

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kalashnikoff v. Halat*,  
2020 BCSC 557

Date: 20200409  
Docket: M54418  
Registry: Vernon

Between:

**Nicolai Kalashnikoff**

Plaintiff

And

**Mohamed Houssin Halat**

Defendant

Corrected Judgment: The text of the judgment was  
corrected on the front page on April 15, 2020.

Before: The Honourable Mr. Justice Betton

## Reasons for Judgment

Counsel for the Plaintiff:

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Counsel for the Defendant:

I. Currie  
J. Bullock

Place and Date of Trial/Hearing:

Vernon, B.C.  
March 4 – 6, 9 and 10, 2020

Place and Date of Judgment:

Vernon, B.C.  
April 9, 2020

**Introduction**

[1] The plaintiff seeks an assessment of damages for injuries received in a motor vehicle collision (the "MVC") that occurred on February 13, 2016. The defendant admits liability for the MVC.

**Background**

[2] The plaintiff was born in China in 1954 to ethnically Russian parents. He is the oldest of seven children. He was raised in very modest circumstances. In part because he was the eldest child and had responsibilities to the family, he received no formal education. He has remained functionally illiterate throughout his life.

[3] His family immigrated to Canada when he was 18 and they arrived in Vernon approximately one to two years later. He obtained employment quickly thereafter and transitioned into the fiberglass industry by 1976. He remained so employed for the remainder of his career. The bulk of that time was with a business located in Kelowna, British Columbia, building fiberglass truck campers.

[4] The plaintiff's attitude toward work is a product of his upbringing and his personality. He worked hard and greatly valued the fact of having a job. He rarely took sick days and is not an individual prone to complaining.

[5] His income during his working years was modest. Tax returns show income as follows:

<u>Year</u>	<u>Employment income</u>	<u>Employment insurance</u>
2013	\$41,787	
2014*	20,482	\$4,490
2015	48,106	
2016	32,877	
2017	37,525	5,138

\* His employment income in 2014 was reduced because there was a fire at his workplace that closed the business for a portion of that year.

[6] The plaintiff is married. His wife grew up in the same area in China and was a close friend of his sister. It was the idea of his mother and sister that they marry and the marriage is not a happy one. The plaintiff and his wife live under the same roof but rarely speak and communicate primarily through their daughters. They remain in their living situation due to financial limitations.

[7] The plaintiff has three children. His two daughters testified at the trial. Both present as articulate and successful individuals who care greatly for and respect their father. His eldest daughter, Natasha , is an RCMP officer. As the eldest child, she too has assumed family responsibilities. In respect of her father, she has assisted with reading and explaining any documents and has served as a bridge between her father's "old ways" and the literary and other demands of the modern technological world.

[8] The plaintiff acquired a small acreage in the mid-1980s near Vernon, BC. That is where the children were raised and the plaintiff and his wife continue to reside. One product of his childhood is the plaintiff's love for animals. The hobby farm has allowed him to have an assortment of birds and livestock over the years. That has been his principal recreation and has always been the core feature of his planned retirement. He did the labour associated with the hobby farm around his work schedule. His intention was to address larger maintenance and repair projects when he retired. The plaintiff had a long standing plan to retire at age 65.

[9] Prior to the MVC, the plaintiff had no health issues. He rarely attended healthcare providers and had no family doctor. His work and his hobbies were physical which he enjoyed and took pride in. Other than the hobby farm and his animals, his only other regular pastime was a weekly attendance at the community recreation center pool.

[10] The MVC occurred when the plaintiff was returning home from the pool on a Saturday evening. The defendant crossed the centreline and collided with the driver's side of the plaintiff's vehicle. The plaintiff was driving a full-size pickup and the force of the impact caused his vehicle to rotate counter-clockwise and come to rest in the shoulder area. The canopy on the pickup was knocked off in the impact. There was approximately \$14,000 damage to the plaintiff's truck.

[11] The plaintiff's daughter Natasha attended and transported the plaintiff home. The next day he was in pain so she took him to a walk-in clinic. He was prescribed a painkiller.

[12] The plaintiff returned to work on Monday, February 15, 2013. He described having pain in his neck, back and right shoulder. He also had headaches. These symptoms adversely affected his sleep. He continued to attend work until March 14, 2016, when symptoms required that he stop. At that time, he described having neck and right shoulder pain and numbness in both hands. He remained off work until June 20. He then began a graduated return to work until he was at full-time hours by July 19, 2016.

[13] The plaintiff did not see a physician between the initial visit at the clinic the day following the MVC and the fall of 2017. In that period, he did seek treatment from two chiropractors. He saw Dr. Weglo four times in March 2016, before she went onto maternity leave. He then saw Dr. Roze between May 2016 and September 2017.

[14] After his return to full-time work in July 2016 and into the fall of 2017, the plaintiff developed increasingly severe symptoms of pain and swelling in his hands. He was continuing to work until his condition was noted by a first aid attendant at his workplace. At the insistence of his employer, he went off work on September 29, 2017. He did not return to work thereafter and has since retired. He was 63.

[15] As at the time of trial, the plaintiff's ongoing symptoms are pain in his neck and right shoulder and in his hands. He wears splints on each wrist, which help him manage the pain in his hands.

[16] After the MVC, the plaintiff was struggling to deal with snow removal on the property. He had always done this by hand. As a result, he purchased a used farm tractor for \$2,000. That unit failed and it was cheaper to replace it than repair it so he bought a second for \$3,500. In his closing argument, the plaintiff took the position that the costs of the tractors should be included as a special damage. An agreed statement of facts was entered as an exhibit detailing the parties' communications and agreement about special damages.

[17] Two expert reports were entered as exhibits by the plaintiff at this trial. The first is from a physiatrist, Dr. McKee. He assessed the plaintiff on October 30, 2017, and his report is dated February 22, 2018. In that report, he opines that the plaintiff has clinical findings consistent with multiple cervical facet joint injury most significantly on the right side. Dr. McKee was uncertain why the plaintiff developed problems with his hands in May 2017, what the diagnosis may be and whether there was any connection to the MVC injuries.

[18] The plaintiff was also assessed by an occupational therapist, Ms. Christina Peters. She completed a functional capacity evaluation dated December 9, 2019, based on assessments carried out on November 21 and December 2, 2019. She concluded that the plaintiff was able to perform light to "entry-level medium" physical tasks. She noted that the plaintiff's hand issues "did not appear to impact his performance and functional testing, with the possible exception fine dexterity tests." Based on her review of documents provided to her she proceeded on the basis that the plaintiff's hand issues were not caused by the MVC.

[19] At the conclusion of allotted court time on March 11, 2020, submissions had not concluded. I directed that submissions on an adverse inference issue raised by the defendant be provided in writing. In addition, the plaintiff's reply submissions had not been given. I directed that those also be provided in writing. The intervention of

the court's response to the Covid-19 pandemic resulted in written submissions being received March 27, 2020. At my request, counsel appeared by phone on April 3rd to address outstanding concerns arising from those submissions.

**Issues and Positions of the Parties**

[20] There is no question that the plaintiff received injuries manifesting in neck and shoulder pain in the MVC. A principal area of dispute between the parties is whether the plaintiff's issues with his hands arise from the MVC.

[21] The parties disagree as to the nature and severity of the plaintiff's symptoms, both to the date of trial and into the future.

[22] The defence argues that an adverse inference should be drawn from the plaintiff's failure to call any medical evidence regarding the plaintiff's hand condition. Specifically, the defendant seeks an inference that the medical evidence about the plaintiff's hands would be contrary to the plaintiff's claim of a causal connection between the problems and the MVC.

[23] The plaintiff argues that this is not an appropriate circumstance in which to draw an adverse inference. He points out that there is no requirement for expert opinion to prove the injury.

[24] The plaintiff says that the combined effect of his injuries has a significant impact on his quality of life and on his ability to maintain and enjoy his hobby farm that was to be the focus of his retirement. He argues that the difficulties with his hands do arise from the MVC but that they are not a major contributor to his ongoing limitations or pain and suffering.

[25] The defendant accepts that the plaintiff has ongoing residual symptoms in his neck and shoulder area and says that the evidence reveals that they have a modest impact on the plaintiff. The defendant argues that the condition of the plaintiff's hands has not been proved to have arisen from the MVC and that it accounts for the

majority of his ongoing pain and suffering. They point out that it was the plaintiff's hand condition that required him to go off work and ultimately retire early.

[26] In support of their respective positions, both the plaintiff and defendant refer to the plaintiff's credibility but take decidedly different positions on that issue. Counsel for the plaintiff argues that the plaintiff should be viewed as an honest and straightforward witness, whose evidence was corroborated by his daughter. Counsel stresses that the combination of his limited command of the English language in combination with his general lack of expressiveness should not reflect negatively on his credibility.

[27] The defendant argues that the plaintiff should not be viewed as a credible witness. The defendant says the plaintiff revealed that he is not a reliable historian and advances a narrative that he knows is inaccurate, particularly in respect of his hands.

[28] The plaintiff's claim for the cost of the tractors acquired by him as a special damage is disputed. The plaintiff says he is at liberty to advance the claim. The defendant says there was an agreement reached and the plaintiff is precluded from adding to the claim as agreed.

[29] The parties' arguments on the evidence translate to divergent views of the appropriate awards and of the various heads of damages. Those positions are set out in the table below.

	<b><u>Plaintiff's position</u></b>	<b><u>Defendant's position</u></b>
Non-pecuniary damages	\$95,000.00	\$50,000 – 60,000.00
Past loss of income	\$13,000.00	13,000.00
Loss of housekeeping capacity	\$40,000.00	0.00
Past loss of earning capacity	\$15,640.00	0.00
Agreed special damages	\$2728.91	2,728.91
Additional specials	\$5,635.00	0.00

Cost of future care	<u>\$30,605.00</u>	Allowance only for ongoing chiro/physio*
<b>Total:</b>	<b>\$202,608.91</b>	

\*The defendant accepted an award was appropriate but did not specify a dollar amount.

**Analysis**

[30] Like any individual, Mr. Kalashnikoff's upbringing and background shaped the person that he is. His is somewhat unique. More consequential than the absence of his formal education and the fact that English is his second language, that background influenced his work ethic, attitude, his approach to ailments and injuries, and his goals and objectives.

[31] Consistent with the evidence of his daughter, the plaintiff is not an individual who is particularly comfortable with expressing feelings and certainly not one prone to complain. His general approach to physical pain or aches and ailments is to work through them and not to seek out medical advice or treatment. His eldest daughter, Natasha, fairly, described him as a stubborn individual.

[32] He took his job as a privilege and a responsibility that he would not jeopardize by complaining or taking sick days. It was a source of pride for him.

[33] Prior to the MVC he was healthy and had clear and uncomplicated goals and objectives.

[34] The plaintiff received injuries to his shoulder and neck in the collision. The nature of those injuries are as described in the report of Dr. McKee and are not controversial. Placing them in the spectrum of relative severity and assessing their impact on his decision to end his employment early and on his day-to-day functioning is aided by the reports of Dr. McKee and Ms. Peters but there are subjective components inherent in that task. Pain is a subjective experience and, as a result, the plaintiff's credibility is very important.

[35] Similar assessments need to be made in respect of the plaintiff's hand conditions, but there is the additional issue of causation. I will begin there in part because it is the subject area relied on by the defendant to argue the plaintiff lacks credibility, but also because the conclusions on causation and credibility inform much of the balance of the analysis. Further, it is the subject regarding which the defendant argues I should draw an adverse inference.

### **Hand Condition**

#### ***History and Diagnosis***

[36] There is no affirmative medical opinion in evidence regarding the plaintiff's hands. What Dr. McKee offers is more in the form of a statement on the subject. It is as follows:

Mr. Kalashnikov did develop problems with his hands in May 2017 which have persisted. I am uncertain why he has these particular problems and what the diagnosis might be and whether there is any relationship to the motor vehicle accident injuries. It may be a benefit to obtain an opinion from a specialist in hand disorders, possibly a plastic surgeon or rheumatologist."

[37] His report does reference other information that he received for consideration on the subject. That is set out in his report and includes:

- a. On May 16, 2017, it was outlined that he had numbness in his hands for about one month. He was referred to Dr. P. Inkpen for Electrodiagnostic Studies.
- b. There were Emergency Records from Vernon Jubilee Hospital dated October 4, 2017. The Emergency Physician's report was not legible. Further in the records, it was noted that he had bilateral hand swelling and had been off work requesting reassessment. His hands were swollen, weak and painful with movement.
- c. After the motor vehicle accident in February 2016, he missed work completely for 1 to 2 months. He was then able to return to his normal duties until he had to go off because of his hands. He noted the hand swelling started in May 2017 and that he has also had numbness of his fingertips. Due to the hand symptoms and swelling, he has been to the Emergency Room several times and reported having nerve conduction studies done, with no diagnosis made. He reported that he had no problem with his hands prior to the motor vehicle accident and had no hand symptoms until the swelling started in May 2017.
- d. There was diffuse swelling and a reddish discoloration of his hands, more prominent on the right side.

[38] There are no records and no report from the physician at the clinic that the plaintiff saw the day following the MVC. The next practitioner that the plaintiff saw was Dr. Weglo in March 2017. Her records did not reveal any reference to hand issues.

[39] The next practitioner who assessed the plaintiff was the chiropractor Dr. Roze. The patient intake form completed on behalf of the plaintiff in May 2016 by his daughter Natasha reported numbness in both hands. The plaintiff saw Dr. Roze consistently during the period May to July 18, 2016. There is no indication in the clinical notes and records during that period of any treatment focused on the plaintiff's hands.

[40] There are clinical notes from various doctors at a walk-in clinic from visits in April and August of 2016 with no reference to hand complaints. The plaintiff did not return to that clinic until May 2017. During that period there are no indications the plaintiff was receiving any ongoing treatment or assessment.

[41] In May 2017, the notes from the walk-in clinic relate only to hand complaints and resulted in a referral to Dr. Inkpen.

[42] The plaintiff saw Dr. Inkpen, a physiatrist, in July 2017. His letter of that date to the referring doctor from the walk-in clinic provides a history and diagnosis. The plaintiff did not return to the clinic and at that point had no family doctor. As a result, the plaintiff apparently was not made aware of the content of Dr. Inkpen's letter until early 2018.

[43] The plaintiff was required to stop work on September 29, 2017. Shortly after the plaintiff left work he began seeing a general practitioner, Dr. Sharma, and returned to the care of the chiropractor, Dr. Roze. Dr. Inkpen's letter was not available to Dr. Sharma's office until March 2018. A clinical note of Dr. Sharma dated October 11, 2017, records the following: "In May noted numbness in both hands. He subsequently developed swelling of hands" and further "unable to work".

[44] Dr. Inkpen's letter records that "[The plaintiff] had no paresthesia and no radicular symptoms prior to the motor vehicle accident, during the recovery or until about three months ago" and further "About two months ago he had onset of bilateral hand paresthesia with nocturnal awakening and a positive flick sign. He has no wrist or elbow pain, has not used any splints and no pre-existing history of [carpal tunnel syndrome]." His opinion as to the nature of the condition is not admissible for its truth in this trial but the fact that a diagnosis was communicated to the plaintiff is admissible.

[45] The opinion given to the plaintiff was "bilateral mild [carpal tunnel syndrome] with severe symptoms". That opinion was communicated to the plaintiff by a Russian speaking locum for Dr. Sharma on March 12, 2018. The plaintiff rejected the proposition that the condition of his hands is not related to the MVC then and remains convinced that it is a product of the MVC to the date of his testimony at trial.

[46] At the time the opinion was conveyed to him, the plaintiff was frustrated at what he perceived to be, an erroneous conclusion regarding his hands. He did not attend upon any physician or any practitioner for the next 17 months.

[47] He returned to see Dr. Sharma on August 23, 2019. He declined a referral to a surgeon regarding his hands. In or about September 2019, he acceded to a recommendation that he begin to wear splints on his wrists and by October 11, 2019, reported that the splints were helping. In his testimony, he estimated that the splints reduced the symptomology and pain in his hands by approximately 50 percent.

### ***Causation & Credibility***

[48] I will address these issues together as they are heavily intermingled. The defendant says that the plaintiff has not proved the pain and swelling in the plaintiff's hands is caused by the MVC. Further the defendant argues the plaintiff's evidence on the issue should lead to a finding that he is not a credible witness.

[49] As noted, there are no expert opinions in evidence as to the specific diagnosis or cause of his hand condition. Dr. McKee's statement is that he does not know. He did not have Dr. Inkpen's letter at the time of his assessment on October 30, 2017, or for preparation of his report.

[50] There is no doubt that the plaintiff honestly holds the belief that the MVC caused his hand conditions. He is not swayed by opinions offered to him that this is not so. The foundation of his view is the absence of symptoms prior to the MVC.

[51] The first report of hand symptoms is the self-report of numbness in the intake form for Dr. Roze in May 2016. There are no other records of complaint or treatment until 2017. The records of Dr. Inkpen, Dr. Sharma and Dr. McKee all indicate the onset of the complaints was May 2017. Logically each of these doctors would have acquired this information from the plaintiff but that is not expressly stated. In her report, Ms. Peters indicates the plaintiff continues to complain of numbness in his right hand when he lies down on his right side.

[52] I accept that the plaintiff experienced the numbness in his hands soon after the MVC. I recognize that the plaintiff's communication and explanation of symptoms may have been less than ideal from the perspective of his treating practitioners but I am unable to find that this left a void in their understanding of the onset of the pain and swelling in his hands. In part that is based on my own experience listening to the plaintiff give his evidence. He effectively responded to questions and I had no difficulty understanding his responses or his meaning. Further, there is no indication of any difficulty in communicating the nature and status of his neck and shoulder issues to his chiropractors or doctors.

[53] The plaintiff's testimony is that he was experiencing symptoms in his hands that became worse in 2017. There are repeated indications by him to doctors that the problems of pain and swelling came on in May 2017. I have no medical opinion or explanation of what, if any, connection the numbness noted soon after the MVC may have with the problems of pain and swelling noted in May 2017. The simple fact that symptoms appear in the same part of the body is not enough to meet the

evidentiary burden of proving that they are progressive manifestations of an injury received in the MVC. On the whole of the evidence, I am unable to find a causal link between the MVC and the pain and swelling the plaintiff began experiencing in early 2017. Whatever numbness he continues to have that did arise from the MVC never was and is not currently a significant functional problem.

[54] Given that conclusion, it is not necessary for me to deal with the adverse inference arguments.

[55] The defendant says that the plaintiff's steadfast adherence to his belief that the MVC caused all of his hand symptoms reflects negatively on his credibility. Under cross-examination, he stood by the assertion that the doctors did not know what the problem with his hands was. The notes and records indicate that they had formed the conclusion that it was bilateral carpal tunnel syndrome, but the plaintiff is unwilling to accept that diagnosis.

[56] The plaintiff was accurately described by his daughters as stubborn. His adherence to his conclusions as to the cause of his hand symptoms despite the medical opinions provided to him is a reflection of that characteristic. His experience has drawn him to his conclusion and he sees the doctors' contrary assessments as flawed and he articulates this conclusion as "they don't know". Despite that, I generally found the plaintiff to be a credible witness. His view on this issue is firmly established and while my conclusion is that it has not been proved, I go no further than that. I have only concluded that there is insufficient evidence before me to prove the causal connection to the MVC. That the plaintiff stands by his belief does not, in the circumstances, reflect negatively on his credibility generally.

[57] The plaintiff was prone to becoming frustrated during his testimony. He knows he has literacy and language challenges and it was, in my observation, when he felt those challenges were being exploited, his frustration boiled up. I do not attribute any such strategy to defence counsel but it was a dynamic evident during the cross-examination. In my view, the plaintiff's presentation did not diminish his credibility,

rather it is part of the social context to be understood in assessing the plaintiff's responses.

### **Functional Impact**

[58] Clearly his hands became a problem by May 2017 and a serious problem by late September 2017. They remained a significant contributor to his reduced functioning and diminished general activity level at least until he began wearing the splints in 2019. The plaintiff says his hand limitations are reduced approximately 50 percent with the use of the splints.

[59] The functional capacity evaluation of Ms. Peters provides objective evidence of the impact of the plaintiff's abilities. The evidentiary value of that evaluation is, however, questioned by the defendant. In part, they take this position because Ms. Peters did not have the plaintiff wear his splints during testing. Ms. Peters explained that she did not require it. She said that she left it to the plaintiff to decide whether or not to use his splints during testing as long as she did not see his hand conditions as impeding his completion of testing.

[60] In addition, the defence notes that the plaintiff testified that he told Ms. Peters during testing that his wrists were bothering him but this is not recorded in her report. This is of little consequence given that Ms. Peters did not identify the plaintiff's wrists as limiting his capacities. The fact that he indicated hand pain over the lunch break does not equate to limiting his performance of testing nor does it diminish the weight I attach to Ms. Peters' report.

[61] The fact that the plaintiff was able to do the testing without his splints indicates that his hands do not present a significant ongoing limitation for his work on the hobby farm. The testing supports the conclusion that the neck and shoulder symptoms intervene to limit his work on the hobby farm before his hands do and thus are the principle problems for him going forward. Wearing his splints day to day will serve only to create a further gap between the onset of his task limiting neck and shoulder symptoms and task limiting hand symptoms.

**Non-Pecuniary Damages**

[62] Since the MVC, the plaintiff has had persistent neck and right shoulder pain. In the earlier stages post MVC he also suffered with headaches. I allow for the fact that he was experiencing some numbness in his hands as well. Alone the problems were not enough to keep him from his work and in many cases that would provide some perspective on their severity. For this plaintiff however, it is clear that he would not miss work except in the most serious of circumstances. This is evidenced by the fact that even with increasing severity of his hand condition he had to be told to leave work when the severity of the condition of his hands became visible to the first aid attendant at his workplace.

[63] The sources of pleasure in the plaintiff's life are not exotic or expensive but that makes them no less valuable to him. The fact that the plaintiff stopped working early is a product of his hand symptoms that were not caused by the MVC. That early retirement had financial consequences for him as well as being a significant blow to his sense of worth. It was an interruption to a longstanding plan. For this plaintiff, that has been a significant disappointment.

[64] The collective impact of his hands and his neck and shoulder problems going forward is to reduce his ability to carry out tasks on the farm at the same pace and effectiveness. As indicated above, however, the primary limiting factors since fall 2019 are his neck and shoulder symptoms.

[65] The enjoyment and satisfaction he would otherwise derive from these activities has been diminished.

[66] In my view, it is appropriate to address the claim for loss of housekeeping capacity here and not as a separate head of damage as argued by the plaintiff. As discussed in *Kim v. Lin*, 2018 BCCA 77, proceeding in this manner is an exercise of discretion focussed on whether a plaintiff is unable to perform such tasks or whether he does so with increased pain or at a slower pace. The functional capacity evaluation at pages 19 and 20 describe his capacities in technical terms and the report makes no recommendation for housekeeping services.

[67] The process of assessing non-pecuniary damages is unique to every individual. The decision in *Stapley v. Hejslet*, 2006 BCCA 34, is the most oft-cited case for its non-exhaustive list of relevant considerations for carrying out those assessments:

- (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. . .

[68] These serve to provide consistent foundation for the analysis of the infinitely variable factual circumstances.

[69] Counsel have referred to various authorities. These serve only to inform the ranges on damages that may be appropriate but every case and every plaintiff is unique. The plaintiff's authorities included *Benson v. Day*, 2014 BCSC 2224; *Brown v. Bevan*, 2013 BCSC 2136; *Jhawar v. Ulici*, 2019 BCSC 2012; and *Riley v. Ritsco*, 2018 BCCA 366. The defence referred to *Nagra v. Stapleton*, 2017 BCSC 2225; *Parker v. Martin*, 2017 BCSC 446; and *Young v. Shao*, 2018 BCSC 2017.

[70] Having regard to those cases and this plaintiff's peculiar circumstances including the consideration of housekeeping capacity, I award \$75,000.

**Past Loss of Income**

[71] The plaintiff continued his full-time employment from July 2016 until September 29, 2017. It was his hand condition that prompted his employer to require he stop working. Dr. McKee records in his report:

He did miss work completely for 1 to 2 months after the motor vehicle accident and had to go off work in [September] 2017 for his hand problems. I assume if his hand problems are resolved, that he could return to work; however, his symptoms certainly could be aggravated by the work situation

[72] The parties agree to a loss of \$13,000 for the time the plaintiff lost from work until his return to full-time work in July 2016.

[73] The plaintiff argues that he lost the opportunity to return to work after he started using the splints in 2019 until his 65th birthday. There is no evidence from the plaintiff's employer that his job was still available and no specific assessment of his capacity to do his job. Importantly, there is no indication that the plaintiff made efforts to go back to his work. He had certainly been able to work with his neck and shoulder symptoms after the MVC from July 2016 until September 29, 2017. There is no evidence to show that his neck and shoulder problems were worse in September of 2019.

[74] The plaintiff has not proved this loss of opportunity.

**Costs of Future Care**

[75] The plaintiff's claim is founded on the report of Ms. Peters. Her recommendations are categorized as healthcare interventions, equipment/adaptive aids and home support services. She proceeded on the basis that the plaintiff's hand condition is not a result of the MVC.

[76] The plaintiff was clear that he would not avail himself of some of the healthcare proposals. As a result, I make no allowance for prolotherapy or injections.

[77] Generally her recommendations are to assist the plaintiff in managing his symptoms and completing heavier tasks connected with the property. The specific awards are set out below but I view her recommendations as appropriate. They are not excessive in intensity or cost and those awarded are what the plaintiff will realistically use. They will serve to minimize the ongoing impact of the MVC-related injuries.

[78] Ms. Peters recommends a one-time allowance for an active physiotherapy program followed by ongoing physiotherapy, massage or chiropractic treatment to manage flare-ups. The plaintiff has attended a chiropractor previously. These are reasonable and in keeping with recommendations from Dr. McKee. I allow them at the midpoint of the recommendations.

[79] She also recommends that the plaintiff receive one-time assistance from an occupational therapist and rehabilitation assistant to be educated on strategies and techniques to maximize his function. This would also serve to maximize his enjoyment of the work on the hobby farm and is, in my view, reasonable.

[80] The plaintiff already uses the community pool and Ms. Peters recommends increasing that use. Allowing some portion of the cost is therefore reasonable. The parties disagree on the formula. I allow for one-half of the cost of an annual pass on an ongoing basis.

[81] The plaintiff agrees that he would benefit from a ride-on lawn mower and I allow for that expense at the midpoint in the range identified by Ms. Peters of \$2,200.

[82] The provision of support for property maintenance at the midpoint, both in terms of hours and cost per hour, from Ms. Peters' report is generally reasonable. This applies to the assistance with property cleanup and seasonal assistance for property maintenance. In respect of the recommendation for general labour for home (and vehicle) maintenance, Ms. Peters used some statistical reference points, which takes into account limitations with natural aging. Her approach, in my view, is reasonable.

[83] I have endeavoured to complete the calculations of net present value but invite counsel to check for accuracy and either party is at liberty to bring the matter of the calculations back before me if errors are identified.

**Special Damages**

[84] The single issue is whether the agreement between the parties precludes the claim for the cost of the tractors. The parties filed the agreed statement of facts and asked that I determine the issue without additional evidence from counsel. The correspondence referenced in it is not a robust articulation of the parameters of the agreement but it does not suggest any reservation of rights to advance further claims.

[85] The plaintiff says that the defendant was aware of the claim for the tractor(s) based on the report of Ms. Peters and therefore should have understood the claim was being made and not be surprised by the claim being made at trial. The difficulty with this is that the report is dated December 2019 and the exchange of correspondence between counsel occurred in February 2020. The list of special damages does not include the tractors. Logically if the plaintiff was intending to include the costs of the tractors it would have been included in the list or at least referenced in some way.

[86] On the evidence provided, the claim for the costs of the tractors is not allowed.

**Conclusions**

[87] The following adapts the table set out earlier with the insertion of the awards made.

	<b><u>Plaintiff's position</u></b>	<b><u>Defendant's position</u></b>	<b><u>Award</u></b>
Non-pecuniary damages	\$95,000.00	\$50,000 – 60,000.00	\$75,000.00
Past loss of income	\$13,000.00	13,000.00	\$13,000.00
Loss of housekeeping capacity	\$40,000.00	0.00	\$0.00
Past loss of earning capacity	\$15,640.00	0.00	\$0.00
Agreed special damages	\$2,728.91	2,728.91	\$2,728.91

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Additional specials	\$5,635.00	0.00	\$0.00
Cost of future care	\$30,605.00	Allowance only for ongoing chiro/physio	<u>\$29,752.00</u>
<b>Total:</b>	<b>\$202,608.91</b>		<b>\$120,480.91</b>

[88] Subject to issues unknown to me regarding costs, I would order that the plaintiff have his costs at scale B. Either party is at liberty to have the matter of costs brought before me if they take the position that some other costs order is appropriate.

“Betton J.”