OUTER HOUSE, COURT OF SESSION

[2020] CSOH 8

A294/07

OPINION OF LADY CARMICHAEL

In the cause

DARREN CONQUER

Pursuer

against

LOTHIAN HEALTH BOARD

Defender

Pursuer: Smith QC, R Henderson; Campbell Smith LLP
Defender: Stephenson QC, Khurana QC; NHS Scotland Central Legal Office

15 January 2020

Introduction

[1] The pursuer sustained an injury to his right, dominant, elbow during a football match on 30 July 2003. He sues the defenders in respect of negligent diagnosis and treatment of that injury. On 1 August 2003 he underwent an operation on his right arm. On 10 June 2004 he had an operation to repair his right biceps tendon. He had a reconstructive operation on his right distal biceps tendon on 16 November 2009, carried out by Mr Reid, consultant orthopaedic surgeon.

[2] In November 2016 the defenders admitted liability in the following terms:

> "1. the defenders admit liability to make reasonable reparation to the pursuer for any loss, injury and damage sustained by him as a consequence of the failure to perform an ultrasound scan of his right upper arm by 3 September 2003;
>
> 2. the defenders admit that had such an ultrasound scan been carried out by said date (a) it would, on the balance of probabilities, have disclosed a right distal biceps tendon rupture, and (b) surgical repair of the ruptured tendon would have been undertaken within a few days thereafter."

[3] During the period since September 2003 the pursuer has had a number of injuries and medical conditions which have required treatment. He has had conditions or injuries affecting his left arm, both shoulders, his spine, and his gastro-intestinal tract. The defenders plead that for at least parts of the period since September 2003 the pursuer has been unfit for work for reasons unrelated to their negligence. The pursuer accepts that the conditions and injuries affecting his shoulders, spine, and left arm are not causally connected to the negligent treatment of his right arm. He does, however, maintain that his gastro-intestinal problems are so connected, because they resulted from the ingestion of opioid medication taken to treat pain in his right arm.

[4] The quantification of damages is complicated also by the pursuer's work history both immediately before and in the period since September 2003.

[5] Much of the evidence both about medical matters and the pursuer's employment history is not in dispute. The approaches of the pursuer and defenders respectively to quantification of the loss arising from the admitted negligence, against the factual background of the pursuer's medical and employment history, are radically at odds. It is therefore necessary for me to set out the factual background in some detail.

[6] The pursuer gave evidence, as did his mother, Mrs Catherine Conquer. He led evidence from Mr Timothy James, consultant orthopaedic surgeon, Mr James Manson, consultant gastro-intestinal surgeon; Dr Andrew Harrison, a clinical psychologist and

neuropsychologist, and Mr Peter Davies, employment consultant. The defenders led evidence from Mr Peter Wade, consultant orthopaedic surgeon, and Dr Joanna Smail, a general practitioner at Tranent Medical Centre, where the pursuer was formerly a patient. It was agreed that a report by Mr M S Butterworth, consultant plastic, aesthetic and reconstructive surgeon dated 8 March 2017 should be treated as his evidence.

[7] Mr James and Mr Wade had had a joint telephone conference before the proof, and together produced a statement of their positions in response to certain questions formulated by parties (6/113 of process). It was not an agreed statement of position between the parties. Parties however agreed that the contents formed part of the evidence provided by Mr James and Mr Wade, and that I am entitled to consider it and take it into account. They agreed about certain matters, and narrated their differing views in relation to others. I refer below to the matters they agreed about where those are material. Although I was not bound to accept their opinions where they were agreed as to those opinions, I did so. There was nothing that caused me to reject their agreed position.

[8] Parties agreed that the calculation of interest would be of some complexity given the two payments of interim damages that the pursuer has already received. I was asked to provide my conclusions in relation to quantification of damages, exclusive of interest, with a view to parties addressing me at a By Order hearing in relation to interest. I therefore produced a draft opinion. Parties appeared at a By Order hearing on 5 December 2012, at which I was informed that they had reached agreement as to the calculation of interest. I record the agreed figures for interest elsewhere in this opinion.

Conditions not caused by the admitted negligence

[9] None of the following conditions is said to be causally related to the negligent treatment of the pursuer's right arm. It is a matter of agreement that he developed these conditions after September 2003. They are potentially relevant in the context of financial losses.

[10] At the end of May 2005 the pursuer injured his left shoulder while in Prague. He attended the Edinburgh Royal Infirmary on 3 June 2005, after his general practitioner had carried out an injection into his left shoulder, which had caused him pain. He was admitted for analgesia and investigation. He continued to complain of considerable pain in his left shoulder until at least November 2005. There is agreement as to the passages in the medical records which describe the condition and its treatment.

[11] On 29 April 2006 the pursuer was admitted to Edinburgh Royal Infirmary with a complete left distal biceps tendon rupture. On 4 May 2006 a surgical repair was undertaken. Post-operatively cellulitis was noted, and the pursuer was treated with antibiotics. He was discharged on 12 May 2006, and was subject to out-patient care until 10 October 2006. On about 3 August 2016 the pursuer was admitted to Grantham and District Hospital with left arm pain. On 5 August 2016 an MRI scan of his left elbow was undertaken, and he was discharged from hospital on 6 August 2016.

[12] On 18 March 2007 the pursuer was admitted to Edinburgh Royal Infirmary with lower back pain following a fall. He had a possible fracture through the transverse process of L5. He was discharged on 26 March 2007.

[13] In early June 2007 the pursuer reported to his general practitioner pain and reduced movement in his right shoulder. His general practitioner referred him to Edinburgh Royal Infirmary. On 9 October he was seen by Miss McBirnie, Consultant Orthopaedic Surgeon.

She noted that he appeared to have rotator cuff tendinosis of the right shoulder and a partial thickness tear of the supraspinatus on the left side. An ultrasound revealed, however, that the supraspinatus, infraspinatus, subscapularis and long head of biceps were intact. The shoulder was injected with steroid. On 1 September 2008 the pursuer was admitted as a day case to Edinburgh Royal Infirmary. He was examined under anaesthetic and underwent arthroscopy and subacromial decompression At out-patient review on 28 October 2008 he was noted to have recovered extremely well and was discharged from follow up.

Matters in dispute

[14] The following issues arise in this case:

(a) What would the result have been had surgical repair of the pursuer's right distal biceps tendon been undertaken within a few days of 3 September 2003?

(b) What consequences, physical and psychological, have resulted from that surgery not having been undertaken at that time?

(c) Whether the pursuer has sustained and will continue to sustain financial losses as a result of that surgery not having been undertaken at that time.

(d) The quantification of damages in the light of (b) and (c).

Evidence

[15] I summarise here the evidence of the pursuer, Mrs Conquer, Mr James, Mr Davies, Dr Harrison and Mr Wade. I deal with the evidence of Mr Manson and Dr Smail separately. It all relates to the causation of the pursuer's gastro intestinal problems, which I consider in a section of this opinion dealing with that particular issue. Dr Smail's evidence related

principally to the contents of the general practitioner records of the practice of which she is a partner and to records regarding opioid medication in particular.

Pursuer

The pursuer

[16] The pursuer's evidence in chief took the form of a signed statement dated 2 May 2019, which he adopted, supplemented by his oral evidence both in chief and in cross-examination. In the course of his evidence he was referred to 6/25 of process which was a statement he had prepared relating to businesses with which he had been involved.

[17] He explained that he currently took nine gabapentin capsules for nerve pain. He took fast acting oxycontin during the day and slow acting oxycontin during the night as needed. His painkilling medication caused nausea, and he took antiemetic medication to cope with that. He had not taken his usual pain killing medication before giving evidence because he perceived that it made him less alert.

[18] He had been keen to be a plumber from an early age, and had undertaken an apprenticeship. He was, however, keen to become established in his own business. He had not enjoyed school, and wanted to work "on the tools". He did not mind working long or anti-social hours on call-outs, because he could see the financial benefit from doing so. He set up in self-employment in 1994. He received various awards in recognition of his endeavour as a young and successful entrepreneur.

[19] His family background was not in plumbing – his father worked predominantly in sales. His father, however, became involved in the pursuer's business. The pursuer's signed statement narrates that his father became more actively involved in 1996 and that he was in control of the business. From about 1996 the pursuer became involved in doing work for

insurance companies in relation to emergency call outs. The pursuer gave evidence about a number of different companies.

[20] The pursuer said he started up All Clear Plumbing Heating and Building Services Limited in 1992. His father later became involved in the business. It went into liquidation on 12 May 1999 as a result of problems with a single contract which had caused the business to become financially overstretched.

[21] All Clear Emergency Services Limited operated between June 1998 and February 2000. The pursuer's position was that it was started by his father. The pursuer left the payroll in 1998 because he preferred at that point to work in relation to bathroom sales and installations. A colleague dealt with sales, and the pursuer with installations. At that time his daughter had recently been born. All Clear Emergency Services did not take off because the insurance business it had anticipated did not materialise. More or less simultaneously European Bathrooms (Scotland) Ltd was in operation. The pursuer was a director. A winding up order was made in May 2000. The pursuer had fallen out with his father in relation to All Clear Emergency Services Limited and wanted to run the bathroom company himself. The two businesses shared premises, of which the pursuer's father was the tenant. When he gave up the lease the pursuer had to give up the shop relating to the bathroom business.

[22] All Clear Emergency Services (North East) Limited ("North East") operated between 1998 and 2004. The pursuer consented again to work with his father in this business, notwithstanding their differences. This business relied on the provision of work by insurance companies, particularly Royal Sun Alliance ("RSA") in relation to emergency call outs. There was a contractual dispute with RSA, in relation to which the company took advice. RSA had promised that the company would have "exclusivity" in relation to certain

postcodes in Lothian, Fife and the Borders, and had reneged on that. Business from RSA represented 80% of the turnover of the business. The pursuer was referred to 6/80 of process, a letter from RSA dated 25 March 2003 terminating the contract with effect from 20 April 2003. There was a legal dispute as a result which eventually resulted in RSA making a payment. He was referred also to 6/81, a report to the meeting of North East's creditors on 14 May 2004. A winding up order was made in respect of North East on 5 March 2004. The report includes the following passage, entitled "History of the Company and Reasons for Failure (Details provided by the directors":

> "[North East] commenced trading in 1998 carrying out insurance repair services. In 1999 the company secured a contract with Royal & Sun Alliance (RSA). This contract was estimated to be worth in the region of £5 million over the following 3 years.
>
> On the back of this contract the company invested heavily in vehicles, plant and technology to ensure proper management of this contract.
>
> 16 months into the contract RSA withdrew [North East's] exclusivity. In view of the investment the company had made the company disputed this. Whilst trying to resolve the dispute the company continued to work with RSA all be it at a reduced level. Additionally the directors set up contracts with other insurance companies in an effort to replace the lost business.
>
> At this time and as a result of a reduced income the company's bankers informed the company that its overdraft would have to be substantially reduced during 2003. This puts a severe strain on the company's cash flow, which was compounded by one of the company's customers been [*sic*] declared bankrupt by the Financial Services Authority. Additionally another insurance company had not made any payments to the company for over 7 months.
>
> In order to ease the company's cash flow position additional funds in the sum of £180,000 were injected into the company in November 2003.
>
> In February 2004 the company's order book was estimated to be in the region of £750,000 and it had secured a major contract with the Bank of Scotland. However work in relation to this contract was deferred.
>
> In view of this, the Director having a serious health scare, and the company's financial position, the director sought professional advice and petitioned the court to put the company in to liquidation."

[23] The pursuer was asked about this passage. He confirmed that he was the director who had had the health scare. He had had an episode of pericarditis. His family were anxious because there was a family history of heart-related illness. The reference to additional funds of £180,000 was a reference to directors' loans made to the company by the pursuer, his father, and Stuart McAlpine in order to assist cash flow. His statement provides more detail as to the source of funds, which included the pursuer's remortgaging his home. In his statement the pursuer maintains that the condition of his right arm had a detrimental effect on the business of North East.

[24] Six or seven months after the operation in 2003 the pursuer tried to go back on the tools but was not able to. He could not twist or turn his right hand under load without pain. He was being assured by those advising him that he would get better. His symptoms were not getting better, and he had some heated exchanges with Professor Court-Brown, the consultant, regarding the matter.

[25] He had pain most of the time during the period between August 2003 and 2009. He had a dull pain, and if he used the arm even for a short time the arm would "want to retract". He might, for example try to pick up the shopping, or one of his children, and be unable to. Trying to do so would cause a sharp pain. There was some improvement after the operation in 2009. It took until the end of 2010 to recover from that operation. He had continuing pain in his arm after that. He had tried at that stage to return to working on the tools on and off over a period of about two months. He could not use plumbing tools. Trying to turn tools was not possible. He had had an almost identical injury to his left biceps tendon, which had been successfully repaired. He described his left arm as "one hundred per cent" following the repair. He had hurt his left arm in 2016 by tripping and

catching his arm on a door handle. He had been due to travel to Newark and attended hospital there and in Edinburgh.

[26] During the period after 2003 he lived by releasing equity from heritable property. He also had some money from a business called Edinburgh Plumbing. He said he did not take a salary during 2006 or 2007. He had taken on plumbers which had been a very expensive exercise. The business had secured a contract with Edinburgh Council, but that had run into difficulties because of broader difficulties the council experienced regarding payments to contractors; because of high overheads, and lack of support from the bank. He set up another firm, Works Done, because a friend had offered him a contract to do work at a fire-damaged church in Leith.

[27] He had tried to undertake bathroom design work. Although he was intellectually capable of the work, he could not do the computer aided design required, because he could not use a computer mouse. He had tried to use a ball mouse and a hand support, but that had not helped. He had not been able to do the work with his left hand. He had last been in any form of employment in 2016. He had given up the lease on his shop at that stage because he had run out of money, and had used up all the equity available to him.

[28] He could use a keyboard for a short period of time. He had numbness in some of his fingers, and pain in the arm from his elbow to about three quarters of the way down his lower arm.

[29] The pursuer and his wife had separated in 2014 as a result of the financial strain on the family. His ability to interact with his children had been affected. His son had a talent for racing go-karts and had progressed to a more advanced form of motor racing. The pursuer had been unable to give him what other young people involved in the field had. He had been able to help his son attend races, but had had to employ mechanics.

[30] The pursuer had had gastric problems since before 2003 but had never lost more than 48 hours at a time from work as a result. In 2004 and 2005 the problems became worse, but settled with a change of medication. In 2008 or 2009 he received medical advice that he should have an operation for oesophagitis. He put it off in order to undergo the reconstruction operation. He then had the operation, a fundoplication, in 2012. He had "horrific" gastric problems after 2012. He had had constant pain in his lower bowel and could not pass wind. He now knew that the problem had been caused by opioid medication. He described the period between 2012 and 2015 as without doubt one of the worst in his life, by reason of gastric pain. He had a further operation in 2013 to deal with what he understood had been diagnosed as "gas bloat syndrome". It did not relieve his symptoms. His new general practitioner had been helpful.

[31] Before 2003 he had been fit and active. He had subsequently put on weight as a result of reduced activity. He had previously played football, snooker and golf. He had tried to return to football, but was afraid of falling. He had tried swimming as part of physiotherapy, but it had not felt right and he had experienced discomfort. He had tried to play golf in 2011. He had practised for periods at a golf range. He had then been invited to participate in a charity match, but had experienced unmanageable pain after playing two holes.

[32] The pursuer was asked about the problems with his shoulders. So far as his left shoulder was concerned, he had been given an injection in relation to that in the wrong area, and as a result his shoulder swelled up and was sore. He had forgotten about the matter until it was mentioned in the course of the proof. He could not be specific about how long it had lasted, but said that it was a very short period. In relation to his right shoulder, he

described a restriction of movement. He could not put his hands above his head. It was not significantly disabling at any time.

[33] In cross examination the pursuer accepted, under reference to figures in 6/81 of process that North East had been only marginally profitable in the years preceding its winding up, although he explained that that was as a result of the contractual situation with RSA.

[34] It was suggested to the pursuer that the impression he had given of working all the available hours was at odds with an account he had given to Mr James of having had a number of leisure pursuits and spending time with his family. He explained that he had not spent every hour actually carrying out plumbing work, but had been available for call outs. By 2002/3 his business was involved not only in carrying out plumbing repairs but in carrying out building repairs associated with flood damage, again funded by insurance companies. Counsel asked the pursuer what he would have done when North East went into liquidation, had he not had the injury to his right arm. The pursuer said that he would not have started another business with the same model as North East. He would have gone back to emergency plumbing of the sort he had done in the 1990s. It had taken a long time to build a business to the level at which North East had operated, and he would have gone back to working as a plumber, in which he would have been earning good money. To start with he would have worked by himself – "just myself and the van"—as he put it. He said that he still had contacts. It would not have taken him time to rebuild his client base, because he was "one of the best in the plumbing businesses in Edinburgh" and had a good reputation.

[35] When he had started All Clear Plumbing Heating and Building, he had operated on his own. Part of the business was emergency plumbing. His father had joined him to "do the paperwork".

[36] In 6/25 at page 4, the pursuer represented that the reason North East was "put down" was that he was not on the tools, and that emergency plumbing work was, therefore not done quickly. The pursuer obtained planning permission to redevelop his house. He managed the project and used contractors. He started work on this project in 2005 to 2006. The pursuer said that he and his wife had realised that they were not "getting back to 1994", which I took to be a reference to the pursuer's ability to work as at 1994, and they had considered using the property as a guest house. The pursuer was asked about a company called Edinburgh Plumbing and Drainage Company. He said it had not started to trade until after North East had stopped trading. It did not feature as a source of income in his tax returns.

[37] Works Done Ltd was incorporated in April 2005. It employed labourers and plumbers and carried out work at the fire-damaged church in Leith to renovate and convert part of the space into offices. He did not take income in 2005/6 or 2006/7 because he was trying to build the business. He had worked until about 2009, the time of the reconstruction operation, as and when he could. He had not made as much money out of the church as he had expected. The client was not paying, and a decision was taken to bring the business to an end. Funding had been an issue both for the client and for Works Done. At some point his father had come back into the pursuer's business life and "dominated".

[38] The pursuer accepted that in 2012 HMRC had made an assessment in respect of 2007/8 and 2008/9 that he had under-declared his income. He was adamant that the assessment was wrong. He had been unable to provide tax inspectors with paper records

because they were lost when a building went on fire. The fire had happened before HMRC's investigation. He said that the matter was being re-examined by HMRC. This issue was the subject of part of his signed statement, to which I refer further elsewhere in this opinion.

[39] The pursuer was asked about 7/15 of process, which was a report by the interim liquidator regarding the winding up of Works Done Ltd. It was suggested to him that HMRC had presented a petition for the winding up of Works Done Ltd on 8 October 2009. He said that he had been "on and off" with illness, and if that was what was recorded, that was what happened. HMRC appeared as creditors for the sum of £129,000.

[40] In 2009/10 the pursuer's employer was listed as European Kitchens and Bathrooms ("EKB") Limited. The pursuer explained that he had received half of a £160,000 settlement arising from the dispute with RSA. The other half had gone to his father. The pursuer had used his share to start a new business, a bathroom showroom. His income had been low because he was trying to build a business. He had family support. His share of the settlement was virtually gone by 2010/11. He secured an overdraft from the Clydesdale Bank. In 2011/12 he was listed as an employee of EKB Limited but had received no income. He had declared self-employed income for that period. That was in respect of work he had done for Andrew Montague, an individual also connected with the development of the church in Leith. Mr Montague was by then building houses in Dalkeith. He had no income from EKB. It ceased to trade. The pursuer went on to assist his father with a larger project. The pursuer's father had no plumbing experience, and had come to the pursuer for assistance in relation with a conversion of offices into flats at Edinburgh Road, Dalkeith. The pursuer was at that time in and out of hospital. He was on site four or five times. He had also assisted to some extent in relation to a project at Chester Street, Edinburgh, but it was his father who had been making the decisions during this period.

[41] The pursuer started giving evidence on the morning of Thursday 9 May. It became obvious in the afternoon that he was struggling. He appeared to be in pain, and also to be experiencing increasing difficulty in concentrating on giving evidence. The evidence of Mr Manson was interposed on the morning of 10 May. When the pursuer resumed giving evidence on 10 May a similar pattern emerged. He had difficulty coping as the day progressed. At times during his evidence he became agitated, particularly in the context of his evidence about the dispute with HMRC and his dispute with the defenders and the history of events since 2003. I record none of this with a view to being critical of Mr Conquer in any way. Rather, I record it because his presentation tended to support the view that his ability to function on a day to day basis is impaired by pain and the medication he takes for it. I also formed the impression that the pursuer ruminated on the consequences of his injury and the now-admitted negligence of the defenders, and that when he is tired and in pain he finds it difficult to avoid speaking at length about these matters, to the extent that he was unable to focus on the questions he was being asked by counsel.

Mrs Catherine Conquer

[42] Catherine Conquer is the pursuer's mother. She gave evidence that the pursuer had worked since he was 15 years of age, and had always enjoyed working. She and his father had tried to persuade him to remain in education, but he had wanted to be a plumber. His father had arranged with a friend to provide plumbing work experience for the pursuer, with a view to putting the pursuer off by giving him "dirty jobs" like clearing drains, but the ploy had not worked, and the pursuer had not been deterred. The pursuer had worked

long hours, and during the time he had been working out of his parental home had been doing a lot of emergency call outs.

[43] She had witnessed the difficulties the pursuer experienced with pain in his right arm. She described him experiencing pain when he tried to do things. She knew he had had a number of operations, and said that they had not worked. The pursuer could not do the things that he would like to do. She had in mind go-karting with his son, and the pursuer's former pastimes of football, swimming and golf. It had upset her a great deal to see him. He felt that his friends were still working, and as if they had gone on ahead, leaving him behind. Since 2003/4 the pursuer had been trying to work hard, but his arm had not let him do the job that he had been trained to do. His family had been affected. They had been very upset, as the pursuer had been in and out of hospital so much. She could not remember a year, apart from perhaps the current year, in which the pursuer had not been attending Edinburgh Royal Infirmary. Mrs Conquer was not cross-examined.

Mr Timothy James

[44] Mr James is a retired consultant orthopaedic and trauma consultant. Although he has retired from clinical work, he has continued in medico-legal practice. He had originally been instructed in relation to the allegations of negligence. He had provided a number of reports in relation to the case.

[45] Mr James explained that the biceps tendon attaches the biceps muscle to bone. The muscle is attached to the radius bone of the forearm at a bony bump known as the radial tuberosity. If the tendon becomes broken, then there is nothing to anchor the muscle to the bone. Repair could be achieved in two ways, both of which involved reattaching the tendon to the radial tuberosity. If repair was carried out quickly, it would give rise to a good result.

The pursuer had had such a repair carried out within a few days of injury to his left arm, and made a satisfactory recovery, with the function of his left arm returned to normality.

[46] If there was a prompt and correct diagnosis the anatomy was straightforward, in that the tendon rupture could be identified after making an incision. The muscle would be pliable and could be brought down to the radius to be reattached. Repair could be achieved without a great deal of difficulty, with a reasonable prospect of success in the form of a pain free arm with a good return of function. If a number of weeks were to pass then the opportunity of a primary repair of that sort would have passed. The muscle could retreat, and the opportunity to restore normal anatomical length by reattaching the tendon to the bony origin would be lost. Where anatomical repair was not possible, then a graft would be taken from elsewhere in the body, attached to the muscle, and attached then also to the radial tuberosity. That was the operation that Mr Reid carried out on the pursuer in 2009, in which a graft was taken from the pursuer's hamstring.

[47] The primary function of the biceps tendon was to enable the arm to rotate in full supination (that is to a position with the palm upward). If one did not have a biceps tendon, one could not achieve that movement, and it would affect endurance regarding other arm movements. It also acted as a flexor of the elbow. The tendon acted with the brachialis to give power and endurance of flexion.

[48] There was some discussion with Mr James in evidence as to the options open to the surgeon who carried out the operation in 2004, and the information available to him. Given the admission of liability, and the defenders' position which I record below as to the outcome had the negligence not occurred, it is not necessary to record this in any detail. Had the pursuer been correctly diagnosed and treated in 2003 he would not have required the operation in 2004, or that in 2009.

[49] In report 6/11 of process Mr James had addressed the consequences of the failure to treat the pursuer's injury promptly. He interviewed the pursuer on 9 November 2016. He had recorded an account from the pursuer of a busy and active recreational and occupational life, and of then becoming unable to work. Nothing in the pursuer's account was out of line with Mr James's physical findings. He examined the pursuer and found that he had difficulty moving his right elbow. When he tried to test the strength of the arm this provoked pain. He was unable to achieve a full range of passive movement of the arm because of the degree of pain it provoked. He did not consider that the pursuer's account of a marked restriction in his occupational activities was unjustified or exaggerated. He had examined the pursuer's left arm because of the history of injury to that arm and repair of it. It was useful to him to compare the two arms. The one that had been treated by timely and appropriate repair had satisfactory function within six months, whereas the other had ongoing pain, difficulty in flexing the elbow, and pain preventing numerous activities in all aspects of his daily living.

[50] The pursuer had about half the normal range of supination. That movement was not achieved under loading. Mr James would expect that the ability to make the movement would be reduced under load, as a result of pain. If the pursuer was able to make the movement at all, he would not be able to carry on doing so for very long. Both elbow flexion and supination were reduced. The pursuer had reduced sensation along the radial border of his forearm. The pursuer reported a reduction in his grip strength.

[51] There was a risk that the graft would fail. Mr James had found nothing in the available literature to help him quantify that risk, nor had he come across a clinician who had had sufficient patients experience a failure of the graft to be able to give any guidance on the matter.

[52] Mr James gave evidence in accordance with his report, to the following effect. The function of the pursuer's right arm did not at any time return to its pre-accident state. During the first six years following the accident, the pursuer suffered a marked degree of disability, due to pain and weakness, in any activity that placed undue stress and strain on his right arm at the elbow and forearm. This was because he did not have an effective right biceps tendon which gave rise to persistent weakness of forearm rotation (in supination) and in elbow flexion. He had distressing pain and altered sensation along the radial border of his right forearm, as a result of the inadvertent division of the cutaneous nerve of his right forearm during the operation in June 2004. During the first six years the pursuer was prevented from engaging in numerous activities in his domestic, recreational and occupational life. This had continued. The level of disability and time off work related to the right elbow condition were reasonable and attributable to the pursuer's injury and its inappropriate management. The pursuer was unlikely to return to his pre-accident work. He has had symptoms related to the donor site at his leg.

[53] The pain in the pursuer's elbow and the effect that movement produces, sometimes resulting in cramping pain and uncontrollable flexion that takes time to settle down would affect the pursuer's ability to work. Anything that the pursuer needed to do with his dominant arm could only be done for short periods at a time because of the pain provoked by activity. The pursuer would have difficulty with heavy manual lifting and carrying. His ability to get into tight spaces would be compromised because of the limited movement in his elbow. His ability to use screwdrivers and spanners would be limited by the loss of supination. Mr James had seen the pursuer again in June 2018. There was no marked improvement or deterioration. There was a slight difference with regard to the right shoulder. It was a little more restricted than previously, but pain-free.

[54] I was provided with the joint statement of the experts only after Mr James had given evidence. Some of the cross examination of him related to matters which were superseded by the terms of the joint statement.

[55] In cross examination Mr James explained that he was not a specialist upper limb surgeon. He had been trained as a generalist, and latterly had concentrated on hip and knee replacement. He had continued working until he was 65 years of age, but had done so under a different contract from the age of 56. He had continued to see a wide range of patients and their post-operative management. He agreed with a description of the presentation of a patient with a tear of the distal biceps tendon to the effect that there would usually be sudden sharp pain which would then subside, but said that he did not believe that there was a typical patient or a typical reaction. In times past (before 2003) there had been controversy about whether to repair this type of injury surgically. Some of the questioning was directed to the witness's experience of following up patients after surgical repair and opportunity to observe outcomes. I do not narrate that in detail, in the light of the position ultimately adopted by the defenders regarding causation.

[56] Various entries in the medical records were put to Mr James for his comment as to whether the degree of pain and disability recorded in them was consistent with his own impression of the pursuer and the complaints the pursuer had reported to him. A record of 24 August 2004 referred to almost full flexion and extension to 170 degrees. Mr James responded that the entry did not refer to pain. Although the pursuer had near to full flexion, he had pain at the extremes of the range of movement. The same was the case so far as extension was concerned. Although there were references to pronation and supination being well preserved, it was not said that there was a full range, and if it was meant to suggest that there was a full range of movement, that was not consistent with Mr James'

own findings on examination. Mr James pointed out that the entry recorded that there was no new distal neurovascular deficit. It was difficult to comment on the record, which was made by a trainee grade registrar, and which contained no reference to the pursuer's level of pain. He would not have been impressed by similar record keeping by a registrar working under his supervision.

[57] Mr James was referred to records relating to a particular episode of right arm pain the pursuer had reported in February 2005 and his attendances at hospital in the following months. An entry by Mr Chris Oliver, a consultant surgeon, whom Mr James described as a specialist in upper limb surgery, referred to active flexion, with a full range of flexion and extension of the elbow, which was weak. It referred to a moderate power of supination, and a belief on the part of the writer that the bicep was working. Mr James commented that it was not clear whether extension was passive or active. There was nothing recorded about the range of supination. Mr James noted that the record referred to there having been a biceps tendon present, which could not have been the case at that stage. He was not impressed by the level of detail in the record. Entries dated 7 and 28 February by Professor Court-Brown recorded respectively that the pursuer had been trying aggressive physiotherapy, and that he was reluctant to return to physiotherapy. Professor Court-Brown recorded that the pursuer needed to return to physiotherapy and that it should be less aggressive than before.

[58] Records relating to the pursuer's left shoulder pain dated 28 July 2005 recorded that the pursuer had a right biceps tendon present, and good power of supination. Mr James suspected that the author had detected the aponeurosis, rather than a tendon, which was partially intact.

[59] Mr James was asked about the pursuer's other orthopaedic conditions. The pursuer had left shoulder pain in early June 2005. Mr James would expect it to have caused problems in reaching overhead. On the basis of the records he described the limitations in the left shoulder as moderate. The pursuer was last seen in November 2005 in connection with the injury. Mr James accepted that the left shoulder condition appeared to have played a role in the pursuer's overall incapacity. So far as the injury to the left biceps tendon was concerned, he accepted that the period the pursuer had spent in hospital after the repair was longer than normal. A record dated 10 October 2006 referred to the pursuer's being told to take strength training slowly, although there was no reason why he should not increase his physiotherapy regime. It was difficult to say what his fitness for work had been at that time. The pursuer had experienced a spasm in his left bicep on 6 April 2010. The records relating to that indicated that the examining doctor had thought the pursuer might have had a re-rupture of the tendon. The pursuer had suffered local trauma to the area in August 2016. There was an increased risk of further injury to the left arm, but it was very small because the pursuer had had a full restoration of power, function and movement in supination and flexion.

[60] In March 2007 the pursuer had a fracture of a lumbar disc. He spent a week in hospital but did not require orthopaedic follow up. Mr James would have expected him to be up and about and able to do most active things after a week or two. He was not sure when a patient with this injury would be back "on the tools". The pursuer referred himself to accident and emergency on 21 May 2007. It was suspected that he had capsulitis of the right shoulder. In October 2007 Ms McBirnie diagnosed a rotator cuff tendinosis of the right shoulder. She noted pain for the previous 8-10 weeks keeping the pursuer awake, and difficulty elevating the arm. A record dated 25 April 2008 narrated that the pursuer's

right shoulder had not settled with conservative treatment. He underwent arthroscopy and decompression on 1 September 2008. Mr James accepted that the pursuer had had ongoing problems that meant that surgery was appropriate. A record dated 28 October 2008 recorded that Ms McBirnie was delighted with the pursuer's rapid improvement after surgery, and that she was discharging him. Mr James said that the pursuer would have suffered restriction on working overhead because of the condition of his right shoulder. He was asked whether, for example, the pursuer would have been able to work with shower panels taller than himself. He responded that there would have been difficulty with any activity where the shoulder was under load and the arm was at more than 90-100 degrees.

[61] A record dated 17 June 2010, six months after the repair to the right biceps tendon related that the pursuer had full movement in his right arm, excellent power and no pain. This was not consistent with the account the pursuer gave to Mr James. A letter dated 7 January 2011 referred to 5/5 power in supination. That was inconsistent with Mr James's findings. A letter from Mr Reid dated 18 October 2012 suggested that the pursuer had a neuroma from a lateral cutaneous nerve division which Mr Reid thought that the pursuer had sustained "at his initial procedure".

[62] Counsel asked Mr James whether he could assess whether the pursuer's complaints were justifiable, in terms of the physical condition of his arm, if one left out of account that he had a pain syndrome. Mr James responded that it was difficult to leave pain out of account, because it limited the range of movement. The anatomy of the bone had not changed, but the condition of the soft tissues had prevented reconstruction in a way that resulted in normal function. The repair by Mr Reid had been remarkably good, but it had not restored the strength of supination, which was the primary action of the tendon, or the power of flexion to the brachialis, the adjacent muscle. If one "subtracted" the pain, one

was left with someone with a weakened arm. The muscles might work, but their powers of endurance would be very much reduced.

Mr Peter Davies

[63] Mr Davies is an employment and vocational rehabilitation consultant.

[64] He gave evidence that although the Equality Act 2010 provided protections for people with disabilities, it remained the case that they faced difficulty and discrimination at the stage of recruitment. The vast majority of Scottish businesses employed fewer than 20 people, and it was difficult for them "carry" people with disabilities and to make adjustments. Public sector organisations and larger employers could provide more flexibility, including part-time working and job sharing.

[65] The pursuer's employment history before 2003 was not unusual for a plumber. Plumbers often worked for other people to gain training and experience before starting their own businesses. He had obtained his advanced certificate, which not all plumbers did, and that demonstrated that he was keen to progress.

[66] When interviewing the pursuer he had observed that his speech was pressured. He appeared anxious, agitated and upset about how long it was taking to resolve the dispute with the defenders. He perceived that the pursuer "was in a bit of difficulty", and observed that it would be for a psychologist to say whether he had a treatable psychological condition.

[67] The pursuer had told him that he could not use his arm and hand properly, and that would be bound to have an effect on what he did on a day to day basis. It affected the amount and type of work he was able to do. He had difficulty with his bimanual dexterity, and could not use his hands equally well over protracted periods. Although he could

operate a computer mouse with his right hand, after a while his hand became sore and tired. Adaptations were available, but they tended not to be as successful as one might wish.

[68] When asked to provide a view as to whether there was a realistic prospect of the pursuer obtaining and doing some kind of paid work, he said that people obtained jobs on the basis of what they could do, not on the basis of what they could not do. That was the starting point, and the pursuer's training and career had been based largely on what he could do physically. If one could not work with "brawn", Mr Davies said, one would try to work with one's brain. That normally involved working with a computer. It had not been unreasonable for the pursuer to move from being "on the tools" to undertaking bathroom design, but that involved using computer assisted design, and that had presented a problem for him. The effect of that was to narrow the options as to the employment open to him. Mr Davies had thought about what he might retrain to do, and it was difficult to see what that might be. His whole career had been based on providing plumbing and heating services. Those represented his core knowledge and skills. There might be options open to him to do "permitted work" as an adviser in a store like B&Q. Mr Davies explained that it was open to people obtaining certain state benefits to do a limited amount of hours per week of work up to a set level of earnings while still retaining their benefits. He would have to find work of that type for himself. He was on heavy medication, which might affect what he could do. Mr Davies' view was that the pursuer might be able to work for five mornings a week, which would equate to the permitted hours and which would have the benefit of allowing the pursuer to get some structure into his life.

[69] Mr Davies had looked at the salaries that could be expected for a range of employments which would have been open to the pursuer on the basis of his knowledge and skills, if he were physically able to do them. He had looked at the salaries for bathroom

sales designers, sales managers and showroom managers in the Edinburgh area in July 2018. These ranged from £21,500 to £30,000 gross with an average net figure of £23,170. Someone in a job of that sort would have to be able to use a computer. Before the accident the pursuer had been earning considerably more than employed plumbers. His gross declared income was £55,000, whereas the median and mean gross figures for employed plumbers at the time were £21,746 and £23,644.

[70] Employed plumbers in 2018/19 received median net earnings of £24,179, and mean net earnings of £25,456. If the pursuer had decided or needed to take a job as a hands-on plumber, Mr Davies would have expected him to earn at the mean or average level. That would have been a fall-back position available to the pursuer had he been fit to work as a plumber. That represented a reasonably conservative view, in his opinion. The upper quartile figure was £28,467, which included higher-earning outliers. He had provided an alternative benchmark by looking at the earnings of managers and proprietors in other services between 2003/4 and 2018/9. The median and mean net figures in 2018/9 were, respectively, £25,773 and £30,965. In the immediate aftermath of the recession the figures for managers and proprietors had increased (in years 2009/10-2012/13) before falling back, which might reflect that householders had invested in home improvements rather than seeking to move house during that period. Given the level at which the pursuer had previously earned when running his own business, Mr Davies would have expected him to earn at the upper quartile rate shown in table 7.5 of the vocational report. To work in a managerial or even a sales capacity in home improvements now would present a problem because it would involve using computer aided design.

[71] Mr Davies had also gone on to extrapolate earnings growth, for the period from 2004/5 to date from a gross earnings figure of £45,000 per year, using current call-out and

hourly charges for plumbers in the Edinburgh area. He had also produced a figure extrapolating from pre-accident earnings, but using the median increase in earnings for managers and proprietors in other services.

Dr Andrew Harrison

[72] Dr Harrison is a consultant clinical neuropsychologist. Dr Harrison's evidence was that the pursuer's psychological difficulties should be considered as resulting from his physical injury and the long terms effects of that injury on his social, domestic, recreational and vocational functioning. The pursuer had clinically significant levels of anxiety and depression. He presented as angry and resentful and reported history of problems with sleep disturbance, fatigue, memory and concentration.

[73] Counsel asked Dr Harrison whether it was possible to tease apart the influence that the pursuer's different conditions had had on his psychological state. He replied that they overlapped and interacted, but it seemed that the primary problem was with the pursuer's arm. It was his dominant arm. It had affected his ability to work in the profession in which he was trained and experienced. He had had persistent problems with pain and function. It therefore seemed to Dr Harrison to be the primary causative factor. The treatment for which there was the best established basis in evidence was cognitive behavioural therapy. It was designed to deal with maladaptive patterns of thought. It looked to address symptoms of depression. The pursuer also regarded himself as a failure and blamed himself for his difficulties. The pursuer perceived the idea of having psychological difficulties as a weakness. He would need up to twenty sessions of CBT. His psychological presentation on its own would not preclude a return to employment. The issue was the combination of psychological and physical difficulties. The persisting reported problem with pain and

function fed into the pursuer's psychological condition. Dr Harrison predicted that there would be improvement with psychological therapy, but that the pursuer would remain at risk of fluctuations in his psychological condition because of his persisting physical problems and problems with pain.

[74] Cross examination of Dr Harrison was directed to his state of knowledge regarding the pursuer's various conditions, and in particular his gastrointestinal complaints. When Dr Harrison first reported, he had not had access to the pursuer's general practitioner records. He accepted that the pursuer's gastrointestinal condition was an important matter. The pursuer had, however, been reporting to him problems which the pursuer described as "stemming from" his problem with upper limb function and the impact that had had on his ability to work.

Defenders

Mr Peter Wade

[75] Mr Peter Wade is aged 71 years. He became a consultant surgeon in 1987. He stopped working in the NHS in early 2019, although he last carried out surgery in December 2018. His area of specialism was hand and upper limb surgery, although he also carried out hip and knee surgery until about 2014. He examined the pursuer in April 2017. He had noted that the pursuer was able to remove his pullover without difficulty. That had indicated less of a problem with the pursuer's elbow than Mr Wade had expected. The pursuer's right shoulder muscle was not wasted, suggesting that the shoulder had been used normally. The range of movement in the right shoulder was restricted by comparison with the left. Mr Wade said that the pursuer had pain in the shoulder when he moved it, particularly in abduction. The pursuer had lost extension of 20 degrees in his elbow. He

was very tender above his biceps. He had limitation of supination and pronation. Pain was the limiting factor. The pain appeared to be in the soft tissues. The elbow could be extended passively (that is by Mr Wade rather than by the pursuer) but not full, again because of pain. There was pain and hypersensitivity on the radial nerve on the back of the pursuer's hand. His wrist and the back of his hand were affected. Dr Wade found that strange, as the pursuer did not have a hand injury. The pursuer's grip was about four-fifths of normal. Mr Wade could not account for that, because there was no objective reason why grip strength should be reduced. Looking at the loss of motion, loss of sensation and loss of muscle strength, Mr Wade had assessed that the pursuer had a permanent impairment in his right upper limb of 29% as compared with the left. He accepted that the pursuer would find heavy or prolonged use of the right upper limb to cause pain or discomfort. The loss of movement in the pursuer's right shoulder would make some plumbing work difficult. He had been surprised that the pursuer had offered to shake hands with his left hand rather than his right. That was unusual.

[76] Much of the fairly concise cross-examination of Mr Wade was in relation to his understanding of the pursuer's employment history. I did not find it of assistance in assessing Mr Wade's evidence. Mr Wade accepted that the pursuer had more extensive scarring on his right arm than on his left.

What would have happened absent the admitted negligence?

[77] In their written submission provided at the end of the proof, the defenders accepted that had surgical repair been undertaken shortly after 3 September 2003 it would probably have been successful in restoring most, if not full, function, and that the pursuer would have been pain free. That was in any event my own conclusion on the evidence. Given the

position of the defenders I can express my reasons briefly. That was the evidence of Drs James and Wade. The pursuer suffered an unrelated but identical injury to his left arm, which was promptly diagnosed and treated. His own evidence was that he made an excellent recovery from that injury, and had recovered fully within six months. In this case, therefore, there is, unusually, the opportunity to compare outcomes in relation to the same injury, in the same individual, one treated promptly, and the other not. I am satisfied on the balance of probabilities, that had surgical repair of the pursuer's right distal biceps tendon rupture been undertaken within a few days of 3 September 2003, the result would have been a full or nearly full recovery of function in the right arm such as to permit the pursuer to return to work within six months.

What are the consequences, physical and psychological, of the admitted negligence?

Condition of the pursuer's right arm, and psychological condition

[78] I am satisfied that the pursuer has suffered the consequences detailed by Mr James in his evidence as I have narrated it above, particularly at paragraphs 49 to 53.

[79] Mr James and Mr Wade agreed that there was iatrogenic division of the lateral cutaneous nerve in the pursuer's forearm during the operation in June 2004, evidenced by the findings of Mr Reid during the operation on 16 November 2009. The nerve division has resulted in pain in the right forearm and numbness along the radial border of the forearm. The pursuer's recovery from the operation in June 2004 was poor, with continuing pain and loss of function in the right elbow, with loss of amenity in all aspects of his domestic, recreational and occupational life. They agreed that there was some improvement in the pain and condition of the right elbow following the surgery in 2009, but that the pursuer had not been able to return fully to the activities in which he had engaged before the injury in

2003. They agreed that the pursuer suffered from ongoing disabling right elbow and forearm pain which was in part due to the iatrogenic division of the lateral cutaneous nerve of the forearm and also due to a chronic pain syndrome.

[80] The pursuer should have been operated on in 2003. Had that happened, the operations in 2004 and 2009 would not have taken place. Although only one of them is an "extra" operation, one of them is the procedure during which he suffered a nerve division.

[81] Although Mr James' and Mr Wade's findings differed as to the extent of limitation of supination and pronation, they were agreed that there was a limitation in supination and pronation by reason of pain. They agreed that there was a limitation in flexion and extension of about 20 degrees. Both elicited restriction of movement in the right shoulder. Mr Wade felt that the pursuer's hand and wrist function was probably not as badly affected as the pursuer had demonstrated to him, and was a little concerned by the pursuer's offer to shake hands with his left hand. They were agreed that the pursuer had significant limitation in function in the right elbow, mainly because of pain on extension and rotation. Mr Wade found it difficult to be precise because of loss of pain and function in the right shoulder.

[82] Mr James has had the opportunity to examine the pursuer twice, and has had the opportunity to observe any differences in the pursuer's presentation on the two occasions, unlike Mr Wade, who saw him only once. Where there is a difference I prefer the evidence of Mr James in relation to the clinical findings. The differences between their findings and opinions are in any event not particularly material.

[83] I am satisfied also that the pursuer has clinically significant anxiety and depression of which the principal cause is the circumstance that he has not regained function in his right upper limb, with the associated and prolonged pain and discomfort, and inability to

pursue his career in the way that he otherwise would have done. I accept that the pursuer's symptoms will improve to some extent if he undertakes the CBT treatment described by Dr Harrison.

The pursuer's gastro-intestinal tract condition

[84] I am not satisfied that the pursuer's protracted gastro-intestinal ("GI") illness from about 2012 was caused or materially contributed to by the admitted negligence, for the following reasons.

[85] The pursuer had a prolonged period of ill-health from about 2012 as a result of the worsening of a pre-existing gastric condition, namely acid reflux. He had an operation for it in August 2012. He made a very poor recovery from that operation, and had a further operation in October 2013. His own evidence is that his GI problems began to resolve only when, with the assistance and support of his current general practitioner, he began to reduce his use of opioid medication. It is not disputed that the difficulties that he experienced following the operation in August 2012 were caused by his chronic use of opioid medication. The pursuer's case is that his chronic use of opioid medication arose because of the ongoing pain in his right arm, which he experienced as a result of the negligence in respect of which liability is admitted. The pursuer had previously made a case that he required GI surgery because of weight gain caused by his reduced activity resulting from the defenders' negligence, but that line was not pursued at proof.

[86] It is a matter of agreement in terms of the joint minute that he became aware of suffering heartburn in 1989 when he was 17 years old. For the following fifteen years he used proton pump inhibitors, which are strong acid blocking drugs used to treat acid reflux. After the accident he had a hospital admission and a number of out-patient attendances in

connection with acid reflux, and related oesophagitis in 2004, 2005 and 2006. These, again, are detailed in the joint minute, and I do not set them out in full here. Anti-reflux surgery was discussed in 2008. He underwent oesophagitis/laparoscopic anterior fundoplication surgery on 20 August 2012, and was discharged from hospital on 24 August 2012. He was readmitted to hospital on eight occasions with various gastric complaints between then and the end of May 2013. He attended clinic twice during that time. He had a further operation on 14 October 2013. He had numerous admissions and attendances in relation to continuing gastric pain in the period between then and February 2017. Of note are that in June 2014 he underwent the laparoscopic insertion of a feeding jejunostomy. The feeding jejunostomy tube was removed on 4 December 2014. In March 2015 the pursuer also underwent a hernia repair operation.

[87] The only witness who gave evidence in relation to this matter was Mr Manson, a consultant surgeon, and a specialist in upper gastro-intestinal surgery. I can narrate his evidence briefly for the following reasons. The conclusion of the GI surgeon, Mr Fullarton, who had prepared a report for the defenders, was put to him. That conclusion, in a report dated 12 May 2017, was that the pursuer most likely suffered from chronic GI dysfunction related to his chronic opioid usage. There were strong clinical pointers to an ongoing diagnosis of narcotic bowel syndrome. Mr Manson was not familiar with the diagnostic label "narcotic bowel syndrome", but otherwise agreed with those conclusions. It was well-known that opioid analgesics caused a decrease in GI motility, and distension and constipation.

[88] Mr Manson's view was that the pursuer's reaction to the operation 2012 was a very unusual one. He had never encountered a reaction like it in his practice. He had consulted a number of colleagues, and learned that they also, had never encountered anything like it.

He explained that after the operation in 2012, the pursuer immediately had severe post-operative pain, requiring patient administered morphine. Mr Manson's explanation for this was that the pursuer had already developed a significant tolerance to analgesia. Following the operation, the pursuer was prescribed a good deal of opioid medication. It is not disputed that this caused him to have very significant GI problems.

[89] What is disputed is the causal link between the ongoing pain in the right arm, prior to 2012, and the poor recovery from surgery and ongoing GI problems that the pursuer had. What is at the heart of this aspect of the dispute is whether there was a proper factual basis for Mr Manson's conclusion that the pursuer already had a significant tolerance to opioid analgesia by the time of the operation in August 2012. The defenders submitted that there was an absence of evidence of significant opioid use before August 2012; that where such medicine was prescribed before August 2012 it related largely to conditions unrelated to the pursuer's right arm injury; and that the medical records demonstrated that the provision to the pursuer of significant quantities of opioid analgesia began only after the operation in August 2012.

[90] Mr Manson had seen a letter dated 23 July 2018 from Dr Sheridan of Tranent Medical Practice that bore to be a report on the prescriptions that the pursuer had had for pain relief since July 2003. It contained an entry in the following terms:

> "Tramadol 50mg capsules, one capsule four times a day when required from 25/01/10 – 27/8/14"

[91] The letter was not spoken to in evidence by its author. There has been no explanation as to whether the author intended a reference to a continuous course of medication during that period, or that prescriptions for tramadol were issued on occasions during that period. As I explain more fully below, the medical records do not support the

proposition that tramadol was prescribed continuously during that period, and in particular between 25 January 2012 and August 2012.

[92] There was, with various witnesses, and most significantly Dr Joanna Smail, examination of the medical records so far as containing reference to opioid medication. The relevant entries record the following. The first entry referring to opioid medication relates to 19 March 2007. On 19 March 2007 the pursuer was issued with a prescription for dihydrocodeine tartarate (56 tablets, 30mg) by his general practitioner. The use of the figure "0" and the absence of subsequent prescriptions sequentially numbered in the records indicated that this was a "one-off" prescription, and had not become a repeat prescription. The pursuer had injured his lower back. He initially contacted the out of hours service at 0722h. The record for his contact with them records that he was "advised to take paracetamol and dihydrocodeine". There is then a record of his own general practitioner's having made a home visit. The record includes the following:

> "Taken dihydrocodeine this a.m. – no effect. Discussed analgesia – try dihydrocodeine qds [four times daily] (already uses this for his arm) pcm qds and tentatively try voltarol as well."

Dr Smail did not know what the abbreviation "pcm" meant. I consider that it is likely to be a mistranscription of "prn", which means "as needed".

[93] Later the same day, the pursuer attended the accident and emergency department at Edinburgh Royal Infirmary, again in relation to his back injury, and was admitted to hospital. The clinical notes record his drug history only as "omeprazole", which is a medication for GI problems. The discharge letter does not specify any continuing analgesic, although it does refer to difficulties managing the pursuer's pain during his admission. A discharge letter would normally include medication that the patient was being sent home with, or which the general practitioner was to prescribe.

[94] The next record of a prescription for opioid medication is for 100 co-codamol 30mg/500mg on 5 June 2007, 2 tablets to be taken four times a day, as needed. Again, the form of the record indicated that this was a one-off prescription rather than a repeat prescription. There is a record of the pursuer's attendance at the practice that day which reads:

> "Seen in GP's surgery wants re referred to GI [gastro-intestinal] – letter dictated. Long discussion re delayed repair R biceps and pains in R arm and shoulder no refcent [sic] injury o/e crepitus R shoulder full flexion estension [sic] to 150 deg only at elbow limited rom [range of movement] shouldrer [sic] imp capsulitis says has RIE physio apt 3 weeks discussed options for analgesia to continue with DHC [dihydrocodeine] add cocodamol."

[95] A record of a referral of the pursuer for a second opinion about his right arm and shoulder dated 7 June 2007 records his recent medication by reference to the prescriptions provided on 19 March and 5 June 2007, and do not include any other reference to opioid medication. Dr Smail confirmed that those references would have been generated by the practice computer system. She gave evidence, which I accept, that it is highly unlikely that medication was prescribed by Tranent Medical Practice but not recorded in the general practitioner records.

[96] The next relevant record of a prescription was for tramadol on 25 January 2010. The figure "1" appears next to it, which would normally indicate it was a second prescription, but there is no earlier record of a prescription of tramadol. The record includes "prn", which means, as needed. Dr Smail explained that this would indicate medication not to be taken regularly, but as needed, for severe or moderate pain. The records do not disclose why it was prescribed. There is a record of attendance that day, but it says "For statin. Cholesterol and LFts and gamma GT in a month". That is the only prescription of tramadol recorded between 2010 and September 2012.

[97] When the pursuer attended hospital on 1 February 2010, the records indicate that he was at the time taking tramadol, but that this was not helping his pain. That is, however, shortly after 25 January 2010, when tramadol had been prescribed. He is again recorded, in relation to hospital attendances on 1 February 2010, 17 March 2010, 6 April 2010, and 2 June 2010 as taking tramadol. The attendance on 1 February was in relation to right forearm pain. That on 17 March 2010 was for review at the lipid clinic. On 6 April 2010 he attended with pain in his left arm, and on 2 June 2010 with pain in his thigh, the area from which tissue was harvested to repair his right biceps tendon. There are references to tramadol and co-codamol in an out of hours record dated 21 June 2010, relating to a painful lump on the pursuer's head. There is a further reference to co-codamol in an out of hours record dated 25 July 2010 which relates to abdominal pain and diarrhoea.

[98] The only records, other than those already mentioned between November 2003 and October 2010, referring to right upper limb pain were entries made by administrative staff, and did not relate to any encounters between the pursuer and a general practitioner.

[99] On 24 May 2012 the pursuer was prescribed codydramol 10mg/500mg, 100 tablets, to be taken one or two tablets four times daily. That was the lowest strength available of that medication. The clinical note for that date records "Pain. Still having a bit of post-op pain. Is well." The pursuer had had a laparoscopic cholecystectomy on 3 April 2012.

[100] The records relating to the pre-operative assessment that took place before the pursuer's fundoplication surgery of 20 August 2012 record that he was receiving various medications for his gastro intestinal complaints, and a statin. It records also that he was receiving 60mg of dihydrocodeine to be taken at night. That is a different medication from the codydramol that he was prescribed in May 2012. There is no record in the GP records of a prescription of dihydrocodeine between May and August 2012. Dr Smail explained that

the preoperative assessment would include any over-the-counter medication. I did not understand her to be confirming that 60mg dihydrocodeine could be bought over the counter. There is no mention of tramadol in the pre-operative assessment.

[101] After 20 August 2012 the general practitioner records contain more frequent prescriptions of tramadol and dihydrocodeine. Morphine sulphate was prescribed on 2 May 2013.

[102] The final tranche of medical records produced runs from June 2013 to April 2017. No later general practitioner records were produced. The section recording prescriptions is fairly extensive. It includes repeated prescriptions for tramadol, dihydrocodeine, morphine sulphate, fentanyl, and oxycodone, which are all opioid drugs.

[103] So far as provision of medication by clinicians other than the pursuer 's general practitioner is concerned, the records disclose only short term prescriptions for opioid analgesic. So, for example, prescriptions for dihydrocodeine and tramadol following his right shoulder arthroscopy in September 2008 were for 5 days' supply only.

[104] The entries for 19 March 2007 (relating to the pursuer's back injury) indicate that the pursuer appears to have had dihydrocodeine in his possession before it was prescribed on 19 March 2007, although there is no earlier record of its being prescribed. Although there was no further prescription of it after that date, there is a reference to the pursuer being advised to continue using it on 5 June 2007. I infer that the pursuer was not taking it continuously, and that he still had medication left from the prescription of 19 March 2007. If he had been using it continuously, it would have been finished.

[105] In summary, the only records so far as GP prescribing before August 2012 is concerned, are of occasional prescriptions of opioid medication for short term use. A number are for conditions other than right arm pain. There are also records of short term

provision of opioid medication following hospital appointments and admissions. Again, these do not relate to the pursuer's right arm pain. There are entries which tend to show that the pursuer had opioid medication available to him at various times which are not proximate to dates on which the records show he had been provided or prescribed opioid medication.

[106] The records also show that the prescription of opioid analgesia became frequent and routine after August 2012.

[107] I accept that the pursuer suffered as he did after August 2012 at least in part because his GI function became severely compromised by his use of opioid medication. I am not satisfied on the balance of probabilities that that occurred because of use of opioid medication caused or materially contributed to by the pain he suffered as a result of the defenders' negligence. Dr Manson's opinion was predicated on the proposition that the pursuer had already developed a tolerance to opioid analgesia by the time of the fundoplication operation. That proposition is not supported by the evidence. The prescription of opioid medication after August 2012 is much more frequent and extensive than it was before that date. Before that date there are occasional prescriptions only. The medical records do not support the proposition that the pursuer used opioid medication continuously, frequently, or heavily before August 2012. The pursuer was not asked about his use of opioid medication before August 2012, and whether he was taking any opioid medication at that time other than the types and quantities shown as having been prescribed in the general practitioner records. The only source of evidence I have about the provision of opioid medication to the pursuer before August 2012 is the evidence contained in the medical records. The pursuer has not discharged the onus on him to prove a causal connection between his GI condition and the defenders' negligence. I am unable to make

any finding as to precisely how much opioid medication he used before 2012. The most I can say is that there were occasional prescriptions of opioid medication. In any event, I have no evidence as to what level of use would result in the tolerance that Mr Manson inferred had developed.

[108] Counsel for the pursuer submitted that the evidence of Dr Smail about the content of the medical records was of no value. The defenders' counsel had not put to the pursuer in cross that he had *not* taken "chronic" doses of opioid medication, or that he had taken opioid medication for reasons other than his arm pain. I reject this submission. The burden of proof lies on the pursuer to establish a causal connection between the negligence of the defenders and conditions for which he claims damages. It was for the pursuer to provide evidence of a connection. He did not give any oral evidence as to his consumption of opioid medication. There was no mention of it in the statement that formed part of his evidence in chief. The pursuer is the obvious source of evidence as to what medication he took, when, and for what.

Financial loss

[109] There are differences between the pursuer and the defenders as to every aspect of the claims for financial loss. I therefore consider in turn what income the pursuer has had since 2003, what income he might have expected to obtain between then and now were it not for the admitted negligence, and then to consider on what basis the question of future loss should be approached.

Past income

[110] The pursuer submitted that I should proceed on the basis that he had received £295,361 by way of past income. He submitted that tax returns during the relevant

period disclosed income of £295,532. I should discount the figure for 2013/4 for the reasons more fully discussed below, and I should add back in a similar figure to take account of the circumstance that there was a dispute as to the true level of income for two of the tax years concerned. I note that that figure provided by the pursuer in his submissions exceeded that contended for by the defenders (£287,195). It exceeded the figure that I reached myself by means of calculations based on the (gross) figures at paragraph 31(e)-(n) of the joint minute (which covers the period from 2003/4 to 2013/14) and the tax returns for years 2014/15-2016/17.

[111] My own calculations of net income so far as based on the tax returns in years 2003/4 – 2006/7, 2009/10 – 2012/3 and 2014/5 – 2016/17 were consistent with those produced by the defenders in their written submissions at paragraph 7. I accept that the figures used by the defenders for those years are correct. They produce a figure of £95,002.

[112] Tax years 2007/8, 2008/9 and 2013/14 raise points of controversy.

[113] In relation to years 2007/8 and 2008/9 HMRC issued Closure Notices. Those notices have not been withdrawn. The pursuer did not agree that they were accurate. By the defenders' calculations, the assessed net earnings in accordance with the Closure Notices were £47,243 for 2007/8 and £36,372 for 2008/9. The gross figures declared in the tax returns were, respectively, £24,055 and £16,528. The gross assessed figures were, respectively, £63,313 and £42,504.01. The defenders submitted that I should take the assessed rather than the declared figures as representing accurately the pursuer's income.

[114] The pursuer submitted that I should take a broad approach and add into the calculation one half of HMRC's assessment of the pursuer's "additional income". That sum amounted to £27,407.10. I understood it to be a net figure derived from the difference

between the declared and assessed income figures for each of those two years. The total gross difference over the two years combined amounted to about £65,231.

[115] The legal effect of those notices, so far as liability for tax is concerned, is to amend the pursuer's tax return in accordance with the notices. The pursuer suggested in his evidence that there was still some possibility that the notices might come to be challenged successfully, but also said that shortly after he had received interim damages, he had been contacted by HMRC, and that he had had to enter into a DAS (which I understood to be a debt arrangement scheme) with HMRC. The defenders submitted that that suggested an acceptance on his part that the tax assessed was due.

[116] The pursuer had attempted to appeal to the First-tier Tribunal Tax Chamber, but had done so out of time, and the tribunal had declined to allow the appeal to be admitted late. The decision of the tribunal includes a narration of some of the issues raised by HMRC relative to the assessment, including the pursuer's ability to obtain substantial lending in the absence of declared income to support it. The pursuer refers to that circumstance in his statement. He acknowledges a disparity between his declared income and what he had represented when applying for a loan. His explanation is that, at the relevant time, banks were relatively liberal in allowing self-employed people to "self-assess" their income when applying for lending. He was providing the bank with an honest representation as to his earning potential, given that he had been assured by medical staff that he should expect to recover.

[117] I am not bound to accept that the Closure Notices reflect the true level of the pursuer's income. They are, however, relevant evidence which I am entitled to take into account in assessing the true level of his income. Prima facie, they are evidence as to his income, compiled by HMRC after investigation. The pursuer himself acknowledges a

disparity which seems to have concerned HMRC. Although he asserted that matters were being reconsidered by HMRC, he provided no vouching as to that matter. Taking these matters into account I am satisfied that I should accept the figures derived by the defenders from the HMRC assessments as reflecting the pursuer's income.

[118] Tax year 2013/14 was controversial in that the pursuer maintained that the sum mentioned there was a gift from his father and was not income. In his statement, which he adopted, he said that "it was advanced to [him] as a "salary" via the company by my dad's personal money". His father had, for whatever reason, chosen to advance the money in that way rather than simply writing him a cheque.

[119] So far as year 2013/14 is concerned, the pursuer recorded in his tax return pay from employment with EKB Ltd in the sum of £32,110, and that the tax deducted was £4,532. The pursuer is responsible for the tax return submitted in his name. There was no adequate explanation as to why this sum should have been represented in the tax return to be income, if it was in fact a gift. The pursuer accepted that it was paid as salary. His own oral evidence was to the effect that he was providing his father with assistance in relation to building projects. I have accepted that it represents an accurate statement of the pursuer's income in 2013/4, and that his net income for the year concerned was £27,578. I accept the pursuer's evidence about this item of income to the extent that I accept that it was generous remuneration having regard to the extent to which he was actually able to be involved in the project in question, and was deliberately generous, having regard to his health difficulties. I accept that his father paid it intending to provide him with assistance in the form of remuneration that was, in the circumstances quite generous, and in a context in which the pursuer was experiencing health difficulties. It was, however, a payment for services

provided. I do not regard it as providing a realistic gauge as to his earning capacity in the wider markets for employment or self-employment.

[120] In relation to past receipts, there was a further matter of controversy. The defenders submitted that the sum that the pursuer received in the extra-judicial settlement with RSA should be taken into account. It represented loss of earnings over a future period. The sum derived by the defenders from the tax returns and the Closure Notices was £206,195, and adding the compensation from RSA produced an overall figure of £287,195. I do not accept that the compensation from RSA should be treated in this way. The pursuer's evidence was that the liquidator of North East assigned the claim to him and his father. The payment was the result of a claim on behalf of the company, North East. I do not know what the claim was for. It is probably reasonable to infer that it related to loss sustained by North East as a result of breach of contract, but I do not know whether those related to losses already sustained by the business or future loss of profit. I note that the pursuer's unchallenged evidence was that he and others had injected funds to ease cash flow before the demise of the business, and that the business's profitability was adversely affected by RSA's conduct. I am not satisfied that the settlement falls to be treated as compensation for loss of earnings so far as the pursuer is concerned. I have left it out of account.

[121] I therefore proceed on the basis that the pursuer's receipts total £206,195.

What would the pursuer have earned, absent the negligence?

[122] The pursuer submitted that I should take as a starting point his net income in 2003/4 from North East, which was £39,943. North East would have had "the opportunity of survival" but for the defenders' negligence. He could have laid off plumbers and covered the work himself. The pursuer was a hard worker who would have taken extraordinary

steps to save the company. There were no suppliers of goods who were creditors of the company, so neither the company nor the pursuer personally would have had to contend with the reputational damage associated with leaving suppliers unpaid. The pursuer could have set up another company, or could in the last resort have earned a significant income as a "man with a van" plumber.

[123] The pursuer's income would have increased. The pursuer submitted that Mr Davies' starting point was too low because he had taken income from 2002/3 as the starting point. On Mr Davies' figures, annual gross income would have increased from £45,526 to £103,040. The pursuer derived from this a "rate of increase over time" of 44.2%. The starting figure of £45,526 is 44.2% of the end figure of £103,040. The pursuer submitted that 22.1% should be used as an average increase over the whole period in order to derive a yearly multiplier for past loss. Using this approach, the pursuer derived a multiplier of £48,770, to which he applied a multiplier of 15.5, producing a figure of £755,941.

[124] The pursuer accepted that some deduction would need to be made for the injury to the left arm, and to account for non-negligent treatment of the right arm, and contended for a figure of £700,000. The shoulder conditions were of little, if any, relevance. The only restriction would be in working above head height. The pursuer was someone who pushed himself to try to work, and an injury to the shoulder was unlikely to have stopped him from working.

[125] The defender submitted that the pursuer had not established that he had suffered any loss of income. Any business the pursuer started would have been subject to risks of the sort the businesses he actually operated had experienced. It would have been affected adversely by the pursuer's other orthopaedic conditions, and he would have been unable to work in any event between 2012 and 2018 because of his GI condition. The pursuer had not

led evidence to support the contention that he would have earned any more than he did, had the negligence not occurred.

[126] The pursuer submitted, under reference to *Van Wees* v *Karkour* [2007] EWHC 165 (QB) that I should be slow to approach the question of loss of income on a broad basis rather than applying the "conventional" approach of selecting a multiplicand and applying a multiplier. I find myself in a position similar to that in which Langstaff J found himself in that case: paragraph 134. I cannot identify an annual figure about which there is relative certainty. I have, however, sought to come to a broad assessment of earnings loss in a similar way to that used by Langstaff J. There are many possibilities and uncertainties as to what the pursuer might have earned.

[127] The relatively high earnings in years 2002/3 and 2003/4 are significantly above the level of earnings in the preceding years. The pursuer's own account of those years is of mixed fortunes trading on his own account and in business with his father. North East went into liquidation for reasons unconnected with the pursuer's right arm. Those are the reasons recorded in the report to the meeting of creditors. I do not accept that the business failed because of the pursuer's difficulties with his right arm. In any event, even had the pursuer been treated appropriately in September 2003, he would have required a recovery period of about six months. The order to wind up North East was made on 5 March 2004, which is roughly when he would have become fit for work with non-negligent treatment. In subsequent years the pursuer was involved in a number of different businesses and projects.

[128] I accept the pursuer's evidence that it would have been his intention, in the aftermath of the demise of North East to start working again, on a small scale at least initially, as a plumber. Both before and after 2003 the pursuer saw a number of businesses and projects fail because of difficulties with clients. His own evidence was that he would have worked

on his own account on a small scale. I accept that the pursuer is a well-motivated individual with a history of having worked hard, and of having engaged in entrepreneurial activity. His history is of having been involved in setting up various limited companies, both before and after 2003, which ceased to operate when trading conditions became unfavourable for a variety of reasons. I consider that it is likely that he would, if fit for work, at some points have expanded his business, but recognise that if he had done so, he would have been subject to the normal range of difficulties that businesses may experience – clients not paying, clients breaching contracts – and that his own businesses did in fact experience. His self-employed earnings over such a protracted period are more likely than not to have fluctuated. Against that background I can take only a very broad approach to identifying his likely earnings between 2003 and the present.

[129] I am not satisfied that I should take the 2003/4 level of earnings as a starting point. As I have observed, the earnings in 2002/3 and 2003/4 are higher than in preceding years. They derive from a business which was only marginally profitable and which was unable to continue trading because of a dispute with its principal client which was the source of 80% of its turnover.

[130] If the pursuer were to have returned to working on a relatively small scale – himself and a van—it is uncertain how much money he would have made. Mr Davies attempted to estimate a figure by taking current hourly rates for local plumbers and applying them to a 40 hour week and a 46 week working year. That would produce £103,040 gross. He took the pursuer's earnings in 2002/3 as a starting point, and assumed straight line progression in earnings over the intervening period. By his calculations, that produced a gross figure of £1,039,962. He assumed that the expenses of the business would have been 20% in each year, producing a gross profit of £831,970, and a net income figure of £561,534.

[131] I do not accept that figure. The starting point is unrealistically high. It is unlikely that, starting a business anew, the pursuer would immediately have achieved earnings similar to those derived from North East in either 2002/3 or 2003/4. There are a number of periods in 2005, 2006 and 2007 when the pursuer had unrelated injuries. Had the defenders not been negligent, the pursuer would have required around 6 months to recover had he been operated on as he should have been. Allowance must be made for all of these periods in the calculation of wage loss. Further, the pursuer was significantly unwell with GI complaints for a protracted period from 2012. His own account was that the situation had improved only after he changed general practitioner and received help to reduce his intake of opioid medication. On Dr Smail's account the change of general practitioner took place in July or August 2018. I discuss the relevance of these other conditions further below.

[132] What I do accept from Mr Davies' analysis is this. The pursuer would at all times have been able to work as an employed plumber if no other option was open to him. I accept, however, that it is likely that the pursuer, as a self-employed plumber of some experience by 2003 would have been able to earn more than an employed plumber.

[133] There are significant periods when the pursuer would have been unable to work as a plumber for reasons unconnected with the defenders' negligence. I refer to entries in the medical records as it is a matter of agreement in some instances that they describe the pursuer's condition and treatment. I accept that he would have been unable to work as a plumber for about six months in 2005 because of his left shoulder condition. He injured the shoulder at the end of May 2005. He attended hospital on 3 June and was admitted. He was discharged on 7 June. He was referred for an ultrasound scan on 16 June 2005. On 28 July 2005 he was noted to have continual pain around his left shoulder. On 22 August Mr Oliver wrote to Ms McBirnie that "the pursuer works in the office just doing administrative

duties because of left shoulder pain". The letter records that ultrasound had shown a 6-8mm deep surface supraspinatus tear, and refers to quite debilitating shoulder pain. The pursuer continued to complain of pain until November 2005. There is a record then of his experiencing regular night pain for which he was taking Kapake. It was thought at that time that his symptoms should settle with conservative treatment. It may well be that the pursuer had forgotten about this injury, given the passage of time and the number of other conditions from which he has suffered, but it was clearly quite significant and gave rise to a number of interactions with medical professionals.

[134] The pursuer injured his left biceps tendon at the end of April 2006. He was attending hospital until October 2006. His own evidence was that he recovered within six months. I note that, although he was being told to take strength training slowly at that stage, he was also being told that he could increase physiotherapy. That suggests an incomplete, albeit encouraging, level of recovery at that stage. I have proceeded on the basis of a period of six months' absence from work. I note that the pursuer had episodes of pain in his left arm in April 2010 and August 2016, but there is no evidence to suggest that these caused any prolonged difficulty. The pursuer suffered a back injury on 18 March 2007. On the basis of Mr James' evidence, which was that he would expect a patient to be active within one to two weeks, but could not say when there would be a return to work, I have allowed, again on a broad basis, a period of absence of one month. The pursuer then, however, had difficulties with his right shoulder which did not resolve, and which were sufficiently severe and persistent to require operative treatment. The pursuer visited his general practitioner in early June 2007. In October 2007 he was noted as giving an account of pain sufficient to keep him awake for the previous 8 to 10 weeks, with difficulty elevating his arm. He had a steroid injection in January 2008. He was noted as having had an

excellent response to that, including complete pain relief and painless movement above shoulder height until about a week before 25 April 2008. On that date he was noted to have difficulty elevating beyond shoulder height, crepitus and pain and weakness. He was listed for arthroscopy and decompression. He was scheduled for surgery in July but was unable to attend. He had an arthroscopy and decompression on 1 September 2008 and had recovered well by 28 October 2008. The pursuer's own evidence was that he had not been able to put his hands above his head, but that his right shoulder condition had not been significantly disabling. That is at odds with a description of pain that kept him awake at night. An inability to work above head height seems a significant restriction for a plumber, particularly if working without any assistant or apprentice as a "man with a van".

[135] From August 2012 until at least August 2018 the pursuer had a protracted period of ill health because of his GI condition. It involved a number of hospital admissions, and the pursuer himself described the period to 2015 as "horrific". Mr Manson's evidence was that following the fundoplication operation in 2012 the pursuer was being admitted to hospital on a regular basis, and could do very little work. On the pursuer's own account matters improved when he changed general practitioner. No medical records have been produced post-dating 2017.

[136] In summary, the period until the beginning of March 2004 requires to be discounted altogether, as the pursuer would have been unfit for work until then with non-negligent treatment. Any claim for loss of income can start no earlier than March 2004. I discount a further six month period during 2005 (left shoulder injury), and a period of six months from 29 April 2006 (left biceps tendon injury). I have discounted one month in relation to the back injury in March 2007. In relation to the right shoulder injury, the pursuer was symptom free between January and April 2008 as a result of a steroid injection. His

symptoms were troublesome between June 2007 and January 2008, and between April and October 2008, a total of about 12 months. It is difficult to know whether, or to what extent, the pursuer might have been able to work during this period if his only problem had been the shoulder pain, and he was not suffering from the consequences of the defenders' negligence. In order to account for the possibility that he might have been able to do some work during this period, while accepting that some plumbing work would not have been possible for him because he was unable to work at head height, I have restricted the period I am discounting to six months. I have discounted the six years between August 2012 and August 2018.

[137] A consequence of these unrelated conditions is that the ability of the pursuer to develop his business interests uninterrupted would have been limited. A growth in income of the sort envisaged by Mr Davies when extrapolating from the income from North East on the basis of current hourly rates, and by the pursuer in his submissions, is not realistic in that context. On a very broad basis I have taken an average of the mean income for an employed plumber and for managers and proprietors from Mr Davies' tables 5 and 6. That is intended to reflect that the pursuer was skilled, experienced and hard-working and could expect to earn more than an employed plumber, but also that his ability to grow his business by sustained periods at work would have been limited by significant interruptions in the form of the injuries in 2005, 2006 and 2007. His work would have been disrupted for a six year period by his GI condition. The assessment is of necessity a broad one, and I have not, therefore, made any further discount to account for the difficulties the pursuer might have faced when returning to work in late 2018. The range of difficulties and uncertainties across the period is intended to be reflected in the approach I have taken.

[138] I have used the net figures produced by Mr Davies for 2004/5 to 2018/19. For the period April 2019 to date I have taken his 2018/9 figure and multiplied by 1.03 to allow for inflation, and produced a figure for the relevant number of months in the financial year to date. Doing this provides a total of £340,166 by reference to the mean earnings for an employed plumber and £501,598 for a manager/proprietor, assuming continuous work.

[139] Again, using the figures provided by Mr Davies, I have made deductions representing half of the 2005/6 figure, seven-twelfths of the 2006/7 figure, one quarter of the 2007/8 figure, one quarter of the 2008/9 figure, two thirds of the 2012/3 figure, all of the years 2013/4 to 2017/8 and one third of the 2018/19 figure, in line with the approach outlined above. Those deductions total £168,311.60 in respect of an employed plumber, and £233,316.40 in respect of managers/proprietors. Applying those deductions brings out figures of £171,854.40 and £268,281.60, the average of which is £220,068.

Future loss

[140] The pursuer submitted that the pursuer would have been earning £60,818.00 net but for the defenders' negligence. A multiplier of 20.39 should be applied, producing a figure of £1,240,079.02. The "raw" multiplier was 23.71. The reduction factor for contingencies other than mortality was 0.86 because the pursuer had been employed, had not been disabled, and was of the lowest educational grade. If there was any residual earning capacity, the multiplier to be applied to that should be calculated on the basis that he was disabled, out of work and at the lowest educational level. The applicable factor would be 0.11.

[141] The defenders submitted that I should make a lump sum award of £100,000. If I were minded to apply a multiplier, I should work on the basis of retirement at 60, rather than 70.

[142] So far as future loss is concerned, I proceed again taking an average of the mean income of an employed plumber and the income of a manager or proprietor as the starting point. I have used Mr Davies' figures for 2018/9 multiplied by 1.03. That produces a figure of £29,057. In taking this approach I accept the pursuers' evidence that his GI condition improved very markedly following the intervention of his new general practitioner. I accept that his GI condition would not now stop him from working. I accept the evidence of both orthopaedic surgeons that the pursuer has some limitation of movement in his right shoulder. Again, however, given the number of variables in this case affecting what the pursuer would be doing at the present time, absent the defenders' negligence, I consider that a figure derived from the earnings of employed plumbers and managers/proprietors is a realistic one. I bear in mind that a realistic option for the pursuer, if he were able to use his right hand, would be kitchen or bathroom design.

[143] I accept Mr Davies' assessment that the pursuer's employment prospects are poor, particularly given his difficulty with typing and using a computer mouse. I accept the pursuer's evidence that he has these difficulties. The pursuer is now aged 47. He has no formal qualifications other than in relation to plumbing. His inability to operate a computer for any length of time raises an obvious difficulty in relation to relatively low-level employment in an office environment. Mr Davies' assessment is that the pursuer could work in certain fairly limited types of employment on a part-time basis. The pursuer is unfit for the work for which he was trained, and for other forms of employment, such as kitchen and bathroom design, which he could otherwise reasonably have hoped to obtain.

His ability to cope with giving evidence throughout a whole court day was limited. Mr Davies envisaged retail work in a DIY store, which involved advising customers, for 15 or 16 hours a week. If the pursuer were to work for 16 hours per week for a wage of £9 per hour (just above the minimum wage) he would earn £7,488. I do not consider that there is a proper basis in the evidence for me to conclude that he is likely to earn more than that in the foreseeable future.

[144] I am not prepared to assume, as the pursuer submitted, that he would have worked to age 70 but for the defenders' negligence. That is unrealistic in a context in which he was working in a skilled manual role, and has already, at age 47, suffered from such a variety of injuries and other physical complaints. I have proceeded on the basis of a retirement age of 65. The multiplier derived from table 9 in the Ogden tables is 18.55. I have applied a reduction factor of 0.86 derived from table A, on the basis that the pursuer would have been employed, his age, and that he was in the lowest category for educational attainment. That produces a multiplier of 15.93 which should be applied to the figure of £29,057. That produces a figure of £462,878. In relation to the multiplier to be applied to the pursuer's residual earning capacity, I have derived a reduction factor of 0.11 from table B, which produces a multiplier of 2.04. I therefore assess the pursuer's future financial loss in the sum of £447,602.

Quantification of claim

Solatium

[145] The pursuer valued solatium in the sum of £130,000 with half allocated to the past, referring to paragraph 7(F) and 4.

[146] The defenders valued solatium by reference to paragraph 7(F)(b) of the Judicial College Guidelines, which relate to injuries resulting in permanent and substantial disablement. They submitted that a figure of £39,470 was appropriate, with one quarter allocated to the past for the calculation of interest.

[147] Paragraph 7(F) of the Judicial College Guidelines, with a 10% uplift, indicate a range between £84,310 and £114,810 for severe injuries, which are described as injuries which fall short of amputation, but which are extremely serious and leave the injured person little better off than if the arm had been lost; for example a serious brachial plexus injury. They provide a range, subject to the same uplift, of between £34,340 and £52,490 for injuries resulting in permanent and substantial disablement. Injuries in this category include serious fractures of one or both forearms where there is significant permanent residual disability, whether functional or cosmetic.

[148] The condition of the pursuer's arm is such that he has significant permanent residual functional disability. He has a chronic pain syndrome. He has had pain over a very protracted period, and there is no suggestion that that will improve. He also has scarring, which constitutes a cosmetic disability. As well as the ongoing disability associated with his arm, the pursuer has continuing anxiety and depression, although it is likely that he will experience some improvement if he obtains CBT treatment. If I were looking at the anxiety and depression in isolation, I would regard them as falling within the moderate category identified in Paragraph 4(A) of the Judicial College Guidelines. Taking all of these matters into account, I consider that his injuries fall somewhere between the ranges indicated in paragraphs 7F(a) and (b) respectively. I value solatium at £60,000, and allocate one half to the past. Parties agreed that interest amounted to £15,922.19.

Services

[149] The pursuer sought damages for loss of services. I was asked to assess this on a broad basis. The pursuer had given evidence that he had not been able to assist his son as he would have liked with go-karting. There was no evidence given in any more detail than that, either orally or in the pursuer's statement. There is no basis on which I can attempt properly to value this head of claim and I make no award.

Past loss of income

[150] On the basis of the calculations detailed above, I assess the pursuer's past wage loss in the sum of £13,873. Parties agreed that interest amounted to £5,000.

Future loss

[151] On the basis of the calculations detailed above, I assess future financial loss in the sum of £447,602.

Conclusion

[152] I therefore pronounce decree in the sum of £542,397.19, inclusive of the sum of £180,000 already received as interim damages.