Expert Evidence: the Do's and Don'ts

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Do: Pick a Properly Qualified Expert

Considerations:

- Location
- Experience/Familiarity
- Timing
- Mohan Criteria
    1. Relevance
    2. Necessity
    3. Absence of Exclusionary Rule
    4. Properly Qualified Expert
- White Burgess

Don’t: Be in a Conflict with your client

Asrafian v. Kavarana, 2023 ONSC 6944

- Jury trial in Newmarket before RSJ Edwards
- Masgras Law Firm hired an anesthesiologist, Dr. Friedlander through an assessment company called Meditecs in 2020
- Meditecs owned by Omar Irshidat, husband of Georgina Masgras
- In 2021, Masgras Law sent a “consent document” asking Plaintiff to waive the conflict.
- Dr. charged $2,034 for the assessment and report. The disbursement list had it at $5,000.
- The Meditecs income was family income. Direct conflict between the Plaintiff law firm and the Plaintiff.
- Mistrial declared.

Asrafian -The Costs Decision – 2024 ONSC 2420

- Ms. Masgras signed an affidavit
- Masgras represented to the Law Society in 2016 her firm had stopped referring to Meditecs (2023 ONLSTH 80 at para. 20)
- Much of the “new” evidence suggested that Ms. Masgras knew nothing about the conduct of the claim until after the mistrial.
- Emails, pleadings said otherwise. “I simply do not believe Ms. Masgras” (para 47)
- Costs awarded personally.

Don’t: Overdo It

- Asrafian (costs) at para 50: personal injury bar and civil bar need to reduce reliance on experts.
- Desmond v. Hanna, 2023 ONSC 4097
  - Jury trial in Brampton. Two injured Plaintiffs
  - Plaintiff #1 (Desmond) – 6 experts (R.53)
    - Chronic pain, ortho, psychologist, psychiatrist, future cost of care, economic loss
  - Plaintiff #2 (Henry) – 7 experts (R.53)
    - Ortho, physiatrist, chronic pain, psychiatrist, psychologist, future cost of care, economic loss
  - Motion at outset of trial. Trimble J. grouped the experts and told each Plaintiff to choose one

Plaintiff	Group 1	Group 2
Desmond	***Blitzer***, Kekosz, West	***Wolf***, Vitelli
Henry	West, Mailis	Westreich, Vitelli

Do: Give your expert a proper foundation

Desmond v. Hanna Trial Ruling #2 – 2023 ONSC 4100

- Desmond chose one expert from each group(Henry case not started yet)
- Problem was future cost of care expert that relied on opinion of the expert “not” chosen. Relied heavily on Kekosz, West, and Vitelli
- Defendant moved to exclude the evidence
- No factual foundation = no necessity, relevance, reliability
- Close call for the Plaintiff

Foundation

Grujic v. Fine – 2024

- Toronto Jury Trial in June 2024. Justice Carole Brown.
- Voir dire on accountant, Vivek Gupta
- 2013 and 2019 accidents - trial was for 2013 only
- Two reports drafted. Second delivered morning of the voir dire removed all references to 2019 accident, but expert did not change his calculations!

Q. You removed the major pillar of your report, and the house is still standing according to you, is that right?

A. Right.

Q. Do you agree with me that that's impossible?

A. I agree.

Q. So, do you agree with me that you are now incapable of following your expert duties under Form 53?

A. You're right.

MR. ASSELIN: Thank you.

THE COURT: Do you have any re-examination?

- Plaintiff did not call expert after voir dire

Don’t: Test the R.53 deadlines

Change to Rule 53.08 (1) in March 2022

53.08 (1) If evidence is admissible only with leave of the trial judge under a provision listed in subrule (2), leave may be granted if the party responsible for the applicable failure satisfies the judge that,

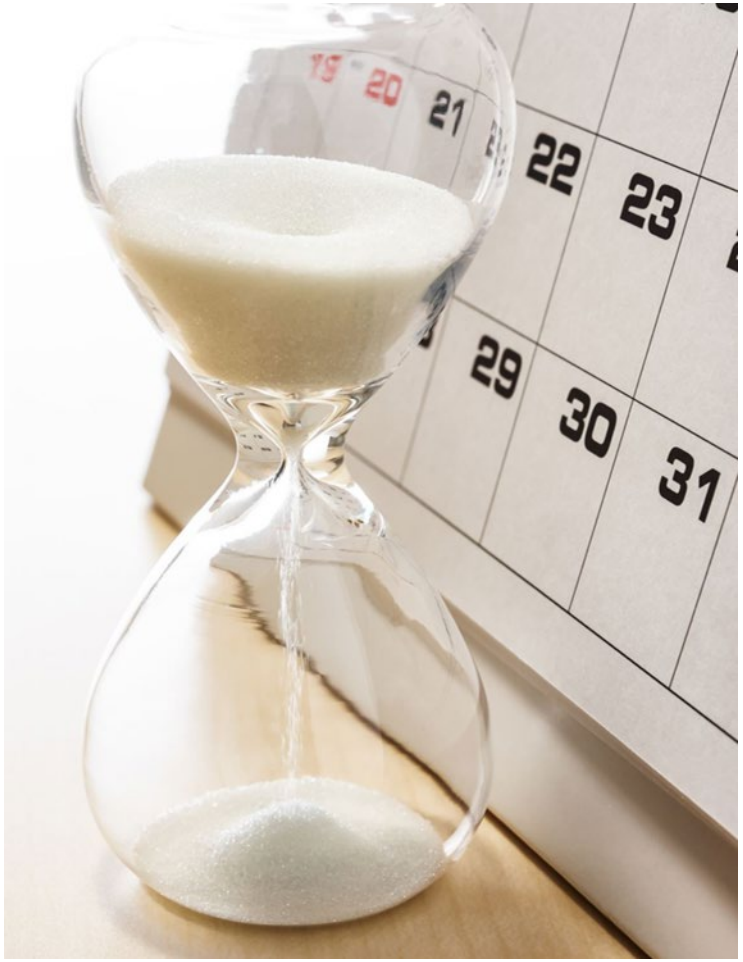
(a) there is a reasonable explanation for the failure; and

(b) granting the leave would not,

(i) cause prejudice to the opposing party that could not be compensated for by costs or an adjournment, or

(ii) cause undue delay in the conduct of the trial.

- Pre trials now much closer to trial dates



Agha v. Munroe, 2022 ONSC 2508

- Newmarket jury trial in April 2022 before RSJ Edwards.
- No experts on income loss or future care – “too expensive”
- Timetable from the Pre-Trial was experts by April 15, 2019
- Offer to get experts mid-trial

[30] For these reasons, this court refused to allow the Plaintiff's request to late serve expert reports. The purpose of the new rule is, in my view, clear and obvious. The first purpose is to send a very loud and clear message to all sides of the Bar, that expert reports are to be served in a timely manner and in accordance with the provisions of Rule 53.03(1) and (2).

[32] Lawyers and litigants need to adapt to the new rule immediately. The late delivery of expert reports simply will not be rubber-stamped by the court. By shifting the onus to the party seeking the indulgence and changing the word “shall” to “may”, the exercise of the court's discretion will, in my view, result in far fewer adjournments and more productive pre-trials. There will always be circumstances that are beyond the control of counsel and the parties which will fall within the definition of a “reasonable explanation” for failing to comply with the timelines for the service of expert reports. In this case, no such reasonable explanation was provided to the court.

Don’t: Ignore the expert’s CV

Graul v. Kansal, 2022 ONSC 1958

- Brampton trial before Justice Lemon.
- Head injury/concussion case with Dr. Mitchell on the defence side and Dr. Basile on the Plaintiff side
- Plaintiff lawyer cross examined Dr. Mitchell on CBC interview + power point presentation where she said 15% of TBI patients will continue (“miserable minority”)
- “vacant stare” followed by laugh – lack of awareness in the expert’s role
- Case also involved Dr. Basile as the Plaintiff expert neurologist.

Do: Keep Your Expert in their Lane

Moustakis v. Agbuya, 2023 ONSC 6012

- Jury Trial with Justice Merritt.
- Voir Dire on Dr. Ford, Orthopaedic Surgeon, for the Defendant
- Dr. opined that ongoing complaints cannot be explained on organic basis.
- “Cannot be explained on any other basis than a psychiatric conversion disorder”
- I will leave that to the psychiatrists…” and “I am not too sure how [the diagnosis] would be done”.
- Goes on to say it is a diagnosis of exclusion after BUILD-UP or fraud considered
- Court said he is not qualified to give that opinion. Tone of report = going out of the way to challenge credibility
- Main issue is somatic symptom disorder, MDD, PTSD. Dr. Ford cannot diagnose these. Evidence not relevant or necessary.

Don’t: Ignore the expert’s process

- Cairns v. Ellis – 2024 Brampton Jury Trial before Justice Tzimas
- Dr. Basile, Neurologist, for the Plaintiff
- Patients =4 days per week.
- Medical legals = 8-10 per week over 3-4 days.$1k AB, $3k+ CAT & tort
- No notes of the assessment of this Plaintiff or any other assessment – dictate directly into a report
- Deemed undertaking lifted for voir dire - 3 redacted reports compared (including this Plaintiff)
- Argument = boilerplate and almost identical without any independent opinion

Cairns v. Ellis – Dr. Basile Voir Dire

- Use of Macros – populates a paragraph with blanks to be filled .
- Report was 17 sections. 11 were standardized macros. Compared 3 reports.
- But no file, no notes, no consent, no MOCA or Rivermead questionnaires – nothing to connect the report to the Plaintiff
- Doctor admitted “it depends on how you ask the question, who is asking and what detail you go into. Open-ended vs. close-ended”
- Answers obtained by using close-ended questions not otherwise in evidence
- Judge found the doctor to be careless and cavalier and use of macros and leading questions deliberately designed to drive desired conclusions.

THANK YOU!

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CITATION: Agha v. Munroe, 2022 ONSC 2508
COURT FILE NO.: CV-14-119327
DATE: 25042022

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
AFSHAN AGHA Plaintiff	Syed Raza, for the Plaintiff
– and –	
MAURICE MUNROE AND LIFELAB INC. and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY Defendants	Mark Elkin, for the Defendants Maurice Munroe and LifeLabs Inc.
	HEARD: April 4,5,6,7,11,12,13,14

REASONS RE LATE SERVICE OF EXPERT REPORTS AND JURY QUESTIONS

M.L. EDWARDS, R.S.J.:

Overview

[1] This matter involves a motor vehicle accident which occurred in 2013. A pre-trial was conducted by Healey J. on August 30, 2018. The delay in the trial was impacted by the COVID-19 pandemic. These Reasons primarily relate to the non-existence of any expert reports that address the Plaintiff's claim for past and future loss of income, as well as the absence of any expert report that addresses the Plaintiff's claim for past and future medical rehabilitation needs and housekeeping needs. These Reasons also address the Questions that were allowed to go the Jury.

The Absence of Expert Reports

[2] The jury in this matter was selected April 4, 2022. When the jury was selected, they were advised that this matter would take between two and three weeks. After the jury was picked, I had some preliminary discussions with counsel in the absence of the jury. As a result of those discussions, it became apparent that the Plaintiff did not have any expert reports that would address the issue of past and future income loss, as well as the Plaintiff's claim for past and future medical rehabilitation needs. When I inquired as to why Plaintiff's counsel did not have any expert reports addressing these issues, I was simply advised that the Plaintiff could not afford to engage these experts.

[3] Shortly after the initial preliminary discussions with counsel, Plaintiff's counsel advised that he had spoken to unnamed experts who had indicated they could provide him with reports some time during the week of April 11, 2022, with no specific fixed date for such delivery. Mr. Elkin strongly opposed any late delivery of such expert reports, indicating that he would not have an opportunity to obtain responding reports, thus resulting in a potential mistrial and/or adjournment of the trial.

[4] In essence, what this court was asked to consider was the exercise of its discretion for the late service of expert reports addressing the issues of loss of income and the claim for the Plaintiff's future medical rehabilitative needs. I indicated to counsel that I would not grant leave for late service of these expert reports and would provide written reasons in due course. These are my written Reasons.

Rule 53.03 of the *Rules of Civil Procedure* as it existed prior to March 31, 2022

[5] Rule 53.03, as it existed prior to the end of March 2022, required a party who intended to call an expert witness at trial to serve the expert's report not less than 90 days before the pre-trial conference. Any responding report had to be served no less than 60 days before the pre-trial conference. It is worth repeating that the pre-trial in this matter took place on August 30, 2018, that is approximately three and a half years before the trial which commenced on April 4, 2022.

[6] While Rule 53.03 provided timelines within which expert reports were supposed to be served, Rule 53.08 provided what I would loosely describe as an escape clause for anyone who was in non-compliance with Rule 53.03(1) and (2). Specifically, Rule 53.08 provided:

> If evidence is admissible only with leave of the trial judge under a provision listed in subrule (2), ***leave shall be granted*** on such terms as are just and with an adjournment if necessary unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial. (Emphasis added)

[7] The late delivery of expert reports prior to March 30, 2022 was the subject of considerable negative judicial commentary. I review in the next few paragraphs a sampling of the case law where a number of judges commented on the late delivery of expert reports and the impact this was having on pre trials and trials.

[8] In *Prabaharan v. RBC General Insurance Co.*, 2018 ONSC 1186, Stinson J. considered the costs for a pre-trial conference that had been jeopardized by a failure to file expert reports on time. In that regard, Stinson J. commented at paras. 12-13 as follows:

> The defendant's failure to serve its experts reports on a timely basis – or even to take any steps in furtherance of this obligation – was a flagrant breach of the requirements set out in rule 53.03(1) and (2). An experienced litigant such as the defendant, cannot defer indefinitely its duty to provide responding expert reports. Indeed, it smacks of unfairness for such a party to, on the one hand, require the plaintiff to provide medical evidence to meet the requirements of O. Reg. 461/96 as amended by O. Reg. 381/03, yet be unprepared to disclose its case on that fundamental issue in response.
>
> The other, obvious, consequence of the failure of the defendant to serve any expert reports as required by the rules was that there was no responding material for the other side or the presiding judge to evaluate and discuss at the PTC. This had the effect of impairing significantly the PTC settlement process. As commented previously, whether this is a case that could have settled at the PTC stage is impossible to know, because the defendant failed to comply with the rules.

[9] Given the failure of the Defendant to serve its expert reports in a timely manner as required by Rule 53.03, Stinson J. ordered costs to the Plaintiff but reduced those costs by one third

given the Plaintiff's own failure to fully comply with the *Rules* regarding timely service of expert reports.

[10] In *Balasingham v. Desjardin Financial Security*, 2018 ONSC 1792, Firestone J. was asked to consider a request by the Defendant to adjourn a trial at a case conference in March 2018, where the trial was fixed to commence at the beginning of April 2018. The Defendant argued for the adjournment on the basis that the Plaintiff had served new expert reports 30 days prior to the pre-trial which had occurred on February 15, 2018. The defence argued that it needed responding expert reports. The Plaintiff opposed the request for an adjournment. In denying the request for adjournment, Firestone J. stated at para. 7:

> This case illustrates the problems which arise from the late delivery of expert reports and the failure of the parties to agree on a schedule (timetable) for delivery of all expert reports early in the litigation process.

[11] At para. 11, Firestone J. continued:

> Notwithstanding the clear time frames imposed under rule 53.03, late requests to adjourn trials are still being made, both at pre-trial conferences and before trial, as a direct result of the ongoing practice of late delivery of expert reports by one or both parties.

[12] Firestone J. completed his Reasons at para. 12, by stating:

> This practice of late delivery of expert reports despite the passage of agreed upon and scheduled delivery dates must stop.

[13] In another decision of Firestone J., *Stadnyk v. Dreshaj*, 2019 ONSC 1184, a request was made by the defence for their costs thrown away as a result of a last minute trial adjournment. The first pre-trial had taken place on May 30, 2018, with a second pre-trial having been conducted on October 2, 2018. Prior to the first pre-trial, the Plaintiff had not served medical reports in support of their claim for general damages and income loss, nor was any timetable agreed to for the delivery of expert reports. Ultimately, the Plaintiff served various reports late, including one eleven days prior to the October 18, 2018 trial date. Commenting on this situation, Firestone J. noted at paras. 8 to 9:

> It is the joint responsibility of all parties to comply with rule 53.03(2.2) in order to avoid disputes such as the one before me.
>
> In a situation where one side or the other will not agree to the required schedule for the delivery of expert reports, counsel should immediately request a chambers appointment (case conference) pursuant to rule 50.13 in order to have the court fix one.

[14] Ultimately, Firestone J. awarded the Defendant their costs thrown away as a result of the late adjournment of the trial, and observed that the Plaintiff's late delivery of expert reports had "set the chain of events in motion that ultimately necessitated the trial adjournment".

[15] The more recent comments of Daley J. in *Khan v. Baburie*, 2021 ONSC 1683, are worth repeating in the context of the issue of late service of expert reports. At para. 45 of his Reasons, Daley J. stated:

> The late service of export reports, contrary to the requirements of the Rules, has been a chronic and frequent issue in the timely management of the civil litigation before this court. Counsel seem to have the belief that the requirements of compliance with the Rules are mere recommendations or suggestions and that as such the breach of the Rules will really have no consequences. Counsel are sorely mistaken in that belief.

[16] In the context of a request to allow for the late service of an expert's report, the following comments of D. Wilson J. in *myNext Corporation v. Pacific Mortgage Group Inc.*, 2019 ONSC 4431, at para. 39, are worth repeating to emphasize the point that the issue of late service of expert reports was, and remains a chronic issue in our court. At para. 39:

> Pacific breached Rule 53.03, which is an important rule governing the receipt of expert evidence. Late service of expert reports is responsible for the vast majority of adjournments of fixed trial dates. No explanation has been offered for the breach; litigants cannot play fast and loose with the *Rules of Civil Procedure* and ignore court orders…

The New Rule

[17] The new provisions of Rule 53.03 became effective on March 31, 2022. O. Reg. 18/22, amended various rules of the *Rules of Civil Procedure* (the *Rules*). All of the changes effected by this regulation are important, but in the context of the Plaintiff's request for late service of the expert reports addressing the Plaintiff's claim for past and future income loss

and her future medical rehabilitative needs, the amendments to Rule 53.08(1) are critically important as it relates to motions such as the one before this court. Rule 53.08(1) now reads:

> **53.08** (1) If evidence is admissible only with leave of the trial judge under a provision listed in subrule (2), leave may be granted if the party responsible for the applicable failure satisfies the judge that,
>
> (a) there is a reasonable explanation for the failure; and
>
> (b) granting the leave would not,
>
> (i) cause prejudice to the opposing party that could not be compensated for by costs or an adjournment, or
>
> (ii) cause undue delay in the conduct of the trial.

[18] Fundamentally, the aforesaid amendment, in my view, will result in a change in how trial judges will be required to consider motions that essentially ask for an indulgence resulting from the late service of an expert report and the admissibility of that evidence at trial. Where the old rule provided that leave of the trial judge "shall be granted", the new rule now is permissive using the language "may be granted".

[19] In addition, the new rule sets forth a new test which will guide the trial judge's exercise of his or her discretion. The onus will be on the party seeking the indulgence to allow for the late service of the expert report and the admissibility of the expert's evidence at trial. The party who is in default of their obligations with respect to the timely service of an expert's report will have to show that there is a reasonable explanation for the failure to serve an expert report, and that the granting of leave will not cause prejudice to the opposing party that cannot be compensated for by costs or an adjournment, or cause any undue delay in the conduct of the trial.

[20] As this new rule applies to the Plaintiff in this case, the chronology of what has transpired is important in the court's exercise of its discretion. At the pre-trial before Healey J. on August 30, 2018, the following Endorsement was made as part of the pre trial judges report :

> On consent, tort defendants will produce surveillance video and accompanying reports, all productions arising out of the Rule 30.10 motion from police, and will advise of policy limits within 30 days.
>
> **Any additional expert reports to be served by January 31/19; and responding reports by April 15, 2019.** (emphasis added)

The Report of the Pre-trial Judge was signed by Mr. Raza and Mr. Elkin.

[21] By the time the trial started on April 4,2022 not only was the Plaintiff in breach of the old Rule 53.03, but the Plaintiff was also in breach of the Order made by Healey J. at the pre-trial.

[22] The only explanation provided by Plaintiff's counsel as to why there were no expert reports addressing the Plaintiff's loss of income claim and her claim for medical rehabilitative expenses, was the cost of those expert reports.

[23] Since my appointment to this court I have conducted hundreds of civil pre-trials, the vast majority of which are usually claims arising out of motor vehicle accidents. I can, in my view, take judicial notice of not only the increasingly high cost of expert reports, which often become an impediment to the resolution of many cases, but I can also take judicial notice of the fact that most, if not all Plaintiffs that I have seen at a civil motor vehicle accident pre-

trial, are represented by counsel who are representing the Plaintiff on a contingency fee basis where Plaintiff's counsel is directly or indirectly funding the cost of the disbursements.

[24] As it relates to the specific facts before me, I have no evidence with respect to the funding of the Plaintiff's experts, including the non-funding of the retainer of an accountant or a life care planner in relation to the loss of income claim and the claim for medical rehabilitative expenses. While Mr. Raza suggested that his client simply could not afford to engage an accountant or life care planner, I had no evidence before me to support that submission. There is nothing in the Report of the Pre-trial Judge and the Order made that would suggest there was any financial impediment with respect to the service of any additional expert reports by January 31, 2019.

[25] The new rule provides that leave "may be granted". The old rule provided that leave "shall be granted". The court, when confronted with a request for the late service of an expert's report to enable a party to call that expert at trial must be satisfied that there is a reasonable explanation for the failure to serve the experts reports within the timelines specified by the Rule. In my view, the explanation for the failure in this case was not a reasonable explanation.

[26] The court in the exercise of its discretion, even assuming that there was a reasonable explanation for the failure to serve the expert reports in a timely manner, also requires the party seeking the indulgence, i.e. the Plaintiff, to show that there is no prejudice to the opposing party that cannot be compensated for by costs or an adjournment, or that the granting of leave would not result in undue delay in the conduct of the trial.

[27] On the facts as they presented in court on April 5, 2022, a jury had been empanelled. The only witnesses that the Plaintiff intended to call was the Plaintiff, the Plaintiff's daughter, three medical legal experts and a treating doctor . As the trial unfolded it became readily apparent that had the three medical legal experts been called in a timely manner, as opposed to one expert per day, this case likely could easily have been completed within five to six days.

[28] Plaintiff's counsel indicated to the court that he could obtain the missing expert reports some time during the middle part of the week of April 11, 2022.

[29] If this court had granted leave to the Plaintiff to obtain these expert reports, it would have had the inevitable result of having to adjourn the trial for some considerable period of time to allow the defence to obtain responding reports. In a situation where the jury had been advised that the trial would be completed within a period of two to three weeks, it would have been a delay that would have been completely unfair to the jury and would have caused "an undue delay in the conduct of the trial".

[30] For these reasons, this court refused to allow the Plaintiff's request to late serve expert reports. The purpose of the new rule is, in my view, clear and obvious. The first purpose is to send a very loud and clear message to all sides of the Bar, that expert reports are to be served in a timely manner and in accordance with the provisions of Rule 53.03(1) and (2).

[31] There is a good reason to require the timely exchange of expert reports prior to the pre-trial. A pre-trial is not just an administrative step in a proceeding. It is a step that has two fundamental purposes. The first is to explore the possibility of settlement. The second

important purpose is to deal with trial management issues. The comments of Stinson J. in *Prabaharan,* at paras. 2 and 3, are worth repeating, as in my view they are equally applicable to the new rule:

> A PTC is an occasion and an opportunity for each side to develop a better understanding of their own and their opponent's case. More importantly, it is also an opportunity for each side to receive guidance and feedback from the presiding PTC judge. Based upon the contents of the PTC memos and other evidence (such as copies of expert reports) the presiding judge can discuss with a party the strengths and weaknesses of their case and assist them in re-evaluating their (and their opponent's) position on settlement.
>
> Where one or both parties fail to follow the rules, the purpose of the PTC cannot be achieved. This is unfair to the opponent and the Court, because the time of each is wasted and the otherwise useful feedback cannot be provided. It also has the possible result of clogging the system with a case that should have settled at (or in the wake of) the PTC, but could not because inadequate information was available at the relevant time.

[32] Lawyers and litigants need to adapt to the new rule immediately. The late delivery of expert reports simply will not be rubber-stamped by the court. By shifting the onus to the party seeking the indulgence and changing the word "shall" to "may", the exercise of the court's discretion will, in my view, result in far fewer adjournments and more productive pre-trials. There will always be circumstances that are beyond the control of counsel and the parties

which will fall within the definition of a "reasonable explanation" for failing to comply with the timelines for the service of expert reports. In this case, no such reasonable explanation was provided to the court.

Questions to the Jury

[33] In the normal course in a motor vehicle personal injury action, it is very common to see questions to the jury that will incorporate questions along the following lines:

a) In what amount if any do you assess general damages?;

b) In what amount if any do you assess the Plaintiff's past loss of income?;

c) In what amount if any do you assess the Plaintiff's future loss of income?;

d) In what amount if any do you assess the Plaintiff's past claim for medical rehabilitative expenses?;

e) In what amount if any do you assess the Plaintiff's future loss of damages for medical rehabilitative expenses?;

f) In what amount if any do you assess to the Plaintiff's claim for past housekeeping expenses?; and

g) In what amount if any do you assess the Plaintiff's claim for damages for future housekeeping expenses?

[34] There may be other questions, but the aforesaid represent fairly typical questions that would go to a jury in a personal injury motor vehicle action.

[35] It is an important step towards the preparation of a jury trial, that counsel for both the Plaintiff and the Defendant confer with respect to the questions that they will ask the court to submit to the jury. More often than not, there is a consensus with respect to those questions. Where there is no consensus, it is equally important that those issues be addressed at the beginning of the trial and not the end of the trial. The questions that will go to the jury frame the issues that counsel will ultimately present their case around, including the witnesses that will be called; how their examination in-chief will be conducted; and the cross-examination.

[36] When I asked counsel whether they had an agreement with respect to the questions that would be submitted, it was obvious that no such agreement had been reached. The defence took the position that the only question that could go to the jury was the first question set forth above, i.e., in what amount if any do you assess general damages. Plaintiff's counsel, on the other hand, wanted the full gamut of the aforesaid questions to go to the jury. I allowed counsel to make submissions with respect to those questions, and ultimately I determined that the only question that could go to the jury was the general damage question. These Reasons explain why I refused to allow any other questions to go to the jury.

The Legal Principles

[37] The general test which the court should apply in determining whether a question should be put to a jury is set forth in the Court of Appeal decisions in *M.B. v. 2014052 Ontario Ltd.*, (*Deluxe Windows of Canada*), 2012 ONCA 135, where at para. 51 the Court stated:

> Whether a jury in a civil case should be asked to decide on a particular issue is a question of evidence. There must be "reasonable evidence" to

allow a question to go to the jury. As Meredith J.A. stated in *Milligan v. Toronto Railway* (1908), 17 O.L.R. 530, [1908] O.J. No. 78 (C.A.) [at para. 50]:

> Although the jury are the sole judges of fact they are such judges only in cases in which there is a reasonable question of fact to be determined. It is the duty of the Court to determine whether there is any reasonable evidence to go to the jury, upon any question of fact; and no such question can be rightly submitted to them until that question has been answered in the affirmative[.]

[38] The aforesaid test set forth by the Court of Appeal in *M.B.*, has also been stated as follows: (See *Walker v. Delic*, [2001] O.J. No. 1346 (SCJ).)

> A question need not be put to the jury unless there is some evidence in which a jury, acting judicially in accordance with that judge's instructions on the law could reasonable make a choice in arriving at a finding.

The Legal Principles Applied

The Plaintiff's Loss of Income and/or Loss of Competitive Advance Claim

[39] To support the Plaintiff's claim for loss of income, Plaintiff's counsel called his client and submitted a number of documents as exhibits, including her income tax returns which were summarized in Exhibit 23. For the years 2000 through 2006 inclusive, the Plaintiff was not

working for a number of reasons, one of which related to maternity leave. Between 2007 and 2013 inclusive, the Plaintiff's tax return reveal the following:

2007 - $4,336.00 (T4)

2008 - $9,566.00 (T4)

2009 - $9, 566.00 (T4)

2010 - $3,689.00 (EI)

2011 - $959.00 (T4)

2012 - $3,012.00 (T4)

$694.00 (Gross commission)

$4,927.00 (Net commission income)

Total Income: $1,285.00

2013 - $3,913.00 (T4)

[40] The Plaintiff was cross-examined with respect her income in 2008 and 2009. For both of those years she declared identical amounts of $9,566.00. It was suggested to her in cross-examination that this represented income splitting with her husband. The Plaintiff sought to evade this line of questioning, and in my view she failed to answer the question that was put to her by counsel. The fact that the plaintiff's income in 2008 and 2009 was identical lends

credibility to the assertion that the plaintiff's only income in those two years came from income splitting with her husband.

[41] The Plaintiff's evidence revealed that immediately prior to the accident, she had quit her job for reasons unrelated to the accident. Her evidence also revealed that she had been involved in another motor vehicle accident in 2008, and that she had to stop the work that she was doing due to back pain.

[42] Subsequent to the 2013 accident, the evidence revealed that the Plaintiff was away overseas helping with her parents who were unwell. She was out of the country for well in excess of a year. The medical evidence also revealed that the Plaintiff was being treated for cancer after the 2013 accident.

[43] As previously noted, the Plaintiff did not have any expert evidence from an actuary or an accountant that would assist the jury in calculating the Plaintiff's loss of income either past or future.

[44] The *Insurance Act*, R.S.O. 1990, c. I. 8, provides in section 267.5(1) that the Plaintiff's past loss of income is calculated at seventy percent of the Plaintiff's gross pre-accident income. The Plaintiff is entitled to recover for one hundred percent of her future loss of income to her anticipated age of retirement.

[45] Plaintiff's counsel presented no evidence from his client with respect to her anticipated age of retirement. Plaintiff's counsel simply suggested that it is a well known fact that people retire at age 65. In this case, because the jury would not have had the evidence from an accountant or actuary, it would have been pure speculation on their part with respect to how

they would calculate the present value of the Plaintiff's future loss of income; to what age; and what if any contingencies they should take into account. All of these questions and more would have been addressed had the Plaintiff called an accountant or actuary.

[46] The theory of the Plaintiff, essentially, would have the jury believe that if the subject motor vehicle accident had never occurred, she would have continued in her employment with the employer she was employed at immediately prior to the accident. The difficulty with this theory, as I already indicated, is the Plaintiff's own evidence which was that she quit this job for reasons totally unrelated to the accident. Specifically, the plaintiff testified she quit her job because her request to take an extended 2-month vacation was denied by the employer.

[47] Even if the theory of the Plaintiff was that she was not going to continue in her employment with that particular employer, she called no evidence whatsoever with respect to what employment might have been available to her after the accident. The Plaintiff called no evidence with respect to what salary or hourly rate she might have received had she been employed post-accident. The Plaintiff called no evidence with respect to any temporary layoffs that she might have been exposed to, nor any permanent layoffs that she might have been exposed to had this accident never occurred. The Plaintiff also called no evidence as to what efforts she made with respect to seeking out other employment. Fundamentally, as Turnbull J. noted in *Loye* v *Bowers,* 2019 ONSC 7198 at para. 36:

> …The jury has no way of knowing with any degree of accuracy how to calculate a loss of income from the time of the accident to the date of trial from the information provided by the plaintiff. At best it would be a guess. It simply is not fair to the defendant to not provide sufficient information

> so that the theory of the plaintiff or even better, the calculations of the plaintiff can be challenged in cross examination and possibly with countering evidence.

[48] The words of the Divisional Court in *Ayub v. Sun*, 2016 ONSC 6598, at para. 62, are equally applicable to the facts before this court, where the Divisional Court stated:

> …it would be problematic to require a jury to try and calculate the income loss without evidence before them of income or expectation of income.

[49] As well, the following admonition from the Ontario Court of Appeal in *TMS Lighting Ltd. v. KJS Transport Inc*., 2014 ONCA 1, at para. 65, further reinforces my view why the jury should not be expected to answer any questions with respect to the Plaintiff's past or future wage loss claim. Specifically, the Court of Appeal, in the context of a judge alone trial, stated:

> …it is not open to a trial judge to postulate a method for the quantification of damages that is not supported by the evidence at trial. Nor is it open to a trial judge to employ an approach to the quantification of damages that the parties did not advance and had no opportunity to test or challenge at trial…To hold otherwise would sanction trial unfairness.

[50] While the aforesaid comments of the Ontario Court of Appeal in *TMS* were made in the context of a judge alone trial, in my view they are equally applicable in the context of a jury trial where Plaintiff's counsel, on the evidence, would essentially be asking the jury to employ an approach to the quantification of damages that was never advanced prior to trial.

[51] Having considered all of the evidence, or absence of evidence, it was my view that to allow the jury to consider a question directed at calculating the Plaintiff's past and or future loss of income would have been to ask the jury to essentially pick a figure out of thin air. It would, in my view, have been nothing more than speculation for the jury to have considered the Plaintiff's claim for past or future loss of income. There was no evidence upon which a jury properly instructed in the law could reasonably come to the conclusion that the Plaintiff had, in fact, suffered a past or future wage loss.

[52] Plaintiff's counsel suggested that if this court was not prepared to allow the Plaintiff's claim for past or future wage loss to go to the jury, then he should at least be allowed to advance a loss of competitive advantage claim. The essential elements of a claim for loss of competitive advantage are summarized in (*Re*) *Conforti*, 2012 ONSC 199.. At para. 34 of his Reasons, Wilton-Siegel J. summarized the essential elements as follows:

> …The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:
>
> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
> 2. The plaintiff is less marketable or attractive as an employee to potential employers;
> 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and

4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[53] Other than the evidence of the Plaintiff and the three expert medical witnesses who testified on her behalf, there was no evidence presented to the jury with respect to what job opportunities the Plaintiff might have had but for the injuries she alleges that she suffered in the subject accident. Given her relative sporadic employment prior to the subject accident, as well as the various events which took place post-accident that kept her away from employment,the jury, in essence, had little to no evidence from which they could assess the Plaintiff's claim for damages for loss of competitive advantage. In my view, to allow the Plaintiff's claim for damages for loss of competitive advantage to have gone to the jury would again have resulted in the jury doing little more than speculate and pulling a dollar figure out of thin air. It was incumbent on the Plaintiff to put before the jury evidence that would have allowed them to do something more than pure speculation. The following comments of Turnbull J. in *Loye* at para. 15, are equally applicable to the facts before this court. Specifically, Turnbull J. stated:

> …The defendant had no basis to know how the plaintiff planned to calculate his claim. No expert reports or other functional abilities assessments were provided. No accounting estimations, present value calculations, contingency allowances or medical evidence has been provided to the court or to the defendant. This claim lacks the evidentiary basis to be put to the jury and it is so ordered.

The Plaintiff's Claim for Damages for Past and Future Medical Rehabilitative Expenses and Housekeeping Expenses

[54] In order to succeed in a claim for damages for past medical rehabilitative expenses and past housekeeping expenses, it is incumbent on the Plaintiff to present evidence to the jury that expenses were incurred and that the expenses were incurred as a result of injuries suffered in the accident. In this case, no receipts of any kind were presented to the court with respect to expenses allegedly incurred by the Plaintiff for past medical expenses or past housekeeping expenses that might not otherwise have been submitted and paid by her own statutory accident benefit insurance company.

[55] As it relates to the claim for future expenses that might be incurred for medical and/or rehabilitative needs and/or housekeeping needs, the Plaintiff presented no medical evidence with respect to the type of expenses that might reasonably be incurred in the future. The Plaintiff called no evidence with respect to the nature and frequency of any treatments and medications that might be required in the future. The Plaintiff called no evidence as to the cost of any future treatments, nor was there any evidence called as to how the jury would calculate the present value of such expenses. The Plaintiff called no evidence as to the duration of any treatment that the Plaintiff might require. In short, the Plaintiff called no evidence that would support any claim for either past or future awards for damages for medical rehabilitative needs or housekeeping needs.

[56] As it relates to the Plaintiff's claim for past and future medical rehabilitative needs and her claim for damages for past and future housekeeping expenses, the reasoning of Di Tomaso J. in *Day v. Haiderzadeh,* 2017 ONSC 7319, at paras. 22-27, are equally applicable to the facts before this court. I entirely agree with DiTomaso J. that the entitlement of a Plaintiff to

compensation for future care costs requires medical justification. In the absence of such justification, which is often found in the form of an expert opinion from an occupational therapist or lifecare planner, the jury would simply be asked to speculate in answering any question that addresses these claims for damages.

Postscript

[57] For the reasons set forth above the only question that went to the jury was a question that required the jury to assess the Plaintiff' general damages. Plaintiff's counsel suggested the jury should assess general damages in the range of $80.000 to $150,000. Defence counsel suggested a range of zero to $10,000.

[58] This was a chronic pain case where the assessment of the plaintiff's credibility was fundamental to the outcome. The jury awarded the Plaintiff $25,000 in general damages. While the jury did not agree with the position of the defence it is equally fair to suggest the jury was not impressed with the credibility of the plaintiff as their award did not come close to even the bottom end of the range suggested by Plaintiff's counsel.. After deducting the statutory deductible the ultimate award to the Plaintiff is zero dollars.

[59] The outcome in this case might cause all members of the personal injury Bar to perhaps consider having this type of case tried under the Simplified Rules where the trial must be completed in 5 days or less; where there is a hard cap on costs and disbursements ($50,000 and $25,000 respectively); where the evidence in chief of witnesses and experts is conducted by affidavit; and where a jury is not permitted.

[60] If counsel are unable to agree on costs and the threshold issue they may contact me through my judicial assistant to arrange to deal with these issues.

M.L. Edwards, R.S.J.

Released: April 25, 2022

CITATION: Agha v. Munroe, 2022 ONSC 2508

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

AFSHAN AGHA

Plaintiff

– and –

MAURICE MUNROE AND LIFELAB INC. and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Defendants

REASONS RE LATE SERVICE OF EXPERT REPORTS AND OTHER PRE-TRIAL MOTIONS

M.L. Edwards, R.S.J.

Released: April 25, 2022

CITATION: Ashrafian v. Kavarana, 2024 ONSC 2420
COURT FILE NO.: CV-18-136386-0000
DATE: 20240430

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
ALI ASHRAFIAN	)	
Plaintiff	)	No one appearing for the Plaintiff
– and –	)	
CYRUS KAVARANA and NISSAN CANADA INC.	)	Loretta De Thomasis and Colleen Mackeigan, for the Defendants
Defendants	)	Counsel for Georgina Masgras, Gavin MacKenzie
	)	**HEARD VIA ZOOM:** February 13, 2024

REASONS FOR DECISION RE COSTS CLAIM AGAINST PLAINTIFFS COUNSEL

M.L. EDWARDS, R.S.J.

Overview

[1] On December 8, 2023, I released my Reasons detailing why I had declared a mistrial in this matter. In my reasons I gave notice to Ms. Masgras, that she might be found responsible for the costs of the mistrial. These reasons address what if any responsibility Ms. Masgras has for those costs.

[2] Ms. Masgras was represented at the hearing of this issue. She sought leave (which I granted) to file affidavit evidence that she says would respond to some of the concerns raised in my earlier reasons granting a mistrial.

[3] The mistrial was declared largely as a result of the non-disclosure of a conflict of interest involving Ms. Masgras, her husband Mr. Irshidat, Mr. Irshidat's company Meditecs and the retainer by Meditecs of two doctors who prepared medical legal reports for Ms. Masgras' law firm (Masgras Law). These reports were then forwarded to the lawyers for the defendant without any disclosure of the aforesaid conflict. There was also no disclosure of the fact the fee charged by one of the doctors to Meditecs was approximately $2,000.00. This became relevant to my analysis in granting a mistrial because Meditecs then charged Masgras $5,000.00 – the amount that was then sought by Masgras from the defendant when this matter proceeded to a failed pretrial.

Additional Facts from Ms. Masgras' Affidavit

[4] Counsel for Ms. Masgras helpfully summarized the additional facts from Ms. Masgras' affidavit in his factum. The relevant facts from the factum are as follows:

(a) Ms. Masgras has been acquainted with the Plaintiff Ali Ashrafian since the fall of 2014, when he was employed by Masgras Professional Corporation on a field placement while he was a student at Seneca College's School of Legal and Public Administration. He met Omar Irshidat, who married Ms. Masgras in 2015, at that time.

(b) When Mr. Ashrafian was involved in the automobile accident that gave rise to this action on June 28, 2016, he approached Ms. Masgras and Mr. Irshidat and they met with him together. With input from Mr. Irshidat, Ms. Masgras advised Mr. Ashrafian on what approach to take to pursue his claim for damages. He commenced both an accident benefits claim and a tort claim.

(c) In January 2019, Ms. Masgras assigned her colleague Paul DeLuca to assume carriage of Mr. Ashrafian's claim. Mr. DeLuca passed away in October 2020. Ms. Masgras' colleague Mark Stoiko assumed carriage of Mr. Ashrafian's claim; he readied the case for trial and acted as counsel at the trial. Ms. Masgras says she has not been involved in the case since 2018.

(d) Ms. Masgras was unaware until she read my Reasons that a loss of income report was delivered outside the time prescribed by the *Rules of Civil Procedure.*

(e) Ms. Masgras was also unaware until she read my Reasons that on December 15, 2020, Mr. Stoiko had written Meditecs to ask that Meditecs retain a chronic pain specialist or an orthopaedic surgeon to assess Mr. Ashrafian and prepare an independent medical report.

(f) Meditecs is a private business. Its services include identifying appropriate doctors or other health care professionals to provide independent and objective medical assessments. Other businesses that compete with Meditecs provide similar services.

(g) The network of doctors and other health care professionals to which Meditecs and its competitors have access are independent practitioners, not employees of Meditecs. They are paid by Meditecs just as they would be paid by Masgras Professional Corporation or another law firm if retained directly (though, as mentioned below, generally in a lesser amount). Ms. Masgras says there is no reason to suspect bias on the part of independent specialists such as Dr. Friedlander or Dr. Shahmalak in the present case merely because they are retained through Meditecs. Ms. Masgras notes that both Dr. Friedlander and Mr. Irshidat testified in a *voir dire* that neither Meditecs nor Masgras Professional Corporation exercised any influence over Dr. Friedlander's assessment or report.

(h) Ms. Masgras states in her affidavit (in what I would describe as her opinion) that the services independent medical assessment businesses provide include finding qualified specialists to conduct assessments, arranging appointments, and assisting the specialists to prepare reports for the purpose of use in litigation. Ms. Masgras expresses her opinion that because a medical assessment business adds value to the law firm that retains them the law firm's charges are higher than the account of the specialists they retain. Ms. Masgras expresses her opinion that if the law firm simply billed the amount the specialists charged, the law firm would not be paid for their own services. As a private business , Ms. Masgras says the law firm is entitled to realize a profit.

(i) Ms. Masgras goes on in her affidavit and states that from her experience, doctors who are retained directly by law firms such as Masgras Professional Corporation charge higher fees than they charge independent assessment services such as Meditecs.

(j) Ms. Masgras suggests in her affidavit that medical practitioners who prepare expert reports based on independent assessments expect, and generally insist, on being paid immediately, though claims may continue for years before they are settled or result in final judgment. Meditecs pays doctors and other healthcare professionals it retains promptly but does not recover payment itself for the independent expert's fee or its own services until claims are settled or result in final judgment. Thus Ms. Masgras argues Meditecs is compensated not only for its services, but for the time value of money. Meditecs shares the financial burden of pursuing clients' claims.

(k) In the present case, Meditecs was charged $2,034 by Dr. Friedlander, including HST. That amount was paid by Meditecs to Dr. Friedlander. Meditecs sent an invoice to Masgras Professional Corporation for $5,000 including HST. That invoice has not been paid to date. Ms. Masgras suggests that interest that would have accrued to date on the $2,034 invoice from Dr. Friedlander if Meditecs was required to borrow from a bank would be in the approximate amount of $1,390.60, for a total of $3,424.60. According to Ms. Masgras she estimates Meditecs expenses to comprise approximately 15% of the amount of its invoice to Masgras Professional Corporation, or approximately $663.71, which would result in a profit for Meditecs of $336.46.

(l) The use of an independent assessment business such as Meditecs, it is suggested by Ms. Masgras, reduces the expense of prosecuting clients' personal injury claims for the entire time the claim is outstanding. Mr. Ashrafian has not been and will not be required to pay Meditecs' account or any other disbursements. Masgras Professional Corporation *never* requires clients to pay disbursements personally. Where cases are settled or result in final judgement in a client's favour, Defendants (or, generally, their insurers),are asked to pay disbursements, in which case they are entitled to challenge the reasonableness of the disbursements incurred. Where cases are not resolved in clients' favour Masgras Professional Corporation never seeks payment of disbursements from clients.

(m) Ms. Masgras plays no part in what fees Meditecs charges for its services. Nevertheless, Ms. Masgras has realized for several years that it may be suggested that her relationship to Mr. Irshidat may give rise to an apparent conflict of interest. For this reason, Ms. Masgras has endeavoured to obtain the informed consent of clients where Meditecs has been retained to arrange for independent medical assessments and reports.

(n) In the present case Ms. Masgras has been unable to locate a consent form signed by Mr. Ashrafian. In her affidavit Ms. Masgras deposes that she knows that Mr. Ashrafian knew that (1) Mr. Irshidat and Ms. Masgras are married, (2) Mr. Irshidat is the owner of Meditecs, (3) Mr. Irshidat, and Meditecs, were collaborating with Masgras Professional Corporation in pursuing Mr. Ashrafian's claim, and (4) that Meditecs was retained to arrange for independent medical reports to be prepared by Dr. Friedlander and Dr. Shahmalak.

(o) Ms. Masgras acknowledges that Mr. Ashrafian did not sign the consent form that was sent to him by a member of Masgras Professional Corporation's staff as referred to in my Reasons. Ms. Masgras then goes on to suggest in her affidavit that Mr. Ashrafian did not object to Masgras Professional Corporation continuing to act on his behalf, though the basis of the apparent conflict was explained to him. In Ms. Masgras' view, the conflict waiver form he was asked to sign was simply confirmatory of his agreement that Masgras Professional Corporation continue to act for him despite the presence of an apparent or actual conflict.

(p) Ms. Masgras notes in her affidavit that her duty of loyalty (including her duty of candour) to her clients, together with her duties as an officer of the court, are at all times Ms. Masgras' first priorities. Ms. Masgras believes she enjoys a deserved reputation for advancing her clients' interests even in preference to her own.

The Position of the Defence in Seeking Costs against Ms. Masgras

[5] Counsel for the defendants acknowledge that the imposition of a costs award against a lawyer should only be exercised in exceptional circumstances and with great care. The defendants do not argue that Ms. Masgras was unprepared or made errors in judgment in the presentation of the plaintiff's case at trial. Rather it is the position of the defendants that the mistrial was declared due to what counsel argues was the "deliberate, dishonest and concerning conduct of counsel, namely, that Ms. Masgras and Masgras Law Firm failed to disclose to their client, the defendants and the court that they were in a direct conflict of interest with respect to their form 53 experts".

[6] What underlies the position of the defendants is the suggestion that the evidence establishes that Ms. Masgras was dishonest in deliberately failing to disclose a direct conflict of interest of which she was clearly aware. In that regard, the defence points to the following evidence:

a. Ms. Masgras has been married to the owner of Meditecs since 2014;

b. The email communication from Masgras Law to the plaintiff dated April 2, 2021, which included the "consent document" evidences the knowledge of Ms. Masgras that she knew she was in a conflict and was equally aware of her obligation to obtain consent from her client to waive the conflict;

c. The medical legal assessments which were facilitated by Meditecs were completed in 2020, more than one year before any consent to waive the conflict was sent to the plaintiff;

d. The assessments were completed by Meditecs despite Ms. Masgras representing to the Law Society that she had stopped referring clients to Meditecs in March 2016.

[7] The defence does not argue that costs should be imposed against Ms. Masgras because of any negligence or error on her part. Rather the defence fundamentally argues that the conduct of Ms. Masgras amounted to deliberate and dishonest actions that resulted in the squandering of judicial time and resources.

The Position of Ms. Masgras

[8] As it relates to the potential conflict between Masgras and the plaintiff it is argued that while no signed consent by the plaintiff has been located, the evidence from Ms. Masgras is to the effect that her client, Ms. Ashrafian, was expressly informed in writing that the relationship between herself and Mr. Irshidat could be considered a potential conflict and that Mr. Ashrafian never objected to her firm continuing to act on his behalf.

[9] As it relates to the issue of the independence or neutrality of Dr. Friedlander and Dr. Shamalack it is argued there is no reason why this court should be concerned about their independence or neutrality simply because they were retained through Meditecs. In that regard it is argued both doctors received the same fee that they would have received had they been retained directly by Ms. Masgras and as such, it is argued there is no reason for

the court to suspect that either doctor would not honour their duty to provide objective, non-partisan evidence as they had certified that they would do pursuant to r. 53.03.

[10] As it relates to the fee charged by either doctor and the account then submitted by Meditecs it is argued that if the defendants or their insurers were asked to pay or challenge the reasonableness of Meditecs' fees, they could do so at the appropriate time. Ms. Masgras argues that she plays no part with respect to the setting of Meditecs fees and as such, the reasonableness of the fees do not justify an award of costs against her personally.

[11] As it relates to the two-part test for the imposition of costs against a lawyer personally it is argued that costs cannot be awarded personally against Ms. Masgras because she has not had carriage of the proceeding for years and as such, there is no element of unwarranted proceedings in this case.

[12] Finally, and perhaps most importantly it is argued on behalf of Ms. Masgras that the court must apply "extreme caution" and only award costs personally against a lawyer in rare and exceptional cases, not simply because the lawyer's conduct appears to fall within the wording of r. 57.07(1). It is also noted by counsel for Ms. Masgras that the court must bear in mind the potential reputational harm that any order for costs against Ms. Masgras would cause.

Legal Principles

[13] The court can only exercise its discretion to make an award of costs against a lawyer where the lawyer has been put on notice of their potential responsibility to pay costs. In this case

in my reasons granting the mistrial Ms. Masgras was put on notice of the potential for an award of costs to be made against her.

[14] The jurisdiction pursuant to which the court may make an award of costs against a lawyer is found in r. 57.07(1) of the *Rules of Civil Procedure* which provides as follows:

> 57.07 (1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,
>
> (c) requiring the lawyer personally to pay the costs of any party.

[15] The Supreme Court of Canada has considered the principles which are applicable where a request is made for a lawyer to be personally responsible for costs. In that regard Gascon J. in *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, [2017] 1 SCR 478 at para. 18 stated that:

> …that the awarding of costs against lawyers personally flows from the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice. (citations omitted). As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct.

[16] It is clear from the jurisprudence that the power of the court to make an award of costs against a lawyer personally is to be exercised sparingly, with restraint, and only in rare or exceptional cases: see *Standard Life Assurance Company v. Elliott*, [2007] O.J. No. 2031 at para. 25 and *Nazmdeh v. Spraggs*, 2010 BCCA 131.

[17] It is equally clear that trial judges must exercise extreme caution in awarding costs against the lawyer personally whether that jurisdiction is being exercised pursuant to the court's inherent jurisdiction or pursuant to r. 57.07(1): see *Carmichael v. Stathshore Industrial Park*, 121 OAC 289 applying *Young v. Young*, [1993] 4 SCR 3.

[18] In a recent decision of the Court of Appeal *Leaf Homes Limited v. Khan*, 2022 ONCA 504 the Court of Appeal set aside an award of costs against the lawyer personally because of a breach of the procedural requirements of r. 57.07(2). The Court of Appeal went on to provide guidance at para. 127 of its reasons as follows:

> A two-part test must be followed to determine the liability of a lawyer for costs under r. 57.07(1). First, the court must consider whether the lawyer's conduct falls within r. 57.07(1), in the sense that it caused costs to be incurred unnecessarily. Second, as a matter of discretion and applying extreme caution, the court must consider whether the imposition of costs against the lawyer personally is warranted. Such awards are to be "made sparingly, with care and discretion, only in clear cases, and not simply because the conduct of a lawyer may appear to fall within the circumstances described in [r]ule 57.07(1)". (citation omitted)

[19] A useful summary of when the courts have found it appropriate to make an award of costs against a lawyer personally can be found in the reasons of Reid J. in *Mitchinson v. Marshall*, 2018 ONSC 5632 at para. 21 where Reid J. held:

> The threshold for making an order to award costs against a lawyer personally is a high one, to be exercised in exceptional circumstances. Examples include cases that involve abuse of process, frivolous proceedings, misconduct, dishonesty or actions taken for ulterior motives where the effect is to seriously undermine the authority of the courts or seriously interfere with the administration of justice. Virtually all the cases involving an order to pay costs personally, whether under the *Rules of Civil Procedure* or otherwise, are based on a marked and unacceptable departure from the standard of reasonable conduct expected of a

> lawyer in the judicial system. Mistakes, negligence or errors in judgment are not typically sufficient to justify the costs award.

[20] In upholding an award of costs against Ms. Masgras personally, the Court of Appeal in *Ferreira v. St. Mary's General Hospital*, 2018 ONCA 247 at para. 34 held:

> It is not clear to me how Ms. Masgras derives any support for her position from the decision in *Jodoin*. The authority of a court to award costs against a lawyer personally was reviewed in that decision. The general requirement was stated by Gascon J., at para. 29:
>
> > In my opinion, therefore, an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice.

[21] The Court of Appeal in its reasons in dealing with an entirely different factual situation than that which is before this court went on in para. 35 of its reasons in *Ferreira* as follows:

> …Ms. Masgras misused the court process and, in doing so, she brought the integrity of the administration of justice into disrepute. On this point, I refer to rule 2.1-1 of the *Rules of Professional Conduct* which reads:
>
> > A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

[22] While the factual basis upon which a costs award against Ms. Masgras was upheld in *Ferreira* the principles are clear and well known to Ms. Masgras.

Analysis

[23] Much of Ms. Masgras new evidence suggests that she knew nothing about the conduct of Mr. Ashrafian's claim until after she reviewed my Reasons granting a mistrial. There are a number of issues with her evidence in this regard. First almost all of the court filings show Ms. Masgras as the lawyer of record. In this regard by reference to court documents filed on CaseLines the following are noteworthy.

(a) The Plaintiffs pretrial memo for the pretrial on September 15, 2022, shows counsel for the Plaintiff as "Georgina Masgras/Mark Stoiko;

(b) The Plaintiffs pretrial memo for the pretrial on June 22, 2023, shows counsel again as "Georgiana Masgras/Mark Stoiko;

(c) The plaintiffs *Ontario Evidence Act* Notice of Intention shows Georgiana Masgras and Mark Stoiko as the lawyers of record;

(d) The factum filed on behalf of the Plaintiff in support of the motion to late serve his loss of income report is signed by Mr. Stoiko with a backing sheet showing Ms. Masgras as the lawyer of record. The Motion Record filed in support of the motion shows Ms. Masgras as "the lawyer for the plaintiff". Ms. Masgras deposes in her affidavit she knew nothing about the late service of the loss of income report which seems inconsistent with the Notice of Motion filed in her name. Noteworthy is the fact the affidavit in support of the motion was sworn by Mr. Stoiko and he appeared on the motion and argued it.

(e) On November 17, 2023, the back sheet of the Affidavit of Service of Mr. Stoiko in relation to the motion record and factum filed in relation to the late service of the loss of income expert report, shows Ms Masgras as the lawyer for the Plaintiff

(f) On November 21, 2023 the back sheet of Mr Stoiko's Affidavit of Service of the Plaintiff's Request to Admit shows Ms Masgras as the lawyer for the Plaintiff

(g) On November 28, 2023, the back sheet of the Affidavit of Service of Mr. Stoiko in relation to a Motion Record that was served in relation to the plaintiff's request to cross examine the defendants investigators shows Ms Masgras as the lawyer for the Plaintiff .

[24] The Court is entitled to rely on pleadings filed by counsel as accurately describing the lawyer of record who is retained to act on behalf of a client. In this case the Court record

as reviewed in paragraph 23 above reflects that Ms. Masgras was the lawyer for the plaintiff. I simply do not believe Ms. Masgras when she says she has not been involved in the case since 2018. As recently as November 2023 Ms. Masgras is described on the back sheet of affidavits of service as the lawyer for the plaintiff .

[25] As it relates to the evidence about Mr. Ashrafian being employed at Masgras, it is worth noting that in his evidence at trial Mr. Ashrafian testified at length about his employment history pre and post accident. There was no mention in his evidence that he had been employed by Masgras on a field placement nor was there any attempt to elicit this evidence by his counsel.

[26] Ms. Masgras maintains in her affidavit she was unaware until she read my Reasons declaring a mistrial that Mr. Stoiko had written to Meditecs requesting that Meditecs retain a chronic pain expert. Her evidence in this regard is inconsistent with an email from Dr. Friedlander dated January 5, 2021, which was addressed to staff@meditecs.ca Dr. Friedlander also sent a copy of his email to Georgiana Masgras. In his email Dr. Friedlander confirms that he would see "this client" i.e. Mr. Ashrafian on January 15, 2021. Either Ms. Masgras does not read her emails or her evidence to this Court does not line up with the documentary evidence.

[27] Ms. Masgras deposes in her affidavit that she plays no part in the fee charged by Meditecs. She acknowledges that for several years she has realized that it could be suggested there is an apparent conflict of interest between her law firm and Meditecs because she is married

to Mr. Irshidat who is the sole shareholder of Meditecs. For this reason, she deposes she has endeavoured to obtain "the informed consent" of her clients when Meditecs is retained. From this I infer that Ms. Masgras and her firm continue to use Meditecs but only when they have received their clients consent to do so i.e. the client has waived the apparent conflict.

[28] The acknowledgement of Ms. Masgras that she continues to use Meditecs is concerning. I say this because she told the Law Society of Ontario as reflected in the Reasons of the Law Society Tribunal – see *Law Society of Ontario v Ortiz* 2023 ONLSTH 80 at para 20 that, "In March 2016 she stopped sending clients to or accepting referrals from the clinics (Meditecs)." This assertion is in direct contrast with Ms. Masgras' affidavit where she says she only retains Meditecs after she has the client's informed consent. No where in her affidavit does Ms. Masgras dispute, she told the Law Society she had stopped sending clients or accepting referrals from Meditecs. I can only conclude that both versions can not be true.

[29] What is also troubling from the reasons of the Law Society in *Ortiz* is another apparent inconsistency in the story about how experts are retained by Masgras and how the apparent conflict of interest has been addressed by Masgras. The conflict of course is not just the conflict of interest as it relates to the solicitor client relationship but also the fact the conflict was never disclosed to the defence. In that regard at para 46-47 of *Ortiz,* The Law Society Tribunal noted as follows:

> The LSO letter arose out of a prior inquiry into Ms. Masgras' alleged conflict based on her relationship with Mr. Irshidat. In 2015, two

> insurers complained to the Law Society that Ms. Masgras acted in a conflict of interest when she acted for eight clients who received medical assessments at one of the clinics owned by her husband. The Law Society investigated.
>
> In the December 5, 2017, LSO letter, the LSO investigator advised the investigations into the alleged conflict of interest complaints were being closed without initiating regulatory proceedings. In the letter, the investigator advised that the relationship between Ms. Masgras and her husband amounted to a conflict of interest but **that regulatory proceedings were not warranted because Ms. Masgras had instituted procedures pursuant to which she disclosed the conflict to the insurer (insurer notification) and had her clients sign the consent form." (emphasis added)**

[30] It would appear that Ms. Masgras advised the Law Society that if and when she retained Meditecs not only did she get the consent of her client, but she went one step further and told the Law Society that she would disclose the conflict to the insurer as well. Ms. Masgras maintains in her affidavit (see sub para (o) above) that Mr. Ashrafian had the conflict explained to him and he did not object to the involvement of Meditecs in retaining Dr. Friedland. It is particularly noteworthy that there is no evidence from Mr. Ashrafian confirming this important detail. As of the time of the hearing of this motion Ms. Masgras still represents Mr. Ashrafian. While there may very well be a potential conflict in Ms. Masgras continuing to represent Mr. Ashrafian the absence of any confirmatory evidence from Mr. Ashrafian is unexplained by Ms. Masgras.

[31] Ms. Masgras told the Law Society that she would disclose the conflict to the insurer. There is also absolutely no evidence that Ms. Masgras ever advised counsel for the defendants in this case of the conflict. If that conflict had been disclosed at the time when Dr. Friedlander's report was served on defence counsel, the issue of the conflict should never have materialized in the mistrial in this action. I say this because if the defence knew

of the conflict it would have been incumbent on the defence to raise the conflict before the trial ever began.

[32] Ms. Masgras seeks to justify the increase in the cost of Dr. Friedlander's account from $2000 to $5000 as something that was for the benefit of Mr. Ashrafian i.e. he did not have to pay Dr Friedlander at a point in time when Dr Friedlander expected payment. There are factual and legal issues related to this position asserted by Ms. Masgras. There is no evidence from Dr. Friedlander as it relates to his expectations regarding the timing of the payment of his fee. As explained below the nature of the retainer between Masgras and Mr. Ashrafian is not disclosed to the court but the suggestion that the increased cost from $2000 to $5000 was somehow beneficial to Mr. Ashrafian defies logic. Mr. Masgras suggests it was beneficial because Mr. Ashrafian didn't have to pay Dr. Friedlander. Apart from the lack of any evidence that Dr. Friedlander expected immediate payment Ms. Masgras has presented no evidence in the nature of the retainer agreement that would have required Mr. Ashrafian to pay disbursements as they were incurred.

[33] In her affidavit Ms. Masgras suggest that the interest on Dr. Friedlander's invoice would have attracted an interest cost to date of $1390.00. Ms. Masgras asserts in her affidavit that using an independent assessment business like Meditecs "reduces the expense of prosecuting clients' personal injury claims". These arguments together with the assertion Mr. Ashrafian would never have to pay the disbursement from Meditecs are all put forward by Ms. Masgras to justify the use of Meditecs.

[34] The suggestion that Dr. Friedlander's invoice of $2,024 rendered on February 17,2021 would today attract an interest cost of $1,390 is very difficult to accept. In 2021 the Bank

of Canada key lending rate was 0.5%. Interest rates that would have been charged on a line of credit in 2021 would undoubtedly have been higher than 0.5%. Interest rates since 2021 to date have of course also increased. A simple mathematical calculation enables the court to conclude that a simple interest accrual of $1390 over 38 months to date would require that the lender charge approximately 21% on the invoice of $2,024-a rate of interest difficult to align with Ms. Masgras' assertion that using an independent assessment business like Meditecs somehow reduces the expense of prosecuting a personal injury claim. Such an assertion simply can not be true. To the contrary where a so-called independent assessment business is used to facilitate medical examinations there needs to be transparency in terms of the costs involved. To simply more than double Dr. Friedlander's invoice lacked transparency and rendered the disbursement from Meditecs unreasonable.

[35] It is somewhat remarkable that Ms. Masgras in her affidavit states that she "estimates that Meditecs expenses comprise approximately 15% of the amount of its invoice to Masgras Professional Corporation or approximately $663.71 which would result in a profit for Meditecs of $336.46". I comment that this statement is somewhat remarkable because Ms. Masgras is not the owner of Meditecs (her husband is) and she asserts in her affidavit she plays no part in what fees Meditecs charges. It is therefore difficult to understand let alone give much credence to her assertion that Meditecs expenses compromise 15% of the invoice to Meditecs from a doctor like Dr. Friedlander.

[36] What is of particular concern is the suggestion in Ms. Masgras' affidavit that because" a medical assessment business adds value to the law firm that retains them the law firm

charges are higher than the account of the specialist". Ms. Masgras goes on to suggest "if the law firm simply billed the amount the specialist charged the law firm would not be paid for their own services". In short Ms. Masgras says the "law firm is entitled to make a profit".

[37] Ms. Masgras fails to understand the difference between the legitimate time cost reflected in a lawyers account and the disbursements incurred by the lawyer to pursue a claim on behalf of the client. While the word disbursement is not defined in the *Rules* it is understood to mean an expense incurred by a lawyer on behalf of a client to advance the litigation. Disbursements must be reasonable. An assessable disbursement for an expert's report must be reasonable and it must be provided to the other party – see Rule 57.01 Tariff A.

[38] It simply can not be the case as suggested by Ms. Masgras that a law firm which utilizes the services of a medical assessment business can somehow charge a higher fee or added cost to the disbursement so the law firm can realize a profit. In this case Dr. Friedlander submitted an invoice of $2024. No one would dispute such a cost as being anything other than reasonable. The justification suggested by Ms. Masgras for then increasing that cost to $5000 is untenable.

[39] The affidavit evidence of Ms. Masgras does not specifically mention that her retainer with Mr. Ashrafian involved a contingency fee arrangement (CFA). Her affidavit does however suggest some of the usual features of a CFA such as her evidence that "if cases are not resolved in a client's favour Masgras Professional Corporation never seeks payment of disbursements from clients".

[40] Part of the reason why a CFA is now a common part of personal injury litigation is that the Law Society has approved the use of CFAs. As well the court has embraced the use of CFAs because they have provided access to justice for some litigants who might not otherwise be able to afford to litigate a personal injury type claim. Part of the reason why lawyers receive a not insignificant percentage of the settlement and or judgement recovered by a plaintiff/client is because the lawyer has assumed a financial risk. The financial risk often means the lawyer funds the disbursements needed to advance a claim.

[41] While it would be difficult to endorse the use of Meditecs or any other similar arrangement, at the very least there is an obligation on the lawyer to make full, fair and frank disclosure to the client; opposing counsel and the court. By that I mean the client must be made aware of the arrangement and consent obtained. Consent must mean informed consent-not implied consent. In this case there is no written record that Mr. Ashrafian understood the nature of the arrangement; the conflict; and its implications. There is also no evidence that the conflict was ever disclosed to the defence in the manner that Ms. Masgras told the Law Society in *Ortiz* that she would. There was also no disclosure to the court until the Court requested it from Mr. Stoiko during the mistrial motion.

[42] The two part test the court must apply where costs are sought against a lawyer requires this court to consider: 1) did the conduct of Ms. Masgras cause costs to be incurred unnecessarily and 2) using extreme caution to consider whether the imposition of costs against Ms. Masgras is warranted. -see *Leaf Homes* para 127.

[43] The court must also consider whether there was any conduct on the part of Ms. Masgras that was of such a nature that it could be said to have frustrated or interfered with the administration of justice. Such conduct would require this court to consider an award of costs against Ms. Masgras as part of its duty to supervise the conduct of lawyers appearing before this court.

[44] The costs of the mistrial, whatever those costs might be, are costs that have been incurred unnecessarily. If Ms. Masgras had lived up to her representations to the Law Society the mistrial would never have occurred. It would not have occurred because the conflict with Meditecs would have been disclosed by Ms. Masgras not only to Mr. Ashrafian but also to defence counsel. The only remaining question is whether the conduct of Ms. Masgras can be said to have frustrated or interfered with the administration of justice.

[45] Ms. Masgras is no stranger to the potential for a costs award being made against her. In *Ferreira v. St Mary's General Hospital* 2018 ONCA 247 in a fact situation very different from the facts before me Nordheimer J.A. stated:

> [34] It is not clear to me how Ms. Masgras derives any support for her position from the decision in *Jodoin*. The authority of a court to award costs against a lawyer personally was reviewed in that decision. The general requirement was stated by Gascon J., at para. 29:
>
> > In my opinion, therefore, an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice.
>
> [35] In my view, the facts of this case amply establish that Ms. Masgras' actions "seriously interfered with the administration of justice." She acted without instructions. She acted in a manner that

> was directly contrary to the wishes of Mr. Ferreira's family. And she did so when one of the most difficult, emotional, and personal of decisions was being undertaken by them. Further, Ms. Masgras' actions potentially interfered with the ability of another individual to receive what might well have been a life-saving organ transplant. Ms. Masgras misused the court process and, in doing so, she brought the integrity of the administration of justice into disrepute. On this point, I refer to rule 2.1-1 of the *Rules of Professional Conduct* which reads:
>
> > A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

[46] While the facts in *Ferreira* are quite different from the facts before this Court, I take from the Reasons of Nordheimer J.A. that where a lawyer's conduct seriously undermines or interferes with the administration of justice then the court can and should step in and consider making an award of costs against the lawyer. In this case Ms. Masgras knew as of when the *Ortiz* matter was decided by the Law Society Tribunal (April 27,2023) that she needed to have her clients consent as it relates to the continued involvement of Meditecs. More importantly she would have been well aware of her representation to the Law Society that the conflict should be disclosed to the defendant's insurers.

[47] Ms. Masgras maintains in her affidavit she didn't know that Mr. Stoiko had requested Meditecs assistance in retaining the services of doctor with a speciality in chronic pain. I simply do not believe Ms. Masgras. She received a copy of an email from Dr. Friedlander dated January 5,2021 in which Dr. Friedlander confirmed he would see Mr. Ashrafian on January 15,2021. As I have already indicated I also don't believe Ms. Masgras when she says she knew nothing about the carriage of the Ashrafian file since 2018. The Court record demonstrates otherwise.

[48] Ms. Masgras' conduct as it relates to the Friedlander account is also extremely problematical. She seeks to justify the more than doubling of Dr. Friedlander's invoice as being designed to "reduce the expense of prosecuting clients' personal injury claims for the entire time the claim is outstanding". I fail to see how it can be argued there is any saving of expense. Rather there is a more than twofold increase in the disbursement cost attributed to Dr. Friedlander – an increase that is never disclosed to the defence or the client. This is troubling in two ways. First assuming Mr. Ashrafian's claim was settled for a hypothetical amount of $100,000 inclusive of costs and disbursements, Mr. Ashrafian would receive an account from Ms. Masgras for her fees plus disbursements. One of the disbursements would have been the Meditecs account which included the $5000 for Dr. Friedlander's invoice. Mr. Ashrafian would never have known that the actual invoice cost of Dr. Friedlander was just over $2000. Equally troubling is if the case settled at the pre-trial when the defence was given the list of the plaintiff's disbursements the defence would also not have known of the inflated cost of the invoice from Dr. Friedlander.

[49] The inflated cost of Dr. Friedlander's account is also of concern in a larger sense. All to often as a trial judge and as a pre-trial judge I see the costs of experts continually rising. No one can doubt that an expert with professional expertise should be properly compensated for his or her time and in this case the account of Dr. Friedlander was reasonable. Nothing that Dr. Friedlander did in this case was improper. What was improper, and misleading was to represent to the defence that the invoice from Meditecs was a true reflection of Dr. Friedlander's invoice. It was not.

[50] Everyone associated with the personal injury Bar and for that matter all civil cases, needs to do everything in their power to reduce the reliance on medical-legal experts which only add to and increase the cost of litigation. At the very least the disbursement cost of an expert must be fair, reasonable and proportionate to the realistic recovery at trial. Most important of all the disbursement cost for which payment is sought-whether from the client or the opposite side, must represent the uninflated cost of the expert.

[51] This is one of the rare and exceptional cases where the conduct of Ms. Masgras requires the court to exercise its responsibility to supervise the conduct of a lawyer where the conduct is of such a nature that it both frustrated and interfered with the administration of justice. Ms. Masgras has not in my view been candid with the court for reasons I have reviewed above. Ms. Masgras made representations to the Law Society which were either false or in the alternative were representations that she never adhered to in her practice Ms. Masgras despite her representations to the Law Society continues to use Meditecs and contrary to her representations to the Law Society she did not disclose her conflict to the defendant's insurer. The mistrial in this case would not have happened if Ms. Masgras had not only adhered to what she told the Law Society but equally important it would not have happened if she had been candid with the Court and the defendants.

[52] The mistrial was entirely avoidable. Ms. Masgras represents in her affidavit that her priorities are her duty of loyalty and candour to her client and to the court. Ms. Masgras' actions in this case demonstrate otherwise. Regrettably, what underlies Ms. Masgras' actions is a complete misunderstanding of what the word candour means. Candour required disclosure of the conflict to the client; to the defendants and to the court. Candour required

full disclosure of the inflated cost of Dr. Freidlander's invoice to the client; the defendants and to the court. None of this happened. This is the rare case where the court should exercise its discretion to award costs of the mistrial against Ms. Masgras. To do otherwise would be to countenance such conduct and to potentially have the client pay the mistrial costs-which would be patently unfair to Mr. Ashrafian where his conduct in no way caused the mistrial.

[53] The costs of the mistrial will be paid by Ms. Masgras. The only remaining issue is the quantum of such costs. Counsel are encouraged to agree on such quantum. If agreement can not be reached the court will entertain written submissions limited to five pages to be received no later than June 1, 2024. If no submissions are received after June 1 the court will assume the issue of the quantum of costs has been resolved.

[54] As for the continuation of these proceedings I am inclined subject to the input of counsel, to place this matter on the September 2024 blitz list. Counsel may make arrangements with my judicial assistant for a case conference to address the trial of this matter.

[55] Before I leave these reasons Mr. Mackenzie correctly urged this court in his submissions to reflect on the potential reputational harm that an order for costs against Ms. Masgras might have. I agree with Mr. MacKenzie. While reputational harm should not be an overriding consideration it is something that can not be ignored. In this case I fully understand that my decision may have an impact on Ms. Masgras' reputation. Her reputation and the reputation of any lawyer is something that must be assiduously guarded by the lawyer. Once a reputation is lost it is difficult to regain. Ms. Masgras must reflect

on what she did that caused the mistrial as well as this court's order in awarding costs against her. It will be up to Ms. Masgras to regain the confidence of the court.

EDWARDS, R.S.J.

Released: April 30, 2024

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ALI ASHRAFIAN

Plaintiff

– and –

CYRUS KAVARANA and NISSAN CANADA INC.

Defendants

REASONS FOR DECISION ON COSTS

EDWARDS, R.S.J.

Released: April 30, 2024

Court File No. CR-23-10000201-0000

THE SUPERIOR COURT OF JUSTICE

CIVIL COURT

B E T W E E N:

REXINE CAIRNS

Plaintiff

- and -

COREY EDGAR PETER ELLIS

Defendant

E V I D E N C E O F D R . V I N C E N Z O B A S I L E
V O I R D I R E

BEFORE THE HONOURABLE JUSTICE R. TZIMAS
on May 16, 2024, at BRAMPTON, Ontario

APPEARANCES:

J. Palmer	Counsel for the plaintiff
V. Merja	Counsel for the plaintiff
S. Uppal	Counsel for the plaintiff
V. Tanner	Counsel for the defendant
T. Tathgur	Counsel for the defendant

SUPERIOR COURT OF JUSTICE

T A B L E O F C O N T E N T S

W I T N E S S E S

E X H I B I T S O N *V O I R D I R E*

SUPERIOR COURT OF JUSTICE

T A B L E O F C O N T E N T S

LEGEND

[sic] Indicates preceding word has been reproduced verbatim and is not a transcription error.

(ph) Indicates preceding word has been spelled phonetically

Transcript Ordered:	
Transcript Completed:	
Ordering Party Notified:	

THURSDAY, MAY 16, 2024

U P O N R E S U M I N G:

V O I R D I R E

VINCENZO BASILE: SWORN

EXAMINATION IN-CHIEF BY MR. PALMER:

Q. Good morning, sir.

A. Good morning.

Q. Are you licensed to practice medicine in any jurisdiction?

A. Yes, Ontario.

Q. Wait, sorry, which jurisdiction?

A. Ontario, Manitoba.

Q. Okay. When did you first become licensed to do so?

A. That would be 2004.

Q. Have you brought a copy of your *curriculum vitae* today?

A. Yes.

Q. Is it updated and current today?

A. I believe so, yes.

MR. PALMER: Your Honour, I don't know whether Your Honour wishes to treat this as an *aid memoir* or an exhibit, but a copy has been provided to my friend. If I may ask...

THE COURT: It will be Exhibit 1 to the -- in relation to the Dr. Basile.

MR. PALMER: Thank you, Your Honour. If I may

hand that up.

THE COURT: Yes, please.

MR. PALMER: Thank you.

EXHIBIT NUMBER 1: Curriculum vitae of Dr. Vincenzo Basile -- produced and marked.

THE COURT: And counsel, you've provided an electronic version of this to my Registrar.

MR. PALMER: I have not yet, Your Honour. We've had a non-updated one, it's on Case Center. But this is a hard copy only, Your Honour. So I do undertake to provide that to Madam Registrar.

THE COURT: All right. Just for -- my Registrar is the one who will be tracking the exhibits. Anything that's handed up to me is for my benefit. But the -- all exhibits will be managed by my registrar.

MR. PALMER: Thank you. Your Honour, sorry, apologies. Q. Dr. Basile, I'm going to take you to page three of that report -- sorry, of that c*urriculum vitae*, section B, "labeled Education."

A. Yes.

Q. Could you tell me, what year you got your medical degree?

A. 2004.

Q. Okay. Did you subsequently complete any fellowships?

A. The medical degree was in 2004, then the residency for five years in Neurology.

Q. Where did you complete that?

A. At the University of Toronto.

Q. Okay.

A. It was fellowship in stroke and neuromuscular

neurology and that was completed in 2010.

Q. There are two other notations on your education. Could you describe those for me, please?

A. The World College Clinician Investigator Program is a research program. While seeing patients who perform research in the hospital as well at Sunnybrook. And then in 2015 was the American Medical Association Guide to Impairment Evaluation course.

Q. Did you complete that successfully?

A. Yes.

Q. Going to page two, Section A, your current and past work experience.

A. Yes.

Q. Where do you currently work, doctor?

A. Currently I'm at, I'm the medical director of McKenzie Spine and Brain Associates. I'm also working as a consultant to Maple Leaf Sports and Entertainment consulting on concussion and head injury for professional athletes, the Leafs, the Raptors, TFC. That would be it.

Q. All right. Were you ever a professor at any university?

A. Yes, I was a clinical associate professor of medicine at McMaster University. I was also an adjunct associate professor at University of Toronto in the Division of Neurology.

Q. And do you provide services through the Ontario Health Insurance Program?

A. Yes.

Q. And what services do you provide?

A. I have an OHIP based practice that's tailored to neuromuscular neurology. So, performing EMG nerve conduction, so that's the peripheral nervous system, but also

the central nervous system. I also see head injury patients and concussion patients through OHIP.

Q. How often do you treat patients under OHIP?

A. My full practice is four days a week, Tuesdays to Fridays.

Q. What is Concussion Incorporated, the K?

A. Concussion was a project that started several years ago where we were looking to define concussion, provide education and research in the area of head injury and trauma. In 2015, we published a white paper inviting world experts in concussion from the U.S. and Europe. And we endeavored to publish this white paper providing some advice and recommendations regarding head injury and concussion.

Q. Okay.

A. But that, that has not been very active lately, to be honest.

Q. Have you ever provided neurological services at a hospital?

A. Yes.

Q. In what capacity?

A. I started -- started off at Sunnybrook Hospital in the first few years of my -- my work there. I then became Medical Director of Stroke and Neurology, Division Head of Neurology at McKenzie Health Hospital and also William Osler Hospital. I was Division Head of Neurology from 2010 to 2019 at McKenzie Health and Medical Director of Stroke. At that time as well, I started the stroke program at McKenzie Health. Later I became Division Head of Neurology and Medical Director of Stroke at William Osler Hospital from 2014 to 2018.

Q. While you were at William...

MS. TANNER: I was just checking to make sure that wasn't my phone. But apparently mine's off,

so....

THE COURT: Thank you.

MR. PALMER: Mine is also on silent. Q. While you were at William Osler, doctor, did you -- what kind of cases did you treat? You're on silent.

A. So on call, we would see everything that would come on, on call. The practice was tailored to neuromuscular neurology. However -- so that we have subspecialists in different areas, some MS experts and they would -- you know, we'd forward the MS cases. There myself would be neuromuscular neurology and ALS.

Q. Did you ever treat patients with head injuries?

A. Yes.

Q. At William, also?

A. Yes.

Q. How frequently?

A. As they would come to hospital, we would be called on call and I had a predilection for these cases so they knew I had an interest, so I would be sent these patients as well. Also at McKenzie Health, it was the same.

Q. Now looking at page four of your *curriculum vitae*.

A. Yes.

Q. Entitled "Certifications."

A. Yes.

Q. Are you certified by the Royal College of Physicians and Surgeons of Canada?

A. Yes.

Q. When did you achieve that certification?

A. I don't know.

Q. What class that would be.

A. 2008, I believe. 2009, sorry.

Q. Okay. And what was that certification in?

A. Neurology.

Q. Are you a member of any professional college in the province of Ontario?

A. The OMA, the Ontario Medical Association. The College of Physicians and Surgeons, the CPSO.

Q. Okay.

A. CMA.

Q. Sorry. When you say CMA, what is that?

A. Canadian Medical Association and the CSCN, the Canadian Society of Clinical Neurophysiologist that certifies me to perform EMG nerve conduction testing.

Q. Of those four certifications you've told us about, are any not in good standing?

A. No, they're all in good standing.

Q. Are you licensed to provide independent services?

A. Yes.

Q. Is there any aspect of your practice that is required to be supervised?

A. No.

Q. On page five, under D, “Professional Affiliations and Activities,” you've listed some -- some associations. One of the -- one of the professional affiliations, as your *curriculum vitae* terms it, is the American Academy of Neurology. What is the nature of your affiliation?

A. I'm a member.

Q. Going through those professional affiliations, is there any affiliation there that is not in good standing currently?

A. No.

Q. Now looking at page six of your *curriculum vitae*, your clinical training, residency. Can you describe to me what Behavioural cognitive neurology is? The last notation on that page.

A. This is a subspecialty of neurology specializing in memory, concentration, cognitive function. They would be funneled patients like Alzheimer's disease, Frontotemporal Dementia, Lewy Body Dementia, et cetera.

Q. In that line, did you ever deal with people with head injuries?

A. Yes.

Q. Have you ever authored any academic journal articles?

A. Yes, on neurology?

Q. This would be at page 16 of your *curriculum vitae*.

A. Yes.

Q. Can you take me to any peer reviewed publications that deal with head injuries.

A. The number one on the list, was a paper with a working group in head injury, focusing on the use of SPECT and quantitative EEG in patients with chronic mild traumatic brain injury with persistent symptoms. Item number one. There are several articles in terms of stroke and injury to the brain, secondary to vascular injury.

Q. Have you ever had to retract any of the articles that you have listed in this *curriculum* detail?

A. No.

Q. You are asked to bring a document specifically relating to any education from your experience with concussion.

A. Yes.

Q. Did you do so?

A. I did. Yes. So this is the Maintenance of Certification Program from the Royal College of Physicians and Surgeons of Canada. Basically, we submit any conferences or education that are gone through and what category. And there's a point system, where you have to maintain certain points per year and over a five-year course to maintain that certification. This -- the range -- the date range is here from January 1st, 2018, to December 31st, 2023. I just haven't had a chance to enter the ones after December 31st.

Q. How many copies have you brought for that document?

A. I brought one copy.

MR. PALMER: Your Honour, I am unable to proffer a copy of this to my friend. My friend has had an opportunity to review it. I would ask that it be made Exhibit 2 to this *voir dire*. But it is, as I said, there's only one copy. So I would ask that it be handed up.

THE COURT: Any concerns? Have you seen it?

MS. TANNER: I had an opportunity to review it for a moment this morning.

THE COURT: We could make more copies. That would -- it's not the preferred way, but we need to be practical here.

Ms. TANNER: Thank you.

THE COURT: Let's take it as a formal copy. I don't know how much you're going to go through it with the doctor, how much you need it. I will review it in due course.

MR. PALMER: Okay, thank you. I would just ask you, doctor, to hold it up for a second please.

THE COURT: And the formal title then of the

Exhibit 2 is what, counsel?

A. Maintenance of Certification, the Royal College of Physicians and Surgeons of Canada transcript report. And this is a report generated online.

EXHIBIT NUMBER 2: Maintenance of Certification, the Royal College of Physicians and Surgeons of Canada transcript report -- produced and marked.

MR. PALMER: Q. Could you hold it up for me, sir? Because we can't see it in the camera. You've -- you've made some marks on this, document?

A. Yes.

Q. What are those marks in pink?

A. I've highlighted the concussion conferences, traumatic brain injury conferences. I note that there's another one from October 2nd, 2023, that I didn't highlight that's from the 15th Annual Brain Injury Conference that should be highlighted as well. But the ones that are highlighted are concussion related and head injury related and persistent concussion syndrome related or traumatic brain injury related as well.

Q. And attendance at those conferences. Did you speak at any of them?

A. I was at roundtable discussions for some of them. Others were for guideline preparation. Others were for development of the article that I mentioned with respect to SPECT. And others were with respect to the white paper, with the International Group of Concussion Experts.

Q. Do those bear any weight with the College or the Royal Society?

A. Yes. They carry different weighting factors, so they're scored with credits reported. So there's confidence versus preparations of guidelines, et cetera. And they're

weighted on the column "credits reported."

Q. And do you fall above or below any required thresholds by those bodies.

A. Yes, they're all above.

Q. Did you prepare a report in connection with Rexine Cairns?

A. Yes.

THE COURT: Sorry, I'm, you're, you're losing your voice.

MR. PALMER: I apologize, Your Honour. My question...

THE COURT: You know the lectern goes up and down. It's supposed to -- no, the lectern.

MR. PALMER: Thank you, Your Honour.

THE COURT: Everything is automated.

MR. PALMER: Everything is excellent in this courtroom.

THE COURT: This is a new courtroom, so it there should be a way to fix it.

MR. PALMER: Court's indulgence. I'll simply lean in, Your Honour.

THE COURT: Okay. All right.

MR. PALMER: Q. Sorry, so my question was, Dr. Basile, did you prepare a report in connection with Rexing Cairns?

A. Yes.

Q. Add did you prepare an addendum to that report?

A. Yes.

MR. PALMER: Your Honour, these have been uploaded to CaseLines. I can put them and provide to my friend. I would ask that Dr. Basile's report be

marked as Exhibit 3 to this *voir dire*, and the addendum be marked as Exhibit 4.

THE COURT: Any concerns at all?

MS. TANNER: No, Your Honour. Thank you.

THE COURT: Okay. Exhibit 3 then is Dr. Basile's report. What's the date of it?

MR. PALMER: There are two dates, Your Honour.

THE COURT: So exhibit three...

MR. PALMER: October 5th, 2022, and April 1st -- apologies.

THE COURT: Exhibit 4, that will be Exhibit 4.

MR. PALMER: Exhibit 3, Your Honour, October 5th, 2022, and exhibit.

THE COURT: Dr. Basile's report for the plaintiff, dated October 5th, 2022. That's the title to Exhibit 3, Madam Registrar.

EXHIBIT NUMBER 3: Dr. Basile's Report for the Plaintiff dated October 5th, 2022 -- produced and marked.

THE COURT: Exhibit 4 is Dr. Basile's addendum? What do you call it?

MR. PALMER: Yes. It's titled Neurological Evaluation Addend Your Honour, but I -- I would ask it be tendered as Dr. Basile's Neurological Addendum dated April 1st, 2024.

THE COURT: So, Madam Registrar, Exhibit 4 is Dr. Basile's Neurological Addendum dated, April 1st, 2024.

EXHIBIT NUMBER 4: Dr. Basile's Neurological Addendum dated, April 1st, 2024 -- produced and marked.

MR. PALMER: Q. Dr. Basile, on the front page of

Exhibit 4 now, your addendum you've described yourself, and I quote, as a "Neuromuscular neurologist, electromyographer, stroke specialist, and concussion specialist." Is there any part of your education, training, or experience that you rely upon to describe yourself as a concussion specialist that we've not yet discussed?

A. Basically, you can see more patients privately and through work. For several years now, in traumatic brain injury and concussion. I have lots of education, I've been certified in the court system. I've been qualified in the court system as a concussion expert as well as the others.

Q. As it pertains to the Ontario Superior Court of Justice, what have your prior qualifications been?

A. I have been qualified as a muscular spine specialist.

THE COURT: I'll need you to speak into the mic as well.

A. Oh, sorry. I've been qualified as neuromuscular spine specialist.

MR. PALMER: Q. Is there any difference, Dr. Basile, between treatment of a concussion and treatment of post concussion syndromes.

A. There is. There is differences in terms of the subcategories.

MS. TANNER: Your Honour, we're having difficulty hearing Dr. Basile. Is his mic on? Perhaps it's not...

THE COURT: Is the mic on?

A. Is the mic on? Hello?

THE COURT: There you go.

A. I just touched something here.

MS. TANNER: That's good. Okay.

THE COURT: Okay, thank you. See, I'm closer, so I'm hearing it, but by all means, please speak up if somebody can't hear.

MR. PALMER: Q. Sorry, doctor, could you complete your answer, please?

THE COURT: So, sorry, can we just back up then? The distinction is between what and what again?

MR. PALMER: Can you just Concussion and post concussion syndromes, Your Honour, and I used a plural, syndromes.

A. So there's the acute management of concussion, then there's the chronic manage management of concussion. Then, there's the sub diagnoses that are managed and comorbidities that go with concussion. And these are all separate. I would say that all of them are. But there are subtle differences among those.

THE COURT: All under what group?

A. All under the umbrella -- all under the umbrella of traumatic brain injury and concussion. But there are subcategories that are treated differently.

MR. PALMER: Q. Of that umbrella that you just told us about, doctor, are there any that you do not have experience with, clinically?

A. No.

Q. Prior to examining, Ms. Rexine Cairns, doctor, did you know her?

A. No.

Q. Did you have any financial relationship with anyone that was not arm's length to Ms. Rexine Cairns?

A. No.

Q. Since authoring the addendum, have you developed any financial interest in Ms. Cairns?

A. No.

Q. Or anyone with whom she's not arm's length?

A. No.

Q. Did you identify any conflict of interest at any time in assessing Ms. Cairns?

MR. PALMER: Your Honour, I would ask that Dr. Vincenzo Basile be qualified as an expert in neurology, concussion, and neurological head injury.

THE COURT: Neurology, concussion, and?

MR. PALMER: Neurological head injury.

MS. TANNER: Your Honour, I'm not aware of the time, but perhaps now is for the morning break, then I would have a chance to quickly review in more detail the second exhibit which was the training that I've just seen this morning. And then the same with the CV that I got this morning. Just so that I can adjust my cross-examination so I don't cover things that are now no longer necessary.

THE COURT: Okay.

MS. TANNER: That can be a very short break. It doesn't -- I mean, it's whatever the staff would want, and I know we got started late, but...

THE COURT: We're getting ahead of your....

MS. TANNER: Yes.

THE COURT: I have a five-minute teleconference at 11:30. So, if we take a break, we won't be back until 20 to 12. That's a bit of a longer one. Usually it's a 20-minute break. Just so you know, going forward, it's 20 after 11. We go for 20 minutes. It's no big deal to go -- to start

earlier, but I won't be back before 20 to 12, because I have to deal with this.

MS. TANNER: I'm happy to start.

THE COURT: If you want to start, if there's some stuff you can get out of the way, then we'll take a break at 11:25 for 20 minutes, and then that'll be more efficient.

CROSS-EXAMINATION BY MS. TANNER:

MS. TANNER: All right, thank you. Let's make sure this mic is on. Okay, great. That's great. No one has ever complained that they can't, so it'll be a first. Q. Thank you doctor for coming today. We're doing this in large part so that we can get it out of the way for when the jury's here, so we can use our time efficiently with them, given that they probably don't enjoy being here as much as we all do. I want to start first with your *curriculum vitae* that is attached to the report very much. that you prepared for this matter. That, Your Honour, that CV can be found at B10043. There's an expert brief that has been uploaded. It includes the initial -- the report, the CV and I believe the addendum as well.

THE COURT: Yes, carry on.

MS. TANNER: Thank you. Q. So, Dr. Basile do you have that in front of you, or do you, would you like a copy?

A. Yes, please.

Q. Okay. Thank you. If I may approach, Your Honour.

THE COURT: Of course.

MS. TANNER: Thank you. Q. So, there's a lot of writing on there. So, you can just disregard the chicken scratching the notes on there, Dr. Basile. So, at the time you

served your report for Rexine Cairns, this was the CV that you attached, correct?

A. This may be an older version that was sent to the IME company and they sent -- they submit for me.

Q. Okay, and this one is affixed to the report.

A. Not -- not when I sent it to them.

Q. This is the CV that was submitted on behalf of the plaintiff attached, affixed to the neurological examination you did, and this is what has been relied upon in this lawsuit until well -- until we received an updated CV from you this morning.

A. Yes.

Q. Okay. So, if we could go to page two of that CV, Your Honour, that should just be whatever the next page is on CaseLines. I would like to ask you about your involvement with the -- as the Chief Medical and Research Officer at Concussion, Inc. All right, do you see that?

A. Yes.

Q. And it says, “to present.”

A. Where is that?

Q. It's under -- on page two. It's the third. First there’s Telestroke -- sorry, it's the second. First is the Telestroke Ontario, second is the Chief Medical and Research Officer for Concussion, Inc.

A. Yes.

Q. Okay. So....

THE COURT: That's under “current and past work experience?”

MS. TANNER: That's right, Your Honour. Thank you.

THE COURT: Because just FYI, the page numbers are different on master and current. I found it so

don't worry.

MS. TANNER: Thank you. The main issue is as long as you've got it, Your Honour.

THE COURT: I've got it.

MS. TANNER: Q. Now, Concussion Inc is -- has a website. Is that right?

A. I believe so. I haven't -- I haven't looked.

Q. Well, are you the chief medical officer?

A. I was, but this has been inactive for many years.

Q. I see.

A. Yeah.

Q. All right. Well, at the time that you were preparing this report, it wasn't -- it was active and certainly you were involved with this company. Right?

A. What was the time of the report?

Q. You issued this report in 2022.

A. 2022, so it had long been inactive at that point.

Q. I see.

A. Yes.

Q. All right, well I want to ask you a few questions about it anyway, given that you were part of this company, which purports to provide professional and semi-professional athletes with concussion management. Right?

A. Yes.

Q. Okay. And the -- the head director of that company is also a neurologist, is that right?

A. He's a neurosurgeon.

Q. Neurosurgeon, Dr. Jha.

A. Yes.

Q. Yes.

THE COURT: Can you spell that?

A. J-H-A.

MS. TANNER: J-H-A, Your Honour. Now, Your Honour, the next CaseLine's reference is MB11382. Perhaps Madam Registrar, now would be the time to share, or I can put on the ELMO, as you -- ELMO, yes.

COURT REGISTRAR: Whichever method you'd like.

MS. TANNER: ELMO works.

THE COURT: It would be the better, because the page numbers I've got master FSF133...

MS. TANNER: I have B11382, or -- that's the master. Or C. Sorry.

THE COURT: Under the jointly submitted and/or consent documents bundle, I've got joint -- I've got the expert brief.

MS. TANNER: So now we're on to a different. This is materials about the company Concussion, Inc., Your Honour.

THE COURT: You know, it might be, we can set it up after the break, but the one facility that works is if your colleague can be bringing you to -- there's the go to page function on CaseLines. Confirm that.

MR. PALMER: Thank you, Your Honour. You directed us to bundle page -- F2136. Apologies, you directed us, it says on CaseLines, to a page...

THE COURT: I directed you?

MR. PALMER: That's what it says, Your Honour.

MS. TANNER: We're in a -- we're in the defendant's bundle, Your Honour. That is perhaps the issue.

MR. PALMER: It, it now says on master F2134 and current F2130.

THE COURT: Okay, well, you can reject that, but let me see. So, concussion -- sorry, you said V1?

MS. TANNER: Yes, it's in the defendant's bundle. B11382, I believe should be the right master. I have the current reference as well.

THE COURT: B113....

MS. TANNER: The current, Your Honour, is B11078.

THE COURT: Okay, "concussion, let them play," is that the page?

MS. TANNER: Is that, pardon me?

THE COURT: Let them play, is that what I see?

MS. TANNER: Yes, that's right.

THE COURT: I had it with holding a head, concussion.

MS. TANNER: That's right.

THE COURT: Okay, B, let's work with current numbers.

MS. TANNER: Okay.

THE COURT: And now that we've got that, we'll -- we are going to break it on.

MS. TANNER: Hopefully we can figure this all out before the poor jury is here.

THE COURT: What works best is if one of you is taking the two pages. We'll take a morning break now.

MS. TANNER: Thank you, Your Honour.

R E C E S S

U P O N R E S U M I N G:

MR. PALMER: Court's indulgence, Your Honour, we just sent my colleague down to the PLA Lounge to photocopy Exhibit 2.

THE COURT: Okay.

MR. PALMER: He'll be back momentarily.

MS. TANNER: I can get going now.

MR. PALMER: Yes, we don't have to wait for that.

MS. TANNER: No. As soon as my colleague is ready with her sharing.

THE COURT: Yes, the good news is we called you. The bad news is we have to....

MS. TANNER: I was going to say that. Q. So we're starting with the expert report.

MS. TATHGUR: Sure.

MS. TANNER: Sure?

MS. TATHGUR: Yes.

MS. TANNER: The expert report? Okay. Yes. We're just going to back up for a moment, Your Honour, to Dr. Basile's October 5, 2022, report on Rexine Cairns.

THE COURT: So Exhibit 3.

MS. TANNER: Yes. Or tab....

THE COURT: Okay, that's great.

MS. TANNER: Yeah. Bundle F, tab four. Thank you. Okay, we're going to learn how to -- I'm going to learn how to do this, Your Honour. And I apologize for the delay in my learning.

THE COURT: No, need for apologies. We're all learning. Let's go.

MS. TANNER: Q. So this is your neurological evaluation of Rexine Cairns, Dr. Basile. Am I saying your last

name, correct?

A. Perfect.

Q. Great. Thank you. And it is dated October 5, 2022. Is that correct?

A. Yes.

Q. So let's -- I would like to go to the first page of your report, which is page two. And this is where your report commences. Is that correct?

A. Yes.

Q. All right. And on this page, it starts "to whom it may concern" and the reason for the assessment. Correct?

A. Yes.

Q. Okay and then we have your professional designations, which form part of your report. So this is where I want to start. My friend has already taken you through your licensing and your certifications. So I have a few questions with respect to the professional designations within -- indicated here in your report. So, the first I wanted to ask was about the additional training in concussion and traumatic brain injury. So do you see that? "I hold additional training in concussion and traumatic brain injury."

A. Yes.

Q. And this report is in 2022, correct?

A. Yes.

Q. And the reason I was interested in this is because then I was searching, searching, searching for where I could find what your additional training would be, and I realized today you've arrived with some further documents, but this -- I don't need that right now. Thank you. If we go now to further along to your current and past work experience, which is at the end of the report and into the CV, which is where I

would next go. Page three of the CV, right there.

THE COURT: So now which CV are we on?

MS. TANNER: Now we're at the CV that is enclosed within the report, so I don't believe you have it, Your Honour, but it will be attached to the back of this report.

THE COURT: So we should be -- what's the page number there?

MS. TANNER: F2131, but we're going to go to section B, so that should be the page up. There we go. Okay, F2130. Q. So, first we have where in your -- at the beginning it says, "I also hold additional training in concussion and traumatic brain injury." We search for that, and the first note about concussions is the concussion...

Ms. TATHGUY: Sorry. Wrong tab reference. It's going to now be in the Defendant's Bundle, tab 43.

THE COURT: So just so that I understand, was this attached to -- it's now separated from the report, so was it attached or wasn't it attached?

MS. TANNER: So when it was served, Your Honour, it was attached. I think for today's purposes, my friend removed the CV with a view towards providing the court with the updated 2023 CV. This...

THE COURT: But in the exhibit's brief, when we have the report, I thought it was all -- the CV was part of that.

MR. PALMER: It is.

MS. TANNER: That is, yes.

MR. PALMER: It is.

MS. TANNER: Yeah.

MR. PALMER: It's part of the exhibit.

MS. TANNER: Q. Okay. So as part of your expert report, there is attached your CV. In my efforts to search where you had any concussion training, I got to B, "Education." In 2013 to 2014, you went to the Concussion Institute of Education. Is that correct?

A. This was a weekly group meeting and that was done for chiropractors. So, I was there as an educator and also a learner at the time.

Q. So, I want -- I would like you to look at this page. It says under "Education," it says you've attended the Concussion Institute of Education, correct?

A. Yes.

Q. Okay, and there's a concussion education program noted there.

A. Yes.

Q. Now, we did a corporate search on the Concussion Institute of Education and it doesn't exist. Now this is of course me giving evidence, but are you aware that there is actually no corporation entitled the Concussion Institute of Education?

A. It's under Konkussion with a "K," and they were providing education for chiropractors, physiotherapists, et cetera and I was involved in that from a student perspective and an educator perspective for a short period of time.

Q. Doctor, did you or did you not attend the Concussion Institute of Education as indicated here? In your CV that was affixed to this report.

A. I did attend.

Q. Okay.

A. And I was physically there. And this was again a course for chiropractors and physiotherapists. And I

was there.

MS. TANNER: Your Honour, now we're at tab 42. This is the corporate profile report of the Concussion Institute of Education. Sorry. No, that is not the right one. In any event, we will find it on paper. This is for Concussion Inc. and I will return to that in a moment, Your Honour. Q. We can make it an exhibit, but if I were to put to you that there is no corporation, the Concussion Institute of Education, you would agree with me then there is no thing as the Concussion Institute of Education that you could have possibly attended?

A. No, I disagree with that.

Q. At the beginning of your report, where we were on the first page, it says, I am -- I am also the Chief Research Medical Officer for Concussion, Inc. Is that right?

A. Yes.

Q. Positive tense.

A. Yes.

Q. This is in a 2022 report.

A. Yes.

Q. And you testified earlier that that business has not been active since 2019.

A. 2018..

Q. 2018.

A. Yeah.

Q. So, this is an inaccurate representation, is that right?

A. Correct, that is, that's incorrect.

Q. That is incorrect. And...

A. As is the CV attached as that was submitted not by myself, that was submitted by the IME company. And the date on the CV is last modified, 2018.

Q. So, before reports are served that you intend

to rely upon in court, do you not review them?

A. I do.

Q. Oh, and you just didn't review this one?

A. No, I did review this one.

Q. Oh, did you not review the CV that was attached?

A. That -- that wasn't submitted. I didn't have the CV attached to that. That was submitted by the IME company.

Q. I see. What about on page one of your report, where you have -- just a moment doctor, where you have "Professional Designation." Did you not review this before you submitted this report?

A. I did not review the cover page and that's in there.

Q. At the time of this report, it would appear that your term -- your 10-year term with the McKenzie Health Hospital ended in 2019, is that correct?

A. Yes.

Q. So, at the time of this report, you had no hospital affiliations?

A. Correct.

Q. And at the time of this report, in fact, you didn't have any hospital affiliations for at least three years?

A. That's correct.

Q. Okay. So, when you're talking really about clinical experience and training and concussions, you're talking about your private clinic.

A. Sorry.

Q. From 2019 onwards any experience that you would have obtained with respect to concussions would be in a clinical setting in your private clinic.

A. No. There's also in the conferences and the

mock diagram -- the mock files that I submitted.

Q. I'm just asking you about your clinical experience as a doctor as a neurologist, clinical with patients. So the patients that you're seeing are strictly in your clinic from 2019 onwards.

A. Yes

Q. So at the time you're going to be testifying here, you will not have had any possible privileges for five years.

A. Correct.

Q. Do you still do business with Dr. -- the neurosurgeon, Dr. Jha?

A. No, 2018 that ended.

Q. That you're -- it ended in 2018.

A. Correct.

Q. And was that because of his criminal convictions?

A. No.

Q. I see. So, if you were to look at the report, regardless of whether it's someone else attached the wrong thing or what have you, the only paragraph that we have then with respect to your professional designations and your ability to provide evidence or provide expert opinion in concussions is, "I also hold additional training in concussion and traumatic brain injury." And the one thing there about the Concussion Institute, which we will find you the corporate profile report on that nonexistent institute. And that's it for your training that you submitted with respect to this report.

A. Now there's also the head injury training with respect to the residency program under cognition that we reviewed earlier.

Q. Sir, where is that? Is that attached to this

report?

A. It's on the CV.

Q. This CV which you said is wrong?

A. Both. Both.

Q. Okay.

THE COURT: So, where is it in the old -- I'm going to call it the 2018 CV.

MS. TANNER: Thank you, Your Honour.

THE COURT: Will you be able to tell us where it's....

A. Yes, let's go over here. So it would be on page six, behavioural cognitive neurology, Dr. Sandra Black, Morris Friedman.

MS. TANNER: Q. Under clinical training?

A. Under residency clinical training, yes. And then during that time there would also be conferences.

THE COURT: So let's just catch up here. So, page six, under "Clinical training," what am I looking at?

A. Last line, if you scroll down.

THE COURT: Behavioural cognitive neurology.

A. Correct.

MS. TANNER: Q. Well, you'd agree with me that doesn't say, concussion or traumatic brain injury.

A. But as we discussed earlier, the head injury cases were seen and learned about in that clinic.

Q. In 2005.

A. Correct.

Q. And 2006 to 2008.

A. Correct.

Q. So the training and education that you're referencing in this report, or that you're making this expert opinion on, that we can only know about here is some clinical

training that's, you know, going on 20 years old -- 15, 20 years old. A clinic that doesn't exist -- an institute rather, that doesn't exist and -- but that's about it.

A. No, then there's also the mock file that you have that has education leading up to this.

Q. The one that we received today.

A. Correct.

Q. Okay. Well, I'm just working on what we had.

A. The one you asked for yesterday.

Q. What's that?

A. The one you asked for yesterday.

Q. All right. Now, with respect to the current past work experience, this is attached, right? This is attached, and you say it's-- you didn't attach it or look at it. You would agree with me that 2010 to present, Division Head of Neurology is not accurate.

A. Correct.

Q. And you'd agree with me then that 2013 to present, Chief Medical and Research Officer for Concussion Inc., that's not accurate.

A. Correct. It was submitted in error by the IME company and has dated "Last modified August 2018." It's a long time ago.

Q. Under "Certifications," which is page four -- so under "Certifications," at tab -- page four, under 2015, we have you as a Certified Independent Medical Examiner of the CIME.

A. Mm-hmm.

Q. Do you see that?

A. Yes.

Q. A search of the Certified Independent Medical Examiners by the American Board of Independent Medical Examiners

doesn't have you on it. Is that also inaccurate?

A. I don't know why that is.

Q. So it's your evidence today that you are certified by the CIME?

A. Yes.

Q. And if we go to tab 28, Your Honour, of this bundle, this is a screenshot of the AVIME [sic], where we put in your name under "neurologist," and received nothing. And it appears to be run by someone in South Africa?

A. No.

Q. No? Not clear?

A. I don't know what it was.

THE COURT: Sorry, what tab was that?

MS. TANNER: That is tab 28, Your Honour. And my intention, Your Honour, at the end of this will be to just go through and make exhibits in a clean and orderly fashion. Q. Oh, so do you have any explanation why you're not on their website?

A. No.

Q. So this is not correct then or not up to date maybe.

A. I don't. I don't assume.

Q. Okay, I'd like to talk to you about you're -- the McKenzie Spine and Brain Associates. That's your clinic?

A. Yes.

Q. And you're the medical director.

A. Yes.

Q. Okay, and do you have offices there?

A. Offices?

Q. Yeah, offices. Do you have an office?

A. Yeah.

Q. And patient rooms for assessments?

A. Yes.

Q. How many rooms do you have?

A. Ten.

Q. And an assessment, those are the OHIP assessments that you do?

A. A. OHIP, private and independent.

Q. Okay, private and independent. So you also do expert legal reports. So you see those patients -- those plaintiffs there?

A. Yes.

Q. And what would be private then?

A. I work for Maple Leaf Sports and Entertainment, so the players come there.

Q. And you started working for Maple Leaf Sports and Entertainment by your new CV in 2017, is that right?

A. Correct.

Q. So...

A. I had not seen professional athletes before then.

Q. Okay. Before 2017.

A. Correct.

Q. So, I mean, not to belabor the point, but when I go back to your -- the first page of your neural logical assessment here, that doesn't show up there. This MLSE, even though you've been doing it at that point for five years.

A. Correct.

Q. Okay.

THE COURT: That doesn't show up in the old -- in the old CV.

MS. TANNER: No, I'm not talking about the CV, Your Honour. The first page that is attached.

THE COURT: Of the report.

MS. TANNER: Right. So, I mean, I can appreciate it's possible that the CV was attached by a company. This is -- forms part of the actual report.

THE COURT: Right. Okay.

MR. PALMER: Yes, Your Honour. Your Honour, I'm following along on the screen here, and you know, it appears my friend -- at least, it was brought up on the screen, there was a review. And I hesitate to impede my friend's cross examination, but I have concerns about putting an unverified, anonymous review up on the screen and crossing my proposed expert on it when there's...

THE COURT: Do we need to ask the doctor to step out for a moment?

MR. PALMER: I think that may be wiser.

THE COURT: Do you mind stepping out for a moment, sir.

...WITNESS EXITS THE COURTROOM

MR. PALMER: So, I'm referring, Your Honour -- what came up on the screen, I'm advised, was tab 41, a document that was uploaded to CaseCentre this morning by my friend's office.

THE COURT: So, tab 41.

MR. PALMER: Yes.

THE COURT: Mackenzie Spine, Brazil Reviews.

MR. PALMER: Yes, that's right.

THE COURT: Okay.

MR. PALMER: And I've been quite -- I've been trying to be quite indulgent, Your Honour, as my friend puts things to the witness that are simply culled from the internet from various places and

not really, you know, authenticated or anything like that, which we've only been recently provided with. I've tried to be quite liberal, Your Honour, but I have to say, my concerns come to a head if Dr. Basile is going to have this anonymous statement put to him in an effort to discredit him. We don't know who this person is and quite frankly, it's my respectful submission, it's not relevant. There's a number of people, "be aware," "worst," "rude," these things first of all, have nothing to do with Dr. Basile's qualifications as an expert, but in another way, Your Honour, I don't know whether someone named Nepheni (ph), which is at Master B11574, I don't know who that is or anything else. And I've deliberately, you know, instructed my office that we don't do that to doctors because we have no idea who those people are or what purpose that review has been posted for. If that's going to be put to Dr. Basile.

THE COURT: This hasn't been put into Dr. Basile.

MR. PALMER: Not yet, Your Honour, but it came up on the screen. I can only assume it's going to be put with my friend's line of questioning. If it's not, I apologize, I'll sit back down, but it's my respectful submission that this is fishing in -- in illegal waters.

MS. TANNER: Thank you, Your Honour.

I intend to ask Dr. Basile about how long he sees people for his assessments. My understanding when I ask him about any notes with respect to his assessment of this plaintiff, is that he will have

none. There will be no way to confirm if he saw her for five minutes or 20 minutes or 1 hour. And...

THE COURT: But surely these reviews have no -- they're not reliable, they're not credible.

MS. TANNER: No, each of these reviews...

THE COURT: Google your names, all of our names...

MS. TANNER: I don't want to.

THE COURT: And see what comes up on these kinds of evaluative -- I mean, to the extent we're being practical here, you again for these purposes, you want to put it to him and see what he has to say. These are not -- they're not reliable.

MS. TANNER: No, my intention was to ask him -- do you ever just see only -- you can't confirm how long you saw Ms. Cairns for. You have no recollection, you have no notes, you haven't an idea, okay.

THE COURT: Those are fair. Those are fair game.

MS. TANNER: Correct.

THE COURT: Those are fair.

MS. TANNER: And then, right, but if I've got...

THE COURT: I was going to say, if we, we don't know who these people are, and everybody's unhappy with somebody and gets pissed off, and they write something, that's -- that can't go in for the truth of its contents.

MS. TANNER: No. It can only go in, Your Honour, if I were going to ask him, have you ever been -- has anyone ever complained that you only see them for five minutes, that you see them in the hallway, that you don't take enough time? And if

he were to say no, that there are no complaints, that no one's ever complained about that.

THE COURT: I can't prove any of this. This is neither -- this is hearsay of the highest order. It's not admissible.

MS. TANNER: Okay.

THE COURT: So that's, that's not going in.

MS. TANNER: Okay. Thank you.

THE COURT: Okay. Bring him -- is -- bring him in? Does that cover off your concerns?

MR. PALMER: Thank you, yes, it does.

...WITNESS ENTERS THE COURTROOM

MS. TANNER: Q. Okay. So I had asked you if it was a fair-sized office and you had indicated you have ten rooms to see patients.

A.

Q. And that you see private patients, you see OHIP patients, and you see claimants. Is that the best way to describe it? Okay. And do you have people check in when they get there?

A. Yes.

Q. And do you have technicians that assist you?

A. Yes.

Q. And an assessment of an OHIP patient. 20 minutes? 30 minutes? How...

A. It depends.

Q. Depends?

A. Yeah, it depends. Some are simple, some take five, ten minutes, others less.

Q. Okay. And what about for...

A. Others who take less. Sorry, more, sorry.

Q. So, more than five or ten minutes?

A. More than five or yes minutes, yes.

Q. Okay.

A. Some an hour.

Q. And what about for, in the context of a legal assessment?

A. Approximately an hour, half-an-hour to an hour.

Q. Half-an-hour to an hour.

A. Yes.

Q. With respect to Rexine Cairns, do you have notes from your assessment of her?

A. I don't have notes. I use a Dragon mic and dictate.

Q. Okay. And with respect to -- so then with respect to being able to...

THE COURT: Sorry, are you -- you use Dragon or are you dictating? Dictating to where?

A. So it's a microphone and then I -- as I dictate it types on the screen.

THE COURT: So directly -- you create the report directly, there's no drafts, there's no -- I mean, we as judges use Dragon too, so some of us do. So, but we -- we dictate to something, those are the notes.

A. Yeah, so this is straight dictation of that document, as I've seen of that document.

MS. TANNER: Q. So do you -- I'm sorry, are you done?

A. Go ahead.

Q. Okay, do you dictate your medical report -- your expert report, let's say as the claimant is there with you.

A. Yes, sometimes I'll add at the end, but for

the most part then.

Q. And is anyone else in the room?

A. I typically have a chaperone.

Q. And with respect to reviewing the medicals, does that have -- does your technician help with that?

A. No, I do that with the help of a technician, not a technician, an assistant that pulls the files.

Q. Okay, so it's a chiropractor, your assistant, is that right?

A. No.

Q. Okay. Who reviews the medicals?

A. I do.

Q. If you see patients four days a week.

A. Yes.

Q. And how many days a week do you see individuals for medical legals?

A. Three -- three or four.

Q. Three or four days a week?

A. Yes.

Q. And about how many would you say you see in a week, on average?

A. Two per day, so probably eight, eight to ten.

Q. So eight to ten claimants, per week?

A. Yes.

Q. For independent medical examinations.

A. Yes.

Q. All right. And you review medicals for all of those individuals.

A. Yes.

Q. And then you dictate it, Dragon Dictate.

A. Yes.

Q. I take it you Dragon Dictate the medical

portion at a different time than when you're seeing the claimant.

A. Correct.

Q. Play. In your report, you talk about the American Academy of Neurology, and that you use the criteria there for post-concussive syndrome.

A. Correct.

Q. One of the things that we requested is if you could bring this criteria for post concussion syndrome. Yes?

A. Yes.

Q. And you -- you brought that.

A. Correct.

Q. Okay. Are you able to show me the criteria for post concussion syndrome? Not for concussion and not for TBI.

A. No, this is a -- this is a guideline that was used by the Ontario Neurotrauma Foundation to develop their guidelines with respect to concussion and head injury, traumatic brain injury. The terms post-concussive syndrome has since gone away and they indicate traumatic brain injury with persistent post-concussion symptoms now.

Q. So, there's no criteria for post concussion syndrome in the American Academy of Neurology?

A. There's the guidelines for evaluation and management of concussions.

Q. Okay.

THE COURT: Say that again.

A. There's the guides -- guideline update for the evaluation and management of concussions.

THE COURT: Guideline updates for concussion.

A. Correct. Guideline of evaluation and management of concussion in sports. And the Ontario Neurotrauma

Foundation guidelines cite this as one of their sources.

MS. TANNER: Q. With respect to the Ontario Neurotrauma Foundation, they don't have criteria for post-concussive syndrome either, do they?

A. They use the multiple diagnostic criteria to come up with the guidelines for...

Q. For concussions.

A. For concussions, yes. And mild traumatic brain injury.

Q. Right.

A. And persistent symptoms, sorry.

Q. So, but what I'm asking, doctor is that I'm talking about the term post-concussive syndrome. Those are the terms that are used in your report. And you rely on -- you state in your report that you rely on criteria out of the American Academy of Neurology and the Ontario Neurotrauma Foundation for criteria for post-concussion syndrome. And I put it to you that post-concussion syndrome is not in those. They have concussion, and they have TBIs. But they do not have criteria for post concussion syndrome.

A. Previously, those terms were used interchangeably, and those terms have been changed.

Q. So yes, or no?

A. Previously, the terms were used interchangeably, concussion, post-concussion syndrome, with persistent symptoms. And to now, traumatic brain injury is used instead of post-concussive syndrome, with persistent post-concussion symptoms, as the terminology changed.

Q. Did you meet Roxane Cairns?

A. Yes.

Q. Did you go through the consent form with her?

A. Yes.

Q. Do you still have your medical brief that you received in order to prepare this report?

A. No.

Q. How did it arrive to you?

A. They arrive in different ways. I don't remember how it arrived, but it could arrive by email, it could arrive by post.

Q. And how long did you see her for?

A. I don't recall now.

Q. Do you have any records to indicate how long you might have seen her for?

A. No.

Q. Do you have a copy of the consent form?

A. I'm not certain.

Q. You were asked to bring your entire file today, right? Correct?

A. Correct.

Q. So you don't have a copy of the consent form?

A. I'd have to look for it. It was last minute.

Q. You diagnosed Ms. Cairns with post-concussive syndrome. Correct?

A. Correct.

Q. You didn't diagnose her with a concussion. Right? That's correct?

A. Let me double check. Correct.

Q. Okay. Thank you. And if we could go to page 11 of your report which -- I'm sorry, Your Honour, I'm trying to keep as best as I can here. Do you have a tab?

THE COURT: I've got the screen.

MS. TANNER: Okay, thank you.

THE COURT: I'm following there. I just have to get the references so that I can go back to the

notes, so go ahead.

MS. TANNER: Q. Thank you. So here we have on her summary, her likely accident-related diagnoses include but are not limited to, do you see? Okay.

She does meet the American Academy of Neurology criteria and Ontario Neurotrauma Foundation criteria for the post concussion syndrome. Right, so you diagnosed that and...

A. Consistent with the traumatic brain injury.

Q. Okay. And I would like to ask you about the aneurysm, which is at the third paragraph.

A. Yes.

Q. And you understand that she had an aneurysm which was discovered post-accident.

A. Correct.

Q. And you do not provide an opinion in this report with respect to the causation of her aneurysm. Is that correct?

A. That statement there should have been underneath two, not as a separate item number three. That should be with the headache section in there. It just -- the accident was not causative of an aneurysm. That's -- I'll be on record on that. This is basically additional information that should have been under the headache section here.

Q. Okay.

A. This is relevant information for the headaches.

Q. So it is your evidence then that the motor vehicle accident did not cause the aneurysm.

A. Correct.

Q. And if we look at page seven of your report, in fact you refer to a 2012 MRI at the very bottom there -- or sorry, a CT from 2012, where you note that, that CT in 2012

could represent an aneurysm.

A. Can you point me to...

Q. It's page seven at the very bottom.

A. If you could repeat the question, sorry.

Q. Well I'm just -- I'm just circling back to confirm your opinion that you just gave, but that here you -- you note that there's a CT December 2012. Which could represent an aneurysm.

A. CT, where is that, sorry?

Q. If you look up on the screen here, that might help. Does that help? Oh, there you go, you have a screen right there.

A. I've got the same screen there.

Q. Perfect.

A. Yep, correct.

Q. Okay, so it would appear then by your review, that this aneurysm could have existed in 2012.

A. They're not related. They did exist.

Q. Okay, thank you. You provided an opinion in your conclusion section then -- sorry, I know I'm jumping around. That's terrible advice, where you'll find that Ms. Cairn's likely converted to a chronic pain syndrome.

THE COURT: So let's, let's go to that conclusion in the page, because I need to be able to follow.

MS. TANNER: Is that it?

THE COURT: Is there a conclusion section, or is it the referral section?

A. Previous page? There you go.

MS. TANNER: Thank you. Oh, thank you. Q. So, number six, "she is likely converted to a chronic pain syndrome with central sensitization and this could form a barrier to recovery."

A. Correct.

Q. So you're giving here an opinion on chronic pain syndrome.

A. Yes.

Q. And you don't have any particular training in chronic pain, do you?

A. No, but in terms of neurology, central sensitization is a brain related condition. We treat it with migraines. Central sensitization is a principle that comes from the migraine literature, and in my capacity doing EMG nerve conductions for lower back pain, we often have to see chronic pain patients that are in there and know when to refer to the chronic pain specialist. I can render opinion on diagnosis, and I also was relying on, I think there's a previous report with respect to the diagnosis of chronic pain.

Q. You don't have any training, though, in chronic pain syndrome. Certainly nothing that we've seen. It's not in your CV, it's not...

A. This is something I deal with since I've graduated in neuromuscular. We don't train in everything. I've never had training, that's specific to migraine headaches.

Q. Okay, so you don't have any training in migraine headaches or in chronic pain syndrome.

A. Specific training. If you're referring to things after residency in, in migraine, we go to conferences.

Q. That's fine, but doctor, you were able to come up with the pages of certificates for the training and sessions and things that you attended for concussions.

A. Yes.

Q. That you gave us today.

A. Yes.

Q. And we don't have anything like that for

chronic pain.

A. Nor are we required to have that to see patients and render opinions daily. I see patients that have chronic pain. If you want to say that there's specific education for that, there isn't. You can be designated as an expert to treat chronic pain. That I don't have.

Q. Okay.

A. So I'm not an expert in treating chronic pain at all.

Q. Okay.

A. But I have to be able, in my capacity, of seeing pain patients with neurological conditions, I have to be able to identify it to be able to refer them off to the appropriate specialist.

Q. And I'm just trying -- we're just trying to figure out here, kind of the parameters of your training, the parameters of your clinical experience versus education versus a hospital. Right. So that's what we're trying to figure out.

A. Sure.

Q. Okay. You prepared an addendum which is at tab four, Master 2164.

THE COURT: Can you give me the current --the current, is there F2116?

MS. TATHGUR: Yes.

MS. TANNER: Would YH rather prefer current or master?

THE COURT: Current.

MS. TANNER: Okay, thank you. All right. Q. This is your neurological evaluation addendum, is that right?

A. Yes.

Q. And this was prepared on April 1st, 2024.

A. Yes.

Q. And counsel sent to you some surveillance.

A. Yes.

Q. And so first I'd like to ask, you don't -- you have never reviewed Dr. Angel's report, is that right? It doesn't form -- there's no mention of Dr. Angel, the other neurologist in this case. There's no mention of him in this addendum and there's no mention of him anywhere.

A. Yeah.

Q. Okay. Is that right?

A. I'm uncertain, but I don't recall.

Q. Okay. Well, would you like to have...

THE COURT: Do you need to take a look?

MS. TANNER: Yeah. Q. Would you like to take a moment to review your addendum to be sure?

A. Sure.

MR. PALMER: Your Honour, if I could ask the witness to be excused for a second.

THE COURT: I'm going to ask you to step out for a moment if there's an objection you need to deal with.

...WITNESS EXITS THE COURTROOM

MR. PALMER: Not so much an objection, Your Honour. It's just a clarification. The surveillance was provided to us the day of the pretrial, December, I believe, 15th, 2023, by my friend and my friend's colleague who was former counsel for the defendant. Justice Shaw made an order that we were able to obtain an addendum with respect to the surveillance. So, no, we did not provide anything additional to Dr. Basile as we felt it would be violative of Justice Shaw's order. We asked Dr. Basile only to review the

surveillance.

THE COURT: So maybe help me here -- where is it? Doc -- who is Dr. Angel? How does he fit in?

MR. PALMER: Dr. Angel is the defendant's neurologist, who the defendant will be tendering. So, his report was, was prepared after...

THE COURT: After the surveillance?

MS. TANNER: No, no, after, after Dr. Basile's. Your Honour.

THE COURT: Okay.

MR. PALMER: Yes. So by the time of the pre-trial, the order was simply for an addendum regarding the surveillance. So, this is just a clarification.

THE COURT: Are the parameters outlined somewhere?

MR. PALMER: Honestly, Your Honour, I'm not sure, but all we sent was the surveillance report.

THE COURT: So, I mean, we need to be very careful what we visit on what were -- what were collectively critical of the doctor and, so what he did and what he didn't do. If he was -- if there was a letter with terms of reference saying Justice Shaw or some variation of that, wants you to comment on the surveillance, somewhere that needs to be on the record. Typically reports what I've seen over the years, the doctor will say I've been asked to review X. Here's my review of X. So, I haven't seen -- had time to get up to speed on the report. Do you have that?

MS. TANNER: If I may, Your Honour, it would -- the problem here is that I'm not, you know, all of this could be explained if I was just allowed to

finish some questions because my friend is very excited and needs to jump in before I get there. My point is going to say, you didn't review it. I don't -- it doesn't matter why he didn't review it. They didn't send it or whatever. I mean, Dr. Angel's opinion is going to go in unchallenged and it's going to go in with no comment from this doctor. And that's the point I'm going to make. You haven't reviewed it. It's not in your report and therefore you don't have an opinion one way or another as to Dr. Angel's opinion, correct? The end. I'm going to move on. Why he doesn't is not...

THE COURT: Well, I think where it sounded like it was going is that this addendum would have given him a chance...

MS. TANNER: Oh, no

THE COURT: ...to review everything and he didn't.

MS. TANNER: No.

THE COURT: So that's where I thought I was...

MS. TANNER: No.

THE COURT: ...I was going.

MR. PALMER: No, because he can only review what's provided to him. Right. I mean, there's certainly no...

THE COURT: So, Mr. Palmer in re-examination, if you need to clarify that something's not here because when we provided to him, that's fine. If you're -- you're going for collateral purpose here to verify that he's not challenging Dr. Angel. That's, I mean, that's fine as well, but what I don't want to be visited, it wouldn't be fair to

visit on the doctor is he had somehow had these reports and chose not to review them or something like that, which is like, no, where...

MS. TANNER: No, it maybe it sounded like that, but I would like to get on the record that he doesn't have -- he didn't have it and therefore he has no opinion as to one way or another of what Dr. Angel is going to -- says or will say.

THE COURT: I think because we were making him go and the reason I asked him to take a look was because I, out of context, it sounded like he's dropped the ball.

MS. TANNER: I understand. Oh no, no, there's nothing about that.

THE COURT: That's what it sounded like.

MS. TANNER: Definitely not.

THE COURT: So let's bring the doctor back and, you can pick up the uniform.

MR. PALMER: Thank you, Your Honour.

...WITNESS ENTERS THE COURTROOM

MS. TANNER: Q. Oh so, doctor nothing nefarious about my questions. I just wanted to confirm for the record that your first report doesn't mention Dr. Angel's report. That's because it didn't exist yet and Dr. Angel did a report in response to your report, but you've never seen that.

A. I’m uncertain.

Q. Okay. You've certainly never authored any sort of opinion with respect to Dr. Angel's opinion.

A. On this particular case?

Q. Yes.

A. No.

Q. Okay. So, you prepared this addendum and it's

with respect to surveillance.

A. Yes.

Q. And you render some opinions under "Discussion," after you watch it, I presume you watched it.

A. Yes.

Q. I would like to take you to the bottom aspect here. So -- well, we can do it a little bit longer, so you watch the various days and you make some notes about what Ms. Cairns has indicated to you she's independent with, such as shopping, independent with respect to driving, and then you note that the surveillance shows her driving and shopping and you make some comment. And then you make a comment that she does have some days that are better or worse, but overall her symptoms have not dissipated. Correct?

A. Correct.

Q. Okay and then you go to some lengths to enumerate the days she's not visualized. So, days of surveillance where they don't see her.

A. Yes, this was in the report of the -- likely the other report, I don't remember to be honest, but...

Q. Okay.

A. ...there's a report usually from the person where they indicate that.

Q. It says, just to enumerate, she was not visualized on surveillance conducted on June 27th, July 1.

A. Okay.

Q. So you made sure to note that. That was important to you.

A. Okay.

Q. Yes?

THE COURT: Was it important to you?

A. I presume if I wrote it, yes.

MS. TANNER: Q. And then it says on June 30th, she was picked up by her spouse at 9:29 a.m. and she was taken to William Mosler Health Services and was dropped back home at 11:12 a.m. Do you see that?

A. Yes.

Q. And then you note, "not to be observed for the rest of the day." Correct?

A. Correct.

Q. And here now you make a conclusion, which indicates that this could be some of her worst days. Do you see that?

A. Yes.

Q. So -- so the fact that she is not observed for the rest of that day, you now give an opinion as to why that might be.

A. Correct.

Q. Could be because she was cooking.

A. Could be.

Q. It could be because she was watching a movie.

A. But she went to Osler Hospital.

Q. Yeah, but you really have no idea why she wasn't observed for the rest of the day.

A. But also, the statement also has that she went to the Osler Hospital.

Q. Okay, and what does -- for an appointment, emergency room.

A. Yes.

Q. Pulmonary tests?

A. Sure.

Q. Okay.

A. Yes.

Q. But somehow, because she went for a visit to

the hospital, and then is not observed for the rest of the day, you saw fit to note this in -- which indicates, not could indicate or might indicate, which indicates that this could be some of her worst days. Is that right?

A. This could be some of her worst days.

Q. Yes.

A. Could be. So the "could" is there.

Q. Okay.

A. It's a possibility. Have you been critiqued in court before for watching surveillance and making commentary that advocates and puts forward opinions about...

A. No.

Q. No? But you'd agree with me the fact that she was not seen for the rest of the day could be due to a myriad of reasons.

A. Yes.

Q. And similarly with the other days where she wasn't observed. Could have been out of town.

A. Yes.

Q. Okay. She could have been at the casino.

A. Yes.

Q. Okay. All right. So Your Honour, I would like to show -- actually there was one case, it's called *Akeelah*, and we've uploaded it, where there was judicial commentary on your referencing and advocating with respect to surveillance on behalf of claimant, or a claimant in that case.

A. I wasn't made aware of it.

Q. Okay.

A. Sorry.

Q. All right. Your Honour, at this point I'd like to show the doctor three reports. And...

THE COURT: What was the cite of the *Akeelah*?

MS. TATHGUR: Tab 33, CB11242.

MR. PALMER: It's got a neutral citation as well, Your Honour.

MS. TANNER: Q. I just have another question. Have you ever been criticized in court for not answering a lot of questions directly, but rather pontificating or explaining away as opposed to kind of answering the question?

A. I've been in the situation where I want to elaborate on an answer.

Q. Yes.

A. Yes.

Q. That was the *Graul* decision, right, with Justice Lemon?

MS. TANNER: That tab -- that is at tab 27, Your Honour. Now, with -- Your Honour, with respect to the defendant's motion to waive the deemed undertaking rule for the purposes of impeachment, I would like to now put away all the paper about the CVs in the report and have the doctor -- this is an exercise, first of all, Your Honour, that I would not do in front of the jury if this had not been done already and without the permission of the court. So I do this in the midst of a *voir dire*, so that the jury is not impacted anyway.

THE COURT: Mm-hmm.

MS. TANNER: What's going to happen is I would like the doctor to look at three reports. We have blacked out -- other than this, we blacked out anything to do with the claimant. We've blacked out any way that you can tell, the dates, everything and what we've done is simply left the

bodies of the reports. And I will advise how this came about, which was in preparation to prepare for court. You know, when I asked around, has anyone cross examined this person or that person? And...

THE COURT: Do you want Dr. Basile to the hearing your methodology?

MS. TANNER: No.

THE COURT: Okay.

MS. TANNER: It doesn't matter.

MR. PALMER: But I, I, I have no objection to excusing the witness, Your Honour.

THE COURT: Why you step outside...

MS. TANNER: This be the last time, I swear.

A. That's okay.

MS. TANNER: You're getting your steps in anyway.

A. Patients booked at one.

...WITNESS EXITS THE COURTROOM

MS. TANNER: I hesitate to testify, but, you know, so in part of preparation I asked, does anyone out -- has anyone cross examine this witness because, you know...

THE COURT: In preparing for trial.

MS. TANNER: Yeah.

THE COURT: It’s due diligence.

MS. TANNER: And as part of that, a lawyer in our office provided me with a Defense Medical by Dr. Dost and when I was reading this Defense Medical by Dr. Dost, there were excerpts from Dr. Basile's report from that plaintiff. And when I was reading it, I was -- sounded very familiar. So I asked if I could see the report for that

plaintiff in the context of that, I have -- it will be our submission that the report that was produced for Ms. Cairns is a boilerplate report and that, in fact, it contains virtually no independent opinion. The only way I can demonstrate that to the court is to have Dr. Basile look at the other report -- and there's a third report too, have him look at them, and walk us through the parts that are independent versus the parts that aren't. And it's an exercise that the defendant feels is very important, and I do believe -- and we could do it now together before Dr. Basile comes in if that is -- but there is a significant concern. This is the same concern we have with Dr. Vitelli where -- where medical experts -- again, we note Your Honour's expressions with respect to these medical experts and -- but medical experts ought not to be permitted to put forth boilerplate statements. Reports, where 98 percent of the report is an exact duplicate of two other reports, and all within a similar time period. Furthermore, this doctor has testified that he Dragon dictates. These reports are 20 pages long. There is less than 2 percent of different words in each report. It's not possible that he, A, dictates Dragon for 20 pages in verbatim. So, I am happy to have Your Honour look at them and decide if I can put these questions to Dr. Basile. However, it's the defendant's position that with respect to the deemed undertaking rule and the exception for impeachment, that Dr. Basile will be shown to have

absolutely no opinion with respect to Ms. Cairns that is different than his opinion with this person, whose name I don't even know, or this person, whose name I don't even know.

THE COURT: Have your friends seen these?

MS. TANNER: They are all in our motion materials.

THE COURT: Mr. Palmer, as we creep up to lunch.

MR. PALMER: Yes, Your Honour. So, I do have some thoughts. I will try to make them brief, but they are fairly strong thoughts.

THE COURT: That's fine. Can you do it before one o'clock or is this something we need to pick up at 2:15?

MR. PALMER: I suspect, Your Honour, that I would not be less than 10 minutes with my submissions as they touch upon several key issues.

I do note that Dr. Basile has advised me that he was -- he had patients at one o'clock or something. I presume the doctor is taking care of that now. But Your Honour, I -- in a nutshell perhaps, rather than being verbose, my friend -- I didn't stop my friend when my friend was referring Dr. Basile to reported decisions. And, of course, I will deal with any concerns about my friend's characterization in reply. This is not a reported decision. This is, in my respectful submission, completely different from what counsel should do, which is to look for public record decisions of another doctor. I have, for example, directed Your Honour to Dr. Page's cross-examinations. They're public record and -- and judicial findings, but I do not, and I don't believe it's

proper for me to go out and try to gather potentially privileged, or at least confidential reports of another practitioner, which is what my friend, I believe, has just stated that occurred. Now, I'm not asking you to speak.

THE COURT: You don't have to do it, but there's nothing impeding them from opening their files and saying, is there?

MR. PALMER: Well, first of all, Your Honour, there is the deemed undertaking rule.

THE COURT: Right.

MR. PALMER: But second of all there's, there's something concerning when we have case A, siloed, confidential. I mean, lots of information of various people, defendant, plaintiff, is contained within that file. If now a large insurer is entitled to pick out, okay, we know that Jane is married to Jack, we've got a file with Jane, we've got a file with Jack, we've got a huge problem.

THE COURT: There's privacy considerations.

MR. PALMER: There's privacy considerations. In over which, and then again, it sounds like my friend was the recipient and not the instigator of this, but in addition to which it's completely unverifiable. We don't know whether or not, patients A, B, and C, as I'll call them, patients A, B, and C have any of the same issues. We don't know anything about those cases. And my friend is not calling Dr. Dost. So...

MS. TANNER: Of course, no. Of course I'm not calling Dr. Dost. No, I don't care about Dr. Dost. I care about Dr. Basile's reports and in a

very quick response, two of them are from his office.

MR. PALMER: Dr. Dost is creeping into this, into this matter. His critique is going to be put to Dr...

MS. TANNER: No, it's not. Only the -- only the...

THE COURT: Hold on, now.

MS. TANNER: Only...

THE COURT: One at a time.

MR. PALMER: It's only Dr. Basile's reports of claimants. Three claimants, two of which are with my friend's office, which is how this came about because she has a number of files with our office. So, that's all. There are three plaintiff reports for three different plaintiffs. Every single thing has been blacked out and served on the -- on my friends. And we would like the court, and Dr. Basile, if the court so decides to look at these three reports side by side.

MR. PALMER: Sorry.

MS. TANNER: What we've done is black out the parts that are -- okay. So we have Dr. Dolf's report in our motion materials to show how -- what the methodology. We're not introducing them -- it for any other purpose. It was to show the methodology. Where we'd like the exercise is to look at the three reports that Dr. Basile authored on three different plaintiffs where 98 percent of it is the exact word. I mean, word for word, which is how -- when I saw Dr. Dost's report, I thought it was about my plaintiffs. I really

thought it was about Rexine Cairns. So, I was having like a strange moment. So, then I was able to look at the other one. We have no intention of looking at any other medical legal report or Dr. Dost's report. That was served as a courtesy as part of our motion materials, so that my friends can know how we came about this situation. Experts have to be held, Your Honour, to a high standard. And that standard is not cut and paste. We've had this with Dr. Ogilvie-Harris. We've had it with a number of doctors over the years. But this, when Your Honour looks at these reports, will be shocking. And they've -- all of these plaintiff reports have been provided to my friend for days. And two of them are from their office.

THE COURT: So, can I suggest -- you said they're in the materials?

MS. TANNER: Yes, and we have fresh paper copies, Your Honour, which are highlighted for your ease. So I would like to hand those out.

THE COURT: Mr. Palmer?

MR. PALMER: So, Your Honour, you know -- I mean, I apologize. My friend's motion materials, and they're at B1389. This is a neurological evaluation report authored by Dr. Rehan Dost, dated April 13th, 2024. It critiques Dr. Basile's report in another case.

THE COURT: Okay.

MR. PALMER: Now, I reiterate, and I, with the greatest respect to my friend, Dr. Dost is not someone I can cross, and Dr. Dost's materials have now come in with the express purpose of seemingly

discrediting Dr. Basile's methodology. So, here we have, Your Honour, a situation that's completely different from what we've been doing up until now, my friend and myself, which is fair pool, which is to say, Dr. Smith, you were not accepted in this case, or Dr. Smith does your published report not say "X?" That's all fair game, Your Honour. But now -- and quite frankly, I'm a little troubled with respect to my office. This is a separate issue which we can deal with later perhaps, but when my friend says, Dr. Dost is not creeping into this proceeding, Dr. Dost's report is Exhibit F of this affidavit. And this is completely unverifiable. I don't know what Dr. Dost's conclusions were in that -- in that report.

THE COURT: Dr. Dost is not the issue, you know, counselor. And here's what I want to say. Would it help if I see the three Brasile reports because page three of each plaintiff's report, Plaintiff A, Plaintiff B, Plaintiff C. You can cover up all three names. If they are reading identical, that's a problem.

MS. TANNER: All the names are covered, yes, Your Honour.

THE COURT: I mean, if you were to blank out even Ms. Cairns, and if you were to put the three of them together, would you be able to say, find the differences?

MS. TANNER: So, Your Honour, I can tell you that's exactly what we've done. We've blacked out -- we have three -- we have a copy of each. You will not know Ms. Cairn's versus either of the

other ones and we invite anyone to be able to determine which is which. So, that is the exact exercise, Your Honour.

THE COURT: So that has nothing to do with Dr. Dost.

MS. TANNER: No.

THE COURT: Well, I think your friend is saying, here's the -- here's the hook. We started to pull away at this string, and this is what unraveled and court, you need to know that Plaintiff A, Plaintiff B, Plaintiff C, it's the same report. There's no differences.

MR. PALMER: Your Honour, I have two -- I have two responses to that, and I'm not -- I'm trying to be courteous, but I am -- I was asked a question by this court, which my friend answered. I just want to discuss a little bit. Let's perhaps get to the nub of the issue first, because Your Honour, I completely agree that the independence and -- and quality of expert reports is a central concern to the administration of justice is on the court and in this case. Right. So, I am in no way...

THE COURT: As a practical matter as soon as our discussion ends, we're going to go to lunch. So, if one of you wants to tell the doctor to be back at 2:15 and he's not -- he can come in and I can tell him he's not permitted, he's under cross examination, not permitted to talk to anybody.

MR. PALMER: I think that's wise, Your Honour.

THE COURT: I'm seeing him pacing, and he can...

MR. PALMER: I can advise him, Your Honour.

THE COURT: Okay. Has he been advised of the rule

that he can't talk?
MR. PALMER: Yes.
THE COURT: Do I have to do that on the record?
MS. TANNER: I know counsel did it, I heard.
THE COURT: Okay, so just tell him he can go do whatever he wants to do at least until -- be back for 2:15 and let's see. We may revise that depending on what we've clarified.
MR. PALMER: I asked him his thoughts on the English Premier League. That was the only thing I discussed, Your Honour and I -- I told him that was the only thing I could discuss. Your Honour, there's two issues here and I'll hit the first one -- the more important one first. At our fact we've actually taken the three reports, which we do strenuously object to and we have put together the differences and they are stark. The problem with that statement which contradicts what my friend says, is that we now have to delve into those other cases and we, you know, we would have to be considering the propriety of what my friend did which is in a way picking out possibly privileged, possibly non-public and private, information from other cases, that has not been before this honourable court. So that's my first issue, that my friend with the greatest respect -- if we do get into this, we'll be able to show, that that's, this is not the case, and that, that what my friend just said is with greatest respect, inaccurate. But if someone was cut and pasting every single part of the report, Your Honour, of course I agree that would be problematic.

The second thing I will say, Your Honour and I think perhaps I did it inexpertly, is this report of Dr. Raehan Dost. Much of it has been blacked out, much of it, Your Honour, and, and I'm referring to pages, for example, page B1391 has been completely redacted, 392 completely redacted, 393 completely redacted, 394 completely redacted. What we get to, Your Honour, is a critique of Dr. Basile, which has not been redacted. There's a critique here on -- starting on, again, we have some redacted pages. The first three reports are summarized. Conclusions have been redacted.

THE COURT: Hold on. What I've understood from your friend is that that report, Dr. Dost's, that became the hook that caused the curiosity to go down the rabbit hole of discovering the truth that Dr. Basile has the same reports. So, if that's the hook, who cares what else the report is saying? What am I missing here?

MR. PALMER: Yes, this is exactly.

THE COURT: They're saying we don't -- we're not introducing that report for anything, but this person opened her eyes to there's a problem. We didn't rest on that. We then went and looked for the reports.

MR. PALMER: Yes, Your Honour, and if that was the case, I could -- you know, I, I, I don't cast aspersions on counsel. Although that was, as counsel indicated, as my friend indicated earlier, that's It's somewhat of an evidentiary basis. But at page B1399, entitled, "as to the issue of brain

injury," the critique of Dr. Basile is almost unredacted.

THE COURT: And what does it say? I don't -- I don't have all of these. It's impossible to keep up with the folks, jumping from one document to another electronically.

MR. PALMER: Right, right. I'll just read it if it's important.

> I recognize that Dr. Basile, a neurologist, has diagnosed him with MTBI, mild traumatic brain injury/concussion. I respectfully disagree for the following reasons.

THE COURT: So first, that's fine.

MR. PALMER:

> Dr. Basile is quoting the American Academy of Neurology for post-concussion syndrome criteria. I have been unable to locate this.

THE COURT: Okay.

> I have requested this of Dr. Basile on several occasions and I have not been provided with same.

THE COURT: Okay.

MR. PALMER: Now, we don't need to get into that right now.

THE COURT: Well, there was a cross-examination directly, independently that your friend did on that. So next.

MR. PALMER: Yes. Dr. Basile -- two, Dr. Basile is quoting the ONF, which I've -- I believe it represents the Ontario Neurotrauma Foundation...

THE COURT: We heard about that.

MR. PALMER: ...which is problematic. A, this is a full page of...

THE COURT: So it's problematic and she tested that with him. Next concern.

MR. PALMER: Right. Okay. So then there's more of that, that goes on for a page-and-a-half, Your Honour. And then we then go to page B1403, which is again, the only -- the next thing that's not blacked out.

THE COURT: Okay.

MR. PALMER:

> There is a discrepancy in reporting of symptoms between me and Dr. Basile where the plaintiff has reported to Dr. Basile cognitive change, vertigo, and headaches. I was unable to elicit these complaints currently, despite asking the question multiple times at different points during the interview. Respectfully submitted, Raehan Duffs.

That's the end of the report, Your Honour. What, what...

THE COURT: What's the concern?

MR. PALMER: The concern, Your Honour, is that if my friend is using this for the extremely limited purpose of saying this only binds, you know, now we're talking about this case, and we still have concerns obviously, Your Honour, but if my friend is using that report for that only, that's...
THE COURT: She's not using it for anything.
MR. PALMER: Well, it's in her materials, Your Honour, and it's got critiques of Dr. Basile in another case which we're not hearing. So, with the greatest respect, and perhaps I'm being inexpert in -- in the way I'm presenting this. My concern is, essentially, the materials have now imported an attack, a critique on Dr. Basile, which we have no way of measuring, in the sense that Dr. Dost is saying two things while not being aware of them.
THE COURT: Those are other issues, but we've moved on from those issues.
MR. PALMER: Well, with the greatest respect, Your Honour, I apologize if the court has. I perhaps have not. What I am saying is simply there's material that's been adduced critical of Dr. Basile. It's been adduced -- if my friend is abandoning any reliance on it, I understand, but it's been adduced, and it may well come up in cross.
THE COURT: But, counsel, I -- maybe I missed the boat here. Your friend put the Association's statements, the guidelines, told them he couldn't -- could he find them, could he point to them, those critiques that you identified. She put them

to the doctor and we'll hear legal arguments about that. That does not, you -- Dr. Dost may have given the -- been the source of educating your friend on what to ask. But those questions were asked, and Dr. Cairns [sic] answered them, and it'll be for me to evaluate whether I accept his answers. Or whether there's -- so that's a package, that's done. It's not a showdown between, Dr. Basile and Dr. Dost. Now we've moved on to the third concern, or fourth concern that says, we've discovered the Basile uses the same template and here are three plaintiffs, we've blinded the names, and if you put them side-by-side, you wouldn't know who it is because these -- it's the same report. I don't, what's the connection to Dr. Dost?

MR. PALMER: That -- that has no connection to Dr. Dost, Your Honour.

THE COURT: Okay, that’s what your friend has been saying.

MS. TANNER: So then, Your Honour, we have -- we would invite the court over lunch to take a copy of these three reports. They are in our materials and have been the entire time. You will -- and to look at them and determine if they can be put to Dr. Basile.

THE COURT: That's where I was thinking.

MS. TANNER: Yeah, and then if not, then we'll move on. But if the court has any sense that this should be explored, that he testified, that he Dragon dictate that's what he does, that he does it while the person is sitting there. We would

like to test what his opinion is and the veracity of the report, et cetera. And, you know, these materials were served some time ago. Two of these are with my friend's firm. The Dr. Dost report was to my friend.

THE COURT: Well, there's confidentiality.

MS. TANNER: No, I understand that...

THE COURT: ...because they're with a firm...

MS. TANNER: No, no, but what I'm saying is simply is that the materials have been out there and they've had a chance to look at them and compare them. And we invite the court to do so now and we just would like to provide the paper copies and that's it. So that Your Honour can have them.

THE COURT: Perhaps I can see the paper copies over lunch and we'll decide if we select it.

MR. PALMER: Your Honour, before my friend hands those up, there is an unredacted name on page B1411. It's of one of my clients, not one of my friend's parties.

MS. TANNER: It's redacted in this copy.

MR. PALMER: It's not redacted in our copy, Your Honour. I have my name -- my client's name, it's clear as day.

THE COURT: Well, verify what you're going to give me, and as soon as you redact it, and if I see it, I will redact it.

MS. TANNER: I mean, Your Honour -- I mean, I trust that Your Honour will, it is redacted in these copies.

THE COURT: It can't be sloppy work. The whole -- the whole -- it can't be sloppy.

MS. TANNER: It's not. It's not, Your Honour.
THE COURT: It's -- it's got to be redacted. The point of the exercise is...
MS. TANNER: It is redacted, you see.
THE COURT: You know, which one of these...
MS. TANNER: That's fine, we went through again before handing it up to Her Honour to ensure that they've been gone over multiple times now to be sure that the exercise was done properly. So I'm sorry if in the motion record there was one error, they've been rectified, which I just showed you.
MR. PALMER: Yes, my friend has showed me that. I accept my friend's undertaking to have redacted everything. I'm not in the business of fighting with my co-counsel. The fact remains it was unredacted in the motion record. I'm happy to accept my friend's explanation.
Your Honour, we again renew our objection to this. It's the use of -- of cherry-picked evidence from other cases without any context. If Your Honour does decide to view it, we see this as being a...
THE COURT: It's already in the materials, right?
MR. PALMER: It's already in my friend's materials.
THE COURT: So, what you're giving me is a paper copy to spare me the time of having to get my assistant to print it.
MR. PALMER: We certainly would not want to do that.
THE COURT: I can't make any sense of this unless I can see, if it's as obvious as your friend is saying, that look, these are -- these are three

plaintiffs, A, B, C, independent of who they are and what other context. Here are three documents. Here, it's awfully suspicious. That's a problem.
MR. PALMER: I agree, Your Honour. I agree...
THE COURT: So you're saying -- you're objecting to that exercise?
MR. PALMER: Your Honour, I am still.
THE COURT: So, you know what? Let's take a lunch break because we can motor through, but my staff needs a break, and I need to be fair to them. They're actually more important than anybody else in this group. Maybe you need to think about -- you bring me some case authorities, legal authorities, and maybe the doctor doesn't come back this afternoon until we drill this down. Maybe it's not something that you know -- you think about it's out of fairness it would be, doctor, what have you got to say that, can you tell which is -- I'm giving you a suggestion, which is, Ms. Cairn's report on the basis of these three. I don't -- but I can't make that suggestion until I have done the blind test on myself.
MS. TANNER: Right, so I don't -- it's inconceivable to me that we can't hand up a paper copy of something so that Your Honour can have them side by each. And the reason we did the paper copies is because Your Honour will have to go from tab to tab to tab, and you'll have to have a split screen or you'll have to print them and go side by side with the highlighter.
THE COURT: What we're going to do is...

MS. TANNER: So that's it.

THE COURT: We'll come back at 2:15 and at that point if you have case law telling me why, in the face of a problem like this, we can't go down this route or it's a legal argument, or you know, Pandora's box has been opened here by somebody who purports to do an expert report and who the allegation seems to be there's a factory producing the same documents lab of a different name. That's the argument that is -- I'm curricularizing it, but that's where this is going and if it's that kind of situation, Houston, we have a problem.

MS. TANNER: And we have paper copies for my friend as well.

THE COURT: Let me, let me take that.

MS. TANNER: Thank you.

THE COURT: And we'll see you back at -- we'll see you back at 2:30 because my staff has an hour break and not less.

R E C E S S

U P O N R E S U M I N G:

THE COURT: So, counsel, I have reviewed the three examples. We will have to figure out how we, so that how we identify them for now maybe lettered exhibits, I'm not sure. However, there is a decision from the Court of Appeal, *R. v. Richard Hason*, H-A-S-O-N, 2024 ONCA 369. That brings into consideration *R. v. Caleb Nettleton*, N-E-T-T-L-E-

T-O-N, and it's 2023 ONCA 390.

In a nutshell, these cases deal with -- it's in the criminal context, but it doesn't matter, the rules are the same. But they deal with unreliable expert evidence when the expert is using boilerplates.
And when the expert are using templates, they use the boilerplate here. And there's some very substantial discussion in the time since 10 after one when we broke and now 10 to 3, I had a meeting, I had 10 minutes for lunch, and then I did some -- reviewed of the documents and did some research and so I haven't had a lot of time to absorb all of what's contained in these two decisions.

However, it strikes me that we're facing -- this is a very -- this is a serious motion. It's not a matter of -- I don't mean to diminish the photograph of the crushed Volkswagen or not. That's a much easier one to deal with. This is the Court of Appeal commenting on what judges are obliged to do when there's commentary and red flags about witnesses in other cases. We saw that come up yesterday in relation to Dr. Pathak (ph), and we have seen this in relation to Dr. Basile. And what's going through my mind is whether I need to give you time to work up -- to review these cases, work up the law and valuate your strategy going forward. From what I've seen from my read of the cases, at the very minim much like in Dr.

Patak's case, I said he needs to be given the opportunity to respond to what is contained in, for example, Justice Vermette's decision. It's the same thing here. Dr. Basile has to, in some way that can be fairly put to him, he has to be confronted with these three reports to explain why they're not boiler plates or why they're not templates.

Yes, I've gone through and yes, there are -- you've got to search to find, okay, there are some differences. One has had surgery, another has not had surgery, but a substantial part of it looks out the same. And so there has to be some thought given to, it's not a situation where these are -- these would be admissible for the limited purpose of impeachment. That is clear. How they are identified, though for Dr. Basile, I'd like to know, for example, in the context of an impeachment, are the names actually disclosed to him or is there some other identifying mechanism because if he says, well, you know, I can't tell without more, that in and of itself may mean something or not, but again it has to be fair for the process.

So, just to bring you full circle. There may be some ideas in the two cases I've given you on how you might want to tweak that approach for Dr. Basile, I'm open to other suggestions, but I think he has to be confronted, given the opportunity to explain why he's done certain things.

On the negative side, he's, you know, just reproducing a slap in the name. On a different spin, how many times have you folks drafted a summary judgment factum and taken substantial parts of the law and cut and paste and just slapped on the name of your plaintiff, your defendant, and gone from there.

So, there's nothing -- there may -- I may conclude that there's nothing wrong with parts of these being templated, and I suspect that from somebody who did a forensic exercise on the experts in the personal injury bar on both sides, we will find a lot more templates than what we see just here. So I want to be very careful that this is not a targeted attack on one or the other, and that's why we -- the guardrails have to be in place that this is done systematically, and if it means we have to slow down, and if it means we're asking the jury to come on Wednesday instead of Tuesday because this needs a thought, I'm going to be open to that. Those are my thoughts at the front end, and I'm interested to hear your responses. You can be sitting, it's in the nature of a case conference in this. You don't need to stand if you don't want to.

MR. PALMER: Thank you, Your Honour. My friend, Mr. Oppel will just excuse himself at this point. I had -- the Social Benefits Tribunal didn't ask me. There's -- they've set a case conference for three, and Mr. Oppel will be going to speak to

that on my behalf. Your Honour, I do think I would need some time to, I -- my legal research over the, over the break as I was asked to do yielded some results, but they were of a different sort and I had been primarily speaking to admissibility and things like that. So -- and I've provided my friend with a copy of *Sopinka*. If, if Your Honour feels that submissions on these cases are needed, they do not appear to be short decisions and so I would ask for some time to prepare some submissions.

We feel very confident in some ways, but as Your Honour points out, this is a very serious issue, and this is an issue that deserves to be treated carefully. And so, in that rather than me making submissions with a very brief overview of that case, Your Honour, I would appreciate some time to make that.

The only other issue I would say is, and I've informed my friend of this my client's family doctor, Dr. Luella Lobo, L-O-B-O.

THE COURT: Mm-hmm.

MR. PALMER: I am summarily imposing upon her to be my first witness on Tuesday and Wednesday of next week. She's unavailable after that until the 20th -- not until the 30th. She'll be unable to be reached. So, Your Honour, I appreciate the gravity of the situation. If Dr. Lobo can be accommodated on the 30th, I have no qualms in releasing her, but I certainly can’t lose my

family doctor.

THE COURT: Okay, we're the 16th. We'll be back on Tuesday. And then do you have enough -- I don't have the full roster of witnesses. Would you have enough to do to get to the 30th with Dr. Moghulback (ph)?

MR. PALMER: It would be a close-run thing, Your Honour. I've been trying to shorten, not lengthen.

THE COURT: Right. You know, some other things we need to think -- you need to think about and when I say look, read the cases and make submissions, I think read the cases and reflect on what the Court of Appeals has said very recently. It may be a full -- it may be a complete answer to the issues. You may have to re-evaluate, both of you, since this case -- these cases cover off criticism of experts by other courts and the implications and what the Court of Appeal has done in this case. So, I can't dictate to you, but I have an obligation to alert you to there's case law on point.

MR. PALMER: Yes.

THE COURT: And you did -- you didn't know about it. You can't default it for not knowing every case out there. It's a very recent case, but now that we all know about it, in the case of the Court of Appeal, they didn't know about it and they went back and reopened the case once.

MS. TANNER: Wow.

THE COURT: Something was brought to their attention. So these things happen. As for the

scheduling, I mean, at some point, it may be that we pick up this issue. So, if it doesn't impact your openings, or maybe you know, it's a broader, more general opening without touching on this, we go as far as we can, but we stick to the plan that we start on Tuesday to accommodate Dr. Lobo. And then pick this issue up and there's a ruling at -- as we move along the line. So that's -- there are practical ways to, to do this. I'll be interested to see what law you're pointing to in *Sopinka* on admissibility issues. But I'll be very surprised if the authority that says these don't get put to -- put to Dr. Basile for an explanation. He may have a very credible, very reasonable explanation. I can't foreclose -- foreclose on that.

MS. TANNER: I brought written submissions. It would enable counsel to turn their minds to these cases and any other cases and would enable us to put our best foot forward in terms of, you know, mentally and such and then we could still we could start the trial, but then Your Honour would have our written submissions, which if you -- if the court would want oral submissions. Yeah, we could do that one morning or one afternoon or something of that nature, but written submissions might get us partway at least moving still. The defendant is in agreement that Dr. Basile ought to be given the opportunity to review. I trust he's not alerted to what's happening.

MR. PALMER: Of course.

MS. TANNER: So, you know, the defendant...

THE COURT: Did you remember I was the one who

kicked him out?
MS. TANNER: Yes, thank you very much. I appreciate that there. There's concern with, you know, is there an explanation for how all the symptoms or the conclusions or the physical exams can be the same? There's a difference between that, I think, and using excerpts of case law in a motion, but we do agree with you, he ought to be given the chance. How do we do that, or they could be ABC, you know. There's really only -- so my copies got mixed up. Now luckily, we have them in these binders. I can't identify myself which one is which, other than I know now that only one of them smokes more than the others, so I can kind of differentiate at least one of two of those because the plaintiff is a smoker, but...
THE COURT: That will be your legal argument.
MS. TANNER: No, I agree. Right.
THE COURT: Right.
MS. TANNER: And so you know, I'm cognizant of the Dr. Lobo situation. We had her on summons, so we've known for weeks when she's available or not and -- yeah, so I mean, the point is that, you know, doctors have to be made to attend and, you know, I'm happy -- I mean, I can only bend so much. I won't have her in my case. I can't agree to that. We can't keep a jury around for days and we're waiting until the 30th and there's no more to be done. Should she go first? I mean, I guess that's my friend's decision. I mean, we've run into some issues evidence wise, but....
MR. PALMER: I have no, I have no choice, Your

Honour. I'm not going to make it a failing position.

THE COURT: If we -- if Dr. Lobo had to be, I don't know if it's a possibility for her to participate virtually if that would make a difference to the timetable.

MR. PALMER: I've raised that with her, Your Honour. She is hoping to participate virtually on Tuesday and Wednesday. After that I'm advised she won't have access even remotely. I have been quite -- I understand this is the process and we follow the process, but I have made significant requests upon her already. She is cancelling her days those days. She did not anticipate testifying those days, but Your Honour I will continue to look into it, but my understanding is that her only availability is Tuesday and Wednesday. And, of course, I must call her as my friend indicated.

THE COURT: Well, it's your client's family doctor, so...

MR. PALMER: Yes.

THE COURT: It would be quite odd if it was the defense calling the family doctor.

MR. PALMER: No, I can't -- I can't ask my friend to do that for a variety of reasons.

THE COURT: So, you know, look, today is Thursday afternoon. I don't know if Dr. Basile is outside.

MR. PALMER: He is. He's outside.

MS. TANNER: He is.

THE COURT: You know, the other way -- if you were content to put these three documents to him and

ask the questions, we could then finish with his *voir dire*, the evidence part of it and then you could, you know, go away, and reflect on the legal submissions, and we could argue this -- I could hear legal arguments to this on another occasion. That's one way to do it. Or we stop the *voir dire* now, send everybody home, because maybe there's something in the cases that inform the questions you ask...

MS. TANNER: Right.

THE COURT: ...Dr. Basile, and I don't want to pre-empt that. So, I don't want to rush you, is the message on this and Tuesday we come back. I instruct the jury, you do your openings. You call Dr. Lobo and we take it one step at a time and by then you'll have more opportunity to have thought through this. It doesn't strike me that Dr. Basile will be the first one testifying after Dr. Lobo. You've got a fair bit of runway.

MS. TANNER: Yes.

THE COURT: And let me throw the other piece out. If at any time you wanted a pre pretrial, mid-trial conference back with Justice Shaw or one of our other colleagues here, that's always available in every case. That's not a pronouncement on strengths and weaknesses of the case. I don't know enough to be able to say it, but I'm going to put that out there as a, you know, fourth dimension to all this to the extent that some hard thinking has to take place. So, options, you need to get instructions.

MR. PALMER: If we might have the matter stood

down for five minutes, if I could discuss that with my friend. If my friend's agreeable.

THE COURT: Okay. I'll be outside. I'm not going very far.

MS. TANNER: Yes, your, your, but your room is far away, we understand.

MR. PALMER: Chambers. Your chambers, yeah.

THE COURT: Chambers is in the other, the other end of the warehouse. But we do have some rooms here and I'll stay close by so that I can come in as soon as you're ready.

MR. PALMER: Thank you, Your Honour.

MS. TANNER: Thank you.

R E C E S S

U P O N R E S U M I N G:

MS. TANNER: Your Honour, I believe counsel would like the opportunity to read the law before we proceed any further with this motion. Dr. Basile can be excused and returned for -- I had a few final wrap-up questions from the -- my awkwardness there in the morning. And then the report's put to him for an explanation. And we can go through that exercise, depending on the submissions and et cetera. So perhaps with a timetable for the submission, or in writing, and then some day we could come a bit earlier and we could do the oral submissions, or at the end of the day if we have some time, and counsel could be ready for that. And then the second issue is, and I hesitate to

say it, we still have one more motion that we haven't heard, which is on special damages. It's not a long motion, and Ms. Tathgur is ready to do so. We can do it now. We were prepared to do it in any event. We didn't expect us to take it all day. Maybe we should have, but -- or we can return tomorrow to do the special damages motion. That is -- anyone's available for all of that. It's really whether the court is interested in now in a new fresh motion.

THE COURT: You know, there's -- it's been a lot to observe.

MS. TANNER: Yes.

THE COURT: So my preference would be not to switch gears and do the special, you know, the special damages. And I'm not sure that you need the special damages for your openings.

MS. TANNER: No.

MR. PALMER: We -- I've informed my friend of my position, Your Honour. I'm not trying to get a shot in before we argue this motion, but I've informed my friend that my position is that that motion should be brought at the close of the plaintiff's pleadings when all the evidence is in. If it's restruck, that's my submission in the right place. I know we were trying to take advantage of the gap this week...

THE COURT: I know, but we, if, we're putting the cart before the horse. I -- the issue and I hope you appreciate it, it's not just Dr. Basile who's potentially impacted after you make these decisions. Your experts are vulnerable on each --

on both sides. And so I don't want to rush this part of it. If it means it's already 3:30 -- if it means that for today, we call it a day, you go, give yourselves a mental break a bit, but then, regroup, review the case law, work it through and then file -- have submissions, we can -- or you can tell me on Tuesday where you are. I don't want you to be working all long weekend. I mean, obviously you're in the middle of a trial, but I'm not going to be saying to you, file your revised factums or revised positions by Tuesday. We can -- on Tuesday, the plan can be that I'll instruct the jury, I'll -- you will do your opening defense. I don't know what your plan is if you're going to open now or after the plaintiff's case. I've seen it done both ways. You call Dr. Lobo and we get that. We get that moving, and then, you know, the plaintiff probably after that, and then there may be an opportunity somewhere there to then regroup on -- on the motion.

MS. TANNER: And shall we return tomorrow to do the special damages? It's maybe an hour and a half, not even. It's maybe...

THE COURT: I guess the -- what is it, again, I haven't seen the materials on the special damages, but are you not in a better position to hear the plaintiff first and then have a better shot at the motion if nothing comes out of it, at least that?

MS. TANNER: So the issue, Your Honour, really is that we -- the defence has no particulars of any special damages.

THE COURT: Right.

MS. TANNER: And so to be provided that on the stand doesn't afford the defendant any opportunity to properly respond or prepare, or if our -- the heads of damage that, that we're discussing, whether past loss of income or future loss of income, like no dollar figures have been put to us ever. No way of calculating has been put to us ever. We served these materials some time ago and we've received responding materials, but again still not even a dollar figure for any head. And so the trial's about to start and part of what the rules are that we're relying on is ten days before trial is the absolute latest that people are meant to give you a number. But for past loss of income, we're dealing with 8,192.50. And then I can look at it and decide and do the math and what have you. And we're in a position where it's not clear to us how that's even going to happen. And certainly we won't be able to respond, let alone prepare for it.

So if some of those heads of damages ought to be removed, in our submission. It can be struck from the claim now or, you know, if it's something, like more loose, I suppose, like low cut, that's one thing, but to be doing math in the middle of a trial is, well -- we don't even know what it would be based on. I went to the law school, so I wouldn't have to do any math. I mean, I take your, I take your point. And I take my friend's point for sure.

THE COURT: It's a really uphill battle for you.

MS. TANNER: Yes.

THE COURT: At this point and most judges -- again, I haven't read the materials, so most judges would be very reluctant. So, if you want to come -- come at it this way. If you want to come tomorrow, and argue that motion, we have the time available and we can do it, but it's a very high threshold to strike it on the -- the eve of trial, really. If it were a summary judgment motion to dismiss much earlier on, it'd be a different equation, but now for two- or three-days difference.

MS. TANNER: I mean, the defense is just looking for and has been looking for particulars and particularization of the special damages claim. There is one out-of-pocket number that to this day we haven't been provided with the background documents, the details, has the MIG 3,500 been removed from it, et cetera. Like, we just don't even know what numbers we're dealing with. And you know, if at the end of the day, those are heads of damages we weren't able to turn our minds to, whether there was exposure, whether there was not exposure, et cetera. We're now, you know, in the middle of the trial, the trial's already happening, and we could have never defended it. We could have never turned our mind to it, whether that was something like -- past loss of income is something that often is dealt with in these types of cases in advance. Like, we offer to settle the past loss, but let's proceed on this. And so, you know, having not been afforded the opportunity to

even consider those items or those numbers, now, you know, our concern is we've opened ourselves up to be vulnerable to some dollar figures that, you know, we've requested them, the rules require it. The trial, you know -- and we appreciate it's early and it's premature or not, it's an unfair exposure to leave to the defendant. Now, does that mean it doesn't get struck or does it mean we establish the groundwork so that we can't just be at trial with Ms. Cairns up there with her calculator trying to explain something? I don't know, but...

THE COURT: Maybe I can hear from Mr. Palmer.

MR. PALMER: You know, if my friend's factual submissions were accurate and that we proceeded in trial and I called no evidence, or I called no admissible evidence, which I think is the thrust of my friend's submissions there, then we would fail. But, with the greatest respect, that's not the case. We don't just have Ms. Cairns to bring up uncorroborated evidence, and my friend, to her credit, did indicate that we provided a -- first of all, for past special damages, an amount that is owing by Ms. Cairns which she will authenticate, which she will describe. Not only that, but on our list and on our list for, and that was in our pre-trial amounts, if nothing else. I believe it was proposed before, but if, which was -- the first pre-trial was in December, of course. Even if that was inadmissible, Ms. Cairns couldn't speak to the amount of treatment she's incurred and owes now, we also have on our

witness list Dr. Thaer Hussein Elrefai, who is the person who gave part of that treatment.

So if my friend is correct that there is no evidence, then it will be struck at the close of the plaintiff's case, but what my friend is essentially trying to do is a pre-emptive attack saying, not only can you call no evidence, you can never meet this test.

With the greatest of respect first of all, as Your Honour pointed out, this is a very high bar for my friend to meet at any stage. Now, without having heard the testimony, without having my friend able to challenge evidence, she takes the position is inadmissible. We'll never know. And so my, my friend is essentially trying to win without firing a shot and without allowing us to put our case in.

So, Your Honour, again, I'm -- I'm in Your Honour's hands. If my friend wants to make a motion, I'm in my friend's hands and in your hands. But as you point out, this is very high bar and we do have and will lead evidence and we provide evidence to my friends. So, you know, again, I'm getting -- perhaps I'm getting a little ahead of myself for submissions. I just wanted to hear this, but we very strongly disagree with my friend's submissions.

THE COURT: Ultimately, it's the defendant's motion. If they insist that they would like to

get -- even with the warnings from the court to be careful, if you want to argue tomorrow, the day is held for -- I have one other matter, but the day is scheduled for this case and I'll hear the motion. If you want to give it a second sober thoughts and kick the can down to some point after you've heard the case, it's your motion. I can't block it. I can caution you. I find it -- I don't, you know, there's a -- there's a bright wall between what happens pre-trial and what a trial judge knows or doesn't know. I find it curious that, you know, this would not have been the subject of pre-trial conferences, pre-discussions, whatever, whatever, but I -- that will go, that will be an issue for costs at some, at some point. So, in a sense, I throw the ball back to you. If you want to argue the motion tomorrow, we can do it. It may have cost consequences downstream if the motions are premature or if it's some of your decision, like, hey, you've got something here, there's something more substantial. So not just the dismiss -- not just the dismissal of that, the strengthening of the plaintiff's position.

MS. TANNER: The defendant will argue the motion, after hearing evidence.

THE COURT: Okay.

MS. TANNER: Thank you.

THE COURT: So, we will not sit tomorrow. I will see you on Tuesday. I will be ready to -- to instruct the jury. I expect you're -- you'll be ready with openings.

MR. PALMER: Yes, Your Honour.
THE COURT: And we'll go from there.
MS. TANNER: And I will, the defense will be making their opening after the plaintiff.
THE COURT: Okay, that's fine.
MS. TANNER: Thank you.
THE COURT: And perhaps at the end of the day, on Tuesday I will have to stop at four o'clock, but perhaps at some point with the benefit of your research, we can come back to revisit when does this *voir dire* get picked up.
MR. PALMER: Thank you, Your Honour. Did I interrupt you?
MS. TANNER: No, no.
MR. PALMER: I was only going to say respectfully, Your Honour, first of all, happy Victoria Day. And second of all, I have advised Dr. Lobo of -- I'm sorry, she is requesting to testify electronically on Tuesday.
THE COURT: Long before COVID, when Skype was still *a la mode*, I've had in personal injury civil jury trials, I had doctors testify from South Africa, Australia, Costa Rica, and it was very good. It's very good results. You can see we're in a courtroom where this, you know, they project there. So as long as we're not into difficulties with time zones and those sorts of things, you'll, coordinate with my Registrar, Zoom links and we'll do it.
MR. PALMER: Thank you, Your Honour.
THE COURT: Happy Victoria Weekend to all of you. I will, of course, be here tomorrow on other

matters, so my weekend's not starting yet so...
MS. TANNER: Your, Your Honour, in terms of if we were to put together submissions, would we send them to the Registrar?
THE COURT: In advance of Tuesday, maybe?
MS. TANNER: Well, a lot of our work has been -- because of the delay, has been done. So we will likely start that already, whether it's completed or not, but I mean we can hold off, or we can....
THE COURT: Well, you can, you know what, send them...
MS. TANNER: To your Hotmail account?
THE COURT: Well, no, you can upload them on CaseLines with the undertaking that you will file them in court because CaseLines is not the court file.
MS. TANNER: Okay.
THE COURT: So, you could -- I just don't want to give you a deadline unless you want me to find the dates.
MS. TANNER: Nope, that's fine. Also...
THE COURT: You can file them in due course, but if you want to put something on to your CaseLines, I will look for it there.
MS. TANNER: Now, also, the other thing is we didn't note mark any exhibits in the -- without Dr. Basile here, we do have a list, and we've sent it to the Registrar, but perhaps we need to read them on the record.
THE COURT: Let's do it on the record, yes.
COURT REGISTRAR Also, as we know, Ms. Tanner was reading the list that was sent to me for the

exhibit.
I realize that two of them might become duplicates because they've already tendered the report.
THE COURT: Okay. So, let's go through them right now and we're actually going to do them.
MS. TANNER: Yes, that's my...
THE COURT: And then we will have earned our keep today.
MS. TANNER: Okay.
COURT REGISTRAR: So we have Exhibit 1, which is a copy of Dr. Basile's CV, last modified September 2003. Exhibit 2, which is the maintenance of certification of the Royal College of Physicians and Surgeons of Canada, the transcript report. Exhibit 3, which is Dr. Basile's report for the plaintiff dated October 5th, 2022. And Exhibit 4, which is Dr. Basile 's Neurological Addend dated April 1st, 2024.
MS. TANNER: So then...
COURT REGISTRAR: So you would be Exhibit 5.
MS. TANNER: Okay, are we ready? All right, so Exhibit 5 for the record is Tab 43, Dr. Basile's CV of August 2018.
EXHIBIT NUMBER 5: Dr. Basile's CV of August 2018 -- produced and marked.
MS. TANNER: And Exhibit 6 is the Tab 44, the Konkussion Education Institute Corporate Search, with a K and a K.
EXHIBIT NUMBER 6: The Konkussion Education Institute Corporate Search -- produced and marked.
MS. TANNER: Tab 28 is Exhibit 7, and that is the Neurology Directory of S-I-M-E?

MS. THAHGUR: A-I.
MS. TANNER: A-I-S-M-E.
EXHIBIT NUMBER 7: Neurology Directory of AEIME -- produced and marked.
THE COURT: Okay, what's the correct one?
MS. TANNER: A-E-I-M-E. Okay, you got that? And then tab 29, so that'll be Exhibit 8, is again that same acronym, it's the second page.
EXHIBIT NUMBER 8: Neurology Directory of AEIME, page two -- produced and marked.
MS. TANNER: And then Exhibit 9 is tab 25, and that is the concussion management program website. And there's two Ks again.
EXHIBIT NUMBER 9: Konkussion management program website -- produced and marked.
MS. TANNER: Exhibit 10, tab 27. Is *Graul v. Kansal* (2022) 4141 and the paragraph that I referenced was 432.
EXHIBIT NUMBER 10: *Graul v. Kansal* (2022) 4141 paragraph 432 -- produced and marked.
MS. TANNER: Exhibit 11 is tab 26, and that case is *Akeelah v. Clow*, paragraphs 94 to 96, and paragraph 106.
EXHIBIT NUMBER 11: *Akeelah v. Clow*, paragraphs 94 to 96, 106 -- produced and marked.
MS. TANNER: And then as you noted, Madam Registrar, the two neurological evaluations have already been made exhibit. So those are done. So thank you for noting that.
THE COURT: Yes. Thank you.
THE COURT: So we're all up to the end on that. And with that, we'll see you on Tuesday.

MR. PALMER: Thank you.

MS. TANNER: Thank you, Your Honour.

THE COURT: Thank you.

...WHEREUPON THESE PROCEEDINGS WERE ADJOURNED

FORM 3

ELECTRONIC CERTIFICATE OF TRANSCRIPTION

(Subsection 5(2))

I, , certify that this document
(Name of authorized person)

is a true and accurate transcript of the recording of
R. v. Zameer in the Superior Court of Justice
(Name of case) (Name of Court)
held at , Toronto, Ontario
taken from recording
which has been certified in Form 1.

_____ _____
Date

A certificate in Form 3 is admissible in evidence and is proof, in the absence of evidence to the contrary, that the transcript is a transcript of the certified recording of evidence and proceedings in the proceeding that is identified in the certificate.

Court File No. CV-17-00001348-0000

SUPERIOR COURT OF JUSTICE

CIVIL COURT

B E T W E E N :

REXINE CAIRNS

Plaintiff

- v. -

COREY EDGAR PETER ELLIS

Defendant

T R I A L P R O C E E D I N G S

BEFORE THE HONOURABLE JUSTICE R. TZIMAS with a Jury
on May 30, 2024, at 7755 Hurontario Street, Brampton, Ontario

APPEARANCES:

J. Palmer	Counsel for the Plaintiff
V. Merja	Counsel for the Plaintiff
S. Uppal	Counsel for the Plaintiff
V. Tanner	Counsel for the Defendant
S. Tathgur	Counsel for the Defendant

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WITNESSES - on *voir dire*

EXHIBITS

LEGEND

(sic) Indicates preceding word has been reproduced verbatim and is not a transcription error

(ph) Indicates preceding word has been spelled phonetically

(indiscernible) Indicates repeated efforts to decipher what was said without success

. . . Indicates interruption

-- Indicates interruption and/or incomplete thought

Transcript ordered: June 4, 2024

Transcript completed: June 5, 2024

Ordering party notified: June 5, 2024

THURSDAY, MAY 30, 2024

U P O N C O M M E N C I N G :

V O I R D I R E

THE COURT: Right, so this morning we are continuing the *voir dire* related to the motion brought by the defense to exclude -- to disqualify or to exclude Dr. Basile from testifying as an expert witness in this trial.

Just to bring everybody up to speed or to set up -- refresh our memories in the context, I started hearing the motion last -- no, two weeks ago, almost now. We got to a point where there was an issue about accessing two other reports that according to defense -- to the defense, ring very -- are very similar to the report that was prepared for Ms. Cairns. I, at the time, stopped the examination of Dr. Basile, always in the context of the *voir dire*, to orient myself and to understand what the issue was. And after I saw the three copies with blanked out information, so there's no personal information revealed in the documents that I saw, I came to the conclusion that it was only appropriate as part of the *voir dire* to examine those reports, and that's when I then came to the conclusion it would be appropriate to put them to Dr. Basile.

I should also clarify that although it's -- we're

hearing from Dr. Basile in the context of a motion, it has a *voir dire* quality to it, and it's possible, depending on my ruling, that there would be -- it will be doubled up as a *voir dire* to qualify him as an expert. Really, practically it means either he's qualified or he's disqualified. I say this on the record in the event somebody's reviewing this, trying to figure out what were we up to. I'm setting up the context.

I should also say that formally speaking, that because the subject of the other two reports come from other files where there would be a deemed undertaking not to disclose, the deemed undertaking is being lifted at this point for the purposes of arguing the motion. Again, depending on what I decide, it may or may not -- the deemed doesn't take -- a curtain rises for the purposes of the *voir dire* and for the purposes of testifying Dr. Basile's credibility and actually, giving him an opportunity in the context of the *voir dire* to explain what's going on. After I hear from him and depending on my ruling, that curtain may drop down again, or may be lifted partially before the jury.

So, that's the set up. I think, unless there's anything I have misstated or mischaracterized or missed, we would be calling Mr. -- Dr. Basile back to the stand. And Ms. Tanner, you would be proceeding with your cross-examination. Mr.

Palmer, is that --

MR. PALMER: I think that's a very accurate summary, Your Honour. I seek one only -- only one point of clarification. Subsequent to the first day of hearing of this issue, several other reports of Dr. Basile have been served by my office onto my friend. My friend has had them for quite some time. The personal information has been redacted. And I would just ask for clarification to make sure that the deemed undertaking rule, if it applies to that, would also be for the purpose of this motion.

THE COURT: So, you'll have to orient me a little bit. I saw -- I saw a supplementary responding record. I didn't dive into it because I was -- I didn't know what was going on. So, can you just give me an overview of --

MR. PALMER: Yes.

THE COURT: -- what you're trying -- where you're going with that, because that will help me give a direction. The rule for lifting the deemed undertaking is you can lift it for the purposes of impeaching a -- testing for the ruling; impeaching credibility. So --

MR. PALMER: Well, this is almost sort of a reply to that, Your Honour. So, my friend is adduced three reports and indicated that there's substantial similarities; that's her argument and I'm not agreeing to that, but my friend is -- has made the submission that there are three expert reports that are significantly similar. My office

has now provided my friend with additional reports of Dr. Basile which it will be my respectful submission on an argument, that there is clear distinctions made, and so Dr. Basile -- at least there's three --

THE COURT: A different report --

MR. PALMER: Different reports with different -- with the confidential information, of course, blacked out, Your Honour.

THE COURT: Right.

MR. PALMER: And there was one, I think, instance where we had to manually redact it. There was a -- something that was missed, but with all confidential information redacted. And so, we seek to -- you know, I'm not seeking an evidentiary ruling as to whether that's admissible or appropriate at this stage, but these reports were prepared. They weren't compelled. So, the deemed undertaking rule, I think, Your Honour is -- you know, if I understand it correctly, protects people from having compelled evidence used against them. These are with the consent, or with the generation of the parties, so this is not compelled evidence.

And so, I just -- to the extent that this Honourable court allows it, I just want to make sure that we're not falling afoul of the deemed undertaking rule when we seek to adduce that -- I'm not -- again, I'm not asking Your Honour for an evidentiary ruling. Of course, my friend will

probably have submissions on that, but just for the sake of as Your Honour put it, the curtain being lifted, we'd like to lift the whole curtain, and not just for the parts that my friend wishes to show.

THE COURT: Okay. Any concerns with that?

MS. TANNER: Well, it's -- Your Honour, it's the defendant's position, then -- obviously, we're not here to go through Dr. Basile's entire practice; that he likely has a variety of boiler plates. These are three relating to motor vehicle accidents with women in, you know, a similar -- not fact-pattern -- but similarities. So, you know, if -- I don't know what those are about, those ones; I don't know how they're relevant, other than to show that he has other reports out there that don't match these ones. If that's the point, then that's fine. And -- but otherwise, this is specific to this case, and specific to ones that are about this case. Ones that -- you know, whether he has reports about brain injuries or a -- T-bone collisions, or rear-end collisions is irrelevant to this case at hand, is all I would say.

THE COURT: But you received these -- you're aware of these --

MS. TANNER: Oh yeah. Yeah.

THE COURT: -- other reports. So, you can deal with them -- I mean, to the extent that the re-examination by Mr. Palmer is intended to rehabilitate and to put into -- to put the witness

in the best light --

MS. TANNER: Of course.

THE COURT: -- I don't see a problem in, you know, keeping the deemed undertaking rule lifted for these supplementary reports. Whether they make a difference or not, that's going to be for the --

MS. TANNER: Yes.

THE COURT: -- legal argument. But the narrow question right now, I think, Mr. Palmer was asking, do I have any concerns with the deemed undertaking be lifted. What's good for the goose is good for the gander --

MS. TANNER: That's what I expect --

THE COURT: There's a rule -- the principal of the rule is we lift it for the purposes of credibility impeachment only. It's not debating the substance of --

MS. TANNER: No.

THE COURT: -- you know, in this report, you said x, in this report with the same symptoms, you came to a different -- we're not debating the --

MS. TANNER: No.

THE COURT: -- substance of it. We're debating is this somebody who takes a boiler plate off his drive on his computer, slaps on another name, tweaks it and sends it out, or not. I mean, that's at the heart of it. This -- it's a reliability issue.

MS. TANNER: And we take no issue with respect to lifting the deemed undertaking rule for those two reports. Thank you.

THE COURT: Okay. All right. So, I think we can bring Dr. Basile in. I'm just going to confirm that he affirmed to tell the truth and that he remains under oath. We don't have to repeat that. And let's take it away.

MS. TANNER: Based on our review of the *Hason* and *Nettleton* (ph) case, I am going to just backtrack a tiny bit.

THE COURT: That's fine.

MS. TANNER: Okay?

THE COURT: Yeah, that's -- whatever I did -- yeah, for the record, I did ask you to review those two cases: a decision from the Court of Appeal, for the record *R. v. Richard Hason* 2024 ONCA 369. And so, of course, you can have some time.

VINCENZO SANTO BASILE: PREVIOUSLY AFFIRMED

THE WITNESS: Good morning.

THE COURT: Good morning. Good morning, Dr. Basile. We are picking up where we left off, I guess two weeks ago. Ms. Tanner will continue with her questions for you. Just to confirm on the record, you were -- you affirmed last time to tell the truth. You remain under oath. This is not something that's -- not new to you, so I just need to confirm that on the record.

THE WITNESS: Absolutely.

CROSS-EXAMINATION BY MS. TANNER: [CONT.]

Q. Hi, good morning. Thank you for coming back.

A. Sorry I couldn't come yesterday.

Q. No, it's no problem. Yesterday would not have worked for me. So -- I only say that because I wasn't feeling well.

A. Oh.

Q. Yeah, but I'm good now.

A. Better today? Well, good.

Q. Yeah. Okay, so you understand why you're here.

A. Yes.

Q. Okay. And we're -- the defense is bringing a motion to seek to exclude you from testifying at the trial of this action.

A. Yes.

Q. And you'd agree with me that's a fairly serious motion.

A. Yes.

Q. Okay. And on May 16th, we brought this motion and you didn't bring a copy of the consent, if you'll recall. We asked you if you had it with you in your file.

A. Yes. And you had asked us the night before to attend at 7:30 p.m., so that's when I received the notion to do so.

Q. Understood.

A. Yeah, and counsel, the document -- my records state that either written or verbal consent --

Q. Yes.

A. -- was obtained.

Q. And so, since the May 16th when you were here, have you been able to locate and bring a copy of that consent

with you today?

A. No.

Q. Did you look for it?

A. Yes.

Q. And do you just not -- do you not have it? Or --

A. I don't have it, no. Verbal consent was also written on the document.

Q. Yes. So, a copy of the written consent, it's not in your file, it's not at the company?

A. No.

Q. All right. And with respect to testifying today, you had 29 records in your file that you referenced with respect to your report. Did you review those medical records anew to refresh yourself for today's testimony?

A. Yes, prior to Friday to prepare for last Friday, I looked at some of the documents that were given to me again.

Q. Okay, so you looked at the medicals.

A. Yes, the ones that were given to me.

Q. The 29 medicals.

A. Well, the ones that counsel gave me before to prepare.

Q. The ones that came to you by e-mail?

A. No, just the -- just the documents that were given, yeah.

Q. Okay, a brief.

A. Yeah.

Q. All right. And how long would you say it takes you, on the first go-around, to review medicals? So, now you know the size, so about how long would it have taken you to

do a review of those medicals the first time around?

A. I don't recall specifically, but I -- this is on a separate date when preparing the file itself, so I'll take and look at all that and take excerpts from it; either cut and paste it, or take it from Connecting Ontario, for instance if it's an MRI scan, or -- and I'll take that pasted right out of Connecting Ontario and I'll put it in the document. That would be prior to the day of the appointment.

Q. How long -- now you've seen the size of the medical brief, how long would you expect it would take you to review that the first time around?

A. Depends. I would -- I mean, it'd be about an hour, maybe?

Q. And that's -- and then the second time around that you did to prepare for today -- your second time around for today, how long would it have taken you to review those medicals?

A. Around the same amount of time.

Q. Another hour?

A. Yeah.

Q. And when you're reviewing your medicals for your report, do you dictate as you go?

A. Sorry, when I'm reviewing to prepare the -- yes.

Q. Yeah. Do you dictate as you go, or do you highlight, or both, or --

A. Dictate. Just dictate and cut and paste excerpts. I'll quote, for instance, another neurologist who I've seen, as in this document for our case.

Q. And other than reviewing the medicals for today's purposes -- right? That's what you did.

A. Yes.

Q. Is there anything else you did for -- to prepare for today's motion?

A. I looked at the file again. I looked at it in detail and that's it.

Q. Okay. And did you bring a copy of your report today?

A. Yes.

Q. Now, we went through -- do you have that copy with you?

A. Yes.

Q. Okay. So, we went through -- we went through together the professional designation section, which is halfway through that first page?

A. Yes.

Q. We did that last day, and we found a few errors --

A. Sorry, a few --

Q. Koncussion Inc was in there even though it had been closed for some years, and the MLSE work that you do wasn't on there. A few clerical errors of that nature, you'll recall.

A. The only one I recall is the concussion -- being involved in Koncussion, with a K.

Q. Yes.

A. Yeah, the MLSE, I hadn't put that in, no.

Q. Well, it's in your current CV.

A. It is in my current CV as is many other things in my current CV that are not in the professional designation.

Q. Okay. With respect to Koncussion Inc., would you agree that you didn't review and read that core part of your report as carefully as you could have?

A. In the preparation of the document -- so, that first page, with the front page, hasn't changed for a while. So, I update that every once in a while, based on how things change. So, I had not seen that one line about Koncussion. But the rest I had updated, included that I was former head of neurology.

Q. Okay.

A. Yeah.

Q. So, Koncussion Inc. I think closed in 2017, did you say?

A. I didn't say that. I said that --

Q. 2019.

A. I said that 2018 is when I --

Q. Okay.

A. -- kind of talked to them and said that -- I don't have any issues but --

Q. Right.

A. -- there's been no movement with that company. I'd made no money from that company whatsoever and Koncussion with a K, I took it off the CV in 2018.

Q. Right. Okay, but with respect to -- I'm just looking at the report, not at your CV, okay?

A. Yes.

Q. And your report is dated October 2022 --

A. Yes.

Q. -- so, would you agree with me, that if you had read it carefully before it got served, you could have read it maybe a little bit more carefully to ensure that it was accurate, because then you would have realized that it hadn't been updated, and that hadn't been removed.

A. That sentence, yes.

Q. Okay. Now, in terms of Reasons for Assessment, that's the top paragraph, right?

A. Yes.

Q. And I take it you read that before it goes out.

A. No, I -- that first page is literally taken, put in there -- I don't read it before it goes out. So, that has been -- not been updated. I assumed that it was correct.

Q. Okay. So, you don't review the first page of your report.

A. No, because I wrote it when I wrote it and assumed that it was correct.

Q. All right. You testified in cross a couple of weeks ago that typically you have a chaperone in the room during your assessment.

A. Yes.

Q. And on the reasons for assessment in the top paragraph there, it says:

> Several of my assistants, including administrative assistant, my nurse practitioner, my EMG nerve conduction technician, were present for the assessment.

A. That should be "one of". So, I choose whoever's available to come in the room at that time.

Q. So, this is a clerical error.

A. Correct.

Q. Okay. So, there weren't three --

THE COURT: What page -- what page are you on now?

MS. TANNER: The very first -- well, it's page

two, but it is the first page of the report, Your Honour.

THE COURT: So, after the --

MS. TANNER: It's a --

THE COURT: -- Professional Designation heading I see Identifying Information.

MS. TANNER: It's before the Professional Designation. It's the very first paragraph.

THE COURT: Reasons for Assessment.

MS. TANNER: That's right.

THE COURT: Okay.

MS. TANNER: So, right under To Whom it May Concern.

THE COURT: Ah, okay. Yes, okay, got it.

MS. TANNER: Q. So, there weren't three to four people present at Ms. Cairn's assessment.

A. No, one person.

Q. And so, you --

THE COURT: Sorry, and you said -- did I -- because I had a technical issue and I want to clarify I understood. This first page of the report --

MS. TANNER: yes.

THE COURT: -- you didn't review? Is that what you said?

THE WITNESS: Correct, yeah. Because it's standard -- I'm assuming it was standard -- and I put it on every report and assumed that that was correct.

THE COURT: Okay.

THE WITNESS: But I hadn't reviewed it.

MS. TANNER: Q. So, when you test -- but you'd agree with me that page two forms part of your report.

A. I agree.

Q. Okay. So, when you testified that you review your report before it goes out, what you're saying is you review your report except not this page before it goes out.

A. Correct.

Q. Okay. And you testified that the -- you testified that you do the assessment of the plaintiff -- or you did the assessment of this plaintiff the same day as you did the report.

A. Correct.

Q. Namely that the assessment took place on October 5 and then the report itself is dated October 5.

A. Correct.

Q. Okay. And so, you assess the plaintiff, Ms. Cairns, and then you dictate the report -- you dictate it while she's there, I understand?

A. Correct.

Q. Okay. And this is a 16-page single-spaced report if I -- it's 17, but one page is the title page.

A. Correct.

Q. And so, as you indicated, you would have reviewed the medicals in advance, and now you're saying that would have taken you about an hour.

A. Prior to.

Q. Right, prior to. And then after you review the medicals, you do the assessment, you dictate it, and then you review the whole report before it goes out. To make sure it's accurate.

A. Typically, I'm reviewing while I'm doing that,

yeah. And then I -- so, I dictate, so there's sentences that are unique, that I'm going to dictate full sentences. There are criteria that I'm going to say macro concussion, and it'll pop up a paragraph that has blocks with it, either positive or negative --

Q. Okay.

A. -- and then complete the sentence and add relative -- relevant details after.

Q. Okay.

A. Yeah.

Q. But after you make -- do that exercise --

A. Correct.

Q. -- and presumably someone either prints it out or something --

A. Right, I read it through --

Q. Yeah.

A. -- yeah.

Q. And you read it to make sure it's accurate.

A. Correct, but I -- not the -- that first page, sorry.

Q. No problem. So, you read it to make sure it's accurate and notice if there's any errors --

A. Correct.

Q. -- check for spelling, I don't know.

A. Yeah. Yes.

Q. Okay. And you testify that you do about three to four medical assessments per week, and two per day.

A. Three to --

Q. You testified that you do about three to four medical/legal assessments a week.

A. Is that what the record says? No, it's more

than that.

THE COURT: That's what you said the last time you were here --

THE WITNESS: Three to four per week?

MS. TANNER: Q. Medical/legal assessments.

A. No, there can be more. Three to four would be in the first two days, three days, yeah.

Q. Okay.

A. Yeah. So, maybe eight per week.

Q. Yeah, so three to four medical -- oh, sorry, yes, and two per day was what I was going to say.

A. Yeah, two per day is eight, sorry.

Q. Yeah, so about eight to ten per week.

A. Yes.

Q. Okay.

A. But the -- just to clarify, does the record state three to four per week?

Q. It says three to four per week, and then two per day.

A. So, two per day, four days a week -- three to four days a week.

Q. Yeah.

A. Yeah, so three to four days a week, two per day --

THE COURT: So, we've clarified this. In a week, you may do up to ten? Between eight and ten?

THE WITNESS: Correct.

MS. TANNER: Q. And you review all the medicals for all of those assessments.

A. Correct, at the end of the week.

Q. Okay. And each -- those assessments cost in

the range of $5- to $6,000 a week -- per assessment -- per report.

A. No.

Q. No?

A. No. That does -- not what we charge. It depends on what it is. So, the fees that I charge for an AB are $1,000 per AB. The catastrophics are higher at $3,000 to $4,000. And then the torts are a similar price. So --

Q. 3-4,000 for a tort.

A. Correct, yeah.

Q. Okay. So, if you were doing ten per week -- I mean tort, which obviously you're probably not only doing tort -- but you would be --

A. The majority are AB --

Q. -- generating for your business -- let's say if you're doing one -- a variety of all that -- between 20- and $40,000 a week you could be generating for the business.

A. The vast majority are AB.

Q. All right. 10- to $20,000 you're generating a week for reports? Or you just don't know.

A. I don't know.

Q. So, the invoice for this report that I saw was $5,000. That's -- is that high?

A. That would be high, yes.

Q. But if that's the invoice, you wouldn't dispute it.

A. No.

Q. Okay. Now, at -- we went through this but I want to just get a little bit more clarity -- on page 11 of your report, we talked about the American Academy of Neurology criteria and the Ontario Neurotrauma Foundation criteria, okay?

We talked about that, so I just want to make sure we get this nailed down a little bit clearer.

So, under Summary -- so, at page 11 -- this is your -- this is your diagnosis.

A. Yes.

Q. Okay. You'd agree with me the diagnosis is a key, if not the most important part of the report, for the purposes of a med/legal.

A. Yes.

Q Okay. So, number one says:

> She does meet American Academy or Neurology criteria, and Ontario Neurotrauma Foundation criteria for the post-concussive syndrome, and this is consistent with a traumatic brain injury.

A. Correct.

Q. Okay. And we went through this at some length because you indicated that there are other terms that are used interchangeably.

A. Correct.

Q. But you agreed, I think, with me that the actual term "post-concussive syndrome" is not in either of those two -- is not the term that is used by those two foundations and academies.

A. No, the Ontario Neurotrauma Foundation does use the term post-concussive syndrome. The American Academy of Neurology determines the definition of concussion. So, in order to do the diagnosis of post-concussive syndrome, which has now been changed to traumatic brain injury with persistent post-

concussive symptoms -- so, that term has changed -- in order to do that --

Q. Yeah.

A. -- one has to first establish that they have the diagnosis of concussion. And then once the establishment of the -- an acute concussion is there, if the symptoms persist -- so, you have to use the same acute concussion symptoms -- if the symptoms persist, then you can make the diagnosis of post-concussive syndrome, and now we call is persistent post-concussion symptoms.

Q. I understand. And we did this -- we went through this a number of times, you and I -- well, not a number; I think at least twice. But -- so, again, now -- okay, let's just say this. The American Academy of Neurology does not have in it the term post-concussive syndrome.

A. Not in the criteria. That --

Q. Okay.

A. -- is establishing the diagnosis of concussion --

Q. Sir --

A. -- and then the Ontario Neurotrauma Foundation establishes the diagnosis of post-concussion syndrome and used multiple diagnostic criteria, ACNR, et cetera --

THE COURT: But I really need you to answer the question, otherwise --

THE WITNESS: Okay.

THE COURT: -- it's not -- it's not helpful. And the more -- the more you confuse me, the past of least resistance, sir, will be to say this is gibberish, I'm not putting you before a jury. So, let's -- I don't want to do that. I'm not

predisposed to do that, but I need to be able to follow the answers. The lawyers will then make their legal arguments. So, let's try that again. That term, specifically, is it in the American Guidelines, yes, or no?

THE WITNESS: It is not in the American Guidelines. It is in the Ontario Neurotrauma.

THE COURT: Thank you.

MR. PALMER: Q. Okay. So, with respect to the diagnosis set out at number one, you could be -- there are other terms that are used, as you've said repeatedly, in the American Academy of Neurology, and you could be specific in your diagnosis and use their terms, but you do not. You use your term here, post-concussive syndrome.

A. Post-concussive syndrome was a term used for the longest time. I'm now aware, when I wrote this report, that that's -- the term that has been adapted. But the Ontario Neurotrauma Foundation uses the term post-concussion syndrome.

Q. Okay. But that -- your sentence -- your diagnosis --

A. Yes.

Q. -- in this report says she does meet American Academy of Neurology criteria for the post-concussive syndrome. So, if those words do not appear in the American Academy of Neurology criteria, you could actually be specific and use the terms that are in there, but you don't; you choose to use this term yourself.

A. I don't. I choose -- the Ontario Neurotrauma Foundation guidelines tell us that that term is fine --

Q. Okay.

A. -- and the American Academy of Neurology

defines the concussion. They have to be together --

Q. Okay, so --

A. -- to make the diagnosis.

Q. -- would you agree with me that the first part of the sentence then, maybe it should just be removed? Or, there should be 1 and 1 a), or 1 a) and 1 b)?

A. No, I don't because like I said, to make the diagnosis of post-concussion syndrome, you first have to establish that a concussion has happened.

Q. But you don't say that. You don't say she does meet the American Academy of Neurology criteria for a concussion, comma, and the Ontario Neurotrauma Foundation criteria for post-concussive syndrome.

A. I think that would be a better way to say it, yes.

Q. Right.

A. But that's why it's in there. I wouldn't agree that I should remove that.

Q. Well, it's misleading, wouldn't you say? You're attributing post-concussive syndrome to the American Academy of Neurology criteria, trying to make it sound like that's coming from the American Academy of Neurology criteria when it isn't. What's coming from them is the definition of concussion.

A. Well, the definition of concussion is a pre-requisite to make the diagnosis of post-concussion syndrome, so --

Q. But I don't see that here.

A. I didn't explain it, but that's part of the diagnostic criteria.

Q. So -- okay.

THE COURT: We have his answer.

MS. TANNER: Q. Thank you. All right. I would like to go now to your identifying information for Ms. Cairns, which is at page three. Now, this would be information that you took from Ms. Cairns, correct?

A. Yes.

Q. And you asked her this and in front of her, you dictated.

A. Yes.

Q. Okay, we heard testimony in court that Ms. Cairns was living with her common-law partner, David Daniels, at the time of this report, and this would have been kind of on the heels of them moving in together. Did she not mention to you that she was living with someone?

A. If she had mentioned it, I would put it in the report.

Q. Okay.

A. Yes.

MR. PALMER: Your Honour, I hesitate to rise during my friend's cross, but my recollection of Mr. Daniels' evidence is that they moved in together in October of 2022. I don't believe a date is specified on that.

MS. TANNER: That is true. And Ms. Cairns gave a different date that was much earlier. And his Will-say statement gives a date that's much earlier, so --

THE COURT: Wait, that would be in legal arguments. Carry on with your --

MS. TANNER: Thank you.

THE COURT: -- there's nothing wrong with the

question?

MR. PALMER: No, Your Honour, there's nothing wrong with the question.

THE COURT: Okay. So, we're not debating legal arguments. Let's -- I need to keep it clean. The examination, the evidence is what is is, and then when you make your legal arguments, you will ask me to look over here, look over there, look over there, and figure it out.

MR. PALMER: Apologies, Your Honour.

MS. TANNER: Q. Under Employment and Education, you wrote:

> Rexine Cairns' work history includes: At the time of the accident, she was not working. She indicates that she stopped working about a few weeks prior to the accident.

Correct?

A. Correct, that's what she told me, yes. And it's dictated in front of the patient.

Q. Okay. So, you dictated it in front of her and she didn't correct you and say that she had been laid off five months earlier?

A. Correct.

Q. Or that she was on EI at the time?

A. No, she did not mention it.

Q. Or that she was in fact receiving CPP at that time.

A. No.

Q. Maybe trying to look for alternative

employment.

A. This is what she told me.

Q. Okay. It's not possible that that's a clerical error?

A. No.

Q. And it's not possible that her living alone is a clerical error?

A. No.

Q. Okay. There are 17 sections in your report.

A. Yes.

Q. And there are 11 by my review that appear to be as standardized format. So, let me just give you a chance to look at them and we'll go through them together. All right, here we go. So, you have 17 sections. The sections that I want to look at with you are: Past Medical History, Medications After the Accident, Pre-Accident Functional Status, History of Accident, Immediate Symptoms, Current Symptoms, Functional Inquiry, ADL -- IADL Function, Physical Exam, Summary, and Work-up and Treatment According to Above Diagnosis. Okay?

A. Sure.

Q. Okay. And each of those sections should be different, depending on the patient. For example, each person's past medical history will be different.

A. Yes.

Q. Yeah, and the history of the accident, presumably will be different for each individual?

A. The details of --

Q. Yeah.

A. -- but the sentence structures could be similar because again, I use that macro.

Q. Okay.

A. History of -- macro, history of accident, and I change the details depending on the circumstances for that individual.

Q. All right. Certainly, the physical exam, that's going to be different for each person.

A. The verbiage will be identical. It's either pertinent positive or negative. They either have a certain physical exam, or they do not.

Q. So, when I asked you two weeks ago, you were very clear that you dictate the entire report --

A. I did say --

Q. -- you didn't mention anything about macros.

A. You didn't ask me, and that's --

Q. Okay.

A. Yeah. Dictation using the mic has a feature macro --

Q. Okay.

A. -- and I -- and then there's tabs where I press the tab button on the microphone, it goes to the relevant section, and I change what's relevant.

Q. So, is it possible that these 11 headings are all macros?

A. They're not totally macros. It's a --

Q. Okay.

A. -- everyone of them has blanks and things to replace, depending on the situation of that patient and how they answer me, or how the physical exam manoeuvre occurs. So, for instance, they either have double vision when we do a convergence test, or they do not, but the macro says when checking for convergence insufficiency, the patient had blank. So, I tab, go to that, and I answer pertinent positive or

negative, and the sentence completes.

Q. Okay. Just a moment. Okay, so I'm going to hand you three -- I'm going to hand you three of your reports and I've blacked out the identifying information. And then I'm going to have a few questions about each of the reports, okay?

A. Yeah.

Q. Great.

THE COURT: And are you identifying this as A, B, C?

MS. TANNER: Q. That's right, Your Honour. And they're marked A, B, C. All right, here you go, Doctor.

A. Thanks.

THE COURT: And just so that I can follow along, on my copies, can you mark me A, B, C?

MS. TANNER: Absolutely.

THE COURT: Or is there some way to --

MS. TANNER: I think that we can do that, right? Yeah. Okay, Ms. Tathgur's --

THE COURT: I'll give these to my Registrar, and just on the front page, just put an A, a B, and a C.

CLERK REGISTRAR: Your Honour, are they going in sequential order? I believe?

MS. TANNER: Yeah.

THE COURT: Yeah, but I -- it's blank out to -- with the identifiers, right, so I don't know -- and I've mixed them up. So, if you can tell --

MR. PALMER: Your Honour, may I have a similarly marked copy, please? I mean, I think I'll have the same one you do, but --

MS. TANNER: Do you have them?

MR. PALMER: I have them, yes.

MS. TANNER: And so, if you give them to Ms. Tathgur, she will do that.

MR. PALMER: Thank you.

MS. TANNER: Do you want to give them to her?

MR. PALMER: Not right now. I'll do it on a break. I just have to dig them out, Your Honour. I'm looking --

MS. TANNER: Okay.

MR. PALMER: -- so, no.

MS. TANNER: Sure.

MR. PALMER: I don't want to give them Sharon right now.

MS. TANNER: Oh, yeah, sure.

CLERK REGISTRAR: Court's indulgence, parties.

THE COURT: I want to be able to follow along --

MS. TANNER: Yeah, absolutely. Would you not -- would you want -- okay. You don't want them available?

MR. PALMER: I'm looking at them on the screen.

MS. TANNER: Okay.

MR. PALMER: I'm content, Your Honour. I apologize for indicating --

THE COURT: Are they also in this brief?

MR. PALMER: They're in the motion record, Your Honour.

THE COURT: I see.

MR. PALMER: And so --

MS. TANNER: They're not -- the highlighted copies are not in the motion --

THE COURT: So, I haven't looked at the motion

record because there was a defect, so I haven't -- that's why I'm relying on the hard copies. And for the record, we're doing this to protect confidentiality.

MR. PALMER: And sorry, the witness has just been handed clean copies?

MS. TANNER: No, they're highlighted.

MR. PALMER: Oh, the witness has been handed highlighted copies.

MS. TANNER: Yes.

THE COURT: The redacted copies.

MS. TANNER: Of course. Yeah, yeah.

THE COURT: Not highlighted.

MS. TANNER: They're -- the yellow parts are there --

THE COURT: Okay.

MS. TANNER: -- but the redactions are all black.

THE COURT: So, the way --

MS. TANNER: You have them -- Your Honour, the (indiscernible, multiple parties talking)

THE COURT: The witness has what I have?

MS. TANNER: Yes. And so does my friends in their paper copies, and so do I, and so does -- yeah.

THE COURT: That's fine.

MR. PALMER: Your Honour, I'm -- the court's indulgence. My colleague advised me that we don't have highlighted copies, but I will make that determination. May we have, Your Honour, just five minutes to make sure we're all on the same page?

THE COURT: Yes.

MR. PALMER: Thank you.

MS. TANNER: So, the copies were circulated when we left last time before this exercise took place, and properly highlighted versions were provided to everyone.

MR. PALMER: I have no doubt --

THE COURT: There's no need for panic.

MS. TANNER: No, no.

THE COURT: We'll get the five minutes. Everybody can just -- we'll just take a five-minute break and you'll sort out -- I just want to be sure that when Ms. Tanner goes to document A, we are all -- page three, we are all following along.

MR. PALMER: Thank you, Your Honour.

THE COURT: Okay. Thank you. Five minutes.

R E C E S S

U P O N R E S U M I N G :

MR. PALMER: My friend's provided me with the hard copies, Your Honour, and I thank her for that.

THE COURT: Thank you very much.

MS. TANNER: Q. Doctor, if we could start by going to page six, please.

THE COURT: Of which one?

MS. TANNER: Q. Of all of them. So, the best we can all do with our limited space.

A. Thank you.

Q. All right. So, this is the Heading section. Once everyone -- once everyone's all oriented.

A. Um --

Q. Yes?
THE COURT: So, in the -- counsel, in B and C --
MS. TANNER: Yes.
THE COURT: I have headaches in A on page 6 --
MR. PALMER: Page 5, Your Honour.
THE COURT: Page 5 for -- okay.
MS. TANNER: All right. So, mine are both at page 6. It's possible when they got printed, but we're looking at the --
THE COURT: At the A sample, it starts at the bottom of page 5 --
MS. TANNER: Right.
THE COURT: -- and goes into page six.
MS. TANNER: So, we'll be on page six for the question.
THE COURT: For all of them, okay.
MS. TANNER: Yeah. And they're all in the Headache section.
THE COURT: Okay.
MS. TANNER: Q. Okay. So, first, Doctor, after -- did you review report, presumably, before coming here today for this continued *voir dire*?
A. So, the report for today's case?
Q. Yes.
A. Yes.
Q. Like, I mean, you said you reviewed your medicals --
A. Yes.
Q. -- took an hour to review them before today, and you reviewed your report, took an hour before today.
A. Yes.

Q. Okay, great. So, I want to look first at -- on version A, the second full paragraph where it says:

> She describes bilateral frontal and occipital pain in the head, which occurs transiently, and she describes --

And this is the part:

> -- a tight band-like squeezing sensation around her head as if her head was in a vice.

A. Correct.

Q. Okay. So, patient A told you that.

A. So, this is a standardized question. Patient A told me that, but --

Q. You wrote it --

A. -- I have to ask it direct. So, I ask, do you have headaches that are bilateral, tight band-like squeezing headaches --

Q. Yeah.

A. -- that make your head feel like they're in a vice. They answer yes, or no.

Q. Okay. And so, she told you that.

A. Correct.

Q. Okay. And then if we look at patient B at the bottom of the page -- this will be the second line in that third -- the bottom paragraph.

A. Yes.

Q. We see the words:

A tight band-like squeezing sensation around her head as if her head was in a vice.

A. Correct.

Q. So, you would have asked patient B that question and they would have said yes, and you would have --

A. Right.

Q. -- inserted that.

A. Correct. That's the diagnostic criteria for tension headaches.

THE COURT: So, the question -- sorry, the question you ask on that is what? Do you have --

THE WITNESS: Do you have headaches that are a tight band-like squeezing sensation as if your head is in a vice. So, I start the question with an open-ended question, and then I go to direct, closed questions that allow me to get to the diagnostic criteria.

MS. TANNER: Q. And this is the diagnostic criteria for -- did you say stress headaches?

A. Tension headaches.

Q. Oh, tension. Okay.

A. Yeah, but this is the section where I look at the --

THE COURT: Sorry, I'm going to ask you to give me that question again. Do you have headaches that are tight?

THE WITNESS: Do you complain of headaches that are tight band-like squeezing sensations as if your head was in a vice.

THE COURT: So, that's a standard question that

you ask every patient?

THE WITNESS: Correct.

MS. TANNER: Q. So, is there -- is your assessment more like a questionnaire?

A. No, I ask them because you have to gauge how they answer you. And even dig deeper sometimes to get an answer to a question. It really depends on the person. Some people, well I don't remember. So, you really have to ask the question, but start open. Like, when I'm teaching medical students in residence, I start with open-ended questions, and then direct them with close-ended questions. But the close-ended questions are useful to actually hit the diagnostic criteria.

Q. Okay. So, with respect to Mrs. Cairns, when you were looking through her medicals for that hour before you came here today for the *voir dire,* what medical did you see where she described to any practitioner, or any other expert, or anyone, whether the neurologist on the file, the Dr. Lobo, what medical record did you see that might have confirmed that she had these tension headaches?

A. I wouldn't do that. I ask the patient, and see what the patient has that day. Now, if there's a past history of headaches, it may or may not inform. It depends on how severe they were, or the character they were, but it may or may not inform what I'm asking today.

Q. So, you don't go back and make sure -- like, after you ask her the questions and then dictate these pages and insert the macros and such, you do not go back and look at the medicals to cross-reference and -- kind of the interplay between medicals and patient.

A. No, if I picked it up initially, I would use it. If it's of relevance, I would use it. If it's not of

relevance prior, I wouldn't use it in the document and go after what's there today.

Q. So, the -- are you saying then that the pre-accident history you had from 2013 up until 2022, I assume of medical history; a history that includes mention of headaches over the years, including pre-accident. There was -- you didn't think that was important in terms of then --

A. This is --

Q. -- making this conclusion? Or making the statement?

A. I wouldn't give that a lot of weight in coming up with a diagnosis for that day, particularly given the amount of time that that was. Now, in preparing for last Friday --

Q. Yes.

A. -- I did notice that there was a headache reference in 2013 --

Q. Yeah.

A. -- about headaches. I also noted a reference two weeks prior to the accident of a lower back pain.

Q. Okay.

A. But I didn't comment on it because it wasn't relevant six years later. The patient presents with what they present with now, and it wouldn't inform heavily my diagnosis.

Q. Okay. How about if we go down to the next couple of lines down, where -- it starts with there -- well, we'll go down first -- let's go to patient A. So, it starts with -- on patient A, now we're at the second full paragraph still, and it starts with "there were positive symptoms".

A. Where is that?

Q. On the second para -- are you on patient A?

A. Patient A, yes.

Q. Okay. The second paragraph, which is just a little bit down from the tight band-like squeezing sentence.

A. Okay.

Q. Do you see where the sentence starts with "there were"?

A. Yes.

Q. Okay. So, this sentence is:

> There were positive symptoms of scintillating scotomas, kaleidoscope appearances, fortification spectra, and ziz-zags in the periphery of vision.

A. Correct.

Q. Okay. And if we go to patient B:

> There were positive symptoms of scintillating scotomas, kaleidoscope appearances, fortification spectra, and ziz-zags in the periphery of vision.

A. Correct.

Q. Okay. And if we go to patient C:

> There were positive symptoms --

Oh, where are we --

> -- there were positive symptoms of scintillating scotomas, kaleidoscope appearances, fortification spectra, and ziz-

zags in the periphery of vision.

A. Correct, yeah.

Q. Okay. And I looked those up. Scintillating scotomas is the visual hallucination, bright shimmering zig-zags.

A. Scintillating scotomas are a black spot --

Q. Okay, black spot.

A. -- with shiny around. Correct.

Q. Okay, back spots with shiny around. Okay.

A. Yeah, when she -- when there's a headache.

Q. Okay.

A. Yeah.

Q. And then, kaleidoscope appearances, is that the lights?

A. No, that's the one that looks like broken glass.

Q. Broken --

A. So, that's how I ask it.

Q. Okay.

A. Did -- on the periphery of the one side of your vision in both eyes, do you see a broken glass-like lens, and that's --

Q. And is it coloured? Or just --

A. Kaleidoscope can be coloured; it doesn't have to be. It's more of a whatever's there, whatever the colours are there, but it's broke -- like, looking through broken glass.

Q. Okay.

A. Yeah.

Q. And fortification spectra, what's -- that's a visual aura?

A. Correct, yeah.

Q. Okay. I got that one right. Ziz-zag in periphery of vision. Those are coloured lights, or flashes of lights on the side vision?

A. Well, the way I ask that one is do you know when fireworks, you have the sparklers --

Q. Yeah.

A. -- so, if you go like that, you kind of get a trail of light. If they answer yes to that, then I give them that positive, or I delete it, or I say they did not have it.

Q. Okay. And these are all migraine features.

A. Exactly, yes.

Q. Okay. And when you went through your -- well, I have a couple of questions. So, first of all, as you're dictating this -- and Ms. Cairns is listening, correct?

A. Yes.

Q. Okay. And it's your evidence that she gave you these answers.

A. Correct.

Q. And when you went through her medicals, certainly post-accident there's commentary of migraines. Pre-accident there's commentary of headaches, as you noticed.

A. Sure.

Q. Well, did you notice -- were there any comments in there about these visual aspects of her migraines?

A. I don't know if another physician's going to ask this question or not. I go off of what the diagnostic criteria and what the patient answers, but I can look at them if there's a history of migraine. But realistically, it's not going to inform the diagnosis. The patient either has them or don't; meets criteria, or doesn't.

Q. Well, I mean, she was sent for a head CT and head MRI because her headaches were so bad. So, you would think that in her medical records, there would be details of how bad -- like, the nature of her headaches.

A. I'm -- in my experience, looking at family doctors' notes, I rarely get diagnostic criteria, and then it depends on the type of neurologist whether they go into those details or not. But the criteria of meeting four out of six items. So, if some doctors -- some neurologists will -- you know, as soon as they hit their fourth most common, they've made their diagnosis, and they don't even go on to the other ones.

Q. Doctor, these are symptoms that appear nowhere in the records.

A. That's not surprising to me.

Q. And these symptoms did not come up in the three days that Ms. Cairns was on the stand testifying.

A. Again, it depends on how you ask the question, who's asking, and what detail you go into. Open-ended versus close-ended questions.

Q. It's not possible you got it wrong?

A. No.

Q. It's not possible that the macro is a little bit too macro and --

A. No.

Q. So, each of these three patients just happen to have that entire paragraph that we looked at. Let's say that's yellow. They happen to have the exact same headache symptoms.

A. These three would have. There are many that don't. I use these same macros through my OHIP assessments as well. And that's how we make the diagnosis. Go through the

criteria.

Q. Okay. If we could just turn the page, everyone could -- okay, I want to look at B and C. Page 7. This is all going to be on page 7 still. The very -- so, B and C, the very top, okay? So, patient B, is this another open-ended question from your macro?

A. That would be close-ended.

Q. Close-ended, okay.

A. Yes.

Q. But this comes out of your macro? This is not dictated?

A. Correct, yeah, it's dictated in the macro. I say --

Q. I don't --

A. -- "macro, headache" --

Q. Yeah.

A. -- and it comes up, and then I go through them, yes or no, yes or no, each question.

Q. Okay. This particular section --

THE COURT: What was the first word?

MS. TANNER: Rest.

THE COURT: Okay, got it.

MS. TANNER: Q. Okay. So, for patient B:

> Rest, sleep, and cold compresses to the forehead provide some relief of symptoms. There had been no history of any significant headaches prior to the accident. Her headaches began immediately after the motor vehicle accident.

Right?

A. That's what she endorsed.

Q. And patient C:

> Rest, sleep, and cold compresses to the forehead provide some relief of symptoms.

And then we have the medication comment which comes out of a different one, but:

> There had been no history of any significant headaches prior to the accident. Her headaches began immediately after the motor vehicle accident.

Do you see that?

A. Yes.

Q. Okay. You read and noted a minute ago in preparation you referred to a 2013 note and a 2015 note, right? So, you obviously did look at the medicals before this *voir dire*, right?

A. Yes.

Q. The medical -- the clinical note and record of Dr. Lobo from the day after the accident, did you have a chance to look at that?

A. Yes.

Q. Okay. And Dr. Lobo, there is no mention of headaches after the accident -- the day after the accident.

A. Okay.

Q. Okay. So, wouldn't you agree that this statement is wrong, with respect to C.

A. No.

Q. Or with respect to B. Or whoever Ms. Cairns -

A. No, I don't. Because it's not uncommon for this to happen when I review documents where a patient did endorse it or the family doctor does one question per visit, or focuses on the most significant complaint, like her back pain, and doesn't move on to the next. The fact that the patient doesn't endorse it doesn't mean they don't have it. And if the doc asks the question, they might get that response. If they don't ask the question, it doesn't mean they don't have it. Would you agree?

Q. No, I don't agree at all, actually.

THE COURT: Well, it doesn't matter. It doesn't matter if counsel agrees --

MS. TANNER: Q. But Ms. Cairns had been treated for headaches, and both pre- and post-accident, and she doesn't shy away, I would put to you, from mentioning when she does have a headache. She gave extensive testimony about her headaches, and there was no mention of headaches after this -- the day after this accident. So, this statement here is factually inaccurate.

A. I disagree.

Q. That's -- well, it's factually inaccurate. It may be what she told you, but -- maybe it is what she told you; I don't know, I wasn't there, and you don't have notes, right? All you have is your appointment with her, and --

A. The document.

Q. -- what's come out of it. Your dictation, right.

A. Correct.

Q. So, you -- this is factually inaccurate, but you didn't go back and check. Like, there's nothing here to say on reflect -- you know, this -- it does not appear in her medical record.

A. I don't see how that informs things.

Q. You don't see --

A. Because I'm diagnosing her today with headaches, and this is what she's endorsed, and I ask the question direct, and that's what -- how she responds.

Q. So, is it your position that if Ms. -- this is -- everything I've shown you so far is Ms. Cairns' error. She's just mis-endorsing everything?

A. No.

Q. Oh.

A. I believe Ms. Cairns. Right? Patients have to give us symptoms to be able to diagnose.

Q. Okay, I know you believe her but -- is it -- so, is what you're saying then, when I'm telling you it's factually inaccurate, is what you're saying then, that she's mis-endorsing?

A. No, it very well could be that the question was not asked at the family visit, and was not endorsed in the note. That's another possibility.

Q. Okay.

A. And this is un -- not uncommon when I'm reviewing.

Q. Okay. How about -- let's -- if we could go back to page five, Your Honour. On all three reports, please. All right, we're going to look at Bilateral Lower Back Pain on reports A and C. We're going to look in the middle -- under Bilateral Lower Back Pain, we're going to look at the middle

paragraph there. On -- is everyone there? Yep. Your Honour?

THE COURT: Yes.

MS. TANNER: Q. Thank you. We're going to -- I'm going to -- I'll -- I'm going to start with "There are no features of". For patient A:

> There are no features of neurogenic claudication, and she can walk for distances without developing leg weakness.

That's patient A. And that came out of a question, and that's another part of the macro, I take it?

A. Yes, so how I ask that one is -- neurogenic claudication occurs when the spinal cord -- the bones -- are tight around the spinal cord, and that points to a medical emergency. So, I have to ask that with anyone that has back pain. So, I ask it "do you develop leg weakness after walking for ten minutes, and then you have to take a rest, and then you can walk again for ten minutes, and then you have to take a rest, but you cannot go continuously for 30 minutes". Or, "If you're at the supermarket, if you're leaning over a shopping cart, can you walk then longer than ten minutes?"

If they endorse yes, then it's yes for neurogenic claudication. If they say no, then there's no features of neurogenic claudication.

Q. Did you bring your macro program with you?

A. No.

Q. If we look at C:

> There are no features of neurogenic claudication, and she can walk for distances

without developing leg weakness.

Right?

A. Correct.

Q. Okay. So, in Ms. Cairns' medical records, including the one you said you looked at on the December 23, I think it was, 2015, there is commentary about Ms. Cairns' leg -- her left leg, in particular.

A. Okay.

Q. Okay? So, here it doesn't specify which leg, so is the macro not specific to what leg?

A. This is a diagnostic criteria, specifically for neurogenic claudication and spinal stenosis.

Q. Yep.

A. So, within that context, it's bilateral leg weakness that we're concerned about. Single leg would point more towards a radiculopathy.

Q. Okay. So, this -- when you're talking here, this is about bilateral leg weakness --

A. Right. Yes.

Q. -- so, she would have -- are you saying that she would have endorsed to you that both of her legs were --

A. Heavy, tired and weak after a certain amount of time walking. And that is when I have to tell them, okay, this part you need to go to the emergency department after you leave because it could point to a cauda equina and that's an emergency. So, it should be asked by anyone who has back pain.

Q. And did that December note, where it talks about sciatica and left leg pain, that --

A. It's irrelevant to this.

Q. I see. You don't feel at all necessary to

correlate or interplay the medicals and your -- and your --

A. No, there's a time and place to interplay the medicals. Radiculopathy can be over lauded, but when discs move, they can move from left to right within months, even weeks. And following these patients with EMG nerve conduction, we see that all the time. You do the MRI if the disc is pinching on the left, and then the symptoms on the right. Then they put a needle into the muscle and it shows me specifically that it's not on the left; it's on the right now.

Q. Okay. This is fact -- I put it to you, Doctor, this is factually inaccurate. So, Ms. Cairns' does not have bilateral leg issues.

A. That question is negative. It says she doesn't have weakness. She does not have neurogenic claudication.

Q. Right. But she -- I understand that. She testified, however, that she has left leg weakness.

A. In the context of a radiculopathy.

Q. Okay.

A. And I talk about radiculopathy later in the diagnosis section.

Q. All right. Well, why don't we look at page 11 then. Oh, hold on, page 10 in --

THE COURT: Sorry, 11?

MS. TANNER: Q. Sorry, I'm looking at page 10, first, Your Honour.

A. Which document, sorry?

Q. I'm -- just give me one second. It's -- for anyone, this is a challenging -- what -- if we look at C.

UNIDENTIFIED SPEAKER: Would you mind

(indiscernible)

MS. TANNER: Q. Yeah, we're going to look at page 10 on report C. And on the -- the paragraph that starts with "On motor exam".

A. Yes.

Q. All right. The last couple of sentences.

MR. PALMER: Sorry, could I just get a little bit more on paragraph number, please?

MS. TANNER: It starts with "On motor exam".

MR. PALMER: Ah.

MS. TANNER: It's half-way through the page.

MR. PALMER: Yeah, one, two, three, four, -- fifth paragraph.

MS. TANNER: Q. And the last two -- the last -- second to last sentence --

A. Mm-hmm.

Q. "In the lower extremity" -- then this, if you'll notice, is not highlighted.

A. Yes.

Q. So, I would expect that this is not part of your macro.

A. This was --

Q. Does that make sense?

A. This was part of the macro and edited for the specifics of this particular patient.

Q. Okay.

In the lower extremities --

So, the legs?

A. Yes.

Q. Okay.

-- there was a decreased sensation of pinprick over the anterior aspect of the right thigh.

A. Okay.

Q. Right?

A. Yes.

Q. Okay. And there's been no medical evidence in this case about Ms. Cairns' right thigh, let alone her right leg, or any part of her right lower extremity. So, factually, if one were to go through the medical records, this appears not to be related to Ms. Cairns.

A. Is this -- is this file for Ms. Cairns? It's redacted?

Q. No, this is just -- like, if this was in her report, that would be wrong.

A. Why would you say that?

Q. Well, you're the only one who's noted anything about a right lower extremity issue.

A. This is a physical exam manoeuvre. So, I take a pin, I pinch the different extremities, and I say is it lighter or the same? Left, or right? Is it hyper aesthetic? Does it hurt, or does it not? So, when I examined her, this is what she had, this particular patient.

Q. All right.

A. Yes.

Q. Can we look at B and C next to each other, on page 10.

A. Mm-hmm.

Q. And can we look at also page ten of A. So, A, B, and C, page 10, all next to each other.

A. Is this on the Physical Exam section?

Q. Yes.

A. So, A, page 10 is not Physical Exam on my copy, sorry.

Q. Okay, just a minute. Okay, your physical exam on patient A starts at page 7, Doctor. Sorry about that.

THE COURT: Sorry, I missed that page?

MS. TANNER: Page 7 is for Patient A. It's a good thing these are marked. Okay. So, the physical exam for patient A starts at page 7 and continues on page 8, Your Honour.

THE COURT: Yes.

MS. TANNER: Q. All right. So, if we could start there, just side by side, all right? And then if we could, on patient A, flip to page 8 and have them all side by side for a moment. All of the yellow represents, Doctor -- just so -- for your reference, exact wording. Every single word that's yellow that we looked at is precisely the same word. Word, for word, for word. Periods, commas, the whole thing, all identical.

A. So --

Q. Okay?

A. Is there a question --

Q. The parts that are not highlighted are different. Okay?

A. So, I would disagree with that. The "on motor exam" paragraph is a completely normal examination. The "on motor exam" paragraph -- that's for A, sorry --

Q. Yeah.

A. B, is completely different, and on the third is slightly different. And these are the specific differences among all three of these patients.

Q. Okay, hold on. Let's I want to give you the -

A. Sure.

Q. So, I'm looking at A and C for a moment --

A. Sure.

Q. It says:

On motor exam, the client had normal bulk and tone without abnormal involuntary movement. On --

And now I'm over on C:

A. Yeah.

Q.

On motor exam, the client had normal bulk and tone without abnormal involuntary movement.

A. Correct.

Q.

Muscle strength testing was full at five out of five, bilaterally.

Muscle strength testing was full, five out of five power, bilaterally.

Sorry, is this wrong somehow still?

A. This is a normal neuro exam on --

Q. I'm not --

A. -- number one.

Q. I -- I am trying to get that all the words are the same.

A. Yes, they --

Q. Okay, but you just --

A. But, no, not in the middle. If we look at the entire paragraph, there not all the words the same. So, for referencing --

Q. That's right.

A. -- paragraph to paragraph, A has one paragraph with similar intros, but the last line starting on document C, with the exception of the following findings in the upper extremities, sensory exam, these are non-highlighted. So, this is following your non-highlighted region in C.

Q. Sorry, the non-highlighted --

A. In C, for the same paragraph. Do you have a highlighted version?

Q. Yeah.

A. Okay, so --

Q. Oh, you're looking at C. Okay, sorry, yeah. With the exception of the following findings.

A. Correct.

Q. Right.

A. So, that's different --

Q. I know, because --

A. -- so, the paragraphs are not identical.

Q. I didn't say it's all identical. Sorry. I said all of --

THE COURT: I think you're agreeing.

MS. TANNER: What's that?

THE COURT: I think there's agreement here.

MS. TANNER: Yeah. And I'm saying --

THE COURT: (indiscernible) lines are identical, and in sample C, the variation is the "with the

exception of the following findings" --

THE WITNESS: Correct.

THE COURT: -- that's the difference.

THE WITNESS: Correct. And in sample B -

THE COURT: So, is it fair -- just so that I can maybe help here, what I'm getting is the -- you asked the question. It comes out normal, so your macro text is that text up to the point where you insert the exception.

THE WITNESS: Correct. Just, the only thing is, it's not a question for this section. This is a physical exam manoeuvre so I physically examine the patient --

THE COURT: Right.

THE WITNESS: -- and the findings there change. If they're normal, that's going to be the normal paragraph for section 8.

THE COURT: Okay.

THE WITNESS: If it's different, I add the difference. And I want to draw attention to item B. This is a very different paragraph, and I'd like everyone to see that.

MS. TANNER: Q. There's one -- let's say two and a half lines that are different.

A. That's from A to C.

Q. Yes. That's --

A. Now look at A to B, and B to C. Comparing B among all of these.

Q. There is no doubt that there are some parts --

A. How much percentage would you say this is? This is at least fifty percent different paragraph for the same

items. But ultimately, I'm going to -- physical exam is physical exam. And neurologists will dictate the physical exam the way they do it the same way over and over. They can dictate it, they can put a tick box, they can put yes/no. If there's similar among these three patients, okay. And -- you know -- yeah.

THE COURT: And you've indicated here on Motor Exam, that's the physical exam.

THE WITNESS: Yes. So, physical exam is the title of the page and then I go through each topic, yeah.

THE COURT: Right, but more specifically, on Motor Exam, that's part of the physical.

THE WITNESS: Correct. Correct, so that's the strength where you measure every muscle strength and you compare it. Yeah. And I'd argue those are quite different.

MS. TANNER: Q. So, the last paragraph on that page, Examination of the Cervical Spine, if we look at each of the patients -- and now I can't find my one for here, hold on. If we look at Examination of the Cervical Spine for each, A has something to do with her -- or her or his, whatever -- skull. That's different there in the middle. There is one, two, three lines that are different.

A. Yes.

Q. You see that are non-highlighted on that whole -- on that paragraph?

A. Yes.

Q. And in fact, on that page, you'd agree with me that there is one, two, three lines at the top, and one, two, three lines in the middle that are different.

A. Yes.

Q. Okay.

A. Because that's what the examination showed.

Q. And if we --

THE COURT: Where did you bring him?

MS. TANNER: So patient A is page 8 --

THE COURT: Yes.

MS. TANNER: So, I am looking at the amount of yellow versus the amount of not yellow.

THE COURT: Right. So -- but which paragraph, sorry --

MS. TANNER: So, I was --

THE COURT: You were on Motor Exam. I was just making a note to --

MS. TANNER: Yeah. Now, we're at the Examination of the Cervical Spine.

THE COURT: Okay, got it.

MS. TANNER: Q. Yeah. So, between these three patients, and those three paragraphs -- just that paragraph --

A. Yes.

Q. -- this one has three lines or two, whatever, depending on how you look at it. Three lines that are different. Patient B has one, two, three, four, five, six, seven, eight, nine, ten, eleven words that are different -- not lines. That's at page 11, Your Honour, for patient B.

THE COURT: Yes.

MS. TANNER: Q. And on patient C, there's one, two, three lines that are different. This looks like a boiler plate report, Doctor. There are -- between just this paragraph alone, at most there's a variety of eleven words to three lines that are different on three totally different people. So, at

most, the difference in your boiler plate -- or in your macro as you keep calling it -- is between ten words and three lines. That's the difference in your examination of the cervical spine.

So, when I asked you initially if you dictated the whole report, that was a bit misleading. There was really no information from you that -- most of your report is a macro, and then you just do a little bit of tweaking as you go.

A. The macro has pertinent positive ending of the statement, or negative ending of the statements. So, the beginning of the statement will be identical. The ending of the statement will be different depending on whether the patient had that physical exam finding, or did not. That's not tweaking, that's stating the truth. I mean, how many different ways would you like me to paragraph the -- paraphrase the physical exam? The findings are the findings.

Q. Well, if C is Ms. Cairns, the right thigh is some brand new factual thing that you're the only one who found.

A. On physical exam?

Q. Yes.

A. Yes.

Q. Okay.

A. Absolutely. And in fact, if we look at Mrs. Cairns, the cervical spine, she endorsed symptoms that might have pointed to a radiculopathy, but then my physical exam was normal for that, and as such I didn't endorse a diagnosis of a cervical radiculopathy, even though the symptoms pointed to that on the history.

Similarly, when it came to the lumbar spine, the fine numbness on the right could have been a pinched nerve in the back, a radiculopathy at L3, but in fact I endorsed something that's less likely related to the accident, meralgia

paresthetica of the thigh due to her weight gain.

So, the differences are very relevant. And these three documents, yeah, they're three patients that were similar. I have thousands of patients that I see that are very different.

Q. Would you mind turning to page 11 on patient C. So, the blacked-out part, I think is the name, and then the next blacked out part is the date of the accident. Your Honour, are you --

THE COURT: Page 11, then?

MS. TANNER: Yes.

THE COURT: Summary?

MS. TANNER: Q. Yes. This is your diagnosis, okay?

A. Okay.

Q. So, black -- summary, blacked out:

> -- whose current symptoms of neck pain, lower back pain, post-traumatic headaches, and post-concussive syndrome, are a direct result of the motor vehicle accident of --

Date.

> -- as she had not had any of the symptoms prior. She does complain of musculoskeletal myofascial soft tissue pain and injuries, however she also complains of several neurological symptoms and signs.

If this is Ms. Cairns, and she had headaches prior to this accident, this statement would be wrong. It would be

factually inaccurate. And this is your diagnosis.

A. The diagnosis of headaches, if you go to her likely accident-related diagnosis are here. Number three -- or sorry, number two --

Q. No, no, no, no, no, no. We're talking at the top, the summary. We're --

A. I understand that.

Q. Where it says, "she had not had any of the symptoms prior". And one of the symptoms -- well, let's look at all the symptoms. Neck pain, lower back pain, and post-traumatic headaches -- or in this case, headaches. Neck pain, back -- lower back pain, and headaches. She had not had any of the symptoms prior. If you had read her medicals, you would know that Ms. Cairns had neck pain, back pain, and headaches prior to this accident. So, is this paragraph wrong, if this is Ms. Cairns?

A. This paragraph is a summary of the symptoms endorsed. You mentioned that my diagnosis was wrong, so I want to comment on that. The diagnosis is not in that opening paragraph. That opening paragraph is a summary of the symptoms that the patient has. The diagnosis of the headaches is number two on the item.

THE COURT: Well, we're not on the headaches.

THE WITNESS: She just asked that about headaches.

THE COURT: She asked you, Ms. Cairns, whose current symptoms of neck pain, lower back pain, post-traumatic headaches, et cetera, she had not had any of the symptoms prior. So, just focus on that.

THE WITNESS: Yes.

THE COURT: So, in Ms. Cairns' records and

testimony what we heard is that she had all of these symptoms prior, and you're saying she didn't have them prior. So, we need some clarification.

THE WITNESS: So, that's not all of the symptoms prior. So, the post-concussion symptoms were not prior. After reviewing the document, she had one mention of a migraine headache in 2013 --

THE COURT: Any of the symptoms prior.

THE WITNESS: Yes.

THE COURT: What counsel has put to you is if you had read the medicals, you would realize that this sentence is inaccurate.

THE WITNESS: The lower back pain and the headaches would be incorrect. The post-concussion --

THE COURT: And neck pain and the lower back pain.

THE WITNESS: The neck pain there was -- I didn't see any indication of neck pain prior to the motor vehicle accident. I saw lower back pain.

MS. TANNER: Q. Did your records -- when you reviewed the records, did they include the imaging reports?

A. The imaging reports that I have in the -- in my document is the ones that I would have looked at, yes.

Q. Okay. So, post-accident imaging contained in Ms. Cairns' medical file were replete with extensive degenerative spine conditions, and extensive cervical spine conditions -- degenerative.

MR. PALMER: Your Honour --

THE COURT: Yes.

MR. PALMER: There is an issue with the line of questioning that's being put to the witness. If I

might ask the witness -- if I might ask that the witness be excused.

THE COURT: Okay, so why don't you step out for a moment so we can clarify the legal issue.

MR. PALMER: Your Honour, I'm happy to deal with this in reply, but it wouldn't -- it would deprive my friend of the right to her cross-examination. My friend is putting to the doctor about medical records. And if you'll recall from the beginning of this trial, Your Honour, we had opened up seven years pre-accident to date and we've agreed that those can go in. But Dr. Basile and Dr. Basile's summary on paragraphs -- on pages 17 and 18 of his report as it relates to Ms. Cairns, states the dates that he had for Dr. Lobo's records. And they are different than what has been admitted at trial. So, when my friend is asking -- and I'm happy to deal with this in reply, Your Honour, but I didn't want to deprive my friend of the --

MS. TANNER: You are.

MR. PALMER: Well, I'm not. I'm raising it now so you have a right to -- so that my friend has a right to cross on this. Dr. Basile has not seen all the records that have been adduced at trial --

THE COURT: But you know then --

MR. PALMER: He --

THE COURT: He has to explain his answers. He's got to say that. He just said he saw those -- the images.

MR. PALMER: He's seen images, Your Honour. I will --

THE COURT: And the question was relating to the images, and the difficulty here is he's not answering the question, counsel. It's a very simple question, and he's telling us, look over here. He drops down to number two. It -- the question was very simple, and it's a very simple one in my -- you know, even if every -- if there -- I understand his -- I'm understanding his methodology on the macros. In a sense, it's not all that different from a chiropractor who doesn't have sentences, but has the tick boxes with the numerous -- and they check them off. So, you know, the macros, I'll tell you right now based on the evidence, is on the line. You can go either way. I have to consider all in its totality.

But when I have somebody who says before the accident -- before -- she didn't have any of these symptoms prior to the accident, that's a -- that's a -- that's concerning. And when he's confronted with that, he tries to squirrel away from that.
MR. PALMER: I -- yes, Your Honour. And I agree that that should be put to him, but my only concern is the fairness of it. If it's going to be put to him for the proposition, she had headaches in 2010, you have never seen those records, so therefore your report is inaccurate, then I think that there should be a -- in fairness to the witness, there should be a very clear delineation of the records he had access to, and that his -- he's ignored those records. And Your

Honour, if he squirrels away from that, that's -- the evidence is the evidence. But --

THE COURT: In e-exam, you can go back and clarify what records he saw and what he didn't, but --

MR. PALMER: Yes, Your Honour.

THE COURT: -- it's his answers, he just said he saw the images. So, he has said he's seen a fair bit. So, the proof is in the pudding. I mean, ultimately, as the gatekeeper, we'll go -- I don't want to get ahead on the legal arguments. This might be a lot more complicated than what it looks like on the face of it, but the question as put to him, is fair --

MR. PALMER: Yes.

THE COURT: -- and he needs to explain that.

MR. PALMER: Yes, Your Honour. I'll deal with that in re-exam, thank you.

THE COURT: Yeah. Anything else before we call the doctor back in?

MS. TANNER: No, we're ready, thank you.

THE COURT: Okay, let's get him back in.

MS. TANNER: Q. Hi. Okay. So, with respect to Ms. Cairns not -- we're going to just drill down on the headache issue before we go on to the imaging. But she did not have any of the symptoms prior, and I want to just look at -- you had three years of CNRs, the plaintiff's family doctor's CNRs. So, Exhibit 6, Your Honour.

So, Doctor, if you had her CNRs, on June 19th, 2013, she went and saw Dr. Lobo and discussed her headaches and that she was on medication for high blood pressure and headaches. Okay? So, that's in three years prior. You would

have had those records. So, there's one instance of pre-accident headaches.

THE COURT: Before we just confirm, do you have those records? I didn't hear the answer.

MS. TANNER: Sure. Let's see --

MR. PALMER: Yeah.

MS. TANNER: Yes. The counsel is confirming that at number 13 of the records that are summarized in the doctor's report includes these pre-accident clinical notes and records.

THE COURT: Okay.

MS. TANNER: Q. And if you had her pre-accident clinical notes and records, you would have seen on May 10th, 2013, her appointment to Dr. Lobo where she is talking about her headaches improving.

A. Okay. Yes?

Q. At -- and if you had and reviewed the clinical notes and records of Dr. Lobo, you would have seen then, February 5, 2013, the reason for the visit. And again, the discussion of metoprolol and how it was helping with her headaches. So, those are three instances alone --

THE COURT: And the first date was?

MS. TANNER: The first date, Your Honour, was June 19th, 2013.

THE COURT: Okay, thanks.

MS. TANNER: They're not in consecutive order.

THE COURT: That's fine.

MS. TANNER: Q. Okay. Those are at least three instances of headaches prior to this accident.

A. Nine years prior to my assessment of her, yes.

Q. Okay. Sure. And you're doing an assessment

about a car accident that happened on 2016 --

A. Yes.

Q. -- and the clinical notes and records were produced to you three years prior to that car accident, and your summary is that she had not had any of the symptoms prior. And one of those symptoms that you note is headaches.

A. Yes.

Q. So, that is -- if C is Ms. Cairns, that is wrong.

A. The headache portion of that is wrong, but does not change my diagnosis as I'm talking about the current symptoms. And the diagnoses are underneath.

Q. How can that be possible? That pre -- that pre-accident headaches that form a part of your summary, and that lead to the diagnosis, how is it possible that pre-accident headaches don't impact a diagnosis with respect to headaches?

A. The actual type of headache is changing. There's migraines headaches. There's medication overuse headaches. There's tension-type headaches.

Q. I'm talking -- no, you said there's none.

A. No, no, I'm talking about the diagnosis now. The --

Q. I know, but I'm talking --

A. -- diagnoses that I'm making. So, the previous history three years prior of a migraine is -- doesn't change my diagnosis for the present day. You can say that there was a worsening of headaches versus they were caused by the accident. But the diagnosis on the day of assessment doesn't change. The diagnostic criteria aren't influenced by did the patient have a prior history of migraine, or not.

Q. Okay. And you had -- you would have had the

diagnostic imaging from pre-accident for three years previous, correct? It would have been contained in the family doctor's records.

A. Let me see if I have it in my notes. Trying to be efficient. So, I looked at the MRI scans in detail, the previous assessments in detail, the MRI scan of the brain, the MRI angiogram, the CT angiogram, the MRI of the head, and the Circle of Willis, 2016, 2015. And -- but to answer your question, yes, I would have had access to Dr. Lobo's previous imaging, yes.

Q. Okay. So, on February 11th, 2013 there was a chest x-ray that found in the thoracic -- "Ms. Cairns' thoracic spine, bulky bridging osteophyte formation in the mid thoracic levels anterolaterally". Would you agree with me that that type of degeneration could lead to back pain?

A. If we MRI'd or CT'd or --

Q. Just --

A. -- x-ray'd 100 people, there could be easily 60, 70 percent that are asymptomatic with that finding.

Q. And there could be --

A. Could it lead -- yes.

Q. All right. And when you were saying that Ms. Cairns had no -- any of the symptoms of lower back pain was one of those things, you had this imaging. Did you ask her any questions that would have related to this?

A. To if she's had imagining? Or if she's had back pain?

Q. Back pain.

A. I had a whole section on back pain.

Q. Okay. But the December 23rd note that you said specifically you referred for preparation of today, is

about lower back pain and radiculopathy into the back leg.

A. Which December 23rd note?

Q. There's a December -- you were -- at the beginning, you were very specific this morning that you reviewed something from 2013 and December 2015.

A. Okay, 2015, yes.

Q. Yeah. And the 2015 note that's two weeks before this accident, is about lower back pain.

A. Yes, I see --

Q. And -- it's an older term called lumbago, and sciatica.

A. Yes.

Q. Right. So, again, the statement of she had not had any of the symptoms prior is wrong for Ms. Cairns if in fact she did go to the doctor on December 23rd complaining of lower back pain.

A. Yes, regarding the lower back pain, but it does not change my impression today of what she has -- or when the report was made.

THE COURT: Based on what you're saying, Doctor, then the paragraph ought to have said although she had these complaints prior to the accident, it -- my diagnosis remains. Or, these prior complaints are irrelevant in my --

THE WITNESS: Correct.

THE COURT: -- that's what you were saying on the stand --

THE WITNESS: Yes.

THE COURT: -- but this report doesn't say that.

THE WITNESS: Yes.

MS. TANNER: Q. You had her post-accident

history, and her post-accident clinical notes and records. There is thoracic spine, cervical spine, and chest imaging of January 8th, 2016, two days after the accident that finds degenerative conditions in Ms. Cairns from C1 and 2 levels, all the way down to C6 and 7. So, virtually the whole neck, you'd agree.

A. Yes.

Q. Okay. And the words that are used in this diagnostic imagings are extensive, increased bony formation, slightly more obvious osteophytic lipping, fairly exuberant increased bony formation. You would have seen all that.

A. I would. But those won't lead to heavy symptoms. Those are -- like I said, the vast majority of time, we get musculoskeletal pain on that. And that's not much.

Q. Okay.

A. Okay?

Q. It's possible that someone -- when you're saying all these percentages, there's a percentage of people who are a --

A. Asymptomatic.

Q. -- and people who are --

A. Symptomatic.

Q. -- symptomatic.

A. Yes.

Q. Right? And given this condition of her neck two days after the accident, that would have predated the accident. A degenerative condition didn't occur in two days.

A. Yeah.

Q. Okay. And so, possible that she had neck pain before this accident.

A. Possible, but unlikely, based on the 70

percent, 30 percent that we spoke of.

Q. Well, you gave a very similar -- very similar percentages for the lower back pain, and I showed you that she had lower back pain. So, in that instance, she's part of the "I have symptoms" versus the asymptomatic.

A. Well, if you have symptoms, it's different. If they have symptoms that they talk about is the sciatica. That points more towards a radiculopathy, not degenerative bony pain.

Q. (indiscernible, multiple parties talking) that was -- but that was her neck.

A. (indiscernible, multiple parties talking) the paragraph where I ask about musculoskeletal pain and those pains, are the ones -- you have pain and stiffness that wakes you up in the morning and then it's worse in the morning when you wake up, and improves after warm up or after taking a shower. So, when I ask that question, that's what I'm talking with those findings.

Q. Okay.

THE COURT: My staff is asking for a morning break.

MS. TANNER: Fair enough, thank you.

THE COURT: Okay, let's take our morning break now, 20 minutes.

MR. PALMER: Come back at 11:20, Your Honour?

THE COURT: Yes, please. Thank you.

R E C E S S

U P O N R E S U M I N G :

MS. TANNER: Q. Doctor, I wasn't showing you the

documents before, so I'll show you a couple now while we just go over the last two clinical notes and records. Your Honour, we're going to look at Exhibit 38, which is a clinical note and record of Dr. Lobo dated September 16th, 2015. So, this is September before the accident that -- hold on -- are you able to see it on your --

THE COURT: I can see it on this screen.

MS. TANNER: Q. Yeah? Oh, great. So, this is the September before the accident, and do you see under her musculoskeletal?

A. Yes.

Q. It's underlined. And it says:

> Gets neck pain times a few months worth with sleeping.

A. Yes.

Q. Okay, so that would be a pre-existing neck complaint.

A. Yes.

Q. Okay. And now, Exhibit 10, Your Honour, which is a May 4th clinical note and record of Dr. Lobo. And sorry about the -- all the scribbles. And this is four months after the accident. So, you would have this record. And it says:

> Did have migraines in past.

Do you see that?

A. Yes.

Q. And you would have had this record.

A. I would have had it, yes.

Q. Okay. So, on patient C, under Summary, you're familiar with the term "causation"? So, what causes. And then we use it at law, so this accident is causally related, or caused -- or causation to X, right? So, your causation is this paragraph, the first one, and then the next ones are your diagnoses. So, this is where you are summarizing what you know, and attributing it to the accident, and then providing the six diagnoses. Correct?

A. Yes.

Q. Okay. So, if she did have -- this is where it says she didn't have any. If she had some, then that means your report would have been more along the lines of she had these before and now they are exacerbated.

A. Yes.

Q. And your report doesn't say that.

A. You're correct, yes.

Q. Okay. And --

A. If there's more info coming up from the accident date forward, I'm happy to review it and take a look and adjust opinion based on that.

Q. Oh, well, you had all of this. These are just -- this is one record just before -- a little bit before the accident and a record a little bit after the accident. They were all contained in Dr. Lobo's notes, which you had.

A. Yes.

Q. And if she didn't have any of the symptoms, then essentially now what you're saying in your causation paragraph, and then onto the diagnoses is, this car accident caused all of these things that are new.

A. Correct, that's what it says, yes.

Q. Okay. Your Honour, I would like next -- and

Doctor -- to go to page 4 of patient 1 -- page 4 of patient 2 -- A, sorry. Page 4 of patient B, and page 5 of patient C. No, that's -- yes, that's right.

THE COURT: Sorry, page 4? Of A?

MS. TANNER: Page -- yes.

THE COURT: (indiscernible) Oh, I have it. Found it. Sorry.

MR. PALMER: Sorry, (indiscernible)

MS. TANNER: Yes.

MR. PALMER: Can you just clarify the pages?

MS. TANNER: Q. Yeah. Oh, so it's page 4, I think, of all of them. Mine had -- we're looking at the immediate post-MVA symptoms. And one's called Immediate Symptoms, immediate symptoms. All right.

All right, so Immediate Symptoms, the first paragraph, Doctor. Other than on patient C where there is one sentence that's different, each of these paragraphs, by all accounts, are identical.

A. Yes. I have to ask these questions because the diagnostic criteria, ACNRs, ask for those immediate symptoms of, for instance, retrograde, anterograde amnesia, loss of consciousness, hit your head, et cetera.

Q. So, they're all the same. Let's -- so, then let's just look at patient C --

A. Okay.

Q.

There was confusion and she did hit her head but did not lose consciousness.

A. Yes.

Q. If this is Ms. Cairns, what part -- what --

how -- what did she hit her head on?

A. Uncertain.

Q. Well, when you're asking her, and she tells you she hit her head, you don't ask a follow up question? Like, for example, did you hit it on the nice soft airbag? Or did you hit it on the glass window? Or did you hit it on the steering wheel? No follow up questions there?

A. Yes, sometimes I do; it depends.

Q. You don't think in a head injury case, knowing what she hit her head on would be important?

A. It can be in some cases, yes.

Q. All right. If this is Ms. Cairns, do you see the paragraph that says "She did not have lacerations and cuts"?

A. Where's that, sorry?

Q. It's part -- half-way through --

A. Yes.

Q. Do you see where it says "She did not have lacerations and cuts"?

A. Yes.

Q. Okay. And in fact, Ms. Cairns, if this is Ms. Cairns --

A. So, this is with reference to lacerations and cuts on the head. This is the section on head injury.

Q. No, this is the section on immediate symptoms.

A. I agree, but when I'm asking this question here, it's really specific to the head is where -- what I'm --

Q. Where does it say that?

A. It doesn't say that, yes, but I'm asking really with respect to bruising, battle signs. I'm asking because those are important from a head injury perspective.

Q. But what she hit her head on was not important

to the head injury perspective, but if there's a cut on her head --

A. Or a bump --

Q. -- that's important to the head injury?

A. Or a bump or a bruise, yes.

Q. Are you able to see that?

A. Yes.

Q. Where it says pain in knees bilaterally, related to abrasions on her knees?

A. Okay, yes.

Q. Yes? If one didn't know that this section was just about her head, one -- this would be wrong, if this was Ms. Cairns.

A. Yes. I mean, abrasions to the knees from a neurological perspective, I wouldn't pay much attention to that when reviewing then documents.

Q. Well --

A. It isn't neurologically relevant.

Q. Okay. So, they show that -- this is -- take a minute and look at this --

A. Mm-hmm.

Q. -- if you don't mind, under S. This is everything that Ms. Cairns reported the day after the accident to her family doctor.

A. Yes.

Q. Okay. Did you note any mention of a headache the day following the accident?

A. I did, yes.

Q. Where?

A. Sorry, in -- on the screen? Or in my note?

Q. No, no, right here. Under -- this is what

she's saying the day after the accident --

A. Oh.

Q. -- like, one day later.

A. Yeah, no. No, I don't see --

Q. She's saying -- there's no mention of a headache, right?

A. Correct.

Q. Okay. And in your immediate symptoms -- and in a paragraph that you now say is about head and head injury --

A. Mm-hmm.

Q. -- you have "she had immediate pain in her neck, shoulders, lower back, followed by a headache".

A. That's what she endorsed.

Q. Oh, but surely this would be an important -- like, it would be important to know not only what she hit her head on, but whether it's accurate that she did or did not report a headache immediately after the accident? Because in order to diagnose concussion, you need to know what are the immediate symptoms so that you can causally relate what happens right after the head trauma and then follow it through to concussion. And so, the immediate post-accident symptoms, I put it to you, are crucial.

A. Yes, they are. And I also asked the patient what the immediate symptoms were and I take collateral history from family as to what the immediate symptoms were.

Q. You spoke to her family about this?

A. No --

Q. Oh.

A. -- I'm talking in general.

Q. Oh, I see, okay.

A. Yeah. (indiscernible)

Q. All right. So, in any event, followed by a headache, according to her family doctor, Ms. Cairns did not report that.

A. Correct.

Q. Okay. And the cuts also, she did report that.

A. On the knees, yeah.

Q. Yeah. And she did have immediate symptoms of concentration and balance issues immediately following the accident which worsened over the subsequent days. Right?

A. Yes.

Q. Okay. There is nothing in this clinical note and record from the day after the accident with respect to concentration or balance, or any record for that matter, with respect to concentration worsening over the next couple of days, or subsequent days.

A. Correct.

Q. So --

A. Patients --

Q. -- is this Ms. Cairns? Like, I -- like, if -- let's just say, this is Ms. Cairns, okay? This is her report. Is this Ms. -- like, is this the right person?

A. The -- physicians have to ask the questions. So, if they're interested in head injury or concussion, they have to ask the open-ended questions and the close-ended questions. So, if they don't ask do you -- did you have balance issues immediately following, they're not going to document that. And that's been routine. I've seen that for years, looking at these documents. When the emergency department sees them, family physician sees them --

Q. Yeah.

A. -- so, they need to be questioning a

concussion first before they go into deep depth as to what those questions are, if they even go to that depth.

Q. So important, I agree. So, the next paragraph where it says "police, fire trucks, and ambulance were needed" -- and I take it you had all those records? From the date of loss? You would have had hospital records, right?

A. Yes.

Q. Okay. And you would have had ambulance records from the date of loss; that makes sense. That's certainly part of an immediate, right?

A. Yes, yeah.

Q. And a way to -- and a way to assess. And here you -- it says "EMS caregivers assessed the client and they did find her worthy of transfer to a hospital". Right?

A. Yes.

Q. Okay. So, that's factually inaccurate. Ms. Cairns did not go to a hospital.

A. She decided not to. It says "but she decided not to go to the hospital".

Q. Right. So, you just took -- so, how do you find there that EMS caregivers assessed the client and they did find her worthy of a transfer to hospital?

A. That was a question to the patient as well. Did the ambulance arrive? Yes. Did you go to the hospital? No.

Q. Okay.

THE COURT: But ambulances arrive all the time.

THE WITNESS: Yes.

THE COURT: So, there's a missing piece of the puzzle here.

THE WITNESS: An ambulance arrive at the scene?

Or --

THE COURT: Ambulances arrive all the time, they don't conclude -- just the fact of their arrival doesn't make somebody worthy of being transported to the hospital, does it?

THE WITNESS: Yes.

THE COURT: They do?

THE WITNESS: No, no.

THE COURT: Oh, okay. So, just -- I'm just trying to understand your conclusion. Did an ambulance arrive, she didn't want to go, how does -- do those two pieces of information translate to the conclusion that she was worthy -- where's the sentence -- of being transported.

THE WITNESS: But I ask a patient, and patient indicated that ambulance arrived, they assessed her, they offered her to go to the hospital, and then she declined. And that was asked of the patient.

MS. TANNER: Q. Did you confirm that through review of the ambulance call report?

A. No.

Q. Because you didn't have one.

A. I'm uncertain.

Q. You don't know if you had one?

A. No, I don't recall.

Q. You reviewed the medicals for an hour for today's purposes. You didn't note whether or not there was an ambulance call report?

A. I don't remember seeing it.

Q. You don't remember or you didn't review or you

didn't note. Sorry, I'm not really understanding.

A. I reviewed, but I don't remember seeing an EMS report.

Q. It would have been one of the first documents, I would expect.

MR. PALMER: Sorry, what is that question? Like, my friend says it would have been one of the first --

MS. TANNER: In a medical brief that's for a car accident, one of the -- generally, they go in chronological order.

THE WITNESS: I've not had that experience.

MS. TANNER: Q. Okay. So, she told you in October of '22 that she had immediate headaches, that she did not have any lacerations or cuts --

A. On the head.

Q. -- and that she had immediate concentration and balance issues following the accident. She told you all that.

A. Yes.

Q. Did you have her -- the Airport Rehab file?

A. I don't recall.

Q. And we will -- do you have the --

THE COURT: Did you have Airport Rehab?

MS. TANNER: Q. Oh yes --

MR. PALMER: (indiscernible)

MS. TANNER: Q. Thank you. Okay, so at number 8 of your documents given -- and the reason I can't find them on the report is because we had to black them out -- is the clinical notes and records from Airport Rehab center from January 13th, the week after the accident, up until March 27th,

2018. So, did you review those records?

A. I would have looked at them, but I don't recall details.

Q. Okay. Well, did you review them in the last couple of days for preparation for today?

A. No, this was before Friday.

Q. Okay. So, there are -- I put it to you, there are a number of notes in there about open wounds and knee issues and cuts and lacerations.

A. As I said, for a neurological evaluation, laceration that's in the legs, it would not strike my attention.

Q. Well, on -- in this -- the next paragraph you do refer to her chiropractic, physiotherapy, and massage therapy.

A. Mm-hmm.

Q. So, it's important to mention that she was advised to seek it. Right? And then the next paragraph, you go through and say how many times a week she had it and what it was --

A. Mm-hmm.

Q. -- and in that review, it didn't strike you that there was notes about lacerations and open wounds.

A. I wouldn't be looking for that if they're on the knees.

Q. Because this is a -- because this -- we should know that this entire section is about immediate head symptoms -- where it says immediate symptoms.

A. No, not necessarily. The line about lacerations --

Q. I know, but I don't -- how are we supposed to --

A. I hear you.

Q. Yeah, okay.

A. I agree.

Q. So, we can't know really, what this paragraph is about without asking you some detailed questions.

A. Yes.

MS. TANNER: Those are all my questions for this witness, Your Honour.

THE COURT: Thank you. Mr. Palmer?

MR. PALMER: Your Honour, may we have -- just because my -- the records are somewhat -- you know, we have a multi-faceted approach to what we're going to ask him about. May we have ten minutes to organize our records, please?

MS. TANNER: Didn't we just have a 20-minute break?

MR. PALMER: Well, yes. Your Honour, my friend just said well didn't we just have a 20-minute break --

THE COURT: I heard her -- what she said.

MR. PALMER: Can we --

THE COURT: Let's excuse the witness. I'll give you the ten minutes, but I need to talk to you before that, just for a couple of minutes. It's a logistics question because rightly or wrongly, the jury is here, and I'm -- I don't know the outcome of this motion, and it would be premature in any event to pronounce -- but I would definitely call any other witness -- the jury in until two o'clock, correct?

MR. PALMER: If then, Your Honour. I don't -- I

expect I'll have to take several -- you know, I'll have to take some time to ask Dr. Basile some questions in a re-examination of what my friend has put, properly of course. And then of course, there are submissions.

THE COURT: Yes.

MR. PALMER: So, it would strike me as being --

THE COURT: Unlikely that we're going to get to the -- regardless of my ruling, we're going to burn through the whole day on this.

MR. PALMER: It looks likely, Your Honour that --

THE COURT: It's not -- I'm not critical, I just want to -- the responsible thing to do is to tell the jury they go home, they come back tomorrow, and the chips will fall where they fall.

MS. TANNER: And tomorrow, I know Dr. Getahun has come -- unless there's --

THE COURT: Yeah, he's in the air right now, but -- so, he won't know on his arrangements -- or, has he already confirmed anything?

MR. PALMER: We've spoken to him on logistical arrangements, Your Honour, at length last night. My colleague did that --

THE COURT: Mm-hmm.

MR. PALMER: -- not myself. But --

THE COURT: We're tracking for nine o'clock tomorrow?

MR. PALMER: Right, for nine o'clock tomorrow, I believe was the conclusion, Your Honour, yes.

MS. TANNER: And with respect to whether there's any down time or time available, we're prepared to

lead Dr. Paget (ph) in his direct of the *voir dire* whenever this is done. He'll just need a little bit of travel time; he's not that far.

THE COURT: Okay.

MS. TANNER: So, we can certainly use it for the direct. I'm ready to go for --

THE COURT: For today you mean?

MS. TANNER: Yeah. Well --

THE COURT: Okay.

MS. TANNER: I'm just saying --

THE COURT: Yeah.

MS. TANNER: -- that to lead him through the direct to address the issues in the plaintiff's motion materials might satisfy matters, I'm not sure. But in any event, we're ready to do that whenever. So --

THE COURT: Okay.

MS. TANNER: -- I just put that out.

THE COURT: More realistically -- I don't want to rush this. This -- for a variety of reasons, this may be the most important motion, separate and apart from the outcome. But this gatekeeping function is serious.

MR. PALMER: Yes.

THE COURT: The directions from the -- increasing directions from the Court of Appeal on the judges is pronounced, and so this is not a day where I want to rush. So, if you need to let Dr. -- if Dr. Paget's content to be sort of on standby, might be called today, but more probably tomorrow, I think that's a fair information to give to him.

But when it comes to the jury, I think we send them home today. And that's not -- I want it to be clear, that's not an indication of where I'm going on this motion; I think I've made that clear, but I want it formally clear on the record. It's out of respect for them. Realistically, you'll be into submissions in the afternoon, maybe. My concern is if the re-exam takes the better part of the afternoon -- and I don't mean to rush you, Mr. Palmer -- then you may want to think about whether you do submissions after Getahun tomorrow.

So, I'm putting it all out there because it is a significant point, you know, unless after you go through this exercise, the two of you have a change of hearts, and you don't want a ruling from me. Either -- and again, I'm not putting my finger on any scale, that's always an -- that's always an option there. But there you have it. Okay? Ten minutes.

MS. TANNER: Thank you, Your Honour.

MR. PALMER: Thank you, Your Honour.

R E C E S S

U P O N R E S U M I N G :

MR. PALMER: Your Honour, if I could recall Dr. Basile for re-examination, please?

THE COURT: Yes.

MR. PALMER: Thank you.

RE-EXAMINATION BY MR. PALMER:

Q. Good morning, Doctor.

A. Good morning.

Q. So, on the screen I've shown -- I've got your report here -- sorry, to make it blurry there for a second -- and I've taken you to the portion that my friend took you to this morning as well. And a summary, which is in evidence, is Rex -- or on this morning, is Rexine Cairns is a 66-year-old whose current symptoms of neck pain or back pain, post-traumatic headaches, and post-concussive syndrome are a direct result of the motor vehicle accident of January 6th, 2016 as she had not had any of the symptoms prior.

Doctor, you've noted here lower back pain and post-traumatic headaches. My friend did ask you, and I believe you were in the midst of discussing headaches, when that answer was curtailed. When you noted post-traumatic headaches, what is the significance of the first word there?

A. So, post-traumatic headaches are after the car accident. So, the headaches that were diagnosed post-accident were multiple sub-types -- four sub-types -- which I mentioned were tension headaches, post-traumatic migraine headaches, occipital neuralgic headaches, and medication overuse headaches.

THE COURT: Sorry, what was the last one?

THE WITNESS: Medication overuse headaches.

MR. PALMER: Q. Okay. And so, with the -- my friend did show you this morning some notes indicating headaches prior to the accident. What can you tell us about those?

A. Those headaches were migraineous but not the other three sub-types.

Q. Okay.

THE COURT: Sorry, those headaches were?

THE WITNESS: Migraine. At least I believe that they were mentioned.

MR. PALMER: Q. All right. And just while we're here -- I mean, this is not going to be the next big part -- my friend has repeatedly referred you both on the first day of this motion, and today, about the American Academy of Neurology criteria, and you've repeatedly said now -- if I have this correctly, and I won't phrase it exactly the way you do, Doctor -- but now it's chronic concussion symptoms, or something like that.

A. Traumatic brain injury with persistent post-concussion symptoms.

Q. Okay. And you say "now" --

A. Mm-hmm.

Q. -- what was it in 2022?

A. In -- depends. So, if you look at the diagnostic criteria -- these weren't published, but I submitted that I go to several conferences and talks, and along the way you learn things, and you update your -- the way you do things based on what the latest literature is. So, in 2022, I'd already known that the term post-concussive syndrome was being shied away from because of -- it didn't reflect that this is a traumatic brain injury. So, it -- publication-wise, things didn't come out yet, but they were talking about this at conferences.

So, I continued to use post-concussion syndrome, but even the diagnosis of post-concussive syndrome is based on a) diagnosing a concussion first -- so, once you've made the diagnosis of a concussion first, then you look at the symptomatology immediately of the accident that allows you to make that diagnosis of concussion first, and then you look at the persistent symptoms. So, the symptoms that start with the concussion, and then remain above and beyond the typical time

where people get better.

And that happens in 10 to 25 percent of patients depending on the study you look at as to the persistence of those initial symptoms beyond the typical time.

Q. Okay. And -- sorry, I appreciate that was a lot of information there --

THE COURT: Sorry, beyond what time?

THE WITNESS: The typical --

THE COURT: The typical. I didn't hear the word.

MR. PALMER: Q. So, I appreciate that was a lot of information there, Doctor. You said it was being shied away from --

A. Correct.

Q. What are the formalities when -- what are the formalities with respect to -- I'm just going to call it PCS for a second -- post-concussive syndrome versus the other term you've mentioned -- what are the -- what are the formally accepted terms in 2022?

A. In 2022, basically there was no consensus. There was expert opinions and the experts were basically saying that PCS as a term doesn't really encompass that there's a traumatic brain injury. So, it went on to this additional term.

So, even what constitutes an initial concussion, in terms of what symptoms -- so, for instance the initial American Congress of Rehabilitation Medicine criteria required there to be -- that you'd hit your head and that you had lost consciousness, and we knew from latest research that that didn't need to be there.

So, we knew that from latest research, but the ACRM guidelines weren't updated until later to reflect that. So, things like balancing, coordination immediately after the impact, previously wasn't there in the diagnostic guidelines, but we knew

from conferences that it became important.

So, for instance, with the Superbowl, it was in the news, there's a quarterback that was hit and got up after the hit. He was off coordination, off-balance, and then the doctor took the field, checked his eyes, and put him back into the game, and he was hit again and he was seriously injured. And there were serious consequences from that. And from that, the ACRM guidelines now include, for instance, balance as an immediate symptom that reflects that a concussion has occurred.

THE COURT: So, it's an evolving science, is what you're saying.

THE WITNESS: Yes, like everything, yes.

MR. PALMER: Q. Okay. So, Doctor, you have at this point -- and I just want to direct your attention, because my next line of discussion is going to focus on my friend putting to you some issues which you described as subjective report. And so, you've mentioned here at the summary, complain --

> She does complain of musculoskeletal myofascial soft tissue injuries, however she also complains of several neurological symptoms and signs.

At what point are you referring to, when you say she complains?

A. Ongoing complaints.

Q. So, let's go back for a second, Doctor. I'm going to take you to another part of your -- of your report here. Sorry. Apologies. Now, I'm taking you to page three of the report. And so, my friend put to you some of the information in the -- what I'll call history -- suggested it was subjective. Could you advise me how you got the information on page three?

A. So, these are direct questioning to the patient.

Q. What if your patient is not telling you the truth?

A. Then we look at the records and see, but --

Q. Okay. And when you write a report, how does that affect it?

A. It doesn't affect the diagnoses all that much, but it does -- can affect causation, as I mentioned.

Q. Why doesn't it affect the diagnoses?

A. Because the diagnoses are what the patient has now, when I'm assessing the patient.

Q. Okay. I'm just going to take you -- first, I'm just going to show you on the screen, as my friend did. She indicates that she stopped working about a few weeks prior to the accident.

A. Yes.

Q. And so, now I'm going to take you to the documents reviewed. It's a clean copy, Your Honour, apart from circling number eight, which my friend had put to the witness.

THE COURT: Yes.

MR. PALMER: Q. Is there anything here, Doctor -- and I can hand up a copy if you don't have one -- is there anything here that you would have reviewed to assess the veracity of Ms. Cairns claim about when she left work? Sorry, I'll put on page 18 first. Tell me when I can go to the next page, or I can hand one up.

THE COURT: Well, the Doctor has his -- the copy of his report, I can see that.

MR. PALMER: All right.

THE COURT: So, you can just direct him to -- I don't think -- I have a copy of it. If you just

give us the reference, we don't need to have it on the ELMO.

MR. PALMER: Q. Okay, yes, Your Honour. So, this is pages 17 to 19 of Dr. Basile's report, dated October 5th, 2022.

A. Yeah, I don't recall if there's anything that I would look at there--

Q. Okay.

A. -- for work history.

Q. Okay. And my friends also put to you that other details --

THE COURT: Counsel, just to verify, the Doctor had Dr. Lobo's notes for how many years pre-accident?

MR. PALMER: Well, I should -- yeah, what's listed, Your Honour, is from February 5th, 2013 to -- I'm just going to put that up on the screen, Your Honour -- February 5th, 2013 to --

THE COURT: Just what number is it, because there's a lot of documents for me to absorb. I just want this for my notes.

MR. PALMER: This is number 13, Your Honour, on page 17. It's --

THE COURT: Okay.

MR. PALMER: -- medical notes and records of Dr. Lobo --

THE COURT: From -- okay.

MR. PALMER: -- February 5th, 2013 to April 5th --

THE COURT: Got it. Got it.

MR. PALMER: -- 2022.

THE COURT: Okay.

MR. PALMER: And that appears to be -- appears to

be it.

THE COURT: Right. Okay, thank you.

MR. PALMER: Q. Thank you. So, Doctor, I've got page three here again, and page four. Now, my friend put to you at page four that the immediate symptoms would be important for diagnosis, and you agreed with that. Now, looking at pages three and four -- and so, I'm using headings now -- apologies -- pages three and four -- obviously identifying information doesn't count. Employment and Education History, Past Medical History, Medications Prior to the Accident, Medications After the Accident, Surgical History, Social History, Pre-Accident Functional Status, Prior Accident Work-Related Injury, and History of Accident. And are any of those other than subjective reports of Ms. Cairns that you rely on when drafting your report?

A. Some is from reviewing the documents as well.

Q. Okay. If anything is purely subjective, does that affect your medical assessment?

A. No.

Q. Okay. Does it affect your medial diagnoses?

A. No.

Q. Okay. All right. So, I want to talk a little bit, Doctor, about something I can't show you anything about, which is your evidence given to my friend about macros. What is a macro?

A. So, in Dragon, you can say a certain phrase, or if you say "macro concussion history" as -- a paragraph will come up that I created that starts the sentence, and goes through each of the diagnostic criteria for concussion. And then within the second half of the sentence, there are completion sentences as to whether or not it was positive or negative. And then I double-click and it completes the sentence.

Q. Okay. So, let's go to one of those sections -

A. Okay.

Q. -- for a second on your report. Let's take you to page ten, and it's paragraph five, all right?

> On motor exam, the client had normal bulk and tone without abnormal involuntary movements. Muscle strength testing was full five out of five bilaterally. Intrinsic hand muscles are five of five on the MRC grade. Ankle dorsa flection and EHL strength were within normal limits. Plantar flection was graded at five out of five.

And I could go on.

A. Yes.

Q. But you see the paragraph. If you're using a macro, and you're assessing me today, what does that paragraph look like on a motor exam?

A. Exactly the same.

Q. So --

A. With the exception of the sensory. I don't know if you have any sensory abnormalities.

Q. Okay. What would you do -- what would you do to test if I had sensory --

A. I would take a pin and test you and see if it -- you'd had it.

Q. Well, please don't prick me with anything --

A. Sorry.

Q. No, that's okay. But my question is, if you did that to me, what would that macro look like? What would the --

A. The same. It would be normal. You just -- they would be the exact same sentences, with negative for each item.

Q. Okay --

A. For instance, in the hospital, we used to dictate on the phone after you see the patient. You dictate into the phone and you memorize this, essentially, because we'd say the same thing over and over again.

To increase efficiency, the hospital then -- their dictation department downstairs were told to e-mail the dictation department what your normal exam is. We e-mailed them, and then we would only say the pertinent differences, at the hospital. And that's through OHIP. So, the sentences would be the same as well. Just you -- it relieves the time of having to say the same thing over and over again.

And with these physical exam manoeuvres, some are very rare, but you have to look for them.

Q. Okay.

A. And some are more common. Yeah. In different conditions.

Q. Who -- for the completion of this report, who physically examined Ms. Cairns?

A. Me.

Q. Okay. And who signed the report?

A. Me.

Q. And what significance does that have to you?

A. That this is my work, yes.

Q. Sorry?

A. This is my work.

Q. Okay. All right.

THE COURT: So, just so that I understand, so on your dicta -- I don't use dicta, I type much

faster than Dragon to keep up -- you'd say on motor exam, macro normal? And that would populate. And then you'd go to the next paragraph?

THE WITNESS: That's if it's normal.

THE COURT: Assuming. Let's assume it's in review, you've done all these tests, you've checked the bilateral power, you've checked the reflexes, the ankle, all of that.

THE WITNESS: Correct.

THE COURT: It's all normal. So, you just say on motor exam, normal.

THE WITNESS: No, I say input exam -- so, it puts the exam template with square brackets around --

THE COURT: So, they're templates.

THE WITNESS: It is. Basically, when you press the tab on the Dragon mic and it goes to the next square bracket. Within the square brackets, there are different options for sentences that are positive or negative. And then --

THE COURT: Right.

THE WITNESS: -- you choose it or dictate it.

THE COURT: Right.

THE WITNESS: You complete it, or just add a sentence. Because sometimes the standard for the neuro exam -- we have our basic neuro exam, and then for instance, a Parkinson patient, you would also do, like, postural instability, which you wouldn't do on your average person. So, you would dictate that part for postural --

THE COURT: But you're doing all this in front of -- with the patient there.

THE WITNESS: Correct.

THE COURT: So, that's -- you're going through. There's no short cut to the length of that, through the macro. You said if it's a long macro -- if you're having to go through and click --

THE WITNESS: Oh yeah, yeah.

THE COURT: -- click, click.

THE WITNESS: Correct.

THE COURT: And you're saying in your microphone click, click, click.

THE WITNESS: And I just click, click, click --

THE COURT: -- positive --

THE WITNESS: -- goes to the next square, and then it's a double-click, and then it completes the sentence.

THE COURT: Imagine what (indiscernible) folks is going to do in the next -- in the next -- I'm not asking you to answer that question, but it may eliminate a lot of jobs for a lot of people.

MR. PALMER: Q. Okay. So, Doctor, I'm just going to take you to C for a second. And we know --

A. Actually, can I just add something before --

THE COURT: No, no. Just -- it's not a coffee discussion.

MR. PALMER: Q. Okay. Yeah, no, I don't know what you were going to say, Doctor, so I can't --

THE COURT: No -- no, you're in the driver's seat, Mr. Palmer.

MR. PALMER: Q. Yes. Yes, Your Honour, thank you. So, now I'm just going to take you to C, which my friend has told you is Ms. Cairns, okay? And I'm going to take you -- thank you, Madam Registrar -- I'm going to take you to your

physical examination. It starts at page ten really; the title's on page nine.

My friend has -- oh, I apologize -- my friend has taken you to the similarities that are highlighted with a couple of reports that I will take you to in due course, but I want to focus on the parts that are not highlighted. What -- and this will stand for the proposition that it was put to you that this is unique across the three reports, A, B, and C that were shown to you. What is the significance of the Montreal Cognitive Assessment that you've noted?

A. Well, that's an objective cognition test, and looks at different areas of cognition. And there's typical patterns that patients with traumatic brain injury display, so I performed that cognitive test, and then highlight the results there.

Q. Okay. And it's not highlighted. Who assessed -- who did this MOCA?

A. Myself.

Q. Okay. All right. And does it form part of your assessment?

A. Yes. So, a physical exam is the cognitive portion of the neurological exam. Some people choose to examine a patient cognitively. Some neurologists don't. They'll say patient grossly intact -- cognitively intact and gave a good history. But quite frankly, if you don't look at the cognitive domains, you'll miss them.

There are many Alzheimer's Disease patients that come in and have a grossly normal cognitive discussion and can give you a good history, but then when you go down and you look at their executive function, their visual/spatial function, we see the deficits.

So, I would argue that in anyone who we're

contemplating a head injury, you should do a cognitive examination.

Q. Okay. All right. Now, the next -- the next one that's been highlighted:

> Post-Traumatic Symptom Checklist and Rivermead Post Concussion Symptoms questionnaire were also performed by the client.

Can you tell my why other exams -- other assessments that have been put to you would have that passage as well?

A. So, this is the part where I assess for -- they're a symptom checklist that basically patients with concussion have, and then they rate this as a severity on a severity scale for each item. So, for instance, balance, nausea, headaches, and they rate it on a severity.

So, this really goes through a lot of the symptomatology that patients with concussions have, and if they're in that 10 to 25 percent, depending on the study, that have persistent symptoms, this highlights which ones they continue to have, and which ones that have improved, which ones have not.

Q. Okay. And was that performed on Ms. Cairns?

A. Yes.

Q. Who performed that?

A. This one, it's on a checkboard. So, basically, as the patient's waiting, they fill it out.

Q. Okay. All right.

A. And they circle zero to six, or zero to four on the severity for each symptomatology, and then I review it.

Q. And the next passage that the results are not

highlighted --

A. Sorry, which passage are you?

Q. On the Post-Concussion Symptom Checklist, she scored 58 over 126. On the Rivermead Post Concussion Symptoms Questionnaire, she scored 38 out of 72.

A. Yes.

Q. Those are not highlighted. Those are --

A. Unique to the patient.

Q. Thank you.

THE COURT: And do you get a printout of these score sheets?

THE WITNESS: Yes.

THE COURT: So, that will be in the file.

THE WITNESS: There was no -- there was no file. I don't keep those. I basically just outline the exact items that they have. The higher the score number, the worse the concussion.

THE COURT: Q. What ends up happening to those questionnaires, Doctor?

A. They get -- they get shredded.

Q. Okay. And now, again I'm just going to take you to the next -- the white pages -- the white parts of the next one. What do those white passages that we're told are unique, what's the significance of what you said there?

A. So, this part, there was evidence of saccadic intrusions with conversion insufficiency, greater in the left eye as compared to the right eye. So, when we assess for concussion, the eye movements can be deranged. So, you can see that when the team doctors take the field, the first thing they'll do is they'll check the eyes where they will cross, and then this is where we check the saccads. And then you bring the finger in and ask them to look at it. You -- if the eyes can fixate on it and

not drive outwards, then -- if that's abnormal, that convergence, that's a marker for traumatic brain injury. So, that was an objective test for that.

Q. Okay, thank you. If you assessed me for strabismus -- that's the next line, there's no obvious strabismus --

A. Yes.

Q. -- what would that entail?

A. Just looking straight at your eyes, and some people have wonky eyes. Strabismus just means that it's crooked, but that's been there for a while. Most people, if you take a hit and the eye goes wonky, if you ask them to look at a finger, they'll see two because they don't line up. But if it's been there for a long time, the brain kind of adapts to it and does not see double anymore.

Q. If you're using your macro on me --

A. Yes.

Q. -- what would your conclusion be with respect to strabismus?

A. No strabismus.

Q. Okay. All right. Then --

THE COURT: Assuming he doesn't have any.

THE WITNESS: He looks pretty good.

THE COURT: From this distance?

MR. PALMER: What's the phrase, Your Honour? Good from far, but far from good?

THE COURT: You're lying.

MS. TANNER: Q. Yes, Your Honour, apologize. Next paragraph. Again, what's the -- what's the importance of the non-highlighted passage there? Oh, I apologize, "with the exception of the following findings", it's right in the middle of your screen now. It's the paragraph on Motor Exam.

A. Correct.

Q. Yes.

A. So, in the upper extremities, sensory examination was normal. And this is relevant because the patient did complain of neck pain and radicular symptoms, so I have to assess if there's numbness and weakness in the appropriate muscles for a pinched nerve. When I examined her, she's actually very good. And as such, this was normal for the upper extremities, and I didn't conclude any pinched nerve in the neck.

However, in the lower extremities, there was decreased sensation to pinprick over the anterior aspect of the right thigh. So, when checking with the pin, the right thigh is the one that was numb that I examined. And the pattern could represent two possibilities, and I reflected those two possibilities in the diagnosis section.

So, for the thigh, it's usually the third lumbar vertebrae that goes to the thigh, so it could be a pinched nerve in the lower back at the third lumbar vertebrae, or a condition known as Meralgia Paresthetica where if you rapidly gain weight, or if you rapidly lose weight, it puts tension on the nerve on the hip, and makes the thigh go numb. She had had a 70-pound weight gain after the accident, and I favoured Meralgia Paresthetica, but you can be fooled.

I mean, at the end, you need an MRI scan and an EMG to help make the decision as to which one of the two, but I favoured the Meralgia Paresthetica, which would be an indirect causation from the accident, rather than a direct. But the radiculopathy would be a direct result of the accident.

THE COURT: But this is an objective test.

THE WITNESS: Correct.

THE COURT: That you're not depending here on what she's reporting. This is an objective test you do

in the morning -- in the report.

THE WITNESS: Correct.

THE COURT: Okay.

MR. PALMER: Q. All right. And finally -- sorry, I apologize, Doctor, you may have covered that in your last answer -- but just in the last paragraph here, the unique portion is -- something about tonal sign (ph) --

A. Correct.

Q. What is that?

A. So, when making diagnosis of the different headache sub-types, you want to ask -- so, on the history, she endorsed base and skull pain that radiates up to the vertex of the head. So, that's very different than a migraine-type headache or a tension-type headache, and could be coming from the upper cervical spine. So, to assess for that, I tap on the greater and lesser occipital nerves here, and if it reproduces the symptoms, then it argues that there's an occipital neuralgia above and beyond as a headache sub-type.

Q. Okay.

A. And that's due to a peripheral nerve injury on the scalp.

Q. All right. And - now I want to take you, Doctor, to B. And this is someone -- this is marked as B. I've been provided this copy by my friend. And this is -- it's got your name on it, right?

A. Yes.

Q. And my friend did take you to this.

A. Yes.

Q. So -- of course, everything is blacked out. An there's some -- sorry, my friend's copy -- there is some highlighting that doesn't show as colourfully for me as -- sorry, it doesn't show as colourfully on the screen as it does for me,

but I'm going to take this as being all highlighted portions you can see are similar. Identical? Sorry, identical. My friend rose. Identical. Okay. So, can you spot any differences in the first paragraph there, Doctor?

A. Exercise, painting.

Q. And so obviously it would be different because it's not highlighted, right?

A. Yes.

Q. Okay. And now there's highlighted portions on the History of Accident. Can you tell me why there's highlighted portions?

A. I asked them if there's a secondary collision. So, if there's a first hit, and then there's a second impact, they'll either say yes, or no, and this one was no, as many are single impact collisions. Others are dual impact collisions. She didn't anticipate the accident, or she knew the accident was coming. And these are -- I change the sentences based on that. The air bags deployed, or did not deploy. She hit her head, or did not hit her head. She lost consciousness, or did not lose consciousness.

And the difference here is that cannot recall if she lost consciousness. Her next memory after the accident was seeing a lot of smoke coming from their vehicle.

Q. And of course, Doctor, I don't think this is controversial, you can't obviously read the redacted portions, right?

A. Yep.

Q. Okay. So, we don't -- do we -- do you have any opinion on what is under there?

A. The specifics for this specific case and how the accident occurred.

Q. Okay. And -- okay. All right. I'm now

taking you to Current Symptoms, which is the next page. Your Honour, just because I was told earlier that it may not be easier to see if I didn't zoom in, can Your Honour see the screen okay? Or would you like me to zoom in?

THE COURT: If you tell me where I'm looking on the paper copies. I'm not relying on the screen.

MR. PALMER: Oh, okay. Okay. Okay. Thank you. But, Your Honour, just so that we're comparing apples to apples, you are looking at the highlighted portion my friend handed up?

THE COURT: Which sample's that?

MR. PALMER: This is B.

THE COURT: B.

MR. PALMER: And my -- I believe my friend did give you a copy.

THE COURT: Yeah, I have them. Give me the --

MR. PALMER: Yeah. Sorry, Your Honour. So, it's --

THE COURT: Yeah, okay?

MR. PALMER: Yeah, I apologize, Your Honour, I just want to make sure --

THE COURT: (indiscernible)

MR. PALMER: Thank you.

THE COURT: I'll -- I think you'll know when I'm -- when I lose the -- when I lose you, I speak up.

MR. PALMER: Q. Thank you, Your Honour. So, Doctor Basile, how did you -- you know, the first paragraph here is completely highlighted with the exception of the redacted portion. Can you explain why it would be completely the same?

A. This patient had similar symptomatology from a musculoskeletal perspective, so these are the musculoskeletal symptoms. You run your fingers along the back. You look for

peri-trapezius tenderness, interscapular between the shoulder blade pain, neck pain with movements. And then I ask the question about musculoskeletal pain which we talked about x-rays of the bones and showing pain in the neck -- is it okay to go on?

Q. Yeah, please.

THE COURT: Yeah, there was some noise there. Are we good?

CLERK REGISTRAR: I think someone accidentally unmuted their mic, Your Honour. I believe (indiscernible)

THE COURT: Okay. Keep going.

THE WITNESS: So, then there's the section on the things we were talking about with the x-rays earlier, having the bony abnormalities, and one would expect neck pain. The type of neck pain that they experience that -- with those findings are these ones: neck pain exaggerated with neck flection extension, stiffness and pain that improves after a hot bath or a hot shower, pain that's worse in the morning when you wake up improves after a warm up (indiscernible) once you get going it feels better.

So, those are the typical neck symptoms that one has when those bony abnormalities are there. But again, you could have those same bony abnormalities, and be completely normal, and that would be more likely than the other scenario.

MR. PALMER: Q. Okay.

A. And the neck pain related to a pinched nerve would be very different. Sharp stabbing pain that radiates down the arm, goes into the shoulder blade, et cetera.

Q. Okay.

THE COURT: So, if you were going through this, presumably you get some kind of a macro on that?

THE WITNESS: Yes.

THE COURT: Just so I'm understanding.

THE WITNESS: Yes.

THE COURT: But then, let's take the hot baths an showers. You'd be asking the patient?

THE WITNESS: Correct.

THE COURT: So, do you --

THE WITNESS: So, is your pain worse in the morning when you wake up? How about when you walk into the shower? After the shower, do you feel better? Absolutely. And they answer that. That's typical for musculoskeletal.

THE COURT: That's the exchange you're having.

THE WITNESS: Correct.

THE COURT: Thank you.

MR. PALMER: Q. Thank you. Now in the next paragraph, there's some non-highlighted text.

A. Yes.

Q. Can you tell me what the significance of the non-highlighted text is?

A. So, when examining with the pin -- because we look at all different areas; I do each digit separately -- and ask them, does the pin feel the same on each digit? And if -- in this particular case, the third, fourth, and fifth digits, so the middle finger, ring finger, and baby finger, had reduction on the left.

Q. Okay. Okay.

THE COURT: And now this is -- but we're back to objective, here.

THE WITNESS: No, sorry. This is on History. So, first they'll describe it on History, and then I'll confirm or disprove it on the physical exam.

THE COURT: So, she did report numbness (indiscernible) is that history? Or is that --

THE WITNESS: That's subjective -- subjective.

THE COURT: That's not you. That's not --

THE WITNESS: But that's the history from the patient, yes.

MR. PALMER: Q. Okay. Next paragraph down indicates -- and of course, you don't know who this is necessarily, Doctor -- but this person would grade her neck pain on a 10 out of 10 on average. It's not highlighted. How would it -- you know, I appreciate you don't know who this is, but how would you -- if this report is yours, how would you have come to this conclusion?

A. We ask the patient, rate it on a scale of one to ten; where would you put it, and then we check for different things.

Q. Okay. Now I'm showing you page six. It's your heading Bilateral Lower Back Pain. It's -- there's -- I would ask that you just read the non-highlighted portions of paragraphs two, three, and four.

A.

> As she complains of radicular symptoms down the right leg, the client does complain of numbness and tingling in the plantar aspect of the right foot. There is reported muscle cramping, however she cannot walk for more than 30 minutes due to dizziness and pain in her legs.

> She described difficulties with sexual function that was above and beyond lack of desire, secondary to pain. There is a functional issue and that she indicated that there are difficulties even achieving lubrication when desire was actually present. She was advised to visit the emergency department in an academic center should she develop any bowel or bladder incontinence, saddle anaesthesia, progressive or acute deterioration in strength in the upper and lower extremities, or urinary retention.

Q. Okay. Thank you, Doctor, I think we can stop there. It's not highlighted. Did you -- when you were assessing and reporting on Ms. Cairns, did you find any of the same things --

A. No.

Q. -- as you just read? No? Okay. And why did you tell this anonymous person to go see an emergency department or an academic center?

A. Because of the -- in the back pain section, if they have problems with lubrication, it can be damage to the lower spinal cord, and an early sign of cauda equina syndrome, so much like the earlier case when we talked about the neurogenic claudication, similarly this is pointing towards an emergency.

And a lot of people are in pain and just don't have sexual desire, but this was above and beyond that because it was achieving lubrication when sexual desire was there. So, that argues that it's a function of the spine that could be doing this, and hence, it's best if she visit the emergency department.

Q. Right. Well, if this is a med/legal, you

aren't being paid to give her any advice. Why would you give her that advice?

A. It's in the best interests of the person -- the patient.

Q. Okay. All right. And then at -- under three, it's unique, could you tell me what's unique about that?

A. It reports both ears tinnitus and no hearing loss.

Q. Did you hear -- is that what you got from Ms. Cairns?

A. I'd have to check.

Q. Okay. It's at page --

A. No tinnitus and no hearing loss.

Q. Okay.

A. The same, yes.

Q. Sorry, it is the same? Or it is not the same?

A. She reports tinnitus. So, this patient had the tinnitus, whereas Ms. Cairns did not have the tinnitus.

Q. Okay. Okay, so again, Doctor -- I don't want to belabour this, but we're almost done -- under four, on page seven --

A. Yes.

Q. Could you read me the unique functions here?

A.

> There were no periods of slurring of speech and cannot recall if she lost consciousness. There was no retrograde amnesia, but some anterograde amnesia. There is no indication of trouble controlling emotions with excessive out of character laughter and/or excessive out of character tearing or crying.

Q. Okay. And I'm just going to take you back -- you know, there's -- that's not highlighted, right?

A. Mm-hmm.

Q. But just going back to Ms. Cairns' -- and it's not on the same page --

A. Just the bottom of page eight?

Q. Yeah.

A. Mm-hmm.

Q. Actually, Doctor, I believe it's page nine.

A. Yes, the top.

THE COURT: Of B or C?

MR. PALMER: This is C, Your Honour, but I'm showing the witness --

THE COURT: The actual.

MR. PALMER: -- the actual report, which -- because we --

THE COURT: I have -- I have it.

MR. PALMER: Q. Yeah. Okay. So, "there were no periods of slurring of speech" is not highlighted on B, and it's actually the same -- well, it's C, Doctor, but it's actually the same on --

A. It should have been highlighted.

Q. -- so, it should have been highlighted, perhaps.

A. Yes.

Q. But --

A. The consciousness is different, so I think -- "cannot recall if she lost consciousness", but our patient -- our client today, and "she did hit her head, but did not lose consciousness".

Q. And in B, you had said there's no retrograde amnesia, but some anterograde amnesia?

A. Yes.

Q. What did you conclude with Ms. Cairns?

A. That there's no retrograde amnesia or anterograde amnesia.

Q. And --

A. And these again, are in the diagnostic criteria for concussion; you need to meet one in one category, or two items in the second category.

Q. Can you discuss the significance of that finding, or absence of finding?

A. So, it -- these are all question that come up when going through the diagnostic criteria. They're American Congress of Rehabilitation Medicine. So, there's an algorithm of how you make the diagnosis of the concussion, and if they have persistent symptoms. So, basically, those positive yes and no's, you look at them all as a whole, you run them through the diagnostic criteria, and if they meet the criteria, they've suffered traumatic brain injury.

Q. Okay.

A. And those American Congress of Rehabilitation Medicine criteria are in the Ontario Neurotrauma Foundation guidelines, but many other criteria are also in those Ontario Neurotrauma Foundation guidelines, as well as the symptoms list and the checklists that we use; the Rivermead.

Q. Okay. Doctor, I'm just going to take you to the summary of B for a second.

A. Of B?

Q. Yes.

A. Okay.

Q. It's page 11 of B. Are one and three identical to Ms. Cairns?

A. No.

Q. And so, in one -- paragraph one -- or summary one, what is the -- what is the difference?

A. There was profound pseudobulbar affect throughout the assessment.

Q. And what does that mean?

A. So, it's an interesting -- they call it -- another name is emotional incontinence. My patients with ALS also get it. And when there's damage to the brain stem hypothalamus region, patients will have excessive laughter out of character, or excessive crying out of character. So, she had it through the evaluation. So, while it was there, but I also ask it as a question. You know, when you're watching TV, if you see something funny, do you laugh and then people around you turn to you and say that's funny, but not that funny -- for the laughter side. And the crying side as well.

Q. Okay. How about paragraph three? Is any of it highlighted?

A. And that -- and that was a marker for traumatic brain injury. That's why it's in that section.

Q. Okay. Okay, sorry. Yeah. Okay.

A. Number three is specific to this patient where there was a likely C8 greater than C7 cervical radiculopathy. So, on exam, these two fingers, the fourth and fifth digits, plus the middle finger, were more numb on examination, and the history fits that. And the weakness was in the specific muscles where the wire originates in the cervical spine. So, when you compress a wire at C7, it hits particular muscles that go weak, and it'll have a pattern of numbness that's specific to that injury.

Q. Okay. All right.

A. In fact here:

Examination today shows extreme -- was

extremely difficult given the difficulties with her pain and effort-related weakness, but also some functional, inner-organic overlays.

So, these are tests for when the patient has either extreme pain and doesn't give you effort on the exam, or sometimes it doesn't make sense logically how the patient is doing it, so -- or they're not giving you proper effort. So, this would be a red flag in terms of the symptomatology when a patient has these type of inorganic features. And it's hard to say there's a neurological problem that's causing it when that's the case.

So, I highlight that outline, that the patient -- there's red flags on this as to are they giving me full effort during the exam.

Q. Did you find anything the way that, with Ms. Cairns?

A. No. I have a paragraph as well for Waddell signs that checks for these things. So, the paragraph is one of the last ones on physical examination.

Q. Perhaps just I'll lead that --

A. Okay.

Q. Steering you this way, Doctor.

A. Yeah. I just wanted to look at it because you asked if she had any; I just want to double-check.

Q. Okay, yeah, please. And where are you referring to right now?

A. The Physical Exam section. So, the second last paragraph on page 10.

Q. Okay.

A. So:

> Assessment for effort-related weakness was performed in conjunction with Waddell signs, or inorganic neurological dysfunction, and/or pain-related effort or abnormalities. Teapot sign of the deltoid was normal.

A. So, basically these are all checks that anatomically can't happen. So, for instance, if I'm checking finger extension, and I check it as part of a normal neuro exam, I'd see -- against resistance -- if the baby finger comes down with it, then they're not giving me good effort. The baby finger should go up because it's one line that (indiscernible) all the fingers' extension.

So, if I'm testing for weakness here, and this guy comes down, it's a red flag. Either they're in pain and they can't do it, or they're just not giving me a proper exam. And these are all different checks for these types of feigning behaviours. The patient in B had some of these red flags I need to watch out for.

Q. And Ms. Cairns?

A. She did not.

Q. All right. I'm showing you page 12 --

THE COURT: So, counsel, we're into the lunch hour --

MR. PALMER: Yes, Your Honour. I'll just --

THE COURT: If anything, my staff needs the break. Are you -- is this -- is there a natural area to close off?

MR. PALMER: I was -- I was trying to bring it to a close with the finish of B, Your Honour, but I apologize, I may have missed the mark --

THE COURT: No, no, no, no, no. If it's five

minutes --

MR. PALMER: Five minutes.

THE COURT: -- let's wrap it up. I don't want to rush you. If it's more than five minutes, you'll pick it up at 2:15, that's all.

MR. PALMER: Yes, Your Honour, I will be done in five minutes --

THE COURT: Okay.

MR. PALMER: -- with this -- with this line of --

THE COURT: Okay, it'll just make it cleaner if we'd all have an instruction.

MR. PALMER: Q. Thank you. Thank you. And again, part four here, Doctor, on B. Page 12 of B. It's not highlighted.

A. Yes.

Q. And so, it's -- the implication is it's unique. Ongoing vertigo with benign paroxysmal positional vertigo --

A. And the differential includes post-traumatic labyrinthitis versus changes secondary to post-concussive syndrome. So, three possibilities in this particular patient based on the exam --

Q. Okay.

A. -- of which post-concussive syndrome is one, but there are other possibilities.

Q. And ongoing vertigo with Ms. Cairns? That you noted on your examination? With benign paroxysmal positional vertigo?

A. No.

Q. Okay. Okay, I don't believe my friend asked you about that portion, so I will stop there with respect to report B, Your Honour.

THE COURT: Thank you very much. Back at 2:15. The lunch hour now.
MR. PALMER: Thank you.
MS. TANNER: Thank you.
THE COURT: You're excused; I need to talk to the lawyers for a moment.
THE WITNESS: Sorry, do I take my stuff? Or --
THE COURT: You can leave it; nobody will touch it.
THE WITNESS: All right.
THE COURT: You can take it with you if you want.
THE WITNESS: No.
THE COURT: But nobody -- if you don't want to take it with you, nobody's going to touch it, so.
THE WITNESS: All right.
THE COURT: The courtroom will be closed. So, counsel, after lunch, I think I had told you we had the Thompson-Reuters people that --
MS. TANNER: Oh, yeah.
THE COURT: -- are coming and watching. They will not be intrusive. I may have somebody sitting on the dais with me, but it's good because we don't have the jury and they won't be distracted. There's probably five or six people --
MS. TANNER: No problem.
THE COURT: -- just -- I just wanted to mention that. So, I know with -- we've gone to paper, but if you could actually use Caselines because -- and part of it, you're doing a service to the profession. But part of it is for these folks to see how it works. My Registrar has brought to my attention that when she tried to create the

exhibits -- the virtual exhibit bundles, all the page numbers were crazy and we know that that's an issue. And so, it's perfect -- she was very nervous about bringing it to my attention; she thought she did something wrong, and I reassured her and said I'm delighted that this has happened because we can -- you see, it's all in the purpose. I want them to see that.

If -- they will not be intrusive --
MS. TANNER: No problem.
THE COURT: -- to what we do. I have a full de-brief with them after 4:30 today, so I just wanted to give you that context.
MS. TANNER: I think that the paper-intensive part was just with respect to the highlighted, so we could be side by each --
THE COURT: Sure.
MS. TANNER: -- but I think (indiscernible, multiple parties talking)
MR. PALMER: (indiscernible, multiple parties talking) definition wise, we -- yeah, Your Honour, we have -- we'll tee up some stuff on Caselines, that is on Caselines and is highlighted.
THE COURT: Yeah, if it's on Caselines, I mean, it's useful to -- you know, I won't -- I won't lie, I have printed off the reports and created my own binder because it -- Caselines does not have the function of being able to put side by side by side, and to flip through. But they are working on a version that eventually we could be able to do that. But they need to -- they don't

understand why we'd need, for example, side by side by side.

This is all to say that Caselines is not going anywhere --

MS. TANNER: We know.

THE COURT: -- it is here to stay. It's here to be improved, but it's here to stay. Okay? Thank you very much. See you back at 2:15.

R E C E S S

U P O N R E S U M I N G :

THE COURT: Good afternoon.

MR. PALMER: Your Honour I would...

THE COURT: Yes.

MR. PALMER: ...ask when – pleases the Court – when we're ready we can have Dr. Basile...

THE COURT: Doctor...

MR. PALMER: ...back in?

THE COURT: ...yes, Basile to come in? Yes.

MR. PALMER: Thank you. Your Honour, just for planning purposes, I'm going to take Dr. Basile to A, what my friend provided. Then I'm going to be using Case-centre to show Dr. Basile some things. Although I just think my friend may have an objection, so, we'll start with that. But I have submissions regardless on *[indiscernible]* platforms, thank you.

THE COURT: So, Doctor, these are not members of the jury, they are other folks watching the operation of the courtroom technology.

VINCENZO BASILE: Thank you.

MR. PALMER: Q. Okay. Doctor, so my friend put this neurological evaluation redacted, for claimant, date of birth, date of last assessment....

THE COURT: Don't forget the microphone, Mr. Palmer.

MR. PALMER: Sorry, Your Honour.

Q. So Dr. Basile my friend put to you A - what we've called A, which is your neurological evaluation. All aspects of which, apart from your name have been redacted, okay. And so I don't know when this was done, but it indicates at page two, that you are also the Chief Research/Medical Officer for Concussion Incorporated, and you've told us that that is not - no longer accurate. Do you know when, if at any time, your standard page two would change?

A. I changed it in 2019, when I was no longer the Medical Director of Stroke Neurology and EMG at the hospital sites. So I edited at that point. I edited the dates and times of that, to past tense. But I forgot to take that one out. But that would have changed in 2018.

Q. Okay. All right.

A. The Concussion piece.

Q. Okay. Now, again, we don't have all of the information here. We don't have the employment and education history. Sorry. We don't have the employment and education history. We don't have the past medical history. We don't have the past medical history apart from some highlighted texts. Medications Prior to the Accident, Doctor. See, it's not highlighted? Is this different from Ms. Cairns?

A. Yes.

Q. Okay. And then Medications After the Accident, part of the text is highlighted and part of it is not.

Again, is this identical, this portion, including the non-highlighted part, is that identical to Ms. Cairns?

A. No.

Q. Okay. And we don't know what the Surgical History is. But it probably - I believe Ms. Cairns' is, is also remarkable.

A. Yes.

Q. All right. But we don't know, of course, what this is for. So, that probably should have been highlighted as well. Now, just scrolling to the next page. Could you indicate to me the parts that are not - oh, I'm sorry. Go to the next page, which is page four of A, Your Honour, thank you. There's Pre-accident Functional Status. Again, could you read the words that are not highlighted, please?

A. "Exercising, swimming, walking".

Q. Okay. And, just if you have Ms. Cairns', could you please read me from page four of that report? Recreational Activities?

A. "Dancing, jogging, skiing, walking, spending time with family and friends".

Q. Okay. All right. And of course we can't talk about what's redacted, we don't know what it is. Doctor, now I'm showing you page five. Regarding the left shoulder, Doctor, what does this report indicate?

A. She reports that she has a complete restriction of movement of the left shoulder.

Q. And is that the case for what Ms. Cairns reported?

A. No.

Q. Okay. On the next paragraph, are there any unique, as opposed to Ms. Cairns, are there any unique reports there?

A. She did not report numbness, tingling, or pins and needle sensations in the hands.

Q. And what about the last sentence?

A. "Left versus right". Left is highlighted – is not highlighted.

Q. Okay. And then, I mean again, with bilateral lower back pain. Doctor, what does bilateral mean in that context?

A. Left and right.

Q. Okay.

A. But where is that?

Q. Is that something that we differentiate on a lower back? We look at quadrants or something?

A. Sorry, where – where are we reading from?

Q. Sorry, Bilateral Lower Back Pain is your second heading.

A. Oh, sorry, the heading, yes.

Q. So, is, you know, is that - how do you break up the lower back with respect to that?

A. So - so, bilateral pain described? Or left leg described, or right leg described. And then I go into the details in the body of the text, in that section.

Q. All right, so in Ms. Cairns' report, Ms. Cairns complains of radicular symptoms down the right leg.

THE COURT: That's what's reported here.

MR. PALMER: Well it's in Ms. Cairns' report, Your Honour, that's been tendered.

THE COURT: In the Cairns report. Not that she'd complained about them in her testimony.

MR. PALMER: Well that's right, Your Honour, I'm just functioning - I'll just put-up Ms. Cairns' for a second and....

THE COURT: No, that's fine. I'm just clarifying...

MR. PALMER: Yes.

THE COURT: ...when you say Ms. Cairns, as reported in the report, as opposed to her saying it somewhere else.

MR. PALMER: Yes, Your Honour...

THE COURT: Right.

MR. PALMER: ...that's exactly correct.

THE COURT: That's the only point I was clarifying.

MR. PALMER: Okay, so....

THE COURT: I mean if it helps you, I have understood the point that there are differences in the two reports.

MR. PALMER: Okay. Thank you, Your Honour. I'll be very brief then, and we'll just operate from the perspective – I don't need to *[indiscernible]*.

THE COURT: Yes, it's a re-examination, so we want to be really focused on something that came up earlier.

MR. PALMER: Thank you, Your Honour.

Q. Doctor, you've talked about, "she does not complain – complains of radicular symptoms down the legs". I have two questions here. One is, how did the word complain, come to be in there twice?

A. In the completion of the sentence. So when I drag and dictate it, the square brackets, I said complains...

Q. Okay.

A. ...while completing the dragging.

Q. All right. And just refresh, because I think we've talked about this at length, but what is the significance

of a lack of complaint, of radicular symptoms down the leg?

A. So it refers to whether or not there's a pinched nerve in the lower back versus not. Because not all back pain is created equal. There's the musculoskeletal-type back pain, where worse with heat, *et cetera*. Then there's radicular back pain. Then there's back pain due to a muscle cramp. There's many different sources of back pain. So these are the things that kind of tease those out. So a complaint of musculoskeletal back pain is different than - or arthritis, is different than a complaint from a pinched nerve. Or from a sciatica. They differ in character.

Q. Okay. All right. And then at page six, Doctor, you've already told us that Ms. Cairns does not complain of tinnitus. If I grasp that correctly, this person does?

A. Yes.

Q. Okay, all right. Okay, and then finally, Doctor, I'm going to take you to two separate sections. Under Physical Exam, the MoCA, and the Rivermead were performed. Are those unique?

A. Yes.

Q. Those are unique results?

A. Yes.

Q. Okay. There's no nystagmus. If I'm pronouncing that correctly, what does that mean?

A. So when you check the eyes, nystagmus if they start to beat. And that's significance is damage to the...

Q. Okay.

A. ...eye control centres of the brain.

Q. Thank you. Doctor, this report at page eight, indicates that you were testing for voice or vocal abnormalities?

A. Yes.

Q. Did you test Ms. Cairns for that?

A. No.

Q. Okay. Why not?

A. It didn't appear to be relevant at that point.

Q. Okay. Are you - did you palpate? So this says, "Upon palpation of the base of the skull through greater and lesser occipital nerves". Did you palpate the base of Ms. Cairns' skull?

A. Yes.

Q. And are the findings the same?

A. I think slightly different, but overall the same.

Q. Okay. What page are you looking at, Doctor?

A. It's page 10.

Q. Page 10 of Rexine's report?

A. Yes.

Q. Okay.

A. "Tinel's sign over the greater and lesser occipital nerves was positive bilaterally". In the third sentence on page 10.

Q. Page 10 of Rexine's report, Doctor?

A. Correct.

THE COURT: At the bottom.

MR. PALMER: Sorry. Okay. My apologies. Yes.

A. So the verbiage is slightly different, but the finding is the same. Which reflects the dictated portion.

Q. Okay. So was there any part where this text is reproduced? The part that I'm directing you to, "upon palpation of the base of the skull"?

A. No.

Q. No. Okay. All right. All right, and again at page nine of the report of A, you've diagnosed her with tinnitus, consistent with post-traumatic labyrinthitis. Is that

right?

A. Tinnitus would be the - the symptom that the patient had. And the cause is either, the diagnosis of post-traumatic labyrinthitis versus secondary to post-concussion syndrome. As both are plausible here.

Q. Okay, and again, we didn't really touch on workup and treatment in cross, so that has....

A. The workup and treatment will be very close, if once you make the diagnosis, the treatment standards are – the way you treat them is pretty standardized. So that - that's micro concussion plan. And that pops out, and then I'll add, if for instance if an MRI of the brain wasn't done recently, I would add - I would - an MRI of the brain or the spine. So an *[indiscernible]* of the spine should be performed, or an EMG should be going, if it's not done recently. And I would add that in the treatment plan.

Q. Okay.

A. So in this particular case the MRI scans were needed, or different imaging was needed for this case, but not in the other.

Q. Okay. Thank you, Doctor.

MR. PALMER: So, Your Honour, I'm just going to finish up the portion of my examination that I do not anticipate will be objected to. And then I will start using Case-centre.

Q. So Doctor, my friend asked you regarding your financial remuneration, with respect to this – well, I think with respect to all your assessments including Rexine’s.

A. Yes.

Q. Does that have any impact?

A. No.

Q. Okay. All right. And why not?

A. It's just an objective evaluation - an independent medical evaluation based on my assessment of the patient that day.

Q. Okay. All right. And so, you indicated - my friend put to you the headaches prior to the accident, that are contained in the records that you had reviewed. And you said, that wouldn't change my opinion. Why not?

A. So there were four diagnoses of headaches that I had made. Post-traumatic in nature. The one that may influence it, would have been the migrainous diagnosis. But the post-traumatic migraines, they have similar characteristics. But the other three headaches, she had not experienced before and those are accident related.

Q. How would you react if you became aware of facts, which would change your opinion?

A. Well, absolutely, I would change my opinion. So for instance, if I became aware of the headaches being every day or dissipating, things would change the - the diagnosis. Or how much it was affecting her life prior to the accident. Or if there was an increase in frequency after the accident.

Q. All right. And so Doctor there - I just have a couple more wrap-up questions - so you indicated you use Dragon Dictate?

A. Yes.

Q. And you indicate that you used to use – at a hospital you used to use a phone, I believe?

A. So, yeah. In the olden days at Sunnybrook and at Mackenzie, and William Osler, you would have a code. You'd type it into the phone after you saw the patient, and then dictate the whole consultation right on the phone. And basically somebody downstairs transcribes it, types it up. They send it back to you, you read it and send it out. That's the olden days,

yes.

Q. Do you have any professional concerns with using Dragon Dictate for your patients?

A. No. It's - the hospitals are all using it now. So, I learned how to program on Epic. It's the EMR that most hospitals in the U.S. use, and now most hospitals here in - in Toronto now are buying in. So I'm doing some education with that. In fact, it's – it's – it's the future. It's – it's actually protects patients. It standardizes things, and it's faster for – for docs to use. An example, for instance, is in strokes. So, in my capacity of Medical Director of stroke at Mackenzie Health Hospital, I implemented several years ago, the use of Dragon when we purchased Epic. And for acute stroke. So, when someone comes in, acute paralysis of one side of the body, you have to move quickly. So if you open up that artery quickly, the brain doesn't die, and you can save somebody completely from a stroke.

So I implemented a system where - basically the same system. Dragon microphone with macros, and it forces all of the stroke neurologists to do things in a standardized way, according to the guidelines. And they fill in the documentation. And what that ended up doing, was it shortened our door-to-needle-time. That was the metric that was used to gauge how good a stroke hospital was doing. How quickly can you make a decision to get the blood saving, blood thinner in? And our door-to-needle-time at Mackenzie Health went down dramatically. And we ended up winning a distinction award in stroke for Canada, long before Toronto Western, St. Mike's and Sunnybrook.

The other downstream effect of this was quality. So when we looked at quality measures, it's standardized - it didn't matter which doctor was there on call that night. You had to use the same principles, because each sentence forced you to

fill in that particular sentence. So if you veer away from the guidelines or the criteria, it alerts you. So I had the software alert the doctor. Did - were you aware that this is? No. It can override that. But what we noticed were the quality metrics improved dramatically. And the error rates.

And then the macros that go in the actual template also protected the physicians and the hospital from medical legal issues as well. So, I - I don't see concern. In fact, I do believe it's important to - to preserve the old way of doing things as well. In that, you need open-ended questions. But sometimes with open-ended questions, if the patient doesn't know to endorse a symptom, and a physician doesn't ask the correct closed-ended question, you'll misdiagnose it. And - and this is important to - you know, have diagnostic criteria fully aware. And every doc will have to use it with this. So it's a reminder. And then the only problem with that, is things change. As in all diagnoses, things change. So staying on top of the software and editing it to make sure that it's up to speed is really, really important.

Hence the changes that we mentioned with balance, as the new criteria now. Have balance, as a single criterion that's sufficient to make the diagnosis of concussion acute.

Q. Thank you, Doctor. One last question, and thank you for that fulsome answer. My friend took you to issues between some of the records and Ms. Cairns, with respect to right or left leg, or right or left side?

A. Yes.

Q. Can you explain the discrepancy between the records and some of your...

A. Sure.

Q. ...conclusions in your report?

A. So back pain, as I mentioned earlier, there's

many sources of back pain. Many types of back pain. So when it comes to back pain that radiates to the leg, there could be left-sided symptoms that are musculoskeletal; or there could be a pinched nerve; or there can be arthritis-related symptoms. And those can fluctuate left to right. The radicular symptoms can also fluctuate left to right. As a disc slides out between the two vertebrae, it can either pinch on the right or the left. The instability of the disc is what's the concern. So moving from left to right isn't of concern.

But with Ms. Cairns as well, I mean, I'm remembering looking at the documentation. I can't remember where it was, but it said that the sciatica had completely resolved prior, in the documentation. So, I mean, it doesn't carry a lot of weight. So for every question that we ask on history; every physical exam maneuver that we have; every past medical history; when we're teaching the students, that are assessing patients, we let them know that every question has a sensitivity and specificity.

So much like a mammogram has a sensitivity and specificity for detecting breast cancer. That is, how good is it at pushing you more towards the diagnosis or pushing you away? What are the false positives, false negatives? So when we're teaching, we teach also that every question you ask, carries a weight. And this is going to push you strongly towards that diagnosis or push you further away.

Every physical examine maneuver has a weight. And some carry more weight, some carry less weight. And that - that's basically where – where that goes in terms of the questions that - that go through.

So when looking at something from nine years ago, yeah, it's relevant, but does it carry weight in the final diagnosis of what's going on now? Yes, it's important. But from

a diagnostic perspective, the here and now is much more important.

Q. Okay, thank you, Doctor.

MR. PALMER: So Your Honour, I only have one line of questioning left. There are four documents, which constitute four more of Dr. Basile's reports, that are in the proper possession, power and control of the plaintiff. They've been produced to my friend, as discussed earlier. But they have not been provided by my friend. I would propose to take Dr. Basile through those. They are located at tabs D to G of our responding motion record, and they are available on CaseLines.

THE COURT: Is that the supplementary responding records?

MR. PALMER: Yes, Your Honour, that's correct.

THE COURT: Okay. Can I just ask the doctor to step out for five minutes? I have a question for counsel.

. . .WITNESS EXITS

THE COURT: Counsel, I'm mindful of time. We need to get to submissions proper. Can you give me an overview of where you're going with these additional reports?

MR. PALMER: Yes, Your Honour. So, Tab D is a report of - well, okay. So tabs D to G are copies of reports of - are clients or former clients who have been assessed by Dr. Basile.

THE COURT: Great.

MR. PALMER: There are significant differences between these reports and the reports that have

been proffered by my friend on this motion. In some cases, they do not diagnose concussion. In other parts, they do not diagnose - they state that a patient does not meet the Ontario Association of Neurotrauma or apologies, Your Honour, I may not be getting that right, exactly. But, they then say, these are not – they do not meet this criterion. And so, we would seek to adduce this because my friend has sought to adduce reports that are similar. We would like to show that Dr. Basile authors other reports which are different.

Now my friend did raise one issue this morning in oral submissions, and said, well, these are women. Well, three of the four that we seek to adduce are of ladies - of women, with the fourth being a man.
THE COURT: So I don't think you need to go down this - I've got what I need in terms of Dr. Basile's methodology here. How he used the macros and how he discriminates; or how he inputs the information he receives from the patient. Whether it's sufficiently protective or not, I mean, let's remember where we started with this. Your friend two weeks ago said, aha, look, there's three reports. If we blank out the names, you can't really figure out who's who. They're so similar. They're virtually interchangeable. That's my word, interchangeable, that wasn't your friend's, but that was the essence.

Having spent most of today deconstructing these

reports, it doesn't matter to me that Dr. Basile, who's done hundreds of these, will have reports that are completely different. It won't help. That's not what's going to tip the scale now. It's going to be: are these differences that have been teased out, sufficient to get us over a reliability *White Burgess...*

MR. PALMER: Yes, Your Honour.

THE COURT: ...*Mohan* test? So, I don't - it's not that I'm preventing you from doing it. If there's some other reason you want to do it, fine. But if the objective is to say, look, here are some reports that are completely different, thanks for coming out. I get it.

MR. PALMER: Yeah, Your Honour, that is essentially it. They use the same template. They have different results. And with that being understood and Your Honour's comments, I think I have no further questions of Dr. Basile.

THE COURT: Okay. So, we'll have the doctor, just to let him know that we're finished and that we're going to turn to the legal arguments or our submissions. And we've had a number of breaks. Hopefully we can slide right into those?

MS. TANNER: Yes. Yes.

THE COURT: Yes? Okay let's just bring the doctor, so we can take his. Now, will it come as a surprise to him that we wouldn't be testifying...

MR. PALMER: No.

THE COURT: ...the next thing will be a ruling from me?

MR. PALMER: Your Honour, after this cross was done, we did do that with Dr. Basile, with the intention of figuring out his schedule...
THE COURT: Okay.
MR. PALMER: ...so he will not be surprised.
THE COURT: Dr. Basile, I've saved some of your time, because of the exchange I've had with the lawyers. Your testimony is complete. I now have to hear legal arguments and give a ruling. And so, you're free to go enjoy the sun or do whatever else.
VINCENZO BASILE: Thank you, so much.
THE COURT: We have a lot more work to do, and the lawyers will let you know as soon as there's a ruling, on what happens next.
VINCENZO BASILE: Thank you, so much.
THE COURT: Thank you, so much.
VINCENZO BASILE: Thank you. Thanks, guys.
THE COURT: Thank you for coming today.
VINCENZO BASILE: Thank you.
. . .WITNESS EXITS
THE COURT: So, Ms. Tanner, it's your motion. You go first.
MS. TANNER: Thanks, Your Honour.
THE COURT: Anytime you're ready.
MS. TANNER: Okay. So Your Honour, I propose to take the Court first through the information that we learned today, and separate it into a few categories. And then apply it to the law.
THE COURT: Thank you.
MS. TANNER: And I'm going to start with the whatever word we so choose, boilerplate, template,

part of my argument. So without seeing it, the program that Dr. Basile uses, we have – we, and the Court, have absolutely no idea how much is propagated. So that is the first issue.

The second - and by all accounts, by virtue of how much is yellow on each of those three reports, we would argue that a large amount of the answer is propagated, not a little. All of the questions that we heard, and examples that Dr. Basile gave, there might have been a one or two that I missed, were leading questions. So the macros used leading questions, namely: you have a headache. Is your headache - does it feel like a band around your head and is that a vise? Oh yes, says patient whoever. As opposed to, oh you have a headache, how does that feel? Can you describe it for me?

So in essence what is happening with, as far as we've heard from Dr. Basile is that, the answer is being put in the mouth of the claimant or the patient or what have you.

And another example, just one funny one, was the bath or shower. When you get out of the bath or shower, you know, do you feel better or worse? Again, this is not an open question. How do you feel in the morning? How does your head feel in the morning? How does your head feel in the afternoon? So, those are - the leading questions embedded within the macros, is highly problematic.

And fully puts the answers in. What we submit is, putting the conclusion into the report, i.e. what *Bruff-Murphy* ((*Bruff-Murphy v. Gunawardena*, 2017 ONCA 502 (CanLII,)) sought to prohibit and discourage. Which is looking for your conclusion, by putting the answers into the question. Or by putting - looking for the information in the evidence, to support your conclusion.

And I would point out that I asked Dr. Basile numerous questions about - on day one, about his dictation. And I asked him this morning as well. And I gave him the opportunity. I said, this is a 16-page, single-space document. I had already pointed out a number of clerical errors on the first page, and he did not mention anything about macros. Anything about text being propagated. And anything about how the question or interview process happens, until I showed him the highlighted versions. And it was only at that time that we heard from Dr. Basile about this program that he uses.

So, Dr. Basile did not come here with a view towards assisting the Court. Or with a view towards answering the defendant's questions in a way that would assist, or what would be honest and forthcoming. We had to drag the answers from him.

Now, what is more troubling to the defendant with respect to the boilerplate, template, and macro program that he is using, is that Dr. Basile came

here with no file; no notes; no consent form. This is boggling. This assessment was done two years ago - not even two years ago, a year and a half ago. No sign-in sheets; no information about how long this took? All of the independent and verifiable information is not available. There is nothing to connect this report to his assessment of Ms. Cairns.

We don't have - that there's no - what time was her appointment? Who was the person who sat in? The consent form, sure, is that a small thing? Maybe, I don't know, but he doesn't even have it. In fact, he repeatedly said, there's no file, there's no file. As though that's not a big deal. Like, as though it was a question that behooved him.

Now, why do I draw those few - make those few examples? Well, Your Honour, the fact that one of the parts that Mr. Palmer took, Dr. Basile to, was about the MoCA and the Rivermead testing. The only parts of his file that the plaintiff would have filled in by hand, a year and a half ago. A verifiable, answers of her hand to paper, to join her to this report, and he said they were shredded. How they were not scanned, kept, or anything is – I mean, I don't really even know what to say to that. One of the only things that we could have checked, fact-checked his numbers to, are gone. Shredded, a year and a half later. And here we are in court.

So we are to rely entirely upon nothing. Other than what Dr. Basile says happened in that room. And this report, that looks almost identical to two other reports.

There we submit, was absolutely no interview of Ms. Cairns and no history taken of Ms. Cairns. The reports that we see, Your Honour, include copious quotations from interviews of claimants, plaintiffs. The interview process generally takes up a whole beginning of a report. How did this happen? What was your health like before this accident? Tell me about how you are now? What kind of work were you doing before? There is no interview. There are no quotes of what she said. There is, oh, you have a headache. Does it feel like a band of tension or vise?

Putting in the - what he needs to come to his conclusion, into the report. Not asking her to describe her headaches ever. And a perfect example is the migraine symptomology that we went through. Never could that be more different than what we heard from Ms. Cairns. Ms. Cairns talked about photophobia and issues with noise. There was nothing about peripheral visions; and lights; and flashing; and black spots; and kaleidoscopes; and all the other fancy terminology for some sort of migraine aura. Aura is not a part of Ms. Cairns' medical history in terms of her long-standing migraines, and the Court knows that.

The Court - we had a lot of evidence about migraines from Dr. Lobo, you know, and from Ms. Cairns. So that is actually one of the diagnostic tools that Dr. Basile used, to come to one of his diagnoses. And it is absolutely within the realm for this Court to interpret that, that is inaccurate and just part of a template.

THE COURT: Isn't that the part where he says, that's his exam? So on his exam, he detected some stagmus and some - I just need to find the....

MS. TANNER: There was one part, Your Honour, where he said there was an exam about one eye.

THE COURT: Yes. That goes to the – how the eye – when he used his finger to go left and right, and then bring the finger towards the nose. And it speaks to the stagmus or strabisme....

MS. TANNER: Yes.

THE COURT: I'm not seeing the quote here. But that – he reported that. He said he reported that on his exam. So, that's independent of anything that Ms. Cairns said to us.

MS. TANNER: Fair enough, Your Honour. But if you were to look, Your Honour, at number three heading, which is Headaches, and that is on page six of Ms. Cairns' - her report. The last paragraph, he's testified that this was all her subjective reporting. And that this is where he would ask her a question. Do you have this? Would you describe it? And if yes, it would propagate. This is where the scintillating scotomas; the kaleidoscope appearance; the

fortification spectra; the zigzags in the periphery vision. This, he says, comes from her. So this is not his objective exam.

When I asked him these questions, and I wrote down here, he said, well, that's her migraines. And then he went on to talk about tension headaches. And I asked him right here about this, because this was a very crucial paragraph that struck me. One, was the description of the tension type headaches, which we had never heard from her, those band around her head. She definitely just - she never described her headaches like that. But the other part was now this business at the bottom with the migraines and the aura, and the hallucinations that, one of the types of symptoms that people with migraines report.

And he said that this is what she told him, or that he asked her questions. And this is where now, I drilled down after the part about you know, you put to her about the tight band and she said, yes. And that was the leading question. So, I wanted to explore that further.

And here I specifically asked him, did you look at the medicals to see what she was complaining about with respect to her migraines? Now if Dr. Basile had looked at the medicals, and the descriptions, and the symptoms that she attributes to her migraines, he would have noticed, photophobia and sound sensitivity. And here was his response,

Your Honour: I don't put a lot of weight on the medicals, because general practitioners don't ask if - don't ask the questions. So, I wrote, not looked at medicals.

And then he specifically spoke about 2013 and 2015. So he had looked at the medicals, and in fact he testified that in preparation for this report, he spent a whole hour reading the medicals. And then in preparation for today, he spent a whole hour reading the medicals.

And for one to not be - now I digress very quickly, but for him one to not be an advocate before this Court the proper response would be: I reviewed the reports on Friday - the medical records. I noted that these symptoms were not accurate. This is not accurate. And he was unable to do that Your Honour. And this is a very clear example of something that is not attributable to this case, and not attributable to Ms. Cairns. And a sign that he is putting into his report; or into the mouth; or into the macro; or what have you, things that will lead to the conclusion. And one of the conclusions he makes is about migraines. And if these are the type of migraines he's diagnosing, then he has the wrong person, Your Honour.

Now, with respect to the boilerplate and template issue again. We heard twice today about in the hospital using dictation to increase efficiency.

And we heard that from an individual who has not had any hospital privileges for the past five years. So his information we would submit is rather dated. In any event, efficiency is not an issue here in this court, for the purposes of determining things like causation and damages. I'm almost certain that the plaintiff's counsel did not advise him, that he only had 10 minutes to dictate a quick report. As he said, is how much time a doctor like often has in the ER, when they have to quickly get needle-to-arm, okay.

So, this process, this judicial process, this court process, the jurors, the law, the legal argument, this is not an efficiency seeking mission. We are not a shortcut system, the judicial system. Should doctors be able to use a dictation system, when they're charging OHIP? When they're rushing through the emergency ward? When they're seeing, you know, 200 patients a day? Absolutely. I don't know what kind they're using, and I don't know what award they're getting and what they're doing.

But here we are, we have a 16-page report, and efficiency is not an issue. And neither are shortcuts. So to compare what he is doing, to - which is drag and dictate and the templates -to what they do in a hospital, is a pure sign of advocacy. Because it's absolutely and completely irrelevant. And it has a no bearing on what we're doing here.

A standardized system is not a system for triers of fact. This is a - what we saw today was a standardized system that Dr. Basile is using, for his business. And it's a standardized practice that is not helpful to triers of fact. It is neither impartial, nor particular to any of the cases that we looked at today - those three cases. It's not specific. And the lack of open-ended questions, is not the standard of an expert. Experts are to assist and be open-minded. And that's why they ask questions like, how does your head feel? Not, does your head feel tight; sharp; throbbing? And give someone a little checklist that they can give, to assist themselves or to assist himself, or what have you.

And I thought it was rather interesting when Mr. Palmer, as part of his questioning, said, as a way to somehow - I thought it was helpful on our side. Well, could this be me? And he stood back and said, this test right here, could that be me? If that's the test, how is that helpful to a jury? Whether it's a, you know, a physical exam? Whether it's a description of the accident? Whether it's descriptions of symptoms? All of which, in this case, had elements that were wrong and that were errors, we should not be able to swap out Mr. Palmer for Ms. Cairns. Or Patient A or Patient C, or Patient B, for each other.

With respect to careless. Now, this comes up in

the *R. v. Nettleton* (*R. v. Nettleton*, 2023 ONSC 3390 (CanLII)), and the *R. v. Hason* (*R. v. Hason*, 2024 ONCA 369 (CanLII)) cases. This is where I address some of those points. So let's start with the small step. The entire first page of Dr. Basile's report is a careless standardized practice that he does not review; that he does not edit; that he does not look at; and he seemed rather unconcerned. But, he at least admitted to those things. He admitted to being careless, with respect to the first page.

He admitted on the first day that he testified, he relies on the assessment company to attach the proper CV. This is a careless practice. He is submitting a report with a CV and a Form 53, to a law firm, getting paid for it. Is that the most egregious of all the carelessnesses *[sic]*? No. But is that one of them? Absolutely. And is that one of the first red flags? That's the first one. That led me to the whole - looking, into the entire first page. And why did I do that? Because he said, well the company does that part. Okay fine. So I stopped asking about that. I moved to the part that he said he reviewed, because I asked him a few times. Did you review this report? And is this page a part of your report? And the entire first page is wrong. It is not up to date and it's not accurate. And in fact, he says that he corrected one thing, but not another thing. So, you know one wonders, when push comes to shove, what parts is he correcting

or not correcting? And when is he editing, and when is he not editing?

Dr. Basile testified that he reviewed for today's purposes, the medicals. And he spent one hour doing so. And in so far as his carelessness he could not recall, whether he had an ambulance call report, which we know he didn't. Because we got it by court order in the beginning of the trial. But he could not recall, having reviewed it on Friday, all the medicals for one hour. He could not recall any GP records. And he could not recall the Airport Rehab file, which is - he goes to some length to report on at page four. The very bottom of his page, in the section entitled Immediate Symptoms. And in terms of immediate symptoms Your Honour, on page four, apparently it should say, Immediate Head Symptoms if you'll recall.

He admitted that that was inaccurate, and he testified that, that entire section is about the head. And why did he say that? Because when I put to him the fact that she had lacerations and reports of open wounds to her knees, he said, well, that's not the section about that. That's the section about head. And she didn't have any cuts to her head. Except then, why is the bottom of the page about Airport Rehab, physiotherapy, and chiropractors?

So not only is that an example of his

carelessness, but that is advocacy in its truest form. He literally redefined the section as we sat here - as I stood here. He testified that that section was all about the head, and so that's why the lacerations is like, I guess, I don't know what he said. Was it a clerical error? Did he say if there weren't any? But we lost track. But then at the bottom of that page, Your Honour, it's all about Airport Rehab. That section is not about the head. That section is about immediate symptoms. That's why it's called immediate symptoms, and that's why it references all different things, including body parts.

And with respect to careless, that section reports that Ms. Cairns hit her head. I asked him, in this head injury case, would it be useful or helpful, if you'd asked what she hit her head on? What if it was the window? What if it was a steering wheel? What if it was the airbag? And he said, hmm, yes, "sometimes I follow up, but I did not ask". When might be an appropriate or relevant time for this medical legal expert to ask in a head injury case, where he diagnoses concussion, about what she hit her head on?

I would suggest, Your Honour, this is the time of all the times, that you're using Dragon Dictate and your templates and your standardized reports. That this is the time in this head injury assessment, to ask her, what did she hit her head on? And insert, perhaps one or two extra words.

Steering wheel, two words. Airbag, one.

I asked him again about why there's no mention of preexisting headaches and back pains? And his response repeatedly throughout my questioning, was that they did not think they were of any relevance. He said that, quoting the 2013 and 2015 records he had looked at. And he said on a number of occasions, "did not think of any relevance". How are headaches not relevant if they predate the accident?

Going on with the careless piece. And you'll note, Your Honour, much of the carelessness dovetails into advocacy, by the refusal to change an opinion. By the refusal to admit of the relevance. By the refusal to consider. And then, by the continuous avoidance of a question or changing of an answer, such as the re-heading of the immediate symptoms section.

I asked Dr. Basile about the interplay between the medical records and his "assessment". And I put to him about balance and concentration, which he noted as immediate post-accident symptoms. And he looked at the CNR, and he said he looked at them before he wrote this report. He said he looked at them on Friday. And I waited for him to mention, oh, you're right, I see here, she was walking around after the accident, and she said she was walking around. I guess that, you know, that wasn't relevant either, given that he was so

committed to ensuring that one of the symptoms, he insists that she told him in his interview, was that she had balance and concentration issues. Which, I put to this Court, is not someone who's walking around immediately after an accident.

Further clerical errors and carelessness include the very first diagnosis at number one, about the American Academy of Neurology, and the Ontario....
THE COURT: Before you go there, I mean we also have her evidence that she drove back – she drove home.
MS. TANNER: Oh, yes, exactly.
THE COURT: Okay.
MS. TANNER: She went, yes - she went and got - somehow got into a rental car that she had never driven before, and made her way home. Yes. That’s someone who is surely is not confused after an accident, but....
THE COURT: Well, or concentration issues.
MS. TANNER: Correct. Absolutely. Again, with respect to clerical and or carelessness, however, we want to call them. I cannot fathom the number of times, or the amount of bandwidth and airtime we wasted, trying to get Dr. Basile to admit that the sentence and the diagnosis at number one, on which he based - we can only presume number one is the most important of all the diagnoses - is wrong. No matter which way you cut it. Because the American Academy of Neurologists does not speak about post-concussion syndrome. It's about concussion. His diagnosis, Your Honour, ought to

have been, she meets the American Academy of Neurologists criteria for concussion. Because you have to have a concussion, Your Honour, to have post-concussion syndrome.

And then, he says I'm the Ontario Neurotrauma Foundation's association criteria for post-concussion syndrome. And you know, we went around the block so long, it's hardly worth going over again. But the fact of the matter is, is he failed as a neurologist in teasing out the concussion part of his analysis. He did not say, my diagnosis is concussion. And because she has a concussion, she has post-concussive disorder. And why is that - post-concussion syndrome? Why is that? Because when I put him to the test, and asked him, well, yes to diagnose a concussion you need immediate post-accident symptomatology, don't you? And he said, yes. *[Indiscernible]*, EMS; hospital; report to the doctor; head strike; headache; confusion; all those things. And it is easily up for the Court to determine, that that is an ambiguous and incorrect diagnosis. And built on a variety of either errors or medicals, which he repeatedly said, are of no utility.

How is this doctor saying to this Court, and in this report, that this lady, meets the criteria for concussion, when he cannot or does not, have immediate symptomatology to refer to? He has a literally - this is the example of putting his conclusion first. And looking for how to make the

conclusion second. Or not even looking for it in this case, because no matter how many headache things I showed him, pre and post. And I went on for some - I mean, I really dug them all up, to make sure. Same with the neck pain. He would not make any comment to that.

The carelessness, Your Honour, with respect to her work history. I think we can all agree that Ms. Cairns, over a period of three days testified consistently and clearly with respect to her work history. She is a woman who knows her work history. All the way back to when she was 44 years old and working at Indigo.

So the two weeks that - the fact that the work history, noting that she stopped for two weeks before, is just not believable. It does not pass the sniff test.

Your Honour, defence puts it to you, that there is absolutely no way that Ms. Cairns would have said that. No chance. She may have had tough memory for some things, but she knew everything about her work history. She, I mean, I feel like I was there. Indigo, Mother Parker's, Amazon, right to the very end. Including when she applied for CPP. How many months before, including exactly how many months she was off work. And my friend took her through it. I took her through it. She got taken through it again in re-direct. Never once did two weeks ever come up about anything.

The immediate headache, Your Honour. The ambulance, that they attended at the scene, and that she was worthy of being taken away. But she decided not to. That is absolutely careless, advocacy, an error, and a conclusion and a sentence, with no factual background. That has to be coming out of his boilerplate - of his standardized report. Because there's no real way of getting from ambulance to where that you'll be taken away. And he had no answer, until he was pushed. He had no answer for me. But Your Honour asked him, and he eventually did say, yes, you're right, that's wrong or makes no sense. I don't recall exactly his words.

But that is one of the very first - that is the very first treatment provider on scene, I think. It might have been the fire department – one of the two, who certainly, that information is pretty crucial towards the diagnosis of a headache, A. For the diagnosis of, did she have capacity to leave then? And somehow it's just glossed over in a report, that has no ambulance call report.

The immediate headaches is an error repeated throughout. Him telling us, that she told him, she struck her head. But then not looking at the documents. Again, how can a doctor, unless they're relying on a standardized report, say that: well, I just took her at her word, and then boom boom boom, comes my conclusion. Well, that's

not doctoring, and that's certainly not of use as an expert. And I put CNR, after CNR, after CNR about the headaches, and about immediately after. And his only two words to me were, I disagree. And I wrote them down. Like how, what, how – I'm showing you the paper, how do you disagree? The cases that we're going to look at talk specifically about experts refusing, to when things are being pointed out to them, to ever change their mind, or admit, or think for a minute, or even take a breath.

And the carelessness and the advocacy with respect to those two new cases that we looked at, Your Honour, go to the professional credibility bias. Which is discussed at some length in those cases. And the leading questions that come out of this – this macro program, or what have you, go directly to the confirmation bias, that is set out in both of those recent cases at *Nettleton* and *Hason*.

And then a deep dive into those two biases, Your Honour, are at page 16 of the defendant's factum.
THE COURT: Which factum is that? Can you put it up? Where is it on CaseLines?
MS. TANNER: If I could have uploaded these to CaseLines, I would have, but I wrote them by hand, so.
THE COURT: Sorry, uploaded what?
MS. TANNER: Well, just when I was writing these for the use of the....
THE COURT: No, no, no. That's okay.

MS. TANNER: Yes.

THE COURT: No, you wouldn't be uploading your notes to CaseLines.

MS. TANNER: No, I know.

THE COURT: But if we can find the factum. And then use the go-to function to get there.

MR. PALMER: Book of authorities, Dr. Basile is Tab 49, Your Honour. It's at....

MS. TANNER: No. We're looking into the factum.

MR. PALMER: Oh, I'm sorry.

MS. TANNER: That's okay.

MR. PALMER: Defence revised factum is at Tab 48, and it's master B-1-1708.

THE COURT: Yes. And I've asked if somebody could use the go-to function. Because otherwise, I'm scrolling up and down. And Madam Registrar, you can turn on the screen for our guests to be seeing this.

CLERK REGISTRAR: Yes, Your Honour.

MR. PALMER: Your Honour, my friend has directed us to paragraph 59.

MS. TANNER: On page 16, Your Honour.

THE COURT: Page 16, yes so the inquiry into pediatric forensics, is that the case?

MS. TANNER: That's it, Your Honour.

THE COURT: Right.

MS. TANNER: So, and that leads into the *R. v. Nettleton* case. So, the inquiry into pediatric forensic pathology in Ontario, which is a 2008 case and conducted by - it's an inquiry, I apologize.

THE COURT: It's the Goudge Report.

MS. TANNER: Right, the Goudge Report.
THE COURT: Commonly known, regarding Charles Smith.
MS. TANNER: Yes. And the Goudge Report discusses six different forms of bias. So, the first is the lack of independence bias, which is when a party hires an expert, and the expert feels affiliated to that party.

The adversarial or selection bias, where the witness was chosen to meet the requirements of the litigation, that's not this case.

The association bias which describes the natural bias to provide beneficial services to those who hire them. We don't have any information about that. That's not where we're going.

But the professional credibility bias, is where an expert has a professional interest in upholding their own credibility, after taking a position. And there is no doubt that that is what we saw here today, and what Justice Goudge was concerned about. Where Dr. Basile has clearly a huge interest, and a professional interest in upholding his own credibility, after taking the position that he took. That's what it was today. That is virtually what we saw, and what we say happened, and what is happening here.

And the confirmation bias, is what we saw in *Bruff-Murphy* and that's where....

THE COURT: So we don't have E?
MS. TANNER: The noble cause distortion where the conviction that a specific result is the correct one to attain? I'm not really sure - I don't think so. But, I didn't turn my mind to it, so I can't say for sure. It's a bit of a confusing sentence.

But confirmation bias is where the individual who is drawn to a specific outcome, tends to seek evidence that favours the desired conclusion, or interpret evidence in a manner that aligns with it.

And Your Honour, I put it to you that, that's what my submissions have all been about so far. Both of those two biases.
THE COURT: Do you have any comments on his indication that the various diagnostic criteria are addressed? They're put into the algorithm, and then there's an algorithm that tells us concussion, no concussion. That was part of his evidence. Do you have any submissions on that?
MS. TANNER: My submission, in short, would be that that's highly inappropriate. That, that is not a fact-finding mission. That is not a way to diagnose a concussion, and that an algorithm has no place in this court. That, that is a standardized way of some sort of a cookie-cutter means of coming to a conclusion, that is highly, highly, not particularized and not specific.

When does it need an algorithm to ask Ms. Cairns about what her symptoms were after the accident? It's a simple one question, maybe two, maybe three. But an algorithm has no place in his diagnosis of Ms. Cairns' concussion, particularly when it's hard to fathom what he put into the algorithm. Because he didn't have anything post-accident. And he repeatedly said that the pre-accident materials were not of real use. He maintained that position when I put post-accident notes to him. And even when he agreed that the immediate post-accident symptomatology was important, he couldn't point out anything that was immediate post-accident that related to this case.

And the only thing that might have sort of held a ring that we were semi-familiar with, was the hitting her head. But as we know from being in this trial, the hitting the head didn't come up for four months after the accident. And it was very specific. So if he didn't - if he's not getting that from immediate after - right after he testifies here in court, that it's the immediate post-accident symptomatology that's important for the diagnosis of a concussion. It doesn't really matter what she said four months later.

Justice Bird in *R. v. Nettleton* explores at length the confirmation bias of an expert witness. Now in that case, it was the dangerous offender paragraph. It was one paragraph. I didn't count all the paragraphs, Your Honour, that were yellow

highlighting, but there were 11 sections of his report that were highlighted a lot. So 11 sections, not including the first two. So I mean, we're talking about in a report of 17 sections.

And we're looking at *R. v. Nettleton,* that was one paragraph that was a cookie-cutter paragraph on a dangerous offender. And that went to the conclusion of if the person was a dangerous offender. In this case, the conclusion goes to causation. And I'm going to get to that, because I think it's very important. Because in that respect, Dr. Basile was very clear in his testimony. And in fact, we can do it right now while I'm thinking about it.

In his report, he agreed that above his six diagnoses was a summary, and that, that summary was causation. He fully agreed that the summary is causation. So, that's the "but for" part of our legal system; our test; what we're all doing here for the last three weeks. This first paragraph relies - his diagnosis rely on this first paragraph and that's, Ms. Cairns had not had any. The word is very – I'm at page 11 Your Honour, of his report.

THE COURT: Yes. Go ahead.

MS. TANNER: I mean, the word any might as well be capitalized. It's a crucial – no matter if you put in, sort of "but for". Those are the types of words that are crucial to whether this is an exacerbation, thin skull case. Or whether this is

a - it's all because of this accident case.

And this report is, it's all because of this accident. This is not an exacerbation report. And I put it to this Court, that if this was an exacerbation report, it would be stronger. If Dr. Basile had gone through the effort of reading the medicals; summarizing that; and going through her medical history; which he didn't do, perhaps this would be a different - there might be some teeth to it. But there aren't any teeth to this report.

When I asked, here is the professional credibility bias right up front. And the confirmation bias, here we go. I asked him, now that we've gone through the records and she has not had any of these symptoms is wrong, or inaccurate I think was the word, I asked him point blank, does that change your diagnosis? And his answer was, no. How can that be? How can a pre-accident medical history not change; alter; or affect his diagnoses, that she has A, a concussion; B, a traumatic brain-injury? If this is a traumatic brain injury case, I must have not been here.

The post-traumatic headaches with occipital neuralgias bilaterally; tension-type headaches; chronic daily medication overuse headaches; and migrainous features, I don't know that that's accurate if some of these symptoms predate. But the tension-type headache, he said, was the one with the band across the head and the vise. And

she didn't talk about that, and that's nowhere. So that has to be wrong.

The chronic daily medication overuse, that's got to be from someone else. I did not hear from Ms. Cairns that she has taken Tylenol every day. I did not hear from Ms. Cairns she's taking Tylenol 3 every day. So, it behooves me to figure out, how the chronic daily medication overuse headache is a thing.
Now, perhaps that's something she told him, that she was taking a lot of medication. I don't know. And then the migrainous features - the migrainous features, Your Honour, that he identifies in this report, are the hallucinations; the peripheral visions; the cicadas (ph), and the kaleidoscope visual disturbances. That is not Ms. Cairns.

So A, how does her pre-accident not affect? And B, how does it not change his diagnosis? And C, how did he not even willing to consider it?

And that goes on, you know, even with respect to the issues of the degenerative spine and the cervical spine and the thoracic spine imaging. And I asked Dr. Basile, could that be a source of pain or discomfort? I don't think I used discomfort, I think I said pain. And we went through that he had them, and we went through they were degenerative as of January 8th, and thus long pre-existing. And Dr. Basile at this point did two very interesting things, he referred to a

study that where 10 to 25 percent of individuals go beyond the time of recovery. Then he - and he said that today. I think it's the first time I've heard it. It wasn't - it's not in his materials. And 30 to 70 percent of individuals are asymptomatic on study. That was in response to my questions about that, and we'd love to know what those studies are.

But citing helpful percentages in court in proposition to actual clinical records that are being put to you, is like twisting yourself into a pretzel to try to make your point.

THE COURT: So you'll get to the next part of the test?

MS. TANNER: Yes.

THE COURT: I think you've covered off...

MS. TANNER: I think I gone through....

THE COURT: ...the concerns. But I need your input on the law.

MS. TANNER: Yes.

THE COURT: And it's a quarter to four already.

MS. TANNER: In *Parliament and Conley* (*Parliament et al. v. Conley and Park, 2019 ONSC 3995 (CanLII)*), the standards of an expert, which are expected, and which go towards the professional credibility bias, are fulfilling the obligation to the Court. And when one is not able to fulfill their obligation to the Court, and needs to really, really, really make sure that their professional credibility is maintained, that type of bias causes prejudice.

And what happens is, according to *Parliament and Conley*, renders a cross-examination on the substance of a report, on the opinion as ineffective. So to cross-examine Dr. Basile, according to *Parliament and Conley*, would largely be ineffective. Because as we saw, he is too firmly entrenched in his opinion. And that ultimately impacts his reliability and his credibility.

And the Ontario Court of Appeal, in 2016, in *R. v. Shafia* (*R. v. Shafia*, 2016 ONCA 812 (CanLII)) - sorry, in *Parliament and Conley*, Your Honour, the citations - well the citations are there.

THE COURT: Where?

MS. TANNER: The citations are just at the bottom, and our book of authorities is at....

THE COURT: Let's see 2019....

MS. TANNER: Yes, that's 2019....

THE COURT: Is there a particular paragraph since you were taking the Court to *Parliament*?

MS. TANNER: I will have to find that for you, and I will do that. But that is an exact quote, so we should have that paragraph.

THE COURT: Is it paragraph 19?

MS. TANNER: Now, I will - Mr. Palmer is going to find it.

MR. PALMER: If I can.

MS. TANNER: *Parliament of Conley* is 2019. The expert's witness's ability to testify in accordance with the standard as expected.

Professional credibility bias of the. Three nine, nine, five.

MR. PALMER: I've only got one hit for ability.

MS. TANNER: Your Honour, if you don't mind, I will circle back to that.

THE COURT: Okay. Yes.

MS. TANNER: Because the search for that paragraph is going to demonstrate my next paragraph, which is, the consumption of time, prejudice, and confusion, and the danger that the triers of fact will not be able to critically assess the evidence. That's what will happen if Dr. Basile testifies.

There will be extreme prejudice to the plaintiff, with the yellow; with the wrong facts; with the business about Dragon Dictate; with the fact that they just sat for two weeks of testimony, that they will, when they hear him, will be wrong. The confusion that will be caused.

THE COURT: Hold on, hold on.

MS. TANNER: Yes.

THE COURT: Because, you're making the assumption that the jury will see the reports, right? It will be his opinion. And then you will challenge him. Ask him to explain how he came to his conclusions? And then you can knock out one by one: but you didn't look at this; you didn't look at that.

MS. TANNER: Yes.

THE COURT: And you can take it - I mean, we have to be careful here. The gatekeeping function of

White and Burgess versus, so what is it that I'm taking away from the trier of fact, versus letting them engage with the evidence? So a cross-examination that says: but Dr. Basile, I'm taking you - I'm giving you an example now.

MS. TANNER: I know, yes.

THE COURT: I'm taking you to Dr. Lobo's note of December 2015, December 23rd, two weeks before the accident. Look at the complaints. What have you got? Just the way you made the submissions here.

MS. TANNER: Yes.

THE COURT: How could you possibly say trauma when this lady's complaining? Or look at how thorough the subjective complaints are when he says, well, if the doctor doesn't ask a question, you won't get an answer.

MS. TANNER: Yes.

THE COURT: But, Doctor, here's a very extensive subjective report. Like, you can have...

MS. TANNER: Yes.

THE COURT: ...a very effective cross-examination, the triers of fact can - I don't know – I don’t know if we have confusion here.

MS. TANNER: So, Your Honour, it's the defendant's position that the gatekeeping role in this particular instance, and what Your Honour is faced with, is with respect to the boilerplate standardized template report, with the leading questions and the inputting of entire sections into a report. That's where the gatekeeping, in our view, is to take place. All of the other parts of my submissions, are my cross. And they

bolster Your Honour's gatekeeping, in the sense that, if Your Honour takes any issue with the amount of standardization in these reports; and takes issue with the template nature; and the leading questions; where his conclusion is being put into Ms. Cairns' mouth. If Your Honour takes issue with that, then all of the cross-examination in essence that I just went through, can only serve to bolster Your Honour's potential decision in the defendant's favour. Because the problems with the template, never mind just one paragraph, that *Nettleton* is based on. One paragraph. So whether or not I can do an effective cross-examination I don't think is the proper issue. And the case law about letting it go to weight or having it come through, and then we deal with it on cross; I submit is not the applicable case law to use here. *Hason* and *Nettleton* are the most recent cases. They are directly on point.

And the judges did not shy away from excluding that which had to be excluded, and making difficult decisions. Paragraph 19, yes, of *Parliament and Conley*, Your Honour, which quite rightly is part of our factum with respect to the expert's role in weighing evidence, assessing credibility, and choosing amongst the witnesses to determine the premise upon which the opinion is expressed. That is not the role of the expert.

All right, paragraph 19, and this is under the section of our factum about the exclusion of

expert evidence, due to findings of professional credibility, bias, and lack of independence. And that's what all of my submissions have been about. That's what the cross-examination was about. And it is our submission that Dr. Basile did exactly what *Parliament and Conley* says he ought not to have done. That it's

> not his role to weigh evidence and assess credibility, and choose amongst witnesses in order to determine the present premise upon which the opinion

is based. And an example if I may say is, Mr. Palmer asked him. Well, what if she's lying? That in and of itself was a difficult proposition to put to someone who just finished testifying that the entire report is subjective in nature. Because if that's true, then the question, what if she's lying, is a real problem, because he doesn't go back and look at any medical records to buttress or at least to attach his opinion to.

So in essence, he's a thousand percent weighing her credibility right from the get-go because that's all he's looking at. Except that it's not even really her credibility because he says he's taking it all from her, but he's giving her what to say.

So really, Justice Woodley, if we go on to the next page on page 18 of the factum. Justice Woodley goes on to talk about how it was, fatal to the admissibility of expert evidence. What was fatal was that the witness refused to part from

the evidentiary conclusions during testimony on the *voir dire*.

THE COURT: Sorry, which paragraph?

MS. TANNER: We're at paragraph 64 of the factum, Your Honour.

THE COURT: And is that still *Parliament*?

MS. TANNER: Yes.

THE COURT: Okay.

MS. TANNER: And, Your Honour Justice Woodley, nailed it on the head there. That was fatal to the admissibility of the expert. And that was on a *voir dire*. In the safety, without a jury present. And the witness refused to part from the evidentiary conclusions.

And the Court of Appeal looked at *Parliament and Conley* - so Justice Woodley, then the Court of Appeal. And at paragraph 65 of the factum, the Court of Appeal, at paragraph 44, agreed with Justice Woodley. And that the credibility and truthfulness of a witness is for the trier of fact. Great. Not the proper subject of the expert's opinion. Great. And the rationale for the policy is that credibility is a notoriously difficult problem. And here's the issue.

> A frustrated jury may readily accept an expert's opinion as a convenient basis upon which to resolve its difficulties.

So the only person....

THE COURT: Where's that?

MS. TANNER: That's at paragraph 65 of the factum, it's the last two lines.

THE COURT: But the quote is from where?

MS. TANNER: That is our – the quote is at paragraph 44.

THE COURT: Thank you.

MS. TANNER: And the concern here is that a jury will hear Dr. Basile say he diagnosed a concussion, when they're frustrated or trying to figure out the credibility of the plaintiff. So that - Your Honour, there's paragraph 44 on the screen for you from the Court of Appeal and there's the quote.

And if we can go to *Denman* in 2022, with Justice Ferguson (*Denman v Radovanovic*, 2022 ONSC 4401 (CanLII)), which is at paragraph 66, Your Honour, of the factum, but we'll get you to the case law. And I will read the submissions. So, at paragraph 34, Justice Ferguson says....

THE COURT: Yes, keep going, I've got your factum.

MS. TANNER: Okay, sure. He says,

> The trial judge must avoid temptation to take the path of least resistance and rule evidence admissible, subject only to weight.

And part there, Your Honour, I would draw you to the addendum report of Dr. Basile on surveillance. And you'll recall, he watched all the surveillance. And his point was simply, no, it doesn't change his opinion. Oh, actually, he didn't watch the surveillance. He reported on the reports only. So never did he watch all the surveillance. He saw the stills, and he read the reports. And his conclusion at the end was, well, you see here, she gets out of the car after going to William Osler, and then we don't see her for the rest of the day. That must have been one of

her very bad days. And that's the expert weighing in to something that is absolutely not in his lane. That's on credibility. What you're seeing there versus what you know, she's doing the later part of the day, that's for counsel to make those pitches. And for the triers of fact to decide, in all the hours we don't see her, what is she doing?

So I will skip ahead, Your Honour, and just quickly talk about *R. v. Hason*. And because that's the Court of Appeal, that's the most recent, that's May 7th, hot off the press, if you will. Paragraph 123, the Court of Appeal adopt *R. v. Nettleton* in its *R. v. Hason* judicial decision.

THE COURT: Which paragraph?

MS. TANNER: Paragraph 123, Your Honour.

THE COURT: Okay, got it.

MS. TANNER: And it's Justice Tulloch who says,

> An expert who routinely treats as boilerplate and takes a careless approach towards a very significant section of a report that judges may rely on to impose profoundly devastating sentencing consequences has breached his duty to the Court and lost his way...Such an expert is not someone who can easily be trusted, much less treated as persuasive as the law requires.

And here is an important sentence.

> It is inexcusable for a repeat player to follow this careless practice case after case after case.

That's what we have here, Your Honour. And the rest of my factum goes through *Graul* (*Graul v. Kansal*, 2022 ONSC 1958), *Akeelah and Clow*, 2018 ONSC 3410 (CanLII), which I did on the first day. Discusses more about the Goudge Report and the

concerns that the judicial system faces with respect to unreliable expert evidence.

And there are a number of decisions after that that involve Dr. Basile. So at paragraph 73 of our factum and onwards, Your Honour, the defendants have put together A through G. And you'll recall we've discussed some case law about, well, if the expert is criticized once, what does that mean? How should we treat it? Dr. Basile's reports have been criticized in the Superior Court of Justice as well as various tribunals. So we have *Graul*, which is the Ontario Superior Court.

THE COURT: Well, Justice Lemon found him helpful there, so.

MS. TANNER: Yes, but Justice Lemon found him that he often failed to answer questions, and went on, on his own lectures, so.

THE COURT: But ultimately he accepts the answers.

MS. TANNER: Exactly, yes. But that's a comment that one can certainly agree with, based on today. *Akeelah and Clow*, when presented with evidence of pre-accident records, Dr. Basile did not change his opinion. And in *Akeelah and Clow*, there was also surveillance footage and Dr. Basile refused to change his opinion.

Endure v. Aviva, which is a 2023 LAT decision, Dr. Basile ignored evidence, and neglected to appreciate a lack of evidence to support the diagnosis of a concussion. And in fact, in that LAT hearing, Dr. Basile's opinion on concussion

was contrary to the physicians who examined the applicant on the day of the accident. So we did go through the ambulance call report. There was nothing about concussion. There was, in fact, no head complaints were noted. And we've gone through, and Dr. Lobo went through, and the plaintiff went through that first record. And again, Dr. Basile's opinion is contrary to the individuals who actually assessed the plaintiff.

The next case is *Wilson v. Aviva*.

THE COURT: What do you say to his comment that these doctors don't have the expertise or they don't turn their minds to these kinds of questions. And that he's dismissive of them?

MS. TANNER: Well, I would say that the first people who are, first of all, Dr. Lobo is a doctor. And second of all, EMS personnel are trained to be EMS personnel. So to just wipe them away is unfair. You know, what I say to that is this, whether or not they diagnose concussion or not is one thing Your Honour. But Dr. Basile doesn't even look for the immediate symptom that he needs to diagnose concussion. So surely in those records, it would say something, headache, anxiety, confusion, head strike, something like that. So whether he thinks they're asking the right questions or not, the fact is the people on scene didn't note any of it. And the person who saw her the next day didn't note any of it. And the person who saw her the next day, Your Honour, you'll recall that all the information that we got

out of that was subjective from the plaintiff.

It's hard for Dr. Basile to stay here in one sense and say, I take everything she says subjectively to me. And, ooh, that's what I'm relying on. But he won't rely on what she says the day after the accident that she tells her doctor.

THE COURT: Okay, Counsel, I've got a note from my staff requesting a health break.

MS. TANNER: Yes.

THE COURT: We've sort of motored through. It's five after four. Mr. Palmer will do submissions tomorrow at some point. That's an easy one. But how far are you from finishing off?

MS. TANNER: Twenty minutes. But that's really just to go through the last few cases. And you know, I'm happy to do that. But I am also happy to have, you know, have Your Honour, review the factum.

THE COURT: Why don't we do this? I think....

MS. TANNER: Because all I do now is go through more cases where Dr. Basile is commented upon.

THE COURT: So under your Basile cases...

MS. TANNER: Yes.

THE COURT: ...I've got your factum. I'm going to need you to sort of tie it back to the *White and Burgess* filter.

MS. TANNER: Okay.

THE COURT: Do that tomorrow.

MS. TANNER: Okay.

THE COURT: And that will give sort of a jumping board for...

MS. TANNER: Perfect.
THE COURT: ...Mr. Palmer to jump off from that with his submissions. So after....
MS. TANNER: After Dr. Getahun.
THE COURT: Yes. We'll do Dr. Getahun...
MS. TANNER: Yes.
THE COURT: ...with the jury, nine o'clock, right?
MS. TANNER: Yes.
MR. PALMER: Nine o'clock.
THE COURT: We're still tracking for that?
MR. PALMER: Yes, Your Honour, nine o'clock.
THE COURT: Nine o'clock.
MR. PALMER: That's the agreement with the Court yesterday.
THE COURT: Yes. So, we'll do Dr. Getahun. We'll take a break. I'll hear submissions and then we'll see what happens next page. Paitich should be on standby.
MS. TANNER: Yes.
THE COURT: And I think we'll just adjourn for the day. And that way we fold the afternoon break into an earlier break.
MS. TANNER: And thank you for allowing me to just do the submissions, get them out there.
THE COURT: Okay. That's what you're supposed to do.
MS. TANNER: I know. But without having to sit down and think about it some more.
THE COURT: Okay.
MS. TANNER: Thank you.
THE COURT: All right, thank you.
COURT ADJOURNED

FORM 3

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CITATION: Desmond v. Hanna et al., and Henry v. Hanna et al., 2023 ONSC 4100
COURT FILE NO.: CV-4405-00 and CV-18-4440-00
DATE: 2023 05 16

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
KENISHA DESMOND Plaintiff	*Lisa Bishop*, for the Plaintiff
- and -	
EVAN HANNA and RONETYA YOUSUF Defendants	*Keith Smockum*, for the Defendants
	HEARD: May 15, 2023

- and -

B E T W E E N:	
SHIAN HENRY Plaintiff	*Lisa Bishop*, for the Plaintiff
- and -	
EVAN HANNA and RONETYA YOUSUF Defendants	*Keith Smockum* and *S. Desai*, for the Defendants
	HEARD: May 15, 2023

NOTE: Not to be Uploaded to any Public Database or Released Publicly Until the Jury has Rendered its Verdict.

Trial Ruling #2: Calling Future Care Expert Yvonne Pollard

Trimble J.

The Motion (in the Desmond v. Hanna Action)

[1] This trial is a personal injury trial arising from a motor vehicle accident. The parties estimate that the trial will take approximately 8 weeks, before a jury. We are in the 2nd week of the trial, having selected the jury and had 5 days of evidence.

[2] On 8 May, I released Trial Ruling #1 - my ruling on the Plaintiffs' motion for leave to call more than three experts. The defence only objected to medical experts.

[3] In my ruling, I grouped Ms. Desmond's medical experts into two groups. The first group comprised Dr. Blitzer, Dr. Kekosz, and Dr. West, all of whom diagnosed chronic pain. They reached the same diagnoses with respect to the same injuries. Therefore, there reports were duplicative of each other, and their specialties not so different as to require separate opinions from specialty.

[4] The second group of doctors comprised Dr. Wolf and Dr. Vitelli, a psychiatrist and psychologist, respectively. They took the same history, administered virtually the same tests, and reached the same diagnoses.

Therefore, they were duplicative of each other, and their specialties not so different as to require separate opinions from each specialty.

[5] I ordered that the Ms. Desmond could select one expert from each group. Ms. Desmond elected to call Dr. Blitzer from the first group of doctors and advised on the argument of this motion that they will call a psychiatrist, Dr. Wolf from the second group.

[6] I made a similar ruling for Ms. Henry's experts, holding that Dr.s Mailis, Westreich ,and Vitelli (a physiatrist, psychiatrist and psychologist respectively), all provided psychiatric opinions about Ms. Henry's post accident condition, which were duplicative, and because the specialties were not so different, Ms. Henry had to select one of that group of doctors.

[7] During the course of that motion, no one argued that the opinions of any one or more of the duplicative doctors' opinions were necessary for the Future Care needs and costs reports.

[8] On 15 May, the Defence sought a ruling that Ms. Pollard cannot be called.

Positions of the Parties

[9] The Defence argued that Ms. Pollard's reports were almost exclusively based on experts that the Plaintiffs decided not to call, following my 9 May ruling. Accordingly, there can be no factual foundation to her evidence.

[10] Ms. Desmond argued that Ms. Pollard's reports were not based largely solely on the opinions of experts that Ms. Desmond elected not to call following my 9 May ruling. In any event, Ms. Pollard's evidence was the only evidence on the cost of future care.

The Law

[11] Neither party referred to any law on this motion. Each approached the issue as a fact driven matter.

[12] More specifically, the parties did not argue, and my decision does not rest on the admissibility of Ms. Pollard's reports or evidence under the 4 admissibility criteria from *R. v. Mohan*, [1994] 2 SCR 9, *White-Burgess Langille Inman v Abbott and Haliburton Co.*, [2015] 2 SCR 182, and *R. v. Abbey,* 2017 ONCA 640).

[13] Implicitly, however, the parties asked me to perform the gatekeeper function from the second step under *White-Burgess*; namely weighing the benefit of admitting the evidence against the prejudice of doing so (see: *White Burgess*, para.24), or balancing the relevance/reliability /necessity of admitting the evidence against the needless consumption of time/prejudice/confusion of doing so (see: *Mohan,* para. 47, per Binnie, J.).

[14] The Defence argued that given the lack of factual foundation for Ms. Pollard's opinion, there is no necessity, relevance or reliability to it and is severe prejudice in allowing her evidence to go before the jury. Ms. Desmond argued the

opposite; namely that there was an admissible factual base for Ms. Pollard's opinion, and severe prejudice in not admitting it since Ms. Pollard's evidence is the only evidence Ms. Desmond has on the cost of future care.

[15] Expert evidence is an exception to the hearsay rule. Expert opinion is accepted where the subject matter is beyond the trier of fact's experience because of its technical or scientific nature, such that the trier of fact cannot draw an inference or form a proper conclusion without the assistance of the expert. The expert is not required to have firsthand knowledge of the facts that form the basis of the opinion, but s/he can rely on the facts or opinions of others. In other words, the expert provides a ready-made inference for the jury based on his/her own measurements, investigation, or observations, and/or information the expert receives from others. Either way, the party calling the expert must prove the facts underlying the opinion (see: Sopinka, Lederman & Bryant, The Law of Evidence in Canada, 6th ed. (Toronto: LexisNexis, 2002), ¶12.40, pg 896).

[16] In *R. v. K. (A.)* (1999), 45 O.R. (3d) 641 (CA), the majority said that even if the evidence that the expert will give is relevant, the Court must be alive to the danger that a jury may misuse expert evidence or that it will distort the fact-finding process, especially where a witness of impressive qualifications expresses an opinion in scientific language which the jury does not easily understand. The jury may see the expert as infallible and give the evidence more weight than it deserves.

[17] With this risk, the court must ask whether the evidence is sufficiently probative to warrant its admission. The balancing between the probative value and the prejudicial effect of the evidence will depend, in part, on the extent to which the facts upon which the opinion is based, are proven (see: *K(A)* at para. 78 through 81). Put another way, the reliability of the opinion depends on the facts underlying the opinion being proved, the extent that the evidence supports the inferences sought to be made from the opinion, and the importance of the matter that it tends to prove (see: Sopinka & Lederman, ¶12.155).

Analysis

[18] The central question before me is whether, as a preliminary matter and based solely on Ms. Pollard's reports, there is sufficient evidentiary foundation for her opinions such that their probative value outweighs their prejudicial effect. This assumes, of course, that Ms. Pollard's evidence meets the four *Mohan* criteria for admissibility, a question which is not before me on this motion.

[19] Ms. Pollard's first future care needs and costs report dated 19 July 2018 is a paper review. She relied heavily on the reports of Dr. Kekosz, West, and Vitelli, whom Ms. Desmond has elected not to call in light of my 9 May ruling. Ms. Pollard also relied on other healthcare providers who do not fall within the scope of my 9 May ruling such as O. T. Berry, psychiatrist Dr. Doyle, kinesiologist Ms. Stevens, psychologist Dr. Karp, orthopedic surgeon Dr. Alvi, G.P. Dr. Mula, physiotherapist

Patel, and defence orthopedic surgeon Dr. Zabieliauskas. Ms. Pollard relies most heavily on Dr. Kekosz.

[20] Ms. Pollard's addendum future care needs and costs report dated 9 October 2020, too, was a paper review. Ms. Pollard provided a revised future care needs assessment based on new information she received, namely: the 14 November 2017 psychiatric report of Dr. Wolf, the 30 July 2020 chronic pain report of Dr. Blitzer, and a report of MRI of the cervical spine done by Dr. Safvi on 27 September 2020. In her summary of current status, she reiterated the diagnoses of Dr. Doyle and West, then reviewed the new opinions. While most of her future care needs and costing is based on doctors Blitzer and Wolf, she continued to rely to on Dr. Kekosz. She also continued to rely on her recommendations in her July 2018 report, many of which were based on Dr. Kekosz, and to a lesser extent, Dr. West.

Result

[21] The Defence motion to exclude the evidence of Ms. Pollard is denied.

[22] Notwithstanding that Ms. Pollard's reports rely heavily on experts whom Ms. Desmond has opted not to call in light of my 9 May ruling, there is evidence before the jury from Dr. Blitzer that supports some of the recommendations in the Pollard reports.

[23] Further, I have no witness list from the parties to know who will be called on behalf of Ms. Desmond. It may be that witnesses yet to be called will give evidence about the limitations that Ms. Desmond faces and her future care needs, that will provide the foundation for Ms. Pollard's recommendations. I cannot determine, at this stage, whether that evidence will come.

[24] Notwithstanding that I have dismissed the defendant's motion, as I have ruled orally in another context, Ms. Desmond, having made her election as to the experts she will call from among the duplicative experts, cannot introduce through Ms. Pollard the reports of those experts she elected to not call. They are hearsay. Ms. Desmond cannot "get through the back door which he cannot get to the front door".

Trimble J.

Released: May 16, 2023

CITATION: Desmond v. Hanna et al., and Henry v. Hanna et al., 2023 ONSC 4100
COURT FILE NO.: CV-4405-00 and CV-18-4440-00
DATE: 2023 05 16

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

KENISHA DESMOND

Plaintiff

- and -

EVAN HANNA and RONETYA YOUSUF

Defendants

- and -

B E T W E E N:

SHIAN HENRY

Plaintiff

- and -

EVAN HANNA and RONETYA YOUSUF

Defendants

Trial Ruling #2: Calling Future Care Expert Yvonne Pollard

Trimble J.

Released: May 16, 2023

Desmond v. Hanna, 2023 ONSC 4097 (CanLII)

Date: 2023-05-09

File number: CV-4405-00; CV-18-4440-00

Citation: Desmond v. Hanna, 2023 ONSC 4097 (CanLII), <https://canlii.ca/t/jz35k>, retrieved on 2024-10-03

CITATION: Desmond v. Hanna et al., and Henry v. Hanna et al., 2023 ONSC 4097
COURT FILE NO.: CV-4405-00 and CV-18-4440-00
DATE: 2023 05 09

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
KENISHA DESMOND Plaintiff	*Lisa Bishop*, for the Plaintiff
- and -	
EVAN HANNA and RONETYA YOUSUF Defendants	*Keith Smockum*, for the Defendants
	HEARD: May 15, 2023

- and -

B E T W E E N:

SHIAN HENRY	)	*Lisa Bishop*, for the Plaintiff
Plaintiff	)	
- and -	)	
EVAN HANNA and RONETYA YOUSUF	)	*Keith Smockum* and *S. Desai*, for the Defendants
Defendants	)	
	)	**HEARD:** May 15, 2023

NOTE: Not to be Uploaded to any Public Database or Released Publicly Until the Jury has Rendered its Verdict.

Trial Ruling #1: Re: Leave to Plaintiff to Call More Than Three Medical Experts Under s. 12 *Evidence Act*

Trimble J.

The Motion

[1] This trial is a personal injury trial arising from a motor vehicle accident. The parties estimate that it will take approximately 8 weeks, before a jury.

[2] After we selected the jury yesterday, the Plaintiffs moved for leave to call more than three experts, each.

[3] The Plaintiffs wish to call the following experts:

a. Dr. Neal Wesitreich, Psychiatrist

b. Dr. Angela Mailis, Chronic Pain Specialist

c. Dr. Michael West, Orthopedic Specialist

d. Dr. Romeo Vitelli, Psychologist

e. Ms. Yvonne Pollard, Future Cost of Care

f. Ms. Kristin Demaline, Economic Loss Expert

[4] Re: Ms. Desmond:

a. Dr. Steve Blitzer, Chronic Pain Specialist

b. Dr. M. Uri Wolf, Psychiatrist

c. Dr. Veronica Kekosz, Physiatrist

d. Dr. Michael West, Orthopedic Specialist

e. Dr. Romeo Vitelli, Psychologist

f. Ms. Yvonne Pollard, Future Cost of Care

g. Ms. Kristin Demaline, Economic Loss Expert

[5] The Defence opposes calling all of the medical experts. They have no issue with respect to the economic experts or occupational therapists.

[6] All experts are medical-legal experts - “hired guns” - retained expressly for the trial of this action. None of the impugned expert are treating physicians.

The Positions of the Parties

[7] The Plaintiffs assert that the experts are all necessary for the proper presentation of the Plaintiffs’ case and that there is no overlap in their anticipated testimony. Each speaks from his or her own specialty, without overlap between those specialties.

[8] The Defence asserts that the number of experts the Plaintiffs wish to call at trial are duplicative, and that it is unnecessary to have more than one expert give evidence in a particular area.

The Law

[9] Section 12 of the *Evidence Act,* R.S.O. 1990, c.E.23 provides that a party is entitled, as of right, to call three experts. Leave is required for more.

[10] The criteria for granting leave to call more than three experts include:

(a) Whether the opposing party objects to leave being granted;
(b) The number of expert subjects in issue;
(c) The number of experts each side proposes to have opine on each subject;
(d) How many experts are customarily called in cases with similar issues;
(e) Whether the opposing party will be disadvantaged if leave is granted because the applying party will then have more experts that the opposing party;
(f) Whether it is necessary to call more than three experts in order to adduce evidence on the issues in dispute;
(g) How much duplication there is in the proposed opinions of different experts; and
(h) Whether the time and cost involved in calling the additional experts is disproportionate to the amount at stake in the trial.

(see: Burgess (Litigation guardian of) v. Wu [2005] O.J. No. 929, S.C.J.).

[11] While the Plaintiffs have the right to put their case forward as they see fit, this right is not without restriction. Justice D. Ferguson said in *Gorman v. Powell*, [2006] O.J. No. 4233 (S.C.J.):

> Longer trials caused by calling unnecessary experts use up scarce resources and deny early trials to other litigants. To ignore the policy underlying s. 12 is contrary to the modern philosophy of civil litigation which is set out in Rule 1.04…to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

[12] Section 2 of the *Evidence Act* is restrictive, intended to limit the number of experts who testify at a trial. Simply because an expert has

authored a report that complies with the requirements under the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194 does not automatically entitle a party to call that individual to give expert opinion at trial. The evidence must be necessary and not repetitive of other testimony from other experts (see: *Hoang v. Vicentini*, 2012 ONSC 1066 (S.C.J.), para 11 to 12)

[13] The path of least resistance - to admit evidence then compensate for its weaknesses by attaching less weight - is an abdication of the gatekeeping function of the judge (see: *Dulong v. Merrill Lynch Canada* (2006), 2006 CanLII 9146 (ON SC), 80 O.R. (3d) 378 (Ont. Sup. Ct.). The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties can go at the end of the day to weight rather than admissibility (see: *R. v. J.-L.J.* 2000 SCC 51 (CanLII), [2000] 2 S.C.R. 600).

[14] The Plaintiff must establish the four admissibility criteria from *R. v. Mohan,* 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9:

a. relevance;

b. necessity in assisting the trier of fact;
c. the absence of any exclusionary rule; and
d. a properly qualified expert.

[15] Relevance is a question of law decided by the trial judge. Necessity refers to the assistance to the court in determining an issue that the court lacks expertise to determine absent the expert. The evidence must not be disqualified by an exclusionary rule. The expert must be qualified, and the expertise acquired through study or experience (see: *Davies v. The Corporation of the Municipality of Clarington,* 2016 ONSC 1079, at para. 15).

Analysis

[16] The use of experts in personal injury cases has run amok. The strategy appears to be to lead evidence from every possible specialty to the effect that the Plaintiff is injured or disabled. Litigation costs continue to climb. Litigation becomes more and more inaccessible. The guidance provided by *Hryniak v. Mauldin,* 2014 SCC 7, [2014] 1 S.C.R. 87 that a party cannot expect to call every witness they want in a civil trial even if that witness may have relevant evidence to give the court, is being ignored. As Karakatsanis J. said in *Hryniak* at para. 24:

> However, undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available, ordinary Canadians cannot afford to access the

> adjudication of civil disputes. The cost and delay associated with the traditional process means that, as counsel for the intervener the Advocates' Society (in Bruno Appliance) stated at the hearing of this appeal, the trial process denies ordinary people the opportunity to have adjudication. And while going to trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.

[17] The obligation of the Court is to prevent the introduction of duplicative evidence that tends to lengthen the trial unnecessarily. This trial is projected to take 8. The trial judge must ask "is this expert's evidence necessary"? Will it add anything to what is before the Court? Alternately, is it merely "piling on?" (see: *Davies, supra*, para 25, 27, 29).

[18] Further, in a jury case, the Trial Judge must also ask whether the duplicative evidence will assist the jury it its task?

Application of Principles

[19] In this motion, the only issue is whether I should grant leave to the Plaintiffs to call more than three medical specialists each under s. 12 of the *Evidence Act*. The defence does not have an issue with the economic experts or occupational therapists.

[20] I have had the benefit of an extensive medical brief and brief of C.V.s with respect to each of the Plaintiffs.

[21] The onus is on the plaintiff to establish the necessity of calling more than three experts; that is, they must establish the relevance and admissibility of the evidence and that they require more than three experts. The plaintiffs have not met their onus.

1) Ms. Desmond

[22] There is unnecessary overlap and duplication between the experts in the following groups of experts. I grant leave to call one doctor from each group.

a) Dr. Blitzer, Dr. Kekosz, and Dr. West

[23] Dr. Blitzer' specialty is in emergency medicine and trauma, chronic pain management, and rehabilitation. Dr. West's specialty is in orthopedic surgery. He has extensive training in that respect in rehabilitation as well. Dr. Kekosz is a physiatrist, a discipline focussing on physical and rehabilitation medicine, the evaluation and management of patients with neuromusculoskeletal injuries including whiplash, mild traumatic brain injuries, chronic soft tissue pain syndromes, and work-related in injuries.

[24] All three doctors reach the same diagnoses with respect to injuries to Ms. Desmond's cervical spine, trapezius muscles, thoracic

spine, lumbar spine/low back, knees and shoulders. All diagnosed chronic pain in these areas.

[25] In my view their opinions are wholly duplicative. Any differences in their specialties are not so significant as to warrant a separate opinion from each.

[26] All three diagnosed posttraumatic headaches, anxiety, stress, depression, sleep interruption. Dr. Blitzer adds a loss in concentration and cognition. Dr. Kekosz adds adjustment disorder with mixed anxiety and mild depression, but in doing so appears to be merely reporting on the consensus in the medical file.

[27] Based on their C.V.s, none of these experts is qualified to make these psychiatric/ psychological diagnoses.

b) Dr. Wolf and Dr. Vitelli

[28] Dr. Wolf is a psychiatrist with a specialty is in geriatric psychiatry with certification in behavioural neurology and neuropsychiatry subspecialties. He has a full-time appointment in psychiatry at the Baycrest geriatric health Institute and the Baycrest memory and related disorders clinic. He also maintains a general adult psychiatry practice.

[29] Dr. Vitelli is a psychologist, with confidence in clinical neuropsychology and forensic psychology.

[30] Both of these doctors administered the same neuropsychological tests including the REY-15 Item test, the Beck Anxiety Inventory, the Beck Depression Inventory – II, Trauma Symptom Inventory, and Pain Patient Profile. Dr. Wolf also administered the M-FAST and Patient Health Questionnaire (looking at depression), and the GAD – 7 Self-report Questionnaire (looking at anxiety).

[31] Dr. Wolf diagnosed an adjustment disorder with anxiety and depressed mood (chronic) and somatic symptom disorder with pain (chronic). Dr. Vitelli concurred in the adjustment disorder and more broadly, diagnosed chronic pain.

[32] The opinions expressed by these two doctors are wholly duplicative. The differences in specialties between Drs. Wolf and Vitelli is not so different as to warrant receiving separate opinions. Indeed, their investigation is virtually the same, as are their diagnoses.

2) Ms. Henry

[33] There is unnecessary overlap and duplication between the opinions of Drs. Mailis, Dr. Westreich, and Dr. Vitelli. I grant leave to call one of them.

[34] Dr. Mailis is a physiatrist with an extensive C.V. in chronic pain and pain management, education, and research, to clearly with pain arising from injury or dysfunction of the nervous system. She founded the trial Western Hospital pain clinic and is one of the leaders in this field. Her opinion, however, is predominantly psychiatric. She indicates that Ms. Henry's mechanical back pain and tension headaches are minor. Dr. Mailis opines that Ms. Henry's psychiatric disorders of somatic symptom disorder with pain (chronic) an adjustment disorder with anxiety and depression (chronic) are her debilitating accident related disorders.

[35] At page 4 of her report Dr. Mailis says that since 1994 she has used the DSM5 classification system for diagnosis of pain conditions despite the fact that she is not psychiatrist. She provides the titles of several peer-reviewed publications which she says indicate her familiarity with the use of the DSM5 system.

[36] It is unclear to me, and no submissions were made to me, about the extent to which Dr. Mailis has acquired expertise in the use of the DSM diagnostic system or with respect to her ability to make psychiatric or psychological diagnoses, other than her assertion of this ability. On the face of it, however, such diagnoses are out of her specific field.

[37] I want to make it clear that in making the above comments I am not expressing any opinion or conclusion on whether Dr. Mailis' opinion

is admissible. I leave that for another day.

[38] I have reviewed Dr. Vitelli's qualifications as a psychologist, above. As with Ms. Desmond, Dr. Vitelli administered to Ms. Henry a number of tests including REY-15 Item test, the Beck Anxiety Inventory, the Beck Depression Inventory – II, Trauma Symptom Inventory, and Pain Patient Profile.

[39] Based on his interview, document review, and testing, Dr. Vitelli noted that Ms. Henry experienced pain in her neck, back, shoulder, left knee, and right leg, in addition to constant ringing in her left ear, along with complaints of pain, depression, fatigue and anxiety. He diagnosed adjustment disorder with mixed anxiety and depressed mood (chronic) and chronic pain associated with psychological factors and the general medical condition. In addition, he diagnosed driving phobia.

[40] Dr. Westreich is an assistant professor in the Department of psychiatry at Sunnybrook Hospital, more specifically in the Department of Child and adolescent psychiatry where he is the director of the adolescent and young adult traumatic brain injury clinic.

[41] Dr. Westreich performed the tests that Dr. Vitelli conducted, adding a MoCA Examination and M-FAST test.

[42] Based on his interview, document review, and testing, Dr. Westreich determined that Ms. Henry was not malingering under the

DSM5 malingering diagnosis but agreed with Dr. Vitelli that Ms. Henry suffered from an adjustment disorder with anxiety and mood symptoms as well as somatic symptom disorder with predominant pain. Both of these he diagnosed to be chronic.

[43] Setting aside any finding with respect to Dr. Mailis' ability to give her psychiatric/psychological opinion, the opinions of Drs. Mailis, Westreich, and Vitelli are duplicative. While Dr. Mailis' specialty is in physical medicine as opposed to psychiatric or psychological medicine as the other two doctors, the opinion Dr. Mailis expresses is psychiatric or psychological. Accordingly, the with the opinions being wholly duplicative, there is not sufficient difference between the specialties to make the opinions separately admissible.

Trimble J.

Released: May 9, 2023

CITATION: Desmond v. Hanna et al., and Henry v. Hanna et al., 2023 ONSC 4097
COURT FILE NO.: CV-4405-00 and CV-18-4440-00
DATE: 2023 05 09

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

KENISHA DESMOND

Plaintiff

- and -

EVAN HANNA and RONETYA YOUSUF

Defendants

- and -

B E T W E E N:

SHIAN HENRY

Plaintiff

- and -

EVAN HANNA and RONETYA YOUSUF

Defendants

Trial Ruling #1: Re: Leave to Plaintiff to Call More Than Three Medical Experts Under s. 12 *Evidence Act*

Trimble J.

Released: May 9, 2023

CITATION: Graul v. Kansal, 2022 ONSC 1958
COURT FILE NO.: CV-18-201
DATE: 2022 04 08

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Jonathan A. Graul	)	
	)	Gary Will, Brennan Kahler, Lane Foster, Counsel for the Plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	Kathleen Polczer, Julie Settimi, Anne-Louise Cole, Counsel for the Defendants
Dev Raj Kansal	)	
	)	
- and –	)	
	)	
Rakesh Kansal	)	
	)	
Defendants	)	
	)	
	)	
	)	HEARD: November 15,16,17,18,19,23,24,25,26,29,30, 2021 and December 1,2,3,6,7, 9,10, 14, & 15, 2021 by Zoom Video Conference
	)	
	)	
	)	

JUSTICE G.D. LEMON

REASONS FOR JUDGMENT

Contents

Introduction

[1] On December 18, 2017, Mr. Graul was involved in a car crash when the defendant, Dev Raj Kansal, drove head on into Mr. Graul's car. The defendant, Rakesh Kansal, was the owner of the car driven by Dev Raj. Mr. Graul submits that, as a result of the accident, he suffered a traumatic brain injury, post concussive syndrome, chronic pain disorder, post traumatic headaches, phonophobia, and tinnitus along with physical injuries to his ears, neck, back, shoulders, and knees. He says that he has disabling psychiatric impairments because of the trauma of the accident including persistent mood disorder, an adjustment disorder with anxiety and depression, driving anxiety, and features of post-traumatic stress disorder.

[2] Despite treatment since the time of the accident, Mr. Graul says that he has not improved and he cannot return to work, now or in the future.

[3] In brief, the defendants submit that Mr. Graul's difficulties are exaggerated and, to the extent that he has any injuries, his choice of treatment has made them

worse. With the correct treatment and some accommodation, the defence submits that Mr. Graul can return to work.

[4] These reasons explain why Mr. Graul is correct in what he says, and the defence is entirely wrong.

[5] As a result of his injuries, Mr. Graul seeks general damages, past income losses and expenses, along with future income losses and future care costs. For the reasons set out below, those matters are determined as follows.

Liability of the Defendants

The Accident

Evidence of Mr. Graul

[6] On December 18, 2017, Mr. Graul was on his way to work in Guelph from where he lives in Fergus. At 7:45 a.m., he was driving his Volvo sedan south on Highway 6 in a typical single line of commuter traffic from Fergus to Guelph. It was not snowing but there was snow on the ground.

[7] Without warning, the car in front of Mr. Graul veered to the right and left the road. Mr. Graul then saw a car coming towards him; he only had time to prepare for impact to the front of his car.

[8] Mr. Graul next recalled being stopped in a ditch against the fence line. The airbags had been deployed from the steering wheel, the windshield pillar, and the side of the motor vehicle. He got out of the car because he could smell smoke.

[9] Mr. Graul suspects that he was unconscious for a time. The damage to the vehicle suggests an impact to the front and side of his car, but he does not remember a side impact. He does not remember talking to the police or his son at the scene, but he was advised later that he had.

[10] Mr. Graul had burns on his hands and face and was bleeding from his nose and mouth. He had abrasions on his arms. He was taken by ambulance to Guelph General Hospital and released later that day.

[11] The accident report and photographs filed in evidence are consistent with Mr. Graul's description of the accident. The accident report shows that Mr. Dev Raj Kansal was the driver of the vehicle that hit Mr. Graul, and that car was owned by Mr. Rakesh Kansal.

Analysis

[12] The defence called no evidence contrary to the evidence in the accident report. The defence does not admit liability, but also does not contest liability. The defence written submission says: "Given that in his Statement of Claim the plaintiff

has sought damages in the amount of $5.5 million, the defendants are not in a position to admit liability."

[13] On this evidence, I am content that the defendants were negligent and are liable for Mr. Grail's damages.

Damages

[14] The defence acknowledges that Mr. Graul was injured by the collision. The issues relate to what injuries were caused by the accident and the extent of those injuries.

[15] In order to determine Mr. Graul's damages, it is important to consider who he was before the accident and how he is after the accident.

Mr. Graul's Circumstances Before the Accident

Evidence of Jon Graul

Background

[16] Mr. Graul is 57 years of age and lives with his wife in Fergus, Ontario. They have been married 34 years and have three sons, aged 32, 29, and 22, who now live independently.

[17] Mr. Graul was born and raised on a farm outside of Stratford. His parents carried on a dairy, beef, and cash crop farm. He has four siblings. When he grew

up on the farm, he had a variety of chores to do and he learned practical skills related to machinery, electrical, and plumbing services, as well as carpentry.

[18] Mr. Graul graduated from high school in 1982 and eventually earned a George Brown College degree in instrument engineering. He started to work in 1985 and then took an electrician's apprenticeship in 1988. He then went to Humber College to be a construction maintenance electrician. He was certified as an electrician in 1994.

Employment

[19] Mr. Graul started work with the City of Guelph in November 1998 as an industrial electrician. In 2002, he became an instrumentation technician/electrician. In 2008, he was promoted to Lead Hand with the city and was employed in that field at the time of the accident. In 2017, he had been employed at the city for 19 years and was 53 years of age.

[20] In December 2017, Mr. Graul was employed at the Guelph wastewater treatment plant. He looked after plant automation, computer programming, equipment installations, in-house design, and engineering, as well as his Lead Hand supervisory role. Reporting to him were five millwrights, two electricians, and one gas fitter. Although he was a supervisor, he also worked with his coworkers to carry his share of the physical work, such as replacing motors and pulling conductors. About 50 percent of his work was at his desk, while 50 percent was

hands-on and more physical work. His work involved climbing ladders. He enjoyed his job because the work was varied and allowed him to be creative.

[21] Mr. Graul agreed that his work could be stressful and political at times. He denied any difficulties with his manager at work.

[22] Mr. Graul also worked overtime of 10 to 20 hours per week, and more during power outages or ice storms. He had been working this amount of overtime on a continuous basis since 2008. Overtime had been consistent from year-to-year but also changed from week-to-week.

Activities

[23] Mr. Graul filed a pre-accident photo brief which disclosed that his hobbies included boating, fishing, golf, and cycling. He had played soccer since his mid-thirties. He was part of a league and played all year in both indoor and outdoor soccer. He played every year except in 2009, when he ruptured his ACL playing soccer. He had surgery and rehabilitation in 2010 and returned to soccer and basketball in 2011. He was playing both sports at the time of the accident.

[24] Before the accident, Mr. Graul socialized once to twice a week with his soccer mates. He had a "guys' weekend" once a year to go golfing and fishing.

[25] Prior to the accident, Mr. Graul did the gardening and lawn work, as well as the snow shovelling, at the family residence. He carried out handyman projects

around the house, such as replacing a patio and deck and putting in a front walkway. He replaced the roof, doors, and windows. He installed gates on the property. He replaced a hardwood floor, heated floors, and finished the basement.

[26] Mr. Graul generally did all the driving when he and his wife were together. He enjoyed driving and generally drove 15,000 to 20,000 km per year. He maintained the family cars including brakes, oil changes, wheel bearings, etc.

Health

[27] Before the accident, Mr. Graul was in good to excellent health. He agreed that he had back pain in 2016 and sought treatment with his family doctor. The doctor prescribed Advil and Mr. Graul attended physiotherapy from June to July 2016 but had no lasting pain.

[28] In 2017, he went to his family doctor about a headache on a pain scale of nine or ten along with blurred vision. Mr. Graul thought that this headache was because of his allergies. Mr. Graul's doctor recommended Tylenol.

[29] Mr. Graul testified that he had a history of medical difficulties but nothing that affected his ability to work or carry on his recreation. He denied having any concussion symptoms before the accident.

[30] Mr. Graul testified at length, in chief and in cross, about a handwritten document of his head injuries in the past. He provided this list of head traumas at

the request of Dr. Jones, his temporomandibular joint (TMJ) specialist. It was referred to as a "list of all of the head trauma incidents leading up to the MVA [motor vehicle accident]". As the credibility analysis and some of the medical evidence relates to this list, I will return to it when I review those issues.

[31] Mr. Graul testified that this history of head injuries did not generate any concussions, injuries, or claims because of prior car accidents. He did not lose time from work because of any of these events. While he agreed that these events involved head trauma, he described them as "minor". He did not go to hospital for any of the incidents, even though on one occasion he was unconscious for four to five minutes.

[32] Mr. Graul agreed that, at his examination for discovery in January 2019, he testified that he had no previous head injuries. However, that discrepancy was clarified in a letter from his lawyer which said he had "no diagnosed concussions or brain injuries." But, he admitted, "I have hit my head before including the time I required two-stitches in my head." He agreed that this last incident was not in the handwritten list, nor was the list included in his answer to his examination.

[33] Mr. Graul agreed that he did not provide this list to any of his experts or treating physicians, except perhaps one. He denied that he intentionally did this to have them focus only on the accident.

Other Evidence of Pre-Accident Circumstances

Evidence of Lydia Graul

[34] Ms. Graul met Mr. Graul at George Brown College. She has known him for 37 years and has been married to him for 34 years.

[35] Ms. Graul testified that, before the accident, Mr. Graul was easygoing, easy to talk to, kind, and had a good sense of humour. Their marriage was successful with no separations or talk of divorce. They overcame the challenges of raising their children and the deaths of their respective fathers. They were supporting their respective mothers.

[36] Ms. Graul said that Mr. Graul was a good and thoughtful husband. Although they had argued in the past, those arguments were not significant. Before the accident, he did most of the driving.

[37] Mr. Graul was a good father and gave advice and guidance to his sons. He worked with them on their cars and coached them in baseball and golf. The family had only one income, but they agreed that Ms. Graul should stay home with the children.

[38] Their extended family, on both sides, were close to Mr. Graul. In the past, Mr. and Ms. Graul's social life consisted of going to a friend's home once a month, out for dinner once every two months, and a movie once every six months. Mr.

Graul used to socialize with friends by golfing, hanging out in the garage, or visiting after soccer games.

[39] The family vacationed together by going to a cottage, going on day trips, or having family celebrations. In February 2017, the couple went to the Dominican Republic. They enjoyed their time there golfing, going on excursions, walking, and swimming. They also went to restaurants with two other couples.

[40] Ms. Graul confirmed in detail Mr. Graul's evidence with respect to his employment, hobbies, and contributions around the house. Because she had a bad back, he did most of the physical maintenance work.

[41] Before the accident, Mr. Graul was healthy. With respect to the head injury list, she was aware that it had been requested by Dr. Jones. She helped put the list together, as did Mr. Graul's mother, sisters, and brother. It took a few hours to put it together. Mr. Graul had told her about his past injuries, and she knew of some of the motor vehicle accidents because they were living together at the time. She was aware that Mr. Graul was not hurt after these accidents and carried on with his normal activities. A 2006 motor vehicle accident occurred with their son in the car; afterwards, both were fine and carried on with their work, sports, and school.

[42] Ms. Graul testified that, before the accident, Mr. Graul's memory was excellent, and he had no problems with concentration or focus. He was able to

organize and multitask. He was not depressed or anxious and had no problems with his balance, hearing, or tinnitus.

[43] Just prior to the accident, they had planned to renovate their kitchen and had even prepared drawings and plans. They still needed an engineer to consider taking out a wall and costing that expense.

Evidence of Daniel Graul

[44] Daniel Graul is Mr. Graul's son. Daniel is a manager at an accounting firm.

[45] Daniel testified that, before the accident, Mr. Graul was kind, outgoing, quick witted, and hardworking. He enjoyed soccer, basketball, and golf. He went for bike rides and swam at the beach. He was a handyman who worked around the house doing jobs such as roofing, decking, interlocking brick, and replacing the master bathroom. He also worked on the family cars which included everything short of replacing the transmission.

[46] Daniel agreed that Mr. Graul enjoyed his work because it presented him with challenges and a variety of tasks every day. Daniel could tell that his father was proud of his work. He was aware that his father worked overtime throughout the year on an on-call basis, including on weekends and holidays.

Evidence of Pamela Ciccarelli

[47] Ms. Ciccarelli is Mr. Graul's older sister. She is presently 67 years of age and lives in Toronto.

[48] In the five years before the accident, the family annually got together for Christmas, Thanksgiving, a week at the cottage, and sporadic other events. When they were at the cottage, they spent time at the beach, shopping, and playing other games.

[49] Before the accident, Mr. Graul was easygoing, curious, and inquisitive. He got along well with his family. He helped Ms. Ciccarelli out at her home by doing wiring and plumbing. He also helped at their mother's home with plumbing, wiring, and replacing a floor.

Evidence of Philip Koechl

[50] Mr. Koechl worked for the City of Guelph during the time Mr. Graul was employed there. Mr. Koechl apprenticed with Mr. Graul as an instrument technician; they worked together every day. Mr. Graul helped him obtain his qualifications. As they had a work relationship, Mr. Koechl had only been to Mr. Graul's house once in 2006. The two have not seen each other since the collision.

[51] Mr. Koechl testified that Mr. Graul was well-liked and respected at his work. For a time, Mr. Graul was Acting Supervisor and all the other employees hoped he would be able to keep that job.

[52] Mr. Koechl described how Mr. Graul's type of work required focus, concentration, and a good memory. One needed fine motor skills because of the fine wiring involved in the job. Some of the locations at the job are very loud.

Evidence of Jerry Atkinson

[53] Mr. Atkinson is the Wastewater Operations Manager for Niagara Region. Before that, he was employed with the City of Guelph, where he worked with Mr. Graul. For a time, Mr. Graul was Acting Supervisor of maintenance. They had a good working relationship.

[54] Both men were Lead Hands until 2016, when Mr. Atkinson became a supervisor. He has not seen Mr. Graul since the motor vehicle accident.

[55] As Lead Hand, Mr. Graul was responsible for handing out work to staff and supervising that work. He was also involved with contractors. Overall, he was to make sure that the plant operated well. Mr. Graul also had duties as an electrician and as a programmer of the Supervisory Control and Data Acquisition (SCADA) computer program. Mr. Graul created SCADA and modified it as necessary. He worked regular overtime to maintain SCADA because no one else could fix it.

[56] While Acting Supervisor, Mr. Graul continued as Lead Hand. Mr. Graul was very good as Acting Supervisor and understood the plant. He was also excellent as the "go to" guy. In Mr. Atkinson's view, it was a natural progression for Mr. Graul to become a supervisor of the maintenance operation. He was a team leader and helped troubleshoot problems. He was very dedicated and loyal to "his guys". If there were things that he did not know, he learned quickly from others. He was an expert related to electrical and instrumentation issues. According to Mr. Atkinson, Mr. Graul appeared to enjoy his job and was a valued team member.

[57] The job included physical work and climbing ladders. It required focus and concentration, or else other staff could be put in danger. Mr. Atkinson said Mr.Graul needed to be able to concentrate on diagrams and know what electrical wires were involved. A mistake "could get someone killed." Mr. Atkinson testified that Mr. Graul also needed a good memory to remember how equipment had been taken apart, so that it could be reassembled.

[58] Mr. Atkinson also testified that Mr. Graul needed fine motor skills for operation instrumentation and to strip and label wires. Small screws needed to be tightened and there was only a small area between wires to work.

Evidence of John Mogk

[59] Mr. Mogk has been an electrician for 40 years. He knew Mr. Graul as a co-worker at the City of Guelph for 10 to 15 years. They did not socialize together,

although they did golf together at a work event. He and Mr. Graul worked together on electrical instruments. He knew that Mr. Graul was a Lead Hand and temporary supervisor.

[60] Mr. Mogk found Mr. Graul knowledgeable and personable. He got along with others. Mr. Mogk knew others went to Mr. Graul for information. Mr. Graul was conscientious and worked a lot of overtime. He came back early from knee surgery. Mr. Mogk testified that Mr. Graul's overtime included an hour or so each night and working on weekends. He appeared to love his job and his employer. In Mr. Mogk's opinion, Mr. Graul would have been a good supervisor.

[61] Mr. Mogk recalled that about one third of Mr. Graul's work was electrical, one third was programming, and one third was supervising. The physical work included climbing ladders and carrying items. Mr. Mogk felt Mr. Graul needed focus and concentration for programming and electrical troubleshooting, otherwise, it would be dangerous. Mr. Mogk agreed the workplace could be loud.

[62] Mr. Graul needed a good memory for his computer work. He needed good eyesight as the wires in an electrical panel were coloured and labeled. He needed fine motor control to deal with electrical wiring and keyboarding. To Mr. Mogk's knowledge, after the motor vehicle collision, Mr. Graul's injuries could not be accommodated in the job.

Evidence of Raymond Masse

[63] Mr. Masse is an industrial millwright and mechanic at the City of Guelph's wastewater treatment plant. Mr. Masse was first hired in April 2013 and worked with Mr. Graul. He knew Mr. Graul as the Lead Hand. He had a working, not social, relationship with him.

[64] Mr. Masse saw Mr. Graul as a hard worker who carried out many functions. He was an electrician, programmer, Lead Hand, and temporary supervisor. Mr. Graul's experience made him very knowledgeable. As such, he was contacted by other employees and departments for information.

[65] Mr. Graul had a passion for his job and spent a lot of time and effort making things work right. Mr. Graul worked a lot of overtime. He could be called at 2:00 a.m. and, if he could not fix a problem from his home computer, he came to the plant to fix it. He also regularly came in on Sundays. He did more than he had to do to make things work. Mr. Graul got along with people at the plant. He was a humble person and did not look for praise.

[66] Mr. Masse also testified the work could be physical, with climbing ladders and carrying heavy loads. Before the motor vehicle collision, Mr. Graul had no problems with the physical part of the job.

[67] According to Mr. Masse, the engine room and blower room are very loud. Other areas are noisy as well. The job requires concentration, along with eye and motor coordination, to deal with electrical measuring devices. The job would be dangerous without these skills. Mistakes could cause significant environmental problems.

[68] Mr. Graul needed to have good memory skills to remember program changes. He needed good vision to deal with electrical wiring.

Aviva Conduct Motion

[69] During the trial, Mr. Graul alleged that the defence had tampered with his witnesses. He therefore brought a motion for an order allowing a statement of witness, Kiran Suresh, to be entered into evidence without requiring Mr. Graul to produce Ms. Suresh for cross-examination. He also requested an order for production of the complete files of all investigators hired by the defendant for this case. That request included communications between the insurance company, its lawyers, private investigators, and witnesses.

[70] I dismissed Mr. Graul's motion for reasons to follow. These are those reasons.

[71] In support of the motion, Mr. Graul relied upon the affidavit of one of his lawyers. It included a great deal of hearsay about the conduct of the private investigators retained by the defence. In response, the defence provided affidavit evidence from those investigators. No one requested cross-examination on any of the affidavits. On that basis, it was difficult, if not impossible, for me to determine exactly what occurred between the witnesses and the private investigators. The motion could have been dismissed on that basis alone.

[72] Further, the defence agreed that the statement of witness, Ms. Suresh, could be filed in evidence. Indeed, it was made an exhibit on the day before this motion was argued.

[73] Mr. Graul submitted that the defence failed to provide all the information they should have. He submitted that the trial should proceed while he reviewed the requested productions. He argued that if, after a review, he believed there was evidence in the possession of the defence that supported his case, he should be allowed to reopen his case.

[74] However, Mr. Graul could not point to any area of evidence that he did not already control. He had produced evidence from his treatment providers, coworkers, friends, and family. Counsel for Mr. Graul, when pressed, could not point to any area of evidence that might be hidden by the defence. I did not see it

as reasonable to hold up a trial to go fishing for what, if anything, the defence might have in their file.

[75] The allegations made by Mr. Graul with respect to both the insurance company's private investigators and their lawyers are serious. If true, there could be significant consequences for all those involved. However, that was not the determination I had to make in this trial. I had to keep my eye on what I was asked to decide and not get sidetracked into other, albeit interesting, areas.

[76] Mr. Graul alleged the defence lawyers failed to produce witness statements for many months, contrary to their obligations. In response, the defence submitted that it provided those witness statements within an earlier affidavit of documents. I did not have that affidavit of documents. On that record, I could not decide whether counsel complied with their obligations or not.

[77] I agree with Mr. Graul that it seems odd that the defence would immediately request the private investigators to cease their investigations if nothing inappropriate had occurred. It also seemed odd that the defence conceded the witness statement if it had done nothing wrong. However odd it may have seemed, I did not have the tools to determine that conduct one way or the other. On all the evidence, it was quite possible that there was a substantial misunderstanding as to what occurred and what was understood by the witnesses involved.

[78] Mr. Graul's lawyers brought their concerns raised by the witnesses to the defence lawyers on three occasions. Defence counsel acknowledged that all three of them failed to respond to the letters from plaintiff's counsel. Obviously, that was a breach of professional conduct. That conduct only heightened the concerns of Mr. Graul's lawyers. An immediate clarification of the circumstances by defence counsel would likely have put this matter to rest. Their failure to do so was inexcusable. But that conduct was unrelated to whether the allegations against the investigators were borne out by Mr. Graul. More importantly, it was unrelated to the real issues in this case.

[79] Mr. Graul submitted that filing the letter of the witness was not a satisfactory result because he was entitled to present a live witness. If this were a jury trial, there would have been merit to that argument. However, on a judge alone trial, the effect of the written statement was to present the evidence unchallenged by the defence. It effectively became an agreed statement of fact. That reality was a significant penalty to the defence for their conduct.

[80] Mr. Graul submitted that, if he had further time to meet with the witness ahead of trial, further helpful evidence may have come forward. Given the significance of the evidence in the statement (set out below), that seemed unlikely. Further, the last interview with the witness was on November 12, 2021. The trial

started on November 15, 2021. It seemed doubtful further evidence of significance would be obtained.

[81] Although it was true the witness declined to testify, her email in the materials did not lay all the reason for that turn of mind at the feet of the defence. I agree with the defence that the email suggested the witness misunderstood her role in this proceeding.

[82] The defence provided some of the correspondence related to the private investigators. Some was excised. The defence submitted that it was excised because of settlement discussions. I agree with Mr. Graul that, read in context, the excision for that reason seemed unlikely. But I did not have sufficient evidence to find one way or the other. Mr. Graul conceded the files he requested could be excised for matters related to settlement discussions or associated information. However, given the apparent lack of trust between counsel, I did not know how Mr. Graul would be satisfied with any excisions required by the defence. That issue alone would have led into a quagmire more prejudicial than probative.

[83] Ultimately, as is often said, there is no property in a witness. The defence had a right and, in some cases an obligation, to seek out further information. I did not hear Mr. Graul say otherwise. The issue was how that investigation could be carried out. I could not make that determination on the provided materials in the

midst of the trial. The determination of the issue was not relevant to the findings that I had to make.

[84] Accordingly, the motion failed.

Agreed Evidence

[85] As explained above, Kiran Suresh's evidence was filed as an exhibit on consent. Her admissible evidence from that statement on this topic is that she met Mr. Graul when she joined the City of Guelph in 2006. They worked in the same department from 2006 to 2016.

[86] Before the accident, Mr. Graul was extremely respectful and professional. He was very knowledgeable and thorough in his work. He was bright, quick, and had a great memory.

[87] Within his employment, Mr. Graul had a very good reputation and was a hard worker. The place of employment was highly regulated and there were many compliance requirements that had to be followed. As such, it was imperative to have very capable and knowledgeable staff in all positions. Mr. Graul was the lead of maintenance. It was a very physical job and he was on his feet all day. He was always "up and running" to make sure nothing fell apart. She defined him as a "Champion" on the team.

[88] Mr. Graul always made himself available for maintenance related work. He was depended on for his opinions, even for construction projects. He worked on every piece of equipment at the water treatment plant and with people on various teams.

[89] Mr. Graul drove a lot for work and was frequently on call.

Analysis of Lay Witnesses

[90] There was no significant attack on the credibility of the collateral witnesses. Despite the defence arguments contrary to Ms. Suresh's evidence, it must be remembered that her evidence was entered on consent without the need for cross-examination. I accept the collateral witnesses' evidence of Mr. Graul's life and work experience prior to the accident for my ongoing analysis.

[91] Mr. Graul's co-workers were consistent in their evidence. All were fellow employees and not close friends. There was no apparent reason for them to fabricate their evidence.

[92] I appreciate that Ms. Graul, Daniel, and Ms. Ciccarelli are family, and I should be cautious about their evidence. However, their evidence is substantially corroborated by the other lay witnesses. Just because a witness is family does not mean they have lied to support Mr. Graul; more is required to reject their evidence.

[93] The defence raises arguments about the credibility and reliability of Mr. Graul's evidence on some discrete topics. I will deal with those items below. However, those defence arguments do not relate to the evidence of how Mr. Graul carried on his life immediately before the accident. This pre-accident evidence is not challenged by any contrary defence evidence. To the extent that there is any concern about Mr. Graul's post-accident evidence, those concerns must be placed in the context of how Mr. Graul carried on his life before the accident.

[94] I accept this pre-accident evidence and find that, before the accident, Mr. Graul was healthy and exceptionally physically fit. A man in his fifties who not only plays soccer all year round but comes back from a significant injury to continue playing cannot be described otherwise.

[95] I find that Mr. Graul was working long hours in a job he liked. He was respected and relied upon in that job. He was a valuable employee to the City of Guelph. He enjoyed rising to the challenges in his job. Mr. Graul had a strong work ethic instilled in him from an early age.

[96] Mr. Graul's job required physical stamina, concentration, and good eyesight and hearing. Mr. Graul's employment needed him to deal with multiple tasks at once and to be able to remember complex steps.

[97] On top of that, I find that Mr. Graul was doing the bulk, if not all, of the physical and "handy man" jobs around the house. As set out above, he did those jobs well and in a timely fashion. At home, he was loved, respected, and relied upon.

Mr. Graul's Circumstances After the Accident

The Day of the Accident

Evidence of Jon Graul

[98] Mr. Graul was taken from the scene of the accident by ambulance to Guelph General Hospital and released after two to three hours. He called his wife from the hospital, but she was too upset to drive. Her manager drove her to pick up and take Mr. Graul home.

[99] At the time, Mr. Graul had a headache, spasms in his back and neck, and was confused. He was, as he said: "Out of it." His wife was concerned about him, so she took him to the Fergus Hospital because she wanted him to have a CT scan. He was examined and diagnosed with a concussion. He was given muscle relaxants, told to see his family doctor, and sent home.

[100] The ambulance call record from the accident was in evidence. It says that Mr. Graul said he had no loss of consciousness. This account is also confirmed in the hospital triage record and notes from Emergency Medical Services (EMS). X-

rays were normal. There was no indication of a head injury. A CT scan on January 12, 2018, showed no abnormalities.

Evidence of Lydia Graul

[101] On the day of the accident, December 18, 2017, Ms. Graul was working 7:00 a.m. to noon. Mr. Graul called her from the highway. To her, he sounded "awful", like he was in shock. Her manager drove her to the Guelph hospital. When she got to the hospital, Mr. Graul seemed dazed, confused, disoriented, and vacant. He was a "shell" and very quiet.

[102] Ms. Graul's manager drove her back to work to get her car and Ms. Graul then drove Mr. Graul home, arriving at 11 or 11:30 a.m. When they arrived at home, Mr. Graul was still not well and, to her, seemed worse. He was more vacant and tilted his head in an odd way. She was worried and called their family doctor. She was able to make an appointment for December 21, 2017, but the doctor told her to take Mr. Graul to the hospital.

[103] They arrived at the Fergus hospital between 2:00 and 2:30 p.m. and, again, he seemed to be declining. He was "falling apart". She knew that he had hit his head and needed to be assessed. The hospital staff did not carry out a CT scan because a scanner was not available. She would have been happier if a scan had been completed.

[104] The hospital doctor gave her instructions on how to look for signs of concussion and told her to keep Mr. Graul awake. They referred her to a physiotherapist. His first treatment was on December 20, 2017, and his second was on December 22, 2017.

Injuries after the Accident

Evidence of Jon Graul

[105] It is important to know that, for reasons set out below, I find Mr. Graul entirely credible in the description of his circumstances since the accident. His evidence is internally and externally consistent with other evidence. While the defence raises issues with respect to some of Mr. Graul's evidence, his testimony is confirmed by other credible witnesses, objective medical evidence from his case, and even some of the defence medical evidence. I will analyze the credibility issues once that evidence is appropriately summarized here.

[106] The defence suggests that Mr. Graul is not motivated to return to work. For now, I note that this argument is damaged by the reality of the evidence set out above: Mr. Graul was a hardworking, committed member of his workplace and his home. As set out below, there is no explanation, other than his injuries from the motor vehicle accident, as to why he would not have returned to work as soon as he could.

[107] On December 21, 2017, Mr. Graul saw his family doctor, Dr. Carlson. He was feeling "terrible". His muscles were sore, and he had headaches, blurred vision, dizziness, and poor balance.

[108] As a result of the accident, his injuries over time included headaches, low mood, forgetfulness, anxiety, depression, a "slowed down feeling", general fatigue, poor libido, vision issues, tinnitus, neck pain, shoulder pain, low back pain, and pain in his elbow with numb hands. He sometimes had sciatic pain down his leg or swollen feet and ankles. He has TMJ problems and other dental issues.

[109] Mr. Graul continues to have headaches, which are either at the base of the skull or behind his eyes and ears. Presently, they are about twice per week but sometimes more depending on weather changes. They were more frequent in the past, occurring daily for hours or a half day at a time. They get worse due to stress or fatigue. Unlike his headaches before the accident, his headaches now are more debilitating. He cannot work through them and needs to lie down in a quiet place.

[110] Mr. Graul's vision is blurred, and he often sees a "halo" around images. This is particularly so in a busy environment. If he tries to read, the words seem "to come off the page" and he sees double. Presently, his vision problems are worse in the morning or when he is tired.

[111] With respect to his tinnitus, he understands this symptom to result from damage to his inner ear. Since the accident, he always has the sound of a cicada in his ear. Stress makes it louder but there are times when the sound will increase for no reason to the point that it is painful.

[112] He had neck pain immediately after the accident and now has it daily. The pain depends on the day and what he is trying to do. If he looks down too much, he has to move and adjust his position to reduce the pain.

[113] He has shoulder pain on both sides which radiates down from his neck. This shoulder pain occurs a couple of times per week.

[114] His lower back pain develops into sciatic pain if he does too much; however, he has controlled this pain by stopping activity before it causes the pain. It still happens about once a month. His lower back pain has spasms a couple of times per week.

[115] His feet can swell up such that he is unable to put on his shoes.

[116] Following the accident, he had facial pain from the airbags deploying. He had to have his dental appliances filed down because they no longer fit his jaw. His TMJ is being managed by using appliances at night.

[117] He has fatigue from not sleeping well due to his pain and tinnitus.

[118] His low mood developed in the months after the accident because of his pain and inability to do much. He is still unable to drive, work, or participate in family events as he would like. As a result, he is irritable, on edge, emotional, and loses his temper. His moods have affected his relationship with his wife because he takes things out on her.

[119] He has memory problems, confusion, and difficulties concentrating.

[120] He has difficulty getting out of bed and often forgets to eat. His wife leaves him post-it notes and messages or reminders on his phone. Even so, he ignores those reminders.

[121] He gets confused trying to understand his mail. When he tries to read a book, he cannot concentrate long enough to remember what he has just read. He does not read the newspaper. He can manage a cell phone screen, but virtual Zoom events are hard for him.

[122] Mr. Graul loses his balance and suffers dizziness daily. He sometimes falls or "bounces off the walls." This is worse in the morning but continues throughout the day.

[123] As a result of his injuries, Mr. Graul has exercised poor judgment on occasion. In May 2018, he walked home from his physiotherapy appointment. This was nine or ten kilometres in sandals and 30-degree weather; without a water

bottle or cell phone. He also leaves the gas stove or barbeque on about once per week. He has left the garage door open overnight and leaves his keys in the front door on a regular basis.

[124] The accident has affected his relationship with his wife. As a result of the accident, he sees the stress aging her, for which he feels responsible. They are frequently angry with each other about her driving and their finances. He has lost libido and is on hormone replacement therapy to assist.

[125] He has temper control problems that he never had before the crash. These difficulties also affect his relationship with his sons. He has been angry with strangers and friends because of his frustrations.

[126] Mr. Graul feels stuck at home and does not go out to see people. He no longer plays soccer. Last summer he attended a game, but he did not go see his former teammates because it was too depressing. He has socialized with those teammates only once in four years. He misses his annual "guys' weekend" to go golfing and fishing.

[127] He is also unable to continue his hobbies of boating, fishing, golfing, bike riding, and reading.

[128] He cannot return to work because he is unable to drive there. He has problems with his vision and hearing and cannot think or organize. He cannot use a computer to assist with that organizing.

[129] After the accident, he thought he would go back to work in less than six months. He was hopeful and worked towards that goal. Work meant a lot to him, and he misses it. Without it, he is angry, worried about money, anxious, and has sleepless nights. He still wishes to return to work because he finds no joy in sitting at home in this "ridiculous form of retirement."

[130] The motor vehicle accident impacts his family finances because he was the principal income-earner. His wife works as a cashier at a grocery store earning approximately $17 per hour and working 28 hours per week. She now tries to work more shifts. She used to make $21,000 per year, while he used to make $100,000.

[131] Because of the change in their finances, the couple has not been able to replace vehicles or renovate their house. Any renovations will cost more because he will not be able to do them as he had in the past. They had hoped to move to a larger home in the future for their children to visit with grandchildren. They had hoped to help finance down payments for their children's homes but will now not have the money.

[132] Mr. Graul normally did all the driving, but now Ms. Graul does it all. He has moved a vehicle around the driveway but nothing more than that. He must pay for car maintenance because he can no longer do it himself. He broke a windshield trying to repair the dashboard of his son's car. He still has the car he got to replace the one damaged in the accident. He has maintained his driver's license and renewed it in November 2018.

[133] He cannot drive because of his visual difficulties. He has problems with his peripheral vision, particularly when there is traffic. If it snows, he must look down to avoid that stimulus. His license has not been medically suspended and one of his doctors said he could drive for short distances. His family physician, Dr. Carlson, has not suspended his license because Mr. Graul told her several times that he is not driving. She has written a letter to confirm that he requires transportation.

[134] As a passenger, he is anxious and hyper-alert, gripping the dashboard and sidebar. He argues with his wife while she is driving. He has not taken a driver desensitizing course because the cost was denied by his insurer, and in any event, he still cannot drive with his vision problems.

[135] Since the crash, he has done little around the house. He has been able to do some painting without success. He does some outside maintenance, but it takes much longer to cut the grass or shovel the walk. In the past, shovelling the

walk took about twenty minutes and now it takes two to three hours. His lack of judgment is such that, when he was removing snow from a vehicle, he damaged its roof.

[136] This accident has been a life-altering event for him. The overall effect of his injuries is that he has lost his sense of self-worth. He has troubles with hearing, double-vision, confusion, and depression. He has lost his independence and finds that to be emasculating. He continues to have extreme fatigue because he does not sleep well and there is "so much to deal with." His depression has become worse, particularly in the winter months.

[137] He agrees that there are some days when he does not use his pain medications, because they are to be used only as needed. He recently started antidepressants but is not sure how long ago. He agreed that he has not been treated by a psychologist or psychiatrist, but rather has only spoken with a social worker.

[138] After the accident, the couple went back to the Dominican Republic for a one-week holiday. Mr. Graul's care providers thought it was a good idea. This vacation had been arranged before the accident to celebrate their 30th anniversary. They were going to renew their vows because it was the same place as their honeymoon. Mr. Graul found the flight painful, but he was okay when he landed. Over the week, he spent approximately 75 percent of his time sleeping in

his room or on the beach. The couple pursued no other activities like they had when they were there the year before.

[139] In cross-examination in advance of seeing some surveillance recordings, Mr. Graul agreed that he walked 40 minutes to the post office in March 2018 and did some snow-shovelling in April 2018. He did yard work in 2018, such as cutting grass and using a pole to trim branches. When he used the pole to trim branches, it did not go well, and his shoulder was injured for months.

[140] He helped his son change the oil and a signal light on his car. In October 2018, he was trimming trees and shovelling snow.

[141] In May 2019, he continued doing yard work, and in August 2019, he went on a holiday at a cottage with his family. In September 2019, he constructed a back-step. He shovelled snow in November and December 2019.

[142] In February 2021, he refinished a table and used a stationary bike. In March and April 2021, he was still doing small jobs around the house.

[143] While testifying, Mr. Graul was shown several "Discomfort Scale" documents that he completed for his TMJ specialist, Dr. Jones. Each sheet required him to rate his average discomfort over the previous seven days on a scale of 0 to 10, with 0 representing no pain. Each sheet listed 12 symptoms to be rated: TM joint pain, TM joint sounds, bite issues, neck pain, headache, facial pain,

eye symptoms, ear pain, stuffy ear or ringing sounds, arm/hand/finger numbness, tingling or pain, upper back pain, and lower back pain.

[144] The average overall pain scores on each sheet ranged from 1 to 2. In evidence, Mr. Graul confirmed the scores were accurate. The sheets were completed between November 28, 2018, and March 4, 2020. As set out below, this overall pain score contrasts significantly with pain scores he gave to other treating practitioners.

[145] Mr. Graul has made no attempt to return to work or re-train. He has not requested modified work or reduced hours. He has made no efforts to obtain other work. He is presently on income replacement benefits and long-term disability. He has not applied for Ontario Disability Support Program (ODSP) or any other government benefits.

[146] He carries out housekeeping around the house, but it is at a much slower pace. He has not needed to hire anyone to do the gardening or snow shovelling. He continues some of his handyman projects but at a slower pace. He completed the back step in 2019, but the step had been started before the accident.

[147] When Mr. Graul was taken through the surveillance videos, he agreed they were accurate. One shows that in July 2019 he went to a community center for a celebration of life. He was there from 1:44 p.m. to 4:08 p.m. Mr. Graul said he took

no joy in attending that event but went because it was a former colleague, and he had an obligation to go. He is still not able to go to other social events because he is overloaded by noise and visual cues. Mr. Graul then went with his wife to Lee Valley and the Beer Store. The video confirms that Ms. Graul drove.

[148] Another video, from September 11, 2019, shows Mr. Graul walking slowly without difficulty. He is shovelling and moving slowly.

[149] A video from July 30, 2020, shows him carrying a gas can, trimming hedges, and pulling vines from the side of his house. He helps a neighbour put a motorcycle into the back of a van. He is seen bending over and, on his knees, gardening and watering the grass. It does not show him having any balance problems.

[150] On July 31, 2020, Mr. Graul is seen taking things to the car from the house, which may be him preparing to go to the cottage in Grand Bend. He is walking between closely parked cars. The recordings confirm that Ms. Graul is still driving, although Mr. Graul helps her take groceries into the house. He does not appear to have problems with balance.

[151] On January 2, 2021, Mr. Graul is recorded shovelling his driveway from 11:38 a.m. until 1:29 p.m. He is working slowly but does not appear to have any balance problems. Mr. Graul described the snow as very light. He cannot shovel

heavy snow; when that is necessary, it is done with the assistance of his neighbours.

[152] In the videos, Mr. Graul does not appear to be in pain. He speaks with his neighbours on two occasions but does not appear particularly tired. After the shovelling, he went shopping with his wife.

Evidence of Lydia Graul

[153] Ms. Graul testified that, after the accident, Mr. Graul was not able to focus or concentrate. He forgot to eat or take his medications. He could not organize anything. She needed to remind him to eat lunch and take his medications by leaving post-it notes or cell phone messages. The notes helped but he might still forget. She phoned or texted him at breaks from her work to check on him and remind him.

[154] She testified Mr. Graul's judgment has been damaged. On one occasion, he walked home for miles from his physiotherapist rather than wait for a cab. She confirmed that it was a hot day, he had inappropriate footwear, and no water. He told no one that he was walking, and she needed to call the police to find him.

[155] Mr. Graul leaves the gas stove on in the kitchen about twice a week and has left the barbecue on. This has resulted in him accidently burning towels and a rug

and melting a plastic pot. He almost always leaves his keys in the door. She checks every night to make sure that he has not left the garage door open.

[156] Ms. Graul is worried that he will stumble or fall when he is home alone. He has balance difficulties because he still struggles with his hearing and visual issues. In the first year after the accident, he had troubles with his balance every day. With vision therapy he has slightly improved, but the balance problems continue. His balance is worse when his tinnitus is worse or when he is tired. She has seen him fall a few times since December 2017 and he has told her about other falls.

[157] Ms. Graul testified that Mr. Graul's thinking ability has slowed down, particularly with respect to calculations and decision making. She does all the family finances. He leaves piles of paperwork around rather than filing it as he did in the past and loses documents because of that disorganization.

[158] He often gets distracted by the TV or the birdfeeder. He cannot multitask and can only focus on one thing at a time. He cannot follow a recipe because he gets distracted.

[159] He tries to do work around the house, but it takes him much longer. He can shovel light snow but does not do it logically and often gets distracted. The neighbours help with heavier snow or the icy snow at the end of the driveway.

[160] He does some cooking, cleaning, and tasks inside the house, but it takes "a little longer." He does some of these tasks to occupy himself, but it took him many months to refinish the kitchen table and he has not yet completed that job.

[161] He is now angry, irritable, anxious, frustrated, sad, and depressed. He will snap at her. He is irritable when his depression is worse, when he sleeps badly, or when focussing on their financial problems. He seems to have no filter for any outbursts. He will eventually apologize, and she tries to be patient with him. He shows his anger only to her.

[162] Mr. Graul finds it hard to fall asleep because of the tinnitus. He will get to sleep about 1:00 a.m. but wakes up through the night. He wakes up fatigued in the morning and finds it hard to wake and orient himself.

[163] Mr. Graul has difficulty socializing with their large family. The noise from loud conversations forces him to leave the room because he gets overwhelmed. He will leave and go to a bedroom for 30 minutes to "quiet his mind" and eventually comes back. The couple does not socialize with friends because Mr. Graul does better visiting with only one to four people. They do not have friends over, nor do they go out. They cannot go to restaurants or movie theatres because of Mr. Graul's sight and hearing issues. He visited with his soccer friends once, but it was too loud, and he could not participate. He does socialize with neighbours if they are outside.

[164] Mr. Graul has not driven since 2017 because he worries about his lack of peripheral vision. He is also easily distracted and is not alert. Ms. Graul was emphatic that it would be dangerous for him to drive, even though he has been cleared by his doctor to drive short distances. Falling snow on the windshield will break his concentration. He is also a difficult passenger and second-guesses her driving. He physically braces himself and his anxiety increases. The driver desensitizing course was denied to him by his insurance company.

[165] Ms. Graul's account of their 2018 trip to the Dominican Republic was similar to Mr. Graul's version. Although they went on his doctor's advice, both flights were "horrible" and, essentially, Mr. Graul rested in bed or on the beach other than his meals. There was no golf or other excursions, and she walked the beach by herself. She has gone on her own for weeklong holidays in 2019 and 2020. She left Mr. Graul home alone during these trips.

[166] She can tell when he is in pain because of the look on his face and his body language. He does less when in pain and takes Advil. He uses a heating pad and rubs the area that hurts.

[167] Mr. Graul's ongoing injuries have had an impact on the family. Ms. Graul said the two of them are concerned about their future because they cannot afford his treatment and they had hoped to help their children and grandchildren financially in the future. They had hoped to buy a slightly larger home, renovate,

and sell their present house to pay for it, and host family events in a larger home. That is no longer possible.

Other Evidence of Post-Accident Circumstances

Evidence of Daniel Graul

[168] Since his father cannot drive and his mother does not like to drive, Daniel's parents do not come to visit him anymore. He also cannot visit as often as he would like. He calls his father once a week, which is more than he did before the accident.

[169] Presently, his father is quieter, irritable, lacks sleep, and has a shorter memory. Daniel sees a little bit of tension between his mother and father. Daniel has seen the notes that she leaves for Mr. Graul, and he knows his parents have little arguments about the notes.

[170] Daniel is certain that his father takes longer to do things because he has less concentration. His father has problems with balance and coordination. He has seen his father stumble and appear to lose balance for no apparent reason. His father cannot work on the cars anymore. Daniel changed the tires on his parents' cars because his father could not. While Daniel was away, his father attempted to fix Daniel's car but ended up breaking the windshield.

[171] His father is less involved with projects around the house and is very slow to finish those projects. It has taken him ten months to refinish a table.

[172] Daniel knows his father was optimistic about getting better, but there has been no progress.

Evidence of Pamela Ciccarelli

[173] As previously mentioned, Ms. Ciccarelli is Mr. Graul's older sister.

[174] Shortly after the collision, Ms. Ciccarelli spoke with Mr. Graul, and he appeared to be "like a zombie." She then continued to speak with him once a week, but he talked little. He was eventually able to converse better.

[175] To Ms. Ciccarelli, Mr. Graul appears to be frustrated and angry because he cannot do the things he used to do. He has lost independence and must rely on others. He does not read and, if he does, he cannot remember what he has read. He has not done any handiwork for her or their mother since the accident. He appears to have taken up birdwatching because he cannot play golf or soccer.

Evidence of Jerry Atkinson

[176] Mr. Atkinson is the Wastewater Operations Manager for Niagara Region. Before that, he worked with Mr. Graul while employed with the City of Guelph.

[177] While in Guelph, Mr. Atkinson was involved with accommodating employees. He testified that, to receive an accommodation, the employee would still need to be able to do the job. He did not see how Mr. Graul's job could be accommodated for Mr. Graul's deficiencies.

Evidence of Raymond Masse

[178] Mr. Masse is an industrial millwright and mechanic for the City of Guelph at the wastewater treatment plant.

[179] After the accident, Mr. Masse saw Mr. Graul at a party before COVID-19 started. The new supervisor wanted to meet Mr. Graul and organized a department get together at the Elora Casino. They all ate dinner together and socialized, but Mr. Graul was not the same as before. After dinner, some of the participants went into the casino; however, the lights and sounds forced Mr. Graul out of the casino within 15 minutes. He needed to look at the ground and hung onto a machine to stay upright.

Evidence of John Mogk

[180] Mr. Mogk worked with Mr. Graul at the City of Guelph for 10 to 15 years.

[181] Since the accident, he has seen Mr. Graul twice. Once, at a meeting with the new maintenance supervisor, and once at Christmas a year or so after the accident. Mr. Graul was not able to remain in the casino because of the noise of the machines. On another occasion, they ate in a restaurant, but it was clear Mr. Graul could not understand the menu and ordered what someone else had.

Agreed Evidence

[182] Kiran Suresh's evidence was filed as an exhibit on consent. She was Mr. Graul's co-worker.

[183] Before Mr. Graul's accident, Ms. Suresh had moved to Barrie and so only spoke with him over the phone. After the accident, Mr. Graul was much slower in recalling things and sounded very unhappy and depressed. He sounded upset that it was taking so long for him to recover.

History of Medical Treatment

Evidence of Jon Graul

[184] The details of Mr. Graul's treatments are set out below. Mr. Graul testified that he first took treatment from the emergency department and his family doctor, Dr. Carlson. He has taken physiotherapy from two different clinics. He has taken occupational therapy, speech therapy, and met with a social worker for counselling at a rehabilitation clinic. That therapy has continued from 2018 to now, with some interruptions because of financing and COVID-19.

[185] From 2018 to January 2020, physiotherapy was at least once a week and sometimes twice. His various care providers have assisted his recovery or at least maintained his level of impairment. He still cannot walk on a treadmill because of his sight problems.

[186] He attended vision therapy and further treatment with his optometrist, Dr. Quaid.

[187] He attends the Berge Hearing Clinic for his tinnitus. He wears hearing aids that help with his tinnitus, but they do not help him sleep. If he tries to sleep with his hearing aids, they reduce the sound of the tinnitus but increase the sounds of his pillow to sound like crinkling potato chips. If he takes them out, the tinnitus returns. He wears his hearing aids sporadically. He believes he must revisit the clinic to have the settings adjusted. Even when they are successfully tuned, the sound is still there, but manageable.

[188] Some of his physiotherapy is financed by the account being protected by his lawyers in this litigation and some paid out of his own pocket. He does not know the amount that he presently owes, but he thinks it could be $20,000 or $30,000. His own insurance benefits ran out in early 2019, which brought some of his therapy to an end.

[189] He is now less concerned about COVID-19 and would go to his health providers if he had funding. He found them all to be helpful and is now backsliding without those resources. The interruption was detrimental to his recovery and his tinnitus has increased.

[190] As he said: "I had been working - it's been - it's become my - a career to get better. Like I was - that's how I was treating all my appointments all along."

Evidence of Lydia Graul

[191] Ms. Graul testified that Mr. Graul has made efforts to get better. He has gone to his physiotherapy and doctor's appointments as requested. It is "his full-time job to get better." She listed all the various doctors and service providers that he has attended and detailed the time that it takes to go to all of them. As she has often been the driver to and from Mr. Graul's various appointments, the time commitment for them both has been substantial.

[192] Mr. Graul's treatment has been interrupted because of the pandemic and their inability to pay the providers. Ms. Graul testified that stopping treatments has caused Mr. Graul to regress. When he is not receiving regular treatment, he has greater mobility issues, greater pain, and his tinnitus is worse. She sees him taking more pain medication and he appears to be feeling unwell.

Medical Witnesses

[193] The medical witnesses fall into three groups: Mr. Graul's treating medical practitioners, the medical experts who assessed him on behalf of his own insurer, and the experts hired by both parties for this litigation.

[194] The parties agreed in advance that the medical witnesses could provide expert opinion evidence and they agreed on the areas in which the doctors could testify. I have summarized their expertise with their evidence. Before those experts gave evidence, I was provided with the doctors' reports, curriculum vitae, and agreed expertise. I reviewed those materials in advance of the witnesses being called. In each case, I relied upon the recent case of *Parliament v. Conley*, 2021 ONCA 261, 155 O.R. (3d) 161, at paras. 43-48, and its helpful summary of the legal principles related to expert witnesses. I satisfied myself that counsel were correct in their agreements on expertise.

[195] While some of the experts were more often retained by plaintiffs or defendants, that fact did not rise to the level of rejecting their evidence in total.

[196] This evidence should also be reviewed in light of the defence submission that Mr. Graul has not done enough to mitigate his damages and that I should be hesitant to accept his evidence of his present concerns. The defence also faults him for failing to obtain what the defence submits is the proper psychiatric care.

[197] I start with Mr. Graul's treating practitioners' evidence: Dr. Carlson, Dr. Quaid, and Dr. Berge. There is no defence evidence contrary to their testimony.

Evidence of Dr. Pamela Carlson

[198] The parties agreed that Dr. Carlson is a medical doctor practicing family medicine and qualified to testify on the diagnosis, prognosis, and treatment of medical conditions arising out of motor vehicle collisions and other trauma. Generally, however, she gave her evidence as Mr. Graul's family physician.

[199] Dr. Carlson has been a family doctor since 2015 and took over a practice from Mr. Graul's previous doctor. Her work is equally involved with family practice and emergency medicine at the Fergus Hospital. As such, she is familiar with the diagnosis, treatment, and recovery of concussions. She regularly diagnoses and treats mild to severe concussions and states that each patient differs in their management.

[200] She first met Mr. Graul in July 2015, but she understood his medical history from his past doctor's notes. Mr. Graul had been in the hospital the year before for diverticulitis but had no other acute problems or concerns. He had a colonoscopy in October 2015 and no issues in follow up.

[201] Her own notes showed that Mr. Graul had attended in May 2016 suffering from three weeks of back pain because of a soccer injury. He had been medicating himself at home. On examination, he was normal, although tests were ordered. There were no other visits relating to his back.

[202] In May 2017, he attended with respect to headaches, blurred vision, and problems with his sinus, which he attributed to allergies. The headaches were "stabbing" with a pain of 9 or 10 out of 10. She could not provide a diagnosis but made notes as to possible causes. She then referred him for allergy treatments but not for his headaches. She suggested he use ibuprofen. She told him to follow up if there was no improvement. She did not see him again until after the collision.

[203] She next saw Mr. Graul on December 21, 2017, three days after the accident. He described the collision and complained of pain in his knee and shoulder. His back was having spasms and he suffered from headaches and dizziness. He was dazed and drowsy but had difficulty sleeping. Although he could fall asleep, he could not stay asleep and required a nap during the day. He was confused and his vision was blurry for near or moving objects. He could not focus on moving objects.

[204] Mr. Graul gave her a history of prior car crashes he had been in, but explained that he had no injuries, nor head injuries, from those incidents. She had not seen the handwritten list of head trauma incidents referred to above. She was aware of some of the incidents on the list, and generally about his car accidents, but not the specifics. Although he did not tell her about all his prior history, she testified there was no indication of any earlier impairments, and he was otherwise forthcoming with respect to information.

[205] The events set out in the handwritten list do not affect her opinion because they are too remote from the accident and there were no ongoing symptoms. Mr. Graul was functioning well; however, that history could make him more prone to concussion.

[206] After the accident, Dr. Carlson examined Mr. Graul. He was alert but emotional with respect to the accident. His affect was otherwise flat. On physical examination, she diagnosed whiplash and moderate to severe concussion. She recommended that he take two weeks off work and provided him with concussion counselling, including brain rest and no overstimulation. She advised that he could take over-the-counter medications for pain. She also recommended counselling relating to the accident, Tylenol, naproxen, Flexeril, and physiotherapy.

[207] She next saw Mr. Graul on January 3, 2018. He was still in pain in his neck and back muscles and his concussion symptoms were ongoing. He described dizziness, loss of balance, "fogginess", memory problems, fatigue, and unrestful sleep. He said he had started physical therapy twice per week. On observation, he seemed to have a flat affect, but he had normal gait and balance. Her physical tests raised no concerns.

[208] On January 15, 2018, he complained of tinnitus for the first time. His symptoms were otherwise the same. He was now having headaches which woke him. He had difficulties with visual patterns and saw halos around things. He had

low stamina and was not able to help with household chores. She recommended amitriptyline for his headaches, sleep, and concussion symptoms. She recommended that he go to an optometrist and obtain vision therapy.

[209] In January 2018, they discussed his depression and anxiety and she urged him to speak with a counsellor. However, he had a lot of appointments and difficulties that were of higher priority. She was not aware if he has since taken any counselling but was aware that he was seeing a social worker.

[210] On February 21, 2018, Mr. Graul still complained of problems with movement and patterns in his vision. He had tingling in his legs if he stood too long, and he continued to have headaches and sleep problems. He was now having difficulty getting to sleep. He also complained of short-term memory problems.

[211] On February 26, 2018, Mr. Graul reported tinnitus, muscle issues, back spasms, fatigue, and difficulties with dizziness and concentration. His sleep was better, but he was now on medications. His reporting of symptoms showed that his concussion was still severe.

[212] Mr. Graul still had problems with his vision, but he had seen Dr. Quaid, his optometrist, for an assessment. He complained of problems with his peripheral

vision. At Dr. Carlson's recommendation, he was now seeing an occupational therapist and Dr. Berge for his hearing problems. His physiotherapy was helping.

[213] Dr. Carlson increased his amitriptyline to help with his sleep. While amitriptyline is an antidepressant; it is not generally used for depression. Here, she prescribed it for his insomnia, and to some extent, for his concussion. They started with a low dose and increased it. When it proved unhelpful, she told him to stop, and he did.

[214] Dr. Carlson met with Mr. Graul on March 24, 2018, and he was still the same. He was not able to walk very long in the snow and was still suffering from tinnitus, sleep deprivation, and some new dental pain. She put him on different sleep medication. Trazodone is an antidepressant, but, again, was used for his sleep issues. He had not been taking counselling as recommended.

[215] On April 30, 2018, Dr. Carlson changed Mr. Graul's sleep medications again. Mr. Graul was not driving, and she provided a note so that he could get transportation benefits.

[216] On May 28, 2018, Mr. Graul's condition had not changed much. His sleep was still a problem, and she changed his medication again. He was having difficulty with walking and memory. He was attending vision and speech therapy.

[217] Dr. Carlson met with Mr. Graul on July 5, 2018, and he complained that he was worse after having various medical assessments. Some of those assessments had occurred in Mississauga and the long drive on the highway had been difficult for him.

[218] Her diagnosis was that he had a severe concussion.

[219] In September 2018, Mr. Graul came to her office regarding an injury to his left shoulder incurred when he was attempting to trim a tree. An ultrasound later in October 2018 was normal.

[220] She met with him on November 19, 2018, and he complained of double vision even though he was wearing glasses and taking therapy. He was still not driving. He had fallen or stumbled recently and had difficulties walking in the snow.

[221] In January 2020, Mr. Graul was still not taking counselling because he was "not sure where to start" and was concerned about paying for it. He was not sharing his concerns with his wife because he did not wish to burden her, and he described that he "keeps things bottled up." Dr. Carlson was focusing on his largest issues being tinnitus, balance, and problems with his vision.

[222] Dr. Carlson had a phone interview with Mr. Graul on July 30, 2020. He still was suffering from tinnitus and low stamina. His headaches were made worse by the various medical assessments carried out. He had fallen that morning and two

or three times over the last six months. He had recurring pain to his back and neck. He had not had any physiotherapy because of COVID-19. He was complaining of a loss of libido, and she referred him for assessment in that regard. He was supportive of the plan.

[223] In her opinion, Mr. Graul's various symptoms were caused by the car accident. The soft tissue injuries were related as well. Her objective evidence was her own exams, his demeanor while at her office, and the audiology, physiotherapy, and optometry reports.

[224] Dr. Carlson did not believe that Mr. Graul would be able to return to work because of his problems with focusing, hearing, vision, and neck and back pain. As a result, he would not be able to bend and twist, operate a vehicle, or travel on public transportation. His judgment and ability to respond to changes would not allow for it. Although he could take care of himself, he would not be able to do the larger duties of daily living such as shopping, household tasks, managing medications, and driving.

[225] With respect to treatment, Dr. Carlson was satisfied that Mr. Graul had participated and followed her recommendations. She recommended he continue with physiotherapy, corrective lenses, hearing aids, occupational therapy, meditation, driving rehabilitation, exercise, and others. In total, she had seen Mr.

Graul 31 times: 17 of those in person between the collision and December 2019, and the remaining 14 since 2019 either by telephone or in person.

[226] Her current diagnosis is that Mr. Graul is suffering from post concussion syndrome and traumatic brain injury. Her opinion has not changed since December 2019. He is still unable to return to work and cannot engage in all aspects of usual daily living. She has not changed her recommended treatment.

[227] She has not seen the reports from the various defence doctors, but she believes she has the necessary information from Mr. Graul and has made no note of any deficiencies in his reporting.

[228] Dr. Carlson was not aware that the defence doctors had recommended that Mr. Graul could return to work, but this did not change her opinion that he cannot work. She explained that, although she relied somewhat on subjective reports from Mr. Graul, she also relied on assessment reports and her own observations. She has not seen him at home but does have reports from other assessors who have.

[229] In May 2021, Dr. Carlson prescribed antidepressants for the first time for Mr. Graul's mental health symptoms. His mood changes had not been of concern to her till that point. However, Mr. Graul had increased difficulties because of the pandemic, no access to therapy, and a personal tragedy to a friend. Accordingly,

she thought it would be a good idea to try an antidepressant. He is still on it and she has increased his dose. She will continue to monitor dosage in the future.

[230] She agreed that psychological and psychiatric problems can cause symptoms including blurred vision, panic attacks, memory loss, cognitive problems, attention problems, and difficulties with decision making and judgment. Although mental and psychological reasons can cause his various symptoms, in her opinion, his difficulties were caused by the motor vehicle accident and the head injury which occurred at that time.

[231] She is aware that Mr. Graul has not driven since the accident. She does not see that he is a high risk to make him unfit to drive.

Evidence of Dr. Patrick Quaid

[232] The parties agreed that Dr. Quaid was qualified to provide expert opinion evidence in the field of optometry and optometrical impairments. Mr. Graul was referred to Dr. Quaid by Dr. Carlson.

[233] Mr. Graul was referred with the following symptoms, all of which began after the motor vehicle accident: near double vision, hypersensitivity, peripheral vision issues, and blurred vision.

[234] Dr. Quaid tested Mr. Graul and found that he had "convergence insufficiency", meaning his eyes will not turn close enough to his nose to read. He

also had "vergence insufficiency and saccadic dysfunction", causing his eyes to not properly track movement. Finally, Dr. Quaid diagnosed Mr. Graul with defective depth perception.

[235] These difficulties affect Mr. Graul's ability to drive, read, and look at a computer screen or cell phone. In Dr. Quaid's opinion, Mr. Graul would have difficulty working with wires or exercising proper depth perception. Mr. Graul would need to touch an item to be sure that he was seeing it properly. It was Dr. Quaid's opinion that, on a balance of probabilities, Mr. Graul's difficulties were caused by the car accident. He does not believe these difficulties were caused by aging.

[236] Dr. Quaid explained that, in time, the brain will be able to suppress the double vision; however, for now, Mr. Graul's double vision remains. As of September 2018, Mr. Graul had significant impairments with visual convergence, vergence amplitude, visual motor search and speed, visual memory, vertical and horizontal tracking, and reading efficiency.

[237] Dr. Quaid's prognosis is "guarded". With therapy, Mr. Graul has made some gains. His therapy will teach his brain how to control his eyes to remove the double vision. This will also occur using specialized glasses. His glasses prescription may have to be altered for a year or two more, but he should also continue with treatments.

[238] Dr. Quaid explained that Mr. Graul has been compliant with his training, but because Mr. Graul's insurer has denied payments and the pandemic intervened, there have been no further treatments.

[239] Dr. Quaid observed Mr. Graul improving over time, particularly with respect to his depth perception, but he still has double vision which becomes worse as he gets tired. With therapy, some of Mr. Graul's metrics have improved but his symptoms remain, particularly with respect to tracking. While tracking is the most important, Dr. Quaid explained he must look at all the metrics. Regardless of improvement, Mr. Graul has poor reaction time and poor hand eye control. Dr. Quaid expects that Mr. Graul will also have problems with peripheral perception and will continue to second guess what he is seeing in his peripheral view. Rain and snow will still cause problems for his eyesight, as will windshield wipers.

[240] Dr. Quaid agrees with Mr. Graul that he should not drive, though he also agrees that Mr. Graul could drive 10 to 15 minutes at a time on backroads and not on the highway. Fatigue for any reason would reduce that driving time. Although Mr. Graul has been cleared to drive in a limited fashion, driving ability is not likely to improve over time. Ultimately, it is safer for others if Mr. Graul does not drive.

[241] With respect to treatment, Dr. Quaid recommends that Mr. Graul should have ongoing checks every six months.

Evidence of Dr. Brenda Berge

[242] Dr. Berge was qualified on consent to give expert evidence in the field of audiology, audiological impairments, and the diagnosis and prognosis of audiological impairments. Dr. Berge carries on her practice at the Berge Hearing Clinic in Guelph.

[243] She met with Mr. Graul on March 29, 2018, after he was referred to her by Dr. Quaid and Dr. Carlson.

[244] Mr. Graul's principal complaints were tinnitus and sound sensitivity. She took a history from him and carried out an examination. She observed Mr. Graul's lack of balance. She carried out a hearing test which showed that Mr. Graul's hearing was normal except for one pitch where there was a significant "notch" at the four kHz line. To her, this was objective and clear evidence that Mr. Graul's difficulties were "a noise induced hearing loss." That notch represented the part of his ear that was "smashed". In her opinion, that injury took place when his airbag deployed in the accident.

[245] At her last examination with Mr. Graul, she carried out a "baby hearing test". The results again were consistent with his complaints of tinnitus and his "misophonia" or emotional aversion to sound. This too was objective and diagnostic of Mr. Graul's problems with his hearing.

[246] With respect to the list of head traumas, since those events were non-symptomatic prior to the collision, that history was not important to her. The list did not change her opinion that these symptoms were caused by the motor vehicle accident, particularly the airbag noise, whiplash, and concussion.

[247] Dr. Berge's clinical diagnosis was "blast induced tinnitus, misophonia and noise induced hearing loss with dizziness." In her view, all his complaints of dizziness, jaw pain, and head and neck injury are indicative of noise induced hearing loss. In her opinion, this hearing loss is permanent; there are no treatments to cure or to relieve his present condition.

[248] She described that tinnitus causes "fight or flight" anxiety which will increase with stress or non-restorative sleep.

[249] She described misophonia as an emotional aversion to sound. Sound will be so chaotic to an individual that it will have a "striking force". All the sounds in the listener's location will appear to be together and positioned immediately in front of that individual's face. Accordingly, that individual will avoid being out with others. Mr. Graul would likely tolerate 20 minutes or so, before the fight or flight response would then kick in.

[250] She recommended hearing aids to assist with the pain in his ears and reduce his misophonia and anxiety. The hearing aids should mitigate his physical and

psychiatric injuries as well. Upon testifying, she found out Mr. Graul was not wearing the hearing aids because changes were needed as they were not working. She left it to him to follow up. She said the prescription for these hearing aids will need to change from time to time, perhaps once a year.

[251] From Dr. Berge's observations of Mr. Graul, he cannot coordinate his arms and gait while walking on soft or inconsistent ground. This too is diagnostic of Mr. Graul's condition. If he is on unstable ground, or walking unevenly, that will be distracting to him and lead to higher heart rate and imbalance.

Evidence of Caterina Minaudo

[252] Mr. Graul was assessed and treated by four professionals at Rehab First, a multidisciplinary practice in London, Ontario. Rehab First primarily gets its referrals from plaintiff's lawyers. Mr. Graul was seen by Caterina Minaudo, Joanne Brotman, Debra Mair, and Karol Nega.

[253] Ms. Minaudo is a speech language pathologist who worked with Mr. Graul in 2018. She met with Mr. Graul three times and received handwritten notes and questionnaires from Ms. Graul, though Ms. Minaudo has not met her. Ms. Minaudo completed a cognitive communication assessment of Mr. Graul and provided speech language therapy to him. She used a semi-structured interview method and two standardized assessment measures.

[254] She trusted the information she received from Mr. Graul. Her standardized testing also showed there was validity to his observations. His reading and writing skills were tested informally through other tests. He was able to do many of the tasks, but required more time, support, structure, and repetition to complete them. Such structuring required, for instance, multiple choice questions rather than free memory.

[255] His responses suggested mild difficulties responding to questions with complex units of information. He could sustain his attention to tasks if there were minimal distractions or disruptions.

[256] Based on her findings, she believed that Mr. Graul was "experiencing difficulties with cognitive skills integral for auditory comprehension and processing." She recommended that Mr. Graul receive speech language pathology treatments to address his concerns. Those sessions provide Mr. Graul with education, exercises, and strategies to strengthen his cognitive communications skills and to promote improved functioning in daily activities. She recommended six treatment sessions within the home or the community as appropriate.

Evidence of Joanne Brotman

[257] Ms. Brotman is a speech language pathologist with Rehab First. Mr. Graul's care was transferred from Ms. Minaudo to Ms. Brotman. Her reports of March 21, 2019 and January 22, 2020 were filed in evidence.

[258] She reported that Mr. Graul was experiencing ongoing pain symptoms, tinnitus, visual disturbances, headaches, fatigue, and emotional and cognitive difficulties. He reported cognitive difficulties such as memory, oral expression, reading and auditory comprehension, and executive functioning.

[259] She provided "pacing strategies" to Mr. Graul, but Mr. Graul had difficulty understanding the importance of those strategies. He had difficulty focussing on her assistance and required repetition and reinforcement of what she was teaching.

[260] In her January 22, 2020, report, Ms. Brotman reported that Mr. Graul continued to have the same difficulties. His treatment had been interrupted by the pandemic and the end of his insurance benefits in March 2019.

[261] When Mr. Graul's benefits ended in March 2019, his therapy, therefore, also went on hold. Ms. Brotman then arranged with Mr. Graul and his lawyer to protect their accounts in this litigation for any future work. She does not know the terms of those protected accounts. His treatment commenced again in September 2019.

[262] Her overall observations were that Mr. Graul had difficulty with his memory, maintaining attention, and attempting to focus. He had difficulties understanding what was required of him. He also had difficulty with his executive functioning skills,

in that he had difficulties with decision making, such as scheduling or preparing lists.

[263] From Ms. Brotman's observations, Mr. Graul continued to lose focus over time and needed repetition and reinforcement. He presented with communication difficulties, including problems with memory, attention deficits, oral expression, social communication, information processing, and executive functioning.

Evidence of Debra Mair

[264] Ms. Mair is a social worker at Rehab First. She provides personal counselling, vocational rehabilitation, and case management services. She spoke with Mr. Graul on seven occasions between March 2019 and August 2019. She reviewed some of the available medical reports relating to Mr. Graul.

[265] Ms. Mair was primarily involved with Mr. Graul in the role of a personal counsellor. From her observations, she noted that Mr. Graul was hesitant to participate at first, but became more open to discussing his feelings, concerns, and stresses. In return, Ms. Mair provided Mr. Graul with strategies to address his emotional status and functioning, such as meditation, breathing techniques, visualization, and reframing. In Ms. Mair's opinion, Mr. Graul was experiencing significant adjustment issues because of the collision and his injuries.

[266] Ms. Mair had Mr. Graul complete standardized tests. Those tests indicated that he had severe levels of depression and mild levels of anxiety.

[267] Ms. Mair's plan was that Mr. Graul would benefit from further social work services and counselling to support his rehabilitation and emotional wellbeing. Such counselling would include driver rehabilitation therapy. He should also have occupational therapy, speech language therapy, physiotherapy, and massage therapy.

[268] She recommended that he have psychological assistance. By that point, he had not had any cognitive therapy, psychotherapy, concussion support groups, or family counselling. He had not been part of any brain injury groups nor prescribed any medications for his psychological problems.

[269] Despite his insurance benefits being exhausted, Mr. Graul continued treatment on a protected basis.

Evidence of Karol Nega

[270] Mr. Nega is an occupational therapist with Rehab First. Mr. Nega interviewed Mr. Graul and reviewed relevant medical literature. He had Mr. Graul carry out various standardized tests.

[271] Mr. Nega formed the opinion that Mr. Graul "has ongoing functional implications due to persisting post-concussive symptomatology" following the

collision. Mr. Graul continues to experience cognitive difficulties and has reduced concentration attention, memory, decision making and problem solving, judgment, organization, and planning.

[272] In Mr. Nega's view, Mr. Graul's "overall rating" was that he had a "lower severe disability."

[273] In his assessment, Mr. Nega recommended that Mr. Graul continue with occupational therapy, physiotherapy, speech therapy, social work, vision therapy, and follow ups with his TMJ specialist and audiologist. In his opinion, Mr. Graul would not be able to continue to work at the City of Guelph.

Insurer's Assessors

[274] Mr. Graul was assessed by his own insurer with respect to his accident benefit entitlements. These assessors filed their reports and were cross-examined by the defence. This group is made up of Zinnia Lee, Johan Reis, and Dr. Sujay Patel.

Evidence of Zinnia Lee

[275] Ms. Lee is a registered physiotherapist and functional capacity evaluator. She was asked to assess Mr. Graul's functional abilities and to determine if he had

a substantial inability to perform the essential tasks of his employment as a maintenance Lead Hand.

[276] Ms. Lee carried out a functional assessment of Mr. Graul on July 4, 2018, seven months after the accident. She found that Mr. Graul gave a reliable effort and she had no concerns about malingering or feigning illness. From her review of the reports, Mr. Graul's history, and her own functional testing of Mr. Graul, she came to the opinion that he could not perform the essential tasks of his employment. She did not rule out that Mr. Graul might return to work in the future but left that to other physicians and what the future might hold.

Evidence of Johan Reis

[277] Mr. Reis is a clinical psychologist. He was asked to conduct a psychological assessment of Mr. Graul. As part of his practice, he deals with patients with brain injuries.

[278] He assessed Mr. Graul in April 2019. Mr. Reis read the relevant documents that were provided to him, interviewed Mr. Graul, and had him carry out standardized tests. He found Mr. Graul's test results reliable, given that they were relatively high in the areas of neurologic impairment and amnestic disorders. This is consistent with Mr. Graul's cognitive difficulties.

[279] Ultimately, Mr. Reis diagnosed Mr. Graul with "Major depressive disorder, Mild with anxious distress" along with a "Specific Phobia, Situational (vehicular)." In his view, from a purely psychological perspective, Mr. Graul suffered a substantial inability to perform the essential tasks of his employment because of the motor vehicle accident.

[280] In Mr. Reis' opinion, Mr. Graul would benefit from psychological treatment to improve his functioning. A typical initial course of treatment would include 12 to 16 weekly or biweekly sessions, each 30 minutes in length.

[281] Although Mr. Graul had not received psychological treatment, he had met with a social worker and said he would go if recommended.

[282] Depending on the success of the psychological services, Mr. Reis felt there was a possibility that Mr. Graul would recover, but that would have to be assessed after the first round of treatment.

[283] Although Mr. Graul could return to work with treatment, that was strictly from a psychological perspective.

Evidence of Dr. Sujay Patel

[284] Dr. Patel is a certified independent medical examiner. He was asked to provide an independent psychiatric evaluation of Mr. Graul. He assessed Mr. Graul on December 3, 2019.

[285] To complete his assessment, Dr. Patel reviewed the extensive list of related medical reports prepared to that point. He interviewed Mr. Graul and had him complete several standardized tests. Those tests disclosed no signs of malingering.

[286] Dr. Patel expected to have an accurate medical history from Mr. Graul, but at the time of testifying was not aware of the handwritten history of head trauma, including the existence of five collisions, nor that Mr. Graul may have lost consciousness or hit a telephone pole. However, this was not relevant to him for psychiatric purposes.

[287] In Dr. Patel's opinion, Mr. Graul was "clinically mildly to moderately depressed." Further Mr. Graul was, from a mental health perspective, "mildly to moderately ill."

[288] In the end, Dr. Patel opined that Mr. Graul had a "Specific Phobia, Situational Type (Vehicular). Adjustment Disorder, with Mixed Anxiety and Depressed Mood." These impairments resulted from accident-related factors.

[289] With respect to employment, Mr. Graul "would likely lack the mental function to show-up/remain, participate and produce in most work roles in a sustained way."

[290] Of significance to my analysis in this trial, Dr. Patel pointed out the obvious:

> When considering the severity of his collective accident related psychiatric and physical disorders (and related impairments) Mr. Graul likely does currently suffer a complete inability to engage in any suitable employment.

Credibility of Mr. Graul

[291] The defence asks me to consider the credibility of Mr. Graul through the lens of *Bradshaw v. Stenner*, 2010 BCSC 1398, at paras. 186-87, aff'd 2012 BCCA 296:

> Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides. The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time.
>
> It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." [Citations removed.]

[292] For the following reasons, I accept Mr. Graul's evidence with respect to his injuries and ongoing circumstances.

[293] Other than the expert opinions about diagnosis, there is no evidence contrary to that of Mr. Graul and his witnesses. I found nothing in Mr. Graul's evidence that was inherently unbelievable.

[294] None of Mr. Graul's treating physicians found him to be inconsistent or to exaggerate his circumstances. As set out below, no expert opined that Mr. Graul's injuries could not result from the accident impact.

[295] Dr. Berge relied on objective testing to diagnose Mr. Graul. She found Mr. Graul's symptoms consistent with that diagnosis. This confirms Mr. Graul's evidence of tinnitus, difficulties with his balance, and anxiety.

[296] Dr. Quaid also relied on objective testing to diagnose Mr. Graul and found Mr. Graul's symptoms consistent with that diagnosis. This confirms Mr. Graul's evidence of difficulties with seeing and driving.

[297] The assessors employed by Mr. Graul's insurer found Mr. Graul to be injured and his complaints consistent with those injuries. No one could suggest that they were biased toward Mr. Graul; I can assume that they were, at least, objective in their findings.

[298] In his testimony, Mr. Graul did not exaggerate his difficulties and appeared to downplay them to some extent. Ms. Graul was able to fill in the descriptions of injuries that he discounted or overlooked.

[299] As set out above and below, the various experts carried out objective standardized testing of Mr. Graul. Those tests included metrics to test for reliability of his responses. None of the experts found Mr. Graul to be exaggerating his symptoms or malingering. All but two found his responses to be completely reliable and those two did not find any indication to reject his information.

[300] The defence raises several arguments with respect to Mr. Graul's credibility. The defence does not submit that Mr. Graul's evidence should be rejected but that his credibility is "suspect". As a result, the defence submit that "the plaintiff's evidence at this trial ought to be viewed with skepticism." I do not agree.

Head Injury History

[301] The defence submits that Mr. Graul was not forthcoming to his various assessors about his pre-accident health history. He failed to provide the handwritten list of head injuries to his healthcare providers. The list included three head trauma incidents in Mr. Graul's childhood which required stitches, and five previous motor vehicle accidents. One of the five accidents caused Mr. Graul to lose consciousness for four to five minutes.

[302] To explain why he did not provide the handwritten list to other healthcare professionals, Mr. Graul characterized these previous incidents as insignificant. Thus, says the defence, he has tried to minimize the importance of providing a complete pre-accident medical history to the various healthcare professionals.

[303] I agree that Mr. Graul's failure to properly answer his undertaking is noteworthy; however, in the end, this list was of little significance. Some of the injuries occurred when Mr. and Ms. Graul were in their relationship. She noted no ongoing concerns following these injuries.

[304] None of Mr. Graul's treating or assessing physicians found the list to be of significance because he did not report any ongoing symptoms after these injuries. None thought it important to their determinations.

[305] To the extent that this list is significant, for reasons set out below, it suggests that Mr. Graul was more susceptible to head injury. Providing that information would have improved his legal case, not hampered it. It would not have helped his case to keep these events from his healthcare providers.

[306] The list of head injuries, or Mr. Graul's failure to disclose it, does not affect Mr. Graul's credibility.

Pain Charts

[307] The defence next focusses on Mr. Graul's inconsistency in his description of the level of pain he has been experiencing since the accident.

[308] In evidence is a series of Discomfort Scale charts Mr. Graul provided for his TMJ specialist, Dr. Jones. Each sheet required Mr. Graul to rate his average discomfort over the previous seven days on a scale of 0 to 10. Each sheet lists 12 symptoms which are to be rated. The symptoms were TM joint pain, TM joint sounds, bite issues, neck pain, headache, facial pain, eye symptoms, ear pain, stuffy ear or ringing sounds, arm/ hand/ finger numbness, tingling or pain, upper back pain, and lower back pain.

[309] The Discomfort Scale sheets are each signed by Mr. Graul, and he agreed in evidence that the scores were accurate. The sheets cover the time from November 28, 2018 to March 4, 2020, or about 1 year and 3 months. The average overall pain scores on each sheet range from 1 to 2 out of 10.

[310] The defence points out that this overall pain score contrasts significantly with pain scores that Mr. Graul provided to other practitioners. For example, on July 24, 2019, he advised Dr. Friedlander that his headaches, neck, and shoulder pain were all 5 out of 10. Likewise, on August 26, 2019, Mr. Graul advised Dr. Lang that his neck and back pain were both 4 out of 10. Two days later, on August 28, 2019, he advised Dr. Basile that his headaches were 8 out of 10. Thus, according to the

defence, Mr. Graul has displayed an inconsistency in reporting his pain complaints and, as such, his evidence on this issue must be viewed with caution.

[311] The defence does acknowledge that some of the expert witnesses opined that this fluctuation is due to the nature of pain (i.e., it ebbs and flows). However, it is only when Mr. Graul is asked by proposed experts to rate his pain that it is consistently higher. While one would expect an ebb and flow of pain, one would not expect that ebb and flow to consistently coincide with the dates that Mr. Graul happened to be assessed by a proposed expert.

[312] I agree with the defence that there is a significant inconsistency here. However, that does not lead to significant evidence. Even if Mr. Graul's pain is a steady one to two, he is still suffering real harm years after the accident.

[313] Further, when asked about this inconsistency, many of the witnesses thought that the answer might depend on the wording of the question. As set out below, Mr. Graul has significant cognitive deficits; I am hesitant to find that he has intentionally misled his healthcare providers without knowing the specific question to be answered.

[314] Mr. Graul's evidence was consistent that his pain increased with long drives. The experts were in the Greater Toronto Area and Mr. Graul resides in Fergus.

While the impact of long drives was not explored, it is as likely to be a cause of the difference as exaggeration.

[315] Finally, this discrepancy is the only aspect of his description that suggests exaggeration. Only one doctor made note of this discrepancy and did not discard the rest of the information provided by Mr. Graul. All other doctors either did not rely on this information or only added it into a multi-factor analysis. It did not affect their opinion of Mr. Graul's difficulties when looking at all the evidence available to them. I shall do the same.

[316] The pain charts do not affect Mr. Graul's overall reliability and credibility.

Surveillance

[317] The defence placed Mr. Graul under surveillance and some of the recordings of his activities were put to him in cross-examination.

[318] The defence submits that Mr. Graul tried to minimize the importance of the activities depicted in the surveillance videos. He had several explanations for his activities. For example, when pulling weeds on July 27, 2019, he stated that he was distracted. When he admitted to spending more than two hours at a celebration of life gathering at a community centre, he tried to explain this away by stating that he felt obligated to go. Nevertheless, he admitted that he went there voluntarily.

[319] It is therefore submitted that Mr. Graul has tried to minimize the impact of this evidence by stating that he felt obligated to go. The defence counters, however, that most people go to funerals and celebrations of life out of a sense of duty and obligation, and not because they really want to be there. The defence submits that the key here is that Mr. Graul's accident-related issues did not prevent him from attending this event. The footage shows Mr. Graul socializing outside before the event for several minutes. While Mr. Graul may have felt an obligation to attend, he was not obligated to socialize beforehand.

[320] The defence also outlines Mr. Graul's other justifications and explanations for his activities depicted in the surveillance videos. For example, on December 11, 2019, Mr. Graul explained his roughly 20 minutes of snow clearing by stating that, on that particular day, he shoveled snow because his social worker was coming, and he did not want her to slip or fall. Again, the importance of this video is that Mr. Graul can do winter maintenance at his home.

[321] On January 2, 2021, Mr. Graul is again shown shovelling snow. He agreed that he had been shovelling for about half an hour, non-stop. He qualified his answer by stating, "If you call that shovelling," and indicated that it represented "minimal efforts." These comments underscore what appears to be Mr. Graul's efforts to minimize the impact of the surveillance. The video clearly depicts Mr. Graul engaged in an activity that would indeed be called "shovelling" by most

people. Snow shovelling in winter is not an easy task, and Mr. Graul appeared to have little difficulty with this activity on this occasion.

[322] In his re-examination, Mr. Graul tried to characterize the snow as being "light" on January 2, 2021, but the video indicates the snow had some weight to it, with perhaps a layer of ice underneath. Mr. Graul admitted in his cross-examination that he was likely trying to break up ice when using his hand to hit the hood of the car.

[323] The defence submits that the surveillance video also shows Mr. Graul assisting his next-door neighbour with the neighbour's motorcycle on July 30, 2020. Mr. Graul may have been helping his neighbour lift a motorcycle into the back of a van, as he was trying to assist his neighbour in any way he could. He may also have been stabilizing the motorcycle.

[324] On the same date, July 30, 2020, the surveillance video also shows Mr. Graul trimming shrubs, pulling weeds, watering plants, and cutting grass. He was active for a total of about two hours that day.

[325] The next day, July 31, 2020, surveillance video shows Mr. Graul being very active. On that date, he watered some plants, socialized with a neighbour, and did some grocery shopping with his wife. After arriving home, he placed several items into the back of the family vehicle in preparation for a drive later that day to Grand

Bend. Mr. Graul made multiple trips between the house and the vehicle to load various items. His activities on this day began at around 8:55 a.m. and ended with Mr. Graul's arrival in Grand Bend at around 4:30 p.m. The drive took approximately two hours.

[326] The surveillance video also shows Mr. Graul shopping with his wife on multiple occasions. He went shopping on July 27, 2019, July 31, 2020, and January 2, 2021. He is seen shovelling snow on two separate occasions.

[327] Finally, the defence refers to surveillance that shows Mr. Graul socializing with neighbours on four separate occasions on July 30, 2020, July 31, 2020, January 2, 2021, and September 8, 2021.

[328] I do not find the surveillance videos to be of much use to me or the defence.

[329] Mr. Graul did not deny these activities and they are not inconsistent with his evidence in chief. Mr. Graul does not say that he is bedridden. He tries to do what he can but cannot do much. That is what the video recordings amply show.

[330] The videos show that Ms. Graul does the driving. Mr. Graul attempts to keep busy in his "ridiculous form of retirement." When one compares the pre-accident description of Mr. Graul with the slow-moving individual in the videos, we are shown a significantly damaged man. It appears from the surveillance that Mr. Graul is essentially trying to fill his day.

[331] The surveillance does not affect Mr. Graul's credibility.

Mr. Graul's Conduct at Trial

[332] The defence points out that Mr. Graul did not seem to have much difficulty giving his evidence at trial. He did not appear to stutter or be at a loss for words. He had a good vocabulary and was well spoken. He showed no noticeable signs of fatigue and engaged appropriately. He understood questions and seemed to have a good recall of events. His memories did not appear to be erratic or disjointed. He did not seem to have difficulty recalling dates, names, and other details. In short, while in the witness box, he did not display the extensive list of cognitive and memory issues he claims to have sustained because of the accident.

[333] The defence asks that I consider that Mr. Graul testified over a period of two days. Over these two days his alleged symptoms were not apparent before the court. As set out below, Dr. Basile testified that Mr. Graul starts to stutter later in the day when he gets tired. Mr. Graul testified later in the day without stuttering. Testifying in court can be a trying and tiring process, especially when it is one's own case being tried. The defence submits that it is questionable as to why Mr. Graul's symptoms were not apparent over the course of those two days of testimony.

[334] I do not find this evidence questionable.

[335] First, as set out below, the defence experts agree that Mr. Graul has cognitive deficits. There is no dispute about that even if those deficits did not show during trial.

[336] Second, Mr. Graul was not dealing with a loud workplace or diverse tasks. He was sitting at home answering questions virtually for which he was prepared. We took breaks as the court normally does. This was not a test of Mr. Graul's ability to endure such that I should be concerned about his credibility or reliability.

[337] The way Mr. Graul gave evidence does not affect his credibility.

Loss of Consciousness

[338] Mr. Graul testified that he must have lost consciousness at the scene. The defence disputes this evidence. The experts' opinions below consider whether it is important that Mr. Graul lost consciousness at the scene and whether he had amnesia with respect to the accident. For reasons set out below, nothing turns on that determination since Mr. Graul's possible loss of consciousness or memory is but one factor in the multi-factor assessment of his condition. However, out of respect to the parties' arguments, I shall make the necessary findings.

[339] The defence submits that, although Mr. Graul claims that he may have lost consciousness in the accident, the balance of the evidence does not support that position.

[340] When Mr. Graul was asked to explain why he thinks he lost consciousness, he indicated that he was convinced that the defendant car hit him from the front, until he saw the damaged vehicle and "the driver's side was caved in." The defence points out that photos of the damaged vehicle simply do not support that the driver's side was "caved in". In fact, most of the damage to the vehicle was on the front end. Thus, Mr. Graul's explanation for why he thinks he lost consciousness simply does not make sense to the defence.

[341] Additionally, Mr. Graul testified that he was certain that he "hit the driver's window" and "the dash with my knees." Thus, Mr. Graul has an actual memory of hitting the window and the dash. These are events that happened after his vehicle came into contact with the Kansal vehicle and before the vehicle came to stop in the ditch. These recollections support the assertion that Mr. Graul did not lose consciousness in the accident.

[342] Further, the defence points out that the medical records in evidence confirm that Mr. Graul told the ambulance attendants at the accident site, the staff at Guelph General Hospital on the accident date, his family doctor on December 21, 2017, and the staff at Eramosa Physiotherapy on January 18, 2018, that he did not lose consciousness. On that basis, the defence submits that the evidence demonstrates that Mr. Graul did not lose consciousness as a result of the accident.

[343] And yet, I note that the evidence also discloses that Mr. Graul has no recollection of speaking with an officer at the scene, although advised by the officer later that he did. I did not hear evidence from that officer, but the hearsay evidence did not seem to be in dispute. I did hear from Mr. Graul's son that he spoke with his father by telephone from the scene, but Mr. Graul did not remember that conversation.

[344] The defence expert, Dr. Freedman, agreed that a patient's report on whether they lost consciousness may not be reliable because they may not be the best historian of their own consciousness. He agreed that one can lose consciousness and not know it.

[345] That expert opinion and common sense tell me that I cannot rely on Mr. Graul's recollection of losing consciousness. The rest of the evidence shows that he did. I find that Mr. Graul either lost consciousness or his memory fails him in respect to what happened at the immediate accident scene.

Credibility of Other Plaintiff Witnesses

[346] The cross-examination of Mr. Graul's lay witnesses was not an attack on their credibility. Rather, it was limited to obtaining what additional evidence might assist the defence. There is no reason to reject the lay witnesses.

[347] As set out above, there is no reason to reject the evidence of family members simply because they are family. The defence submits that Ms. Graul was "bitter" in her evidence. I did not find that to be the case. Rather, she appeared to be concentrating on giving answers to the questions and was rather taken aback by the nature of the questions rather than the evidence that she was providing. While there was nothing untoward in that cross-examination from a legal point of view, I could well understand her offence at some of the questions and their tone.

[348] Since the lay witnesses gave credible and consistent evidence to that of Mr. Graul, they add to Mr. Graul's credibility and reliability.

[349] The defence submits that I should be hesitant to accept the evidence of the Rehab First witnesses since it is in the best interests of their employer to recommend continuing treatment. I reject that submission. I cannot make that presumption about healthcare providers any more than I should be hesitant to accept the submissions of legal professionals that are in the best interests of their employer. The defence makes no other submissions against the reliability or credibility of these witnesses.

[350] In short, I accept Mr. Graul's evidence of his circumstances since the accident.

Expert Medical Evidence

[351] To this point, I have made findings on Mr. Graul's condition before and after the accident. Both parties presented expert medical evidence but, given my findings above, little turns on that evidence. That is to say, on the evidence, and using lay language, Mr. Graul had a head injury at the time of the accident. It damaged his seeing and hearing. He has trouble with his balance and memory. He cannot see well enough to drive. He is depressed. He is in lot of pain which is long standing and not likely to end. On that basis he cannot return to work and cannot continue his usual daily activities.

[352] Instead, the experts seemed to be more concerned about what to call Mr. Graul's condition rather than dispute his symptoms and what he was living through. To the extent that they relied on hypothetical facts, I have the advantage of having made findings of fact in this decision. To those facts, I will apply the opinions of the expert medical evidence that I accept and provide reasons why I have rejected other evidence.

[353] All the expert witnesses were recognized to be qualified to give opinion evidence in their respective fields. I have agreed that their evidence is admissible. Most of the medical witnesses had some failings in their evidence from their

apparent bias, ability to answer questions, or degree of expertise. However, not much turns on that given Mr. Graul's proven injuries from the collision.

Does Mr. Graul have a Mild Traumatic Brain Injury?

Evidence of Dr. Vincenzo Basile

[354] Dr. Basile gave evidence for Mr. Graul as an expert in the field of "neurology with specialties in traumatic brain injury management and post concussive syndrome." He was qualified to opine on the diagnosis and prognosis of traumatic brain injury and post concussive syndrome, prognosis of neurological impairments, restrictions arising from neurological impairment, the need for treatment and housekeeping assistance due to neurological impairments, and the effect of neurological impairments on the ability to work.

[355] In brief, Dr. Basile is a neurologist. He has trained with leading experts in the field of traumatic brain injury. He works with neurosurgeons in both the United States and in Canada.

[356] Dr. Basile was asked to carry out a diagnosis, prognosis, and assessment of causation with respect to Mr. Graul. In coming to his opinion, Dr. Basile applied all the information available from Mr. Graul, family members, and other treating professionals; however, each piece of information "has its own weight." In Dr.

Basile's view, one looks at all the evidence to see if it makes logical sense in the total picture.

[357] It was Dr. Basile's opinion that Mr. Graul had post concussive syndrome and moderate traumatic brain injury. These conditions will affect the quality of his life and ability to function. Even mild traumatic brain injury can significantly compromise one's activities of daily living.

[358] Dr. Basile first met Mr. Graul in August 2019 and followed up in November 2021. From Mr. Graul's description of the accident, there was sufficient force to have jolted Mr. Graul's brain. A loss of consciousness is not required for a diagnosis of traumatic brain injury. The fact that there was no abnormality on Mr. Graul's MRI is also unremarkable. Although the MRI was normal, with no blood, bleeding, or structural damage, that did not discount traumatic brain injury.

[359] The fact that Mr. Graul could not remember some things after the accident is consistent with a concussion or hitting his head in some fashion. Mr. Graul's wife described him as having blank staring spells, which is also indicative of traumatic brain injury and concussion.

[360] Dr. Basile reviewed the records of Mr. Graul's family physician, Dr. Carlson. The symptoms set out in those records, such as headaches, sound sensitivity, dizziness, feeling "loopy" or dazed, repeating questions, drowsiness, and

increased sleep, are consistent with concussion. He agreed with Dr. Carlson's diagnosis of moderate to severe concussion and whiplash.

[361] From Dr. Basile's own observations, Mr. Graul was slurring or stuttering or searching for words when he was tired towards the end of the day. That too is typical of traumatic brain injury. Mr. Graul's dizziness, failure to concentrate, poor sleep, pain, anxiety, and blurred vision meet the clinical criteria for post concussive syndrome.

[362] In reviewing Mr. Graul's activities of daily living, Dr. Basile could see that Mr. Graul had a functional injury as well. Although he was independent in his activities, he was slow and needed the help of his wife for such things as driving and finances. He had greater difficulty when he got tired. The fact that these symptoms lasted six to seven months after the accident, and that Mr. Graul had difficulties with memory and concentration, judgment and decision making, tinnitus, double vision, lack of sleep, depression, and slowness in his activities, pointed to typical traumatic brain injury. So too did the fact that he angered, was hyper critical, and did not appear "to have a filter."

[363] In his physical examination of Mr. Graul, Dr. Basile observed the indications of traumatic brain injury in Mr. Graul's eye movements and when he had trouble finding words. This was supported by the reports of Dr. Quaid and Dr. Berge. Their

observations were the same. In Dr. Basile's view, the cause of the tinnitus was traumatic brain injury.

[364] In Dr. Basile's opinion, Mr. Graul suffers from "moderate" traumatic brain injury, which affects his day-to-day conduct. It started with the motor vehicle accident and has persisted. Dr. Basile has the same diagnosis now as he had in 2019. Although Mr. Graul has improved somewhat, his problems with tinnitus and balance have not. Dr. Basile believes that Mr. Graul will not be able to return to work because of his cognitive and behavioral deficiencies along with some physical limitations.

[365] Dr. Basile recommended treating symptoms with Omega-3, mindfulness training, and other methods, including a sleep study. Treatment will not be a cure for the concussion; there is some hope for change but that is unlikely at this stage. Although Dr. Basile recommended treatment, his prognosis for Mr. Graul is "guarded". However, without treatment, Mr. Graul's condition will worsen; particularly if he pushes himself too hard.

[366] Defence expert, Dr. Mitchell, says that the traumatic brain injury has resolved, but Dr. Basile disagrees. There have been some subtle improvements, but Mr. Graul still has problems with his daily activities of life. There were delayed symptoms but objective evidence from all the treating doctors shows that Mr. Graul is still disabled and is not malingering.

[367] Dr. Basile denies that the persisting problems are because of Mr. Graul's depression. Depression would not cause his eye or hearing problems, nor would it explain some of his behavioral difficulties. On a balance of probabilities, the cause of the symptoms is the head injury.

[368] Dr. Basile agreed that he was not told of Mr. Graul's head trauma history. However, this history did not affect his opinion because Mr. Graul said that he had recovered completely. Further, this history may have predisposed Mr. Graul to concussion and his ongoing persistent symptoms. More frequent concussions mean a greater risk of having another.

[369] Dr. Basile agreed a Glasgow Coma Scale (GCS) of 15 at the time of the accident suggests there was no sign of brain injury, but he opined that there can still be a brain injury. In Dr. Basile's view, the GCS is antiquated. The speed of the accident is a factor but not determinative if one is already prone to concussions.

[370] Dr. Basile was not concerned about the difference in how Mr. Graul described the discomfort in his headaches. Symptoms will fluctuate daily. That difference had no bearing on his opinion. All symptoms need to be considered as part of a constellation in coming to a medical opinion.

[371] Dr. Basile does not believe that Mr. Graul can return to work because of such barriers as driving. That said, he did not know about Mr. Graul's work

requirements. Dr. Basile presumed that, given his persisting symptoms, Mr. Graul would be quite slow at what he does, as he was not the same person he was before.

[372] Dr. Basile denied that Mr. Graul's difficulties are "iatrogenic" or caused by psychological factors or the nature of his treatment to date.

Evidence of Dr. Sarah Mitchell

[373] Dr. Mitchell gave evidence for the defence. It was agreed that she is an expert in the field of "neurology with specialties in traumatic brain injury management and post concussive syndrome." She is qualified to opine on the diagnosis and prognosis of traumatic brain injury and post concussive syndrome, prognosis of neurological impairments, restrictions arising from neurological impairment, the need for treatment and housekeeping assistance due to neurological impairments, and the effect of neurological impairments on the ability to work. That is to say, the same qualifications as the plaintiff's expert, Dr. Basile.

[374] Dr. Mitchell's curriculum vitae is quite impressive; she has significant teaching and training in the area along with clinical experience with psychiatric and complex brain disorders. She is an assistant professor in both psychiatry and medicine at the University of Toronto. She attempts to split her medical-legal assessment practice between both plaintiff and defence.

[375] For Mr. Graul's assessment, she was with him for approximately fifty minutes. Before that, Mr. Graul was with her intake assistant to obtain standard information for the assessment. Dr. Mitchell then reviewed that information with Mr. Graul for 30 to 35 minutes. This is the same process she uses in her clinical practice.

[376] After meeting with Mr. Graul, Dr. Mitchell reviewed his medical brief in detail. She left this step to the end so that it did not bias her examination of Mr. Graul. Based on the objective and subjective information of Mr. Graul's ongoing complaints, she diagnosed Mr. Graul with a mild traumatic brain injury that is now resolved. He also had a resolved concussion, but unresolved chronic tension headaches.

[377] The various symptoms described by Mr. Graul's family physician could indicate a mild traumatic injury, which is partly why Dr. Mitchell formed her diagnosis. The various symptoms noted by the family physician, such as sensitivity to noise, balance, and "slowed down", are all classic symptoms of traumatic brain injury.

[378] Dr. Mitchell agreed that traumatic brain injury does not require a blow to the head; acceleration/deceleration can cause a traumatic brain injury. Such an injury can occur without showing on an MRI or CT scan. It is unusual, but symptoms can increase over time.

[379] In examination-in-chief, Dr. Mitchell testified that a traumatic brain injury should resolve within three months. If it takes longer, then other causes are more likely. Mr. Graul's depression, sleep disturbance, and ongoing pain needed further assessment. In her opinion, there was no ongoing neurological impairment from the concussion and traumatic brain injury. Rather, those impairments were caused by other factors.

[380] In cross-examination, she acknowledged that, although Mr. Graul's acute symptoms have resolved, she could not say when that occurred. After three months, 80 to 95 percent of mild traumatic brain injury patients recover, but 5 to 20 percent will continue to complain of subjective symptoms.

[381] Later in cross-examination, she was confronted with PowerPoint slides from a presentation on this topic that she gave to Aviva Insurance. One of her slides shows that 15 percent of patients continue to suffer symptoms. They are described by her as the "miserable minority". She could not explain why Mr. Graul did not fall into this group.

[382] Dr. Mitchell's PowerPoint slides were filed as an exhibit. They confirm that any period of loss of consciousness, post-traumatic amnesia, or confusion is consistent with traumatic brain injury. Those slides also confirm that most of Mr. Graul's symptoms are consistent with mild traumatic brain injury.

[383] In Dr. Mitchell's opinion, Mr. Graul received inappropriate treatment for depression. He needs an assessment and treatment by a psychiatrist. He also needs a sleep study. He needs to reduce his reliance on analgesics and change his lifestyle.

[384] Dr. Mitchell agreed that Mr. Graul continues to have ongoing symptoms. The symptoms have waxed and waned, and been described differently, but he continues to have problems with balance, headaches, focus and concentration, memory, sleep problems, and fatigue. Dr. Mitchell agreed that Mr. Graul needs to pace himself. He can do duties around the house, but still must pace himself.

[385] The symptoms in January 2018 of tinnitus, affected sleep, headaches, vision and balance problems, difficulty with patterns, halos, no stamina, fatigue, and difficulty waking, are unusual one month after a traumatic brain injury. Some, however, are related to traumatic injury. The tinnitus and sight problems are not associated with traumatic brain injury and should be improving. There is no clear cause for the tinnitus, but Dr. Mitchell deferred to Dr. Berge's opinion.

[386] The list of head trauma plays into the value of Dr. Mitchell's evidence. Dr. Mitchell agreed that she reviewed the handwritten list of head trauma in her report of November 22, 2021. She said:

> Given these previous head injuries, a more detailed account of Mr. Graul post accident symptoms is required. These previous

> injuries may have predisposed Mr. Graul to the concussions sustained in the index injury, and potentially to ongoing persistent symptoms.

[387] As a result of the handwritten list, Dr. Mitchell had a heightened concern about the possibility of multiple head injuries. That history could have a dramatic effect on Mr. Graul's recovery, even if the old trauma had apparently recovered or was of lesser degree. Although Dr. Mitchell wanted more information about the head injuries, no one contacted her to provide that information.

[388] In her evidence, Dr. Mitchell confirmed that she provided her draft reports to AssessMed, the facility that hired her to give her opinion. She signed her latest report on November 22, 2021, even though it was a draft. She said that AssessMed only made simple edits to her report. She did not know who did the review, but it was simply administrative assistance.

[389] And yet, this last report had a further paragraph added by AssessMed after her comment about previous head injuries. She approved:

> My opinion has not changed as stated in my report dated July 11, 2019.

[390] Dr. Mitchell testified that she would not be concerned about a patient having a "vacant stare" but agreed that it should be investigated. Ms. Graul was prudent to take Mr. Graul to the hospital, but a vacant stare is not a "red flag" to Dr. Mitchell.

When it was pointed out that she said the opposite in a CBC programme, she laughed.

[391] Given the description of Mr. Graul at the casino, Dr. Mitchell agreed his reaction could be from a brain injury, but that it would be unusual.

[392] Dr. Mitchell testified that she refers to herself as a cognitive neurologist and not a neuropsychologist. In her view, she would be better able to diagnose a mild traumatic brain injury than a neuropsychologist. This will be of significance when considering the defence evidence from neuropsychologist, Dr. Freedman, below.

[393] Dr. Mitchell agreed that, with a mild traumatic brain injury, going to a grocery store could feel overwhelming, but Mr. Graul should still be able to integrate into normal life. He should do activities "as tolerated". He should not be reclusive.

[394] She agreed with the suggestion that there is unlikely to be recovery after three years if diagnosed with post-concussion syndrome.

[395] To summarize her examination and cross-examination, Dr. Mitchell's evidence relating to my determinations is as follows. She agreed that Mr. Graul had a mild traumatic brain injury. While she thought his symptoms were from another cause, some victims of such an injury do continue to have symptoms like Mr. Graul. She agreed that he continues to have related and consistent symptoms. She thought there should be further investigation into his history of head trauma.

Evidence of Dr. Lawrence Freedman

[396] Dr. Freedman gave evidence for the defence. On consent, he was qualified as an expert in the field of neuropsychology, neuropsychological impairments, and qualified to opine on the diagnosis and prognosis of neuropsychological impairments, and neuropsychological treatment. Since 2006, 75 percent of his practice has been medical-legal and almost exclusively for defendants. Of that 75 percent, 15 percent was for Aviva Insurance. Since 2006, Dr. Freedman has not treated anyone for traumatic brain injury; his clinical practice is assessments and advice but not treatment. Of those clinical referrals, none relate to mild traumatic brain injury.

[397] Dr. Freedman was retained by the defence to determine if Mr. Graul had sustained a traumatic brain injury, to assess the severity of any injury, and to consider any cognitive impairments because of that brain damage. He was also to consider treatment and whether Mr. Graul was able to return to work.

[398] As was his practice, the assessment commenced at about 9:30 a.m. when Dr. Freedman's technician carried out a number of cognitive tests of Mr. Graul. This testing continued into the afternoon with appropriate breaks and time for lunch. After the tests were completed, Dr. Freedman completed a clinical interview of Mr. Graul. The whole process ended at approximately 2:30 or 3:00 p.m.

[399] During his clinical interview, Mr. Graul's behavior was normal, he was alert, cooperative, and oriented. He showed no retrograde amnesia in describing the accident. He showed no physical neurological deficits.

[400] From Dr. Freedman's review of the test results, Mr. Graul had deficits relating to verbal memory functioning, sample processing speed, and semantic fluency. The deficits were in the domains of language, problem solving, speed, verbal and spatial cognition skills, and intelligence. Dr. Freedman testified that Mr. Graul had difficulties with problem solving. Mr. Graul's validity testing showed that there were no validity concerns.

[401] In cross-examination, Dr. Freedman agreed that Mr. Graul's visual scanning was in the first percentile of the population; 99 percent of the population would be better at those tasks than he was. Dr. Freedman agreed that visual scanning was very important when working with "machinery and processes" and was "absolutely" necessary for driving. In other areas, his scoring was so low that it impacted Mr. Graul's ability to read. Significantly, Dr. Freedman agreed that such a low score in that area was a "significant marker for traumatic brain injury." It could also have a significant impact on Mr. Graul's type of work.

[402] After the clinical interview, Dr. Freeman reviewed the various medical records of Mr. Graul's treatment. From that review, he saw that Mr. Graul had no loss of consciousness, no amnesia, no confusion or disorientation, and no

repetitive speech. Since he had no amnesia about the accident, that was indicative of no traumatic brain injury.

[403] He did not think that Mr. Graul had post traumatic amnesia because Mr. Graul could remember the start of the accident, even though he could not remember the impact to the side of the car or arriving in the ditch. Since he could remember the start of the accident, this imperfect recall was not significant.

[404] From a review of all the information, Dr. Freedman did not believe that Mr. Graul had experienced a traumatic brain injury. Rather, the test scores themselves do not show a traumatic brain injury, only a cognitive deficit.

[405] In Dr. Freedman's opinion, Mr. Graul does not need any therapy for traumatic brain injury.

[406] In short, Dr. Freedman looks for five indications of traumatic brain injury. First, loss of consciousness. Second, post traumatic amnesia. Third, an unusual GCS score. Fourth, physical neurological deficit. And fifth, evidence from imaging. He did not find any of those in his review of the medical records.

[407] In Dr. Freedman's opinion, the acute accident history is the most important factor. Based on the information that he reviewed from the medical records from the day of the accident, he felt one could not diagnose concussion and he was not convinced that there was concussion. In Dr. Freedman's view, one cannot rely on

subjective reporting when it does not match the objective tests for traumatic brain injury.

[408] In examination-in-chief, Dr. Freedman said that Mr. Graul's CT scan was normal. Therefore, he said there could be no diagnosis of traumatic brain injury. He found no objective evidence of any shock or disorientation. However, in cross-examination, he agreed that one can have a traumatic brain injury without coma, findings on an MRI or CT scan, fractured skull, or a brain bleed.

[409] In his view, there was moderate cognitive impairment; however, he could not connect that to a traumatic brain injury. Accordingly, there must be other factors or other disorders causing the symptoms. He agreed that Mr. Graul's depressed mood is an impairment from the accident, but stated it was not caused by a head injury.

[410] He agrees that there was a decline in Mr. Graul's verbal function domain between July of 2018 and 2020. If there had been a traumatic brain injury, one would not expect there to be that decline because the injury should have stabilized by that point. When one has a minor traumatic brain injury, the patient usually recovers within three months unless there is a new neurological cause. Therefore, there must be other factors related to Mr. Graul's pain and depression.

[411] Dr. Freedman does agree that Mr. Graul has cognitive deficits as shown in the testing carried out by both he and Mr. Graul's expert, Dr. Valentin. However, Dr. Freedman believes that the deficits are from Mr. Graul's depression and not a traumatic brain injury. In his view, Mr. Graul would benefit from psychotherapy and medication.

[412] Dr. Freedman agreed that most patients recover from mild traumatic brain injury. He did not agree that 10 to 15 percent do not recover; that was a "myth". In his opinion, it is more likely 1 percent do not recover. He acknowledged that studies show 10 to 15 percent do not recover but said that, in his opinion, those studies are flawed, and the results misinterpreted.

[413] Dr. Freedman agreed that traumatic brain injury can be diagnosed clinically and without a CT scan from such symptoms as double vision, blurry vision, confusion, dizziness, "feeling hazy, foggy and groggy", lethargy and drowsiness, headaches, sleep disturbances, inability to focus or concentrate, and sensitivity to light or sound.

[414] Other signs or observations include behavioral or personality changes, blank stares or dazed looks on an acute basis, difficulties with balance or coordination, delayed or slow speech, memory loss, slurred or unclear speech, and trouble controlling speech.

[415] Only in cross-examination did Dr. Freedman acknowledge that, while he did not refer to percentiles in his report, some of Mr. Graul's results were significantly below average and many domains showed significant impairment. One of the tests was in the 9th percentile. Another that tested Mr. Graul's problem solving was zero - meaning 100 percent of people perform better on that test. Mr. Graul also had deficits in verbal memory and language fluency.

[416] While the tests showed that Mr. Graul's reasoning was intact, his processing speed was significantly below average and much lower than one would expect given Mr. Graul's background, education, and employment. Dr. Freedman agreed that this impairment of speed was a significant marker for mild traumatic brain injury.

[417] Dr. Freedman agreed that some of Mr. Graul's executive functioning was in the 16th percentile and that he would have difficulty planning and multitasking. He agreed that Mr. Graul's semantic fluency was in the 4th percentile.

[418] Dr. Freedman was referred to the writings of Dr. Ronald Ruff. Dr. Freedman agreed that Dr. Ruff was one of the leaders in the area of traumatic brain injury. Dr. Freedman agreed that Dr. Ruff's writings were important, and he agreed with much of his work. He agreed that traumatic brain injury is manifested by at least one of loss of consciousness, amnesia, alteration of mental state, or focal cognitive deficits. He agreed that some practitioners follow this definition, and he agreed

with some of it but not all of it. With respect to Dr. Ruff's article, he did not agree with the use of the nonspecific term "befuddlement". Otherwise, he agreed with it.

[419] He agreed that concussion is difficult to diagnose even weeks or months afterwards. Patients cannot accurately self-report a loss of consciousness because they would not necessarily know of their loss of consciousness. In any event, one can have traumatic brain injury without loss of consciousness.

[420] He agreed that Mr. Graul's symptoms at his December 21, 2017 visit with his family physician were consistent with symptoms of concussion.

[421] He did not dispute Dr. Quaid's opinion and expertise. He also agreed that he was not an audiologist and Dr. Berge has expertise in that field.

[422] Dr. Freedman did not receive any information from friends or family about Mr. Graul's symptoms but agreed that such information could be important to his diagnosis.

[423] In answer to my question, Dr. Freedman agreed that, if I were to find that there was a loss of consciousness, post traumatic amnesia, and a physical neurological deficit, it could be that Mr. Graul had a mild traumatic brain injury.

[424] In summary, Dr. Freedman was the only medical opinion that rejected a diagnosis of traumatic brain injury. However, he relied only on his view of the

medical reports and the objective evidence. It appears that even Dr. Ruff would have made a diagnosis of traumatic brain injury. Based on my finding of fact above, Dr. Freedman's evidence confirms a mild traumatic brain injury.

[425] In any event, Dr. Freedman provided ample opinion and objective evidence that Mr. Graul has been significantly compromised by this car accident. Those areas of compromise relate directly to his ability to resume his pre-accident employment. Although Dr. Freedman was to consider whether Mr. Graul was able to return to work, he was not asked that question in evidence.

Analysis

[426] Trial judges will always need expert evidence in some areas. Those exceptional individuals who assist the courts need to be paid. But they also need to understand their role is to assist the court, not the party who pays them. I encourage Dr. Freedman and Dr. Mitchell to focus their exceptional medical knowledge and experience on the patients that need them and to forgo this well-paid role. If they intend to carry on this line of work, I recommend that they familiarize themselves with the principles of expert evidence set out in *R. v. France*, 2017 ONSC 2040, 36 C.R. (7th) 293. Where their evidence conflicts with other expert evidence, I reject their evidence.

[427] Dr. Mitchell testified that she prepares the best report she can "within the restrictions of my time." The time she had available was apparently not enough to do the work required to assist the court in this case.

[428] Dr. Freedman gave one opinion in chief and another in cross-examination. I obtained all of Dr. Freedman's considerable expertise only after rather routine cross-examination. While that is the role of cross-examination for most witnesses, the court should not need to rely on cross-examination to obtain unbiased and complete evidence.

[429] If an expert wants more information to render an opinion, that expert should decline to give the opinion or qualify the opinion to point out that necessary or helpful information is missing.

[430] I can accept some of what a witness says, all of what a witness says, or none of what a witness says. I accept Dr. Basile's and Dr. Mitchell's evidence and find that Mr. Graul has a mild traumatic brain injury. I accept Dr. Basile's and Dr. Freedman's evidence and find that Mr. Graul continues to deal with those impairments.

[431] Dr. Basile's approach of looking at all factors and assigning weight is a better way to proceed than Dr. Freedman's approach of ignoring or not asking for information that did not match his opinion. Dr. Mitchell's opinion in chief was that,

while Mr. Graul has deficits, since they have lasted more than three months, they must not be from a traumatic brain injury. In cross-examination, she agreed that 15 percent of traumatic brain injured patients can continue to have symptoms. I find that Mr. Graul is in that group.

[432] Dr. Basile often failed to answer questions and went on his own lectures even when instructed not to do so. However, that conduct did not damage his overall evidence.

[433] For the following reasons, I reject Dr. Freedman's opinion that Mr. Graul did not suffer a traumatic brain injury.

[434] In examination-in-chief, Dr. Freedman was adamant that factors indicating brain injury were non-existent. By the end of cross-examination and my questions, he agreed that they might well exist. There was no such hesitation in his initial opinion.

[435] Only in cross-examination did Dr. Freedman agree that one can have a mild traumatic brain injury without coma, or findings on an MRI or CT scan. Only in cross-examination did he agree that almost all of Mr. Graul's symptoms were consistent with traumatic brain injury.

[436] Despite having given expert evidence in the past, Dr. Freedman had difficulty understanding what of his "complete file" he needed to provide to Mr.

Graul's counsel for cross-examination. He is either less experienced than he professes or tried to avoid disclosing the necessary records. Either way, his evidence is tainted.

[437] Throughout the cross-examination, Dr. Freedman was defensive. He often did not answer the question, even though he was often reminded by me. He was entirely different in cross-examination than he was in examination-in-chief. Although he could answer examination-in-chief questions very easily, he parried with Mr. Graul's counsel over word choice and semantics.

[438] By the end of cross-examination, Dr. Freedman agreed that no other treating doctor nor noted authorities agreed with his diagnosis and findings. Despite that, he doggedly held on to his opinion that Mr. Graul did not have a traumatic brain injury.

[439] While Dr. Freedman's report is not in evidence, the cross-examination disclosed that he failed to clarify Mr. Graul's many deficits in his report. His explanation was that there were no requirements for him to be so clear and he left it to other neuropsychologists who might have access to his raw data to understand his report. That manner of reporting is of no use to the court from an independent expert whose role is to assist the court. It is more the role of a biased, paid expert trying to hide real and significant evidence from the court.

[440] Although Dr. Freedman agreed that information from other readily available sources would have been of assistance to him, he did not ask for that information before rendering his opinion.

[441] I do accept Dr. Freedman's evidence that Mr. Graul has significant deficits, whatever Dr. Freedman thinks may be the cause. But I reject the balance of Dr. Freedman's evidence.

[442] For the following reasons, I reject Dr. Mitchell's opinion that Mr. Graul is no longer suffering the effects of a traumatic brain injury.

[443] Dr. Mitchell's process of report writing leaves much to be desired, but I am to consider her court room evidence, not her report writing.

[444] However, her attention to detail is alarming. I cannot see how Dr. Mitchell can, within one page, say that based on new information "a more detailed account of Mr. Graul's post accident symptoms is required", while still confirming her earlier diagnosis without that new information. And that confirmation was added by her AssessMed editors, not drafted by Dr. Mitchell herself, though she approved the addition.

[445] I do not expect an expert to laugh when caught in a significant contradiction in her evidence as Dr. Mitchell did. That demonstrates a lack of awareness of the significance of the expert witness's role.

[446] Ultimately, Dr. Mitchell's evidence assists Mr. Graul. He had a mild traumatic brain injury. He continues to have deficits. Just like 15 percent of similar head injury patients. It is not clear to me why, if Dr. Mitchell was an unbiased, helpful expert witness, she could not have told me all of that in her first report. I do not know if that was because she was too busy or not clear on her role. Either way, she did not assist as she should have.

Does Mr. Graul have Psychiatric Injuries?

Evidence of Dr. Neal Westreich

[447] Dr. Westreich gave evidence for Mr. Graul and was agreed to be an expert in the field of psychiatry and psychiatric impairments, and qualified to opine on the diagnosis, prognosis, and treatment of psychiatric impairments.

[448] Dr. Westreich has an extensive curriculum vitae. In short, he is the Head of the Sunnybrook Health Sciences Centre Adolescent Traumatic Brain Injury Clinic and a staff psychiatrist. He is an assistant professor at the University of Toronto Medical School in the Department of Psychiatry.

[449] Dr. Westreich's reports were entered into evidence. Based on his reading of the relevant records, interview with Ms. Graul, and his meetings with Mr. Graul on July 30, 2019, and November 2, 2021, Dr. Westreich diagnosed Mr. Graul with a mild neurocognitive disorder due to mild traumatic brain injury, along with an

adjustment disorder with mixed anxiety and persistent depressive mood. He added that Mr. Graul has residual vehicle anxiety. He diagnosed that Mr. Graul "clearly presents with a post-concussive syndrome with ongoing symptomatology."

[450] Dr. Westreich described Mr. Graul's prognosis as poor and recommended ongoing psychiatric care and continued work with an occupational therapist. He did not believe that Mr. Graul could continue with employment. He was of the view that these difficulties were caused by the motor vehicle accident.

[451] Mr. Graul described his symptoms to Dr. Westreich consistently with what is set out above. Dr. Westreich had Mr. Graul complete a number of standard tests. Based on those tests, Dr. Westreich was satisfied that Mr. Graul was forthright and honest throughout the assessment. Dr. Westreich opined that there was no evidence to suggest that Mr. Graul was "intentionally malingering or exaggerating his symptoms."

[452] Dr. Westreich agreed that Mr. Graul did not give him the handwritten list of head trauma. But the list did not change Dr. Westreich's opinion. Such a history of head injury supported his opinion and diagnosis of why the symptoms have continued.

[453] Although he recommended that Mr. Graul should have ongoing psychiatric care, he was aware that there had been none to date. Seeking care is the patient's choice.

Evidence of Dr. Irina Valentin

[454] Dr. Valentin gave evidence for Mr. Graul and was agreed to be qualified to provide opinion evidence in the fields of neuropsychology and neuropsychological impairments, and on the diagnosis, treatment, and prognosis of neuropsychological impairments.

[455] In her work, Dr. Valentin carries out assessments for both plaintiffs and defendants on an equal basis. She also treats patients with traumatic brain injury.

[456] When she met with Mr. Graul in 2018 and 2021, she reviewed reports from other assessors. As part of her opinion, she relied on those previous reports, as well as her own observations and interview of the client. She also used standardized tests. Based on that information, she made a diagnosis of mild traumatic brain injury with major depressive disorder and provided recommendations.

[457] When she met with Mr. Graul in July 2018, she observed that his walk was slow and marked by a moderate limp. He walked up stairs slowly and cautiously. He was able to provide a description of the accident and appeared to have a good

memory of the accident other than his loss of consciousness. The level of his cognitive functioning and impairment of his daily activities was common in her traumatic brain injury patients.

[458] She had Mr. Graul complete several standardized tests, which were the same or similar to those conducted by Dr. Freedman. Comparing to what was elicited in Dr. Freedman's cross-examination, the results of the two batteries of tests were similar in outcome.

[459] Those tests that Dr. Valentin administered that related to validity, raised no concerns, and she was satisfied that Mr. Graul made a good effort.

[460] She chose the tests to see how he functioned in several areas on a day-to-day basis. She relied on his description of his employment to say that he had average or high-average intelligence prior to the accident. She said that his reasoning and language skills were in the 37th percentile. His visual scanning abilities were lower than one percent. He is now mildly impaired in his ability to scan for information. His visual motor skills are good, but time-sensitive skills are a problem. This is a significant marker for traumatic brain injury where speed is often decreased.

[461] Dr. Valentin opined that Mr. Graul was, at that time, not able to return to work. She thought that he would not be able to deal with stress, noises, making

quick judgments, or anything that required processing speed. He would be unable to do the work at all or would make mistakes. His visual memory ranked as low-average. Accordingly, he would not be able to perform tasks that required visual memory, or process complex visual information. His reasoning functioning was impaired and, therefore, he would not be able to multitask.

[462] All of this was consistent with a mild traumatic brain injury and post-concussion symptoms. In her opinion, it would affect his daily living.

[463] Because Mr. Graul had none of these symptoms prior to the accident, and there is no indication of any other cause, Dr. Valentin's opinion was that his difficulties arose from the accident.

[464] She then assessed Mr. Graul in March 2021. Overall, he had improved "a little bit" but was still impaired with respect to his processing speed. His employment would still be impacted. His condition was consistent with his condition in 2018. He had reduced attention and would be incapable of paying attention for an extended period. After less than 10 minutes, he would get lost at work.

[465] His executive functioning was impaired with respect to his efficiency. At work, he would be distracted with noises or multitasking. As he tired, his executive function would decline, and he would not be able to function.

[466] Since 2018, his psychiatric condition had worsened, and his depression had increased to significant or severe. His anxiety difficulties were "profound". This is not common if treatment were provided, but Dr. Valentin classified this case as "complex". There is more than one diagnosis and overlapping impairments. Therefore, there is less chance of recovery. This is particularly so if Mr. Graul receives no treatment, or if treatment is not provided consistently. His hopelessness affects his psychological functioning, which would affect his ability to work.

[467] Dr. Valentin's present diagnosis is that Mr. Graul still has mild traumatic brain injury plus a major depressive disorder. He has a specific phobia relating to driving and a neurocognitive disorder "not otherwise specified" in the mild range. This last diagnosis affects his cognitive abilities. In her view, the neurocognitive disorder was still caused by the car accident.

[468] At this time, she believes improvement is unlikely, but there is always a possibility that he could return to work in some capacity.

Evidence of Dr. Zohar Waisman

[469] Dr. Waisman testified for the defence. He was qualified on consent to give opinion evidence in the field of psychiatry, and the diagnosis, treatment, and prognosis of psychiatric impairments. That is to say, the same as Mr. Graul's expert, Dr. Westreich. Dr. Waisman carries on a private practice in psychotherapy.

[470] Dr. Waisman, like the other medical witnesses, was provided with Mr. Graul's medical brief and took a history from Mr. Graul. It does not appear that the information provided was significantly different than set out above.

[471] In July 2020, Dr. Waisman asked Mr. Graul whether he would go for psychological care. Mr. Graul answered that it would depend, because "I feel like it means I am weak. Can figure it out on my own. It is also confusing because of all the different opinions that have been made about me."

[472] Dr. Waisman testified that it was a "very challenging task" to diagnose Mr. Graul, though he eventually diagnosed Mr. Graul as suffering from an adjustment disorder with anxiety and depression as a result of the collision. He saw no evidence of any deficits in memory, concentration, or focus. He did not believe that Mr. Graul's condition was permanent but thought he would benefit from further psychotherapy as well as optimization of his medications.

[473] Dr. Waisman left the diagnosis of a brain injury to the neuropsychological or neurological assessors. He said that he was not qualified to diagnose brain injury.

[474] Dr. Waisman's diagnosis was that Mr. Graul's emotional and behavioral problems arise from the accident. He had significant impairment in various areas of his functioning. Dr. Waisman had "absolutely no doubt that he suffers from chronic pain."

[475] Mr. Graul had some features of post traumatic stress disorder, but not all the criteria. Dr. Waisman agreed that Mr. Graul could be disabled without meeting all the features of a definition of post traumatic stress disorder.

[476] Dr. Waisman was clear that Mr. Graul had an adjustment disorder because of the car accident. From his review of the family physicians' records, he could not say when the adjustment disorder started. Dr. Waisman agreed that the adjustment disorder could impact Mr. Graul's ability to socialize, interact with others, relate to others, and enjoy life. Accordingly, he made a recommendation for treatment.

[477] As I understand Dr. Waisman's opinion, he believes that Mr. Graul's condition is not permanent and, with further psychotherapy and proper use of medications, he will improve. He believes that there is no psychiatric restriction to Mr. Graul carrying on his normal activities of daily life. He provides no opinion on other areas of Mr. Graul's condition.

[478] In Dr. Waisman's view, Mr. Graul has not received optimal management from healthcare providers. He reviewed the treatment that Mr. Graul had received from his family physician. As a psychiatrist, Dr. Waisman was not happy with the medications given as antidepressants. He was concerned that Mr. Graul had bad side effects from the medications and, therefore, the medications should not have been prescribed. On the other hand, he said the medications should have been

kept on longer. In short, Mr. Graul should have been referred to a psychiatrist. Dr. Waisman had no criticism of the family physician, Dr. Carlson, and was content with her present antidepressant medication for Mr. Graul; he simply would have chosen a different series of medications and treatments in the past.

[479] He believes that Mr. Graul will worsen without treatment but, with proper treatment, he could improve.

[480] Dr. Waisman believes Mr. Graul's circumstances are too complex for treatment by a social worker. Mr. Graul needs a psychiatrist for therapy and medications. Given Mr. Graul's head pain, depression, tinnitus, fatigue, and cognitive deficits, psychotherapy may not be successful. Such therapy would need to be structured around Mr. Graul's needs and would require a highly trained psychiatrist.

[481] On the other hand, such therapy will not assist with Mr. Graul's visual problems, auditory impairment, or his vestibular impairment. Dr. Waisman had no opinion on how to treat the auditory, visual, or vestibular problems. The psychotherapy will not be a "cure all" and the treatment will need to be multidisciplinary.

[482] He agreed that Dr. Westreich would be better placed to assess Mr. Graul's current level of functioning.

[483] In summary, Dr. Waisman does not disagree with Dr. Westreich other than to believe that Mr. Graul can recover if he receives proper psychiatric treatment. He is simply more optimistic of Mr. Graul's prognosis.

Analysis

[484] From all this evidence, it is obvious that Mr. Graul has psychiatric injuries arising from the accident.

[485] The only issues appear to be whether he can recover from his circumstances or whether he should have had other treatment.

[486] I do not have Dr. Waisman's optimism of Mr. Graul's condition. Mr. Graul has overlapping difficulties. His visual problems, auditory impairment, vestibular impairment, and cognitive deficiencies will not be treated by psychiatry and will impinge on his ability to follow instruction despite his best efforts. Dr. Waisman agreed that he was only looking at the psychiatric aspects of Mr. Graul's condition and not all the overlapping conditions in play. When I look at all of them, I cannot find that Mr. Graul will return to work or his pre-accident life.

Does Mr. Graul have Chronic Pain?

[487] I note that defence Dr. Waisman has already diagnosed chronic pain.

Evidence of Dr. Mark Friedlander

[488] Dr. Friedlander gave evidence for Mr. Graul and was qualified on consent as an expert in the field of chronic pain and anesthesiology and qualified to opine on the diagnosis and prognosis of impairments arising from chronic pain, and treatment for chronic pain.

[489] Like others involved with Mr. Graul, Dr. Friedlander relied on Mr. Graul's history as well as the various records with which he was provided. That history was consistent with the evidence set out above. Dr. Friedlander assessed Mr. Graul in July and August of 2019. Dr. Friedlander did not do a physical capacity test but, instead, relied on the reports of others. He did carry out a physical examination of Mr. Graul.

[490] Dr. Friedlander's opinion was that Mr. Graul had chronic pain headaches and a traumatic brain injury. Further, Mr. Graul had cervical and lumbar vertebral column sprain/strain causing chronic post traumatic musculoskeletal neck and shoulder blade pain and nerve root irritation symptoms. Mr. Graul also has a psychological impairment and a sleep disorder alongside his chronic pain.

[491] Dr. Friedlander opined that these injuries resulted from the car accident and prevent Mr. Graul from returning to work. He recommended a functional abilities evaluation if Mr. Graul were ever to return to work. However, as of the time Dr. Friedlander assessed him, Mr. Graul would not be able to return to work based on

the other reports that Dr. Friedlander reviewed. In Dr. Friedlander's view, one must look at the full picture and cannot ignore the other reports.

[492] Dr. Friedlander thought that Mr. Graul's prognosis was poor. Further treatment should occur, but complete healing or cure was unlikely.

[493] Dr. Friedlander was not concerned that some reports suggested that Mr. Graul had pain of 2 or 5 out of 10, because his responses may depend on the questions asked. He was not concerned that Mr. Graul had described pain but had no limited range of motion. Even if Mr. Graul could move, he would still feel the pain. In his opinion, the cause of the injury was head trauma and injury to Mr. Graul's spine even though not visible on an x-ray.

[494] Although Mr. Graul was trying to perform some activities, he was not doing as much as he had before the accident. In Dr. Friedlander's view, Mr. Graul was trying to do more at home, despite the recurring pain.

Analysis

[495] On this evidence, I find that Mr. Graul has chronic pain. There is no evidence to reject that opinion and Dr. Friedlander's evidence is quite persuasive. There was no damage to his credibility in cross-examination.

[496] Of greater significance to my analysis, I accept Dr. Friedlander's opinion that one must look at all Mr. Graul's circumstances to determine his injuries from the accident.

Can Mr. Graul Return to Work?

Evidence of Alan Walton

[497] Mr. Walton gave evidence for Mr. Graul and was qualified on consent as a registered physiotherapist with experience in the treatment of chronic pain, mild to moderate brain injury, and emotional responses following trauma. It was agreed that he was an expert in the field of vocational rehabilitation and assessment and qualified to opine on the impact of impairments on an individual's employability and earning capacity. He normally works for plaintiffs in motor vehicle litigation.

[498] Like the other experts in this trial, Mr. Walton was provided with a medical brief. He interviewed Mr. Graul in August 2019 and learned Mr. Graul's history similar to what is set out above. Mr. Walton also administered a number of standardized tests. Like other experts set out above, Mr. Walton found Mr. Graul to have moderate depression and mild anxiety.

[499] Mr. Walton testified that treatment effectiveness depends on the client. In this case, treatment is more difficult because of the multiple diagnoses and Mr.

Graul's cognitive difficulties. His chronic pain and sleep depression are complications that make it more difficult to treat.

[500] Throughout the reports, Mr. Walton found that the diagnosis of concussion was a constant, and such a diagnosis also seemed obvious to him. He noted that Mr. Graul had vision problems consistent with concussion.

[501] Mr. Walton expected that Mr. Graul would have ongoing multidisciplinary treatment. He noted the family physician had suggested treatment, but that Mr. Graul ran out of money to support those treatments.

[502] Mr. Graul's physical complaints were like other motor vehicle accident clients of Mr. Walton. Mr. Graul's reporting was consistent throughout his interview and consistent with what would be expected from concussion.

[503] Mr. Graul expressed a desire to go back to work. Mr. Walton was satisfied that Mr. Graul did what he could, but he worked very slowly and methodically. He needed to take breaks and struggled towards the end of the test.

[504] The results of the tests showed Mr. Graul had cognitive deficits, such that he could not concentrate or focus, and was easily distracted. Accordingly, he would not be predictable in his work. These deficits are consistent with concussion. For Mr. Graul to continue to work, he would need breaks and would not be able to work

quickly. Driver desensitization courses are available, but not likely to be successful for Mr. Graul given his cognitive difficulties.

[505] In Mr. Walton's opinion, Mr. Graul would not be able to meet the demands of his job or any other job. Returning to work would be quite unsafe. He does not have adequate fine motor coordination, particularly for complex tasks. Mr. Graul would also not be employable in other occupations because his cognitive difficulties would make it difficult for him to retrain. Given Mr. Graul's age, he would not likely be able to find other employment.

[506] Mr. Graul is intelligent but cannot test well in a real-world scenario. Although he can read, and spell particular words, he cannot focus long enough to keep track of the task or factor out distractions. He is also not able to remember what he reads a short time later.

[507] Mr. Walton was aware that Mr. Graul had short-term disability benefits and income replacement benefits. In his view, Mr. Graul is not financially motivated to fake his illness and would have preferred to work. In his view, Mr. Graul should continue to push himself as he has.

[508] He did not think that psychological treatment would assist because Mr. Graul is "not psychologically minded." In any event, in Mr. Walton's opinion, Mr. Graul

would need to get control of his pain and solve his cognitive impairments before pursuing psychological treatment.

Evidence of Dr. Michael Lang

[509] Dr. Lang gave evidence for the defence and was found on consent to be an expert in the field of physical medicine and rehabilitation. He was qualified to give evidence with respect to the diagnosis, treatment, and prognosis of physical and musculoskeletal impairments.

[510] As a physiatrist, Dr. Lang treats chronic conditions relating to muscular skeletal impairments. He treats patients in the hospital and in outpatient clinics. He gives expert evidence in a ratio of about 75 percent for the defence and 25 percent for plaintiffs.

[511] Dr. Lang assessed Mr. Graul in June 2019 and has not seen him since.

[512] Dr. Lang's intake assistant spent about an hour and a half obtaining historical data from Mr. Graul. Dr. Lang reviewed that information with the assistant, then later with Mr. Graul to clarify any questions and review Mr. Graul's symptoms with him. Dr. Lang carried out a neuromuscular examination of Mr. Graul. The entire assessment took just over two hours. Finally, Dr. Lang reviewed his notes and the medical file to prepare his report.

[513] While Dr. Lang did not receive any information from other lay witnesses, he did think that information would be useful for his psychosocial assessment of the impacts upon Mr. Graul. It would help determine if Mr. Graul could actually return to work. For instance, Mr. Graul's family physician would have more information with respect to his abilities.

[514] Dr. Lang found Mr. Graul to be straightforward, cooperative, did not exaggerate his symptoms, and made a good effort. The description of his pain was consistent with his injuries. He did not appear to be "the kind of guy" to complain.

[515] Dr. Lang's examination of Mr. Graul was "unremarkable" except for some tension in Mr. Graul's neck muscles. Based on that examination, Dr. Lang diagnosed Mr. Graul as having chronic myofascial neck pain. He also found that Mr. Graul had mechanical back pain in his lower back. His other injuries, such as his right flank pain and elbow pain, were not related to the motor vehicle accident.

[516] In Dr. Lang's opinion, Mr. Graul suffered a whiplash injury from the motor vehicle accident as well as an injury to his lower back. Although Mr. Graul was not overly limited on clinical examination, Dr. Lang opined that he would fatigue more quickly. He would also not be able to look in one direction for a lengthy period of time or stand in one location; instead, he would have to take breaks. Mr. Graul would not be able to carry heavy objects or lean back for a long period of time, like

a painter might. He would not be able to participate in high impact athletics like running or jogging.

[517] Dr. Lang opined that Mr. Graul should regularly exercise to keep up his range of motion. He should not be too sedentary and should continue with an exercise program. Mr. Graul could also undergo surgery for his back pain; however, that might need to occur every six months or yearly.

[518] To return to work, Mr. Graul will need to exercise pacing and his employer will need to accommodate his limitations. For example, lifting would need to be accommodated.

[519] Dr. Lang agreed that Mr. Graul's injury was permanent, but he did not think it was serious, so long as Mr. Graul received accommodations in the workplace. Dr. Lang could not give an opinion as to what work Mr. Graul could return to, but Mr. Graul would need modification in order to do so. He agreed that all spheres of injury need to be considered to determine if Mr. Graul could return to work.

[520] In answering a question from me, he agreed that it would be considered a serious injury if Mr. Graul could not get back to work. In his view, Mr. Graul's physical impairments are permanent.

Analysis

[521] I accept the evidence of Mr. Walton. It accords with the evidence of the lay witnesses above. I find that Mr. Graul cannot return to work.

[522] Dr. Lang is of the view that, from a physical point of view, Mr. Graul can return to work if he can be accommodated; however, Dr. Lang has nothing to base that hope for accommodation. He agreed that third party information would be of assistance. It is unfortunate that all the evidence before me has not been shared with the defence experts. From the evidence of Mr. Graul's co-workers, I find that Mr. Graul cannot be accommodated. Mr. Graul cannot climb ladders or carry weights. He cannot read to any significant extent. He cannot multitask. He cannot do tasks requiring fine visual or motor coordination skills. He cannot work in noisy locations. He cannot drive any significant distance. All of these are required for his work.

[523] Even if Mr. Graul could be accommodated for his physical weaknesses, such accommodation fails to consider his auditory, balance, visual, and cognitive failings. Although Mr. Graul's witnesses point out the obvious that one must look at all of Mr. Graul's circumstances, the defence position appears to look only at one factor at a time while ignoring all others. That is not a useful analysis.

Failure to Mitigate

[524] The defence says that Mr. Graul has failed to take the necessary steps to mitigate his losses from the car accident. I have taken the defence issues from its written submissions.

[525] The defence submits that, while Mr. Graul has received varied and extensive treatments for the possible concussion or traumatic brain injury, his treatment for his psychological issues has been limited.

[526] However, the defence ignores the fact that Mr. Graul's funding for such treatment ran out in 2019. He has not been able to afford the regular care of a treating psychologist or psychiatrist.

[527] The defence points out that Mr. Graul did not receive long-term antidepressant treatment until 2021.

[528] However, the defence ignores the fact that Mr. Graul did not receive any advice to do so until Dr. Carlson turned to that issue when more serious issues were stabilized. Mr. Graul did not receive any different advice until then. Although Dr. Waisman thought that different medication was warranted, he did not fault Dr. Carlson's management. In any event, there is no requirement for a plaintiff to change their medical treatment at the instance of a defence expert.

[529] The defence then complains that Mr. Graul claims the accident has had a detrimental impact on his ability to work but has taken no action to return to work.

He claims to have loved his job; however, since the accident, he has made no attempts to inquire about whether modified duties or hours might be available for him at his workplace.

[530] However, the defence has led no evidence to suggest that such modification was available to Mr. Graul with his admitted chronic pain and cognitive deficiencies. The only evidence I have is that no such accommodation is available. With Mr. Graul's permanent auditory, visual, and cognitive deficiencies he cannot return to the work described by Mr. Graul and his co-workers. He would not be able to work in that work environment.

[531] The defence says Mr. Graul has made no attempts to return to work, retrain, or find alternative employment.

[532] However, when one considers Mr. Graul's full-time career trying to make himself well, there is little time for other employment. To submit that retraining is possible, the defence submission ignores its own evidence of Mr. Graul's cognitive difficulties.

[533] Further, there is no evidence - even from the defence - that counters all the medical evidence that Mr. Graul cannot do the tasks required to return to work. He cannot be faulted for failing to attempt that which his treaters say he cannot do.

[534] The defence then refers to the evidence that Mr. Graul has not taken any driver desensitization treatment. Nor has he made any attempt to return to driving, "notwithstanding the fact that his treating optometrist has cleared him to drive short distances."

[535] However, the defence simply ignores the evidence that Mr. Graul cannot afford those courses. Even if Mr. Graul found the time and money for the course, there is no reason to think it would be helpful with his cognitive issues. Further, driving short distance for 20 minutes when he is rested will not get him to work; it will be even less likely to get him home from work when tired. Mr Graul will not be able to drive into work to deal with any emergencies. The evidence of Dr. Quaid is not contested. Mr. Graul's visual problems are still significant and ongoing. That evidence confirms Mr. Graul's inability to read or have good depth perception. And those failings are inconsistent with work and consistent with all else Mr. Graul describes.

[536] The defence objects to Mr. Graul's claims that the accident has affected his ability to do household tasks; he admits that he can do many household tasks, albeit at a slower pace.

[537] However, the phrase "slower pace" is a loaded one in this case. Mr. Graul's attempts to keep himself busy should not be compared to the multitasking, highly

competent man he once was. The evidence of Ms. Graul and their son is not contradicted on how Mr. Graul functions at home.

[538] As set out above, the defence surveillance reports do not challenge the evidence of Mr. Graul's present circumstances. Rather, it shows that Mr. Graul has little else to do and is trying to fill his day. While surveillance evidence has shown that he is capable of cutting grass, shovelling snow, trimming shrubs, and watering plants, he is doing so slowly and consistently with his evidence. He has been shown to engage in these activities for hours at a time on jobs that should take much less time. Surveillance has also shown Mr. Graul socializing with neighbours, engaging with others at a celebration of life, and travelling to Grand Bend for a family weekend at a cottage. However, we know from other evidence that this is unlike Mr. Graul before the accident when he socialized more often and with more people.

[539] The defence submits that Mr. Graul has failed to follow the treatment recommended to him by his audiologist. He was prescribed hearing aids for his tinnitus but failed to return to his treatment provider for over three years to have the hearing aids readjusted. As soon as he returned in November 2021 to have his hearing aids readjusted, he experienced immediate relief to his tinnitus symptoms and his balance.

[540] However, the defence fails to consider the rest of the story. Again, Mr. Graul did not have funding to carry on his treatments. More importantly, the hearing aids are not treatment for the permanent damage he has suffered to his hearing; they are only to improve his symptoms. He has explained that the hearing aids have their own failings and, regardless, he continues to have the steady drone of a cicada in his head.

[541] Further, even if Mr. Graul failed to follow that one piece of advice, the evidence shows that every one of the doctors who assessed or treated him found him to be co-operative and responsive. He followed the advice of all his doctors. I agree with Mr. and Ms. Graul that he has made a career of trying to get better. He has done all he has been asked, except when he could no longer afford it.

[542] The defence summarizes that, had Mr. Graul followed medical advice and obtained appropriate treatment for his mental health issues, his driving anxiety, and his tinnitus, he would be much further down the road to recovery.

[543] However, no medical expert says that. Rather, all say Mr. Graul's prognosis is guarded. At best, Dr. Waisman believes his proposed plan is better, but still, that does not support what the defence submits.

[544] On all the evidence, I find that Mr. Graul has done all he can to mitigate his losses. On this evidence, I have no reason to think he will change those efforts. I find that Mr. Graul is doing the best that he can given his proven injuries.

General Damages

The Evidence

[545] To consider Mr. Graul's general damages, I have considered all that I have set out above with respect to how Mr. Graul was before and after the accident. Very briefly and without reducing the significance of all the evidence:

1. Before the accident, Mr. Graul was healthy and exceptionally physically fit.
2. Mr. Graul worked long hours in a job he liked. He was respected and relied upon in that job. He was a valuable employee to the City of Guelph. He enjoyed rising to the challenges in his job.
3. Mr. Graul had a strong work ethic instilled in him from an early age.
4. Mr. Graul's job required physical stamina, concentration, and good eyesight and hearing. Mr. Graul's employment needed him to deal with multiple tasks at once and to be able to remember complex steps.
5. Mr. Graul was doing the bulk, if not all, of the physical and "handy man" jobs around the house. He did those jobs well and in a timely fashion. At home, he was loved, respected, and relied upon.

6. As a result of the motor vehicle collision, Mr. Graul has damage to his hearing, sight, memory, and balance. He is in chronic pain. He has cognitive deficiencies. He is easily confused and cannot multitask.
7. Mr. Graul cannot return to the social, athletic, and personal tasks that he enjoyed in the past. He cannot return to the work that he valued and enjoyed. He has lost all the collegiality of those activities.
8. Mr. Graul's relationships within his family have been harmed.
9. At present, at best, he cannot drive more than 20 minutes if it is not raining or snowing. He cannot read except on a cell phone. He is in pain and does not sleep properly.
10. Without his income, Mr. Graul's plans for his and his family's future have been destroyed.

[546] However, I agree with the defence that I must also keep in mind that Mr. Graul is not bedridden or house-bound. He was able to go on one holiday in 2019, however reduced that holiday may have been.

[547] There have been improvements in some of Mr. Graul 's symptoms. His neck pain has improved. It is dependent on activity and certain positions like looking down. Mr. Graul 's shoulder pain is now "in the background more often" and flares up a "couple times in a week." Mr. Graul experiences low back pain a couple times a week. Mr. Graul no longer has issues with chewing.

[548] I do not accept the defence argument that examples of what Mr. and Ms. Graul considered to be "poor judgment" since the accident can be seen as "not really evidence of extreme or unusual behaviour."

[549] The defence submission on this point is emblematic of its position throughout the trial. The defence regularly picks and chooses evidence to support its position while ignoring evidence that defeats its argument. In this instance, the defence submits that:

> Taking a long walk is something that many people do for exercise. Since Mr. Graul was not working when this incident occurred, he certainly had the time to take a one-hour walk. Likewise, most people have left stoves on, burnt plastic items or tea towels, left keys in doors or left garage doors open. These occurrences are not all that unusual and have limited significance in this case.

[550] To revisit the evidence on this point, Mr. Graul's "one-hour walk" was in the heat of the day, without water, without proper shoes, without a phone, and without notice to his caregivers. That is a significant error in judgment and not something that people regularly do. The evidence is that Mr. Graul left a stove on as he left the house and leaves his key in the door most days. Those are significant events.

[551] I do agree with the defence that I must keep in mind that, even though Ms. Graul raises several serious concerns about Mr. Graul's judgment, she has left him alone for two one-week holidays. She is most certainly entitled to her own time and

has earned some time to herself, but that evidence is contradictory to her evidence that she worries extensively about Mr. Graul.

[552] Mr. Graul has continued to engage in household and handyperson tasks since the accident. He has carried out an oil change on a family vehicle. He has changed a signal light on a family vehicle. He has been refinishing a table. He has installed outdoor stairs over several months.

[553] Mr. Graul is also able to do external gardening and lawncare activities including cutting grass, trimming shrubs, weeding, and watering plants. He is able to shovel light snow. Mr. Graul admits to going on a weeklong holiday to a cottage with his family in 2019.

[554] However, there is no doubt that he will not be able to do the more expensive and, for Mr. Graul, enjoyable work around the house, such as renovations, wiring, plumbing, and significant work on the family vehicles.

[555] I agree with the defence that Mr. Graul's financial plans may have been unrealistic, but the collision has brought those hopes to an immediate end.

[556] While there are no submissions that Mr. Graul fails to meet the threshold for general damages, on all the above evidence, I find that he has a permanent serious impairment of important physical, mental, and psychological functions.

Analysis

[557] The principles related to fixing personal injury damages are well known. I am to assess an amount to restore Mr. Graul to the position he would have enjoyed but for the accident, to the extent that money can do so. No such amount can be perfect compensation but must be reasonable and fair to both parties. The award must be consistent with other decisions involving similar injuries. It cannot be based on sympathy for the plaintiff nor retribution to the defendants. There can be no dispute that such an award will have to be arbitrary and be decided on the circumstances of each individual, both in terms of physical and psychological suffering: *Andrews v. Grand and Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, at p. 261.

[558] In order to determine this issue, I have considered: *Legree v. Origlieri*, 2021 ONSC 7650; *Rizzi v. Marvos*, 2008 ONCA 172, 236 O.A.C. 4, leave to appeal refused [2008] S.C.C.A. No. 200; *Akeelah v. Clow*, 2018 ONSC 3410; *Doxtater v. Farrish*, 2014 ONSC 4224; *Rolley v. MacDonnell*, 2018 ONSC 6517, affirmed 2020 ONCA 642; *Higashi v. Chiarot*, 2021 ONSC 8201; *Watts v. Donovan*, 2009 CanLII 26931 (Ont. S.C.); *Foniciello v. Bendall*, 2016 ONSC 1119; *Kwok v. Abecassis*, 2017 ONSC 164; *James v. Harper*, 2010 ONSC 4785; and *Gray v. Macklin*, [2000] O.T.C. 866, 7 M.V.R. (4th) 264 (Ont. S.C.).

[559] I do not intend to compare and contrast these cases in this judgment. In some of these cases, the plaintiff was less injured than Mr. Graul; in others, the plaintiff was more injured. When considering and distinguishing these cases (and the ones referenced in them), I place weight on the certainty that Mr. Graul will not return to work of any kind and will not likely be able to drive again, and that he has significant cognitive injuries along with permanent hearing and visual impairments.

[560] In Foniciello, at para. 78, Henderson, J. summarized:

> Based on the principles set out above and the caselaw, I find that the range for general damages for cases in which a plaintiff has suffered a significant brain injury but has moderate functionability is $200,000.00 to $300,000.00.

[561] There is a lot of play in the terms "significant" and "moderate", but based on the case law available to me, I see that range of damages to be accurate albeit a bit high.

[562] In considering all of that, I fix general damages in the amount of $225,000.

Special Damages

[563] The defence does not dispute Mr. Graul's special damage claim of $38,177.40.

Lost Income

[564] The parties dispute what income should be attributed to Mr. Graul for the time he has been away from employment. Mr. Graul submits that his income should be based on an average of his last two years of income, while the defence submits that it should be based on an average of his last five years.

[565] Once that income is determined, Mr. Graul says that he would have retired at age 70 if not injured in the accident. The defence submits that he would have retired earlier if he had not returned to work by April 2020. The date of any return to work or retirement will, of course, be a significant factor in determining what the future lost income will be for Mr. Graul.

Past Lost Income

Evidence of Ian Wollach

[566] Mr. Wollach gave evidence for Mr. Graul. It was agreed that Mr. Wollach was qualified to give expert opinion evidence in the field of forensic accounting and provide an opinion on income losses and calculations with respect to the present value of cost of future care.

[567] In order to prepare his report, Mr. Wollach reviewed Mr. Graul's income tax returns for 2013 to 2018, his short-term and long-term benefits, a neuropsychologist's report, and a vocational report. He also considered Statistics Canada's life tables including statistics relating to average retirement date. He

noted Mr. Graul's income replacement benefits and the provisions of the *Insurance Act*, R.S.O. 1990, c. I.8.

[568] Based on Ontario law, he calculated the income loss commencing seven days after the accident, at 70 percent of Mr. Graul's gross income, to the date of trial. That amount is then to be reduced by the benefits Mr. Graul received from long-term and short-term disability and income replacement benefits. There was no dispute between the parties on that methodology.

[569] As one of his initial assumptions, Mr. Wollach based Mr. Graul's pre-accident income on an average of his 2015 and 2016 incomes, his best two years prior to the accident. That figure was $108,016 earned annually.

[570] In cross-examination, Mr. Wollach agreed that he could have averaged the income over five years but, given that Mr. Graul had a collective agreement, two years would be a better estimate for the future. He agreed that five years would have reduced the loss.

[571] He also confirmed that the correct way to estimate Mr. Graul's past losses was to average it over two years, rather than five, because the increased rate of pay reflects what the future holds.

[572] I agree with Mr. Wollach's analysis. Averaging the income over five years would not reflect the reality of Mr. Graul's real income at the time of the accident

and going forward, given his employment contract. That would not be a fair estimate of Mr. Graul's income. There is no evidence that an approach of averaging over two years is contrary to accounting of income losses.

[573] Mr. Wollach prepared two reports: one in 2019 and one in 2021. He agreed that he failed to update the latest report with updated income replacement benefits. As a result, he recalculated the losses as a result of the income replacement benefits to November 2021. The effect of that reduced the lost income from $102,311 to $75,308.

[574] I find that the past lost income is $75,308.

Future Lost Income

[575] While Mr. Graul must prove past facts on a balance of probabilities, future loss or damage must only be shown to have a reasonable chance of occurring. Once it is shown that there is a reasonable chance of suffering a loss or damage in the future, the court must then assess the value of that chance, and future contingencies are regarded as factors to increase or decrease the award: *Schrump et al. v. Koot et al.* (1977), 18 O.R. (2d) 337 (C.A.), at pp. 339-340.

[576] The degree of possibility of such future loss must be reflected in the award. Compensation for future loss is not an all or nothing proposition, but rather

depends on the degree of risk established: *Graham v. Rourke* (1990), 75 O.R. (2d) 622 (C.A.), at p. 634.

[577] The defence submits that Mr. Graul could have returned to work by April 2020. I can reject that submission in brief. As set out above, there is no evidence to support that submission. Given my findings above, it has no fact finding to support it.

When would Mr. Graul have retired?

Evidence of Mr. Graul

[578] In 2017, Mr. Graul had been employed at the City of Guelph for 19 years and was 53 years of age. His plans were to keep working to age 70 and even to obtain his Master's Electrician license so that he would be able to do independent electrical work. As long as his health was good, he had not thought of early retirement. The City of Guelph has no mandatory retirement, and he knows others who have worked past 65.

[579] Between 2001 and 2006, he had his own business doing consulting with respect to instrumentation and electrical work. He stopped that work when his then employer was bought out.

[580] Mr. Graul's Ontario Municipal Employees' Retirement System (OMERS) pension report as of January 31, 2019, shows that he would have an income of

$23,860.03 if he retired as of June 30, 2026 (at age 62). OMERS continues to contribute to his pension and, therefore, his actual income would be somewhat higher than this statement. However, this low pension amount is another reason to remain working. Even if he earned more pension income, he would have continued to work. Mr. Graul said that he liked his work and so "Why not?"

[581] In 2012, he tried a management position but, after three months, he gave it up. He preferred to work with his hands, though he did not close the door to that kind of opportunity. He thought he might consider a management position for the years 65 to 70.

[582] If Mr. Graul received his Master's Electrician license, he could do consulting work on the side at about $150 to $185 per hour depending on the service. This would be a back up plan if he lost his job with Guelph. He cannot get that license now since he cannot do the necessary studying and reading.

[583] All his sons have had post-secondary education and he and his wife have helped them out with their education in the hopes of them having little or no debt at their graduation. This included Michael's nine years of schooling to become an osteopath.

[584] In the long term, Mr. Graul wanted to assist his children with down payments for homes, and to buy a new home for himself and Ms. Graul of perhaps 2500 square feet on a larger lot to entertain their growing family.

Evidence of Ms. Graul

[585] Ms. Graul testified that Mr. Graul's intention was to work to age 70. He had no reason to slow down, and he enjoyed his computer work. He knew that he was entitled to retire at 65 but they only recently found out that he was eligible for an unreduced pension. Even so, he was intending to work past 65.

[586] If he was no longer able to work at the City of Guelph, Mr. Graul had planned to have a consulting job when he obtained his Master's Electrician license. He had had a similar business between 1999 and 2005 or 2006. He did this consulting work after-hours and on weekends from his work with the city. He consulted about 15 hours a week.

[587] Ms. Graul said that she likes her job, and her intention was to work until she was 69 so the two would retire together. Neither of them was afraid of work and their first priority was family.

[588] She was not aware that Mr. Graul might join management at Guelph. She agreed that he had not got around to getting his Master's Electrician paper. His father died at age 62 from a heart attack. Mr. Graul enjoyed his activities around

the house, but she did not believe that he would change his plans from working longer. He would have had time to do all his activities and still go to work.

[589] Ms. Graul testified that they helped their three sons with tuition and university to allow them to graduate without debt. They paid for a total of 18 years of post-secondary education. They wished to provide down payments for their sons' houses and help with their weddings. They hoped to contribute to their grandchildren's Registered Education Savings Plans. They also wished to buy a larger house to entertain the family. With those financial hopes, Mr. Graul would have continued to work till 70.

Evidence of Daniel Graul

[590] Daniel Graul had no knowledge of his father's retirement plans.

Evidence of Pamela Ciccarelli

[591] Ms. Ciccarelli is Mr. Graul's older sister. She has worked for the provincial government for 42 years. She could have retired in 2015 on a non-reduced pension but did not. She is presently 67 years of age and lives in Toronto. She does not have plans to retire. As she said, "We just work."

[592] Mr. Graul has never spoken to her of any plans for retirement.

[593] She agreed that her father died at 62 and yet they both had planned to work past that age.

Evidence of Co-Workers

Evidence of Philip Koechl

[594] Mr. Koechl worked with Mr. Graul from 2006 to 2017, up until the time Mr. Graul was injured.

[595] Mr. Graul was Acting Supervisor for six months and all of the other men hoped that he would keep that job. Mr. Koechl does not know why Mr. Graul did not get the job.

[596] He did not speak with Mr. Graul about his retirement plans and did not know about them.

Evidence of Jerry Atkinson

[597] Mr. Atkinson is the Wastewater Operations Manager for Niagara region.

[598] He testified that it is not unusual to retire and go into consulting with the city. He knows others who have done so and others who want to. From his knowledge of Mr. Graul, he could have done that as well. He believes it was realistic for Mr. Graul to be a supervisor past age 70.

[599] In his job as Manager, Mr. Atkinson has a set of approved contractors. He would have hired Mr. Graul as a contractor if he was healthy and able to do the job.

Evidence of John Mogk

[600] Mr. Mogk worked with Mr. Graul at the City of Guelph for 10 to 15 years.

[601] Mr. Mogk retired at age 62. He retired due to COVID-19 when he became aware of all the illnesses that went through the plant. He did not have any knowledge of Mr. Graul's retirement plans.

Evidence of Raymond Masse

[602] Mr. Masse is an industrial millwright and mechanic for the City of Guelph at the wastewater treatment plant.

[603] Presently, there is one employee he knows who is 70 and another one who is turning 70. He knows other workers who have been hired back to work three or five days a week after they retire.

Agreed Evidence

[604] Kiran Suresh's evidence was filed as an exhibit on consent. From her statement, her admissible evidence was that she met Mr. Graul when she joined the City of Guelph in 2006. They worked in the same department from 2006 to 2016.

[605] Ms. Suresh confirmed that she was aware of Mr. Graul's desire to expand his career and work towards becoming a Master Electrician. It was her opinion that Mr. Graul would have wanted to work beyond 65 as he was very work-oriented,

focused, and hard-working. She stated she certainly would have hired him (in compliance with all the rules and regulations) to work for the city as a contractor if that was what he wanted. She was aware that people who work for the City of Guelph can work beyond the age of 65.

Analysis

[606] I have no difficulty in finding that Mr. Graul would have remained employed with the City of Guelph until age 70.

[607] The evidence shows that he has been steadily employed since a young age. He was a hard worker who was respected at his place of employment. All the witnesses confirm his evidence that he enjoyed his work and was good at it. They also said that he did well in his short time in management. I find that his aptitude and experience would have made him a valuable asset for the city to keep employed.

[608] Mr. Graul was Acting Supervisor for a time but gave it up to be more hands on. This supports the view that he would have been able to "slow down" to a desk job as he got older. I find that he would have continued to remain employed with the City of Guelph.

[609] I do not make this finding based on what others have done beyond 65 or what the statistical averages might show. Rather, I have considered the evidence as it relates to Mr. Graul alone.

[610] I agree with the defence that the Grauls' generous plans for the children and their accommodation are unrealistic, but I find that those plans were honestly held. For those plans to have any hope of success, Mr. Graul would have had to remain employed. His pension would not have allowed him to maintain what the family already had.

[611] I do not factor in Mr. Graul's potential income from consulting. He did not have a Master's license yet and the evidence of potential income is simply hope and conjecture. There is insufficient evidence to make a finding to support that submission.

[612] Mr. Graul had a variety of other interests to draw him away from employment. In my view, it is unrealistic to think he would have remained working past 70.

Evidence of Ian Wollach

[613] Mr. Wollach calculated the future loss to age 70. For his calculations, he made no changes for either positive or negative contingencies. In his view, the positive contingencies, such as a new employment contract, balanced out the

negative contingencies related to health and accident. He did not factor in any increases in income for promotion or pay raises.

[614] Mr. Wollach applied a net discount rate of 0 percent for 15 years and 2.5 percent thereafter. He used an inflation rate to increase Mr. Graul's income from the time of the accident to the time of the report. There was no objection raised with respect to Mr. Wollach's methodology.

[615] On that basis, he calculated Mr. Graul's future lost income based on two scenarios, both of which relied on self-employed income after retirement. Those calculations are of no use to me given my findings above. However, Mr. Wollach provided me with the tools to carry out my own calculations of future lost income based on Mr. Graul's continued employment to age 70 at the City of Guelph.

Analysis

[616] Based on Mr. Wollach's calculations and my findings above, I find that Mr. Graul's total lost income to age 70 is $1,282,074.

[617] Mr. Wollach's evidence is persuasive and not contradicted by any other evidence. All his calculations are in evidence and I do not think it will be useful to attempt to summarize those well-known calculations.

[618] I do not rule out arithmetical errors based upon my factual findings. If I have made arithmetical errors, counsel may advise within their costs submissions set out below.

Pension Production Issue

[619] During the trial, the defence moved for an order for production of Mr. Graul's "complete OMERS file" in advance of the defence calling a representative from OMERS as part of the defence case. In particular, the defence asked that Mr. Graul sign a requisition to obtain "the complete OMERS file" or an order that OMERS provide "the entire file" to Mr. Graul. That motion was dismissed for reasons to follow. These are those reasons.

[620] The motion was first raised as an issue prior to the commencement of the trial, but not served until November 14, 2021 (one day before the trial).

[621] Prior to the trial, Mr. Graul had produced his December 31, 2019, pension statement in support of his claim for lost future income. His pension statement confirmed his income on retirement as of age 65. It also set out the terms of his pension to calculate other amounts for early retirement. He also produced his income tax returns to 2020.

[622] Prior to trial, the defence subpoenaed a representative of OMERS to come to trial to obtain further information. This subpoena requested, "Your complete pension records regarding the plaintiff."

[623] In response, counsel for OMERS requested a clarification of what was required because he felt the summons was overly broad. Further, OMERS required an express consent from Mr. Graul or a court order to produce the file. OMERS counsel also pointed out that any general information relating to the plan, such as its terms and information about retirement eligibility dates, was publicly available, and he provided the relevant website. Finally, he made several suggestions on how the request might be narrowed.

[624] In response, the defence requested "a general list of documents" within the file in order to narrow the request. In reply, OMERS advised that it did not have a general list of documents that may be contained in a member file.

[625] The defence responded with a list of matters that it wished to investigate:

1. When Mr. Graul is eligible to obtain an unreduced pension.
2. The amounts that he will receive if he receives an unreduced pension.
3. The amounts that he would receive if he received a reduced pension.
4. Records of inquiries Mr. Graul made regarding his pension.
5. How the pension is calculated.

[626] However, the defence still wanted the complete file from OMERS and requested it in the Notice of Motion.

[627] Mr. Graul's counsel echoes the submissions of OMERS and points out that the file may contain private information that is irrelevant to the issues at trial. Further, if the information is of such importance, the defence has not explained why it did not request this information in advance of trial. However, Mr. Graul consented to the release of any information related to his inquiries about retirement as well as his contributions to his pension in 2020 and 2021.

[628] It is important to remember that at no time did OMERS refuse to attend pursuant to the subpoena or refuse to produce the information; it only sought a more specific request. I dismissed the motion without affecting those steps.

[629] Further, the defence defined its request during argument to specific items and Mr. Graul agreed to those requests. As such, I did not need to make any order about those items.

[630] The defence submitted that "the OMERS file contains documents pertaining to the plaintiff's anticipated retirement and the amount he will receive." The existence, terms, and contents of the OMERS file would serve a role in how the trial would proceed. Further, the production of the file in advance of the OMERS representative testifying would shorten the trial.

[631] There is no doubt that the documents related to Mr. Graul's pension income might be relevant to the issues at trial; however, other than any requests about retirement from Mr. Graul, the defence could not articulate what information it was missing or what information had not been produced by Mr. Graul. Nor could the defence describe any prejudice to it for any missing information. Mr. Graul had already provided a pension report with all the necessary calculation factors as set out in items 1 to 3 and 5 above. Without knowing what the defence actually needed from the file, the request was simply a fishing expedition.

[632] The defence gave no reason why this request was not made sooner than the outset of trial. Mr. Graul's expert report relating to this issue was provided in December 2019. The defence has filed no responding expert report.

[633] In the result, this motion was simply a late request for an unspecified fishing expedition into Mr. Graul's pension file. On that basis, it was dismissed.

[634] While I made no order in advance of the OMERS witness, it was still open to the defence to call that witness. In the end, the defence did not call any witness from OMERS.

Future Care Costs

[635] Given Mr. Graul's injuries, the medical evidence confirms that he will need a lot of assistance to carry on his life. Some of those expenses are agreed upon but most are in dispute. The defence submits that a round figure of $75,000 will cover any future treatments Mr. Graul may need.

[636] As set out below, Mr. Graul has provided evidence of those needs and their costs. Expert witness for Mr. Graul, Ms. Marla Tennen, has given her opinion of the costs of those needs. Mr. Wollach has then provided his opinion of what lump sum will be necessary to fund those expenses to ages 65, 75, or for life depending on the need.

[637] As before, I rely on *Schrump v. Koot*, at pp. 339-340, to show that, while Mr. Graul must prove past facts on a balance of probabilities, future loss or damage must only be shown to have a reasonable chance of occurring. Once it is shown that there is a reasonable chance of suffering a loss or damage in the future, I must then assess the value of that loss.

[638] The award must be fair to both parties but the ability of the defendant to pay is not a relevant consideration. The focus must be on the injuries of the innocent party. Fairness to the defendants is achieved by assuring that the claims raised against them are legitimate and justifiable: *Andrews v. Grand and Toy Alberta Ltd*., at pp. 243-244.

[639] As said in *Higashi v. Chiarot*, at para. 246:

> The standard of real and substantial risk applies to future care expenses. The test for determining the appropriate award for future care costs is an objective one, based on medical evidence. To prove a claim for future care costs, the following conditions apply: (a) there must be medical justification for the claims; (b) the award must be fair and moderate; and (c) the claims must be reasonably necessary, having in mind personal circumstances. [Citation removed.]

[640] Mr. Graul may only claim once and my concern is to ensure that he will have adequate future care: *Andrews v. Grand and Toy Alberta Ltd*., at p. 261.

Evidence of Marla Tennen

[641] Ms. Tennen was qualified on consent to give opinion evidence with respect to "life care planning". She has been a "professional rehabilitation consultant" for 30 years. Her report set out what she saw as Mr. Graul's requirements for the future and the cost of those items. Her report was filed as her examination-in-chief and she was then cross-examined on that report. The cross-examination successfully reduced her report to an accounting exercise. To be fair to this evidence, the report is entitled "Future Cost of Care Report". For the following reasons, I have only relied on Ms. Tennen's evidence for what various services cost. The defence made no submissions contrary to that evidence. I will rely on the medical evidence to decide what Mr. Graul needs.

[642] Ms. Tennen's work is referred to her primarily by plaintiffs' lawyers. Typically, she is not retained by defendants. Her evidence shows that bias and advocacy for Mr. Graul.

[643] Ms. Tennen did not make any home observations. She did not think it necessary to meet with Mr. Graul other than by phone. She did not assess the presence of any family support system. She did not carry out any tests other than to rely upon the examinations done by others. She did not get any information from the defence to prepare her report. She did not take into consideration that Mr. Graul might have age-related health issues in any event.

[644] Ms. Tennen said that she relied upon her nursing training and years of expertise to make her recommendations. She saw her present job as nursing; however, she has not done any clinical nursing work in a doctor's office or hospital since 1992.

[645] Ms. Tennen agreed that Dr. Valentin did not recommend a rehabilitation support worker as she had. She relied on her own experience for that recommendation. A rehabilitation support worker would support and add to the work of the occupational therapist. She agreed that Mr. Graul has not had a rehabilitation support worker to date, and no one has recommended such a worker except her.

[646] Throughout her evidence, Ms. Tennen was defensive and arrogant. Often, she did not answer the question but simply added her own defensive editorial. Ms. Tennen's opinion was weakened by her defensiveness. She was more an advocate for her own position than for Mr. Graul or in assistance to the court.

[647] Although Ms. Tennen recommended a "multidisciplinary approach", she was quite vague in what those disciplines might be. In her view, there was no overlap in her recommendations, when there clearly was.

[648] Ms. Tennen recommended case management services for two years even though Mr. Graul has not used, or apparently needed, such services in the four years since the accident.

[649] Ms. Tennen did not consider that medication is covered at age 65 or that Mr. Graul may have health benefits from his employer. She was aware the government might fund some of these services but did not include it in her findings.

[650] Ms. Tennen's opinion with respect to attendant care was based solely on her opinion and she agreed that, depending on the day, Mr. Graul might not need assistance.

[651] She agreed that no doctors have recommended Mr. Graul have assistance for gardening and snow shovelling.

[652] I am prepared to accept that Ms. Tennen's report is helpful to me for the cost of various items in dispute. The report is dated 2019 and I am sure that the costs will have increased to the benefit of the defence. Other than those values, I reject the rest of Ms. Tennen's evidence.

[653] After her evidence was given, it appeared that Mr. Graul amended his requests. I will, therefore, analyze these issues following Mr. Graul's written submissions.

Evidence of Ian Wollach

[654] Mr. Wollach prepared a schedule which set out the present value of each item recommended by Ms. Tennen and added HST where applicable if she had not included that in her report.

[655] In order to calculate the future cost of most items, he used 0 percent for the first 15 years and 2.5 percent thereafter for the correct multiplier. He also provided me with different ways to calculate the future cost of different values than Ms. Tennen provided.

[656] Mr. Wollach fairly gave no evidence on the need for any of the expenses; his evidence was essentially mathematical. I did not hear any objection to his methodology.

Psychological/Social Work/Relationship Counselling

[657] Mr. Graul submits that he suffers from psychological and psycho-social disabilities because of his injuries suffered in the 2017 collision. These impairments affect his psychological functioning, his ability to function in social relationships with his family and friends and have negatively affected his overall quality of life.

[658] Mr. Graul testified that he participates in social work counselling to help him deal with memory limitations and concentration issues in coping with daily things. He testified that, if he had funding, he would continue with his social worker. He felt the treatment was helpful. Mr. Graul testified that the social work counselling helped him feel better about himself and gain control over his emotions and depression.

[659] As set out above, Mr. Graul also testified that, since the injury, his relationship with Ms. Graul has suffered. Dr. Friedlander discussed the need for counselling in his reports which were filed as exhibits. Dr. Westreich believed Mr. Graul can benefit from cognitive behavioral therapy.

[660] Dr. Valentin also recommended counselling for Mr. Graul. She testified that, although Mr. Graul 's prognosis for further recovery is poor, it remains important to continue his treatment. She testified that the people who don't receive treatment

will get worse. She believed that Mr. Graul requires substantial psychological treatment for the rest of his life.

[661] The defence's Dr. Waisman also discussed Mr. Graul's need for treatment. He specifically recommended psychological counselling but conceded that the therapy will not cure Mr. Graul. Instead, the goal would be to improve his quality of life and depression symptoms.

[662] Ms. Tennen provided the cost of psychological counselling for two years at 48 sessions per year. The cost of that psychological counselling totalled $10,560 per year. In year three, she recommended 24 sessions of psychological counselling at a total cost of $5,280 for year four through to life expectancy. Ms. Tennen recommended additional reserves of 24 sessions throughout Mr. Graul 's lifetime at a cost of $21,120.

[663] Ms. Tennen provided the cost of Mr. Graul continuing with social work counselling. She recommended 24 sessions a year for two years at a cost of $3,120 per year. In year three, she recommended 15 sessions at a cost of $1,950.

[664] Mr. Wollach reported the lifetime cost for this item as $54,379.

Analysis

[665] The defence acknowledged the need for counselling and submitted that psychological counselling for life was appropriate. The defence submits that those

services can be funded in the amount of $46,169 based on Ms. Tennen's proposed rates but for fewer hours.

[666] Mr. Graul's request is less than the defence acknowledges. Accordingly, I grant judgment in the amount of $27,052 for psychological counselling and social work therapy.

Occupational Therapy

[667] Mr. Graul testified that he has significant impairments in his activities of daily living. As a result, he has participated in courses of occupational therapy. After Mr. Graul exhausted his accident-benefit medical and rehabilitation fund, he could not continue his occupational therapy. He testified that, if he had funding, he would go to occupational therapy as he found it helpful. Specifically, he testified it helped him organize his appointments and medication, as well as decide whether he should eat and how to organize his paperwork.

[668] Dr. Valentin commented on Mr. Graul 's impairments affecting his ability to perform his basic activities of daily living. Dr. Valentin specifically recommended ongoing cognitive rehabilitation by an occupational therapist.

[669] Dr. Westreich also stated that he was fully supportive of Mr. Graul's ongoing work with an occupational therapist, with behavioural activation as a goal.

[670] Dr. Friedlander referred to the need for occupational therapy and stated it seemed reasonable and necessary.

[671] Ms. Tennen provided the cost of occupational therapy for Mr. Graul. Specifically, she recommended 24 sessions of occupational therapy intervention in the first year with a cost of $3,000. She recommended 16 sessions per year for life expectancy at $2,000 per year.

[672] Ms. Tennen also recommended the use of a rehabilitation support worker, who would help Mr. Graul work on his occupational therapy techniques, but at a much-reduced rate. Ms. Tennen recommended 4.5 hours a week for 48 weeks in the first year at a total cost of $14,040, and then 4.5 hours a week for 24 weeks for year two at a cost of $7,020.

[673] Mr. Wollach opined that the lifetime cost for this need would be $54,240.

[674] The defence denies that such services are necessary.

Analysis

[675] Besides the medical evidence referred to by Mr. Graul, his witness Dr. Basile also agreed with the therapies suggested by Ms. Tennen as they related to the traumatic brain injury, cognitive impairments, and care for neck and back pain management. I find that occupational therapy falls into this category and is reasonable.

[676] I accept the evidence of the need and the value of this expense. I find that judgment should follow for $54,240 for occupational therapy.

[677] With all the other supportive assistance Mr. Graul will have, I find that a rehabilitation support worker is redundant. Such services are recommended only by Ms. Tennen. I deny that item of future care.

Physiotherapy, Massage Therapy, Gym Membership, Personal Trainer

[678] Mr. Graul testified that he had participated in many sessions of physiotherapy since the collision to address his physical injuries and impairments. He indicated that physiotherapy was interrupted as funding stopped, which he found to be detrimental. He said that his muscles were stronger, and he was feeling like they moved better when he participated in regular physiotherapy. Mr. Graul testified that, if funding is restored, he will participate again in physiotherapy.

[679] Dr. Friedlander stated that Mr. Graul should continue working at active muscle strengthening and core muscle training. He said that Mr. Graul should work with a trainer to develop a physical exercise program focussing on cardio and conditioning. He agreed that a gym membership and supervision by a trainer would be therapeutic. He confirmed these expenses are reasonable and necessary.

[680] Dr. Basile testified that Mr. Graul could benefit from physiotherapy to assist with his neck and back pain.

[681] For the defence, Dr. Lang did not think that the injury justified a regular attendant and supportive care. Mr. Graul did not need long-term passive therapy.

[682] Dr. Lang agreed that Mr. Graul could benefit from a personal trainer for a period, but not perpetually. Rather, he could be educated and then re-educated overtime.

[683] Dr. Lang did not support physiotherapy for chronic conditions, as it is best to use it for early treatment and then move to a personal trainer. In his opinion, Mr. Graul requires active exercise rather than passive therapy from a physiotherapist.

[684] However, the defence acknowledges the need for physiotherapy. It submits that the lifetime total is more properly $15,000, rather than Ms. Tennen's rates.

[685] Ms. Tennen provided the cost of physiotherapy treatment. She recommended physiotherapy, in the first year, twice a week for 24 weeks and then once a week for 24 weeks at a cost of $9,000. She then recommended physiotherapy, for year two, once weekly for 48 weeks at a cost of $6,000. Finally, she recommended 20 sessions a year as required for year three through to life expectancy at the cost of $2,500 per year.

[686] In addition to physiotherapy, Ms. Tennen provided the cost for the gym and trainer. She recommended a yearly membership at a fitness facility at a cost of $900 per year from present to age 75. She also recommended a personal trainer

for the first year to provide Mr. Graul with guidance on an exercise program, at a cost of $90 per hour. She costed 24 sessions, for a total one-time trainer cost of $2,160.

[687] Dr. Friedlander recommended passive therapy such as heat ultrasound massage and a tens machine to provide Mr. Graul with temporary pain relief. He also supported Ms. Tennen's recommendation for massage therapy.

[688] Ms. Tennen provided the cost of massage therapy for Mr. Graul. In year one, she recommended 48 sessions at a cost of $4,800. In year two, she recommended 24 sessions at a cost of $2,400. From year three to life expectancy, she recommended 15 sessions a year at a cost of $1,500 per year.

[689] Mr. Wollach calculated a lifetime cost for these items (age 75 for fitness membership and trainer) at $139,006.

Analysis

[690] I accept the medical evidence that Mr. Graul will benefit from physiotherapy, a gym membership, and massage therapy. I accept Ms. Tennen's and Mr. Wollach's calculations of those costs. I find for Mr. Graul, the sum of $139,006 is appropriate.

Pain Management

[691] As set out above Mr. Graul has been diagnosed as suffering from chronic pain.

[692] Dr. Basile testified that Mr. Graul would benefit from a pain management program to address his neck and back pain.

[693] Dr. Friedlander considered Mr. Graul's need for pain management and recommended various interventional pain management techniques to try and assist him in coping with his pain. Dr. Friedlander stated that it would require a multi-modal analgesic approach, likely into the future and probably indefinitely. Specifically, he stated that a coordinated and more intensive multidisciplinary approach is needed.

[694] Ms. Tennen estimated a multi-disciplinary chronic pain management program would cost $11,375.

[695] Mr. Wollach opined that a lifetime cost would be $11,375.

[696] The defence denies the need for such counselling.

Analysis

[697] The evidence of both defence and Mr. Graul demonstrates he has chronic pain. Accordingly, he needs this treatment and I accept the requirement and cost of this care. Mr. Graul is granted judgment for $11,375.

Speech Language Therapy

[698] Ms. Brotman, Mr. Graul's treating speech language pathologist, explained in her reports that Mr. Graul experiences cognitive communication difficulties, including with his attention memory, oral expression, social communication information processing, and areas of executive functioning. Ms. Brotman provided Mr. Graul with speech language pathology services. Ms. Brotman testified that, in her experience, Mr. Graul's need for speech language will continue as therapy is an ongoing process, with new goals emerging which require tweaking.

[699] Both Dr. Valentin and Ms. Mair also testified that they believe that Mr. Graul requires ongoing speech language pathology services.

[700] Dr. Friedlander opined that, to address Mr. Graul's ongoing post concussion syndrome symptoms, speech language therapy is reasonable and necessary.

[701] Ms. Tennen provided the cost for speech language therapy. She recommended 24 sessions a year for two years at a cost of $3,720 per year.

[702] Mr. Wollach opined that the lifetime expense for this need was $7,440.

[703] The defence denies the need for this expense.

Analysis

[704] As above, the reasonable need and expense for this treatment is in evidence. There is no evidence contrary. I grant judgment for $7,440.

Case Management Services

[705] Ms. Tennen also provided the cost for a case manager to help Mr. Graul coordinate his future therapy and services. She opined that two years of case management services would be adequate, after which time Mr. Graul's occupational therapist could assume this rehabilitation coordination role as part of their work. Ms. Tennen recommended seven hours a month of case management services for two years at a cost of $10,500 per year.

Analysis

[706] Given all the other assistance Mr. Graul will receive, I am confident that he will need some practice to do some things for himself. To the extent that he cannot manage, his other treaters will give him the skills to overcome. In any event, he has been managing this for more than two years now. I dismiss this claim.

[707] Mr. Graul made no claim for a case manager.

Transportation Assistance

[708] Mr. Graul has not driven a car since his collision. He testified that, due to issues with his vision, his hearing, his balance, and vehicle anxiety, he does not believe he could safely operate a vehicle at this time.

[709] Dr. Carlson and Dr. Quaid both agree with Mr. Graul's decision to not drive.

[710] Ms. Graul typically drives Mr. Graul, and at other times Mr. Graul takes a taxi. With a transportation allowance, Mr. Graul could function more independently by hiring a taxi without imposing on his wife. Further, Mr. Graul requires transportation to attend treatment sessions and doctor appointments, and to get around town independently.

[711] Ms. Tennen costed this transportation allowance on two alternate bases. One option provides Mr. Graul with $4,800 per year for life, in case he is not able to resume driving.

[712] Another option provides $4,800 per year for two years of transportation. This option assumes that Mr. Graul will be able to resume driving in two years and would require him to participate successfully in a driving assessment and desensitization lessons. The one-time cost of the driving assessment is $535. Twelve lessons of driver desensitization total $1,080.

[713] It is acknowledged by the experts that the driver desensitization lessons would target the anxiety impairments which prevent Mr. Graul from driving. These lessons would not improve his visual, auditory, or vestibular issues which prevent him from driving.

[714] Mr. Wollach testified the lifetime cost of this expense, if Mr. Graul does not return to driving, is $111,264.

[715] The defence acknowledges the cost of a driver desensitization course, but only acknowledges transportation expenses if Mr. Graul does not return to driving.

Analysis

[716] The medical evidence from Dr. Berge and Dr. Quaid indicates Mr. Graul's injuries are permanent. Dr. Quaid is hopeful that Mr. Graul will improve in the future but is not certain to the extent. From the evidence, I find that it is best for all if Mr. Graul does not drive. It seems likely that restriction will be for life. He still needs a desensitization course to assist him with being a passenger.

[717] Accordingly, I grant judgment for Mr. Graul in the amount of $111,264 for a lifetime transportation allowance and $1,080 for a desensitization course. Given the evidence to date, Mr. Graul does not need a driving assessment or driving lessons.

Assistive Devices

[718] Assistive devices have been recommended for Mr. Graul's use. In her report, Ms. Tennen detailed that Mr. Graul has been provided an Obus-form back support, knee pillow, long-handled toilet brush, and lightweight mop by his occupational therapist Megan McLean.

[719] Ms. Tennen opined that Mr. Graul would also benefit from a chronic pain management device, regular replacements of his present assistive devices, and

Bluetooth headphones to cancel out extra noise. Ms. Tennen also believed that Mr. Graul could benefit from a home heating pad and Obus-form back and neck massager, supportive cognitive devices, and a mindfulness app. She costed those devices at $1,000, plus a yearly allowance of $400 per year for life to replace items as needed.

[720] Dr. Friedlander specifically stated the recommendation for these assistive devices is reasonable and necessary.

[721] Mr. Wollach provided a lifetime cost of $9,872.

Analysis

[722] Based on Dr. Friedlander's evidence of need and Ms. Tennen's evidence of cost, I grant judgment in the amount of $9,872.

Hearing Aids

[723] Dr. Berge gave evidence that Mr. Graul could benefit from the use of noise-cancelling hearing aids to provide him with some relief from his constant tinnitus. Dr. Berge indicated that Mr. Graul's experience of tinnitus, misophonia, noise-induced hearing loss, and dizziness could be improved with these hearing aids. Ms. Tennen priced these hearing aids at $3,000, every five years. These hearing aids are recommended for Mr. Graul for his life expectancy.

[724] The defence does not dispute this expense and agrees with the expense rounded to $15,000.

[725] Accordingly, I grant judgment on this claim for $15,000.

Vision Therapy

[726] Mr. Graul testified he has participated in vision therapy for several years and that this therapy assists with his blurred vision. Dr. Quaid's testimony confirmed this account. Dr Quaid testified that, in his opinion, Mr. Graul should continue with this therapy. Dr. Quaid also believed that Mr. Graul would require new prism glasses as his prescription changes every few years.

[727] Ms. Tennen provided the cost for vision therapy. She indicated that therapy once a week for 24 weeks, for three years, would cost $4,200 per year. She also priced glasses with prism and blue-tinted clip bonds at $1,200 per pair to be replaced every two years for Mr. Graul's life expectancy.

[728] Mr. Wollach provided a lifetime value of $26,883.

[729] The defence denies this claim.

Analysis

[730] I accept the evidence of Dr. Quaid; it is uncontradicted. I accept the calculations of Ms. Tennen and Mr. Wollach.

[731] I grant judgment for vision therapy and glasses with prisms in the amount of $26,883.

Attendant Care Assistance

[732] Mr. Graul testified that he has daily trouble with his memory, cognition, balance, and dizziness. Mr. Graul testified that he frequently forgets to perform his usual and necessary activities and requires cueing and prompting.

[733] Mr. Graul testified that he has on several occasions since the collision engaged in unsafe activities because of his poor memory and concentration.

[734] In Dr. Carlson's opinion, Mr. Graul suffers executive function impairments, including difficulties with problem-solving, poor judgment, organization and planning, and fatigue, as a result of the brain injury he suffered in the 2017 collision.

[735] Dr. Valentin stated in her reports that Mr. Graul experiences ongoing and significant cognitive impairments, including memory impairments affecting his functioning, as a result of the brain injury. Dr. Freedman concurred on many of these impairments.

[736] Dr. Basile noted in his reports that Mr. Graul suffers cognitive impairments including memory dysfunction and difficulty with initiation. Dr. Basile agreed with Ms. Tennen's recommendation that Mr. Graul be provided some attendant care assistance due to these impairments.

[737] Dr. Berge testified that Mr. Graul suffers significant vestibular dysfunction from his traumatic brain injury and associated impairments. As a result, he is often unsteady on his feet and at risk of falling.

[738] For all these reasons, it was submitted that Mr. Graul requires, and will continue to require for his lifetime, assistance to safely perform some of his activities of daily living. Though Ms. Graul currently assists him for free, it was submitted that Mr. Graul should be provided a fund for hiring third party care providers.

[739] Ms. Tennen costed the required attendant care at 99.24 hours per month, or $2,580.24 per month. This totals $30,962.58 per year.

[740] Mr. Wollach provided a lifetime value of $811,023.

[741] The defence denies that attendant care is necessary.

Analysis

[742] While I agree that Mr. Graul has some times that require attendant care assistance, it is nowhere near the 99.24 hours a month that Ms. Tennen suggests. If Ms. Graul is prepared to leave Mr. Graul alone for a week at a time, so too am I.

[743] Although Ms. Graul should not have to provide this service for free, most times she is there in any event. She will certainly retire before the end of Mr. Graul's

lifespan. They will not need a third person at home for much of that time. Ms. Tennen provides no explanation of why almost 100 hours a month is required.

[744] I can, however, imagine acute times that might assist Mr. Graul to have some supervision. In my view, 20 hours a month over his lifetime should be ample.

[745] Accordingly, I reduce this claim to $160,000.

Housekeeping Assistance

[746] Mr. Graul testified that since the collision, his pain, balance issues, fatigue, and cognitive impairments have prevented him from resuming his usual housekeeping tasks. He testified that he continues to try to assist Ms. Graul, but that he is limited and must pace himself. As a result, these tasks take much longer to perform and can cause him pain. Ms. Graul confirmed this evidence.

[747] Ms. Tennen provided the cost for housekeeping assistance for Mr. Graul. She recommended four hours of assistance each week at $22 per hour to age 75. She identified the cost of this assistance at $4,576 per year.

[748] Mr. Wollach said that the lifetime cost for this assistance would be $81,286.

[749] The defence denies that Mr. Graul needs housekeeping services.

Analysis

[750] The evidence is clear that, before the accident, Mr. Graul did most of the work around the home since Ms. Graul has a bad back. Mr. Graul continues to help out and to keep himself busy. Ms. Tennen recommended housekeeping assistance for four hours a week. I find that amount will fill the gap between what Mr. Graul did in the past and what he can still do.

[751] I find for Mr. Graul, $81,286 for housekeeping assistance.

Outdoor Maintenance Assistance

[752] Mr. Graul gave evidence that, prior to the collision, he was solely responsible for performing all gardening and snow shovelling at his home. Mr. Graul's evidence was that he continues to try to take care of the garden and lawn and shovel light snow, but he is far less efficient, and these tasks take him much longer. There will be times where Mr. Graul's pain and vestibular issues may prevent him from performing these tasks at all.

[753] Ms. Tennen provided the cost for Mr. Graul to receive a seasonal contract for assistance with gardening services and snow shovelling. She opined that each service would cost $600 per year and should be provided to age 75.

[754] Mr. Wollach valued these items at $10,658 each to age 75.

[755] The defence denies that Mr. Graul needs such assistance.

Analysis

[756] While Mr. Graul can do some work around the house and is well advised to keep active, this claim will again fill the gap between what he was able to do and what he can do now. His neighbours should not have to help with shovelling free of charge.

[757] I grant judgment on these claims for $10,658 each.

Handyman Assistance

[758] Mr. and Ms. Graul testified that Mr. Graul was a skilled handyman who independently carried out significant home renovations, adding value to their home and saving them from the expense of hiring professional contractors. Mr. Graul also performed all routine maintenance and basic repairs on the family's vehicles. Mr. Graul testified that since the collision he has been essentially unable to engage in these activities.

[759] The couple also testified they had plans to do more renovations to their kitchen and even had some drawings done. The plan was that Mr. Graul would do the work, but he has been unable to since the collision.

[760] Ms. Tennen provided the cost for a handyman to complete the household repairs and maintenance which Mr. Graul previously performed. She

recommended five hours per month at $65 per hour, to age 75, for a total of $3,900 per year.

[761] Mr. Wollach provided a value of $69,278 to age 75.

[762] The defence denies that Mr. Graul requires this assistance.

Analysis

[763] The evidence is clear that Mr. Graul carried out this work to his former benefit and can no longer do so.

[764] Ms. Tennen recommends five hours a month. That seems reasonable to bridge the gap as described above.

[765] I therefore grant judgment for Mr. Graul in the amount of $69,278.

Summary of Future Care Costs:

[766] Using Mr. Graul's written submission list, I find that the defendants shall pay as follows:

Psychological and Social Work Therapy $27,052

Occupational Therapy $54,240

Rehabilitation Support Worker $0

Physiotherapy $76,525

Massage Therapy $44,053

Chronic Pain Management Clinic $11,375

Speech Language Therapy $7,440

Case Management $0

Gym Membership $15,987

Personal Trainer $2,441

Driving Assessment $0

Driving Lessons $0

Assistive Devices $9,872

Hearing Aids $15,000

Vision Therapy $12,684

Glasses with Prisms $14,199

Transportation Allowance (Lifetime) $112,344

Transportation Allowance $0

Attendant Care Assistance $160,000

Housekeeping Assistance $81,286

Gardening Contract $10,658

Snow Clearing Contract $10,658

Handyman Assistance $69,278

Total: $735,092

[767] There is a disconnect between the evidence given by Mr. Wollach with respect to the capitalized value he calculated, and the figures used by Mr. Graul in his written submissions. I may have made an arithmetical error or missed a point of evidence or argument that clarifies that difference. I do not wish the parties to need to appeal to correct that discrepancy. I do not suggest that I can change any findings of fact. However, if I have missed something in my calculations, counsel may make brief written submissions with respect to arithmetic with their costs submissions.

Result

[768] Accordingly, I find the defendants liable to Mr. Graul. They shall pay to Mr. Graul:

1. General damages in the amount of $225,000;
2. Special damages in the amount of $38,177.40;
3. Past lost wages in the amount of $75,308.00;
4. Future income losses fixed in the amount of $1,282,074;
5. Future care costs fixed in the amount of $735,092.

[769] I understand that, on consent, the defendants shall be entitled to their legislated subrogated interests pursuant to s. 267 of the *Insurance Act*, R.S.O. 1990, c. I.8.

Costs

[770] If costs cannot be agreed upon, Mr. Graul shall provide his costs submissions within the next 20 days. The defence shall provide their response within 20 days thereafter.

[771] Each submission shall be no more than five pages, not including any Bills of Costs, Offers to Settle, or submissions relating to any arithmetical errors. No reply submission will be accepted unless I request it. If I have not received any submissions within the timeframes set out above, I will assume that the parties have resolved the issue and I will make no order as to costs.

[772] Neither party need include the authorities upon which they rely so long as they are found in CanLII and the relevant paragraph references are included.

[773] Any costs submissions shall be forwarded to my office in Guelph by electronic transfer to Teresa.pearson@ontario.ca or by mail to Guelph Superior Courthouse, 74 Woolwich St., Guelph, N1H 3T9.

"Justice Lemon"

Justice G. D. Lemon

Released: April 08, 2022

CITATION: Graul v. Kansal, 2022 ONSC 1958
COURT FILE NO.: CV-18-201
DATE: 2022 04 08

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Jonathan A. Graul

Plaintiff

– and –

Dev Raj Kansal

- and –

Rakesh Kansal

Defendants

REASONS FOR JUDGMENT

Justice G.D. Lemon

Released: April 08, 2022

Court File No. CV-15-00541672-0000

SUPERIOR COURT OF JUSTICE
CIVIL COURT

B E T W E E N:

ZORICA GRUJIC

Plaintiff

- v. -

DANIEL M. FINE

Defendant

P R O C E E D I N G S A T T R I A L

BEFORE THE HONOURABLE JUSTICE C. BROWN with a Jury
on June 13, 2024, at 330 University Avenue, TORONTO

APPEARANCES:

L. VARTANIAN	Counsel for the Plaintiff
F. VARTANIAN	Counsel for the Plaintiff
Y. SAFFIE	Counsel for the Defendant
C. MICUCCI	Counsel for the Defendant
T. ASSELIN	Counsel for the Defendant

SUPERIOR COURT OF JUSTICE

CIVIL COURT

T A B L E O F C O N T E N T S

LIST OF WITNESSES on VOIR DIRE

LEGEND

[sic] Indicates preceding word has been reproduced verbatim and is not a transcription error.

(ph) Indicates preceding word has been spelled phonetically.

Transcript Ordered:	14 JUN 2024
Transcript Completed:	15 JUN 2024
Ordering Party Notified:	15 JUN 2024

WEDNESDAY, JUNE 13, 2024

VOIR DIRE

VIVEK GUPTA RETURNS TO THE STAND

EXAMINATION IN-CHIEF BY MS. VARTANIAN: (Continued)

Q. Good afternoon, Vivek.

A. Good afternoon.

Q. I just want to be asking you some question to qualify – to make you for qualifications to Your Honour.

A. Okay.

Q. What is your current occupation?

A. I'm an actuary and I do loss of income reports for the law firm.

Q. And can we please have your education?

A. I'm with the [indiscernible] society of actuaries and the [indiscernible] of actuaries.

Q. And you're currently the owner of TCL Evaluation?

A. TCL Economic Valuation Experts.

Q. And how long have you been in that position?

A. Since 2007.

Q. And have you ever been – have you ever testified in Court?

A. Yes. Seven times.

Q. Seven times. And when was the last time that you were – you were qualified – sorry, you were – been qualified by the Court?

A. It was 23 years ago. I don't remember the exact date.

Q. Do you have any relevant certificates or licences?

A. Yes. I'm – I have a fellowship from the – like an Actuary, and a fellowship from the Canadian Institute of the Actuary.

Q. And are you a member of any professional association?

A. I'm a member of the Canadian Institute of Actuaries.

Q. And you submitted a report for the plaintiff in this case, Zorica Grujic.

A. That is true.

MS. VARTANIAN: Your Honour, I submit Mr. Gupta as a qualified actuary for this case. If my friend has any further questions.

THE COURT: Okay. Just a moment. Now, Mr. Asselin.

CROSS-EXAMINATION BY MR. ASSELIN:

Q. [Indiscernible] Good afternoon.

A. Good afternoon.

Q. You mentioned that you do loss of income reports for the law firms.

A. That is true.

Q. Is that only for plaintiffs?

A. Mostly for plaintiffs.

Q. Ninety percent plaintiffs.

A. That is true.

Q. Higher than 90 percent.

A. Higher than 90 percent, yes. I did [indiscernible] defence reports.

Q. Okay. In your entire career.

A. That is true.

Q. Okay. And you've been doing this since – I think you said 2005.

A. 2007.
Q. Yeah, 2007.
A. Over 1,000.
Q. Over 1,000 reports. Yes.
A. That is true.
Q. Okay. So, you don't have any other practice area. You only do loss of income reports for lawsuits.
A. That is true.
Q. For personal injury lawsuits.
A. Yes.
Q. So, seven times you've been called by an expert for a plaintiff in a lawsuit. Yes?
A. I can't remember but actually one case was for the defence, and it wasn't for personal litigation it was for civil litigation.
Q. Now, in this action you were retained by Ms. Vartanian, yes?
A. That is true.
Q. When was that?
A. In '23.
Q. The date of your report – your first report, okay? [Indiscernible] the date – boths – on your first report, is September 27th, 2023. Correct?
A. Yeah.
Q. So, were you retained shortly before that?
A. That is true.
Q. Within days of that report.
A. Within a month or so.
Q. Okay. Was it requested on a rushed basis?
A. I don't remember.
Q. Your first contact with this lawsuit at all was from this Ms. Vartanian?

A. No. I'd been retained before with this lawsuit. [Indiscernible]. Maybe I did [indiscernible], I don't remember.

Q. Okay. So, you worked before for Ms. Grujic?

A. Yes.

Q. You were engaged by her behalf by or on behalf of Ms. Grujic before Ms. Vartanian.

A. That is true.

Q. [Indiscernible] this lawsuit involved a car accident on December 7, 2013. Yes?

A. That is true.

Q. Okay. So, we'll deal with the other lawsuit, but were you first retained for this lawsuit, the December 7, 2013, accident, by Ms. Vartanian, in 2023?

A. That is true.

Q. You weren't retained by any other lawyer but this one?

A. Not at this moment. No.

Q. You were retained by another lawyer for one of Ms. Grujic's prior lawsuits. Yes?

A. That is true.

Q. Okay. Do you remember which one?

A. I don't remember which one.

Q. Do you know the date of that report?

A. I didn't prepare any report. I was retained but then it was dropped.

Q. Okay. Were you retained in that prior lawsuit after December 7th, 2013?

A. I think so. Yes. After December 2013.

Q. Do you recall the scope of that retainer?

A. It was to prepare a loss of income report.

Q. Okay. And in that loss of income report – or that retainer, were you asked to focus on one accident or multiple accidents?

A. I don't remember actually.

Q. But no report was drafted by you. Right?

A. No. No report was drafted.

Q. Do you have notes of your conversations with Ms. Vartanian or Ms. Gurjic about this retainer?

A. [Indiscernible] retainer or something.

Q. Do you have a retainer letter?

A. No.

Q. Is there an email retainer?

A. I'm sure.

Q. Okay. Do you have that with you?

A. Not right now.

Q. Do you remember – do you remember the scope of the retainer?

A. It was to prepare a loss of income report.

Q. So, you just got an email from this person saying can you prepare a loss of income report?

A. That is true.

Q. Were there other details in that email?

A. I don't remember.

Q. Good. Probably was. Right?

A. I have to look for it.

Q. Now, you signed a form 53 in this lawsuit. Yes?

A. That is true.

Q. You understand what a form 53 is?

A. That is – yes, I do. It should be – a client's report follows – considers a full report.

Q. Right. Line 2 of the form 53 says this, "I have been engaged by or on behalf of Zorica Grujic, which is the plaintiff." Yes?

A. That is true.

Q. To provide evidence in relation to the above-noted proceeding, which is this lawsuit.

A. That is true.

Q. You understand this lawsuit relates to the 2013 accident?

A. That is true.

Q. Okay. Number 3 under form 53, you acknowledge you have a duty to the Court. Yes?

A. That is true.

Q. In relation to this proceeding.

A. That is true.

Q. To be fair.

A. Uh-huh.

Q. Objective. Yes?

A. It is true.

Q. Non-partisan.

A. Uh-huh.

Q. Yes?

A. Yes.

Q. You are to provide opinion evidence that is related only to matters that are within your area of expertise.

A. That is true.

Q. You are to provide such additional assistance as the Courts may reasonably require to determine a matter at issue. Yes?

A. That is true.

Q. Okay. Then lastly, you acknowledge that your duties to the Courts are – prevails over any obligations of which you owe to a a party by whom – on whose behalf you're engaged.

A. That is true.

Q. So, you understand that your obligation to the Courts prevails over your client?

A. That is true.

Q. Are you able to send us your retainer email, Mr. Gupta?

A. If I find it.

Q. Okay. But if you find it, you'll send it to us?

A. Right now or....

Q. Not right now, just after.

A. Yes.

Q. Okay. I want to talk to you just generally about loss of income reports. Okay?

A. Uh-huh.

Q. Now, you make assumptions on loss of income reports, right?

A. That is true.

Q. And you rely on your assumptions to form opinions. Yes?

A. That is true.

Q. If assumptions change, then your opinion could change.

A. That is true.

Q. If your assumption changes, and your ultimate opinion which is the numbers, the dollars and cents, can change.

A. That is true.

Q. Assumptions are important in your line of work.

A. That is true.

Q. You're not a doctor.

A. No, no.
Q. You can't give opinion as to whether or not Ms. Grujic can or cannot work.
A. That is true.
Q. You can't say to what extent she can work.
A. No. That is the [indiscernible] yeah.
Q. Right.
A. Yeah.
Q. So, an actuary, we're told about [indiscernible], Ms. Grujic's ability or inability to work, of some sorts. Right?
A. That is true.
Q. That could be her lawyer.
A. Yeah.
Q. Her medical experts.
A. That is true.
Q. Or is it by herself.
A. Yes. And that is true.
Q. And those are assumptions that you rely on in your reports. Yes?
A. True.
Q. Now, often times I've seen – you tell me if I've wrong, Mr. Gupta, that an actuary or an accountant, could rely on medical expert reports to form kind of a foundation of their assumptions about the client's ability to work. Yes?
A. Yes.
Q. And it would be helpful to have medical evidence to confirm the information given by the plaintiff or the plaintiff's lawyer about her abilities.
A. [Indiscernible] Could you give me a [indiscernible].

Q. Yeah. In – in a number of cases, it would be helpful to have medical expert opinions or medical opinions about the plaintiff's ability to work.

A. That is true.

Q. It would kind of bolster your report. Right?

A. Right.

Q. And the assumptions that you rely on in that report?

A. That is true.

Q. So, in your practice, do you often receive doctors' reports?

A. I do.

Q. Do you receive vocational assessments, for example?

A. Yes, I do.

Q. Have you ever seen any functional ability evaluations?

A. Yea.

Q. You could get even the parties' expert reports. Right?

A. Yeah.

Q. Now, if we go to page 23 of your appendix....

A. Uh-huh.

Q. For your first report, sir.

A. [Indiscernible.]

MR. ASSELIN: [Indiscernible]for the Court – that first report is dated September 27, 2023.

THE COURT: Okay, and that's at....

MR. ASSELIN: Page 23 of 31.

THE COURT: And that's at Tab....

MR. ASSELIN: That is, between road rage, Your Honour, at Tabs one through....

THE COURT: Okay. And page - sorry?
MR. ASSELIN: Twenty-three.
THE COURT: Twenty-three.
A. Okay. I have mine.
Q. One moment.
THE COURT: Okay.
MR. ASSELIN: Now, this is the kind of document that you received from Ms. Grujic's lawyer. Correct?
A. That is true.
Q. These are all the documents that you had to - got your report.
A. That is true.
Q. And you rely on those.
A. That is true.
Q. So, if you look at the medical documents here is it that you only had numbers 9, 10, 11, in terms of medical records?
A. That is true.
Q. The rest of it are lay witness statements. Yes? And some financial records.
A. That is true.
Q. You didn't receive an expert report, from either side of this case.
A. There were some expert reports.
Q. The medical expert reports.
A. There have been other reports I received.
Q. Right. You didn't receive anything then.
A. No.
Q. Okay. So, you had the neuro-psychological report of Dr. Mad(ph), and then it looks like you had two single entries from Dr. Pubben.
A. Mm?

Q. Yes. Ten and eleven.
A. That is true.
Q. But they're just single family doctor's visits. Yes?
A. That is true.
Q. So, there's not a whole binder of practical notes.
A. That is true.
Q. So, you would have to rely, in this case, it's a bit thin on the medical records. Do you agree with me?
A. I agree.
Q. So, in this case, because the medical records are thin, you had to rely especially on what the plaintiff tells you. Yes?
A. Yes.
Q. And you had to rely especially on what the plaintiff's lawyer told you.
A. That is true.
Q. And that's regarding Ms. Grujic's ability or inability to work. Right?
A. Right.
Q. So, you relied on what the plaintiff and the plaintiff's lawyer told you about her ability or inability to work.
A. That is true.
Q. And that formed the assumption in your report.
A. That is true.
Q. And you relied on the assumptions to form your opinion.
A. That is true.
Q. And that's how you get to the numbers – dollars and cents. Right, Mr. Gupta?

A. That is true.
Q. Okay. Let's go to that first report. Now that we're still at Tab 1C.
THE COURT: Yes. Mm-hmm.
Q. Mr. Gupta, do you have your report there?
A. Yes, I do.
Q. What [indiscernible] my first report again.
A. Okay.
Q. Is this the first draft of the report?
A. Second, I believe.
Q. How is it different from the first one? I don't have the first one.
A. The assumptions were different, if I [indiscernible].
Q. Okay. Do you have that draft report in front of you? Can you help us out?
A. Let me look for it. If I have it. Normally I don't keep the draft.
Q. Why is that?
A. Let me look for it. Yes, I have it.
Q. Okay. Is that – I have a number of questions without even seeing it but does that first draft – so there's one draft. Yes?
A. That's right.
Q. And then there's the final report that we've seen, September 27, 2023.
A. Okay.
Q. Yes.
A. Let me check the date. Yes. September 27, one is the date.
Q. Okay. So just one prior draft[indiscernible].
A. I think so.

Q. Okay. What were the assumptions in - just generally, in that first draft?

A. Well that her income would have grown with her....

Q. Let me just jump right to it.

A. Okay.

Q. In that first draft were you retained with the 2013 and 2019 accidents?

A. That is true.

Q. Okay. So, that doesn't change from the first draft to the final version.

A. That is true.

Q. So, what are the assumptions that change between the draft and the final?

A. The main assumptions that changed was how much - how much her income would have grown by number of reductions she would have done.

Q. Okay. So, if I recall, in your final first report you say that from 2013 to 2023, she would have grown her business 100 percent.

A. That is true.

Q. In terms of deals and money income.

A. That is true.

Q. What's the assumption in the draft report, Mr. Gupta?

A. Ninety percent. Fifty percent.

Q. Okay. So, any other different assumption from the first draft?

A. I don't think so.

Q. All right. So, if you go with the first draft, then your numbers at the end of the day are more than your final version.

A. That is true.

Q. Who gave you the fifty percent number in the past?

A. Ms. Grujic.

THE COURT: Pardon? I didn't hear that.

MR. ASSELIN: Ms. Grujic.

THE COURT: The Plaintiff? Is that what you said?

A. That's correct.

THE COURT: That's good.

MR. ASSELIN: Q. Who asked for the change from 50 percent to 100 percent [indiscernible]? Do you remember who it was?

A. Ms. Grujic.

Q. Do you remember the circumstances of why Ms. Grujic wanted you to just double her income from 2013 to 2023?

A. She thought it was too – too conservative to – to keep the numbers that it was normally and the salary exactly what it was way [indiscernible] much more than that.

Q. And do you know how much time passes between the 50 percent number and the 100 percent number, when she came back to you? Like two weeks later or two days later?

A. Few days. I don't remember exactly.

Q. So, you got the first report with lower numbers and sent it to Ms. Grujic and Ms. Vartanian.

A. That is true.

Q. And then you speak with only the plaintiff about increasing it to 100 percent?

A. No, I spoke with Ms. Vartanian as well.

Q. Okay. Did you have any concerns, as an actuary, to increase that number from 50 percent to 100 percent?

A. That is her call. That is her business and [indiscernible].

Q. Well, you're also making an – an opinion, right?
A. That is true.
Q. And in your report, I can take it, you have an interest just above where you sign it [indiscernible] – perhaps you can help me find it so you can in your final first report where you said, "I adopt these assumptions and I think they're reasonable, based on my actuarial experience", I think I might have found it. One moment. Does that ring a bell to you, Mr. Gupta?
A. It does.
Q. Okay. So....
A. [Indiscernible.]
Q. It's page 5. So, you sign page five? Right?
A. That is true.
Q. Looking for it. You say, "It is my opinion that the assumptions and methods I have taken response that – sorry – let me start over. It is my opinion that the assumptions and methods I have taken responsibility are appropriate in the circumstances of this case and for the purpose of this report."
A. That is true.
Q. The assumptions have become more of your account. Wherever do you take responsibility for the accounts?
THE COURT: I think responsibility for the assumption.
MR. ASSELIN: You have to take responsibility for the assumptions because they form your opinion. No?
A. I still take responsibility for the assumption.
Q. Okay. So, if you had concerns that just changing this number was overreaching.
A. That is her call.

Q. Okay. What's your call then? An actuary that is? Because we have the first report that is 50 percent, and then we have the second report that's 100 percent. You're doubling it.

A. That is true.

Q. Okay. So, when you went from 50 percent to 100 percent, did you do any research in between to find out is this even possible? Can it filter double their income?

A. No, I did not do any research.

Q. You just took Ms. Grujic or Ms. Vartanian's number or opinion and ran – you ran it through the system. Right?

A. That is true.

Q. No research.

A. No research.

Q. You didn't talk to any other builders.

A. I didn't talk to any other realtor. No.

Q. Do you have concerns now about building that number without even questioning it?

A. Hmm, I don't have opinion. That is her call. It's – he expected her to govern and it's not – it is reasonable. It's all [indiscernible] in 10 years. It's possible.

Q. Anything's possible. Why not 200 percent? There's a real estate boom. People are making – that we've heard at this trial, a ton of money in the real estate world. Why not 200 percent to be in touch?

MS. VARTANIAN: That's argumentative.

MR. VARTANIAN: Argumentative.

THE COURT: I think we can move on.

MR. ASSELIN: We can pass - taken the 200 percent number.

MS. VARTANIAN: No. I objected:

MR. VARTANIAN: [Indiscernible]

THE COURT: No. But he's asking a different – he's raising it differently.

MR. ASSELIN: Q. If Ms. Grujic came back asking for that 50 percent number and said, you know what, let's go with the 200 percent, would you have taken that? If she would have came in that cheap, would you have done that?

MS. VARTANIAN: That's purely speculative, and I mean...

THE COURT: I think he was answering it.

MR. ASSELIN: Mr. Gupta, would you have taken the 200 percent number?

A. I would have asked her like, would you give me some [indiscernible] some reasonable – reasonable [indiscernible] for that. Like I do not [indiscernible].

Q. But you would have wanted some assurances on that 200 percent affirm to make you feel comfortable at the time of your report. Right?

A. That is true.

Q. But you didn't need any assurances for the 100 percent though. Right?

A. That is true.

Q. Okay. Let's go to page three of your report.

THE COURT: Page three.

MR. ASSELIN: Yes. Page three of thirty-one of...

THE COURT: Yeah.

MR. ASSELIN: ...the first report.

A. All good.

Q. I'm going to read that first paragraph.

> *[As Read]* This report has been requested by Ms. Lena Vartinian, counsel for Ms. Grujic, for the purpose of calculating the capitalized value of

Ms. Grujic's loss of income in relation to two motor vehicle accidents in which she was involved on December 7, 2013.

You see that?

A. That is true. I see that.

Q. Okay. And then you in parenthesis "MVA One". That's what you call. Yes.

A. Yeah.

Q. And on March 15, 2019, you put "MVA Two".

A. That is true.

Q. Okay. So, reading this paragraph, you were retained by the plaintiff's lawyer to calculate loss of income based on two accidents. Yes?

A. Yes.

Q. That's the scope of your retainer. That's your job.

A. Right.

Q. Okay. Let's go to same page, second last paragraph, starting with "after her accidents", plural.

THE COURT: You said, "the second page"?

MR. ASSELIN: Sorry, same page....

THE COURT: Same page? Okay.

MR. ASSELIN: Second last...

THE COURT: Okay.

MR. ASSELIN: ...paragraph.

THE COURT: Very good. Okay.

A. Okay.

Q. "After her accidents, plural, in sites of the injuries related to the accidents, Ms. Grujic returned to work as a real estate agent out of her [indiscernible]". You remember that, right?

A. Right.

Q. So, based on this you understood she has injuries resulting from, as you call it, "mva one" and "mva two". Yes?

A. Yes.

Q. Well, let's go to this last paragraph right beneath this. "If not for the accidents, as advised by Ms. Grujic for the course of this report, it's assumed that she would have continued working as a real estate agent up to age 70 to earn and to keep busy? You wrote that?

A. Yes, I – I wrote that.

Q. Okay. So, this – this means that as a result of mva one and mva two it has – those two accidents have affected her retiring age essentially. Right? It's the assumption here?

A. Her retirement age? No. At this time, actually it's called – if there was no accident.

Q. Well, it doesn't say that 'cause you just said accidents didn't do it. This paragraph said but for the accidents essentially.

A. Mm-hnn.

Q. She would have continued working as a real estate agent up to age 70. Right?

A. That is true.

Q. Okay. So, the idea here is that these two accidents affected her retirement age.

A. No. The two accidents did not affect her retirement age. That's what I said in that paragraph.

Q. So, you said two accidents in that paragraph. If she wasn't – if she wasn't involved in the two accidents, she would have continued working up to age 70.

A. That is what I said.

Q. Okay. But you're saying something different now.

A. No. I'm saying if there was no accident or accidents.

Q. Right. We got to be careful between singular and plural. Are we on the same page?

A. Yes.

Q. Okay. So, you're saying here another – you understand the platform test, right? 'Cause we talk about it....

MS. VARTANIAN: You got me, Your Honour. It's – he's already – he asked and answered the question...

MR. VARTANIAN: Four different ways.

MS. VARTANIAN: ...four different ways.

THE COURT: Well, I think he – he was – he wasn't sure about the question but this last time he answered it.

MS. VARTANIAN: Yes.

THE COURT: Yes.

MR. ASSELIN: Q. Yes. The answer is no. Okay. We can – we'll deal with it another way, Mr. Gupta. Let's go to page 1 – or sorry page 8 of this report. Summary of data. So, you list the date of the accident, mva one, December 7, 2013.

A. Mm-hmm.

Q. And you list the date of mva number 2, March 15, 2019.

A. That is true.

Q. You would have gotten those dates either from the plaintiff or the plaintiff's counsel. Yes?

A. Yeah.

Q. Let's talk about valuation date. Valuation date is important. Yes?

A. Yes.

Q. Because it frames your past loss of income time period.

A. That is true.

Q. Because past loss of income is calculated differently than future loss of income under the *Insurance Act.*

A. That is true.

Q. Okay. So, past loss of income is anything from one week after the accident until date of trial.

A. That is true.

Q. And that income is calculated at 70 percent.

A. That is true.

Q. Okay. Future income is after trial. Yes?

A. Yes.

Q. At 100 percent.

A. That is true.

Q. Okay. So, who gave you the valuation date of November 15, 2023?

A. Ms. Vartanian.

Q. Okay. And then under that you calculate rather precisely the plaintiff's age at the time of mva one and her age at the time of mva two. Yes?

A. Yeah. That is true.

Q. And then you calculate her age at the date of valuation.

A. That is true.

Q. Okay. So, let's talk about that pass loss of income time period, 'cause you talk about it right underneath. Do you see it? Period of pass losses.

A. That is true.

Q. Okay. So, your pass loss of income window, as I call it.

A. Mm-hmm.

Q. Or as I guess we could all call it, is December 14, – sorry, December 14, 2013 until November 15, 2023.

A. That is true.

Q. And November 15, 2023, was maybe an old trial date and something happened to the trial date. Yes. Something like that.

A. Something like that.

Q. Okay. So, it's roughly ten years of pass loss of income.

A. That is – yeah, that is true.

Q. That's your window to calculate 70 percent of Ms. Grujic's income.

A. That is true.

Q. Okay. Future income at 100 percent is from your valuation date to retirement age, whenever that might be.

A. That is true.

Q. So, this is the relevant data for your calculations. Yes?

A. Yeah.

Q. Did you know about a 2023 car accident when you drafted this report?

A. I'd received an email saying there was bunch of accidents. I don't remember the exact dates.

Q. Okay. So, you don't know if 2023 was on there?

A. I don't remember.

Q. Okay. But regardless, you didn't consider the 2023 car accident in this report. Right?

A. No.

Q. So, it's not relevant?

A. No.

Q. All the relevant dates are in this summary of data. Yes?

A. That is true.

Q. Okay. So, in the summary of data, the 2019 accident is relevant?

A. That is true.
Q. Okay. Did you know that Ms. Grujic's daughter they loss for the 2019 accident?
A. No, I don't.
Q. Did you assume, when you wrote this report, that there must be a lawsuit out there for the...
A. No, I...
Q. ...2019...
A. ...I - no, I did not think of it.
Q. Did you know why you were calculating income loss involving the 2019 accident if there wasn't a lawsuit?
A. No. I was relying on Ms. Vartanian's...
Q. Retainer record.
A. ...retainer.
Q. Right. The retainer asked you to calulate pass loss of income for two accidents. Yes?
A. That is true.
Q. Okay. So, do you agree with me, Mr. Gupta, that the overarching assumption of this report is that Ms. Grujic was involved in two car accidents. Yes?
A. Yeah.
Q. And she had injuries from two car accidents?
A. That is true.
Q. And those injuries affected her employment?
A. That is true.
Q. Those injuries affected her income.
A. That is true.
Q. Those injuries affected her ability to work in the future, as you put it.
A. That is true.
Q. Now, let's go to your pass loss of income chart, Mr. Gupta. Page six, same first report.

A. Okay.
Q. Okay. So, this is a chart of page six.
A. Okay.
Q. This is a chart of your calculation of the plaintiff's pass loss of income to the valuation date.
A. That is true.
Q. Encompassing two accidents.
A. That is true.
Q. So again, that pass loss of income time period is December 14, 2013 to November 15, 2023.
A. That is true.
Q. So, we got 10 years of pass loss of income. Yes?
A. Mm-hmm.
Q. Yes?
A. All right.
Q. With two accidents mixed in there.
A. That is true.
Q. Okay. Now, on page six you call it "accumulated value of pass lossess". I haven't seen that before, so does that just mean accumulated because it's two accidents?
A. That is true.
Q. Okay. 'Cause otherwise if it was one accident you'd just say here's your pass loss of income.
A. No, can I give it – it's just a mathematical term, like, the sum of all pass losses.
Q. Okay. I thought you just said accumulated is because there's two accidents there.
A. No.
Q. Okay. So, in the chart you agree with me that it says, "income without accidents" plural – "income after accidents" plural. Right?
A. That is true.

Q. So that number – your pass loss of income number for that ten years is $1,093,901.00.
A. That is true.
Q. For both accidents.
A. That is true.
Q. Does this chart contain a pass loss of income number solely for the 2013 accident?
A. No.
Q. Okay. So, there's no number that you can point to, on this chart, that says, "This is her pass loss of income for 2013 only."
A. That is true. No.
Q. If the assumption is that the 2019 accident affected her work, then isn't the relevant time period we should be looking at pass of loss December 2013 to 2019 accident.
MS. VARTANIAN: Is that – was that established? That the 2019 accident affected her ability to work?
MR. ASSELIN: He just admitted it. It's one of the assumptions. We covered it.
THE COURT: He already [indiscernible] it. He already stated that – that he had taken that into account and he had the injuries in that – into account.
MR. ASSELIN: Q. So, I'll – I'll repeat my question, Mr. Gupta, for you.
THE COURT: I think your client had also indicated her injuries were in the 2019 accident.
MR. ASSELIN: Q. If one of your assumptions is that the 2019 accident affected her work, then isn't the relevant time period we should be looking at for pass loss of income go from December 2013 to the date of that 2019 accident?

A. I'd been separate the two.

Q. I agree with you. I'm asking you about the relevant time period for this lawsuit that's currently in trial. If your assumption is that the 2019 accident affected her injuries. You already said you're not a doctor. Right?

A. That is true.

Q. So, you can't tell me what injuries are from what.

A. No, I can't.

Q. You can't tell me what injuries affect employment which way or the other. Right?

A. That is true.

Q. Okay. So, if the assumption is that the 2019 accident affected her injuries, then shouldn't the relevant time period for pass loss of time be from December 2013 to the date of that 2019 accident?

A. It depends. Sometimes I separate the two losses. Sometimes I don't.

THE COURT: Sometimes - I'm sorry - didn't hear that.

A. Sometimes I don't separate the influence of two accidents. I just calculate the address if they able to set out however they want to discuss it. I don't get into the middle of which injury affected what.

MR. ASSELIN: Q. Okay. For - since we're sitting here in this trial, to calculate the plaintiff's loss of income for the December 2013 accident, only, are you with me?

A. Yeah.

Q. Do you agree with me that a more relevant time period for the pass loss of income would be from December 2013 to the date of that 2019 accident?

A. That is a time frame when only accident was responsible and from December 2019 – from March 2019 to November 2023 both accidents were responsible.

Q. Okay. Mr. Gupta, you were retained in this lawsuit. Right.

A. That is true.

Q. And you agree that....

THE COURT: This lawsuit with respect to...

MR. ASSELIN: The 2013...

THE COURT: The 2013 accident only.

MR. ASSELIN: Right.

Q. Mr. Gupta.

A. [Indiscernible].

Q. I'm – I'm telling you that one of the issues that this jury needs to decide is what is the plaintiff's pass loss of income for this accident only. Are you with me?

A. I'm with you, yeah.

Q. You agree with me that you can't give that answer based on your first report.

A. No, I can't.

Q. It's not in there.

A. It's not in there.

Q. You didn't run the numbers for the relevant time period. Do you agree?

A. I agree.

Q. Okay. Let's go to page nine.

A. Okay.

Q. Now you set out the trajectory of the plaintiff's – kind of paraphrasing here – career before the December 2013 accident. Right?

A. That is true.

Q. Okay. And that would be an accurate thing to look at. How did she do before the accident?

A. That is true.

Q. All right. And then if we jump down to the last kind of bolded heading there. "If not for the accidents", plural, right?

A. Right.

Q. "It is assumed that she would have continued working full time." So, again you're blending the two accidents. Right? In your assumptions.

A. I'm blending the two accidents. That's right.

Q. Okay. And that's an assumption. Right.

A. That's an assumption. Yes.

Q. And you relied on that assumption in forming your opinion.

A. That is true.

Q. Let's go to page 13, Mr. Gupta. I just, Your Honour. It's 1:10 nearly, and we have the jury coming back at 1:15.

THE COURT: Mr. Registrar, do you see the next witness in the waiting room?

MR. REGISTRAR: There's no one guarding it.

THE COURT: Okay. So, we will, at this point, continue.

MR. ASSELIN: Okay.

Q. Page 13, Mr. Gupta.

A. Okay.

THE COURT: Mr. Constable, do we have to – Mr. Constable do we have to let them know. Well, we'll – we'll – we'll let them know when we want to bring the jury in. Okay? We – we'll let them know when we want the jury.

COURT OFFICER: Okay.
THE COURT: And we – we – we're going to continue with this first. Good. Okay. Please continue.
MR. ASSELIN: Thank you.
Q. Page 13, Mr. Gupta, at the top.
A. Uh –huh.
Q. Future incomes – sorry, future earnings without the accidents, plural. You meant both accidents. Yes.
A. Yes.
Q. Okay. So, again, we talked about her pass loss of income, page 13. We're now on her future income. So, her future income number is blended between the two accidents. Yes?
A. That is true.
Q. That's what you were asked to do?
A. That's right.
Q. Okay. Now, if we look under assumptions.
A. Mm-hmm.
Q. Kind of mid-way down the page, Mr. Gupta.
A. Yeah.
Q. As of September 18, 2023, which is probably around the date you were retained.
A. No, no. That is when I completed the report. I was working on the report.
Q. Okay. Working – yeah, 'cause you released the report nine days later. Yes?
A. Yes.
Q. Okay. So, under assumptions, as of September 18, 2023, due to the injuries related to both of the accidents, Ms. Grujic was able to work only at a reduced capacity. You see that?
A. That is right. I see that.
Q. Again, we're blending the two, right?
A. We're blending the two.

Q. Okay. Let's have a deeper dive into your future income numbers. Page 7.

A. Okay.

Q. Now you say at the top of page 7, present value of gross future losses. Do you use the word gross because that's two accidents?

A. No. Gross is because it's made of not – it's not made of taxes or anything. It's 100 percent.

Q. Oh. So, your future income number is at 100 percent income, not taking into account her expenses?

A. Not taking into account her taxes.

Q. I see. But it takes into her account her expenses 'cause she's self employed, right?

A. No, no. Does....

Q. That's okay. That's another issue for another day. If we just look at the chart though.

A. Okay.

Q. This is your chart of future income for the plaintiff.

A. That is true.

Q. And typically, at trial, you would present this chart to the trier of fact. The judge or the jury.

A. That is true.

Q. Say here are my numbers for future income. Yes?

A. Yeah.

Q. So, you agree with me that this chart takes into account both accidents.

A. That is true.

Q. And to arrive at your numbers of, let's call is 3.8 million dollars.

A. Mm-hmm.

Q. That number includes both car accidents.

A. That is true.
Q. 'Cause she was injured in both car accidents, as you assumed. Yes?
A. That is true.
Q. So, both accidents affect her future income claim or numbers.
A. That is true.
Q. All right. Page 10.
A. Okay.
Q. You say, "If not for the accidents", on the top of page 10, and then you make other assumptions. Right.
A. Right.
Q. Okay. So, again these assumptions here on page 10 are taking into account both car accidents.
A. Both car accidents.
Q. Okay. Now, I could fast forward a little bit if - but I'm going to put it to you, Mr. Gupta, that this first report, throughout, references two car accidents. Right?
A. That - yeah.
Q. Okay.
A. True.
Q. All of your opinions in this report are based on two car accidents.
A. That is true.
Q. Okay. There's no page in this report where it only deals with one or the other.
A. That is true.
Q. Now, if we go to page 16.
A. Okay.
Q. That first bullet point.
A. Mm-hmm.

Q. As of September 18, 2023, due to – due to the injuries related to both of the accidents, Ms. Grujic was able to work only at a reduced capacity. You see that?

A. Yeah.

Q. Okay. And then – one, two, three, four – the fourth bullet point, Mr. Gupta.

A. Mm-hmm.

Q. Due to her accident-related injuries – now I assume that means both accident-related injuries. Right?

A. That is true.

Q. You just didn't put accidents-related injuries 'cause it sounds funny and looks weird, right?

A. Right.

Q. Right. Ms. Grujic's working capacity would be lower relative to her pre-accident working capacity. You see that?

A. Yeah.

Q. And then you cite some, I'm going to call them reports or Stats Canada reports on people with impairments or disabilities in the workplace.

A. That is true.

Q. And that would be relevant if somebody had a disability or an impairment in the workplace. It would be relevant to your kind of assessment of the person.

A. Would it be easier to be questioned.

Q. Sure. So, if somebody – you're citing the study for a reason. Right?

A. Right.

Q. You're citing the study because it is your assumption that Ms. Grujic has a disability in the workplace, and those with disabilities in the workplace tend to have lower incomes. They could have earlier retirements. They could have

competitiveness issues. Those types of things. Right? Generally speaking.

A. Generally speaking. Yes.

Q. Okay. Now, let's go to your supplementary report.

...THE COURT AND REPORTER DISCUSSING WITNESS

THE COURT: Mr. Gupta, there is one witness that is only available between now and 2:00.

A. Okay.

THE COURT: Is it possible for you to take a break until 2:00 and come back at 2:00?

A. Oh, for sure.

THE COURT: Okay. All right. .

A. Thank you.

Q. So, why don't we – you can just – you can sign off and – and log in again or you can just – it's probably best to sign off and log in again.

A. Okay.

THE COURT: All right.

A. Thank you.

THE COURT: So, we'll – we'll see you at 2:00.

A. Okay. Thank you.

THE COURT: Thank you very much, Mr. Gupta.

A. Thank you very much.

THE COURT: So, we will not bring the jury in so they can hear Ms. McCloud – Ms. McCord – Ms. McCord, I'm sorry.

CLERK REGISTRAR: Good.

THE COURT: Thank you.

R E C E S S

U P O N R E S U M I N G:

MR. ASSELIN: Q. Hi, Mr. Gupta -- Gupta. Thank you. I believe the -- where we left off was the -- the two accidents that we talked about are the -- the basis for your first report, is that right?

A. That is true.

Q. Okay. So, if we can go to your supplementary report.

MR. ASSELIN: And, Your Honour, I'm at 1D of your brief.

THE COURT: Yes, I have that.

MR. ASSELIN: Page 3 of 12.

THE COURT: Okay.

THE WITNESS: Okay.

MR. ASSELIN: Q. Do you have your supplementary report, Mr. Gupta, of May 10th, 2024?

A. Let -- let me open it.

Q. Page 3 of your supplementary, Mr. Gupta.

A. Let me open it. I'm opening it.

Q. Okay.

A. Okay.

Q. Okay. So, this is your signature page, yes?

A. That is true.

Q. Okay. And you date it May 10, 2024?

A. Yeah.

Q. So, that’s about a month ago. And --

A. Yeah.

Q. -- this report was -- this supplementary report of yours was requested by Ms. Vartanian, correct?

A. That is true.

Q. And you reviewed the reports of ADS Forensic, there are two of them, yes?

A. That is true.

Q. And those reports were commissioned by the defence, you understood that?

A. Right.

Q. Okay. Now, three lines up just kind of in the middle of the sentence, "To calculate Ms. Grujic's loss of income due to her two motor vehicle accidents on December 7, 2013, and March 15, 2019." So, in your supplementary report you're still calculating loss of income related to both accidents?

A. That is true.

Q. You understood that in the ADS Forensics report Ms. Seaquist points out that you're calculating loss of income for two accidents, remember reading that?

A. Yeah.

Q. Okay. And after reading that ADS Forensic report you're still set on calculating loss of income for two accidents, do I have that right?

A. Yeah.

Q. Okay. Now, if we return to your assumptions 'cause we talked about this earlier that your assumptions are important, right?

A. That is true.

Q. We talked about this earlier I believe, as well, if an underlying assumption -- assumption changes then your opinion can change.

A. That is true.

Q. There's a good chance your opinion might change if an assumption changes?

A. Yeah, that is true.

Q. And if your assumption changes then your numbers change?

A. That is true.

Q. Now, if you change your assumption --

A. Okay.

Q. -- should you provide perhaps an explanation for it? Let me -- let me rephrase, Mr. Gupta. If we're dealing with multiple reports over a period of time, which is common in personal injury litigation, right?

A. Not necessarily but it can happen.

Q. Things change over time, right?

A. Right.

Q. Plaintiffs can -- can get employed, they can get unemployed, loss of income can change based on a number of factors.

A. That is true.

Q. If one of your assumptions changes, should you provide an explanation as an expert for the change of the assumption?

A. That is true.

Q. Now, let's talk about your new report. What changes did you make in the new report? I'm talking about the one served today, June -- if my watch is right, June 13, 2024?

A. So, I removed the reference to March 2019 accident.

Q. Right. So, you removed one of the major assumptions from your first [indiscernible] -- from -- sorry, from your first report, correct?

A. Correct.

Q. Did you provide an explanation for why you removed that major assumption from your first report?

A. No, I did not.

Q. So, all you did with the new report was remove and I still haven't read it yet, so you tell me, did you only remove any reference to the 2019 accident?

A. That is true.

Q. But your numbers stay the same?

A. That is true.
Q. Did you know that the plaintiff applied for catastrophic impairment as a result of the 2019 accident?
A. No, I did not, no.
Q. Are you familiar with what catastrophic impairment is in the accident benefits world?
A. Right.
Q. It generally means a plaintiff, if approved and all that, has sustained rather significant injuries, whether mental, psychological, or physical?
A. That is true.
Q. Sometimes life altering injuries?
A. That is true.
Q. So, to recap you relied on the assumptions you made in your first report, yes?
A. Right.
Q. Now, you remove one of those major assumptions, yes?
A. That is true.
Q. There's no change to your number?
A. That is true.
Q. Earlier we talked about you -- remember we talked about the increase in the plaintiff's business from 50 percent to 100 percent to 200 percent?
A. No, we did not talk about 200 percent.
Q. Well, we talked about the hypothetical 200 percent, remember that?
THE COURT: You really talked about the --
THE WITNESS: [Indiscernible].
THE COURT: -- 50 and the 100.

MR. ASSELIN: Q. Right. So, we talked about the 50 percent and the 100 percent were numbers coming from the plaintiff, correct?

A. That is true.

Q. And then I asked you a question, what if the plaintiff asked you to put it at 200 percent would you change it, and you said you would want some assurances on that, right?

A. That is true.

Q. Did you get any assurances from anybody before removing the 2019 accident from your first report? And by that I mean did you get any assurances that if we ignore the 2019 accident that the numbers stay the same?

A. No, I did not.

Q. Okay. Did you refer to any medical records about any impact the 2019 accident had?

A. No, I did not.

Q. So, you have no idea how significant or insignificant the 2019 accident is on the plaintiff's ability to work?

A. No, I did not.

Q. Now, if we go back to your report, your first report, I'm sorry, Mr. Gupta.

A. Mm-hmm.

Q. Your first report page 7.

A. Okay.

Q. Tab 1 -- 1C, Your Honour. This is your chart of the plaintiff's future income, right?

A. That is true.

Q. And this -- in your first report this is your projected future income of the plaintiff, page 7. So, this chart is the -- your opinion on the projected future income of the plaintiff as a result of two car accidents?

A. That is true.

Q. So, on this chart here, in the first report can you tell me what the plaintiff's loss of future income is as a result of the 2013 accident only?

A. No, I cannot.

Q. There's no number?

A. No number.

Q. So, we talked earlier about is there a number in your report, your first report of the plaintiff's loss of income as a result of the 2013 accident only and your answer was no, do you remember that?

A. Right.

Q. So, if Your Honour wants an answer from you as to what the past loss of income is from 2013 accident only, you are incapable of answering that question?

A. That is true.

Q. If Her Honour wants an answer from you or the jury about what is your opinion on the plaintiff's loss of future income as a result of the 2013 accident only, you are incapable of giving an opinion on that based on the first report?

A. That is true.

Q. But now there's -- your opinions have new life; do you agree with me?

A. Right. I agree with you.

Q. If you were to come to court to testify with your new third report all of a sudden you have an answer to those two very important questions, do you agree with me?

A. I do.

Q. We had a discussion in court yesterday and you're probably aware, Mr. Gupta, of the concerns we had with your first report, are you aware that there was a discussion with Her Honour yesterday?

A. No.
Q. Well, did somebody call you last night about your first report?
A. Right.
Q. Either the plaintiff or the plaintiff's counsel?
A. Right.
Q. And there was a change requested of you, right?
A. That is true.
Q. And the change was can you remove the 2019 accident from your loss of income report?
A. That is true.
Q. And you did it?
A. I did.
Q. Did you ask any questions of anyone?
A. No, I did not.
Q. So, in less than 24 hours the plaintiff or the plaintiff counsel asks you to change a fundamental assumption in your report, right, and you create a new report based on that request to change?
A. That is true.
Q. Without asking a question, am I right?
A. You're right.
Q. And it's your opinion that despite removing a fundamental assumption in your report your opinion stays the same?
A. That is true.
Q. So, if plaintiff's counsel or the plaintiff had asked you to let's take out the 2013 accident and run the numbers, would you have done that, as well?
MR. VARTANIAN: Objection.
THE COURT: I don't think that's necessary.
MR. ASSELIN: Q. Let's go to page 19 of your first report, Mr. Gupta.

A. Okay.
Q. Page 19 at the bottom last paragraph.
A. Okay.
Q. First report, again, right?
A. Right.
Q. At the time of writing this report, no information is available to me regarding any unfavourable -- sorry -- unfavourable health conditions which could affect her standard disability incidents' rates.
THE COURT: I'm sorry, where are you reading?
MR. ASSELIN: Page 19 of the first report --
THE COURT: Yes.
MR. ASSELIN: -- last paragraph. At the beginning of the last paragraph.
THE COURT: Okay.
MR. ASSELIN: Q. I'll take it again, Mr. Gupta. At the time of writing this report, no information is available to me regarding any unfavourable health conditions which could affect her standard disability incidents' rates.
Do you see it?
A. Right. I see that.
Q. 'Cause you had no other information that the plaintiff was involved in a 2023 accident or if she had any other detrimental health issues going on?
A. Right. That is true.
Q. Okay. That line on page 19 of your first report, does that also appear in your second report? Or sorry, your -- your brand new report?
A. That is true.

Q. Okay. So, can you actually say that in your brand new report? I'll take it again. Let's think of your brand new report delivered today.

> At the time of writing this report, today, no information is available to me regarding any unfavourable health conditions which could affect her standard disability incidents' rates.

In your brand new report can you say that?

A. Yeah, I am not aware of any -- her health conditions.

Q. You are though, right? 'Cause your new report doesn't mention the 2019 accident at all, am I right about that?

A. Right.

Q. Okay. So, how can you say today that you're not aware of any unfavourable health conditions 'cause you know about the 2019 accident, right?

A. I do.

Q. You can't forget about it, right?

A. That is true.

Q. It was a major pillar of your first report, right?

A. Right.

Q. So, this statement on page 19 in your new report is untrue, correct?

A. Correct.

Q. Now, if we go back to Form 53, did you sign a new Form 53 after delivering the brand new report, or are we relying on the old one from May 10, 2024?

A. I did not sign a new one.

Q. Okay. So, under Form 53 you acknowledged earlier that you had a duty to provide evidence to the court in this proceeding?

A. That is true.

Q. And that opinion evidence from you was to be fair?

A. That is true.

Q. It was to be objective?

A. That is true.

Q. It was to be non-partisan?

A. That is true.

Q. Do you agree with me now that with this brand new report you were incapable of complying with Rule 53? Is your --

A. [Indiscernible] --

Q. Sorry.

A. [Indiscernible] doesn't tell me about the health conditions.

Q. I want to go to your Rule 53.

THE COURT: I -- I -- I didn't hear that. I'm sorry.

MR. ASSELIN: I want to go to your 53 --

THE COURT: Could you, please, repeat what you said, Mr. Gupta?

THE WITNESS: I -- I said that the 2019 accident didn't tell me any particular health conditions.

MR. ASSELIN: Q. We already went over it though. It was a major pillar of your first report, right?

A. Right.

Q. You removed the major pillar of your report, and the house is still standing according to you, is that right?

A. Right.

Q. Do you agree with me that that's impossible?

A. I agree.

Q. So, do you agree with me that you are now incapable of following your expert duties under Form 53?

A. You're right.

MR. ASSELIN: Thank you.

THE COURT: Do you have any re-examination?

RE-EXAMINATION BY MS. VARTANIAN:

Q. Hi, Vivek.

A. Hi.

Q. So, yesterday when we had a conversation about the issues that my friends had with your report, what was -- what was the first question that I asked before we proceeded with any changes, do you recall?

A. That would it change any numbers?

Q. Correct. So, the -- so, just to be clear, if we were to remove the contingency of the 2019 accident, would it impact the numbers that you had provided, correct?

A. Right.

Q. Okay. And do you recall your answer?

A. Yes.

Q. And that -- was that it would not make any impact in terms of the assessment of the past or future income loss, correct?

A. Correct.

Q. Okay. And then in terms of the first draft report when there was a request with regard to the 50 percent to raise it to 100 percent, do you recall having conversations with Zorica about that?

A. Yes, I did.

Q. Okay. And do you recall the duration of those conversations? Were they five minute -- like, if it helps, was it something like five minutes, or was it closer to half an hour?

A. It was a short one.

Q. A short one. And then in terms of her ongoing discussions regarding her income loss and the factors regarding that, do you recall the duration of those conversations?

A. Those were kind of in betweenish, 15, 20 minutes.

Q. Right. And do you recall how many conversations you had with her?

A. A few.

Q. A few. Okay. So, in terms of her proposing the increase to 100 percent, was that something that was based on the information she provided to you, or was it also based on the documentation you had in your possession?

A. It was based on the information she provided to me.

Q. Okay. And then whenever you do economic loss reports, is it -- is it standard at any point for lawyers to provide you with medical records or to provide you, you know, detailed information regarding the injuries that they're seeking an economic loss report with regard to?

A. Sorry, could you, please, repeat your question?

Q. Sure. Do lawyers provide you with medical records whenever they request economic loss reports?

A. They do.

Q. They do. And in term --

A. Many time, many times, not every time.

Q. Okay. And is it -- in terms of the assessment of the economic loss, does that factor into the numbers that you provide in your reports?

A. Could you, please, repeat your question?

Q. Do the medical records impact the number in terms of the economic loss assessment?

A. Medical records impact the assumptions, yes.

Q. They'll impact the assumptions in terms of duration of the economic loss, or is it more to do with the actual numbers?

A. They impact the assumptions regarding the future working capacity, regarding the plaintiff's future working capacity and that impacts the results.

Q. Okay. So, in terms of -- just -- just to kind of go back -- okay. And then in terms of the March 2019 accident, is there a table contained within the --

THE COURT: March 29, what year?

MS. VARTANIAN: Oh, sorry, March 2019. So, the --

THE COURT: I see. Okay.

MS. VARTANIAN: Q. The March 15, 2019, accident, was there -- is there a way within the actual report to calculate the past income loss with regard to the March 15, 20 -- March 15, 2019, accident?

A. I can calculate the past losses, just because based on the dates.

Q. Right.

A. But I can calculate up to 2019 and have a separate number just for 2013 accident from the date of 2013 to 2019, from 2019 forward on I cannot calculate the two numbers.

Q. Right. And in terms of the number that had been provided and with regard to the updated report, it was -- the reason that the report was updated was because there was no change in terms of the future income loss with regard to the 2013 accident, correct?

THE COURT: I don't understand that question.

MS. VARTANIAN: Q. Sorry. Irrespective of the March 2019 accident, the past and future income losses would not have changed for the December 7, 2013, accident?

THE COURT: I still don't understand what you're saying.

MS. VARTANIAN: Q. I guess. So, as per our -- as per the discussion that was had with regard to changing the report, were you -- was -- were you accurate in terms of saying that the income loss past as well as future for the December 7, 2013, accident remained unchanged whether or not there was an accident in March 15 of 2019?

A. That's what I did. I assumed there was no impact on the -- on her income -- on her working capacity due to the accident of 2019, March 2019.

MS. VARTANIAN: Those are my questions. Thank you.

FORM 3

ELECTRONIC CERTIFICATE OF TRANSCRIPT (SUBSECTION 5 (2))

Evidence Act

I, **Charlene Bechard - pages 1-34, Austin Noguera pages 35 to 50** ,
(Name of Authorized Person)

certify that this document is a true and accurate transcript of the recording of

Grujic v Fine in the **Superior Court of Justice**
(Name of Case) *(Name of Court)*

held at **361 University Ave, Toronto**
(Court Address)

taken from Recording 4899_330U-5-1_20240613__10_BROWNCA.dcr , which has been certified in Form 1.

June 16, 2024 *Charlene Bechard & Austin Noguera*
(Date) *(Electronic signature of authorized person)*

_____
(Authorized court transcriptionist's identification number – if applicable)

_____**Ontario** , Canada
(Province of Signing)

A certificate in Form 3 is admissible in evidence and is proof, in the absence of evidence to the contrary, that the transcript is a transcript of the certified recording of evidence and proceedings in the proceeding that is identified in the certificate.

Court File No. CV-17-00588805

SUPERIOR COURT OF JUSTICE

CIVIL COURT

B E T W E E N :

KYRIAKI MOUSTAKIS

Plaintiff

- v. -

REYNALDO AGBUYA

Defendant

E V I D E N C E O F M I C H A E L F O R D

BEFORE THE HONOURABLE JUSTICE L. MERRITT with a Jury
on October 17, 2023, at 330 University Avenue, Toronto, Ontario

APPEARANCES:

D. Dick	Counsel for Kyriaki Moustakis
V. Yang	Counsel for Kyriaki Moustakis
V. Tanner	Counsel for Reynaldo Agbuya
A. Chau	Counsel for Reynaldo Agbuya

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WITNESSES

EXHIBITS

LEGEND

(sic) Indicates preceding word has been reproduced verbatim and is not a transcription error

(ph) Indicates preceding word has been spelled phonetically

(indiscernible) Indicates repeated efforts to decipher what was said without success

. . . Indicates interruption

-- Indicates interruption and/or incomplete thought

Transcript ordered:	October 18, 2023
Transcript completed:	October 21, 2023
Ordering party notified:	October 29, 2023

TUESDAY, OCTOBER 17, 2023

V O I R D I R E

MICHAEL FORD: AFFIRMED

EXAMINATION IN-CHIEF BY MS. TANNER:

Q. Good morning.

A. Good morning.

Q. Dr. Ford, we've all agreed in this room that you are an orthopedic trauma surgeon, and we would like to ask you some questions about your experience with chronic pain and chronic pain syndrome. So, we're just going to narrow that issue and explore it a bit further. So, why don't we start with your experience in assessments of chronic pain.

A. Well, firstly chronic pain is not a specific diagnosis; it's just a label, which means somebody's had pain for more than six weeks. And virtually all of my elective patients have pain for more than six weeks, because they've had to wait months and sometimes years before actually being assessed. But chronic pain syndrome is also not a diagnosis; it's a psychiatric label that was developed in the late eighties to describe those individuals who have an altered behavioural response to chronic pain. And I have to be aware of these conditions because chronic pain by itself is not a huge issue, but chronic pain syndrome where people have developed altered behavioural response is extremely important, because once that occurs it has a significantly negative impact on the outcomes of any treatment. So, we have to be aware of it. You have to recognize it, and I teach this phenomenon to medical students, residents and fellows.

Q. Okay. But how do you teach that?

A. Basically to be familiar with the -- the

parameters, the -- the factors that are typically associated with chronic pain syndrome. So, the vast majority of these -- these people are claimants. We very rarely see, if ever, people with chronic pain syndrome who are not involved in some sort of litigation process. These people typically have pain behaviours that are in excess of what we would expect given the nature of their underlying pathophysiology. In many cases there isn't any organic objective explanation for the behaviour. There is -- doesn't appear to be any specific psychological diagnosis for the features that we associate with chronic pain syndrome such as the duration of their -- their symptoms, the drug use. A lot of these people are typically using large amounts of drugs that invariably are opiates.

Q. And when you say these patients, you -- sorry, these people, do you mean patients?

A. Yes.

Q. Okay.

A. Yeah. People that we are seeing, for instance, and we have to recognize as I said that they have this phenomenon. Indirectly, investigations so it seems that generally objective evidence to explain their presentation, their level of disability far exceed what one would expect. Given the -- the nature of their condition, they often have a lot of non-organic signs on examination. These are maneuvers that typically don't produce pain even in someone who's riddled with cancer, and yet will produce pain in these individuals. So, all of these things have to be recognized, because operating on that patient can have significant negative outcomes.

Q. So, your experience, then, with chronic pain and chronic pain syndrome is directly related to your orthopedic surgery?

A. Correct.

Q. What percentage of your orthopedic patients have chronic pain?

A. I would say almost all of them. All of the elective patients. Obviously, the acute patients -- treatment from trauma patients, their history is very short. But any elective patients, typically spinal patients that I saw, invariably had symptoms from greatly exceeding six weeks, or six months.

Q. And when you are talking about teaching medical students and residents is that in your role as a professor of surgery at the University of Toronto?

A. That's correct.

Q. And that role is ongoing?

A. That's correct.

Q. And is that role also extended to your teaching at the hospital?

A. That's correct.

Q. And have you talked, spoken at all on this topic, for example, at any seminars or conferences?

A. Yes, I have.

Q. Can you tell us about a few of those?

A. Well, specifically the orthopedic residents have what's called “OP Day,” and on a semi-annual basis I was teaching them about disc creations (ph). And so, that discussion typically and invariably took place. And then, of course, bed-side teaching, clinic teaching, teaching in the operating room, specifically, you know, if a resident sees a patient, they would be asked, you know, did you check for non organic signs? What's the history? Is there a litigation involved? And, you know, if they didn't do these things, then, they would receive a stern talking to.

Q. And -- and you're not here to try and give us

psychiatric diagnosis of any sort?

A. Absolutely not, I'm not a psychiatrist.

Q. And you're -- your interests and your -- your specific interest in chronic pain and chronic pain syndrome is from the physical perspective?

A. That's correct.

Q. From the orthopedic perspective?

A. That's correct.

Q. And as a medical doctor?

A. That's correct.

Q. And have you spoken at the Law Society with respect to injuries of the neck and back?

A. I -- yes, I have.

Q. Was that for a Oatley McLeish seminar?

A. That's correct, yes.

Q. And that's a plaintiff group is it not? Oh, my friend is shaking his head, no.

A. Well, they...

Q. You may not know.

A. I -- I can tell you that I do mostly defence (indecipherable).

Q. Oatley McLeish hasn't.

A. I'm pretty sure they haven't. If they have it's very few.

Q. Why don't you tell us, then, a bit about your -- oh how about this. How many pedestrians who have been struck by cars have you treated?

A. Well, I couldn't tell you, it's probably hundreds.

Q. Hundreds. And...

A. If not more. I don't know. It's a lot.

Q. Are you able to testify on the difference

between pain and physical impairment?

A. Absolutely. Firstly the -- the two are not related at all. Physical impairment and the term "impairment" is very specific as defined by the World Health Organization. An impairment is an observable objective evidence of injury. So, for instance the loss of an eye results in a visible impairment. The loss of a lower limb will result in a mobility impairment. Contrary to popular belief, just because you're reporting a pain and functional tolerance limitations or recorded level disability, that does not equate with impairment. The term is often misused. And the reason why impairment is utilized by the courts, is because of of its objective nature.

Q. All right. Are you able to testify to the difference between illness behaviour and disability?

THE COURT: Sorry. I didn't hear that. Could you repeat that question, Ms. Tanner?

MS. TANNER: Q. Are you able to testify to the difference between illness behaviour and disability?

A. Well, there is some overlap; okay? Disability just is -- is first of all it can be objective, like I said, someone who's got loss of a lower limb they will definitely have a mobility disability. But if someone is reporting disability on the basis of pain then that's going to be subjective. Dealing with behaviour is one of the things that can be a manifestation for the purposes of total chronic pain syndrome, because patients develop altered behavioural response to their pain. So, for instance, I mean someone, you know, who -- who says they have back pain and they scream in agony because they've touched -- or you touch their skin and there's no burn, or -- or laceration of anything like that, that's an example of illness behaviour, for instance.

I see, you know, claimants where, you know, the

relative will help them pull on their shoes, pull off their shoes despite the fact that there's no observable objective evidence of post-traumatic pathophysiology that would prevent them, for instances, from doing that.

Q. And can you testify or spoken that you – you treat patients with chronic pain, do you -- have you also had occasion to treat patients with chronic pain syndrome?

A. Well, as I said earlier, one tries not to treat these patients surgically because of the poor outcome, but of course on occasion you will see someone with their -- the features of a chronic pain syndrome who does have some pathology that -- where there is absolute limitation for surgery, than in someone who's, you know, had back for years and years and years and they suddenly develop a Cockayne (sic) syndrome because of an unrelated large disc herniation, you still have to operate on them, but you also temper your expectations with respect to subsequent outcome.

Q. Are you familiar with the criteria for the diagnosis of chronic pain?

A. Yes, I am. I -- I did allude to some of those the -- the seven eight b's, the duration, drug use, dysfunction and these are all -- and I've forgotten some of the other ones, but basically report a level of disability exceeded what one would expect in physical examination findings, non-organic findings, the -- the lack of correlation between reported level of disability and any observable objective pathology that would explain that disability.

Q. Would you agree that there's an overlap between the chronic pain syndrome with respect to psychiatric and, let's say, in your orthopedic specialties?

A. Well, if you're looking at the person as whole, I can't completely separate their -- their psychiatric -- the

psychiatric component of that patient from the physical. To do so would be totally inappropriate. You know, it's not appropriate, for instance, to offer someone elective surgery who's obviously, you know, an untreated schizophrenic who's having hallucinations, or someone who has suicidal ideations. I mean I have to recognize that, for instance, and that would be important for me to do so. It's no different than me having to recognize if somebody has other conditions that are outside of orthopedics like the cardiac condition, or you know, some other neurological condition. I have to be a doctor first and an orthopedic surgeon second.

Q. And have you been qualified in court to testify on the issues of orthopedics as well as chronic pain and chronic pain syndrome?

A. I have.

Q. And was that recent?

A. Yes.

Q. Okay. And on more than one occasion?

A. Yes.

Q. And that was Ontario Superior Court, I take it?

A. Yes.

Q. What about in any other -- in any other, like in arbitrations, or for Workers Compensation, or any other, or primarily Superior Court?

A. Well, obviously arbitration is not court and...

Q. Yes.

A. ...workers comp invariably never goes to court...

Q. Yes.

A. ...in Superior Court, so not in those cases.

Q. Okay. Now, my friend is for sure going to have some questions with respect to your defence medicals.

A. Yes.

Q. Can you explain for us whether, you know, what portion is from the defence perspective, what portion of your independent medical examinations are plaintiff based?

A. With respect to automobile insurance claims, the vast majority is is defence, 99...

THE COURT: Sorry I didn't hear, the vast majority is?

THE WITNESS: Defence, 99 percent. And it's not that I refuse them, it's that invariably initially plaintiff counsel would send them to me but they didn't like my reports because they're objective and other (indecipherable). And so, whatever reason it’s taught with respect to medical malpractice...

MS. TANNER: Q. Yes.

A. ...it’s split fifty-fifty.

Q. That's -- can you explain that, you're medical malpractice medical examinations and they're split fifty-fifty?

A. So, these are doctors, patients, involved in obviously an adverse outcome after -- after treatment. And so, I will see the plaintiffs, the patients invariably, sent by plaintiff counsel for my opinion. And I’ll be sent by the -- the -- I'll be sent briefs from the CNPA, the -- the defence counsel or the doctor. And so, I'll offer opinions for both sides. And it's pretty -- I think it's probably a little bit more than plaintiff, I don't know. I haven't looked at the numbers. There's no reason for me to do that, but I do see a lot of plaintiff cases for the reason that plaintiff counsel does seem to value my -- my opinions in that case, because obviously they don't want to embark on a lengthy expensive trial if they don't think they have a case. And by the same token, the CMPA doesn't

want to do that either, but if my report suggests that the doctor did not, you know, carry out (indecipherable) standard, then they will obviously (indecipherable) defend that case.

Q. And do you feel capable and competent in providing evidence that's fair, objective, and non-partisan?

A. Absolutely, that's all I do.

Q. And are you able to tell this court that your opinion will be unbiased?

A. Absolutely.

Q. And you signed a Form 53 with that respect?

A. Yes, I did.

Q. And you are prepared to provide opinion evidence related only to matters within your area of expertise?

A. Correct.

Q. And your expertise, for the purposes of today in these reports, how would you define them?

A. I am...

THE COURT: Doctor...

THE WITNESS: Yes.

THE COURT: ...can you do this very slowly and facing me so I can...

THE WITNESS: Oh okay.

THE COURT: ...follow what you're saying and hear you clearly?

THE WITNESS: Yes, absolutely.

THE COURT: That's okay, sometimes your voice just tends to trail off and it's important for me to get the answer to this question.

THE WITNESS: Okay. So, I am an orthopedic spine and trauma surgeon, and I'm on active staff at Sunnybrook Health Sciences Centre. I am currently retired from doing surgeries, but I still see

patients and I still do consulting work and I still do some teaching.

THE COURT: Okay. Thank you.

MS. HUMPHREY: Q. And how would you describe to this court your expertise with respect to, or your experience and expertise with respect to chronic pain and chronic pain syndrome?

A. Well, as I've said I've received training in it and I did a lot of my residency and fellowship training with Dr. Hamilton Hall who was a world renown spine surgeon, who has also spoken extensively on chronic pain and chronic pain syndrome, but he's been done out of a Canadian practice to -- with respect to that. I spent time with Dr. Hall as a trainee learning the logistics of -- of doing this kind of consulting, medical legal consulting, the -- I was a fellow and worked in his personal injury clinic. So, unlike a lot of my peers, I actually received some formal training in this -- this whole process. And you know that was over 30 years ago and I have been doing that since. So, certainly by training, education and experience I certainly feel qualified to do this.

MS. TANNER: Those are my questions, Your Honour.

CROSS-EXAMINATION BY MR. DICK:

Q. Good morning, Dr. Ford.

A. Good morning.

Q. So, you've told us you're not trained or qualified or licenced to practice as a psychiatrist?

A. Correct.

Q. And if we go and I apologize, your reports I don't think have page numbers. I'm at page F2532 on CaseLines, but I think that's your first report January 20th, 2020, on the second page?

A. Correct.

THE COURT: There are page numbers in the upper right corner of his reports.

MR. DICK: I think the CaseLines printout has printed the CaseLines number over...

THE COURT: Oh I see.

MR. DICK: ...the page number on me. I apologize.

THE COURT: All right. Well, if -- if need be I can assist or Ms. Tanner can assist if we get in trouble.

MR. DICK: Q. I'm looking at -- it's the first full paragraph, I guess. I'm -- I'm about in the middle. And I guess I should ask first, Doctor, when you write these reports you understand that they're for litigation; correct?

A. Correct.

Q. And you understand that they're very important to the parties' civil litigation; correct?

A. Absolutely.

Q. And you're careful when you write your report?

A. I take them very seriously.

Q. And if you include something that's because it's important; correct?

A. Correct.

Q. And you're careful with your wording when you write these reports?

A. I typically am.

Q. So, I'm going to read from your report, the January 20, 2020, report.

> I am familiar with somatic symptom disorder as the diagnosis of this condition has significant ramifications with respect to

prognosis after any surgical procedure.

That's what you wrote; correct?

A. Correct.

Q. And that's what you meant; correct?

A. I did.

Q. You would agree with me, Doctor, that the DSM 5 or the Diagnostic and Statical Manual of Mental Illness is published by the American Psychiatric Association; correct?

A. Correct.

Q. And any diagnosis coming from and based on the DSM 5 you would defer to a psychiatrist; correct?

A. Correct.

Q. So, when you write that somatic symptom disorder is important, that's in someone else's diagnoses you need to know about it because it's -- it's going to affect the surgical outcome; correct?

A. That's correct.

Q. Just the same way if someone had a cardiac issue, you'd defer to the cardiologist to tell you what the exact condition was, but you need to know about it because it may affect surgery?

A. I do. I still have to recognize it in order to refer them to a cardiologist for details.

Q. Exactly. You'd have to recognize there may be a problem, you then either seek out the opinion of a cardiologist, or rely on a cardiologist for a precise diagnosis; correct?

A. Correct.

Q. Your second report...

THE COURT: Wait, I didn't hear an answer to that.

Was there a head nod?

THE WITNESS: I said correct.

MR. DICK: That's -- I'll ask it again.

Q. I just -- you -- you would rely then on the cardiologist for a specific diagnosis; correct?

A. Correct.

THE COURT: Thank you.

MR. DICK: Q. You refer in one of your reports to the journal of Risk and Insurance. Is that journal peer reviewed?

A. That I don't know.

Q. Does that journal have any relevance, whatsoever, to the clinic practice of a orthopedic surgeon?

A. Yes, it does.

Q. It would -- it would assist you in surgeries?

A. No, what it does is it helps me recognize a phenomenon known as BOILB-UT which has been well described in the insurance literature.

THE COURT: Sorry, helps me describe a phenomenon known as?

THE WITNESS: BOILB-UT, B-O-I-L-B- U-T.

THE COURT: Okay.

MR. DICK: Q. You formed the opinion that Cindy's complaints "cannot be explained on any other basis than a psychiatric conversion disorder"; correct?

A. That's one of the explanations, yes.

Q. No, no, you wrote, "cannot be explained on any other basis than a psychiatric conversion disorder"; correct?

A. Yes, I did say that but…

THE COURT: Oh sorry what page...

THE WITNESS: ...what page is that?

MR. DICK: Q. I'm at page F2552 in your May 31st,

2023, report. Perhaps if someone could give Doctor the page -- page number.

MS. TANNER: I believe, is that under the summary of opinion?

MR. DICK: Yes.

MS. TANNER: So, it's going to be, Doctor...

THE COURT: Is it page 8?

THE WITNESS: Yes, I've got it. It's -- it's my page 8.

THE COURT: Oh page 8.

MS. TANNER: Page 8.

THE COURT: And can someone help me with where in...

MR. DICK: It's in the middle...

THE WITNESS: Middle of the page.

MR. DICK: ...of the page, Your Honour. The sentence starts, "This potential reason".

THE WITNESS: Mm'hmm.

MR. DICK: And I started the quote at the word "cannot."

THE WITNESS: That's correct.

MS. TANNER: I just need one minute to find it. Yes, thank you.

MS. TANNER: Are you -- Your Honour found the spot?

MR. DICK: Q. And you write, "That this potential reason for Cindy's expanding symptoms cannot be explained on any other basis than a psychiatric conversion disorder." That's what you wrote; correct, Doctor?

A. That's correct.

Q. Would it surprise you that her treating psychiatrist, Dr. Teshima, has never made a diagnosis of conversion disorder?

A. No.

Q. And you -- and you were never provided that Dr. Teshima's records, were you?

A. Did you read the next line of that sentence?

Q. Would it surprise you, though?

A. No.

Q. And you were never provided Dr. Teshima's records?

A. Yes, I was.

Q. Oh you were provided -- you references one single record and they're not in your appendix "A" of -- of documents reviewed?

A. No, I did receive them. I was -- I didn't go through all of his documents because of course most of it doesn't apply to me, I'm not a psychiatrist.

Q. Oh, it doesn't apply to you? Okay.

MS. TANNER: So -- so and Your Honour...

THE COURT: Hold on.

MS. TANNER: ...before we continue, the appendix to Dr. Ford's addendum contains all of Dr. Teshima's clinical notes and records under Sunnybrook.

MR. DICK: Q. Were you given Dr. Gerber's medical legal opinion?

A. Yes.

Q. Were you given Dr. Ross's medical legal opinion?

A. I remember Gerber, I can't remember if I got Ross.

Q. None of the psychiatrist involved in this case found a conversion disorder.

A. Okay.

Q. You then say after making the diagnosis, "I

will leave this diagnosis up to the psychiatrists and psychologists."

A. That's right.

Q. Correct?

A. Correct, correct.

Q. But then you go on after -- including this and this careful important report you go on to say, "I'm not too sure how this would be done." You wrote that; right? "I'm not too sure how this would be done."

A. That's correct because it is a diagnosis by exclusion and...

MS. TANNER: Can the -- can the witness answer the question my friend, like come on.

THE WITNESS: Yes, let me explain -- I'm trying to explain that.

THE COURT: Okay.

THE REPORTER: Your Honour, I have three people speaking at once. The record is getting trashed.

THE COURT: Yes. You cannot conduct yourselves in this fashion; okay. We can only have one person speaking. Whichever lawyer is on their feet, talks; the one who is sitting does not talk until the other one has sat down. And, Doctor, please don't speak if either lawyer is standing. We're just making the court reporter's life miserable.

THE WITNESS: Apologies.

THE COURT: Okay. So, you need to stand up and say I object to the question, state the reason for your objection. Mr. Dick, you'll have an opportunity to -- to respond to the objection, and then Ms. Tanner you'll have an opportunity for any reply. And I don't mean to be critical, it's human nature, we

talk over each other, we get excited, we think we know what the answer should be and we speak over each other, it's very common, but it in a courtroom can't work. So, there's an objection.

MS. TANNER: Thank you, Your Honour. The defence objects to the last five questions where Dr. Ross was not permit -- or Dr. Ford, I apologize, was not permitted to answer any of the questions which he started to answer and then was cut off. We would ask that the last five questions be repeated and Dr. Ford to be allowed to answer them to his completion.

THE COURT: Well, I'm not going to go back five questions. Sorry, Mr. -- Mr. Dick.

MR. DICK: No, no, Your Honour, sorry I apologize.

THE COURT: Did you have response? No, okay. So -- so...

MS. TANNER: If I may, Your Honour, the last five questions relate entirely to this one -- these -- this one paragraph.

THE COURT: Did you see Dr. Gerber's report? Yes. Did you see Dr. Ross? I'm not sure. None of the psychiatrist make this diagnosis. I'm not aware. You say you would leave it to the psychiatrist? Yes. You say I'm not too sure how this would be done? Yes. So, let's take it from there.

MR. DICK: Q. So -- so, let me re-ask the -- the final question, Doctor.

THE COURT: You can do whatever you need to do in re-exam, Ms. Tanner.

MS. TANNER: Thank you, Your Honour.

MR. DICK: Q. You write in your report, "I am not

too sure how that would be done"; correct?

A. Correct.

Q. So, in your careful detailed report you have spent a paragraph -- well, four lines, commenting on something that you don't know how it would be done?

A. Correct.

Q. You would agree with me that the Waddel signs are named for Gordon Waddel?

A. I agree.

Q. You would accept Gordon Waddel as an authority with respect to the Waddel signs?

A. I do.

Q. Would you accept the journal Spine as an authority in the area of orthopedic surgery?

A. I do.

MR. DICK: Thank you, Your Honour those are my questions.

THE COURT: Journal Spine is an authority in?

MR. DICK: Orthopedic surgery.

THE COURT: Just give me a second, Ms. Tanner.

MS. TANNER: Yes, Your Honour.

THE COURT: Okay. Do you have any questions in re-exam, Ms. Tanner?

MS. TANNER: Yes, Your Honour.

RE-EXAMINATION BY MS. TANNER:

Q. Dr. Ford and those four sentences that were just put to you by plaintiff's counsel, you would agree with me that you leave any of these...

THE COURT: Wait, wait.

MS. TANNER: Yes.

THE COURT: That sounds very leading.

MS. TANNER: Okay.

THE COURT: You -- are with me that, so I'm just going to caution you to be careful here.

MR. DICK: Your Honour, if it can speed us up, I don't think the answer's going to be controversial that he leaves the diagnosis to psychiatrist.

MS. TANNER: That was it.

MR. DICK: If my friend wants to lead on the question...

THE COURT: Oh okay.

MR. DICK: ...I'm content that she lead on that question.

THE COURT: Okay, fine.

MS. TANNER: Q. You -- you would leave any psychiatric diagnosis to a psychiatrist?

A. Correct.

Q. What is the diagnosis of exclusion?

A. In many cases, there are some things you cannot definitively exclude because we don't have objective parameters. And given that my reports and my opinions are objectively based, I certainly focus on that. Malingered related pain disorder, for instance, is difficult to exclude because there are no objective parameters for instance. The diagnosis of -- or the label, and you have to understand it's not a psychiatric diagnosis, it is a label. Conversion disorder is a psychiatric diagnosis and I have seen patients for it; it's quite unusual. But there are situations where you cannot make a specific diagnosis unless other potential diagnosis have been excluded. And -- and that's the reason why, for instance, in -- with respect to chronic, the label chronic pain syndrome the American Psychiatric Association has clearly stated that it hasn't been validated for forensic situations. It's -- it was developed for clinical, educational

and research purposes, but in the absence of any validation, it shouldn't be used for forensic situations because again, it can't be used until you rule out malingered related pain disorder and that's very difficult to do.

MS. TANNER: Those are my questions, Your Honour.

THE COURT: Okay. All right. We're going to have some argument now, Doctor, so I'm going to ask you to leave the courtroom for a time while we deal with this.

THE WITNESS: Can I leave my stuff here?

THE COURT: Oh yes certainly.

MS. TANNER: Yes.

THE COURT: And...

THE WITNESS: No, thanks.

THE COURT: All right. Well, let's see how long the argument goes.

MS. TANNER: Your Honour, I just have one comment after Dr. Ford is...

THE COURT: Okay.

MS. TANNER: So, I am the first to admit that I have not previously written out these qualifications that we are putting in and have primarily just said things like, this is a psychiatrist and we're here about this accident. So, it could be in my offered wording when I wrote the, what can only be described as a very long sentence that the word "diagnosis" is perhaps the issue, because I don't -- I don't -- we don't -- the defence does not intend to have Dr. Ford diagnose the chronic -- anything, the chronic pain somatic disorder. So -- so that's...

THE COURT: Okay. Here's what I'm going to do.

MS. TANNER: ...so that's my -- I...
THE COURT: Okay.
MS. TANNER: ...I just wanted to alert the court to that. He has opinions and expertise on it.
THE COURT: Okay. But hold on. Here's what I'm going to do.
MS. TANNER: Yes.
THE COURT: I'm going to take a mid-morning break now for 20 minutes. The jury's on ice anyway, so when they get their coffee they get their coffee. They're not coming back any time soon.
COURT OFFICER: No. They should get it soon though.
THE COURT: But it doesn't matter when they get their coffee because they're not coming back any time soon.
COURT OFFICER: Okay.
THE COURT: I've got to hear argument on this. I'm going to need time to rule on this. I'm going to need time to deliver my ruling. I may not even be done by lunch time with this. So, here's what I'm going to suggest. During this mid-morning break I would like the two of you to speak with each other to ascertain whether "A" there is any basis, any basis on which Mr. Dick feels that this witness can be qualified as an expert. If the answer to that is no, that's fine I'll give the argument, I'll rule, et cetera.

If there is some basis that you think he could be qualified to give some sort of opinion, then I'd like you to discuss with Ms. Tanner what that

wording might be and see if the two of you might be able to work that out.

MR. DICK: Your Honour, I can assist. After that re-examination, no and knowing what the issue was the Doctor couldn't help himself but spending half of the re-examination talking about malingered pain disorder which is clearly in the Bailiwick of a psychiatrist and he was clearly, even here without the jury acting as an advocative, so no I don't think there's any basis...

THE COURT: Okay.

MR. DICK: ...that this Doctor can give evidence.

THE COURT: Okay.

MS. TANNER: Well, at all?

MR. DICK: At all.

MS. TANNER: Okay.

THE COURT: Okay. Okay. Well, let's take the break anyway because this a convenient time, I don't want to interrupt somebody in the middle of their submissions. So, we'll -- we'll break for 20 minutes now, we'll come back I'll hear from both of you on the issue of the expert's bias and then I'll make a ruling.

MR. DICK: Thank you, Your Honour.

R E C E S S

U P O N R E S U M I N G

THE COURT: Just before you get started Mr. Dick, I'm thinking about the timing of all this. It seems to me that we are going to be dealing with this matter either by way of your submissions or my

taking time that I need to consider the matter and render the decision until close to the lunch hour. So, I'm going to release the jury now. There's no reason to keep them sitting there waiting through all of this and have them come back at 2:15. You may want to do the same with the Doctor. I don't see a need to keep him sitting here. The earliest he'll need to come back is 2:15 assuming I let him testify and if I don't well then he won't need to be back at all. So, if you need a moment to call him or go to talk to him, Mr. Chau you can do that.

MR. CHAU: Okay.

THE COURT: And you can release the jury until 2:15. Okay. Mr. Dick please proceed.

MR. DICK: Should I give Mr. Chau a moment to return or...

THE COURT: Does he need to be here, Ms. Tanner?

MS. TANNER: Yeah, I think we can -- we can start, I'll take notes.

THE COURT: Okay. Thank you.

MR. DICK: Thank you.

SUBMISSIONS BY MR. DICK ON VOIRE DIRE:

Your Honour just to set the framework and I'm going to make my submissions on bias first and then I'll turn to the issue of the qualification at the end.

I've already yesterday drawn Your Honour's attention to the *R. v. Parliament* case and I won't quote at length, because I know Your Honour is aware, but I do want to specifically reference at paragraph 44.

THE COURT: Can we start with -- can we start with the page number?

MR. DICK: Yes. A1793, A1793.

THE COURT: And this is the *Parliament* case?

MR. DICK: This is the *Parliament* case, Your Honour.

THE COURT: Yes, okay.

MR. DICK: And I know Your Honour's aware of it, but just to set the framework paragraph 44.

> The ultimate conclusion as to the credibility or truthfulness of a particular witness is for the trier of fact and is not the proper subject of expert opinion.

I then take Your Honour to page A...

THE COURT: Give me a moment please.

MR. DICK: Yes.

THE COURT: Thank you.

MR. DICK: I take you Your Honour to A1812, A1812. This is comments of the Court of Appeal in the *Bruff-Murphy* decision.

THE COURT: Yes, paragraph number?

MR. DICK: I'm at paragraph 46. Your Honour for the purposes of my argument I believe you should review all of paragraphs 39 to 46, but I'm specifically I want to quote just from paragraph 46.

THE COURT: Okay.

MR. DICK: And the Court of Appeal there noted;

> Next the whole tone of the report was a reliable predictor of Dr. Bale's testimony. He goes out of his way to make points that are meant to damage Ms. Bruff-McArthur's case.

And I -- I note it's Bruff-McArthur there, although the name of the case is *Bruff-Murphy*.

THE COURT: All right.

MR. DICK: Your Honour, not only Dr. Ford's reports, primarily his second report, but both reports show a willingness to go well beyond the scope of his expertise. His examination in the voir dire showed the same. Even when he was clearly alert to the issue, Your Honour saw that he could not but help himself with a long explanation of malingered pain syndrome, which not only arises nowhere from the plaintiff's experts or treating psychiatrist which maybe isn't surprising. Arises nowhere in the defence psychiatry opinion.

THE COURT: Malingered pain syndrome is it?

MR. DICK: Yes. That's what he discussed...

THE COURT: Yes.

MR. DICK: ...in re-exam.

THE COURT: Right. Okay.

MR. DICK: Your Honour, I will take to page F2552, this is his second report.

THE COURT: Are these examples you're going to show me where he goes beyond his expertise?

MR. DICK: Yes, I'm going to show both where he goes beyond his expertise and where he sets out to

challenge the credibility of the plaintiff for no other reason than to introduce it with -- with no foundation I would suggest.

THE COURT: Okay.

MR. DICK: Right at the top of the page you'll see he notes that "minor shoulder pathology is more closely related to depression." Maybe that's not the worst example. He says he has to take the diagnosis of a psychiatrist to look at prognosis.

THE COURT: Sorry, sorry. I'm having trouble finding this.

MR. DICK: Sorry, the very, very first sentence on the very top of F2552.

THE COURT: "Symptoms associated with minor shoulder pathology are more closely related to depression."

MR. DICK: Depression.

THE COURT: But isn't that what your folks are saying too that -- that it's somatic pain?

MR. DICK: Well, it is Your Honour and maybe that's not the worst example, because he did say at one point he takes the diagnoses from a psychiatrist and uses it to outline prognosis, but if you flip back a page, I just note, he draws that from a study that he acknowledges is -- is not on all fours. It was a study of -- of findings in men not women. And he doesn't anywhere else acknowledge that Cindy has been diagnosed with depression, so that, you know, we would expect it.

Another example if you move down in the paragraph.

THE COURT: Sorry I'm missing the point there.

He's saying there's a study of men that says that these kind of difficulties are -- are not post-traumatic, they're -- they're relevant in the a symptomatic population.

MR. DICK: Correct, Your Honour. I raise it just because he raises, you know, he raises depression but then he doesn't have reference to any of -- apparently the psychiatric records that -- that he had available to him. And I think it's another example of him being willing to comment psychiatrically instead of deferring as he should.

THE COURT: I see. Okay.

MR. DICK: If you move down...

THE COURT: Hold on. Okay. Okay. So, hold on. Okay. Sorry. Thank you.

MR. DICK: It's a little hard because it's all one paragraph, Your Honour, but there's a sentence about a third of the way down the page that starts, "The science has clearly shown that persistent." I'll just give you a moment to find it.

THE COURT: Yes, I've got it.

MR. DICK: "The science has clearly shown that persistence symptomology after a minor traumatic event associated with compensation litigation issues is pyscho-socioeconomic and not organically based. Expanding symptomology is not uncommon amongst litigants." I'll pause on that sentence.

I don't see any relevance to his expertise as -- as an orthopedic surgeon to talk about expanding symptomology, but he goes on. "It's known as BUILB-UT." Any references article about fraud, no

suggestion of that anywhere in this case. He admitted to the court he doesn't even know if the journal of Risk and Insurance is peer reviewed, so we could have no confidence in the conclusions reached by this journal. And even if we could have confidence, I'm not sure what a 25 to 75 percent range does in the way of assisting the finder of fact at all. And I would suggest the only reason that is there is so he can include the sentence, "insurance claimants show some evidence of fraud or BUIL-UT." It's a prejudicial comment. It's not probative. It's not connected to Cindy in any way. He's opining clearly with respect to what he calls the phenomenon of -- of BUILB-UT with respect to a psychiatric phenomenon, pain that is not organically explained. It's outside his expertise. It's designed only to challenge the credibility of the plaintiff, which is a job for the jury. And is a gratuitous attempt to harm the plaintiff's case as we saw the -- the comment in *Gruff and Murphy* with no relevance.

I spent -- I apologize Your Honour, I'll let you catch up.

THE COURT: Thank you. Okay. Thank you.

MR. DICK: I spent some time on this next portion. He diagnosis a psychiatric conversion disorder. Can't be explained on any other basis. Now, I guess he caught himself as he was writing because then he says, "Well, I'll leave the diagnosis up to someone else." But he's already made it. And it's made it in a report that he gave evidence was

careful, was detailed, and he was particular with his language. And yet, here he is making a diagnosis that none, none of the psychiatrist, including the defence psychiatrist have even suggested. No other explanation in his view.

THE COURT: Just give me a moment. Okay. Thank you.

MR. DICK: He does say, "I will leave this diagnosis up to the psychiatrist and psychologist." And that comment may give the court some comfort, except as paragraph 46 in the Bruff-Murphy case points out, even here he can't help himself. In the very next sentence he's back to giving psychiatric evidence about how that diagnosis would be reached and explaining that it's a diagnosis of exclusion. It's a psychiatric diagnosis. He said again and again he doesn't make psychiatric diagnoses, but yet here he is wandering outside of his expertise. And the court should be concerned and is entitled to take the report as evidence that he will be a problematic witness.

I don't mean disrespect with his comment but I don't know how else to put it. The whole conversation seems more suited to -- to drinks at the bar than an expert report. He then after going in, wandering into psychiatric diagnoses saying he shouldn't make the diagnosis, explaining how it would be made. He said, "Although I'm not even sure how this would be done." And this is a report that he testified was careful and precise.

I'm not moving Your Honour to ten lines from the bottom of the page. He throws in a comment, "Not surprisingly the pedestrians who are at fault recover as per expectations." The only possible relevance of that sentence is to cast doubt on Cindy's veracity. To cast doubt on her credibility and to reraise this specter of fraud for the jury.

THE COURT: Give me a second. And no other experts have gone down this road; right?

MR. DICK: None and it's nowhere to be found in Dr. Ross's reports either. My friend will correct me if I'm wrong, but my summary of Dr. Ross is basically that Cindy is at her base line. She had problems before. She's got the same problems now.

THE COURT: Right.

MR. DICK: Again, standing on its own and this is five -- the -- the sentence that starts on the fifth line from the bottom. "Standing along it may not be particularly problematic." But he admits that well he doesn't really have a study that matches. He goes searching through the library to find a -- a whiplash study...

THE COURT: Hold on. There have not been any studies. Oh okay.

MR. DICK: Again, standing alone that may be incredibly problematic but is part of the flow of this entirely partisan attack. I think it's important.

THE COURT: This -- what you're saying if I'm following you, is this all goes to whether Cindy is malingering?

MR. DICK: Correct but it all go -- it's deeper

than that. It -- it goes to an attempt to smear Cindy with no direct evidence about Cindy, just a wide ranging romp through the library for any article that mentioned fraud or malingering or recovery in an attempt -- again, as in Bruff-Murphy to take every opportunity to hurt the plaintiff's case and to not really act in anyway as an unbiased expert.

And Your Honour, I do think it important to note on page F2553, the second paragraph. He goes so far as to say, "That any claim that Cindy's prognosis is poor or guarded on our" -- I think it's a typo there, "are not based on any objective parameters." He's not a psychiatrist. He's told us again and again and yet here he attacks the psychiatric prognosis. He told us he had Dr. Gerber's report. That must be what he's responding to.

THE COURT: Mm'hmm.

MR. DICK: Then Your Honour, I take you finally to the last page of that addendum report, F2554.

THE COURT: Okay.

MR. DICK: And that second paragraph on that page, the second sentence. He writes, "Any claims that are issues are structural and organic in any way are completely unsubstantiated." That's appropriate. He's an orthopedic surgeon who give an opinion about the organic pain symptoms. He could have so. He can't but reveal himself as a partisan yet again. Instead of saying within his expertise and stopping by saying, there's no organic explanation. He can't help it. He goes

on, "Cindy's ongoing complainants are either secondary to BUILB-UT", again, reintroducing this idea of fraud of malingering. "Or some other psychiatric condition." The entire sentence shouldn't be there. He has said he is not a psychiatrist. He has said he doesn't diagnosis psychiatric conditions. He merely relies on the diagnoses of others as they impact his orthopedic decisions. That's appropriate. This entire sentence is inappropriate and he goes again to the fact that there, in my submission, will be no instruction from the court that will be able to contain him to giving appropriate evidence. He simply sees himself as a partisan. And there will be no way to limit the scope of his evidence to what's proper.

I said that the first report, or the second report is where he primarily reveals this. But Your Honour, I do want to take you back to the first report. You'll recall that he agreed that Gordon Waddel was the authority on Waddel signs and he agreed that the journal spine was authoritative. I have an article from the journal that I would like to pass up, Your Honour.

THE COURT: Thank you.

MR. DICK: The article I have just passed up, Your Honour is authored by Chris Main a PhD and Gordon Waddell of the Waddel signs, who Dr. Ford agrees is an authority.

I take Your Honour to page 2370, it's the second

last page. And I acknowledge the article is from 1998, but you'll see that Gordon Waddel of the Waddel signs writes;

> Under interpreting signs as indicators of faking. Perhaps the most serious misuse and misinterpretation of behavioural signs has occurred in the medical legal context. The signs frequently are used as an indication of faking or simulating incapacity.

Dr. Waddel goes on to say, "that's not proper."

If you go to conclusion number 8 in the paper. Dr. Waddel and Mr. Main write;

> The behavioural signs are not on their own a test of credibility or veracity.

With this article in what the Doctor acknowledges is an authoritative journal, that has been out there since 1998, let's see how the Doctor treats Waddel signs.

THE COURT: Okay. So -- so, does this article have the Waddel signs? I'm not familiar with it.

MR. DICK: It is. In fact, the article, Your Honour is very specifically completely about the Waddel signs.

THE COURT: Okay.

MR. DICK: It's -- it's titled "Behavioural responses to an examination, a reappraisal of the interpretation of non-organic signs." Perhaps Mr. -- sorry, perhaps Dr. Waddel was -- didn't want to be seen as arrogant and took his name out of the signs in the title, but it is referring to these Waddel signs.

THE COURT: Okay. I'll read the article. Thank you. I mean are you going to take me to where...

MR. DICK: I'm going to take you to -- to his report. I apologize, Your Honour, I just -- too many pieces of paper.

F2353. This is the original report.

THE COURT: No, that's an acknowledgement of expert's duty.

MR. DICK: F2535.

THE COURT: Oh sorry.

MR. DICK: Sorry, I -- I think I misspoke, Your Honour.

THE COURT: 2535?

MR. DICK: 2535. I'm going to read the entire second paragraph, because I think it's that important.

> These non-organic signs are also known as Waddel's non-organic signs.

So, Your Honour should have comfort that the article does deals with the -- with the right

thing.

> They represent an altered behavioural response to aspects of the physical examination.

So, far so good.

> They are rarely seen in those individuals who are not involved in compensation or litigation issues.

Already we are into what Gordon Waddel himself said was the most serious misuse of the signs in the medical legal context. Quoting again.

They are often seen in individuals where there is a potential for secondary gain, including both financial and or emotional benefits. They are more commonly seen in those individuals who score higher on the hypochondria -- chondriasis scale of the MMPI. They can be seen in those individuals who were consciously attempting to modify aspects of the physical examination.

Gordon Waddel in 1998 in an authoritative journal said;

> Don't use these signs as an indicator of credibility or veracity.

In 2020, Dr. Ford uses the sign as an indicator of credibility and veracity, which should be left to the jury in any event, but certainly if he's going to attack it he shouldn't do it on the very basis that the authority says not to do it on.

You know, again, the first report's not nearly as bad as the second. He does go on to say there are multiple other reasons and then he concludes the paragraph with what I think is not controversial. He says;

> They do not represent central sensitization, nor are they indicators of the presence of a somatic symptom disorder.

Well, the second half the sentence he can't know because he can't diagnosis a somatic symptom disorder. Certainly the first half of the sentence, it's not problematic.

Taking into account the entire tenure of the second report, not just the sections I referred Your Honour to, but the entire tenure of that report, including its wide ranging ramp through insurance literature. Taking into account his misuse of the Waddel non-organic signs based on what the authorities, his acknowledged authorities say, I believe Your Honour is in the same situation that the trial court in *Bruff-Murphy* found itself. Where the Court of Appeal cautioned that;

Where a witness has gone out of his way to include tangential and irrelevant information designed only to hurt the plaintiff's case, that that is a sign of bias. Where the witness has gone out of his way to challenge the credibility of the plaintiff, or introduce --

I use the word "smear". It's an ineloquent word, Your Honour, but I can think of no better as I stand here, simply introducing insurance fraud. No basis, no connection to Cindy, just wanting the jury to hear those words. Those are all indicators that the witness is biased. He's not willing to abide by the undertaking he gave when he signed the Form 53. And in my submission he should not be allowed to testify either at the initial stage of the inquiry, although I acknowledge that's a very low threshold, but certainly at the court's residual discretion to exclude a witness who will be more prejudicial than probative.

In the alternative, Your Honour, if this court is still despite all of the evidence prepared to let this witness testify, I submit that his testimony must be strictly curtailed to his area of expertise as an orthopedic surgeon that does not include the diagnoses of psychiatric illnesses. It does not include the prognosis with respect to psychiatric illnesses. It does not include his comments on how to properly interpret an insurance journal article that finds 25 to 75 percent people engaged in

fraud. And the only way we could even hope to do that, Your Honour would be to limit to his testimony only to what is in his first report and the witness would have to be cautioned by the court before he even began. In my submission the court shouldn't have confidence that those steps will be adequate. It's a jury trial. We risk tainting the jury, so my primary submission is he should not be a witness, but in the alternative if this court is still entitled to give Dr. Ford the benefit of the doubt he needs to be confined to his first report and he needs to be cautioned that he can only testify to those things within his expertise as an orthopedic trauma surgeon.

Thank you, Your Honour. Unless you have any questions those are my submissions.

THE COURT: No. Okay. Ms. Tanner.

MS. TANNER: Thank you.

SUBMISSIONS BY MS. TANNER ON VOIR DIRE:

So, I had written down some thoughts, but I'm going to start by responding to my friend's submission because I think that might direct us better and then I will circle back to make sure that I've hit everything I wanted to hit.

So, I would like to start with Dr. Teshima qualified as an expert. So, my friend misspoke when he said there was not an expert that opined on the issues that relate to this report. There was. He signed a Form 53. He was introduced as an

expert. He was qualified as an expert. My friend took him through his CV at length.

My friend says there's no direct evidence on the issues that arise in this report. By direct evidence I take it he means from the plaintiff, or in this case from Dr. Teshima. I would suggest Your Honour there is direct evidence from both.

Not only was Dr. Teshima qualified to give evidence as an expert in this trial. He was also a treating physician, therefore by that very nature his opinion evidence can only be interpreted by a jury as having extra weight. He knows they're the best. Those are best friend and family. Dr. Teshima introduced -- I won't -- numerous conversations, quotes, sentences, excerpts from his communications with his patient on the very issues that then Dr. Ford opines on.

So, we start at the paper trail at A1176. Taken on its own from a treating psychiatrist, not so problematic. From an expert Form 53 psychiatrist who then was able to explain it away, okay. Now, we have something that's added to. He gets the opportunity to introduce the wording and explain it away with his opinion, which is what he did.

On May 8th, 2017, at A1191.

> Wanting to pursue a lawsuit for compensation.

That is the exact quote. If Dr. Teshima had testified as a treating psychiatrist different, he didn't. He testified as a Form 53 expert. He explained it away. He gave opinion evidence. The opinion evidence was related to a psychiatric diagnosis, was maybe referring to something else, et cetera.

A1286 was reasonable for -- that is August 25, 2020.

> It's reasonable to plan for compensation.

These are direct quotes, Your Honour from Dr. Teshima's clinical notes and records. Introduced by the plaintiff, filed on consent, taken through at length.

February 27, 2023, at A1468. I quote;

> Get appropriate compensation for the accident and the impact it had on her.

A1177 and A1178. We took Dr. Teshima through those records where Cindy and he spoken about one of the OT assessment reports, sorry one of the psychological assessment reports that was Dimitra, Your Honour. There were three separate entries and visits where Cindy and Dr. Teshima discussed this

report, discussed the need to take it to the lawyer and then the need to go back for what she wanted was a PTSD questionnaire.

And then, the last at A1178, is them requesting, Teshima and Cindy discussing that that report be edited prior to submission.

September 14th, 2020, A1291.

> Winning the lawsuit would set her up financially until retirement.

Direct quote. Again, Dr. Teshima who's qualified as an expert.

THE COURT: So, can I just...
MS. TANNER: Yes.
THE COURT: ...stop you here for a second?
MS. TANNER: Yes.
THE COURT: So, are you taking me to all these things so that Dr. Ford will be able to testify...
MS. TANNER: No.
THE COURT: ...that she's faking and...
MS. TANNER: God, no.
THE COURT: ...malingering and...
MS. TANNER: No, no, absolutely not.
THE COURT: ...and -- and after compensation? So, I'm having trouble connecting...
MS. TANNER: Understand.
THE COURT: ...the dots.
MS. TANNER: My friend has -- has given submissions on a smear campaign of some description or whatever

the words used stating there was no evidence...
THE COURT: Okay. But...
MS. TANNER: ...no direct evidence...
THE COURT: But -- okay.
MS. TANNER: ...so my...
THE COURT: But let's not just argue back and forth.
MS. TANNER: No, no.
THE COURT: I'm trying to understand what it is you're trying to do. Are you trying to say...
MS. TANNER: I'm trying to say that he didn't just come up -- he didn't just out of thin air respond to these things. My friend says he's just throwing it in here as...
THE COURT: But he doesn't reference any of this in his reports does he?
MS. TANNER: No, but he had all of those records. He reviewed all of those records.
THE COURT: But he hasn't given opinion he thinks she's faking.
MS. TANNER: No, not that I...
THE COURT: So, why are we talking about faking and fraud in the report?
MS. TANNER: No, there's evidence -- sorry, Your Honour the -- the specific paragraphs or sections that my friend was drawing to you to were coming things like this 58 to 25 to 75 percent are for compensation are not resolving. It's to explain why those journals are in there. It's not to say that there was a basis for him to consider reviewing these -- hold on.
THE COURT: But the difficult that I'm having here

is there doesn't seem to be any connecting of the dots. You're saying there are things in Teshima's records, these references you have taken me to, and I remember them all.

MS. TANNER: Yes.

THE COURT: And -- and I'm sure there are others where you want to take that and say -- and say that is somehow relevant to what he said in his report. This is what give him the idea.

MS. TANNER: Well...

THE COURT: Okay. But the only way to connect those two things is these are evidence that she is faking, otherwise I don't get it.

MS. TANNER: No, not -- the evidence is that the issue -- a lot of these issues that all the various journal articles were about compensation.

THE COURT: And fraud, 75 percent of the people are fraudulent and -- and they're looking for money so that means they're faking. Isn't that the point of all that?

MS. TANNER: That's not how I take it, but my...

THE COURT: So, how do you take it?

MS. TANNER: Okay.

THE COURT: How do you take it?

MS. TANNER: That -- so, again, to take us back to the evidence.

THE COURT: He's saying if you don't have a compensation system. If people won't get money they'll get better.

MS. TANNER: Yes he did say that, or he will -- whichever.

THE COURT: Or those articles say that.

MS. TANNER: So -- and so did Dr. Teshima twice in his testimony. He put that right out there. He said; "She is not taking her treatment, it is serving as a disincentive because she has this lawsuit." Specifically right our there and he testified to it at length. I took him to it multiple times, Your Honour that she was -- it was that this lawsuit served as a disincentive to pursuing her treatment. So, how can we not let Dr. Teshima...

THE COURT: Yes, that wasn't -- I'm not sure that's how I understood his evidence. I thought he was saying it's a distraction...

MS. TANNER: No...

THE COURT: ...this lawsuit was...

MS. TANNER: ...it was "a disincentive" is the word.

THE COURT: Yes. Okay.

MS. TANNER: My point simply...

THE COURT: But then -- then...

MS. TANNER: ...my point...

THE COURT: ...now you're saying, but again it's the same thing.

MS. TANNER: I'm just -- but what I'm saying, Your Honour is we've heard evidence about this already that there is a disincentive. He put it in his records and he's...

THE COURT: But he hasn't -- but he hasn't given the opinion Cindy is faking. So -- so, what you're doing is you're trying to throw things out there...

MS. TANNER: Well...

THE COURT: ...and have the jury connect those dots

when he himself is not doing that. That's my problem.

MS. TANNER: Dr. Teshima specifically gave opinion evidence to explain away all of the comments about compensation.

THE COURT: Right.

MS. TANNER: And his explanation was, well, I don't even know if he had a really explanation, but her certainly wrote in there and agreed that the litigation was serving as a disincentive to treatment. That is not outside the scope of whatever these articles are about.

Now, of course he is not going to call his own -- his own patient a liar, or a fraud, or anything.

THE COURT: But your expert doesn't either.

MS. TANNER: So, then I don't...

THE COURT: That's my -- that's my point.

MS. TANNER: ...so then...

THE COURT: So, what's the point of all this?

MS. TANNER: Right.

THE COURT: The whole thing how is this relevant?

MS. TANNER: Well, my friend is making it relevant saying he's too biased to testify. And what I'm saying is the issues that he is arguing about within these reports are already front and center in this sense of it's been out there, the compensation, the disincentive, the -- the paper, all of the issues with litigation, right down to adjusting reports with her treating doctor, right down to foregoing treatment, so that the reports could be adjusted.

THE COURT: So, what does that lead to? What conclusion does that...

MS. TANNER: What?

MR. DICK: ...what -- what does the jury take from that?

MS. TANNER: Well, everyone's entitled to their opinion.

THE COURT: No, but what...

MS. TANNER: Dr. Teshima was entitled to his opinion.

THE COURT: No, no, but -- but put all this together...

MS. TANNER: Yes.

THE COURT: ...and where does that lead? What is this relevant to?

MS. TANNER: It leads Dr. Ford testifying about there's no objective, organic explanation for a symptomology that started at a chest pain and then grew and expanded to some other -- he calls it a "constellation of symptoms."

THE COURT: Okay. And where does that lead to, like what is the end of the road?

MS. TANNER: The end of the road is that he will have no explanation as to why that happened, other than his experience treating chronic pain patients and patients with -- who have been diagnosed with chronic pain disorder, as he has said and how that relates to how they get better and how he uses that to decide on the surgery.

THE COURT: But how -- what that does have to do with Cindy?

MS. TANNER: But that is his experience. So, his

experience and his expertise and his formal education, I mean now I'll take it -- that takes me back to kind of the beginning of the whole exercise and necessity and what have you, which I'm happy to do. But I wanted simply to address some of my friend's points because I didn't want them to go u unsaid. So, his first point, if I may just quickly go back?

THE COURT: Sure.

MS. TANNER: Was on page F2552. And my friend -- friend read -- read this. And this is information that comes out of an elbow surgery magazine or journal, Your Honour. And if one turns...

THE COURT: Mm'hmm, I'm there.

MS. TANNER: Okay. If one turns to the page just before that the words are "evidence has demonstrated that". So, he is relying on the rotator cuff tendinopathy because before this trial started, Your Honour the shoulder issue was a very much a central issue in the case in terms of the various diagnoses and such and her -- all of her x-rays and ultrasounds and such.

So, I just wanted to alert Your Honour because when my friend read that out and then talks about it goes on, that is a quote from the rotatory cuff tendinopathy. It's -- and the j shoulder elbow surgical magazine or journal rather.

THE COURT: Okay.

MS. TANNER: So, my point is simply, it needs to be read in context. Like I don't feel that when my friend is making his submissions he read it in

context.

With respect to his second point, my friend's second point, which was down that page. It started with "The science has clearly shown". My friend, I wrote down said there -- his concerns were with the issue of expanding symptomology.

THE COURT: But okay, again, I'm having trouble understanding.

MS. TANNER: Yes.

THE COURT: Let's take this sentence.

MS. TANNER: Okay.

THE COURT: "Science has shown that persistent symptomology after minor traumatic event associated with compensation litigation issues is pyscho-socioeconomic and not organically based." That's a very fancy way of saying that people who are getting money exaggerate, or -- or invent their symptoms for purposes of financial gain.

MS. TANNER: Or stay sick as Dr. Tashema testified.

THE COURT: All right. Or stay sick -- or stay sick for financial gain.

MS. TANNER: Yes.

THE COURT: Okay. And he does not give the opinion that that is what Cindy is doing does he? Is that his opinion for Cindy, or is this just gratuitous stuff in there as Mr. Dick suggest?

MS. TANNER: No, my understand -- well, I mean we -- I don't know that we got to the opinion. My understanding is that without an organic explanation then there is...

THE COURT: He has to defer to the psychiatrist.

MS. TANNER: Yes, or -- yes, yes and he has to defer to his experience and he tried to find these articles that support his experience, which is...
THE COURT: Lots of people have fakers?
MS. TANNER: No, certainly that's not what we heard from -- there's a fine distinction, Your Honour with staying sick until the trial is over, because otherwise you have to stand here and say I'm not sick anymore so I don't know why I'm here, or -- or getting better before trial and then the case is changed dramatically; right?
THE COURT: So -- so, you're saying it maybe a subconscious as opposed to conscious process?
MS. TANNER: Right because otherwise a person would be sitting in court completely healed with no issues, but still fighting for their claim. For example, if this trial had not -- it happened before COVID we would have a less lengthy; right?
THE COURT: Right.
MS. TANNER: A less lengthy time.
THE COURT: But -- but let me ask you this.
MS. TANNER: Yes.
THE COURT: I understand the point you're making, you know, and I may put it more crudely...
MS. TANNER: Yes.
THE COURT: ...and -- and -- and miss the subtlety of it but let me rephrase it. The thinking the theory is, the idea is that people stay sick subconsciously not as a wilful intent to commit fraud, but they stay sick because they have litigation coming?
MS. TANNER: Yes. Well, I think in this case there

-- there are a few articles that said there two. There's a secondary gain or emotional gain. I know certainly Dr. Ross will testify to the psychiatry secondary gain is -- is more an emotional gain, so people take care of you and things like that.

THE COURT: Right, right.

MS. TANNER: Okay. So, in orthopedics this -- I think the secondary being is more the compensation and emotional gain is having to describe, you know, now people do your laundry for you now, people clean your room for you, et cetera.

THE COURT: Okay.

MS. TANNER: So...

THE COURT: But again...

MS. TANNER: yes.

THE COURT: ...I -- I keep coming back to is Dr. Ford qualified to give that kind of opinion and has he given that kind of opinion?

MS. TANNER: Has he given the type of opinion...

THE COURT: That Cindy is staying sick to get financial compensation in this lawsuit or anything close to that?

MS. TANNER: I mean I...

THE COURT: If that's not his opinion then why are we going down this road? That's...

MS. TANNER: Well, my friend's concern is that he's too bias to provide an objective opinion and or stay within his lanes is my understanding.

THE COURT: Okay.

MS. TANNER: So, that's why I think we're here and why I'm standing up trying to dispute the things that were said...

THE COURT: Okay.

MS. TANNER: ...in those articles.

THE COURT: Okay.

MS. TANNER: There -- I don't anticipate Dr. Ford sitting up there saying she's a fraud. That's not in his report. But he is saying that there's no explanation. That there is literature out there that said when litigation is involved or compensation people don't get healthy as fast. And that's from his own treatment of people who need surgery.

In any event, my point with Dr. Teshima, Your Honour is that there is absolutely a basis and a connection to Cindy when it comes to these various issues of compensation and litigation, and there are at least two incidents that I referred Your Honour to with respect to not pursuing treatment in the context of this litigation. One was the delay in her psychotherapy while the report was edited. And one is Dr. Teshima saying this is serving as a disincentive to getting treatment or his concern. They're concern the discuss together that this is serving as a disincentive to getting treatment.

In terms of having Dr. Ford testify, I did make some notes on that, Your Honour if I may? So, first of all with respect to *Bruff-Murphy* I agree that it may or may not be relevant in terms of the legal analysis, but the -- the -- the facts of the case were -- wholly different. Dr. Vail did a physical exam as a psychiatrist, not so far out of

his realm, fine. Then used the physical -- the results from the physical exam and applied to surveillance. That's outside of his realm as a psychiatrist. So, he stepped away...

THE COURT: Sorry give that I was (indecipherable).

MS. TANNER: Yeah, Dr. Vail...

THE COURT: He did a physical exam.

MS. TANNER: ...did a physical exam, which you wouldn't normally do as a psychiatrist.

THE COURT: Yes.

MS. TANNER: And then applied it to something to suit his theory, which was the surveillance and then came out, right out with it. He didn't -- he never gave like it might be this or it might be that, he just honed in right on one specific answer and one specific opinion; right? He didn't say it could be this or it could be that. He had Ms. Bruff-Murphy do a math test and then again used the results of that, so clearly that's not the assessment that was, you know, it was a mathematical equation type thing and applied it outside of his realm to fit his purposes.

So, the *Bruff-Murphy* case is not on all fours. It does provide some good legal analysis, but Dr. Vail is not Dr. Ford. Dr. Ford at most is referring to some journals that my friend doesn't like, because they don't suit the theory of his case, but Dr. Vail went far outside that conducting extra tests, conducting extra -- making extra efforts going outside, you know, finding basically the evidence. Dr. Ford takes what's in the objective file and

what's in his physical examination and tries to find one or the other, what could it be and leaves it for the triers of fact. And he certainly never tells -- says in his report that she's misleading, or he finds her to be faking, or fraudulent, or anything like that. But he grapples with, I don't understand why there's no organic explanation here and he tries to apply some of his training to trying to figuring out what could be wrong.

And I do believe in his report when he talked about the Waddel signs he doesn't just say these Waddel signs are the end all and be all. As Waddle says, please do not do. And my friend can cross him on that. He doesn't take them on their own. It's part of his general -- it's part of his, you know, (indecipherable) considerations.

And Your Honour, I did make some -- some actual notes on -- now I can't seem to find them. Hold on. Excuse me. So, I would just like to go back a little bit in terms of necessity, just so that I understanding that we're focused on bias but I'd like just to go backwards a little bit. Dr. Ford is the defences expert on the objective medical issues in this case. In this realm he's quite qualified and necessary. We don't have another medical expert, if you will, to opine on the injuries, the physical injuries sustained by this plaintiff.

In terms of chronic pain, I think it was quite

clear from the voir dire evidence that he has both long standing clinical, formal training and education in chronic pain.

I myself was quite surprised that the 30 years experience and all the courses and then the -- the treatment and such. So, it is out position that he is and has been well trained, educated for years and along with his experience in chronic pain. And he has experience in the chronic pain syndrome insofar not as it's diagnoses, which again I admit could be my faulty wording and I am prepared to adjust to whatever wording, but it's how it relates to his surgical practice and to his job as a surgeon treating all sorts of people all over, you know, in the hospital context and in his clinical practice. So, he has experience in that regard. And he has been qualified on both of those. Now, of course we don't have those reports in front of us, but he's been qualified to testify at the Ontario Superior Court with his expertise in chronic and chronic pain syndrome.

And again, the wording of diagnosis that is my mistake. It is not the defendant's intention to have him diagnose that. He sees patients who have already been diagnosed with it and has opinions related to that. He's treated hundreds of patients who have been pedestrians and he's the only doctor, medical doctor, physical doctor testifying in that realm.

When I say "medical" Your Honour, I would -- I just differentiate between medical versus psychiatric, but as such he's both necessary and relevant.

And again, as a final few points on the issue of bias, he explained that yes he does do defence medicals and his only explanation is because plaintiff's counsel don't like his opinion when it involves objective analysis and that's fine. Everyone chooses. I mean I think we see that all over the board. We see certain doctors on one side and certain doctors on the other and it doesn't make them biased. He testified that he's never turned down a plaintiff case. But more importantly, Your Honour he testified that the CMPA uses him just as much as does the plaintiff medical malpractice bar. So, maybe not in the context of MBA tort but in the context of medical malpractice he's hired equally.

Now, does he stand by his opinion? Yes. Does that make him an advocate? No. And I put it to this court and my friend that if challenged on cross, unlike Dr. Gerber, undoubtedly Dr. Ford would be prepared to adjust his opinion as necessary further to the Form 53 and his duties to the court.

Those are my submissions unless Your Honour has nay questions. I think we've been around the whole gambit now.

THE COURT: Mr. Dick.

REPLY SUBMISSIONS BY MR. DICK ON VOIR DIRE:

I apologize if I jump around a bit in reply, Your Honour but I'll try to be quick. I think my friend's submission actually made the danger crystal clear. She went through a note from Dr. Teshima that talks about a report from a cognitive behavioural therapist, with the suggestion being that somehow this is going to be put to an orthopedic surgeon.

Dr. Ross is coming tomorrow. We have a witness who can speak to whether Dr. Teshima and Cindy delayed treatment cognitive behavioural therapy treatment in order to get an addendum to that report. The very fact that this is the type of evidence that's being suggested will be put to the orthopedic expert to me is the problem.

I think it's important, because Your Honour asked if -- so what's Dr. Ford's conclusion? In two sentences, any...

THE COURT: Can you give me the page?

MR. DICK: F2554.

> Any claims that are issues are structural and organic in any way are completely unsubstantiated.

THE COURT: Sorry.

MR. DICK: Sorry, second paragraph Your Honour.

THE COURT: "I have many claims that prognosis is poor or guarded."

MR. DICK: F2554.

THE COURT: Oh sorry I've got 553, hold on.

MR. DICK: No problem.

THE COURT: Right.

MR. DICK: That's an orthopedic opinion. And then, but he does exactly what I complain of. He brings up secondary gain and BUILB-UT or some other psychiatric condition. We've heard Dr. Ross is able to address secondary gain. Dr. Ross is the right witness to address it.

My friend took you back to the article about outcome after a rotator cuff tear. There's no ropetator (sic) cuff tear. There isn't one. And so, as I understood my friend's submission is exactly the risk we're worried about. The opinion is no organic explanation, I leave it to the psychiatrist. But then he says, oh but hey jury here's an article about people with rotatory cuff tears. There's literature -- this was what my friend said. No explan -- I've written it down. No explanation literature. Now, she didn't say the next part, but I can only assume the next part is wink, wink, nudge, nudge, what do you think of that? That's the only reason for it to be there and it's improper.

Your Honour can review it. Dr. Ford makes one reference to Teshima. It's at page F2550. F2550, Your Honour can review it. It refers only to Dr. Teshima's clinical notes of August 10th, 2022 where Dr. Teshima reviews Dr. Gerber's report.

THE COURT: Sorry. I was catching up give that to me...

MR. DICK: Oh sorry, F2550 is the one and only reference in both reports to Dr. Teshima and it refers to one entry which is Teshima's review of Gerber's opinion. To suggest that the literature review and everything else was spurred by comments in Dr. Teshima's records when they are nowhere in the report should not be accepted.

And this is my final point in reply.

THE COURT: Okay. Just give me. Okay. Thank you.

MR. DICK: Dr. Ford's expertise with respect to chronic pain he sets out -- I'll give you the page number and I'm going to paraphrase because you've seen it, Your Honour but it's F2532. Dr. Ford says;

> My expertise is because I need to know for post-surgical outcomes.

There's no surgery here. That's it. That's what Dr. Ford says in his report and I won't go through it again, but he told us he was very careful and complete in his report. That's what he says his expertise is. There's no expertise that could -- need for any of the bias comments to be made and frankly there's no surgery here. So, there's no need for his opinion on how chronic pain may have affected Cindy's post-surgical outcomes.

Thank you, Your Honour.

THE COURT: Okay. All right. I'm not sure that I'll be done by 2:15. We're going to break at least until 2:15 and if I would ask you that you be back by then in case I can be done by that time, but if I can't the Registrar will give an update at that point.

R E C E S S

U P O N R E S U M I N G:

RULING ON VOIR DIRE

MERRITT, J. (Orally):

The defendant has tendered Dr. Michael Ford as a litigation expert. Dr. Ford has provided reports and signed a Form 53.

As I have said in my rulings on the other *voir dires r*elating to the qualification of expert witnesses when considering the admissibility of expert evidence, the starting point is the *Mohan* test of relevance, necessity, absence of an exclusionary role, and a properly qualified expert.

The second stage requires me to conduct a cost-benefit analysis to determine whether otherwise admissible expert evidence should be excluded because its probative value is outweighed by its prejudicial effect. The gatekeeper inquiry. This involves balancing the risk and benefits of admitting the evidence or balancing the relevance, reliability and necessity against the consumption

of time prejudice and confusion. Is the evidence beneficial enough to warrant admission despite the potential harms? In this case there is no exclusionary rule, but I do have concerns about the remaining three branches of the test.

The defendant asked me to qualify Dr. Ford as an orthopedic surgeon with experience in chronic pain and somatic symptom disorder; and the diagnosis, prognosis, causation and impairments relating to functionality and employment, particularly as it relates to Cindy Moustakis and the motor vehicle accident of January 9th, 2016.

The plaintiff submits that Dr. Ford is biased and I should not qualify him as part of my gatekeeping function because the cost of admitting his evidence outweighs its probative value.

White v.Burgess stands for the proposition that a lack of independence and impartiality can go to the admissibility of the evidence. Impartiality is best addressed as part of the qualified expert or fourth part of the *Mohan* test.

In addition to the common law requirements, litigation experts have a duty to provide impartial evidence under sub rules 4.1.01(1) and sub (2). The duty to the court overrides the obligation to the party calling them. If the expert is unwilling or unable to fulfill that duty they are not qualified and should be excluded. Once the expert

attests or testified to recognizing the duty, the burden shifts to the party seeking to exclude the expert evidence. It is rare to exclude expert evidence on that basis. Examples include where exclusion would be inappropriate are where the expert has a direct financial interest, close familiar relationship, exposure to professional liability if the opinion is rejected, or the expert has assumed the role of an advocate. I should only exclude at the threshold stage in a clear case where the expert is unwilling or unable to provide fair objective non-partisan evidence.

Dr. Ford said in the *voir dire* that his experience with chronic pain syndrome relates to decisions of whether to do surgery and potential post-surgical outcomes. There is no issue of surgery in this case.

In this case I find that Dr. Ford has gone outside his expertise and assumed the role of an advocate in his reports. I also find that when balancing the relevance, reliability and necessity of his evidence against the consumption of time, prejudice and confusion, the cost of admitting his evidence outweighs its probative value.

As the court has set out many times, there is always a risk that a jury will inappropriately defer to an expert's opinion rather than carefully weigh it.

As set out in the *Parliament* case and others, the ultimate conclusion as to the credibility or truthfulness of a witness is for the jury and is not the proper subject of expert opinion. The rationale for this policy is that credibility is a notoriously difficult problem, and a frustrated jury may rely on an expert's opinion as a convenient basis upon which to resolve its difficulties.

In this case both of Dr. Ford's reports show his willingness to go beyond his expertise and his answers in re-examination on the *voir dire* concerning malingered pain syndrome is an example of Dr. Ford's willingness to venture into an area where no other experts, either plaintiff or defence, have gone. This is beyond his stated experience and constitutes a challenge to the plaintiff's credibility. In several places in his reports, he ventures into this topic.

For example, at page 7 of his report, Dr. Ford cites a study relating to rotator cuff injuries and says that…

> Evidence is demonstrated, the symptoms associated with minor shoulder pathology are more closely related to depression that pathology severity.

On the same page he says…

> The science has clearly shown that persistent symptomology after a minor traumatic event associated with compensation/litigation issues is psycho-socioeconomic and not organically based.

He says…

> Expanding symptomology is not uncommon for litigants. It's known as BUILD-UP.

He cites an article in the Journal of Risk and Insurance on fraud detection.

On the *voir dire* he was unable to say whether this journal is peer reviewed. However, he does say in his report that…

> This paper describes the prevalence of this phenomenon and that 25 to 75 percent of insurance claimants show some evidence of fraud or BUILD-UP.

He says…

> This phenomenon cannot be discounted.

He goes on to say…

> This potential reason for Cindy's expanding complaints and ongoing report of disability for six and a half years after a minor accident cannot be explained on any basis other than a psychiatric conversion disorder.

Dr. Ford is not a psychiatrist, nor a psychologist, and he is not qualified to make this diagnosis. He seems to acknowledge this in the next sentence of his report where he says…

> I will leave this diagnosis up to the psychiatrists and psychologists.

But he doesn't leave it there. He goes on to say…

> This diagnosis, however, would be a diagnosis of exclusion after BUILD-UP has been definitively excluded.

He says…

> He is not too sure how that would be done.

Again, he is opining on matters outside the area of his expertise. I note that none of the other

experts who are properly qualified to make such a diagnosis have done so.

Dr. Ford also says at page 8 of his report that…

> Not surprisingly, the pedestrians who are at fault recovered as per expectations. Those involved in compensation litigation issues had significantly poorer outcomes with no organic explanation.

Dr. Ford says…

> This is in keeping with the literature demonstrating that compensation significantly negatively affects outcomes, and studies demonstrate this negative relationship between outcome and compensation.

As I said before, no other experts, plaintiff or defence, have gone down this road. The idea that Cindy has a psychiatric conversion disorder or is being fraudulent, or having BUILD-UP has not been canvassed by the defence psychiatrist Dr. Ross, who is better qualified to opine on such matters.

At page 9 of his report Dr. Ford says that…

> Eliminating compensation has been

> demonstrated to improve outcomes and any claim that Cindy's prognosis is poor or guarded is not based on any objective parameters.

Again, he is commenting on the prognosis of the psychiatrists.

In his conclusion Dr. Ford says…

> Cindy's ongoing complaints cannot be explained on an organic basis.

That is within his expertise, but he goes on to say…

> Cindy's ongoing complaints are either secondary to BUILD-UP or some other psychiatric condition.

The idea of BUILD-UP and a diagnosis of psychiatric conversion disorder is outside Dr. Ford's area of expertise and is designed to challenge the plaintiff's credibility, as are the references to insurance fraud.

As in the *Bruff-Murphy,* case the whole tone of the report is a liable predictor of Dr. Ford's testimony. He goes out of his way to make points that are clearly meant to challenge Cindy's credibility. He goes beyond a mere lack of independence and appears to have adopted the role

of advocate for the defence.

The defence concedes that Dr. Ford cannot diagnose chronic pain syndrome, now known as somatic symptom disorder. Ms. Tanner agreed to remove that for the opinions for which she sought to qualify Dr. Ford.

Given that the main issue in this case is whether Cindy has a somatic pain disorder, a major depressive disorder, and post-traumatic stress disorder symptoms and what damages flow from those conditions, I find that Dr. Ford's evidence is not sufficiently relevant or necessary. I find that his evidence is too prejudicial and not sufficiently probative.

…End of excerpt requested

FORM 3

ELECTRONIC CERTIFICATE OF TRANSCRIPT (SUBSECTION 5 (2))

Evidence Act

I, _____ ,
(Name of Authorized Person)

certify that this document is a true and accurate transcript of the recording of

Royal Appliance Warehouse Ltd. V. Belvedere Property Ltd. in the **Superior Court of Justice**
(Name of Case) *(Name of Court)*

held at **330 University Avenue, Toronto, Ontario**
(Court Address)

taken from Recording **4899-330U-5-1-20231017-090049-10-MERRITLO** , which has been certified in Form 1.

_____ _____
(Date) *(Electronic signature of authorized person)*

_____
(Authorized court transcriptionist's identification number - if applicable)

Ontario

_____, Canada
(Province of Signing)

A certificate in Form 3 is admissible in evidence and is proof, in the absence of evidence to the contrary, that the transcript is a transcript of the certified recording of evidence and proceedings in the proceeding that is identified in the certificate.