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1. *Gill v. Stephens, [2019] B.C.J. No. 908*

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Gill v. Stephens, [2019] B.C.J. No. 908

British Columbia and Yukon Judgments

British Columbia Supreme Court

New Westminster, British Columbia

J.M. Gropper J.

Heard: October 1-5 and 9-12, 2018.

Judgment: May 21, 2019.

Docket: M186421

Registry: New Westminster

[2019] B.C.J. No. 908 | 2019 BCSC 798

Between Surinder Singh Gill, Plaintiff, and Michael Robert Stephens, Gerardo Avila Garcia and Wilma Apeldoorn, Defendants

(101 paras.)

Counsel

Counsel for the Plaintiff: ***K. Cowan***.

Counsel for the Defendants: J. Simon.

Table of Contents

Cost of Future Care

Special Damages

MITIGATION

SUMMARY OF DAMAGES

COSTS

Reasons for Judgment

J.M. GROPPER J.

Introduction

1 Surinder Singh Gill was injured in a motor vehicle accident on July 18, 2015, near the intersection of Vedder Road and Keith Wilson Road in Chilliwack, British Columbia. He was in a line of traffic, which was advancing slowly. Wilma Apeldoorn was behind him in her vehicle. She was inattentive for a moment and failed to stop behind Mr. Gill's vehicle when he stopped. She hit the rear of Mr. Gill's vehicle, causing Mr. Gill to hit the vehicle in front of him, which proceeded to hit the vehicle in front of it.

2 Ms. Apeldoorn has admitted liability for the accident.

3 As a result of the accident, Mr. Gill suffered physical injuries including myofascial pain symptoms arising from spinal sprain/strain injuries including facet mediated pain and post-traumatic headaches. Most significant is that Mr. Gill suffers from major depressive disorder with predominant anxious features. It is this injury that has interfered in Mr. Gill's life to the greatest extent and results in ongoing limitations.

Background

4 Mr. Gill was born in New Westminster on April 23, 1970. He is now 49 years old. He was raised and educated in New Westminster. He left high school when he was short of a few grade 12 credits. He went to work at Richmond Plywood and was employed there for 16 years.

5 In 2005, he applied for a job as a longshoreman. He was successful in the application lottery. He began as a casual labourer and received training over the years on various pieces of equipment including the boom forklifts, cranes, and lift containers. He became a member of the International Longshore and Warehouse Union (Longshore Union) in June 2015. Mr. Gill was working as a longshoreman when this accident occurred.

6 Mr. Gill married his wife, Sarwinder, in 1994 in India. She moved to the Lower Mainland a year later. Mr. Gill describes their relationship before the accident as very good; they were happy. He describes his wife as happy and outgoing.

7 They have two children, a son and a daughter who are now in their early 20s. When the children were in grades 6 and 7, they moved with their mother to complete their education in India and stayed there for about seven years. Mr. Gill and his family would communicate through Skype and telephone calls and he would visit India for two or three months each year.

8 His son returned from India in 2015 and his wife and daughter returned about four months later.

9 Several of Mr. Gill's friends described what he was like before the accident. He was happy, outgoing, sociable, and engaged in social events with friends and family. He was talkative and easy-going. He talked about his employment which he enjoyed very much; he was healthy, strong, and worked hard. He was proud of what he did. He was also proud of his children and their accomplishments. He supported their hopes and dreams.

10 In respect of his medical history, Mr. Gill had some intermittent conditions but none are contributory to any significant extent to his current injury symptoms. He suffered whiplash-related injuries in seven prior motor vehicle accidents. He recovered from those injuries, but they likely predisposed him to some degree of cervical and lumbar symptomatology from the July 2015 motor vehicle accident.

11 Mr. Gill also has a limited history of workers' compensation claims. In particular, he suffered workplace injuries in 1990 and 2004, the latter being his most recent work-related lumbar strain injury.

The Accident

12 Mr. Gill was at a complete stop in a line of traffic when the defendant's vehicle rear-ended his vehicle. The back window of Mr. Gill's vehicle was broken as a result of the impact but the airbags did not deploy.

13 Neither Mr. Gill, his son (who was a passenger), nor Ms. Apeldoorn know at what speed the Apeldoorn vehicle was traveling when it hit Mr. Gill's vehicle. It was sufficient to cause over $16,000 worth of damage to Mr. Gill's vehicle, which was written off. It also caused a chain reaction: Mr. Gill's vehicle rear-ended the vehicle in front of him, which in turn rear-ended the vehicle in front of that vehicle.

14 Mr. Gill called a friend who resided in Chilliwack from the scene of the accident and she picked him and his son up. Mr. Gill told her what happened and that he was sore. She took Mr. Gill and his son to her place where they stayed overnight. Mr. Gill's friend drove Mr. Gill and his son home the following day.

After the Accident

15 Mr. Gill attended Peace Arch Hospital on July 19, 2015, the day after the accident. He was assessed for soft tissue injuries. Symptoms included left arm tingling; back, neck and shoulder pain; and headaches.

16 Mr. Gill did not return to work.

17 On July 30, 2015, Mr. Gill attended his family physician's office where he reported that his pain and stiffness had worsened as well as his headaches. He had low back pain and pain in his shoulders. He was given anti-inflammatory medication and home-based stretches for exercise.

18 Mr. Gill continued to see his family physician, Dr. Jeffrey Dresselhuis, over the next few months. His condition remained largely unchanged and he was unable to return to work.

19 On March 21, 2016, Dr. Dresselhuis described Mr. Gill's mood as "despondent", which the doctor linked to his prolonged time away from work.

20 Mr. Gill's mental health was the subject of "ongoing concern" by his rehabilitation specialist on May 17, 2016. The rehabilitation record notes "anxiety" in June 2016.

21 On June 29, 2016, Mr. Gill attended at his family physician's office with his wife and daughter. His wife told the doctor she had noticed that her husband was different: he was repeating things over and over and was stressed about wanting to make money and the children's studies. Ms. Gill was worried that Mr. Gill was weak and sleep-deprived. He cried regularly, he could not sleep, he hardly ate, he would not talk, and he communicated very little with members of the family.

22 Dr. Dresselhuis noted that Mr. Gill's mood was lower than on the previous visit. He had blunted affect. His speech, Dr. Dresselhuis observed, "reflected an obsession with physical symptoms as well as various worries." Dr. Dresselhuis diagnosed Mr. Gill with depression and prescribed a daily 50 milligram dose of an antidepressant, sertraline, anticipating increasing the medication by an additional 50 milligrams over five days. Dr. Dresselhuis considered that Mr. Gill's feelings of helplessness were likely related to his prolonged time off work.

23 Approximately one month later, on July 19, 2016, Mr. Gill was still having difficulty concentrating due to pain from his physical injuries as well as his mood issues. Dr. Dresselhuis noted that his mood issues seemed to have worsened.

24 Mr. Gill continued to attend rehabilitation three times a week for four hours each session. He continued to have feelings of helplessness.

25 A year after the accident, Mr. Gill still had not returned to work.

26 Victoria Dhaliwal, a family friend, visited Mr. Gill and his family over the months from April 2016 onwards. She observed that Mr. Gill would sit in his living room with the television on. He was not watching, he was just sitting there. His hair had gone grey, he had lost weight, he was unshaven and he was unresponsive to Ms. Dhaliwal. She learned that his doctor had prescribed antidepressants. She learned that Mr. Gill was not taking his antidepressant medications because his wife feared that this would be habit forming. Ms. Gill confirmed that this was the case.

27 On August 17, 2016, Mr. Gill attended his doctor with Ms. Dhaliwal. It was after Mr. Gill had stayed with her and her sons for several days and she was concerned that Mr. Gill may hurt himself. Dr. Dresselhuis strongly advised that Mr. Gill restart sertraline and attempt to activate his mind and brain as opposed to his default position of staying around the house.

28 Mr. Gill's psychological symptoms continued to worsen. By October 31, 2016, Mr. Gill's right hand tingling, back stiffness, neck pain, and headaches persisted. He remained on sertraline. He also began counselling with Dr. Sundeep Thinda, a clinical psychologist, on a weekly basis. Dr. Dresselhuis prescribed a new antidepressant and encouraged Mr. Gill to take the medication.

29 By December 15, 2016, Mr. Gill was seeing Dr. Thinda once a week. He continued to attend his rehabilitation program for hours multiple times per week.

30 Dr. Dresselhuis continued to see Mr. Gill on a close to monthly schedule. Mr. Gill's physical ailments remained unchanged. He continued to have panic episodes and anxiety, he had trouble getting out of the house, he had difficulty making decisions, and his appetite was poor.

31 Mr. Gill had an appointment to see Dr. Dresselhuis on November 15, 2017, but he did not attend the appointment. At his next visit, he advised Dr. Dresselhuis that he experienced a "complete freeze"; he was unable to get out of the house that day.

32 When Mr. Gill saw Dr. Dresselhuis on December 13, 2017, Mr. Gill described that his appetite was still poor and he had difficulties engaging in self-care. He was not motivated to do anything, including going for walks. Dr. Dresselhuis considered that his mood-related passivity was a large obstacle in his progress to recovery from his physical ailments.

33 In January 2018, Mr. Gill ingested twelve Tylenol 3 tablets while parked on the side of the street. He thought he was a burden and that he could not fix anything. He did not know what to do and thought that he should end his life. He phoned his friend and told her what he was doing. She came and got him and took him to the hospital. He remained at the hospital for observation and was released. He was advised to see a psychiatrist.

34 Mr. Gill saw Dr. Dresselhuis after he was released from the hospital. Dr. Dresselhuis noted that even the smallest task was momentous for Mr. Gill. He managed to negotiate the walking and transit demands to travel to the doctor's office by Skytrain, but he still had a desire to stay away from crowds.

35 Mr. Gill's progress continued to be limited throughout 2018. His physical ailments continued and his psychiatric condition went from bad to worse. He was not entirely compliant with his doctor's advice to continue to take the antidepressants that had been prescribed for him. Attempts were made to have Mr. Gill participate in volunteer work in the community to activate him and to determine whether he was able to return to his job or some other vocation. These attempts failed.

36 Just before the trial commenced in October 2018, Mr. Gill participated in a residential program trying to improve his mental health and function. The trial took place between two of the five-week program sessions. Mr. Gill's family doctor and counsellor supported the program. Mr. Gill said that he benefited somewhat from it but that there was still a long way to go. He intended to continue treatment, attending the residential program after the trial and with the support of his doctors and counsellor. He described himself as being nervous, scared, and unsure of himself. He said he tries the best he can.

37 Mr. Gill has not been able to return to his employment as a longshoreman, nor any other occupation.

Expert Medical and Psychological Opinions

38 I have referred to Dr. Dresselhuis, Mr. Gill's family physician. He is of the view that Mr. Gill's physical and psychiatric conditions are causally linked to the accident. He concludes that Mr. Gill has a whiplash-associated disorder and lumbar spine strain and suggests that 80% of that condition is attributable to the motor vehicle accident. He suggests that there is a 20% likelihood that Mr. Gill may have had these types of symptoms during the same period based on his previous medical history. With regards to the depression, which Dr. Dresselhuis describes as a major depressive disorder with predominant anxious features, Dr. Dresselhuis describes it as "clearly the largest factor in [Mr. Gill's] ongoing constellation of symptoms, as well as his ongoing disability from both occupational, recreational, social and family participation."

39 Dr. Dresselhuis is of the opinion that the motor vehicle accident is the entire cause for Mr. Gill's mental health issues. Dr. Dresselhuis considers that Mr. Gill is unable to return to his previous employment as a longshoreman and there will be a considerable challenge to find alternative employment with equivalent pay. His current mental health issues rule out any return to competitive employment in the immediate future.

40 While Dr. Dresselhuis remains "cautiously optimistic", he is of the view that there is a distinct possibility that Mr. Gill will be unable to return to work or retain any vocational function. He also says that it is uncertain whether Mr. Gill will ever recover from his ongoing complete disability from the workplace and from other social, domestic, and recreational functioning.

41 Dr. Thinda, the psychologist, has been treating Mr. Gill since August 2016, on a once per week basis. He too considers that the motor vehicle accident is causative of Mr. Gill's psychological impairments. His diagnosis is that Mr. Gill has symptoms suggestive of major depressive disorder with anxious distress and generalized anxiety disorder. Dr. Thinda also diagnoses Mr. Gill with somatic symptom disorder (pain) due to a persistently high level of anxiety about his health symptoms and excessive time and energy devoted to those symptoms and to health concerns. Dr. Thinda notes the same limitations on Mr. Gill's personal life, activities of daily living and employment as determined by Dr. Dresselhuis.

42 In respect of prognosis, Dr. Thinda is of the view that it is unlikely that Mr. Gill will ever make a complete recovery from his current position. He points out that in terms of prognosis, if improvements are not made within the first two years, then the focus of the psychologist must be on managing symptoms and quality of life maintenance. The prognosis is poor and even if Mr. Gill is able to make an eventual recovery, he will be susceptible to

mood/anxiety regressions and redevelopment of the diagnoses in the future. Dr. Thinda is of the view that Mr. Gill will not return to his previous employment and is unlikely to be successful at returning to work at all.

43 Dr. Robert Tarzwell, a specialist in psychiatry and nuclear medicine, prepared a medical legal report after he examined Mr. Gill on March 26, 2018. Dr. Tarzwell diagnosed Mr. Gill as suffering from post-traumatic stress disorder (PTSD) with delayed expression, severe; and chronic pain due to trauma. Dr. Tarzwell believes the accident to be the sole cause of Mr. Gill's psychiatric symptoms.

44 Dr. Tarzwell is of the view that Mr. Gill has been completely vocationally disabled since the accident due to his psychological injuries. He further opines that Mr. Gill's PTSD has led to a "widespread loss of interests, effectively eliminating his recreational life." Dr. Tarzwell describes Mr. Gill's detachment from others, particularly friends and family, and that his loss of motivation results in Mr. Gill not showering, shaving, getting his haircut, or engaging in other aspects of self care.

45 Dr. Tarzwell believes that Mr. Gill remains severely symptomatic with suicidal ideation. He recommends treatment with antidepressant medication and cognitive behavioural therapy, as well as a chronic pain program.

46 Ultimately, Dr. Tarzwell considers that Mr. Gill does not have any realistic prospect of spontaneous recovery. If that were to happen it would have occurred by the time Dr. Tarzwell examined him in March 2018. Dr. Tarzwell notes that Mr. Gill has continued to deteriorate and that his symptoms are chronic and severe. At the same time, he acknowledges that Mr. Gill may improve.

47 Mr. Gill was also assessed by a physiatrist, Dr. Harpreet Sangha, who was retained by the defendant to provide an independent medical examination. Dr. Sangha considers that Mr. Gill's physical ailments are directly related to the motor vehicle accident. He says the cause is likely due to facet strain and superimposed myofascial impairment. He continues "[Mr. Gill's] perception and functional interference from the pain is likely being amplified from his psychoemotional issues. There is a strong correlation between psychological distress and the physical manifestation of pain."

48 Dr. Sangha believes that without the psychological distress, Mr. Gill's physical injuries have resolved to a point where he would be able to transition back to his work as a longshoreman, at least on a graduated basis.

Causation

49 Causation is not disputed by the defence. The defence suggests that Mr. Gill may have had a "unique vulnerability due to predisposing factors" but accepts "that the psychological injury would not have occurred, but for, the trauma from the accident." This is amply demonstrated in the reports and *viva voce* evidence of the experts.

Damages

Non-Pecuniary Damages

50 *Stapley v. Hejslet*, *2006 BCCA 34* is often referenced in respect of non-pecuniary damages. It provides an inexhaustive list of common factors that influence an award of non-pecuniary damages:

(a) age of the plaintiff;

(b) nature of the injury;

(c) severity and duration of pain;

(d) disability;

(e) emotional suffering; and

(f) loss or impairment of life.

51 Applying those factors, Mr. Gill is now 49 years old and he has been suffering from his injury for almost four years. The treating doctors and Dr. Tarzwell opine that Mr. Gill's psychological problems continue and will not be cured. Mr. Gill is isolated from his peers. Mr. Gill's ambition and drive towards his career goals have dissipated. Mr. Gill's future career prospects, if there are any, will likely include work that is less challenging, interesting or rewarding for him. Mr. Gill has lost his own sense of self-worth and confidence. Mr. Gill's degree of emotional suffering has been extreme and reflects a lonely, frustrated, and frightened individual. Mr. Gill's family, marital and social relationships have been directly impaired, as have his physical and mental abilities. Mr. Gill has completely lost his pre-accident lifestyle. Mr. Gill is unable to bear his loss stoically.

52 The defence argues that the experts have made a positive diagnosis in that the plaintiff can improve and can be rehabilitated to return to his pre-accident employment status. The defence argues that it is probable, although not certain, that Mr. Gill will return to longshoreman's work.

53 The expert opinions are not optimistic about Mr. Gill's recovery or his return to work. Though the most recent residential treatment program demonstrates some glimmer of hope, it is just that. It is reasonable that Dr. Tarzwell acknowledges Mr. Gill may get better, but he does not suggest that it is likely. That evidence does not meet the balance of probabilities standard.

54 The plaintiff seeks general damages of $225,000. The defence argues general damages should be set between $100,000 and $130,000.

55 Both parties have provided a series of cases to support their positions. The distinction between the authorities provided is that the court in each considered the likelihood of improvement.

56 Mr. Gill's physical symptoms have been secondary to his psychological injuries. The psychological injuries have had a devastating impact on every aspect of his life. He was a happy, healthy, ambitious person. He was involved in a loving marriage and had close relationships with both his children. He was pursuing a job that he loved. He enjoyed socializing, he was concerned about his appearance, and he was physically active. His future was bright. That is no longer the case. Mr. Gill is a shadow of his former self. His interaction with his friends and family is non-existent. The effect of these injuries on his day-to-day functioning is profound. Some of his family, friends, and the experts described that Mr. Gill is unable to even engage in basic health self-care and personal hygiene.

57 Mr. Gill has suicidal ideation that manifested itself in his attempt to take his own life in January 2018.

58 I have reviewed the authorities provided by the parties. I find the decision of *Felix v. Hearne*, *2011 BCSC 1236* to be apposite. In that case, the plaintiff suffered from the combined effects of physical injuries along with a "pervasive emotional disorder" that was "devastating to [her] personal and vocational life" (at para. 47). The court found that the plaintiff was no longer self-reliant and could not engage in her pre-accident activities or social life. Non-pecuniary damages were assessed at $200,000.

59 I have taken a global approach to non-pecuniary damages and consolidate both Mr. Gill's physical and psychological injuries in assessing Mr. Gill's non-pecuniary damages at $200,000.

Past Wage Loss

60 As noted, after ten years of working as a casual longshoreman, Mr. Gill earned membership in the Longshore Union a month before the accident. By the time of the accident, he was earning approximately $90,000 to $100,000 a year. With his union membership Mr. Gill could choose when he wished to work and could optimize his income by working evening, graveyard, and overtime shifts that were paid at a higher wage rate because of the applicable differential.

61 Chris Rowe, a co-worker, was accepted into the union at the same time as Mr. Gill. Mr. Rowe gave evidence that after he became a member of the union, his hours increased dramatically as did his income. In 2017, Mr. Rowe earned $144,000. He works on the dayshift where there is no differential paid.

62 Darren Benning was called as an expert economist by the plaintiff. He provided evidence for the quantification of pecuniary damages. In his report concerning past loss of income, he was asked to assume that Mr. Gill would have earned income based on a 40-hour work week at a base salary for longshoremen, plus an additional 10% in order to reflect overtime and shift differentials.

63 Mr. Benning referred to the collective agreement in effect between Mr. Gill's union and his employer which set out wage rates payable to employees. He applied a further 10% to the base wage rate to reflect shift differentials. In respect of his past wage loss to the date of the accident, Mr. Benning calculated that Mr. Gill's past net wage loss amounts to $209,460. The plaintiff suggests that, as Mr. Gill's choice was to maximize his income by working overtime and graveyard shifts, an additional amount should be added. Further, Mr. Rowe's experience demonstrates that Mr. Gill would have earned more than $90,000 per year which is the basis of Mr. Benning's estimate.

64 I accept that Mr. Gill's entry into the union would have resulted in his increased income after July 2015. However, I consider that Mr. Benning's approach, based upon the wages as set out in the collective agreement, is a reasonable basis upon which to calculate his past wage loss.

65 I assess Mr. Gill's past net wage loss from the date of the accident to the date of trial at $210,000.

Diminished Capacity to Earn Income in the Future

66 In order to establish a claim for loss of future earning capacity, Mr. Gill must first establish that his earning capacity has been impaired by his injury and if so, what compensation should be awarded for the resulting financial harm that will accrue to him over his working life. This requires an assessment of the loss, not an application of a mathematical calculation. The appropriate means of assessment varies from case to case: *Perren v. Lalari*, *2010 BCCA 140* at para. 32.

67 There are two possible approaches to the assessment of loss of future earning capacity: the earnings approach adopted in *Pallos v. Insurance Co. of British Columbia* *(1995), 100 B.C.L.R. (2d) 260* (C.A.); and the capital asset approach adopted in *Brown v. Golaiy* *(1985), 26 B.C.L.R. (3d) 353* (S.C.). The earnings approach will generally be more useful when the loss is easily measurable: *Perren* at para. 32.

68 In this case, the earnings approach is the appropriate one because the loss is easily measurable.

69 In *Kwei v. Boisclair* *(1991), 60 B.C.L.R. (2d) 393*, the Court of Appeal held that the correct approach to assess damages under this head was to consider the factors described by Finch J., as he then was, in *Brown*. Mr. Justice Taggart cited the *Brown* factors with approval. Those factors are:

(a) The plaintiff has been rendered less capable overall from earning income from all types of employment;

(b) The plaintiff is less marketable or attractive as an employee to potential employers;

(c) The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and

(d) The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

70 I find that Mr. Gill meets all four factors.

71 Dr. Dean Powers gave expert evidence in vocational rehabilitation. He provided an opinion on Mr. Gill's future vocational opportunities given his injuries, based upon his aptitude testing, Mr. Gill's interests and his education. Dr. Powers considers that Mr. Gill is completely disabled from any gainful employment at this time. He continues, stating "[h]is vocational future hinges on treatment recommendation and interventions, which at the time of my assessment had yet to be scheduled. Absent this intervention his vocational outlook is unlikely to change."

72 There is no dispute that Mr. Gill will incur a loss of future earning capacity. The dispute between the parties regards his potential for recovery. The defence's position is that the plaintiff is likely to recover significantly from his injuries to return to work on either a full-time or part-time basis. The plaintiff disagrees. Again, I do not find that the evidence supports a likelihood that Mr. Gill will return to his employment as a longshoreman or indeed to any employment based on the grim prognosis of the doctors and psychologist.

73 I find that Mr. Gill has been rendered less capable overall from earning income from all types of employment. Dr. Dresselhuis states that his mental health issues currently rule out any form of competitive employment. Dr. Tarzwell concludes that all available evidence suggests that Mr. Gill is severely disabled in all functional domains. Dr. Thinda considers that Mr. Gill's return to work is extremely unlikely and his psychological injuries mean that he is uncertain about making decisions, lacks confidence, and cannot make quick judgment calls. Mr. Gill sees himself as less valuable as he is unable to competitively earn income in the labour market. Mr. Gill's confidence is entirely diminished.

74 Mr. Gill testified that prior to the accident he intended to continue working as a longshoreman as much as possible. He intended to maximize his income by working evening, graveyard, and weekend shifts, all of which attract a wage differential.

75 Mr. Rowe testified that many longshoremen work beyond their 70th birthday.

76 Mr. Gill suggests that because he enjoyed his work as a longshoreman so much, he would have likely worked to age 75. Mr. Gill is currently 49 years old.

77 Mr. Benning provided tables based on Mr. Gill's pre-accident earnings, assuming he will not return to work. His actuarial calculation addresses negative contingencies including non-participation in the labour force, unemployment, part-time work and premature death.

78 I consider that because Mr. Gill has been working full-time since he was in his late teens, he would have worked to age 65. In accordance with the tables provided by Mr. Benning, his future loss of earning capacity from the date of the trial to age 65 is $1,233,296.

79 I assess Mr. Gill's loss under this head of damage at $1,230,000.

Pension & Benefit Losses

80 As a result of his not returning to work as a longshoreman, Mr. Gill also loses his pension and health and welfare benefits, which are paid by his employer if he reaches a certain level of earning each year. I have based Mr. Gill's future loss on an amount that exceeds that limit and find he would therefore, but for this accident, have earned these benefits. It is necessary to deduct the contributions that Mr. Gill would have made to these plans.

81 Mr. Benning calculates the pension loss to be $365,327 and his loss of benefits as $31,514, assuming the plaintiff does not return to work as a longshoreman.

82 I assess this loss at $390,000.

Cost of Future Care

83 Simone Hartman, an occupational therapist, has provided a report regarding the cost of future care for Mr. Gill. In each case, she refers to the recommendations of the doctors and psychologist and costs out each item, including those that will be a one time expense, and those that are ongoing of a period of years or for the duration of Mr. Gill's life.

84 The cost of care reports refer to:

(a) ongoing kinesiology costing $10,800 per year;

(b) family counselling between $880 and $1200;

(c) a functional capacity evaluation at a cost ranging between $1950 and $4500;

(d) a vocational assessment at a cost ranging between $2500 and $4500;

(e) attendance at a pain clinic at a cost of $14,300;

(f) vocational counselling for 30 hours at $125 per hour plus GST;

(g) contingency physiotherapy visits at an annual cost between $840 and $1140 over a period of at least two years;

(h) a kinesiology activation program for a duration between one and three years, for a three year total cost of $20,160 to $32,400;

(i) occupational therapy/case management over three years at a cost ranging between $18,000 and $29,700;

(j) psychology and cognitive behavioural therapy at $13,000 per year - through to age 65 the cost of counselling is $189,800 (expressed as a present value);

(k) medication is described and the range of costs is from $180 to $610 annually;

(l) a gym pass at $504 annually to age 59 (11 years) and $387 annually thereafter (23 years based on statistical life expectancy); and

(m) the pharmacy home care program at $10,950 per year for two years.

85 Mr. Gill says that using the low-end of these various figures, the value of care could approach $285,000. He acknowledges that there are a number of variables that make it difficult to assess. While the court has the discretion to assess future care costs on an item by item basis, Mr. Gill suggests an amount of $125,000 under this head of damage.

86 Mr. Gill makes a claim for housekeeping in the amount of $10,000 on the basis of Ms. Gill's evidence that her housekeeping duties have increased following the accident.

87 I find that the following items must be included in the cost of future care:

(a) One-time expenditures:

i. functional capacity assessment in the amount of $1950;

ii. pain clinic attendance for $14,300; and

iii. vocational counselling for $3000.

iv. Expenditures for an intermediate duration:

v. contingency physiotherapy for four years for $2000;

vi. kinesiology activation for two years for $13,000;

vii. occupational therapy case management for two years for 12 sessions per year at $250 per session amounting to $6000;

viii. psychological counselling for two years at $17,500; and

ix. contingency for future psychology sessions in the amount of $10,000.

(b) Life-long expenditures:

i. medications in the amount of $7000.

88 I decline to award housekeeping costs as the evidence concerning that is sparse and Ms. Gill did not perform housekeeping duties for the family before the accident.

89 I assess the total amount for cost of future care as $75,000.

Special Damages

90 The parties agree on special damages of $28,550.

Mitigation

91 The defence asserts that Mr. Gill failed to mitigate his losses on the basis that he failed to follow treatment advice, even though he had the capacity to make reasonable decisions about treatment and the advice was sound. Specifically, the plaintiff failed to mitigate by: failing to take his antidepressant mediations as prescribed; failing to tell his family doctor that he was not taking his antidepressant medications; failing to seek immediate psychiatric treatment when it was offered through Surrey Memorial Hospital after his overdose incident in January 2018; and failing to follow up with immediate psychiatric treatment when it was recommended by Dr. Tarzwell in his April 4, 2018 report.

92 The three-part test for mitigation was set out in *Karim v. Li*, *2015 BCSC 498* at paras. 109-111:

> [109] A plaintiff has an obligation to take all reasonable measures to reduce his or her loss, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, *2010 BCSC 1111* at para. 234.
>
> [110] Once the plaintiff has proven the defendant's liability for his or her injuries, the defendant must prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question and it involves a consideration of all of the circumstances: *Gilbert v. Bottle*, *2011 BCSC 1389* at para. 202.
>
> [111] The three elements to be proven by the defendants were set out in *Frers v. De Moulin*, *2002 BCSC 408* at para. 217:
>
> (a) there were steps that the plaintiff could have taken that might have avoided or reduced the loss;
>
> (b) those steps were reasonable; and
>
> (c) the amount by which those steps would have avoided or reduced the loss.
>
> See also *Chiu (Guardian ad litem of) v. Chiu*, *2002 BCCA 618* at para. 57.

93 Mr. Gill refers to the evidence of Dr. Dresselhuis in his report:

> the contribution of the adverse family dynamics regarding Mr. Gill's passivity regarding complying with the recommended medication trials (albeit a small factor) has to be acknowledged as a relevant one. It is therefore tremendously challenging to opine as to what degree Mr. Gill's mental status would have permitted him to be further down the road to functional and vocational recovery had he consistently participated in medication trials.

94 He refers to the evidence of Drs. Dresselhuis, Tarzwell and Thinda that the challenges associated with identifying the correct medication and dosage is an ongoing one and that medication can sometimes complicate rather than help problems.

95 I consider that Dr. Tarzwell's evidence on this is critical. He said that Mr. Gill experiences passivity to a pathological degree. He has profound loss of motivation and interest. Where this is the case, an individual's symptoms impair improvement in spite of him or her wanting to get better. Dr. Tarzwell continued: "taking a pill is an enormous burden. Taking medication can be an insurmountable obstacle."

96 Mr. Gill took many measures to avoid or reduce his loss for many years: he engaged in exercise, physiotherapy, occupational therapy, counselling, and the residential program.

97 The evidence does not support that had Mr. Gill done the things that the defence says that he ought to have, that his losses would have been mitigated.

98 I do not find that Mr. Gill failed to mitigate his loss.

Summary of Damages

99 Mr. Gill is awarded:

Non-pecuniary damages Past wage loss Future loss of earning capacity Pension and benefits Future care costs Special damages **Total**	$200,000 $210,000 $1,230,000 $390,000 (less contributions) $75,000 $28,550 **$2,133,550**

Costs

100 Mr. Gill is entitled to costs at scale B.

101 If there are issues that I must consider in relation to costs, the parties may schedule a hearing or make written submissions.

J.M. GROPPER J.

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