

CANADA / JUDGMENT

## Kempton v. Struke Estate

2020 BCSC 2094

### COURT

Supreme Court of British Columbia

### DECIDED

31 December 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 2094 Kempton v. Struke Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kempton v. Struke Estate,

2020 BCSC 2094

Date: 20201231

Docket: M176252

Registry: Vancouver

Between:

Alan Whitney Kempton

Plaintiff

And:

Loretta Mae Struke, William Ross Struke, and Bradley Struke and Loretta Mae Struke,  
Administrators of the Estate of William Ross Struke, Deceased

Defendants

Before: The Honourable Mr Justice Crerar

Reasons for Judgment

Counsel for the Plaintiff:

David J. Wallin

Counsel for the Defendants:

Erin K. Haupt

Sabah Christopher

Place and Dates of Trial:

Further Written Submissions

Vancouver, B.C.

June 8 -17, 2020

June 30, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 31, 2020

Table of Contents

Paragraph Range

I. INTRODUCTION

[1] - [7]

II. ISSUES AND OVERVIEW OF POSITIONS

[8] - [13]

III. FACTS

[14] - [43]

A. The plaintiff

[14] - [27]

B. After the accident

[28] - [34]

C. The Worksafe BC claim

[35] - [38]

D. The plaintiff's current circumstances

[39] - [43]

IV. CREDIBILITY AND RELIABILITY

[44] - [48]

A. Law

[44] - [45]

B. Discussion and decision

[46] - [48]

V. MEDICAL EVIDENCE

[49] - [79]

A. Pre-accident health

[49] - [58]

B. The plaintiff's condition immediately after the accident

[59] - [60]

C. The development of the plaintiff's conditions

[61] - [61]

D. Post-accident injuries

[62] - [63]

E. Treatments

[64] - [66]

F. Expert medical testimony

[67] - [71]

G. Prognosis and recommendations

[72] - [79]

VI. CAUSATION

[80] - [93]

A. Law

[80] - [84]

B. Discussion and decision

[85] - [93]

VII. DAMAGES

[94] - [189]

A. Introduction

[94] - [94]

B. Law

[95] - [97]

C. Contingencies

[98] - [101]

D. Overview summary: damages

[102] - [104]

E. Non-pecuniary damages

[105] - [122]

1. Law

[105] - [106]

2. The effect of the accident on the plaintiff's life

[107] - [118]

3. Discussion and decision

[119] - [122]

F. Loss of past and future earning capacity

[123] - [141]

1. Law

[123] - [128]

2. Discussion and decision

[129] - [141]

G. Cost of future care

[142] - [166]

1. Law: general

[142] - [145]

2. Deduction or denial where plaintiff unlikely to use funds

[146] - [152]

3. Discussion and decision

[153] - [166]

H. Loss of housekeeping capacity

[167] - [174]

I. In-trust claim

[175] - [180]

J. Management fees

[181] - [186]

K. Special damages

[187] - [189]

VIII. WCB CLAIM

[190] - [192]

IX. FAILURE TO MITIGATE

[193] - [201]

X. CONCLUSION

[202] - [204]

## **I. Introduction**

- [1] At around 8:20 AM on August 5, 2015, the plaintiff Alan Kempton was driving a 2007 Freightliner tractor-trailer to pick up a load of "hog fuel" (forestry by-products). He was driving eastbound on Ness Lake Road, near Chief Lake Road, northwest of Prince George.
- [2] Travelling westbound, 19-year-old William Struke was driving a 2008 Chevrolet Aveo owned by his mother, the defendant Loretta Mae Struke. He had been drinking with friends the evening before and into the morning and was likely fatigued. The car crossed the centre line into the lane occupied by Mr Kempton's oncoming truck. Mr Kempton braked, and the tractor-trailer locked in a long skid. Mr Struke made no attempt to brake. Just before impact, Mr Kempton saw that Mr Struke's head was slumped over the steering wheel, likely asleep.
- [3] He stared at Mr Struke as the Struke car disappeared under the front of his truck. The police report described the car as it being crushed like an accordion. In accident scene photographs, but for the tires, it is barely recognizable as a vehicle. Mr Struke's body was crushed and torn apart. He was killed instantly.
- [4] The impact threw Mr Kempton to the floor of his truck cab. The truck cab partly buckled in the collision, trapping Mr Kempton inside, wedged on the floor. Through the "ankle window" he could see up close the wreckage of Mr Struke's car.

- [5] Mr Kempton desperately tried to escape, as emergency responders tried to force open the doors. For the five years since the accident, he has been unable to sleep for more than two or three hours at a stretch. Recurring nightmares of the accident and being trapped in the cab cause him to jerk violently in his sleep. He claws the bedroom wall, and his toenails gouge his legs, as he tries to kick free.
- [6] Remarkably, the plaintiff did not suffer serious physical injury in the accident. Diagnosed injuries were limited to bruising on his chest and a friction burn on his calf. He was discharged from hospital later that day.
- [7] A few days later he was given clearance to visit the compound where his truck was being held as part of the post-accident investigation, in order to retrieve his wallet and personal items. He was shocked and disturbed to see Mr Struke's crumpled vehicle beside his truck. He saw -- actual or imagined -- blood and bodily remains in the car. He thought of "that poor kid and his family." He says that this image haunts him almost daily, five years after the accident.

## II. Issues and overview of positions

- [8] In this action, Mr Kempton seeks compensation primarily for his ongoing post-traumatic stress disorder ("PTSD") flowing from the accident. He also seeks compensation for physical injuries to his back, shoulder, and collarbone, which he claims were exacerbated or caused by the accident.
- [9] The plaintiff argues, and his medical experts confirm, that he is unlikely to recover from the PTSD. His prospects for further employment, which he would have continued as long as he physically could, are poor. He seeks \$1 million for loss of future earnings capacity. He also seeks \$500,000 for the cost of future care: psychological and physical therapy that seeks to treat his condition, as well as domestic adaptations to assist in his current lethargic state. In total, he seeks damages of \$2,305,463.
- [10] Liability is notionally but not seriously contested; the defendants provided no cross-examination or argument on this issue. The Court finds that the plaintiff has proven liability on a balance of probabilities. The defendant Mr Struke crossed the line into Mr Kempton's lane, causing the accident. Mr Kempton applied the brakes immediately, leaving a 68-metre-long tire skid mark. There was nothing the plaintiff could do to avoid the accident, given the wholly unexpected actions of Mr Struke on perfectly clear road conditions that morning.
- [11] The defendants also accept that the plaintiff continues to suffer from serious PTSD as a result of the accident. As set out below, I accept that the plaintiff has proven, on a balance of probabilities, that the accident caused his PTSD.

[12] The defendants' case focuses on three issues: whether the accident caused the plaintiff's physical injuries; whether the plaintiff has failed to mitigate his damages by not pursuing or continuing recommended treatments; and the appropriate quantum for each head of damages.

[13] The defendants called no witnesses, factual or expert, in response to the plaintiff's case.

### III. Facts

#### A. The plaintiff

[14] The plaintiff has overcome many challenges in his difficult life, notwithstanding having supportive and capable parents. He suffered from a serious reading disorder as a child. He attended a special school from grade 6. He was then transferred directly into the regular high school, into grade 10. He described this experience as "horrible." He dropped out two weeks later, and remains with the equivalent of a grade 6 education.

[15] Throughout his life, the plaintiff has struggled valiantly to overcome this adversity. He had some successes, albeit at times short-lived, in his work history.

[16] Upon leaving school at age 15, he worked as a fruit picker in the Annapolis Valley. He later worked as a janitor and a hospital porter in Halifax.

[17] He moved to Vancouver, but did not find the city life to be a good fit. He then moved to Winnipeg, where he worked first as a roofer's apprentice and then a roofer himself. He then progressed to construction work, focusing on carpentry. This led to Mr Kempton operating his own construction company, where he built custom residential homes. He says that the business was successful, and that he enjoyed a good reputation in the industry. At one time he employed some 30 people. He operated this business for more than a decade.

[18] Around 2010 he decided to leave the construction industry. He says that he did so because the industry was radically changing, with increased paperwork and regulation, and because he recognized that it would be difficult to continue in that field as he aged.

[19] His plan at that point was to become a truck driver: a field that would allow him to travel and see the outdoors. He described this as a dream job, one that he had contemplated since the 1990s. His plan was to train as a truck driver, and to eventually become an owner/operator of his own truck.

[20] Before pursuing that dream, he worked for three years as a CN Rail subcontractor, clearing rail lines and operating heavy equipment.

- [21] That said, this period between his construction career and his move to British Columbia is somewhat murky. The plaintiff's recall about this period is vague. His 2012 tax return indicates earnings of \$1.00, and his 2013 tax return indicates earnings of \$23,918. His record of employment indicates that he was dismissed from a Thunder Bay drilling company in October 2014. He received employment income benefits for each of 2013, 2014, and 2015.
- [22] In late 2014 he moved to British Columbia. He was initially on employment insurance. The government paid for a two-month commercial truck driving course in late 2014. While waiting for the course to start, he temporarily worked in the construction industry. In spring 2015 he earned his Class 1 commercial truck driver's license. At age 48, he was ready to start a new career.
- [23] In early 2015, he met his future spouse Tammy Elford. Both of them enjoyed outdoors activities, such as driving on back roads, canoeing, hiking, fishing, and gold panning.
- [24] Ms Elford does not work outside of the house, and is presently on disability leave herself.
- [25] Mr Kempton eventually moved in with Ms Elford in Chilliwack. There, he replaced a roof on a building owned by Ms Elford's parents. It was a physically demanding job. In exchange for the work, the parents gave the couple a 25-foot "fifth wheel" that they eventually towed to Prince George, to start a new life together.
- [26] In July 2015, they purchased a property about 40 kilometres outside of Prince George. Mr Kempton's long-term goal, shared by Ms Elford, was to "live off the grid," homesteading in the forest or country.
- [27] In mid-July 2015 they moved to Prince George. Mr Kempton soon found work. Elite Transport, a company focusing on driving for the forest products sector, offered him an entry-level commercial truck driver position, driving a semi-trailer. He says that he loved the work. He had been working for just a few weeks when the accident occurred.

## B. After the accident

- [28] Despite the trauma of the accident, the plaintiff was able to return to work a few days later. He continued to work his regular 12-hour shifts, five days a week, as well as additional shifts whenever offered. He continued to work the same 12-hour driving days that he had before the accident, after the accident, for 10 more months.
- [29] Despite this resilience, Mr Kempton found that he was suffering from creeping psychological stress. He felt that people were avoiding him, while talking about him in the community. Although he was wholly blameless in the accident, he, then and now, blames himself for the accident. In the days leading to the accident, he would start his workday at a Husky gas station by buying coffee there. As a recurring theme, he blames himself for not carrying out that pattern the morning of the accident; that few minutes' delay could have avoided the accident and saved Mr Struke's life. He feels constant guilt for Mr Struke's death, and thinks constantly of its impact on the Struke family.

- [30] He then found driving to be increasingly stressful. He would suffer anxiety attacks while driving, particularly when driving past accident scenes. He exhibited rage towards other drivers, particularly if they drove aggressively or tailgated. At times he experienced flashbacks to the accident. He sometimes would freeze or "black out" while driving his truck; when he regained focus, his knuckles were strained from gripping the wheel. At times he vomited. Several times, he had panic attacks, and drove his personal vehicle off the road.
- [31] The plaintiff had and continues to have recurring nightmares about the accident. Certain sounds, smells, images, or situations serve as triggers, bringing him back to the moment of the accident. These recollections are often accompanied by an audio hallucination of bone hitting metal, although it is unlikely that he would have in fact heard this sound in the accident.
- [32] His doctor advised him to take time off from driving, to deal with the increasing stress. As it turned out, he did not recover, and his anxiety about driving increased. He believed that he could not return to his job as a truck driver. He said that he did not want to risk "killing anyone else" while driving.
- [33] While he could still drive himself short distances, the anxiety increasingly grew. He relied upon his wife for driving; she now drives about 75 percent of the time. When his driving anxiety is acute, he wears a blindfold or sunglasses with blocked-out eyepieces, so that he does not see the road and surroundings as a passenger. He sometimes complements this coping strategy with a mixture of Gravol and vodka. He must schedule his own driving trips to avoid traffic and people.
- [34] In October 2015, two months after the accident, Mr Kempton started work building their house on their Summit Lake property. At first he was able to make progress. He soon began making significant and inexplicable construction errors. For example, he was unable to level the house. He had difficulty focusing on instructions. These impediments in a vocation of 25 years confused him. Ms Elford describes a daily ritual of Mr Kempton trying to restart the project, before screaming and quitting. Over the next month or so, in frustration with his loss of skill, he stopped working on the house altogether.

### C. The Worksafe BC claim

- [35] Mr Kempton filed a claim with Worksafe BC ("WCB"). WCB sent Mr Kempton to several doctors and therapists. Mr Kempton described his experience as "horrible." He complained at trial that he had constantly sought out treatment for his psychological conditions, but only received, in his estimation, a series of "assessments," rather than assistance.
- [36] Throughout his dealings with WCB, Mr Kempton expressed growing frustration. This reached a climax in August 2016, when he called a crisis line. During that call he expressed suicidal thoughts, although he later claimed that he was only speaking out of frustration. The police attended, further bolstering his mistrust of psychological interventions.

- [37] In the end, as described by Mr Kempton, WCB gave up on him and "pensioned him off," with a monthly payment of \$4,100.
- [38] On September 1, 2017 WCB found that Mr Kempton's PTSD could no longer be clinically treated, and had become permanent. It noted that Mr Kempton could no longer work in commercial driving or any work where a temporary lapse in concentration, judgement, or focus could harm himself or others. His condition also limited him from working with others where there exists a high or likely risk of conflict. On September 17, 2018, WCB determined Mr Kempton to be "competitively unemployable."

#### **D. The plaintiff's current circumstances**

- [39] Mr Kempton claims that in the years following the accident and his departure from work, living in northern British Columbia became increasingly untenable. He found it stressful to drive to and from Prince George for shopping. He felt that he could not deal with people, while shopping or otherwise.
- [40] In 2018, feeling that his time in British Columbia was cursed, and worried about getting into another accident, Mr Kempton and his wife moved across the country. Mr Kempton now lives in a semi-hermit state at the end of Digby Neck: a thin peninsula jutting off the northwest coast of Nova Scotia. His new home is some 50 kilometres from the nearest town, Digby (population 2000), and 3 hours from Halifax. Mr Kempton described it as "a forgotten part of Canada." He lives there in part to address his condition: he sees few people and hears few cars. At the same time, even before the accident he wished to live far away from civilization. As a result of living so remotely, there are limited resources for psychological and counselling services.
- [41] Although he is originally from Nova Scotia, and his mother lives a few hours' drive away, he has not contacted her. She apparently does not know that he lives nearby.
- [42] He spends most of his life indoors and listless. His wife does most household tasks, from laundry to finances.
- [43] While Mr Kempton weighed 170 pounds before the accident, he now weighs 235 pounds. He believes that his inactivity and weight gain has prompted his latent pre-and post-accident injuries to become manifest, such that he feels pain all the time, and all over his body. He identifies his sore knees, and his sore "as hell" back, as the primary manifestations.

#### **IV. Credibility and reliability**

## A. Law

- [44] The injuries in this case are psychological and physical soft tissue injuries. The expert medical reports adduced in this trial by the plaintiff all rely significantly upon the plaintiff's self-report of physical and psychological pain. In such circumstances, credibility findings assume a heightened importance.
- [45] In *Karim v. Li*, 2015 BCSC 498, Abrioux J (as he then was) usefully summarizes the principles to be taken into account in assessing credibility where the plaintiff's complaints are largely subjective:
- [88] As Madam Justice Dillon noted in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296:
- [186] 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* (1951), 1951 (BC CA), [1952] 2 D.L.R. 354 (B.C. C.A.) [*Faryna*]; *R. v. S. (R.D.)*, 1997 (SCC), [1997] 3 S.C.R. 484 (S.C.C.) at para.128). 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).
- [89] In addition, the following principles should be taken into account by the trier of fact:
- no one can expect compensation in the absence of convincing evidence that complaints of pain are true reflections of a continuing injury: *Price v. Kostyba* (1982), 70 B.C.L.R. 397 at 399 (S.C.);
  - every injured person has a different understanding of his or her own complaints and injuries and it falls to judges to translate injuries to damages: *Price* at 397;
  - where there is little or no objective evidence of continuing injury and where complaints of pain persist for long periods extending beyond the expected resolution, the court should be exceedingly careful to assess assertions in light of the surrounding circumstances including the medical evidence: *Price* at 399; *Tai v. De Busscher*, 2007 BCCA 371 at para. 41;
  - it is the doctor's function to take the patient's complaints at face value and offer an opinion based on them and it is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent

with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room: *Edmondson v. Payer*, 2011 BCSC 118 at para. 77, *aff'd* 2012 BCCA 114; and

- in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries: *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1127 at para. 73, *aff'd* 2011 BCCA 516.

## B. Discussion and decision

- [46] The defendants argue that while Mr Kempton is genuinely trying to present accurate evidence, he is an unreliable witness: his present mental state and his fixation on the accident as the source of his present difficulties should prompt the Court to receive his evidence with caution.
- [47] At the same time, the defendants called no witnesses to contradict Mr Kempton's testimony. There were no contrary medical reports. There were no expert witnesses, medical or otherwise, to contradict Mr Kempton's self-reported conditions. Nor did they call lay witnesses or surveillance video that could have contradicted the plaintiff's complaints with evidence of normal functioning.
- [48] The Court is thus faced with the plaintiff's own uncontradicted evidence, corroborated by the evidence of his wife, Ms Elford, and confirmed generally by the three medical experts and the occupational therapist. Subject to the limitations and exceptions below, I generally found both Mr Kempton and Ms Elford to be credible and reliable witnesses, and accept their testimony.

## V. Medical evidence

### A. Pre-accident health

- [49] The plaintiff suffered from both physical and psychological conditions before the accident.
- [50] Psychologically, he has a history of anxiety, panic, and depression, with psychiatric treatment, including psychiatric medications, before 2012. An acrimonious divorce flared up depressive symptoms in 2008. In March 2012 he had a suicidal crisis after an arrest for domestic violence. He was briefly admitted for psychiatric observation.
- [51] Physically, he has suffered from the bodily decline of a life spent in physical labour. The plaintiff describes his pre-accident physical condition as "not perfect." He admitted to regular lower back pain. But he considered his aches to be the natural wear and tear of an aging 47-year-old construction worker. He claims that he managed it before the accident and that this could have continued but for the accident.

- [52] He has long-standing pre-accident chronic mid and lower back pain, dating back at least to 1997. He attributed this, again, to his long years of physical labour. He described this pre-accident back pain as constant, at a mild intensity. Pre-accident epidural injections and other treatments, including three years' attendance at a pain management clinic, provided little improvement. X-rays taken the time of the accident revealed a congenital degenerative disc condition in the cervical and lumbar regions of his spine. He claims, however, that his back condition was stable over time and non-disabling.
- [53] The chronic back pain and other pain disrupted his sleep.
- [54] Throughout his life he has had several physical fights. One led to a "boxer's fracture" in his finger.
- [55] In 2009 he suffered a severe crush injury to his left hand, requiring several operations, including the insertion of plates and screws. This injury caused constant but non-disabling pain.
- [56] From 2009 until 2019 he took the opioid hydromorphone, which he said was for his hand, and not for his back. He took up to eight milligrams a day. Dr Laura Chapman, a consultant psychiatrist for WCB, diagnosed him with an opiate use disorder in her August 4, 2017 report. I cannot rely upon this diagnosis as evidence, as Dr Chapman was neither called as a witness, nor provided an expert report: *Firman v. Asadi*, 2018 BCSC 2437 at para 29. That said, there is sufficient evidence, in his medical records, as well as in the expert reports provided by the plaintiff himself, to indicate that the plaintiff has likely suffered from an opioid addiction to some degree, both before and after the accident. The evidence also indicates that the hydromorphone likely masked more serious pre-existing back pain and other physical conditions, than Mr Kempton perceived at that time.
- [57] In 2019 the hydromorphone was replaced with gabapentin, which provides less effective pain relief. He also takes medication (Sotalol) for an atrial flutter in his heart, and congestive heart failure. He candidly admits that "I have no idea what I'm taking."
- [58] Throughout his life he has smoked approximately one pack of cigarettes a day. Even before his increased post-accident alcohol intake, he had a history of difficulties with alcohol, leading to fights and relationship conflicts while drinking.

## **B. The plaintiff's condition immediately after the accident**

- [59] Unfortunately, the medical evidence on the development of his physical and mental injuries is less complete than would be usual in a motor vehicle case.
- [60] The plaintiff testified that he felt "sore all over" after the accident. He had slashes on his legs, apparently from trying to force his way out of the cab. He candidly admitted that these soon healed themselves. He also had bruising on his chest, and a sore collarbone. He speculates presently that the shock of the accident caused the seatbelt strap to break his collarbone. But the post-accident medical records do not support this theory. X-rays taken the day of the

accident revealed no fracture or any damage to the chest, pelvic, or the cervical, thoracic, or lumbar spinal regions. The plaintiff was released from hospital the day of the accident, and started work again a few days later, with no apparent physical impediments.

### C. The development of the plaintiff's conditions

- [61] Because of Mr Kempton's hermit-like existence, there are few objective indications of the progression of his injuries between the accident and present day. His reports in testimony and to the physiatrist Dr Waseem, are that his physical pain, particularly his mid and lower back pain, have become much worse since the accident.

### D. Post-accident injuries

- [62] In early October 2017 Mr Kempton fell 9 feet while working on his roof. He was treated at a hospital in Prince George. A year later, in November 2018, Mr Kempton went to Digby General Hospital seeking a refill of his hydromorphone. The medical notes indicate that he only attributed his back pain to the fall, and not to the accident. There is no suggestion that the fall was caused by any aspect of the injuries suffered in the accident.
- [63] Dr Waseem was of the opinion that the 2017 fall did not result in any new injuries, but permanently worsened the back symptoms caused by the accident. Dr Waseem's comment in this regard is terse, and it is not clear whether he was fully aware of the significant height of the fall.

### E. Treatments

- [64] The medical experts note that Mr Kempton's treatments since the accident have been minimal. Dr Viljoen notes that there has been almost no psychiatric intervention. Dr Waseem notes in his report that treatments for his physical injuries have been "non-existent."
- [65] Dr Saif referred Mr Kempton to a counsellor to assist him with his PTSD and pain management. Unfortunately, Mr Kempton stopped attendance after one session, because the counsellor "rubbed [him] the wrong way." Other attempts at therapy in both British Columbia and Nova Scotia also soon ended because Mr Kempton did not trust or form a good rapport with the therapists.
- [66] His attempts to obtain psychological treatment and Digby have been similarly unsuccessful. He has seen one or two doctors and therapists, but only attended once or twice. He is not actively seeking counselling at present. That said, he testified that he is open to counselling if the opportunity arises with a counsellor he can trust.

## F. Expert medical testimony

- [67] The plaintiff presented expert reports from three medical professionals: Dr Soma Ganesan (psychiatrist); Dr Hendre Viljoen (neuropsychologist); and Dr Zeeshan Waseem (physiatrist).
- [68] Drs Ganesan and Viljoen both diagnosed the plaintiff with "severe" PTSD. Dr Viljoen also diagnosed Mr Kempton with a chronic and severe major depressive disorder. Dr Ganesan preferred to describe the depression and anxiety disorder as "cluster manifestations" of the PTSD.
- [69] Dr Ganesan noted that the plaintiff met all major criteria for a diagnosis of PTSD in the Diagnostic and Statistical Manual of Mental Disorders ("DSM-5"), and further noted that these symptoms beset the plaintiff almost immediately after the accident:
- 1) Direct experience of a traumatic event;
  - 2) Recurrent involuntary and intrusive memories of the traumatic event;
  - 3) All efforts to avoid distressing memories, thoughts or feelings about, or closely associated to traumatic events. He used a lot of alcohol to block his memory and to help him sleep. He also used the environment to assist him in avoiding the intrusive thoughts by living in smaller areas and avoiding human contact;
  - 4) All efforts to avoid external reminders (people, places, conversations, activities, objects and situations) that arouse distressing memories, thoughts or feelings about, or closely associated with traumatic events;
  - 5) He had negative alteration in cognition and mood associated with the traumatic event;
  - 6) Persistent negative emotional state (fear, horror, anger, guilt or shame);
  - 7) Markedly diminished interest or participation in significant activities;
  - 8) Feelings of detachment or estrangement from others;
  - 9) Persistent inability to experience positive emotion, inability to experience happiness, satisfaction or a loving feeling;
  - 10) Irritable behaviour and anger outburst with little or no provocation, possibility expressed as verbal or physical aggression towards other people or objects;
  - 11) Hypervigilance;
  - 12) Exaggerated startle response;
  - 13) Problems with concentration; and
  - 14) Sleep disturbances.

- [70] Dr Waseem opined that Mr Kempton sustained various physical injuries as a result of the accident. These injuries focus on the thoracic and lumbar spine. While Mr Kempton had pre-existing chronic lower back pain, it was generally manageable. The accident aggravated that condition, and has resulted in chronic pain throughout his back. At present, Mr Kempton also reports pain in his right shoulder, left clavicle, throughout the upper and lower back, left hand, right knee, and both ankles. Based on Mr Kempton's self-report, Dr Waseem notes that the pain is constant and severe in intensity. Those symptoms had persisted since the accident and have become "much worse" over time.
- [71] All three medical experts agree that the PTSD and other psychological symptoms exacerbate his pain and physical symptoms, which in turn, in a vicious cycle, exacerbate his psychological infirmities. His PTSD and general lack of motivation leads to lack of exercise and drinking, leading to greater physical decline, and thus denial of a potential path to partial physical and psychological rehabilitation.

#### G. Prognosis and recommendations

- [72] All three medical experts provided a pessimistic prognosis for Mr Kempton's recovery and functioning.
- [73] Dr Viljoen found that Mr Kempton's "high levels of emotional distress and significant persisting emotional and behavioural dysfunction, together with persisting cognitive limitations, and the prognosis for a successful return to his preinjury vocational potential, social/interpersonal functioning, or quality of life appears to be very guarded indeed."
- [74] Dr Ganesan noted that Mr Kempton's comorbid psychiatric diagnosis makes Mr Kempton's accident-related psychiatric symptoms challenging to treat. This state also results in a more negative prognosis with respect to his chances for improvement.
- [75] With respect to his physical recovery, Dr Waseem concluded that "the chances for complete recovery are poor." Even if treatment is successful, it will require treatment for an extended period of time, potentially indefinitely.
- [76] Dr Ganesan recommended more effective pharmaceutical treatment for mixed depression and anxiety treatment. He specifically recommended Pristiq and Fetzima. If Mr Kempton benefits from those medications, he should stay on them for the rest of his life.
- [77] Dr Ganesan also recommended more intensive PTSD treatment, provided by a qualified psychologist or psychiatrist, weekly or bi-weekly. He disagreed with the earlier assessment of the WCB physician, Dr Chapman, that psychological treatment would likely be futile. He envisions a step-by-step process whereby Mr Kempton first learns to trust his counsellor, followed by regular one-on-one psychological sessions over one or two years, leading possibly to group therapy treatment for PTSD.

- [78] Dr Ganesan opined that physical treatment is a critical complement to psychiatric treatment. He thus recommended more effective treatment for pain management, including referral to a pain specialist. Specifically, he advised that Mr Kempton be weaned off hydromorphone, to be replaced with a more appropriate medication to assist with pain and sleep. As it turns out, it appears that Mr Kempton tapered himself off hydromorphone after meeting Dr Ganesan.
- [79] Finally, Dr Ganesan noted that given the profundity and severity of Mr Kempton's conditions, his PTSD and depression may well get worse, rather than better, even with further treatment.

## VI. Causation

### A. Law

- [80] The law of causation is well established. The plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. If the defendant's negligence is one cause of an injury, or if it exacerbates or aggravates an existing condition, then the defendant is liable for causing the resulting injury: *Athey v. Leonati*, [1996] 3 SCR 458 at para 47. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimus*.
- [81] Causation need not be determined by scientific precision: *Athey* at paras 13-17. The "but for" causation test must be applied in a robust, common sense manner. The inference of "but for" causation usually flows without difficulty from proof of negligence: *Clements v. Clements*, 2012 SCC 32 at paras 9-10.
- [82] The primary test for causation asks: "but for the defendant's negligence, would the plaintiff have suffered the injury?" This test recognizes that compensation for negligent conduct should only be made where there exists a substantial connection between the injury and the defendant's conduct: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras 21-23.
- [83] Tortfeasors must take their victims as they find them, and are liable even if the plaintiff's injuries are more severe than they would be for the average person: the thin skull rule: *Athey* at para 34.
- [84] In determining causation, caution is required before drawing any inference that because one event follows another in time, the first event is the cause of the second: *White v. Stonestreet*, 2006 BCSC 801 at paras 70-74.

### B. Discussion and decision

- [85] While accepting that the accident caused the PTSD, the defendants argue that the plaintiff did not suffer any physical injuries as a result of the accident beyond initial stiffness, soreness, and a friction burn to his leg. They note that the plaintiff continued to work for 10 months after the accident, and that in 2016, the plaintiff worked on building his house near

Prince George. They argue that his present pain is attributable to pre-accident degenerative back conditions, as well as the October 2017 nine-foot fall from his roof. Further, the pre-accident pain is more noticeable following the plaintiff's switch from hydromorphone.

- [86] Unfortunately, the defendants have not presented any medical expert reports that would assist the Court in weighing the affirmative expert medical reports confirming that the accident did cause, in the sense of exacerbation, the plaintiff's physical complaints. Dr Waseem opines that the accident exacerbated pre-existing injuries, and that the effect of the fall was to exacerbate the combined effects of these two causes.
- [87] The plaintiff has established causation on a general level for his psychological conditions and, to some extent, his physical conditions. Each of the three medical experts opined that the injuries complained of are likely causally linked to the accident.
- [88] With respect to the physical conditions, Mr Kempton has established that the accident did exacerbate his pre-existing back condition. There are three significant qualifications with respect to these physical injuries, however.
- [89] First, Mr Kempton had significant pre-accident infirmities with much of his body after 30 years of physical labour. Second, due to his changes in residence, general lack of a family physician, and present hermit-like existence, the Court lacks a typical medical history, through objective medical reports, for Mr Kempton. Third, as part of his overall collapse into despair following the accident, Mr Kempton appears to attribute all of his physical infirmities to the accident, with an unreliable ability to distinguish between his condition before and after the accident, and the extent to which those injuries would be manifest even without the accident. An example is his claim that he broke his clavicle/collarbone in the accident, although an x-ray taken that day revealed no fracture.

- [90] Dr Waseem's report alludes to all three of these difficulties:

He has right shoulder impingement, left clavicle deformity, probably right knee osteoarthritis and bilateral ankle ATFL strain. It is not clear to what extent these conditions are related to the accident. Although Mr. Kempton indicated these complaints arose from the accident, the medical records do not specifically make any specific mention of these problems.

- [91] In this, I agree with the defendants that the medical and other evidence does not establish on a balance of probabilities that the accident caused or exacerbated Mr Kempton's conditions in his right shoulder, clavicle, left hand, right knee, and ankles. Those conditions are either clearly attributable to an event unrelated to the accident (such as the hand crush injury), or more likely the natural consequences of a lifetime of physical labour.
- [92] I accept Dr Waseem's opinion that the accident exacerbated Mr Kempton's back condition. As noted above, however, it is not clear that Dr Waseem had received sufficient information about Mr Kempton's nine-foot fall to weigh the relative influence of that significant event on his current complaints. Further, the plaintiff's ability to sit 12-hour days in a truck driver's seat for 10 months after the accident indicates that his back conditions are not as

attributable to the accident as urged by the plaintiff. I also agree that the plaintiff's complaints of increased back pain are likely attributable in part to going off hydromorphone.

[93] The accident's physical effects thus are thus limited to the exacerbation of his pre-existing back conditions. The more important and clear physical result of the accident finds its roots in the PTSD and depression: the diminution of his mental ability to manage pain overall, including with respect to his pre-existing injuries. As per Athey, it is enough to find that the accident exacerbated his pre-existing back condition, such to establish causation on a balance of probabilities based on the evidence before the Court. Instead, the three difficulties canvassed above influence the determination of damages: what is the appropriate award to compensate the plaintiff for the loss of the physical state he would have likely been in but for the accident?

## VII. Damages

### A. Introduction

[94] The plaintiff seeks the following damages:

Head of damages

Amount of claim

General (non-pecuniary) damages

\$250,000

Past loss of earnings/loss of opportunity

\$209,541

Loss of future earning capacity/loss of opportunity

\$1,000,000

Future costs of care

\$500,000

Loss of housekeeping capacity

\$50,000

In trust claim for Tammy Elford

\$125,000

Management fee

\$150,000

Special damages

\$20,922

Income Tax Gross Up

to be assessed\*

COIA interest (on past wage loss and special damages claims)

to be assessed\*

TOTAL

\*not included in total

\$2,305,463\*

## B. Law

[95] While causation concerns the legal cause of the plaintiff's injuries, the assessment of damages measures the extent of their loss: that is, the difference between the plaintiff's life as it is, and plaintiff's life as it would have been, but for the negligence that caused those injuries. Damages awards seek to place the plaintiffs in the positions they would have been but for the defendants' negligence: no better or worse. The defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would likely have experienced regardless of the defendant's negligence. The defendant is liable for the additional damage but not the pre-existing damage: *Athey v. Leonati* at paras 32-35.

[96] As McLachlin CJC stated in *Blackwater v. Plint*, 2005 SCC 58 at para 78:

Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: [*Athey v. Leonati*].

[97] As L. Warren J explains in *Abbott v. Gerges*, 2014 BCSC 1329:

[55] The fundamental principle in assessing tort damages is that the quantum should be that which is required to place the plaintiff in her original position; that is, the position she would have been in absent the defendants' negligence: *Athey*, at para. 32. This requires a determination of the plaintiff's position after the negligence and an assessment of what the original position would have been. The difference between these positions represents the quantum of the defendants' liability: *Athey*, at para. 32.

- [56] The defendants need not put the plaintiff in a position better than her original one and should not compensate the plaintiff for any damages she would have suffered anyway: *Blackwater v. Plint*, 2005 SCC 58, at para. 78. In determining the plaintiff's original position, it may be necessary to reflect any debilitating effects of a pre-existing condition, or a measurable risk that such a condition would have detrimentally affected the plaintiff in the future regardless of the defendant's negligence. This is the crumbling skull rule and, where applicable, it results in the damages award being reduced to reflect risks inherent in the plaintiff's pre-accident condition: *Athey*, at para. 35.
- [57] As explained in *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670, at para. 48, a measurable risk need not be proved on a balance of probabilities:

Whether manifest or not, a weakness inherent in a plaintiff that might realistically cause or contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in the award. Moreover, such a contingency does not have to be proven to a certainty. Rather, it should be given weight according to its relative likelihood.

### C. Contingencies

- [98] In *Athey*, supra, Major J provided guidance on adjustments for contingencies. He contrasted past events, which must be proven on a balance of probabilities and are thereafter treated as certainties (at para 28), with hypothetical and future events:
- [27] Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Mallett v. McMonagle*, [1970] A.C. 166 (H.L.); *Malec v. J.C. Hutton Proprietary Ltd.* (1990), 160 C.L.R. 638 (Aust. H.C.); *Janiak v. Ippolito*, [1985] 1 S.C.R. 146. For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Schrump v. Koot* (1997), 18 O.R. (2d) 337 (C.A.); *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).
- [99] The extent, if any, to which awards should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para 253.

- [100] None of the three medical experts provided an optimistic prognosis. In some motor vehicle accident cases, experts providing opinions will also recommend treatments, and, in recommending those treatments, will note their likely success: see, for example, *Tsonis v. Mizuguchi*, 2020 BCSC 643 at paras 150-155. In this case, however, the three medical experts offer no substantive glimmer of hope or silver-bullet cure. They identify no specific treatment that will likely cure the plaintiff in the long or short-term. The recommended treatments may improve the plaintiff's life but will not likely cure his PTSD. Again, a medical report from the defendants would have been useful in this regard if the defendants wished to press this point.
- [101] Insofar as the medical experts do recommend treatments that could in the long-term provide some relief to plaintiff and allow him to function, that possibility will be considered under the appropriate heads of damage, particularly loss of housekeeping capacity.

#### **D. Overview summary: damages**

- [102] As stated, the plaintiff has convinced the Court that his present conditions are largely attributable to the accident, and that he is entitled to damages.
- [103] The Court must also consider the physical and psychological state the plaintiff would likely be in but for the accident. The Court should not award damages based upon the assumption that the accident deprived the plaintiff of an otherwise perfect future, in mind, body, and employment. Even without the accident, the plaintiff's pre-accident history, including his excessive reliance on alcohol and narcotics, history of violence, physical and psychological challenges, sleep difficulties, interpersonal problems, inconsistent employment history, learning disabilities, and limited education, would not presage a stable or optimistic future. Before the accident, he suffered from significant pain in his back, hand, knees, and ankles, and he would suffer these complaints regardless of the accident. Further, a significant portion of his present physical complaints are also likely exacerbated by his nine-foot fall, and would have manifest themselves regardless of the accident.
- [104] Accordingly, the plaintiff has not convinced the Court that his present and future state would be as optimistic as argued by counsel had he not suffered the accident. Therefore, his physical and psychological and employment challenges, unconnected to the accident, serve as significant considerations in reducing the damages claimed, as set out below.

#### **E. Non-pecuniary damages**

##### **1. Law**

- [105] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras 188-189.

[106] Stapley v. Hejslet, 2006 BCCA 34 at para 46, sets out a non-exhaustive list of factors guiding the assessment 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;
  - 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;
  - j. all within the consideration that plaintiff's stoicism should not lessen a damages award.
2. The effect of the accident on the plaintiff's life

[107] The accident has affected every aspect of Mr Kempton's life. It has rendered a vital, engaging, hard-working man into a broken and lethargic shell of his former self. Mr Kempton's present despair was conveyed through his own testimony, through the testimony of his wife, and through the testimony of the medical experts who assessed him. It was also conveyed through his presentation during his lengthy testimony at trial. At all times, he seemed to be suffering from physical and emotional pain, with scarcely repressed anger. His appearance was disheveled. His affect was flat; his tone was blunt. His eyes were dark and darting. His testimony was often meandering and distracted. He had to ask for questions to be repeated. He would lose track of his answers halfway through and have to restart.

[108] As set out above, his recurring nightmares and pain grant him only three or four hours of broken sleep each night. This prolonged lack of sleep leaves him physically and mentally fatigued. Between his dark thoughts whilst awake, and his nightmares while sleeping, he is more sleep-deprived than before the accident. He never wakes up feeling rested. He takes Nyquil, beer, wine, and cannabis cookies to fall asleep.

[109] His alcohol consumption has increased significantly since the accident, particularly aimed at, in his mind, helping him sleep. He drinks one or two bottles of wine per day, or about a dozen beers. Drs Ganesan and Viljoen note that self-medication through alcohol is a typical manifestation in PTSD.

- [110] He and his wife testified that his personality has changed significantly. They confirm that the personality changes came immediately after the accident. Before the accident, Mr Kempton was engaging, and enthusiastic, with a good sense of humour. After the accident, he grew increasingly impatient, with a short temper. He suddenly erupts in anger toward other people, particularly when driving. Ms Elford described life as "walking on eggshells," to avoid angering Mr Kempton. She listens patiently to his rants and outbursts, and does her best to calm him down.
- [111] This personality change has affected his relationship with his wife. Intimate relations have more or less ended since the accident.
- [112] He has significant memory lapses. While talking, he often loses focus and forgets the topic. This condition manifest itself in repeated and genuine fashion during his trial testimony.
- [113] Before the accident, Mr Kempton was an avid outdoorsman, spending hours pursuing activities such as hunting, trapping, fishing, kayaking, canoeing, power boating, motor biking, and backroadng: that is, exploring backroads on a four-wheel drive vehicle. He now rarely leaves the house, and has no energy or enthusiasm for outdoor activities, or indoor activities for that matter.
- [114] He cannot even turn to television as an alternative form of distraction: any depiction of violence or a car accident on the news or in a programme will serve as a trigger.
- [115] Before the accident, Mr Kempton was hard-working. He took pride in his work, with an exacting attention to the details of his carpentry and construction. While he built custom houses before the accident, he is unable to build a window. As set out above, he had to abandon work on his house. He lacks the focus, confidence and energy to perform tasks at home or in the yard. He can no longer focus on or complete even the simplest of jobs. He cannot focus on tasks, and cannot remember where he has left his tools.
- [116] He states that he no longer feels happiness or joy. He describes his life as "useless." He has lost all confidence. His loss of independence and pride in his industry imposes a further and compounding emotional stressor on him.
- [117] This loss of self-esteem, coupled with his injuries, coupled with his fatigue, coupled with his lack of focus, renders him unable to do the simplest of household tasks. He has been unable to chop wood or cut grass, and his house is a mess.
- [118] As set out above, he has become a recluse. He feels anxiety around other people. He runs away when the neighbours approach. He has not even contacted his mother since moving back to Nova Scotia. He feels shame at how he would present to her.

### 3. Discussion and decision

- [119] The non-pecuniary damages awards in the cases cited by the parties range from \$144,000 (defendants) to \$265,000 (plaintiff), with a median of approximately \$200,000.

[120] The cases closest to the present facts and injuries, specifically the likely life-long and irremediable transformation of the plaintiff's entire life due to PTSD and depression, are as follows:

- a) *Hans v. Volvo Trucks North America Inc.*, 2016 BCSC 1155, aff'd 2018 BCCA 410 (\$265,000; \$287,992 when adjusted for inflation): the plaintiff was a decade younger than Mr Kempton, and had a more stable business and personal history and future. Further, the accident inflicted more severe injuries on the plaintiff, such that his wife effectively had to babysit him, including reminders to tend to basic hygienic needs. The plaintiff had also made several suicide attempts. The descriptions of Mr Hans ("emotionally and socially a shell of his former self," "isolation," "withdrawal," "lethargy" and "despair:" see BCCA at para 14) apply to Mr Kempton, albeit to a lesser degree.
- b) *Chowdhry v. Burnaby (City of)*, 2008 BCSC 1337 (\$200,000; \$237,627 when adjusted for inflation): the plaintiff's traumatic brain injury left him listless and in despair, in contrast to his vital pre-accident state. The plaintiff had a more stable business and personal history and future than Mr Kempton. At the same time, the plaintiff was a decade older than Mr Kempton.
- c) *Gill v. Apeldoorn*, 2019 BCSC 798 (\$200,000): the plaintiff was close in age to Mr Kempton. At the same time, the accident in question was not particularly inherently traumatic, and the plaintiff was not rendered as incapacitated as Mr Kempton.
- d) *Redmile v. Beaulieu*, 2019 BCSC 1571 (\$180,000): the plaintiff suffered PTSD after witnessing the death of the defendant. The plaintiff was a decade younger than Mr Kempton. At the same time, the PTSD diminished, rather than obliterated, his enjoyment of work and social life.
- e) *Godbout v. Notter*, 2018 BCSC 1043 (\$175,000, before a 10 percent reduction for failure to mitigate): the plaintiff was similar in age and occupation to Mr Kempton. At the same time, as with Redmile, the PTSD did not transform the plaintiff's life to the same extent as in the present case.

[121] With an eye to the Stapley factors, and the most applicable cases, the Court finds that \$225,000 would be an appropriate base for non-pecuniary damages.

[122] The Court declines to significantly reduce this amount based upon his pre-accident conditions. Mr Kempton was generally able to cope with his pre-accident challenges, and the trauma of the accident clearly pushed him over the edge to a state of overall practical dysfunction. That said, absent the accident, there existed a real risk that some other trigger or accident would have reduced him to a similar psychologically disabled state. With this risk of mind, I reduce the non-pecuniary damages to \$200,000.

## F. Loss of past and future earning capacity

### 1. Law

- [123] The parties largely agreed on the applicable legal principles guiding the court's assessment of loss of past and future earning capacity and opportunity.
- [124] Compensation for past loss of earning capacity is based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para 30; *M.B. v. British Columbia*, 2003 SCC 53 at para 49.
- [125] Insofar as possible, the plaintiff should be put in the position he or she would have been in, but for the injuries caused by the defendant's negligence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para 185. The essential task of the court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para 32.
- [126] *Falati v. Smith*, 2010 BCSC 465 at para 41, aff'd 2011 BCCA 45, sets out the principles which inform the assessment of loss of earning capacity:
- The task of a court is to assess damages, rather than to calculate them mathematically - *Mulholland (Guardian ad litem of) v Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43;
  - The standard of proof is not the balance of probabilities; the plaintiff need only establish a real and substantial possibility of loss, one which is not mere speculation, and hypothetical events are to be weighed according to their relative likelihood - *Athey v Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, at para. 27;
  - Allowances must be made for the contingencies that the assumptions upon which an award is based may prove to be wrong - *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.);
  - Any assessment is to be evaluated in view of its overall fairness and reasonableness - *Rosvold*, at para. 11.
- [127] A claim for loss of future earning capacity raises two key questions: (1) has the plaintiff's earning capacity been impaired by his or her injuries? And, if so, (2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not on an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 26 BCLR (3d) 353 (SC); *Pett v. Pett*, 2009 BCCA 232.
- [128] *Savage J* (as he then was) summarises the principles for assessing loss of future earning capacity in *Parker v. Lemmon*, 2012 BCSC 27 at para 42:
- (1) A plaintiff must first prove there is a real and substantial possibility of a future event leading to an income loss before the Court will embark on an assessment of the loss;
  - (2) A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation;

- (3) A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having returned to his or her employment;
- (4) An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss;
- (5) It is not the loss of earnings but rather the loss of earning capacity for which compensation must be made;
- (6) If the plaintiff discharges the burden of proof, then there must be quantification of that loss;
- (7) Two available methods of quantifying the loss are (a) an earnings approach or (b) a capital asset approach;
- (8) An earnings approach will be more useful when the loss is more easily measurable;
- (9) The capital asset approach will be more useful when the loss is not easily measurable.

## 2. Discussion and decision

[129] The plaintiff seeks \$209,541 for past loss of earning capacity and opportunity, and \$1,000,000 for loss of future earning capacity and opportunity.

[130] The plaintiff relies upon the report of Darren Benning, an economist. Mr Benning worked with the assumption that Mr Kempton would have continued working as a commercial truck driver absent the accident. Mr Benning sets out three scenarios. The first is a continuation of Mr Kempton's job at the time of the accident: working 60 hours a week, at a wage rate of \$24.50 per hour. Alternative scenarios have Mr Kempton switching to the more lucrative roles of an oil patch truck driver (\$110,000 to \$125,000 per year) or a logging truck driver (\$100,000 to \$115,000 per year) in 2017. Under each scenario, he would work full-time to age 65, and half-time thereafter, to age 70.

[131] Those scenarios result in a present value of future earnings from \$852,541 to \$1,147,890.

[132] The plaintiff argues that the scenarios for loss of past and future earning capacity are conservative. They emphasize that Mr Benning was not asked to calculate a more optimistic and lucrative scenario based upon Mr Kempton becoming a logging truck owner/operator, even though Mr Kempton had in his earlier career owned his own building and carpentry company.

[133] The plaintiff argues that despite early adversity, Mr Kempton has worked hard throughout his life, and that there is no reason to think that he would not continue to work, and to continue increasing his earnings in the five years since the accident, and thereafter over the next 25 years of employment, as he gained trucking experience.

[134] In contrast to this previous future trajectory, the plaintiff is now likely wholly unemployable for the rest of his life. The prognoses of the three medical experts are very guarded, and the treatments recommended are envisioned as curative but palliative, to use

the phrase of the plaintiff. Neither Dr Viljoen nor Dr Ganesan anticipate that the plaintiff will be able to return to truck-driving, or any work, now, or in the foreseeable future. In his report, Ralph Cheesman, an occupational therapist, concluded that Mr Kempton is no longer competitively employable due to his cognitive, emotional, and social difficulties. It would be unsafe and unreliable to place Mr Kempton in a driving occupation. Mr Kempton does not possess the necessary functional capabilities to work presently, or in the foreseeable future. This matches the earlier assessment of WCB.

- [135] The plaintiff stresses that Mr Kempton, as a direct result of the injuries attributable to the accident, has been rendered significantly less capable overall of earning income from all kinds of employment. His severe PTSD has almost wholly destroyed, in the words of the plaintiff, "his most impressive capital asset: his determination to work hard."
- [136] The defendants advance minimal argument in response to this, the largest aspect of the plaintiff's claim. The written argument pointed to no evidence in this regard. The written argument consisted of three paragraphs on a single page, most of which was occupied by a long quotation from *Perren v. Lalari*, 2010 BCCA 140 at paras 30-32 for the uncontroversial proposition that a plaintiff must always prove that there is a real and substantial possibility of a future event leading to an income loss.
- [137] The plaintiffs have more than satisfied this requirement, based on the evidence of Mr Kempton and Ms Elford, as confirmed by the three medical experts and the occupational therapist.
- [138] I am also satisfied that Mr Benning's scenarios are reasonable, and indeed conservative, based upon the assumption that Mr Kempton would have continued to work as a truck driver from 2015 until his retirement at age 70. I adopt and rely upon those scenarios, and accept the plaintiff's suggested reconciliation of those scenarios at \$1,000,000 as an appropriate baseline figure before consideration of contingencies.
- [139] That said, the Court must also consider the significant risk that factors wholly unrelated to the accident would interrupt or limit the 30-year truck-driving career upon which Mr Benning bases his scenarios. Mr Kempton would have faced a greater risk of unemployment or early retirement than the average person on which Mr Benning bases his negative labour market contingencies within his calculations. Mr Kempton's pre-existing chronic back problems, along with other physical ailments, cast some doubt on his envisioned 30-year career driving long hours seated behind a wheel. His ongoing problems with medications and alcohol would also have affected his ability to function in this high-focus occupation. His history of interpersonal and anger difficulties might also have endangered such a career.

[140] While he has no doubt worked hard in the past, he has had to work in many different fields, for multiple employers, in multiple cities. He spent several years on income assistance immediately before obtaining the truck-driving job. His curriculum vitae, as best as can be discerned at trial, does not presage an optimistic future of solid employment and ever-rising income to age 70.

[141] In light of these factors, the Court awards \$175,000 for past loss of earning capacity. For future loss of earning capacity, stretching 20 years, into the plaintiff's old age, there is a greater risk of interruption, cessation, or diminution of his earnings: \$700,000 is awarded.

#### G. Cost of future care

##### 1. Law: general

[142] An award for costs of future care seeks to restore, as best as is possible with a monetary award, the injured person to the position he or she would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras 29-30.

[143] In *Dzumbur v. Davoody*, 2015 BCSC 2316, Kent J provides a useful summary of cost of future care principles:

[244] The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:

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

See *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Krangle v. Brisco*, 2002 SCC 9; *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Langley Township*, 2008 BCCA 420; *Gregory v. ICBC*, 2011 BCCA 144; *Jacobsen v. Nike Canada Ltd.* (1996), 19 B.C.L.R. (3d) 63 (S.C.); *Penner v. ICBC*, 2011 BCCA 135; *Shapiro v. Dailey*, 2012 BCCA 128.

[144] In *Turner v. Dionne*, 2017 BCSC 1905 at paras. 347-348, Adair J provides a further overview of principles especially germane to the issues in this case:

[347] In order for a plaintiff to successfully advance a cost of future care claim, it is not necessary that a physician testify to the medical necessity of each and every item of care that is claimed. But there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional. See *Gignac*, at para. 31 (citing *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, at para. 39). Since damages for cost of future care are a matter of prediction, they cannot be measured exactly: see *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, at para. 21.

[348] Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see *Shongu*, at para. 210 (citing *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20 and *O'Connell v. Yung*, 2012 BCCA 57, at para. 68). In *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135, the court observed (at para. 13) that "a little common sense should inform claims under this head, however much they may be recommended by experts in the field."

[145] The resulting award is to reflect the reasonable or normal expectations of what the injured person will require while being fair to both the claimant and the defendant: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras 21-22.

## 2. Deduction or denial where plaintiff unlikely to use funds

[146] Future care costs will only be awarded if they are likely to be incurred by the plaintiff: *O'Connell v. Yung*, 2012 BCCA 57 at para. 68-70. *Suthakar v. Humble*, 2016 BCSC 155 considers whether the court ought to deny a sought item of future care where the evidence indicates that it realistically may not be pursued by the plaintiff:

[127] Whether a plaintiff is prepared to accept care that is in his or her best interests is a relevant factor. Where the plaintiff testifies that he or she will not submit to the recommended treatment, even though it is medically justified on the evidence, the court may decide that an award ought not to be made or may discount the quantum of it: *Coulter (Guardian ad litem) v. Leduc*, 2005 BCCA 199 [Coulter]; *O'Connell v. Yung*, 2012 BCCA 57 [O'Connell]. Additional material considerations would include: (i) whether the plaintiff's judgment on the question of whether he or she will adhere to the recommendation has been impaired by the injuries inflicted by the tortfeasor; and, (ii) whether the evidence establishes that the plaintiff may ultimately be forced by circumstances to participate in treatment that he or

she has expressed a desire to avoid, especially if the injuries are grave: O'Connell at paras. 61-62; Van v. Howlett, 2014 BCSC 1404 at paras. 78-79.

- [128] There is a distinction between a case where there is evidence that the plaintiff will not follow the recommended treatment (as in O'Connell and Coulter) and a case where no evidence has been led one way or the other. The Court of Appeal recently addressed this nuanced point in *Lo v. Matsumoto*, 2015 BCCA 84, at paras. 20-21:
- [20] I agree with counsel for the plaintiff that there is no hard and fast rule that requires a plaintiff to testify that he intends to use every item in the "wish list" of an occupational therapist in order to justify some award. On the other hand, a plaintiff must prove his case, both in terms of need and the likely utility of the item sought: see *O'Connell v. Yung*, 2012 BCCA 57 at para. 68. Where the costs claimed are not matters of absolute necessity, a plaintiff cannot assume that the court will simply accept the recommendations of occupational therapists or even of medical practitioners. Unfortunately in this case, Mr. Lo was not closely examined in chief or cross-examined on every item in the therapist's report or on any discrepancies between his own testimony and what he had told the therapist.
- [21] Considering, however, the seriousness of Mr. Lo's back injury and the fact that it is expected to cause him pain or discomfort indefinitely, I believe that the trial judge should have made some allowance for physical therapy sessions (costed at \$600 per year) in the long term; a facility fee to pursue an exercise program (costed at \$357 per year until age 65 when it would drop to \$250); some yard maintenance (costed at \$100 per year); non-prescription medications for back pain (\$400-\$500 per year); and something for the possibility that he would use the "Intimate Rider" equipment that might assist with his sexual function. Doing the best that I can with the evidence to which we were referred, I would increase the award for future care costs by \$7,000.
- [129] The court, therefore, should be cautious about reducing or eliminating altogether an award for the cost of future care simply on the basis that the injured plaintiff has not confirmed a willingness to participate in a medically justified course of care, or currently says that he or she will not follow the recommended treatment. The court should act with similar circumspection where the plaintiff has not previously used the recommended type of treatment. This is because fairness requires that the court be alive to the prospect that an injured person's disposition may change, or that he or she may not have had the means or ability to follow certain courses of treatment in the past.
- [147] In *Gignac*, the Court applied a 20 percent reduction to an award of future care costs to reflect the contingency the plaintiff would not attend a recommended course of treatment:
- [53] There is evidence that Mr. Gignac may not (as opposed to will not) use some of the services he has been awarded, such as the psychological counselling.

- [154] Contingencies have been taken into consideration already for general age-related dysfunction. There was no error in not applying an additional reduction for general contingencies. In my view, however, the evidence supports a specific contingency reduction for the psychological counselling as Mr. Gignac is only "considering" going to counselling, despite the fact the evidence is clear that it would be of considerable assistance to him. I would apply a 20% reduction to this award only, reducing it to \$2,670.
- [148] The present case aligns with Lo, discussed in Suthakar: the plaintiff did not outright refuse to follow treatment recommendations, and was not examined to any extent about his intention to follow specific recommendations.
- [149] The defendants argue that Mr Kempton has wilfully failed to pursue any treatment or seek any help for his PTSD. As noted by Dr Viljoen, he has received almost no intervention at all since the accident.
- [150] The defendants argue that it is not a case of a passive failure to seek help. Rather, since the accident Mr Kempton has been sent for counselling on several occasions. He has not continued with any counsellor. He testified that he did not "get along" with some counsellors, and did not trust others. There was only one counsellor, in Prince George, with whom he gained a relationship of trust, but, even here, he did not pursue further treatment.
- [151] These doubts are compounded by the plaintiff's decision to move "to the middle of nowhere" at the end of the Digby Neck, and his desire to "live off the grid," which predated the accident and heightened after the accident. His social challenges, and distrust of healthcare providers, which, again, pre-date the accident, and grew worse after the accident, also make it unlikely that the funds allocated for specific future care costs will in fact be spent towards them. If that were the case, it would provide the plaintiff with a cash windfall. Insofar as the award is based on specific anticipated expenses that the plaintiff will likely pursue and likely benefit from, it would undermine the justice system to make a full award where there is a realistic risk that those amounts will not be used.
- [152] I agree that the evidence establishes a significant risk that the plaintiff will not pursue or will not continue each one of the specific recommended courses of treatment set out below.

### 3. Discussion and decision

- [153] The parties generally agree on the law on future care awards. They differ on their application to the plaintiff.
- [154] The plaintiff seeks \$500,000 under this head of damages, rounded down from an itemized list totaling some \$550,000, reflecting the present value of the recommended treatments and services. These address both the psychological and physical injuries suffered by the plaintiff. The plaintiff points to his medical expert reports of Drs Ganesan and Viljoen, as well as those of the occupational therapist Mr Cheesman, to justify each of those expenses.

- [155] These expert recommendations form the basis of the report of Ruth Duggan, a vocational consultant, who prepared a life care plan and cost of future care report based on an in-home visit and examination. The recommendations in the Duggan Report are based entirely on expert care recommendations by the medical experts and Mr Cheesman, save for the physical therapy recommendations later made by Dr Waseem.
- [156] Ms Duggan sets out individual recommended line items, including psychiatric treatment for PTSD, pain management treatment, prescriptions for non-opioid pain medication, occupational therapy, case management, couples counselling, psychological treatments, occasional drivers, and adaptive changes to his house.
- [157] Ms Duggan's report takes into account the possibility that Mr Kempton's overall function will improve somewhat with the recommended interventions. That said, such improvement is expected to fluctuate, and, based on the medical reports, it is unlikely that Mr Kempton will ever be able to function wholly independently.
- [158] The plaintiff observes, again, that the defendants did not seek to tender any expert evidence on their own, or even provide rebuttal expert evidence to the future care evidence provided by the medical experts or the vocational consultant. Nor did the defendants seriously challenge the plaintiff's experts in cross-examination either with respect to the need for recommended treatments, or the appropriate costs of such treatments.
- [159] The defendants disagree with certain recommended future care items.
- [160] I agree that the Sotalol claim (\$9,812) should not be included, as it treats his pre-existing atrial flutter. I also agree that his gabapentin, as a substitute for his pre-accident hydromorphone should also be disallowed. The other prescriptions are connected to his increased pain due to the accident, and are allowed.
- [161] The costs for personal drivers (\$198,713) are excessive, given that Mr Kempton can still drive to a limited extent, particularly if he plans his necessary outings at quiet times, and given that his spouse, does and would be expected to occasionally drive, in the ordinary course of life. Insofar as his medical appointments and other daily necessities, coupled with the ebb and flow of his psychological state, may require the occasional driver, the Court will allow half the amount sought.
- [162] With respect to the case planner and personal care assistant, the defendants argue that the evidence indicates that the plaintiff is able to effectively plan his day-to-day activities. Although Dr Viljoen found that the plaintiff had difficulty with complex executive planning, Mr Cheesman's tests indicated that he could cope with simple planning and execution. Further, he could use his smart phone for reminders and organization.

- [163] I agree that the plaintiff does not need such assistance for more mundane tasks around the house, but he will need such help to plan and execute more complicated tasks moving forward, even if his condition improves modestly, which is realistically the best possible outcome. The Duggan Report does not envision daily assistance, but a modest amount for occasional assistance with direction and organization.
- [164] Beyond those items, I am satisfied that the individual items set out in the Duggan Report and plan are sufficiently linked to the expert medical and vocational recommendations. Based upon that report, the frequency and cost of the recommendations are appropriate. I am also satisfied that the defendants cannot reduce their compensation duty by relying on Ms Elford's assistance in lieu of the professional recommendations. Ms Elford may well not remain with Mr Kempton for the rest of his life; both have experienced divorce, and Mr Kempton is no doubt a challenging person to live with. It is thus appropriate to budget with a contingency that Mr Kempton, one day, will be wholly dependent on the services for functioning and improvement.
- [165] The deductions set out above bring the present value of the future costs of care to \$426,495.50.
- [166] I return to the contingencies discussed above. Regardless of the accident, Mr Kempton may well have become partially incapacitated such as to require similar services. Further, following Gignac and Suthakar, there is a significant possibility that the plaintiff will not use the funds for their intended purposes. With those two factors in mind, on the specific facts of this case, the costs of future care award will be reduced by 30 percent, to \$298,546.85.

#### H. Loss of housekeeping capacity

- [167] Mr Kempton claims \$50,000 as a discrete head of damage, over and above the claim for non-pecuniary damages.
- [168] The defendants provided no arguments in opposition to this head of damage.
- [169] *Kim v. Lin*, 2018 BCCA 77 at paras 31, 33-34 sets out the principles governing an award for loss of housekeeping:
- [31] loss of housekeeping capacity [is] just that, a loss of capacity, or the loss of an asset that should be compensated as a pecuniary loss regardless of whether the replacement services which are used to value the loss and determine the quantum of the award are actually purchased .
- [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work - i.e., where the plaintiff has suffered a true loss of capacity - that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for

courts addressing these awards, and as this Court said in Liu, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage "

- [34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, the court may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, be tied to the actual loss of capacity which justifies the award in the first place.
- [170] Before the accident, Mr Kempton fully participated in indoor and outdoor housekeeping and maintenance tasks. He and Ms Elford formerly split housekeeping tasks equally; Ms Elford now solely provides those services. She also does the majority of external work, including grocery shopping, prescription collection, banking and finance, medical coordination, and driving.
- [171] Mr Cheesman opines that Mr Kempton does not possess the required functional abilities to perform typical homemaking, housekeeping, or home maintenance activities with a level of productive efficiency. At present, Mr Kempton can only contribute to household tasks in a limited manner.
- [172] That may be the present situation. But while the medical experts are guarded on Mr Kempton's long-term prognosis, their recommended counselling and treatment offers a realistic hope that he may be able to cope with at least simple household tasks in the future. Insofar as his primary impediment to household tasks is physical, and insofar as he would have likely suffered physical impediments regardless of the accident, this head of damage should be modest.
- [173] The Court awards \$20,000 for loss of housekeeping capacity.

## **I. In-trust claim**

- [174] The plaintiff advances an in-trust claim on behalf of Ms Elford. As set out above, he argues that she now performs nearly all of the domestic and external responsibilities for the couple. These external tasks are more arduous than typical, given the remote location where they live. She also must remind the plaintiff of his daily hygiene and pharmaceutical needs. The plaintiff seeks \$125,000 under this heading.
- [175] Again, the defendants provided no submissions on this issue.
- [176] In *Dykeman v. Porohowski*, 2010 BCCA 36, Newbury JA confirms this category of damages, while urging trial courts to scrutinize such claims carefully:

- [28] Since *Kroeker*, it has been settled law in this province that "housekeeping and other spousal services have economic value for which a claim by an injured party will lie even where those services are replaced gratuitously from within the family." In *Kroeker*, such recovery was allowed under the heading of 'loss of future ability to perform household tasks', but obviously, damages for loss of such ability prior to trial may also be properly claimed and recovered: see, e.g., *McTavish v. MacGillivray*, 2000 BCCA 164 at paras, 43, 51-7, per Huddart J.A.; *West v. Cotton*, (1995) 10 B.C.L.R. (3d) 73 (C.A.) at para. 25; and *Campbell v. Banman* 2009 BCCA 484. The reasoning in *Kroeker* has been extended beyond "spousal" services to services rendered by other members of a family: see *Boren v. Vancouver Resource Society*, *Dufault*, *McTavish v. MacGillivray*; *Bystedt v. Hay*, all *supra*. Such awards are colloquially referred to as "in trust" even though it is the plaintiff who recovers them, and British Columbia courts do not generally impose trust terms in their orders, regarding the loss as that of the plaintiff: see *Feng v. Graham* (1988), 25 B.C.L.R. (2d) 116 (C.A.) at 9-10; *McTavish*, *supra*.
- [29] The majority in *Kroeker* was alive to the possibility that awards for gratuitous services by family members of plaintiffs could "unleash a flood of excessive claims" (*supra*, at para. 29) and for that reason, urged courts to be cautious in making such awards. In the words of Gibbs, J.A.:

... as the law has developed it would not be appropriate to deny to plaintiffs in this province a common law remedy available to plaintiffs in other provinces and in other common law jurisdictions. It will be the duty of trial judges and this Court to restrain awards for this type of claim to an amount of compensation commensurate with the loss. With respect to other heads of loss which are predicated upon the uncertain happening of future events measures have been devised to prevent the awards from being excessive. It would be reasonable to expect that a similar regime of reasonableness will develop in respect of the kind of claim at issue in this case. [At para. 19; emphasis added.]

I do not read *Kroeker* or *Ellis*, however, as establishing a threshold of "grievousness" in terms of the injuries which may necessitate such services. A plaintiff who has a broken arm, for example - presumably not a "grievous" injury - and who is obliged to seek assistance in performing various household tasks should not be foreclosed from recovery on this basis. This was recognized in *Ellis* in the quotation reproduced above. Thus I disagree with the trial judge's reference to grievous injury as a threshold that the plaintiff was required to surmount if her claim was to go to the jury. Instead, claims for gratuitous services must be carefully scrutinized, both with respect to the nature of the services - were they simply part of the usual 'give and take' between family members, or did they go 'above and beyond' that level? - and with respect to causation - were the services necessitated by the plaintiff's injuries or would they have been provided in any event? Finally, if these questions - which I would have thought are appropriate for determination by a jury - are answered affirmatively, the amount of compensation must be commensurate with the plaintiff's loss. The assessment of such loss has been the subject of several considered judgments in this province, most notably *McTavish* and *Bystedt*, both *supra*.

[177] In *Frankson v. Myer*, 2008 BCSC 795 at para 51, Savage J, as he then was, sets out the relevant factors for such a claim:

- (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
- (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship;
- (c) the maximum value of such services is the cost of obtaining the services outside the family;
- (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
- (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services;
- (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

[178] With an eye to these factors, the amount sought under this head is excessive. No doubt Ms Elford has assisted Mr Kempton significantly since the accident, and she is entitled to some in trust compensation in that regard. That said, for the reasons set out above, under "loss of housekeeping capacity," it is likely that in the future, with the recommended treatments and counselling, Mr Kempton will be able to better contribute to the household. With respect to the remoteness of Digby, this was a mutual decision of Ms Elford and Mr Kempton, and in any case, is not an extraordinary commute by Canadian standards. While commendable, the services are not significantly "over and above" the assistance that would normally be offered by a person to an aging and injured spouse. Further, were Ms Elford single, she would be performing many of the same tasks for which she now seeks compensation in any case. Ms Elford and Mr Kempton live a simple lifestyle, in a small house, with no children. Finally, the Court has already awarded amounts that will contribute to the maintenance of their household, under the previous two heads of damage.

[179] In light of the above, the Court awards \$30,000 as an in-trust claim.

## J. Management fees

[180] Mr Kempton seeks an award of management fees, to invest and manage the present awards for cost of future care, future loss of income earning capacity, cost of housekeeping care. The plaintiff cites *Watkins v. Olafson*, [1989] 2 SCR 750 and *Hans v. Volvo Trucks North America Inc.*, 2017 BCSC 555 at paras 13-15.

- [181] The defendants argue that the plaintiff has failed to establish, through evidence, the necessity of such an award, citing *Pestano v. Wong*, 2019 BCCA 141 at para 10. They argue that most banks offer free investment advice, and that the plaintiff has failed to canvass options alternative to a financial manager.
- [182] The Court disagrees. There is ample evidence, from the plaintiff himself and Ms Elford, and from Drs Viljoen and Ganesan, and from Mr Cheesman, that the plaintiff is incapable of properly managing his funds at present, and will need assistance in carefully managing the damages award flowing from this judgment. His PTSD and attendant difficulties, including alcohol and drug dependence, reiterate this need. While Ms Elford has assisted in basic daily banking needs, she has no particular financial experience or skills.
- [183] Hans considered and applied the different levels of financial management set out in the Law Reform Commission Report, "Standardized Assumptions for Calculating Income Tax Gross-up and Management Fees in Assessing Damages" (January 1994). The Court concluded that Mr Hans's condition was level 4: "requiring full investment management services on a continuous basis, including custody of the fund, accounting and discretionary responsibility for making caring out investment decisions. Such a plaintiff is likely to be mentally incapacitated or otherwise incapable of managing personal financial affairs." The Court awarded Mr Hans \$558,800, grossed up by \$1,400, for a total award of \$560,200: para 36.
- [184] The plaintiff does not propose that the Court undertake the same formal exercise with levels of care under the BCLRC report. Instead, he suggests a management fees award of \$150,000 to reflect Mr Kempton's future financial needs both in planning and management.
- [185] As noted above, Mr Kempton's condition and prognosis is less dire than that of Mr Hans. The overall damages award in this present case is smaller. Mr Kempton is a decade older, and thus likely will need financial assistance for a shorter period. The Court awards \$150,000 under this head.

## K. Special damages

- [186] Mr Kempton claims \$20,922.60 in various out-of-pocket expenses flowing from the accident, including WCB-related health expenses. These are set out in a table, backed up with receipts.
- [187] The defendants did not challenge these amounts in evidence or argument.
- [188] The Court is satisfied that the special damages enumerated and claimed were reasonably incurred, and awards the \$20,922.60 sought.

## VIII. WCB claim

- [189] In the final paragraph of their brief written argument, the defendants argue that Mr Kempton ought to re-open his claim with WCB under s. 125 of the Workers Compensation Act, RSBC 2019, c 1. The defendants argue that the expert evidence of Dr Ganesan demonstrates a "significant change" in Mr Kempton's PTSD that would satisfy the requisite threshold under that section. They argue that Mr Kempton ought to seek compensation for the appropriate treatments from WCB, as he did between 2016 and 2017.
- [190] The plaintiff argues that this argument is a red herring. WCB has closed the plaintiff's file, concluding that he is permanently disabled. The plaintiff has elected to pursue, through this litigation, his claims against persons other than his employer. He is entitled to do so (s. 128), and is subject to an ultimate subrogation claim by WCB for its payments and expenses to date with respect to his treatment (s. 130).
- [191] I agree with the plaintiff. The defendants provided no authority for the proposition that Mr Kempton is obliged to return to WCB for compensation. WCB has effectively closed its file, save for subrogation, against Mr Kempton. Nor did the defendants provide evidence or authority to establish that Dr Ganesan's very guarded prognosis would satisfy the WCB threshold. Ultimately, Dr Ganesan's opinion does not differ significantly from that of the WCB's Dr Chapman: he merely opines that psychological treatments should be attempted, not that they will be successful.

## IX. Failure to mitigate

- [192] The defendants argue that Mr Kempton has wilfully failed to pursue any treatment or seek any help for his PTSD. As noted by Dr Viljoen, he has received almost no intervention at all since the accident.
- [193] The defendants argue that it is not a case of a passive failure to seek help. Rather, since the accident Mr Kempton has sought or has been referred to counselling several times, but he has never continued with any programme. He testified that he did not "get along" with some counsellors, and did not trust others. There was only one counsellor in Prince George, with whom he gained a relationship of trust, but, even here, he did not pursue further treatment.
- [194] The parties agree that the defendants bear the onus of proving that the plaintiff could have avoided all or a portion of his loss. Specifically, the defendants must prove two things to establish that the plaintiff has not pursued a course of medical treatment recommended to him by doctors: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618 at para 57.
- [195] As stated in *Gregory*, where the Court of Appeal reversed the trial judge's mitigation deduction based on the plaintiff's failure to seek recommended cortisone injections:

- [56] I would describe the mitigation test as a subjective/objective test. That is whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages would have been reduced" by that treatment. The Turner case, on which the trial judge relies, uses slightly different language than this Court's judgment in Chiu: "there is some likelihood that he or she would have received substantial benefit from it..."
- [57] In this case the trial judge found as a fact that the cortisone shots were "not necessarily curative, they reduce the inflammation... Sometimes the relief is only temporary but sometimes the injections bring long term benefits." She did not find that the treatment would have reduced the symptoms. In addition there is the fact that the plaintiff reasonably believed the diagnosis was a tear and that the injections would have no healing effect on a tear.
- [58] Regardless of whether the trial judge erred in finding on the evidence that it was objectively reasonable for the plaintiff to undergo the injections, I conclude that she erred in her application of the correct test, as articulated in Chiu. The physicians testified only that it was a reasonable treatment to try, and it might afford some relief. In my view such an opinion does not meet the threshold for reducing an award as described in Chiu.

[underlining in original; bolding added]

- [196] Where the failure to seek or continue treatments is itself a manifestation of the psychological injury inflicted upon the plaintiff by the defendants, courts have rejected the defendants' arguments that the plaintiff has failed to mitigate: *Dewitt v. Tokacs*, 2008 BCSC 314 at para 126; *Wagner v. Newbury*, 2015 BCSC 894 at paras 230-233. As Blok J states in *Ali v. Padam*, 2017 BCSC 1849:
- [225] Finally, there is the matter of psychological counselling. Ms. Ali said she finds it very difficult to discuss what she is going through. This raises another issue on mitigation because the circumstances indicate Ms. Ali's lack of diligence may well be part of her major depressive disorder. In Chiu, a case involving a cognitively-impaired plaintiff, the court made it clear that reasonableness must be assessed from the plaintiff's point of view. In *Cassells v. Ladolcetta*, 2012 BCCA 27, the court clarified that while the test is an objective one "the mitigation question in each instance must be what would be expected of a reasonable person in the circumstances having regard for the plaintiff's medical condition at the material time and the advice given concerning treatment" (at para. 26). Here, the defendants have not shown that Ms. Ali's reluctance to undergo counselling (or, for that matter, other aspects of rehabilitation) is not itself a consequence of depression. They have the burden of proof on this issue. A plaintiff cannot be found to have failed to mitigate damages where that failure stems from a condition that the defendants themselves have caused.

- [197] In this, Dr Viljoen confirms that the psychological affects of the accident are largely to blame for his failure to pursue or continue with treatment: "[he] has had little intervention to date, related in large part to barriers to participation in associat[ion] with his emotional and behavioural profile, which in turn is primarily related to the present accident and its consequences."
- [198] In *Redmile v. Beaulieu*, 2019 BCSC 1571 at para 109, D. MacDonald J reduced a damages award by 5 percent, in part because the plaintiff refused to continue counselling for his PTSD or take medications that would have helped his physical and psychological conditions. As in *Wagner and Ali*, the Court acknowledged that avoidance of both counselling and medication is a typical manifestation of PTSD.
- [199] The facts in the present case differ from those in *Redmile*. In *Redmile*, there was clear evidence that the plaintiff directly rejected and declined to follow specific advice of his physician. While evidence of the benefits of those treatments was not entirely clear on the evidence, the fact that they had been originally prescribed by the physician indicates that it would have had a reasonable chance of success.
- [200] Here, in contrast, there is no clear evidence of consistent medical recommendations that Mr Kempton pursue certain treatments which would likely improve his conditions. The plaintiff's medico-legal experts, while providing recommended treatments, are not optimistic that they will in fact improve the plaintiff's condition, or to what extent; the best prognosis is that these treatments may help, the extent to which is presently unforeseeable. In this, the present evidence goes no further than that in *Hollyer v. Gaston*, 2016 BCSC 1401 at paras 150-155, where the Court rejected a failure to mitigate argument: while the expert reports recognize that standard treatments may assist the plaintiff, the prognosis was so tentative as to fall short of the Chiu/Gregory test. The defendants themselves have not provided any expert medical reports that would fulfil this second component of the Chiu/Gregory test. As such, they have failed to discharge their onus. The Court rejects their argument that the plaintiff has failed to mitigate his damages.

## X. Conclusion

- [201] The plaintiff is awarded the following damages:

Head of damages

Amount of claim

General (non-pecuniary) damages

\$200,000

Past loss of earnings/loss of opportunity

\$175,000

Loss of future earning capacity/loss of opportunity

\$700,000

Future costs of care

\$298,546.85

Loss of housekeeping capacity

\$20,000

In trust claim for Tammy Elford

\$30,000

Management fee

\$150,000

Special damages

\$20,922

TOTAL

\$1,594,469.45

[202] The income tax gross up and the Court Order Interest Act, RSBC 1996, c 79 interest on past wage loss and special damages claims shall be assessed in future, if the parties cannot agree on those amounts.

[203] Subject to further submissions on facts presently not before the Court, the plaintiff is entitled to his costs.

"Crerar J"

---

### Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE      <https://www.bccourts.ca/jdb-txt/sc/20/20/2020BCSC2094.htm>

CASE PAGE              <https://chat.esheria.ai/case-law/canada/kempton-v-struke-estate-2020>

Prepared on 28 October 2026 · Esheria