

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Prasad v. Sedivy*,
2008 BCSC 443

Date: 20080414
Docket: M032068
Registry: Vancouver

Between:

Praneel Prasad

Plaintiff

And

**Jan Martin Sedivy, Charles Berneche-Filon
and Resort Municipality of Whistler**

Defendants

Before: The Honourable Mr. Justice Williamson

Reasons for Judgment

Counsel for the Plaintiff

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Date and Place of Trial:

February 18-22, 25-29,
March 3-7, 10-14, and
17-19, 2008
Vancouver, B.C.

[1] The plaintiff, Praneel Prasad, was struck by a vehicle driven by the defendant Jan Sedivy, and owned by the defendant Charles Berneche-Filon, on December 3, 2002 in Whistler, British Columbia. At the time, he was in a marked crosswalk accompanied by a friend, Shawn Messom.

[2] The plaintiff was struck on his left side. He flew over the hood of the defendant's vehicle. His face smashed into the windshield. He then was thrown off the car landing on the pavement. He was taken by ambulance to the Whistler Health Care Centre where he was stabilized and facial injuries were sutured. He was then transported to Lions Gate Hospital. He was released from hospital on December 4th.

[3] Liability has been admitted. The case against the Resort Municipality of Whistler has been discontinued.

Issues

[4] The plaintiff says he sustained physical and psychological injuries, and as a result is clinically depressed, has chronic pain, and has cognitive impairment. He says these conditions are permanent, and that as a result his quality of life and capacity to earn are reduced substantially.

[5] The defendants admit the plaintiff sustained facial cuts, a fractured nose, soft tissue injuries to the neck, back and left knee, and a concussion. They say the concussion was mild and submit that he does not have chronic pain, a psychological disorder, nor impaired cognitive abilities. Indeed, the defendants say the plaintiff is deceitful, and is malingering.

[6] Many witnesses, both lay and expert, testified. After considering that evidence, as well as the submissions of counsel, I conclude that as a result of the accident, the plaintiff has chronic pain, depression, some cognitive difficulties, and an addiction to narcotic analgesics. As a result, he has a reduced capacity to earn. I do not accept, however, that the reduced capacity is as drastic as is submitted by the plaintiff.

The Plaintiff's Testimony

[7] The plaintiff testified. Some twenty witnesses for the plaintiff testified before he did. The defendants say this was to permit the plaintiff to tailor his evidence to that of his other witnesses. The plaintiff did not explain why he chose this course. I have in mind the defendants' suggestion, but I did not find that the plaintiff tailored his testimony. I conclude that while he is sometimes angry at the position taken by the defendants, and while he struggled with the

questions, I am satisfied that he did his best to answer them honestly.

[8] I also note there are many small inconsistencies in his testimony, and in the plethora of "histories" he recounted to the many medical personnel who have treated or assessed him. I do not find this persuasive evidence of deceit or of malingering. It is not surprising that with so many accounts given over five or more years, and given his depression and cognitive difficulties, discrepancies would appear.

[9] Generally, his description of the accident has been consistent. He remembers being in the marked crosswalk, hearing the defendant's vehicle "rev up", and realising he was going to be hit. He remembers jumping up, being hit in the left knee, and his face hitting the windshield. He next remembers being on the pavement, his face covered in blood.

[10] He has some recollection of conversation at the scene, but little recollection of the ambulance ride to the nearby Whistler Health Care Centre. He recalls doctors working on him (he received 110 sutures to the face) at the clinic. He recalls being taken to Lions Gate Hospital, and being released later the next day.

[11] He then spent two or more months recuperating, staying with a friend and then his brother, and attending various medical appointments. He returned to work in February 2003, but was unable to work full-time. In June of 2005, he was demoted from assistant manager to clerk. Since then, he has worked three or four six hour shifts per week.

The Plaintiff's Treating Physician

[12] On December 4, 2002, the plaintiff went to see Dr. Gregory Phillips, a family physician who has treated the plaintiff since. In a report written May 7, 2003, Dr. Phillips stated that the plaintiff presented with:

... head and neck trauma, as well as other musculoskeletal trauma. Of note were abrasions, some deformities, contusions and lacerations to his left periorbital area (eye socket) and cheekbone, nasal arch, and upper lip. He (upon initial presentation) complained of neck pain, and abrasions were noted to be present on his left chest, and tenderness noted throughout his anterior and posterior chest wall. Bruising, swelling and abrasions were also noted to his left knee and to his right hand.

[13] Two weeks later the plaintiff was still complaining of significant pain, including "soreness to the left anterior ribs, especially with breathing and coughing". Dr. Phillips referred him for further x-rays, an MRI of his neck, and physiotherapy. By January, Dr. Phillips noted "increasing

problems with his memory, he finds that he is repeating himself, has difficulty with names, and is having problems with long term memory or events". He concluded that the plaintiff "has post concussion syndrome with headaches and memory disturbance".

[14] In May of 2003, Dr. Phillips concluded that:

Praneel is still troubled with fatigue, headaches, neck, back and knee pain, and with memory lapses and other problems with his memory. Praneel is still unable to perform his duties or work, at a full level, or at a level which was comparable to his pre-injury occupation, and he still requires the use of analgesics, physiotherapy, sleeping aides, and significant rest. His recovery time is prolonged, and Praneel also may require reconstructive and reparative plastic surgery and long term counselling, not to mention long term physical and psychological therapy. As such, it is hoped that with time and treatment Praneel can recover to the best of his and our abilities, but it is likely that he will be left with at least some physical and even psychological scars that will be permanent.

[15] In November 2004, Dr. Phillips reported that the plaintiff was still experiencing pain on a daily basis, as well as limitation of function, and still required access to other health care providers. He noted that the plaintiff was using sleeping pills and narcotic analgesics. He concluded that "as this has been the case now of almost two years", the plaintiff would likely have a permanent residual component.

[16] Finally, in a recent report, January 6, 2008, Dr. Phillips noted that over the years since the accident the plaintiff's injuries have "waxed and waned, but have never disappeared". Summing up, he wrote:

It is my opinion that Praneel has suffered from cognitive impairment, specifically difficulties with executive decision making, as well as depression and attention deficits. The chronic and long term effects of his physical symptoms, his continued use of narcotic analgesics as well as the injuries from the accident themselves are all causative factors.

Praneel has been referred to many different specialist and paramedical agencies in the assessment and treatment of his injuries and conditions which include physical medicine specialists, counsellors, occupational therapists, massage therapists, physiotherapists, plastic surgeons, otolaryngologists, psychiatrists and now pain control specialists. This is an ongoing process and it is expected that Praneel will continue to need the services of many of the above on a permanent basis.

It is my opinion that Praneel will have permanent and ongoing physical complaints and limitations that he will have ongoing and permanent psychological concerns with executive functioning and mood disturbances and he will require continued treatment with physical therapy, medications and counselling psychotherapy.

[17] Most of the medical personnel who have assessed or treated the plaintiff have agreed to an extent with Dr. Phillips. Certainly, there is criticism of the level of narcotic analgesics prescribed for and used by the plaintiff. There is both lay and expert opinion that this overuse of

narcotics contributes to the plaintiff's present difficulties. There is no credible evidence, however, that this dependency on such drugs arose as a result of anything other than the continuing pain caused by the accident.

[18] One expert called by the defendants, Dr. Kevin Solomons, an experienced psychiatrist, concluded contrary to the views of other medical witnesses that there is no evidence of psychological conditions, nor any neuropsychological deficits. Rather, Dr. Solomons concluded that the plaintiff has a longstanding personality disorder that pre-dates the accident. I will return to Dr. Solomons' opinion, which I do not accept, below.

The Lay Witnesses

[19] With one exception, the lay witnesses support, in one aspect or another, the tenor of the plaintiff's testimony.

[20] The first witness for the plaintiff was his lifelong friend, Sandy Higashitani. Mr. Higashitani has known the plaintiff since the two were 11 years old and in elementary school in Vancouver. They have been close friends through their school years and adult lives.

[21] Higashitani was called to describe the plaintiff before and after the accident. He said that before the accident, the

plaintiff was adventurous and an extrovert. He said that he was somewhat of a clown or jokester, always playing pranks. He said that he got on well with all of his friends.

[22] He described the plaintiff's home life as "somewhat strained" in his relationship with his father, who he described as an alcoholic. He said, however, that he had a good relationship with his three brothers and two sisters.

[23] The plaintiff dropped out of high school after grade 11 according to Higashitani. The plaintiff then moved to Williams Lake to live with an uncle, and eventually, after one year out, returned to grade 12 at Williams Lake High School and graduated. During that period, Higashitani and the plaintiff would visit regularly. Higashitani visited the plaintiff in Williams Lake and the plaintiff came down to Vancouver from time to time and stayed with the Higashitanis.

[24] After high school, Higashitani went to the British Columbia Institute of Technology, and in 1990 became employed by Canadian Superstore. He has been employed by them ever since and is now an assistant manager.

[25] He said that the plaintiff worked for some time at a 7-Eleven and then started with IGA in Burnaby in 1989. He said

that at that time the two were seeing each other about twice a week. He called the plaintiff his "very close friend".

[26] He testified that as far as he knew the plaintiff excelled at his job. He was aware that after two to three years the plaintiff moved to an IGA in Pitt Meadows and then when the owner-operator of the Burnaby IGA purchased the right to open an IGA in Whistler, the plaintiff moved to Whistler in 1995, where he still lives.

[27] Higashitani described a close group of male friends who stayed together after high school. He described the plaintiff in glowing terms. He said that he was "loyal, trustworthy, honest, unselfish, and very giving". He described him as having a good temperament and not prone to anger or temper. He said that he was in good physical shape and while in Vancouver belonged to a 24-hour gym, but also had a home gym. He also said that the plaintiff was very concerned with his appearance and took great care with his grooming and clothing.

[28] Higashitani said that after the motor vehicle accident there was a period where he had little contact with the plaintiff, although he attempted to have contact with him. Although he saw him occasionally in Whistler, he said that he did not see him regularly again until the autumn of 2003.

[29] He testified that after the accident the plaintiff changed. No longer well-groomed, he looked messed up, unshaven, and at times not clean. He described the plaintiff's formerly tidy apartment as "a pig sty" with clothing and half eaten food all over.

[30] He said that he stayed overnight a few times in Whistler and found that the plaintiff slept a great deal and from time to time screamed out in his sleep.

[31] Higashitani testified that he assumed the plaintiff would get better, but that "things have not changed". He said that prior to the accident they would have long discussions about their jobs, as they had very similar jobs. Now, he says, he does not bother with those conversations.

[32] In cross-examination, Higashitani agreed that the plaintiff joined him and others on a trip to Las Vegas in 2004. This, I assume, was related to the plaintiff's history of gambling in casinos, and to a great deal of cross-examination concerning the fact that the plaintiff and a group of friends get together from time to time to play poker. Higashitani agreed that the poker game that they played required focus and concentration. However, he also testified in cross-examination that when the plaintiff plays poker he has problems with the cards. He testified that the plaintiff

mixes the black and the red cards, and that his difficulties are "noticeable".

[33] He agreed that he was aware that the plaintiff on visits to Vancouver from Whistler would attend casinos, but that he was not aware whether the plaintiff did so every time he was in Vancouver. He testified that at casinos, he understood the plaintiff would play Baccarat poker and said that it is not a game that requires the kind of attention necessary to the poker that the group played. He described Baccarat as "sort of like the flip of a coin".

[34] Patrick Fowler was also in elementary and high school with the plaintiff. They have remained friends. They socialized together after completing school until the plaintiff moved to Whistler. After that, they saw one another occasionally. Mr. Fowler was one of the group of friends that took an annual trip to Las Vegas. This group included Higashitani. He described the plaintiff, while in Las Vegas, as "playing a little roulette, not anything too heavy".

[35] He gave a glowing description of the plaintiff's pre-motor vehicle accident character. He said that he was genuine, honest, trustworthy, loyal and unselfish.

[36] As an example, he observed that because he, Fowler, is legally blind, he has not been able to drive for about 15 years. He said that the plaintiff, more than others, would volunteer to drive him.

[37] Fowler heard of the accident through Higashitani. He did not see the plaintiff again until a trip to Las Vegas in 2003 or 2004 with the same group. He noticed at that time that the plaintiff slept longer than he had, and one night woke up screaming, an incident which Fowler said "scared" him.

[38] Fowler also attends the weekly poker games with the group of old friends. He does not think that the plaintiff is a good poker player. He observed that the plaintiff now has major concentration problems. He described him as being unable to figure things out. He pointed out that sometimes the plaintiff cannot recall if he has put his money in and he cannot follow things. Asked in cross-examination if the plaintiff has improved since the accident, Fowler said "if anything he's worse". He said that he is more tired and less energetic. In examination-in-chief, he described the differences between the plaintiff before and after the accident as "night and day".

[39] Mike Spink is a fellow employee of the plaintiff at the IGA in Whistler. He has worked there since 1998 and is a

senior grocery clerk. Frequently over the years, he worked the same shift or an overlapping shift with the plaintiff.

[40] He described the plaintiff as a hard worker who was in charge of all training for new staff up until the accident. He said he was a "workhorse". He also said that prior to the accident he was very fit, was a dirt bike rider and was a mountain bike rider. He moved quickly around the store, he was very productive and punctual.

[41] He said that the plaintiff worked long hours and treated the staff very well. He said that he was always helpful, polite and calm.

[42] Spink remembered the motor vehicle accident. He remembered the plaintiff returning in February of 2003, but soon realized that he and a fellow employee, Shawn Messom, had to cover for the plaintiff. They would find him lying down or just sitting, which he described as completely different than the plaintiff had been before. They covered for him for some time until the owner found out and eventually the plaintiff was demoted from his position as assistant manager.

[43] Spink said that the plaintiff simply could not do the physical work and that he also had trouble remembering things.

His energy level was obviously lower and he appeared to Spink to be frustrated.

[44] He pointed out that when the manager of the store, Ken Quon, died his position was taken by Tim Pugh, who was an assistant manager at the same time as the plaintiff. The implication here is that the plaintiff would have had a good shot at that job. In cross-examination, Spink conceded that the plaintiff still trains staff in the grocery department. He said that the plaintiff does some price checks, does some ordering and also helps customers. He was adamant, however, that the plaintiff is not improving. He also stated that the plaintiff's personal grooming had deteriorated since the accident.

[45] Trevor Hopkins, age 35, is an assistant store manager at the IGA in Whistler. He has worked there since 1994, with the exception of one year out from 1998 to 1999. He started as a produce clerk and then became a lead grocery clerk. In 2000, he became a third assistant manager, reporting to the plaintiff who was at the time an assistant manager.

[46] Hopkins described the plaintiff as assistant manager as "very loyal, hardworking, punctual and competent". He noted that he was physically strong and he was able to say this

because he frequently worked shifts that overlapped with the plaintiff's shifts.

[47] Hopkins recalled the car accident and the plaintiff's attempt to return to work about three months later. He said the return "did not go well". He said that unlike previously, the plaintiff was short-tempered, disorganized and had a hard time focusing. On several occasions he observed him "taking painkillers". He said that the plaintiff kept medications at work in the manager's office. Hopkins said he sensed that the plaintiff had not improved and in some respects had "gotten worse".

[48] He also said there were several incidents in which the plaintiff had disagreements with customers. He said it was apparent that the plaintiff was no longer able to be an assistant manager without help. He described him as forgetting to secure money upon closing the store, forgetting to lock the safe, forgetting to set the alarm, and forgetting to schedule changes.

[49] He said that before the accident the plaintiff was the primary trainer for the store, but that after the accident he was unable to continue in this and now only trains people occasionally. He also noted that the plaintiff's department

or clothing gradually deteriorated and that he seemed solemn and depressed, always looking down.

[50] In cross-examination, Hopkins agreed that there were occasions when he had forgotten the cash. He was questioned at some length about a three-day trip to Las Vegas with the plaintiff in 2004. Again the subject of gambling came up. He said they did not gamble every night.

[51] Shawn Messom worked at the IGA in Whistler from August 1999 until July of 2005. He was a lead grocery clerk. The plaintiff worked roughly the same schedule. Messom said that for three or four of five shifts each week he worked side by side with the plaintiff.

[52] He described the plaintiff as "pleasurable". He said that everyone got on with him and that he was a "cool guy". He testified he respected what the plaintiff did with the store and the way he related to staff and customers. He said that as far as he knew the plaintiff was respected by the other staff members. He described him as doing "a great job". He said that the plaintiff was "a very hard worker with high energy. He'd get people fired up".

[53] Messom was guarded about the other assistant manager, Tim Pugh. He said that he did not see eye to eye with Pugh, but

that they had a working relationship. He found Pugh demanding. He described Pugh's attitude as "his way or the highway". In cross-examination, however, he conceded that although Pugh was "old school" and he, Messom, was "new school", Pugh treated him and the other staff respectfully.

[54] Messom was the person who was with the plaintiff the night of the accident. He was crossing the street in the marked crosswalk with the plaintiff when he heard a man yelling at a car that was leaving the parking lot. He said the car "rolled through the stop sign and turned left". He testified that the car then sped up. He heard the engine "rev up" and then the car hit the plaintiff. He saw the plaintiff in the air heading towards the windshield. The car then braked, and the plaintiff flew off the engine hood, landing, Messom said, 10 to 15 feet from the car. He thought the car was doing 25 or 30 kilometres per hour when it hit the plaintiff.

[55] Messom said he screamed at the driver and then ran to the plaintiff, who was lying close to the centre line, curled in a ball with his hands on his face. He said that the plaintiff was bleeding, that his face looked like mush, and that he was moaning. He described it as "pretty sickening".

[56] Messom rode in the ambulance to the clinic with the plaintiff. He observed the emergency personnel responding to the plaintiff. He said that he waited at the clinic about a half an hour during which time the plaintiff was moaning and screaming.

[57] Messom did not see the plaintiff until he returned to work some three months later. He testified that at this time the plaintiff had a "hideous scar across his entire face". He testified that at first the plaintiff worked two to three days a week and that eventually this was increased. However, he testified, the plaintiff was not doing a lot. Messom observed the plaintiff stop and indeed sometimes would make him stop because he could see the plaintiff having a hard time.

[58] He reported that the plaintiff was having problems with his memory. He said that the plaintiff used to remember everything about stock, but that after the accident he could not. He testified that he became the plaintiff's "back" and that he did all the building of the displays for the rest of the time that he was there. He testified "I'd do pretty much his work for him".

[59] He said that the plaintiff remained in charge of what would go where, but that was the extent of his capability. In cross-examination, Messom said that he did not remember the

plaintiff having any run-ins with customers prior to the motor vehicle accident.

[60] Chris Ormiston met the plaintiff in 1993 when both of them worked at the IGA in Pitt Meadows. Mr. Ormiston was then a teenage grocery clerk still in high school. He worked with the plaintiff frequently, usually three days per week. He observed the plaintiff ordering stock, opening and closing the store, stocking shelves, and training.

[61] Ormiston testified that it was the plaintiff who trained him to become a purchaser, as well as the day to day duties in the store. He described him as a "very good trainer with strong functional expertise". He said that the plaintiff was business minded and worked as if he was an owner.

[62] He described the plaintiff as neat, clean, pressed and well-groomed. He said he treated staff and management with respect and that he was always happy, smiling, making eye contact, and cordial with customers. He described the plaintiff as "thoughtful", and thinking of the best interests of his workmates.

[63] He described some out of work activities with the plaintiff, including 4X4 exploring, bowling once, and working out. He described the plaintiff as having good fitness. He

said that he was strong and took pride in his strong physique, and that his energy seemed unlimited.

[64] He testified that the plaintiff left the Pitt Meadows store in about 1995 and went to Whistler. Ormiston stayed another year and then, having been recruited by the Whistler store owner Jim Chan and the plaintiff, moved to Whistler so that he could ski and work in the IGA in that town. When he did so, he ended up working with the plaintiff about three times a week. He said that the plaintiff gave him further training concerning purchasing, which he described as much more involved at the Whistler store because of the larger volume and the necessity for a "strategic process".

[65] He testified that the plaintiff became an assistant manager responsible for operations of the store and that he had a hands-on style, opening, closing, doing the cash, and handling all of the staff for the day to day operations. He said that "training was his strength". He said he would show young staff "how to do a good job then a great job". He said that he "really looked up" to the plaintiff.

[66] As for Pugh, the other assistant manager, Ormiston said that he got on with him "as best I could". He described, however, an incident when he was doing one job, which had a deadline, and Pugh asked him to do something else. He asked

one of the junior people to do it. Pugh was upset, saying "I told you to do it". Ormiston thought this rather odd.

[67] Ormiston described the plaintiff attending his wedding, which was a three-day family affair. He described the plaintiff as being very happy at that gathering. He also said that during the time that he was at Whistler before the accident the plaintiff became more involved in outdoor activity.

[68] After the accident, although Ormiston tried several times to contact the plaintiff, he testified that essentially the contact was "lost". Ormiston would see the plaintiff in the IGA store when he shopped there. He described him as no longer the clean kept individual that he knew. He testified that the plaintiff's speech had become a monotone, that there was no excitement in his voice, no eye contact and that conversations were short. In the end, he testified that he "felt sad" for the plaintiff and that their friendship had "gone away". In cross-examination, he was challenged about whether he was a hard worker and he said that he was. With respect to Pugh, he agreed that Pugh was "old school".

[69] Cross-examined about his overtime hours, and shown documents that suggested in 1998 he had not worked the number

of overtime hours that he had reported, he responded that what he said was not an exaggeration, but was an estimation.

[70] Aaron Wong, now age 34, is an assistant manager at the Whistler IGA. He has known the plaintiff for 20 years. They met at the IGA in Burnaby when both worked there at a time when Mr. Wong was a school student working two to three days a week during the school year and 40 hour weeks in the summer. Wong testified that he was six years at the Burnaby store and that he thinks the plaintiff was there about five of them.

[71] During that period the two worked side by side. The plaintiff trained Wong to open, to close, and to order stock. Wong described the plaintiff as "a very good teacher". He said he was very thorough, always checking over what Wong had done. He said they got on well. He said the plaintiff was friendly, knowledgeable, and that he looked up to him.

[72] He described the plaintiff as always well-groomed, well-dressed and as muscular.

[73] Wong said that he went up to Whistler to work at the IGA in 1994 or 1995 and has been employed there since. In the Whistler store, he observed the plaintiff training many more people. He said that the plaintiff did most of the training and that he was very thorough. He said that the plaintiff

became an assistant manager, that he moved "a lot of stock", that he did most displays, and usually was the person who closed the store. He said that the plaintiff had keys, the combination to locks, that he handled the cash, and that he set the alarms.

[74] He testified that he worked side by side with the plaintiff many times. He described the plaintiff as interacting with fellow workers, managers, owners, and customers in a friendly, courteous and helpful manner.

[75] He testified that he occasionally socialized with the plaintiff, as they had mutual friends in Burnaby. He also attended what he called "casual poker nights" at store owner Chan's house with Chan and his wife and the then store manager Quon. He said that they played different types of poker and there was a \$20 buy-in. He said it was "just for fun" and that they enjoyed it win or lose.

[76] He described the plaintiff's purchase of his condominium in early 2002 and noted how "proud" the plaintiff was.

[77] He testified that after the plaintiff returned following the accident, he was "like a shell" of his former self. He said the scars were obvious, and it was obvious that the

plaintiff had a very sore back. He testified that the plaintiff could not do the work that he used to do.

[78] He said that the plaintiff would forget things, that he would take frequent breaks and say "no calls" and therefore was unavailable to the cashiers for such things as authorizing cheques or providing currency. He would simply not respond. He testified that he and others began to help him to shelve stock and to do displays. In particular, to do lifting. He said that he, Spink, Hopkins, and Messom all helped the plaintiff. Indeed, he testified that "people still help him". He said that eventually when all the help the plaintiff was receiving became clear to the store owner, the plaintiff was demoted.

[79] Wong testified that the plaintiff was not very good at poker. He said he had a poor poker face.

[80] Wong observed that a person he called "an ICBC lady" (Pamela Russell) came to check on the plaintiff as he worked at the store. He did not observe any change in the plaintiff as a result of her attendance. He thought she tried to increase his hours, but that as a result, his work suffered. He observed that the plaintiff was forgetting a number of things and did not get on as he had previously with cashiers and customers, and that he now gets "agitated and angry". He

observed him arguing with the managers and with customers. This, he testified, is something the plaintiff never did before the motor vehicle accident.

[81] As a result, he said, store morale suffered. The cashiers did not want to deal with him. He said that there was a perception that the plaintiff got preferred treatment from store owner Chan.

[82] In cross-examination, Wong reiterated that he has not noticed any improvement in the plaintiff's mood since the accident. He described him as sad, not laughing or joking, and not having a good time. He said that the plaintiff now builds heavier displays only with people helping him.

[83] Perhaps the most compelling of the lay witnesses was Jim Chan. For 14 years he has been the owner-manager of the IGA store in Whistler where the plaintiff was and is employed. Prior to that, Chan owned the IGA store in Burnaby and the plaintiff had worked for him there as part of his management team.

[84] When Chan went to Whistler, the plaintiff left the store in Burnaby and went to work in an IGA store in Pitt Meadows. About two years later, Chan needed some help in his store and asked the manager of the Pitt Meadows store if he could borrow

the plaintiff for a month or so. The manager agreed and the plaintiff went to Whistler. As the plaintiff enjoyed working there, according to Chan, he asked if he could stay. Chan agreed.

[85] He described the plaintiff's work as excellent. He said that he was good at training, and that it was the plaintiff who trained most of the current management team, including the witnesses Hopkins, Wong and Spink. Chan said that the plaintiff got on well with staff and customers, and that he had excellent display and merchandising skills. He testified that the plaintiff, "improved our bottom line - he was very good at getting the extra dollar". As a result, Chan promoted him to assistant manager.

[86] Chan testified that he could count on the plaintiff. He said that he was "the most reliable of anyone at getting things done". He testified that the plaintiff had an excellent memory and that he would do a "manager's walk" about the store with the plaintiff suggesting things that needed to be done and when he returned the next day, these requests were all accomplished.

[87] He described the plaintiff before the accident as "fun loving, happy, and hardworking". He said that he was an excellent supervisor of staff, including disciplining staff.

[88] The night of the accident Chan received a telephone call and went to the scene. He found that the plaintiff had already been taken to the Whistler Health Care Centre. He went immediately to the clinic and there saw the plaintiff, with doctors and nurses working over him. He described the plaintiff as "really beaten up". He said it was a "pretty horrid scene" with much bleeding. It appeared to him that the plaintiff had massive injuries. Although he spoke to the plaintiff, he cannot be sure that the plaintiff knew he was there. He said the plaintiff was "screaming in pain".

[89] Subsequent to the accident, Chan recalled the plaintiff returning to work in about March of 2003. Chan was surprised. He thought, and said repeatedly to the plaintiff, that he was returning to work too early. He said that the plaintiff was there, but not working. He described him as "showing up - there physically", but "absolutely" not able to do the work of an assistant manager. He was aware that the plaintiff was taking a large number of medications. He noticed that as the plaintiff tried to increase the hours he worked, he took more medications. He testified that "we saw him deteriorating" and that "we were hoping things would get better, but things got worse".

[90] Eventually, he discovered that other managers and staff were covering for the plaintiff. He said that in fact they were doing much of his work. He understood they were doing this because they admired him and had respect for his previous work as an assistant manager.

[91] When Chan discovered this, he came to the opinion that the plaintiff was no longer reliable, and that he no longer had patience with either staff or customers. He described him as "not friendly". He said that the plaintiff came to the store "drugged up".

[92] He also noted significant memory loss, which he said became a key issue. He testified that, in his view, the plaintiff has never regained the memory he had prior to the accident.

[93] In 2005, he made what he called "the difficult decision" to demote the plaintiff from assistant manager and to reduce his hours to part-time hours. He discussed this with the plaintiff, whom he described as accepting that it was necessary. He said that by this time, the plaintiff was "a shadow of the person he was before".

[94] Asked why he continued to employ the plaintiff in these circumstances, Chan said that the plaintiff had "helped us to

become a successful company". He said that he had been loyal, trustworthy, and hardworking. He said "you do your best in return to good people". He said that it was the plaintiff who had "helped us immeasurably" to become successful, and that one of the toughest things he ever had to do was cut the plaintiff's hours and demote him. He said that he kept and continues to keep the plaintiff employed "because of what he did for us. You don't just throw that away. It's not his fault he got hit".

[95] In cross-examination, Chan was pressed about why he continued to give the plaintiff such things as the so-called \$1,500 ski pass bonus. In reply, the witness asked would it be proper to "all of a sudden take away his \$1,500 bonus because he was hit?"

[96] The one lay witness who disagreed to any significant degree with the testimony of the above lay witnesses was Karen Pugh. Ms. Pugh has worked at the IGA in Whistler since 1998, although there was a period in 2000 when she, and her husband Tim Pugh, who is currently store manager of the Whistler IGA, were away for a year. She has known the plaintiff since 1989. At that time, he was employed in the Burnaby IGA as a grocery clerk and she and her husband purchased the store. They operated the store as owner-managers.

[97] I found she was not a credible witness. She was hesitant, and constantly said one thing and then changed her testimony, saying things such as "oh gosh, I'm trying to remember", "I shouldn't say that", or "no, I have to rephrase that".

[98] Further, she was internally inconsistent. Much of her evidence was that the plaintiff was not a particularly good employee and that he "absolutely" was never capable of being a manager. On the other hand, she also testified that he was loyal, honest, and would do any job that you showed him how to do. She said that he "did his job". She said that he was trustworthy and that she and her husband could count on him. She agreed that he had never been disciplined in either store.

[99] She was adamant that nothing changed after the motor vehicle accident. But she then testified that subsequent to the motor vehicle accident he was alright on the first half of his shift, but having taken analgesics halfway through the shift he became foggy and could not do the job. I note that this last evidence is consistent with a number of other witnesses and raises questions, as I will discuss below, about the efficacy of Pamela Russell's occupational therapy.

[100] I was also troubled by Ms. Pugh's innuendo. She suggested that the drugs that he was consuming were not

prescription analgesics. Apparently she believed this because some of the pills were loose in a bag or because at one point he was taking liquid codeine. She rejected his proffered explanation that at the time he obtained codeine in that form, there were no pills available. I accept that the analgesics the plaintiff was taking were, where necessary, prescribed.

[101] Despite her evidence that the plaintiff would do what he was told to do and would not deviate from it, she testified that her husband did not like the plaintiff because, as she put it, "if you ask someone to do something and he does the opposite" her husband does not like it, evidence contrary to her testimony that the plaintiff always performed exactly as he was directed.

[102] I found this witness indulged in speculation and innuendo, and was generally antagonistic to counsel, particularly in cross-examination. Where her evidence conflicts with that of other witnesses, I reject it.

[103] One other lay witness who worked at the Whistler IGA testified. Ryan Anderson has been in the grocery business since 1980, formerly working with Overwaitea. From 1998 until 2006 he worked at the IGA in Whistler as a clerk. He usually worked the morning shifts, originally from 8:00 until 4:30 and then 7:00 until 3:30. He said that as the plaintiff usually

worked the afternoon shift, they did not work together much although their shifts from time to time overlapped.

[104] He said that they did not talk to each other much and as he put it, just stayed out of each other's way. He testified about an altercation or disagreement they had early on because of an extra long lunch hour that Mr. Anderson had taken. They got into an argument about this and the two of them went to Chan, who basically told them to each do his own job and not worry about what the other was doing.

[105] In contrast to Pugh, who said that Chan would come to work around 10:00, Anderson said that he came in around 8:00 or 8:30.

[106] Anderson agreed, as the witness Spink had testified, that he often left early. However, he said that that was because he often came in early and if things were slow later in his shift he would rather leave and participate in the recreational offerings of the Whistler area.

[107] Anderson testified that he heard some discussion about the plaintiff gambling, but said "it was no big deal". He said that the plaintiff never discussed gambling with him. Again, contrary to what Ms. Pugh said, Anderson said that after the accident the plaintiff would fail to get things done

that he was asked to do, such as ensuring that milk was in the refrigerators on the evening shift.

[108] In cross-examination, Anderson conceded that he was never close to the plaintiff from the beginning. He said that they were not friends and that he did not work with him a great deal. While he testified that the plaintiff did not get along with two or three other particular employees, he testified that the plaintiff appeared to get along well with the young people who worked on the night shift. With respect to both Chan and Quon, Anderson said that they had "great management skills". Contrary to what some other witnesses testified, Anderson said that Pugh was a manager "under Ken Quon" until Quon died, at which time Pugh became the manager. All in all, Anderson added very little to the information on this case.

Medical Evidence

[109] I have already referred to the treating family physician Dr. Phillips' evidence. A number of other doctors or therapists testified.

[110] Pamela Russell is an experienced occupational therapist. She provided occupational therapy services to the plaintiff from July of 2005 to July of 2007. She was originally

contacted by ICBC to conduct an assessment. The idea was that she would assess the plaintiff and propose a multi-disciplinary plan to facilitate his recovery and return to work as an assistant manager. She was then to coordinate the various participants in the plan, as well as to provide direct intervention herself. As a result, she made a number of visits to the IGA in Whistler while the plaintiff was working to find ways to facilitate his work.

[111] In chief, she testified that she did not see herself as "an ICBC spy", but she said that unfortunately some clients do see her as such. She testified that she reported to ICBC, as well as to both counsel and other professionals.

[112] Unfortunately, when Ms. Russell had the plaintiff sign a standard consent for occupational therapists, she filled in names on the consent form to provide authorization for her to speak with the plaintiff's family physician, with the kinesiologist working with him, with the massage therapists involved, and with his lawyer. There was a note at the bottom of the consent form that she was to report "only to lawyer" initially. Lawyer, she agreed, in this context meant the plaintiff's lawyer. There is nothing in the consent that permitted her to report to litigation counsel for ICBC.

[113] Nevertheless, she did. In an illuminating exchange in April of 2006, counsel for the defendants sent an e-mail to Ms. Russell saying, "I appreciate that you're not ICBC's spy, but any kind of gambling addiction would certainly play into the psychological condition he has currently". She then asked Ms. Russell to elaborate on the plaintiff's gambling.

Ms. Russell responded.

[114] It appears from this that Ms. Russell breached the agreement that she had with the plaintiff. This is significant because she testified that there was often a sense that he did not trust her and that he considered her as somehow or other a spy for ICBC. I note that the plaintiff's concern that ICBC was spying on him was accurate. The corporation hired investigators to video the plaintiff surreptitiously.

[115] I find there is a fundamental flaw with the opinion of Ms. Russell concerning the plaintiff's ability to do his job. When she was first retained to conduct the occupational therapy assessment, she, quite appropriately, met with Chan, the owner-manager of the Whistler IGA. Chan cooperated with her and permitted her to visit the store while the plaintiff was working. She did this a number of times; the hours involved totalled 29.

[116] However, Chan told her that the problems with the plaintiff's performance were manifest during the second half of his shifts. That is to say, the plaintiff started off all right, but according to Chan, he became so fatigued or possibly in pain that his performance fell off significantly in the second half of a shift. This evidence is consistent with that of the plaintiff's co-workers who testified. As noted above, eventually Chan reduced the plaintiff's shifts and cut the hours on his remaining shifts from eight to six. I infer that was because of his poor performance in the final two hours of his shift.

[117] However, despite knowing this, Ms. Russell in her many visits to the store never visited him in the second half of a shift. As a result, all of her observations refer to the early part of his shift and none refer to the second half of the shifts, the period that the store owner described as difficult for the plaintiff. She justified this course of action by testifying that she expected to observe him deteriorating in the first half of the shift. I do not find this explanation persuasive.

[118] This failure to apply common sense to the circumstances renders Ms. Russell's observations of the plaintiff's performance not too useful. This is significant, for many

other medical therapists relied upon her comments. It also renders her discharge opinion questionable.

[119] I note in passing that the videotaping of the plaintiff working has the same flaw. Despite over 140 hours of surveillance, the investigators managed very little filming of him working, and according to the surveillance summary, these clips were taken between 2:00 p.m. and 5:30 p.m. As the evidence is that the plaintiff worked the afternoon and evening shift, these videos were taken in the first half of his shift.

[120] Dr. Walter Hartzell was found competent to give opinion evidence in the area of occupational medicine and fitness to work. His curriculum vitae and his report are in evidence. He conducted a comprehensive occupational health assessment.

[121] It is the view of Dr. Hartzell that the plaintiff's real problem is one of pain rather than lack of strength; it is the pain that is the limiting factor. Further, he is of the opinion that it is the plaintiff's perception of pain that is the problem. He says that carrying on with his work under this perceived level of pain is a measure of his effort and is to his credit. He was challenged extensively in cross-examination and sometimes seemed somewhat evasive or unwilling to answer questions. But he did not change his opinion.

Shown a videotape secretly filmed of the plaintiff at work, he observed that the plaintiff was functioning very slowly and "ponderously", to use his word.

[122] As of March 8, 2005, Dr. Hartzell was of the opinion that the plaintiff was suffering chronic pain modified by the associated psychological or cognitive side effects of the pain medication. He also was of the opinion that some aspects of his injuries will be present the rest of his life. He said the "possibility of him getting back to his pre-injury occupation" exists, but only with physical rehabilitation and pain management. Given this, Dr. Hartzell stated that "a definitive opinion regarding his future employability is not possible".

[123] In July of 2007, the plaintiff was assessed for his physical/functional abilities and limitations by Min Trevor Kyi, a Clinical Assistant Professor with the University of British Columbia, Faculty of Medicine School of Rehabilitation Sciences. Mr. Kyi found no difficulties with the effort put forward, indeed he described a keenness in the plaintiff to do as well as he could. Towards the latter stages of extensive testing, Mr. Kyi noted "various signs of increased pain and reduced function". He concluded that the plaintiff "presents with a reasonable work tolerance somewhere in the 20-30

hour/week range", an opinion consistent with that of IGA store owner Chan, and indicative of the flaw in Pamela Russell's observations.

[124] A number of experts assessed or screened the plaintiff for neurological deficit. The first was Dr. Andrew Woolfenden, who examined the plaintiff in February 2005 after a referral from Dr. Phillips. He found the plaintiff complained of headache, cognitive difficulties, changes in mood, fatigue, insomnia and loss of sense of smell. He raised concern about narcotic analgesics and pointed out that there could be an element of "analgesic rebound" from the use of codeine. He also had a concern that the plaintiff may have sustained an underlying structural brain injury. He said that both the plaintiff's complaints and the clinical findings suggest that he may have a "dysexecutive syndrome".

[125] In December 2004, Dr. Hendre Viljoen conducted a neuropsychological screening assessment of the plaintiff at the request of the family physician. Dr. Viljoen concluded that based upon the plaintiff's description, it appeared that he sustained a mild concussion. On the neurological screening, he concluded that the plaintiff exhibited a pronounced interference with frontal-executive functions. He noted difficulty with planning, reduced verbal fluency,

inhibition of appropriate responses and impaired mental flexibility.

[126] However, this report was written in December 2004, some 17 months after the "limited battery of neuropsychological screening testing" was undertaken. As a result, Dr. Viljoen was careful to point out that the results obtained may no longer be accurate.

[127] In November 2007, Dr. Philip Teal provided a neurological opinion at the request of counsel for the defendants. It was his opinion that the plaintiff "may have sustained a very mild concussion". He wrote that it was his opinion that the plaintiff "has not suffered persisting neurological cognitive sequelae" as a result of the accident. He also said that it was his opinion that the plaintiff's complaints of cognitive difficulties are "most probably attributable" to sleep disturbance, narcotic analgesics, anxiety and depression. He deferred, however, any opinion regarding the origin of the depression and anxiety to psychiatrists.

[128] Finally, on December 19, 2007, Dr. Donald Cameron, at the request of counsel for the plaintiff, provided an opinion on the neurological condition of the plaintiff. He concluded that the plaintiff "probably did sustain a mild traumatic

brain injury or concussion". He disagreed with Dr. Teal's conclusion that the plaintiff did not suffer a mild traumatic brain injury, pointing out that Dr. Teal does say that the plaintiff "may have suffered a mild concussion".

[129] He also concluded that the major ongoing contributing factors to the plaintiff's physical and cognitive function are his chronic pain disorder and the ongoing taking of narcotic analgesics. He concluded that the plaintiff has remained partially disabled and will probably remain so permanently.

[130] The psychological factors involved in this case have been repeatedly assessed. In March 2005, Dr. Frank Spellacy performed a neuropsychological assessment over two days. He performed a series of tests. He stated that in his opinion the plaintiff made "generally good effort" and that there was no indication of symptom exaggeration.

[131] He concluded that the neuropsychological test results are consistent with the plaintiff's complaints. He recommended psychotherapy to develop strategies for improving mood and emotional control and said that without treatment, the plaintiff was likely to remain symptomatic.

[132] In March 2007, after a recommendation by Dr. Phillips and Pamela Russell, Dr. Sheila Mildenberger, a psychiatrist,

assessed the plaintiff for the purposes of making treatment recommendations. It is evident that she was to recommend treatment regarding the prolonged use of narcotic analgesics, a problem that, as noted above, had been observed by other professionals. Among other things, the plaintiff complained to her that he felt he was being watched and followed by ICBC, a feeling that, as I have observed, turned out to be accurate.

[133] Dr. Mildenberger found the plaintiff a reliable historian, except for his omission to tell her about his gambling problems. She found that his affect was flat, that he presented as worried and frustrated and that he described some suicidal ideation. She concluded that the plaintiff has chronic pain syndrome, a major depressive disorder, an anxiety disorder and noted the chronic use of narcotic analgesics. Her diagnosis of major depressive disorder was based on the DSM IV criteria.

[134] It was her opinion that the plaintiff would benefit from psychotherapy, both cognitive and behavioural therapy. She also recommended referral to a specialist in the treatment of chronic pain.

[135] Dr. Wesley Buch testified. He submitted three written reports dated June 9, 2006, December 16, 2007 and January 31, 2008. In the first of these, he set out that the plaintiff

was referred to him by Pamela Russell not for assessment, but for psychological treatment.

[136] He reported that when he first met with the plaintiff, the plaintiff presented as withdrawn, dejected, not making eye contact, brooding and sullen. He said that the plaintiff described his work as extremely important to him. He told Dr. Buch that his hard work had been rewarded by his promotion to assistant manager, but reported his recent demotion and said he feared he would eventually be fired.

[137] Dr. Buch embarked upon a treatment plan, which he reported as consisting of antidepressant behavioural strategies working towards a gradual return to work. The plaintiff reported fatigue, a sense of financial strain, and a gambling habit since the beginning of 2006 that was significant enough that Dr. Buch thought it a direct threat to his rehabilitation. Nevertheless, by June of 2006, Dr. Buch thought the plaintiff in "partial remission with a promising course towards full remission" and discharged him.

[138] However, in early 2007, Dr. Buch reassessed the plaintiff and found that he had "suffered a major setback". Dr. Buch found that the plaintiff's signs and symptoms were persistent, severe and met the DSM IV diagnostic criteria for

major depressive episode, a finding consistent with that of Dr. Mildenberger.

[139] Dr. Buch began treatment again. He reported that by June 2007, the plaintiff's depression had shifted from severe to moderate, but was still persistent. He noted that the plaintiff reported stopping his gambling in casinos at the end of 2006.

[140] The plaintiff again talked of his suicidal ideation and Dr. Buch seems to have entered into some sort of an agreement with the plaintiff that he would not consider suicide until the conclusion of these proceedings. This seems a rather odd arrangement, but although it was questioned somewhat in cross-examination, I am unable to say that it was inappropriate.

[141] Dr. Buch said that at this time, December 2007, the plaintiff's treatment progress was again being hindered by fatigue, depression and suicidal ideation. He concluded that the plaintiff has sustained psychological impairment related to chronic pain and depression that impacts negatively upon his social functioning. He found this impaired his concentration and stamina at work. He recommended further psychological therapy.

[142] The one medical report that stands out as distinctly different from all others is that from Dr. Kevin Solomons. Dr. Solomons conducted a psychological assessment of the plaintiff on October 3, 2007, at the request of counsel for the defendants. He reviewed a number of other medical reports, including those of Dr. Woolfenden, Dr. Buch and Dr. Mildenberger. He concluded that the plaintiff's reports of physical injuries and limitations "seem significantly exaggerated and possibly even feigned".

[143] No other expert witness or lay witness suggested that the plaintiff was feigning his injuries. I note that many of the witnesses who described the signs and symptoms manifest in the plaintiff observed him over extended periods of time. Dr. Solomons observed him on one day.

[144] He gave three reasons for his conclusion that the reports may be feigned. First, he said during the course of the interview there was no sign of the plaintiff being in physical pain. Second, he reported that at no time during the interview did the plaintiff massage his face as he had told Dr. Solomons he regularly did to avoid pain. Third, he said that for about the last hour and a half of the interview, the plaintiff lay on the couch on his left side, with his knees drawn up and his head on the arm of the couch. He described

this as an awkward position that, sustained as it was, seemed inconsistent with pain.

[145] I find these justifications for the conclusion that the plaintiff may be feigning, shallow and unpersuasive. Many other witnesses observed that the plaintiff's pain has waxed and waned. Thus, how he appears on one day is not determinative. Second, no one else has stressed the face massage point, and of course the doctor was unable to say whether there had been any massaging of the plaintiff's face any other time that day. Third, the plaintiff was not questioned by Dr. Solomons, nor was he challenged in cross-examination, about why he might have taken what appeared to be an awkward posture. He was never asked if it was, given his injuries, in fact an awkward posture for him.

[146] Dr. Solomons disagreed with the finding of Dr. Mildenberger that the plaintiff met the criteria for a diagnosis of major depressive episode, social anxiety disorder, and pain disorder. Dr. Solomons challenged the depressive episode diagnosis on the grounds that symptoms were not present, insofar as he knew, for periods of as long as two weeks or more. This flies in the face of years of reports by other witnesses, lay and professional, of apparent depression in the plaintiff. Similarly, he says that the symptoms of

anxiety are not excessive or disabling. As for the diagnosis of pain disorder, he says there is no evidence of any psychological factors, and second, that there is an issue of reliability of his pain reports. Again, he referred to the plaintiff's behaviour during the interview, saying this suggested that "his reports of pain are either grossly exaggerated or feigned".

[147] Dr. Solomons went on to say that in his opinion, the plaintiff has "a mixed personality disorder of the cluster B type, set out in the DSM IV", which pre-dated the accident.

[148] In setting out his rationale for this diagnosis, he starts out by saying that "while the plaintiff has a history of past criminal activity, both charges and convictions, I do not think they are sufficient grounds for him to meet the criteria for an anti-social personality".

[149] Counsel for the defendants seized upon this past criminal history. I reject this reasoning. It is true that the plaintiff as a very young man had a brush with the law for which he was sentenced to an intermittent sentence. It is also true that he told his employer about that when it was apparent that his employer was going to give him responsibilities for handling money, keys and combinations. To suggest that something done wrong by an adolescent should

come back to haunt him at this point in his life for this reason is unacceptable. It disregards the value of rehabilitation, which is well known and accepted in Canadian criminal law. It amounts to innuendo. If Dr. Solomons thought that the criminal past "conviction and charges" were not sufficient grounds to meet the criteria for the diagnosis he wished to make, why did he put it into his report?

[150] I note that Chan, the store owner, knew about the plaintiff's past problem with the law, for the plaintiff had told him. That knowledge did not deter Chan from making the plaintiff an assistant manager and trusting him with keys, cash, and combination lock codes. Chan's decision to trust the plaintiff proved wise.

[151] Dr. Solomons also talked about the plaintiff's "grandiose view of himself", pointing to the plaintiff's account of his work history. The plaintiff told him about the progress that he had made in his years working for IGA. Everything that he said was confirmed by Chan or other co-workers. In other words, what the plaintiff was telling Dr. Solomons was, I find, true.

[152] Next Dr. Solomons talks about the plaintiff's "tendency to cut people out of his life, and a long standing pattern of

instability in interpersonal relationships". He describes him as having only one friend.

[153] Here, Dr. Solomons has the facts wrong. While the plaintiff is estranged from his family, there is ample evidence of friendships going back to elementary school, friendships that have lasted over 20 years. To say that the plaintiff has "a dysfunctional personality" that long pre-dates the accident, is not in accord with the evidence.

[154] Later in his report, Dr. Solomons questions the reliability of the complaints of the plaintiff that might sustain a diagnosis of a psychological disorder. He says that the plaintiff has functioned at work since the accident, and indeed says that he has not suffered any decline in income. This is, of course, wrong. The doctor reports that the plaintiff continues to function at work in his present capacity. I find this is also incorrect.

[155] Although I would have rejected Dr. Solomons' opinion without further evidence on the point, I am buttressed in this by the testimony of Dr. Buch and Dr. O'Shaughnessy.

[156] Dr. Buch disagrees with Dr. Solomons' opinion that the plaintiff has grossly exaggerated or even feigned his symptoms. He testified that he monitors for malingering and

offered a number of observations that challenge Dr. Solomons' conclusion. First, Dr. Buch notes that the plaintiff improved during the course of his treatment and testified that this is not the behaviour of someone who is feigning or malingering. Second, he noted that the plaintiff has stuck tenaciously to his graduated work return program. Third, although he was temporarily addicted to gambling, which he rationalized by saying it helped him, the plaintiff stopped gambling in casinos towards the end of 2006.

[157] I observe in passing that the fact that he occasionally has an evening of poker with friends, with a \$20 pot, is not evidence of an addiction to gambling. The gambling undertaken by the plaintiff in 2006 was of an entirely different magnitude.

[158] I also accept Dr. Buch's common sense testimony that it is very difficult to sustain a feigned set of injuries over a long period of time with a large number of people. When asked in cross-examination "how intelligent do you have to be to lie?", he testified:

Actually, to sustain a credible enduring and compelling malingering display with a seasoned psychotherapist and a seasoned occupational therapist and physician and assorted others, is really quite complicated. The things you have to remember about what you said to whom and how you

behaved there, is not that easy. Dumb malingering gets found out pretty quick.

[159] Equally significant, I accept the opinion of Dr. O'Shaughnessy. Dr. O'Shaughnessy was retained by counsel for the plaintiff to provide a critique on the methodology, diagnosis and conclusions reached by Dr. Solomons. He concluded that Dr. Solomons made multiple methodological errors.

[160] First, he noted that Dr. Solomons compared long-term memory with short-term memory and concentration. Dr. O'Shaughnessy is of the opinion that Dr. Solomons failed to see the significance of the fact that one would rarely see long-term memory impairment following mild traumatic brain injury, but will invariably see difficulties with concentration and short-term memory. Second, he noted that to compare long-term memory for family of origin with traumatic memories is "inappropriate and incorrect". He found that Dr. Solomons' conclusions concerning memory "are simply not founded".

[161] On the chronic pain complaints, Dr. O'Shaughnessy noted the evidence of waxing and waning and was critical of Dr. Solomons' emphasis on the absence of demonstration of pain during the examination.

[162] Dr. O'Shaughnessy also reviewed the clinical records and, in particular, the testing of the plaintiff that demonstrates that there has not been a significant lack of effort. He observed that "Dr. Solomons' opinion stands quite apart from virtually every physical examination of this man and no other medical doctors have supported his notion that the man does not have chronic pain". I agree with this statement.

[163] I need not go on with Dr. O'Shaughnessy's many observations. In short, I agree with Dr. O'Shaughnessy that there is no "medical support for the opinion this man is feigning".

[164] I have not set out all of the medical evidence. However, upon a review of that which I have outlined above, and in consideration of the other evidence, I conclude that the plaintiff has chronic pain syndrome, is depressed, has continuing cognitive deficit, and is suffering the effects of an overuse of narcotic analgesics.

[165] I agree with the opinion of those medical experts who say that with proper pain management, and a proper weaning of the narcotic analgesics, there will be some improvement in the plaintiff's ability to function at work. I find, however, that there will be some loss of capacity in the future.

Non-Pecuniary Damages

[166] The defendants concede that the plaintiff sustained facial lacerations, a fractured nose, soft tissue injuries to the left knee, neck and back, and a mild concussion. There is evidence that a mild concussion is essentially the same as mild traumatic brain injury.

[167] The plaintiff, on the other hand, agrees with the injuries admitted by the defendant, but would add injury to the temporal mandibular joint and teeth, and would describe the facial lacerations in greater detail. According to the plaintiff, these include full thickness lacerations to the forehead, the nose and other parts of the face. The plaintiff notes these injuries required extensive suturing and have left the plaintiff with permanent facial scarring or disfigurement. The latter is confirmed by the evidence of several witnesses.

[168] The plaintiff also says that as a result of these injuries, he suffers from depression, insomnia, fatigue, anxiety and panic attacks, chronic pain disorder, and importantly, cognitive deficits.

[169] Without getting into fine distinctions, I accept the list of injuries that have been submitted by the plaintiff.

[170] In particular, I am satisfied upon the evidence that the plaintiff, as a result of this accident, suffers from depression, chronic pain injury and has continuing cognitive deficits. I accept that there is a psychological overlay that has resulted from these detriments, which must be addressed. I also accept, as has been submitted by the plaintiff, that there has been a failure to deal with the overuse of narcotic analgesics, analgesics necessitated by the pain that followed the injuries sustained in the accident.

[171] I reject the submission of the defendants that there is no convincing evidence the plaintiff sustained any period of loss of consciousness. I accept that while he recalls the accident and smashing into the windshield, he has no recollection after that until waking up on the sidewalk. I accept that his memory of events from that point until being released from Lions Gate Hospital later the following day is sporadic.

[172] I also note that if the continuing complaints of cognitive difficulties, and of sleep disturbance, are a result of the continuing use of significant quantities of narcotic analgesics, that is of no assistance to the defendants. I find that the plaintiff became dependant upon narcotic analgesics as a result of the pain that followed the accident

and as a result of the prescription of such drugs by his physician.

[173] I agree with the plaintiff that the rehabilitation program directed by Pamela Russell had little, if any, chance of success, and indeed was not successful, because there was a failure to address the problem of the use of narcotic analgesics.

[174] It follows from this, however, that if there was a proper rehabilitation program that included an emphasis upon the significant reduction over time of the use of narcotic analgesics, the plaintiff's chronic pain condition and depression would improve significantly. It is not so clear that his cognitive difficulties would improve.

[175] The defendants submit that the appropriate award of non-pecuniary damages is approximately \$70,000. They rely upon ***Middleton v. Morcke***, 2007 BCSC 804, a decision of this Court, in which the plaintiff was awarded \$60,000 for injuries sustained in two accidents in May and December of 2003. I have reviewed this case. In my view, the injuries are far less severe than in the case at bar. The plaintiff missed only three days of work as a result of her injuries and there was no evidence of a reduced capacity to earn.

[176] Second, the defendants rely on *Clark v. Hebb*, 2007 BCSC 883, in which the plaintiff received an award of \$75,000 for non-pecuniary damages. However, in that case, the plaintiff was found to have exaggerated his symptoms. The court concluded that for the most part all symptoms had resolved within two years of the accident. That is not the situation in the case at bar.

[177] The defendants have cited other cases with a similar range of damages.

[178] The plaintiff relies upon *Lomax v. Weins*, 2003 BCSC 1354. That is a case, as with the case at bar, in which the defendants to some extent suggested that there were pre-accident emotional and psychological difficulties. The court observed that the plaintiff was of average intellectual level, but that he had experienced troubling family dynamics in his childhood, had been traumatized by observing violence and also had a learning disability.

[179] Nevertheless, the court concluded that before the accident the plaintiff was a "functioning individual". Non-pecuniary damages were assessed at \$120,000 (approximately \$131,000 in 2008 dollars).

[180] I find that the plaintiff in this case was, before the accident, a highly functioning individual. I observe that like the plaintiff in *Lomax*, the plaintiff had problems in his childhood with a dysfunctional family. However, his history from his first being fully employed after high school until the accident when he was aged 36, that is to say a period of approximately 18 years, is that he performed exceedingly well. I accept the evidence of the IGA Whistler store owner-manager, Chan, on this point. At the very least, but for the accident the plaintiff would have continued working as an assistant manager with IGA.

[181] While the plaintiff had some "odd" characteristics, to quote Dr. Buch, I reject the suggestion of Dr. Solomons that he had some sort of anti-social personality disorder. The evidence is that he had a number of long-term friends, friends from as far back as elementary school. There is considerable evidence from co-workers that he was looked up to, respected and accepted as not only a good boss, but a good friend.

[182] In the accident, the plaintiff sustained serious and painful injuries. His face was smashed, his knee, ribs, jaw, left shoulder and back were injured. Despite this, he returned to work early in the following year and attempted to work full-time. This continued until it was obvious to his

co-workers, and eventually to the store owner, that he could not perform as he had in the past. The store owner, Chan, testified that when he told the plaintiff that he would be demoted, the plaintiff accepted that fact and appeared to understand why. It is no surprise then that he has suffered depression.

[183] I find that he suffers from chronic pain syndrome, depression and continuing cognitive deficits. I accept that a significant factor in his depression and anxiety is the overuse of narcotic analgesics.

[184] In the circumstances, taking into account the evidence, the submissions of counsel and the case law cited, I assess non-pecuniary damages at \$135,000.

Mitigation

[185] I reject the submission that the plaintiff has failed to mitigate his damages. I find upon the evidence that a major factor in his continuing disability is the use of narcotic analgesics. I do not lay this at the feet of the plaintiff. These drugs were prescribed. The defendants say that he had a personal responsibility, despite what his doctor said, to reduce his use of such narcotic analgesics. I do not find this persuasive. If he had failed to follow his doctor's

recommendations or orders, I have no doubt that the defendants would be raising a different mitigation issue.

[186] Second, it was not only the plaintiff who failed to deal with the narcotic analgesics problem. Pamela Russell, the occupational therapist charged with putting together a team of medical personnel and therapists designed to increase the plaintiff's daily functioning, was well aware of the problem of these analgesics. She failed, however, to insist that there be a clear plan, directed by a physician, in place to wean the plaintiff of narcotic analgesics.

[187] Third, the preponderance of evidence is inconsistent with a failure to mitigate. The plaintiff, in this case, has attended hundreds of sessions of therapy of one sort or another in an attempt to bring himself back to his pre-accident level of functioning. He has tried to work full-time. He has, with the exception of a couple of minor non-determinative tests, demonstrated good effort on the myriad tests that have been administered by various professionals. I accept that the plaintiff has always identified in a significant way with his career, and that since the motor vehicle accident he has made determined efforts to restore his function in the retail food business.

[188] For all of the above reasons, I reject the submission that he has failed to mitigate his losses.

Past Wage Loss

[189] The defendants submit that the plaintiff's past wage loss extends to the date of trial on the basis that it is his addiction to narcotic pain medication that prevents him from working as an assistant store manager on a full-time basis. For the purposes of this past wage loss claim, I accept that that is so, except that in addition I conclude that his chronic pain, depression and cognitive problems are factors as well. The more difficult factual issue with respect to past wage loss is at what level would he have been paid between the motor vehicle accident and the trial?

[190] The plaintiff notes that his income increased from just over \$49,000 annually in 1997 to \$84,000 in the 11 months in 2002 before the December 5, 2002 motor vehicle accident.

[191] Gerry Taunton, an economist, provided a report setting out guidelines for the calculation of past and future wage loss. Based on the information that he had, he calculated the past wage loss, that is from the date of accident until trial, to be \$161,011. In this amount, he included \$20,943 for loss

of the company car, actually a truck, which had been leased on behalf of the plaintiff by his employer.

[192] The defendants say that the loss of the company truck should not be included in the past wage loss claim. The defendants say the plaintiff has not proved upon a balance of probabilities that the loss of the truck was in any way related to the injuries he sustained in the accident. I am not persuaded. It was the evidence at trial that Chan, the owner-manager of IGA Whistler, decided to discontinue the lease because the plaintiff was unable to perform the duties on behalf of the company utilizing the truck that he did prior to the motor vehicle accident. I do not conclude that the fact that the plaintiff bought out the lease impinges upon this finding. Thus, I accept that the gross past wage loss claim is \$161,000. However, based upon the reasoning in *Hudniuk v. Warkentin*, 2003 BCSC 62, 9 B.C.L.R. (4th) 324, supplementary reasons at 2003 BCSC 131, and the necessity to consider the net wage loss after taxes, I assess past wage loss at \$101,436.

Loss of Future Income

[193] It is this head of damages that is the most difficult or the most speculative in this case. Some of the professional witnesses, including Dr. Hartzell, Mr. Kyi and Dr. McGraw,

suggest that the plaintiff is physically capable of performing the duties of an assistant store manager. I agree, he is physically capable of working that position. I find, however, that given his energy level and his cognitive deficits, the plaintiff is not capable of performing as an assistant store manager. I also accept the evidence of the store owner that although before the accident he saw the plaintiff as a potential manager, he has since "written him off" in that capacity. This is a result of the owner's observations of the plaintiff's performance at work since the accident. It is as much to do with his cognitive difficulties as with any physical difficulties.

[194] However, a significant factor in any disability that the plaintiff manifests is a result of the overuse of narcotic analgesics. Therefore, I am not persuaded that the plaintiff is so permanently physically disabled that he can never again be a senior or lead clerk with some management duties, including some responsibility for training. I am satisfied, however, that given his cognitive deficits it is unlikely he could assume the responsibilities of assistant manager.

[195] In the result, I am unable to conclude it is probable that the plaintiff will eventually become a store owner, manager or assistant manager. I am persuaded, however, that

with proper therapy he probably will be able to return to being a full-time senior clerk with an income higher than he is earning currently.

[196] I note that whether he became an assistant manager or store manager might not impact upon his income. The evidence is that the late Ken Quon was earning \$110,000 per year as manager, while the present store manager, Pugh, is earning in the neighbourhood of \$85,000. The latter figure is close to what the plaintiff was earning as an assistant store manager. The point, however, is that in either position he would earn more than he would as a senior or lead clerk.

[197] Mr. Taunton, the economist called by the plaintiff, presented several calculations. He assumed that without the accident, the plaintiff would have continued working to retirement age of 65 as an assistant store manager, or in the alternative would have continued in that capacity until 2010, at which time he would have become a manager. He assumed that as a result of the accident, the plaintiff will continue in his present job at \$20 per hour 25 hours a week, or will become an assistant store manager in five years. He calculated the plaintiff's future loss at \$905,000 if the plaintiff continues at his present earning level, or \$219,000 if he becomes an assistant manager in five years. He

calculated a higher amount if it were determined the plaintiff would have become a store manager. He provided present value calculations. Mr. Taunton did not, however, assume as I have found, that the plaintiff will likely be able to return to full-time work as a senior clerk.

[198] I am satisfied that the appropriate approach to loss of future earning capacity and opportunity should take into account that absent the motor vehicle accident, the plaintiff would have earned \$85,000 to \$95,000, or possibly more, annually until retirement at age 65. He will not earn that amount as a clerk. His earnings in 2006, albeit for only 25 hours per week, were just over \$26,000. However, this assessment must also take into account my conclusion that with appropriate therapy, which I find has not yet happened, including proper pain management and a properly managed program fostering a significant reduction in the use of narcotic analgesics, the plaintiff will improve his work performance to the point that he can work full-time, and thus increase his earning capacity.

[199] How should this loss be assessed? In *Pallos v. Insurance Corp. of British Columbia*, 100 B.C.L.R. (2d) 260, [1995] 3 W.W.R. 728 (C.A.), the court noted at para. 27 that there are two approaches to assessing this loss. The first is

the "capital asset" approach. Using this method, one treats a person's capacity to earn income as a capital asset whose value may be lost or impaired by his or her injuries. The second, or "real possibility" approach, is to determine the likelihood of some future event leading to loss of income.

[200] That his cognitive deficits will probably prevent him from securing an assistant manager or higher position amounts to a loss of capacity to earn in the future, an asset that has been taken from the plaintiff. The defendants have submitted that should I find the plaintiff has been left with a permanent impairment affecting his employment in the future, a loss of future earning capacity approach ought to be taken. I agree. I conclude in the circumstances of this case, the loss of a capital asset concept is the appropriate approach to the question of the plaintiff's future loss. Possibilities, probabilities, opportunities, chances and risks, as long as they are substantial, must be taken into account.

[201] The plaintiff is 41 years old. He likely will continue to work until age 65, in other words 24 more years. In considering this aspect I must take into account the real and substantial opportunities and risks. These include the plaintiff's continued efforts and the support of his co-workers and his boss, but also the possibility that things may

change and his position may be jeopardized. I conclude the plaintiff an employee that is less attractive or marketable than he was prior to the accident. He is less capable overall of earning income from other types of employment, thus he has lost the opportunity to take advantage of opportunities which might have come his way. I find he realizes this, and as a result feels he is less valuable to himself as a person.

[202] I also take into account the imponderables, the vicissitudes of life that raise the possibility that for other reasons the plaintiff may not have become a store manager nor have worked to the age of 65.

[203] I assess his impaired capital loss considering the likelihood that eventually the plaintiff will return to working full-time and that eventually he will be able to work as a senior or lead clerk. I take into account the negative and positive contingencies evident in this case.

[204] I assess the loss of this capital asset at \$450,000.

Cost of Future Care

[205] I am satisfied, given my findings above, that the plaintiff requires a certain amount of future care in order to improve his functioning. While I have rejected the submission that he will be permanently significantly physically disabled,

I accept that without appropriate treatment as has been recommended from time to time by various medical personnel, it is unlikely that the plaintiff will improve. Conversely, with appropriate treatment, I am satisfied upon a balance of probabilities that he will improve.

[206] Mary Richardson, an occupational therapist, has provided a report and testified with respect to the costs of future care. I accept much of what she has said. However, I am not satisfied that all of the amounts that she recommends are necessary, nor am I persuaded that the therapy will be required for as long as she has assumed.

[207] First, I accept that the plaintiff requires assessment and management from a medical perspective. However, follow-up with a psychiatrist or other medical practitioner would be covered under the Medical Services Plan of British Columbia, provided it results from a referral from his family physician. I have little doubt that his family physician will make the necessary referrals.

Psychotherapy

[208] The plaintiff submits that given his feelings of decreased self-worth, which has led from time to time to suicidal ideation, increased anger and impacted upon his

personal grooming, psychotherapy is required.

Dr. Mildenberger recommended psychotherapy. She stressed the necessity of a rapport between the treating psychologist and the plaintiff.

[209] Ms. Richardson assessed the cost for this for the first year at \$7,200, and for subsequent years, in the range of \$1,800 to \$3,600.

[210] I note that Dr. Buch, who previously provided psychotherapy, at one point thought that the plaintiff had improved to a degree that he could discontinue the services. Afterwards, there was a setback and psychotherapy resumed. I take it from this that psychotherapy is not necessary for a long period of time. I accept the costs for the first year would be \$7,200, and I accept there is a probability that follow-up sessions would be required for approximately two years thereafter. Therefore, I assess the costs under this head at \$7,200, plus \$1,800 for two more years, for a total of \$10,800.

Occupational Therapy

[211] The occupational therapy provided by Pamela Russell was unsuccessful. As discussed above, I have concluded that it was unsuccessful for two reasons. First, her failure to deal

with the plaintiff in the second half of his shifts despite being told that it was in the latter part of his workday that problems arose. Second, her failure to insist that the problem of reliance upon substantial amounts of narcotic analgesics be addressed. I am satisfied, therefore, that appropriate occupational therapy, coupled with a plan to reduce analgesics, will be beneficial to the plaintiff for at least one year. Utilizing the total costs suggested by Ms. Richardson, I assess this cost at \$4,500.

Exercise Program

[212] I recognize that ongoing participation in an active exercise program is recommended. I also accept that it would be valuable to the plaintiff to have the assistance of a trainer or kinesiologist for a period of time. I conclude that one year would be appropriate. Using the figures suggested by Ms. Richardson, I assess this amount at \$4,290.

Massage Therapy

[213] The plaintiff has testified that the one thing that regularly makes him feel better is massage therapy. I am also satisfied, however, that the requirement for such therapy will decrease quickly if he responds to the pain management and the reduction in the use of analgesics, which I have discussed

above. Therefore, I find it is appropriate that he be awarded the cost of future massage therapy at the minimal amount suggested by Ms. Richardson, \$1,820 for one year, and the minimal amount of follow-up sessions for a year after at \$420, for a total of \$2,240.

Vocational Assistance

[214] This suggestion is related to the fact that the plaintiff's job at IGA may be in jeopardy. I recognize that if he continues to perform at his present level, there is a possibility that he could lose the job. I find that that will not happen as long as Chan owns the store. There is a possibility, although no evidence suggesting it might happen soon, that Chan could sell the store in the future.

[215] However, given the above therapies, I am satisfied that the likelihood, within a year or so the plaintiff will be well on the road to functioning at a level closer to his pre-accident level, at least as a senior clerk. In the circumstances, I am not satisfied that the plaintiff has proved upon a balance of probabilities that vocational assistance should be funded.

Plastic Surgery

[216] Dr. Rai, a plastic surgeon, has recommended a revision of the plaintiff's facial scars and a rhinoplasty to improve the appearance of the plaintiff's nose. He has identified the cost of these at \$7,700.

[217] I accept the evidence of the plaintiff, and the testimony of some of his friends and co-workers, indicating that the scarring to his face has been a significant psychological or emotional difficulty for him. There is no question that this scarring has resulted from the automobile accident. I conclude, therefore, that this amount should be allowed at \$7,700.

Homemaking Assistance

[218] The plaintiff submits that prior to the motor vehicle accident he was able to perform all tasks in his home in order to keep it clean and comfortable. There is evidence that since the accident his apartment appeared to be a "pig sty". On the other hand, there is evidence from Jody Hopkins, an exercise physiologist, that she treated the plaintiff in his residence from October 2004 until June 2007, when the exercise sessions moved to a gymnasium. She testified that when she visited his home it was reasonably clean. The plaintiff,

consistent with her evidence, testified that when he knew she was coming to the home he cleaned it up. I am satisfied that he has not shown upon a balance of probabilities that the cost of future care should include homemaking assistance.

Equipment

[219] Nor am I satisfied that the equipment, the costs for which were specified by Ms. Richardson, is required. While the plaintiff, I conclude, does require an exercise program, much of his difficulty results from the psychological overlay and the reliance upon narcotic analgesics. I also note that in the past he has been a member of an exercise gymnasium where presumably much of the suggested equipment is available. I decline to make an award for equipment.

Medication

[220] However, I am satisfied that the plaintiff will require non-prescription medications related to his injuries for another year. I assess that cost at \$365.

[221] With respect to prescription medications, I conclude that with proper medical management, his reliance upon these drugs will reduce significantly. I think that reliance will not end immediately, and I therefore make an order assessing the cost of those medications, taking into account the

Pharmacare Program as is included in Ms. Richardson's report, at \$1,000 in the first year, and \$500 in the second and third years, for a total of \$2,000.

[222] In the result, I award cost of future care in the amount of \$31,895.

Summary

Non-pecuniary damages	\$135,000
Past wage loss	\$101,436
Loss of earning capacity	\$450,000
Cost of future care	\$ <u>31,895</u>
Total:	\$ <u>718,331</u>

Costs

[223] Unless there is something of which I am unaware, the plaintiff will have his costs.

"Williamson J."