware of the plaintiff's ongoing symptoms in his left arm however he did not give a diagnosis or prognosis for the left arm.

[136] Dr. Hughes agreed that stiffness in the shoulder is common after surgery.

[137] Dr. Hughes also agreed that three weeks following the plaintiff's shoulder surgery he noted that the plaintiff was doing reasonably well, sleeping better and pleased with his progress. Dr. Hughes thought that the surgery was successful at this time.

[138] Dr. Hughes last saw the plaintiff on April 12, 2023 and he noted the plaintiff was improving though slowly.

[139] Dr. Hughes agreed that he did not have Dr. Kriek's clinical records when he wrote his report.

[140] Dr. Hughes testified that he would recommend six months of physiotherapy or longer for the plaintiff after this type of surgery.

[141] Dr. Hughes said that he was not aware when he was writing his report about the plaintiff's complaints related to his neck, knees and his feet.

[142] Dr. Hughes agreed that the plaintiff's pain profile was similar before and after the surgery.

[143] Dr. Hughes testified that he is sure he did a resection of the plaintiff's labrum though that was not specifically referred to in his report.

Peter Sheldon

[144] Peter Sheldon was qualified as an expert capable of giving opinion evidence as to the estimation of economic damages in personal injury cases.

[145] Mr. Sheldon provided a report dated March 18, 2024 for this trial.

[146] Mr. Sheldon provided his opinion with regard to the calculation of the plaintiff's past and future loss of earnings as well as the cost of future care.

[147] Mr. Sheldon opined that the plaintiff's past loss of income from 2019 to the date of trial is as follows:

- a. 2019 - is either \$3,900 (assumed loss of \$5,000) or \$7,800 (assumed loss of \$10,000);
- b. 2020 - is either \$3,800 (assumed loss of \$5,000) or \$7,400 (assumed loss of \$10,000); and
- c. 2021 to June 16, 2024 - \$170,931

[148] Mr. Sheldon provided a table of income loss multipliers from 2024 until 2051.

[149] Mr. Sheldon also provided a method to estimate the plaintiff's loss of future earning capacity.

[150] Mr. Sheldon also calculated the cost of future care for the plaintiff based on Mr. Kerr's recommendation. Mr. Sheldon estimated that the present value of cost of future care for the plaintiff would range from \$255,443 - \$359,601.

[151] Mr. Sheldon on cross-examination testified that he asked for employment records for the plaintiff prior to 2018 however they were not provided to him. He also testified that he was not instructed to consider income from the plaintiff's butcher jobs.

[152] Mr. Sheldon was not aware as to what the plaintiff's income was in 2016 and 2017.

[153] Mr. Sheldon was not aware of the plaintiff's actual income in 2024.

[154] Mr. Sheldon testified that for 2020 he did not factor in the effect of the Covid 19 pandemic on the plaintiff's ability to earn income and rather just gave the court a method to calculate past income loss.

[155] Mr. Sheldon agreed that it is appropriate to add in any net contingencies when calculating these losses.

Defendant's Case

Mark Gosling

[156] Mark Gosling was qualified as an expert in estimating economic damages in personal injury cases. Mr. Gosling provided a report dated May 3, 2024 on this trial in response to the report of Mr. Sheldon.

[157] Mr. Gosling opined that Mr. Sheldon's multipliers for future earnings projections are not adjusted for labour market contingencies. These contingencies would be expected to reduce future earnings by 35.6% - 38.2%.

[158] Mr. Gosling also noted that Mr. Sheldon excluded the possibility of voluntary part time work and voluntary non-participation in the labour force as a contingency.

Dr. Patrick Chin

[159] Dr. Patrick Chin was qualified as an expert in orthopedic medicine with a sub-specialty in upper extremities and knees.

[160] Dr. Chin provided a medical legal report dated February 16, 2024.

[161] Dr. Chin met with the plaintiff on December 4, 2023 for an Independent Medical Examination. Dr. Chin opined that the plaintiff's diagnosis is as follows:

Chronic neck pain and stiffness with concomitant cervicogenic headaches and upper back pain secondary to myofascial pain syndrome due to whiplash-associated disorder (WAD) type II without focal neurologic dysfunction.

Chronic right upper extremity pain and "weakness" secondary to:

- a) Right shoulder pain related to possible symptomatic acromioclavicular joint arthritis, left worse than right.
- b) Residual right proximal long head of biceps tenosynovitis, post-traumatic status post SLAP repair.
- c) Cubital tunnel syndrome, right elbow.

[162] Dr. Chin testified that with older patients the procedure that Dr. Hughes performed on the plaintiff came with the likelihood of shoulder stiffness as a complication. Dr. Chin said that would have been explained to the plaintiff.

[163] Dr. Chin opined that based on his examination of the plaintiff's shoulder it is not indicative of a frozen shoulder. Dr. Chin also opined that the plaintiff had a positive test for a compressed nerve in his elbow.

[164] Dr. Chin testified on cross-examination that he thought the plaintiff's main source of pain was in his AC joint though he agreed it is possible it may not be from arthritis.

Jeannie Earle

[165] Jeannie Earle is a registered nurse with expertise in assessment and quantification of care and service needs.

[166] Ms. Earle provided a Care and Service Needs Responding Report dated May 3, 2024 in response to Mr. Kerr's report.

[167] Ms. Earle did not meet with the plaintiff in preparing her report. Ms. Earle agreed that it would have been preferable to meet with the plaintiff before preparing her report.

[168] Ms. Earle in preparing her report only reviewed the reports of Mr. Kerr as well as the medical legal reports of Dr. Hughes and Dr. Chin. She did not review any of the plaintiff's other medical documentation.

[169] Ms. Earle provided her treatment recommendations beginning at page 36 of her report.

[170] Ms. Earle agreed on cross-examination that she does not know what the plaintiff's capabilities are because she did not personally examine him.

[171] Ms. Earle agreed on cross-examination that when she said the plaintiff was able to perform all of his basic daily living activities that was her best estimate

[172] Ms. Earle agreed that evaluating work capacity is not her area of expertise.

[173] Ms. Earle agreed that with regard to her recommendation for massage therapy it would be best to have met with the plaintiff to see if massage therapy was appropriate.

Position of the Parties

Plaintiff

[174] The plaintiff says that the issues to be determined on this trial are the quantum of non-pecuniary damages, loss of earnings to the date of trial, loss of future earning capacity, cost of care and loss of housekeeping capacity.

[175] The plaintiff argues that that he is a reliable and consistent witness. He has been somewhat resistant to medical treatments because he could not afford them. He has relied heavily on his partner to complete tasks around the Property that he would otherwise have done himself.

[176] The claimant notes that Dr. Hughes testified that he had a Type 3 SLAP injury on his right shoulder. Dr. Hughes performed a re-section of a portion of the shoulder.

[177] Dr. Hughes notes that the plaintiff continues to have quite significant pain and restricted function. Dr. Hughes stated that his prognosis for the plaintiff was guarded.

[178] The plaintiff argues that Dr. Chin erroneously testified that the surgery performed by Dr. Hughes was a repair of a Type 4 SLAP injury. The plaintiff notes however that Dr. Chin said that the plaintiff did not exhibit any exaggerated pain response.

[179] The plaintiff notes that Dr. Chin's prognosis for complete resolution of his pain is poor. Dr. Chin agreed that his view that the plaintiff suffers from AC joint arthritis was a guess.

[180] The plaintiff argues that based on the opinions of both Dr. Hughes and Dr. Chin he suffers from chronic right extremity pain and myofascial pain syndrome as a direct result of the MVA.

[181] The plaintiff argues that the work capacity evaluation of Mr. Kerr found that the plaintiff participated in this assessment with high levels of effort within his pain limitations. Mr. Kerr noted that the plaintiff had a reduction in right shoulder range of motion.

[182] The plaintiff argues that the opinions expressed by Mr. Kerr who met with the plaintiff personally and attended at the Property should be given significant weight.

[183] The plaintiff argues that the report of Ms. Earle should be given little to no weight because she did not meet with, examine or interview the plaintiff. She did not attend at the Property and she has given opinions on work capacity which are outside of her area of expertise.

[184] The plaintiff argues that the defendant should not be permitted to rely on the defence of failure to mitigate because that was not pled in their response to civil claim. In the alternative if the defendant is allowed to rely on the defence of failure to

mitigate that defence should fail because the plaintiff was not in a financial position to access many of the recommended treatments. Also there is no expert report or expert testimony that the plaintiff would have reduced his damages had he followed this advice.

[185] The plaintiff is seeking an award for non-pecuniary damages of \$150,000. In that regard the plaintiff relies on the following cases:

- a) *Stapley v. Hejset*, 2006 BCCA 34;
- b) *Cumpf v. Barbuta*, 2014 BCSC 1898;
- c) *Murphy v. Hofer*, 2018 BCSC 869; and
- d) *Ross v. Dupois*, 2017 BCSC 2159.

[186] The plaintiff is seeking \$73,000 for past income loss. The plaintiff notes that based on the documentation on this trial his income for the years 2016 - 2023 is as follows:

- a) 2016 Employment Income \$18,810;
- b) 2017 Employment Income \$4,378;
- c) 2018 Employment Income \$25,918;
- d) 2019 Employment Income \$30,148, EI Benefits \$7,306 - Total
Income: \$37,454;
- e) 2020 Employment Income \$24,358, EI Benefits \$20,000 - Total
Income \$44,358;
- f) 2021 Employment Income \$16,720, EI Benefits \$20,232 - Total
Income \$36,952;
- g) 2022 Employment Income \$18,328;

h) 2023 Employment Income \$26,011, EI Benefits \$5010 - Total Income
\$31,021

[187] The plaintiff concedes that there was no compensable loss in 2019 and 2020 given his income and the impact of Covid 19 on his employment.

[188] The plaintiff argues that there is a hypothetical potential that the plaintiff would have worked full-time in 2021 to the date of the trial. The plaintiff is capable of consistent employment as demonstrated by his employment at Allcraft and Chilcotin Guns.

[189] The plaintiff argues that Mr. Sheldon estimated that based on full time earnings for those employed as a construction labourer and helper from 2021 to June 16, 2024 his past income loss is \$170,931. To determine past income loss Mr. Sheldon says that you must subtract the plaintiff's actual post MVA income. The plaintiff says that after doing that the total loss is \$73,090.

[190] The plaintiff is seeking an award for loss of future earning capacity in the range of \$334,000 to \$493,500.

[191] The plaintiff argues that he would have been working full time if it was not for his injuries from the MVA. He has also been forced to significantly reduce his farming operations.

[192] The plaintiff is asking for compensation for loss of future earning capacity and says that the capital asset approach is appropriate because of the difficulty in quantifying the plaintiff's income.

[193] The plaintiff argues that the evidence of Dr. Hughes, Dr. Chin and Mr. Kerr support a real and substantial possibility that this loss of earning capacity will cause a pecuniary loss. The plaintiff has been rendered less capable overall from earning income from employment, he is less marketable and attractive as an employee. The plaintiff has lost his ability to take advantage of all job opportunities and is less valuable to himself as a person capable of earning income.

[194] The plaintiff argues that for the purposes of determining this loss his 2023 income of \$31,021 should be used.

[195] The plaintiff argues that using Table 4 in Mr. Sheldon's report there are two methods to determine his future loss of earnings capacity. One is utilizing the contingency adjusted employment income for a Construction Trades Helper and Labourer to age 70 and the other estimates the contingency adjusted employment income based on the plaintiff's current hourly rate of \$28 per hour to age 70.

[196] The plaintiff argues that his award for cost of future care should be \$282,000. The plaintiff says that Mr. Kerr's report should be relied on to determine this amount. The plaintiff argues that using Mr. Kerr's recommendations and using Mr. Sheldon's report to calculate the present value of those recommendations the following should be awarded:

- a) Psychiatrist \$10,997;
- b) Psychological/Counselling \$25,712;
- c) Occupational Therapy/Case Management \$7,541;
- d) Physiotherapy \$29,734;
- e) Massage Therapy \$39,436;
- f) Kinesiology \$10,238;
- g) Seasonal Home Support \$17,851;
- h) Gym Equipment \$20,770;
- i) Medication \$20,906;
- j) Fencing \$46,541;
- k) Fencing Repair \$26,291;

- l) Snow Blower \$5,848;
- m) Lawn Mowing \$2,798
- n) Firewood Collection \$13,145;
- o) Tire Changing \$1,384; and
- p) Fire Prevention Equipment \$2,967

Total: \$282,159

[197] The plaintiff says that regardless of whether or not he operates a farm on the Property the reality of living on a rural property is that many of the tasks that are required on the Property are outside of his current abilities.

[198] The plaintiff argues that he should be awarded \$180,993 for loss of housekeeping capacity. This is based on the recommended general property labour replacement suggested by Mr. Kerr at page 22 of his report of \$7,300 per year. The plaintiff argues that the multiplier provided by Mr. Sheldon at page 20 of his report of 23.613, plus 5% GST is the appropriate multiplier to be used.

[199] The plaintiff argues that he should be awarded between \$1,020,000 and \$1,179,500 for his injuries.

Defendant

[200] The defendant acknowledges the plaintiff has sustained injuries however they argue there is a distinction between his stated level of disability and his actual functional ability.

[201] The defendant argues that the plaintiff has lost little to no income and in fact has earned more income since the MVA.

[202] The defendant acknowledges that the plaintiff was out of work for approximately four months after his shoulder surgery in 2022.

[203] The defendant acknowledges that the plaintiff is entitled to an award for future loss of earning capacity and that the capital asset approach is the correct approach to take.

[204] The defendant argues that there is no claim for special damages by the plaintiff and no evidence that he was ever denied treatment. The defendant argues that he will not use any of the care items as suggested by Mr. Kerr.

[205] The defendant argues that there is no evidence that the plaintiff developed the farm on the Property from 2014 when he began living there to the time of the MVA.

[206] The defendant argues that the plaintiff has several non-MVA medical issues which impact his level of functioning which include his left shoulder pain, knee and foot pain as well as his weight.

[207] The defendant argues that Dr. Hughes' evidence is confusing. Dr. Hughes did not specifically record the type of surgery that he did. Dr. Chin says that the records are consistent with a Type 4 SLAP injury.

[208] The defendant notes that Dr. Hughes has opined that there is no risk of degeneration of the plaintiff's injuries from the MVA.

[209] The defendant notes that Dr. Hughes did not do any further testing on the plaintiff. Dr. Chin says that the plaintiff's right shoulder is 60 or 70% of what it was before the surgery.

[210] The defendant accepts that Dr. Chin says the plaintiff suffers from myofascial pain however Dr. Chin also notes he is still able to perform his work and personal activities.

[211] The defendant argues that Mr. Kerr ignored the clinical records of Dr. Kriek who noted increasing left shoulder complaints and Dr. Hughes who also expressed a concern with the plaintiff's left shoulder function.

[212] The plaintiff says that his left shoulder is no longer a problem however the defendant argues that he complained of his left shoulder from 2021 through to December 2023 and indicated to Dr. Kriek that he had “two broken shoulders”.

[213] The defendant argues that Mr. Kerr initially said that that plaintiff’s right shoulder range of motion had decreased since 2021 however on cross-examination he admitted that one aspect of range of motion had decreased and two other aspects of range of motion had increased.

[214] The defendant notes that the plaintiff currently works 5 - 7 days a week.

[215] The defendant does note that Mr. Kerr says that the plaintiff’s right shoulder is currently the same as it was in 2021 as does Dr. Chin.

[216] The defendant notes that the plaintiff has gone to physiotherapy approximately 25 times however he has always terminated the sessions. There is no evidence that the plaintiff requires a home gym.

[217] The defendant notes that from 2019 through 2023 the total income earned by the plaintiff was \$169,388. This is \$33,000 on average per year. This does not include any income from the plaintiff related to his activities around farming, butchering or work that he did for his boss helping him build a house. The plaintiff has not provided any documentation in this regard though Ms. Hennessy says that documents exist in relation to the farm income.

[218] The defendant argues that pre-MVA the plaintiff was not expanding the farm yet post-MVA he was.

[219] The defendant says they are not pursuing the failure to mitigate argument other than it is relevant to his future care claim as to what he would actually utilize.

[220] The defendant notes that the plaintiff is using T3’s which were not prescribed to him and he is not attending counselling.

[221] The defendant argues that there is no evidence that the plaintiff was intending to work to age 70 yet those are the calculations that Mr. Sheldon performed.

[222] The defendant says that the plaintiff does his chores around the Property and engages in his recreational activities it just takes longer to do them. The evidence establishes that the plaintiff has built fences and pigs stalls since the MVA.

[223] The defendant argues that the plaintiff developed left shoulder problems two years after the MVA.

[224] The defendant argues that with regard to the recommendations made by Mr. Kerr there is no evidence that the plaintiff needs or will follow through with this treatment.

[225] The defendant argues that there is no evidence that the plaintiff lost employment because of the MVA. The defendant says that if it is assumed that the plaintiff was making \$25,000 as of 2018 this equates to \$2,083 per month. The defendant argue that the plaintiff was off work for four months which would equate to approximately \$8,500. He received approximately \$5,000 in EI benefits so the net past wage loss would be \$3,500.

[226] The defendant admits that the plaintiff meets the test for an award for future loss of earning capacity. There is no evidence that he has lost any income since the MVA. The defendant argues that one way of assessing this loss would be to award the plaintiff two or three years of wage loss at \$25,000 a year. This would equate to a wage loss of \$50,000 - \$75,000.

[227] The defendant argues that the non-pecuniary damages are between \$80,000 and \$90,000. The defendant says that the cases which establish this range are as follows:

- a) *Mocharski v. Ngo*, 2016BCSC 1165;
- b) *Furlan v. Strata Plan BCS3202*, 2016 BCSC 213;

- c) *Park v. Donnelly*, 2017 BCSC 778; and
- d) *Montgomery v. Williamson*, 2015 BCSC 792.

[228] The defendant argues that the plaintiff should not receive any award for loss of future housekeeping capacity because the plaintiff is still able to look after and do his chores just less efficiently. The defendant argues that if anything the award for non-pecuniary damages should be increased to account for any difficulties the plaintiff is having in performing his household chores.

Decision

[229] The issues to be determined on this case are what award should the plaintiff receive for non-pecuniary damages, loss of earning to the date of trial, loss of future earning capacity, cost of future care and loss of housekeeping capacity.

[230] The defendant has admitted liability in this case.

Non-pecuniary loss

[231] In assessing an appropriate award for non-pecuniary damages I have to consider the following factors:

- a) age of the plaintiff;
- b) nature of the injury;
- c) severity and duration of 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, generally speaking, penalize the plaintiff...;

Stapley v. Hejslet, 2006 BCCA 34 at para. 46.

[232] The plaintiff received a serious injury to his right shoulder as a result of the MVA which required surgical intervention and has not resolved his right shoulder pain.

[233] Dr. Hughes opined that the plaintiff's prognosis is guarded and that he continued to have ongoing restrictions with respect to both his range of motion and strength. I accept the opinion of Dr. Hughes in this regard.

[234] Further Dr. Chin opined that the plaintiff suffered from chronic neck pain and stiffness with concomitant cervicogenic headaches and upper back pain secondary to myofascial pain syndrome due to whiplash-associated disorder (WAD) type II without focal neurologic dysfunction as well as chronic right upper extremity pain and weakness. I accept Dr. Chin's opinion in this regard.

[235] The plaintiff is a large strong man who enjoyed physical labour as well as had dreams of maintaining a farm on the Property. He testified that he has difficulties completing his chores and work. He also has had difficulties in maintaining his intimate relationship with Ms. Hennessy. I accept that the plaintiff has difficulties completing his chores and some of his work tasks. However I find that the plaintiff is capable of performing his current work activities and household activities as opined by Dr. Chin.

[236] Ms. Hennessy testified that the plaintiff is physically exhausted after he returns home from work. I accept Ms. Hennessy's evidence in this regard.

[237] It is clear that the plaintiff's injuries have impacted his personal and work life and his self-image as a strong capable man has been damaged.

[238] The plaintiff's cases establish a range for non-pecuniary damages of \$120,000 - \$175,000.

[239] The defendant's cases establish a range for non-pecuniary damages of \$80,000 - \$95,000.

[240] The cases that the parties have provided for an assessment of non-pecuniary damages are helpful though they do not have the exact same fact patterns as the case at bar.

[241] The most helpful cases have been the cases of *Furlan*, *Park* and *Ross*.

[242] The plaintiff in *Furlan* suffered a labral tear in his right shoulder which required surgery. He continued his employment and did not suffer any psychological injuries. In that case \$80,000 was awarded for non-pecuniary damages.

[243] In *Park* the plaintiff suffered a left labral tear to the shoulder as well as other injuries. In that case the plaintiff was awarded \$85,000 for non-pecuniary damages.

[244] In *Ross* the plaintiff suffered a labral tear to her shoulder as well as a moderate tear to her rotator cuff and other injuries. Five years after the accident she still continued to have persistent shoulder pain which caused her to wake up at night. The plaintiff was awarded \$120,000 for non-pecuniary damages.

[245] The plaintiff's injuries particularly to his right shoulder were serious and have persisted since the MVA in 2018. The plaintiff has also suffered an injury to his neck, right elbow, headache and chronic pain. Given the nature and duration of the plaintiff's injuries they are more serious than the plaintiff's injuries in *Furlan* and *Park* however in my view are less serious than the plaintiff in *Ross*.

[246] Having considered all of the above I award the plaintiff \$100,000 for non-pecuniary damages.

Past Loss of Earning Capacity

[247] In *Tanaka v. Gill*, 2023 BCSC 344 Mr. Justice Milman in discussing the legal principles to be applied in assessing damages for past loss of earning capacity stated the following at para. 88:

(88) The legal principles to be applied in assessing damages for that aspect of his lost were conveniently summarized by Goepel J.A. in *Grewal v. Nauman*, 2017 BCCA 158, as follows:

[48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Laren*, 2010 BCCA 140 at para. 32.

[49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

[248] The plaintiff suggests that there is a hypothetical possibility that he would have worked full-time in 2021 and continued full-time employment to the date of the trial.

[249] The plaintiff says that the report of Mr. Sheldon should be used in assessing past loss of earning capacity. Mr. Sheldon estimates that based on full-time full-year earnings for employment as a construction labourer and helper absent the MVA from 2021 to June 16, 2024 the plaintiff could have hypothetically earned \$170,931. Deducting what the plaintiff did earn during that period of time would leave a loss of \$73,090.

[250] The difficulty I have with that proposition is based on the evidence the plaintiff has earned more income post-MVA than he did pre-MVA. Further there is no evidence that he lost out on any significant job opportunities.

[251] The plaintiff was also fired from one of his jobs and quit another.

[252] The plaintiff's work history involves taking jobs that are often of a short duration and then changing jobs on a frequent basis.

[253] I do not find that there is a hypothetical possibility that the plaintiff would have worked full-time in 2021 to the date of the trial.

[254] The plaintiff however needed approximately four months to recover from his shoulder surgery in December 2022.

[255] Based on the plaintiff's work history and the income he earned in 2023 of \$26,011 it is probable that he would have earned \$39,000 in 2023 absent the shoulder surgery. This would equate to \$3,250 per month in income. Multiplying \$3,250 x 4 months equals \$13,000. The plaintiff received \$5,010 in EI benefits in 2023. After deducting \$5,010 from \$13,000 leaves a loss of \$7,990.

[256] The plaintiff is awarded \$7,990 for past loss of earning capacity

Future Loss of Earning Capacity

[257] The British Columbia Court of Appeal in *Rab v. Prescott*, 2021 BCCA 345 sets out a three-step process for considering claims of loss of future earning capacity. The court stated at para. 47;

From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which

step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras. 93-95.

[258] The first step of the process is to determine whether the evidence discloses a potential future event that could lead to a loss of capacity. Dr. Hughes opines that the plaintiff's right shoulder injury will affect his ability to seek competitive employment.

[259] Dr. Chin opines that the plaintiff is unlikely to be able to return to his previous vocation as a carpenter and will have difficulties trying to butcher animals. Dr. Chin also opines that the plaintiff can still perform his work activities and activities that he performs around the house, but it takes them longer and he is less efficient.

[260] In my view the evidence does disclose a potential future event that could lead to a loss of capacity that being the plaintiff's inability to do sustained construction work or manual labour.

[261] The second step in the process is whether there is a real and substantial possibility that the future event in question will cause a pecuniary loss. Mr. Kerr opines that the plaintiffs work endurance is reduced. This is also confirmed by the evidence of the plaintiff who said he reduced his work hours from 8 to 6 hours a day at Allcraft.

[262] In my view the evidence of the plaintiff and Mr. Kerr combined with the opinions of Dr. Hughes and Dr. Chin establish that there is a real and substantial possibility that the future event will cause a pecuniary loss. There is real and substantial possibility that the plaintiff will miss out on future employment or have to reduce his work hours.

[263] The third step in the process is to assess the value of the possible future loss.

[264] In *Kim v. Baldonero* 2022 BCSC 167 Madam Justice Horsman (as she then was) in discussing the process of assessing damages for loss of future earning capacity stated the following at para. 92:

(92) The process of assessing damages for loss of future earning capacity in a case where a plaintiff has ongoing injuries that may impair their future earning capacity, but whose income at the time of trial is at or near their pre-accident level of earnings, presents particular challenges. Damages for loss of future earning capacity in such cases tend to be assessed using the capital asset approach, as opposed to the earnings approach: *Rab* at para. 30.

[265] The parties agree that in assessing the future loss of earning capacity the capital asset approach should be used. Given the difficulty in determining the plaintiff's income and the fluctuating nature of his employment leads me to conclude that the parties are correct and the capital asset approach should be used. Further the plaintiff is presently earning more income than his pre-MVA income.

[266] The plaintiff says that Table 4 at page 13 of Mr. Sheldon's report dated March 18, 2024 should be used in determining the plaintiff's loss of earning capacity.

[267] The plaintiff says that either the contingency adjusted employment income for a construction trades helper and labourer to age 70 should be used in conjunction with the plaintiff's 2023 income of \$31,021. Or the plaintiff's actual income based on \$28 an hour should be used again with his 2023 income to determine his future loss of earning capacity.

[268] The difficulty I have with using these formulas is that there is no evidence that the plaintiff would have worked to age 70 which is one of the factors in Mr. Sheldon's report. Also the evidence does not establish that the plaintiff would have ever worked full-time in the construction industry or that he would earn \$56,000 per year on a consistent basis. His annual losses at present cannot be calculated because he is currently earning as much or more as his pre-MVA income.

[269] The assumptions made by Mr. Sheldon and the plaintiff in calculating the plaintiff's future loss of income are not borne out in the evidence.

[270] What is established in the evidence is that the plaintiff could earn approximately \$40,000 per year. Given the age of the plaintiff, the chronic nature of his injuries and his work history in my view it would be appropriate to award him three years of income.

[271] The plaintiff is entitled to a future loss of earning capacity award of \$120,000.

Cost of Future Care

[272] In *Dzumhur v. Davoody*, 2015 BCSC 2316 Mr. Justice Kent summarized the principles applicable to the assessment of claims and awards for the cost of future care at para. 244 as follows:

- the purpose of any award is to provide physical arrangements for assistance, equipment and facilities directly related to the injuries;
- the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
- the test for determining the appropriate award is an objective one based on medical evidence;
- there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
- the concept of “medical justification” is not the same or as narrow as “medically necessary”;
- admissible evidence from medical professionals (doctors, nurses, occupational therapist, et cetera) can be taken into account to determine future care needs;
- however, specific items of future care need not be expressly approved by medical experts... It is sufficient that the whole of the evidence supports the award for specific items;
- still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

[273] The courts have considered circumstances in which the cost of care items are reasonably necessary but have disallowed those awards where the evidence was that the plaintiff would not use the services recommended: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74.

[274] I have a cost of future care report from Mr. Kerr as well as a responding report from Ms. Earle.

[275] I am not putting any weight on the report of Ms. Earle for a number of reasons which include the fact that she did not personally assess the plaintiff, she only reviewed limited medical documentation of the plaintiff and in my view she gave evidence outside of her area of expertise in relationship to the functional capacity of the plaintiff.

[276] I prefer and accept the report of Mr. Kerr for the most part however many parts of his report were not helpful because Mr. Kerr included care costs for items that in my view were unreasonable such as a skid steer or a \$20,000 home gym. Mr. Kerr's recommendations were also based on the plaintiff's future desires to engage in certain activities such as opening a butcher shop, woodworking shop and raising animals on the Property.

[277] In my view while these are legitimate dreams of the plaintiff the evidence does not establish that he ever would have pursued these activities on a full-time basis.

[278] To the plaintiff's credit he has focused primarily on expenses for health related services and some limited expenses relating to snow removal, lawn care and fencing for the purposes of this trial.

[279] Dr. Hughes opined at page 7 of his medical legal report dated July 7, 2023 that the plaintiff would likely benefit from the following future treatments:

- a) a dedicated physical therapy in combination with an at home exercise program;
- b) referred to a pain and rehabilitation medicine specialist for consideration of trigger point injections, myofascial pain relief, chronic pain consultation and assistance with multimodal analgesia;
- c) as needed analgesia which would be best directed by family physician or a physiatrist for multimodal and synergistic pain relief; and

- d) referral to psychiatry to help deal with the mental aspects of chronic pain and inability to work.

[280] The complicating factor in assessing the plaintiff's future care costs is that he has not availed himself of any of the recommended care modalities other than some limited physiotherapy treatments.

[281] The plaintiff has been using Ms. Hennessy's T3's without supervision of a doctor and without any expense to him. The plaintiff has also made it clear that he receives counselling from Ms. Hennessy and does not want to attend at a counsellor's office.

[282] The plaintiff given his chronic pain will likely however requires some assistance around the Property in terms of snow removal, lawn care and firewood collection which he has been relying on others to do in past.

[283] I not satisfied that the plaintiff requires a \$20,000 home gym or would avail himself of counselling, occupational therapy, massage therapy, kinesiology, or medication from the doctor.

[284] I am also not satisfied that the plaintiff requires seasonal home support, or assistance with fencing and fencing repair because the evidence establishes that the plaintiff is able to do these tasks it just takes him longer. Ms. Hennessy also does much of this work around the Property such as gardening and raising animals which are hobbies she enjoys and she agreed to do when she entered the relationship with the plaintiff.

[285] The plaintiff has attended physiotherapy in the past and this would clearly assist him in the future. I am satisfied that the plaintiff would attend at physiotherapy and at a physiatrist as recommended by Dr. Hughes.

[286] Based on the recommendations of Mr. Kerr and the calculations provided by Mr. Sheldon as to the present day value of these recommendations which I accept the plaintiff is entitled to the following amounts for the cost of future care:

- (1) Psychiatrist - \$10,997;
- (2) Physiotherapy - \$29,734;
- (3) Snowblower - \$5,848;
- (4) Lawnmowing - \$2,798; and
- (5) Firewood collection - \$13,145.

Total: \$62,522

Loss of Housekeeping Capacity

[287] In *Rogers v. Rekow* (1997), 35 B.C.L.R. (3d) 371 the court in considering compensation for loss of housekeeping capacity and replacement of farm labour stated the following at para. 37:

(37) To the extent that the interference with housekeeping and farming activities represents an intangible loss-whether by depriving the plaintiff of enjoyable activity or by causing her pain and suffering in her attempts to perform such tasks-it is compensated in the award for non-pecuniary damages. However, to the extent such services have been replaced, whether gratuitously or by hired labour, and to the extent they will require to be replaced in future to make the plaintiff whole, the loss or impairment of ability to carry out these functions is an economic loss properly compensated by a pecuniary award: *Fobel v. Dean*, [1991] 6 W.W.R. 408 (Sask C.A.) *Johnson v. Shelest* (1988), 22 B.C.L.R. (2d) 230 (C.A.) at 233, *Kroeker v. Jansen*, [1995] 6 W.W.R. 5 (B.C.C.A.)

[288] I have awarded some future care costs in relationship to snow removal, lawn mowing and firewood collection for the plaintiff. Beyond that I am not satisfied that the plaintiff requires replacement of farm labour or compensation for loss of housekeeping capacity because I accept the opinion of Dr. Chin that the plaintiff “can still perform his work activities and activities that he performs around the house, but it takes him longer and he is less efficient”

[289] The plaintiff’s claim for loss of housekeeping capacity is dismissed.

Conclusion

[290] The plaintiff is entitled to the following damages:

- 1) Non-pecuniary damages: \$100,000;
- 2) Past loss of earning capacity: \$7,990;
- 3) Future loss of earning capacity: \$120,000; and
- 4) Cost of future care: \$62,522.

Total: \$290,512.

[291] The plaintiff's claim for loss of housekeeping capacity is dismissed.

Costs

[292] The plaintiff is entitled to his costs of this trial however either party is granted leave to address the issue of costs if there are any matters I am unaware of.

“The Honourable Mr. Justice Tindale”