IN THE SUPREME COURT OF BRITISH COLUMBIA

2010 BCSC 1466 (CanLII)

Citation: *Wahl v. Sidhu,*
2010 BCSC 1466

Date: 20101020
Docket: M072939
Registry: Vancouver

Between:

Donald Martin Wahl

Plaintiff

And

Hardeep K. Sidhu

Defendant

Before: The Honourable Mr. Justice Chamberlist

Reasons for Judgment

Counsel for the plaintiff:	W.D. Mussio
Counsel for the defendant:	S.W. Hood and L.C. Boulton
Place and Date of Trial/Hearing:	Vancouver, B.C. January 4 to 8, and January 11 to 14, 2010
Place and Date of Judgment:	Vancouver, B.C. October 20, 2010

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INTRODUCTION

[1] In this personal injury action the 39 year old plaintiff claims damages for injuries the he says were sustained on June 22, 2006 when he was driving his employer's 1988 Ford Pickup Truck which was loaded with two large tires weighing approximately 1,200 pounds each. He was in the process of delivering them to a destination while carrying out his business duties for his employer, Midway Tire Limited.

[2] Mr. Wahl was travelling in a westbound direction on 72nd Avenue, in Surry, B.C. There are two lanes of travel in each direction with an additional left turn lane. Mr. Wahl was in the right-hand through lane travelling at approximately 45 to 50 kph. As he approached the intersection of 126th Street he had the green light. The defendant's Honda Civic was proceeding northbound on 126th Street and came out into traffic on 72nd Avenue. The front part of the plaintiff's vehicle struck the Honda Civic. There was little forewarning of the accident and the plaintiff had no opportunity to avoid the accident.

[3] As a result of the accident, one of the large tires broke through the back of the cab of the pickup, smashing the window, and probably hitting the plaintiff in the head. The plaintiff believes that he lost consciousness for a short time and was pushed up against the steering wheel because of the tire location. There was significant damage to Midway Tire's vehicle and I understand it was a complete write-off. Photographs entered into evidence disclose the significant damage.

[4] Janessa Ferguson was called by the plaintiff to describe the accident scene. She is a transit bus driver who observed the accident while she was standing beside the driver of a nearby bus. She described the severity of the accident. She exited the bus. She first went to the car that had been in collision with Mr. Wahl's truck and within two minutes came to the Ford vehicle. Mr. Wahl was still inside the pickup. She observed Mr. Wahl to have cuts and blood on his hands and described him as being in a state of shock and non-coherent. She described him as not being able to

get out of the vehicle and she called 9-1-1. She described him as being "glazed over" but she related asking Mr. Wahl if he was okay and that he responded to her.

[5] Liability for the accident has been admitted but the quantum of damages claimed by the plaintiff is vehemently opposed by the defendant.

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OVERVIEW OF THE ACTION

[6] The plaintiff alleges that he suffered physical and psychological injuries as a result of the accident and alleges that as a result of the accident he is clinically depressed, has chronic pain syndrome with principal areas of lasting injury being his neck, back, right shoulder and left hip. The depression he alleges is emotional upset including major depressive episodes. He further alleges a concussion but at trial conceded that the effects of the concussion had resolved and plaintiff's counsel did not argue any significant injuries as a result of it not being a lasting event.

[7] In addition, the plaintiff alleges he suffers posttraumatic stress disorder, cognitive deficits and headaches as a result of the accident. All heads of damage are said to be still existing, aside from the direct effects of the concussion he alleges.

[8] As a result of the accident Mr. Wahl, presently aged 39, claims damages as follows:

Non-Pecuniary Damages	$ 135,000.00
Past Wage Loss	114,000.00
Future Loss of Capacity	600,000.00
Special Damages	32,000.00
Future Care	240,000.00
In Trust Claim	20,000.00
TOTAL	$1,141,000.00

[9] The defence submits that based on the medical evidence the plaintiff sustained, at most, grade two soft tissue injuries to his neck and low back area. The defendant concedes that the plaintiff may have sustained income loss ranging from a few weeks to three months and that he likely has some special damages resulting from physiotherapy visits for a short period after the accident. The defence takes issue with some 350 physiotherapy visits which the defendant has incurred since the

accident up to date of trial. The defence says that the medical evidence is clear that there is nothing objective to explain the plaintiff's level of pain and disability over the 3 ½ years since the accident.

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[10] The defendant's position is that the plaintiff's medical experts have all based their opinions on the self-reporting of the plaintiff and as such the court should be very diligent in reviewing the medical evidence given that, from their perspective, there is no objective finding that can give rise to the damages claimed. The defence is also critical of the plaintiff's case relative to the overwhelming evidence that it was the plaintiff's lawyer who referred the plaintiff to the medical experts in this case and not the family doctor, Dr. Hay. Indeed, it appears that it was the plaintiff's lawyer who had been paying for all of the plaintiff's 350 physiotherapy treatments and, with respect to the medical experts tendered by the plaintiff in this trial, the defence contends that the plaintiff was not attending to these medical examinations to improve medically but for the purposes of this litigation.

[11] The defence further contends that it is the role of the general physician to monitor the medical treatment for a plaintiff and for the general physician to make referrals that he opines are necessary for the patient to be able to resolve ongoing medical complaints. It is obvious, says the defence, that it is not the plaintiff's lawyer's role to monitor the medical treatment a plaintiff is receiving. The defendant submits, generally, that our medical system is designed to make people better and that it works. The defence submits that, in this case, the plaintiff attended on his family doctor one day following the accident and advised him that he was in so much pain that he was not able to return to his job or function in activities of daily living; but no follow-up referrals were made by Dr. Hay.

[12] The defence points to the fact that Dr. Hay did not refer the plaintiff to any medical specialist whatsoever and that, as a result, I should question the propriety of having all the health care witnesses called by the plaintiff having being obtained by the plaintiff's lawyer rather than his family doctor on the basis that if Dr. Hay felt the plaintiff was disabled and that treatment would help the plaintiff's self-reporting

symptoms the family doctor should have done it as he has a wide range of treatments available for referral.

[13] In particular, the defence also points to the report of a neuropsychologist, Dr. Bishop, who saw the plaintiff in February 2008 and December 2008. Dr. Bishop was not called by the plaintiff as part of its case but was called by the defence as part of the defence case. Although Dr. Bishop found she was unable to make a full diagnosis as a result of what she found to be lack of effort by the plaintiff during her observations, she did make certain recommendations which were not followed up on by the plaintiff although he did commence seeing a psychologist regularly and increased his medications.

[14] The defence points particularly to the plaintiff not attending a chronic pain clinic as recommended by Dr. Bishop early on in February 2008.

[15] The defence is also somewhat critical of the roommates that Mr. Wahl resides with doing everything required for the plaintiff's day-to-day living. The defence suggests that as these two roommates, being Tammy and Greg Massender, are included in the plaintiff's statement of claim seeking money as a result of the In Trust claims, their evidence should be discounted. The defence says that it has become their job to say they provide the plaintiff with all the attention, sympathy and care he claims that he needs and to support the plaintiff in making his claims for disability.

[16] Finally, the defence, in its submissions, say that there is some evidence that Ms. Massender is, in fact, the plaintiff's girlfriend, and suggests that the court may not know the whole story of the relationship between the plaintiff and Tammy and Greg Massender.

[17] While this is my introduction to these reasons, I must say early in these reasons that there is absolutely no basis for this position. While it is true that one of the expert reports refers to her as the plaintiff's girlfriend there is absolutely nothing to establish this point. Ms. Massender was not questioned regarding this possible relationship and it was not raised at all in the evidence.

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[18] The defence also points to the plaintiff's income tax returns as not being reliable and that from that I should find that because his evidence about his income over the years is not reliable I should also find his evidence to not be reliable. It is true that the evidence shows that he was obtaining remuneration from physical work, including landscaping, in March 2003, but that this income appears not to be reported in his 2003 tax return.

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[19] Other witnesses called by the plaintiff also show that he did odd jobs for cash which does not appear to have been declared on tax returns.

[20] Having observed the plaintiff in the witness stand for some time during his evidence in direct and his cross-examination leads me to conclude that his evidence about his income and the tax returns he filed may not be reliable but I generally found much of his evidence about the accident and many of his post-accident complaints to be reliable and corroborated by medical evidence and those lay witnesses who testified as to his pre-accident and post-accident conditions.

[21] Finally, the defence submits that the plaintiff has made absolutely no effort to return to work or enrol in school to upgrade or retrain or make even some effort to find more sedentary or appropriate work as contemplated by both the occupational therapist and vocational consultant called by the plaintiff. The defence submits that the fact that Mr. Wahl has done nothing over the past 3 ½ years suggests that the real problem for Mr. Wahl is motivation rather than real disability on the basis that disabled persons who are motivated at least try to maximize their abilities. The defence points to the plaintiff's position that when suggestions of school or work are made to the plaintiff Mr. Wahl has an excuse for why he could not possibly do any of the suggested activities. This, the defence submits, is a motivation issue and not a disability issue.

[22] With this overview in mind I now turn to a review of the evidence.

EVIDENCE ON BEHALF OF THE PLAINTIFF

[23] The lay witnesses called by the plaintiff to establish his pre-accident condition and his post-accident condition over the past 3 ½ years included his roommates Tammy Massender and her ex-husband Gregory Massender, his mother Jillian Wahl, his step-father Richard Osborne, David Doeffin a realtor friend of his step-father and mother who had hired the plaintiff in or about March 2003 to do some landscaping work, and an uncle, Lorne Sass, who had also hired the plaintiff to do floor work.

[24] In addition the plaintiff called coworkers who had worked with the plaintiff at Country Tire and Midway Tire Limited, being Glen Anderson and Douglas Scott.

[25] Although I may refer to these witnesses' evidence in particular later in these reasons, I would make the following findings with respect to all of their evidence that deals with the primary issue as to whether or not, as a result of the accident, the plaintiff presents as being quite different from what he was immediately preceding the accident. All witnesses referred to the plaintiff as being an excellent worker who was in excellent physical condition preceding the accident and one who exhibited extraordinary strength and exemplary work habits. Similarly, those lay witnesses who have had the opportunity to be with the plaintiff and observe him are all of the view that he was not the same person following the accident, physically and psychologically, as the person they knew or worked with prior to the accident.

[26] While these are merely general comments with respect to the whole of their evidence, it is clear that their evidence was generally consistent with the evidence of the other lay witnesses.

[27] I am of the view that there can be no doubt whatsoever that physically and psychologically there had been a noted change, in the observations of lay witnesses called who gave evidence, as to the pre-accident condition of the plaintiff and the post-accident condition of the plaintiff that has existed for, now, 3 ½ years post-accident.

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[28] As stated earlier Donald Wahl is presently 39 years of age, having a birth date of August 5, 1970. Mr. Wahl grew up in Prince Rupert, B.C., firstly with his biological parents and then from when he was 5 with his stepfather Richard Osborne and his mother Jillian Wahl after his biological father was brain injured in an accident. His stepfather described Mr. Wahl as being a popular normal teenager with no physical ailments. His mother and stepfather decided to relocate to the lower mainland but Mr. Wahl remained in Prince Rupert for some months. He took room and board at a friend’s home and joined his stepfather and mother later. His mother described him as a high energy person who was very hard working and whose physical fitness she described as being “amazing”.

[29] After joining his family in Vancouver Mr. Wahl left home before he turned 20. His employment included work as a cook, work with a moving company, an apprentice plumber for a number of years, a mechanic and working in the tire stores. Ms. Wahl confirmed that he had held no office jobs. She described him as a young man having lots of energy, lots of friends, enjoyed fishing, swimming, crabbing and diving, and was active in soccer. She recalled a 2001 accident where he suffered injury as a result of a 3-ton truck falling on him, which I will deal with later in these reasons, but testified that two years after that accident he suffered no more physical problems and she was not aware of any emotional problems being experienced.

[30] Ms. Wahl specifically recalled her son planting a hedge for her and his stepfather. She described her son, relative to his work, as being driven and wanting to accomplish 100%. She described how news of the subject accident was devastating to her and described her son now as being a shadow of his former self. She now described him as being an emotional wreck who would get upset all the time following the accident and that she is afraid to say anything that may upset him. She described him as getting loud and agitated which, according to her, was not the norm for him. She testified to having seen no improvement in him and testified to Donald Wahl being very concerned about his future. To her knowledge her son has not worked since the accident. She testified that she recently saw him over the 2009 Christmas period when he spent time with her and her family. She described him

not being able to sit for too long and having to get up and pace. She also testified to having observed him squirming in his chair.

[31] Under cross-examination Ms. Wahl conceded that she had only seen her son four to five times in 2009 and had not been out to the home that he shares with Greg and Tammy Massender. She testified to having seen her son perspiring when he complained of headaches. She was not aware of her son’s circle of friends other than the fact that he would spend most of his time with his roommates, the Massenders.

[32] Ms. Wahl could not recall when she first saw him after the June 22nd accident. She described her son as being intelligent but repeatedly described him as being unable to think of what he could do following the accident.

[33] Kevin Kaulback, of Kevin’s Auto Clinic, was called by the defence. He testified regarding the accident of August 2001 as did the plaintiff and his roommate Greg Massender. Kaulback and Massender were both present at the time. While at Kevin’s Auto Clinic the plaintiff did tire and oil changes, brake work and tune-ups which would be checked over by Kevin Kaulback, a licenced mechanic. Mr. Wahl was asked to perform a rear brake job on a cube van. As the cube van was too large for the Clinic’s bays it was worked on outside. The plaintiff was working under the vehicle when the jack gave way and the vehicle landed on him. Thankfully there was no crushing effect of the vehicle. The plaintiff was in receipt WCB benefits for some time, until WCB stopped benefits after approximately 1 or 1 ½ years after the accident.

[34] Mr. Wahl described the injuries sustained in that accident as being a separated right shoulder and an injury to his left hip. He recalled WCB benefits having been received for over a year or 1 ½ years.

[35] Kevin Kaulback also employed Tammy Massender for office work and related duties. Greg Massender would work the odd day in his shop. The accident occurred on one of the days Greg Massender was working at the shop.

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[36] Following his employment related accident in August 2001, Mr. Wahl began work for Country Tire, in either late 2003 or early 2004.

[37] The plaintiff's work career at Country Tire and Midway Tire Limited was also covered by the evidence of Douglas Allen Scott. Mr. Scott, aged 57, has been in the tire business a few decades. He had been a co-owner with Country Tire and hired Mr. Wahl at Country Tire as a tire installer. He had not known Mr. Wahl prior to that time. Mr. Scott described Mr. Wahl as his star employee during the time that Mr. Wahl was employed by Country Tire, and described him as being able to work unsupervised and pick up information quickly. He described Mr. Wahl as one who never quit working and outworked everybody on the floor. He described him as having no limitations and was in very good physical condition. He testified to Mr. Wahl having no light duties at Country Tire and as a tire installer he installed tires that weighed between 40 pounds and over 100 pounds. Mr. Scott described the work as being very physical. One thing that was very interesting was Mr. Scott's comment that you "don't see many old installers". He described installing tires as being hard on the back.

[38] Mr. Scott also testified to never having seen the plaintiff unable to work and could not recall any complaints about shoulder or back pain.

[39] After a few years, Mr. Scott left Country Tire and joined Midway Tire Limited where he became lead hand. He testified that shortly after joining Midway he wanted the plaintiff to come to work for him. At the time he described the plaintiff as working a 4-day week at Country. He testified to having taken some three months until he was able to offer comparable wages and hours of work to Wahl. Mr. Scott was able to arrange for a 4-day work week which he testified to being the key component of Mr. Wahl's request if he was to leave Country Tire. From his knowledge he testified to Wahl having other interests such as mechanical work that he did at home. He described Mr. Wahl as being a diligent worker for Midway just as he had been with Country Tire and described himself having a hard time keeping up with Wahl's work ethic. He said that at that time there were no physical

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limitations that he observed and heard no complaints of Mr. Wahl regarding shoulder or hip problems. He described the work done by Mr. Wahl as being the same type of work he had been doing at Country Tire.

[40] Mr. Scott did go out to visit the plaintiff two or three times following the accident. He testified that a month after the accident Mr. Wahl had physically disintegrated and he felt that Mr. Wahl had lost some 20 pounds. He described Mr. Wahl not being as buff as before the accident and stated that he was physically not the same guy he had known before and observed Mr. Wahl on those visits to be seemingly in pain and taking pills.

[41] Gregory Massender, one of the plaintiff's roommates, also gave evidence. He is presently 45 years of age and testified to having known the plaintiff for some 22 years. His first introduction to him was when they met while Massender was working for a moving company. Mutual friends who knew the plaintiff introduced them and Massender offered employment to him. He described the plaintiff as being a "fantastic" employee and being able to work harder than much bigger guys in that business. I believe his words were that he had had much bigger guys do one-half the work that the plaintiff was able to do. He said at that time Mr. Wahl had no physical limitations. He described how the plaintiff had lived with himself, his ex-wife and their young son on the mainland and that thereafter the four of them had moved out to their rented home on Barnston Island approximately 1 ½ years before the accident.

[42] The evidence of Greg Massender, Tammy Massender and the plaintiff were quite consistent with respect to how they shared household duties and expenses at their home. All expenses were split three ways and most chores were also equally split. Mr. Massender testified how the two of them would cut up to 10 cords of firewood a year and that before the accident the cutting of firewood was split 50-50 between the plaintiff and himself. He also testified to the three of them taking turns cutting the grass, cooking and cleaning of bathrooms.

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[43] Mr. Massender also testified how he worked with the plaintiff to earn money doing landscaping work which was done in the spring of 2003 when he and the plaintiff had to remove several yards of soil, remove trees and shrubs and redesign the elevation of a yard for a sidewalk. He described this work in 2003 in terms of physical dexterity as ranking 9 ½ out of 10. The job, according to everyone concerned, lasted about 14 or 16 days. Mr. Massender described the work as being done by the two of them together and that the plaintiff worked hand-in-hand with him. He testified to observing no limitations in the plaintiff's ability to work. He also described helping moving furniture for family members with the plaintiff during this time frame.

[44] Mr. Lorne Sass gave evidence of the work done for him one or two years after the 2001 WCB accident where the plaintiff and Greg Massender provided the necessary labour to install a main floor. Mr. Sass, an uncle of the plaintiff, also gave evidence with respect to that work. Mr. Massender also testified that that job required an 11 out of 10 effort.

[45] Suffice it to say Mr. Massender's evidence was that Mr. Wahl exhibited no physical limitations in the years leading up to the 2006 accident. He further testified to shortly before the subject accident having never seen the plaintiff unable to do physical work because of any injuries and commented that the week before the accident the two of them were preparing the plaintiff's boat for a fishing trip by washing it and servicing it's engine. Mr. Massender also commented on feeling jealous of Mr. Wahl's physique and commented that he was in amazing shape, weighing approximately 150 pounds at the time.

[46] Mr. Massender testified as to how, subsequent to the accident, times had changed. He testified to him doing all the firewood chopping and 90% of the remedial work. He stated that the plaintiff had done no chopping, no mountain biking as he had done before the accident with Mr. Massender's son, and that Mr. Wahl's boat had not been moved. He also testified to Tammy taking care of all the dogs and Mr. Wahl not returning to any of his former pursuits. He described

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observations of the plaintiff limping and literally being “a shadow of his former self”. He testified to there having been negligible improvements since the accident, and described the plaintiff’s only activities as being to check his e-mail and talk to friends.

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[47] As with other witnesses called by the plaintiff, Mr. Massender described the plaintiff pre-accident as being very active, but now described him as being a “house potato”. With respect to depression, all that Mr. Massender could say was that prior to the accident the plaintiff seemed happy and content, whereas now he described him as being sad and feeling useless. He described the plaintiff as being, on the whole, angry that he could not do what he wanted to do. He described the plaintiff as rarely going out of the house.

[48] With respect to the plaintiff’s commencement of work for Country Tire in late 2003 or early 2004, Mr. Massender described the plaintiff as having looked for work, commencing two years after the 2001 accident and said “he was getting stir crazy”. He described the Country Tire job as having “fallen into our lap”. He described the plaintiff not feeling comfortable going under vehicles following the 2001 accident. He testified to having observed the plaintiff hesitating to even look under a vehicle.

[49] Mr. Massender also gave some evidence with respect to the plaintiff’s time with Country Tire. He described how the plaintiff had originally worked five or six days a week, then at his request moved to four days a week by choice so he could have one day off where he could work on his own truck, restore his Camaro automobile, talk with friends and spend time on a riding-lawnmower cutting the lawn.

[50] With respect to the subject accident, he described picking up the plaintiff at hospital at approximately 2:30 p.m. on June 22nd and described the plaintiff as complaining of general discomfort all over.

[51] Under cross-examination Mr. Massender agreed that as he worked 7 a.m. to 3:30 p.m. during the day, he seldom saw the plaintiff during the day and that, in his words, “Tammy hangs around the house”. He described Mr. Wahl as being a person who can’t stand or sit for long periods of time.

[52] Donald Wahl testified that he completed grade 10 and was three-quarters of the way through grade 11 when he quit school. In February 1989, when he was 19 and still residing in Prince Rupert, he worked as a prep-cook in the fish cannery. At the end of 1989 or early 1990 he relocated to the lower mainland. Not much evidence of his employment was led for the period 1990 to 2001 when he had his WCB accident while working for Kevin's Auto Clinic.

[53] Mr. Wahl, in his direct evidence, described the accident in some detail and described having had a hard time breathing as a result of the presence of his seatbelt. He recalled seeing blood on his hands and glass when he, in his words, "woke up" and was taken to hospital. He described how his friend Greg Massender had come to the hospital to pick him up because he wasn't able to drive his own truck home. He described over the next few days his condition of headaches, dizziness, back pain, shoulder pain, spasms, tingling and elbow pain. The following day he attended on his family physician, Dr. Hay, where he testified to having made complaints of pain in his right shoulder, pain in his right elbow, pain in his lower back (predominantly his left lower back), spasms originating in his mid-back and proceeding right through his chest, and tingling of a general nature in his left leg and hip.

[54] With respect to his elbow complaints, Mr. Wahl testified that those complaints had gotten better but the elbow is not as good now as it was prior to the accident. He described the tingling in his left foot as being not so bad. He testified to having emotional problems since the accident, and being very emotional and easy to anger. He says he is subject to headaches, and migraine headaches, and that a stutter had come back. He claimed his short term memory no longer was good and as a result has to concentrate on remembering things.

[55] Mr. Wahl testified to having nightmare almost every night and only being able to sleep four to six hours per night. He described how he wakes up with sweats and pain. He described how it is still hard to be a passenger in a vehicle. In particular, in the first month following the accident he described a lot of soreness, stiffness and

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the pain getting worse over two months with his hip continuing to be as bad as it was then. He stated that his hip and shoulder continue to be as bad and emphasized that this pain got worse following the first month after the accident.

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[56] Within a time frame of six months post-accident, Mr. Wahl described his hip as not being any better and his headaches getting worse. He described how in 2007 he was regularly doing range of motion exercises and stretches but that his shoulder, neck, back and hip were not advancing in pain reduction. He testified that in 2008 he had "tried everything" but the pain seemed to have plateaued and that his headaches and emotional problems had continued.

[57] Again in direct examination, Mr. Wahl described 2009 as being the same and in his words "nothing helps". With respect to the year 2010 he described how his headaches still continue with no improvements. In particular, he complained of dizziness, nausea, and experiencing double vision when he is watching TV. He described two types of headaches, one emanating in his head which he referred to as migraines, and the other emanating in the back of his head, especially if he over-exercises. He conceded that the headaches emanating in the back of his head have not been as frequent as they were earlier on.

[58] With respect his right shoulder, the plaintiff maintained that his right shoulder was the same as it was in 2008 and that physiotherapy, which he attends regularly, has not improved his right shoulder pain and referred to "pinching" on top and in the back. He stated that the more he does the worse it gets.

[59] Similarly, with respect to his back pain, Mr. Wahl testified that there had been no improvement and that the pain emanates from the middle of his back up to his shoulder and down from the small of his back into his left hip or sacroiliac joint.

[60] With respect to spasms, Mr. Wahl testified to suffering spasms almost daily in his upper and lower back and sacroiliac area. Mr. Wahl also described tingling in the toes of his left foot but at the time of trial testified to very seldom experiencing the tingling now.

[61] Mr. Wahl testified that he had sustained neck pain between his shoulder blades, and described the pain moving up to his head, and that this pain was present all the time, although he conceded that it had improved following the first year post-accident, but stated that since that time the pain has plateaued.

[62] Mr. Wahl described his present range of motion as having more range on the right side of his neck and less on the left side. He also described now experiencing chest pains by the end of the day. With respect to his emotional complaints he described having nightmares every night, and particularly nightmares involving seeing blood and glass all over himself. He testified to waking up "soaking wet". He also described the stuttering that he had as a young child. He now described stuttering at least once a day.

[63] Mr. Wahl also described himself as a person who would not normally cry but since the accident being very emotional and finds himself getting angry on a daily basis. He also described concentration problems that he experiences and related how, on two occasions, he had taken his dog for a walk from his residence and forgetting the dog on his return home. He described how following the accident he was unable to drive for approximately one year and how he did not want to drive at all because of the pain experienced by him when he was driving a vehicle. He described how in the first year post-accident his roommate Tammy Massender had driven him to his appointments with his doctor and physiotherapist and how he had not gone out socially for approximately a year following the accident. He described how he has, since the year following the accident, driven to his parents' but generally stays at home and only leaves his home for his appointments with his physiotherapist and doctors.

[64] Mr. Wahl described his activities prior to the subject accident. He would go fishing, do mechanical work on his 4x4 truck, restore pinball machines and generally be a "Mr. Fix It" around the house and for friends. Since the accident he testified to not being able to repair vehicles, being unable to do any heavy lifting, being unable to go fishing and being unable to do any of the activities he did before the accident.

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He also described his work around the residence which he would share with his roommates but which he has been unable to do as confirmed by his roommates Greg and Tammy Massender.

[65] Finally, Mr. Wahl testified that ultimately his hope for the future is to be the person he was before the accident, and stated that he hadn't seen any light at the end of the tunnel at this time.

[66] Under cross-examination Mr. Wahl agreed that he was not sure if he in fact lost consciousness following the accident and described himself as being in a "blur" following the impact. He also agreed that there were no x-rays taken at the Memorial Hospital when he had been admitted immediately after the accident, but maintained all he had been given was a brief physical examination and Tylenol 3 tablets. He agreed that it was his family doctor, Dr. Hay, who first recommended x-rays the following day. Mr. Wahl appeared to be confused as to exactly who had referred him to various specialists but finally agreed that it was his lawyer who had referred him to Dr. Bishop, Dr. Chin and Dr. Shuckett. He also agreed that it was his lawyer who had referred him for a private MRI in April 2008.

[67] Mr. Wahl was questioned about why he had not applied for a position as a salesman at Midway, but Mr. Wahl maintained that he was not very good at speaking and that his stuttering would get worse. He also maintained that he could not be on his feet all day. He agreed that he has not sought employment through any job agency although Mr. Wahl indicated that he had looked on Craig's List for work but has found nothing he felt he would be able to do.

[68] Under cross-examination Mr. Wahl maintained that his short term memory results in him forgetting what he is reading. With respect to attempts to obtain work Mr. Wahl merely said that he would attempt to work "as soon as I can". Mr. Wahl maintained that he won't try to work until he feels that he is able to offer something. With respect to the work he used to do restoring pinball machines, Mr. Wahl maintained that he has not gone back to repairing pinball machines since the accident and now restricts that work to merely giving advice on how to fix them. He

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agreed that his right hand difficulties had resolved after two months and that it represented no disability and that the numbness or tingling which occurred shortly after the accident does not impact on him.

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[69] With respect to his 350 physiotherapy attendances up to the time of trial, he agreed that there has been nothing but minimal results from the therapy but maintained that he does get some pain relief from the treatments.

[70] Mr. Wahl remained consistent in his criticism of his attendance at the hospital after the accident. He maintained that they basically looked at him for five minutes and no x-rays or CT scans were taken. Under further cross-examination he advised that his roommate Tammy Massender helped him with massages when he got spasms and that his physiotherapist had asked if he had someone who could help him at home. His response, under cross-examination, was that he tries not to ask roommates for help and that he does try to do things around the house such as clean up part of his own room and sweep the odd time.

[71] With respect to driving his automobile, he testified that that was pretty well restricted to attendances for physiotherapy as his right arm and hip bother him when he is driving. Mr. Wahl maintained that he had fully reported all his symptoms to his family physician. In his words Mr. Wahl commented that “Dr. Hay is wonderful”. However, Mr. Wahl could not explain why Dr. Hay had no reference to his fear of driving in his records but nevertheless maintained that he did in fact talk to Dr. Hay about everything. He maintained that when he did attend on Dr. Hay he would be at Dr. Hay’s office for between ½ hour to 1 hour per visit.

<u>THE MEDICAL EVIDENCE</u>

[72] Generally, while the lay witnesses are all generally consistent with respect to their observations, the medical and psychological evidence presented by the plaintiff regarding the present circumstances of the plaintiff, post-accident, are met with opposite views by the medical evidence provided by the defence’s medical

evidence. The medical and psychological evidence provided by the plaintiff consisted of the following[1] –

		Date of Report(s)
Dr. Rhonda Shuckett	Rheumatologist	October 22, 2007
Dr. Patrick Y. K. Chin	Orthopaedic Surgeon	November 6, 2008
Dr. Elizabeth Zoffmann	Forensic Psychiatrist	January 9, 2009
Dr. Donald Hay	Family Physician	March 14, 2009 January 1, 2010
Dr. Marlo Gal	Registered Psychologist	November 2, 2009

[73] The medical evidence called by the defence consist of the following –

		Date of Report(s)
Dr. Carole Bishop	Registered Psychologist	February 25, 2008 December 20, 2008
Dr. Jordan Leith	Orthopaedic Surgeon	June 10, 2008 March 26, 2009
Dr. Kevin Solomons	Psychiatrist	August 21, 2009
Dr. Philip Teal	Neurologist	November 2, 2009

[74] In addition to these medical and psychological reports the parties called the following witnesses with respect to physical capacity evaluations, cost of future care analysis, and vocational assessments –

		Date of Report(s)
Reza Hormozi	Physiotherapist	
Mary Richardson for the Plaintiff	OT Consulting /Treatment Services Ltd. physical capacity and future care cost evaluations	January 27 and January 28, 2009
Derek Nordin for the Plaintiff	Vocational Consulting Group vocational assessment	January 29, 2009
Gerard Kerr for the Defendant	Progressive Rehab – Orion Health work capacity evaluation	January 31, 2009

[75] All of the above witnesses were presented for cross-examination on their reports.

[1] I have placed them in the order of their expert reports and not the order in which they gave evidence at trial

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[76] In addition, reports of Darren Benning of PETA Consultants Ltd., dated February 11, 2009 and December 2, 2009, respectively, dealing with present value of future care cost and past and future income loss were presented by the plaintiff without the necessity of Darren Benning being subject to cross-examination.

PHYSICAL CAPACITY EVALUATIONS

[77] In the physical capacity evaluation performed by Mary Richardson, on January 27, 2009, Mary Richardson noted at page 2 of her report:

> As part of determining the reliability of test results, it is important to address whether or not full effort was given and whether there were any behavioural factors affecting performance.

On the same page, she said as follows:

> Based on Mr. Wahl's behavioural and profiles, it is this evaluator's opinion that Mr. Wahl presented with pain behaviour that may interfere with his functional performance. He sees himself as significantly limited in his physical capacity and he self-limited his performance on certain evaluation tasks because of his level of symptoms and concern about hurting himself. Based on test results and clinical observation, Mr. Wahl is considered to have given a variable level of effort during testing. That is, he gave full effort on some aspects of testing, but self-limited his performance in other areas. Thus the test results are felt to represent his current level of function, but may not represent his maximum capacity in all areas.

[Emphasis added.]

[78] Based on her assessment at the time, being some 2 years 5 months post-accident, she concluded, based on the testing and feasibility of different employment, she said, at page 8:

> In my opinion, with consideration only to his present physical capacity, Mr. Wahl is not employable at the present time.

[79] In addition, at page 9, she said this:

> This evaluator recommends that a reactivation program based on his current functional abilities be implemented to increase Mr. Wahl's tolerance to sustained activity in conjunction with supportive counselling and physiotherapy to address symptom exacerbations as he attempts to increase his activity levels.

[Emphasis added.]

She then reviewed his pre-accident condition as a tire technician and the physical demands required of that employment and stated, again at page 9:

> Based on his performance during testing, Mr. Wahl does not demonstrate the physical capacity to meet the physical demands of his former job as a tire technician.
>
> Mr. Wahl's feasibility for competitive employability as outlined is based on his present physical capacity. At the time of writing this report, no information was available with regard to the prognosis for Mr. Wahl's shoulder injury. However, the medical documentation did provide insight into Mr. Wahl's issues with pain, anxiety and depression.

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[80] The work capacity evaluation tendered by the defence and prepared by Gerard Kerr of Progressive Rehab, dated January 31, 2009, refers to his December 12, 2008 assessment of Mr. Wahl. The report is somewhat very similar to the findings made by Mary Richardson, especially with respect to effort testing and consistency of reported pain and disability.

[81] At page 3, Mr. Kerr states:

> Results of formal effort testing in combination with clinical observations show Mr. Wahl participated in work capacity testing with generally high levels of effort. <u>However, there were occasions when his function improved under distraction including neck range of motion and spontaneous right hand/arm use</u>. While the test results are considered a generally accurate measure of physical capacity <u>it is recognized that he may be capable of greater function than demonstrated</u>.

[Emphasis added.]

[82] With respect to work endurance, Mr. Kerr said this at page 4:

> <u>Mr. Wahl's ability to tolerate full time work demands is currently compromised by his psychophysical factors</u>.

[Emphasis added.]

[83] Similarly, with respect to his pre-accident employment, Mr. Kerr reports as follows on page 5:

> The results of work capacity testing indicate that Mr. Wahl does <u>not</u> presently meet the physical demand requirements for this type of work. In particular he does not meet the bilateral strength demands required to change/handle

heavy auto and light truck wheels/tires. He does however, have potential to work in lighter jobs including counter sales or similar.

[Emphasis of not in original.]
[Other emphasis added.]

[84] He concluded his report with the following:

> Of some concern is Mr. Wahl's lack of any significant improvement over the past 2 plus years in spite of continued and fairly intensive treatments. Dr. Shuckett in her October 22, 2007 report suggested that further improvement was possible and encouraged Mr. Wahl to continue with regular exercise. It is apparent that Mr. Wahl, for whatever reason, has not pursued this recommendation. Further, aside from performing his own basic personal care activities he has withdrawn from participation in daily living activities (including getting his own breakfast). He relies largely on his roommates to perform these tasks. This level of inactivity is, in my view, also a significant barrier to achieving any functional improvement.
>
> Mr. Wahl remains adamant that he is incapable of doing more than he is currently doing. Consequently, some attention to his psychological state will likely be important if he is to realize functional improvements from his therapy regime. I would be pleased to provide treatment recommendations at your request.

[Emphasis added.]

[85] These comments obviously relate to the interview findings found at page 14 of his report which includes the Beck Revised Depression Inventory in which he reported Mr. Wahl scoring 39 out of 63, which he concluded was a score which rated Mr. Wahl in the severely depressed category of that Inventory. In his report Mr. Kerr said this at page 14:

> Results of formal effort testing in combination with clinical observations show Mr. Wahl participated in work capacity testing with generally high levels of effort. However, there were occasions when his function improved under distraction including neck range of motion and spontaneous right hand/arm use. While the test results are considered a generally accurate measure of physical capacity it is recognized that he may be capable of greater function than demonstrated.
>
> Mr. Wahl's presents with a strong focus on his pain and disability. His self reports of function and pain were not always consistent with demonstrated function and therefore more weight was given to his demonstrated function. There were a number of non organic findings suggestive of a psychological component to his presentation.

[Emphasis added.]

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[86] My conclusion with respect to both these reports concerns the lack of follow-up with the recommendations made by Dr. Bishop with respect to the obvious psychological problems Mr. Wahl was having as a result of the accident. Both the plaintiff's vocational assessor and the defence assessor commented on the psychological problems that seem to have interfered with the plaintiff's ability to move forward in dealing with his psychological and physical problems.

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REPORT OF DR. BISHOP

[87] It is noteworthy that Dr. Bishop assessed the plaintiff, first in February 2008, some one year and eight months following the accident, and thereafter on December 20, 2008, some two years six months post-accident. While Dr. Bishop was unable to give a medical opinion due to her expertise, she did, at page 2 of her February 2008 report, say this:

> From a neuropsychological perspective a number of psychological factors preclude interpretation of test findings at over 20 months post-MVA. Mr. Wahl has not worked since the MVA. He is extremely concerned about his future and ability to work, as his skills, background and preferences have been for hands-on, practical trades.

[88] With respect to his chronic pain, depression and anxiety she said, also at page 2:

> . . . Such pain can be resistant to spontaneous resolution and can be debilitating without adequate management.

Thereafter, on the same page, she commented as follows:

> The following barriers were identified from my assessment of this man in relation to the MVA:
>
> 1. Chronic pain of various locations, including chronic headache pain, R shoulder pain, L hip pain, low back pain and upper neck and mid-thoracic pain. Pain is persistent, has been present since the MVA, pain markedly affects functioning, and is marginally responsive to current interventions with the exception of temporary relief.
>
> 2. Marked emotional distress. He fits DSM-IV-TR criteria for:
>
> (a) Major Depressive Episode, Chronic, moderate severity
>
> (b) Post Traumatic Stress Disorder, chronic, with panic attacks as part of that constellation

(c) Insomnia, probably related to post-concussive effects, anxiety and depression, as well as mid-cycle awakenings associated with pain and anxious nightmares and associated with chronic low energy and daily fatigue.

[89] Thereafter, in her first report, she said this under Recommendations:

> Mr. Wahl needs treatment in a number of domains of psychological and emotional functioning. No comments about cognition are possible until adequate resolution of depression, anxiety and sleep, along with better pain management is realized. The following is strongly recommended to assist this man in moving toward return to productive, satisfying social and vocational roles.
>
> 1. <u>Pharmacological treatment for Depression</u>. It was strongly recommended to Mr. Wahl that he sees his GP as soon as possible to discuss this type of treatment. Such intervention may also help with his anxiety to some extent given the appropriate agent. He is aware that he may need to remain on an antidepressant, if deemed suitable for a number of months or longer. Mr. Wahl was in agreement with this recommendation.
> 2. <u>Medication Review</u>: Mr. Wahl has been on a benzodiazepine, Flexoril, for a surprisingly lengthy time (since the MVA). The side effects profile may not be the best fit for Mr. Wahl given his anxiety. It is recommended that once he is stable on an antidepressant, this medication be very slowly weaned and replaced with an agent for sleep, if needed that also has fewer dependency complications.
> 3. <u>Cognitive-Behavioural Therapy for Anxiety</u>: Mr. Wahl's anxiety is multifactorial. He would be best treated with evidence-based psychological intervention to provide practical, functionally-based skills for anxiety management. Depression management as well as sleep management skills can readily be part of such intervention, along with processing of unresolved emotional issues related to his changed situation. Mr. Wahl may also benefit from practices that assist in reducing arousal, such as meditation, for arousal management. Psychologists with training in these therapies and who are in close proximity to Mr. Wahl [names, addresses and telephone numbers omitted.]
> 4. <u>Pain Management</u>: Mr. Wahl has few coping resources for pain and has little understanding of the factors that affect his pain. A multidisciplinary, time-restricted day pain program is strongly recommended to provide him with the skills to best manage his pain difficulties. Back in Motion . . . provides rehabilitation services to this kind and is located in Surrey BC reasonably close to where he lives. Psychological services can also be accessed as part of their programs.

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> 5. Re-Assessment: I would be happy to see this man once again for assessment once clinical features of depression, anxiety and sleep disruption are better managed and stable, and once his physical condition is resolved and pain is less prominent. A reassessment for the late fall or early 2009 is recommended; at this time, I have reserved Monday December 1, 2009 for reassessment, if needed.

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[90] This report was dated the same date as the short assessment done by her. Her report of December 20 is a full report, made at a time when she also interviewed the plaintiff's mother and his roommate Tammy Massender.

[91] With respect to her fuller assessment, Dr. Bishop commented negatively on the plaintiff's effort during her assessment. At page 22 of her December 20th report, she noted very poor effort on the part of Mr. Wahl. She defined poor effort as being performance either below 50% or lower than expected by test parameters. In Mr. Wahl's case this raised the possibility of poor effort that could also affect the performance integrity of the test administered by her. Her words to that effect are found at page 22 of her report where she states, particularly with respect to Evaluation of Effort:

> Effort testing was applied. Although effort testing of itself cannot determine motivation as submaximal effort may be multifactorial in origin (e.g., fear of pain, anxiety with regard to performance, perception of dysfunction, need to demonstrate distress, etc) poor effort as defined by performances either below chance (50th percentile) or lower than expected by test parameters raises the possibility of poor effort that could also affect other test performance integrity. Suboptimal performance on at least three of the measures below, along with feigned psychological symptoms in concert with deliberately invalidated personality measures would strongly suggest high levels of calculated negative impression management scores. His effort was poor on a standard forced-choice test; both low effort and fatigue are probably implicated but in any case question any lower-than-expected, isolated cognitive findings.

[Emphasis added]

[92] Various tests were performed by Dr. Bishop and she repeatedly found Mr. Wahl's performance on various tests to be very weak. At page 3 of her December report she commenced her opinions and commented positively relative to the fact that he had, by then, started psychological treatment with psychologist Marlo Gal.

Thereafter her opinions with respect to Mr. Wahl are somewhat guarded. At page 4, paragraph 3, she states:

> With regard to the validity of the test results, there was indication of poor effort on a formal forced-choice test of dissimulation at both assessment dates. In concert with indications of poor effort on a similar measure in February 2008 at the first assessment and along with a marked chronic pain presentation and chronic sleep disruption, the cognitive findings from this assessment are interpreted with caution.

Thereafter she dealt with the lack of effort issues she had previously identified when she said at paragraph 6:

> Regardless of effort issues, it is useful to comment on Mr. Wahl's intellectual and cognitive functioning in order to understand his presentation. Mr. Wahl's general pre-accident intellectual capacity and potential for academic achievement was probably average at best. He was not academically inclined but had relative strength for nonverbal or performance abilities. Testing at both assessment dates demonstrated stable intellectual functioning consistent with his background, with stronger (High Average) non-verbal or performance abilities.

[Emphasis added.]

[93] On more than one occasion Dr. Bishop commented on the fact that his test results could have been affected by chronic pain, sleep disruption, anxiety and depression, and finally, commencing at paragraph 10 she dealt with Mr. Wahl as an individual when she said:

> 10. The main impression is of a very entrenched, catastrophic chronic pain profile in a naïve individual who has a highly pessimistic view about his current and future situation. He fits the DSM-IV-TR criteria for Pain Disorder. Thought processes are concrete. He is highly somatically focused, over and above what I understand to be a significant, persistent right shoulder soft tissue injury. He is remarkably stuck in a belief about complete incapacity. He reports no responsibility for any contribution to the running of his household other than personal care. He is adamant that any activity puts him 'over the edge' with pain, describing how he sometimes screams with pain and anger. He described that even using the TV remote is very painful for him. His identity was attached to his ability to perform physical work and to simply 'tough it out' when life was difficult.
>
> 11. I have no doubt that Mr. Wahl is experiencing considerable pain and emotional distress, and am of the opinion that his pain, depression and anxiety are associated either directly or indirectly with the MVA in question. Mr. Wahl is understandably concerned about his future, but is of the belief that his physical capacity is diminished to an extent to prevent him from

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> engaging in even regular daily activities. Past events continue to have strong emotional impact on Mr. Wahl: events associated with his father's brain injury and following life complications, as well as his work-related accident in 2001 where he was also trapped, both exert significant emotional impact for fears and worry about his future.
>
> [Emphasis added.]

Thereafter, she said this at paragraph 13:

> 13. Resolution of emotional distress, headache and shoulder pain, sleep disruption, dizziness and emotional turmoil should be reflected in a much better emotional state for this man. However, given his entrenched position about pain-related issues, I very much doubt that much progress will be made unless he is formally treated in an intensive pain management program, as one strategy.
>
> [Emphasis added.]

She concluded with the following Recommendations:

> 1. Anxiety Treatment: Mr. Wahl is counselled to continue with psychological treatment. Behavioural activation is recommended as part of this intervention. Should further assistance be needed, a referral to the Anxiety Disorders Clinic at UBC may be useful although their admission criteria are somewhat narrow and it is geographically distant from Mr. Wahl's home.
> 2. Pharmacological Intervention: Mr. Wahl is counselled to discuss the need for pharmacological intervention for depression and anxiety with a treating psychiatrist.
> 3. UBC Sleep Disorders Program Assessment/Intervention: A referral to the UBC Sleep Disorders Clinic should be considered; his GP may wish to follow-up in this regard. [Address and phone number omitted.]
> 4. Pain Management Program – Back in Motion – an intensive, formal pain intervention program is strongly recommended to help this man better manage his pain and re-engage in normal activity.
> 5. Addictions Medicine Specialist Consultation: Mr. Wahl is dependent on a number of pain-related medications, as well as on Flexoril, an agent recognized to be counterproductive in the longterm.

[94] It is noteworthy that in both her recommendations of February and then in December she repeatedly recommended a pain management program and medication review given her finding that Mr. Wahl had become dependent on a number of pain related medications as well as on Flexoril.

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REPORT OF DR. MARLO GAL

[95] Dr. Marlo Gal is a registered psychologist having obtained her doctoral degree in 2004 and being a Registered Psychologist in British Columbia since 2006. Her report is dated November 2, 2009. She began seeing Mr. Wahl on August 13, 2008 following the departure of his previous psychologist Dr. Wade. Apparently Dr. Wade first saw Mr. Wahl on March 18, 2008 and at the time of trial had seen him some 50 times. At page 3 of her report she refers to him having told her not only of his bodily pain but also problems of concentration, and also of the following symptoms –

a) Ringing in his ears;

b) A different sense of smell;

c) Constant spasms in his right shoulder;

d) His right shoulder “clicks, snaps, and pops” all of the time;

e) Limited range of motion in his neck;

f) Right side of his neck hurting worse than his left side;

g) Pain on the right side of his chest from his clavicle downward;

h) Upset stomach all of the time which has resulting in acid reflux for which he takes Renetidine;

i) Stabbing-like pain in his left hip;

j) Spasms throughout his back;

k) Difficulties with bladder and bowels.

[96] He also reported to her that his appetite was diminished and he had to force himself to eat. Dr. Gal reports that Mr. Wahl reported to her that he had been depressed since the accident and reiterated what he said at trial, being “there is no

light at the end of the tunnel". In addition, she recites that Mr. Wahl reported that he has no sex drive and that he experiences suicidal thoughts, although sometimes they are just fleeting thoughts.

[97] With respect to driving Mr. Wahl related to Dr. Gal that he hated driving and that he panics and he feels closed-in. He reported that those symptoms he has with respect to driving are even worse as a passenger. At page 9 of her report relative to Personality Assessment Inventory (PAI) which she administered on October 7, 2009, she found that Mr. Wahl was elevated on one of the clinical scales ". . . indicating some exaggeration or overemphasis of problems". She opines that:

> Such an elevation may represent an overly negative view of self and life in general, a "cry for help", or some deliberate distortion of the clinical picture.

[Emphasis added.]

She did however say that her interpretation should proceed with caution. She went on to state, again at page 9 of her report:

> His clinical profile suggests that he has significant concerns about his health, traumatic related anxiety, depression and general anxiety. Such an individual believes that their health is not as good as similar aged peers and that their health problems are complex and difficult to treat successfully. They report functional impairment due to symptoms associated with sensory or motor dysfunction. They report frequent occurrences of various physical symptoms such as headaches, pain or gastrointestinal problems. The physical symptoms are often accompanied by some depression and anxiety. Such a profile also reflects significant anxiety and tension. Such an individual is tense much of the time and ruminates about anticipated misfortunes. They report prominent worry and concern about current issues. Their worries affect their ability to concentrate. Their friends are likely to comment about their over concern regarding issues and events over which they have no control. They have difficulty relaxing and are fatigued as a result of high perceived stress. They tend to experience and express stress in somatic forms (e.g. sweating palms, trembling hands). It is likely that phobic behaviours are interfering in some significant way in their life. They have typically experienced a disturbing traumatic event in the past – an event which continues to distress them and produce recurrent episodes of anxiety. They are socially withdrawn and misunderstood by others. Typically there is little energy and motivation to pursue interests. They report thoughts of worthlessness, hopelessness and personal failure. Indecisiveness and difficulties in concentration are also likely. They report feeling sad, a loss of interest in normal activities and a loss of pleasure in things that were previously enjoyed. They experience depression in somatic forms. They report changes in physical functioning, activity and energy. They are likely to

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> show a disturbance in sleep pattern, decreased sexual interest and loss of appetite and/or weight loss. They have little hope for the future, are in despair, believe that they are useless to others and feel unable to help themselves. They may feel rejected by people around them and are often bitter about the way that they have been treated by others. Such an individual is likely to closely monitor their environment for evidence that others are trying [to] harm or discredit them in some devious way. They are likely to be socially isolated and have few interpersonal relationships that could be described as close and warm. Their social isolation and detachment may serve to decrease the sense of discomfort that interpersonal contact fosters. The thought processes of these individuals are likely to be marked by confusion and difficulties in concentration. Such an individual also tends to experience episodes of extreme mood swings. They tend to be uncertain about major life issues, have little sense of purpose and describe themselves as feeling empty, bored or unfulfilled. They are easily angered, report having difficulty controlling the expression of their anger and are likely to be perceived by others as being hostile and readily provoked.

[98] In Dr. Gal's Summary of Psychological Intervention she recites that she has been seeing Mr. Wahl on a weekly basis since August 13, 2008. She reports that although he has come to every session, <u>Mr. Wahl has been resistant to the therapeutic process and that "historically, he has coped with difficulties by avoiding dealing with them</u>". She went on to state that rapport between herself and Mr. Wahl was difficult to develop, however, once it was established some progress was made. She described the therapy provided over the 50 visits as being learning self-relaxation techniques, anger management, behavioural activation to reduce symptoms of depression, identification of PTSD symptoms and beginning of exposure therapy, pain management, and general support as he only has his friends Greg and Tammy who provide support and assistance to him. [Emphasis added.]

[99] Dr. Gal then reported with respect to teaching Mr. Wahl how to relax with deep breathing techniques but only had a small amount of success and was unable to utilize progressive muscle relaxation with Mr. Wahl in part because "he is unable to sit still". She gave a report on one relaxation technique that did appear to have success at page 12:

> The last relaxation technique that was tried yielded the greatest success. We tried a combination of deep breathing and the use of a stress ball. When this was tried in the office, Mr. Wahl reported that it helped. He reported that he tried it at home and it was also helpful. I showed Mr. Wahl pictures of a Ford

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> F150 and using the combination of the deep breathing and stress ball resulted in a reported decrease in anxiety from 10/10 to 6.5-7/10.

[100] She also reviewed other therapies that she had attempted, including exposure therapy utilizing a picture of a tractor tire and showing it to him. Apparently the preliminary exposure therapy was not successful and it was delayed for a few months. When the second attempt was initiated by Dr. Gal she reports that Mr. Wahl was having difficulty looking at a picture of a white Ford 150 truck but then brought him a tennis ball to use like a stress ball. She reports that Mr. Wahl reported that having the tennis ball to use as a stress ball helped. Some time later after using the stress ball and deep breathing, Mr. Wahl reported that after doing this at home his anxiety had decreased to a 6 out of 10. At page 14 of her report, Dr. Gal said:

> It is anticipated that as the depression and PTSD symptoms decrease, there should be a decrease in pain. At the time of writing this report, Mr. Wahl was still waiting to see an orthopaedic specialist about his shoulder and hip.

[101] In her summary she reported that her psychological intervention had been of some benefit. She concludes, at page 15 by stating:

> . . . Mr. Wahl has had difficulty engaging in treatment, but progress is demonstrated, albeit slow. He has expressed frustration about his lack of physical progress and the lack of answers about what is wrong with him physically. Mr. Wahl does have a passive-aggressive style of coping, which was not problematic until this accident. Prior to this accident, Mr. Wahl had recovered from serious physical injury in a short period of time. As such, he has always avoided coping with the stressor as none of the previous stressors were prolonged, and he would just "put it behind" him. As a result of this recent accident and the persisting nature of his problems, he is not recovering physically nor psychologically; and his inability to participate in physical activity and work has resulted in significant psychological problems.
>
> Based on my observations of Mr. Wahl's behavior in our sessions and his current psychological difficulties, I am unsure if he will be able to return to the workforce in any capacity. To determine his residual employability, the diagnosis and prognosis of his physical problems would need to be assessed, an area which is outside of my area of expertise. Furthermore, a vocational assessment may be of benefit to determine his residual work abilities and, if feasible, potential areas of retraining. I would defer to the respective specialist to comment on Mr. Wahl's future employability.
>
> Based on my assessment of Mr. Wahl, my interview with Ms. Massender, and my treatment of Mr. Wahl, I am of the opinion that he is still experiencing PTSD, depression and chronic pain due to psychological factors and a

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> medical condition which are referable to his motor vehicle accident of June 22, 2006.

DR. DONALD HAY

[102] Dr. Hay, Mr. Wahl's family doctor, gave evidence for the plaintiff. He also provided his reports of March 14, 2009 and January 1, 2010. He had been the plaintiff's family physician since October 19, 2005. With respect to his first visit on October 19, 2005, Dr. Hay, in his report of March 14, 2009 states:

> On history, he incidentally mentioned that after very heavy work, of over 40 hours per week, he had mild discomfort in his right shoulder and left hip. These were thought to be from a motor vehicle accident sometime before. He had no disability and only mild discomfort after prolonged heavy work. I x-rayed his right clavicle, right shoulder and his left hip. All were reported as completely normal.

[103] Dr. Hay, in the same report, references the accident on June 22, 2006 when Dr. Hay attended on Mr. Wahl on June 23, 2006. With respect to that examination Dr. Hay reports that the plaintiff had neck pain and increasing stiffness and pain with very limited rotation, flexion and extension of his neck. Dr. Hay also states that the plaintiff had bilateral peri-scapular muscle pain. Dr. Hay prescribed Naproxen, 500 mg B.I.D. and Flexeril. Dr. Hay then reports seeing the plaintiff some six days later on June 29, 2006, noting that the plaintiff's pain and stiffness had increased with trapezius pain bilaterally as well as peri-scapular and upper back pain and also left hip pain.

[104] In his report of March 14, 2009 addressed to plaintiff's counsel, Dr. Hay provides the following:

> He was seen again on July 7 and July 17, 2006. Initially, reports were sent to W.C.B. because he was working at the time of the motor vehicle accident. He was ordered to have physiotherapy in mid July for his back (lumbar spine), his peri-scapular muscles and his neck.
>
> By August 3, 2006 he was still in significant pain in his shoulders, back, peri-scapular and lumbar region. He was feeling nauseated and he was having significant neck pain. He had a CT of his head which was negative for any acute intracranial injury. The films were to make certain he did not have a subdural hematoma.

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> By August 29, 2006 he had significant right biceps, shoulder and peri-scapular pain. He was feeling confused and seemed to stutter, but his CT was normal. He continued to take Naproxen but he required Nexium to control the gastritis from the NSAID.
>
> In late September 23, 2006 he was having physiotherapy twice weekly but still had considerable pain. He was slowly improving but his right shoulder was a major problem and he appeared to have impingement problems. An M.R.I. was ordered of his lumbar spine and hip. The hip part of the M.R.I. was normal with normal anticular cartilage and the muscles and tendons were unremarkable. The lumbar spine part of the M.R.I. shows extensive spondylosis of L2-3, L4-5 and L5-S1. This could account for the extensive pain in his lumbar region and also radiation to his hip and through gait modification from pain would give hip and leg pain.
>
> He continued to have both hip and right shoulder pain. Improvement was very slow and seemed to reach a plateau with only slow forward progress if any. It became evident that he could not resume his employment with the tire company as there is no light duty and with physical work he would promptly deteriorate. He continued an exercise program under the direction of physio. He continued with right shoulder and left hip pain. The hip had poor range of motion and pain.
>
> Through early 2007 his improvement was slow and intermittent with deterioration with increased activity. His shoulder continued to be painful with noise on movement of the joint. He appeared to have significant problems with the supraspinatus tendon with partial tear.
>
> By mid July 2007 it became evident that he should find an alternative vocation. He remains in that situation still with a plateau in improvement.
>
> It appears he will have long term or permanent disability originating from the motor vehicle accident on June 22, 2006. His shoulder and hip pain and limitation are still severe and some retraining will be necessary but with work designed to allow for his physical problems. He was partially trained as a plumber but that does not seem to be a possibility with his limitations. He has pain with prolonged standing or sitting and these would have to be considered. He improves with exercise programs and physio and these would need to be continued.
>
> PROGNOSIS:
>
> He has significant disability which will be prolonged or permanent.

[105] Finally, in his report of January 1, 2010, written as an addendum to his report of March 14, 2009, Dr. Hay provides the following:

> Another part of his disability following the M.V.A. is headaches. He had no headache problem before the M.V.A., then he sustained a head injury from the M.V.A. After the accident he was checked and had x-rays including still films and no fractures were found. He sustained a concussion, but there was no evidence of an intracranial bleed or pressure. I saw Donald the next day when he had neck pain, shoulder pain and spasms.

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> These injuries were causing him severe headaches. Throughout the course of treatment the headaches have persisted. He became frustrated with his slow recovery and this stress has added to the problem. These headaches were of mixed injuries, muscula from the neck, stress and migraines. The headaches now are often or always migraines. Some headaches are aggravated by the analgesics used for the muscle pain as they can cause a rebound. The analgesics used are not addictive and he is using them in proper dosage. Some Amitryptyline has helped the headaches and other pain.
>
> The headaches are continuing as a significant disability with no evidence if they will stop in the near future.
>
> His general disability continues as well making work impossible and severely impacts his daily life. He is unable to sit for a short time. His hip, back and neck pain limit most activities. He is only able to work at a computer for 5 – 10 minutes before pain and spasms force him to stop.
>
> It is difficult to find employment which he could perform in his present status and at this point it is difficult to predict his progress.

[106] Dr. Hay's medical records were provided to the court in the defendant's brief of documents marked as Exhibit 5 in these proceedings. Of some note is the fact that at Dr. Hay makes the following comments:

October 14, 2006	slowly improving
November 1, 2006	improving – having physio regularly
December 18, 2006	doing well, improving

[107] Notwithstanding those general comments, there are still references to the plaintiff's hip and shoulder.

[108] On February 15, 2007 Dr. Hay, in his clinical reports, notes:

> Shoulder improving slowly – physio great help

[109] Notwithstanding, at that time there were questions noted on the same entry of February 15, 2007, being

> - neck – x-ray normal but some sudden pains & spasms – facet joint pain?
>
> Lumbar pain – has L5S1 disc problem – new – certainly symptoms only present since accident – MRI?

[110] At that time Dr. Hay noted, with respect to the plaintiff's hip, that there was a poor range of motion. The next date of entry in the record is February 22, 2007 where he notes "MRI ordered through Lawyer". On March 21, 2007 Dr. Hay notes:

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> Shoulder – snaps & pops & pain – no physio exercises – physio seems to make it worse, . . .

[111] On July 4, 2007, Dr. Hay again reported “slow improvement” in the plaintiff’s hip and back although on August 22, 2007 he also noted “back hip & shoulder still major problem”. On December 11, 2007 Dr. Hay reported that he discussed the shoulder pain with the plaintiff and noted “numbness worse” but also reported “slowly improving”. Finally on April 8, 2008 Dr. Hay reports in his records:

> Is slowly improving but has plateaued peri-scapula muscles – spasm

[112] Throughout the fall of 2008 Dr. Hay’s reports of complaints of spasms indicated by the plaintiff in his neck and shoulder and that the plaintiff was unchanged. On February 9, 2009 Dr. Hay noted “headache shoulder hip back & spasms”. Similarly, through the spring to May 26, 2009, Dr. Hay’s clinical notes refer to medication and subjective complaints from the plaintiff. During the period June 23, 2009 through to August 26, 2009, being the last entry in Dr. Hay’s clinical notes, essentially all entries in the notes are of subjective complaints by the plaintiff.

[113] Dr. Hay, in his direct examination, did state that he okayed recommendations each time and in particular recommended counselling. His opinion was that Mr. Wahl needed support and guidance. He also confirmed that he himself had noted spasms and prescribed medication for them, although he agreed that this medication can make one sleepy.

[114] Under cross-examination Dr. Hay agreed that he had a vast array of resources to assist patients and agreed that he carefully and accurately records his appointments with his patients in his clinical notes. He agreed that his notes of O/E refers to ‘on examination’ and S refers to ‘subjective’. He also agreed that he encourages patients to get back to work and it is best to get back to work to avoid depression.

[115] Dr. Hay also agreed that the plaintiff had advised him that x-rays had been taken of his neck at the hospital, but conceded that that advice was erroneous. He also agreed that an x-ray was done on the plaintiff in December 2006 which proved

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to be normal. With respect to physiotherapy, he agreed that the plaintiff had indicated to him that physio was not helping but Dr. Hay felt that the plaintiff may need physio for a long time and that medically he did not know if the plaintiff would get worse without it. He agreed that he only thought that he had referred the plaintiff to an orthopaedic surgeon but conceded that Dr. Chin was a referral from the plaintiff's lawyer.

[116] Dr. Hay also agreed under cross-examination that in neither of his medical/legal reports was there any mention of anxiety or emotional symptoms mentioned. He also agreed with respect to the January 1, 2010 report that no physical examination was performed at that time specifically for the report. With respect to Dr. Hay's statement that it is difficult for the plaintiff to find employment as contained in his January 1, 2001 report, he agreed that the plaintiff had not told him that he was indeed trying to find employment.

[117] Under further cross-examination Dr. Hay agreed that he had not physically examined the plaintiff for the preparation of either of his reports and they were solely based on subjective reports to Dr. Hay from the plaintiff. Dr. Hay indicated that he prefers to trust and believe his patients. Dr. Hay also opined that the plaintiff was taking his medication quite religiously and the medication seemed to be working, although he agreed that his opinion was again based on the subjective reporting by the plaintiff.

[118] With respect to x-rays taken of the plaintiff since the accident, Dr. Hay agreed that there is no evidence of joint or objective findings on the x-rays.

[119] Under re-examination with respect to objective findings, Dr. Hay was asked by defence counsel of any objective signs he had observed in the plaintiff. His answer was simply that he notes the limitation of movement. With respect to the one reference in his notes to anxiety, Dr. Hay agreed that anxiety was the frustration of not getting better and that anxiety presents as a problem when there was no improvement over time.

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[120] With respect to the MRI conducted of the plaintiff on April 10, 2008 and the impression of the MRI that lumbar spondylosis was evidenced, Dr. Hay agreed that this can be wear and tear but opined that Mr. Wahl was fairly young to have this although it is not uncommon in most 50 year olds and construction workers.

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[121] Dr. Hay, being the plaintiff's family physician, is an important witness for the plaintiff. I did, however, come to the conclusion after listening to Dr. Hay in both direct and cross-examination that he came across as being rather defensive and close to being an advocate for the plaintiff when he stated that he felt sorry for Mr. Wahl. It is noteworthy that Dr. Hay agreed that there were no signs of an objective injury having been sustained by the plaintiff and that the plaintiff's complaints after the accident were, according to him as evidenced by his clinical notes, very general with respect to any particular location in the plaintiff's upper back and shoulder area rather than being specifically localized on the right shoulder tip where Dr. Chin had reasoned specific pain would be. It is also noteworthy that Dr. Hay agreed that Mr. Wahl did not complain of symptoms of concussion to him. As previously indicated, while Dr. Hay may have initially referred the plaintiff for some physiotherapy shortly after the accident, there is nothing to indicate ongoing rapport between the physiotherapist and Dr. Hay regarding the treatment by the physiotherapist or the progress being made by the plaintiff as a result of physiotherapy which reporting one regularly sees where the general practitioner is the "gate keeper" with respect to his or her patient.

<u>DR. PHILIP TEAL</u>

[122] The plaintiff was assessed by Dr. Teal at the request of the defence on September 18, 2009, and his report of November 2, 2009 is part of Exhibit 5. Dr. Teal is a neurologist and he conducted a mental status examination and an assessment of Mr. Wahl's cognitive functions. He provided the following information with respect to the current medications Mr. Wahl was taking as at the date of examination:

1. Gabapentin 3-6 capsules per day
2. Cipralex 15 mg per day

3. Amitriptyline 30 mg per day
4. Flexeril ½ tablet twice during the day and full tablet at bedtime
5. Tramacet 4-8 tablets per day
6. Ranitidine 300 mg per day
7. Naproxen 500 mg 2-4 tablets per day
8. Tylenol or Advil as necessary

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[123] With respect to his physical examination of the plaintiff, Dr. Teal stated, at page 7, as follows:

> Mr. Wahl initially demonstrated pain behaviour with sighing and some grimacing and appearances of discomfort. This behaviour, however, was not sustained throughout the course of the interview and examination, and he subsequently became more animated, relaxed, and smiled, and did not continue to demonstrate pain behaviour.
>
> He was able to get in and out of chairs and on and off the stretcher without any discomfort. He was able to take his shirt and shoes off and put them back on without any limitations or apparent restrictions.
>
> Romberg's was negative. Toe-walking and heel-walking were normal. His natural gait was stable and narrow-based with symmetric arm swing.
>
> There was no evidence of nerve root irritation of his lumbar spine. Tripod manoeuvre was negative. Trendelenburg sign was negative. Straight leg raising was negative to 90 degrees.
>
> There was preservation of lumbar lordosis. Forward flexion was full. He was able to touch his toes with his legs straight. Lateral rotation and lateral flexion were normal. Back extension was normal.
>
> Throughout the course of the interview and examination spontaneous neck movements were full and natural with no apparent limitations or restrictions. Compression tests, Spurling's manoeuvres, and cervical grind testing were all negative for signs of nerve root irritation. There was no bony tenderness and no paracervical muscle spasm.
>
> Tests for thoracic outlet manoeuvre were negative. Upper Limb Tension Test was negative. Adson's manoeuvre was negative. On sustained Elevated Arm Stress Test, he reported right shoulder pain and muscle spasms spreading into the neck. There were no complaints of hand or arm numbness or tingling.
>
> There were no changes in skin colour or temperature in the hands or arms. Radial pulses were symmetric. There were no subclavian bruits heard. Abduction manoeuvres of the shoulder were negative for signs of radial pulse deficit or subclavian bruits.
>
> Olfaction was present bilaterally. Visual fields were full to confrontational testing. Funduscopic examination was normal. Ocular movements were full and smooth with no nystagmus. Facial sensation and movement were normal. Hearing was intact to routine bedside testing. The lower cranial nerves were intact.

> Tone was normal in the upper and lower extremities. There was no drift. Rapid hand pats and fine finger movements were normal. Rapid alternating movements were normal. Power was full both proximally and distally in the arms and legs in all muscle groups.
>
> Deep tendon reflexes were 2/4 (normal), present and symmetric throughout. Plantar reflexes were flexor bilaterally (normal).
>
> There was subjective decrease to pinprick in the left 4th and 5th finger and medial aspect of the forearm which was inconsistent. There was no splitting of the 4th finger. There was no aggravation or reported worsening of sensory symptoms in various positions or with provocative manoeuvres.
>
> Cerebellar testing was normal. Tandem gait was normal.
>
> During the initial portion of the examination Mr. Wahl would occasionally move or rub his shoulder and grimace in discomfort. This behaviour was not sustained and was very inconsistent throughout the examination. Spontaneous movements observed throughout the remainder of the interview and examination did not reveal any apparent limitations or restrictions of shoulder movement. On formal testing, forward flexion, internal and external rotation, and abduction of the right shoulder showed normal range of motion. The Apley “Scratch” Test was normal. There was no wasting or loss of muscle bulk in the deltoid, supra- and infraspinatus muscles. There was no evidence of weakness in the shoulder girdle.

[Emphasis added.]

[124] Dr. Teal provides the following opinion with respect to potential injuries and possible neurological sequelae sustained by the plaintiff in the subject motor vehicle accident:

> 2. It is my opinion that it is very unlikely that Mr. Wahl sustained any clinically significant Mild Traumatic Brain Injury (MTBI) or concussion as a result of the motor vehicle accident, and any possible head injury sustained was trivial in nature. I base this opinion on the following facts, assumptions, and reasoning:
>
> 2.1 A number of definitions and grading systems are applied to the term “Mild Traumatic Brian Injury”, and also to “concussion”. I generally use the classification for Mild Traumatic Brain Injury (MTBI) defined by the World Health Organization (WHO) Collaborating Centre for Neuro-Trauma Task Force on Mild Traumatic Brain Injury. This task force recommends the following operational definition: MTBI is an acute brain injury resulting from mechanical energy to the head from external physical forces. Operational criteria for clinical identification include: (i) One or more of the following: Confusion or disorientation, loss of consciousness for 30 minutes or less, posttraumatic amnesia for less than 24 hours, and/or other transient neurologic abnormalities such as focal signs, seizures, and intracranial lesion not requiring surgery; (ii)

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> Glasgow Coma Score of 13-15 after 30 minutes post-injury or later upon presentation for health care. These manifestations of MTBI must not be due to drugs, alcohol, medication, caused by other injuries or treatment for other injuries, or caused by other problems.
>
> Additionally, in the assessment of the severity of brain injury, I take into consideration the depth and duration of both anterograde and retrograde amnesia, the duration of loss of consciousness, the injury mechanism, the presence or absence of focal neurologic signs or symptoms, and the results of neuroimaging studies including CCT and MRI brain scans.
>
> 2.2 The ambulance crew arrived at the accident scene within four minutes of receipt of the call. He was reported to be alert. Initial Glasgow Coma Scores were 15/15 on two occasions.
>
> 2.3 The ambulance crew reported that the patient denied loss of consciousness. The medical and nursing staff at Surrey Memorial Hospital both recorded that there was no loss of consciousness.
>
> 2.4. There is no report of confused behaviour or posttraumatic disorientation.
>
> 2.5 Mr. Wahl did not report any history or symptoms of a head injury when evaluated by his family physician on June 23, 2006, one day following the motor vehicle accident or during subsequent frequent evaluations.
>
> 2.6 At the time of my evaluation, Mr. Wahl reported that he may have been transiently unconscious and states he woke up with broken glass around him and blood. This is inconsistent with the medical records and reports obtained on the day of accident and immediately following the accident. Mr. Wahl reported clear and vivid memories of events immediately after the accident including his initial verbal response to a bus driver who came up to the window of his vehicle. Mr. Wahl recalls the arrival of ambulance and the fire department and recalls immediate events following the accident. His vivid memory for these details is inconsistent with postconcussional confusion.
>
> 2.7 Mr. Wahl has no retrograde amnesia for events immediately preceding the impact, in fact, he remembers the actual impact.

[125] In his summary Dr. Teal opined that the plaintiff does not fulfill even the minimal criteria for a mild traumatic brain injury. His opinion was that the plaintiff had not sustained persisting cognitive or neurobehavioural sequelae as a result of the subject accident.

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[126] Further, based in part on the fact that the plaintiff did not report any complaints of cognitive problems to his family physician in the months following the motor vehicle accident and the results of the neuropsychological assessments conducted by Dr. Bishop and other facts and assumptions, Dr. Teal concluded that it was most likely that the plaintiff's subjective cognitive complaints were due primarily to issues of sleep disturbance and the use of sedating medications.

[127] Dr. Teal further opined that what had been suffered was a Grade II cervical strain (whiplash) as Mr. Wahl had not indicated any symptoms to support a diagnosis of cervical nerve root injury or irritation.

[128] Dr. Teal also found that at the time of his evaluation of Mr. Wahl in 2009 that the plaintiff had a completely normal cervical spine examination and that his spontaneous neck movements were full and natural. Formal neck evaluation showed full range of motion and no paracervical muscle spasm or tenderness.

[129] With respect to Mr. Wahl's reports to Dr. Teal respecting chronic headaches, neck pain, right shoulder pain and left hip pain, Dr. Teal observed, at page 11 of his report:

> At the time of my evaluation, Mr. Wahl initially demonstrated pain behaviour with grimacing, rubbing of his shoulder, and sighing. This behaviour resolved quite quickly. He subsequently appeared to be comfortable and had no apparent restrictions or limitations.

[Emphasis added.]

[130] Given the proximity of time to trial of Dr. Teal's report, I would set out the following closing opinions made by Dr. Teal, at page 12, in his report of November 2, 2009:

> 6. Mr. Wahl has a prior history of right shoulder injury and a left hip injury. These have been the subject of previous WCB claims and work loss. It is possible that the motor vehicle accident of June 22, 2006 aggravated pre-existing problems with his right shoulder and left hip. I would defer to an orthopedic opinion as to whether or not Mr. Wahl has any objective evidence for persisting recurrent injuries to his hip or shoulder arising from the motor vehicle accident of June 22, 2006.

7. It is my opinion that it is highly unlikely that Mr. Wahl will develop progressive degeneration the cervical or lumbar spine as a result of injuries sustained in the motor vehicle accident of June 22, 2006. Mr. Wahl will not require future surgery to the neck or back as a result of any injuries arising from the motor vehicle accident in question. I find no evidence for any limitations of recreational or vocational activities with regard to his neck or back.

8. Mr. Wahl does report recurrent headaches since the motor vehicle accident. At the time of my evaluation, he stated the headaches were occurring on a daily basis. A review of the medical records of his family physician does not reveal recurrent complaints of headaches. He did report headaches on September 23, 2006, but there are no recurrent complaints of headaches in the year following the motor vehicle accident.

   It is my opinion that Mr. Wahl's headaches are not due to persisting posttraumatic mechanisms. There is no evidence for a postconcussional syndrome. He does not have a history or clinical findings to suggest that his headaches are due to chronic cervicogenic mechanisms. It is likely that his headaches are tension-type headaches.

9. Mr. Wahl has rather extraordinary complaints of pain in multiple areas including headache, neck pain, shoulder pain, low back pain, and hip pain. The reported severity and persistence of his pain greatly exceeds any objective evidence of injury. The injuries sustained by Mr. Wahl in the motor vehicle accident of June 22, 2006 are essentially soft tissue injuries which, for the most part, should have resolved within 6-12 weeks.

   I am concerned about the polypharmacy and daily use of multiple medications. As far as I can determine, the use of gabapentin, Tramacet, and anti-inflammatories has not significantly improved Mr. Wahl's pain. Additionally, Mr. Wahl does not seem to have significantly benefited from frequent and repetitive physiotherapy.

   It is my opinion that Mr. Wahl's complaints of pain far exceed evidence of organic pathology. Potential explanations for his persistent subjective complaints of pain include mood disturbance, a chronic pain disorder, or malingering. I would defer to a psychiatric opinion regarding the presence, causation, and contribution of any depression or mood disturbance on Mr. Wahl's pain symptoms.

10. Mr. Wahl does not require any further neurological investigations. I would recommend a progressive reduction and subsequent discontinuation of potent analgesics such as Tramacet, the use of gabapentin, or the long term use of an anti-inflammatory. Amitriptyline may continue to serve a useful purpose with respect to sleep regulation. I would defer to a psychiatric opinion regarding the need and ongoing role of antidepressant medication.

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> 11. Based on the nature and mechanism of injury, I would have anticipated that Mr. Wahl would have been off work for 6-12 weeks.
>
> [Emphasis added.]

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[131] Under cross-examination Dr. Teal agreed that he had not had the opportunity to see Dr. Hay's latest report of January 1, 2010 and he also confirmed that he had not been provided with any counselling records, Dr. Gal's reports, his physiotherapist's reports and had not spoken to collateral witnesses. Dr. Teal was cross-examined at some length but maintained that he was confident in his findings.

REZA HORMOZI – PHYSIOTHERAPIST

[132] Reza Hormozi, physiotherapist, gave evidence with respect to 350 physiotherapy treatments he had provided to the plaintiff up to December 9, 2009. Mr. Wahl had originally been referred by Dr. Hay. He gave evidence that when he first started treating the plaintiff, the plaintiff had very restricted range of motion. He testified that he had observed positive signs of pain although conceding that there had been some improvement in the first month of treatment and then no improvement following that time. He testified that in October 2006 the plaintiff had up to 50% mobility in his shoulder and approximately 50% mobility in his lower back. Since October 27, 2006 he testified that the plaintiff's range of motion had not changed much and that the range of motion was probably only approximately 10% although his posture at the present time was much better. As of December 2009 he testified to the plaintiff still feeling pain and the objective sign he relied on was that the plaintiff's shoulders are rounded.

[133] The treatment consisted of ultrasonic therapy to Mr. Wahl's right side and massage for his neck and right shoulder. Other therapy included a heat pad, and traction to the plaintiff's lower back and neck. With respect to compliance, the therapist testified that the plaintiff attends regularly although the plaintiff may have missed a couple of times because of influenza.

[134] Under cross-examination the physiotherapist agreed that he sees various clients, some of who are partially covered by MSP, but with respect to the plaintiff he

confirmed that he had seen him as a private patient for which he charged $45 per hour. He also agreed that based on his records there were no copies forwarded to the family physician, Dr. Hay, and any extension requests were therefore made by someone other than Dr. Hay. He also agreed that according to his own clinical records there was no referral indicated from Dr. Hay except for December ’09. He agreed that the plaintiff had reported improvement for the first three months and then no indication of improvement beyond that. Although the physiotherapist maintained that Dr. Hay had said to continue the physiotherapy treatments, he was unable to point to any indications in his records of Dr. Hay advising him to continue, and finally agreed that he had relied on what the patient told him Dr. Hay had said.

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[135] Under further cross-examination the physiotherapist admitted that he had not sent a progress report to Dr. Hay and that the only letter contained in his records was the letter sent to the plaintiff’s lawyer in October of 2006. With respect to the continuation of treatments after October 27, 2006, the physiotherapist agreed that it was only the plaintiff who wished to continue with the treatment.

[136] On the initial assessment, Reza Hormozi found that the objective evidence of the plaintiff was as follows:

a) Clutching, slouching;

b) Right shoulder point tenderness;

c) Right shoulder reduced range of motion;

d) Neck range of motion 50% of normal;

e) Back range of motion 90% of normal.

[137] By October 2006 the objective signs that were observed by Mr. Hormozi included:

a) Poor posture;

b) Neck range of motion 90% of normal;

c) Right shoulder range of motion 50%;

d) Lower back range of motion 50%.

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[138] Mr. Hormozi gave evidence that essentially demonstrated that the tests he had administered to the plaintiff over 350 visits were primarily based on subjective complaints by Mr. Wahl even though according to him objective signs of restricted range in motion and shoulder impingement and tenderness were present. Most important is the fact that his evidence was that although Dr. Hay initially recommended physiotherapy treatment he referred to "the lawyer" paying for the treatment. While he could find no more than two referral notes from Dr. Hay in his records, he also agreed that not one of the 350 physiotherapy visits was contained in the MSP printout from the date of the accident to the date of trial. While agreeing that the plaintiff had stopped improvement and his condition had plateaued within a few months, Mr. Hormozi maintained that his physiotherapy treatments should continue.

ORTHOPAEDIC EXPERT EVIDENCE

[139] Assessments by the orthopaedic experts differ significantly. The plaintiff was first assessed by orthopaedic surgeon Dr. Jordan Leith on July 15, 2008 as a result of the defence request for a medical/legal evaluation regarding the plaintiff. His report is dated June 10, 2008. Thereafter he was assessed by orthopaedic surgeon Dr. Patrick Y.K. Chin on November 6, 2008 at the request of plaintiff's counsel. It is interesting to note that at the time, both orthopaedic surgeons practised out of the Specialist Referral Clinic in Vancouver, and I also note that although Dr. Leith's report is dated June 10, 2008, either the date on the letter or the date of the evaluation must be incorrect.

[140] Orthopaedic surgeon, Dr. Jordan Leith, provided his opinion that Mr. Wahl did not sustain any major structural injuries to his extremities or spine in the subject

motor vehicle accident. He did however opine that it appeared to him that Mr. Wahl had sustained minor soft tissue injuries to his neck, back and shoulder regions as a result of the accident. He also opined that the right shoulder symptoms were most likely an aggravation of the previous right shoulder symptoms encountered by Mr. Wahl. I take it that this is reference to the 2001 accident.

[141] Dr. Leith further opined that there was nothing to suggest any acute left hip injury because the clinical record did not indicate any sign of immediate pain or disability to the left hip. With respect to the right shoulder symptoms complained of by Mr. Wahl, Dr. Leith concluded that the pre-existing right shoulder symptoms were most likely aggravated by the subject accident. As for the complaints from Mr. Wahl regarding his left hip, Dr. Leith opined that he could not find any clear objective evidence within the clinical record that any injury actually occurred to the left hip. He further opined that the clinical symptoms and his evaluation were not consistent and did not indicate to him that there was a problem with the left hip joint itself. He concluded that the clinical symptoms with respect to the left hip were primarily subjective in nature given that there was no sign of any physical disability.

[142] Dr. Leith also opined that his assessment of the plaintiff's right shoulder was also normal, and:

> The MRI's of the right shoulder do not indicate that any acute injury has ever occurred to the shoulder. The findings are consistent with minor age related changes and changes seen often in labourers without any injury. I would not consider the MRI reports as relevant to the symptoms exhibited following the subject MVA. There was no correlation to what was reported anatomically and the clinical presentation following the subject MVA.

[143] Of note are the latter conclusions contained at page 3 of his report:

> It is my opinion that there was no objective medical Orthopaedic findings that would preclude Mr. Wahl from being able to carry out his duties of employment or any recreational activities. <u>His limitations are not anatomically based as there were no findings of any structural injury or joint disability noted</u>. I would expect a reasonable amount of time for recovery and time off work from such soft tissue injuries to be on the order of 6-12 weeks.
>
> There was nothing to indicate during this evaluation and within the clinical record that Mr. Wahl will ever require surgery for any of these symptoms now or in the future. He may require an assessment and management from a

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> Pain Specialist and associated program as he did exhibit pain amplification behaviour during this evaluation.
>
> The history provided by Mr. Wahl does not correlate with the objective examination findings or the documented medical record. The documented medical record and the examination findings would indicate that there were minimal injuries at the time of the subject MVA and that there was minimal disability. Mr. Wahl however presents with a more significant history of injury and disability.
>
> [Emphasis added.]

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[144] In the appendix to his report are found the results of the physical examination conducted by Dr. Leith with the following observations and diagnosis:

> Physical Examination: His examination revealed him to be a fit 37-year-old gentleman who is lean and muscular. He stood with level pelvis and level shoulders and midline spine. He was able to toe walk and heel walk without a limp and without any weakness. He did walk with a limp at the conclusion of the evaluation.
>
> His cervical spine range of motion revealed about 10 to 15° loss of neck extension. His forward flexion was full. Rotation to the left was full. Rotation to the right lacked about 10 to 20° as did lateral bending to the right. He had pain to very light pinching of the cutaneous structures about the right side of the neck and the right shoulder area that were nonanatomic in distribution. He had pain to light tapping over the acromion and the spine of the scapula. There was no atrophy noted about the shoulder girdles. His shoulder range of motion was full except for mild loss of forward elevation of about 5°. He had pain at the extreme of forward elevation and external rotation with the arm at the side. There was no sign of instability in either shoulder. His rotator cuff power was well maintained at 5/5 for all muscles tested. He was acutely tender over the biceps tendon proximally and no other abnormalities were noted with the upper extremity examination bilaterally.
>
> His thoracic and lumbar spine were midline. He had tenderness to light palpation along the left lumbar region. His lumbar spine range of motion was full as he was able to nearly touch his fingertips to the floor. Lateral bending right and left was to the knee joint line. Rotation right and left did not cause any significant pain. His straight leg raise was normal. Trendelenburg was normal as well as his lower extremity motor power and reflexes were all full and normal.
>
> His hip examination did not reveal any crepitus, but there was a snapping when bringing the left hip from a 90° flexed position down to the extended position. I was unable to determine where this was coming from. His range of motion measured 60° of external rotation bilaterally. Internal rotation with the knee flexed 90° was 10 to 20° on the left and 30° on the right. This was the only asymmetry noted with the hip examination. He had tenderness about the buttock on the left side to light palpation. His greater trochanters were nontender and the rem[a]inder of the examination was otherwise unremarkable.

> Diagnosis: There were no findings suggestive of any Orthopaedic diagnosis for either the right shoulder or the left hip. I can characterize the findings of this evaluation as a diffuse soft tissue pain disorder with features of pain amplification.

[Emphasis added.]

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[145] Under cross-examination Dr. Leith conceded that he deals primarily with higher level problems such as failed surgeries, and in that role does not deal primarily with complaints of chronic pain. With respect to the MRI findings relating to the plaintiff, Dr. Leith opined that an MRI is just a picture and that MRI's do not necessarily signal anything. He went on to say that he sees patients, operates and actually sees the inside of the patient. He preferred the observations that he himself makes. With respect to his note on page 4 that pain amplification was present he again confirmed his conclusion that the presentation of the plaintiff is related to non-physical issues.

[146] Under further cross-examination Dr. Leith stated that his opinions were based on his objective analysis of what the problem is and maintained his position that there was no physical basis for the complaints. With respect to Dr. Chin's report, which had obviously been provided to Dr. Leith, he again confirmed his position that there was no physical reason for Mr. Wahl's complaints. He, by way of example, said that during his examination of Mr. Wahl he barely touched his skin and Mr. Wahl complained. It was his conclusion that Mr. Wahl was either embellishing or was amplifying his pain. Based on his conclusions Mr. Wahl did not need an operation, or he was either exaggerating or embellishing. Dr. Leith confirmed that he had not seen any reports from the treating psychiatrist and had only reviewed the records which he had been provided with for his assessment of Mr. Wahl.

[147] Of interest relative to a March 13, 2007 MRI which had been taken of Mr. Wahl's right shoulder, and the accompanying report of the radiologist, Dr. Leith only referred to the report as being the opinion of the radiologist and advised that a bursal tear to the tendon is not a true tear but only a disruption. He explained how the bursal is located on the top of the tendon covering the shoulder. He noted a 2002 MRI was not reported as a tear and therefore he did not know when it happened.

He opined that if it did in fact occur at the time of the accident there must be something to correlate the tear with the accident.

[148] Dr. Leith further opined that based on his review of the plaintiff's records, Mr. Wahl did not have those symptoms following the accident. In this case he felt that the MRI referring to a bursal tear did not correlate with the plaintiff's symptoms and that he found inconsistencies in that the plaintiff's complaints were more than his objective findings. When asked if spasms and lack of range of motion were considered objective findings he agreed that range of motion would be an objective finding if the victim was credible but maintained that there is still a subjective element with respect to range of motion. Ultimately Dr. Leith testified that he would defer to a psychiatrist regarding pain and what was causative of the pain.

[149] Dr. Chin assessed Mr. Wahl, at the request of plaintiff's counsel, some six months after having been assessed by Dr. Leith. From the documents reviewed, Dr. Chin did have available to him additional material including MRI examinations of March 13, 2008 and April 27, 2008, but apparently not the clinical records of Dr. Cecil E.G. Caines, Orthopaedic Surgeon, December 4, 2002 to March 11, 2005, nor those of Dr. T.E. Hicks, Orthopaedic Surgeon, clinical records of October 23, 2001 to January 21, 2002 (no doubt related to the 2001 WCB accident). It is also important to note that Dr. Chin admitted under cross-examination that he had not seen the March 18, 2007 MRI scan of the plaintiff's right shoulder and relied entirely on the report of the radiologist. His physical examination results are found at page 5 of his report:

> This is a health-appearing Caucasian male. He is physically fit. He weighs only 135 lb and stands 5' 10" tall. There are no disconcerting behaviours noted throughout the interview. He did not exhibit any exaggerated pain response throughout my assessment today.
>
> Examination of his cervical spine confirms close to full range of motion of his cervical motion, except for a 20% decrease in cervical extension and 5-10% decrease in right-sided lateral flexion. There was tenderness over the right trapezius area and paraspinal muscles. Spurling's test was negative for radicular symptoms. There was no evidence of obvious scapular shrug sign or external signs of cuff atrophy about the shoulder girdle. Neurovascular examination of both upper extremities revealed intact motor and sensory

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> function with only a slight decrease in light touch over the C8 dermatomal level in his right hand.
>
> Range of motion of both shoulders was measured as follows: passive external rotation 70°, forward elevation 170°, and internal rotation to the T4 level. He had positive impingement signs in his right shoulder with moderate subacromial crepitus that was painful. He had mild scapulothoracic crepitus, right worse than left. His right AC joint was tender to palpation but cross-body adduction test was negative. Labral testing with O'Brien's and labral shear test was negative. The proximal biceps was neither tender nor torn. The deltoid muscle was intact. The belly press test for subscapularis deficiency was negative. Both shoulders were stable. He was tender mainly on the anterolateral acromial portion of the right shoulder, which was significantly worse than the AC joint tenderness. The empty milk can sign was negative for weakness. The hip was not assessed today given the pending assessment by a hip surgeon.

[Emphasis added.]

[150] With respect to the March 13, 2007 MRI and other post-accident reports, Dr. Chin said this:

> MRI scan, March 13, 2007 of the right shoulder, read: "Partial articular-sided and bursal tears of the supraspinatus tendon with supraspinatus tendonopathy".
>
> "Mild hypertrophy is demonstrated of the acromioclavicular joint without convincing subacromial impingement. The acromion demonstrates normal position, morphology and angulation. The bursal-sided supraspinatus tear was small, measuring approximately 15 mm from the insertion on the greater tuberosity".
>
> In the x-ray of December 8, 2006 of the right shoulder, there was no fracture dislocation. There was no bony or joint abnormality. In the left hip x-ray, there is no bony or joint abnormality and no fracture.
>
> Cervical spine x-ray on November 14, 2006 read: "The alignment and height of the vertebrae are normal. Normal disc spaces. Normal upper cervical junction. No evidence of degenerative disc disease. No evidence of cervical ribs".
>
> MR lumbar spine, April 10, 2008 read: "Impression: lumbar spondylosis which is more severe at L2-3, L4-5 and L5-S1". MR left hip reported: "No abnormality identified", read by Dr. David Fenton.
>
> X-ray, February 6, 2007, read: "Lumbar spine: L5-S1 disc space is somewhat narrowed with lipping about it. Sacroiliac joints appear normal".

[Emphasis added.]

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[151] It is noteworthy that Dr. Chin's diagnosis is as follows:

> 1. Chronic RIGHT shoulder pain, secondary to chronic impingement syndrome, post-traumatic with underlying partial bursal-sided supraspinatus tendon tear, with an underlying component of myofascial pain syndrome.
> 2. Chronic neck pain, secondary to musculoligamentous injury, i.e. soft tissue injury.

[152] With respect to his evaluation and review of the material that was provided to him Dr. Chin formed the opinion that Mr. Wahl had sustained an aggravation of his pre-existing injuries to his right shoulder as a result of the accident of June 22, 2006. He based the aggravation conclusion on the basis of the 2001 work related accident because the MRI scan performed in 2002 confirmed the diagnosis of rotator cuff tendonitis in Mr. Wahl's right shoulder. While only saying it was probable that Mr. Wahl had an underlying chronic rotator cuff tendonitis and impingement syndrome prior to the motor vehicle accident of June 2006 he also went on to say that this accident probably aggravated the pre-existing condition which resulted in a symptomatic small bursal-sided surface tear of the supraspinatus tendon as shown on the recent MRI scan since the subject accident.

[153] As with the evidence of Dr. Leith, while not discounting the fact that he may have a partial rotator cuff tendon tear he found Mr. Wahl's pain level and disability to be out of proportion to what he would expect from a partial tear of one of the rotator cuff tendons. At page 7 of his report, Dr. Chin states:

> In my opinion, Mr. Wahl would benefit from a referral to a neurologist and a chronic pain clinic, so that a multi-disciplinary approach to his chronic pain would be helpful. I am not discounting the fact that he does have a partial rotator cuff tendon tear, but his pain level and disability are substantially way out of proportion to what I would expect from a small partial tear of one of the rotator cuff tendons.

[Emphasis added.]

[154] With respect to future assessments of him, Dr. Chin said this:

> It would be helpful for Mr. Wahl to undergo an impingement test, i.e. a subacromial injection into his right shoulder to confirm the origin of the amount of pain that he is currently experiencing from the subacromial space (of the shoulder) or from another location besides his shoulder. It seems that

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> a component of his pain syndrome pertains to his right shoulder. <u>Hence, the next prudent step to offer this gentleman would be a diagnostic/therapeutic subacromial injection. However, given his needle phobia, I am hesitant to offer him this option at this juncture</u>.
>
> I am opined that given his symptoms have improved by only 30% over the last two years, his prognosis is guarded to good. I would expect that over the last two years, the majority of his symptoms should have improved by now, but he has only made limited gains. He obviously feels that he is not able to return to his previous occupation as a tire technician. Given this knowledge and following my assessment and review of Mr. Wahl, I am opined that it is highly unlikely that he would ever be able to return to his current employment. He is likely at high risk of a permanent disability following this MVA in terms of returning to his previous occupation.
>
> At this juncture, I do not think Mr. Wahl is a surgical candidate. I think that if there is a way that we are able to perform "the impingement test" on his shoulder, and the test showed a decrease or abatement of his pain symptoms about his shoulder girdle, one could be convinced that perhaps an arthroscopic subacromial decompression plus or minus rotator cuff surgery may be beneficial for this gentleman.

[Emphasis added.]

[155] As can be seen, Dr. Chin (as did Dr. Leith opine) concluded that he did not believe Mr. Wahl to be a surgical candidate but if the impingement test on his shoulder was done " and the test showed a decrease or abatement of his pain symptoms about his shoulder girdle, one could be convinced that perhaps an arthroscopic subacromial decompression plus or minus rotator cuff surgery may be beneficial for this gentleman".

[156] It is noteworthy that Dr. Chin opines probabilities notwithstanding his inability to make definite conclusions without conducting an impingement test which Mr. Wahl did not have done because of his needle phobia.

<u>DR. RHONDA SHUCKETT - RHEUMATOLOGIST</u>

[157] Dr. Rhonda Shuckett, rheumatologist, assessed the plaintiff on September 26, 2007. Her report of October 22, 2007 was presented in evidence. She was the first assessor with a medical background to see the plaintiff other than the plaintiff's family doctor. She noted at that time, being approximately 15 months post-accident, that Mr. Wahl described to her having experienced headaches which began in his upper thoracic spine at about T-1 and radiated out on both sides on the back of his

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neck and into his head. She notes him saying that since the motor vehicle accident he has had a headache every day and continues to have these. At that time he rated his headaches as being in the range of 5 to 6 out of a magnitude of 10. He also described his headaches being daily occurrences and occurring five out of seven days of the week, and lasting all day.

[158] Mr. Wahl also described to her that following the 2001 WCB injury his right shoulder range of motion was not decreased but that since the accident he had lost about 10% to 15% of his mobility of his right shoulder at the time of assessment. He reported to her that since the subject MVA his shoulder pain had been a lot worse and comes on more readily and that his shoulder cracks and makes noises. He described his shoulder pain as keeping him up at night with headaches, back pain and the hip pain he complained of. He also volunteered to her that he had numbness and tingling in his right underarm and also volunteered that his right ring and pinkie fingers go numb, soon after the MVA, and also advised that he has symptoms to his right elbow that have occurred since the accident.

[159] With respect to his lower lumbar area of pain Mr. Wahl advised Dr. Shuckett that his sacroiliac joints do not move properly and that he could not lie down for more than two hours at a time, would not sleep and toss from side-to-side at night. He described his low back pain being usually in the 4 to 5 out of 10 range and sometimes going up to an 8 out of 10. With respect to his left area pain he described pain in his groin and lateral hip region in the range of 5 to 6 out of 10 and sometimes it would go up to a 7 out of 10 ranking.

[160] Mr. Wahl furthered described to Dr. Shuckett that if he flexed his hip the pain would increase and would also increase with walking and weight bearing. With respect to physical treatment he confirmed that at that time he was going to physiotherapy about twice a week, including ultrasound stretches and exercise and inferential therapy. With respect to exercise he advised her that he was limited in what exercise he can do as he is unable to tolerate much walking because of his left hip area pain.

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[161] On examination Dr. Shuckett found the plaintiff to be “a very pleasant man of lean build and very cooperative in answering her questions”. She found the plaintiff to be tender over the right trapezius with the notation “although this was quite mild”. She further noted that he was tender over the C7-T1 spinous processes and tender over the right bicipital tendon and the right supraspinatus tendon.

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[162] With respect to active range of motion of the neck assessment, Dr. Shuckett found the plaintiff’s lateral flexion in both directions to be full, although lateral flexion to the left was associated with some pulling in his right shoulder girdle. She also found the rotation of the plaintiff’s neck in both directions to be full, without pain. In addition she found forward flexion to be full without pain although the plaintiff’s extension of his neck was 45° (with normal being 60°) with a pinching pain in the C7 to T1 region. With respect to thoracolumbar rotation she found it to be quite full although there was some right shoulder girdle pain.

[163] At page 8 of her report, Dr. Shuckett stated:

> Active abduction of the shoulders was fine with a little bit of discomfort in the right shoulder. Anterior flexion of the right shoulder was just about 10 degrees to 15 degrees less than that of the left shoulder with some pain. Active internal rotation and external rotation were quite full and were well tolerated. Passive internal rotation and external rotation of the right shoulder was also quite full with some mild stress pain. The Hawkin’s test of the right shoulder for impingement syndrome led to pain. External rotation of the right shoulder against resistance was painful. <u>The Hawkin’s test suggested some impingement syndrome and pain on external rotation against resistance suggests some rotator cuff pain</u>.
>
> His hand grip of the right hand was only 180/20 compared to a hand grip of 320+/20 on the left side. This indicates some weakness of his dominant right hand.
>
> When he held his right arm held at 90 degrees of abduction and external rotation, he had numbness in the right ring and pinky finger and in the ulnar half of the right middle finger. Compression of the ulnar nerve at the elbow with the Tinel’s test did not lead to any symptoms.
>
> He was tender over the left upper sacroiliac region and the left iliolumbar ligament but this was quite mild. He was tender over the left greater trochanter. He had pain with left hip flexion and this was felt in the groin. With the hip flexed and externally rotated, he had left groin pain. With the hip flexed and internally rotated, he did not have pain. With log rolling, internal rotation was associated with some groin pain.

Gaenslen's test, to ostensibly stress the sacroiliac joints, led to severe groin pain, but not pain in the sacroiliac region.

Forward flexion of the lumbar spine was quite good but there were abnormal dynamics of straightening up. Extension of the low back was a very full range of motion with some discomfort. Lateral flexion of the lumbar spine to the right hurt in the left hip region.

[Emphasis added.]

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[164] At page 10 of her report, Dr. Shuckett gave her impression as follows:

His current symptoms include right shoulder pain in the right supraspinatus region. He says the shoulder pain is about 6-8 out of 10 in severity. He has left hip pain felt in the left groin and this pain is about 5-7 out of 10. These pains are constant but worse when he is active. He has some headaches which are 5-6 out of 10 and which occur daily. He has not worked since the 2006 MVA. He also has pain in the upper thoracic spine/lower neck area and some low back pain as well. The low back is his least area of pain as it fluctuates and is not constant. He has neck pain which runs about 4-5/10 mainly in the C7/T1 region of the neck/upper back.

On examination, he was not overly tender and he did not have fibromyalgia syndrome. He was tender over the right shoulder supraspinatus tendon and the bicipital tendon. His range of motion of the right shoulder was quite full with some pain. He had pain with the Hawkins' test of the right shoulder, suggesting some impingement syndrome. He had some pain with external rotation of the right shoulder against resistance, suggestive of rotator cuff tendonitis.

His left hip was painful mostly in a non capsular pattern and his range of motion was quite good.

[Emphasis added.]

[165] Under Diagnoses Dr. Shuckett said this:

1. Cervicothoracic junction region pain (lower neck/upper back region) most likely due to musculo ligamentous injury. Zygapophyseal joint capsular injury is also likely.
2. Cervicogenic headaches with some vascular or migraine features.
3. Right shoulder impingent syndrome and rotator cuff tendonitis.
4. Left hip pain in the groin is likely tendonitis.
5. Low back pain of a mechanical nature, relatively mild.
6. Suspected mild degree of thoracic outlet syndrome of right side with numbness in the ring and pinky fingers simulated with the right arm held at 90 degrees of abduction and external rotation.

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[166] In her evidence Dr. Shuckett opined that Mr. Wahl's right shoulder was at significant increased risk of injury following the 2001 WCB accident but based on the plaintiff's advice as to his working after this injury she concludes that she believed his right shoulder injury to have been caused by the subject motor vehicle accident. With respect to the plaintiff's neck and upper back pain, she believed that they were causally connected to the subject MVA. With respect to the plaintiff's left hip she opined that the left hip pain is likely a combination of his pre-MVA injury and the subject injury though she opined that his low back pain appears to be a new complaint since the subject MVA.

[167] It is noteworthy that Dr. Shuckett also opined that having more records, including the WCB records relative to the 2001 injury, would have been useful to her. In particular, with respect to more information that she would have liked to have been provided with she would have liked to have seen the MRI report of the shoulder taken before the subject MVA but she did comment, notwithstanding not having that MRI report, as follows:

> . . . I do note that, in the records which I have, that October 2005, eight months before the subject MVA, he and the doctor had a discussion about his right shoulder and left hip injury from the WCB injury. X-rays of these areas were done November 2005. Then the next visit was not until after the subject MVA of June 2006. Thus the shoulder and hip appeared to be of some ongoing issue at that point some eight months before the subject MVA, but did not lead to any visits between October 2005 and June 2006. Also, these symptoms did not appear to interfere with his work.
>
> The prior right shoulder/left hip injury in 2002 when the truck fell on him would have rendered him at greater risk of re-injury of these areas with the subject MVA. However, if not for the subject MVA, I do not expect he would be in his current unemployed disabled status. It is in keeping with his injuries, especially his right shoulder injury, that he cannot work. Ongoing disability and need for vocational retraining is likely in this young man. His right hand grip is measurably weak and I believe this reflects his right shoulder condition. His lifting capacity is decreased. He cannot do a manual physical type of work. He even depicts difficulty using the computer mouse with his dominant right hand. A functional capacity evaluation and vocational assessment are likely warranted.

[168] Under Prognosis, Dr. Shuckett concluded as follows:

> It is still early to prognosticate as it is just one year and 3 months since the subject MVA. <u>There is room for improvement in the next year. Still, he does</u>

> fall into that subset of patients who does not resolve at the one year plus mark after the injury. I understand he is going to see a shoulder orthopaedic specialist. This has been a referral made by his family doctor from what I gather. I would be interested in a copy of that consult when it comes through.
>
> As far as medication the Naprosyn can be continued or it could be replaced by another NSAID such as Diclofenac (Voltaren) 75 mg BID or Tiaprofenic Acid 300 mg BID or Fluorbiprofen 100 mg BID with the warning of gastrointestinal (GI) irritation and GI bleeding from such agents. He may need Pariet 20 mg po OD with any of these.
>
> Regular exercise is to be encouraged although most modalities of exercise are probably going to be challenging with his left hip pain.
>
> An MRI arthrogram of the right shoulder to rule out a SLAP lesion, (ie. a glenoid labral tear), is indicated. A MRI can/arthrogram of the left hip to rule out an acetabular labral tear is also likely warranted. Please fax me requisitions if you wish for me to order these. I realize his is awaiting an appointment to see a shoulder surgeon and surgery may indeed be a future issue for his right shoulder supraspinatus tear.

[Emphasis added.]

[169] Under cross-examination Dr. Shuckett agreed that it is the general practitioner or family physician who is the gate keeper and who decides what expert should be seen. Dr. Shuckett confirmed that her assessment of the plaintiff took approximately 1 ½ hours with two-thirds of that time, or one hour, being the time required to take his history and one-third or one-half hour being the time she took to do the physical examination of the plaintiff. She further agreed that her recollection of his history included the plaintiff telling her that Tammy Massender was his girlfriend.

[170] She also agreed under cross-examination that there were inconsistencies in the plaintiff's history that he had provided to her including his advice to her that an x-ray had been taken of him at the hospital immediately following the accident when in fact one was not done until requested by his family doctor, Dr. Hay. In addition, with respect to symptoms, Dr. Shuckett noted that the plaintiff pointed to a very specific area of his shoulder and that she made no notes of him having to stand or squirm, or that he was squirming while being seated. She agreed that if she had noted the plaintiff grimacing she would have made a note of it. Similarly, with respect to the pain complained of by the plaintiff in the lumbar area she did note that the plaintiff

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had a good range of motion but remained adamant that when the plaintiff straightened up he did show signs of pain.

[171] Some time was spent on the tests conducted by her to ascertain if there was a possibility of false reporting obtained by the plaintiff, and defence counsel spent particular time and effort in attempting to elicit from Dr. Shuckett that a possibility existed with the plaintiff's complaints. Much time was also spent on the fact that Dr. Shuckett is a rheumatologist.

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[172] Dr. Shuckett, being a rheumatologist, agreed that she would defer mechanical problems to the opinion of an orthopaedic surgeon and was cross-examined with respect to the possibility existing of secondary pain. Dr. Shuckett, a rheumatologist of many years' experience, had concluded that the plaintiff did not appear anxious or depressed, and did not exhibit anything that would make her feel that he was embellishing. She did however agree that Mr. Wahl's complaints of numbness in his right arm pit and the third finger on his right hand and in his little toes made no anatomical sense.

PSYCHIATRIC/PSYCHOLOGICAL REPORTS

[173] Dr. Elisabeth Zoffmann, forensic psychiatrist, assessed the plaintiff on November 19, 2008 and provided her report on January 9, 2009. She described the plaintiff's appearance that day as including having quite sweaty hands and appearing pale and sweaty. She was with him some 3 ½ hours to perform her assessment. She did not note any pain behaviour and did not make a note of any fidgeting by the plaintiff. She did however note that he was restless and had low sitting tolerance although that recollection was not included in her written report. She noted him to have problems with his attention level in that he would lose his train of thought during the assessment, but overall she found him to be as cooperative as she thought he could be. Although she did not notice any grimacing she testified to him looking uncomfortable although there was no moaning or grunting.

[174] Dr. Zoffmann also noticed that Mr. Wahl became very agitated when he was asked specifically about the subject accident and noted him turning pale and his pupils becoming dilated when the accident was mentioned. She concluded that he showed marked distress at the time. From her observations at the time she concluded that his employment is a form of pride to him. She also concluded that the plaintiff's perception of pain would exacerbate the pain that he felt.

[175] After reviewing Mr. Wahl's current complaints and current functioning, she described him as having catastrophic thinking and, in particular, with respect to the accident itself states this:

> Mr. Wahl describes panic attacks in response to recollections of the accident. He states that he will occasionally see certain things that look like some aspect of the events. He states that this "*rolls me right back to what happened*". He suffers a panic attack and notes symptoms of heavy sweating, tears, tightening of his chest, shortness of breath, rage, feelings of being trapped and palpitations. Examples of cues that remind him of the accident are intersections; the smell of tires; seeing a bus come towards him; hearing sirens and hearing tires squealing or metal crunching. These sounds may occur in real life or they may be present on television or in movies and he finds that he cannot watch action movies anymore.

[176] Under the heading Past Psychiatric History she recounts Mr. Wahl describing the occasion when his parents left him in Prince Rupert and that he felt like "*an unwanted animal"*. Thereafter she refers to him giving his account of the 2001 WCB injury and the fact that his biological father suffered from two head injuries.

[177] Of particular note she commented that when he was describing the subject accident she noted him to become sweaty and agitated and that during the recitation of the accident "his voice got louder and louder and he appeared angry".

[178] Under the heading Mental Status Evaluation, Dr. Zoffmann said this at page 9 of her report:

> His affect was labile and intensively overreactive. He was frequently irritable and his voice tended to escalate in volume. There was constant psychomotor agitation and fidgeting. When he touched the top of the interview desk he left wet palm prints. His pupils were dilated and his skin was pale. As set out earlier, he described multiple symptoms of posttraumatic stress disorder as well as symptoms of depression with anhedonia, feelings of hopelessness and suicidality and intrusive suicidal

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> thoughts, poor concentration, poor appetite, weight loss, loss of pleasure in usual activities, and constant low mood. Further, he described continuous pain and during the interview there was apparent discomfort evidenced by constant fidgeting and stretching.
>
> Mr. Wahl was difficult to interview due to his poor concentration and fluctuating levels of arousal. He was fully oriented to time, place and person and there was no evidence of paranoia, hallucinations or delusions.

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[179] Under the heading Testing, Dr. Zoffmann commented at page 11:

> . . . When his spontaneous interview answers are organized with this instrument, he shows definite evidence of posttraumatic stress disorder with a high degree of severity and chronicity.

[180] Under the heading of Diagnosis, Dr. Zoffmann offered the following opinions at page 11:

> Axis I
> 1. Posttraumatic stress disorder – severe – chronic;
> 2. Major depressive episode – moderate to severe – chronic - ? recurrent;
> 3. Chronic pain disorder based on psychiatric and physical symptoms
>
> Axis II
> Mr. Wahl has pre-existing personality characteristics of suspiciousness and hostility and dependence. His coping responses have been a lifelong pattern of over-coping and pseudo-maturity and these traits have made for difficult interpersonal and intimate relationships.
>
> Axis III
> 1. Soft tissue injuries to neck, back, chest, hip and low back. I leave discussion of these areas to those who are more expert in the fields of physical rehabilitation medicine and orthopaedic surgery.
>
> Axis IV
> The stressors impinging on Mr. Wahl’s current mental state include the circumstances of both accidents. The first accident in 2001 was profoundly frightening but did not lead to significant post-traumatic anxiety though there were prolonged pain symptoms as suggested by Dr. Caines’ clinical records. However, these symptoms did not ultimately prevent him from returning to work or stop him from pursuing his normal range of social and recreational pursuits.
>
> The second motor vehicle accident was similar to the first accident in some respects in that he was trapped, felt unable to breathe, and feared that he was about to die. He describes clear dissociative symptoms during the time he was waiting to be released from his vehicle. He started experiencing intrusive recollections of both the subject motor vehicle accident and the past work-related accident in the form of intrusive memories, nightmares, and flashbacks.
>
> Mr. Wahl has developed depression as a result of chronic pain, insomnia and chronic arousal related to PTSD symptoms.

Axis V Mr. Wahl's current Global Assessment of Functioning score is 45 to 50. He has intrusive suicidal ideation, marked emotional lability, bouts of rage and irritability, patterns of avoidance that limit most of his social contacts, constant arousal, poor concentration and attention, constant vigilance and hyperreactivity and marked stress sensitivity.

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[181] With respect to the diagnosis of posttraumatic stress disorder, Dr. Zoffmann noted that Mr. Wahl had experienced two events that threatened death that caused feelings of helplessness and intense fear with the WCB injury not appearing to cause significant posttraumatic symptoms, however, she concluded that after the subject accident the plaintiff had consistently and persistently re-experienced the events of both incidents in one or more of the following ways:

a) Recurrent and intrusive distressing recollections of the event including images or thoughts or perceptions that the process is recurring.

b) Recurrent distressing dreams of the events.

c) Times when he acts or feels as though the traumatic event were recurring or reliving the experience.

d) He has had intense psychological distress and physiological reactivity to remembering the incidents or experiencing cues that remind him of the incidents.

e) Mr. Wahl has developed a pattern of avoiding stimuli that are associated with the trauma and this is evident in his efforts to avoid thoughts or feelings, conversations, activities, places, or people that are associated with the trauma or arouse recollections of the trauma. He describes some inability to recall some aspects of the post-accident events.

f) He has experienced a marked decrease in his interests and his participation in previously pleasurable activities.

g) He describes feeling detached and estranged from others.

h) He has a restricted range of affect in that he is unable to experience warm or friendly feelings and is constantly enraged.

i) He has a constant sense of doom and a foreshortened view of his future.

j) He has persistent symptoms of increased arousal in the form of insomnia, irritability and outbursts of anger, difficulty concentrating, hypervigilance, and exaggerated startle response.

k) He has associated features of guilt that are not associated with the trauma per se. He has a number of dissociative symptoms of derealization, depersonalization, and feeling dazed.

[182] With respect to the diagnosis of Chronic Pain Disorder Dr. Zoffmann opined that that diagnosis was met by the presentation of pain in one or more anatomical sites that is the predominant focus of clinical presentation and clinical treatment, and concluded that the experienced pain has caused significant distress and impairment in Mr. Wahl's social, occupational, and recreational functioning.

[183] She also concluded that the psychological factors she found present in Mr. Wahl have had an important role to play in the severity and maintenance of his pain. She further stated that ". . . these symptoms are not intentionally produced or feigned and this pain experience is not better accounted for by a mood or anxiety disorder".

[184] Based on the history of the accident she further concluded:

> There were initial soft tissue injuries experienced at the time of the June 22, 2006 accident which had a role in the triggering or onset of this chronic pain disorder. In my opinion the presence of severe anxiety symptoms related to PTSD and chronic depression play a major role in the continued experience of pain which is much more severe than would be warranted by the apparent anatomical problems (rotator cuff inflammation, lumbar spondylosis, etc.).

[185] With respect to pre-existing conditions Dr. Zoffmann stated:

> I am of the opinion that Mr. Wahl's prior experience, personality characteristics, and coping mechanisms left him vulnerable to developing the posttraumatic stress disorder in response to the events of the motor vehicle accident of June 22, 2006. I do not believe that he would have developed these symptoms in the absence of a further significant stressor and I can find no information that suggests that he had problems with social and occupational functioning in the year before June 22, 2006 that could be attributed to a psychiatric disorder.

[186] With respect to disability, Dr. Zoffmann concluded that the time off from work taken by the plaintiff was warranted due to soft tissue injuries and pain complaints. Her conclusion was that the physiotherapy records and Dr. Hay's records supported the presence of observable physical limitations which would prevent him from engaging in his previous occupation, and she also suggested that detailed discussion of his physical capacity should be determined by a physical capacity evaluation and assessment, which of course, was undertaken by Mary Richardson, Derek Nordin and Gerard Kerr.

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[187] The next consideration by Dr. Zoffmann was under the heading Treatment Considerations. She opined that the past treatment received by the plaintiff for his physical injuries had been appropriate and necessary and, in particular, she made this finding:

> . . . He has likely not experienced full benefit from physical therapy due to constant psychological/physiological reactivation and muscle tension with subsequent muscle spasm and headaches.

[188] With respect to treatment for posttraumatic stress disorder, Dr. Zoffmann concluded:

> The best evidence for PTSD treatment is in combining medications (to reduce chronic anxiety and depression) with re-exposure therapy provided in a cognitive behavioural format. The re-exposure treatment is preceded by intensive training in relaxation techniques; (Mr. Wahl demonstrates that he has little idea of how to use relaxation techniques in spite of receiving counselling re same). I recommend that Mr. Wahl be referred to Dr. Mary Ross at the Copeman Neurosciences Centre (it is important to ask to speak with Dr. Ross Directly).

[189] Under the heading Future Disability and Prognosis, Dr. Zoffmann stated:

> The prognosis for future functioning at work and in social and recreational activities is difficult to estimate at this point because Mr. Wahl could benefit significantly from further treatment. . . .

[190] Under cross-examination it became readily observable that aside from self-reporting from the plaintiff and the reports of Tammy Massender, Dr. Zoffmann did not know a great deal about the plaintiff or his life. Dr. Zoffmann admitted that she did not know much about Mr. Wahl's home life or whether he was undergoing new job training or attempting to work. Her evidence was that she thought he might have seen a psychologist but she was not sure.

[191] Some ten months later the plaintiff was assessed by the defendant's psychiatrist, Dr. Kevin Solomons. Dr. Solomons assessed the plaintiff on July 30, 2009 and made his report August 21, 2009. Dr. Solomons noted in his report that neither Dr. Zoffmann nor Dr. Bishop had addressed the questions or the possibility that his symptoms were being intentionally produced. He made various comments with respect to Dr. Bishop and Dr. Zoffmann. With respect to Dr. Bishop's reports he

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noted that Dr. Bishop had expressed concern regarding Mr. Wahl's unreliable effort at the two assessments and the fact that there was increasing reliance on narcotics and sedating medications. With respect to the findings made by Dr. Zoffmann, Dr. Solomons commented that none of the symptoms recorded by Dr. Zoffmann had been recorded in Dr. Hays' records or any other physician's records over the years since the accident, and that no diagnosis or treatment had been initiated for these reports of severe psychiatric symptoms as set out by Dr. Zoffmann. He was also critical of Dr. Zoffmann having not addressed the diagnostic criteria for chronic pain disorder in the same manner that she had for her diagnosis of depressive disorder and posttraumatic stress disorder.

[192] I note that Dr. Solomons did not comment on Dr. Zoffmann's consideration that Mr. Wahl had a dysfunctional personality style.

[193] Dr. Solomons also made note of the fact that it was notable that Mr. Wahl's complaints of memory loss and inability to concentrate were not recorded in Dr. Hays' records, and the fact that Dr. Hay had noted that the plaintiff was improving by October of 2006. Dr. Solomons spent some time noting that exaggerated pain behaviour was observed and documented by Dr. Leith, Dr. Bishop and Mr. Kerr and Ms. Richardson.

[194] Dr. Solomons also observed that both of the occupational therapists had concluded that formal examinations and evaluations of the plaintiff revealed greater functional ability than Mr. Wahl reported.

[195] From a review of Dr. Solomons lengthy report, he said this at paragraphs 37 to 40, at page 9 of his report:

> 37. There were marked discrepancies between his reports of severe disability and the actual results of functional testing, which were at a higher level than his reports of disability. There was also an absence of any significant abnormal clinical findings on repeated physical examination. His investigational findings were all essentially normal, in contrast to his reports of disabling physical symptoms.
>
> 38. The diagnosis of a pain disorder requires that, in the physician's judgment, psychological factors play an important role in the onset,

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> persistence or maintenance of pain. There is no requirement to specify which psychological factor may have this effect or by what mechanism they may do so. There is no actual scientific basis for the presumed relationship between psychological factors and pain production or exacerbation.
>
> 39. An additional requirement for the diagnosis of pain disorder is that the symptoms are not deliberately produced for secondary gain purposes.
>
> 40. Neither Dr. Zoffmann nor Dr. Bishop addressed the questions of the possibility that his symptoms may be intentionally produced.

[196] Finally, with respect to psychiatric complications, Dr. Solomons said this:

> It is my opinion that he did not develop psychiatric complications or disorders as a result of this accident. This opinion is based on the absence of any record or documentation in his family doctor's records of psychiatric symptoms in the 17 months following the accident. There was a single reference to anxiety three months after the accident. This reference was not elaborated upon, with no details of either the nature or source of the anxiety and whether it was even clinically relevant anxiety. There was no indication that whatever it was that was being referred to as anxiety at this time persisted or was a focus of treatment.

[197] Dr. Solomons further found that the preconditions required for a diagnosis of posttraumatic stress disorder were so clearly documented by Dr. Zoffmann 2 ½ years after the accident but had not been recorded by Dr. Hay at a time closer in time to the accident. He further commented that as there was no documentation of the emotional effect of the accident which he now complains of having been noted by Dr. Hay and those complaints should be discounted.

[198] For the reasons given, Dr. Solomons formed the opinion that the plaintiff did not develop a psychiatric disorder as a result of the motor vehicle accident and that there is no disability arising from any psychiatric state following the accident. Of more import, he comments on Dr. Zoffmann's diagnosis with respect to chronic pain disorder as follows:

> Dr. Zoffmann diagnosed him with chronic pain disorder. The DSM-IV diagnosis of a pain disorder requires that psychological factors are judged to play a significant role in the onset, severity, exacerbation or maintenance of the pain. In his specific circumstances the psychological factors that are alleged to have played a role in the persistence of his soft tissue pain symptoms would necessarily be expected to perpetuate and exacerbate the pain symptoms he experienced as a result of fracturing a metacarpal bone in his hand, which he did a year after the accident in 2007. I note that Dr.

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> Zoffmann does not address this circumstance. There is no medical basis for long-term persistence of pain from one site but not contemporaneously from a different site if the pain is judged to be based on psychological factors.

[199] In particular, Dr. Solomons commented at length on DSM-IV definition of malingering and the four identifiers set out in DSM-IV:

> 1. medicolegal context of presentation;
> 2. marked discrepancy between the person's claimed stress or disability and the objective findings;
> 3. lack of cooperation during the diagnostic evaluation and in complying with prescribed treatment regimen;
> 4. the presence of antisocial personality disorder.

Based on those criteria, Dr. Solomons found that the first two criteria applied to Mr. Wahl, and that there was evidence from both the psychologist as well as the occupational therapist that Mr. Wahl's level of cooperation and effort in the assessments were suboptimal. He also commented that there was no evidence that Mr. Wahl had an anti-social personality disorder. On this point I do not believe that Mr. Kerr, the defence occupational therapist, made any comment that there was a negative comment on the level of cooperation exhibited.

[200] Finally, Dr. Solomons found that because he was unable to exclude a particular criteria he opined that it was not possible to make a diagnosis of pain disorder and it was not possible to exclude the intentional production of the pain symptoms.

[201] With respect to the physical injuries, he questioned, based on the opinions of Dr. Leith and Dr. Chin and Dr. Hay's records, whether symptoms of low back pain that did not arise until apparently four months after the accident were related to the accident, although he conceded that those issues are best addressed by the relevant physical medicine experts.

[202] Dr. Solomons finally concluded that there was no psychiatric basis for any past, present or future loss of work as a result of the subject accident and made the following comments at the end of his report:

> I have elaborated in the foregoing sections of this report on the areas of disagreement between my opinion and that off Dr. Zoffmann with regard to

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> his diagnosis. I am in agreement with Dr. Bishop's view that there is no evidence of a brain injury arising from this accident. It is not clear to me what Dr. Bishop's psychological or psychiatric opinions were at the time of the December 2008 report. Insofar as her view was that he suffered PTSD and major depression in her February 2008 report, my views differ on the same grounds that they do with Dr. Zoffmann's opinion.
>
> In agreeing with Dr. Bishop regarding the absence of any brain injury arising from this accident, my view is that there are no neurocognitive deficits or impediments arising from this accident, no neurocognitive diagnoses, disabilities or impact on his past, present or future ability to work as a result of this accident, and in my view he has no requirement for neurocognitive treatment.

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ANALYSIS

[203] This is a case where the anticipated recovery time for the plaintiff following the accident of June 22, 2006 has not been met with the passage of time. Some 3 ½ years post-accident the plaintiff still complains of physical discomfort and psychological discomfort as a result of the accident in which liability has been admitted by the defendant. As can be seen from the medical evidence there is disagreement between the plaintiff's experts and the defendant's experts as to the present circumstances of the plaintiff regarding his ongoing complaints.

[204] At the beginning of these lengthy reasons I stated that I was of the view that there could be no doubt whatsoever that physically and psychologically there has been a noted change in the observations of lay witnesses who gave evidence as to the pre-accident condition of the plaintiff and the post-accident condition of the plaintiff that has now existed for 3 ½ years post-accident.

[205] Those observations, of course, in this case, must meet the fundamental legal principles that are applicable to this type of case where the plaintiff alleges soft tissue injuries that have continued beyond the normal range of resolution, and also alleges that he is suffering ongoing psychological symptoms since the accident of June 22, 2006.

[206] In *Maslen v. Rubenstein*, 83 B.C.L.R. (2d) 131, [1994] 1 W.W.R. 53, 33 B.C.C.A. 182, 54 W.A.C. 182 (B.C.C.A.), the plaintiff suffered soft tissue injuries to his neck and shoulder in a rear-end motor vehicle accident. That case is somewhat

similar to the case at bar as in that case the plaintiff, aged 51, shortly after the accident developed numbness and tingling in her left arm and hand and received over 300 physiotherapy treatments and multiple referrals to different specialists. At her trial, some 3 ½ years post-accident, the plaintiff still claimed to be unable to return to her work or her recreational and domestic activities in spite of various doctors expressing their opinions the year following the accident that she was able to return to work.

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[207] In that case the physicians who had examined and treated her were unable to give any physical explanation for her symptoms but none suggested that she was malingering. The trial judge, Spencer J., found that the psychological mechanism which gave rise to the plaintiff's condition was beyond the plaintiff's control and had been set in motion by the defendant's conduct. The trial judge rejected the possibility that the plaintiff was deliberately exaggerating her injuries and awarded non-pecuniary damages, damages for past wage loss, damages for loss of future earning capacity and costs of future care. The trial judge awarded future damages based on the premise that the plaintiff would recover within 18 months. Both the plaintiff and the defendant appealed the amounts assessed under each of the heads of damages where the plaintiff sought increases in all the awards except that for past wage loss.

[208] On appeal, Taylor J.A., speaking for the Court, stated this at paragraph 16:

> 16 With respect to the evidence required in order to meet the onus lying on a plaintiff in such cases, Chief Justice McEachern (then sitting as a trial judge) in *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.), repeating his observations in *Butler v. Blaylock* (October 7, 1981) Doc. Vancouver B781505 (B.C.S.C.) put it thus:
>
>> I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.
>>
>> An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence – which could be just his own evidence if the

> surrounding circumstances are consistent – that his complaints of pain are true reflections of a continuing injury.
>
> So, there must be evidence of a "convincing" nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the normal recovery period, but the plaintiff's own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose.

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[209] Some two years later, in *Yoshikawa v. Yu* (1996), 21 B.C.L.R. (3d) 318 (C.A.), the Court of Appeal determined that it was important to understand what was established and what was not established by the Court's decision in *Maslen v. Rubenstein*, *supra*. Commencing at paragraph 12 of that decision, the Court of Appeal set out a number of principles derived from *Maslen v. Rubenstein* in determining a claim for inquiries such as in the present case. The Court stated:

> 12 It is important to understand what is established and what is not established by the decision in *Maslen v. Rubenstein*. I propose to set out a number of principles extracted from the reasons of Mr. Justice Taylor, for the Court, in the *Maslen* case. The first point is a preliminary point and appears in *Maslen* at p. 133 under the heading "(a) The Background":
>
> 1. The plaintiff must establish that the pain, discomfort or weakness is "real" in the sense that the victim genuinely experiences it.
>
> The remaining ten points are drawn from the part of the reasons headed "(b) The Basic Principles" at pp. 134 to 137:
>
> 2. The plaintiff must establish that his or her psychological problems have their cause in the defendant's unlawful act.
> 3. The plaintiff's psychological problems do not have their cause in the defendant's unlawful act if they arise from a desire on the plaintiff's part for such things as care, sympathy, relaxation or compensation.
> 4. The plaintiff's psychological problems do not have their cause in the defendant's wrongful act if the plaintiff could be expected to overcome them by his or her own inherent resources, or "will-power".
> 5. If psychological problems exist, or continue, because the plaintiff for some reason wishes to have them, or does not wish them to end, their existence or continuation must be said to have a subjective, or internal, cause. (NOTE: I consider that this proposition must deal with the conscious mind,

otherwise it seems to me to beg the question, see my first observation, later in this Part of these reasons.)

6. If a court could not say whether the plaintiff really desired to be free of the psychological problems, the plaintiff would not have established his or her case on the critical issue of causation.

7. Any question of mitigation, or failure to mitigate, arises only after causation has been established.

8. It is not sufficient to ask whether a psychological condition such as “chronic, benign pain syndrome” is “compensable”. Such a psychological condition may be compensable or it may not. The identification of the symptoms as “chronic benign pain syndrome” does not resolve the questions of legal liability or the question of assessment of damages.

9. It is unlikely that medical practitioners can answer, as matters of expert opinion, the ultimate questions on which these cases often turn.

10. Mr. Justice Spencer, at trial in the *Maslen* case, put the overall test quite correctly in these words:

> [C]hronic benign pain syndrome will attract damages . . . where the plaintiff’s condition is caused by the defendant and is not something within her control to prevent. If it is true of a chronic benign pain syndrome, then it will be true also of other psychologically-caused suffering where the psychological mechanism, whatever it is, is beyond the plaintiff’s power to control and was set in motion by the defendant’s fault.

11. There must be evidence of a “convincing” nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the recovery period, but the plaintiff’s own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose.

[210] Thereafter, commencing at paragraph 18 through 19, the Court went on to say as follows:

> 18. Some principles have emerged to help in dealing with questions of proximate cause.
>
> 19. One of the most important principles, for the purposes of this case, is the principle that, for the purposes of assessing damages, a tortfeasor must take the person injured by the tort in the actual condition of that person at that time. This has been called the “thin skull” principle. In its application to psychological problems it has been called the “egg shell personality”

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> application of the principle. In my opinion there is no basis for giving a more restrictive application to this principle in cases where psychological injuries are suffered than would be given in cases where only physical injuries are suffered. A predisposition to suffer psychological injury in circumstances such as those brought about in a particular case by a defendant's wrongful act does not relieve the defendant of the liability to compensate the plaintiff for the injuries represented by those psychological symptoms. Such relief could only occur, as I have said, if the psychological symptoms would have occurred in any event, even without the defendant's wrongful act, through an application of the cause-in-fact test. Examples of the application of the "thin skull" principle to the award of damages for psychological symptoms in circumstances where there was an existing predisposition include *Enge v. Trerise* (1960), 26 D.L.R. (2d) 529 (B.C.C.A.), *Cotic v. Gray* (1981), 17 C.C.L.T. 138 (Ont.C.A.), *Elloway v. Boomars* (1968), 69 D.L.R. (2d) 605 (B.C.S.C.), and *Marconato v. Franklin*, [1974] 6 W.W.R. 676 (B.C.S.C.).

[211] Thereafter, at paragraph 24, the Court stated:

> [24] . . . I think it is correct to treat a plaintiff's own conscious wish to receive care, comfort and attention, or the plaintiff's own conscious failure to exercise his or her willpower to bring about a healing of the symptoms, as coming within the principle of new intervening acts, and to treat those occurrences as giving such a sufficient new impetus or deflection to the chain of causation as to render the original wrongful act no longer a proximate cause. But if the plaintiff's wish to receive care, comfort and attention is accepted as being entirely unconscious and contrary to the plaintiff's own apparent efforts to attain a healing of the symptoms, or if the plaintiff's own failure to exercise his or her own willpower is unconscious and contrary to the plaintiff's own apparent efforts to attain a healing of the symptoms, then I would not be prepared to say that the plaintiff is still excluded from compensation for the psychological symptoms. In short, I think that the word "conscious" is implicit in points 3, 4, 5, and 6 that I have extracted from Mr. Justice Taylor's reasons in *Maslen*.

[212] Finally, at paragraph 32 Mr. Justice Lambert said this:

> [32] It seems to me that there are two different types of psychological symptoms that may be covered by the principles that are here being discussed. There are those where the psychological symptoms have their origin entirely in the defendant's wrongful act. Clearly they are compensable. And there are those psychological symptoms where the defendant's wrongful act triggers a pre-existing psychological condition so that both the defendant's wrongful act and the pre-existing condition are causes-in-fact of the psychological injury. In the latter cases the psychological injury will be compensable on the basis of a pre-existing thin skull, except only in cases where the psychological problem is so dominant as a pre-existing condition and the injuries sustained in the accident are so trivial that the accident can no longer be said to be a sufficient cause in law to support an award of damages on the basis of proximate cause.

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[213] Before dealing with the considerations I must deal with in accordance with the dicta of the Court of Appeal in *Yoshikawa v. Yu*, *supra*, I wish to comment on what occurred and what did not occur with respect to the evidence of Mr. Wahl at trial. My notes of his evidence, particularly his evidence given under cross-examination, indicate that negative comments made by the various treators and Mary Richardson and Gerard Kerr were not put to him under cross-examination so that he would have an ability to deal with that evidence. It is my view that the witness must be confronted with these opinions before the opinion can be properly dealt with (*Browne v. Dunn*, (1893) 6 R. 67 (H.L.)). This is especially required in a case such as this where the defence submits that the plaintiff, in this case, is not motivated to get better and that the credibility of the plaintiff is at issue.

[214] With respect to the issue of credibility, the defence submits that the plaintiff is not at all credible and in that light refers to incidents in the plaintiff's past to sustain that argument. I have already commented on the fact that I do not find the fact that the plaintiff did not report income for landscaping work, moving work and construction work that he did some years before the accident materially affects his credibility. In addition the defence relies to some extent on the reporting by the plaintiff that he lost consciousness shortly after the accident. I accept that the ambulance report and the Surrey Memorial Hospital record do not note a loss of consciousness. It is noteworthy that the independent witness to the accident, Janessa Ferguson, by her own evidence, indicated that she attended on the plaintiff's vehicle only after attending at the defendant's motor vehicle, a passage of some minutes. In any event, embellishment or exaggeration do not go to the core of credibility.

[215] The defence also relies on what appears to be incorrect reporting by the plaintiff to Dr. Zoffmann's report, at page 7, where she mentions that the plaintiff told her that he had "intense fear" of travelling in a vehicle when his roommate Greg drove him home from the hospital on the date of the accident. However, Greg Massender did not give any indication of such problems. Similarly, the plaintiff relies on the fact that Dr. Zoffmann noted from her interview with the plaintiff that he had

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told her that x-rays were done at the hospital which is not confirmed by the Surrey Memorial Hospital records or Dr. Hay's records. I do not believe the credibility of the plaintiff turns on this misinformation or embellishment to Dr. Zoffmann some years post-accident.

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[216] The defence also relies on the fact that the various expert medical reports in evidence show that the plaintiff exhibited a significant amount of pain behaviours during medical assessments and demonstrated some poor levels of effort on his testing with Ms. Richardson and Mr. Kerr. As I have already indicated, this evidence was not put to the plaintiff when he was on the stand. As such, I am not able to conclude that the plaintiff's presentation is unreliable as urged by the defendant. I accept that in a chronic pain case the plaintiff's credibility must be the cornerstone of the claim but surely he must be given the opportunity to answer to the assertion that he is not credible when he is in the witness box.

[217] The defence, in this case, called Dr. Bishop as a witness. Interestingly enough, the plaintiff in his closing submissions also referred at length to Dr. Bishop's evidence and report. The defence, in its submissions, referred to the clearest and most telling of the lack of credibility of the plaintiff coming from Dr. Bishop's report. As indicated earlier Dr. Bishop was originally retained by the plaintiff but did not call Dr. Bishop at trial. The defence made a point of filing Dr. Bishop's reports and defence called her evidence as part of its case. In the defence written submissions, the defence maintains that "her evidence makes it clear that she is of the opinion that the plaintiff is intentionally faking symptoms". The defence then went on to say in those written submissions that at page 23 of Dr. Bishop's medical/legal report of December 20, 2008 she stated in her own words that:

> . . . Suboptimal performance on at least three of the measures below, along with feigned [or fake as she said in her testimony] psychological symptoms in concert with deliberately invalidated personality measures would strongly suggest high levels of calculated negative impression management scores.

[218] To fully understand what Dr. Bishop was saying by these comments, I find that reference must be made to Appendix 6 of her December report under the

heading Assessment Procedure and Baseline Functioning, commencing at page 22. Item iii of that Appendix reads as follows:

> Effort testing was applied. Although effort testing of itself cannot determine motivation as submaximal effort may be multifactorial in origin (e.g. fear of pain, anxiety with regard to performance, perception of dysfunction, need to demonstrate distress, etc) poor effort as defined by performances either below chance (50th percentile) or lower than expected by test parameters raises the possibility of poor effort that could also affect other test performance integrity. Suboptimal performance on at least three of the measures below, along with feigned psychological symptoms in concert with deliberately invalidated personality measures would strongly suggest high levels of calculated negative impression management scores. His effort was poor on a standard forced-choice test; both low effort and fatigue are probably implicated but in any case question any lower-than-expected, isolated cognitive findings.

[Emphasis added.]

[219] It is important to note the first lines of the evaluation of effort where Dr. Bishop said, and I repeat:

> . . . Although effort testing of itself cannot determine motivation as submaximal effort may be multifactorial in origin (e.g. fear of pain, anxiety with regard to performance, perception of dysfunction, need to demonstrate distress, etc) . . .

[Emphasis added.]

That finding cannot be relied upon, in my opinion, by the defence when the particulars of those conclusions were not put to the plaintiff when he was on the stand. What is more important, in my view, are her conclusions contained in her report of December 20, 2008 and what she said in paragraphs 10 and 11, which I have already referred to at paragraph 93 of these reasons. It should also be noted that at paragraph 6 of that report she concluded by stating:

> Regardless of effort issues, it is useful to comment on Mr. Wahl's intellectual and cognitive functioning in order to understand his presentation. Mr. Wahl's general pre-accident intellectual capacity and potential for academic achievement was probably average at best. He was not academically inclined but had relative strength for nonverbal or performance abilities. Testing at both assessment dates demonstrated stable intellectual functioning consistent with his background, with stronger (High Average) non-verbal or performance abilities.

[Emphasis added.]

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It is also important to note what she said at paragraph 9 where she concluded that Mr. Wahl fit the criteria for Post Traumatic Stress Syndrome:

> At my first meeting with Mr. Wahl, he fit criteria for Post Traumatic Stress Syndrome. Concurrently, he also presents with persistent symptoms that may or may not be associated with post-concussion complications, although he does not strictly fit diagnostic criteria for Post Concussion Syndrome. From what I understand, psychological difficulties in the form of depression and anxiety marked by post-trauma symptoms, probable anxiety and panic and general difficulty managing autonomic arousal first presented following the MVA and have resulted in functional limitations for this man, including the ability to return to productive employment. He continues to experience symptoms of depression as well as what appears to be panic episodes and increasing difficulty with claustrophobia, but it was difficult to determine whether mood or anxiety issues were prominent over a psychologically-related pain presentation. Driving-related anxiety is less prominent but still problematic at times.

[220] Although Mr. Wahl, in his evidence, indicated that he had never not followed recommendations made to him, he did agree that he had not taken a strengthening program based on, as he put it, some discussions with his physiotherapist.

[221] It is noteworthy that the recommendations of Dr. Bishop for the plaintiff to attend an anxiety disorder clinic, the UBC sleep disorder clinic and a pain management program do not appear to have been followed up but those recommendations made by Dr. Bishop were not dealt with by the defence in any confrontational way to ascertain why. It appears those recommendations were not followed. That, of course, is a mitigation defence which the defendant must establish on a balance of probabilities. In any event, when dealing with causation that is not a matter to be dealt with by the court.

[222] <u>It is also important to point out that Dr. Bishop also testified that she sees emotional or psychological problems as complicating factors to testing in about one-fifth of the cases that she is called upon to assess. Dealing specifically with the plaintiff, she did comment that her opinion of Mr. Wahl was that he has naive and concrete thinking with the naive aspect making him want to “tough it out” and be “proud”</u>. She indicated this is common amongst labourers and that his personality creates a situation where stress turns into pain, anxiety and depression. Dr. Bishop

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was also of the view that Mr. Wahl was not making a conscious attempt to mislead and she did not allocate his presentation to her as one of malingering.

[223] While Dr. Bishop expressed concern regarding Mr. Wahl's increasing reliance on narcotics and/or other sedating medications to manage his distress and pain, her concerns must be taken in the context that these medications were being prescribed by his family physician, Dr. Hay.

[224] With respect to the conclusions by both Ms. Richardson and Mr. Kerr that they had concluded a lack of full effort by him on their testing I have concluded that Mr. Wahl was self-limiting in nature because he was indeed afraid of getting worse pain and that was due to his perception of himself that he was in pain and disabled and his own voluntary embellishment of his circumstances. Both Mr. Kerr and Ms. Richardson concluded that there was a reduced range of motion in the plaintiff's neck, together with a reduced range of motion of Mr. Wahl's right shoulder.

[225] With respect to the contradictory physical findings of orthopaedic surgeons Dr. Chin and Dr. Leith, I would say that Dr. Leith's evidence is based primarily on his physical findings. Based on those physical findings he gave evidence that short of clear objective signs of injury then there should be no ongoing problems whatsoever, but that is obviously inconsistent with the findings of Dr. Chin who did note a series of objective signs of injury including possible impingement signs of the right shoulder and the same reduced range of motion in Mr. Wahl's neck which had been also found by his physiotherapist, Reza Hormozi, who gave evidence of right shoulder reduced range of motion and right shoulder tenderness as well as range of motion deficiency.

[226] On a preponderance of all of the evidence I have concluded that Mr. Wahl, after the accident, was experiencing pain and emotional distress including depression and anxiety that are associated either directly or indirectly with the motor vehicle accident of June 22, 2006, liability for which has been accepted by the defence.

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[227] From the evidence before me I also conclude Mr. Wahl is highly somatically focused over his persistent right shoulder soft tissue injury which I believe to be based on a psychological impact brought about by the accident.

[228] A review of the totality of the medical evidence does not indicate any objective conclusions that any further improvement in his present condition would be unlikely, although Dr. Chin, in his report of November 6, 2008 opined that it was highly unlikely that Mr. Wahl would ever be able to return to his current position and was likely at high risk of a permanent disability following the motor vehicle accident in terms of returning to his previous occupation. That, of course, was stated by Dr. Chin after he had opined that he felt Mr. Wahl's symptoms had improved by only 30% over the two years preceding his report, but he did also add "his prognosis is guarded to good". He also stated, in the same paragraph "he obviously feels that he is not able to return to his previous occupation as a tire technician".

[229] Of some import, Gerard Kerr, in his December 12, 2008 report, stated this:

> From a physical perspective Mr. Wahl showed consistent difficulties using the right arm for any extended or overhead reaching, or for tasks involving repetitive movements of the right shoulder. He was considered highly guarded in using the right hand/arm and in general, simply tended to avoid using it <u>though he was clearly able to use it in certain circumstances. He presents with reduced right grip strength (compared to the left). Right hand dexterity was entirely intact and as noted he spontaneously engaged the right hand/arm on occasions at least for short duration activities</u> . . .

[Emphasis added.]

[230] It is important to note that both Mary Richardson and Derek Nordin in their reports refer to Mr. Wahl's then current conditions and both comment negatively on Mr. Wahl's having self-limited his performance on certain kinds of tasks.

[231] Dr. Shuckett's diagnoses (paragraph 165 of these reasons) confirm the summary of physical injuries she identified on her assessment of the plaintiff some 15 months post-accident.

[232] In this case the objective evidence of physical injury is contradictory, especially with respect to the evidence of the orthopaedic surgeons. It is noteworthy

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however that Dr. Shuckett, in 2007, refers to impingement and Dr. Chin, in November 2008, was also of the opinion that there probably is impingement although he would have preferred to do further testing which he was not allowed to do because of the plaintiff's needle phobia.

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[233] I am satisfied that where there is a psychological overlap, as I find there is here, a straight line observation that where there appears to be no musculoskeletal reason for pain there can be no pain is not acceptable. The evidence is overwhelming that there is a probability that impingement is the problem with the plaintiff's right shoulder and I repeat Dr. Chin's opinion that Mr. Wahl sustained an aggravation of his pre-existing injury to his right shoulder following the subject motor vehicle accident and that it is probable that Mr. Wahl had underlying chronic rotator cuff tendonitis and impingement syndrome prior to the subject motor vehicle accident which chronic condition was aggravated by the accident.

[234] I accept Dr. Bishop's conclusions at paragraphs 10 and 11 of her report that Mr. Wahl suffered from a very entrenched catastrophic pain profile and continued for some time into the future because of his highly pessimistic view about his current and future situation thus fitting the DSM-IV-TR criteria for pain disorder.

[235] The same conclusion was reached by Dr. Gal where she opined that the plaintiff suffered from post-traumatic stress disorder, major depressive disorder and pain disorder associated with the accident of June 22, 2006.

[236] A somewhat different conclusion was reached by Dr. Teal when he assessed the plaintiff and ruled out any traumatic brain injury or concussion. He noted that although Mr. Wahl, on September 18, 2009, demonstrated pain behaviour and sighing, and some grimacing and the appearance of discomfort, this behaviour was not sustained throughout the course of the interview and noted that Mr. Wahl was able to get in and out of chairs without discomfort, and was able to take his shirt and shoes off and put them back on without any limitations or apparent restrictions.

[237] This observation was made some four months pre-trial.

[238] Again, during Mr. Wahl's attendance on the witness stand I did not note any grimacing or any noticeable attempts by the plaintiff to change his seating position, nor were there any requests by Mr. Wahl for a break from his providing evidence, which is so often the case in continuing physical complaints.

[239] It is somewhat noteworthy that Dr. Teal, in his evidence under cross-examination, backed off his opinion at trial conceding that the plaintiff's time off of work could be up to six months. It must also be remembered that Dr. Teal's overall opinion was simply that there was no organic basis for the pain claimed by the plaintiff but he did not rule out psychiatric/psychological issues. My notes also indicate that he would defer to a psychologist or psychiatrist with respect to any mood disorders related to medication, sleep deprivation and mood disturbance, including depression, although he noted in his evidence that those issues had not been recorded in Dr. Hay's clinical notes which he relied on. Also, when confronted with the fact that he had not seen Dr. Hay's report he again reiterated that his report was based in part on Dr. Hay's medical records that he had received.

[240] I do note at this time that, notwithstanding Dr. Shuckett's assessment of the injuries she relates to the plaintiff suffering as a result of the subject accident, her conclusions at the time of her assessment was that it was still early to predict the future for the plaintiff given that it was just 1 year 3 months since the motor vehicle accident when she did her assessment. She did state that there was room for improvement in the next year although the plaintiff did fall into "that subset of patients who does not resolve at the one year plus mark after the injury". At the time of her report she had stated that she understood that the plaintiff was going to see a shoulder orthopaedic surgeon and she did comment that "regular exercise was to be encouraged although most modalities of exercise are probably going to be challenging with his left hip pain".

[241] With respect to the report of Dr. Zoffmann, she reported on January 9, 2009 that, again, the prognosis for future functioning of the plaintiff at work and in social

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and recreational activities was difficult to estimate at the point of her assessment "because Mr. Wahl could benefit significantly from further treatment".

[242] In this case plaintiff's counsel has been adamant that I should reject the psychiatric evidence offered by Dr. Solomons and the neurological evidence offered by Dr. Teal. I have spent, perhaps, an inordinate amount of time in these reasons and in my deliberations of attempting to reconcile their evidence with the evidence tendered by the plaintiff.

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[243] On a review of all the evidence I am satisfied that there were physical injuries and psychological injuries sustained by the plaintiff which are directly attributable to the negligence of the defendant but that there has been improvement in the plaintiff's physical injuries over the time that has elapsed since the accident and that, at the present time, namely the time of trial, the plaintiff should have made far better recovery than he has made had he followed the recommendations of his treators.

[244] In this case I find that the recommendations of his treator, Dr. Bishop, were not followed, in particular, the attendance by the plaintiff for anxiety treatment, sleep disorder, and a pain management program.

[245] There was some time spent by the defence on its position that it was not for plaintiff's counsel to make the referrals to treators as was done in this case.

[246] With reluctance I have accepted that criticism as I am of the view that had the treators recommendations been referred to the treating family physician there would have been appropriate steps taken to ensure such attendance at a pain clinic. In this case there was a lack of follow-up with respect to the attendance at the pain clinic which I find was particularly required in Mr. Wahl's case.

[247] The duty at law on Mr. Wahl to take reasonable steps to minimize his loss was not met by the plaintiff when such early treators as Dr. Bishop and Dr. Zoffmann either made the recommendation or were cognizant of the fact that Mr. Wahl's psyche had taken over his physical recovery to such an extent that the attendance at a pain clinic was absolutely necessary.

[248] I am unable to be critical of Dr. Solomons' findings when he examined the plaintiff some months before the trial of this action.

[249] The most rational conclusion I can come to in balancing all the psychiatric and psychological evidence presented to me is that over a period of time the plaintiff's post traumatic stress syndrome and other psychological problems had essentially resolved. Similarly, I have also come to the conclusion that I am unable to rationalize the evidence of Dr. Leith and Dr. Chin although I have concluded, based on Dr. Shuckett's initial conclusions and Dr. Chin's conclusions, that there was an impingement problem in the right shoulder which has not been properly addressed due to the plaintiff's own reluctance to have further testing done by way of the needle therapy desired to be undertaken by Dr. Chin.

[250] A plaintiff shares the same responsibilities as a person who is first diagnosed with diabetes. He must be willing to take needles notwithstanding any phobia with respect to needles if he truly desires to maintain his health. Similarly, a person diagnosed with cancer will be motivated to take such treatment as is necessary to eradicate the cancer and prolong his life. In this case the only rational conclusion I have been able to come to is that the plaintiff has failed to mitigate his losses because of lack of motivation and his pre-existing psychological state. This state includes his needle phobia which should have been overcome by him by his own motivation to improve following the accident. This is in part a thin skull finding but I am of the opinion that, in keeping with the dicta I have reproduced from *Yoshikawa v. Yu*, *supra*, which I have set out at paragraphs 209-212 of these reasons, that there was ample time by the third anniversary of the motor vehicle accident to have motivated the plaintiff to attend a pain clinic, which was recommended some twenty months post-accident, and the needle test which Dr. Chin wanted to administer in late 2008.

[251] I am fortified in this view, notwithstanding the evidence of Dr. Hay and his very general medical report on January 1, 2010 which was done without a medical assessment at the time. I also note my earlier comment that Dr. Hay came across

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as an advocate on behalf of Mr. Wahl and one whose clinical reports appeared to be inconsistent with his testimony and medical reports.

[252] I am unable to accept the evidence of the plaintiff and Dr. Hay regarding permanence when viewed in light of the observations of not only the plaintiff's own experts but also the defence experts. The totality of the evidence amounts to evidence that is not of a convincing nature to overcome the improbability that Mr. Wahl's psychological complaints and physical complaints will continue into the future on a permanent basis.

[253] While causally I am of the opinion that Mr. Wahl's early physical and psychological problems have their cause in the defendant's wrongful act and that his pain and discomfort was real, I simply find that his pain and discomfort could have been resolved earlier by his own motivation on or about the third anniversary of the accident, being June 2009.

[254] In coming to this conclusion I have reluctantly come to the conclusion that Mr. Wahl's evidence at trial regarding his present symptomology cannot be accepted, but I have picked the third anniversary of the accident as a date that must come close to the opinions of Doctors Solomons and Teal, who assessed and observed him in the latter months of 2009.

[255] While this observation and conclusion obviously relates to the credibility of Mr. Wahl, I have in mind the following comments of Southin J., as she then was, in *Le v. Milburn*, [1987] B.C.J. No. 2690 (15 December 1987) Vancouver Registry No. B81193 (B.C.S.C.), where, at page 1, Her Ladyship said:

> When a litigant practises to deceive, whether by deliberate falsehood or gross exaggeration, the court has much difficulty in disentangling the truth from the web of deceit and exaggeration. If, in the course of the disentangling of the web, the court casts aside as untrue something that was indeed true, the litigant has only himself or herself to blame.

[256] Based on these findings I therefore now turn to the damages sought by the plaintiff with respect to this accident.

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NON-PECUNIARY DAMAGES

[257] I find that the plaintiff suffered medium tissue injuries to his neck and back. Dr. Hay's clinical records and the records of his physiotherapist both indicate that his symptoms were improving consistently up to six months post-accident when they appeared to plateau due to psychological symptoms which were first indicated approximately one year post-accident, and which were confirmed on assessment by Doctors Bishop and Zoffmann. I find that the psychological overlay prolonged the plaintiff's recovery, in part due to his failing to attend a pain clinic as first recommended by Dr. Bishop in February 2008, some 18 months post-accident. In short, the plaintiff did not prioritize his recovery over the three years that I have indicated. I am satisfied that on a balance of probabilities there is more than modest improvement to reasonably be expected in the plaintiff's recovery, and I find that by June 2009 he should have made a full recovery had he followed his treators' advice, especially that of Dr. Bishop.

[258] The defence has pled that the plaintiff has failed to mitigate his damages. At first blush the failure of the plaintiff to follow Dr. Bishop's recommendation regarding future steps related to his recovery might be some evidence of his failure in this regard. I have considered this but given the psychological overlay which I have found directly related to the accident I would not reduce the amount of damages under this head. I award the plaintiff $65,000 non-pecuniary damages.

PAST WAGE LOSS

[259] For the full year of 2005 Mr. Wahl had gross income of $30,092.44, and net income of approximately $25,000. For 2006, up to the date of the accident, his total gross earnings were some $15,893 with some $13,000 net income. In the plaintiff's brief of income loss (Exhibit 4), there is correspondence from his employer at the time of the accident that the then $18 per hour pay had the possibility of a raise to $20 per hour depending on ability.

[260] I cannot accept that possibility as being something that would have occurred on a balance of probabilities without more. I calculate his past wage loss claim in accordance with s. 95 of the *Insurance (Vehicle) Act* as follows:

2006	$13,000
2007	26,000
2008	26,000
2009	13,000
	$78,000

I therefore award the plaintiff $78,000 for his past wage loss claim from the time of the accident to June 2009.

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FUTURE LOSS OF CAPACITY

[261] The factors the court is required to consider in assessing the loss of capacity claim were set out by this court in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (B.C.S.C.) as follows:

1) whether the plaintiff has been rendered less capable overall from earning income from any types of employment;
2) whether the plaintiff is less marketable or attractive as an employee to potential employers;
3) whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4) whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[262] As I have indicated in these reasons, based on the medical evidence I have accepted, as of June 2009 the plaintiff should have been capable of returning to work and I reject the evidence of the experts Mr. Kerr, Ms. Richardson and Dr. Chin that the plaintiff likely could not return to the same type of physical work he performed in June 2006.

[263] I am not in a position to prefer the plaintiff’s evidence at trial regarding his current physical and psychological condition over the totality of the evidence which I accept regarding his current physical abilities.

[264] This claim is dismissed.

IN TRUST CLAIM

[265] The plaintiff's evidence, along with the evidence of Tammy and Greg Massender, demonstrate that the Massenders have both provided significant support to Mr. Wahl since the accident. The plaintiff relies on the decision of our Court of Appeal in *Ellis v. Star*, 2008 BCCA 164 for the proposition that the additional yard work, house work and assistance primarily provided by Ms. Massender should result in an in trust award for the extra effort done by them as a result of the injuries sustained by the plaintiff in the June 2006 accident.

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[266] After the conclusion of this trial the Court of Appeal released its reasons in *Dykeman v. Porohowski*, 2010 BCCA 36. In that case the Court dealt rather extensively with in trust claims.

[267] At paragraphs 27 through 29 the Court of Appeal dealt with this issue as follows:

> [27] On appeal, counsel for the plaintiff contends that the trial judge was wrong to suggest that an in-trust award may be made only where the plaintiff's injuries are particularly "grievous". He relies on this court's more recent judgment in *Ellis v. Star*, 2008 BCCA 164, in which the plaintiff was a police officer whose wrist had been injured. At trial, he received an in-trust award of $3,500 as compensation for household services (which he would otherwise have performed) carried out by his wife. Mackenzie J.A. noted the defendant's submission that the cases in which awards for gratuitous personal services have been made had involved "seriously injured plaintiffs <u>or other support services beyond those normally expected in a marital relationship for minimal debilitating injuries</u>." (Para. 18; my emphasis.) The Court found that yard maintenance services undertaken by Ms. Starr were not "sufficiently extensive or related to the injury" to support an in-trust award. The appeal was allowed to the extent of deleting the in-trust award.
>
> [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 <u>prior</u> 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*.

[Emphasis in original.]

[268] Applying the law as set out by the Court of Appeal I have looked at the nature of the services performed by his roommates of many years. I have posed myself the following two questions –

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1. Was the yard work and house work and personal assistance provided by Ms. Massender shortly after the accident helping the plaintiff dress simply part of the usual "give and take" between family members, or did they go "above and beyond" that level? and

2. With respect to causation, were the services necessitated by the plaintiff's injuries or would they have been provided in any event?

[269] Both questions must be answered in the affirmative to give rise to an in trust award. In this case, the Massenders and the plaintiff are not "family members", but they have been roommates and part of an extended family for many years. I am of the opinion that the taking on of the duties normally performed by the plaintiff around the home were "give and take" activities that occur between family members and long time roommates and nothing more.

[270] As a result I dismiss the plaintiff's in trust claim.

SPECIAL DAMAGES

[271] The plaintiff claims physiotherapy costs to November 30, 2009 in the amount of $14,175. The evidence is that the plaintiff had plateaued within a very few months and no improvement was noted past that time. Physiotherapy was, however, continued for some 350 visits. They appear to have been continued on the basis that they made the plaintiff feel good notwithstanding any improvement in his physical condition. The physiotherapy treatments continued solely because plaintiff's counsel was paying for them without reference to Dr. Hay. I would allow the 23 sessions at $45 per session up to January 11, 2007 under this head, for an award of $1,035. The plaintiff claims for prescriptions in the amount of $101.26. They are allowed. Under the heading of psychology visits the plaintiff is claiming $10,800 from April 2008 to November 2009. In keeping with my decision I would subtract from that amount claimed all claims subsequent to June 30, 2009, for a total deduction of $2,700, for an award of $8,100. Under 'miscellaneous' the plaintiff claims $2,997.01, which sum includes expenses for parking, BC Ambulance Service, three MRI examinations of the right shoulder, and an MRI of the lumbar spine and

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left hip. Those claims are also allowed at $2,997.01 The total award for special damages is therefore $12,233.27.

FUTURE CARE

[272] The only future care I envision for the plaintiff is the care I have repeatedly stated that he should have received following Dr. Bishop's assessment. That would have included the pain program which Mary Richardson, in her report, indicated a present day cost of $8,500 - $14,098. Under this head I allow $10,000.

SUMMARY

[273] The plaintiff is therefore awarded the following –

Non-Pecuniary Damages		$ 65,000.00
Past Wage Loss		78,000.00
Future Loss of Capacity		0.00
In Trust Claim		0.00
Special Damages	Physiotherapy	1,035.00
	Prescriptions	101.26
	Psychology Visits	8,100.00
	Miscellaneous	2,997.01
Future Care		10,000.00
TOTAL CLAIM		**$165,233.27**

COSTS

[274] On the issue of costs, the plaintiff is entitled to costs on Scale B provided that if there were any offers to settle that should be taken into account counsel are at liberty to make further submissions. Counsel may apply to the Chief Justice for a justice to hear any further submissions with respect to the issue of costs.

"Chamberlist J."

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