IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Morrow v. Outerbridge,***
2009 BCSC 433

Date: 20090401
Docket: S050245
Registry: Vancouver

Between:

Joshua Morrow

Plaintiff

And:

**Dr. A. Ross Outerbridge, Dr. Dave K. McKeown,
Interior Health Region, operating a public hospital
Under the name and style of Royal Inland Hospital,
and the said Royal Inland Hospital**

Defendants

Before: The Honourable Madam Justice Bennett

Reasons for Judgment

Counsel for the Plaintiff	J. E. Murphy, Q.C. & A. Price-Stephens
Counsel for the Defendant, Outerbridge	P. Willcock & J. Gibson
Date and Place of Trial:	October 6-10, 14-17, 20-23, 30 and 31, 2008 Vancouver, B.C.

[1] In 2003, Joshua Morrow was 19 years old and playing hockey in the Western Hockey League ("WHL") for the Kamloops Blazers. He had been drafted to play hockey by the Nashville Predators, a team in the National Hockey League ("NHL"). On February 5, 2003, Dr. Outerbridge operated on Mr. Morrow's shoulder and made a serious mistake by leaving metal anchors or screws standing proud (sticking up from the bone). This mistake ultimately caused significant damage to Mr. Morrow's shoulder, ending his hockey career and left him with debilitating and painful arthritis in his shoulder. The issues are whether Dr. Outerbridge is liable for damages as a result of his conduct, and if so, the extent of the damages. Dr. Outerbridge is the only remaining defendant.

[2] There is also an issue regarding the admission of the reply evidence given by Dr. Hawkins. While I admit the evidence of Dr. Hawkins, and would have his report marked as Exhibit 23, I will discuss the reasons for the admission of the evidence and the weight to be attributed to it when I discuss his report.

THE EVIDENCE AND FINDINGS OF FACT

[3] Much of the background of the case is not challenged, and indeed, an agreed statement of facts was filed dealing with a number of facts. There are some credibility issues to be resolved and I will address those as I review the evidence.

[4] In brief summary, in 2003, Joshua Morrow played hockey for the Kamloops Blazers in the WHL. He had been drafted by an NHL team, the Nashville Predators, in the 2002 draft. On February 5, 2003, Dr. Outerbridge operated on Mr. Morrow's shoulder to repair an injury suffered on January 23, 2003. The operation did not go

well, and Dr. Outerbridge left two anchors sticking out of Mr. Morrow's joint. These anchors frayed the cartilage that it came in contact with, and over a relatively brief period of time, severely damaged Mr. Morrow's shoulder. In June 2003, Dr. Pagnani, the orthopaedic surgeon for the Nashville Predators, identified the anchors as a potential problem. He noticed arthritis developing in Mr. Morrow's shoulder at that time. Mr. Morrow returned to see Dr. Outerbridge; however Dr. Outerbridge did not take any steps to address the situation. I add, parenthetically, that there is a credibility issue in relation to this, which, for the reasons below, I resolve in favour of the plaintiff. Mr. Morrow's hockey ability deteriorated, as did his personality. He was eventually traded to the Kootenay Ice, a WHL team in Cranbrook, B.C. This team cut him days before play-offs. This was the end of his hockey career. Dr. Bury removed the anchors in June 2004. Since then, Mr. Morrow has suffered serious consequences as a result of his shoulder injury, including an inability to work at certain jobs, an inability to study, an inability to participate in life as he knew it, as well as dealing with the demise of his dreams of playing professional hockey in such a sudden manner.

[5] I turn to the details of the evidence. The plaintiff, Joshua Morrow, was born on June 12, 1983, and is now 25 years old. When he was a young boy, his family moved to a 40-acre farm in Sherwood Park, Alberta. His grandfather, Mr. Nick Pentelechuk, who Mr. Morrow considers his best friend, lives about 40 kilometres northwest on a 1000-acre farm. His uncle and paternal grandfather own the farms adjacent to his parents' farm.

[6] His mother is a doctor of optometry and his father was a former professional hockey player in the farm leagues, and is now an optician. He has a sister, Whitney, age 22 who is in nursing, and a younger brother, Joseph, who at 15 years is playing in the WHL in Portland, Oregon.

[7] Mr. Morrow had a wonderful childhood. There was a lake on the farm and he could skate on the ice all winter. He spent a great deal of his time playing hockey, and, perhaps as a result, his academic work suffered. He did not perform well at school, which is born out both in his evidence and that of his mother, plus his academic records. For example, in Grade 7 he had failed one course and barely passed three others. His marks did not improve much over the years, and Mr. Morrow testified that he was particularly bad at Math and English. He has been tested vocationally and I will review those results later in the decision.

[8] While he struggled academically, he excelled at hockey. He was playing in the Alberta Junior "A" Hockey League at age 15, and was drafted by the Medicine Hat Tigers of the WHL. At age 15, he was called up to Medicine Hat during the 1998-99 season and played 12 games with the team. There is no doubt that he was a skilled hockey player to be able to enter both the Junior "A" league and the WHL at that age.

[9] Prior to the surgery in 2003, Mr. Morrow had a very good relationship with both his mother and his father. This relationship has deteriorated for reasons I will discuss later in these reasons. His grandfather, Mr. Pentelechuck described Mr. Morrow before the surgery as a "very fun-loving, happy, positive person".

[10] In the off-season, Mr. Morrow spent many hours on his off-ice training program as well as worked on his grandfather, Mr. Pentelechuck's potato farm. He worked stacking 100 lb bags of potatoes on palettes. He would stack approximately 500 bags of potatoes a day. He enjoyed farming a great deal, especially the September harvest. He chopped and piled wood for his grandfather and learned to operate farming equipment. Mr. Pentelechuck described Mr. Morrow as being a natural operator of farm equipment.

[11] When he was 16 years old, Mr. Morrow went to play for the 1999-2000 hockey season in Medicine Hat. He left home and was billeted with a family. He continued his education by correspondence courses. In his first full season he played 49 games, or just over half of the games. He was one of several 16-year-olds, and the playing time was divided amongst them. He was a defence man at that point, and was either in the number 5 or 6 position or the 7 or 8 position. This means he played either the third line or the fourth line. He was not nominated by his team as the Rookie of the Year.

[12] Mr. Morrow returned to Medicine Hat for the 2000-2001 hockey season. He played 46 games, as he missed part of the season due to contracting mononucleosis. In November 2000, Mr. Morrow saw a chiropractor for pain in his shoulder. In the medical records, it appears that a doctor in Medicine Hat told him he might have to have surgery. Mr. Morrow did not recall this. He also saw Dr. Gregg in Edmonton in 2000 regarding a shoulder problem. There is no evidence that whatever caused the problem then continued to be an issue for him.

[13] In spite of his lack of academic accomplishment, Mr. Morrow finished Grade 12 in 2001, at the appropriate time for his age.

[14] The next season, 2001 - 2002, Mr. Morrow ran into a few difficulties. The coach up to that point had been Rick Carriere, who Mr. Morrow got along with well. However in the 2001 - 02 season, Mr. Carriere took over the position of General Manager, and Bob Loucks coached the team. Mr. Morrow felt that Mr. Loucks did not give him a chance to show his abilities. Mr. Carriere testified that Mr. Loucks did not give Mr. Morrow more playing time because he did not think he deserved it. Mr. Carriere suggested to Mr. Morrow that perhaps he should look for a trade and get a fresh start. Mr. Morrow agreed, and a trade with Tri-Cities in Washington State was made.

[15] During the time he was with Medicine Hat, he was not named as a captain or assistant captain. Nor did he receive any team awards. Mr. Carriere described him as a very good skater, an aggressive player (which is considered a good quality for a hockey player), and that he had good puck handling skills. Mr. Carriere said that the main area where Mr. Morrow needed improvement was his ability to read and react to the play, or in other words, his “hockey sense”. A good player will know how to “read the ice”, in the sense that he will be able to see plays unfolding and know where he should be or where he should send the puck. Mr. Morrow lacked some of this ability.

[16] Mr. Morrow was traded to Tri-Cities in January 2002. In Tri-Cities, he became the number one defence man on the power play and killing penalties. (When the

opposing team has a penalty, the team is on the power play. When the situation is reversed, they are killing the penalty.) Mr. Morrow testified that an important aspect of being a team member was the ability to "stick up" for team-mates, especially on the ice. He said that one's team-mates had to know that they could rely on each other for support. Mr. Morrow felt he was very good at supporting his team-mates. He was not named as a captain or assistant captain, nor did he receive any team awards while with Tri-Cities.

[17] Although he was not the team fighter, Mr. Morrow could fight if necessary (also a positive attribute for a junior hockey player). This was considered all part of being a team player.

[18] Mr. Morrow was drafted by the Nashville Predators in 2002, in the seventh round at number 203. He had received a number of offers from universities before he played in the WHL, but knew he was not academically inclined and decided to play Major Junior hockey (WHL) instead.

[19] Mr. Rick Knickle is the scout for the Nashville Predators who identified Mr. Morrow as a potential draft pick. Mr. Knickle testified that he had seen Josh Morrow play about 15 times. He described him as a naturally powerful skater, he could hit and he could fight. He cited examples where he identified Mr. Morrow's "hockey sense" or ability to read the play, as developing. He described him as a "good team guy". He described Mr. Morrow as "low-key" and "respectful", both positive qualities in Mr. Knickle's eyes. Mr. Knickle had gone to interview Mr. Morrow in the Morrow's home in Sherwood Park. He had played hockey with Mr. Morrow's father.

[20] Mr. Morrow broke his ankle in 2002 and missed some of the season. He attended the Nashville Predator's rookie camp, but was unable to skate because of the broken ankle. Mr. Morrow was quite pleased with being drafted by the Nashville team. He was disappointed that he went in the seventh round, as he thought he would be picked higher, but felt he would fit in with Nashville, as it was a young team and promised a lot of opportunity.

[21] Mr. Morrow returned to Tri-Cities for the 2002-2003 season. However, once again, he faced a new coach and things did not work out as Mr. Morrow had hoped. He asked Tri-Cities for a trade, and was sent to the Kamloops Blazers in November 2002. He was very excited when he learned he was going to Kamloops.

[22] Mr. Morrow said that when he went to Kamloops, the team was very supportive of him. His billet family was very good, his team-mates were great and he felt spoiled. He was expected to play a rough, physical game. He could carry the puck out of his own end, support his team-mates and provide leadership. The town and the fans were very supportive of him. His ankle had healed, and there had been no delay to his start of the September 2002 season.

[23] Patty Meyer, Mr. Morrow's billet mother, described Mr. Morrow before the surgery as someone with a "bubbly" personality. He fit in very well with their family. He was very respectful and got along well with her husband and their 14-year-old daughter. The Meyer family enjoyed having Mr. Morrow living with them. Mrs. Meyer never had a problem with him. She said he was an extremely fast skater

and a very physical player. He never complained about bumps and bruises. He was always talking with her husband about hockey.

[24] Prior to the injury in January 2003, Mr. Morrow had complaints about his shoulder; however, I find that none of these had any part in the subsequent surgery and the damage to his shoulder after the surgery. In other words, the evidence does not support any pre-existing condition with respect to his shoulder.

[25] On January 20, 2003, Mr. Morrow and the team were in Medicine Hat, Alberta. He was practicing, and took a slap shot which caused considerable pain in his right shoulder. Mr. Morrow is right-handed. He was seen by a doctor in Medicine Hat, and then seen by Dr. Newhouse, the Blazer's team doctor when he returned to Kamloops. Dr. Newhouse referred Mr. Morrow to the defendant, Dr. Outerbridge, who was the team's orthopaedic surgeon.

[26] Dr. Outerbridge received his medical degree in 1986. He was qualified as an orthopaedic surgeon in 1992, and after a short stint at Lion's Gate Hospital in North Vancouver, B.C., he moved to Kamloops, B.C. in 1994. He has provided medical care to a number of athletes, and was the surgeon for the National Water Ski team for a number of years, and travelled with that team to a number of International sporting events. He trained in arthroscopic surgery at both the University of British Columbia, under Dr. Hawkins, as well as during his fellowship in Boston, plus additional courses over the years. The vast majority of his practice is arthroscopic surgery. He does not consider himself as a specialist in shoulder surgery, however, approximately 30-40% of his elective surgeries involve shoulders. Dr. Outerbridge

did consider himself a specialist in athroscopic surgery. Indeed, he felt at that time there was no one else in British Columbia as qualified as he to perform the surgery he performed on Mr. Morrow.

[27] At this point, I will define some of the medical terms used below: A dislocation occurs when the humeral head dislocates out of the front of the joint; the articular surface is the joint surface, the humeral head is the ball of the shoulder at the top of the humerous bone. The humeral head is kept in the socket (or glenoid) by stabilizers, including muscles, tendons and ligaments. The glenohumeral joint is the shoulder joint.

[28] Mr. Morrow saw Dr. Outerbridge on January 23, 2003. He had X-rays taken, and sent Mr. Morrow to Vancouver for an MRI. Mr. Morrow said that the Blazers paid for the trip to Vancouver, and for the MRI. The MRI ruled out a labral tear, which had concerned Dr. Outerbridge. However, there was also no evidence on the MRI of a Hills-Sachs injury, which occurs at the back or posterior of the humeral head, or a Bankart lesion, which is a tear in the labrum. Dr. Outerbridge decided to perform arthroscopic surgery so he could have a look at the shoulder, as he did not yet have a diagnosis.

[29] There was no evidence of any degenerative arthritis in Mr. Morrow's shoulder pre-surgery.

[30] Mr. Morrow testified that Dr. Outerbridge was not sure what the problem was, that he wanted to do surgery to have a look at the shoulder, and if possible, repair

whatever the problem was. Mr. Morrow agreed to surgery. He was very nervous about the surgery as he never had had surgery before.

[31] The operation was on February 5, 2003. Dr. Outerbridge booked two hours for the operating room. He was surprised to see that the shoulder was dislocated as he had anticipated a labral tear.

[32] In his medical report, and his evidence, Dr. Outerbridge identified two problems. The most significant problem according to his report, was the dislocation, which was described by Dr. Outerbridge as, “The anterior glenoid [sic, should say anterior labrum. This was corrected *viva voce*] was completely avulsed off the anterior and anteroinferior glenoid with signs of acute tearing”. He also noted that, “The posterior humeral head, however, showed an obvious Hills-Sachs lesion with some unstable flaps of articular cartilage. There was no significant impaction of the subchondral bone, but there were 3 or 4 flaps of articular joint cartilage which were quite unstable and just holding on by a few edges”. Dr. Outerbridge shaved these pieces of cartilage off. This brought him to bare subchondral bone, and he drilled the bone with a K-wire to allow blood supply and to promote growth of fibrocartilage over the bone. This is referred to as the chondroplasty. He said that this was not a classic Hills-Sachs fracture as the bone was not punched down or depressed, but the cartilage had been sheared off.

[33] Dr. Outerbridge said that because the articular cartilage had sheared off, he was aware that the bone underneath was quite hard. In his testimony, Dr. Outerbridge said that the shearing of the cartilage was a significant injury. He

did not make that comment about the seriousness of the Hills-Sachs in this operative report. This becomes significant later when I discuss the evidence of Dr. Day, Dr. Hawkins, Dr. Bury, and Dr. Leith.

[34] Dr. Outerbridge decided to proceed with the Bankart repair to the shoulder as there was an “acute inferior dislocation of the shoulder” and the shoulder was unstable. The surgery was video-taped and I have watched the video a number of times as the witnesses testified.

[35] Dr. Outerbridge described the surgery in both his operative report and in his evidence. He used what are referred to as mini-Revo screws (which are also referred to as anchors) and sutures. The anchor is inserted into the bone, and the suture, which is already attached to the anchor, is then used to secure the part that has avulsed or torn away. Dr. Outerbridge testified that the first anchor went in with no difficulty. He used a punch to make the hole in the bone for insertion.

[36] In his testimony, Dr. Leith opined that given what occurred subsequently, this anchor likely skived the bone and actually did not go into the bone, but went under the cartilage. Dr. Leith, on viewing the video, did not think that this anchor was well-seated. In any event, this anchor did not cause the difficulties. The second and third anchor did. Instruments were used to grab the anteroinferior (in front and below) joint capsule and labrum and suture it back to the edge of the glenoid with the first anchor.

[37] The second anchor bent the punch that Dr. Outerbridge was using. Dr. Outerbridge said he placed the punch guide in position, and used a mallet to insert

the punch into the bone. The punch slid along the bone under the articular cartilage, and the punch was bent because Mr. Morrow's bone was very hard. This had never happened to Dr. Outerbridge before. He advised the Court that his assistant told him that he performed the Bankart surgery 83 times before February 5, 2003. This is, of course, hearsay, as the billing records were not brought to court. However, I accept that he has done this surgery a number of times.

[38] Dr. Outerbridge had to use a drill to core out the hole for the anchor. He had never used a drill before when performing this surgery. He said there are two ways one knows that the drill has gone far enough: the first is that there is a laser mark on the drill so you can watch the drill advancing and the second is that he can feel when the drill has advanced sufficiently. The problem with this is that Dr. Outerbridge had the guide turned the wrong way and could not see the laser line properly. The other problem is that while Dr. Outerbridge had used drills before, he has never used one in this surgery, thus "feeling" his way to the proper place in the bone was not quite as comforting as it otherwise might have been. Dr. Outerbridge said that the drill was designed so it would not drill too far. However, after the hole is drilled, Dr. Leith said that the hole must be tapped, and Dr. Outerbridge did not have a tap.

[39] As a result, the hole was not deep enough and the second anchor did not insert into the bone fully. Dr. Outerbridge attempted to remove this anchor, but was unsuccessful. Dr. Leith noted that the removal was attempted with the suture still in place, which should not occur. Also he said that the removal instrument was used without the removal guide. The removal attempt was unsuccessful.

[40] Dr. Outerbridge then removed the suture and broke off the head of the anchor. His operative report says, “We…broke the head off this screw as we could not remove it and did not want it sitting proud on the articular surface”. Sitting proud means that the screw was sticking out of the bone. Dr. Outerbridge knew that the head of the screw, while under the articular surface, appeared to be sitting above the level of the subchondral bone. Dr. Leith noted that the anchor was left about 1 mm above the cartilage. This is the first serious mistake made by Dr. Outerbridge. I add that he acknowledges that what he did was not optimal, but said he relied on his judgment, and simply made a mistake. I will return to this theme, which is repeated often, later in the Reasons.

[41] With respect to the third anchor, Dr. Outerbridge’s operative report says this: “We then inserted a second screw just beside it and we were able to get this one buried in a much better position so that it was not as prominent at the glenoid surface”. Dr. Outerbridge testified that he wanted to make sure that the suture anchors were away from the joint surface as much as possible. I emphasize this, as all of the orthopaedic surgeons testified that metal has to be buried in the bone, entirely – not, I add, as much as possible.

[42] Dr. Leith said that the third anchor, instead of being in a better position than the second anchor was, in fact, in a worse position. It was sticking out above the cartilage within the joint by approximately 3 cm. Dr. Bury, who removed the anchors, also testified that this anchor was not buried in the bone.

[43] Dr. Outerbridge said that if he thought the anchors were sticking out, he would have removed them. I do not accept Dr. Outerbridge's evidence on this point. Dr, Outerbridge said he knew that the anchors were sticking out, but felt the placement of the anchors would have "little impact" on the joint. His evidence is inconsistent on this point. At some points he says that the anchors were not sitting proud, yet at other times, and more frequently, he says that he knew they were above the bone, but he made a judgment call that they would be all right in that position. However, when Dr. Pagnani identified the anchors as a potential problem, Dr. Outerbridge paid no heed to him and did nothing. I will review this event in more detail shortly.

[44] The video is clear, as is the evidence of Dr. Leith and Dr. Bury, which I accept, that the anchors were sitting proud, that Dr. Outerbridge knew they were sitting proud, and left them there. Dr. Outerbridge testified that the operative report he prepared is an accurate description of the video. Clearly it is not. While he did advert to the problem with the second anchor, he did not say that it was not fully embedded in the joint.

[45] The third anchor was in a worse position, which is clear from the video, yet he stated in the operative report that it was in a better position. Any doctor reading this report would not have been alerted to the problem with the third anchor. Dr. Outerbridge's explanation for not reporting that the surgery was difficult was because he "made a judgment call during the surgery that the placement of the anchors was satisfactory to repair the damaged tissue and having made that judgment call, moved forward". Dr. Outerbridge agreed that he knew the operative

report had to be accurate. At trial, Dr. Outerbridge testified that the third anchor was not higher than the second anchor, yet on his discovery, he said that while the plan for the third anchor was to be lower than the second, it was higher. However, he thought because the anchor was more anterior, its potential to cause damage was much less than the second anchor. This is but one of several times Dr. Outerbridge was inconsistent in his evidence.

[46] The report was misleading, and I can draw no other conclusion, particularly given Dr. Outerbridge's subsequent conduct with Dr. Pagnani, and his evidence, that it was deliberately misleading. In cross-examination, after being pressed by counsel whether he thought that the anchors were buried in the bone, he finally answered that he did not think they were buried in the bone. Clearly this is something that should have been reported in the operative report. He knew that the anchors were not embedded in the bone, but left that critical fact out of the operative report. I add that he told both Josh Morrow and Dr. Pagnani that the anchors were buried in the bone.

[47] When Dr. Outerbridge could not get the second anchor out, he did not consider coring the bone out and taking out the anchor because he wanted to get the repair done. He knew that if the anchors were a problem that continued use of the shoulder joint would lead to the total destruction of the joint.

[48] In cross-examination, Dr. Outerbridge testified that he thought that the risk that Mr. Morrow's joint would be damaged by the anchors sitting proud, would be minimal. He testified that he made the decision during the operation that the risk

was acceptable and moved forward. He never told Josh Morrow what had occurred, or that there was a risk of damage because of where he left the anchors. He repeatedly told Josh Morrow that everything was fine. His follow-up was no different for someone with a successful surgery, and he left everyone with the impression that Josh Morrow's surgery was successful, and, in his words, the shoulder was "well-repaired". Nothing could have been further from the truth and Dr. Outerbridge knew it. In terms of "moving forward" with Mr. Morrow's rehabilitation, he never told either the team trainer or the physiotherapist to watch for pain or grinding when treating Mr. Morrow, and that either of those could be a sign that the anchors were causing damage to Mr. Morrow's shoulder. As will be discussed below, Mr. Morrow felt intense pain and grinding during treatment by the physiotherapist. The trainer was the gatekeeper to further medical treatment and was not told what to watch for in terms of symptoms.

[49] When the surgery was over, Mrs. Meyer picked Mr. Morrow up from the hospital. She said he looked quite "dopey" when she picked him up. Mr. Morrow did not recall much from this day. On February 7, 2003, Mr. Morrow was in so much pain, Mrs. Meyer took him to emergency. Mr. Morrow said that he was "used to battling pain, but just could not take it". Dr. Outerbridge saw him at the hospital, and Mrs. Meyer said that he told Mr. Morrow that he had, "operated on 10-year-old ballerinas with a higher threshold of pain". Dr. Outerbridge prescribed Percocet for the pain. The next day, the pain had not subsided, and Mr. Morrow returned to emergency where he was given morphine.

[50] Dr. Leith opined that post-operative pain was normal and there was no sign of a mechanical problem at this time.

[51] On February 16, 2003, Mr. Morrow saw Dr. Outerbridge to have the stitches removed, and was told by him that the pain was normal. Dr. Outerbridge did not tell Mr. Morrow that there had been a problem with the surgery and that he should watch for grinding or pain.

[52] Mr. Morrow saw Dr. Outerbridge on March 27, 2003. Mr. Morrow said that he told Dr. Outerbridge about the pain and the grinding in his shoulder. He said that Dr. Outerbridge told him this was normal.

[53] Dr. Outerbridge testified that the March 27, 2003 visit was a six-week follow-up. He said had Mr. Morrow mentioned pain; he would have noted it in his chart. He said if Mr. Morrow had crepitation, which causes grinding, he would have been able to feel it. The problem with this evidence is two-fold. Firstly, Dr. Pagnani testified that patients can feel crepitation even when the doctor cannot. Dr. Pagnani testified that it would be very unusual to detect crepitation of the glenohumeral joint as the joint is four to five inches under the muscle and the soft tissue. It would be unlikely that a doctor would feel crepitation even if the joint was severely damaged. Further, Dr. Outerbridge had never had a patient who had hardware sticking out of his shoulder before and had never felt hardware in that position.

[54] I acknowledge that Josh Morrow's evidence was sometimes vague and his memory not always 100%. I am also alive to the fact that Mr. Morrow wanted to play hockey, and any physical setback would delay him returning to the game. However,

he was firm in his evidence that he told Dr. Outerbridge about his pain and the grinding. Further, he was less likely to hide his symptoms in March, as the season was over. I find as a fact that on the March 27, 2003 visit, Josh Morrow told Dr. Outerbridge that he felt pain and grinding, and that Dr. Outerbridge told him that these symptoms were normal.

[55] Mr. Morrow had started attending physiotherapy with Holly Eburne. He testified that the exercises and stretching were the most painful things he had ever experienced. He hated physiotherapy because of the pain, and came close to blacking out because of it. He had once been kicked in the face with a skate and the cut went through his mouth, yet he kept playing. The pain from physiotherapy was much worse than that experience. Mr. Morrow thought, given what he had been told by Dr. Outerbridge, that the pain was normal and he did not want to come across as a "wimp". He testified that he did gain more movement in his shoulder, but the pain and the grinding were always there. In hindsight, it is now known that his shoulder was being shredded by the metal anchors rubbing up against the ball of his shoulder, the humeral head.

[56] Holly Eburne has been a physiotherapist since 1981 and is qualified as a physiotherapist for the Olympics. She travelled with the National Water Ski team with Dr. Outerbridge for approximately eight years.

[57] She had extensive experience with patients who had a Bankart repair to their shoulder, having treated over one hundred such patients in her practice. She stated that Mr. Morrow's treatment progressed normally for about two and a half months.

At that point his pain should have started to decrease and it did not. After four months, his range of motion was not where it should have been, and rehabilitation was not following the normal course. She testified that she would have talked to Dr. Outerbridge at the four month mark. She said that at six months after the operation, Mr. Morrow should have been pain free and have a full range of motion. By eight months, he should have been fully rehabilitated and playing at the level he was playing before the surgery. He was not.

[58] She spoke to Dr. Outerbridge on February 18, 2003 about Mr. Morrow. In the past, Dr. Outerbridge has told her if a surgery was difficult. He did not mention any problem to her about Mr. Morrow's surgery.

[59] She said she tried everything to improve his shoulder, but after a couple of months realized that she was not successful. She said Mr. Morrow was very compliant. He did everything he could to get his shoulder back to where it was so he could play hockey. He was very motivated.

[60] She continued to work with him through the fall but his range of motion was still quite limited, especially his ability to reach behind his back.

[61] Ms. Eburne believes she would have spoken to Dr. Outerbridge regarding Mr. Morrow as she often talked to him about patients. She had no specific recollection of speaking to him, nor did she have a note of it.

[62] While I suspect that Ms. Eburne did express her concerns to Dr. Outerbridge, I cannot find as a fact that she did, other than as noted on February 18, 2003.

However, I accept her evidence that Dr. Outerbridge did not tell her that there were problems with the surgery. He did not tell her that she should be looking for certain signs or symptoms that would indicate a problem.

[63] I add one further comment. During his evidence, Mr. Morrow was extremely frustrated that no one believed him regarding the pain in his shoulder, including the team and eventually even his billet family and his own family. It is clear from the evidence that Ms. Eburne believed him, albeit she likely was the only one.

[64] Mr. Morrow attended at the Nashville Predators camp in June 2003. This was a conditioning camp for the newly drafted players. Dr. Michael Pagnani is the orthopaedic surgeon and head physician for the Nashville Predators, and has been since the team's inception in 1997. He testified that all of the participants in the camp had to undergo a pre-participation physical and musculoskeletal exam. It was noted that Josh Morrow's shoulder was weaker and stiffer than it should be, and Dr. Pagnani took him into his office for a further examination.

[65] Dr. Pagnani had X-rays taken, and those showed two metal anchors which appeared to be partially in the bone and partially out of the bone. He also noted degenerative changes at the inferior humeral head and some erosion of the anterior aspect of the humeral head. As a result, Dr. Pagnani ordered a CT arthrogram and the Nashville team agreed to pay for it.

[66] On June 25, 2003, Dr. Pagnani reported in his chart that it appeared "that neither of the suture anchors are completely within the bone. Only a couple of millimetres of each anchor appear to be localized within the bone." Further he noted

significant degenerative arthritic changes in the anterior glenoid. As a result of these findings, Mr. Morrow was not allowed to participate in the conditioning camp.

[67] Mr. Morrow testified that when he got to Nashville, he knew his shoulder was quite bad. He had worked hard all spring to try to rehabilitate it, but he felt like he shredded it, which in fact, he had. He tried to keep the pain quiet as he wanted to be signed by the team.

[68] The Nashville team decided to send him back to consult with his doctor in Canada. Dr. Pagnani said that it would cost about $25,000 for him to operate on Josh Morrow and the team was not prepared to pay for the operation in the United States. He was quite certain he gave a copy of the CT to Mr. Morrow. Mr. Morrow said he received a copy, and I find as a fact that Mr. Morrow returned to Canada with a copy of the CT scan.

[69] Mr. Morrow said that Dr. Pagnani told him that the anchors were out of his shoulder and that he should talk to the doctor at home about fixing the problem. Mr. Morrow was devastated that he could not skate at the NHL camp.

[70] Mr. Morrow went to see Dr. Outerbridge on July 3, 2003. Here is the primary issue relating to credibility as Mr. Morrow's evidence differs significantly from that of Dr. Outerbridge.

[71] Mr. Morrow left the CT scan for Dr. Outerbridge at his office. Patty Meyer said that Mr. Morrow returned from Nashville with a big manila envelope. He saw Dr. Outerbridge at his hospital office. He testified that he told Dr. Outerbridge what

Dr. Pagnani told him about the “pins” (meaning the anchors) being out of place. Mr. Morrow said that Dr. Outerbridge told him that he knew what he was doing, that the Nashville doctor did not do the surgery, and that he did not know what he was talking about. Mr. Morrow said that Dr. Pagnani wanted to speak to him, and that Dr. Outerbridge said that there was nothing to discuss. Mr. Morrow said that Dr. Outerbridge assured him that everything was fine and that this was all just part of the process.

[72] Mr. Morrow denied that Dr. Outerbridge ever suggested that they scope his shoulder. He said that Dr. Outerbridge continually told him that he was fine. Mr. Morrow desperately wanted to believe Dr. Outerbridge. He felt foolish questioning Dr. Outerbridge. He said he trusted Dr. Outerbridge to do the best thing for his health. He felt that all he had to do was “suck it up” (meaning put up with the pain without complaining) and work harder, and he felt that Dr. Outerbridge thought he was acting like a baby.

[73] Dr. Outerbridge testified that when Mr. Morrow came to see him on July 3, 2003, that there was no presenting complaint, that it was just a normal follow-up. This statement is completely incorrect. Mr. Morrow went to see Dr. Outerbridge because of what occurred in Nashville. Dr. Outerbridge testified that he sent Mr. Morrow for X-rays. He said that he made a note that there were no symptoms. There is a note “stable/no creps” which Dr. Outerbridge said meant no crepitation. There is a note “CT scan” and below that “? screws out”. Dr. Outerbridge testified that he was considering getting a CT scan and that he was considering taking the screws out. He guessed that they were discussing the plan. He testified that they

discussed scoping his shoulder and that Mr. Morrow would get back to him. He acknowledged that the X-ray clearly showed some signs of osteoarthritis, but he felt that the cartilaginous damage on the humeral head was the most likely cause. This is the injury noted above that Dr. Leith said was minimal. I will be discussing this in considerable detail below.

[74] Dr. Outerbridge said the he examined Mr. Morrow for crepitation and did not find any. He said he would have noted it, if Mr. Morrow complained about pain or crepitation because those symptoms would have caused him concern.

[75] Counsel for Dr. Outerbridge pointed out a number of contradictions in Mr. Morrow's testimony. For example, he initially could not recall where he met with Dr. Outerbridge, as Dr. Outerbridge has two offices. He believed he told Dr. Outerbridge about the pain, but was not certain. He said that he was piecing things together. He said he did not recall a number of things. Mr. Morrow had just turned 20 years old a few weeks before this visit. It is not surprising that his evidence is vague and somewhat unreliable so many years after the event. However, equally vague and unreliable was Dr. Outerbridge's evidence. He testified that he was waiting for Mr. Morrow to get back to him about having his shoulder scoped, yet in cross-examination he testified that he did not expect to see Mr. Morrow again. The main turning point in assessing who is being truthful is the subsequent conversation that Dr. Outerbridge had with Dr. Pagnani which is related below.

[76] Mr. Morrow continued his workout program through the summer to get ready for the Nashville training camp in September. He testified that the pain was awful and the grinding continued.

[77] He returned to the Nashville rookie camp in September 2003. Dr. Pagnani saw Mr. Morrow at that time. He learned that the surgeon in Canada told Mr. Morrow that he was fine. Dr. Pagnani was frustrated that two to three months had gone by and nothing had happened regarding Mr. Morrow's shoulder. He testified that Mr. Morrow was still struggling with his shoulder, and that he did not think that Mr. Morrow was well enough to go to camp, but he allowed him to participate.

[78] Mr. Morrow said that the camp was difficult, his word being "brutal". He said he was unable to fight, body check, or stick-handle the puck, and he never got a chance to show the Predators what he was capable of doing. He said the trainer stretched his shoulder and it was very painful. He said he did not want them to know how badly he hurt.

[79] Dr. Pagnani told Mr. Morrow that he was going to get in touch with Dr. Outerbridge, and he did. He said that he cannot recall another time when he spoke to the doctor of a drafted player. Although Dr. Pagnani was not entirely clear whether he spoke to Dr. Outerbridge in July or September, the circumstantial evidence supports that it was September. Dr. Pagnani believed the conversation occurred in September. Dr. Pagnani's note of the conversation follows a note made on September 5, 2003. Dr. Pagnani had ordered updated X-rays of Mr. Morrow's

shoulder and found a “large inferior osteophyte” and “prominence of his suture anchors”. The osteophyte is indicative of osteoarthritis.

[80] Dr. Pagnani then recorded the following:

> I discussed Josh’s case with his physician in British Columbia. I had strongly recommended that he consider examining the shoulder arthroscopically. The surgeon in Canada decided against this course. He assured me that he was absolutely certain that the anchors are in the bone. He did not agree with our findings on the CT arthrogram.

[81] Dr. Pagnani said that he explained his concerns about the results of the CT arthrogram. Dr. Outerbridge said that he did the operation, and Dr. Pagnani did not. He was very confident that things were the way they should be and that Dr. Pagnani was incorrect in his interpretation of things and Dr. Pagnani’s concerns were not well-founded. Dr. Pagnani believed that Dr. Outerbridge had seen the CT arthrogram as they discussed it. He believes he told him he thought the anchors were sticking out and that it was causing the rapid development of arthritis. Dr. Outerbridge’s response was that he put the anchors in and that they were definitely in the bone and he had no doubt about that. Dr. Pagnani believes that he told Dr. Outerbridge that if Mr. Morrow was his patient, he would do a scope within days. Dr. Outerbridge said he was not going to do that because he knew the anchors were in place. Dr. Pagnani said that the conversation was not the most congenial conversation he ever had.

[82] Dr. Pagnani’s evidence is very similar in content to what Josh Morrow reported as his conversation with Dr. Outerbridge in July 2003. It completely

supports Mr. Morrow's version of what occurred in the sense that Mr. Morrow said he was not offered a scope and that Dr. Outerbridge told him everything was fine, and the Nashville doctor did not know what he was talking about.

[83] I believe the evidence of Dr. Pagnani. Of interest is the fact that Dr. Outerbridge testified that he did not recall that Dr. Pagnani, the orthopaedic surgeon for an NHL team, called him. Dr. Pagnani's evidence is damning in terms of Dr. Outerbridge's conduct. I do not accept for one minute that Dr. Outerbridge does not recall this telephone call. It was too important a call, given it was regarding a patient who Dr. Outerbridge knew he had left anchors sticking out of his bone – in spite of his denial to Dr. Pagnani. It was a call regarding a Blazer's player, who was at an NHL rookie camp, which was important given he was still the Blazer's orthopaedic surgeon. It was a call pointing out significant problems that Dr. Outerbridge by this point knew he had contributed to by leaving the anchors proud. I say this in spite of his denial otherwise.

[84] It is important to note that, at this point, Dr. Pagnani thought the anchors had come loose because he had seen that before with football players. He did not know until he saw the video shortly before the trial that the anchors were never put into place properly. Thus, he was not accusing Dr. Outerbridge of incompetence during the call, only attempting to tell him that his diagnosis was that it appeared that the anchors were sitting proud and causing significant degenerative arthritis.

[85] When Mr. Morrow returned to Kamloops after his unfortunate experience at the Nashville camp, where he was not asked to sign a contract, he devised a ruse to

see Dr. Newhouse to ask for a second opinion. All medical appointments went through the team trainer, Mikki Lanuk. Mr. Morrow correctly concluded that Mr. Lanuk would not let him see Dr. Newhouse to get a second opinion regarding his shoulder. Dr. Newhouse arranged for Dr. Regan, a shoulder specialist, to see Mr. Morrow in Vancouver, but when the team learned of it, the appointment was cancelled.

[86] Mikki Lanuk testified that he spoke to Dr. Outerbridge regarding the request for a second opinion and Dr. Pagnani's view that there was a problem. He said that Dr. Outerbridge assured him that everything was fine, that Mr. Morrow's complaints were unfounded and that all that was wrong with him was a minor reduction in his range of motion. Mr. Lanuk said that he had a good professional relationship with Dr. Outerbridge, that he provided good information, and that he trusted him. As a result of the advice he received from Dr. Outerbridge, Mr. Lanuk did not support Mr. Morrow attending to Vancouver for a second opinion, and Mr. Morrow did not see Dr. Regan. Dr. Outerbridge effectively prevented Mr. Morrow from getting a second opinion regarding whether the anchors were sitting proud.

[87] Mr. Morrow's play with the Kamloops Blazers deteriorated. People, including his billet family, became sick of listening to him complain about his shoulder. Mr. Morrow testified that no one believed that he had a problem with his shoulder, as everyone accepted what Dr. Outerbridge said. He almost began to believe himself that his pain was all in his head.

[88] Patty Meyer testified that she began to ignore his complaints because as far as she knew, Dr. Outerbridge, who she considered a respected doctor in the community, had said he was fine.

[89] Ms. Meyer described Mr. Morrow as a different hockey player in the fall of 2003. He was not as aggressive, he favoured his shoulder, and would not go into the corners (where he either would be body checked or have to body check another player). She said he became withdrawn; he was not the same kid. She described him as becoming more and more sad and depressed. She said he was "one unhappy, sad kid".

[90] He eventually had a confrontation with Mikki Lanuk and Mr. Lanuk felt threatened by Mr. Morrow. Mr. Morrow threatened to beat him up. As a result, Mr. Morrow was traded in November 2003 to the Kootenay Ice in Cranbrook, B.C. Mr. Morrow said that his hockey career was falling apart, his life was in ruins, he was angry, disappointed, and he took it out on Mikki Lanuk.

[91] However, in Cranbrook, Mr. Morrow did not do well. His play was inconsistent. He said his shoulder hurt constantly. He no longer liked going to the rink and playing. He said that he became a loner. The coach of the team, Cory Clouston said that he did not fit in with the team, and that just before play-offs started several players came to him and asked him to cut Mr. Morrow because he was essentially going to hurt them going into play-offs.

[92] Mr. Morrow was cut from the Kootenay Ice team as a result. That was his last year that he was eligible to play junior hockey, and as a result, that was the end of

his hockey career. He had never had the opportunity to play during play-offs. He was devastated when he was cut. His grandfather came to get him, and said that Mr. Morrow was crying and upset.

[93] Mr. Morrow returned to Sherwood Park. At this point I will review in more detail, the evidence of the several doctors who testified on the issue of liability. I have already covered much of Dr. Outerbridge's evidence.

[94] I will start with the evidence of Dr. Bury, as chronologically, his participation in this case is next. Dr. Bury is an orthopaedic surgeon in Edmonton, Alberta. He has expertise in shoulder surgery, and approximately 50% of his practice relates to shoulder surgery. He is also on the staff of the University of Alberta. He first saw Mr. Morrow on April 12, 2004, as a result of a referral from Mr. Morrow's family doctor. At the time of the referral, he did not know that Mr. Morrow had already had surgery. He said, and I quote:

> The sad reality is that if I had known prior to seeing this young man that he had undergone previous surgery in Kamloops, and that he had not done well subsequent to the surgery, I probably would not have seen him, and would have told his family physician that he should go back and see his original physician.

[95] Dr. Bury found a marked restriction in the motion in Mr. Morrow's right shoulder. He also said that there was a striking finding of degenerative arthritis. A review of the X-ray looked like one of the suture anchors was sitting above the level of the bone, which could cause damage to the humeral head. He looked at the pre-

surgery X-rays from February 2003 and there was no evidence of degenerative arthritis.

[96] Dr. Bury received the operative report from the hospital in Kamloops, and it was clear that there had been a problem in the surgery; however, his read of the report left him with the impression that the anchors were flush with the joint surface or below it. There was a significant injury to the articular cartilage as well as a Hills-Sachs defect.

[97] Dr. Bury saw Mr. Morrow again on May 27, 2004, and told him that he was concerned about the amount of arthritis in his shoulder, that he was concerned that the anchors were sitting proud and that he wanted to do a scope to have a look. He also told him that he did not believe that he would be able to play professional hockey.

[98] The surgery occurred on June 25, 2004. Dr. Bury found that the shoulder was significantly degenerated. The articular cartilage on the humeral head had been severely eroded. The two superior anchors in the glenohumeral joint were clearly proud of the articular surface and were causing direct erosion of the humeral head. The anchor that had been broken off was lower than the one adjacent to it. The anchors were securely embedded into the bone. He tried several ways of getting the anchors out of the bone. He testified that the first anchor came out easily, but the other two were “bomb-proof”. He had to drill arthroscopically around the anchors until he could get them out with a needle driver. Dr. Bury testified that the first anchor was fairly level and just “popped out”, and he said it probably did not have a

very good purchase there. It took Dr. Bury three to four minutes of drilling per anchor to remove the second and third anchor. The entire operation took approximately one-half hour.

[99] Dr. Bury testified that there was a glaring contradiction from the video of the surgery and the operative report. The report said that the final anchor went into the bone, when in fact both anchors were sticking way up. He said that Dr. Outerbridge spent a fair bit of time trying to put the second anchor in deeper and then a fair bit of time trying to pull it out. When that did not work, he hammered on it to try to break it and make it flush with the joint surface. Dr. Bury said that the third anchor, which was every bit as proud as the second one, was completely ignored by Dr. Outerbridge.

[100] Dr. Bury took photos to show unequivocally that the anchors were both sitting proud. He had not seen the video of the operation at this point. He testified that the anchors were sitting well proud of the articular surface and they show unequivocally that the humoral head, which was directly opposite the anchors, was shredded by the metal. In the video, the humeral head had nice white smooth articular cartilage; however, the photo Dr. Bury took shows that it was now completely eroded in the area sitting right above the anchors. This was not normal for a 19 to 20-year-old.

[101] The photos also show the two anchors sticking way up, which was contrary to the operative report. The X-rays of July 3, 2003 showed degenerative arthritis.

[102] Dr. Bury had a similar experience with a different patient when he could not get the anchor in sufficiently. He put in the needle driver and backed the anchor out.

Dr. Outerbridge did try to back the first one out; however, Dr. Bury said that with a young man who has hard bone, sometimes the inserters strip. Dr. Bury no longer uses this system.

[103] Dr. Bury watched the video and noted the damage to the posterior (or back) of the humeral head. This was referred to as the osteochondral fracture, or Hills-Sachs lesion. He noted that Dr. Outerbridge had debrided that and drilled the bone to encourage bleeding and the formation of fibrocartilage to cover the area. When Dr. Bury looked at the posterior of the humeral head it was covered with fibrous tissue.

[104] Dr. Bury opined that the metal tips of these anchors sitting above the articular cartilage of the glenoid were causing significant erosion and damage to the articular cartilage on the humeral head. Dr. Bury reported that Mr. Morrow was showing "significant degenerative arthritis in his right shoulder". These changes developed extremely rapidly and that he stated "I believe, on a balance of probabilities, that the suture anchor tips eroding on the articular surface of the humeral head either caused or contributed in a very material way to the degenerative changes seen in this young man's shoulder".

[105] Dr. Bury was asked whether the original injury or the osteochondral fracture (the Hills-Sachs) at the humeral head was causing the rapid degeneration of the joint. Dr. Bury testified that he would not have considered that as a likely possibility. The only diagnosis in his opinion was the anchors were sitting proud and damaging

the cartilage. This contradicts the opinion of Dr. Day, reviewed below. For the reasons stated below, I accept the opinion of Dr. Bury over that of Dr. Day.

[106] Dr. Bury opined that:

> … the standard of care when using thread-in metal suture anchors is that the anchors should be placed below the level of the articular cartilage in the relevant joints so that they cannot cause erosion to the articular cartilage on the opposite side of the joint. Further to this, when a metal suture anchor strips or twists off during insertion, as occurred in this case, it is my opinion that standard of care is that that anchor must be removed from the joint. There is no tool that I am aware of that will certainly break an anchor off so that it is well below the level of the joint surface. If the anchor cannot be removed arthroscopically then, in my opinion, standard of care is that an open surgical procedure should be undertaken to remove it.

[107] When asked if Dr. Outerbridge had just made a judgment call during the surgery, Dr. Bury's response was that he made a judgment call that he was culpable for. He said that when one leaves something sticking out of a joint it has a material effect on the bone healing and he would not accept it. "Full Stop".

[108] Dr. Bury opined that Mr. Morrow would never play professional hockey again. He was correct in this prediction.

[109] As noted above, Dr. Outerbridge's answer to why he left the anchors sitting proud was that he made a "judgement call interoperatively and moved forward". He used this phrase approximately 35 times. He often tried to avoid answering questions in cross-examination by providing this response.

[110] I add that there was variable evidence relating to Mr. Morrow's range of motion as between Drs. Newhouse, Pagnani, Outerbridge, Bury and the various

other medical practitioners who saw Mr. Morrow. The bottom line is that Dr. Outerbridge was not of the view that the range of motion was a symptom of a problem with the anchors. All of the testing showed some limitation to his range of motion. The various assessments of the range of motion have no impact on the liability question. His range of motion today will affect a damage award, and that is discussed in the evidence of Dr. Leith, who has most recently treated Mr. Morrow.

[111] I turn to Dr. Leith's evidence next. I have referred to Dr. Leith's evidence above, and, like Dr. Bury, his role is both as expert and treating physician. Dr. Leith has been an orthopaedic surgeon for nine years. His practice is 60-70% shoulder surgery and 30-40% knee surgery. He practiced with Dr. Hawkins, Dr. Regan, and others.

[112] Dr. Leith reviewed the video of the surgery. In terms of the posterolateral cartilage injury, or Hills-Sachs, Dr. Leith opined that this could probably been left alone, but said that the approach taken by Dr. Outerbridge of debriding the cartilage and drilling to generate bleeding and fibrous tissue was not unusual. Dr. Leith opined that this lesion was relatively small and would not have led to rapid degeneration of the anterior region of the joint. As noted above, Dr. Bury was also of the opinion that this injury would not have caused the degenerative changes. Dr. Day's evidence is to the contrary, and I will review that shortly.

[113] Dr. Leith discussed some of the anatomy of a shoulder dislocation. He said that when a shoulder dislocates, the ligaments that keep the humeral head in the glenoid are torn. The humeral head moves out of position and tears the ligaments

that are attached to the glenoid. Traumatic dislocations are susceptible to recurrent dislocations and require surgery. He said there are two ways to repair this injury: open dissection or arthroscopically.

[114] The arthroscopic method involves passing sutures through the torn tissue and reattaching it back to the bone, using anchors. As described by Dr. Outerbridge, the anchors are placed into the bone, the sutures come out of the anchors, are passed through the tissue and the then the tissue is pulled to the anchor. The tissue and bone interface and the tissue heals back to the bone.

[115] Dr. Leith watched the video of Dr. Outerbridge's surgery. He said that the punch creates a pilot hole in the bone for the anchor. The punch has a guide and Dr. Outerbridge had the punch guide turned the wrong way. When the punch guide is in the correct position it has a window that goes all the way to the edge. The window is used to see the punch to make sure that the surgeon has created a deep enough pilot hole. The next step is to tap the holes because the anchor is like a screw. The surgical kit Dr. Outerbridge used did not have a tap.

[116] When Dr. Outerbridge was putting in the second anchor, the punch bent due to the bone hardness. He then drilled the hole. He also had the drill guide turned the wrong way and could not see the laser mark to see if the drill went deep enough. Dr. Leith said it was very simple to rotate the guide the correct way. Dr. Leith said that the laser mark is used as a guide of where to drill to because otherwise there is no way of determining how far the drill has gone, and the surgeon is just drilling

blindly. I have already reviewed Dr. Outerbridge's evidence on this point. He said that he could also feel the depth of the drill.

[117] Here, the anchor went into the bone but was sitting above the cartilage. Dr. Outerbridge tried to push it in deeper. Dr. Outerbridge then tried to loosen the anchor with a probe and he tried to unscrew it. He also tried the removal instrument to no avail. When that did not work, he tried to break the anchor head off. Dr. Leith said that the cartilage was becoming more damaged with every attempt to try to remove it. Once the removal options failed, he should have drilled around the anchor and removed it. Instead he left it sitting proud in the joint.

[118] Dr. Leith stated the following opinion in his report:

> Leaving this anchor still visible was unacceptable. Any sign of hardware breaching the articular cartilage and within the joint is not acceptable. It is one of the principles of Orthopaedics that any use of hardware in and around joints not be sitting in the joint or within the bone-cartilage interface. The hardware should be completely buried within the bone only. If there is any possibility that the hardware is in the vicinity of the joint then it should be repositioned or removed from the joint such that the potential for joint damage from the hardware is eliminated.

[119] Then Dr. Outerbridge attempted to insert the third anchor near the second anchor. Again, the guide was facing the wrong way and the laser mark was not visible down to the cartilage and below. This anchor was not inserted properly and was also sitting proud.

[120] Dr. Leith opined that the position of this anchor was also not acceptable. He noted that the video and the operative report do not agree, as is noted above.

[121] Dr. Leith stated, “It is my opinion that Dr. Outerbridge failed to meet the standard of care for an Arthroscopic Bankart repair by leaving these metal anchors visible and proud within the joint. The degenerative changes noted with the imaging studies, pain and stiffness and functional disability are predictable outcomes when anchors are prominent within the joint as occurred during this procedure.”

[122] Dr. Leith opined that the progressive degenerative changes to Mr. Morrow’s right shoulder would have been avoided if the metal suture anchors had been applied correctly or removed intra-operatively after recognizing that they were proud during surgery. The damage to the joint would have been lessened if Dr. Outerbridge had addressed the concerns raised by Dr. Pagnani and removed the anchors in July 2003. Dr. Leith opined that based on the investigations by Dr. Pagnani, immediate surgery was warranted, and Dr. Outerbridge failed to meet the standard of care for failing to do so.

[123] Dr. Outerbridge gave evidence that he thought the main cause of the arthritis was the posterior damage to the humeral head. Dr. Bury said that that area had fibrous tissue grown back and that it was not likely that this was the cause of the arthritis. Dr. Leith did not think that this injury was serious and said when he looked at the shoulder, it had cartilage.

[124] Dr. Day testified for the defence. Dr. Day also has an impressive resume, and has done a great deal of work in the area of arthroscopic surgery. Dr. Day did not at any time treat Mr. Morrow or look into his shoulder. An independent medical examination was done by Dr. Lavoie in Edmonton, but he did not testify.

[125] Dr. Day opined in his report that the prominence of the anchors in the shoulder would probably have fairly minor consequences. In cross-examination, he stated that he agrees there was more damage to Mr. Morrow's shoulder than he expected, but felt that it was not all due to the anchors. He further stated that when he said minor consequences he was making a general statement for someone sedentary, in spite of the fact he knew he was dealing with a 19-year-old hockey player. He stated that the more severe injury was the osteochondral lesion, which is the Hills-Sachs lesion, over the humeral head. He also said that this would be a significant factor on whether Mr. Morrow would play professional hockey.

[126] Dr. Day did not agree with the opinion of Dr. Leith that the Hills-Sachs lesion to the humeral head was not significant. He gave evidence that the drilling of the bone after debridement with the K-wire did not regenerate the cartilage. The essence of Dr. Day's evidence was that Mr. Morrow would develop osteoarthritis even if the surgery was perfect because of the Hills-Sachs lesion on the posterior of the humeral head.

[127] Dr. Day was asked a number of times in cross-examination about the surgery itself, and he repeatedly stated that he would not have done it the way Dr. Outerbridge did, in that he would not have left the screws in place. Upon watching the video, he said that he quickly came to the conclusion that the screws had to be removed, but did not mention that in the first report. In spite of saying several times that he would not have performed the Bankart surgery in this fashion, he would not go so far as to say that Dr. Outerbridge's conduct fell below the standard of care. He avoided the question by repeating that he, Dr. Day, would not

have done it that way. However, he also did not say that it was within the standard of care.

[128] Dr. Day also testified that recurrence of shoulder dislocations were common amongst hockey players and that was another reason he did not think Mr. Morrow would play in the NHL. He then said that in his cases, the failure of the surgery is about 10-15%.

[129] He agreed that the literature in terms of the development of arthritis following a Bankart surgery is inconsistent, and there have been no long term studies. He also said that Mr. Morrow was at risk for developing arthritis, but could not say how that would affect his functionality. Indeed he said that damage to a joint will result in arthritis later in life, but that it could be minimal and that Mr. Morrow could have no symptoms at age 45 years.

[130] Dr. Hawkins was called in reply. I admit his opinion regarding the injury to the humeral head which I will review momentarily for the following reasons: Dr. Day did not refer to the evidence regarding the lack of cartilage regrowth in his report. It was heard for the first time during his evidence. Also, Dr. Bury was questioned about the lesion causing arthritis, he was not cross-examined on his observation regarding the presence of the cartilage in this area.

[131] Dr. Hawkins, who, as I understand based on the evidence of Drs. Day, Outerbridge, and Leith, is the most qualified orthopaedic surgeon in British Columbia for addressing issues relating to shoulder problems. He reviewed the video of the surgery and stated that it showed a full-thickness osteochondral lesion in the back of

the humeral head approximately 8-10 mm in diameter. This is larger than Dr. Leith estimated. Dr. Outerbridge debrided unstable pieces of cartilage and the central portion of the exposed subchondral bone was drilled. Dr Hawkins opined that this was appropriate to promote regrowth of new cartilage.

[132] He then looked at pictures and videos prepared by Dr. Leith on August 1, 2008. He stated that these show that the lesion on the back of the humeral head had filled in with new cartilage and there was no longer any bare bone.

[133] Dr. Hawkins had been asked in advance of testifying his opinion regarding the likelihood of arthritis developing in Mr. Morrow. He was not asked this opinion by Mr. Morrow's counsel. The defendant submits I should draw an inference against Mr. Morrow because of the failure to question him on this point. I add parenthetically, that the defendant did not ask the question either. However, Dr. Hawkins was consulted on October 20, 2008, mid-trial and long after the time expert reports could be tendered as evidence. The opinion of Dr. Hawkins regarding the development of arthritis was not proper reply evidence, and could not be tendered by the plaintiff. Therefore, it would not be appropriate to draw any inference against the plaintiff for not seeking to tender that opinion.

[134] Dr. Hawkins also gave evidence potentially contradicting whether Dr. Day was on staff at the University of British Columbia. The relevance of this evidence relates to Dr. Day's qualifications. This aspect of his evidence is collateral, and not admissible. I have not considered it when assessing Dr. Day's opinion.

[135] Dr. Day's opinion about the injury to the humeral head was based in part on his view that no cartilage had regrown in that area and that the bone was bare. Dr. Bury and Dr. Leith both saw the bone and said the cartilage had regrown. Dr. Hawkins viewed the same video and photos as Dr. Day and said that the cartilage had regrown. I accept the evidence of the three doctors over that of Dr. Day. I am not sure what Dr. Day saw, but he was mistaken when he opined that the cartilage had not regrown. I accept that Mr. Morrow might have developed arthritis from this injury at a later stage in his life, however, the evidence is overwhelming that the degenerative changes in his shoulder were due primarily, if not completely to the fact the screws were left proud in the joint. Dr. Bury testified that all of the damage he saw was directly across from where the screws were located. Any arthritis he might have otherwise developed would likely not have affected function until he was much older.

[136] I find as a fact that the significant degenerative changes to Mr. Morrow and the cause of his debilitative arthritis were caused by the failure of Dr. Outerbridge to remove the anchors at the time of the initial surgery.

[137] I will continue with the chronology relating to Mr. Morrow after he left the Kootenay Ice hockey team.

[138] Mr. Morrow was extremely upset when he was cut from the Kootenay Ice hockey team. He did not want to be around anyone, and spent most of his time in his bedroom in his parent's house. Indeed he spent so much time there, he can no longer stand to stay in that room because it is associated with so many bad

memories. He did not know what to do, now that his dreams of a hockey career were over.

[139] His shoulder felt better once Dr. Bury removed the screws. He tried to play hockey again with the Golden Bears at the University of Alberta ("U of A"). While he practiced with the team, his shoulder was never good enough to permit him to play a game with them. He could not bear to watch the team play when he could not participate.

[140] Mr. Morrow saw Dr. Leith in 2005. His range of motion was limited, especially his internal rotation towards his back. The imaging done at the time showed obvious arthritis to his shoulder. Further imagining in November 2006 showed further degenerative changes in his shoulder.

[141] Mr. Morrow did fairly well academically at the U of A. However, he said he received considerable assistance from a friend. He did not return for a second year. He helped out on the farm, and he tried to work in the oil patch in northern Alberta.

[142] His employment and earnings are set out the agreed statement of facts, and I will review them here: Mr. Morrow earned $7,080 on the family farm in 2005. In June and July 2005 he worked as a labourer in the oil patch for Lincoln County. He earned $12,538.17. In October 2005, he returned to Lincoln County and was paid $26 per hour as a labourer and earned $8,012.16. He quit November 13, 2005. He worked for Blair Nelson Contracting where he first began to train as a back hoe/excavator operator. He worked there until December 20, 2005 and earned $11,130, inclusive of his subsistence and truck allowances.

[143] From April to May 13, 2006, Mr. Morrow worked on the family farm and earned $4,549.64.

[144] In 2006, Mr. Morrow also worked in the oil patch and up until late July 2006 he worked for a number of different companies and earned the following, respectively:

Blair Nelson	$27/hour; $90/day subsistence; $27/day for truck on site	$11,164.38
Corvet Construction	$30/hour; $100/day subsistence; $75/day for truck on site	$ 7,843.10
Advantage Oilfield		$12,149.85
Atlantic Pipeline	$40/hour; $160/day subsistence; $100/day for truck on site	$11,566.15
Strike Energy	$36/hour; $10/hour for truck on site; travel allowance. When Mr. Morrow rented his own equipment; $90/hour; $100/day for ATV on site.	$40,366.88

[145] In July 2006, and while he was working for Strike Energy, Mr. Morrow began renting a new excavator so that his hourly charge out rate was covering his work and his provision of the machine. He rented the excavator from July 1, 2006 to December 31, 2006. The rental payments on this excavator were $10,600/month.

[146] Mr. Morrow took August 2006 off for holidays.

[147] From early September 2006 until the end of the year, Mr. Morrow did the following work and earned:

Reon Oilfield	$40/hour; $125/day subsistence; $100/day for truck on site	$36,866.80
Goal Projects	$40/hour plus subsistence and truck allowance	$ 1,102.40
Denim Pipeline	$36/hour plus subsistence and truck allowance	$ 5,584.08
Watts Project	$38/hour plus subsistence and truck allowance	$ 2,134.84
Arnett & Burgess Construction	$36/hour plus subsistence and truck allowance	$ 5,857.62
Trevor King Oilfield	$38/hour plus subsistence and truck allowance	$ 6,624.38

[148] On January 15, 2007, Mr. Morrow purchased the excavator for a cash price of $286,730 plus GST. The majority (85%) of his previous rental payments on the excavator were credited against the subsequent purchase of the excavator, with an additional cash payment being made, leaving the balance required to purchase the excavator as $150,690.

[149] When Mr. Morrow converted his rental of the excavator into a purchase, his payments dropped to approximately $3,200/month (excluding the down payment).

[150] He worked for Watts' Projects from January until mid March 2007 earning $53,321.18, and then worked with Spirit Pipelines into April 2007 earning an additional approximately $25,000.

[151] From the end of the Spirit Pipeline job until Mr. Morrow started college in early September 2007, he had the following jobs, all of which involved Mr. Morrow working as an equipment operator, but not using his own machine:

Pinnacle Consortium Inc		$ 5,676.30
Shamrock Valley	$38/hour	$27,962.80
Cabays Dirtworks	$40/hour plus subsistence and truck rental	$14,373.60
Lincoln Country Oilfield		$ 3,816

[152] Mr. Morrow enjoyed working in the oil patch in the sense that he enjoyed hard work and felt it gave him a good opportunity to earn a good living. He went from being a labourer to learning how to work an excavator. He became very skilled at working the heavy equipment. Two of his former employers testified, Mr. Neilson and Mr. Cabay, who both rated him 9.9 out of ten in terms of his ability to operate the excavator. He became particularly skilled at working in a live plant site, where he would have to excavate around live sour gas lines. Contact with such a line could cause a catastrophic explosion and kill everyone in the vicinity. It was delicate, difficult, and stressful work. It was also work that paid very well. With his own excavator, he could earn $155-165 per hour, including fuel, but not including his subsistence or his truck allowance.

[153] Mr. Cabay testified that his business had not suffered much during the downturn of the price of oil because much of what his company did was reclamation work, which had to be done, and did not depend on the price of oil.

[154] Mr. Neilson said that Mr. Morrow was a very good employee. He was not as personable as some of the workers, and would get irritated by them. However he was very talented. Mr. Neilson ended up buying Mr. Morrow's excavator from him

for $70,000, plus taking over the loan payments. Mr. Morrow had put about $100,000 into buying the excavator.

[155] Mr. Morrow found life in the oil patch difficult after a while. He said that there was a lot of drug and alcohol use, plus the place was frequented by strippers. He eventually bought a large truck for work and a fifth wheel trailer, so he could live in the trailer instead of in the housing with all the other workers.

[156] Mr. Morrow liked operating the heavy equipment. However, the more he operated it, the worse his shoulder became. The excavator had two controls that required frequent use of his shoulder. Additionally, the cold weather irritated his shoulder and increased the pain. The pain became so severe, that he began becoming angry with people and sometimes violent. He said this happens quite often now. His shoulder would frequently ache and throb with pain.

[157] He sometimes became so lonely, he would ask his grandfather to come up and see him. Mr. Pentelchuk always came when he was called by his grandson.

[158] As a result of the pain he was suffering while operating the excavator, Mr. Morrow decided he had to quit this work and returned to school. He enrolled in Lakeland College in Alberta in September 2007, in a program related to environmental reclamation.

[159] He found the first term very hard, especially the chemistry, math and computer work. He worked very hard at the program, but did not perform well. The

second term involved much more math and computer work and he failed two classes.

[160] While it is clear that academically, Mr. Morrow was not prepared to take this course of studies, his shoulder also caused him significant problems while at college. He could not work at the computer for long hours as it aggravated his shoulder, his neck, and gave him headaches. He saw a doctor who gave him some painkillers, but those made him drowsy and made it harder for him to study.

[161] He used the Learning Centre while at Lakeland. He got a job in reclamation over the summer of 2008, but found it very difficult as it was physical work. It also only paid him $17 per hour. He does not want to return to Lakeland College and finish the program.

[162] A student from Lakeland College, Ms. Kotun, testified regarding the program and its difficulties. She was not a friend of Mr. Morrow, but was someone who had finished the diploma program and could not find a job in the field. As a result, she has returned to school to finish the degree program. She said her summer jobs in the field were very physically demanding, and not well-paying. She also estimated that she would spend approximately four to five hours a day doing computer work during the program.

[163] Ms. Ness, who was Mr. Morrow's girlfriend while he was at Lakeland College, also testified. She said that she noticed that the cold affected Mr. Morrow's shoulder pain. She described him as being unhappy constantly because he was in pain everyday. He tried to keep the pain to himself, but every now and then he would

explode. She described him as a ticking time bomb. She referred to one incident where a truck driver cut him off, and Mr. Morrow jumped out of his truck and tried to confront the driver and entice him to fight. Mr. Morrow did not understand afterwards why he had done that, except that he was so frustrated by his pain that he had to vent his anger.

[164] She described how hard he worked at school work, but how he had a hard time sitting at a desk working on the computer because of his shoulder pain. She said he developed bad headaches. When at his family home, Mr. Morrow would leave the house because all the family talked about was hockey, and he could not stand to be around that constant discussion. They went skating on the lake on the family property. He said it was the first time in three years that he had gone skating. Afterwards, he broke down crying. They took a vacation to Montana and he could not swim or rock climb. The relationship ended in July 2008.

[165] During his school year, much of his hair fell out, he believes to the stress he was undergoing. He had a hair transplant done.

[166] He has been unable to sell the fifth wheel trailer.

[167] The situation with Mr. Morrow's family is very difficult. He has lost his temper at his father several times, and his relationship with his father is strained. His younger brother Joseph is playing in the WHL and Mr. Morrow is upset with his parents for letting his brother play in that league after what happened to him. In addition, although he wants to be a support for his brother, he cannot stand to watch any hockey now or be involved in any hockey related activity. He does not watch his

brother play or help in his developing career. He has had to distance himself from his family because they are very excited about Joseph's career, and he cannot participate in that excitement.

[168] Mr. Morrow also finds it difficult to be around his former friends. One night he ran into some of his friends and they all wanted to know why he quit hockey. He could not handle that discussion. When he went home, he broke down crying and, again, his grandfather comforted him.

[169] Mr. Morrow testified that he cannot reach behind his back with his right arm. It is hard for him to wash his left side and use deodorant. If the arm is jolted, the pain is 9 out of 10. He has trouble holding something for a while, like a pen or a toothbrush. He can only clean himself after a bowel movement using his left hand. He has constant chronic pain at about 6.5 out of 10. Before his shoulder surgery, he could play basketball, swim, ride a bike, go horseback riding, play tennis, play volleyball, go cow roping and steer wrestling, play football, play baseball, play golf, and shoot a rifle. And, of course, play hockey.

[170] He can no longer play basketball, go swimming, biking, play volleyball, cow roping or steer wrestling, or play baseball. He tried playing tennis, took three swings and his shoulder hurt for three days. He tried playing football but it was incredibly painful. He tried shooting, but it hurt too much. All he can do for exercise is sit on a recumbent bike. He has also lost interest in sex as it also hurts his shoulder.

[171] On August 1, 2008, Mr. Morrow received further surgery, this time by Dr. Leith. He asked his mother to go with him to Vancouver for support, which she did.

[172] Dr. Leith identified a significant amount of degenerative change in Mr. Morrow's shoulder. The majority of the change was anteriorly within the glenohumeral joint. At the most inferior aspect of the anterior glenoid, there was a complete loss of articular cartilage and fully exposed bone. This is the area where the anchors were located.

[173] Dr. Leith debrided the area of fibrillated and frayed soft tissue, as well as unstable flaps of cartilage.

[174] Dr. Leith said that the humeral head is now flattened and malformed. This was as a result of it moving over the anchors with every shoulder movement.

[175] Dr. Leith opined that Mr. Morrow will require a shoulder replacement within the next two to three years. The shoulder would have to be replaced two or three more times because the replacements wear out after approximately 10-15 years with a sedentary lifestyle. While it is possible that new technology will improve this situation, this is where the situation now stands. The pain relief could be as much as 80-90% from a shoulder replacement, but 50-74% is a more realistic estimate.

[176] With every surgery there is increased risk for infection which could cause a flail shoulder, additional scarring, and risk of nerve damage; Mr. Morrow would have to avoid heavy labour and repetitive movement as that would make a shoulder replacement wear out sooner.

[177] Dr. O'Shaughnessy, a well-known psychiatrist, and the head of forensic psychiatry at the University of British Columbia, saw Mr. Morrow in January 2008,

and took a thorough history from him. He described Mr. Morrow as very driven, a hard-working individual, and an extremely diligent worker. This impression is supported by a number of the witnesses who testified. He opined that this hard work was one way that Mr. Morrow dealt with his losses.

[178] Dr. O'Shaughnessy said that Mr. Morrow suffered a substantial loss when he could no longer play hockey. He developed problems with his self-esteem and his self-confidence. His hard-working personality bodes well for a professional athlete, but on the other side, he sees losses not as normal, but as failure. He noted that Mr. Morrow became markedly depressed when he talked about the loss of his hockey future. There was a noticeable change in his affect and mood. He was clearly distressed and saddened. The loss was not only his hockey, but that most of his social relationships surrounded hockey.

[179] Dr. O'Shaughnessy opined that Mr. Morrow broods about his loss daily. These thoughts are intrusive and involuntary. The brooding is triggered or enhanced by the increased pain in his shoulder. He tried to avoid hockey and put it out of his mind. Mr. Morrow does not have the psychological skills to deal with the loss of his career.

[180] Dr. O'Shaughnessy diagnosed Mr. Morrow as being significantly clinically depressed and that he meets the threshold criteria for a Major Depressive Disorder at a moderate level. This stems from both his loss of his hockey career and his chronic pain. He also said that pain and depression can affect concentration and memory.

[181] Dr. O'Shaughnessy opined that Mr. Morrow's self-esteem and self-image are dependent on his perceived abilities and he perceives himself as dysfunctional and disabled. He recommended that Mr. Morrow receive psychological counselling for approximately 20-25 sessions. If that was unsuccessful, then he should undergo a pharmaceutical approach with anti-depressant medication.

[182] Mr. Morrow's prognosis was difficult to predict. In Dr. O'Shaughnessy's opinion, much will depend on whether he is able to complete his academic goals or find suitable employment.

[183] Dr. O'Shaughnessy opined that the emotional difficulties, including his anger, frustration, and the Clinical Depression would not have occurred had Mr. Morrow's shoulder not been injured.

[184] Dr. O'Shaughnessy acknowledged that at some point his hockey career would end, and there would be some sense of loss.

[185] The cost of psychological treatment was not canvassed. Counsel have agreed that if I find that this is an appropriate cost of future care, they will agree on the cost between them.

[186] I now turn to the evidence of how far Mr. Morrow would likely have progressed in his hockey career, as well as salaries a player such as Mr. Morrow might expect to receive.

[187] A player is only eligible to play in the WHL until he is twenty years old. He is not eligible for a scholarship to an American school once he has played in the WHL.

Most players negotiate a deal that the WHL will pay for some education once the player leaves the league. Indeed, this is what Mr. Morrow did, and he still has some years of tuition owing to him.

[188] In the evidence, several options were discussed for players beyond the Major Junior League, of which the WHL is a part. There is the East Coast League ("ECL"), the American Hockey League ("AHL"), the European and Russian Leagues, and of course, the NHL.

[189] Mr. Morrow was drafted in the seventh round of the NHL draft in 2002. He was scouted by Rick Knickle of the Nashville Predators. Mr. Knickle testified that once a player is drafted, he has two years to sign a contract. Most players spend 4-5 years in the AHL before playing permanently in the NHL. He said that drafting is not a science. Sometimes players who are picked in the first and second round of the draft never play professionally, whereas some players who are picked in the seventh round or not drafted at all end up as star players. He referred to the Detroit Red Wings as an example of a team that turns low draft picks into great players all the time.

[190] He acknowledged that Mr. Morrow was not ranked on the NHL's Central Scouting roster when he was drafted. However, Mr. Knickle said he did not always agree with their analysis of players and the criteria they used.

[191] Mr. Knickle reviewed the careers of a number of players who were drafted lower in the draft who eventually played in the AHL and NHL.

[192] Mr. Knickle said that the going rate for a player in the AHL for the first five years was around $60-70,000, but that could increase to $100-400,000.

[193] He said that the first year salary in the NHL was in the range of $450,000 with signing bonuses. That would increase each year. Mr. Knickle performed an analysis of players who were drafted between 2002 and 2004. Of those drafted in the second half of the entry draft in 2002, 11.3% had played a game in the NHL, 40% were paid a signing bonus and the average bonus was $129,210. He said that 15% of defencemen drafted in the second half that year have played in the NHL and 39% were paid a signing bonus. Salaries for players in the NHL who were drafted in 2002, in 2006-07 playing year were in the range of $450-550,000 plus bonuses.

[194] Ross Gurney was Josh Morrow's agent after he started playing with the Kamloops Blazers, when Mr. Morrow had already been drafted by Nashville. Mr. Gurney represented other players in Nashville. Mr. Gurney said that once drafted, Mr. Morrow was on the right path to aspiring to be a professional hockey player. As an agent, he receives 4% of the professional contract. He looks for players who can skate, have grit, good puck skills, and hockey sense.

[195] He said that Mr. Morrow could skate with the best of them. In his view, he was a better skater than another of Nashville's top prospects, who now plays for the team. He put Mr. Morrow's skating ability at the top 1-5% of WHL players, top 15% of AHL players, and top 30% of NHL players. He said his grit, by which I assumed he meant toughness and aggressive play, was "unbelievable". He said that his

skating got him drafted, but his grit would get him signed, meaning a professional hockey contract.

[196] An NHL team has to make a “bona fide” offer to a player it has drafted in order to keep that player as the team’s asset. Such an offer was made to Mr. Morrow, but it was declined. Mr. Gurney said that these offers are always declined. It is just an indication that the team is still interested in the player.

[197] He watched Mr. Morrow play the rookie game against the Columbus Blue Jackets at the September 2003 camp, and said his skating was good, but his grit left a bit to be desired.

[198] Mr. Gurney heard that Mr. Morrow was having problems with his team in the fall of 2003. He met with him and talked to him. Mr. Gurney said that players are never released after the trade deadline and before play-offs. When that happened to Mr. Morrow in Cranbrook, it curbed his opportunity to play in the NHL immediately. As a drafted player he has to play to be evaluated, plus it is embarrassing.

[199] His assessment was that Mr. Morrow had changed from when he first met him. He had become distracted, short-tempered, a kid without direction, and his outlook was bleak. He was distracted because his focus was no longer on the goal of signing with the Nashville Predators, but was with his pain, his discomfort, and people not believing him.

[200] Mr. Gurney said that Mr. Morrow would have played in the AHL just given his skating. He said that Mr. Morrow would also have a very good chance of playing in the European League. In his view, Mr. Morrow had “pro potential”.

[201] Mr. Gurney said that at the time, base salaries were $500,000 in the NHL with signing bonuses of approximately $50-75,000 per year, and $28,500 in the AHL, but, in his view, Mr. Morrow would have made $50-100,000 in the AHL. He said there is a player in the AHL who is making $700,000 a year. These figures are in United States dollars.

[202] Mr. Gurney said that the salaries in the European League started at $40,000 USD, tax free and went up to $250,000, plus there were substantial perks including trips, vehicles, free accommodation, and so on. He said that the Russian League is on par with the NHL with salaries between $450,000 and $10 million dollars.

[203] Mr. Gurney said that every year approximately 300 players are drafted in the NHL. Approximately 78% of those never play in the NHL. On the other hand, there are many players in the NHL who were never drafted. The deeper (or lower) a player is selected in the draft, the less likely he is to play. On the other hand, Mr. Gurney said that the last player selected in the 7th round in 2002 is now playing in the NHL for Detroit. It is very difficult to predict the future of most hockey players.

[204] If a player is playing in the AHL and is called up to the NHL, he is paid at the NHL salary per day he is with the team, on a prorated basis. He said players sign two-way contracts between the NHL and AHL and sometimes three-way contracts, which would also include the ECL.

[205] Mr. Gurney said it was common for players to play in the AHL for 4-5 years and then move onto Europe.

[206] Two of Mr. Morrow's former coaches testified. The first chronologically was Rick Carrierre, who was his coach in Medicine Hat. At age 17, Mr. Morrow was a fast skater and an aggressive player. Mr. Carrierre said he could see him playing in the East Coast Hockey League when assessing him at that age, and he could see him earning a contract with the AHL.

[207] Cory Clouston was Mr. Morrow's coach for the Kootenay Ice in Cranbrook. He is now coaching an AHL team, the Binghamton Senators in New York, which is the farm team for the Ottawa Senators. Mr. Clouston is a very experienced hockey coach, and has twice won Coach of the Year in the WHL.

[208] In his view, Mr. Morrow's skill level, size, and physical play was above average for the WHL. He recalled that he needed work on his hockey sense. He felt that if Mr. Morrow was more of a "team guy" and worked on his hockey sense, he had a chance to play in the NHL. He was big enough, strong enough, and skilled enough to play at that level. Although he acknowledged that it was a hard league to break into.

[209] He had no doubt that Mr. Morrow could play in the AHL and in Europe. He also said that Mr. Morrow could play in Russia. He said he may or may not have had the skill for the NHL. It is difficult to evaluate a 20-year-old. His main observation of Mr. Morrow was after his injury and surgery.

[210] Mr. Clouston was not aware of Mr. Morrow's shoulder and joint problem other than he saw him icing his shoulder and saw him with the trainer.

[211] Mr. Clouston said that top players on his AHL team earned $200,000, and they were considered a low-paying team. He said a player in the AHL who is called up to the NHL on occasion would earn up to $400,000.

[212] Mikki Lanuk, the trainer for Kamloops, said he did not think Mr. Morrow would play in the NHL. I give Mr. Lanuk's opinion less weight than that of Mr. Gurney, Mr. Clouston, Mr. Carrierre, and Mr. Knickle. His expertise was not in evaluating players, but in the physical care of the players.

[213] Derek Nordin performed vocational testing of Mr. Morrow. His academic results were below his actual education. He was at a Grade 10-11 for Reading, Grade 11 for Spelling, and Grade 7 for Arithmetic. His IQ tested as average. Mr. Nordin opined that Mr. Morrow would have difficulty finishing university, but could finish a one or two year college level program. However, he recommended that Mr. Morrow not complete his program at Lakeland College because it was above his ability.

[214] Mr. Nordin stated that Mr. Morrow, because of his medical condition, is restricted to work of a light or limited strength nature and would lose access to medium or heavy strength category jobs. These jobs form about 30% of the available jobs in Canada. Mr. Nordin said that 50% of the jobs are limited strength jobs, but the majority of those jobs require post-secondary education.

[215] He listed potential employment that he thought Mr. Morrow could obtain: Electrical Power Line and Cable Workers at $65,200 per year; Telecommunications Installations and Repair Workers at $56,100 per year; or Longshore Worker at $66,150 per year. Frankly, although Mr. Morrow could do those jobs as they do not require college diplomas, I find it difficult to see how he could do any of those jobs from a physical perspective given he has significant range of motion limitations with his dominant arm.

[216] In terms of vocational testing, sales and marketing appeared to be a suitable fit, except for two things. First, he would have considerable difficulty in such a job if he failed to maintain his temper. Also, there is no diploma program in this field in Alberta. There is a program in British Columbia, but it requires taking courses in computers, math, and accounting, none of which are suitable for Mr. Morrow at this time or at least without upgrading his math skills.

[217] Mr. Benning and Mr. Gosling are economic experts who testified for the plaintiff and defendant respectively. I have referred to their evidence when discussing the issues pertaining to wage loss.

[218] At the time of trial, Mr. Morrow had no idea what he would like to do with his life. He felt lost. Ideally, he would like to have a good job and not be in pain. He would like to go into sales as the vocational testing suggested, but is afraid of his temper. He is a very angry and depressed young man, in part due to the pain and in part due to what has been done to him and the fact that this could have been avoided by Dr. Outerbridge.

ISSUES

i) Whether Dr. Outerbridge breached the standard of care when he conducted the surgery or when he failed to remove the anchors either at the time of the surgery or at a later time.

ii) If he is liable, what damages flow from that liability:

a) General damages

b) Past Income Loss

c) Special Damages

d) In Trust Claim

e) Loss of Capacity

f) Future Care

g) Aggravated Damages

h) Punitive Damages

iii) Failure to Mitigate Damages

LIABILITY

[219] The plaintiff has to establish, on a balance of probabilities, that Dr. Outerbridge failed to meet the standard of care of the ordinary, competent orthopaedic surgeon in the same circumstances. The applicable standard was

described by Shroeder J.A. in ***Crits v. Sylvester***, [1956] O.R. 132, 1 D.L.R. (2d) 502 at 508 (C.A.):

> The legal principles involved are plain enough but it is not always easy to apply them to particular circumstances. Every medical practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. He is bound to exercise that degree of care and skill which could reasonably be expected of a normal, prudent practitioner of the same experience and standing, and if he holds himself out as a specialist, a higher degree of skill is required of him than of one who does not profess to be so qualified by special training and ability.

[220] The test is also stated in ***Wilson v. Swanson***, [1956] S.C.R. 804 at 811-812, 5 D.L.R. (2d) 113, by Rand J.:

> … What the surgeon by his ordinary engagement undertakes with the patient is that he possesses the skill, knowledge and judgment of the generality or average of the special group or class of technicians to which he belongs and will faithfully exercise them. In a given situation some may differ from others in that exercise, depending on the significance they attribute to the different factors in light of their own experience. The dynamics of the human body of each individual are themselves individual and there are lines of doubt and uncertainty at which a clear course of action may be precluded.
>
> There is here only the question of judgment; what of that? That test can be no more than this: was the decision the result of the exercise of surgical intelligence professed? Or was what was done such that, disregarding it may be the exceptional case or individual, in all the circumstances, at least the preponderant opinion of the group would have been against it? If a substantial opinion confirms it, there in no breach or failure …

[221] This principle was affirmed in ***ter Neuzen v. Korn***, [1995] 3 S.C.R. 674 at para. 33, 127 B.C.L.R. (4th) 577 where McLachlin J. (as she then was) said this:

> It is well settled that physicians have a duty to conduct their practice in accordance with the conduct of a prudent and diligent doctor in the

> same circumstances. In the case of a specialist, such as a gynaecologist and obstetrician, the doctor's behaviour must be assessed in light of the conduct of other ordinary specialists, who possess a reasonable level of knowledge, competence and skill expected of professionals in Canada, in that field. A specialist, such as the respondent, who holds himself out as possessing a special degree of skill and knowledge, must exercise the degree of skill of an average specialist in his field. [citations omitted].

[222] Further, at para. 38:

> It is generally accepted that when a doctor acts in accordance with a recognized and respectable practice of the profession, he or she will not be found to be negligent. This is because courts do not ordinarily have the expertise to tell professionals that they are not behaving appropriately in their field…

[223] Thus, if Dr. Outerbridge acted within the accepted standard of care of a prudent and diligent doctor in the same circumstances, then he will not be found to be negligent. The evidence in this case overwhelming establishes that he did not so act, and that he breached the standard of care when he operated on Mr. Morrow.

[224] The standard of care stated by all involved is that metal is not left above the bone in a joint. Dr. Day, Dr. Leith, Dr. Bury, and Dr. Pagnani all said that the anchors should not be left sitting proud. Indeed, Dr. Outerbridge knew that as well. Although there was criticism of the manner in which Dr. Outerbridge attempted to insert the anchors, in that the guide was misplaced and that he did not use or have a tap, had he removed the anchors and not left them sitting proud, I do not think that his conduct could be characterized as negligent. He overstepped the acceptable level or standard of care when he left the anchors sitting proud in the joint, and in particular, he knew they were proud within the joint. His repeated assertions that he

made a judgment call do not help him. The only judgment call available to the prudent and diligent practitioner was to remove the anchors.

[225] His next act that aggravated the situation was when he, knowing the anchors were sitting proud, and knowing that they could cause pain and grinding, did not tell Mr. Morrow or either Holly Eburne, the physiotherapist, or Mikki Lanuk, the Blazer's team trainer, that there had been a problem with the surgery and they were to watch for these symptoms, which they both saw. Indeed, he continued to tell Mikki Lanuk that Mr. Morrow's shoulder was fine, when it was not.

[226] The next act of negligence was ignoring the concern expressed by Dr. Pagnani through Mr. Morrow in July 2003. I have made a finding of fact that Dr. Outerbridge did not tell Mr. Morrow that he could have his shoulder scoped, but that he said that Dr. Pagnani did not know what he was talking about, that his shoulder was fine, and that his symptoms were normal.

[227] Finally, when Dr. Pagnani called Dr. Outerbridge in September 2003, Dr. Outerbridge brushed him off and refused to pay any attention to his concern regarding Mr. Morrow's shoulder. The only explanation for this conduct, which was below the standard of care, is that Dr. Outerbridge was of the view that he knew better than anyone and was too arrogant to admit that he might have made a mistake.

[228] As Rand J. said in ***Wilson***, the preponderant opinion of the group was against the judgment call made by Dr. Outerbridge when he did not remove the anchors in

Mr. Morrow's shoulder. Dr. Outerbridge was negligent in doing that act and is liable for damages suffered by Mr. Morrow as a result.

GENERAL DAMAGES

[229] As a result of the surgery, Mr. Morrow has suffered significant and debilitating arthritis to his right shoulder, starting at the age of 19 years old. The evidence indicates that some individuals with a traumatic shoulder injury develop arthritis; however, there was no evidence that had Mr. Morrow developed arthritis later in his life, it would have had any effect on his mobility or caused him pain. It might have, but that is not the test. As noted above, his prior complaints regarding his shoulder I found to be insignificant and there was no evidence of a continuing or chronic problem with his shoulder prior to the dislocation.

[230] Further, I did not accept the evidence of Dr. Day that the arthritis was more likely caused by the posterior humeral head injury (or the Hills-Sachs injury). Indeed, even Dr. Day appeared to retreat somewhat from this position in cross-examination. The damage to the cartilage was across from the location of the proud anchors. The anchors caused most, if not all of the damage that renders Mr. Morrow debilitated today.

[231] The surgery caused pain and grinding to the shoulder. Mr. Morrow suffered terrible pain while undergoing physiotherapy. Certainly some pain is expected, but this pain was beyond the norm. He has lived with chronic pain since he was 19 years old, and he will live with chronic pain for the rest of his life. The pain will be alleviated from time to time when he has to undergo at least two, possibly three or

four surgical interventions to have a shoulder replacement. He gets some relief from massage and chiropractic treatment, but it is fleeting. His range of motion is still limited, especially reaching behind his back.

[232] The following are risks associated with the shoulder replacement: infection, which could result in a flail arm, instability, nerve or blood vessel damage, intra-operative fracture, chronic stiffness and weakness, and hematoma formation.

[233] There is a three to five month period of recuperation after a shoulder replacement, plus six to twelve months of physiotherapy to rehabilitate the shoulder.

[234] Mr. Morrow suffered disappointment at the Nashville Camp when he could not skate in July. He felt humiliation and embarrassment at the rookie camp when he performed poorly in the training and games. When he returned to the Blazer's in September, his game deteriorated. He could not longer play the tough, aggressive game for which he was known. The coach demoted him from a first or second line defenceman to a fourth line forward. When he was traded to the Kootenay Ice, things did not improve and he became more frustrated, angry and depressed. Finally, he was cut from the Kootenay Ice just before play-offs and after the trade deadline.

[235] He suffered humiliation and great loss when his hockey career came to an abrupt end because he could no longer play with his damaged shoulder. He suffered personally when it was apparent to him that no one believed that he was injured when he was playing in Kamloops. The trainer was told by Dr. Outerbridge that Mr. Morrow was fine. His billet family was fed up with his complaining. He was

to a degree ostrasized by a team and a community which had formerly been very supportive of him. While lost wages will be address in the wage loss category, Mr. Morrow still suffered an emotional and psychological loss when his hockey career ended in the manner that it ended. As he said, this all could have been prevented. His social network also disappeared. He became very angry and frustrated. He had conflicts with his family, which seldom occurred before. His grandfather said he could no longer do things for him around the farm.

[236] In spite of his loss and pain, he tried to carve out a career for himself in the oil patch, but the chronic pain became unbearable, especially in the cold weather. He had made a significant investment in equipment and lost a fair bit of money as a result of having to leave this employment.

[237] He tried going to school. I acknowledge that he did not have the academic background or ability to be very successful at Lakeland College but his ability to study was also compromised by his inability to sit at a desk, the chronic pain, and the headaches all relating to his shoulder.

[238] Day-to-day activities that he can no longer perform are as follows: reaching behind his back, washing and applying deodorant to this left side, reaching into a high cabinet, reaching into his back pocket for his wallet or cell phone, brushing his teeth, holding a pen for an extended period of time, using a computer, personal hygiene after using the washroom, and engaging in intimate relationships.

[239] He can also no longer rock climb, play basketball, swim, bike, horseback ride, play tennis, play volleyball, go cow roping and steer wrestling, play football or

baseball, play golf, or shoot with a rifle. The only exercise he can now do is ride a recumbent stationary bike.

[240] He cannot do any heavy lifting and is bound to go from an extremely active, physical life to one that is primarily sedentary.

[241] He is suffering from Clinical Depression as a result of his chronic pain and the loss he has experienced as a result of what has occurred and the degenerative arthritis in his shoulder.

[242] Prior to the surgery, Mr. Morrow was a happy, bubbly, hard-working, driven young man. He had a goal and a dream and worked extremely hard to fulfil it. He was a very successful junior hockey player, in that he has been playing since he was 15 years old, and was drafted by an NHL team. He had a professional career ahead of him to one degree or another. To use the vernacular, “Life was good”. Now he is an unhappy, frustrated, depressed young man prone to angry outbursts, who has lost his way in the world. He is in chronic pain, and faces at least two, probably more, major surgeries to alleviate his shoulder pain. He has already had to have two surgeries, one to remove the anchors and one to debride the cartilage, since 2003. He has no direction, no focus and does not, at age 25, know what to do with his life. Much has changed since February 2003.

[243] Given his young age when this event occurred, and the significant subsequent events, it is clear that the effect of this surgery on Mr. Morrow was devastating to him. This was and continues to be a life-altering injury.

[244] The defendant submits that a fair award for general damages is $150,000, less $30,000 to take into account prior injuries to his shoulder, for a total of $120,000. As I have previously indicated, regardless of the award, I am not disposed to reduce it on the basis of prior or pre-existing injury. The evidence does not support a finding of that magnitude.

[245] The plaintiff submits that an appropriate award is $225,000, which is 70% of the current upper limit of $330,000 for general damages. The defendant also seeks a separate award for aggravated and punitive damages.

[246] The defendant relies on ***Van Rossum v. Khan***, [1995] B.C.J. No 1202 (S.C.). Mr. Van Rossum suffered a fractured glenoid, which is a more serious injury than Mr. Morrow's injury. He also suffered pain, loss of enjoyment of life similar to Mr. Morrow, chronic pain and was facing two or three shoulder replacement surgeries. Mr. Van Rossum was awarded $100,000 for general damages, which the defendant submits, in today's dollars is around $150,000. While some of the results suffered by Mr. Van Rossum are similar to Mr. Morrow, I find that Mr. Morrow's pain and suffering is greater. For example, Mr. Van Rossum's left shoulder was compromised, not his dominant side. Mr. Morrow's right shoulder was destroyed which is his dominant side. Mr. Van Rossum was 33 years old when the injury occurred, whereas Mr. Morrow was 19 years old and faces many more years of pain. Additionally because of his age, it is more likely that Mr. Morrow will require at least one additional shoulder replacement than that anticipated for Mr. Rossum. Finally, Mr. Rossum was no longer able to work as a warehouseman. Without

diminishing that type of work, Mr. Morrow had the realistic dream of a professional hockey career ahead of him, which was destroyed as a result of the injury.

[247] The defence also relies on ***Goglin v. Lightheart***, [1992] B.C.J. No 2416 (S.C.), where $100,000 in general damages was awarded to a 19-year-old girl who suffered a fractured humerus in her right shoulder, as well as other injuries. She had chronic pain that she could tolerate. However, her shoulder was functioning well and she did not have to make significant lifestyle changes. It was a probability that she would have to undergo one shoulder replacement in her lifetime. Her life was not doubt affected by her injury, but on reading the judgment, the effect to her of her injury, albeit serious, was not as severe as the effect of the injury on Mr. Morrow.

[248] The plaintiff relies on ***Soligo v. Turner***, 2002 BCCA 73, 97 B.C.L.R. (3d) 300. The plaintiff was struck by a car and suffered soft tissue injuries to her shoulder. She was a school teacher and an elite curler. She had competed in the 1992 Olympics, winning a Bronze Medal. At the time of the accident in 1996, she had left competitive curling to complete her education, but had hoped to return to the competitive level in order to compete in the 1998 Olympics. Her injury did not improve and she had seven surgeries, as well as other non-surgical interventions. She suffered from chronic pain and could no longer teach, although she could work at other employment. She certainly could not curl any longer, but was able to take up coaching the sport. The Court of Appeal upheld an award of general damages in the sum of $150,000.

[249] In ***Alden v. Spooner***, 2002 BCCA 592, 6 B.C.L.R. (4th) 308, the Court of Appeal upheld a jury award of $200,000 for general damages for injuries suffered by a 17-year-old girl for injuries suffered as a result of four car accidents. She suffered chronic pain syndrome and depression. There was evidence that the accidents could have the effect of physically and emotionally devastating to plaintiff. Similarly, in this case, Mr. Morrow has been physically and emotionally devastated by the injury to his shoulder.

[250] In some cases, aggravated damages have been made a separate award, and in other cases, they are considered part of the award for non-pecuniary or general damages. I have concluded that if there is to be an award for aggravated damages, it should be part of the general damages for the following reasons.

[251] Aggravated damages are compensatory in nature, and are to be distinguished from punitive damages, which, as the name implies are to impose punishment. Aggravated damages are awarded when the conduct of the defendant, beyond the act comprising the negligence, aggravates the injury. The conduct is variously described in the cases as “high-handed, malicious or oppressive”. These adjectives often describe behaviour that will also attract an award for punitive damages, and the two sometimes overlap. However, the distinction between the two is significant, and important to keep in mind.

[252] In ***Huff v. Price*** (1990), 51 B.C.L.R. (2d) 282, 76 D.L.R. (4th) 138 (C.A.), the Court, said this, at 299, in relation to aggravated and punitive damages:

> So aggravated damages are an award, or an augmentation of an award, of compensatory damages for non-pecuniary losses. They are designed to compensate the plaintiff, and they are measured by the plaintiff's suffering. Such intangible elements as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that are caused by the conduct of the defendant; that are of the type that the defendant should reasonably have foreseen in tort cases or had in contemplation in contract cases; that cannot be said to be fully compensated for in an award for pecuniary losses; and that are sufficiently significant in depth, or duration, or both, that they represent a significant influence on the plaintiff's life, can properly be the basis for the making of an award for non-pecuniary losses or for the augmentation of such an award. An award of that kind is frequently referred to as aggravated damages. It is, of course, not the damages that are aggravated but the injury. The damage is for aggravation of the injury by the defendant's high-handed conduct.
>
> Punitive damages, by contrast, are a separate award against the defendant designed to impose a punishment on the defendant and to set an example to others who might seek to act in a similar way. Punitive damages are measured by the degree of moral culpability of the defendant. They are not designed to compensate the plaintiff and they are not measured by an assessment of the plaintiff's suffering. An element of wilfulness or recklessness such as would underlie a finding of guilt in a criminal act is likely to be present before punitive damages will be awarded. But the defendant's conduct need not be criminal. Mr. Justice McIntyre used such words to describe the conduct that would give rise to a claim for punitive damages as "harsh, vindictive, reprehensible and malicious" but Mr. Justice McIntyre acknowledged that he had not exhausted the available adjectives. The anomaly, of course, about punitive damages is that they are paid to the plaintiff and not to the state, even though the plaintiff should have been fully compensated by his award of compensatory damages, pecuniary, non-pecuniary, and aggravated.

[253] See also ***Vorvis v. Insurance Corporation of British Columbia***, [1989] 1 S.C.R. 1085 at 1098-1099, 58 D.L.R. (4th) 193; ***Norberg v. Wynrib***, [1992] 2 S.C.R. 226 at 263-264, 92 D.L.R. (4th) 449; and ***Hill v. Church of Scientology of Toronto***, [1995] 2 S.C.R. 1130 at paras. 188-191, 126 D.L.R. (4th) 129.

[254] Here the conduct that attracts aggravated damages is as follows:

i) The anchors were not removed when Dr. Outerbridge knew they could cause damage to Mr. Morrow's shoulder. This is the act of negligence, and does not, on its own, attract additional compensation through aggravated damages.

ii) He did not identify that the anchors were sitting proud in the operative report.

iii) He did not tell Mr. Morrow that the anchors were sitting proud and that there were symptoms that he should be aware of, in particular, pain and grinding, that could indicate if the anchors were causing a problem. Nor did he advise Mr. Morrow of the risks associated with the anchors sitting proud.

iv) Dr. Outerbridge knew the anchors were sitting proud. He also knew that there were potential symptoms that could identify if the anchors were in fact causing problems, yet he did not notify the two primary health care providers, Ms. Eburne and Mr. Lanuk, to watch for those symptoms.

v) He rejected Dr. Pagnani's concerns expressed to him through Mr. Morrow in July 2003, when it clearly called for investigation.

vi) He rejected Dr. Pagnani's direct concerns when Dr. Pagnani contacted him. Again, clearly there was a need to further investigate Mr. Morrow's shoulder and Dr. Outerbridge did nothing.

vii) When Mr. Lanuk approached Dr. Outerbridge regarding the second opinion sought by Mr. Morrow, Dr. Outerbridge said that it was not necessary

as there was nothing wrong with Mr. Morrow. As a result, Dr, Outerbridge effectively derailed Mr. Morrow's opportunity to obtain a second opinion in September 2003.

viii) At all times, Dr. Outerbridge knew that he had left the anchors proud in the joint of Mr. Morrow.

[255] As a result of all the conduct (except the original act of negligence and the misleading operative report), both cumulatively or individually, Mr. Morrow's injury was aggravated beyond merely the act of negligence. Had Dr. Outerbridge acted sooner, the fact that the anchors were causing significant arthritis would have been identified at the latest in July 2003 or likely earlier given the evidence of Holly Eburne, that she knew that the shoulder was not progressing properly.

[256] He would have been spared some of the pain he suffered through 2003 until today, and in the future. Mr. Morrow would have been spared the humiliation of playing his last year of hockey as a wash-out, or less than useful player. He would have been spared the humiliation of being cut from a team just before play-offs. Although significant damage was done by July 2003, according to Dr. Pagnani, it would not have been as serious as it was ten months later.

[257] The evidence fully supports the finding that Mr. Morrow's injury was aggravated by the high-handed, arrogant, and oppressive conduct of Dr. Outerbridge subsequent to the initial act of negligence in February 2003, and calls for an award of aggravated damages.

[258] I recognize that there is an issue whether the combined effect of general damages and aggravated damages can exceed the cap on general damages as outlined in the trilogy (***Andrews v. Grand & Toy Alberta Ltd***., [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452; ***Thornton v. Prince George Board of Education***, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480; and ***Teno v. Arnold***, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609.) The amount that I have awarded is well-within the current upper-limit; I do not need to address this issue. See ***Bob v. Bellerose***, 2003 BCCA 371,16 B.C.L.R. (4th) 56 at para. 35.

[259] Based on the authorities cited above, the many consequences suffered by Mr. Morrow as a result of the surgery to his shoulder as outlined in detail above, I conclude that an award of $200,000 in general damages is appropriate. I would augment this award by an additional $35,000 for the aggravation of the injury by the conduct of Dr. Outerbridge. Clearly, this money will not put Mr. Morrow completely back in the position he was before the surgery. No amount of money will do that. However, hopefully this will provide some measure of compensation to him for what he has suffered.

PAST INCOME LOSS

[260] Mr. Morrow is entitled to compensation from the time of the injury to now. The test for hypothetical events is whether it was a real possibility that an event would occur and the actual likelihood of the event occurring. See ***Smith v. Knudsen***, 2004 BCCA 613, 33 B.C.L.R. (4th) 76 at paras. 28-29. I will go into further detail regarding this test when addressing the issue of future wage loss. I need not

now because the evidence is strong that Mr. Morrow would have played in the AHL but for his injury. Also, we know what Mr. Morrow in fact made while working in the oil patch.

[261] Mr. Morrow attended the University of Alberta for 2004-2005. The next year, Mr. Morrow went to the oil patch. After the oil patch, and a couple of stints on his grandfather's farm, he returned to school.

[262] There was no evidence that he lost any income during the 2003-04 hockey season, as he played until almost the end of the season. This was his last year of eligibility in the WHL, and I think it most likely, that if he had signed with Nashville, he would have played this final year of Major Junior hockey.

[263] If Mr. Morrow had signed with the Nashville Predators and assigned to the AHL team, the Milwaukee Admirals, for the 2004-2005 season, as the evidence strongly suggests he would have been, he would have likely earned, based on the evidence of Mr. Clouston and Mr. Gurney, around $50,000.

[264] While I acknowledge that the minimum salary for the AHL is much lower, based on the evidence that I have accepted above, I do not think Mr. Morrow would have started at the minimum salary.

[265] The evidence also supports that Mr. Morrow would have, as most players do, stayed in the AHL for around four or five years before making the leap to the NHL. Had Mr. Morrow played in the AHL, he likely would still be playing there in the 2008-2009 season. His earnings would have also likely increased from a starting wage of

around $50,000 up to at least $100,000 by the fourth year. The range of salary in the AHL is great – from $35,000 to upwards of $700,000 for the highest paid player. I took from what Mr. Clouston said that most of the players beyond rookies earn in the area of $100,000, and a few earn more than that. Those who are regularly called up to the NHL will earn considerably more than that. However, while Mr. Morrow had some excellent skills, including his skating, he still had areas that required work, and I do not think the evidence supports that there was a real possibility that he would be in the upper echelon of income in the AHL. Therefore, his past wages if he was with the AHL would be $50,000 for the first year, $75,000 for the second year and $100,000 for the third, fourth, and fifth years. Therefore, from the date of injury to the date of judgment (as the hockey season is winding down), there was a real possibility (and indeed, a likelihood) that he would have earned $425,000 had he played in the AHL over five seasons.

[266] The difficulty with assessing hypothetical earnings in this case is that assessing a hockey player at age 19 or 20, by all accounts, is difficult. Some are clearly headed for stardom, and succeed. I think one can take judicial notice of a career such as that of Wayne Gretzky. On the other hand, some headed for stardom may suffer a career ending injury, such a serious concussion. Had Mr. Morrow not had the surgery to repair his dislocation, the evidence suggests that there was a chance that he could continue to suffer from dislocations.

[267] Others, who were never drafted in the NHL, become star players. Again, I think it is fair to take judicial notice of the career of Martin St. Louis, an impressive player in college, but not drafted by the NHL. In the 2003-2004 season, playing for

Tampa Bay Lightning, he won not only the Stanley Cup, but also the Hart Trophy for the most valuable player, the Lester B. Pearson award for peer-chosen most valuable player, and the Art Ross Trophy for the most points in a season.

[268] Mr. Knickle identified a player who was taken last in the seventh round of 2002 (the same round Mr. Morrow was selected), who now has a substantial NHL contract. If those who are highly skilled in the area have difficulty predicting an outcome for a player, it is all that more difficult for someone in the position of "crystal ball gazing". I say this only to demonstrate that this exercise is not one of mathematical precision, but an effort to put right as best one can, based on the evidence, the loss suffered by Mr. Morrow.

[269] The evidence supports on a standard higher than reasonable possibility in terms of whether Mr. Morrow would play hockey in the AHL, and concomitant with that contract, he would likely have received a signing bonus. In order to play in the AHL, Mr. Morrow would have signed a two or three-way contract. The contracts generally contain signing bonuses. The evidence of Mr. Knickle was that the average signing bonus paid that year was $129, 210. I appreciate the evidence is that of the 2002 draftees in the second half of the draft, only 40% received signing bonuses. However, I have found not only is it a real possibility that Mr. Morrow would have played in the AHL, that is was likely that he would, and therefore he would have been one of the 40% who received a signing bonus. Added the average bonus to the five year past wage loss, the total is $554,210 USD.

[270] Some of this needs to be discounted for contingencies, the primary one being injury. Contingencies such as part-time work, unemployment and so on, are not generally applicable in this situation. Indeed, Mr. Gosling, the defendant's expert in economic loss testified that usual labour market contingencies did not apply to a professional hockey player. He did not deduct anything from his assessment of the salary. However, he did not take into account the evidence that Mr. Morrow could suffer an injury. Therefore, although 20% is often applied for contingencies downwards, I would apply a 10% discount in this case. I would round the amount of past wage loss from the loss of playing professional hockey to $500,000 USD. This of course needs to be calculated against what he in fact earned during this period. It also needs to be calculated against what he could have earned if the had remained in the oil patch.

[271] I have taken into account that Mr. Gosling, for the defence, calculated that Mr. Morrow would have earned $172,846 had he played in the AHL. However, that calculation was based on a minimum salary in the AHL and I have found, based on the evidence that while he would not have been earning in the higher range of salary, he also would not have been earning in the minimum range.

[272] The plaintiff argues that had he continued to work in the oil patch, he would have earned in excess of $200,000 per year. These calculations do not take into account the time that Mr. Morrow would need to establish himself as an owner/operator of an excavator, on the evidence one to two years. It does not take into account the time off due to break-up in the spring or the time off in the fall before the ground freezes. Nor did it take into account the payments and costs associated

with running the excavator, including the interest on the monthly payments as well as the cost of fuel to run the machinery, for which the owner operator is responsible. Thus, I do not accept these figures as accurate in terms of past wage loss.

[273] Mr. Gosling stated in his report that Mr. Morrow earned $134,957 in the oil patch for 2005-2008. The figure from the plaintiff's expert, Mr. Benning was not that different. Had he just worked the past five years in the oil patch, he would have earned less than five years in the AHL. I round that up to $135,000 and this figure will be deducted from the total of $500,000 USD. I do not have the appropriate exchange rate, so I will defer to counsel to adjust the figure.

LOSS OF CAPACITY/FUTURE INCOME

[274] The principles applicable to the issue of loss of capacity to earn income in the future are neatly set out in ***Reilly v. Lynn***, 2003 BCCA 49, 10 B.C.L.R. (4th) 16 at paras. 100-101:

> [100] An award for loss of earning capacity presents particular difficulties. As Dickson J. (as he then was) said, in ***Andrews v. Grand & Toy Alberta Ltd.***, [1978] 2 S.C.R. 229 at 251:
>
> > We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: ***The Queen v. Jennings***, *supra*. A capital asset has been lost: what was its value?
>
> [101] The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: ***Athey v. Leonati***, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real

> and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: ***Athey v. Leonati***, *supra*, at para. 27, ***Steenblok v. Funk*** (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: ***Milina v. Bartsch*** (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: ***Rosvold v. Dunlop*** (2001), 84 B.C.L.R. (3d) 158, 2001 BCCA 1 at para. 11; ***Ryder v. Paquette***, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: ***Mulholland (Guardian ad litem of) v. Riley Estate*** (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: ***Milina v. Bartsch***, *supra*, at 79. In adjusting for contingencies, the remarks of Dickson J. in ***Andrews v. Grand & Toy Alberta Ltd.***, *supra*, at 253, are a useful guide:
>
> > First, in many respects, these contingencies implicitly are already contained in an assessment of the projected average level of earnings of the injured person, for one must assume that this figure is a projection with respect to the real world of work, vicissitudes and all. Second, not all contingencies are adverse ... Finally, in modern society there are many public and private schemes which cushion the individual against adverse contingencies. Clearly, the percentage deduction which is proper will depend on the facts of the individual case, particularly the nature of the plaintiff's occupation, but generally it will be small ...
> >
> > [emphasis added by B.C.C.A.]

[275] I will first speak to whether there was a reasonable possibility that Mr. Morrow would play as a full-time player in the NHL after five years in the AHL. The evidence supports that there was a reasonable possibility that he could play in this league. Salaries from NHL players vary widely, however, those who did play from the later draft picks, by and large (but as noted not exclusively) earned in the range of $450-500,000 USD per year. However, the statistics put forward by Mr. Knickle indicate

that around 10% of those players ever play just one game in the NHL. Thus, had Mr. Morrow made the NHL, and earned in the range of $4,000,000 USD over an eight-year period, that must be deeply adjusted in terms of the relative likelihood that he would play in the NHL. On a 10% basis, which is probably on the high side, Mr. Morrow would have earned $400,000 USD over this time period. Clearly he would have made more working in the oil patch over this time frame, and that was a much more likely career for him.

[276] If he did not make the NHL within five years, Mr. Morrow would have moved on. He might have played in Europe, and he had the ability to do so. Playing in Europe had never been a consideration for Mr. Morrow. If he did not make the NHL within five years, it is more likely that he would move onto another occupation. Thus, while it is a realistic possibility that he could play in Europe, the likelihood of that happening is remote. The discounted income would be less than he would earn in the oil patch.

[277] Mr. Morrow did very well in the oil patch. Had it not been for the injury, and subject to contingencies of that employment, there is a reasonable possibility, with a one-hundred percent likelihood of occurrence, that Mr. Morrow would have continued in the oil patch until retirement.

[278] His income from 2005-2008 is does not reflect the true picture of what he could earn in the oil patch, as he was starting out as an owner/operator of an excavator. He could earn upwards to $160 per hour. From this he would be liable to pay for fuel and the expenses associated with his machine.

[279] In 2007, Mr. Morrow' s income derived in part from his own labour on an employer's machine, as well as some work with his excavator, and was $145,546. In his calculations, Mr. Benning, the plaintiff's economic expert, used the figures of $150,000 per year, after his start-up, decreasing at age 40 to $100,000 annually and decreasing again at age 50 to $75,000, with a retirement age of 65 years. I find that these figures are fair, and represent a reasonable assessment of what Mr. Morrow would have reasonably earned had he continued in the oil patch. These figures have been partially discounted by Mr. Benning with some contingencies, but his opinion does not take into account all of the contingencies a court is normally required to consider.

[280] It is difficult to determine what percentage of a contingency to apply, as the future of the oil patch is uncertain. However, Mr. Morrow operated an excavator, and Mr. Cabay testified that much of his excavation work is reclamation work, which is not dependent on the price of oil. Additionally, an excavator can be employed for many types of work, not just in the oil patch. Therefore, I would add an additional contingency of 10%. The contingency takes into account things such as economic down-turn, illness, part-time work, or other event that might limit Mr. Morrow's ability to earn income.

[281] Mr. Benning commenced his calculation from 2008. I have found that Mr. Morrow would likely remain in the AHL for five years until the end of this season. He would reasonably start employment in the oil patch by July 2009. Mr. Benning has attributed $150,000 for each of these years in the oil patch and then prepared a present value calculation, taking into account some contingencies. I would take Mr.

Benning's present value calculation and deduct the 2008 amount and half of the 2009 amount, which totals ($143,808 + 70,546.50) $214,354.50, from Mr. Benning's present value total of $2,826,831 future wages, to retirement. That calculation results in a present value calculation of total earnings of $2,612,476.59 had Mr. Morrow been able to continue to work in the oil patch. I then deduct 10% for contingencies, noted above, which is $261,248. Thus, the final figure for the present value of future wages, had Mr. Morrow worked in the oil patch until age 65, is $2,351,228.50. (Counsel are invited to check the calculations).

[282] The next step in the process of crystal ball gazing is trying to assess what Mr. Morrow will earn once he has employment. Some jobs were identified for him in terms of what he might be able to do, including electrical power line and cable work. The difficulty is that he will be limited to sedentary work, and can no longer perform trades that will require him to do any kind of lifting, or significant movement with his right arm. This disability takes him out of many occupations that he might otherwise be able to do.

[283] The other difficulty is that sedentary occupations often, according to the evidence, require post-secondary skills that Mr. Morrow does not have, and may not be capable of acquiring.

[284] The most likely occupation in which he might achieve success, according to Mr. Nordin, is in sales and marketing. However, for Mr. Morrow to have a chance at success in this course, he must first upgrade his math and arithmetic skills considerably.

[285] Mr. Gosling listed a number of occupations available to young men in trades, or other skilled occupations. However, these are just noted, with no discussion whether any of these occupations would be suitable for Mr. Morrow given his debilitating injury. Many are not suitable.

[286] I find as a fact that Mr. Morrow would be best suited to find employment in the marketing field, after taking a two-year diploma, given his disability and academic limitations. However, he will also have to take at least a year of upgrading in order to be able to tackle the course. Mr. Benning has performed such an analysis, and in this analysis has taken into account some contingencies. However, one contingency not considered is the fact that Mr. Morrow will lose up to a year's employment because he will have to have repeated shoulder surgeries. Another contingency is that if Mr. Morrow continues to have issues with his temper, related to his shoulder pain, such outbursts could impact his ability to perform this type of work.

[287] Mr. Benning's figures contemplate Mr. Morrow starting work in 2010. The earliest Mr. Morrow would be able to start work is in the spring of 2012. He would not be able to start a diploma program until September 2010, as he would need from now until that time to upgrade his arithmetic and writing skills.

[288] For the sales and marketing employment income figures, Mr. Benning has included systemic increases in salary and has taken into account more contingencies than he did for the oil patch calculation. Given this, it would be difficult for me to properly calculate the present value of the wages that will reasonably be earned by Mr. Morrow in the future. It is not as straightforward as the

calculation for the oil field. I recommend that counsel have the figure recalculated based on my findings of fact, as well as take into account that at approximately age 28, 43 and 60, Mr. Morrow will lose 4 months work due to the likelihood he has to have shoulder replacements.

[289] Further, an additional 10% should be discounted from the sales and marketing figures on the basis that Mr. Morrow may have other issues affecting his ability to work. If counsel can agree on the present value figure for future wages that Mr. Morrow could anticipate earning in the sales and marketing area, they have leave to do so. If not, they may either attend at the Registrar or bring the matter back before me. The figure that Mr. Morrow would reasonable earn from working in sales and marketing will then be deducted from the sum calculated for working in the oil patch. This amount will form his award for loss of capacity for earning future income.

SPECIAL DAMAGES

[290] The special damages are admitted by the defendant, save and except for the sum of $7,350, which was the cost of the hair transplant. Mr. Morrow believes the hair loss was due to the stress. First, there is no evidence other than from Mr. Morrow that his hair loss was due to stress. Secondly, Mr. Morrow felt stress in the oil patch, not just from his situation, but also from the type of job he was performing in that he was working near live sour gas lines, and one misstep on his part could cost many lives. Additionally, his stress at school was in part because he was not academically ready for this level of education. Relating the hair loss to the surgery

is too remote and I am not satisfied that this is a special damage attributable to the defendant. Therefore the plaintiff is entitled to special damages in the amount of $20,314.59, plus interest.

IN TRUST CLAIM

[291] The plaintiff makes a claim primarily on behalf of his mother for time she has taken off work to date to look after her son, plus the time she will likely have to take off in the future for subsequent surgeries. A claim for $45,000 is made under this heading of damages. No evidence was tendered with respect to the amount of money Dr. Morrow lost when she took time off work to accompany her son to his appointments and looked after him after two of his surgeries.

[292] The defendant relied on ***DeSousa v. Kuntz*** (1989), 42 B.C.L.R. (2d) 186 (C.A.). In this case, the Court of Appeal dismissed a claim “in trust” for the plaintiff’s wife who had to take on an additional burden of caring for her husband as a result of his illness. The court held that there is no claim for household or nursing duties that one could expect a husband or wife to perform through the “natural affection, friendliness and interdependence of the usual marital relationship”. Only if the spouse had to take on the complete nursing function, outside the usual concept of what is involved in taking marriage vows.

[293] This decision was overtaken by ***Kroeker v. Jansen*** (1995), 4 B.C.L.R. (3d) 178, 123 D.L.R (4th) 652 (C.A.). The Court of Appeal found that jurisprudence is changing and housekeeping and other spousal services have economic value even if those services are replaced gratuitously from within the family.

[294] However, there was no evidence of the cost to Dr. Morrow for the time and money she spent assisting Mr. Morrow to appointments and to his surgery. The plaintiff still bears the burden of establishing the amount of the loss, and this was not done so for this claim.

FUTURE CARE

[295] Mr. Morrow will require future care, without question. He currently benefits from massage therapy and chiropractic treatments. He will require care after his shoulder replacement surgeries. There is a lengthy rehabilitation period required, plus physiotherapy and massage therapy following the surgery. Counsel submitted that I make the order with respect to how much future care he will require, and they would calculate the present value. I find that a reasonable amount of treatment is massage once weekly. He will likely require physiotherapy 2-3 times per week for six months to a year following each of three shoulder replacement surgeries.

[296] He will also require home care for at least a week after each of these surgeries. While no evidence was tendered on this point, I understand that counsel are able to agree on an appropriate figure.

[297] Dr. O'Shaughnessy opined that he would require 20-25 sessions with a psychologist in order to combat his depression. Again, counsel have indicated that they will agree on an appropriate figure.

[298] The defendant submitted that $50,000 was an appropriate figure for the cost of future care. Given the findings that I have made, I believe this amount is too low.

For example, massage therapy once a week, at $75 per hour, (which is the amount in the exhibit), would be more than $50,000 over the lifespan of Mr. Morrow.

[299] If counsel cannot come up with an agreeable figure for the present value of future care, they have leave to return to me.

PUNITIVE DAMAGES

[300] Punitive damages are considered after the remainder of the damage award has been determined. The rational for this is that punitive damages are just that, for punishment. If the combined award is sufficient to punish the defendant for the conduct, then there is no need for a further award of damages. Punitive damages are assessed based on the moral culpability of the defendant and do not relate to the injury suffered by the plaintiff. Adjectives often used to describe conduct that attracts punitive damages are, “harsh, vindictive, reprehensible and malicious”. The purpose of the award is to demonstrate a court’s concern for wrongdoing by a defendant. See: ***Huff*** at 299-301; ***Vorvis*** at 289-293; ***Robitaille v. Vancouver Hockey Club Ltd*** (1981), 30 B.C.L.R. 286 at 310, 124 D.L.R. (3d) 228, ***Whiten v. Pilot Insurance Co.***, [2001] 1 S.C.R. 595.

[301] In ***Hill***, Cory J. stated the principles this way, at para. 196:

> Punitive damages may be awarded in situations where the defendant’s misconduct is so malicious, oppressive, and high-handed that it offends the court’s sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant

> and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

[302] Here the same evidence that supported the augmented award for aggravated damages founds the basis for an award of punitive damages. The important question is how to characterize what Dr. Outerbridge has done. He has acted in a high-handed, arrogant fashion resulting in an aggravated injury of Mr. Morrow. Was his subsequent conduct an effort to hide what he knew he had done, or was he so arrogant and confident in his abilities that he did not think that any criticism of his judgment was warranted? This might explain his conduct with Dr. Pagnani, and Mr. Lanuk regarding obtaining a second opinion. It does not explain why he did not tell Mr. Morrow of the risk – ever. Nor does it explain why he did not advise Ms. Eburne or Mr. Lanuk to watch for symptoms that could indicate that there was a problem with the anchors.

[303] Conduct that has attracted the court's condemnation includes that by the Church of Scientology, in ***Hill***, which was described by Cory J. in para. 195 as "recklessly high-handed, supremely arrogant, and contumacious". In that case, one of defamation, the Church of Scientology continually and consciously attacked Mr. Hill (at the time a prominent and well-respected Crown counsel), without any regard for the truth of the allegations, and the Supreme Court of Canada upheld a jury award of $800,000 for punitive damages. That was a case involving a corporate body with significant financial resources.

[304] In ***Coughlin v. Kuntz*** (1989), 42 B.C.L.R. (2d) 108 (C.A.), the Court of Appeal upheld an award of $25,000 in punitive damages against a doctor for conducting experimental surgery on a patient when he was advised not to do so by the College of Physicians and Surgeons. He failed to advise the patient of the risks, and resulted in exposing the patient to two surgeries instead of one, plus a prolonged recovery period.

[305] In ***Shobridge v. Thomas*** (1999), 47 C.C.L.T. (2d) 73, (B.C.S.C.), an award of $20,000 in punitive damages was made against Dr. Thomas. Dr. Thomas had operated on a patient in September 1995. Afterwards, she suffered complications from the surgery. A second surgery was performed in December 1995, by Dr. Thomas and he discovered that he had left a large roll of gauze inside the patient during the first surgery. He told the surgical staff not to make notes of the discovery and made efforts to cover up his mistake. He eventually told the patient in February 1996, after pressure from nursing staff, about the mistake he made. The trial judge made the award on the footing that the doctor had acted deliberately, in bad faith, and unprofessionally in attempting to hide his error from the patient.

[306] As I have not finalized figures for wage loss, I can only calculate only a rough and ready figure of a total award, which is in the range of $1,435,000. Although Dr. Outerbridge's conduct borders on the reprehensible, and deserving of punishment, as noted by the evidence summarized above, this award achieves sufficient punishment. Punitive damage awards are rare in Canada. I do not find it necessary or appropriate to admonish Dr. Outerbridge further by adding a punitive damage award. I add that in ***Huff*** the court noted that the entire award is to be considered,

however in ***Hill***, just the general and aggravated damages were to be considered before assessing whether sufficient punishment had been achieved. In ***Hill***, there were not other damages; therefore, I conclude that where there are damages beyond general damages and aggravated damages, the entire award is to be considered.

FAILURE TO MITIGATE

[307] The defendant submits that the plaintiff failed to mitigate his loss. First, he says that he failed to take advantage of the "scope" of his shoulder suggested by Dr. Outerbridge in July 2003. I found as a fact that Dr. Outerbridge not only did not suggest scoping his shoulder, but told him everything was fine, and said that Dr. Pagnani did not know what he was talking about.

[308] Next, he did not follow-up with the referral to Dr. Regan. Mikki Lanuk testified that the second opinion was halted because Dr. Outerbridge told Mr. Lanuk that Mr. Morrow was fine and there was nothing wrong with his shoulder.

[309] Mr. Morrow did not reject having surgery, and thus did not fail to mitigate his loss. He was told repeatedly that he was fine, that his pain was normal and that he did not need further treatment. There is no feasible argument for failing to mitigate because each step that Mr. Morrow took to mitigate his loss was thwarted by Dr. Outerbridge.

SUMMARY

[310] The following award is made to compensate Mr. Morrow for the pain, suffering and loss incurred as a result of the negligence of Dr. Outerbridge in conducting a Bankart repair to Mr. Morrow's shoulder:

i) General damages: $200,000 augmented by $35,000 for aggravated damages, for a total of $235,000.

ii) Past wage loss, although not finalized, will be in the range of $400,000 plus interest.

iii) Future wage loss, although not finalized, will be in the range of $800,000.

iv) Special damages in the amount of $20,314.59 plus interest.

v) Future care – to be determined.

[311] Counsel indicated that they wished to address the court on the question of costs once the reasons were complete. Therefore, costs will be dealt with at a time convenient to counsel.

"E. Bennett J."