

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Homan v. Modi*,
2024 BCSC 612

Date: 20240415
Docket: M219764
Registry: New Westminster

Between:

Richard James Homan Junior

Plaintiff

And

Gauravjeet Singh Modi and Amarjeet Singh Modi

Defendants

Before: The Honourable Justice Basran

Reasons for Judgment

Counsel for the Plaintiff:

A.E. Harrison

Counsel for the Defendants:

R.B. Rogers
J. Bell

Place and Dates of Trial:

New Westminster, B.C.
November 27–30
December 1 and 14, 2023

Place and Date of Judgment:

New Westminster, B.C.
April 15, 2024

Table of Contents

INTRODUCTION 4

CREDIBILITY ASSESSMENT..... 5

 Legal Principles 5

 The Parties’ Positions and Analysis of Credibility 5

NON-PECUNIARY DAMAGES 6

 Relevant Legal Principles 6

 The Plaintiff’s Position on Non-Pecuniary Damages 7

 The Defendants’ Position on Non-Pecuniary Damages 8

 Findings of Fact on Non-Pecuniary Damages 8

 Mr. Homan’s Pre-Accident Condition 8

 The Accident..... 10

 Mr. Homan’s Post-Accident Condition 11

Medical Expert Evidence 14

Dr. David Koo – Psychiatrist..... 14

Dr. Christopher Watt - Sports Medicine Physician 17

 Dr. Donald Cameron – Neurologist..... 17

Analysis of Non-Pecuniary Damages 17

 Liability..... 17

 Causation..... 18

 Assessment of Damages 18

LOSS OF INCOME-EARNING CAPACITY 20

Factual Findings..... 20

Past Loss of Income-Earning Capacity 24

 Relevant Legal Principles 24

 The Parties’ Positions on Past Loss of Income-Earning Capacity 25

 Analysis of Past Loss of Income-Earning Capacity..... 25

Future Loss of Income-Earning Capacity..... 26

 Relevant Legal Principles 26

 The Parties’ Positions on Future Loss of Income-Earning Capacity 28

 Analysis of Future Loss of Income-Earning Capacity 28

LOSS OF HOUSEKEEPING CAPACITY 31

Relevant Legal Principles 31

The Parties’ Positions on Loss of Housekeeping Capacity..... 32
Factual Findings and Analysis on Loss of Housekeeping Capacity 32
COST OF FUTURE CARE 33
Relevant Legal Principles 33
The Parties’ Positions on Cost of Future Care 34
Factual Findings on Cost of Future Care 35
Analysis of Cost of Future Care 36
SPECIAL DAMAGES 37
CONCLUSION..... 38
COSTS 38

Introduction

[1] On December 5, 2017, Mr. Homan, the plaintiff, was driving his minivan home after picking up his four children from school. As he travelled southbound on 138 Street and approached 74 Avenue in Surrey, B.C., an oncoming vehicle turned left into the intersection and collided with Mr. Homan’s vehicle (the “Accident”).

[2] The defendant, Gauravjeet Modi (the “Defendant Driver”), drove the left-turning vehicle owned by the defendant, Amarjeet Modi, that collided with Mr. Homan (together, the “Defendants”). The Defendants do not admit liability for the Accident. However, I have no difficulty in concluding that they are liable for the Accident.

[3] Prior to the Accident, Mr. Homan was in good physical and emotional health. He worked as a longshoreman and did this work without any limitations or restrictions. The Accident caused pain in his neck, shoulders, and back, along with associated headaches.

[4] Mr. Homan seeks damages for his pain and suffering, past and future loss of income-earning capacity, loss of housekeeping capacity, and cost of future care. He also seeks special damages.

[5] For the reasons that follow, I have concluded that Mr. Homan is entitled to:

a) Non-pecuniary damages:	\$130,000
b) Past loss of income-earning capacity:	\$30,212
c) Future loss of income-earning capacity:	\$398,145
d) Cost of future care:	\$72,752
e) Loss of housekeeping capacity:	Nil
f) Special damages:	<u>\$5,380</u>
Total:	<u>\$636,489</u>

Credibility Assessment

Legal Principles

[6] It is useful to set out the principles governing credibility determinations. In assessing the truthfulness of the testimony of any witness, I am guided by the test set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.):

[...]. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. [...]

[7] In assessing credibility, I will apply the factors described by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); [*Faryna*] v. *Chorny*, [1952] 2 D.L.R. [354] (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna*] at para. 356).

The Parties' Positions and Analysis of Credibility

[8] The parties do not dispute the credibility or reliability of the evidence provided by Mr. Homan and the other witnesses. I agree that Mr. Homan was a credible and reliable witness. Mr. Homan testified honestly, sincerely, and forthrightly. If anything, he downplayed his symptoms and the other effects of the Accident. He is a soft-spoken, introspective, and stoic individual who did his best to explain the circumstances of the Accident and its consequences.

[9] Similarly, the other witnesses at trial testified forthrightly in a manner that was internally and externally consistent with the other evidence.

Non-Pecuniary Damages

Relevant Legal Principles

[10] A person must not drive a motor vehicle on a highway without due care and attention: s. 144(1)(a), *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [MVA].

[11] When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard: s. 174, *MVA*.

[12] “The obligation imposed by s. 174 on the left turning vehicle is that it “must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard”. A left turn must not be commenced unless it is clearly safe to do so”: *Nerval v. Khehra*, 2012 BCCA 436 at para. 33.

[13] “The effect of s. 174 is to cast the burden of proving the absence of an immediate hazard at the moment the left turn begins onto the left turning driver [...]”: *Nerval* at para. 35.

[14] Mr. Homan must prove that the Accident caused his injuries and the Defendants are liable for them. He need not establish that the alleged negligence of the Defendants was the sole cause of his injuries, but he must demonstrate a substantial connection between the Accident and his physical and psychological injuries: *Thompson v. Helgeson*, 2017 BCSC 927 at paras. 28–30.

[15] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal set out some of the relevant factors in assessing non-pecuniary damages, including:

- a) the plaintiff’s age;
- b) nature of the injury;

- c) severity and duration of the pain;
- d) disability;
- e) emotional suffering;
- f) loss or impairment of life;
- g) impairment of family, marital, and social relationships;
- h) impairment of physical and mental abilities;
- i) loss of lifestyle; and
- j) the plaintiff's stoicism (as a factor that should not penalize the plaintiff)

The Plaintiff's Position on Non-Pecuniary Damages

[16] Mr. Homan submits that the Defendants are wholly liable for the Accident. He relies on his own evidence at trial and the evidence read in from the transcript of the examination for discovery of the Defendant Driver. Specifically, the Defendant Driver had a duty to yield when he was operating the left-turning vehicle. By failing to yield, contrary to s. 174(1) of the *MVA*, the Defendant Driver was negligent in causing the Accident.

[17] Furthermore, based on the Defendant Driver's admission that "yes", this was "just a case that he misjudged the situation and turned without paying attention", the Defendant Driver was also negligent in operating a motor vehicle on a highway without due care and attention, contrary to s. 144 of the *MVA*.

[18] Mr. Homan further submits that he has established on a balance of probabilities that the Defendant Driver's negligence caused his injuries. He did not have any pre-existing conditions and, therefore, would not have sustained these injuries "but for" the negligence of the Defendant Driver.

[19] Mr. Homan relies of the following cases in support of his claim for \$120,000 to \$140,000 in non-pecuniary damages:

- a) *Elzinga v. Sharpe*, 2019 BCSC 314: the plaintiff was 52 years old at the time of the accident and was awarded \$85,000 in non-pecuniary damages, approximately \$98,700 in 2023 dollars;
- b) *Dadwan v. Kim*, 2023 BCSC 1903: the plaintiff was 35 years old at the time of the accident and received \$130,000 in non-pecuniary damages; and
- c) *Chau v. Farshid*, 2023 BCSC 1004: the plaintiff was 36 years old at the time of the accident and was awarded \$140,000 in non-pecuniary damages.

The Defendants' Position on Non-Pecuniary Damages

[20] If the Defendants are liable for the Accident and the Accident caused Mr. Homan's injuries, the Defendants rely on the following cases in support of their position that Mr. Homan is entitled to an award of \$85,000 in respect of non-pecuniary damages:

- a) *Kang v. Sahota*, 2021 BCSC 624: the plaintiff was 25 at the time of the accident and worked as a longshoreman. He received \$80,000 in non-pecuniary damages; and
- b) *Sandhu v. Gabri*, 2014 BCSC 2283: the 38-year-old plaintiff received \$60,000 in non-pecuniary damages, approximately \$80,000 to \$85,000, adjusting for inflation.

Findings of Fact on Non-Pecuniary Damages

Mr. Homan's Pre-Accident Condition

[21] Mr. Homan was born on September 15, 1975. He is currently 48 years old and was 42 at the time of the Accident. He is a single parent, with four young children.

[22] Mr. Homan did not have any significant or ongoing physical injuries or medical conditions prior to the Accident. Specifically, he had no pain in his neck, back, arms, or shoulders. He was somewhat overweight and had started doing weekly cardiovascular exercises. He experienced migraines a few times a year, but had no other injuries prior to the Accident. He had some mild social anxiety and was diagnosed with sleep apnea in 2016.

[23] Mr. Homan began casual work as a longshoreman in 2007. In September 2020, he became a fully accredited member of the International Longshore and Warehouse Union, Local 502. Longshoreman work is physically demanding and occasionally dangerous. It involves a range of tasks including general labour, loading and unloading timber, unloading motor vehicles, and driving specialized vehicles and multi-trucks that transport large shipping containers.

[24] Mr. Homan's pre-Accident recreational activities largely involved playing with his four children. He took them swimming, kicked balls and threw frisbees, and played basketball with them at a court near their home. He set up a badminton net in their front yard and he occasionally took them to a wave pool, waterslide park, and ice-skating. Mr. Homan had no physical limitations in doing any of these activities with his children.

[25] Mr. Homan also tried to go to the gym once a week to do cardiovascular exercises and lift light weights. He had some exercise equipment at his residence and periodically used it.

[26] Prior to the Accident, Mr. Homan did all the yard work involved in maintaining his own residence, including mowing the lawn and shoveling snow as required. He also assisted his father, Mr. Homan Senior, who lived on a nearby hobby farm, at least three days a week with building animal pens, shoveling and spreading manure, erecting fences, and generally helping with most of the heavy and physical work on the hobby farm. Mr. Homan would also assist his father with loading and stacking 50 bales of hay every two weeks (each bale of hay weighs 100 pounds). Mr. Homan had no difficulty doing these tasks. He considered this work to be good exercise.

[27] Mr. Homan was also responsible for most of the cleaning, cooking, and home maintenance for the family residence. He had no difficulty performing these tasks prior to the Accident. Mr. Homan Senior confirmed that as a single parent, his son did all the work involved in raising four children and maintaining their household. He also recalled that his son was actively involved with the children and played many sports with them.

The Accident

[28] On December 5, 2017, Mr. Homan was driving his minivan home southbound on 138 Street after picking up his children from daycare. The Accident occurred sometime between 3:30 p.m. and 4:15 p.m. in Surrey, B.C. It was still light out. At the intersection of 138 Street and 74 Avenue, the Defendant Driver, who was traveling northbound, attempted to turn left westbound onto 74^tAvenue and collided with Mr. Homan's vehicle.

[29] After the collision, Mr. Homan and the Defendant Driver pulled over to the side of the road to exchange information. Mr. Homan checked to ensure that his children were okay. His children were shaken up and startled, but not injured.

[30] The Defendant Driver told Mr. Homan that he thought he had an advanced green left arrow. Mr. Homan pointed out that the traffic light only had three lights, so the intersection did not have an advanced green left arrow. The Defendant Driver apologized profusely.

[31] Police and an ambulance attended at the scene. Neither Mr. Homan nor his children were taken to a hospital. Mr. Homan drove their minivan home.

[32] The police issued a violation ticket to the Defendant Driver for his failure to yield on a left turn, in contravention of s. 174(1) of the *MVA*. He did not dispute the ticket.

[33] Mr. Homan's insurer subsequently wrote off the damaged minivan and paid him its value.

[34] At trial, the Plaintiff read in evidence of the Defendant Driver's examination for discovery, in which he admitted the following:

Q So was this just a case that you misjudged the situation and turned without paying attention?

A Yes.

Q And do you take responsibility for the collision?

A Yes.

Mr. Homan's Post-Accident Condition

[35] The day after the Accident, Mr. Homan tried to see his family physician, Dr. Mutombo, but he was unavailable, so he saw another physician, Dr. Grewal. Mr. Homan explained to Dr. Grewal that he felt soreness and pain in his neck, shoulder, trapezoids, and mid back. His pain symptoms radiated around his shoulder. Dr. Grewal recommended that Mr. Homan take a week off work and treat his pain symptoms with Advil.

[36] Shortly thereafter, Mr. Homan saw Dr. Mutombo who referred him for physiotherapy, which he started immediately.

[37] Mr. Homan's pain symptoms worsened in the week after the Accident. He recalls frequently consuming Advil during this time. Dr. Mutombo prescribed a muscle relaxant and referred him for kinesiology and chiropractic treatment, in addition to physiotherapy. Mr. Homan underwent physiotherapy and seven chiropractic treatment sessions. He stopped this latter treatment because it aggravated his pain symptoms.

[38] In addition to pain in his neck, trapezoids, shoulder blades, and back, Mr. Homan also developed headaches stemming from the pain symptoms in his shoulder and neck. He also experienced tingling and numbing in his hands after they were elevated for extended periods.

[39] In the period immediately after the Accident, Mr. Homan's pain symptoms were constant and daily. Now they are somewhat manageable with the use of Advil. Mr. Homan does, however, still experience ongoing and persistent aches and tightness on the right side of his neck and back, along with frequent pain flareups. These symptoms are persistent and ongoing.

[40] Mr. Homan finds that physiotherapy reduces his pain symptoms and increases his mobility. This treatment ameliorates his symptoms for approximately one week, but sometimes strenuous work activities reduce the length of its effectiveness.

[41] All of the pre-Accident recreational activities Mr. Homan used to do without limitations were affected by the injuries he sustained in the Accident. He could no longer play with his children in the water, swim, throw a frisbee, or play badminton. He also found camping more difficult because he had difficulty loading the family vehicle for these trips and setting up a campsite. Due to his injuries, Mr. Homan reduced the frequency of his family's camping trips from three times a year to once a year.

[42] Following the Accident, Mr. Homan watched his children play in the park, but he avoided reaching and repetitive, sudden movements, so he could not play with them the way he did prior to the Accident. The quality of the time he spent with his children deteriorated. He found that he became short tempered and irritable with them, particularly when they asked him to do activities that he could not tolerate. This inability to play and enjoy time with his children saddened Mr. Homan.

[43] After the Accident, Mr. Homan was unable to assist his father on the hobby farm. He could no longer lift and stack bales of hay or perform any of the other physically demanding tasks he used to do for his father. He also finds it difficult to perform tasks for the upkeep of his own residence, including yard work, mowing the lawn, shoveling snow, cooking, cleaning, and other home maintenance tasks. Following the Accident, he needs his children to assist with most of these tasks. For some of the indoor tasks, Mr. Homan does what he can by breaking up tasks and pacing these activities depending on his pain symptoms.

[44] Mr. Homan is unable to do overhead ladder work or fence repairs. He is particularly frustrated that the fence in the home he purchased in 2019 requires significant maintenance, but he cannot do it. Prior to the Accident, he would have had no difficulty doing all of these repairs, because he did this type of work at his father's hobby farm. He knows what needs to be done but he is not physically capable of doing these repairs, due to his pain symptoms. The estimated cost of repairing the fence at his residence is \$5,164.95.

[45] Kelly Dumont and Mr. Homan have been friends for over 30 years. Mr. Dumont is also a longshoreman at Local 502. He recalled that prior to the Accident, Mr. Homan actively participated in physical activities with his children. He was upbeat, healthy, happy, and had no indications of injury or pain.

[46] After the Accident, Mr. Homan did not complain, but Mr. Dumont noticed that Mr. Homan's posture worsened, as did his mood and outlook. Although Mr. Homan was stoic about his injuries, Mr. Dumont observed that they were noticeable.

[47] Currently, Mr. Homan experiences ongoing pain symptoms on the right side of his neck, upper back, trapezius, and shoulder. Mr. Homan also experiences bursts of pain in his shoulder area that radiate to his neck and arms. He has difficulty getting in and out of his vehicle and shoulder checking while driving. The pain on the left side of his back, shoulders, and neck has subsided. He has limitations with his ability to turn and twist, and he experiences pain flareups two to three times a week. He also experiences weekly headaches related to these pain symptoms.

[48] Mr. Homan acknowledges that his pain symptoms have improved since the Accident. However, he continues to have a lingering and dull pain sensation on the right side of his back that can flare up at any time in response to a relatively simple and straightforward motion or action, such as reaching for something in a cupboard. As another example, Mr. Homan explained that while exercising on an elliptical machine one week before the trial commenced, he experienced a pain flareup that took three to four days to resolve. Mr. Homan's pain symptoms and occasional pain flareups limit his activities.

[49] Mr. Homan's current treatment consists of physiotherapy and chiropractic treatment. He also consumes two to four Advil pills for pain flareups and headaches, two or three times per week. Two weeks prior to the start of this trial, Mr. Homan commenced kinesiology treatment, three times a week.

[50] Mr. Homan tried trigger point injections as suggested by a physiotherapist, Dr. Azadi. However, Mr. Homan found that this treatment only provided periodic and

temporary relief and obtaining it required that he take a day off work. He therefore ceased this treatment after six or seven sessions and instead continued with physiotherapy.

Medical Expert Evidence

Dr. David Koo – Psychiatrist

[51] Dr. Koo is a qualified expert in physical medicine and rehabilitation. He conducted an independent medical examination of Mr. Homan on July 12, 2023 and produced an expert report dated July 27, 2023.

[52] Dr. Koo opined that the Accident caused the following injuries and conditions:

- a) soft tissue injuries to the cervical, thoracic, and lumbar spine, resulting in:
 - i. chronic mechanical neck pain of myofascial origin;
 - ii. chronic mechanical upper back and right greater than left periscapular pain of myofascial origin; and
 - iii. post-traumatic cervicogenic migraines (aggravation of pre-Accident condition);
- b) mild depression;
- c) anxiety disorder not otherwise specified, deferred to psychiatric opinion;
- d) pain-related sleep disruption; and
- e) deconditioning with loss of strength and activity tolerances.

[53] Dr. Koo noted that although Mr. Homan was (and continues to be) obese, he was entirely functionally capable prior to the Accident. He used to be able to work as a general labourer and multi-truck driver, could tolerate commuting, and looked after his four children as a single parent. This included doing all work associated with cleaning, cooking, laundry, and dishes for the household. His obesity did not limit his activities. Aside from sleep apnea, which he was treating appropriately, he did not have any other health problems.

[54] According to Dr. Koo, but for the Accident, Mr. Homan would still be capable of functioning at the same level of pain-free employment and recreational, domestic, and athletic ability. The Accident caused Mr. Homan's soft tissue injuries to the cervical, thoracic, and lumbar spine, and both shoulders, as well as residual chronic mechanical pain affecting his neck, upper back, and right greater than left periscapular region.

[55] Mr. Homan's headaches are likely cervicogenic and related to injury and pain from adjacent structures in his neck and shoulders in combination with his post-traumatic insomnia. This has led to an increase in the frequency of his headaches, some of which develop into migraine headaches.

[56] Dr. Koo noted that Mr. Homan experienced increased anxiety after the Accident and that this is an aggravation of his pre-Accident vulnerability. He also suffers from mild depression.

[57] Mr. Homan's ongoing chronic soft tissue injuries contribute to moderate levels of disability. He continues to experience recurring pain aggravation through normal daily activity and occupational demands, including from prolonged sitting or driving, retracting his shoulder blades, overhead reaching, standing for long periods, and with repetitive or sustained use of the arms for lifting, reaching, pushing, pulling, and carrying.

[58] Dr. Koo observed that Mr. Homan's pain symptoms are aggravated by working, but that as a single parent with four children, he works out of financial necessity. His return to work was likely premature and based on financial need. Mr. Homan has more pain at the end of his workday than at the beginning. His work is physically demanding and it aggravates his pain symptoms.

[59] The workplace aggravation of his pain has taken a toll on Mr. Homan because he has less energy and pain tolerance to spend time with his children after work. Prior to the Accident, he used to come home from work and take his children swimming or to the park or play with them in the schoolyard. Since the Accident, he

does not have the energy to do this. Specifically, he is not able to throw a ball, or play basketball, frisbee, or badminton with his children. He finds throwing actions and overhead reaching to be painful.

[60] Mr. Homan is currently also less capable of doing home renovations and repair work around his house than he was prior to the Accident. He is also no longer able to lift fence panels, mix concrete in a wheelbarrow, or hammer fence posts.

[61] Dr. Koo opined that Mr. Homan's reports of ongoing limitations with prolonged sitting, heavy lifting, overhead reaching, pushing, pulling, digging, and throwing are consistent with his chronic soft tissue injuries to his neck, upper back, and periscapular muscles.

[62] Dr. Koo noted that Mr. Homan had partial improvement in his neck, upper back, and shoulder injuries in the period soon after the Accident, but that his work consistently aggravates his pain symptoms. In his opinion, the persistence and severity of Mr. Homan's residual neck, upper back, and right greater than left shoulder pain following the Accident suggests that the prognosis for a full recovery is poor. Mr. Homan has likely reached maximum medical recovery and he is likely to continue experiencing activity-limiting pain with moderate levels of ongoing disability on a permanent basis.

[63] In Dr. Koo's opinion, Mr. Homan's neck, upper back, and shoulder soft tissue injuries will continue to create moderate levels of disability that interfere with his ability to tolerate heavier lifting, reaching, and carrying. This disability will continue to affect his participation in recreational activities, heavier housekeeping, yard work, and home renovation work.

[64] Dr. Koo also found that the work Mr. Homan currently does as a multi-truck driver on the graveyard shift suits him, given that the shift is shorter than others and because it involves less commuting time.

[65] Finally, Dr. Koo noted that Mr. Homan's medical and rehabilitative management has been appropriate to date.

Dr. Christopher Watt - Sports Medicine Physician

[66] Dr. Watt assessed Mr. Homan on June 6 and 28, 2023 and produced an expert report dated July 24, 2023.

[67] Dr. Watt diagnosed Mr. Homan with post-traumatic myofascial pain in his neck and upper back, thoracic outlet syndrome, and deconditioning. He opined that the Accident caused all of Mr. Homan's musculoskeletal complaints.

[68] In Dr. Watt's view, Mr. Homan has achieved maximum medical improvement because he has undergone extensive and appropriate medical and rehabilitation treatment but still remains functionally limited by pain in his neck, upper back and shoulder girdles. He believes that Mr. Homan has a permanent partial disability.

Dr. Donald Cameron – Neurologist

[69] Dr. Cameron assessed Mr. Homan on November 15, 2018 and produced an expert report dated February 23, 2019. He opined that Mr. Homan suffered soft tissue and musculoskeletal injuries involving his upper back, left shoulder, and neck in the Accident and has developed chronic pain in the left shoulder and upper back. He found that Mr. Homan is neurologically normal.

[70] Dr. Cameron recommends further active and passive therapy such as exercise with a kinesiologist, physiotherapy, and massage therapy. He does not recommend other prophylactic or Botox treatments, given that the frequency of Mr. Homan's headaches has reduced to weekly.

[71] Dr. Cameron concludes that Mr. Homan is partially disabled. Interestingly, despite his area of expertise, Dr. Cameron did not make any neurological findings regarding the extent, frequency, or treatment of Mr. Homan's headaches.

Analysis of Non-Pecuniary Damages

Liability

[72] I accept Mr. Homan's evidence regarding the circumstances of the Accident. Specifically, the Defendant Driver errantly commenced a left turn without yielding the

right of way to Mr. Homan's oncoming vehicle. The Defendant Driver admitted that he misjudged the situation and began turning left without paying attention. The Accident was undoubtedly his fault.

Causation

[73] I am satisfied that the Accident caused Mr. Homan's injuries. He was healthy and pain-free before the Accident. Afterwards, he suffered several persistent and ongoing injuries and related pain symptoms.

[74] All three medical experts agree that Mr. Homan sustained the following injuries as a result of the Accident:

- a) soft tissue injuries and musculoskeletal injuries to the neck, resulting in chronic myofascial pain consisting of chronic mechanical neck pain of a myofascial origin; and post-traumatic myofascial pain syndrome in the neck; and
- b) soft tissue injuries and musculoskeletal injuries to the upper back and periscapular areas, resulting in chronic myofascial pain consisting of chronic mechanical upper back and right greater than left periscapular pain of a myofascial origin; and post-traumatic myofascial pain syndrome in the upper back.

[75] I also accept that Mr. Homan sustained the following injuries as a result of the Accident, as diagnosed by Dr. Koo:

- a) soft tissue injuries resulting in post-traumatic cervicogenic headaches;
- b) soft tissue injuries resulting in regional sensory phenomena in his upper extremities from proximal myofascial injury;
- c) soft tissue injuries to the low back (that have resolved);
- d) pain-related sleep disruption; and
- e) deconditioning, with loss of strength and activity tolerances, as diagnosed by both Dr. Koo and Dr. Watt.

Assessment of Damages

[76] In the immediate aftermath of the Accident, Mr. Homan suffered pain in his neck and in his back, from his trapezii down into his shoulder blades on both sides,

with radiation into his arms, episodic tingling and numbness in his fingers, and headaches. Mr. Homan was in constant pain and found working very difficult. I accept that he felt compelled to return to work despite these symptoms because he is the sole provider for his four children.

[77] Mr. Homan experiences ongoing pain symptoms on the right side of his neck, upper back, and occasional flareups of pain in his shoulder area that radiate to his neck and arm. The pain symptoms on the left side of his neck, back, shoulders have abated. He experiences pain flareups two to three times a week. He also experiences weekly headaches. These injuries and related pain symptoms are ongoing and cause some functional impairments.

[78] Mr. Homan is stoic and has done his best to get on with his life and care for his family. I will not penalize him for understating and minimizing the extent of his injuries and their impact on him.

[79] Prior to the Accident, Mr. Homan actively participated in a range of recreational and sporting activities with his four children. He also took them camping several times a year and enjoyed swimming, water sliding, and playing with them generally. After the Accident, Mr. Homan was no longer able to do any of these activities with his children.

[80] Mr. Homan and Mr. Homan Senior both reported that Mr. Homan became somewhat irritable and short-tempered with the children after the Accident. I accept that this was borne out of his frustration at being unable to do the range of things with them that he previously enjoyed, combined with the effects of his ongoing pain symptoms.

[81] Mr. Homan is a devoted father who loves his children. Due to the injuries he sustained in the Accident, he missed out on many years of being able to play and engage with them the way he did prior to the Accident. As a committed single parent, this constitutes a significant loss both for him and his children.

[82] Mr. Homan also provided significant assistance to his father with physical tasks at his hobby farm prior to the Accident. This work included pounding fence posts, building animal pens, and regularly loading and stacking 100 pound bales of hay. Mr. Homan was unable to do any of these tasks after the Accident.

[83] Taking into account the cases referred to by the parties, I am satisfied that Mr. Homan is entitled to \$130,000 in respect of the pain and suffering he endured that is attributable to the Accident. As explained later in these reasons, I have augmented this amount in consideration of Mr. Homan's loss of housekeeping capacity.

Loss of Income-Earning Capacity

Factual Findings

[84] Mr. Homan left high school in the eleventh grade but continued his studies in his early twenties and completed his diploma. He has not obtained any further formal education.

[85] In 2006, Mr. Homan became a casual labourer with the longshoreman union. Work was allocated on the basis of seniority, so he did not receive many opportunities to do this work until 2011. At this time, he took two weeks off from his work as a drywall labourer and found that he was able to get a sufficient number of shifts as longshoreman.

[86] Mr. Homan received training for operating multi-trucks in shipyards. These are the vehicles that transport shipping containers to and from the dock and rail yards. Mr. Homan is trained and qualified to drive multi-trucks and he prefers and enjoys this type of work.

[87] Prior to the Accident, Mr. Homan had moved to the "A board" rank of employees, which is the highest level of seniority for casual employees. As of September 2020, he obtained a regular membership in the longshoreman union. His stated intention was to continue working five or six days a week until he could retire

with a full pension. This would have required 35 years of pensionable service, until he was 71 years old.

[88] Mr. Homan took two weeks off work immediately after the Accident. However, he felt obliged to return because he is a single father of four children and the sole income earner in his family.

[89] Mr. Homan continues to work five or six days per week. He feels compelled to maintain his working hours in order to keep his seniority and ensure that he earns a sufficient amount of income to support his family and accrue pensionable service. He must earn approximately \$93,000 a year for it to count as a pensionable year.

[90] 95 percent of the work Mr. Homan does involves driving multi-trucks. Although this does not involve lifting, it requires significant turning, twisting, jostling, and reaching.

[91] Mr. Homan avoids general labour jobs in the event that his preferred work as a multi-truck operator is not available. This is because these labour jobs exacerbate his pain symptoms. Even Mr. Homan's preferred work as a multi-truck driver involves the constant turning of his neck and shoulders, which exacerbates his pain symptoms. He experiences pain at the end of each shift and after each week of work.

[92] Between June and November of 2017, Mr. Homan worked 107 shifts, with an average of 17.3 shifts per month. Between January and June of 2018, Mr. Homan worked a total of 110 shifts, with an average of 18.3 shifts per month. In addition, his shift records show that, in the period between January 1, 2015, and August 14, 2018, Mr. Homan only worked eight shifts that were not multi-truck driver shifts.

[93] Mr. Homan's yearly income has increased since the Accident. From three years predating the Accident to the 2022 tax year, Mr. Homan's net income is as follows:

2014	\$86,494
2015	\$92,633
2016	\$80,330
2017	\$87,112
2018	\$104,834
2019	\$112,900
2020	\$146,873
2021	\$146,040
2022	\$148,844

[94] Mr. Homan’s annual income increased each year following the Accident, with the exception of 2021, when his net income was \$833 less than the year prior.

[95] Dr. Koo opined that Mr. Homan’s ongoing injuries reduce his long-term durability as a full-time multi-truck driver and will likely require him to consider reducing to part-time employment or retiring earlier than he otherwise would have, had he not sustained injuries in the Accident. Mr. Homan is now poorly suited for working as a general labourer, longshoreman, or from alternative driving occupations due to the prolonged sitting required.

[96] On the issue of how the Accident affected his ability to work, Mr. Homan testified that he missed one or two shifts per month because of his pain symptoms. Specifically, he does not take on very many “labour” shifts because he finds these to be far more demanding than his usual work of driving a multi-truck.

[97] Mr. Homan’s plan for the future is to continue supporting his family, help pay for the post-secondary education of his four children, and work until he is entitled to a full pension. Mr. Homan’s pain symptoms cause him to worry about his ability to continue working durably as a longshoreman. This financial stress weighs heavily on him.

[98] As noted above, Mr. Dumont, a long-term friend of Mr. Homan, is also a longshoreman at Local 502. Mr. Dumont explained that driving a multi-truck as a

longshoreman is both taxing and dangerous. Large 40-foot containers are loaded onto these vehicles, sometimes abruptly, which jostles and jars the driver. Furthermore, the quality of the multi-trucks varies. Older vehicles have poor cushions and springs that do not provide sufficient support to drivers. Driving these vehicles is often uncomfortable because there are large potholes and uneven surfaces throughout the railyards and shipyards. The work in the shipyard is particularly dangerous because there is a great deal of heavy machinery moving above ground. Workers need to constantly survey their surroundings to ensure they remain safe.

[99] David Best is also a co-worker of Mr. Homan. They have known each other for approximately 15 years. As longshoremen, they both work primarily as multi-truck drivers. Mr. Best explained that driving multi-trucks can be jarring, because the rocking of the loads dropped on the attached trailer can injure the driver.

[100] After the Accident, Mr. Best noticed that Mr. Homan often looked stiff, winced, and stretched frequently to relieve the tension in his neck. He did not notice these behaviours prior to the Accident. He explained that Mr. Homan is stoic and tends not to complain.

[101] Mr. Best describes one of the benefits of being a longshoreman member, as compared to a casual employee, is the ability to operate heavy machinery instead of doing labour jobs. He recalled that younger workers with less seniority, who have not trained in a particular discipline, often do labour jobs, whereas more experienced longshoremen in their 40s or 50s prefer operating heavy machinery because this work is less physically demanding.

[102] Mr. Best testified that he is usually able to secure work driving a multi-truck. He rarely does shifts as a labourer.

[103] Dr. Watt opined that Mr. Homan is fit to work as a longshoreman, but only on an accommodated basis, because he no longer meets the physical demands of this position. He is only able to safely and competitively tolerate work involving light

physical demands. For this reason, he opined that Mr. Homan's employability as a longshoreman has been significantly and adversely affected because of the injuries sustained in the Accident. Mr. Homan would not be able to tolerate jobs requiring more than light physical labour or full-time work that required more than occasional stooping, bending, crouching, kneeling, or crawling.

[104] Dr. Watt thus observed that the scope of the work Mr. Homan can do has narrowed because he is limited to lighter duties. He cannot do the full range of work available to longshoremen.

Past Loss of Income-Earning Capacity

Relevant Legal Principles

[105] The principles applicable to an assessment for past loss of income-earning capacity are:

- a) An assessment of a loss of income involves a consideration of hypothetical events.
- b) The plaintiff need not prove these hypothetical events on a balance of probabilities.
- c) A hypothetical possibility will be taken into account provided that the plaintiff establishes that it is a real and substantial possibility, and not mere speculation.
- d) Once a hypothetical possibility is established, the court must consider the likelihood of the event occurring in determining the measure of damages.
- e) A causal connection must be established, on a balance of probabilities, between the Accident and the pecuniary loss claimed.
- f) It is up to the trial judge to determine what approach to use to quantify the loss (i.e., an earnings approach or a capital asset approach).

See: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48 (Goepel J.A. in dissent, but not on this point); *Smith v. Knudsen*, 2004 BCCA 613 at paras. 36–37; *Laxdal v. Robbins*, 2010 BCCA 565 at paras. 19–20.

[106] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47, the court set out a three-step process to assess damages for the future loss of income-earning capacity:

- a) Whether the evidence discloses a potential future event that could lead to a loss of capacity?
- b) Whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss?
- c) If yes, the court must assess the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring.

The Parties' Positions on Past Loss of Income-Earning Capacity

[107] Mr. Homan submits that he missed one week of work immediately after the Accident. He claims \$1,910 in respect of this period, net of tax.

[108] In addition, Mr. Homan asserts that from 2018 to the start of trial, he missed an average of two shifts per month due to his pain symptoms and related functional limitations. He claims \$56,605, net of tax, for this period.

[109] Taking into account the loss of non-wage benefits, estimated at 9.1 percent, Mr. Homan seeks \$60,000, net and rounded, in respect of past loss of income-earning capacity.

[110] The Defendants submit that Mr. Homan is entitled to a nominal award under this head of damage, based solely on the shifts Mr. Homan missed immediately after the Accident. They deny that he is entitled to compensation for missing two shifts per month. However, the Defendants acknowledge that he may have missed some days of work in order to attend treatment, due to pain symptoms caused by the Accident, or due to the limited availability of relatively sedentary shifts, such as driving a multi-truck. They suggest that he is therefore entitled to \$5,000 under this head of damages.

Analysis of Past Loss of Income-Earning Capacity

[111] I am satisfied that there is a real and substantial possibility that Mr. Homan missed working shifts because of the ongoing effects of the injuries he sustained in

the Accident. However, I am not convinced that Mr. Homan missed working an average of 24 shifts per year since the Accident. Leaving aside a reduction in shifts caused by the COVID-19 pandemic, the evidence suggests that currently, Mr. Homan continues to work approximately the same number of shifts that he worked prior to the Accident. I accept that he is doing this because he feels compelled to do as much as he can to provide for his family. To the extent that he continues to experience ongoing pain symptoms, this has been accounted for in the award of non-pecuniary damages.

[112] I accept that Mr. Homan has missed some shifts owing to a combination of the limited availability of the multi-truck shifts he prefers, his need to attend treatment, and because of pain symptoms that periodically prevent him from working. In my view, compensation for twelve shifts per year adequately accounts for this loss.

[113] Accordingly, Mr. Homan is entitled to \$1,910 for the one week's worth of shifts he missed immediately after the Accident, and \$28,302 in respect of twelve missed shifts per year from 2018 to 2023. In sum, he is entitled to \$30,212 for past loss of income-earning capacity.

Future Loss of Income-Earning Capacity

Relevant Legal Principles

[114] The court's assessment of a plaintiff's future loss of income-earning capacity involves comparing a plaintiff's likely future, had the accident not happened, to their future after the accident. This is not a mathematical exercise. The court's assessment depends on the type and severity of a plaintiff's injuries, and the nature of the anticipated employment at issue. Economic and statistical evidence provides a useful tool to assist in determining what is fair and reasonable in the circumstances: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 7.

[115] As noted earlier in these Reasons, in *Rab* at para. 47, the court set out a three-step process to assess damages for the future loss of income-earning capacity:

- a) Whether the evidence discloses a potential future event that could lead to a loss of capacity?
- b) Whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss?
- c) If yes, the court must assess the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring.

[116] This three-step process applies to both past and future income-earning capacity claims: *Siu v. Regehr*, 2022 BCSC 1876 at paras. 162–164.

[117] The third step of the *Rab* analysis may involve either the “earnings approach” or the “capital asset approach”. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial. Where there has been no loss of income at the time of trial, the capital asset approach is usually more appropriate, as it reflects the fact that the plaintiff has suffered a loss of a capital asset, rather than a loss of earning capacity. The capital asset approach is also applicable when a plaintiff has yet to establish a settled career path, as it creates a more holistic picture of a plaintiff’s potential future: *Ploskon-Ciesla* at paras. 16–17.

[118] In *Dornan v. Silva*, 2021 BCCA 228, Justice Grauer stated that in undertaking the analysis of positive and negative contingencies for damages, courts are required to assess what happened to the plaintiff in the past, proven on a balance of probabilities. Then, they are required to assess what might happen to the plaintiff in the future. Courts can only consider future possibilities to the extent that they are real and substantial possibilities. Once the hypothetical future event is found to be a real and substantial possibility, the court must assess the relative likelihood of that possibility: *Dornan* at paras. 94–95.

The Parties' Positions on Future Loss of Income-Earning Capacity

[119] Mr. Homan submits that there is a real and substantial possibility that a future event will cause a pecuniary loss because he will likely miss work shifts in the future that he otherwise would have worked. This may occur when he cannot get a shift as a multi-truck driver, when he declines available labour shifts due to pain symptoms, or when these symptoms prevent him from doing work of any kind.

[120] Mr. Homan further submits that as time passes, he will likely experience worsening disability, as he will be less able to manage his pain symptoms. He seeks damages for future loss of income-earning capacity in the range of \$629,000 to \$650,000

[121] The Defendants deny that Mr. Homan has demonstrated a real and substantial possibility that he will be unable to work as many shifts as he would have, absent the Accident. They further assert that he has not suffered a pecuniary loss because his net income has steadily increased in the years since the Accident.

[122] The Defendants further suggest that Mr. Homan may have some untapped residual capacity based on his reluctance to take prescription medications. They also point to his failure to seek accommodations as an indication that he has not mitigated his losses.

[123] In the alternative, if the court finds that Mr. Homan is entitled to an award under this head of damage, the Defendants submit that he ought to receive \$75,000 based on missing one shift per month for 17 years.

Analysis of Future Loss of Income-Earning Capacity

[124] I do not accept Mr. Homan's evidence that but for the Accident, he would have continued working to age 71. His evidence, along with that of Mr. Dumont and Mr. Best, confirms that longshoreman work is very physically demanding. Doing this work takes a cumulative toll on one's body over many years. Even a relatively sedentary task, such as driving a multi-truck, is jarring, stressful, and occasionally dangerous. Although there is anecdotal evidence that some individuals work as

longshoreman to age 71, the evidence does not support the contention that this is common or generally expected. In my view, it is reasonable to expect that Mr. Homan would have retired at age 65.

[125] Dr. Koo diagnosed Mr. Homan with a moderate disability and predicted that he will experience worsening disability as he ages. Dr. Watt diagnosed Mr. Homan with a permanent partial disability and doubted that Mr. Homan would be able to work full-time to age 65.

[126] I am satisfied that Mr. Homan's ongoing pain symptoms will impair his capacity to continue working full-time to age 65. His work is demanding and his ability to tolerate its physical demands is impaired by his Accident-related pain symptoms. The expert evidence of Dr. Koo and Dr. Watt supports this finding.

[127] Furthermore, Mr. Homan cannot do the full range of tasks expected of longshoremen. He is restricted to relatively sedentary tasks, such as driving a multi-truck. I accept that older longshoremen with more seniority prefer doing less demanding tasks. To the extent that Mr. Homan is no longer able to do general labour jobs, this may not initially appear to be much of a loss, given that he prefers multi-truck driving in any event, and because this work is usually available to him by virtue of his seniority. However, uninjured and otherwise unrestricted longshoremen are capable of doing the full range of tasks available in any given shift. Mr. Homan's inability to do the full range of work available to longshoremen puts him at an increased risk of being unable to continue working in this capacity. Mr. Homan's choices are restricted because of the effects of the Accident. This constitutes a loss of capacity.

[128] Additionally, there is a risk that the work he prefers doing—driving a multi-truck—could become mechanized and may eventually be no longer as available to him as it has been in the past. If he is unable to do the full range of other, more physically demanding types of jobs available to longshoremen, his ability continue working as a longshoreman may be limited.

[129] In my view, there is a real and substantial possibility that Mr. Homan's inability to work all the shifts available to him will cause a pecuniary loss. I am satisfied that he will experience deteriorating disability as he gets older because his pain symptoms will probably worsen, given the cumulative effect of the demanding work he performs. I accept that his income has steadily increased since the Accident but find that this is largely owing to increases in his hourly wages. His working hours have remained relatively stable.

[130] I am convinced that Mr. Homan's ability to continue working full-time as a longshoreman will deteriorate as he gets older. Accordingly, his income will decrease as he approaches age 65, when I expect he will retire.

[131] I have calculated Mr. Homan's future loss of income-earning capacity based on increasing reductions in his capacity to work, and earn income, as he gets older:

- a) From the date of trial to age 50:
Applying a 5 percent reduction to a cumulative income of \$301,864, Mr. Homan's lost future earnings would be \$15,093 ($\$301,864 \times 5\%$);
- b) From age 50 to 55:
Applying a 10 percent reduction to a cumulative income of \$967,208, Mr. Homan's lost future earnings for this period would be \$66,534 [$(\$967,208 - \$301,864) \times 10\%$];
- c) From age 55 to 60:
Applying a 20 percent reduction to a cumulative income of \$1,590,561, Mr. Homan's lost future earnings for this period would be \$124,671 [$(\$1,590,561 - \$967,208) \times 20\%$]; and
- d) From age 60 to 65:
Applying a 40 percent reduction to a cumulative income of \$2,122,567, Mr. Homan's lost future earnings for this period would be \$212,802 [$(\$2,122,567 - \$1,590,561) \times 40\%$].

[132] Applying a base income in 2023 of \$164,300, as suggested by Mr. Homan, and applying the above-referenced anticipated reductions in his income, the present value of Mr. Homan's future loss of income-earning capacity is \$419,100.

[133] In my view, this amount should be reduced by five percent for contingencies unrelated to the Accident. I am satisfied that there is a real and substantial possibility

that Mr. Homan may have retired early or reduced to part-time work because of the physically demanding nature of his work as a longshoreman. In concluding that only a minor negative contingency is appropriate, I note that Mr. Homan has a strong attachment to the workforce, he is motivated to continue providing for his children and caring for his father, and he wishes to ensure a comfortable retirement by accumulating pensionable years.

[134] Mr. Homan is entitled to \$398,145 ($\$419,100 \times 95\%$) for future loss of income-earning capacity.

Loss of Housekeeping Capacity

Relevant Legal Principles

[135] In *McKee v. Hicks*, 2023 BCCA 109 at paras. 94–112, Justice Marchand, as he then was, set out the framework for the consideration of a claim for loss of housekeeping capacity:

- a) The first question is whether the loss should be considered as pecuniary or non-pecuniary. This involves a discretionary assessment of the nature of the loss and how it is most fairly to be compensated: *Kim v. Lin*, 2018 BCCA 77 at para. 33.
- b) If the plaintiff is paying for services provided by a housekeeper, or family members or friends are providing equivalent services gratuitously, a pecuniary award is usually more appropriate: *Riley v. Ritsco*, 2018 BCCA 366 at para. 101.
- c) A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset: *Kim* at para. 31. It may be entirely appropriate to value the loss holistically, and not by mathematical calculation: *Kim* at para. 44.
- d) Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages: *Riley* at para. 102.
- e) A plaintiff who has suffered an injury that would make a reasonable person in the same circumstances unable to perform usual and necessary household work is entitled to compensation for that loss by way of pecuniary damages. However, in such cases, the trial judge retains the discretion to address the plaintiff's loss by the award of non-pecuniary damages: *McKee* at para. 112.

- f) However, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities: *McKee* at para. 112.
- g) When family members have gratuitously done the work the plaintiff can no longer do and the tasks they perform have a market value, that is evidence of loss of housekeeping capacity: *McTavish v. MacGillivray et al.*, 2000 BCCA 164 at para. 63.

The Parties' Positions on Loss of Housekeeping Capacity

[136] Mr. Homan suggests that he is incapable of doing all of the tasks associated with cleaning and maintaining his home and yard and that in a few years, his teenage children will probably no longer live with him and assist him with these tasks. He submits that he has sustained a loss of housekeeping capacity that warrants a pecuniary award to compensate him for two to three hours of household labour per week. Applying a rate of \$30 per hour, he seeks an aggregate award for both past and future loss of housekeeping capacity and home maintenance in the range of \$65,000 to \$105,000.

[137] The Defendants deny that Mr. Homan is entitled to damages for loss of housekeeping capacity. Instead, they submit that an award for housekeeping capacity should be included in the award for non-pecuniary damages.

Factual Findings and Analysis on Loss of Housekeeping Capacity

[138] Prior to the Accident, Mr. Homan cleaned and maintained his house and yard. After the Accident, he was able to clear snow and mow the lawn but did so less frequently and thoroughly. Similarly, he cleaned his house after the Accident but paced the tasks, such as vacuuming, and enlisted the assistance of his children with this work.

[139] In 2020, Mr. Homan and his family moved into a two storey, five-bedroom, three-bathroom, 2,400 square foot house in Chilliwack, B.C. Since then, his children have taken on more of the cleaning and maintenance tasks. This is in part due to

Mr. Homan's ongoing pain symptoms but also because he wishes to instill a sense of responsibility for maintaining the family home in his children.

[140] Mr. Homan's father, Mr. Homan Senior, recently moved into the basement of Mr. Homan's house. He is responsible for cleaning this area and pays one of his grandchildren to do this work.

[141] In my view, Mr. Homan experiences some difficulty and frustration in maintaining his residence but he is capable of performing most of the necessary tasks with pacing and the assistance of his children. He did these tasks in the years immediately after the Accident and continues to do some of them. His children assist with some of the home maintenance tasks at his urging. Mr. Homan's desire to instill responsibility in his children by expecting them to contribute to the maintenance of the family residence is laudable. It does not, however, suggest that he is unable to do this work.

[142] As the years pass and his children move out of the family home, it will require less cleaning and maintenance with fewer people living there. I am not convinced that Mr. Homan is incapable of caring for his home. In my view, the difficulties he experiences in performing home maintenance tasks are appropriately compensated by an augmentation of the non-pecuniary damage award, which I have done in concluding that he is entitled to \$130,000 in non-pecuniary damages.

Cost of Future Care

Relevant Legal Principles

[143] The principles applicable to the assessment of cost of future care are:

- a) Providing adequate damages for future care of an injured plaintiff is of paramount importance.
- b) The purpose of such an award is to provide for assistance directly related to the injuries caused by the accident.
- c) The test for determining an appropriate award is an objective one based on medical evidence.

- d) The focus should be on the plaintiff, with fairness to the other party being achieved by ensuring that the expenses are legitimate and justifiable.
- e) The plaintiff needs to show: (a) a medical justification for the items claimed; and (b) that the amount claimed is reasonable.
- f) “Medical justification” is broader than “medically necessary”.
- g) Medical experts need not expressly approve specific items of future care; it is sufficient if the totality of the evidence supports the award for specific items.
- h) Common sense should be employed in this assessment.
- i) No award should be included for items that would be incurred in the absence of the accident.

See: *Thompson* at para. 149; *Singh v. Storey*, 2021 BCSC 1825 at para. 104.

The Parties’ Positions on Cost of Future Care

[144] Mr. Homan submits that he will continue to attend some combination of physiotherapy and chiropractic therapy, approximately weekly on an ongoing basis. He seeks an award for his cost of future care in accordance with all of Dr. Koo’s recommendations. He also seeks \$5,165 for the replacement of his fence and the present value to age 75 of \$1,500 per year for hired assistance with heavy household maintenance tasks. In total, he seeks \$92,406 for the costs of his future care.

[145] The Defendants assert that Mr. Homan’s claims for costs of future care are largely unsubstantiated and that they are not liable to compensate him for therapies, treatment plans, or equipment that he probably will not use. Specifically, they assert that Mr. Homan is not entitled to an amount in respect of prescription medications because he testified that he does not like consuming pills and he avoids taking them despite the recommendations of physicians. He is also not entitled to the costs of a gym pass or exercise equipment because he exercises infrequently and already owns some exercise equipment. Finally, they suggest that he is unlikely to regularly obtain passive treatment. The Defendants submit that an appropriate award for the cost of future care is \$5,000.

Factual Findings on Cost of Future Care

[146] Dr. Koo recommends that Mr. Homan have access to regular pain reducing therapies, otherwise his elevated pain symptoms become unbearable and will likely result in him being unable to work. He recommends ongoing massage therapy, physiotherapy, and/or chiropractic treatment every two to three weeks for treatment of pain exacerbations associated with Mr. Homan's normal activities and vocational demands. He also recommends eight to ten psychology sessions, based on his reports of depression and social anxiety, as well as a referral to a headache specialist for review of Mr. Homan's post-traumatic migraines.

[147] Dr. Koo also recommends a home occupational therapy referral and support for lawnmowing, power washing, snow removal, gutter cleaning, gardening, tree trimming and renovation work/property maintenance, given that Mr. Homan's injuries would likely be aggravated from these household duties. Dr. Koo believes that Mr. Homan will require outsourcing for home renovation work, due to his reduced capacity to do this work himself. This, presumably, would include having his fence repaired, the cost of which is in evidence.

[148] Dr. Koo makes the following recommendations for Mr. Homan:

- a) a self-directed active rehabilitation program with periodic oversight by a kinesiologist twice a month for one year;
- b) access to home gym equipment;
- c) low impact activities such as walking, stretching, yoga and swimming; and
- d) ongoing access to a gym and aquatic centre.

[149] Dr. Watt recommends that Mr. Homan obtain a percussive muscle massager and undertake the following treatment:

- a) a four-month progressive exercise program;
- b) One to five sessions of passive therapy of Mr. Homan's choice, such as intramuscular stimulation, physiotherapy, chiropractic, or massage therapy; and

c) yoga.

Analysis of Cost of Future Care

[150] Mr. Homan requires regular access to passive therapies to manage his pain symptoms, particularly given the physically demanding nature of his work. I am satisfied that bi-weekly, he ought to have access to his choice of physiotherapy, chiropractic treatment, or massage therapy. Applying an average cost of \$80 per session for 26 sessions per year, until his estimated retirement age of 65, Mr. Homan is entitled to the present value of \$30,301.

[151] After Mr. Homan retires, he will require ongoing access to his choice of passive therapies, but at a reduced frequency, because he will no longer be enduring the physical demands of his work. In my view, 18 sessions per year of passive therapy of his choice, at an average cost of \$80 per session, is both medically justified and necessary during his retirement. Mr. Homan would not have required these treatments but for the Accident and the purpose of them is to manage his ongoing pain symptoms. Mr. Homan is entitled to \$7,167 in respect of passive therapies to manage his pain symptoms from age 65 to age 80.

[152] Both Dr. Koo and Dr. Watt recommend that Mr. Homan work with a kinesiologist to develop an exercise program. This would enable Mr. Homan to improve his health and conditioning generally, and would enhance the probability that he will be able to continue working for as long as possible. An amount of \$3,000 for 26 sessions with a kinesiologist, is both medically justified and reasonable.

[153] I also agree with Dr. Koo's recommendation that Mr. Homan receive \$2,500 to fund ten counselling sessions with a psychologist. Mr. Homan did not suffer depressive symptoms prior to the Accident. I accept his evidence, along with that of his father, that he has become somewhat irritable, short-tempered, and occasionally depressed as a result of his ongoing pain symptoms. I am satisfied that access to counselling to address these issues is both medically justified and reasonable.

[154] Mr. Homan has been unable to repair the fence in his backyard because of his ongoing pain symptoms. Prior to the Accident, he had no difficulty doing these types of tasks. He regularly built animal pens and fences, and lifted and stacked large bails of hay on his father's hobby farm. Replacing a fence on his own home is the type of task Mr. Homan would have done on his own absent the Accident.

[155] I am also satisfied that Mr. Homan requires assistance with heavier home maintenance tasks. In my view, \$1,500 per year for this type of work is both medically justified and reasonable, because it will enable Mr. Homan to hire someone to clean gutters, hang Christmas lights, and do other home maintenance tasks that require climbing a ladder, extended reaching, and/or prolonged crouching. I therefore award Mr. Homan \$1,500 per year to hire someone to do these tasks, to age 75.

[156] Mr. Homan is therefore entitled to the present value of \$29,784 for assistance with heavier home maintenance tasks. I decline to specifically provide an amount for the repair of Mr. Homan's fence because it serves merely as an example of the type of assistance he will require. The amount awarded is intended to compensate Mr. Homan for all types of heavy home maintenance tasks.

[157] I am not convinced that Mr. Homan is entitled to amounts in respect of yoga, prescription medications, gym equipment, or other assistive devices. He has not done yoga since the Accident and he avoids taking prescription medications. Mr. Homan owns some gym equipment and he has not used assistive devices since the Accident. I do not accept that these items are medically necessary or justified.

[158] Similarly, Mr. Homan has had a family pass for the YMCA for many years, so the need for a gym pass is not related to the Accident.

[159] In total, Mr. Homan is entitled to \$72,752 for the cost of his future care.

Special Damages

[160] The parties agree that Mr. Homan is entitled to \$5,380 for special damages.

Conclusion

[161] Mr. Homan is entitled to a damages award of \$636,489 consisting of:

a) Non-pecuniary damages:	\$130,000
b) Past loss of income-earning capacity:	\$30,212
c) Future loss of income-earning capacity:	\$398,145
d) Cost of future care:	\$72,752
e) Loss of household capacity:	Nil
f) Special damages:	<u>\$5,380</u>
Total:	<u>\$636,489</u>

Costs

[162] If the parties wish to make submissions on costs, they must file their submissions within 30 days of the date of this judgment. If the parties wish to make oral submissions on costs, or other matters related to the implementation of this judgment, they may make the necessary arrangements with Supreme Court Scheduling within this timeframe. If no submissions are received, Mr. Homan will have his costs at Scale B.

“Basran J.”