

JUDGE AWARDS \$1.6 MILLION TO TRUCK DRIVER TRAUMATIZED BY FATAL COLLISION.

KEMPTON V. STRUKE ESTATE,
2020 BCSC 2094

The Reasons for Judgment of The Honourable Mr. Justice Crerar were given December 31, 2020 in Vancouver, British Columbia

On August 5, 2015, at about 8:20 a.m., the plaintiff, Alan Kempton, was driving a tractor-trailer eastbound on Ness Lake Road, northeast of Prince George. A Chevrolet Aveo, driven by 19-year-old William Struke, was heading westbound. The evidence revealed that Mr. Struke had been drinking with friends the night before and into the morning. As a result, he was likely fatigued. His car crossed the center line and into the path of Mr. Kempton's 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. Mr. Kempton stared at Mr. Struke as the car disappeared under the front of his truck.

The police report described the car as being "crushed liked an accordion". Mr. Justice Crerar commented that "In the 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."

The impact of the collision threw Mr. Kempton to the floor of the truck cab and he was trapped inside, due to the damage to the vehicle. Through the "ankle window" he had a close up view of the wreckage of Mr. Struke's car. Mr. Kempton made desperate attempts to escape as emergency crews tried to free him.

Remarkably, Mr. Kempton did not suffer serious physical injuries as a result of the collision, however, five years post-accident he still suffers from recurring violent nightmares and is unable to sleep more than two to three hours at a stretch.



The plaintiff's claim is primarily for ongoing post-traumatic stress disorder (PTSD) as well as physical injuries to his back, shoulder and collarbone, which were caused or exacerbated by the accident.

The defendants do not dispute that Mr. Kempton continues to suffer from serious PTSD. They do contend however, that Mr. Kempton failed to mitigate his damages by seeking and pursuing recommended treatments. Further, they do not accept that the accident caused Mr. Kempton's physical injuries. The defendants called no witnesses, factual or expert, in response to the plaintiff's case.

Mr. Kempton has the equivalent of a grade 6 education. He suffered from a very serious reading disorder as a child and was unable to integrate from a special education facility into regular high school. After two weeks at high school, at age 15, he quit. To his credit, Mr. Kempton had a fairly solid, though varied, work history prior to the collision. From fruit picking and janitorial work in Nova Scotia he travelled west to Vancouver and ended up in Winnipeg as a roofer's apprentice. He learned the trade and progressed to the construction industry, in particular carpentry. For more than a decade Mr. Kempton operated his own successful construction company, building custom residential homes. He enjoyed a good reputation in the industry and employed as many as 30 people at one point. Around 2010 he made a decision to leave construction. The industry was radically changing with increased paperwork and regulations. He also realized that it would be a difficult occupation to continue with as he aged.

For many years he had contemplated becoming a truck driver. He described this as his dream job, allowing him to travel and see the outdoors. He wanted to eventually become an owner/operator of his own truck. Before he realized that dream, he worked for three years for CN Rail, as well as various other short term positions and collected employment insurance benefits. In 2014 he moved to British Columbia. In 2015 he successfully completed his Class 1 commercial truck driver training and, at 48 years of age, was ready to start a new career. In early 2015 he met his future spouse, Tammy Elford. They moved to Prince George and purchased property 40 kilometers outside Prince George to pursue their shared goal to "live off the grid". Mr. Kempton quickly found a position with Elite Transport, driving semi-trailer. He loved the work. He had been working for just a few weeks before the accident occurred.

Initially, despite the trauma of the accident, the plaintiff was able to return to work a few days later. He was able to continue his regular shifts, as well as additional shifts whenever offered, for some 10 months after the accident. As time progressed, he found that he was suffering from creeping psychological stress. He felt like people were avoiding him and talking about him in the community. He still feels intense guilt that he could have somehow avoided the accident. He blames himself for the accident and thinks constantly of its impact on the Struke family. He found driving to be increasingly stressful. He would suffer anxiety attacks while driving. He experienced flashbacks to the accident and on occasion would freeze or "black out" while driving his truck. His doctor advised him to take time off from driving



to deal with the increasing stress. The anxiety increased. He relied on his wife to do the majority of the driving. In October of 2015, two months after the accident Mr. Kempton started working on building their house at their property. He soon began making significant inexplicable errors and in spite of 25 years of experience building houses, he became increasingly frustrated and gave up working on the house altogether.

The plaintiff suffered from both physical and psychological impairments prior to the accident. Psychologically, he had a history of anxiety, panic and depression with psychiatric treatment and medications before 2012. In March of 2012 he had a suicidal crises after an arrest for domestic violence. He was briefly admitted for psychiatric observation. Physically, he suffered the results of a life spent doing physical labour. He admitted to regular low back pain but said it was manageable prior to the collision. His other injuries are unrelated to injuries sustained in the collision. Mr. Kempton testified that his physical pain, particularly his mid and lower back pain, have become much worse since the accident.

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.

The Court accepted that the plaintiff has proven, on a balance of probabilities, that the accident has caused his PTSD. In the face of the plaintiff’s uncontradicted evidence, which was corroborated by the evidence of his wife and confirmed generally by three medical experts, Mr. Justice Crerar states: “I generally found both Mr. Kempton and Ms. Elford to be credible and reliable witnesses and accept their testimony”. He found that the physical effects of the accident were limited to the exacerbation of the plaintiff’s pre-existing back conditions. He goes on to say that “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 [unrelated] injuries.”

In considering non-pecuniary damages the Judge emphasized that 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.” Mr. Kempton has become a recluse. He feels anxiety around other people and runs away when neighbours approach. He moved back to Nova Scotia in 2018 to a property 50 kilometers away from the nearest town of 2,000 people. He has not contacted his mother to let her know that he is nearby, as he is ashamed of how he would present to her.

The Court rejected the defendants’ argument that the plaintiff failed to mitigate his damages.

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

The full Reasons for Judgment of The Honourable Mr. Justice Crerar [can be found here.](#)

IF YOU WOULD LIKE TO BOOK ASSESSMENTS WITH : DR. SOMA GANESAN, PSYCHIATRIST OR DR. HENDRE VILJOEN, NEUROPSYCHOLOGIST, PLEASE CONTACT US AT INTEGRA