IN THE MATTER OF AN ARBITRATION
PURSUANT TO SECTION 148.2(1) OF THE *INSURANCE (MOTOR VEHICLE) ACT*,
REVISED REGULATION (1984)

BETWEEN:

X

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

AMENDED ARBITRATION AWARD

ARBITRATOR	**JOSEPH A. BOSKOVICH** DuMoulin Boskovich LLP West Coast Lawyers Since 1972 1800 - 1095 West Pender Street Vancouver, BC V6E 2M6
COUNSEL FOR THE CLAIMANT	**WES MUSSIO** Murphy Battista Barristers & Solicitors 2020 – 650 W. Georgia Street Vancouver, BC V6B 4N7
COUNSEL FOR THE RESPONDENT	**MICHAEL P. RAGONA, Q.C.** Alexander Holburn Beaudin & Lang LLP Barristers & Solicitors 2700 – 700 W. Georgia Street Vancouver, BC V7Y 1B8

Date of Award: June 9, 2011
Date of Amended Award: October 28, 2011

The parties have agreed, pursuant to Section 148.2 of the Revised Regulations (1984) of the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231, and *The Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 to submit this matter to Arbitration.

The arbitration was held in Vancouver, BC over the course of 14 days between August and November 2009, and ultimately concluded on January 22, 2010. Written submissions were tendered by the parties, with the Claimant's reply submissions having been received on July 14, 2010.

Introduction

The Claimant, X ("the Claimant") is a 70 year old lawyer who was involved in a motor vehicle accident on May 3, 2004. The Claimant alleges he has suffered a number of injuries, the most significant of which is a mild traumatic brain injury which continues to impair his ability to function and communicate. The Claimant submits that his cognitive limitations have robbed him of his ability to practice law, a career he enjoyed and by all accounts, one that personally defined him.

This is an unusual case and not simple for the trier of fact. I say this, in part, because the Claimant is a senior lawyer whose practice has focused in the area of prosecuting personal injury actions stemming primarily from motor vehicle accidents. It is with this experience that the Claimant and his family have, either directly or indirectly, approached all matters stemming from the motor vehicle accident.

The Claimant's Submissions

1. Claimant's counsel submits "there is no dispute that the Claimant was functioning at a high level immediately before the Accident and that the evidence is clear that his level of function dropped dramatically after the Accident". Counsel for the Claimant repeated this proposition and suggested it to most of the witnesses that were called.

2. The Claimant seeks damages on the basis that he has suffered "an MTBI that has had a severe effect on his life". He seeks income loss premised on the fact that but for the accident he would have continued to practice law for another five to ten years.

3. The Claimant says the temporal proximity of the accident "to the sudden decline in function makes it clear the accident is the trigger behind the current low level of function".

4. With respect to MRI scan evidence, the Claimant submits "the MRI scans of June 29, 2004 and November 5, 2008 are of little significance in this case" as the findings neither prove nor disprove the existence of a mild traumatic brain injury.

The Respondent's Submissions

5. The Respondent concedes that the Claimant sustained injuries in the accident but rejects the theory he is suffering from ongoing cognitive difficulties related to the accident which have resulted in his giving up the practice of law.

6. The Respondent submits the Claimant's medical evidence is flawed because it is founded on the proposition that because there is very little pre-accident medical information that one can conclude that the Claimant was in good health both physically and cognitively.

7. The Respondent suggests the Claimant was suffering from an undiagnosed underlying cognitive condition prior to the accident and states the Claimant's pre-accident work history and function is demonstrative of this.

The Accident

8. On May 3, 2004, at approximately 12:15 p.m., the Claimant was driving westbound on Gatenbury Road in Port Moody. He was on his way home for lunch. The Claimant's vehicle was struck head-on by an older model Cadillac that had rolled eastbound downhill on Gatenbury Road after its uninsured driver had jumped out of it.

9. During his direct examination the Claimant said that he struck his head in the accident and that he lost consciousness. His first recollection after the accident, which he was able to describe in detail, was waking up and not realizing, "I had been knocked unconscious, but I remember undoing my seatbelt and getting out of the car, but I did not remember the seatbelt coming off". As will be seen, the Claimant has not been consistent in reporting this history.

10. The Claimant also said that he did not remember the airbag in the vehicle deploying or the driver's side window breaking.

11. When the Claimant was asked during his direct examination if he knew how the driver's window had broken he testified, "Nope, I do now. Because my head must have hit it".

12. The Claimant also said that at the scene of the accident he was attended to by a female bystander to whom he was able to provide his home telephone number and ask that she contact his wife so she could attend at the accident scene.

13. This female bystander, who had direct contact with the Claimant at the accident scene, was not called as a witness.

14. During his cross-examination the Claimant refused to admit having asked someone at the scene to call his wife despite having said so in his direct evidence. When this was put to him he said, "I said it may have happened. I'm not sure if it did or didn't".

15. In response, an Affidavit the Claimant swore on February 21, 2006, was put to him by Respondent's Counsel in which he deposed,

- After the accident **I called my wife D** and asked her to bring a video camera so that she could record the accident scene. **I made it clear to her** that I wanted the video of the accident to preserve the evidence for the purposes of using it in any lawsuit.

- My wife then attended the accident scene shortly thereafter and took the video of the accident scene on my request.

- The video was taken for the purpose of preserving the evidence of the accident scene to be used in any lawsuit that arose out of the accident. It was not done for the purposes of investigating the accident.

[emphasis added]

16. The Claimant agreed the contents of the Affidavit are true.

17. The Claimant's wife gave the following evidence about the day of the accident,

> I was home making lunch, and he had followed me home from the property, I got home maybe 10 minutes before him and I got a cell phone call from I believe it was the lady who was following him up the hill. I don't really know. She saw the accident. And I believe it was a stranger. I have no idea who she was, but she called me, and said your husband has been in an accident, and it was just down the hill, and he gave me your number.

18. The Claimant's wife says she then, "raced around the house, grabbed my camera and drove down the hill". She was unable to recall her conversation with her husband when she arrived on the scene except to say that he told her, "I'm fine". She says he was sitting in a lawn chair and he looked white as a ghost. She says he was stunned and that she was also stunned the accident happened. She "set off to find out what happened".

19. The Claimant's wife was unable to say how long it took for the firefighters and ambulance to arrive at the accident scene. Various scene photographs were put to the Claimant's wife but she was unable to say if she took any or all of them. She was unable to recall the driver's side window of her husband's vehicle being broken at the accident scene, but then commented "the pictures speak to the evidence. That is why I took pictures".

20. During cross-examination when asked what the purpose of recording the accident scene was the Claimant's wife said, "You get the best evidence with pictures or video, because that is the initial presentation. People tend to make up stories. I didn't know what happened, so I went down there to find out what happened".

21. I ask her if the female who had called her had indicated whether or not her husband had been injured and she said "no". She agreed that at the time of the call she had "no idea" about the status of her husband. I found this somewhat odd. It appeared from her direct evidence that she was more concerned at the time with finding her camera than the status of her husband. It could very well be that she did in fact speak to her husband as outlined below.

22. During cross-examination an Affidavit sworn by the Claimant's wife on February 21, 2006, was put to her. In that Affidavit she deposed,

- on the day of the accident she received a telephone **call from her husband** indicating he had been in an accident nearby their home and asking her to bring a video camera so that she could record the accident scene;

- she attended the accident scene and took a video of the accident scene at the request of the Claimant "for the purpose of preserving the evidence of the accident scene to be used in any lawsuit that arose out of the accident"; and

- the sole purpose of me making the video was "to preserve the evidence for the anticipated lawsuit on the advice of my husband".

[emphasis added]

23. When the inconsistencies between her evidence and the Affidavit were put to her, the Claimant's wife was vague, evasive and argumentative. When pressed by Respondent's Counsel and reminded she was under oath she said, "If I signed that paper two years after the accident, then I would presume that would be closer to the truth, yes." She also admitted, "**I sometimes remember all kinds of things that aren't quite accurate, this is a day I don't want to remember**".

[emphasis added]

24. I found the inconsistencies in the evidence given by the Claimant and his wife at this hearing and the Affidavits they swore in this proceeding about the events that took place on the day of the accident more than a little troubling as it relates to their credibility.

a) The Injuries

25. The Claimant's case is premised on the fact that he suffered a disabling brain injury in the accident. As an alternative, the Claimant suggests that he is suffering from an underlying degenerative process or neurological condition that has been triggered or accelerated by the accident.

26. The medical experts seem to agree that, while a loss of consciousness is not necessary for the diagnosis of a mild traumatic brain injury, some degree of altered consciousness must exist before the diagnosis of a mild traumatic brain injury can be made. How long the altered state of consciousness exists is also relevant to making such a diagnosis.

27. As I understand the evidence of the experts, which will be outlined below, there is a correlation between the initial severity of injury and eventual outcome such that most individuals with a mild traumatic brain injury go on to a full functional recovery.

28. The medical experts also address the role of medical imaging such as MRI scans in assisting with the diagnosis of a mild traumatic brain injury. I take it however, from the evidence that even if such imaging is negative, that result does not rule out a brain injury as some findings can be too microscopic to show up and/or the imaging can be done at a time so far after the injury that findings may not show up.

29. The evidence also indicates that neuropsychological testing can be used to measure deficits in people with mild traumatic brain injuries or other processes that impact executive brain functioning. According to the experts, there are various factors that can influence these test results.

30. Dr. Cameron stated in one of his early opinions that he felt the Claimant was suffering from depression. Other examiners, such as Dr. Schmidt, did not find the Claimant endorsed a formal mood or anxiety disorder. As I understand the evidence given by Dr. Cameron, as well as that of Dr. Schmidt, Dr. LeBlanc and Dr. Semaru, depression and psychological problems can cause symptoms similar to those of a mild traumatic brain injury and further it is not uncommon for a person who suffers from a mild traumatic brain injury to develop depression.

31. Having regard to the above-noted objective measures, as imperfect as any one of them may be, I must examine the evidence tendered.

b) The Evidence

32. No engineering evidence was called. The witness, who, according to the police file observed the accident events, was not called as a witness at this proceeding and so it is difficult for me to make any conclusion as to the severity of the impact simply based on the Claimant's assertion about the material damage involved. I note that the photographs tendered depict considerable front end damage to both vehicles.

33. An ambulance attended the accident scene and the paramedics noted the Claimant's chief complaints as being left wrist and knee pain. The paramedics also noted that the airbag in the Claimant's vehicle had deployed and that he was able to extricate himself from the vehicle by the time they arrived.

34. The paramedics found the Claimant to be alert and oriented. His Glasgow Coma score was noted to be 15/15. He denied any dizziness.

35. The Claimant was transported to Eagle Ridge Hospital where he reported the dynamics of the accident, the fact that the airbag had deployed and that he had not suffered a loss of consciousness. His Glasgow Coma Score was again recorded as being 15/15. On admission, the Claimant reported the "gradual onset of neck pain, both knees, left wrist, upper back pain, right chest pain".

36. X-rays of the Claimant's chest and left wrist were ordered and were reported as being normal. An ECG was also done.

37. There is no indication that the treating emergency physician was concerned about possible concussion or altered state of consciousness. His intake assessment described the Claimant as "alert". There were no bruises, lacerations or contusions reported to the Claimant's head or face.

38. The nursing notes describe the Claimant as being steady on his feet and able to walk to the washroom unassisted.

39. The hospital discharge assessment was "soft tissue injuries post MVC". On discharge the Claimant was not given any concussion or head injury precautions. He was advised to take Motrin and was given some Tylenol #3 and was told to take 24-72 hours off work as he felt necessary.

The Claimant's Experts

Dr. Monks, GP

40. The next medical person to come into contact with the Claimant after the accident was Dr. B. Monks, who has been his family physician since 1978.

41. According to Dr. Monks, he saw the Claimant six times between May 4 and December 6, 2004. At those visits the Claimant complained of feeling "foggy" and fatigued and not being mentally sharp or competent to manage his law practice.

42. Dr. Monks also said that he did not see the Claimant very often before the accident. He described his health as uneventful, except for obesity and high cholesterol. He described the Claimant as an impatient person.

43. In terms of the physical findings outlined in Dr. Monks' report dated September 10, 2008, and which stems from his initial post accident visit with the Claimant, he noted the Claimant had contusions to his knees, his right hand and a hematoma over his abdomen. His findings include strain to the neck and back. No mention was made of any facial/head trauma.

44. Under cross-examination Dr. Monks admitted that on June 3, 2004, he wrote a note stating that the Claimant had suffered what appeared to be a mild concussion as a result of the motor vehicle accident and that his concentration and attention span were affected and that he fatigued easily and, as such, would not be able to resume work for a month. In that note Dr. Monks also stated "his physical injuries are recovering at an average rate".

45. When asked why the note was written, Dr. Monks said it was because the Claimant's son requested it.

46. Dr. Monks admitted the contents of that note were based on the Claimant's self-reporting. It was entirely unclear as to why the Claimant's son needed such a note. The Claimant was self-employed and there was no evidence led that he required the note for Part VII or collateral disability benefits or other treatment. I infer the note was for litigation purposes.

47. Under cross-examination Dr. Monks testified,

> Q And was it he, doctor, that advised you that he felt he couldn't practice law? He couldn't go back to practice law?
>
> A Yes.
>
> …
>
> Q And was he the one that told you he continues to be foggy in his concentration?
>
> A Yes.
>
> Q And in fairness, doctor, is that which – is it that which caused you to come to the conclusion that he might have suffered a minimal brain injury in this accident? Set aside the reports.
>
> A I would think so, yes. Maybe I should add if I could, that he – I also got the sense that he was a little foggy apart from what he told me. He didn't seem like himself.
>
> Q Can you expand on that?
>
> A It's hard to put it in exact words, but he was different after the accident…**But to put an exact finger on it – and say precisely what it was, I'm not - just didn't seem quite his regular self**.
>
> …
>
> [emphasis added]

48. In his medical report and at this hearing Dr. Monks made no mention about having observed issues with the Claimant's balance, cognition or ability to communicate.

49. Dr. Monks did not see the Claimant that often before the accident and, in that same vein; he has really not followed his clinical course in any detail since. In fact, at the time Dr. Monks wrote his report in September 2008, he had not seen the Claimant since April 10, 2007. It is entirely unclear from the report if that clinical visit had anything to do with the alleged accident injuries.

50. I find that the diagnosis made by Dr. Monks in his September 2008 report of "minor brain trauma as a result of this accident [with] "some personal sequelae" was based largely on the independent medical reports commissioned by Claimant's counsel and provided to him rather than his own examinations, observation and findings which were indeed very minimal.

51. I found Dr. Monks to be an honest and straightforward witness and, with respect, I take more from what he did not observe, record, or investigate as a physician than I do from the things he recorded and attributed to the Claimant himself.

Dr. Cameron, Neurologist

52. On June 24, 2008, the Claimant saw an experienced neurologist, Dr. Cameron.

53. The Claimant said the appointment with Dr. Cameron was "as a result of an appointment set up by my lawyer" but then went on to say he thought he had dealt with the booking of Dr. Cameron directly.

54. With respect to the appointment with Dr. Cameron, the Claimant testified as follows during cross-examination:

Q: And was it your view…that as of the 24th of June 2004 – and to put that in context, less that two months after the accident, was it your view you had a brain injury?

A: I thought I should have it checked out, and I had some of the best people I knew check it out.

…

Q: You thought you should have it checked out?

A: That's correct.

Q: And because you still had in mind litigation arising out of this accident?

A: Absolutely. As a trial lawyer and acting for plaintiffs and having dealt with ICBC in the past, I wanted to make sure that I had to tackle them right in order.

…

Q: And part of getting your tackle in order was for you to seek out an opinion from Dr. Cameron within two months of the accident?

A: I let him see me rather quickly after the accident.

…

Q: To get your tackle in order?

A: That's right – to get – to have everything in order; that's right.

Q: You had a lot of confidence in Dr. Monks, did you not?

A: I did.

Q: Did it ever cross your mind to ask Dr. Monks for a referral to a neurologist?

A: I don't recall what crossed my mind.

…

Q: I see. But according to the records, you had seen Dr. Monks on four occasions before you saw Dr. Cameron?

A: If that's what it says, that's what it says.

Q: Okay.

A: I think he recognized that I may have better contacts and better knowledge than he did.

Q: You had better contacts in the medical world than Dr. Monks?

A: In respect to this particular type of injury, yes.

Q: I see. Because you had decided by June 24th or sometime prior to that when you made the appointment that you sustained a brain injury; that is in your mind?

A: I wanted to make sure that if I had one, I had the right people to deal with it.

…

55. At the June 24, 2004 visit to Dr. Cameron, the Claimant was able to explain the accident dynamics and stated his last recollection prior to the accident was seeing the vehicle coming towards him and his first recollection after the accident is being out of his vehicle and feeling "dazed and confused". As will be seen below, this history is of critical importance to Dr. Cameron.

56. At that visit, the Claimant complained of feeling foggy, having problems with his memory and reduced concentration. He also complained about slurring when speaking, having word finding difficulties and difficulty with names.

57. Dr. Cameron's first neurological assessment was fairly unremarkable. The Claimant's gait, stance, balance and motor function were normal. No mention was made by Dr. Cameron at that assessment about his observing any problems with the Claimant's speech. I point this out because the evidence suggests that Dr. Cameron enjoyed a professional relationship with the Claimant in the years prior to the accident and, as such as with Dr. Monks, I would expect that he would notice if the Claimant presented in a manner that was alarmingly different to his pre-accident condition, especially with respect to his ability to ambulate and speak.

58. Dr. Cameron's opinion was that the Claimant "did lose consciousness or suffer an altered state of consciousness at the scene of the accident and after the impact". Dr. Cameron's diagnosis was of post concussion syndrome. Dr. Cameron recommended an MRI of the Claimant's brain which was done on June 29, 2004, which showed white matter lesions in the frontal parietal lobes.

59. Under cross-examination **Dr. Cameron admitted he put a lot of weight on the history** the Claimant provided to him stating,

> Unfortunately, we don't have video cameras in all the cars and on bicycles and patients who suffer head injuries and concussions, and you can't tell how long they're unconscious, and **we're dependant on the history they provide us**.
>
> [emphasis added]

60. According to Dr. Cameron, who did not see the MRI film but reviewed the radiologist's report, the MRI showed no evidence of intracranial hemorrhage or hemosiderin deposition which he says can be present for up to two to four years following an intracranial hemorrhage or hemorrhagic contusion. Dr. Cameron's opinion is that it is probable the white matter lesions are due to the **normal aging process** and small **vessel ischemic disease** due to hardening of the arteries. He felt "it is **only possible** that some of these lesions may be due to non hemorrhagic shear injury sustained at the time of the motor vehicle accident".

[emphasis added]

61. Dr. Cameron's diagnosis was that the Claimant suffered "a mild traumatic brain injury at the time of the accident and is suffering from ongoing cognitive deficits".

62. Dr. Cameron's prognosis was for improvement on the basis that "patients tend to improve up to approximately two years following these types of injuries". He suggested that the Claimant be followed regularly by his family doctor and that neuropsychological testing be undertaken in six months if his condition did not improve.

63. On November 16, 2004, at the request of the Claimant's son, Dr. Cameron reassessed the Claimant. There is no reference to the specific neurological testing undertaken by Dr. Cameron at that visit. Again, there is no mention made by Dr. Cameron of his observing any problems with the Claimant's speech or communication style. Dr. Cameron noted the Claimant reported doing some administrative activities at work.

64. At that visit, the Claimant's wife told Dr. Cameron that the Claimant was more irritable and had mood swings much more than in the past. She also said the Claimant felt down, had negative feelings, memory problems and issues with his sleep.

65. It appears that based on those interviews Dr. Cameron came to the conclusions the Claimant was "significantly disabled" and "competitively unemployable as a result of ongoing cognitive problems and probable associated psychological problems". Dr. Cameron again recommended neuropsychological testing and evaluation by a psychiatrist.

66. The Claimant next saw Dr. Cameron in September 2005. At that time, he noted complaints of intermittent insomnia, pain in both knees and right wrist. Symptoms of depression were recorded. Referral to a psychiatrist or psychologist was recommended. Dr. Cameron also suggested the Claimant be reassessed by a psychiatrist and neurologist when he was two years post-accident.

67. In November 2006, the Claimant returned to Dr. Cameron for a third assessment. Dr. Cameron noted minimum improvement. Once again no mention is made by Dr. Cameron about his observing the Claimant as suffering from any issues with his speech, gait or balance.

68. The Claimant told Dr. Cameron of his ongoing problems with his memory, attention span and concentration. He told him his irritability and mood swings had improved but not resolved and he still felt depressed. Again, he described going to the office to do administrative work on a part-time basis and managing the construction of his home.

69. Dr. Cameron's final assessment was on March 20, 2008. Dr. Cameron's examination, while not terribly remarkable, did demonstrate some changes in the Claimant's short term memory as compared to his previous assessments. Dr. Cameron concluded the Claimant "will be completely disabled and not competitively employable permanently in the future principally due to cognitive dysfunction and in part due to psychological dysfunctions that he has suffered as a result of the injuries sustained at the time of the motor vehicle accident". The report does not address what these psychological dysfunctions might be.

Dr. N. Stewart, Physiatrist

70. On September 29, 2004, the Claimant attended an assessment with Dr. N. Stewart, Physiatrist. At the time of that assessment the Claimant reported that there had been no change in his balance or coordination since the accident. He told her he could not say if he struck his head, although the side window of his car was broken. He told her that he had no bumps or bruises on his head after the accident.

71. The Claimant told Dr. Stewart that he had not suffered from neck, back pain or headaches since the accident. He felt he had to use the handrail when going down stairs. It was not clear if that was because of bilateral knee complaints since the accident.

72. The Claimant advised Dr. Stewart that he had issues with fatigue after the accident but that his energy level had improved over time. He also complained of difficulties with his speech since the motor vehicle accident, like word finding, as well as problems with his memory, slower thinking and being easily frustrated.

73. Dr. Stewart conducted a collateral interview with the Claimant's wife. She reported the Claimant had difficulty answering questions and would use the wrong words. She also reported issues with his mood and increased outbursts of anger. At that visit, the Claimant's wife was of the view his career was over due to his injuries.

74. Dr. Stewart's physical examination was relatively unremarkable. Examination of the Claimant's knees was normal, as was his gait. Dr. Stewart noted the Claimant appeared disheveled after getting dressed following the examination.

75. Dr. Stewart's opinion was that because of the impaired level of consciousness reported by the Claimant and observed by his wife after the accident and the changes in his memory, thinking and emotional state, that he likely suffered a mild traumatic brain injury. She

recommended a neuropsychological assessment be undertaken. She also suggested speech therapy to help with his language skills.

76. On December 11, 2006, the Claimant returned to Dr. Stewart. At that time, the Claimant reported continued improvement with his physical symptoms, although he felt they had reached a plateau and that he felt his energy level was "going down slightly". He reported continued problems with his memory and concentration. He described his mood as being "a little more calm". He said the physiotherapy for his knees was helpful.

77. The Claimant told Dr. Stewart that while he had "been to court a couple of times on pretty straight forward matters", that his son was now running his former law practice. He also said that he provided advice to the lawyers at his son's office in areas where he is "probably more knowledgeable than any other lawyer in the province".

78. The Claimant also advised Dr. Stewart that he remained involved in the design and co-ordination of building a new house and in conducting computer research.

79. Again, Dr. Stewart's physical examination was relatively unremarkable. No problems with gait or range of motion were noted. Dr. Stewart opined, "the physical injuries have largely resolved".

80. The Claimant's final independent assessment with Dr. Stewart was on June 11, 2008. At the time of that assessment the Claimant reported he, "no longer has a problem with pain in his knees and pain in the left wrist", although he prefaced this by saying he did not use these areas that often because he did not want to push things.

81. In Dr. Stewart's report dated June 23, 2008, she again referenced the Claimant as reporting ongoing problems with memory and concentration. She also indicated that at her final visit that the Claimant reported "difficulty writing and printing". She also noted **the Claimant's speech was somewhat slurred**.

Dr. J. Schmidt, Neuropsychologist

82. In December 2004, the Claimant was seen by Dr. J. Schmidt, Neuropsychologist. Dr. Schmidt was provided with a number of documents to review but was not given the post accident ambulance crew report or hospital records.

83. Dr. Schmidt's view is that the Claimant suffered an altered state of consciousness for a period of "seconds to a minute" after the accident.

84. No mention is made by Dr. Schmidt of his having observed the Claimant to be suffering from any problems with his speech, gait or balance when he saw him.

85. Dr. Schmidt concluded based on the history he was given, the Claimant was a well functioning individual prior to the accident and that he most likely suffered a mild traumatic brain injury which resulted in a constellation of cognitive and emotional problems as a result of the accident.

86. With respect to the testing undertaken by Dr. Schmidt, there was no evidence of generalized mental slowing. The Claimant showed some weakness, although his scoring was in the 61st percentile in testing for focused, divided and sustained attention.

87. Dr. Schmidt indicated his testing did raise the possibility of attention deficit disorder. In terms of executive function, Dr. Schmidt's testing revealed subtle weaknesses in problem solving. The Claimant had generalized difficulty with learning verbal and visual information. The Claimant's verbal comprehension was in the 91st percentile but he did have problems with word finding and letter fluency. Dr. Schmidt found the language functioning and generalized deficits "a striking finding given his educational and vocabulary history".

88. Dr. Schmidt opined that the Claimant's age is a significant factor when it comes to addressing the effects of his injury as "brain injury in older adults raises the three issues that warrant further discussion" including:

- Brain injury in older adults (especially those over 60) produces more significant cognitive and psychological effects;
- Older adults are at risk for age related cognitive disorders, most notably dementia;
- That even with normal aging there is some decline in cognitive performance which might lead to low scores on tests simply reflecting the aging process.

89. While Dr. Schmidt felt the Claimant's testing was consistent with a mild traumatic brain injury he did caution that because of the results of the CT scan of the Claimant's brain "he may have a concurrent neurological condition which could interact with the effects of the head injury to intensify the symptoms". Dr. Schmidt said **the history he was given suggested the onset of symptoms was sudden after the accident**; given that circumstances and the problems could not be related exclusively to an underlying neurological condition.

90. Dr. Schmidt also opined that further recovery could occur. He recommended further testing in 10-12 months.

91. In October 2006, Dr. Schmidt conducted a second evaluation of the Claimant. The Claimant reported doing administrative tasks at work but he said he was spending most of his time trying to finish the construction of his house. This included dealing with some legal issues involving the Municipality. The Claimant reported problems with printing and handwriting. Cognitive testing was unchanged. At that time, Dr. Schmidt felt the Claimant was not depressed.

92. Dr. Schmidt undertook a third assessment on April 16, 2008. Dr. Schmidt's testing showed continued difficulty with focusing, sustaining and shifting attention and with learning and retaining information. There were slightly weaker scores on a test asking him to learn and remember a story than in previous testing. There was slight improvement in

word learning testing.

93. Dr. Schmidt opined the Claimant's situation had reached a plateau and that he would not experience a great deal of improvement or deterioration in cognitive functioning in the future.

Janice Landy, OT

94. On June 29, 2008, the Claimant was seen by Janice Landy, Occupational Therapist, for the purposes of a Life Care/Cost of Future Care Plan. The report was based on meetings Ms. Landy had with the Claimant, his wife and son in May 2005 and June 2008.

95. Ms. Landy's opinion is that because of,

> The diagnosed mild traumatic brain injury sustained and the constellation of symptoms which emerged immediately post injury – cognitively, behaviorally, physically and emotionally – and which continued to the present time have dramatically impacted [the Claimant's] abilities for independence in his personal, safety, emotional and social wellbeing. He will require continuous support to overcome the barriers to facilitate participation at a personal and societal level and provide the least restrictive environment possible.

96. Included with Ms. Landy's recommendations are the following:

a) One-To-One Rehabilitation Support Worker on a day-to-day basis;
b) In-Home Support 20 hours a week;
c) Speech and Language Therapy;
d) Physical Activation Program;
e) Psychological Consultation;
f) Transportation Assistance;
g) A Rehabilitation Case Manager; and
h) Financial Management.

The Respondent's Experts

Dr. J. LeBlanc, Neuropsychologist

97. At the request of the Respondent, the Claimant saw Dr. J. LeBlanc, Neuropsychologist on August 27, 2006.

98. When Dr. LeBlanc first asked the Claimant about the accident he declined to answer stating "it is in my records". I note from the other reports produced, it does not appear the Claimant had any difficulty discussing the dynamics of the accident with Dr. Monks, Dr. Cameron or Dr. Schmidt and so the response is suspect. I am not sure whether this obstinacy is part of his litigation strategy as it certainly was not lack of memory because

with some prompting he did provide Dr. LeBlanc with the accident details.

99. According to Dr. LeBlanc,

> He was then hit head-on by a driver-less vehicle after its driver jumped out of it. At the time of the accident, [the Claimant's] airbag was deployed…he reports that he didn't realize that it had done so….He states his last memory prior to the accident was seeing the vehicle smash into his car. His next memory was taking off his seatbelt and leaving his automobile. [The Claimant] reports injuries sustained at the time included a mark over his waist from the seatbelt, feeling dizzy and dazed, and later being aware his knee hurt ("I think it was my left knee") He states that he can't recall, but either he or someone else contacted the police, and he also called his wife.

100. Dr. LeBlanc noted that at the time of the assessment, "he continues to experience fatigue (which has improved over the past few months), decreased concentration, memory difficulties ("I mix up my kids names – I can't recall information unless given cues"), and a tendency to mix up words and have poor enunciation….He was then questioned more specifically, and noted that his handwriting has "dropped badly," that problem solving is "still pretty good – but it takes longer…".

101. The Claimant's wife told Dr. LeBlanc, "…he tends to ask her to remember information for him now, and that his conversations can seem scattered and disconnected. She feels his concentration has improved...[The Claimant's wife] finds that she sometimes needs to prompt [the Claimant] to groom himself…as he will not do so on his own…She states he is able to manage his finances adequately, and that he is "mortified" of making mistakes in this area".

102. Dr. LeBlanc's opinion was that **the Claimant did not put forth full effort** when his memory was being tested. She noted,

> Measures of validity and effort, as well as consistency between tests reflected varying degrees of performance, with clear indicators of less than optimal effort. As a consequence, [the Claimant's] neuropsychological test results are of questionable validity.
>
> More specifically, **on a measure of memory**, effort scores on this measure indicate that there is a very high likelihood that [the Claimant] **did not put forth full effort.** On this measure, which is insensitive to severe brain injury but which is greatly affected by effort, [the Claimant's] scores were so low as to indicate **incomplete effort**, and thus doubtful validity of test results…
>
> To put [the Claimant's] memory abilities in context on this measure, his scores were lower than patients with brain injuries who had Glasgow Coma Scale Scores of 9.6, the scores of children in clinical samples, and

> those of documented neurological patients. The developer of the test noted that scores less than 70% on one subtest or less than 60% on another subtest would be very suspicious except in someone with dementia (in need of supervision) or profound amnesia. ([The Claimant] scored 50% on the former subtest and 40% on the latter when having to make associations with the words – thus 20% less than the cut-off on both measures).
>
> ...
>
> On another measure of memory and list-learning [the Claimant's] performance reflected significantly low level of ability in four out of four areas. **This low level of performance is suggestive of poor effort**. For example, on a test of recognition [the Claimant] endorsed new or incorrect words at a high level, rejecting words he had previously been given significantly below a chance level. It is also notable that [the Claimant's] results on this measure indicates that **he has a pronounced tendency to intrude incorrect information (or confabulate) into his recall; however, this tendency was not evidence on any other measures of memory – a very unusual finding**. He also did not demonstrate improved performance in paradigms which are usually helpful for those with traumatic brain injury – performing much lower than average.
>
> **Invalid performance was evidenced on personality testing, as well**. On the Personality Assessment Inventory, [the Claimant] **appeared to attempt to present himself as exceptionally free of the common shortcomings or difficulties most people experience**. He did so to such a degree that the validity of his scores on this measure are highly questionable and unable to be interpreted….
>
> [emphasis added]

103. The results of Dr. LeBlanc's testing were invalid due to the Claimant's "less than optimal effort".

104. On May 1, 2008, the Claimant returned to Dr. LeBlanc. The Claimant's wife also attended the appointment but refused to provide any collateral information stating that she was "told not to say anything", which is curious given her participation in prior assessments arranged on the Claimant's behalf.

105. At this second assessment the Claimant provided greater effort and Dr. LeBlanc considered the results of the testing to be valid.

106. Dr. LeBlanc's opinion was that the medical records, the Claimant's reporting and test data supported a diagnosis of dementia rather than a persistent post-concussive disorder. She opined,

> When examining the neuropsychological test performance of [the Claimant] over the course of four assessments during the past four years

> (two from Dr. Schmidt), it is clear that [the Claimant] is performing at a more impaired level from a neuropsychological standpoint now than in 2004, in a number of areas associated with Alzheimer's Disease. This finding is despite the fact that test scores may have been artificially low due to lack of effort in his July 2006 evaluation with this clinician. In other words, [the Claimant's] current valid neuropsychological test performance is actually weaker than his previous testing (which appeared to be overly negative due to lack of effort). Thus this, indeed, represents **a notable decline in skills**.
>
> [emphasis added]

107. Dr. LeBlanc outlined various neuropsychological indicators of dementia present in the Claimant's testing and also clinical symptoms recorded consistent with cortical dementia **but inconsistent** with a mild traumatic brain injury including:

- Slurring of words or dysarthria;
- Changes in sleep patterns;
- Being short tempered;
- Being disconnected in conversation;
- Decreased ability to perform basic activities of daily living such as grooming and dressing;
- Weakness in attention, problem-solving and organizational ability;
- Mixing up words and concepts;
- Personality changes, i.e. inappropriate behavior in social settings;
- Persevering or overly focusing on details;
- Problems with handwriting and printing – very uncommon with mild brain injury; and
- Progression of symptoms over time.

108. Dr. LeBlanc admitted the problems reported by the Claimant immediately after the accident, including complaints of fatigue, dizziness and decreased attention were consistent with a concussion, making it possible he did suffer a concussion at the time of the accident. Dr. LeBlanc also pointed out that "the pattern of recovery for concussion is one in which the symptoms lessen to a significant degree (or fully remit) within three to twelve months post injury".

109. Dr. LeBlanc opined that the medical records since the accident are much more consistent with dementia due to the increased symptoms over time and his decreased ability to perform activities of daily living, as well as the neuropsychological symptoms reported that are inconsistent with a post-concussive disorder.

110. Dr. LeBlanc further indicated the accident did not initiate, aggravate or hasten the neuropsychological decline the Claimant has been experiencing and that he would have demonstrated the same constellation of neuropsychological weaknesses in the absence of the accident occurring.

111. Dr. LeBlanc opined, "[the Claimant] does not have accident-related symptoms, from a neuropsychological perspective, thus there is no indication that his current difficulties related to his ability to work as a lawyer is due to the accident in question, in any capacity. Instead, the deficits in his ability to work as a lawyer appear due to a pre-existing cortical type dementia, which has worsened over time".

112. Dr. LeBlanc testified that the medical literature indicates that a onetime concussion does not cause the onset of dementia.

113. In her report and at this hearing, Dr. LeBlanc and other experts, including Dr. Schmidt, explained that dementing processes begin very gradually. Dr. LeBlanc also explained it is not unusual for families to be unaware of acquired deficits associated with dementing processes until there is a sudden disruption in someone's routine which results in the person being disoriented, confused and unable to cope with a situation.

114. Dr. LeBlanc is of the view that the motor vehicle accident served as such a situation and so while the accident did not cause the neuropsychological symptoms, it served to highlight the Claimant's pre-existing deficits in cognition and his functional inability to cope with the situation.

Dr. S. Semrau, Psychiatrist

115. On October 31, 2006, the Claimant attended Dr. S. Semrau, Psychiatrist. Dr. Semrau's opinion was that there was no physical evidence the Claimant suffered a concussion or mild traumatic brain injury in the accident. Dr. Semaru stated that if there was a head injury then "it would have been extremely mild and would have fully resolved very rapidly".

116. Dr. Semrau noted,

> There is no history of pre-accident complaints of memory-cognitive symptoms leading up to this MVA (see pre-accident history – opinion page 4). However, it is very common that neither the patient nor others they are in contact with tend to readily observe or take specific note of relatively mild signs of memory/cognitive dysfunction, particularly in older people. Given that [the Claimant] himself appears to be a very proud man, it s particularly unlikely that he would have been able to develop awareness or insight into such symptoms himself, probably tending to ignore them or put them down to other causes such as simple aging or tiredness from long hours of work. Thus the lack of pre-mva history of memory/cognitive symptoms is not a particularly reliable basis for concluding that none were present.

117. Dr. Semrau did not find the Claimant suffered from driving anxiety or posttraumatic stress symptoms since the accident.

118. With respect to any possible post accident mood disorders, Dr. Semrau found there were some isolated indications of early depression in the clinical records and that the Claimant reported to him initially feeling frustrated, irritable and that he lacked patience but that

those symptoms had improved. The Claimant denied feeling significantly depressed since the accident but acknowledged he had to face the reality he could not practice law, stating he has taken the "can't cry over spilt milk" approach to dealing with this.

119. Like others, Dr. Semrau felt the progress of the Claimant's symptoms with his memory, concentration and issues with speech stood in contrast to the usual pattern of recovery experienced by people who suffer mild traumatic brain injuries. According to Dr. Semrau these people typically show gradual or complete recovery over roughly the first two years post injury followed by a plateau phase.

120. Dr. Semrau did not find the Claimant to be in need of psychiatric treatment "except in relation to whatever dementia or other such illness is causing his mental functioning problems, as well as to assist his own and his family's adaptation to his difficulties".

Dr. A. Prout, Neurologist

121. On June 2, 2008, the Claimant attended Dr. A. Alistair J.E. Prout, Neurologist. According to Dr. Prout's report,

> …he has recollection of the events leading up to the accident and there is no suggestion of retrograde amnesia. The history provided to me on June 2, 2008 suggests that [the Claimant] may have been briefly unaware (likely for a period of seconds) immediately following the impact at the time of the accident but he appears to recall the actual impact. It appears that the only period of the accident that is not recalled by [the Claimant] is the actual deployment of the airbag and possibly the few seconds thereafter. He has provided history to me and to other examiners suggesting that he recalls being in the vehicle immediately after the accident and he recalls taking his seatbelt off. In my opinion he does not have a period of posttraumatic amnesia beyond the initial moments after the impact of the accident. In my opinion the period of possible posttraumatic amnesia has been exaggerated by certain examiners including Drs. Cameron and Stewart. The records reviewed and the history provided to myself and to Dr. Schmidt in particular did not suggest that [the Claimant] had posttraumatic amnesia lasting for several hours (as was the opinion of Dr. Cameron) or possibly several days (according to the report of Dr. Stewart).
>
> …

122. Dr. Prout's opinion is that it is unclear whether the Claimant suffered a very mild traumatic brain injury or even a concussion in the motor vehicle accident. Dr. Prout bases this on the fact the Claimant **did not report the typical symptoms reported with a concussion** such as significant dizziness, photophobia or headaches. Dr. Prout indicated that the Claimant's reported feelings of being foggy and tired could be related to the physical pain he experienced in the immediate aftermath of the accident.

123. Dr. Prout also found the symptoms reported by the Claimant atypical for the expected course following a traumatic brain injury or concussion. Specifically, Dr. Prout noted the

findings made at the accident scene and in the hospital of the Claimant being alert and cognitively intact. He also noted the refractory cognitive and behavioral difficulties reported, which have not improved but rather gotten worse with time, are also inconsistent with the Claimant having suffered a mild traumatic brain injury.

124. I find it significant that Dr. Prout at his first assessment noted the Claimant endorsed features of "hypophonia, decreased facial expression and general slowness of movement or bradykinesia". Problems with micrographia (the tendency for handwriting to peter out) were also found on examination. Dr. Prout indicated these types of "**extrapyramidal findings**" are most commonly seen in degenerative brain conditions and such findings would be "exceedingly unusual in the case of an uncomplicated mild traumatic brain injury".

125. Dr. Prout, when reviewing the Claimant's records, noted that many of the clinical findings he himself found were not apparent at the time of earlier evaluations commenting, "Dr. Cameron did not appear to identify any slowness of movement or softness of voice or change in gait" and "Dr. Stewart did not document "slowness of movements, softness of speech or weakness in facial expressions as identified in my examination" and this raised a concern in Dr. Prout's mind that these issues, "may well represent a neurological problem unrelated to the accident in question".

126. Dr. Prout outlined various differential diagnoses that might apply to the Claimant including a mixed type of dementia (degenerative dementia in association with vascular dementia), which would correlate with the results of the MRI findings in 2004. Dr. Prout recommended a repeat brain MRI and repeat neuropsychological testing as the results of Dr. LeBlanc's 2006 testing were not considered clinically valid.

127. At the time Dr. Prout wrote his June 2, 2008 report he was unaware the Claimant had just undergone neuropsychological testing by Dr. LeBlanc and when her report was presented to him in July 2008, he opined in an addendum, "I am in agreement with the opinion of Dr. LeBlanc with respect to her opinion that the neuropsychological test results indicate the presence of a dementia which is unrelated to an alleged head injury".

128. The Claimant underwent a second MRI on November 5, 2008.

129. The Claimant returned to Dr. Prout on September 2, 2009, for a follow-up independent assessment. In his report of that same date Dr. Prout found that since his assessment in the summer of 2008 the Claimant's neurological functioning had deteriorated. Dr. Prout also noted the Claimant was difficult to understand and reported speech problems both of an articulation issue, softness of speech and word finding difficulties and "a probable dysphasic component (dysphasia referring to the process of language rather than the articulation of speech)."

130. Dr. Prout's opinion was that the Claimant's findings and deterioration were consistent with "a mixed picture of cortical/subcortical neurologic dysfunction although they would favor primarily sub-cortical brain changes".

131. With respect to causation, Dr. Prout's finding was that the Claimant's problems relate to a slowly progressive brain problem that in his view is "consistent with degenerative process with the main differential diagnosis being subcortical vascular process (secondary to microvascular changes in the subcortical brain)".

132. In his report dated September 2, 2009, Dr. Prout opined,

> With respect to the motor vehicle accident of May 3, 2004, it is my opinion that the neurological abnormalities displayed by [the Claimant] can in no way be construed as the result of the effects of a concussion (if such an injury did indeed occur) sustained in the accident of May 3, 2004. Neither the clinical presentation of [the Claimant] at the time of my initial examination of June 2, 2008 nor the clinical findings on September 2, 2009 can be accounted for by the effects of a concussion. The neuroradiological findings, both in June 2004 and November 2008, cannot be accounted for by the effects of a concussion.
>
> …

Discussion

133. The foregoing represents the medical evidence tendered at this hearing, save and except the evidence of the Neuroradiologists, Dr. Graeb for the Claimant and Dr. Lapointe for the Respondent, who gave opinions regarding interpretation of the MRI scans referred to by the medical experts. I will comment on their evidence later in this decision.

134. As stated earlier, the medical evidence at this hearing is primarily made up of experts hired by one party or the other.

135. Dr. Monks, the Claimant's family doctor, was the only treating physician and he did not direct any treatment, order any investigations nor did he refer the Claimant to any specialists.

136. The body of medical evidence depicts two divergent views regarding the diagnosis and cause of the Claimant's symptoms.

137. As noted at the beginning of these reasons, within moments of the accident the Claimant was on a "path of litigation" rather than one of medical treatment and rehabilitation which is the typical route followed when a person is injured. The strategy involved in this litigation makes discerning the truth a daunting task.

138. Another difficulty is the fact that the Claimant was not a youngster at the time of the motor vehicle accident. He was 64 years old which is an age noted by all the experts when there is some normal decline in cognitive performance. The MRI imaging after the accident clearly indicates changes in the Claimant which relate to his age.

139. The consensus appears to be that in order to diagnosis whether or not the Claimant suffered a mild traumatic brain injury **a clear history of the Claimant's ability to function before and after the accident is critical**.

140. In this regard, the Claimant called a number of collateral witnesses. These witnesses included relatives, staff from his law firm and a lawyer, KW, who did contract legal work for the Claimant before and after the accident. With some exceptions, most of the testimony of the collateral witnesses was not particularly helpful in giving me a clear picture of the Claimant immediately prior to the motor vehicle accident or after it.

141. The Respondent called two collateral witnesses. One was RH, a lawyer who acted as opposing counsel to the Claimant in two trials which took place months before this accident. The other witness was FB, a body shop manager, who knew the Claimant before the accident and dealt with him within weeks after the accident.

142. The most significant witnesses at this hearing were the Claimant, his wife and son.

The Claimant

143. The Claimant gave evidence over the course of a day and a half and I have already referred to his relevant testimony regarding the motor vehicle accident.

144. I feel it important to note that I acted as a mediator in a case in which the Claimant was counsel at least ten years ago and he presented much differently at that time than he did before me at this hearing. At this hearing, aside from moving rather slow and appearing disheveled, the most glaring difference I noticed was his voice and his ability to communicate. He spoke softly and he seemed to drop his voice at the end of a phrase. He appeared to mumble and it was often difficult to understand what he was saying. At times, his sentence structure was disjointed.

145. Throughout his testimony the Claimant was asked if he would "speak up", and often he was asked to repeat his answers. That being said, most of his responses were appropriate in content and he understood what was being asked of him.

146. His direct examination commenced with simple questions including things like his address and the names of his children. He was unable to say when any of his children were born and when asked their ages he would preface his answer by saying things like "born in about 1975, I'm just guessing; I don't know". When asked who his third child was he responded, "probably Robert".

147. The Claimant was asked when he was called to the bar, which he was able to recall without hesitation. Much in the same manner he was able to explain when he incorporated his law practice and how he saw his first client the same day he was called to the bar.

148. When asked by his counsel to describe his practice he stated,

> "In the early stages, I was doing conveyancing in Coquitlam. At the time of the accident I was doing ICBC defence work – sorry suing ICBC on behalf of my clients".

149. The Claimant estimated that at the time of the motor vehicle accident, he was opening 200 personal injury files a year and was running 400-500 files with his son and another lawyer working with him.

150. The Claimant was able to describe in detail his corporate structure for the operation of his law firm. He explained that he had three companies. One company was the law firm itself which he owned. Another company, ALS, was a management company for the law firm which was owned by his wife and he was its director. The third company, ALC, was owned by him and it was the company that owned the building in which the law firm was situated.

151. The Claimant also stated he was a director of his wife's company, G. Ltd., which owned the land upon which their much discussed home was being built. The Claimant said, in addition to being a director of that company, he also did its legal work. He also referenced owning a construction company which was building the home.

152. The Claimant was able to describe tax advantages of having his law firm in a corporation and having it managed by his wife's company. In direct examination he appeared to understand all his income tax returns, except he was somewhat evasive about his consulting income in the year from 2007 and 2008 and said he would have to defer to his accountant.

153. The Claimant described his son's involvement in the practice prior to the accident stating that his son grew up around the firm and that it was fortunate he came back and took over. The Claimant stated, "he was assisting me. He was my gopher. I was training him to – I wanted him to take on files; he would assist on trials and all that kind of thing. And all sorts of ICBC work".

154. The Claimant explained he hired his son because he planned on practicing until he was "85, 90 years old" but he wanted to bring in "a good reliable person". Somewhat incongruently, the Claimant also testified "I was never going to retire" and that he had never thought about selling his practice to his son.

155. The Claimant said he was in charge of operating the firm even though he might have delegated some responsibility of overseeing the staff to his son. He said he was in control and "I was pretty hands on everything I did".

156. The Claimant testified that three or four years before the accident he had trials all the time and his son assisted him.

157. His recollection was that his son might have had a few files that he ran on his own, but he hadn't run any trials in British Columbia. When asked if, in his view, his son was ready to run a trial on his own prior to the accident, he stated, "well, kind of borderline, but he was – I thought - - I would like to have a few more trials with him". And he added, "but he has done very well since and he has done an excellent job".

158. With respect to his activities prior to the accident, the Claimant described being heavily involved in the Federal Liberal party and having run for political office unsuccessfully on two occasions. He described that in the five years before the motor vehicle accident he had little involvement with politics as his son has taken over that role. He described that at the time of the accident his life was focused on his practice, family activities and trying to complete the house that has been referred to. He said he owns an airplane and that he was a pilot. He was candid and admitted that he had not used the airplane for a number of years prior to the accident. He also said he owns a 41 foot yacht. Again, he was candid and stated that in the few years prior to the accident he had only used it a few times and has hardly used it since. Another endeavor the Claimant engaged in was handling his stock portfolio which used to occupy about 20 hours a week.

159. The Claimant was asked about the May 3, 2004, motor vehicle accident and, as outlined earlier in these reasons, he was able to describe it in some detail. When asked to describe what injuries he felt at the accident scene the Claimant responded, "I felt tired and fatigued and that was probably the main things. I was trying to fight off whatever it was, and that's about it".

160. The Claimant described being treated by ambulance attendants at the accident scene and that they eventually drove him to Eagle Ridge Hospital where he said he was for a couple of hours and had x-rays taken. He described his stomach as being red from the seatbelt.

161. The Claimant said he "very quickly afterwards" saw Dr. Monks and told him what problems he was having and when asked what these were the Claimant said "problems with my knees and my chest and stomach and fogginess and just general types of problems".

162. The Claimant also testified that he went back to work immediately after the accident, "I tried to do everything as if nothing happened and it turned out that didn't work out very well". When asked to explain why this was the Claimant stated,

> Well, I was tired; I was fatigued. I had a lot of problems. And I think the doctors…Dr. Cameron – he was a neurologist in North Vancouver – explained it best, he said he had seen this happen in cases where people had been involved in severe accidents and they think they are going to get better, but they don't get better. This is what happened in my case, unfortunately.

163. The Claimant was asked to describe his health in the five years before the accident. He said he had no physical impairments, that his ability to walk was excellent and he can't recall any aches and pains. He was of the view he was in very good shape. "My doctor saw me every five, ten years. That's about all".

164. After the accident he said that his knee, leg and arm were bothering him, but he was unable to recall which arm or leg was involved. He now claims that he walks slower and shuffles to avoid falling down and he feels that his walk is progressively deteriorating and not

getting better. He describes he had a faint blue mark across his stomach which lasted several weeks and he can't recall if he has had any problem with his stomach since then.

165. He was asked to describe his problems with cognition and memory. He said his memory is not as good as it used to be, but he says, "it seems that I can remember but I can't go ahead and put it properly together". He commented,

> I have had problems with my – primarily my main problem is putting down in writing what my thoughts were. First of all, I could do it printing …now even that's difficult, so I use computers primarily to do that.

166. When asked if there have been any improvement in his memory since the accident he said, "No, none at all".

167. When asked when his concentration problems and memory issues started, the Claimant said,

A I think it all happened about instantly, but they got better; then they got **worse**.

Q. And so they were getting better for what period of time?

A. By a two-year period.

Q. And then after that, **they got worse**?

A. **Yes**.

[emphasis added]

168. The Claimant described suffering from fatigue, which he noticed the first day after the accident or closely thereafter. He said that he is better in the morning than in the afternoon, "whereas before I could go all day and all night almost. And now I don't know if I can go a couple hours in the morning". He stated that his fatigue has not improved but has gotten worse.

169. The Claimant said that prior to the accident he used to be able to control his mood and temper. He described having anger management issues since the accident stating, "I recognize they are there. I just don't let myself fall into it…with the problem, if I see myself getting angry I will just keep quiet".

170. He described his ability to communicate prior to the accident as "very smooth". Because he can no longer speak the way he used to, he describes his voice as quieter, he avoids social activity because he doesn't want to embarrass himself.

171. With respect to his treatment since the accident, there was very little evidence tendered during his direct examination except to say that he said he was not receiving any treatment at all at the time of the hearing.

172. I asked the Claimant whether he was going to get any speech therapy as had been recommended by one of the specialists and he answered, "no". He went on to say, "It was discussed. Discussed by somebody…but the feeling was, it couldn't do any good. I wanted to make sure it would do some good, and it wouldn't do any good, so I left it how it was".

173. During cross-examination the following exchange took place with respect to speech therapy,

Q. …if my memory serves me correctly, I believe it has been suggested that you should have some speech therapy. And that hasn't taken place.

A. No it hasn't. And I don't need it either.

174. The following was elicited on redirect Claimant's counsel,

Q. Now you have a speech problem. Would you accept having therapy?

A. I would.

But the Claimant then qualified this by saying it would depend on the person who was doing the therapy and "I don't think it would help at all quite frankly. That is my personal feeling".

175. When asked about future care recommendations made by Janice Landy, the Claimant agreed he would accept funding for psychological counseling, a case manager and housekeeping assistance for his wife and someone to take personal charge of his hygiene and dressing. He admitted that his wife used to look after him before the accident but that this has now turned into a full-time job.

176. The Claimant was vigorously cross-examined by Respondent's Counsel regarding the lack of treatment he received for his injuries and how the future care recommendations appeared to be incongruent with his past conduct.

177. The Claimant admitted that as a personal injury lawyer he knew of treatment options and "brain injury programs" such as GF Strong but testified his situation was different. He didn't think his injury was a serious one that would require the treatment given by those programs. He testified,

A My case wasn't so obvious. My case was much more difficult.

Q. What is so different about yours, in your mind?

A. Well, it doesn't appear that I have a brain injury sometimes. It came – I didn't realize I had this serious brain injury. I wanted to check it out, make sure I had it or didn't have it. I've got it, no doubt about that.

Q. Okay.

A. And it's due to the accident, no doubt about that. And that's about all I can say at this stage of the game.

178. The Claimant admitted he has more knowledge than the average lay person about this type of injury and further more awareness about the appropriate medical experts. As outlined above, he testified it never entered his mind to go to GF Strong or some such program but rather he preferred to see an expert like Dr. Cameron who he thought would give him the proper advice. He testified that neither his son nor his wife have ever suggested to him that he should be getting treatment.

179. When confronted with the paradox that his evidence was that he would now seek some treatment such as psychological counseling, if funded by this award, as compared to having no treatment whatsoever in the past number of years he said,

Q. All right. But it never crossed your mind to do it before? Before today?

A. Whatever, I was fine with it.

Q. Sorry.

A. I would do it at any time.

Q. Well, why haven't you done it?

A. Because programs have not been laid out, I guess. I don't know.

Q. The programs have not been laid out?

A. That's correct. This case is not settled.

…

Q. "I've not done that you said and it's up to my lawyers"?

A. That's right.

180. When he was asked to try and explain his lack of initiative to get treatment considering his particular expertise in personal injury claims, he argued,

A. I think I have already answered it. I said it depends on what my lawyers do with it.

Q. And that is the only criteria?

A. No, I didn't say that. I said that's one of the stages of the game.

181. The Claimant testified that since he sold his practice to his son, he has continued to go to the office a few times a week for short periods of time to do work associated with the construction of the house. He described this as "checking on material and where to get it…following up on that kind of thing, inspecting certain items". He also described checking his personal stocks online and working on an expropriation case for his wife's company.

182. The Claimant admitted that he has taken a lot of initiative with respect to the building of the house since the accident. He described his role as about the same as it was beforehand stating, "I tried to carry out as best as, I can do everything that I was doing beforehand. But I cannot practice law and there are other things I have slowed down on".

183. The Claimant admits he has travelled extensively with his wife since the motor vehicle accident with trips commencing in February 2005. He described trips to China, Australia and the United States. He testified the purpose of the trips to China were "all business" to source cheap material for his house. As an example, he went to Xiamen, where he bought granite and he went to Shenzhen to buy furniture. He said he went to China at least three or four times, but his wife's passport disclosed at least eight such trips.

184. He testified he went to New York, Las Vegas and Seattle, mainly for the purposes of business and because "I wanted to see what was going on, keeping track of what is happening….New York for example is a place of financial center in our world".

185. Regarding his practice prior to the accident, the Claimant said he worked pretty hard when he worked but that he was home in the evenings and on the weekends. He explained, "I had a good staff, and I worked on the important issues". He estimated he worked about 50 hours a week on law, and five to ten hours a week on his house project and another 12 to 15 hours a week managing his stock portfolio.

186. As previously noted the Claimant's evidence is that after the accident he went to the office and acted as if nothing had occurred. He was not sure if he worked on any legal files from the time of the accident until the time he sold his practice to his son in January of 2005.

187. With respect to work, the Claimant stated that Dr. Monks had suggested to him that he should not return to the practice of law as he was not the same person after the accident.

The Claimant was unable to provide a frame of reference as to when this discussion took place.

188. The evidence regarding how the Claimant was functioning during the period of time from the accident through the fall of 2004 was somewhat fuzzy. The Claimant would go to the office and would work on, as he described it, the building of his wife's house. He was responsible for every aspect except for the actual labour. He did all the design work and in this regard produced hundreds of drawings. He also sourced and monitored all the material for the project and supervised construction.

189. The Claimant's evidence is that they started to build this house in 1984 and had a target completion date of 2000. He explained that it did not finish by 2000 because he had problems with the municipality. He also stated there was some delay because he changed the whole design of the house after the accident. He described the house as being 60% completed at the time of the accident and approximately 90% completed at the time of this hearing.

190. He admitted that as a personal injury lawyer he thought his brain injury symptoms would likely get better within two or three years. That being said, he decided within months of the accident that he would pass his practice on to his son. During cross-examination he testified,

A. I could not carry on the practice of law.

Q. In your opinion, you could not practice, continue on the practice of law?

A. That's right.

191. In his examination in chief when asked why he sold his practice to his son, he answered,

A. I didn't want to…because I couldn't carry on the work anymore.

Q. And what was preventing you from carrying on the work?

A. I couldn't go out, I couldn't do the trials and I wasn't as sharp as I used to be.

192. The Claimant was able to describe the terms of the sale of his practice. He testified the effective date of the sale was January 2005, and the sale price was $1.1 million dollars. He also explained the price was based on an average of a number of years of past-gross billings. The purchase price was to be payable with a $100,000.00 down payment and then payments based on a quarter of the firms future gross billings over the course of the next four years. The Claimant testified that, instead of his son paying the $100,000.00 down payment, he gave his son a credit in that amount for the work he had done from the time of the accident to the date of the sale.

193. The Claimant testified that when he sold his practice to his son, it did not include the private lawsuits he was conducting that were not personal injury files. These included a number of actions against the City of Coquitlam in regard to the home he was building and the property it was on.

194. During this proceeding there was an issue about the agreement between the Claimant and his son and whether the terms were reduced to writing or not. At the Claimant's Examination for Discovery in May 2009 he indicated that he thought there was a written agreement drafted. Prior to the commencement of his hearing, Counsel for the Respondent made a number of requests for production of any documents pertaining to the sale of the Claimant's practice to his son. Ultimately, Counsel for the Respondent made an application to me regarding the particulars of the sale and I ordered that Interrogatories be delivered to address the issue. This was done and the Claimant provided an Affidavit in response but did not produce any written agreement. At the commencement of this Arbitration the Claimant's solicitor produced an unexecuted agreement purporting to set out the terms of the sale of the law practice to the Claimant's son.

195. Under cross-examination the Claimant admitted that in 2007 he was audited by Revenue Canada regarding his law practice and in this regard he was able to retain and instruct counsel at the law firm Fraser Milner and ultimately challenged his counsel's account.

196. Under cross-examination the Claimant also admitted that in July 2008 ABA Engineering Consultants sued his company ALC which owns the property on which his office is situated. He also admitted he was able to draft and file the Statement of Defence in that proceeding. The litigation involved an issue over a soil sample report that was required when refinancing the office building. In essence, the Claimant was unhappy with the report and asked them to change it. The engineering company sued him for their account and the Claimant delivered a Counterclaim and the matter was ultimately settled.

197. What is germane from the above is the fact that the Claimant was able to explain from his point of view the theory and issues of his dispute with each of the said litigants. With respect to the engineering report, he explained the very technical nature of the reports and why he challenged them.

198. I contrast this with the Claimant's evidence during his direct examination when he was asked to recall a personal injury trial he did in the fall of 2003 (C v. S). The Claimant testified he thought he did "very well on that one" and his client was "quite pleased" but that "we had a lot of problems with the defence counsel". He also said "the judge did some weird things, I thought. But we won in the end". He was asked if it went to the Court of Appeal and he replied "I believe that happened after the accident. I can't remember if we did or not".

199. My impression is that the Claimant did not want to talk about this trial and it was convenient for him to simply say he did not remember its details.

200. I will make further comments below regarding the Claimant as a witness.

The Claimant's Wife - D

201. The evidence of the Claimant's wife regarding how she came to learn about the motor vehicle accident has already been outlined, as have my comments regarding the vagueness of that evidence.

202. She went on to explain that when she arrived at the scene of the accident, she asked her husband if he was okay and he replied that he was fine. She then said, "so I set about to find out what happened". That is when she went out and took photographs of the vehicles and the scene of the incident.

203. When asked about her observations of the Claimant at the scene she said he seemed very white, he appeared to be shaking, he was just sitting in a lawn chair that someone had brought for him, stunned looking.

204. She said the ambulance took him to Eagle Ridge Hospital ER where she described him as being "out of it, and appeared in shock". She said he was "grey as a ghost".

205. Under cross-examination these observations were challenged by Respondents' Counsel with the records made by the ambulance attendant, emergency physician and nursing staff. The paramedics and hospital staff both noted the Claimant's skin colour as normal. Similarly, both recorded that the Claimant was "alert" and oriented. D was very argumentative when these observations were put to her but after lengthy questioning agreed that the medical staff seen in the hospital after testing him considered him "alert", she would have to agree with them.

206. D also stated that she observed abrasions to the Claimant's face, wrist and leg, as well as a bruise on his abdomen. She videotaped these injuries, with the exception of the alleged abrasion on his face. The hospital records were put to her indicating that there were only abrasions noted on his left knee and left wrist. She took issue with the record insisting there were abrasions on his face. When questioned why she did not photograph that injury she said a nurse stopped her videotaping and told her she was not to take any more video in the emergency department.

207. It was difficult to follow the evidence given by D as she was very defensive and argumentative when being cross-examined and ultimately explained,

> A. You know, I think I should preface everything with "the best of my recollection". I don't even remember what happened in the hospital now.
>
> Q. …sorry?
>
> A. If that's a failing, then I accept it…but I couldn't possibly tell you what conversation went on. I don't even remember the first week or the first month. I just remember snippets of it.

208. During her direct examination D was asked about her observations of the Claimant in the first month after the accident. She outlined that his arms were banged up, he limped and he complained about his shoulder and the bruising on his abdomen. She said he did not return to driving immediately.

209. She could not remember when he first started going back to driving, nor did she remember when he first returned to the office. She just has a general recollection of the period after the accident that he was in the house all day "mumbling about this and that and it was a shock to me as well as to him, what had just happened".

210. In terms of his speech, she said that prior to the accident he never had a problem. She described him as very articulate and a great conversationalist. She said the day after the accident he got up, got dressed and, knowing his car had been smashed, insisted on wanting to get a new car immediately. He was interested in purchasing a Mercedes similar to the one owned by her older sister and brother-in-law. She recalled sitting in her car with the Claimant and he was speaking to them on the telephone about the Mercedes. She said her sister then spoke to her alerting her to the fact the Claimant's speech was somewhat incoherent. That being said, D said she did not think a whole lot about it because it was just one person's observation.

211. D said throughout the rest of 2004 it was her view the Claimant did not really get better. She noticed some major personality changes which were initially very difficult for her. She said he would get angry at the most absurd things, he was anxious and agitated and he was up in the middle of the night down in the fridge eating.

212. In terms of his speech, at times she could not understand what he was saying because he would mumble, she would ask him to clarify and he would shout at her and speak louder.

213. She also testified that she thought he had some memory loss, had difficulty making a decision and seemed somewhat paranoid. She attributes much of this to "a sense of loss of control of what was going on in the law firm".

214. She described that since the accident the Claimant is not as socially engaging and people do not seem to understand him so he is isolated at family gatherings.

215. In direct examination she was asked to talk about her husband prior to the accident. She said prior to May 3, 2004, that she and her husband were busy raising their children and with life. She said they were very involved in the community and they were busy building their house. She considered her husband to be very organized, energetic and ambitious. She said he could multitask.

216. She described that she was a stay at home wife and mother. She was very proud when speaking about their five children and their accomplishments. She described their youngest child as being 22 years of age.

217. When asked about their pre-accident activities, D described that her husband had a pilot's licence and he owned a Navaho twin engine aircraft which he piloted. She also explained they owned a 41 foot cabin cruiser and said that prior to the accident he used to drive this boat "all the time" and since the accident he has not used the boat. When asked by me when the Claimant had last flown the plane prior to the accident, she admitted it had not been for many years and said it was because the aircraft was old and needed certification.

218. D also stated that prior to the accident the Claimant used to be involved in swimming. That he "swam with the kids every night" in the pool that they had in the back yard. She also talked about his involvement with the Liberal party.

219. In terms of the division of labour in the home, D said "I ran the house and he ran the office". She did the outdoor chores and the indoor chores and he ran the finances.

220. D was asked whether they had any plans in terms of retirement and she replied that they were still "Living life large. We were still in university mode, supporting our kids in university. We hadn't really discussed retirement. Like, that was something somebody else did, old people did….We hadn't considered it".

221. This testimony is not unlike that given by the Claimant, that there were never any discussions or plans about his retirement.

222. The Claimant's expert Janice Landy, OT, who prepared a cost of future care report testified that when she met with the Claimant, his wife and son in 2005 she was told the original plan was supposed to be a seven year gradual transition of the Claimant's practice to his son and that the Claimant would remain in a semi-retirement consultant role with his son's firm. When Ms. Landy's evidence was put to D during cross-examination she denied that it happened and further denied that anyone in the family was aware of such a plan. She said there was never a discussion about retiring, "it wasn't something that we thought about. We thought we were young".

223. During her examination in chief, D was asked when her son came from Alberta to practice law with the Claimant and whether he had come to eventually take over the father's law practice and she answered "No, I don't think he even considered it - considering knowing the relationship between him and his dad". She indicated that the Claimant is a very domineering person, although he admired his children, they were his children and he considered himself "far superior" to his son. She said he saw him maybe as an assistant, helping out, but that was it. She said his role was basically "to carry his dad's bags".

224. There is a recurrent theme of the Claimant being dominating and controlling with his children and with his wife which came through D's testimony. My general impression from the evidence is that the Claimant was an intimidating man when it came to his family. For example, D was asked whether she agreed with the ambulance attendants who noted that the Claimant was "obese" and she replied "no, I am not going to agree with that on the record, I'd get in so much trouble if he saw that, but I guess that might be true".

225. During cross-examination D testified she thought her husband was in good health. She would nag him about his weight since his father died of a heart attack, but he assured her that he had passed his medicals for his pilot's licence. She took that to mean he was in good condition. It was pointed out to D that the Claimant had not renewed his pilot's licence after it expired in 1992. She did not know why he did not renew the licence and stated she thought it was because the plane's engines were not certified.

226. With respect to the house they were building, D said they took out the building permit in 1994 and around the year 2000, they decided to speed it up. At the time of the accident she was optimistic and her husband had promised her that the house would be finished very soon. She testified that just before the accident occurred in 2004 the matter was further complicated because they ran into issues with the Municipality of Coquitlam which, without notice, expropriated some of their property and put a roadway through it which resulted in legal action.

227. D said presently the project is slowly coming together, the roof is on and the glass is in and she says the Claimant's role is still managing the project and dealing with the City on the expropriation matter. She said he has been able to do the drawings on the computer and order the glass, but she said he did things at a much slower pace.

228. D admitted that the Claimant monitors their investments and trade stocks on the computer, an activity he did both before and after the accident.

229. D testified that the Claimant has come to an acceptance of his "lack of ability to converse with people and to think things through and whatever".

230. She does not know why he limps. She says as far as she knows the MRI of the knee was normal, but she says "there must be a medical reason why he does it, why he is so immobile. Otherwise, he is a very proud man and he would be walking properly".

231. D was asked if his fatigue had improved and she said, "I cannot give a definitive answer. He is not as active…but I actually think on the whole that he has come to accept his position what has gone on, and therefore he doesn't fight it as much. So maybe he is not as fatigued, but he is certainly not the ball of energy that he was".

232. When D was asked whether she thought the Claimant's problems were getting worse, better or staying the same, she answered she thought that they had actually plateaued. She did not articulate why she felt this. She did say that she herself has learned to accept that she cannot understand some things he says sometimes and it doesn't cause her the frustration that it did initially. "I just want him to be the way he used to be".

D as a Witness

233. I have no doubt D was a very good wife and mother; however, I had a number of difficulties with her testimony.

234. D described the functioning of her husband prior to the accident in a very broad time frame that spanned decades and she did so in very general terms. I found her view of her husband as being seen through a veneer of unrealism.

235. Despite the fact he was 64 years old at the time of the accident, she spoke about the notion of retirement having no relevance to their lives because they were "young". She described their lives as being involved with their children who were in university even though their youngest child at the time was 22 years old and their older children had already achieved academic success and had careers. She testified about the Claimant's activities prior to the accident suggesting he was doing things that he, himself, testified he had not done for years.

236. During cross-examination D was argumentative, unresponsive and vague especially when the inconsistencies between her testimony and sworn Affidavit were put to her. To the contrary, during her examination in chief, she tried to portray a confident, clear recollection of the history.

237. I place little testimonial reliability on the evidence given by D, especially her description of the Claimant as it pertains to the issues that are before me. I find the man D talked about was the Claimant of years past and not of the actual man he was at the time of the accident.

The Claimant's Son - S

238. The Claimant's son, S, gave evidence about his childhood and the activities he was involved in with his father which included swimming, boating, and researching cars.

239. In terms of his education, S graduated from Bonn's University in 1997 and in 1998 he went to Law School at the University of Alberta and was called to the bar in 2000.

240. S moved to British Columbia and was called to the BC bar in June of 2003. Prior to that time he would come out from Alberta and assist the Claimant with various trials and chambers applications. Upon moving to BC, his role at his father's firm was doing research and litigation support and accompanying his father to trials. He also argues a few motions.

241. S said he also did clean-up around the firm; he literally meant janitorial work. He described himself as a bit of a clean freak and he thought his dad's staff at his firm was less than acceptable in terms of their desk cleanliness. He explained he was helping to supervise the staff as well as helping managing and keeping the office organized. S described his father as very organized, but he stated he wanted to delegate some of those duties. S said he saw his role in the firm as "updating systems and all that kind of stuff".

242. When asked what his plan was when coming to the firm, he testified that in his mind he had a ten year plan and "that's kind of what I had understood. I think my father had come close to articulating that as well". He thought during those ten years he would become

comfortable enough to run major trials. His expectation was that, since his father never wanted to retire, if his father passed on he would have the practice. At the time of his father's accident S was making $5,000 a month as an independent contractor.

243. S also expressed that it was pretty clear that he had to prove himself to his father, yet, he felt "pretty frustrated because, of course, you can't prove yourself independently, without actually having the opportunity to prove yourself". Therefore, at the time of the accident he was hoping that his father would give him conduct of some files to run independently. He did not really know when that was to happen.

244. S described the Claimant as very smooth and gracious in social situations prior to the accident. An example of this he gave was of hearing his father speak at his sister's wedding in 2000, some four years before the accident.

245. S was asked to describe his father's physical health prior to the accident and he said "he was fat" but he was "full of energy". He said he was not aware of any physical problems that his father had before the accident. Nor did he think he had any issues with his cognitive and emotional state of well being.

246. S described the Claimant's work ethic of being that of "a machine". He described him as being very focused, though he said he would get a little tired of being on his feet at trial for a week at a time.

247. With respect to the Claimant's ability to conduct trials, S testified that he attended two trials with his father in the months prior to the accident and that the Claimant "was great". The Claimant's performance at these two trials is referenced later in this decision by way of the evidence of two collateral witnesses, KW and RH.

248. In terms of the Claimant's practice, S described the period around 2003 to 2004 as being a tough time running a plaintiff personal injury practice. He said that it was not easy to settle files with ICBC because there was very little negotiation and "everything was going to trial".

249. S testified about how the Claimant dealt with staff before the accident. He described that when he was in high school back in 1993 his father had a very competent staff. He then said that from 2002 to 2004 the Claimant had a group of employees that were continually letting them both down. S said his father would not write them up for underperforming. S gave an example of an employee who had worked with the Claimant for 14 years and who was underperforming. S said the Claimant would get angry at her and then in the same breath offer to put her in her own office or buy her a car as an incentive to work.

250. S said just before the accident the law firm had what he called "some major HR issues, no doubt about it".

251. S described that the Claimant's staff were "not improving because they did not have the

capability. They were not the caliber of the staff that he had previously enjoyed throughout his career previously. And so – and there was a shift, I saw that as a paradigm shift and I still see it as a paradigm shift. We don't rely on staff to be as good as they used to be and so I've put more lawyers and computers in to deal with that".

252. This evidence clearly suggests that the Claimant's philosophy towards dealing with staff was quite different than S, who came across as somewhat judgmental and self-righteous when speaking about some of the staffs' personal life choices. S also explained that some of the Claimant's staff, including a highly valued bookkeeper, left the firm after the Claimant's accident.

253. It is my impression that the staff issues created tension not just in the firm but also between the Claimant and his son both before the motor vehicle accident and after.

254. With respect to the motor vehicle accident, S testified that after the accident he went to Eagle Ridge Hospital and saw his father who looked a little startled. He said he also appeared pale, rubbed his left knee and had big bruises across his "big belly". He believed his father returned to the office pretty soon after the accident. He said it certainly would have been within the week.

255. S also confirmed that the Claimant was able to go out with him and buy a new vehicle within a few weeks of the accident.

256. S said it was over the course of 2004 that he thought the Claimant regressed as he noticed he started to slow down, he appeared to be tired all the time and he was having trouble with things that before he did with relative ease. He noticed emotional changes and changes to his demeanor which he described as being flat. He said "if he wasn't flat he was angry". He was having difficulty making decisions and if S made one for him, he usually considered it to be wrong.

257. For the first year after the accident he testified that the Claimant was doing nothing physically. S also observed the Claimant having difficulty going up the stairs at the office noting he had also put on a lot of weight.

258. S described that in the early stages after the accident the Claimant spoke softly and it became very hard to hear him and when he was asked to speak louder he would get frustrated and yell. He said prior to the accident the Claimant could articulate and modulate his voice appropriately and it could be quite powerful when he needed it to be.

259. S said the Claimant is now much more withdrawn socially and that his speech is much different than it was before the accident. S described the Claimant as being the most difficult to understand in the evenings when he is tired.

260. S said after the accident, though the Claimant came to the office he was not doing any work on client files, so he had to step in and take over. S said the first year was tough, "I was under a lot of stress dealing with ICBC became a lot meaner…I was fighting with the old staff because they say things like, well, that is not the way [the Claimant] does it". S described "it was an HR crisis", even though his father did not view it that way.

261. S testified that after he took over the Claimant's practice in 2004 the Claimant would come to the office and would spend most of his time on the internet and working on his house drawings.

262. S said he was able to speak to him about file related materials and he would give some advice here and there. S said at times the Claimant seemed okay, especially in the mornings but that in the afternoon he became fatigued and would start slurring his words more.

263. S believed the Claimant accepted that he cannot help him out with the practice and that the Claimant came to this understanding in 2007. S was then trying to encourage him to get active in the practice again because S felt he was the bestselling feature for the firm and it was his business plan to keep the Claimant integrated as part of the firm.

264. In his direct examination S was asked whether since the accident the Claimant had worked on personal injury matters and he said, "I have asked for his help, but, he usually wants to talk about…our atomic watches…cars…and that is pretty much our relationship".

265. This testimony was inconsistent with the evidence he gave when I asked him a similar question, whether the Claimant, as a senior lawyer, was helpful as an advisor despite not handling any files directly. When I asked that question, S said he still goes to his father to seek his wisdom on professional conduct issues and practice advice, strategies on files and "he is totally capable of providing me with guidance and wisdom". He qualified this by saying he is not very efficient after an hour as he gets tired.

266. S said his father is still a genius with numbers and is his "backup guy on accounting, cross-reconciliations, that sort of thing. But on dictation and correspondence, reading documents, communicating with anybody apart from his most trusted staff members,…he is ineffective".

267. S says that until about 2008 his father was trying to work on his personal litigation files, which involved lawsuits over the house, but nothing was really getting done. S then realized that he would have to take it over, which he did, and hired some outside lawyers to work on it.

268. S said that after the motor vehicle accident he closed 100 files between May and December 2004. He said while his father did not work on these files at all, "he just wanted to make sure the clients were happy, that was his only concern".

269. During cross-examination S was asked whether he consulted with Dr. Monks or any other medical expert, about whether or not his father's condition would improve to the point he would be able to return to practicing law prior to deciding to buy out the practice. He responded it was not a relevant consideration for him and that he did not need to do so. That being said, he admitted having read Dr. Cameron's report of August 2004 in which he indicated that patients with mild traumatic brain injuries tend to improve in the first two years following an accident.

270. Somewhat gratuitously he offered the following testimony,

> It was pretty clear to everyone in the family that if he was going to continue to armchair quarterback practice when he wasn't in a condition to do so, would not be in my best interest or the firm's best interest or his best interest. He was always the guy in control. I mean, that was evidenced by the fact that when I did work for him, what I was doing? I was doing janitorial. I was being his you know, for lack of a better word, I was being his lackey, so you can't expect - he couldn't expect - and I think he accepted this, and this is why we had to do the deal. It was to be something that I - if it was an opportunity for me to be successful, I had to jump in there with both feet, be responsible for the decisions that I made with those files, and he had to be separated to some degree…
>
> So in that context, and I am sorry I didn't understand your question, but, yes the doctor's report says wait and see. But you have to appreciate from me and [my father's] perspective, the money does not happen by itself. And the way that we worked before had to fundamentally change. And that would be created through a new agreement and the responsibilities are divided.

271. Ultimately, S provided what I believe could be the real reason for his taking over the practice as quickly as he did when he said that he and his father were having considerable difficulties with staff following the accident and through Christmas of 2004, describing the situation at the firm as "a civil war".

272. S explained that after his father's accident there were basically two bosses because he was running the practice and his father was still the owner of the firm, "and I had employees I didn't think a lot of anyways that were making it difficult for me to get the work done I needed to get done to make the firm successful".

273. A great deal of hearing time was spent trying to have S explain the terms of his purchase of the Claimant's firm. In his direct examination S said he had to pay $100,000 down and the balance of $1 million was payable over time. When asked how he paid the $100,000 down payment he answered "I think I had extra money sitting around". Under cross-examination he was asked the simple question of whether he wrote a cheque for the $100,000 and he answered, "I don't recall the method of payment. I don't think I paid cash…but I probably paid some form of value…".

Q. Yesterday, you said you had $100,000; I had some money lying around, and so I paid $100,000. Now are you telling us it was some different consideration?

A. I don't know. I had lots of money in 2005, so I don't know where it came from. It probably came from my law corporation.

Q. I didn't ask you that. I asked you did you write a cheque….and I don't care where it came from.

This banter went back and forth and I had to advise the witness that he was being defensive and evasive about a matter that was not contentious in nature. The Claimant's son continued to provide fairly non-responsive answers, save and except trying to explain that he was not being evasive and finally stated, "I gave him my $100,000 either as a cheque or a bank draft or some form of benefit I already paid. I just can't remember".

274. Ironically, it was the Claimant who subsequently easily explained this non-contentious issue. He explained the deposit was made up of a credit of $100,000 he gave to his son for his efforts in running the law firm after the accident until the end of 2004. I would have thought the Claimant's son would have known this since he testified it was he who came up with the terms of the purchase.

275. During cross-examination S admitted his father is still a lawyer licensed to practice in British Columbia.

276. S was then asked whether his father has been cited in breach of the Law Society's rules for failure to attend a practice review scheduled for March 27, 2009. Rather than simply answering yes or no, after I had already ruled I was not going to allow Respondent's counsel to ask about the merits of any such complaint, S refused to do so stating, "I am reluctant to comment on anything that is kind of in process. I think I can give you the explanation and that is it". This lead to the following exchange with counsel for the Respondent:

Q. I didn't ask for an explanation…

A. Well, I am giving you one.

Q. I don't want one. I am just asking are you aware?

277. Finally, I had to say to S that I took his response to mean he was aware that his father had been so cited.

278. Under cross-examination S was asked whether he knew why his father was requested to attend the practice review meeting. Again, rather than answering yes or no to the question, he attempted to go into the merits of the matter, trying to explain something that wasn't yet asked of him, and not relevant to this hearing.

279. During his direct examination S referred to two trials that he had run with the Claimant just prior to the accident. As previously noted, when asked how his father functioned at the trial of C v S, he answered "He was great". S also talked extensively about some of the evidentiary issues, his view of the jury's verdict and conduct of opposing counsel during that case.

280. When asked to recount the facts of that same case during cross-examination, S curiously replied, "I don't think I would have a good recall of the facts in the case at this stage, it was done in 2003". When confronted about the judge's criticism of his father during the C v S trial S then insisted on being given the opportunity to explain the facts and theory of the case, which he had testified moments before he could not do because of the passage of time.

Discussion – The Evidence of S and the Claimant

281. As set out, the Claimant and his son gave evidence regarding the sale of the Claimant's law practice. During this hearing an issue arose regarding the documentation related to that transaction.

282. In May 2009 an Examination for Discovery of the Claimant was conducted during which he was asked whether he had any documentation setting out the terms of the sale of his practice to his son. He responded that he thought there was, but could not recall for sure. A request for such documents was made at that Examination.

283. Prior to this hearing there were a number of applications brought by Respondent's Counsel for production of the documentation pertaining to the sale of the Claimant's practice to his son including a request for the agreement between them.

284. Various Orders were made including an Order that the Respondent was to also deliver Interrogatories to the Claimant pertaining to the sale of the business.

285. Counsel for the Respondent did deliver Interrogatories and asked specific questions about the documentation relating to the sale of the Claimant's law practice including the terms of the sale, financing, copies of any agreements between them and/or their respective companies regarding the transfer.

286. In response to the Interrogatories, the Claimant swore an Affidavit that can best be described as nonsensical deposing,

> The contract between us, in my view, is the entirety of the scope of the agreement.

287. No agreement or contract was appended to the Affidavit or delivered.

288. On the first day of the hearing, an unexecuted agreement between the Claimant and his son was produced and it was eventually entered as an exhibit.

289. This agreement was referred to in cross-examination of the Claimant's son. He was asked why the document was not produced earlier, and he stated that he thought that the agreement had been delivered to the Claimant's counsel. He claimed that he was very busy and there were a lot of documents being requested and it was an oversight.

290. Counsel for the Respondent argued that the draft agreement never existed before it was produced and faxed to Claimant's counsel, an original was never signed and the purported sale of the Claimant's practice to his son was "bogus".

291. I will deal with the sale of the practice later in these reasons, but I refer to it now mainly because of the Affidavit sworn by the Claimant in the days before the hearing. That Affidavit was sworn before the Claimant's son.

292. I find it astonishing that S would have allowed his father to swear such an Affidavit without appending the agreement when that was specifically being asked for especially given it was S who drafted the agreement. I commented on this at the time S gave his evidence and he said that he thought the written contract had been delivered to his father's counsel. However, that does not explain what was deposed to by his father and the response is strikingly as nonresponsive in tone as is the content of the Affidavit itself.

293. I did not find S forthcoming with information asked of him even though it was not unreasonable to assume he had intimate knowledge of the topics being asked.

294. As outlined earlier, S was asked to recount the facts of the C v. S trial he conducted with his father prior to the accident. He first stated he did not recall them. Subsequently, it became very clear under cross-examination he had knowledge of the facts of the case.

295. At times, S appeared to be being deliberately obstructive with questions that were not contentious in nature and simply could have been answered with a yes or no.

296. A great deal of time was spent during this hearing trying to get S to explain his purchase of the Claimant's practice. I found him to be evasive and almost flippant when dealing with the issue.

297. I place little testimonial reliability on the evidence given by S.

298. With respect to the Claimant, I found him to be more reliable than both his wife and his son. Subject to the difficulty of trying to understand him at times because his voice would drop, he did have a good memory of most of the historical content asked of him. This included the details of the sale of his practice to his son and the theory of the cases that he was working on for G. Company in regards to the house. He also had a good grasp of the status of the construction of the house before and after the accident and his involvement with it.

299. The Claimant showed a clear ability to vet the questions asked of him and was even able to correct Respondent's counsel regarding misstatements of medical reports quoted to him and also a misquote from an Examination for Discovery that was put to him.

300. The Claimant's perception of his health, retirement and role in his law firm was all very positive. I accept that he believed he had no health problems and that he perceived himself to be strong, buoyant and good counsel. Whether his self-perception was realistic is a different question. I also accept he was not a person who wanted to show any sign of weakness after the accident.

301. However, the Claimant's credibility was not beyond question. He has a convenient lack of memory of matters he really didn't want to speak about, such as the C v. S trial. He was as vague about what legal work he did at his office after the accident as he was in the Affidavit he swore a few days before this hearing. For whatever reason, he did not want to discuss his post-accident income.

302. As noted at the beginning of these reasons, the idea of litigation strategy kept surfacing throughout the evidence in this case and what is puzzling me is that the Claimant and, to some extent his son, do not seem to realize that this is not just another personal injury claim they are prosecuting, but it is a claim in which they are in fact giving sworn testimony.

303. Illustrative of this is the fact the Claimant did not seem to appreciate problems posed to his credibility by giving inconsistent testimony. Nor did he appreciate, or perhaps care, about the inconsistencies in his evidence regarding his cost of future care stating, "It depends on my lawyers" because we are not "at that stage of the game".

304. There is a further factor which is very relevant to the Claimant's credibility. Without exception he was cooperative with the medical experts retained by his counsel who tested and interviewed him for the purposes of this litigation.

305. When he attended Dr. LeBlanc for a neuropsychological assessment at the request of the Respondent, his results were invalidated because of his lack of effort and because he would interject with incorrect or irrelevant information. The reason for this conduct was never explained by the Claimant. His lack of effort speaks to his attitude and approach towards this litigation.

306. The Claimant's focus on the litigation strategy seems to encapsulate every aspect of this lawsuit which, to use his words he describes as "a game". With that in mind I cannot help but question the veracity of his evidence overall.

BS – The Claimant's Cousin

307. BS is the Claimant's younger cousin and is a retired RCMP Constable who started working for the Claimant's son as a private investigator in June or July 2008. At the time of this hearing BS was 55 years old.

308. BS testified that in the years prior to the motor vehicle accident, he would see the Claimant once or twice a year when his parents came to the lower mainland to visit. He would make

a point of taking his parents to see the Claimant and his wife. BS said that after October of 1999, when his father passed away, until the summer of 2008 he did not have any interaction with the Claimant.

309. BS said that when he saw the Claimant in the summer of 2008 he could not engage him in conversation and he found the Claimant to be "out there". He described his speech as low. That being said, he admitted he only sat with him for 10 minutes on that occasion.

310. Since the summer of 2008 BS has seen the Claimant on two occasions. Once at a social function in September 2008 he found the Claimant to be hard to hear when he spoke until the Claimant's son told him to speak up, at which time "then I understood what he was asking about". The second interaction was at the firm's staff Christmas party in December 2008. BS said he made a point of not sitting by the Claimant at that function and did not have any conversation with him.

311. Under direct examination BS stated the Claimant does not work at the law firm and so he has no interaction with him there.

JS – The Claimant's Cousin

312. JS is married to BS. At the time of this hearing she was 52 years old. Her evidence is that since getting married in 1982 she has seen the Claimant around a dozen times. She says she found the Claimant intimidating and did not speak with him much other than being polite. She described him as being physically fine and that she did not notice any issues with his speech.

313. JS said the first time she saw the Claimant after the accident was at a family gathering in the summer of 2008. She did not speak with the Claimant. She observed him trying to get into the hot tub at that visit and thought he moved like he was 95 years old.

314. JS next saw the Claimant at the Christmas party in December 2008. She described sitting directly next to the Claimant and found him difficult to understand because his voice was low and he mumbled.

PC –Employee

315. PC, a 40 year old legal assistant who started working at the Claimant's firm in 1992 was called as a witness. PC's employment with the Claimant ended in 1995 when she gave birth to her first child. PC returned to work for the Claimant's firm on one occasion in the summer of 2003 putting together a factum. In March 2009 PC resumed working for the Claimant as his personal assistant.

316. PC gave evidence about the Claimant's physical status between 1992 and 1995, describing him as being physically active. She described his voice as being clear and strong. She also described him as being mentally sharp.

317. As outlined above, PC returned to work for the Claimant in March 2009 and since that time has been working with him "doing his book work and whatever assignments he gives me". She described these assignments as including banking and routine correspondence.

318. When asked to describe any changes she has noticed in the Claimant since returning to work in 2009, as compared to when she was there between 1992 and 1995, PC described the Claimant as having gained weight and that he moved slowly and shuffled when he walked. She also described him as being easily fatigued.

319. PC states the Claimant is very good with numbers but that she has observed he has difficulty finding words at times when he is speaking. She also described his handwriting as "not legible like it once was".

ML - Employee

320. Also called by the Claimant was ML, a paralegal who worked with the Claimant's firm from 1989 to 1993 when she left the firm to raise children. ML returned to the firm on a part-time basis in 1996.

321. ML continues to work part-time and described her duties as "issuing Writs. That's my job".

322. ML testified that she did not notice that there were any changes in the Claimant's health or functioning from what she observed back in the late 1980s and early 1990s as compared to how he was in 2004. She did clarify that there was a period of time in 2004 that she described as "close to the accident" where she was away for six months on leave.

323. ML said that since she returned to work at the firm, albeit she gave no definitive evidence as to when that was, she noticed that the Claimant had problems with his right leg. She described his speech as being very low and slurred. She also says he has trouble finding words and appears to fatigue quickly.

324. ML also said that prior to the accident the Claimant had a "loud voice" and now "I can barely hear him. She said it is difficult to converse with the Claimant because he slurs and "his voice is very low". She also said "he grapples for words". He'll talk about something and "not be able to pick out a word…He called me on a couple of occasions somebody else's name, he had never done that before".

325. ML also mentioned that on the date of the hearing the Claimant was having a problem putting the zipper on his jacket together and that she had to assist him to "put the two pieces together and pull it up".

326. She testified, both in direct and cross-examination that his difficulties seemed to be getting worse with time. During cross-examination she testified,

Q. Now from your observations Ms. L is it your view that [the Claimant's] condition is getting worse as time goes on?

A. It would appear to be yes.

Q. And we are talking about both physically and mentally.

A. It appears to be that way.

327. When asked, ML did admit that since the accident she has only seen the Claimant on occasion and further that she has not worked with him.

328. Under cross-examination ML admitted the law firm has become busier over the last years and has gone from a one man firm to a five man firm.

329. ML was not able to say in what capacity the Claimant's son was working prior to the motor vehicle accident nor could she remember if the firm had any other associate or contract lawyers working there at that time. When asked if the Claimant's son was a lawyer in 2003 she replied "I don't know what the status was then".

330. ML gave me the impression she was very uncomfortable being at this hearing. She appeared to be very apprehensive, nervous and guarded while she was giving her testimony.

GC – OFFICE MANAGER

331. The Claimant also called GC, who is the office manager and a claims analyst at his son's firm. GC described her work as including dealing with human resources issues, hiring staff and reviewing medical reports, researching and quantifying personal injury claims.

332. GC started working at the firm on October 18, 2005. Prior to that time she had been working as an ICBC Claims Adjuster between September 16, 1989 and October 6, 2005. In her direct evidence GC testified that while working for ICBC between 1992 and 2005 her job was to adjust the personal injury files prosecuted by the Claimant.

333. GC described that when she worked at ICBC she and the Claimant met once to twice a month at his office and would work from 8:30 a.m. until 12:30 p.m. trying to settle files. She estimated on average they would settle 15 and 20 files at each meeting. In between those office visits, she would communicate with him by telephone.

334. GC described the Claimant as being "stubborn…in many cases he [had] tunnel vision. It wasn't easy to deal with him, but I certainly never thought he had a cognitive problem". She described having many frustrating interactions with the Claimant and commented that he had a bad temper but that they had agreed when they started working on files together

that this would not result in verbal altercations.

335. GC never had any dealings with the Claimant on his files after the motor vehicle accident. She described that after the accident all calls were put through to the Claimant's son.

336. GC started working for the Claimant's son in October 2005. She described seeing the Claimant after starting her job there and noticing that he spoke in a low voice, "like he did not have enough breath to finish a sentence". She also said he appeared unsteady because he seemed to drag one leg. He had difficulty going up stairs. GC could not add much else regarding "cognitive or emotional-type issues" as she does not work directly with the Claimant and does not see him often nor is she aware of what he does.

337. GC admitted that in the summer of 2009 the firm was looking for associates and that the advertisement directed applicants to submit their resumes and applications to the Claimant. GC indicated she dealt with the applications herself.

338. Under cross-examination GC admitted that during the 12 years she worked on files with the Claimant many of them involved chambers applications, and that while she herself had no recollection of appearing at any of these hearings, she did get reports back from her defence counsel that the Claimant "was chastised quite a few times" by the presiding master or judge. GC agreed this was more the norm than the exception.

339. GC recalled attending at trial and having seen the Claimant chastised but she qualified her evidence by stating she had only attended the trial on one day and could not speak to whether that conduct continued for the duration of it. She also stated that she had attended many trials over the years and had seen various counsel chastised by the court.

340. GC also said that over this 12 year period she had handled approximately 2,500 files of the Claimant and only three went to trial.

341. GC had no concern regarding the Claimant's mental status when seeing his performance at trial.

342. I found GC to be a straightforward and credible witness in spite of being cross-examined regarding some sensitive personal issues.

LS – The Claimant's Younger Brother

343. LS is the Claimant's younger brother. At the time of this hearing he was 67 years old. LS has a PhD in engineering and mathematics and runs a company called Aegis Systems Company Inc. that provides information security.

344. In his direct examination LS testified that their mother died at the age of 81 and their father at the age of 79 from what he thought was a heart attack. He described their parents as mentally capable their entire lives.

345. LS described having lost contact with the Claimant after he finished university and moved to California and then to Montreal and eventually the Okanagan in 1989. He did remember spending a day with the Claimant in August of 2003 at his nephew's wedding and said he was "perfectly normal" at that time and, while he was overweight, he appeared physically fine.

346. He also remembered speaking with him on the telephone on one occasion in February 2004, when he asked the Claimant for direction on the drafting of a petition. He said the Claimant gave him "excellent advice" and directed him to a precedent on how to draft the petition.

347. LS next spoke with the Claimant on the telephone in June or July of 2004. During that conversation the Claimant told him that he could not help him anymore with his petition issue and that he should retain a lawyer. LS said this was a big shock to him as the Claimant had always been very helpful.

348. During that conversation the Claimant was able to tell LS what had happened in the accident. LS did not mention he was unable to understand the Claimant or that he noticed anything unusual about his speech.

349. LS testified that the first time he saw the Claimant after the accident was in the summer of 2008 when he spent 6 hours with the Claimant and his family in Vernon. LS described that when he saw the Claimant in July 2008 he had difficulty hearing him when he spoke as he felt he mumbled. He observed him to drag his leg when he walked and that he used the hand railing when going down stairs.

350. At the July 2008 meeting, LS described the Claimant as being able to think and seeming to have a good memory but not being able to put things together. He also said the Claimant did not seem to be able to carry on a lengthy conversation. He also described being shocked at how unkempt he found the Claimant to be.

351. Under cross-examination LS admitted that he believes the Claimant's memory is as good as his own. LS also stated the Claimant has good recall on the aspects of the topics that the two of them discuss but that he does not seem able to put the pieces together and again said he could not understand a lot of what the Claimant said due to his soft speech.

352. LS was a good witness. His observations of the Claimant's communication difficulties are similar to those exhibited by the Claimant at this hearing.

KW – Lawyer and former District Registrar & Registrar

353. The Claimant called KW as a witness. KW was called to the bar in 1983. In 1990 she was appointed the law officer to the Chief Justice and Associate Chief Justice. A few years later she became a District Registrar and then a Registrar of the Supreme Court. In 2001 KW returned to private practice. She says she has done two trials and numerous

Registrars' hearings since her return to private practice.

354. KW acted for the Claimant in 2002. KW's retainer was limited to acting for the Claimant on cost issues arising from a Registrar's assessment of an account for fees that had been challenged by his clients. She said "I'm not sure why they retained outside counsel". I also note this to be an unusual departure from his practice as the Claimant was being depicted as being a controlling lawyer who handled his own court matters.

355. KW said that at the time of her retainer the Claimant had an imposing presence. She thought "he was a force to be reckoned with". She also described him as having a temper that she did not want to be on the receiving end of.

356. She described him physically as a big man. She said he "sort of strode" when he came into a room and that he was an "in charge type of guy".

357. She said that "it is a bit difficult to actually follow him because he speaks quickly".

358. KW was instructed in late 2003 to help the Claimant with a special costs application the Defendant was bringing following the C v. S trial.

359. KW's evidence was in the days before the accident she spoke with the Claimant on the phone because they had the cost hearing scheduled. She said he appeared no different than he was when she acted for him previously in 2002.

360. A day or two after the accident she received a call from the Claimant's son and he told her the Claimant had been involved in the accident and that he was now running the practice and that if she needed anything she should speak with him.

361. KW then recounted having difficulty getting the correct information for the upcoming cost hearing from the Claimant's son and so she called the Claimant at home. During that telephone conversation she found the Claimant to be slurring his words and nonresponsive.

362. KW said she was left to try and deal with the Claimant's son on the cost issue and despite the fact he had acted as the junior on the trial, she found him to be "useless to deal with – he wasn't responsive".

363. The cost hearing occurred in July 2004. KW recalled she attended the hearing with S but did not think the Claimant was there, but she was not sure. She described doing the hearing without any input from the Claimant. In fact after her one telephone conversation with him at home, she had no dealings with the Claimant on the matter, although she thinks she may have spoken with him once about getting information from him for an Affidavit.

364. KW says that she was also retained after the accident to deal with an assessment of an account which was being challenged by one of the Claimant's clients. The Claimant had to be a witness at the assessment because he'd been at the mediation, where this matter

settled, prior to the motor vehicle accident. KW attended the assessment with the Claimant and described his evidence as, "not completely coherent, not flowing very well. It wasn't what you would expect a lawyer – how a lawyer would give evidence". She wasn't certain when this hearing took place but said "maybe the first year after the accident".

365. KW's last dealing with the Claimant was on an appeal she conducted for him regarding a matter involving his wife's company. KW described having been retained to assist the Claimant with the appeal and having been asked to review his factum which she described as "awful". She said the appeal was "supposed to be negligence against the City but the factum was mostly engineering evidence and this argument based on the engineering evidence – and I understand that X was an engineer at one point, but this seemed to be focused on engineering, not focused on the negligence issues".

366. While it was not clear whether the factum was written prior to the accident or after it, KW admitted it was her understanding that the Claimant did not do any legal work after the accident.

367. KW thought this appeal took place in 2006, but was not completely sure about the year. At that hearing the Claimant stood up before the Court of Appeal, introduced himself and said, "I've been in a car accident and I've had a head injury and she is here to make sure I don't make any mistakes".

368. KW admitted that she was unaware of the Claimant's legal capabilities before the accident. She had never been to court with him before she appeared with him at the Court of Appeal.

369. She continues to visit the law office for various matters, including political/social functions. She says the Claimant doesn't appear to be doing any legal work and that his son seems to be in charge.

370. KW described that the Claimant now seems to shuffle, to be "slumped" in his posture and out of shape. He also seems much quieter.

371. Under cross-examination KW admitted that in her experience having done many costs hearings both as counsel and as a Registrar, that she found it unusual that considerable time was taken during the C v. S trial with the court redacting the Claimant's expert reports.

372. KW also admitted she found it very unusual that Madam Justice MacKenzie in C v. S had asked to review the Claimant's submissions prior to them being delivered to the jury.

373. KW also admitted that on her review of the C v. S trial transcript it was clear Madam Justice MacKenzie was frustrated with the Claimant to the extent she made the following comments,

> X was responsible for the consumption of about five days of court time by the disarray of documentary evidence, the late applications to dispense

> with the jury and for production of documents on which privilege was asserted and the continuation in court of the plaintiff's examination for discovery.
>
> Significant work was generated at the 11th hour for counsel for the defendant by the very late service of reports.
>
> Nor did X intend to be difficult or confusing. He was not driven by anything other than his own standards of preparation and communications for this case. Those standards were inadequate here.
>
> The reasons for the difficulty and prolonged course of the trial can be summarized simply as due to: the nature of X's preparation, his failure to analyze and review the evidence, his lack of attention to Rule 40A requirements for expert reports and his failure and his lapses of communication with opposing counsel before and during the trial.
>
> What you X have been doing has been a jumbled-up mess throughout this trial.

374. When asked by Respondent's counsel, KW said she viewed the Claimant's performance at C v. S as "adequate". She also thought the trial judge was "super critical".

375. KW admitted that when she appeared before the Court of Appeal at the special cost application made against the Claimant, the presiding judges did not criticize the trial judge nor any of the strong comments she made regarding the Claimant and his conduct.

376. During her cross-examination KW also admitted she was aware the Claimant was running to be a bencher for the Law Society at the time of the arbitration hearing, but said she was somewhat surprised he got nominated.

The Respondent's Witnesses

FB – Body Shop Manager

377. The Respondent called FB, a body shop manager for Metro Motors Ltd., where he had been employed for 20 years. FB testified that he has known the Claimant since the 1980s as, "I used to do a lot of their work. They were famous for smashing cars up". He would also do estimates on vehicles owned by the Claimant's clients, "he's sent – I guess has had clients that I had to do their estimate for".

378. FB testified that over the years he met the Claimant four or five times and he found him to be arrogant, hard-nosed and aggressive.

379. FB testified that after the May 2004 motor vehicle accident the Claimant asked him to strip apart his vehicle and do an estimate on it. He said this discussion took place over the telephone. FB described their conversation as "normal…straight forward and business-like". FB found the Claimant to be coherent, and nothing unusual about his speech.

380. From his review of the work order and invoice FB said that he billed the Claimant for the estimate on May 11, 2004 and the telephone conversations with the Claimant took place prior to that date.

381. FB testified the Claimant called him a day or two later and asked him to remove the black box from his vehicle and return it to him which FB did. FB said he had two or three telephone conversations with the Claimant around this time, but not on the same day. Again, he did not notice anything unusual about the Claimant during these conversations.

382. FB said over the course of his work this was just the second time he had been asked to remove a black box. He didn't know why the Claimant wanted the black box removed.

383. After his dealings with the Claimant in May 2004, FB never had occasion to speak with the Claimant again.

384. Under cross-examination FB was asked to describe the Claimant's height, weight and age. When it was suggested to FB that he really did not remember the Claimant it was obvious FB was uncomfortable and he responded "I do recall. I just don't want to insult him; that's all".

385. FB admitted during his cross-examination that he did not remember all the details of his conversations with the Claimant after the accident but he remembers him telling him to do the estimate and to remove the black box. He also could remember the technician who did the work and which bay the Claimant's vehicle was in when the work was done.

RH - Lawyer

386. The Respondent called RH, a female lawyer, who was called to the bar in 1987. RH testified that she has done hundreds of trials involving personal injury, both with and without a jury. Her practice also includes family law and plaintiff personal injury cases.

387. RH testified that at the time of this hearing she was aware that the Claimant was running to be a bencher with the Law Society of British Columbia.

388. Prior to the accident, RH was acting as defence counsel on approximately 30 ICBC personal injury files in which the Claimant was representing the Plaintiffs. Included in these were two personal injury jury trials conducted by the Claimant, with his son junioring him. The first of the two trials, C v. S commenced in October of 2003 and ran for four weeks. The second was a three week jury trial which commenced in February of 2004.

389. RH's evidence is that the Claimant was lead counsel on the trials and, with the exception of two applications that his son spoke to, the Claimant conducted the trials in their entirety.

390. Although she spent 7 weeks in trial with the Claimant, most of her evidence was about her observations of the Claimant in the first trial, C v. S. RH testified that during that trial there were as many as twenty defence applications and that with the exception of a couple of them, the defence was successful.

391. These applications included matters involving the Claimant's filing of late medical reports, redacting much of the inadmissible evidence in his experts' reports and his putting forward evidence before the jury that was objectionable.

392. As I cautioned counsel, this arbitration hearing was not about reviewing the Claimant's practice habits or if there was success or failure at trial and it is with this in mind one has to consider the evidence.

393. The Claimant's position is that he was a very high functioning lawyer who had no physical or cognitive issues at the time of this accident. Bearing that in mind, I find the observations made by RH are relevant and probative as to his status in the months prior to the accident. RH said the Claimant appeared unprepared for issues to be addressed. She said he had no trial plan. She said many of the Claimant's arguments "made no sense to me whatsoever and certainly didn't address the issue at hand". This description flies in the face of the evidence given by the Claimant's son.

394. RH also testified "that [the Claimant] regularly arrived late, appeared disorganized. When he arrived in terms of locating what was going to be relevant for the day…" and that the trial judge expressed her frustration about the Claimant's tardiness in court.

395. RH said the Claimant didn't seem to have any prepared notes for questioning or cross-examination which resulted in the trial having very little rhythm or flow to it.

396. RH said that it was difficult to understand the Claimants arguments:

> My recollection is that, on several occasions, she (the judge), expressed frustration with Mr. S for a number of different things. She didn't understand what he was arguing…., and I didn't understand what he was arguing at several of the pre-trial applications that were made. And that comment continued throughout the trial. She didn't understand what he was arguing, what he was trying to say. And she expressed what I saw as frustration with [the Claimant's] lack of organization and proper presentation of the case.

397. RH said when she had the second trial with the Claimant in February 2004 that she "felt like I was going down the same path again". She said it did not flow at all and that there were the same problems with putting in evidence that was objectionable. She stated, in

terms of "general presentation, there was no improvement, discernable improvement that I observed in [the Claimant's] presentation".

398. RH when asked during cross-examination if she knew whether the Claimant had any physical problems, other than his appearing to be out of shape, stated the only thing she remembers is the Claimant complaining about his back being sore. She described that he appeared slumped over the podium in the courtroom. Again, she described that he shuffled when he walked and dragged his feet along the ground such that he made an audible noise. She says she specifically recollects this because she finds it very annoying when people shuffle their feet.

399. With respect to the Claimant's ability to communicate, during cross-examination RH testified,

> Q. [the Claimant] was able to enunciate his positions?
>
> A. No, it - went beyond that in the C v. S trial because there were - his own Plaintiff didn't understand the questions he was asking from time to time. Madam Justice McKenzie didn't understand the arguments he was making. They made no sense.
>
> Q. Well - I am not asking you about your observations of how the arguments went, the content of it. I am talking about verbally, you could hear him and understand him, is what I am trying to ask you.
>
> A. Well in C v. S - I do have a vague recollection that there were times when either he was making submissions to her Ladyship or either I can't remember exactly the circumstances, but there were times or occasions where he would either trail off or say something that, you know nobody understood so - he would be asked to repeat it or what do you mean.
>
> Q. And that was a rare event in the seven weeks of trial that you - seven weeks or so at trial?

RH replied that it occurred several times over the four weeks of the C v. S trial.

400. When RH was asked to explain what she meant by his voice trailing off she said,

> Well, there was I recollect that - what is more vivid in my memory he would start --I will give you a prime example, and I have got notes. It is too bad I don't have my notes [here] because I could give example after example. He would be given his response to an argument on a particular point and he would start with words that were a sentence fragment and then go to another line of thought which was a sentence fragment to another. So following that was almost impossible because he never completed his first thought or the first sentence and did not complete the

> second one or the third one. That was something that happened a lot. And it was just frustrating to try and figure it out what he was actually - what the point was because you dealt with all these sentence fragments - that is more what it was. It was very difficult to understand.

401. Claimant's counsel then asked RH about the Claimant's "actual ability to speak" and she admitted that he could enunciate his words.

402. RH's evidence is that in her years of practice prior to the C v. S trial, she had never seen a judge request to see a draft submission to the jury and then take the better part of a day to review the submissions and make redactions to them before they were made to the jury. RH also testified that despite the redactions, when it came time for the Claimant to give his submissions, some of what the judge redacted crept back in such that objections had to be raised when he was making his address.

Discussion Regarding Collateral Evidence

403. Claimant's counsel argues the collateral witnesses called are important as they provide a clear picture of the Claimant's level of function before and after the accident.

404. In my view, the Claimant's choice of collateral witnesses, especially the office staff and his two cousins, is of limited relevance given the temporal context of their evidence.

405. The evidence of PC is of limited value as she worked for the Claimant almost a decade before the accident and then did not have any dealings with him until she was hired back by the firm in 2009 to be his personal assistant. Her evidence is relevant regarding her observations of the Claimant in 2009 but I find limited value in her comparisons to his function then as to when she last worked with him in 1995.

406. Similar comments can be made about the evidence given by ML, who herself was absent from the firm around the time the Claimant had his motor vehicle accident. It appeared from her evidence that she had limited contact with the Claimant both before and after the accident given the very limited nature of her job.

407. GC, the office manager, dealt with the Claimant extensively in the years prior to the motor vehicle accident as an ICBC adjuster. She had no dealings with the Claimant after the accident at all and did not see him until she was hired by the Claimant's son in October of 2005. Since being hired she has had very limited interactions with the Claimant.

408. The Claimant did call one other witness, DC, whose evidence I have not outlined. She is the 28 year old daughter of the office manager, GC. At the time of this hearing DC was employed at the firm as a legal assistant. DC gave evidence about seeing the Claimant once in court over a decade ago when she was a teenager. She stated she found him to be impressive when she saw him in trial and she outlined her current observations of him. With respect, her evidence is of no value.

409. From the evidence given, it is clear the Claimant has worked with many staff over the years and any number of them could have been called to outline their observations of him.

410. It is also clear from the evidence that the Claimant had other lawyers with whom he worked, and who were not called as witnesses, including DC, who commissioned the Affidavits sworn by the Claimant and his wife in 2006. Surely over the course of what has been described to be a very successful career that spanned some 30 years at the time of the accident, there could have been any number of lawyers whom could have been called to give their observational evidence of the Claimant.

411. KW was called by the Claimant and while she was a good witness, she was not a great historian. She could not remember when she was first retained by the Claimant stating it could have been 2001, 2002 or 2003. She finally decided to settle on the year 2002. KW only had a rough estimate as to when she acted for the Claimant on the assessment of an account and when she appeared with him at an appeal.

412. Despite being unclear on the above, KW was very clear in stating she had one telephone conversation with the Claimant a day or two after the accident where she found him non-responsive. She also said that she may have had one meeting with him after the accident to put together an Affidavit but she did not think the Claimant attended a hearing with her in July 2004.

413. With respect to the Claimant's family members. The Claimant's cousin and his wife had no dealings with the Claimant between 1999 and the summer of 2008, some four years after the motor vehicle accident and so, again, their evidence is of little value.

414. The evidence indicates the Claimant has five adult children and while his son, S, was called none of the other children, including his youngest son who lives with him and works for him, were called.

415. RH, who was called by the Respondent, dealt with the Claimant extensively as opposing counsel on 30 of his personal injury files prior to the motor vehicle accident. Between October 2003 and February 2004 RH spent almost seven weeks in trial with the Claimant. RH was able to remember in great detail the court cases and, in particular, the day to day functioning of the Claimant as a lawyer. I found her evidence very relevant to the issues in this case.

Analysis

416. The above evidence provides a contextual framework that assists me in determining the weight to be given to the expert evidence regarding whether or not the Claimant suffered a mild traumatic brain injury.

417. When addressing the nature of the Claimant's injuries, I place significant weight on the records and evidence taken in closest proximity to the accident.

418. The Claimant did not report hitting his head to anyone, including Dr. Monks who saw him the next day. He denied having struck his head when he saw Dr. Stewart months later. At this hearing the Claimant testified that he must have hit his head on the side window because it was broken. I find his testimony in this regard to be a reconstruction rather than an actual memory of what occurred.

419. That being said, I am mindful that the medical evidence indicates a person can suffer a concussion even without a direct blow to the head and that a concussion is normally accompanied by a loss of or altered state of consciousness and post traumatic amnesia.

420. Dr. Cameron saw the Claimant about six weeks after the accident. He diagnosed a mild concussion based primarily on the history given to him by the Claimant. That history included the fact that the Claimant's last recollection prior to the accident was of seeing the vehicle coming towards him and his first recollection thereafter was being out of the vehicle feeling dazed and confused. The Claimant told Dr. Cameron that he did not recall the airbag deploying or the window breaking. A similar history was given to Dr. Schmidt.

421. Dr. Cameron interpreted this history to mean the Claimant had post traumatic amnesia and either a loss of or altered state of consciousness at the accident scene

422. I find the history the Claimant gave to Dr. Cameron and Dr. Schmidt is inconsistent with the history he gave to Dr. Prout, Dr. LeBlanc and Dr. Semrau. He told those experts that immediately after the accident, he undid his seatbelt, he recalled the seatbelt coming off and he got out of the vehicle.

423. As far as not recalling the airbag deploying, Dr. Schmidt testified that this is not really relevant to the diagnosis of a head injury as the deployment happens instantaneously on impact and it is not uncommon for someone not to remember such an event.

424. With respect to the Claimant's history, it is important to note that none of the experts were told that at the scene upon getting out of his vehicle the Claimant was able to phone his wife, as he deposed in his Affidavit, and instruct her to bring the video camera to the accident scene to preserve the evidence. This conscious action and apparent lack of concern about his injuries after the accident seems to mitigate against him having suffered a serious head injury. In cross-examination, both Dr. Cameron and Dr. Schmidt agreed that if the Claimant was able to make intelligent decisions immediately after the accident his ability to do so would be an important part of the history and relevant to any diagnosis.

425. Dr. Prout conducted a neurological examination in June of 2008. He took a thorough history and reviewed all the medical reports and clinical records, including the MRI film. I was impressed with Dr. Prout's testing and analysis as set out in two reports and his testimony.

426. Dr. Prout concluded based on his interview of the Claimant and the medical records that any period of post-traumatic amnesia would have been very brief and that "it is **possible** …that [the Claimant] did suffer a very mild traumatic brain injury, but in my opinion this

is not certain".

[emphasis added]

427. Dr. Prout said some of the non-specific symptoms reported in the first month after the accident, including "fatigue and a feeling of being foggy" and difficulties with concentration could be interpreted as the effects of a mild concussion or could be related to pain issues from other injuries and psychological effects after an accident and they are not diagnostic as a post-concussion syndrome. He also noted the Claimant "did not develop **typical symptoms** of dizziness, photophobia, phonophobia or headaches commonly seen in the setting of a post-concussion syndrome".

[emphasis added]

428. Dr. Prout also found that any relationship between a possible mild traumatic brain injury and the Claimant's current persistent cognitive difficulties questionable and very "atypical course" following a mild traumatic brain injury. Like Dr. LeBlanc, he found the Claimant displayed "extra pyramidal findings which include hyphonia (soft speak), decreased facial expression and a general slowness of movement bradykinesaia". He also noted the Claimant reported "micrographia" (a tendency for the handwriting to peter out). Dr. Prout says **these symptoms are commonly seen in degenerative conditions**, such as Parkinson's disease or other related neurological degenerative conditions.

429. An MRI of the brain completed on June 29, 2004, disclosed that the Claimant had "age related cerebral white matter".

430. In his report dated June 2, 2008, Dr. Prout opined "the differential diagnosis would include a subcortical brain dysfunction secondary to deep ischemic changes as a result of small blood vessel ischemic disease. This diagnosis would be supported by the MRI findings noted in 2004 that were consistent with deep ischemic changes (small vessel disease) and were not consistent, in my opinion, with the effects of traumatic brain injury".

431. Dr. Prout testified these deep ischemic changes are associated with the high risk factors the Claimant had, which include high cholesterol and a pre-diabetic condition. He said these ischemic changes do not look the same on an MRI as the effect of a traumatic brain injury. Dr. Prout suggested that a longitudinal follow up by repeating an MRI of the Claimant's brain and a repeat neuropsychological test would help make a final diagnosis.

432. Dr. Prout saw the Claimant in September of 2009, just after the Claimant testified at this hearing. Dr. Prout found that there had been some mild deterioration in his neurological function that included his cognitive functioning and deterioration in his writing. He also noted the Claimant displayed more speech difficulties and he found him at times difficult to understand.

433. Dr. Prout went on to analyze the different aspects of the Claimant's speech difficulties, articulation versus the dysphasia, which is the process of language rather than the articulation of speech. His evidence is that each is an indication of a dysfunction of either the subcortical or cortical part of the brain and that the Claimant displays abnormalities in

both of these brain structures.

434. He noted that Dr. Semrau in May 2009 and Dr. Stewart in February 2008 both commented on the Claimant's difficulty in articulation and expressing himself. As noted above, this was certainly not a clinical feature observed and recorded by Dr. Monks and Dr. Cameron when they saw the Claimant in the days and months after the accident when one would expect these to be prevailing if caused by injury in the accident.

435. Dr. Prout noted that the repeated MRI performed on November 5, 2008, also suggested a minimal increase in the findings, which he described as small vessel ischemic changes in the subcortical white matter, as well as a slight atrophy of the brain which affects the midline structure of the brain which is consistent with aging, as well as the underlying conditions.

436. Based on his testing and the MRI evidence Dr. Prout found, "It is my opinion that the neurological abnormalities displayed by [the Claimant] can in no way be construed as the result of any effects of a concussion (if such an injury did indeed occur) sustained in the accident of May 3, 2004".

437. Dr. Jocelyn LaPointe, Neuroradiologist, called on behalf of the Respondent and Dr. Douglas Graeb, Neuroradiologist, called by the Claimant, both were of the opinion that the MRI abnormalities are consistent with micro vascular cause (ischemic disease) and not with what would be seen with a traumatic brain injury.

438. Having heard and reviewed all of the expert evidence regarding the MRI findings, I do not accept Dr. Cameron's proposition that there is a "possibility" that some of the lesions found may be related to a non-hemorraghic shear injury sustained from a head injury. Dr. Cameron is alone in this suggestion and he himself points out that these lesions were not located where they are usually seen after a shear injury.

439. The MRI findings, although relatively glossed over by the Claimant's experts except for Dr. Schmidt, are significant because, as noted by Dr. Prout and Dr. Schmidt, they identify a potential differential diagnosis. That diagnosis being the possibility of an underlying neurological disease, such as dementia. Dr. Schmidt testified that was "the biggest concern the MRI gave me".

440. Dr. Schmidt said he would defer to the expertise of the neuroradiologist and neurologist to interpret the MRI.

441. In terms of the neuropsychological tests, the medical experts agree that such testing does not diagnose a brain injury but rather assists in measuring cognitive changes that may result from a brain injury or other neurological changes. The results of such testing are predicated on the patient giving honest effort. The Claimant failed to do this with the first battery of tests that Dr. LeBlanc administered. His lack of effort is disclosed by separate validity tests administered by her as part of the standard testing protocol.

442. Dr. Schmidt did not conduct these separate validity tests two out of the three times he tested the Claimant.

443. Dr. Schmidt also testified that in cases such as this one, the history reported by a person is very important. He stated:

> The other **critical factor in this case from my standpoint is the history. If the history does not really show a sudden change in his functioning, as it appeared to me that it did,** then that is a very strong indication that something happened at that point, and the only something we have is the accident.
>
> On the other hand**, if the history that I have is wrong,** and I say this **because you are in a better position to evaluate this than I am because you have more evidence**, so if it were to transpire that he did indeed start **showing periods of progressive deterioration that was steadily getting worse** and this accident happened then the deterioration continued after the accident, then that would be an argument against the accident having caused that. That would appear to be just an instance along the course of deterioration.
>
> [emphasis added]

444. Dr. Schmidt is correct, I do have more evidence to evaluate the Claimant's ability to function before and after the accident than the medical experts had.

445. In terms of the immediate post-accident history given to the medical experts, it all came from the Claimant, his son or wife.

446. At this hearing, there was other relevant testimony given regarding the Claimant's history. This evidence came from a number of lay witnesses.

447. KW, the lawyer who was doing some work for the Claimant around the time of the accident, spoke with him by phone a day or two after the accident. She testified that he seemed nonresponsive and to be slurring his words. These observations stand in complete contrast to the observations of FB, the body shop manager who dealt with the Claimant on numerous occasions in the past and spoke to the Claimant on the telephone at least three or four times in the days following the accident. He described the Claimant as being quite normal and coherent in his speech and instructions.

448. LS, the Claimant's brother, also had a telephone conversation with the Claimant shortly after the accident and his evidence is that the Claimant was able to explain all the facts of the accident. LS did not make any mention about the Claimant's ability to communicate during that conversation being impaired, a problem he did notice in 2008 and which he described at this hearing.

449. Perhaps more significantly, Dr. Monks who saw the Claimant four times in the first month after the accident did not make note of, nor at this hearing give evidence indicating that he observed any problem with the Claimant's ability to communicate.

450. Dr. Monks did, based on the Claimant's self-reported complaints of head fogginess, fatigue and lack of mental sharpness and on his review of the various expert reports obtained by the Claimant, opine that the Claimant might have had a very mild brain trauma. Dr. Monks' personal observation of the Claimant was that he, "just didn't seem quite his regular self". This in and of itself is a very vague finding.

451. As indicated, I find it surprising that had the Claimant presented in the manner in which he did at this hearing, and, if that manner was a complete deviation as alleged from his pre-accident clinical presentation, Dr. Monks would have noted it and would have immediately undertaken some clinical investigations in May of 2004 or soon thereafter to identify the underlying issue.

452. In terms of how the Claimant was functioning as a lawyer prior to the accident, I acknowledge the evidence indicates he had a successful law practice. While I am not prepared to comment on the Claimant's approach to practicing law, I do not, in the face of the evidence, accept his son's characterization that he was functioning "great" in the trials he conducted in the months prior to the accident and which were referred to during this hearing.

453. I find the evidence given by RH of her courtroom observations of the Claimant prior to the accident very relevant. It mirrors many of the symptoms and complaints that are now being alleged to have occurred since the accident.

454. In terms of the Claimant's physical status, RH said the Claimant complained about having a sore back and noted his posture as being slumped. She also described that the Claimant shuffled when he walked which is a description used by many of the Claimant's witnesses to describe his post-accident status.

455. RH also described that the Claimant had problems communicating. She described his questions as being unorganized and further that his own client did not, at times, understand what he was asking. These matters were also commented on by the trial judge.

456. During cross-examination RH said there were times when the Claimant's voice would either "trail off or say something that you know nobody understood…so he would be asked to repeat it or [asked] what do you mean".

457. RH testified the Claimant would not respond to the argument in sentences but use sentence fragments and then would change to a completely different thought which made him very difficult to understand and follow. Similar observations were made by Dr. Stewart and other clinicians as well as by the Claimant's brother when he saw him in the summer of 2008. Indeed, these observations are similar to those I encountered with the Claimant at this hearing.

458. Another reason RH's evidence is important is because it is part of the Claimant's pre-accident history which only surfaced at this hearing and was never made available to any of the medical experts.

459. Her comments are in stark contrast to the position put forward by the Claimant that he was high functioning, organized and had no issues whatsoever with his ability to communicate and process information.

460. I prefer the evidence of RH regarding the Claimant's pre-accident functioning over the evidence tendered by the Claimant.

461. The medical evidence indicates that age related mental decline is usually a fairly gradual process that takes place over a long period of time. I accept the evidence of Dr. LeBlanc and Dr. Semaru that cognitive memory dysfunctions in the early stages are usually not noticed by individuals or their family members or if noticed are attributed to things such as stress and fatigue.

462. Claimant's counsel submits the Claimant's current cognitive and speech difficulties are caused directly by the mild traumatic brain injury he suffered in the accident. This position is predicated on the assumption that the Claimant had no pre-existing issues.

463. Claimant's counsel submits and, in fact, put to each of the medical experts called that the Claimant was a highly functioning lawyer at the time of the accident and that it was only after the accident that he started to have problems which left him the way he presented at this hearing.

464. I find that the pre-accident characterization of the Claimant's level of functioning by his wife unrealistic. She seemed to be in complete denial that he was aging and her evidence appeared to be of the husband she remembered from years gone by and not the man he was at the time of the accident.

465. I am equally not convinced of the accuracy of the Claimant's son's pre-accident description of the Claimant, especially given he observed him over the course of four weeks in the C v. S trial.

466. The Claimant, who was a proud, controlling man also refused to acknowledge any previous difficulties including the normal frailties of life such as tiredness, memory loss or word finding difficulties which all experts, including Dr. Cameron, say that most people over 50 years of age have. Indeed, the Claimant's younger brother, LS, admitted to some memory issues himself which he attributed to aging.

467. In addition to the problems I find with the Claimant's reporting to the experts and the irregularities with the neuropsychological testing, I find that the evidence tendered at this hearing depicts a picture of a man who is showing subjective and objective symptoms of cognitive difficulties that appear to have progressed over time since the accident

468. The experts agree that when a person has a mild traumatic brain injury, their symptoms will be worse just after the trauma and eventually improve. In fact, Dr. Schmidt testified that 85% to 90% of people who sustain a mild traumatic brain injury go on to full recovery. Dr. Schmidt described that people with more serious concussions also improve but then their symptoms plateau.

469. With respect to the MRI scans, Dr. Lapointe's opinion is that between 2004 and 2008 when the Claimant had the MRI scans, there was a progression of ischemic lesions, as well as brain atrophy. Dr. Graeb opined that the findings showed "no significant change".

470. I have carefully reviewed the evidence and reports of both neuroradiologists. I was impressed with the careful analysis made by Dr. Lapointe, not just in her meticulous counting of the lesions and her measurements of brain atrophy, but also how she put her findings of the MRI into the context of the Claimant's medical history, his age and the medical evidence presented at this hearing.

471. Generally speaking, Dr. Lapointe testified that everybody's brain ages and that with age you expect a certain amount of atrophy and degeneration in the brain. Dr. Lapointe testified that with a normal aging brain one would expect one lesion per decade. Therefore at age 70, when the Claimant's second brain MRI scan was done one would expect to find 8 to 10 lesions. Dr. Lapoint counted 50-53 in the scan. Dr. Graeb found 30. This evidence does not support the position that the Claimant was extremely healthy for his age.

472. I accept Dr. Lapointe's opinion that the Claimant is having some progressive brain degeneration and that the cause of the progression could be dementia or a number of other processes that are taking place. As Claimant's counsel stressed in his argument, none of the doctors were able to put a definite label or diagnosis on what that process might be, but it is clear from the evidence and I find that this degenerative process is not from an alleged mild traumatic brain injury sustained in the accident.

473. That diagnosis is corroborated by the repeat neuropsychological testing done by Dr. LeBlanc in 2008 which showed an ongoing "decline in a variety of cognitive abilities, including memory, language executive function and attention all indicating the presence of dementia". I prefer her evidence to that of Dr. Schmidt on this point.

474. The progression of the Claimant's degeneration is not only depicted in the medical evidence, it is something admitted to by the Claimant at this hearing. He testified that he thought he was getting better for two years but that his symptoms and fatigue then got worse. He also testified that his memory is getting worse and that he is having increased difficulty writing and printing, all of which was noted by Dr. Prout and Dr. LeBlanc in their examinations and supports their opinions of ongoing degeneration.

475. ML also testified that she is of the view that the Claimant's functioning, both mentally and physically, is getting worse.

476. As an alternative, Claimant's counsel submits that if the Claimant was suffering a degenerative neurological condition, it has been triggered and accelerated by the accident. The Claimant however did not lead any evidence to support that theory.

477. The Respondent's expert, Dr. Leblanc, testified that studies indicate that a minor head injury or concussion does not accelerate a degenerative neurological condition. Dr. Prout's evidence is that there is no way the Claimant's neurological abnormalities are accounted for by the effects of a minor concussion.

478. After considering all the evidence, including the pre and post-accident history regarding the Claimant's ability to function and the impressive analysis and reports by Dr. Prout and Dr. LeBlanc, which I prefer over that of Dr. Cameron and Dr. Schmidt, I find that if the Claimant did sustain a mild traumatic brain injury in this accident, it was very minor and its effects were transient.

479. I also find that the symptoms alleged by the Claimant at this hearing are not related to that injury but are the result of a progressive neurological disorder that was not triggered or accelerated by the Claimant's accident injuries.

480. In summary, the Claimant's evidence does not persuade me on a balance of probabilities that he suffered a permanent mild traumatic brain injury or post-concussive syndrome after the accident.

Damages

Non-Pecuniary Damages

481. While most of this hearing was consumed by submissions and medical evidence related to the issue of whether or not the Claimant suffered a mild traumatic brain injury, there was also some evidence lead regarding the physical injuries he suffered in the motor vehicle accident. These included bruising to his chest, injury to his left knee and soft tissue complaints related to his wrists, neck and back.

482. With respect to his bilateral wrist complaints, the Claimant saw Dr. Gropper, Orthopaedic Surgeon, in December 2006 who sent him for x-rays. No report was tendered by Dr. Gropper. I accept the evidence given by Dr. Stewart that there was likely no bony injury involved.

483. MRI scans and x-rays taken of the Claimant's left knee showed some early osteoarthritis but no definite diagnosis was ever made.

484. I accept the evidence of Dr. Stewart that by December 2006, the balance of the Claimant's physical injuries and limitations related to the motor vehicle accident, had substantially improved.

485. The evidence also indicates the Claimant had some psychological problems after the accident including depression, anxiety and issues affecting his ability to sleep. Dr. Cameron indicated early on that he thought the Claimant was depressed however, when the Claimant saw Dr. Schmidt in December 2004, he was found to be not depressed.

486. After having reviewed all the evidence and considered the cases and submissions of both counsel, I award the Claimant $65,000 for non-pecuniary damages.

Income Loss

487. As outlined previously in these reasons, the Claimant submits that he has had to give up the practice of law because of the consequences of a mild traumatic brain injury and that but for the accident, he would have continued practicing law until at least age 75. The Claimant, by way of an actuarial report from Mr. Darren Benning of PETA Consultants, estimates his past and future income loss to age 75 to be approximately $1,200,000.

488. The Respondent submits "no amount ought to be awarded to the Claimant with respect to past and future wages based on the injuries sustained in the accident".

489. With respect to the Claimant's work/life plan, a variety of evidence was given. I was told everything from the fact that he was never going to retire to the fact that his plan had been to sell his law practice to his son and that this process was expected to take place over the course of seven years with the transition being on a gradual basis.

490. It is very clear from the evidence tendered the Claimant had a number of issues going on in his life both before and after this motor vehicle accident. He was involved in litigation surrounding the house he and his wife were building, he had some issues with the Law Society and, according to the evidence, he was showing signs of limitations in terms of his ability to perform as a trial lawyer.

491. I accept the evidence given by the Claimant's son that the practice of personal injury litigation was changing at that time. More matters were proceeding to trial and given the Claimant's performance at trial in the months prior to the accident I find that would have been extremely difficult.

492. I also accept the evidence given by the Claimant's son that there were staffing issues and firm management issues that were also becoming a challenge.

493. Having already found that if the Claimant suffered a head injury in this accident it would have been very mild and its effects would have resolved in short order and further that the cognitive issues reported after that time are related to a concurrent neurological disorder that was not triggered by or accelerated by this mild head injury, I do not accept the Claimant's assertion that the sale of his practice had anything to do with the motor vehicle accident. This was simply an option he chose at that time in his career.

494. Notwithstanding the fact that the sale of the Claimant's practice was for reasons unrelated to the motor vehicle accident, he did suffer some income loss associated with his accident injuries. As outlined above, I do accept given the Claimant's age that his accident injuries would have necessitated him taking some time off work. Having regard to the medical evidence and the testimony given at this hearing, some of which as I have outlined I question the reliability of, I am satisfied that the time off associated with the Claimant's accident injuries would have been for a maximum of one year.

495. Quantifying the Claimant's income loss for that one year period is difficult given the array of evidence that has been presented with respect to his historical earnings, income splitting and the nature of how he set up his business for tax purposes.

496. The evidence is clear that immediately after the accident the Claimant's son stepped in and assumed conduct of the running of the law firm. Everyone from GC, who was then working as an adjuster on files with the Claimant, to KW, who was acting as counsel for the Claimant, were consistent in that regard.

497. According to the accounting evidence tendered by the Claimant and the Respondent, the Claimant's pre-accident income, including the management fees and income attributed to his family members for tax purposes was:

- 2000 $488,325
- 2001 $95,072
- 2002 $271,254
- 2003 $370,786

498. The Claimant's 2004 income, which includes the work his son performed from May 2004 to January 31, 2005, when the Claimant was not working on any files, was $407,786.

499. The Claimant's evidence is that he compensated his son for the work he performed on his behalf from May 5, 2004 to January 31, 2005 (January 31st being the fiscal year end for the Claimant's firm) by way of a bonus of $100,000 which was credited towards the purchase of his practice, in addition to the annual salary his son was paid.

500. The Claimant's accountant stated the Claimant's average annual income from 2000 to 2004 was $328, 925. The actuarial evidence tendered by both sides; however, indicates the average to have been approximately $288,000. Having regard to this evidence and the discrepancies between it, I find the Claimant's average annual income to be $310,000. Had the Claimant practiced from February 1, 2005 to May 31, 2005 which is when I have already indicated his disability from this motor vehicle accident would have ended, he would have earned $103,334.

501. In total, I award $203,334 to the Claimant for his past income loss for the one year period

following the motor vehicle accident. This amount is comprised of the $100,000 bonus he paid to his son for the additional work he performed between May 5, 2004 and January 31, 2005 and the additional $103,334 the Claimant would have earned had he practiced to the end of May 2005.

502. With respect to the Claimant's functioning after that first year, when the residual effects of the motor vehicle accident were no longer a functional impairment, it seems based on the evidence he demonstrated a residual capacity to earn income. The Claimant's evidence is that he stopped practicing law because he could no longer do the trial work. The evidence also indicates the decision to sell the practice was made within months of the accident itself.

503. The evidence also indicates the Claimant has continued work on personal legal matters. He also has continued working on the building of his wife's home which has been an extraordinary process designing it and involved various contractors, tradesman, legal and municipal matters. The Claimant's evidence is that his house project involved multiple trips to Asia where he was also exploring business ventures. The Claimant's evidence is also that he has continued to manage his own finances and investments.

504. The evidence also establishes that in 2007, 2008 and 2009, after the Claimant's son paid off the purchase of the practice, the Claimant was paid $110,000 a year by his son's firm for consulting fees. The evidence also indicates the Claimant was running to be a bencher in 2009.

505. Having regard to all of the evidence, I do not find there is any evidence supporting any ongoing disability associated with the motor vehicle accident after May 2005 and in this regard there will be no award for future income loss or loss of income earning capacity.

Cost of Future Care

506. The Claimant has advanced a claim for future cost of care in the amount of $858,000.00.

507. The costs include the following:

a) One-To-One Rehabilitation Support Worker on a day-to-day basis;
b) In-Home Support 20 hours a week;
c) Speech and Language Therapy;
d) Physical Activation Program;
e) Psychological Consultation;
f) Transportation Assistance;
g) A Rehabilitation Case Manager; and
h) Financial Management.

508. The Respondent submits there are no future care needs based on the injuries suffered by

the Claimant in the accident.

509. The balance of the cost of care recommendations are predicated on the assumption the Claimant is suffering the effects of a mild traumatic brain injury stemming from this motor vehicle accident. That is not the finding that has been made here.

510. With respect, it is important to note that the "wish list" of care items outlined above and which are founded on the Claimant's report from Janice Landy, OT, include items that the Claimant has never sought by way of consultation with Dr. Monks, GP.

511. It is also important to note that despite having shown the financial ability himself to afford such services which might mitigate his ongoing limitations and improve his level of function, the Claimant has not presented any special damages for such services from the date of the accident to this hearing. In fact, it was clear from the Claimant's evidence he's not undertaken any of the services outlined above except for some limited physiotherapy for his knees.

512. Both the Claimant and his wife gave evidence that he continues to manage their finances and his own investment portfolio, as well as the building of their home which involves interacting with contractors, lawyers, services providers and the purchase of materials.

513. Having regard to the Claimant's evidence, which I have indicated had the most reliability out of the family; I find the items outlined to be far-reaching.

514. I do not accept that going forward he will have any care needs associated with the injuries he suffered in the motor vehicle accident. He and his family may, as recommended by some of the experts, benefit from some counseling, therapy or rehabilitative services to help them adjust to the cognitive issues he is suffering from but as these issues are not related to the motor vehicle accident injuries there can be no award for such services here.

515. Simply, these care items are related to medical conditions not caused by the accident. The Respondent is not liable to pay for them.

516. There will be no award for any of the care items sought by the Claimant.

In Trust Claim

517. I have reviewed the parties submissions regarding the in trust claim for the services provided by the Claimant family members in connection with the injuries he allegedly sustained in the motor vehicle accident.

518. The only evidence given regarding any assistance provided came from the Claimant's wife who described him as irritable and demanding after the accident.

519. Having regard to the findings outlined above with respect to the nature and extent of the Claimant's accident injuries, and given the evidence tendered by both the Claimant and his wife that she was the person responsible for the management and maintenance of their home, meal preparation and cleaning, I do not find the assistance she provided to him after the accident to be anything beyond what would be provided normally by a spouse out of love and affection.

520. I do not find the in trust claim to be supported by the evidence and in this regard there will be no award.

UMP Deductions

521. Section 148.1 (the wording of the Legislation as it applies to this proceeding) provides the following:

> "deductible amount" means an amount
>
> (a) payable by the corporation under section 20 or 24 of the Act, or recoverable by the insured from a similar fund in the jurisdiction in which the accident occurs,
>
> (b) payable under section 148,
>
> (c) payable under Part 7 or as accident benefits under another plan of automobile insurance similar to Part 7,
>
> (d) paid directly by the underinsured motorist as damages,
>
> (e) payable from a cash deposit or bond given in place of proof of financial responsibility,
>
> (f) to which the insured is entitled under the *Workers Compensation Act* or a similar law of the jurisdiction in which the accident occurs,
>
> (f.1) to which the insured is entitled under the *Employment Insurance Act* (Canada),
>
> (f.2) to which the insured is entitled under the *Canada Pension Plan*,
>
> (g) payable to the insured under a certificate, policy or plan of insurance providing third party legal liability indemnity to the underinsured motorist,
>
> (h) payable under a policy of insurance issued under the *Insurance Act* or a similar law of another jurisdiction providing underinsured motorist protection for the same occurrence for which underinsured motorist protection is provided under this section, or
>
> (i) payable to the insured under any benefit or right or claim to indemnity.

Amendment – Deductible Amounts

522. The original Arbitration Award referenced the total payment made by ICBC in the underlying tort proceeding as being $220,575.17. The parties have since advised and produced an Acknowledgement of Payment and Partial Assignment Agreement that indicates the total payment was $223,575.17. Initially, both parties indicated this amount would be deducted from the UMP award.

523. According to the Acknowledgement of Payment and Partial Assignment Agreement, the Claimant received $200,000 pursuant to the uninsured provisions and the Corporation also paid him an additional $23,575.17 representing "costs and disbursements incurred in Supreme Court of British Columbia Registry Action No.: M045096".

524. There is no issue that the $200,000 uninsured payment is an applicable deductible amount pursuant to section 148.1(a). The issue that has arisen is whether or not the additional $23,575.17 paid for the tort costs and disbursements is an applicable deductible amount.

525. The Respondent submits the $23,575.17 in costs and disbursements paid to the Claimant is an applicable deductible amount as it was paid "…on the understanding that it would be deductible on the amount of UMP available to the Claimant under the provisions of Section 148.1 of the Regulations".

526. The Respondent has also produced an Affidavit outlining some further deductible amounts including $551.36 in Part VII payments made on the Claimants behalf to various medical practitioners and $2,000.00 that the Corporation paid for production of accounting documents pertaining to this matter.

527. Counsel for the Respondent has indicated that further evidence on the above noted deductible amounts can be given by the handling ICBC Claims Examiner. Having regard to the nature of the additional deductible amounts I do not find such a hearing is required nor would it be a cost effective exercise for either party to undertake.

528. Claimant's Counsel submits that the $200,000 uninsured payment is the only applicable deductible amount under the Regulations.

529. The Claimant submits the $23,575.17 in costs and disbursements paid by the Respondent in the underlying tort proceeding is not an applicable deductible amount.

530. With respect to the $551.36 Part VII payment, Claimant's Counsel submits these are not Part VII payments made to or on behalf of the Claimant but rather these are MSP payments and in this regard that Section 88(6) of the Regulations provides the Corporation is not liable for any expenses paid or payable to or recovered by the insured under a medical, surgical, dental or hospital plan or law.

531. Claimant Counsel states that because the Respondent is not required to reimburse MSP for

the treatment received that there can be no deduction made.

532. With respect to the $2,000.00 paid by the Respondent for accounting documents, Claimant's Counsel submits this item is a disbursement incurred by the Respondent and is not an applicable deductible amount.

Determination

533. The underlying tort proceeding was founded in Section 20 of the *Insurance (Motor Vehicle) Act and Regulations* which addressed uninsured claims.

534. Pursuant to Regulation Section 105, the Respondent's liability for an uninsured claim is limited to, $200,000.00 "***for all claims under s.20…that arise out of the same accident, including claims for prejudgment interest, post judgment interest, and costs***".

535. As agreed by the parties the $200,000 paid pursuant to Section 20 is an applicable deductible amount.

536. The additional $23,575.17 paid as costs and disbursements by the Respondent was not and could not have been a payment pursuant to Section 20.

537. The only other way the $23,575.17 could be used to reduce the award would be if the payment fell within any of the other codified applicable deductible amounts.

538. The codified applicable deductible amounts are very clear and not one of them contemplates a deduction for the costs and disbursement associated with a payment made:

- pursuant to Section 20 or Section 24;
- paid or payable under Part VII;
- paid by the underinsured motorist as damages;
- paid or payable under a certificate, policy or play of insurance providing third party legal liability indemnity to the underinsured motorist;
- paid or payable under vehicle insurance, wherever issued and in effect, providing underinsured motorist protection for same occurrence for which underinsured motorist for protection is provided under this section,
- paid or payable to the insured under any benefit or right or claim to indemnity; and
- paid or able to be paid by any other person who is legally liable for the insured's damages.

539. On their own, the costs and disbursements paid do not fall under a payment of any "benefit or right or claim to indemnity".

540. I do not find the $23,575.17 paid by the Respondent for the costs and disbursements

associated with the underlying tort claim to be an applicable deductible amount pursuant to the UMP Regulations.

541. With respect to the payments made by the Respondent and submitted as being related to Part VII, the balance of these payments according to the printout appended to Mr. Lattanzio's Affidavit, are coded as "CL-MSP Payment" and appear to be payments made to MSP for visits with Dr. Monks and with an A.E. Manning. There is one payment coded as "CL-288 Payment" in the name of the Claimant. There is nothing in the materials indicating what this payment pertains to.

542. The Claimant submits that these amounts are not Part VII payments as they involve payments made to MSP. The Claimant submits his position is supported by Regulation section 88(6) which provides,

> The corporation is not liable for any expenses paid or payable to or recoverable by the insured under a medical, surgical, dental or hospital plan or law, or paid or payable by another insurer.

543. The Claimant ignores section 88(1) which provides,

> Where an insured is injured in an accident for which benefits are provided under this Part, the corporation shall, subject to subsections (5) and (6), pay as benefits all reasonable expenses incurred by the insured as a result of the injury for necessary medical, surgical, dental, hospital, ambulance or professional nursing services, or for necessary physical therapy, chiropractic treatment, occupational therapy or speech therapy or for prosthesis or orthosis.

544. The payments made by ICBC to the Medical Services Plan of British Columbia for the various medical visits listed are payments made pursuant to Part VII as medical benefits and are a codified applicable deductible amount pursuant to Section 148.1(1)(c). There will be a deduction of $551.36 for these payments.

545. With respect to the $2,000.00 paid by the Respondent to Claimant's Counsel for accounting documents pertaining to this matter, the Claimant submits this item is a disbursement and is not an applicable deductible amount. I agree.

546. The deductible amounts under the UMP Regulation are:

a) $200,000.00 pursuant to Section 148.1(a);

b) $551.36 pursuant to Section 148.1(1)(c)

Total Deductible: $200,551.36

Court Order Interest

547. Counsel have each calculated Court Order Interest differently. The Respondent submits, "Since the Claimant on the 1st of March 2007, received an amount ($223,575.17) in excess of his total past loss of income, we have calculated COI up to March 1, 2007….COI amount to $7,653.73…"

548. Claimant's counsel calculated Court Order Interest at $19,137.70.

549. Both counsel fail to take into consideration the payment of $200,000.00 made by the Respondent under Section 20 of the Regulations included claims for **pre judgment interest**, post judgment interest and costs. I am governed by this Regulation.

550. I found the total award for damages is $268,334.00. Of that, $200,000.00 is paid out of the uninsured fund. By operation of Part VIII, Section 105, the maximum payable under the section is $200,000.00 inclusive of court order interest. The effect here is to reduce the claim under UMP to $68,334.00. Since there is no way of delineating what the $68,334.00 represents, non-pecuniary or wage loss, for the purposes of determining this issue, I look at the relationship of income loss to the whole award which calculates to 75.8%. This means that of $68,334.00, 75.8% is made up of income loss. This represents $51,781.00 and the interest from the date of loss to date of the award is $8,332.98. So the total award is ($276,666.98 less deductible amounts pursuant to Section 148(1) of $200,551.36) the sum of $76,115.62.

The Award

551. The award shall be as follows:

	Amount
Non-Pecuniary Damages	$ 65,000.00
Past Income Loss	$203,334.00
Court Order Interest	$ 8,332.98
Total	$276,666.98
Less UMP Deductions	**$200,551.36**
Net Award Total:	**$ 76,115.62**

Costs

552. The parties agreed that this arbitration would proceed under the Supreme Court Rules, now the Supreme Court Civil Rules.

553. On June 18, 2009, about two weeks prior to the start of the arbitration, the Respondent delivered a formal offer to settle this matter for $50,000.00 new money plus costs and disbursements.

554. This offer was not accepted and the Arbitration proceeded on July 6, 2009.

555. Counsel for the Respondent submits:

a) Pursuant to the provisions of Rule 9-1-5(b) and (d) that the Respondent should be awarded double costs, because the formal offer was greater than the Claimant's net award which the Respondent calculates to be $49,861.20.

b) The Respondent also says that I should also factor into any award of costs the findings I made at this arbitration regarding the credibility of the Claimant and the members of his family that were witnesses.

c) The Respondent, as an alternative argument, submits that if double costs are not awarded to the Respondent, I should award the Claimant costs and disbursements up to June 18, 2009 (the date of the Offer to Settle) and the Respondent should be given the costs and disbursements from June 25, 2009. Although not articulated, I assume counsel is saying that the Offer to Settle was close enough that it should have been accepted to avoid an expensive hearing, or that the final award was very modest in relation to the Claimant's demand in excess of $1 million.

556. Claimant's counsel submits that the Claimant was successful in this arbitration. He calculates the net award to be $89,428.16 which exceeds the Respondent's formal offer. Under Rule 14(1)(9) of the Supreme Court Rules, the Claimant is entitled to his costs and disbursements of the arbitration proceedings. He further argues that there is no reason to depart from the awarding costs to the successful party.

557. As noted above, I have not accepted the parties' submission on the calculation of deductible amounts under Section 148(1) or their calculation of Court Order Interest. I have concluded that the net award to the Claimant be the sum of $76,115.62.

Discussion

558. "Costs awards are quintessentially discretionary" (2009) *Nolan v. Cary Inc.* 2 S.C.R. 678. I do not agree with Claimant's counsel's position that this case does not merit a departure from the usual order that costs must be awarded to the successful litigant.

559. Offers to Settle made by parties are relevant when considering costs. The policy behind the rule for Offers to Settle is to encourage both parties to assess the risk of trial and make early settlements. In relation to the Offer to Settle here, the Claimant was monetarily successful in this litigation and the question of entitlement of the Respondent to double costs does not arise. It is important to note that monetary success of the litigation does not equate to overall success as the Claimant was seeking well over $1 million but failed to prove the essential issue, whether his cognitive difficulties were caused by this motor vehicle accident. Should then the Claimant have accepted the Offer to Settle? As set out in my Reasons, I was critical of the Claimant as a witness, but I never found that he was

concocting his disability. He presented before me as one having cognitive difficulties, especially with his speech. This was supported by ample medical evidence presented by both parties. The issue of causation was not a simple one and had I concluded (as the Claimant argued) these problems had the genesis from the effects of the accident, the Claimant would have been undercompensated by the Respondent's offer. In the circumstances, it was not unreasonable for the Claimant to not accept the Respondent's offer.

560. As stated above, the monetary success of the litigation does not equate to overall success. Overall, the Respondent enjoyed greater success than the Claimant on the main issue litigated.

561. Other factors which I may consider in the exercising of my discretion regarding costs is the conduct of the parties. Here I refer to the conduct of the Claimant and not to any of his witnesses.

562. I have noted extensively in these reasons the Claimant's lack of candor as a witness and the fact that he demonstrated a lack of respect of the judicial process of which he has been a participant his whole career.

563. The Claimant was obstructive throughout the process in terms of production of documents. From November 6, 2008 to June 29, 2009, there were five interlocutory applications by the Respondent for production. In November of 2008 the Respondent was given an adjournment of the hearing because of the Claimant's failure to produce financial documents. Just days before the arbitration was to commence on July 6, 2009, the Respondent applied for another adjournment on the same grounds. I refused further adjournment and ordered the Claimant to verify documents and respond to Interrogatories.

564. As noted in these reasons, the responses provided by the Claimant to this order were incomplete, evasive and illustrative of his obstructive attitude throughout this litigation.

565. My criticism is directed to the Claimant and not his counsel as I feel he was doing his best in the circumstances to comply.

566. Considering all the factors noted above, and the findings outlined in these reasons, I award the Claimant 40% of his costs and all of his disbursements. No disbursement paid in the tort proceeding shall be recovered in the arbitration proceeding.

It is so awarded.

Dated this 28th day of October, 2011

Joseph A. Boskovich

Joseph A. Boskovich
Arbitrator