Court of Queen’s Bench of Alberta

Citation: Tavakoli v. Junghans, 2009 ABQB 756

2009 ABQB 756 (CanLII)

Date: 20091221
Docket: 0401 02291
Registry: Calgary

Between:

Akbar Tavakoli

Plaintiff

- and -

Alysa R. Junghans

Defendant

Reasons for Judgment
of the
Honourable Mr. Justice Peter M. Clark

Introduction

[1] On June 23, 2002, the Plaintiff, Akbar Tavakoli, was involved in a motor vehicle accident when the Defendant, Alysa Junghans, collided with the rear end of his vehicle. Mr. Tavakoli claims that he was injured as a result and seeks damages for personal injuries arising out of the accident. Liability for the collision has been admitted by the Defendant.

[2] Mr. Tavakoli alleges that as a result of the accident he suffers from a psychiatric condition called “Somatoform Disorder” which entails the perception of pain where there is no physical medical explanation. He further claims that an underlying mental illness was triggered by this accident. Other than a roughly two month period in early 2003, Mr. Tavakoli has not returned to work since the accident. He seeks damages for pain and suffering, loss of amenities and housekeeping, loss of past and future income, cost of future care and out-of-pocket expenses.

[3] The Defendant's position is that Mr. Tavakoli's injuries are not objectively verifiable and further denies Mr. Tavakoli's entitlement to damages as his credibility has been completely undermined. In the alternative, the Defendant submits that Mr. Tavakoli suffered a moderate soft tissue injury to his back and neck which lasted 12 to18 months and from which he subsequently recovered, or ought to have recovered but for the pre-existing Chronic Pain condition he sustained from an earlier 1993 accident. The last alternative suggested by the Defendant is that the accident aggravated an ongoing Somatoform Pain Disorder, originally caused by the earlier 1993 accident, and thereby created an increased level of pain and dysfunction for a period of no more than two years. Coincident with this is a finding that this Somatoform Pain Disorder would have returned to hamper Mr. Tavakoli at some point irrespective of the accident.

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Issues

[4] The issues for the Court to decide are as follows:

1. Is Mr. Tavakoli a credible witness?

2. Are Mr. Tavakoli's post accident physical and psychiatric injuries casually connected to the motor vehicle accident in 2002 with the Defendant?

Executive Summary

[5] As a result of the reasons that follow, I have come to the following conclusions:

[6] Mr. Tavakoli was not a credible witness. In turn, his evidence was not accepted by the Court in determining causation.

[7] The evidence of the treating and examining medical professionals that based their conclusions on Mr. Tavakoli's self-reported symptoms was tainted and was not accepted by the Court in determining causation.

[8] The evidence of the treating and examining medical professionals that based their conclusions on objective observations and findings about Mr. Tavakoli was accepted by the Court in determining causation.

[9] The objective evidence of the treating and examining medical professionals did not demonstrate that on a balance of probabilities that Mr. Tavakoli's alleged injuries were caused by the car accident in 2002.

[10] For the above reasons, Mr. Tavakoli's claim for damages is dismissed.

Evidence - June 2002 Accident

[11] The accident occurred on June 23, 2002, at approximately 2:30 a.m. when the Defendant was proceeding eastbound in her 1987 Oldsmobile Cutlass on 5th Avenue S.E., Calgary, Alberta, and collided with the rear end of Mr. Tavakoli's 1985 Buick Somerset while it was on 5th Avenue at 1st Street S.E.. Mr. Tavakoli was wearing his seatbelt. The damage to Mr. Tavakoli's vehicle was assessed at $4,271.28, which rendered the vehicle a write-off for insurance purposes. An ambulance was called to the scene of the collision and Mr. Tavakoli's passenger, Hussain Al Derazi, was treated by emergency workers and taken to the hospital. Mr. Tavakoli did not seek or receive aid from the ambulance attendants. Instead his cousin drove him to the Foothills Hospital a few hours later where the emergency doctor diagnosed a cervical hyper extension injury.

[12] Mr. Tavakoli testified that when the Defendant collided with the rear end of his vehicle, he had his head turned to the left and was not aware of the impending collision. The collision was analysed by a forensic engineer, Mr. William Acteson, who opined that the collision speed was in a range of between 24 and 46 km/h.

Pre Accident History - Background History and Health - Mr. Tavakoli

[13] Mr. Tavakoli was born on April 30, 1964, in Isfahan, Iran. He was 38 at the time of the accident and 43 at the time of trial. Mr. Tavakoli was raised in Iran with some 18 brothers and sisters and attended what he described as an "Arts School". In September 1980, when Mr. Tavakoli was approximately 16 and one-half years old, Saddam Hussein of Iraq launched an invasion of Iran. As a result of the war, Mr. Tavakoli and his younger brother, Ashgar Tavakoli, and cousin, Bahman Poshtchaman, decided to try and escape Iran. There were numerous attempts to escape, resulting in the capture and imprisonment of Mr. Tavakoli in Iran, Turkey and Greece. He also tried to use forged passports to get out of Iran and Greece. He eventually escaped Iran in 1986 and stayed in Greece for three years. In 1990 Mr. Tavakoli migrated to Canada. He was arrested and convicted of shoplifting that same year. In 1994 he became a Canadian Citizen.

[14] Upon his arrival into Canada he was able to obtain a cleaning job. A few years later he purchased, with his cousin Mr. Poshtchaman, a pool hall and arcade in High River, Alberta. However, a year later, in March 1993, he moved to Calgary, Alberta and started working for Big Rock Breweries.

[15] In May 1993, Mr. Tavakoli suffered lower back connective tissue injuries from a rear-end car crash. However, he continued to work at Big Rock. He took treatment but the injury never entirely healed and he took on lighter duties. He still had trouble with his lower back and missed work intermittently. In February 1995 he ended up in hospital for a few days. It was around this time that he lost his job.

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[16] In early 1995, Mr. Tavakoli started work managing the "Pop's Deli" in Elveden House, which was partially owned by his cousin Mr. Poshtchaman. In 1996 he moved on to work as a warehouse delivery person and then as an assembler with a manufacturer from May 1997 to January 1998.

[17] In May 1998, while working with another cousin, the brother of Mr. Poshtchaman, dismantling an iron framed bridge, Mr. Tavakoli fell off a forklift and broke his right wrist and suffered a compression fracture to his C-7 neck vertebra. He testified that he stopped working until August 1998, when Dr. Hunter, a neurosurgeon, suggested he could gradually return to his normal routine. This recommendation was included in Dr. Hunter's office note dated August 17, 1998.

[18] Thereafter Mr. Tavakoli moved to Montreal with his girlfriend at the time, Samantha Stuckey (nee Kuhn), where the two of them enrolled in upgrading education classes and worked until early 2000. They then returned to Calgary, although Mr. Tavakoli made a diversion for a few months to visit his family in Iran for the first time since 1986.

[19] Upon his return to Calgary in mid-2000, Mr. Tavakoli was back at work managing Pop's Deli in Elveden House, this time as a partner in the business. However, he testified that his cousin Mr. Poshtchaman was stealing from the till to feed a gambling habit and as a result, the business failed. For a time, Mr. Tavakoli turned to landscaping, and then to tile work and home renovations. In the autumn of 2001 he started a job as a tile setter with a contractor doing tile work at the Calgary International Airport during its expansion. At the time of the accident, Mr. Tavakoli was working as a tile setter for Park Avenue Flooring at the Airport. He had started this particular job less than six months before the accident.

[20] Mr. Tavakoli has never been married, however, at the time of trial he had a girlfriend, Sarieng Kheang, whom he met after the accident. Mr. Tavakoli and Ms. Kheang have had two children together since the accident: a son born in December 2005, and a daughter born in May 2007. Mr. Tavakoli also has a step-son who was 12 years old at the time of the trial.

[21] Mr. Tavakoli described himself prior to the 2002 accident as a hard worker with a passion for creating things. He professed great pride in his work and creativity. As a hobby he created various pieces of art including paintings and sculptures made from scraps. He described himself as very active outside work also. Specifically, Mr. Tavakoli mentioned a number of sports and activities he participated in, in addition to body building and working out, generally.

Lay Witnesses

[22] Nine other lay witnesses testified at trial as to Mr. Tavakoli's pre-collision life. They included Samantha Stuckey (Mr. Tavakoli's ex-girlfriend), Zabilloh Ghorbani (a co-worker of Mr. Tavakoli's from 2000), Don Wall (Mr. Tavakoli's immigration sponsor and close friend for over 20 years), Ashgar Tavakoli (Mr. Tavakoli's younger brother), Bahman Poshtchaman (Mr. Tavakoli's cousin), Abbas Davoudi (an acquaintance), Harvey Hopper (a customer), Aaron

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Martens (a friend) and Cameron Nerland (Mr. Tavakoli's job supervisor at the Calgary International Airport). Their evidence can be summarized together.

[23] The common theme from the testimonies was that Mr. Tavakoli was a hard working, active, athletic and creative man prior to the 2002 accident. Mrs. Stuckey described Mr. Tavakoli as very fit, athletic and active. She recalled many of the pieces of art that he created while they were together. Mr. Ghorbani described Mr. Tavakoli as a great co-worker who would "work so hard" and said that everything about him was "so fast". Mr. Nerland also described him as a good worker. Mr. Wall, who co-sponsored Mr. Tavakoli as a Canadian Citizen and has been a close friend since 1990, described Mr. Tavakoli as self-motivated and hardworking. Mr. Hopper, a customer of Mr. Tavakoli's from his 2001 job at Pop's Deli in Elveden House, used phrases such as "very impressive; worked tirelessly; very industrious; and very conscientious" to describe Mr. Tavakoli. Mr. Martens described Mr. Tavakoli as "very easy to be around" and someone who was "positive".

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Pre Accident Medical History and Health- 1993 Motor Vehicle Accident

[24] Mr. Tavakoli was involved in a motor vehicle accident in May 1993. He testified he was rear-ended while driving on McLeod Trail in Calgary. He testified that it was not a major accident, but he did attend on his doctor complaining of back pain. He subsequently commenced an action against the driver of the other vehicle, which was settled in September 1998 for $67,500.

[25] During the course of treatment for that 1993 accident, and indeed even at trial, Mr. Tavakoli denied having back pain prior to the 1993 accident. report of Dr. Laatsch from February 17, 1994, indicated Mr. Tavakoli had suffered from vague lower back pain for approximately 4 years since coming here from Greece in 1990. Despite this pre-existing history of back pain, in August 1995, Mr. Tavakoli told Dr. Miller that he had no pre-accident lower back problems of any kind.

[26] As a result of the 1993 accident, in September 1994, after completion of a lumbosacral spine examination, Dr. Urban, an orthopaedic surgeon, found Mr. Tavakoli had a permanent impairment of 2.5% to 5.0% due to back pain. In February 1995, Mr. Tavakoli was hospitalized for five days due to back pain.

[27] In October 1996, Dr. F. James Bazant, an orthopaedic surgeon, performed an Independent Medical Examination (IME) of Mr. Tavakoli. He indicated that Mr. Tavakoli experienced "daily pain" and that "he is never without pain". On cross-examination when questioned regarding this report, Mr. Tavakoli stated he could not remember these pains and that, in any event, they represented a "totally different issue" from what he is currently experiencing.

[28] Four and one-half years after the 1993 accident, Mr. Tavakoli was still attending weekly physiotherapy sessions. On December 30, 1997, Dr. Nichol, a general practitioner, noted Mr. Tavakoli had more severe pain in his back.

[29] On August 5, 1995, Dr. Mothersill, a psychologist, wrote a report based on a Psychological Assessment he had conducted of Mr. Tavakoli. He concluded that Mr. Tavakoli was suffering from a Chronic Pain Disorder and a Major Depressive Disorder. A decrease in physical activities caused a loss of self efficacy, occupationally and interpersonally, as well as loss of self confidence; he had become more irritable, angry and suspicious of others. In total, Mr. Tavakoli attended 13 sessions of psychological treatment for his Pain Disorder and Major Depressive Disorder with Dr. Mothersill between July 31, 1995 and February 28, 1996.

[30] It appears from a review of the medical records that Mr. Tavakoli had been prescribed the antidepressants Luvox and Prozac on various occasions through the years 1994 to 1998. While Mr. Tavakoli denied experiencing depression prior to the 2002 accident, on cross examination after being referred to several references to depression in the treatment notes of Dr. Nichol, Mr. Tavakoli admitted to having experienced depression "once in a while".

1998 Forklift Accident

[31] In May 1998, Mr. Tavakoli fell off a forklift while working for his cousin, Mr. Poshtchaman. He sustained a fractured wrist and a C-7 spinal compression fracture. Subsequently, Mr. Tavakoli had to wear a hard neck collar for two and one-half months. He testified that he did not make a Workers' Compensation Board ("WCB") claim because Mr. Poshtchaman had not made the appropriate arrangements with the WCB and he was afraid of getting Mr. Poshtchaman into trouble or causing him to miss out on an opportunity to retain the scrap metal. It appears from the records available that Mr. Tavakoli was off work for approximately four months after the accident before moving to Montreal.

[32] While in Montreal from 1998 to 2000, Mr. Tavakoli saw several doctors for minor ailments including stomach and neck pain, but he testified that he was otherwise healthy. I note, however, that a chart note from his Montreal physician dated January 6, 1999, indicated Mr. Tavakoli found it "hard to sit straight", had "pain all over his body" and experienced "secondary muscle pains in legs, back". Also while in Quebec, Mr. Tavakoli was prescribed a continuation of Prozac on November 2, 1998, and complained to his physician of continuing headaches on November 10, 1999.

[33] Once Mr. Tavakoli returned to Calgary in 2000, he testified to being "pretty healthy". However, a review of Dr. Zubko's chart indicates that on March 5, 2001, Mr. Tavakoli reported lower back pain "for the past three weeks". On cross examination Mr. Tavakoli did not dispute Dr. Zubko's notes.

Arguments

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[34] Mr. Tavakoli acknowledges that his medical history reveals significant issues such as colitis, a lower back injury from the 1993 car crash, and a broken wrist and neck injury from the forklift fall in 1998. However, he asserts that he was able to maintain his lifestyle in spite of these injuries, that up until the 2002 accident his health had not deteriorated to any noticeable extent, and that his current state is a direct result of the 2002 accident alone.

[35] The Defendant asserts that the medical records do not support Mr. Tavakoli's claims of excellent pre-accident health. The Defendant suggests that Mr. Tavakoli suffered numerous injuries from previous accidents and ailments which directly contrasts with Mr. Tavakoli's testimony. For example, in addition to the injuries such as those suffered from the 1993 and 1998 accidents, and the colitis, the Defendant contended that Mr. Tavakoli made five WCB claims from 1994 to 2002. These included a claim in January 1995, following an incident at Big Rock Brewery where Mr. Tavakoli wrenched his back while lifting a heavy box. He testified that he was taken to the hospital by ambulance following this incident.

[36] It is clear to me that despite Mr. Tavakoli's suggestion that the 1993 accident was only minor in nature, in fact it was not. First, as a result of this accident Mr. Tavakoli claimed to have experienced troubling back pain for at least three years afterwards to Dr. Urban, Dr. Bazant and Dr. Mothersill. Second, Mr. Tavakoli was diagnosed with a Chronic Pain Disorder and Major Depressive Disorder, caused by the 1993 accident by Dr. Mothersill in August 1995. As a result of the diagnoses, Mr. Tavakoli attended 13 psychological counselling sessions with Dr. Mothersill up until February 1996. Third, the lawsuit pertaining to the 1993 accident was settled for $67,500 in 1998, which is not indicative of a minor accident.

[37] Dr. Zubko's chart note dated March 5, 2001, and the other above references to back pain from the 1993 accident and the 1998 forklift incident, indicate to me that Mr. Tavakoli suffered at least two serious accidents prior to the 2002 accident, both of which left him with significant pain until January 1999 and possibly as late as March 2001. Further, Mr. Tavakoli was prescribed antidepressants as far back as 1994 and at least as late as 1998 (after the forklift accident that same year). He attended 13 psychological sessions to counsel him on his depression and Chronic Pain Syndrome. In fact, these events did effect Mr. Tavakoli's life and health more than he has let on to the Court.

Post- Accident (2002) Health and Medical Diagnosis and Treatment

[38] At 4:00 a.m. on June 23, 2002, approximately two hours after the accident, Mr. Tavakoli attended at the Foothills Hospital. According to the hospital's records, he complained of neck pain and indicated that three years earlier he had suffered a C-7 injury and had a history of colitis. He was diagnosed with a cervical hyper extension injury at that time.

[39] The following day, Mr. Tavakoli attended on Dr. Romauld Zapasnik, general practitioner. He continued to be treated by Dr. Zapasnik on a number of occasions until May 2003. In addition, he has attended on Dr. Beverly Tompkins, General Practitioner, since May

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2005, to the time of trial and Janusz Curylo, Massage Therapist, since December 2002, to the time of trial.

[40] For the purpose of an IME, Mr. Tavakoli attended on the following medical professionals:

- Dr. Devrome, psychologist, in March and May 2004 and January 2009.
- Dr. Maryana Apel, physiatrist, in November 2004 and May 2008.
- Gillian Bagg, occupational therapist, in February and March 2005.
- Dr. Clarke, anaesthesiologist, in January 2005.
- Doug Conway, vocational psychologist, in June 2006.
- Dr. Reesal, psychiatrist, in July 2006.
- Dr. Ancill, psychiatrist, in January 2008.
- Sherri Beauchamp, kinesiologist, in December 2008.

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[41] In addition, since the 2002 accident Mr. Tavakoli saw the following medical practitioners and care givers for treatment:

- Lindsey Park Physiotherapy from September to October 2002.
- Dr. K.C. Hill, orthopaedic surgeon, for the purposes of a Section B medical examination on October 22, 2002.
- Dr. Gary Klein, neurologist, on September 19, 2002 and in December 2008.
- Dr. S. Donaldson, psychologist, for assessment and treatment purposes in July 2003.
- Ashley Smith, physiotherapist, for a physiotherapy-legal assessment on July 18, 2003.
- Dr. Glen Edwards, orthopaedic surgeon, on September 15, 2003
- Dr. Terry Medock, dentist, from December 2003 to June 2004.
- Dr. Won-Jae Lee, acupuncturist, from January 2004 to July 2004.
- Marg Haynes, hypnotist, in February 2004.
- Dr. Debavelaere, naturopath, from May 2004, to November 2005.
- Dr. Man-Son Hing, neurologist, on January 23, 2005.
- Dr. Ma, gastroenterologist, in July 2005 and October 2007.
- Dr. Steven Edworthy, rheumatologist, on July 28, 2005.
- Dr. Steven Casha, neurosurgeon, and Robert Jacobsen, physiotherapist, at the National Spine Care office on November 21, 2005.
- Terry Willard, herbologist, in February 2007.
- Jennifer Ash, a “divinity therapist” in early 2007.
- Dr. A. Patullo, an infectious disease specialist in October 2007.
- Chronic Pain Centre at the Holy Cross Hospital site since October 2008.
- Drs. Zapasnik, Tompkins, Apel, Devrome and Ancill, and Gillian Bagg and Douglas Conway provided expert medical reports and gave viva voce evidence on behalf of Mr. Tavakoli. Dr. Ancill provided a rebuttal report to Dr. Reesal and Gillian Bagg provided a rebuttal report to Sherri Beauchamp. Janusz Curylo, Mr.

> Tavakoli's massage therapist, testified at trial. The Defendant tendered medical reports from Drs. Clarke and Reesal, and Sherri Beauchamp all of whom testified at trial also. Dr. Clarke provided a rebuttal report to Douglas Conway and Dr. Apel, Dr. Reesal provided a rebuttal report to Douglas Conway and Dr. Apel, and Sherri Beauchamp provided a rebuttal report to Gillian Bagg. Dr. McDougall was called as a witness by the Defendant to introduce paper review reports he provided to Alberta Insurance for the Severely Handicapped ("AISH") in May and October 2005, that were entered as an exhibit.

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[42] After the 2002 accident, Mr. Tavakoli applied for Section B benefits from Alberta Motor Association ("AMA"). In total Mr. Tavakoli received $10,728.42 for disability, acupuncture, massage, physiotherapy and medications. After February 5, 2003, AMA stopped payments to Mr. Tavakoli and he brought a civil claim against the AMA for failing to pay further benefits after this date. This claim was settled prior to trial in September 2004, for the sum of $15,000 plus $250 in costs. The parties to the present action have agreed that this settlement is to be accounted for as $9,000 for disability and $6,000 for medical expenses.

Lay Witnesses

[43] Eleven lay witnesses, including Mr. Tavakoli, gave viva voce evidence as to Mr. Tavakoli's condition and life after the 2002 accident. The common thread from all of these testimonies is that Mr. Tavakoli has completely changed since the accident.

[44] Cameron Nerland, a co-worker, noticed that Mr. Tavakoli complained about being in pain and upset while at work. Friends such as Aaron Martens and Don Wall noticed that Mr. Tavakoli was no longer as active and could be described as "an old man" and someone who was "pushing through his pain". His brother and cousin were surprised that the collision caused so much difficulty for Mr. Tavakoli because he had been able to overcome injuries in the past and thought that something was seriously different with him. Abbas Davoudi noticed that Mr. Tavakoli seemed different after the accident and described him as "never comfortable" and easily frustrated. Zabihollah Ghorbani summarized the differences in Mr. Tavakoli's behavior pre and post accident as "like black and white". Mr. Tavakoli's ex-girlfriend, Samantha Stuckey, described his post accident appearance and attitude as "negative, unhappy, weak, sick and unattractive". Sarieng Kheang, the mother of Mr. Tavakoli's two children, indicated that she cannot live with him because she cannot cope with him complaining about his pain. Lastly, since Garret Griffiths met Mr. Tavakoli in 2008, he described Mr. Tavakoli as a really nice guy, who enjoys working "vicariously" through others because he enjoys being at a worksite, despite not being able to physically work. He also mentioned that he could tell Mr. Tavakoli was in a lot of pain when they were together.

[45] On cross-examination, Ashgar Tavakoli admitted he does not live in Canada and has not seen his brother consistently since 1989. Interestingly, Ashgar Tavakoli testified that he came to visit Mr. Tavakoli in 2002 after the accident and provided his brother with massages for pain relief, despite Mr. Tavakoli's assertion to medical professionals and this Court of being hyper

sensitive to touch. Ashgar Tavakoli also testified that after the 2002 accident, Mr. Tavakoli attended at work sites and was involved in either checking on work or had done a certain amount of work himself. Mr. Poshtchaman indicated in his testimony that Mr. Tavakoli was not lying down at a jobsite in Longview and that the Longview job took place over a span of weeks.

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[46] Since the 2002 accident, Mr. Wall has attended many of Mr. Tavakoli's medical appointments, completed his tax returns for him and lent him over $20,000. On cross-examination Mr. Wall indicated that he was surprised at some of the video surveillance of Mr. Tavakoli doing activities Mr. Wall didn't think he was capable of and was unaware that Mr. Tavakoli was performing work tasks of any kind.

[47] Sarieng Kheang is Mr. Tavakoli's girlfriend and mother of his two children, however, they did not meet until 2004 and they do not live together. As such, Ms. Kheang had limited information to offer the Court on Mr. Tavakoli's condition or generally how his injuries have affected his life. Aaron Martens, Abbas Davoudi, Cameron Nerland, Garret Griffiths and Harvey Hopper were passing acquaintances or coworkers with little knowledge of Mr. Tavakoli's pre or post accident health.

Plaintiff's Medical Experts - Dr. Zapasnik

[48] Dr. Romauld Zapasnik is a family practitioner. He first saw Mr. Tavakoli a day after the collision on June 24, 2002. At this visit, Mr. Tavakoli complained of having pains in his neck and back. On examination, Dr. Zapasnik found that Mr. Tavakoli was very tender over his upper back and neck spine, his muscles were in spasm with over-sensitivity on palpation and there was a decrease in the range of motion in the cervical spine and upper back. At this time Dr. Zapasnik's report indicates that Mr. Tavakoli was started on anti-inflammatories and analgesics. According to his testimony and medical records, Dr. Zapasnik's initial diagnosis can be described as a soft tissue/connective tissue injury localized to the neck and upper back.

[49] Dr. Zapasnik saw Mr. Tavakoli again on 12 occasions from July 4, 2002, to May 28, 2003. Mr. Tavakoli's complaints during this time period can be summarized as spasm in his neck and back muscles, tenderness over his lower back muscles and pain throughout his left side of the body including leg, foot, neck, chest wall and shoulder muscles, and at times, pain everywhere.

[50] It is noteworthy that on December 27, 2002, Dr. Zapasnik's report indicates that Mr. Tavakoli was started on massage twice a week and that in the May 28, 2003, report Dr. Zapasnik documented that Mr. Tavakoli was still receiving massage therapy, basically without a lot of improvement.

[51] Dr. Zapasnik prepared a report on June 1, 2003, for Plaintiff's counsel which concluded that Mr. Tavakoli suffered a musculigamentous injury from the 2002 accident. His report indicates that from his understanding, because of Mr. Tavakoli's history of a cervical fracture in 1999, he is recovering very slowly. Dr. Zapasnik included the statement "probably because of the past history of the injury, the patient is developing chronic pain syndrome".

[52] On September 25, 2003, Dr. Zapasnik prepared a second letter for Plaintiff's counsel which read as follows:

> Mr. Akbar Tavakoli has been known to me since June 24, 2002. At that time he stated he was the driver of a car that was rear-ended. He suffered some musculoligamentous injury in his back and neck. Because of his job as a tile setter, he is not able to work or has been unable to work since the accident. In addition, from my understanding, he developed the Fibromyalgia with Chronic Fatigue Syndrome, very possibly related to this accident. At the present moment he is totally disabled to do any kind of bending or lifting. He has been attending psychological sessions with Dr. Donaldson, Psychologist. On a daily basis he is using anti-inflammatories and analgesics to cope with the pain and discomfort in his muscles.

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Dr. Tompkins

[53] Dr. Tompkins is a family practitioner. Plaintiff's counsel presented her as an expert in family medicine and rehabilitation of patients with fatigue disorders. I did not accept Dr. Tompkins as an expert witness in any area, for reasons discussed below. Accordingly, her opinions carry little weight and should only be considered in light of the treatment she provided to Mr. Tavakoli over the last five years.

[54] Dr. Tompkins first saw Mr. Tavakoli on May 17, 2005, three years after the collision upon a referral from Dr. Zapasnik. On October 24, 2008, she prepared a report at the request of Plaintiff's counsel. In her report she outlined Mr. Tavakoli's symptoms as including the presence of widely spread body pain, fatigue, insomnia, cognitive impairment and intolerance to physical activity. Dr. Tompkins diagnosed Mr. Tavakoli with fibromyalgia and reported that this diagnosis was later confirmed by rheumatologist, Dr. Steven Edworthy. She mentioned that Mr. Tavakoli's medical history was complicated by ulcerative colitis and a previous C-7 compression fracture. She noted that rehabilitation at the clinic was "exceedingly difficult" due to Mr. Tavakoli's "poor financial status" as well as due to the presence of chronic stomach pain due to a chronic bacterial infection.

[55] Dr. Tompkins' report indicates that Mr. Tavakoli told her that he was in a period of shock after the accident and that his body felt heavy. Further, several days following the accident he stated that he experienced the onset of body pain and an electrical sensation of pain in the region of his neck. This pain became widespread and more severe over time. The report further states that the pain "became associated with insomnia, cognitive difficulties, and the inability to perform physical activity that was previously well tolerated prior to the accident". The report also indicates that Mr. Tavakoli's health status has progressively deteriorated in spite of his efforts to seek treatment from multiple sources and that his rehabilitation with Dr. Tompkins was extremely difficult due to his "very poor financial status".

[56] Dr. Tompkins' report also indicates that Mr. Tavakoli was placed on numerous medications by numerous doctors and care providers to try and improve his health status, which included medications for pain, insomnia, depression and stomach pain. Twenty-four medications and approximately 16 herbal supplement or food recommendations were listed in Dr. Tompkins report.

[57] Dr. Tompkins' report finishes by addressing Mr. Tavakoli's ability to work. Specifically, Dr. Tompkins highlights that for the past six years, Mr. Tavakoli has been "highly impaired and severely disabled primarily by the symptoms of widespread body pain, fatigue and lack of physical stamina". She further opined that Mr. Tavakoli is not able to work at any job in any capacity at this point. In the best case scenario, she suggested that Mr. Tavakoli might be able to return to work on a part-time basis in three to five years given sufficient financial resources to pursue an appropriate rehabilitation plan.

[58] In testimony, Dr. Tompkins explained that she saw Mr. Tavakoli on 44 visits which amounted to 21 hours of time spent with him. She noted that he displayed histrionic behaviour, which she believed was consistent with a "middle east culture". She further explained that she decided to rule out or identify all medical problems by sending Mr. Tavakoli for neurosurgery review, gastroenterology, rheumatology and blood work. Ultimately she diagnosed Mr. Tavakoli with fibromylagia. Plaintiff's counsel conceded that this diagnosis is not appropriate as it is counsel's submission that Mr. Tavakoli's illness is psychiatric and also, the diagnosis of fibromyalgia is not supported by Dr. Apel or any other physician with the expertise to make such a diagnosis.

[59] Despite Dr. Tompkins' diagnosis of fibromyalgia which was not supported by any other medical expert at trial, she nevertheless came to the conclusion that the June 2002 collision was the likely cause for Mr. Tavakoli's current condition. Her conclusion was based on Mr. Tavakoli's work, medical and physical activities history, and by eliminating any other possible medical causes. In her report she stated that she did not think that there was much of a chance of Mr. Tavakoli recovering to his pre-collision status. However, in her testimony she stated that she thought Mr. Tavakoli was getting better and that if he stayed with his current rehabilitation program and kept his pain level low he might be able to return to a part-time occupation in 18 to 24 months.

Janusz Curylo

[60] Janusz Curylo is a massage therapist. Over the last six years, Mr. Curylo has provided Mr. Tavakoli with at least 486 massage treatments, spending an excess of 500 hours with him. It appears that Mr. Tavakoli attended massage therapy based on one medical prescription, being that of Dr. Zapasnik in August 2002. Mr. Curylo acknowledged that his treatments have not caused Mr. Tavakoli's condition to improve. He indicated that they only provide Mr. Tavakoli with temporary pain relief. Nevertheless, Mr. Curylo stated in his testimony that he believes these treatments to be necessary because they "break the cycle of pain". In questioning from the Court he explained that the continued use of massage therapy was useful because Mr. Tavakoli

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was giving positive feedback and there was no negative feedback with respect to receiving the treatment. Mr. Tavakoli has incurred over $25,000 in massage therapy costs in the last six years and currently owes Mr. Curylo $8,000 for past treatments.

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Dr. Maryana Apel

[61] Dr. Maryana Apel is a physiatrist. She first examined Mr. Tavakoli in November 2004 after a referral by Dr. Medock, a dentist, who was looking for an explanation of Mr. Tavakoli's jaw pain. As a physiatrist, Dr. Apel looks at the whole physical condition of the patient in coming to her assessment. At the first visit on November 23, 2004, very little was accomplished as she could not complete the examination of Mr. Tavakoli. He explained that he was too sensitive to touch, therefore Dr. Apel could not determine any diagnosis. In her experience, Mr. Tavakoli did not behave like most patients, as he had an overwhelming reaction to her attempts at eliciting movement. Also, his range of motion was very limited. Dr. Apel testified that his erratic behaviour was suspicious because there were no obvious physical problems. Her report from November 23, 2004, confirms that she could not find anything physically wrong with him. She thought his problem may be related to Somatoform Pain Disorder, however, this was not within her area of expertise, so a diagnosis was not made.

[62] Dr. Apel was later retained by Plaintiff's counsel to perform a more thorough examination and assessment on May 29 and June 12, 2008. Dr. Apel reported that on May 29, 2008, she aborted her examination when Mr. Tavakoli became "emotionally labile" and "violent with no provocation". For her safety, Dr. Apel asked Mr. Tavakoli to leave. Dr. Apel left the examination room and upon her return, she discovered Mr. Tavakoli's gown torn in half.

[63] Plaintiff's counsel requested another examination with Dr. Apel, which she obliged with the presence of Mr. Tavakoli's friend, Mr. Wall. On June 12, 2008, Mr. Tavakoli re-attended with Mr. Wall and was cooperative such that Dr. Apel was able to fully examine him. Dr. Apel noted that Mr. Tavakoli did not give a complete effort, but she again found nothing physically wrong with him and she was unable to explain his symptoms. Dr. Apel suggested Mr. Tavakoli be treated psychologically rather than with medication. She was clear in stating that she did not assume that Mr. Tavakoli was feigning or malingering and opined that his condition was psychological or psychiatric and required one of those two disciplines to diagnose further.

[64] Dr. Apel documented her diagnostic conclusions as follows:

1. There was history of Helicobacter pylori infection without the knowledge of its control.
3. There was radiological evidence of (C7) remote cervical fracture and, related to that, cervical post-traumatic sponylosis.
4. Significant emotional and psychological problems were obvious throughout all encounters.

[65] Dr. Apel was careful to note that "Chronic Pain" in and of itself is not a diagnosis. Chronic Pain Syndrome is a term used by physicians when they cannot find the specific source of the patient's pain. According to Dr. Apel, "it is not a diagnosis, it's defeat".

[66] On cross-examination, Dr. Apel agreed that it is difficult to pinpoint the causes of Chronic Pain or Somatoform Disorder. She stated that in most cases, Somatoform Disorder is likely caused by several different factors, including upbringing, family stress and others. She also agreed that a person does not have to experience an actual physical injury to experience Somatoform Disorder.

[67] Dr. Apel did not agree with the diagnosis of fibromyalgia made by Dr. Tompkins. In her view, Mr. Tavakoli demonstrated "over-dramatization" behaviour in that light touching and light movement resulted in an overly dramatic response. Further, Dr. Apel found that Mr. Tavakoli had "significant discrepancy of movement", meaning that he was actively resisting manipulation and moving less during passive range of motion tests compared with active range of motion tests where the patient is asked to move his limbs on his own.

[68] Dr. Apel also noted that Mr. Tavakoli exhibited strongly positive Waddell's signs. Dr. Apel explained that Waddell's signs are tests administered by doctors to see if a patient is faking or exaggerating symptoms. She found at least four positive Waddell's signs during her examination. When she tested Mr. Tavakoli for fibromyalgia, she pressed several points on the Mr. Tavakoli's body and received the same response whether or not the pressure point was an identified "trigger point". She testified that this confirmed to her that Mr. Tavakoli did not suffer from fibromyalgia.

[69] In her report, Dr. Apel concluded that Mr. Tavakoli exhibited "supratentorial pain amplification". In her testimony she stated this was a euphemism for "the pain is in his head". In fact, Dr. Apel could not determine why Mr. Tavakoli was complaining of pain and concluded that she did not know what injuries he may have suffered in the accident.

[70] Regarding treatment, Dr. Apel noted Mr. Tavakoli was not exercising enough. She further testified that massage treatments more than six years after the accident at a frequency of twice a week was excessive. In her view, active treatment such as exercise would be more helpful than passive therapies. Further, although Dr. Apel did not think that Mr. Tavakoli was suffering from fibromyalgia, she stated that her treatment for fibromyalgia focuses on exercise rather than Dr. Tompkins' emphasis on rest.

Dr. Arlene Devrome

[71] Dr. Arlene Devrome is a clinical psychologist with an emphasis on patients with Chronic Pain and similar disorders. Mr. Tavakoli was referred to Dr. Devrome by Dr. Donaldson for counselling focused on pain management. She ran a battery of psychological tests and conducted interviews over two days in April 2004, then provided a report to Plaintiff's counsel on July 5, 2004. The tests she implemented variously found that Mr. Tavakoli tended to exaggerate, and

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suffered from depression, anxiety and psychological distress. Her conclusion about Mr. Tavakoli was that he has a "pain disorder complicated by depression and anxiety".

[72] Dr. Devrome's report indicates that Mr. Tavakoli told her about the 2002 accident and the medical care he had been receiving since then. He told her that he had been referred to physiotherapy but that he found it to be too painful. As a result, he stopped attending physiotherapy and tried massage therapy instead. Although long-term pain reduction had not resulted from the massages, Mr. Tavakoli explained that it helped him to cope with his pain.

[73] Mr. Tavakoli also told Dr. Devrome that he was referred to and attended treatment at the Calgary Pain Management Centre ("CPMC") and that he attended two treatments with a hypnotist at Sky Gamma Natural Therapy, although he could not remember the details of when he went or which therapist he saw. He told Dr. Devrome that he attended an IME at the request of his insurance company. The physician reportedly indicated that he was able to return to work, and the insurance company subsequently stopped financial assistance and any funding of treatment. He also informed her that since that time he had been living on social assistance benefits and was in serious financial distress. He described himself as "homeless", saying that he lives with friends and relatives for varying lengths of time. He described constant, severe pain that interfered with his ability to sit, stand, walk or perform any physical activities for any length of time; as such, he did not participate in any of the social or recreational activities he used to enjoy and he is unable to work.

[74] Dr. Devrome reported that Mr. Tavakoli presented as a muscular, healthy appearing male and that he was open and cooperative during the examination. She also noted that he was extremely pain-focused and frequently shifted positions in his chair or moved positions and occasionally he would hunch forward and moan while holding his stomach.

[75] Dr. Devrome indicated that Mr. Tavakoli had difficulty with understanding and reading some of the materials and understanding the idioms of the MCMI test. She read some of the questions to him because of these difficulties.

[76] Dr. Devrome gave evidence that there were three psychological tests she used for validity: the Word Memory Test, the Test of Memory Malingering and the Lees-Haley scale built into the Minnesota Multiphasic Personality Inventory Revised ("MMPI-2"). On the first two tests she explained that the results showed Mr. Tavakoli was being truthful and was demonstrating good effort. However, the Lees-Haley scale suggested Mr. Tavakoli was malingering as he scored 30 out of 30. Dr. Devrome did qualify this score by pointing out in her testimony that 13 of the 30 questions could be accounted for by the physical complaints arising from Mr. Tavakoli's colitis, which would potentially bring his score down to 17 out of 30.

[77] The validity of the Lees-Haley scale was addressed by Dr. Reesal in his testimony, which I will discuss later. For now it is sufficient to note that there are some concerns of false positives with this test, which may affect the veracity of a conclusion of malingering based on Mr. Tavakoli's score.

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[78] A description of the other tests Dr. Devrome conducted and Mr. Tavakoli's test results are as follows below.

[79] The MMPI-2 is a 567-item personality test which is the most extensively used such inventory in North America. Mr. Tavakoli's responses to this test suggested that he attempted to present himself in a moralistic and unrealistically virtuous manner, that he is prone to exaggerate his symptoms to such an extent that a question is raised as to their validity and that he tends to rely on hysterical defences of denial and repression in the face of conflict. Dr. Devrome's report went on to suggest that Mr. Tavakoli "may be receiving secondary gain from his symptoms that helps him to maintain them". As well, Mr. Tavakoli's profile suggests that he harbours negative attitudes towards work that could limit his adaptability in the workplace. Further, his low morale and lack of interest in work could impair future adjustment to employment. Dr. Devrome's report did suggest that some individuals with this profile may gain from treatment in a Chronic Pain program where the exaggerated symptomatic behaviour focussing on their extreme pain complaints can be extinguished and more adaptive behaviour substituted.

[80] The Millon Clinical Multiaxial Inventory ("MCMI-III") is a self-report instrument designed to assess personality disorders and clinically relevant syndromes, and to provide recommendation on how to proceed with treatment of identified conditions or problem areas. On the basis of this test data, Mr. Tavakoli's results indicate that he may have reported more psychological symptoms than objectively exist and that his response style demonstrates a moderate tendency toward self-deprecation and a constant exaggeration of current emotional problems. With regard to Mr. Tavakoli's personality traits, his MCMI-III profile indicates that he is an egocentric man who can be identified by an inflated sense of self-importance, resentful and arrogant attitudes, a socially intimidating manner, a voiced pride in self-reliance, unsentamentality, and competitive values. According to his profile, others are belligerent and antagonistic, and thus he is justified in his defensive aggressiveness. It appears that his guiding principle may be to outwit others and to use them to enhance himself. In his constant seeking of recognition, admiration, and power, he may seek to exploit others and he expects special attention from others without intending to reciprocate. His clinical presentation and profile suggests that Mr. Tavakoli is undergoing an acute major depression that is probably characterized by agitation and erratic qualities.

[81] The Beck Depression Inventory II ("BDI-II") is a self-report instrument which provides an estimate of the degree of depressive symptoms reported over the two-week period prior to its administration. This test showed "severe depression" and that Mr. Tavakoli cannot tolerate his unhappiness and he feels his future is hopeless and can only get worse. The Detailed Assessment of Post Traumatic Stress ("DAPS") test to identify post traumatic stress disorder ("PTSD") seemed to suggest that Mr. Tavakoli suffered from PTSD, but Dr. Devrome felt that he did not meet all the criteria to come to that conclusion. Also the State Trait Anxiety Inventory ("STAI"), a psychometric test which assesses anxiety, indicated that Mr. Tavakoli was very anxious during the testing, as he scored above the 99th percentile.

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[82] Dr. Devrome also conducted numerous tests that focus on subjective reports of pain and disability. The Symptom Trait Scale ("STS") is a 54-item list of varied physical symptoms, of which Mr. Tavakoli endorsed experiencing 29 on at least a weekly basis. Mr. Tavakoli endorsed more symptoms on this inventory than 95% of the normative group, which is the general population. The Oswestry Index ("OI") is a 10-item psychometric test that is used to provide a gross index of an individual's perception of pain-related disability. Mr. Tavakoli's responses indicated a "crippling" level of disability due to pain as his score on the OI was higher than 99% of pain patients. The Sickness Impact Profile ("SIP") is a scale which allows an individual to relate his or her perception of the impact of an illness or physical disability over a wide spectrum of areas of life functioning. Again, Mr. Tavakoli produced significantly elevated scores at or above the 99th percentile on all composite measures. The Personal Capacities Questionnaire ("PCQ") is a self-report instrument which allows an individual to report his or her perceptions of specific obstacles to work that may arise from disability or other factors. In comparison to a group of Chronic Pain patients, Mr. Tavakoli's score on the PCQ was above the 99th percentile, which represents an extreme level of perceived work-related disability.

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[83] Dr. Devrome also carried out coping testing, using the Coping Strategies Questionnaire ("CSQ"), which is a psychometric test that requires a patient to report the frequency of usage of various coping strategies in managing pain complaints. For example, some of the coping strategies have been found to be associated with positive adaptation and adjustment to pain, which minimize disabling effects. Other coping strategies are generally associated with maladaptive coping and increased disability. Dr. Devrome found that Mr. Tavakoli displayed a maladaptive pain-coping profile on the CSQ; his overall score was "extremely elevated, at the 99th percentile". Further, his responses suggest that he predominantly reacts to his pain in passive ways, either by praying or hoping the pain will get better or by engaging in negative and hopeless thinking. Dr. Devrome went on to report that Mr. Tavakoli's poor coping is also suggested by his response to questions about his ability to control his pain and his ability to decrease it; he reported that he has no control over his pain and there is nothing he can do to decrease the pain.

[84] Dr. Devrome went on to find that Mr. Tavakoli was emotionally distraught and in physical pain. She noted that Mr. Tavakoli reported that the only treatment that brought him any positive effect was hypnotherapy, which he attended for two sessions.

[85] Dr. Devrome's conclusion was that Mr. Tavakoli was obviously experiencing significant suffering and that he perceives himself as experiencing significantly more symptoms than others. Further, Dr. Devrome found that his perception of pain, disability and suffering was more severe than other Chronic Pain patients. Mr. Tavakoli's performance on psychological testing was indicative of an intention to provide good effort, however, his results from the personality tests were of marginal validity because of his tendency to exaggerate his symptoms. Also, Mr. Tavakoli's scores on the testing instruments ranged between the 95th and 99th percentiles and, as such, indicated a significant tendency to exaggerate. Further, on the Lees-Haley test, which is usually taken as the "gold standard" for exaggeration, Dr. Devrome found that Mr. Tavakoli's results were clearly indicative of exaggeration.

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[86] As a result of these findings, in 2004 Dr. Devrome diagnosed Mr. Tavakoli as suffering from an Undifferentiated Somatoform Pain Disorder and Major Depressive Disorder. She attributed this to the 2002 car accident. Her recommendations included: clarification of his diagnosis related to fibromyalgia, the use of two kinds of antidepressants, referral to a rehabilitation program at the Columbia Rehabilitation Centre and referral to the Psychiatric Assessment Service at the Foothills Hospital through which he would have access to ongoing appointments with psychiatrists, psychologists, and mental health workers. Dr. Devrome also recommended group therapy as opposed to one-on-one therapy sessions.

[87] Dr. Devrome saw Mr. Tavakoli again in August 2004, and prepared a report for Plaintiff's counsel dated August 20, 2004. The purpose of this meeting was to further explore with Mr. Tavakoli his attempts to return to work after the 2002 accident. Mr. Tavakoli informed Dr. Devrome that he went back to work as a mason/tile layer six to seven months after the accident but that he did not last more than two months at that job because of his pain level, due to loss of the contract by his employer, and because of his very low wages. Mr. Tavakoli told Dr. Devrome that over the next year he worked as an independent contractor refurnishing and remodelling homes, at which time he worked as a manager, hiring people to do the manual labour because of the continued pain he experienced. He indicated that his last employment contract ended six months prior to meeting with Dr. Devrome when he quit another contract position as a result of a fight with a security personnel. Mr. Tavakoli indicated that he believed there were very few jobs that he would be able to do. He also stated that he could no longer drive because of his physical condition, and more so because driving makes him feel dizzy. Notably, Dr. Devrome reported that since the accident Mr. Tavakoli "was offered a job that would pay him approximately $300,000 but he had to turn it down because of his pain". Lastly, when asked about medications he was taking, Mr. Tavakoli stated he was taking Percocet, a narcotic analgesic, up to seven tablets per day, and that he used Tiger Balm, a topical ointment, for pain reduction.

[88] During this second examination, Dr. Devrome reported that Mr. Tavakoli could not sit still for longer than three to five minutes. As a result of this examination, Dr. Devrome reported that she did not think that Mr. Tavakoli would likely return to his pre-accident employment, but that after receiving an appropriate medical diagnosis and treatment that it was likely that he could return to some occupation. Again, reiterating her suggestions from her first report, Dr. Devrome suggested that Mr. Tavakoli see a Rheumatologist and also attend a program similar to the one offered at the Columbia Rehabilitation Centre. Her report went on to explain that such a program offers examination by medical specialists, counselling by pain management specialists, definition of a drug therapy regime by pharmacists, and psychological evaluation and support. She noted that the Columbia Rehabilitation Centre also has an exemplary pain management program which has been successful in assisting a number of her Chronic Pain clients to adjust to and continue living with their pain.

Dr. Raymond Ancill

[89] Dr. Ancill is a psychiatrist. He has extensive experience dealing with Pain Disorders and has treated over 2000 patients who have similar symptoms to Mr. Tavakoli.

[90] Dr. Ancill met with Mr. Tavakoli, his brother Ashgar Tavakoli and Don Wall on January 11, 2008, for an examination. Afterwards he reviewed Mr. Tavakoli's medical materials. Dr. Ancill described his approach, in summary, as taking a history from Mr. Tavakoli, speaking with the collaterals, being Ashgar Tavakoli and Mr. Wall, doing a mental state examination, reading the available materials and then reaching a "considered clinical formulation which includes the diagnosis". His diagnosis of Mr. Tavakoli was a "Somatoform Pain Disorder" and he also found that Mr. Tavakoli had a "major depression of moderate severity".

[91] During the examination Mr. Tavakoli told Dr. Ancill about the 2002 accident as well as a later 2006 motor vehicle accident. He told Dr. Ancill that he had been diagnosed with fibromyalgia and chronic fatigue. He also stated that the pain that started in his upper left back and shoulder has now spread "almost everywhere". When asked about treatment, Mr. Tavakoli told Dr. Ancill that his friend Mr. Wall paid for massage therapy which was of some help in relaxing his muscles, but that any benefit was short-lived. He went on that initially these treatments were paid for by the insurance company but that payments stopped in January 2003. At this time, Mr. Wall told Dr. Ancill that he had spent $18,000 since January 2003 paying for Mr. Tavakoli's massages but that he too stopped paying in January 2007. Since that time Dr. Ancill noted that the massage therapist was continuing the treatments "on account".

[92] Mr. Tavakoli told Dr. Ancill that his current medications were Percocet, a pain medication, (one to five per day) and Welbutrin-SR, an antidepressant, (150 mg per day) but that he had only been on antidepressants for a few days, prescribed by Dr. Tompkins. With respect to his past medical history, Mr. Tavakoli told Dr. Ancill that he fractured his wrist and his C- 7 vertebra when he fell off a forklift in 1998 and that because of that accident he was off work for almost a year but that there was no WCB claim. He also reported having ulcerative colitis from 1994 to 2000 but said that it was currently in remission. He also informed Dr. Ancill that he had been involved in a previous motor vehicle accident in 1993 when he was rear-ended while his vehicle was moving. As a result of that accident, he had lower back pain for about 18 months but had only taken a month off work in total.

[93] During the remainder of the interview Dr. Ancill asked questions of Mr. Tavakoli, his brother Ashgar Tavakoli and Mr. Wall about Mr. Tavakoli's childhood, adulthood and work history. It is worth noting that Ashgar Tavakoli told Dr. Ancill that his brother was working about 100 hours a week at the time of the 2002 accident between his two jobs laying tiles, commercially and residentially.

[94] In his testimony, Dr. Ancill spent some time explaining the difference between acute pain, Chronic Pain and a Pain Disorder, which is a psychiatric diagnosis. He explained that the essence of acute pain is that it has no psychiatric component and only has physical signs. Chronic Pain is acute pain that has become chronic because it did not heal, whereas a Pain Disorder is "poles away" from acute pain and is, in fact, a psychiatric illness.

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[95] With respect to these terms and how they relate to Mr. Tavakoli's case, Dr. Ancill explained that following the 2002 accident, Mr. Tavakoli's psychiatric state deteriorated dramatically. He described Mr. Tavakoli as catastrophizing his problems as they became overwhelming. He noted that there were no or few signs of physical injury in Mr. Tavakoli's case and that there were no convincing signs of mechanical damage to account for the severity and extent of Mr. Tavakoli's complaints.

[96] In his report, Dr. Ancill described Mr. Tavakoli's account of his physical symptoms as typical of a patient with a Somatoform Disorder. Dr. Ancill explained that as Mr. Tavakoli was primarily focused on pain, his diagnosis was that Mr. Tavakoli was experiencing a Pain Disorder. linical history of similar complaints or behaviour. Interestingly, Dr. Ancill noted that Mr. Tavakoli was a reasonable historian and that he did not use overly dramatic language or behaviour when describing his injuries or their consequences in the examination.

[97] Dr. Ancill noted that Chronic Pain often leads to the emergence of a depressive illness, which he found to be the case with Mr. Tavakoli. He found Mr. Tavakoli to be suffering from a Chronic Major Depression of moderate severity. Dr. Ancill continued in his report by stating that any prognosis for recovery was guarded because antidepressants had only recently been started. At this time I find it necessary to point out that Mr. Tavakoli had not been taking his anti-depressant medications as prescribed almost four years earlier by Dr. Devrome. It also appears that Mr. Tavakoli misled Dr. Ancill about when he had first been prescribed anti-depressants, as Dr. Ancill's report reads as if Mr. Tavakoli had only recently been prescribed anti-depressants a few days earlier.

[98] Dr. Ancill concluded his report by stating that prior to the 2002 accident, Mr. Tavakoli had no such Somatoform Disorder and therefore this led to the conclusion that but for the accidents of 2002 and 2006, Mr. Tavakoli would likely not be suffering from his current disorder. Dr. Ancill also stated that the 2002 was the main cause of his current state as the 2006 accident did not result in any "new" problems, only an exacerbation of current symptoms.

[99] In the first Appendix to Dr. Ancill's report he noted that on the day of the examination, Mr. Tavakoli understood his questions and his answers were appropriate. Dr. Ancill also noted that Mr. Tavakoli's English was fluent but accented. Further, Dr. Ancill recorded that Mr. Tavakoli appeared to be in physical discomfort and was only able to sit on a chair for 15 minutes or so before having to change positions.

[100] In his testimony, Dr. Ancill also addressed the issue of "inconsistent histories" given by patients with a Pain Disorder, opining that these individuals are much less focused on giving a history as they are at persuading the doctor they're speaking to how unwell and dysfunctional they are in the hope that the doctor will understand them, believe them and offer some help.

[101] Lastly, Dr. Ancill addressed the issue of malingering in his testimony. In his opinion, malingering was an "ineffably difficult" issue for many doctors as it is not a positive diagnosis,

rather it’s the absence of illness. Dr. Ancill took the position that as malingering speaks to credibility of an individual, it is a question better left to the Court. He described his role, as a doctor, as accepting what the patient says and assuming that it is the patient’s responsibility to give the doctor information that is truthful.

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[102] On February 8, 2008, Dr. Ancill provided a rebuttal report to Plaintiff’s counsel in response to Dr. Reesal’s report dated August 23, 2006. He noted that Dr. Reesal spent a great deal of time noting several inconsistencies between what Mr. Tavakoli told him and what he had told others who interviewed and examined him. Dr. Ancill also noted that Dr. Reesal used the term “exaggeration” frequently in his report, as opposed to other terms such as “symptom exacerbation” or “amplification”. Dr. Ancill stated that he found Dr. Reesal’s report to be pejorative and that the general approach taken by Dr. Reesal seemed to be one of mistrust and suspicion.

Gillian Bagg

[103] Gillian Bagg is an occupational therapist. She is trained in the area of assessing a patient’s functioning in daily living situations and assisting patients with their loss and disability. Ms. Bagg spent two days on February 28 and March 1, 2005, interviewing and testing Mr. Tavakoli. She subsequently prepared a thorough report at the request of Plaintiff’s counsel dated April 8, 2005.

[104] In her report, Ms. Bagg noted that prior to the 2002 accident, Mr. Tavakoli was involved in a work-related fall in 1998 that resulted in a fracture to his cervical spine, and another motor vehicle accident in 1995 resulting in lower back pain. However, he was able to return to work full-time after both incidents. She noted that to-date he had received a multitude of medical diagnoses ranging from soft tissue injury to the neck, left shoulder and lower back, to fibromyalgia and a psychosomatic disorder. She also noted that massage therapy provided positive but short term relief and that Mr. Tavakoli had participated in a Chronic Pain program evaluation, however, the “results were not evident as further psychological testing was recommended”.

[105] After her physical examination of Mr. Tavakoli, Ms. Bagg found that he demonstrated a number of functional restrictions mainly in the areas of range of motion, muscle strength, grip strength, lifting, carrying, reaching, balance, low level postures, fine motor handling, prolonged sitting and standing, walking, stair climbing, and simulated work tasks. She continued in her report that all of these restrictions are fully or in part related to the 2002 accident and that all of these restrictions were limited by subjective reports of pain by Mr. Tavakoli. Interestingly, she found that Mr. Tavakoli demonstrated the capacity to lift a maximum of five pounds below waist and above shoulder height and that his carrying capacity was similar with a maximum of ten pounds carried bilaterally or unilaterally. Further both lifting and carrying capacity were reduced on her second evaluation of him. Ms. Bagg also reported that Mr. Tavakoli required a high number of breaks from the position being evaluated. His maximum standing and sitting

tolerances were averaged at approximately ten minutes and low level work tolerance maximized at eight minutes.

[106] Overall, Ms. Bagg found that as a result of her assessments, it was apparent that Mr. Tavakoli does suffer from Chronic Pain and that he demonstrates self-limiting behaviours which led to further physical deconditioning, feelings of hopelessness and a crippled self perception. She noted that this conclusion was complicated by depression and anxiety related in part to his “poor financial status”.

[107] Ms. Bagg documented that Mr. Tavakoli arrived to the assessment on time on day one and 20 minutes late on day two, and was pleasant during introductions. Ms. Bagg reported that Mr. Tavakoli does not expect that his condition will get worse with time and that he in fact expects further recovery, even though he is uncertain how long it will take.

[108] After her two interviews with Mr. Tavakoli, Ms. Bagg concluded that Mr. Tavakoli was disabled and certainly unable to carry on his job as a tile setter. However, she qualified her conclusion by suggesting that Mr. Tavakoli’s disabilities were "either in whole or in part" due to the 2002 car accident. Later in her report, Ms. Bagg acknowledged that it is difficult to determine how much of his incapacity is related to the 2002 car accident.

[109] On February 5, 2009, Ms. Bagg prepared a rebuttal report for Plaintiff’s counsel in response to Sherri Beauchamp’s report dated December 19, 2008. Ms. Bagg took issue with the framework used by Ms. Beauchamp in assessing Mr. Tavakoli’s functionality and also with Ms. Beauchamp’s interpretation of the video surveillance footage. For example, Ms. Bagg stated that as the camera angles frequently did not provide a view of Mr. Tavakoli’s face, signs of difficulty could not be observed or heard and that Mr. Tavakoli was not in fact seen lifting a stroller out of the trunk of his car, rather only pulling and lowering it to the ground. Ms. Bagg took issue with Ms. Beauchamp’s report identifying numerous occasions when Mr. Tavakoli demonstrated overt pain behaviours and variable performance throughout the evaluation which led Ms. Beauchamp to suggest that Mr. Tavakoli might have been more physically capable than he demonstrated. Ms. Bagg concluded her rebuttal report by reiterating her diagnosis that Mr. Tavakoli suffers from Chronic Pain and stated that Mr. Conway supported this conclusion based on his assessment of Mr. Tavakoli in April 2007.

Doug Conway

[110] Doug Conway is a rehabilitation and vocational psychologist. He spent three days on June 19, 20 and 23, 2006, assessing Mr. Tavakoli and prepared a report dated March 26, 2007, at the request of Plaintiff’s counsel. Mr. Conway’s report included information on Mr. Tavakoli’s education and employment history, his earning information over the past ten years and a thorough review of documents and reports authored by the numerous doctors and care providers Mr. Tavakoli had seen up until the time of Mr. Conway’s assessment.

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[111] In his report, Mr. Conway stated that he found Mr. Tavakoli to be a poor historian as he tended to “gloss over” events and he was not able to consistently provide dates or other details. However, Mr. Conway did not find that this tendency represented a deliberate attempt to misrepresent, rather that Mr. Tavakoli was more focused on his present situation, to the exclusion of all other matters. During testing, Mr. Conway reported that Mr. Tavakoli presented as friendly and cooperative, but as very pain focused. He appeared to be in obvious discomfort during the interview and testing sessions. Mr. Conway reported that Mr. Tavakoli’s maximum sitting tolerance was one hour early on in the assessment and decreased to 30 minutes thereafter. During testing Mr. Conway reported that Mr. Tavakoli experienced some difficulty with instructions and appeared to have some difficulty with required reading in English.

[112] Mr. Conway used three measures to assess potential response bias during testing and Mr. Tavakoli’s results were consistently indicative of unbiased responding. In other words, there was no indication that he offered less than good effort during this assessment. Additionally, Mr. Conway assessed Mr. Tavakoli’s intellectual functioning and academic achievement; vocational aptitudes; cognitive, perceptual and psychomotor ability; vocational interests; pain perception; disability perception; and emotional and personality functioning. Mr. Conway also considered Mr. Tavakoli’s pre and post 2002 accident employability potential.

[113] Mr. Conway’s opinion, as articulated in his report, stated that Mr. Tavakoli was highly focused on his condition and limitations, and did not cope well with his pain or fatigue. In Mr. Conway’s opinion, Mr. Tavakoli required further education on acceptance of his pain and management strategies. He described Mr. Tavakoli’s life as unusual, as he escaped from his home country in Iran and survived on few resources until he eventually found his way into Canada. Since that time he had learned English and held a variety of occupations over time, appearing to have difficulty settling on one career path. Mr. Conway noted that Mr. Tavakoli’s circumstances were complicated by previous injury accidents and slow recovery, but that Mr. Tavakoli did consistently return to the labour force. At this time, however, from an employment perspective, Mr. Conway concluded that Mr. Tavakoli was unlikely to acquire and maintain competitive employment until he better copes with his condition or there is considerable improvement in his function.

Defendant’s Experts

Dr. Robin Reesal

[114] Dr. Robin Reesal is a psychiatrist. He was qualified as an expert in the general area of psychiatry. patients with Somatoform Pain Disorder as part of his general practice, in hospitals and within the legal setting.

[115] Dr. Reesal met with Mr. Tavakoli on July 27, 2006, for the purpose of an IME, after which he prepared a report dated August 23, 2006. His prevailing diagnosis was that of malingering and a personality disorder. Further, he noted that Mr. Tavakoli demonstrated "ingrained patterns of behaviour" that were not caused by the 2002 accident.

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[116] Specifically, Dr. Reesal believed Mr. Tavakoli had a mixed personality disorder with narcissistic, anti-social type and histrionic features. This later feature arose out of Mr. Tavakoli's presentation as being overly dramatic and prone to exaggeration. Dr. Reesal explained that Mr. Tavakoli had a grandiose sense of self, namely, a belief that he was special and unique. Dr. Reesal further noted that Mr. Tavakoli exhibited a sense of self-entitlement, a tendency to exploit inter-personal relationships, such as his relationship with Mr. Wall, and a lack of empathy, such as continuing to drive a car despite symptoms of dizziness. In addition, he commented on Mr. Tavakoli's anti-social traits, which included his patterns of breaking the law, not conforming to social norms, deceitfulness, and the "conning of others for personal gains". By way of example, Dr. Reesal cited Mr. Tavakoli's years of attempts to escape from Iran, his obtaining of illegal passports on many occasions, and his shoplifting incident after arriving in Canada. In addition, Dr. Reesal referred to objective test results as reported by Dr. Devrome in the MMPI and MCMI that confirmed his opinions about Mr. Tavakoli's personality traits.

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[117] As indicated in his report, Dr. Reesal found numerous inconsistencies in Mr. Tavakoli's reports of his various pre and post accident symptoms, including different stories given to the doctors who were involved in assessing his injuries from the 1993 accident. Dr. Reesal explained that his conclusions about these inconsistencies do not merely arise from his own subjective opinion; rather, they are validated by Mr. Tavakoli's history in dealing with care providers and various other experts from other accidents. Dr. Reesal believed his conclusions were also validated by test results as administered by Dr. Devrome. Dr. Reesal did, however, confirm in testimony that a patient who is not malingering can give an inconsistent history. As such, giving an inconsistent history is not determinative of malingering.

[118] Dr. Reesal testified that he could not find any psychiatric disorder that would explain why Mr. Tavakoli provided inconsistent reports or had "selective amnesia". Dr. Reesal also referred to the difference between errors of omission versus errors of commission. The former error relates to simply forgetting certain details while the latter error involves a degree of elaboration in an answer. Dr. Reesal noted that Mr. Tavakoli did not simply forget certain elements of his life, but went out of his way to elaborate on other areas that were clearly beneficial to his self interest.

[119] Then there was the issue of exaggeration. Dr. Reesal found that Mr. Tavakoli's dramatic responses, which were inconsistent when observed formally versus informally, suggested that Mr. Tavakoli was trying to convince others of his symptoms. He believed that these dramatic responses also provided Mr. Tavakoli with a convenient explanation for why he could not perform certain tests or be examined in a certain fashion. One example of this was his extreme sensitivity to touch which "belied common sense". Dr. Reesal explained that if it was in fact the case that Mr. Tavakoli could feel pain due to "mere energy from a passing hand" he would not be able to tolerate clothes rubbing against his skin, sitting in a chair, lying in bed or shaking hands.

[120] Overall, Dr. Reesal made reference to Mr. Tavakoli's personality characteristics, including his narcissism, histrionic tendencies, and anti-social behaviour, as being "long standing

maladaptive behaviour". Dr. Reesal concluded that this was enduring behaviour that Mr. Tavakoli has had all his life, and that it was not caused by the accident. Rather, the accident has merely become an excuse for the continuation of this behaviour which has since been reinforced by various care providers. In his rebuttal report of August 8, 2007, Dr. Reesal made specific reference to these care providers as contributing to a "pattern of attribution favouring illness interpretation". In short, Dr. Reesal believed that Mr. Tavakoli's illness behaviour is "help seeking and reassurance-seeking". Hence, in Dr. Reesal's opinion, the continuing massage treatments from Mr. Curylo and the reinforcement of a diagnosis of fibromyalgia from Dr. Tompkins falls into this category.

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[121] Dr. Reesal provided an addendum report dated August 8, 2007, in response to Mr. Conway's employability assessment dated April 10, 2007. Dr. Reesal reiterated a summary of his IME from August 23, 2006; namely, that in his opinion, Mr. Tavakoli presented a consistent pattern of inconsistent subjective and objective findings that fulfilled the DSM IV criteria for malingering. Further, Mr. Tavakoli presented with symptoms that suggested a major depression, a generalized anxiety disorder and narcotic dependancy according to DSM IV criteria. However, given the inconsistency of the information Mr. Tavakoli gave, Dr. Reesal could not make a definitive diagnosis in these areas. He noted that there were also patterns of behaviour consistent with a mixed personality disorder according to DSM IV criteria.

[122] With respect to Mr. Conway's report, Dr. Reesal found there to be further inconsistent information which only stood to solidify Dr. Reesal's original psychiatric opinions. Dr. Reesal took issue with Mr. Conway's classification of his report as judgmental or too focused on inconsistencies. Dr. Reesal explained that his role as an independent medical examiner is to be objective and empathetic and to focus on the information provided to him, be it other medical reports or Mr. Tavakoli's self-described history. Dr. Reesal drew attention to Mr. Conway's comment that Mr. Tavakoli was a "poor historian" who "glossed over" events and could not remember details and dates. Dr. Reesal reported that in his experience with Mr. Tavakoli, this was not entirely the case, rather Mr. Tavakoli made statements that were factually incorrect for major life events that had particular relevance to the June 23, 2002, accident. For example, Mr. Tavakoli clearly stated that the 1993 accident was minor and that he did not have significant injuries and that he was back to work within a few months. According to medical documents, Dr. Reesal found that this was simply not the case at all. Dr. Reesal noted that Mr. Tavakoli demonstrated in his past and also recently a pattern of selective amnesia which is consistent with malingering. Dr. Reesal also took issue with Mr. Conway's findings with respect to Mr. Tavakoli's ability to read and understand, his treatment of depression, his justification for breaking social norms and illegal behaviours, and his cognitive and sexual dysfunction.

[123] In addition, Dr. Reesal provided an opinion dated October 6, 2008, in response to Dr. Apel's report about her examination of Mr. Tavakoli on May 29 and June 12, 2008. Dr. Reesal reported that Dr. Apel's report does not change his previously stated conclusions. Specifically, her report highlighted numerous discrepancies between objective findings and subjective complaints by Mr. Tavakoli and a lack of cooperation as demonstrated by her having to stop the examination when she feared for her physical safety. Dr. Reesal went on that Dr. Apel's report

stated that there was no identifiable physical, focal, structural or organic problem with Mr. Tavakoli. As such, Mr. Tavakoli’s symptoms have a psychological origin and narcotics should be stopped and Valium type psychiatric drugs should be stopped. Dr. Reesal agreed with Dr. Apel’s statements. Dr. Reesal concluded his report by stating that from a psychiatric standpoint the threat of violence, tearing up a patient gown and making others feel unsafe is more typical antisocial type patterns, which is consciously produced, that are consistent with Mr. Tavakoli’s pre-accident history. He cautioned that this type of behaviour is not culturally based and concluded by stating that Dr. Apel’s report reinforced his views that Mr. Tavakoli is consciously producing physical and psychological symptoms for secondary gain.

[124] Dr. Reesal testified that he took no pleasure in pointing out the Mr. Tavakoli's extreme levels of exaggeration or in making a diagnosis of malingering. Rather, Dr. Reesal opined that he was only trying to make sense of the objective information. He confirmed that a diagnosis of malingering is not a mental illness. Basically, it is Dr. Reesal's opinion that Mr. Tavakoli is making a conscious production of his physical symptoms for purposes of secondary gain. Because of the inconsistencies in Mr. Tavakoli’s history telling and in the reported symptoms themselves, Dr. Reesal was unable to make a diagnosis of Somatoform Disorder, depression or PTSD. Dr. Reesal acknowledged that a diagnosis of malingering actually precludes a diagnosis of Somatoform Disorder, as the two are not compatible. Rather, malingering is intentional and Somatoform Disorder is an unconscious production of symptoms.

[125] As treatment, Dr. Reesal suggested that Mr. Tavakoli get back into main stream living and put the accident behind him. He recommended that Mr. Tavakoli's behaviours not be rewarded. He questioned the likelihood that any counselling would be beneficial as Mr. Tavakoli does not seem to want to attend counselling and has not consistently or lastingly taken his anti-depressant medication, which made Dr. Reesal doubt whether Mr. Tavakoli wanted to get better. Dr. Reesal emphasized in his testimony that most distressing to him was Mr. Tavakoli’s statement during his examination that he did not know where to get help. Dr. Reesal found this to be inconsistent with Mr. Tavakoli’s self-sufficient history, the number of people that are willing to help him, and the fact that he has already been to various individuals who have made recommendations for psychiatric treatment, including Dr. Devrome and Dr. Apel.

[126] In Dr. Reesal’s opinion, Mr. Tavakoli’s attendance at the Chronic Pain Centre is not necessarily indicative of the validity of his complaints. According to Dr. Reesal, this is merely another example of Mr. Tavakoli’s pattern of seeking reinforcement for his self-reported symptoms. Dr. Reesal suggested that perhaps it is an example of Mr. Tavakoli adapting to changing circumstances which in this case includes Dr. Reesal's opinion that he is malingering.

[127] Asked on cross examination about Dr. Mothersill's diagnosis in 1995 and 1996, Dr. Reesal indicated that Dr. Mothersill's diagnosis confirmed many of his opinions about Mr. Tavakoli’s personality traits. For instance, Dr. Mothersill diagnosed that Mr. Tavakoli had dependent and avoidant traits. Dr. Reesal also referred to the fact that Mr. Tavakoli had attended 13 sessions of treatment with Dr. Mothersill over a six month period. The fact that Mr. Tavakoli was unable to recall these treatments was a further indication to Dr. Reesal of his selective

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amnesia. Although Dr. Reesal confirmed that an individual may not remember one or two medical appointments, 13 psychotherapy sessions over six months is not something that he expected could be forgotten.

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[128] Dr. Reesal disagreed with Dr. Ancill's conclusion that Mr. Tavakoli had a Pain Disorder. Dr. Reesal specifically pointed out that a Pain Disorder would not provide an explanation for the following symptoms or traits:

- Mr. Tavakoli continues to drive despite his symptoms of dizziness.
- Mr. Tavakoli's extreme sensitivities including being sensitive to the energy level of a hand passing close to his body.
- Mr. Tavakoli has gotten himself into problems with the law.
- Mr. Tavakoli has provided an inconsistent history of his medical and psychiatric condition.
- The MMPI and MCMI test results obtained by Dr. Devrome.

[129] On cross examination, Dr. Reesal refuted the suggestion that Mr. Tavakoli's understanding of English was poor, as evidenced by Mr. Tavakoli's handwritten statement about the nature of the accident and the injuries he has suffered thereafter. Dr. Reesal opined that although Mr. Tavakoli may not be a flawless speller and has some difficulty with syntax, the handwritten statement is understandable and does demonstrate that he has a reasonable command of English. Overall, Dr. Reesal did not waiver from his opinion that Mr. Tavakoli was willing to go to extreme ends to achieve his goal of financial gain and that this was his pattern of behaviour, namely that the ends justify the means. Dr. Reesal saw this occurring as far back as Mr. Tavakoli's attempts to escape from Iran.

[130] On cross-examination, Dr. Reesal addressed the validity of the Lees-Haley Scale. He confirmed that there have been some recent concerns about the validity of this scale, namely a concern of "false positives" for scores of 22 out of 30 and below. Dr. Reesal explained the history of the Lees-Haley test as part of the MMPI, including the test's development in 1991 to filter out the validity of an individual's complaints. Dr. Reesal also explained that the University of Minnesota, the publisher of the MMPI, presented arguments to eight experts for and against using the Lees-Haley test as part of the MMPI in light of the potential issue with false positives. The majority conclusion reached by the experts was that the Lees-Haley test should be included as part of the MMPI. Hence, as far as this Court is concerned, any issues with respect to the Lees-Haley test's validity have been addressed and quelled. Further, Dr. Reesal noted that no such validity concerns have ever been raised for scores over 28, and Mr. Tavakoli scored a 30.

[131] At this juncture, I do not wish to undertake an in-depth analysis of the Lees-Haley scale and any recent concerns over its results. From my understanding, this test is the "gold standard"

for exaggeration and has been used extensively by the medical and legal professions for many years. Mr. Tavakoli's 30 out of 30 score is noteworthy. Although I note that there may be qualifying factors at play, including Mr. Tavakoli's colitis, that might lower this score, there is still a strong indication of exaggeration. Further, Mr. Tavakoli's Lees-Haley score is but one piece of evidence that indicates exaggeration. Other personality and psychology tests confirmed that Mr. Tavakoli was significantly exaggerating, as he scored in the 95th to 100th percentile on every test. Most medical professionals who treated or examined Mr. Tavakoli noted some level of exaggeration or embellishment, usually tending towards the level of significant or extreme. His testimony in front of this Court with respect to his symptoms and complaints was most dramatic as well. I take note of the concern over Mr. Tavakoli's Lees-Haley score, however, I also note that there is other evidence to support his tendency to exaggerate.

Dr. Ian Clarke

[132] Dr. Ian Clarke is an anaesthesiologist. He was qualified as an expert in Chronic Pain diagnosis, treatment and management. Dr. Clarke completed a clinical interview and physical examination of Mr. Tavakoli on January 3, 2005.

[133] Dr. Clarke reported that Mr. Tavakoli arrived a few minutes late for his appointment and that he was accompanied by another man introduced as a friend. This friend, Mr. Wall, filled out Mr. Tavakoli's forms for him, which Dr. Clarke noted in his report as unnecessary as Mr. Tavakoli's command of the English language seemed more than adequate.

[134] Dr. Clarke testified that the day Mr. Tavakoli showed up for his appointment was the first time he had been told that there would be another person in the room and that this was not his normal practice. Dr. Clarke clarified in his report that he often encourages the attendance of a family physician or a close family member (parent, sibling, spouse, child), but no one else. Dr. Clarke also noted in his report that he explained this to Mr. Tavakoli and Mr. Wall and they were both agreeable that Mr. Tavakoli would, in accordance with Dr. Clarke's usual practice, be unaccompanied in the consultation. Dr. Clarke opined that he did not think that it would be appropriate to have another person present when questions about very personal matters were asked.

[135] Dr. Clarke was unexpectedly served with an *ex parte* court order that directed him to conduct his examination of Mr Tavakoli in the presence of Don Wall, a "close family friend". The *ex parte* order is not in evidence and I neither had an opportunity to review it nor do I understand how or from whom such an order might have been obtained. Dr. Clarke was not a party to any action involving Mr. Tavakoli. Rather than accede to that direction, Dr. Clarke simply refused to conduct the examination. Confronted with that position it was agreed that the examination of Mr. Tavakoli could proceed in accordance with Dr. Clarke's standard practice. Mr. Wall waited in an adjoining room.

[136] During the examination, Mr. Tavakoli discussed his history prior to the accident, which included having fled Iran and having been convicted of theft in Canada. Dr. Clarke noted that

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these factors were important in assessing whether an individual has engaged in anti-social behaviour. Dr. Clarke considered theft to be an anti-social behaviour, which is one factor in assessing whether an individual is malingering.

[137] Dr. Clarke discussed Mr. Tavakoli's injuries following the 2002 accident. He noted that patients who are involved in motor vehicle accidents while wearing seatbelts, rarely develop pain anywhere but in their neck because the seat supports the lumbar spine during the accident. Dr. Clarke reported that Mr. Tavakoli's symptoms were "remarkable" in that most people who suffer from a whiplash injury from this type of accident usually recover within 3 to 6 months. Even if the pain lingers for one year, Dr. Clarke stated that patients usually have full range of motion. Dr. Clarke also noted Mr. Tavakoli was physically fit and had well developed muscles, which would generally lead him to expect a less serious injury.

[138] Dr. Clarke noted that Mr. Tavakoli told him that at the time of the assessment he was receiving massage therapy and physiotherapy and attending on his family physician, and that these were the only treatments he was currently obtaining.

[139] Mr. Tavakoli's score on the Self Care Assessment Schedule was modestly elevated suggesting to Dr. Clarke some minor interferences with activities of daily living. Mr. Tavakoli's score on the General Health Questionnaire was almost double the threshold for Chronic Pain patients suggesting to Dr. Clarke a high probability that he was currently suffering a major mental illness with symptoms of anxiety more prominent than those of depression.

[140] Upon examination, Dr. Clarke testified that he was struck by Mr. Tavakoli's restlessness; he sat on every chair in Dr. Clarke's office, on the floor and even curled himself into a ball at one point. Dr. Clarke noted this is not behaviour he usually sees, even in his most seriously injured patients. He noted Mr. Tavakoli's spinal movements were very limited upon examination, but that Mr. Tavakoli did not show these same restrictions while moving around his office and when curling up on the floor. Dr. Clarke described one particular instance when he attempted to check for a Waddell's sign by pushing on the top of Mr. Tavakoli's head, also referred to as axial loading. When Dr. Clarke touched Mr. Tavakoli's hair, before even touching his head, Mr. Tavakoli fell to the floor and complained of pain going all the way down his spine from his head to his coccyx. Dr. Clarke testified that the normal response for putting pressure on a person's head is that they feel nothing. Dr. Clarke also stated that Mr. Tavakoli tested positive for all the Waddell's signs.

[141] In reviewing Mr. Tavakoli's Alberta Statement of Benefits Paid, Dr. Clarke found that Mr. Tavakoli's treatment frequency was about the same prior to the accident as it was after the accident. In reviewing his pre-accident health records, Dr. Clarke noted Mr. Tavakoli clearly had back pain since the early 1990's. Before the 2002 accident, Mr. Tavakoli also complained of chest pain, abdominal pain and sexual dysfunction. Specifically, Mr. Tavakoli had prolonged periods of apparent disability from the 1993 accident lasting until 1995 and perhaps beyond, and from the 1998 forklift accident which lasted far longer than one would expect from the normal healing process in an otherwise fit and healthy individual.

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[142] Dr. Clarke was of the view that Mr. Tavakoli was not suffering from a significant physical disease. He described Mr. Tavakoli's symptoms as extravagant, nonanatomical and as not fitting within any known physical disease or identifiable physical abnormalities. Dr. Clarke acknowledged that even if one accepts that the 2002 collision was enough to produce some muscle strain, Mr. Tavakoli's early symptoms are not consistent with this and his excellent muscle development and self-described physical strength and physical fitness prior to the accident makes it relatively unlikely that Mr. Tavakoli suffered any injury at all. Dr. Clarke reiterated that he did not think that Mr. Tavakoli suffered any serious physical injury in this accident, although it was possible that he might have experienced a minor muscle strain around his neck at the time of impact. He went on that given Mr. Tavakoli's general fitness and physical development, 12 weeks recovery would be generous for this type of injury. Dr. Clarke concluded that Mr. Tavakoli's current presentation could only be explained on the basis of a psychological disorder or the deliberate simulation of illness, namely, malingering.

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[143] Dr. Clarke noted the numerous inconsistencies between Mr. Tavakoli's actions when he was aware he was being examined as opposed to his actions when he was not under direct examination. This led Dr. Clarke to opine that at least some of Mr. Tavakoli's complaints were likely deliberately exaggerated, in other words, that Mr. Tavakoli was malingering.

[144] Dr. Clarke noted that malingering is not an illness and requires no treatment. There is no psychological component to malingering and that it is not in and of itself a diagnosis. It is entirely voluntary and purely for secondary gain. Malingering responds best to withdrawal of all reinforcing factors, which in Mr. Tavakoli's case would include medical and other health care treatment, the prospect of financial gain through litigation or other compensation routes, the return of his brother, Ashgar Tavakoli, to Australia and the insistence of friends and family that he return to work and return to independent living.

[145] While Dr. Clarke did recognize the possibility that Mr. Tavakoli may be suffering from a Somatoform Disorder, he stated that this is a lifelong condition. In other words, in Dr. Clarke's opinion, if Mr. Tavakoli was suffering from a Somatoform Disorder, it was unrelated to the 2002 accident.

[146] Dr. Clarke noted that Mr. Tavakoli's situation may have worsened by the treatments he received, in that they likely reinforced his "sick role" and his "illness behaviour". According to Dr. Clarke, when people such as Mr. Tavakoli take on a sick role, they learn that if they continue to complain to medical professionals, doctors will continue to treat them and reinforce their behaviour. This type of behaviour is also reinforced by family and friends who provide financial and emotional support. In essence, Dr. Clarke stated that while education and treatment by health care professionals is intended to help people like Mr. Tavakoli, it prompts them to learn and reproduce sick behaviour.

[147] Dr. Clarke authored a rebuttal report dated September 22, 2008, in response to Dr. Apel's medical opinions dated May 29 and June 12, 2008 and Mr. Conway's employability assessment dated April 10, 2007. Dr. Clarke reiterated his original opinion that Mr. Tavakoli suffered no

serious injury in the 2002 accident and that his presentation was the result of either a psychological disorder, likely a Somatoform Disorder, or Mr. Tavakoli's malingering behaviour. Dr. Clarke reported that Dr. Apel's opinion was quite close to his although, like others before her, Dr. Apel "has given him the benefit of the doubt" and considered Mr. Tavakoli to be sick rather than suspicious. In Dr. Clarke's opinion, Dr. Conway seemed to dismiss suggestions that Mr. Tavakoli might be exaggerating or malingering, rather emphasizing the role of fibromyalgia and Chronic Fatigue Syndrome, a spectrum of conditions that Dr. Clarke mentioned as still being highly controversial.

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[148] Dr. Clarke disagreed with Mr. Conway's suggested course of treatment, in that it was physical in focus. Dr. Clarke believed that such treatment would only serve to reinforce Mr. Tavakoli's sick role behaviour. If anything, Dr. Clarke thought that Mr. Tavakoli would likely benefit from treatment at the Canmore Pain Clinic. However, he noted that Mr. Tavakoli would likely not pass their rigorous screening if he were to reproduce the same test results to the Canmore Pain Clinic as he did to Dr. Devrome. Patients who are malingering and who attend the Canmore Pain Clinic are watched almost 24 hours a day. Dr. Clarke noted that malingering is an act that can be carried out quite easily for two or three hours at a time, but it is difficult to sustain for 24 hours a day. The Canmore Clinic is able to identify malingerers after less than two days. Thus, what Dr. Clarke appears to be suggesting is that the Canmore Pain Clinic would be able to "out" Mr. Tavakoli as a malingerer after a few days, and as such, any treatment there would be discontinued.

Sherri Beauchamp

[149] Sherri Beauchamp is a kinesiologist. Ms. Beauchamp conducted a Functional Capacity Evaluation ("FCE") of Mr. Tavakoli on December 16, 2008. She was provided with all of Mr. Tavakoli's medical information and a number of surveillance videos obtained by Defendant's counsel to which I will refer to at greater length later. She did not review the surveillance until after the testing. Her testing protocol included validity of effort assessments and tests that determine reliability of reported pain and disability. Ms. Beauchamp concluded that Mr. Tavakoli's overall effort during the assessment was "variable" and as such he may be capable of more than he demonstrated during the assessment.

[150] Ms. Beauchamp's report indicated that Mr. Tavakoli demonstrated the ability to perform tasks within the sedentary-light (up to 15 pounds) to light (up to 20 pounds) strength level in carrying and dynamic lifting. She noted that Mr. Tavakoli's overall effort during this assessment was variable, therefore in her opinion Mr. Tavakoli might be capable of more than he demonstrated during the assessment. She further noted overt discrepancies between Mr. Tavakoli's reported level of disability and demonstrated ability during the assessment. Specifically, Mr. Tavakoli reported a high level of disability on the intake questionnaires which was not observed during the assessment. After completing the assessment of Mr. Tavakoli, Ms. Beauchamp watched the surveillance footage of Mr. Tavakoli. She reported that this footage provided further evidence to support discrepancies in Mr. Tavakoli's level of functioning versus what he reported on the date of the assessment. Ms. Beauchamp noted nine specific examples in

the surveillance footage where Mr. Tavakoli was observed doing something that is beyond what he demonstrated in the assessment.

[151] Ms. Beauchamp's report outlined the areas in which the variable effort was noted. In testimony, she made reference to one particular example, being Mr. Tavakoli's range of motion in his cervical spine. On direct testing his ability to bend his head forward (flexion) was minimal, but he was observed to have much greater flexion on indirect observation. Ms. Beauchamp also made reference to significant pain behaviours exhibited during the assessment, including an occasion where Mr. Tavakoli fell to the floor during pinch grip testing and then got up after about 30 seconds without reliance on any external support and with no signs of additional discomfort. She also made reference to Mr. Tavakoli complaining of a burning sensation in his finger tips during pinch and grip testing and his claim that he had a bruise on his finger tip that she was unable to observe even when it was pointed out to her.

[152] Ms. Beauchamp testified and wrote about overt discrepancies between Mr. Tavakoli's reported level of disability and his demonstrated ability. In particular, she testified that his subjective complaints of pain, and the degree to which he perceived himself to be disabled, was inconsistent with what she was able to observe of his objective abilities. As a result of these overt discrepancies, Ms. Beauchamp was of the view that the abilities he demonstrated during functional assessment were inconsistent with his self-reports of pain and fatigue.

[153] Based on her testing, Ms. Beauchamp concluded that Mr. Tavakoli demonstrated the ability to perform tasks within the sedentary - light (up to 15 pounds) to light (up to 20 pounds) strength level. She further concluded that Mr. Tavakoli was capable of working in a job within these strength levels, and that in fact, he may be capable of strength levels higher than he demonstrated on testing. Ms. Beauchamp suggested it was reasonable that Mr. Tavakoli could return to work on a gradual basis, increasing up to at least six hours per day.

[154] Ms. Beauchamp prepared a document review on February 12, 2009, in response to Gillian Bagg's rebuttal report dated February 5, 2009, that critiqued Ms. Beauchamp's original FCE carried out on December 16, 2008. Ms. Beauchamp remained unwavering that Mr. Tavakoli has the physical ability to perform activities within the sedentary-light to light strength level and suggested a gradual return to work based on the length of time Mr. Tavakoli had been off work. Ms. Beauchamp concluded her second report by stating again that Mr. Tavakoli provided variable effort during the assessment and as a result, some results might not be a valid representation of his current abilities, reiterating that he might be capable of more than he demonstrated during the FCE.

Dr. David McDougall

[155] Dr. David McDougall practices in the area of occupational medicine. Dr. McDougall was not called as an expert. He was asked to attend trial in order to ensure that the paper review reports he provided to AISH in May and October 2005, were entered as exhibits. Although he did not examine Mr. Tavakoli, from his review of the medical documents, Dr. McDougall

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concluded that there was no evidence of any medically measurable impairment with Mr. Tavakoli. Dr. McDougall noted evidence of "symptom magnification" and "hypochondriacal features" and agreed with Dr. Apel's assessment from 2004. Dr. McDougall then concluded in his paper review to AISH that "this patient continues to present with a high and medically inappropriate perception of disability". This is essentially the same conclusion reached by Drs. Reesal and Clarke.

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Other Medical Reports

[156] A number of other medical reports were admitted into evidence as proof of their contents without the need for cross examination of the author thereof. A brief summary of that evidence is as follows.

Dr. K. Hill, Orthopaedic Specialist

[157] Dr. Hill provided an IME report dated October 22, 2002, at the request of AMA, the Section B insurer in the 2002 accident. He found that Mr. Tavakoli exhibited illness behaviour and a number of positive Waddell's signs. In his view, Mr. Tavakoli sustained only soft tissue injuries from the 2002 accident but concluded that "there were significant illness behaviour signs … which will doubtless impact on resolution of his problem".

Ashley Smith, Physiotherapist

[158] In his report of July 23, 2003, Mr. Smith also made note of "significant pain behaviours" and the presence of several Waddell's signs. He found it difficult to assess Mr. Tavakoli due to "signs of inconsistency in history and symptoms". Further, Mr. Smith stated in his report that "prognostic indicators for this collision did not reveal any number of factors that would necessitate prolonged symptoms existing beyond an initial healing phase (approximately 12 weeks)". As a result, Mr. Smith did not think further physiotherapy would be of any assistance to his recovery.

Dr. G. Edwards, Orthopaedic Specialist

[159] Dr. Edwards examined Mr. Tavakoli in September 2003, at the request of Dr. Zapasnik. His report suggests Mr. Tavakoli’s problems are likely due to anxiety and depression. Dr. Edwards did not find anything wrong with Mr. Tavakoli from a physical or orthopaedic perspective.

Conclusions re: Medical Experts and Evidence

[160] A common theme emerged from a review of the respective medical experts’ notes and reports; namely, that they were often based on different and incomplete information. Specifically, the information made available to different doctors, either by Mr. Tavakoli or by a review of past medical records, was inconsistent. Certain doctors had more information about

Mr. Tavakoli's medical past than others. Also, certain doctors based their diagnoses and conclusions almost entirely on Mr. Tavakoli's subjective self-reported complaints whereas others came to their conclusions as a result of objective findings.

[161] Although I found the expert witnesses to be credible and genuine in their beliefs about Mr. Tavakoli's condition, in many cases Mr. Tavakoli's presentation was so distorted that any conclusions or diagnoses made as a result of his presentation are tainted and cannot be given the same weight as they otherwise would. The problem is akin to a house of cards; when one card is removed, namely Mr. Tavakoli's credibility, the rest of the cards, being the medical conclusions and diagnoses reached based on Mr. Tavakoli's evidence, all fall down too. What I am left with is the evidence of those who came to conclusions about Mr. Tavakoli's condition independent of self-reported symptoms.

[162] I found Mr. Curylo to be genuine in his belief that the massages he provided helped Mr. Tavakoli, if only for a few hours or days. However, nearly 500 massage therapy treatments over six years is excessive. Further, this type of treatment can be referred to as passive, whereby individuals let someone else provide a benefit to them, rather than an active treatment whereby the individual does something themselves for a benefit. The only recommendation for massage therapy was from Dr. Zapasnik, a general practitioner, in 2002. It appears that Mr. Tavakoli decided what treatment he wanted to follow and has zealously returned for massages averaging almost two a week for seven years. By contrast, he has not taken medication prescribed to him, sought psychological or psychiatric treatment since the 2002 accident or attempted to exercise. Instead, he has opted for receiving what is oft classified as a "spa service". It is also noteworthy that massage therapy has not provided any lasting benefit to Mr. Tavakoli.

[163] With these ongoing treatments, Mr. Curylo has become an "enabler" which reinforces to Mr. Tavakoli that he has ongoing symptoms of pain and problems from the accident. I am of the view that massages were never required as Mr. Tavakoli has not demonstrated on a balance of probabilities that he suffered injury from the 2002 accident.

[164] Dr. Tompkins observed Mr. Tavakoli on numerous occasions, however, I do not give her testimony or report much weight for at least five reasons. First, I refused to qualify her as an expert in any area. Second, her diagnosis of fibromyalgia is not supported by any of the other physicians who have seen and assessed Mr. Tavakoli and are qualified to make such a diagnosis. Third, even if her diagnosis was right, which I do not believe that it is, nor does Plaintiff's counsel assert that it is, her methods of treatment are contrary to the recommendations put forward by Dr. Apel. Dr. Apel testified that her recommended treatment regime for fibromyalgia is to encourage the patient to exercise and stretch in order to become conditioned. On the other hand, Dr. Tompkins indicated that she will only make such recommendations if the patient has the necessary "energy levels" to accommodate exercise. Fourth, I am troubled by Dr. Tompkins not knowing what Waddell's signs are. Part of a doctor's analysis and assessment of a patient, particularly where all symptoms are self-reported, is using some tool for measuring the veracity and legitimacy of a patient's complaints. Not only did Dr. Tompkins not test for Waddell's signs, but in testimony she wasn't even aware of what they were. Fifth, I found that Dr. Tompkins was not an impartial treating physician. She admitted to empathizing with her patients as she suffers

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from fibromyalgia herself. Also, she was involved in Mr. Tavakoli's AISH application whereby she included her finding that Mr. Tavakoli suffered from fibromylagia, but did not mention Dr. Apel's report, which she was aware of, that found that Mr. Tavakoli did not suffer from fibromyalgia. I think that it is fair to say that an objective physician would include all available professional conclusions about Mr. Tavakoli's condition in order for AISH to make a decision based on all available information. Instead, Dr. Tompkins decided to become an advocate for Mr. Tavakoli with respect to his AISH application and in front of this Court, which compromises her objectivity as a professional. Thus, in sum, I do not find Dr. Tompkins' evidence particularly compelling and do not give it much weight as such.

[165] Dr. Apel considered that Mr. Tavakoli might be suffering from a Somatoform Disorder, however, in testimony she indicated that this diagnosis wasn't an assertive one, rather it was defeat in that she couldn't find anything physically wrong with him. In turn, her findings are helpful to the Court in ruling out potential medical conclusions, but not in making a positive diagnosis of Mr. Tavakoli's condition.

[166] Dr. Devrome's diagnosis of a Somatoform Disorder is problematic as this conclusion appears to be based upon inaccurate or incomplete information provided by Mr. Tavakoli about his present symptoms or his past medical records. For instance, Dr. Devrome was never advised of Mr. Tavakoli's pre-accident symptoms of depression, his years of prescriptions for anti-depressants or the diagnosis reached by Dr. Mothersill in 1995. The selective knowledge she had of his history has a significant impact on the validity of her opinion particularly as it relates to the diagnosis of depression. Dr. Devrome's opinion was almost entirely based on Mr. Tavakoli's self-reporting of symptoms on various tests. On almost all the tests Mr. Tavakoli gave answers that put him in the highest possible category of disability, pain perception or perceived impairment. However, many of the answers he provided on these tests were contradicted by his actual abilities and level of functioning as demonstrated by surveillance. Accordingly, the test results were not an accurate depiction of Mr. Tavakoli's functional abilities, and Dr. Devrome's diagnosis based on these tests results cannot be established.

[167] Likewise, Dr. Ancill's opinion was hampered by the lack of medical documentation he received at the time of his report. For example, Dr. Ancill did not have Dr. Nichol's records or many of the other records pertaining to Mr. Tavakoli's pre-accident condition. This is problematic as Dr. Ancill diagnosed a Major Depression of moderate severity resulting from the 2002 accident, without knowledge of medical records that show a history of depression going back to 1995. With respect to Dr. Ancill's finding of a Somatoform Pain Disorder, he was clear in front of this Court that he did not make a finding on Mr. Tavakoli's credibility in coming to this conclusion. This is important because essentially once it is agreed that any problem is not physical, but psychological or psychiatric, it is either unconscious and referred to as a Somatoform Disorder or conscious and referred to as malingering. As I have found that Mr. Tavakoli is not a credible witness, a finding by a medical professional that does not address Mr. Tavakoli's credibility is less preferential, especially in comparison to an objective medical opinion that does consider Mr. Tavakoli's credibility.

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[168] Professionally Dr. Ancill is not required to make a judgment about the credibility of a patient, and is not wrong in deferring to the Court on the issue of credibility. The Court does, however, have to make findings on credibility which can affect how the Court accepts expert evidence based solely upon the Plaintiff's self-reporting. I am not prepared to accept the evidence from Dr. Ancill's report as it was based on the subjective reporting of Mr. Tavakoli whose self-described evidence or history lacked credibility. As such, Dr. Ancill's reports and testimony are tainted by the evidence and history they were based upon. This is especially true in comparison to other experts, including the Defendant's expert Dr. Reesal, who made an independent judgment of Mr. Tavakoli's credibility in light of the evidence he received and reviewed.

[169] Dr. Reesal also considered a Somatoform Disorder but was unpersuaded by both the medical documentation and Mr. Tavakoli's presentation on assessment. Professionally, he could not make such a diagnosis when there were such glaring inconsistences in the medical evidence and a pattern of deceitful and self-benefiting behaviour exhibited by Mr. Tavakoli.

[170] Plaintiff's counsel submitted that Dr. Reesal's focus on these inconsistencies in various doctors' reports didn't account for whether these were direct statements by Mr. Tavakoli or interpretations of the individual writers, or how Mr. Tavakoli was feeling on those days when he saw the medical professional. I cannot accept this argument for two reasons. First, no medical record will ever give the entire context of when and what is said. Doctors are trained professionals who ask patients questions and solicit responses and answers, then make notes based on the information available to them. It is unrealistic to expect doctors to entirely change their practice and start recording who said what based on what prompt, and whether it was a direct question or a volunteered piece of information. The bottom line is that doctors are made aware of information during an examination and they record it. When the Court is faced with these medical records, notes and reports, these documents are the only information available to make a judgment on. Second, having good days and bad days does not adequately explain how inconsistent and inaccurate Mr. Tavakoli's reporting was. Further, Mr. Tavakoli has spent hundreds of hours with health care providers over his lifetime and especially the past seven years, thus it is unlikely that on every occasion that he saw a practitioner he was feeling a certain way that made him leave out details or give a different story.

[171] Plaintiff's counsel submitted that Dr. Reesal prejudiced his conclusions by reading the materials, in particular Dr. Clarke's report which suggested malingering, before he met with Mr. Tavakoli. In cross-examination, Dr. Reesal told the Court that he has approached interview situations differently, sometimes reading material beforehand to get a sense of what the relevant information and issues are and sometimes not reading the material beforehand. In that latter situation, the first information the doctor hears is from the individual.

[172] I find that it is acceptable that Dr. Reesal would have read the material before meeting with Mr. Tavakoli in order to have a global or contextual understanding of Mr. Tavakoli's medical past. Additionally, it appears from Dr. Reesal's testimony that this review was cursory and only highlighted the relevant issues, as opposed to an in-depth review that resulted in Dr.

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Reesal approaching the interview with a formed, biased opinion. Further, I am not persuaded by other medical practitioners evidence and reports that are based purely on Mr. Tavakoli's self-reported information, as opposed to a review of the medical records of other treating practitioners.

[173] As outlined above, there is a fundamental difference between Dr. Ancill's and Dr. Reesal's respective approaches. Dr. Ancill took what he was being told by Mr. Tavakoli at face value, did not question Mr. Tavakoli's credibility and did not note any inconsistencies in the information from previous medical examinations and the information he received from Mr. Tavakoli. Conversely, upon becoming aware of such inconsistencies, Dr. Reesal started questioning Mr. Tavakoli's credibility, which became a significant factor in Dr. Reesal's ultimate opinion.

[174] Credibility findings are particularly important in the area of psychiatry where there is reason to question a patient's self-reported symptoms, and where self-reported symptoms form the main criteria for the diagnosis of various psychiatric disorders. Dr. Reesal was quite clear in his view that it would be improper and perhaps even irresponsible for a psychiatric expert to make any diagnosis as if such inconsistencies did not exist.

[175] I find this approach acceptable, particularly given some of the glaring inconsistencies with Mr. Tavakoli's self-described symptoms and evidence and the inconsistent and sometimes selective histories he has given to treating physicians and expert examiners.

[176] Plaintiff's counsel submitted that there has been judicial consideration and disapproval of using psychological testing to prove a witness is not credible and directed the Court to *Guthmiller v. Krahn*, 2000 ABQB 444, where McIntyre J. expressed disapproval of using the defendants' psychologist to attack the plaintiff's credibility at paras. 21 - 22:

> The defendants put forward Dr. Fraser's evidence to attack the plaintiff's credibility. This smacks of reverse oath-helping. I refer to the long vanished practice of being allowed to call witnesses who testify as to the credibility of the individual (as opposed to the present practice of allowing evidence as to general reputation in the community for veracity).
>
> To use Dr. Fraser's evidence in the way the defendants propose seems to be the reverse of oath-helping. In scientific guise, Guthmiller is suggested to be exaggerating his condition because he failed certain tests. The purpose of the testing was not to see if he was credible in court (nor could it be). See *R. v. Marquard*, [1993] 4 S.C.R. 223 at paragraph 49. Further, the evidence is that more than 50% of chronic pain sufferers fail these tests. If that is so, perhaps there is something wrong with the tests. It seems that such tests might usefully be used as a screening mechanism for chronic pain sufferers.

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[177] I am in agreement with McIntyre J. and his concerns about the use of expert testimony to attack a plaintiff's credibility. It is not up to an expert to decide whether a plaintiff is credible for the purpose of the legal claim, however, a conclusion that a plaintiff is malingering is within a medical professional's jurisdiction. I am not troubled by the way Dr. Reesal presented his evidence and conclusions in front of this Court. Dr. Reesal's conclusions were based on his examination with Mr. Tavakoli and were premised on his expertise and assessment of this case. His conclusion about Mr. Tavakoli's personality traits and lack of a Pain Disorder appear thoughtful, considered and genuine and I found him to be a credible witness.

[178] Plaintiff's counsel submitted that using Dr. McDougall and his consultation letter to AISH which resulted in AISH denying Mr. Tavakoli's application because they ruled that he is not disabled enough to meet their standards, to bolster the Defence's case is inappropriate. Specifically, Plaintiff's counsel contended that this was another example of "reverse oath-helping" as described by Justice McIntyre in *Guthmiller*, and should be disregarded.

[179] On the issue of the AISH application, Mr. Tavakoli testified that he did not think AISH was taking him seriously and blamed this on the "negative report" written by Dr. Apel. He stated that he continues to apply for AISH and has complained to the Ombudsperson regarding the denial of his claim.

[180] The evidence or implications taken from Dr. McDougall's letter that he wrote deal with Mr. Tavakoli's perceived level of disability, not his credibility directly. However, Mr. Tavakoli's credibility in the eyes of the Court is to be surmised from the totality of evidence put forward. It is thus open to the Court to interpret this evidence in determining so. I am not placing significant weight on this letter in any event; it is simply one more piece of evidence.

[181] Dr. Clarke's report gives a comprehensive review of Mr. Tavakoli's medical background, and it appears that Dr. Clarke was provided with a relatively complete depiction of Mr. Tavakoli's health. He considered the possibility of a Somatoform Disorder, however, due to the extreme and exaggerative behaviour demonstrated by Mr. Tavakoli, Dr. Clarke concluded that Mr. Tavakoli was likely embellishing for secondary gain. Dr. Clarke also found that Mr. Tavakoli had been playing a "sick role" for the benefit of others' emotional and financial support. Dr. Clarke is not a psychiatrist, thus he is not qualified to make a diagnosis of a psychiatric condition. He is very able, however, to comment on Mr. Tavakoli's physical abilities and presentation. Dr. Clarke is an expert in treating Chronic Pain Disorders, precisely what Mr. Tavakoli claims to suffer from, and Dr. Clarke was not persuaded that this was the case.

[182] Interesting, Dr. Clarke found Mr. Tavakoli to not be suffering from any known physical condition, and was not persuaded that Mr. Tavakoli sustained any physical injuries in the 2002 accident. Mr. Tavakoli's account of his physical injuries after the 2002 accident were not consistent with the type of whiplash injuries that Dr. Clarke would expect to find with someone who was wearing his seatbelt and was physically fit at the time of the accident. Specifically, Dr. Clarke would expect an injury to the neck solely and not to the shoulders or under the shoulders as a result of a rear-end collision, which were the injuries described by Mr. Tavakoli.

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[183] I found Dr. Clarke to be a knowledgeable and credible witness and I am persuaded by his findings with respect to Mr. Tavakoli's physical condition. I also take note of Dr. Clarke's concern of a secondary gain motive present in Mr. Tavakoli, as derived from his extreme dramatization and exaggeration. As I have mentioned before, this level of embellishment and perhaps fabrication was noted by most other medical experts, and by this Court.

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[184] As such, I find that Dr. Reesal's opinion with respect to Mr. Tavakoli's psychiatric condition and that of Dr. Clarke with respect to Mr. Tavakoli's physical condition, to be the most objective and persuasive. Dr. Reesal was unwilling to accept Mr. Tavakoli's statements at face value in light of the inconsistencies between those statements and the actual information he was provided with. Dr. Reesal found Mr. Tavakoli had imbedded personality traits of narcissism, histrionic behaviour and anti-social behaviour which, when combined with the inconsistencies in his reporting, led Dr. Reesal to the conclusion that Mr. Tavakoli was intentionally creating his symptoms for secondary gain. It should be noted that at no time has Dr. Reesal seen the surveillance which, in my opinion, provides support for his conclusions. Further Dr. Reesal's opinion is also supported by Dr. Clarke, who has extensive experience treating and examining Chronic Pain patients.

[185] When comparing the expert opinions in relation to Mr. Tavakoli's credibility, consideration should also be given to the extent each expert was provided with his complete medical information. Dr. Reesal did have the complete package, particularly when compared to what was provided to Dr. Devrome, Dr. Tompkins, Dr. Ancill and Dr. Zapasnik. Given the comprehensiveness of the information provided and reviewed, Dr. Reesal was in the best position of all the experts to make comments on causation and to provide a legitimate and complete diagnosis of Mr. Tavakoli's condition.

Reliance on Expert Evidence

[186] As noted above, a number of Mr. Tavakoli's experts based their opinions, at least in part, on reports that were not introduced into evidence. This was particularly the case with Mr. Conway and Dr. Tompkins. Defence counsel submitted that such opinion ought to thereby be given less weight based on the decision of the Supreme Court of Canada in *R. v. Lavallee*, [1990] 1 S.C.R. 852.

[187] In that case, the Supreme Court of Canada addressed the admissibility of expert evidence. A psychiatrist testified as to battered women syndrome which was in part based on a conversation between the accused and his own mother, neither of whom testified. The Court interpreted a previous decision of the Supreme Court of Canada in *R. v. Abbey,* [1982] 2 S.C.R. 24, to state the following regarding the admissibility of expert evidence at paras. 78 - 81:

1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence.

2. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.

3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.

4. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

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[188] In the case at hand, the reports of Dr. Edworthy, Mr. Curylo and Mr. Jacobson were never admitted into evidence, and are therefore hearsay. Any expert opinion that relies on such reports as such are given less weight than competing opinions.

Video Surveillance

[189] Mr. Tavakoli was under surveillance from late 2002 until November 2008. Forty-seven hours of video surveillance was recorded although only five hours of actual video was put into evidence after editing by the investigators. Counsel disagree as to what the surveillance does and does not show.

[190] The surveillance videos were admitted by the Plaintiff's counsel as proof of their contents. The Defendant’s counsel also called the investigators at trial to have their reports entered as evidence. I found the investigators all had extensive experience and all conducted themselves in a respectful manner when filming Mr. Tavakoli. Their reports were admitted in their entirety, with nothing deleted or edited. In light of the concerns with Mr. Tavakoli’s credibility and the inconsistencies in his evidence, video tapes and written reports of the investigators were preferred by the Court where there were contradictions between the surveillance evidence and the testimony of Mr. Tavakoli.

[191] With only one exception, the videos depict Mr. Tavakoli carrying out his daily activities in a normal, apparently pain-free manner. He is seen walking, shopping, driving, travelling as a passenger, cleaning his car, playing with his children, etc. There is no grimacing, groaning, facial expressions of pain, need for rest, grabbing of body parts or even any stretching. He does not appear as a man in distress or a man consumed by pain and fatigue. The one noted exception is a vacuuming episode in April 2003 when Mr. Tavakoli was seen grimacing and grabbing his shoulder. This behaviour, however, appears to only have commenced after Mr. Tavakoli likely realized he was being videotaped.

[192] Some portions of the videos directly and specifically contradict Mr. Tavakoli’s testimony of his inabilities and functional restrictions. Some examples of such contradictions include the following examples:

- Using a wand to wash his car, which indicates shoulder and arm activity.

- Vacuuming out his car, indicating crouching, bending, kneeling and getting up from a low level position without reliance on any other objects.
- Playing with his son, including throwing him up in the air, lifting him in and out of the stroller, walking while pushing him in the stroller.
- Lifting heavy objects such as 18 gallon pails of paint, 3 gallon pails of paint, lumber and putting a ladder on top of the roof of the SUV.
- Driving lengthy distances without indications of problems including stretching or the need to stop and rest.
- Walking without a limp.
- Walking in a normal manner without any degree of slowness or guarding.
- Running and jogging when apparently late for an appointment at the Chronic Pain Centre.
- Operating a tile cutter at a residence in Longview, Alberta.
- Generally running errands including driving his son to school, shopping, and other day to day activities.

[193] Mr. Tavakoli testified at Examinations for Discovery that he was only able to walk three blocks at a time, or five blocks if he "pushes it". At trial Mr. Tavakoli agreed that he generally has trouble walking three to five blocks at a time. He further indicated that he can only play with his son for five to ten minutes at a time before becoming fatigued. After this, he must lie down and rest. Surveillance footage, however, appears to contradict all of these statements. For example, on May 10, 2006, footage shows Mr. Tavakoli carrying his infant son, throwing his son into the air and catching him, lifting his son in and out of a stroller and walking with the stroller. This all occurs over a two hour period during which time Mr. Tavakoli is not seen to rest. Afterwards, Mr. Tavakoli is shown getting into his vehicle and the report indicates that he drove around to several auto parts stores.

[194] Dr. Tompkins' report indicated that Mr. Tavakoli had difficulty standing up without holding onto furniture and difficulty lifting over three kilograms of weight. Surveillance video from September 30, 2008, however, shows Mr. Tavakoli lifting grocery bags, without any apparent difficulty. Surveillance video from October 2, 2008, shows him washing his SUV, loading wooden beams into the SUV two at a time, lifting an 18 gallon can of paint from the trunk and lifting a large paint sprayer out of the passenger side door. Mr. Tavakoli testified that he had purchased the building materials for some friends who were working for him, but that he was just dropping off the materials. Despite the large and apparently heavy items he was seen loading and unloading from his vehicle, Mr. Tavakoli testified that he just helped unload "the small stuff".

[195] On the video from October 2, 2008, two men were seen lifting a large ladder off the top of Mr. Tavakoli's SUV. While it took two men to unload the ladder, Mr. Tavakoli admitted he had loaded the ladder on top of the vehicle by himself. This is in direct contradiction to his later testimony that he could not complete tasks requiring him to lift his arms above shoulder level. When questioned regarding this discrepancy, Mr. Tavakoli stated he was not referring to activity such as lifting a ladder, but was rather referring to his difficulty lifting weights above shoulder

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level. He did, however, agree that the ladder was heavy and that the paint cans he lifted contained five to 18 gallons of paint.

[196] Mr. Tavakoli testified that he had not worked since 2003 because of his injuries. He testified that he does not feel as though he can do any work. He expressly stated in testimony that he has not attempted to work renovating houses. However, he went on to testify that he has helped his brothers on "quite a few jobs" because he is "fascinated by the job".

[197] Surveillance footage from October 2007, shows Mr. Tavakoli operating a tile cutting saw in the garage of a house in Longview, Alberta. When questioned on this footage, Mr. Tavakoli first stated he only cut one or two tiles with the band saw. When pressed, he admitted that he remained at the jobsite the entire day the footage was taken, and in fact returned the following day as well. He admitted that he had attended on that jobsite for four or five days in total. He stated he was not paid for his work, but that his brother and cousin, with whom he worked, were paid. He stated he had a deal with his cousin and brother that he would help them on the jobsite in exchange for them living with him and paying his mortgage.

[198] Though this particular example only deals with four or five days, there is a doubt raised as to how many occasions Mr. Tavakoli might have worked over the past seven years, and Mr. Tavakoli’s evidence on this matter is simply not credible.

[199] Following her testing, Ms. Beauchamp reviewed the surveillance videos. She testified that these videos provided further evidence of the discrepancies she noted during the testing. Additionally, the surveillance videos solidified Ms. Beauchamp’s view of Mr. Tavakoli’s variable overall effort during the assessment. In particular, she pointed out that Mr. Tavakoli was able to carry groceries on his fingertips, which was contrary to the results of the pinch grip testing, and his ability to lift and carry pails while observed at Home Depot on October 2, 2008, was greater than what he demonstrated during the assessment. Lastly, she commented on the footage of Mr. Tavakoli running to the Chronic Pain Centre on November 14, 2008, when he was late for an appointment, which was contrary to his assertions that he was unable to run.

[200] Ms. Bagg's rebuttal comments about the video evidence are noteworthy. Despite being faced with obvious differences in Mr. Tavakoli's functional abilities in the videos compared with what she measured in April 2005, she was unwilling to change her ultimate opinion. She instead attempted to justify and explain Mr. Tavakoli's actions in the videos. First, she stated that such videos present an unreliable picture because they do not show how Mr. Tavakoli was actually feeling during such tasks nor do they show how he felt after the tasks had been completed. Then she suggested that Mr. Tavakoli's activities on the video were not necessarily inconsistent with what he said he could or could not do. For instance, Mr. Tavakoli reported that he could not lift but when the video showed him removing a stroller from the trunk of his car, Ms. Bagg stated that this was not exactly lifting but was "pulling, sliding, tipping and lowering" while using the car for stability. She provided the same sort of explanation of his activity when lifting the paint sprayer out of his SUV. Similarly, she did not believe there was any inconsistency with how Mr.

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Tavakoli answered questions on whether he could run or jog when compared to video evidence of him running and jogging to the Chronic Pain Centre in 2008.

[201] The fact that Ms. Bagg was not willing to acknowledge that Mr. Tavakoli's functional abilities may be greater than what she observed on testing and that his functional abilities observed in the video may actually demonstrate that he does have the ability to work in some capacity, suggests that she has little objectivity in this case. An objective expert, when faced with compelling evidence from the surveillance video, would at least acknowledge that Mr. Tavakoli's measured abilities in April 2005 were less than what he was actually observed doing on the video. Ms. Bagg’s assessment of the video surveillance, is in my view problematic, which in turn affected her credibility as an objective expert.

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2006 Motor Vehicle Accident

[202] On June 15, 2006, Mr. Tavakoli was involved in his third rear-end accident in 13 years. He was rear ended and pushed into the car in front of him. From the vehicle insurance report, it appears that damage to his vehicle was under $5,000.

[203] Mr. Tavakoli testified that immediately following the accident, his pain increased in his head and he felt like he was going to be sick. An ambulance attended on scene and a paramedic assisted Mr. Tavakoli out of the car. The paramedic apparently pulled Mr. Tavakoli’s left arm which caused him a great deal of pain and Mr. Tavakoli testified that "I felt like I was dying".

[204] Mr. Tavakoli attended at a hospital but was told he would not be immediately admitted. He apparently became upset and argued with the security guards because the guards did not understand how sick he was.

[205] Mr. Tavakoli testified that after the 2006 accident he was in more pain, needed more rest, required increased massage visits for two or three months, but that after about three months, the pain had returned to previous levels.

[206] On cross-examination, Mr. Tavakoli admitted that he commenced a lawsuit following the 2006 accident in which he alleged that he sustained the following injuries: neck injury, back injury, shoulder injury, aggravation of pre-existing Somatoform Pain Disorder and shock and upset. Mr. Tavakoli could not explain why he would have pleaded these injuries in his Statement of Claim if he had not actually suffered them following the 2006 accident. This claim was settled for $18,000 in late 2008.

[207] There is also the issue of the injuries claimed by Mr. Tavakoli arising out of the 2006 accident. In 2006, Mr. Tavakoli claimed injuries virtually identical to the injuries he claimed in respect of the 2002 accident. In the course of this litigation, Mr. Tavakoli has denied that the injuries at issue arose from the 2006 accident, despite commencing a claim stating otherwise. In essence, Mr. Tavakoli has pleaded the same injuries in both lawsuits for the 2002 and 2006 accidents, and “tried his luck” that one might work out.

Analysis

[208] There is no question that Mr. Tavakoli was involved in a motor vehicle accident on June 23, 2002, for which liability has been admitted. The issue is whether Mr. Tavakoli suffered any injury as a result of that accident. If so, then the nature and extent of those injuries are also in question. Mr. Tavakoli's complaints are, by their nature, extremely difficult to assess. It should be apparent from the foregoing summary of the evidence that his credibility is the most crucial issue to this case.

[209] For the past seven years no medical examiner was able to find a physical, organic or structural cause for Mr. Tavakoli's complaints, and no psychiatric or psychological examiner was able to agree on a diagnosis. Psychologically and psychiatrically, Dr. Ancill and Dr. Devrome concluded that Mr. Tavakoli suffers from some kind of Somatoform Disorder or Pain Disorder. Dr. Clarke concluded that Mr. Tavakoli suffers from either a Somatoform Disorder or is malingering for secondary gain. Dr. Reesal concluded that Mr. Tavakoli is not suffering from a Somatoform or any other psychiatric illness, and that rather he is malingering. Further, the medical experts disagree on whether Mr. Tavakoli's current condition is related to or was caused by the 2002 accident. Drs. Ancill and Devrome found that Mr. Tavakoli's current state was caused by the accident, whereas Drs. Clarke and Reesal found that it was not. Mr. Tavakoli's credibility appears to be paramount in understanding the different approaches taken by these doctors in explaining his condition, thus a comprehensive assessment of Mr. Tavakoli's credibility is required.

Credibility of The Plaintiff

[210] The credibility of Mr. Tavakoli was the most significant issue at this trial. I have heard evidence and read medical reports that do not only suggest that Mr. Tavakoli might be motivated to embellish or exaggerate for secondary gain, but also that he is malingering, which is a conscious and deliberate attempt for secondary gain. A number of factors impacted negatively upon Mr. Tavakoli's credibility with respect to the severity or existence of his injuries and current complaints.

Test Results

[211] Mr. Tavakoli's test results raised issues as to whether his scores were a result of feigning or were bona fide. The results of Mr. Tavakoli's cognitive testing by Dr. Devrome were striking. He scored in the 95th percentile on the STS as he endorsed experiencing 29 out of 54 listed symptoms on at least a weekly basis, which positions him as experiencing more symptoms than 95% of the normative group.

[212] Further, Mr. Tavakoli scored above the 99th percentile on numerous tests, including the OI, SIP, CSQ and PCQ. Interestingly, with respect to the PCQ, the test group is comprised of Chronic Pain patients, not the general population, thus a score in the 99th percentile,

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comparatively, is an extremely elevated score representing an extreme level of perceived disability. Such results also indicate a significant tendency to exaggerate.

[213] Mr. Tavakoli's Lees-Haley score was 30 out of 30. There was discussion from Dr. Devrome that at least 13 of the answers could be attributed to Mr. Tavakoli's ulcerative colitis, which would bring his score to 17 out of 30, which is not suggestive of malingering. However, I am not persuaded by this explanation for two reasons. First, Mr. Tavakoli's history of ulcerative colitis is somewhat questionable. Dr. Ma, a gastroenterologist, completed a biopsy on Mr. Tavakoli on July 4, 2005, and did not find objective information to suggest a diagnosis of ulcerative colitis. Colonoscopy test results from July 11, 2005, stated, "Impression - Normal terminal ileum ... normal colon ... ?IBS". Further a July 20, 2005, operative report by Dr. Ma based on an upper endoscopy indicated, "Normal EGD ... IBS". As interpreted by Dr. Reesal, these biopsy results indicate a normal colon, not one affected by colitis. The only source of information relating to a history of colitis is from Mr. Tavakoli himself, which is troubling due to Mr. Tavakoli's credibility issues. Second, even if Mr. Tavakoli does suffer from ulcerative colitis, Dr. Devrome only suggested that Mr. Tavakoli's score on the Lees-Haley test could be anywhere from 17 to 30. The issue of malingering is not fully answered by Dr. Devrome's qualification of Mr. Tavakoli's test results. Lastly, I am persuaded by Dr. Reesal's discussion of settled concerns relating to the Lees-Haley test, and am prepared to accept Mr. Tavakoli's test results as they were reported, without any qualification for speculative contributing factors or validity concerns that have been medically adjudicated and cleared.

Obstructive and Extreme Behaviour

[214] On May 29, 2008, Mr. Tavakoli became aggressive towards Dr. Apel during an assessment. Dr. Apel testified that out of concern for her safety, she asked Mr. Tavakoli to leave the room. Dr. Apel left the room and when she returned to the examination room, she discovered Mr. Tavakoli's medical gown had been torn up.

[215] On November 23, 2004, when Mr. Tavakoli met with Dr. Apel and received test results that indicated there was no neurological or musculoskeletal problem found with him, Dr. Apel testified that Mr. Tavakoli became angry.

[216] These are examples of intimidating behaviour exhibited by Mr. Tavakoli that are inappropriate in the medical setting and reinforce the pattern of conduct and personality traits attributed to Mr. Tavakoli by Dr. Reesal.

Inconsistencies in the Plaintiff's Evidence

[217] Mr. Tavakoli's testimony was riddled with inconsistencies and showed marked discrepancies when compared to documentary evidence or the oral evidence of other witnesses. Some of these inconsistencies are highlighted below.

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[218] In his statement to an insurance adjuster, Mr. Tavakoli indicated that prior to the accident he was earning $2,800 every two weeks working as a tiler and $3,000 per month from his other work. This would total $8,600 in income per month or $103, 200 per year. According to his tax returns, in 2001 Mr. Tavakoli's gross income was $16,481 and his net income was $9,273. In 2002, Mr. Tavakoli's gross income was $33,945 and his net income was $29,955. Using the highest of these numbers, being Mr. Tavakoli's gross income for 2002, $33,945, which he would have made from January 1, 2002, to at least the date of the accident, June 23, 2002, the monthly breakdown is $5,657.50 per month. Thus, Mr. Tavakoli has at least embellished approximately $18,000 (the difference between making $8,600 for six months in 2002, as compared to $33,945 gross income per his tax returns) or has under-declared his taxable income by as much. This number is likely much larger as I did not use a net income figure, which would have indicated an even larger discrepancy. At trial Mr. Tavakoli admitted that he was not earning $8,600 per month at the time of the accident.

[219] Another example of inconsistent responses was on cross-examination when Mr. Tavakoli denied that his symptoms of pain did not arise until three days after the collision. At Examinations for Discovery, Mr. Tavakoli testified that he began experiencing pain three days after the collision.

[220] Dr. Reesal's IME report indicates that during the examination, Mr. Tavakoli denied that he had been diagnosed with depression or anxiety at any point prior to the 2002 accident, nor had he ever received treatment with any antidepressants for such conditions. This history is inconsistent with medical documentation from Dr. Nichol's clinical notes from his letter dated June 12, 1995, Dr. Miller's medical-legal report dated August 31, 1995, and correspondence written by Dr. Bazant from October 10, 1996.

[221] Also in Dr. Reesal's IME report, he noted that Mr. Tavakoli told him that he had never received psychological help in the past. However, Dr. Clarke's report identified that Mr. Tavakoli in fact attended on Dr. Mothersill, a psychologist, for 13 sessions from July 31, 1995, until February 28, 1996. In his testimony, Dr. Reesal explained that while forgetting one or two psychological treatment sessions might be realistic, forgetting 13 is not. I agree with Dr. Reesal's conclusion and find that Mr. Tavakoli did not forget about attending 13 sessions with Dr. Mothersill, rather like so many other incidences described, he selectively chose not to tell certain health care providers this information in order to advantage himself.

[222] Lastly, Mr. Tavakoli testified as to being so hyper-sensitive to touch that even Dr. Clarke's hand coming near his head caused him pain. Nevertheless, he has attended for nearly 500 massages since the 2002 accident. There is no way to reconcile that testimony with being able to attend massage therapy, let alone on such a frequent basis. This evidence is simply not consistent.

Inconsistencies Between Behaviour on Examination and Under Observation

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[223] Mr. Tavakoli exhibited different behaviour while being tested, as compared to behaviour while in the testing room, but not being tested. Ms. Beauchamp indicated in her report that on direct testing, Mr. Tavakoli's ability to bend his head forward was minimal, however, on indirect observation, he was observed to have much greater flexion. Ms. Beauchamp also noted an instance in her report where Mr. Tavakoli fell to the ground in pain during pinch grip testing and then got up from the floor without any reliance on any external support or without signs of additional discomfort.

[224] Dr. Apel found Mr. Tavakoli to have a "significant discrepancy of movement," meaning that he was actively resisting manipulation and moving less during passive range of motion tests compared with active range of motion tests where he was asked to move his limbs on his own.

[225] Further, Drs. Clarke and Reesal noted that Mr. Tavakoli had no signs of physical discomfort or disability while entering and exiting their offices, or while waiting before the appointments, as compared to the massive disability he displayed on examination. Mr. Tavakoli also fell to the floor while being tested by Dr. Clarke, although Dr. Clarke was not even touching him, and yet, Mr. Tavakoli got up off the floor without any aid and without any observed pain or discomfort afterwards.

Inconsistencies Between Subjective Complaints and Objective Findings

[226] Mr. Tavakoli indicated to numerous care providers including Dr. Reesal, that he was extremely sensitive to touch. According to himself, this sensitivity was so exquisite that simply touching his arm or getting close to him would cause him to feel pain. Nevertheless, Dr. Reesal noted during his examination that Mr. Tavakoli was able to wear clothes, which at times moved across his arms and legs; his arms were able to touch both sides of the chair; he was able to lean back up against the wall without inflicting pain; and he did not seem to experience any pain while shaking Dr. Reesal's hand, both coming into the office and leaving.

[227] Ms. Bagg's report from April 8, 2005, notes that during her examination of Mr. Tavakoli she tested his skin sensation and he demonstrated intact sensation for light touch, pressure, and stereognosis bilaterally. This is not consistent with his statement to Dr. Reesal that his sensitivity to skin was so severe that it was not possible for him to be touched. This examination by Ms. Bagg indicated that from an objective standpoint, there was no available evidence supporting the statements being made by Mr. Tavakoli to Dr. Reesal.

[228] Dr. Apel's report dated November 23, 2004, based on an examination of Mr. Tavakoli that same day, included the following two concluding paragraphs, "being in danger of legal consequences, it was my opinion that this patient's pain is of supratentorial amplification, and if there was some objective organic abnormality underneath, those were extremely well hidden by the patient. Based on the extent of the examination I was able to obtain, I was not able to attest to any neurological or musculoskeletal problems ... Of course, when I conveyed this message to [Mr. Tavakoli], he became rather angry".

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[229] Dr. Apel was not able to find any objective physical condition that was afflicting Mr. Tavakoli, despite his significant complaints.

[230] Sherri Beauchamp also indicated in her report that Mr. Tavakoli's self-reported high level of disability was not observed whatsoever on examination.

[231] Drs. Apel, Clarke, Hill and Mr. Jacobsen, a physiotherapist, all indicated that Mr. Tavakoli displayed strong positive Waddell's signs, including pain with stimulated axial rotation and pain with light touch not being different from pain of different palpation.

Exaggeration

[232] Mr. Tavakoli claims extensive psychological and physical complaints. In many cases, his reported pain or disability puts him in the 95th or 99th percentile, compared to a normative group, or even Chronic Pain patients in some instances. Medically, this indicates a massively crippling illness. However, no medical examining physician was able to find a physical, organic or structural cause, and no psychiatric or psychological examiner was able to agree on a diagnosis or that a diagnosis was appropriate. Nevertheless, most doctors that examined Mr. Tavakoli noted some range of exaggeration or embellishment on his behalf, when he relayed information about his past history or present situation.

[233] In Dr. Devrome's report, Mr. Tavakoli's test results indicated that exaggeration was problematic and Mr. Tavakoli's results from the Lees-Haley test, the "gold standard" for exaggeration, were clearly indicative of exaggeration. Dr. Devrome reported that Mr. Tavakoli's performance on psychological testing was indicative of a tendency to significantly exaggerate his symptoms.

[234] Drs. Clarke, Reesal, Apel and Devrome all referenced Mr. Tavakoli's tendency to exaggerate or embellish his symptoms. Drs. Clarke and Reesal believed this exaggeration was motivated by secondary gain, be it financial, emotional or psychological.

Dramatic and Extreme Behaviour

[235] During his many examinations, various treating professionals and examiners noted Mr. Tavakoli's unusual and extreme responses and behaviour.

[236] Dr. Hill indicated in his October 22, 2002, assessment that Mr. Tavakoli "demonstrated a hyper response to the examination along with a significant shunting. There are a number of illness behaviour and Waddell's signs which were noted during the course of this examination".

[237] As part of the history given to Dr. Devrome, Mr. Tavakoli reiterated difficulties with touch sensation, incongruent with the objective examinations of others. For example she noted that the "... physiotherapist could not touch let alone work on his body". Further, Dr. Devrome

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noted that on occasion Mr. Tavakoli would hunch forward, hold his stomach and moan and that writing would cause him too much pain.

[238] Dr. Clarke stated in his January 3, 2005, report that Mr. Tavakoli's "descriptions of symptoms are extravagant, nonanatomical and do not fit any known physical disease or identifiable physical abnormalities". Further, Dr. Clarke noted an incident when he went to press on the top of Mr. Tavakoli's head and when he had only touched his hair, Mr. Tavakoli nearly collapsed from the pain. Dr. Clarke also reported that Mr. Tavakoli sat in every chair in the examination room, sat and laid on the ground, stood against the wall and that he had never examined a Chronic Pain patient who did this. It is worth reiterating that Dr. Clarke is a Chronic Pain specialist who has treated many number of patients suffering from Chronic Pain, hence this observation from such a seasoned professional is noteworthy.

[239] Dr. Reesal testified that during his examination, Mr. Tavakoli moved throughout the room, grimaced and sighed in a highly noticeable manner. Similar observations very documented by Drs. Devrome, Ancill and Clarke and Mr. Conway. Mr. Tavakoli also indicated to Dr. Reesal during the interview that his skin was so sensitive that even if someone came close to him it would cause him discomfort.

[240] Also, as a result of the June 12, 2008, assessment, Dr. Apel noted that Mr. Tavakoli demonstrated "over dramatization" behaviour in that light touching and light movement resulted in an overly dramatic response.

[241] Lastly, it is worth noting that Mr. Tavakoli advised Dr. Devrome in August 2004, that since the 2002 accident, he was offered a job that would pay him $300,000, but that because of his injuries, he had to turn it down. While this may be the case, Mr. Tavakoli was 38 years old at the time of the accident and his highest earnings since 1993, as declared in his income tax returns, was $33,945 gross or $29,955 net in 2002. I am reluctant to believe that coincidentally, after the 2002 accident, Mr. Tavakoli was offered a job that would pay him five to ten times what he was used to making in a full year's work. Once again, I think that this is an example of Mr. Tavakoli telling an exaggerated and embellished version of a story, trying to paint himself in a better or more sympathetic light.

Treatment History

[242] Drs. Clarke and Reesal noted that one significant difficulty in evaluating Mr. Tavakoli's complaints was the fact that he has had numerous care givers, none of whom, in the doctors' views, were presented with a complete picture by Mr. Tavakoli.

[243] I agree with Defence counsel's assertion that Mr. Tavakoli's pattern of seeking treatment from multiple physicians concurrently has, to an extent, allowed him some control over the course of his treatment and the perception of the seriousness of his condition and disability. Specifically, Mr. Tavakoli has told different doctors different stories about his medical past and what treatment he has received, which has in turn affected the doctors' perception of Mr.

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Tavakoli's situation. This in turn leads to a diagnosis based on incomplete and sometimes erroneous information, which undermines the veracity of the present diagnosis given by that doctor. I have tried to evaluate and ascertain what information each medical expert called to testify had reviewed before writing a report and testifying at this trial. I find that Drs. Reesal and Clarke had the most complete picture of Mr. Tavakoli's medical history and as such their opinions and conclusions are to be given the most weight in terms of an accurate and comprehensive assessment of Mr. Tavakoli's situation.

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Non-Compliance with Suggested Treatments

[244] In my view Mr. Tavakoli did not pursue a number of treatments that were suggested to him. Rather, Mr. Tavakoli chose which treatments he preferred, opting for passive treatments, such as excessive amounts of massage therapy, as opposed to taking prescribed medications, specifically antidepressants, or seeing a psychologist or psychiatrist for treatment. Dr. Clarke ascertained in January 2005 that Mr. Tavakoli's problems were not physical whatsoever in nature and that any problems, therefore, arose out of psychological or psychiatric issues.

[245] Further, Mr. Tavakoli was recommended to attend a pain management clinic, such as the Columbia Rehabilitation Centre, by Dr. Devrome on two separate occasions, in two separate reports, which Mr. Tavakoli did not follow. In fact, Dr. Devrome opined in her second report in August 2004, that the Columbia Rehabilitation Centre had an exemplary pain management program which had been successful in assisting a number of her Chronic Pain clients to adjust to and continue living with their pain. It was not until October 2008, however, that Mr. Tavakoli attended the Chronic Pain Centre at the Holy Cross Hospital site, four years after this type of action was recommended to him.

[246] Instead, following a recommendation from Dr. Zapasnik, a family doctor, Mr. Tavakoli has zealously pursued massage therapy even though no lasting benefit has been achieved and despite Mr. Tavakoli not suffering from any physical injuries or ailments. I find this completely unacceptable. Medical practitioners are trained professionals and when their advice is given, it is not to the uninformed patient to pick and choose what treatments they like best and only follow those. Particularly when the most salient and germane advice is being ignored in favour of excessive, passive treatment recommended one time seven years ago by a generalist. I do not think that such a treatment was ever necessary for Mr. Tavakoli, even seven years ago right after the accident, thus I find that continuing this treatment for seven years post-accident on a frequent basis is entirely inappropriate.

[247] I also note that Mr. Tavakoli did not pursue any lasting form of treatment for depression, despite being diagnosed by numerous doctors and given prescriptions for various antidepressants over the past 15 years, including such action by Drs. Nichol, Miller and Mothersill in 1995, Dr. Bazant in 1996 and Dr. Devrome in 2004.

Illegal Behaviour

[248] In and of themselves, Mr. Tavakoli's run-ins with the Police or his attempts to flout the law are not directly relevant to whether he was injured in 2002 accident. However, as this case turns on Mr. Tavakoli's credibility, evidence of his character, which is revealed by how he has ignored the legal consequences of his actions over the span of his life, is relevant. The following examples of Mr. Tavakoli's conduct were offered by Defence counsel as indicative of the veracity of what Mr. Tavakoli has told his own treating practitioners over the years and his overall evidence at trial. I find it worthy of discussion.

[249] Shortly after arriving in Canada in 1990, Mr. Tavakoli was arrested and convicted of shoplifting a pan for his girlfriend. He testified that he wanted to give her a gift.

[250] While in Montreal, Mr. Tavakoli was involved in an altercation with the Police in 1999. He explained that he had parked in a handicap parking stall at a mall to pick up his girlfriend. He claimed that the Police approached the car and began to hassle him. While attempting to leave, his car apparently jerked forward, at which time the Police Officer pulled out his gun and held it to Mr. Tavakoli's head. He testified that he filed a complaint with the Police, hired a lawyer and considering suing the Police. This incident caused Mr. Tavakoli a lot of stress, as was documented in his medical records, and he testified that he received treatment from a psychologist because of this stress. While Mr. Tavakoli claimed his then-girlfriend Samantha Stucki was in the car with him she testified to having no memory or knowledge of this incident.

[251] Mr. Tavakoli further testified that he got into an altercation with his girlfriend's friend in February 2008. The Police attended at the scene and handcuffed Mr. Tavakoli. While Mr. Tavakoli testified that he was not charged, Dr. Tompkins' note from February 14, 2008, indicates Mr. Tavakoli was charged with assault.

[252] Finally, there is the issue of Mr. Tavakoli's tax returns. There are marked differences in the amounts of the invoices that were produced at trial for 2001, which was the year before the accident, when compared with the revenues he declared on his tax returns. In short, at least for 2001, Mr. Tavakoli did not declare the full amount of income earned from employment. The 2001 invoices add up to approximately $30,000 in revenues. In fact, Mr. Tavakoli testified that there may have been more invoices showing additional revenues from 2001 but he could not locate them due to his files being disorganized. However, the tax return declared only $16,000 in revenues. When questioned as to why he only declared $16,000 of income in 2001, Mr. Tavakoli testified that Mr. Wall had prepared his taxes, and that he did not review the returns before signing them. Mr. Wall testified that he prepared the tax returns on the basis of the materials Mr. Tavakoli provided to him.

[253] In short, neither Mr. Tavakoli nor Mr. Wall took responsibility for the discrepancies in the revenues on the invoices versus on the tax return. I found Mr. Wall to be a credible witness, and a very genuine man. I believe that Mr. Wall prepared the tax returns for Mr. Tavakoli based on the information made available to him. Conversely, I am not convinced that Mr. Tavakoli was being completely honest in producing invoices for the purpose of filing tax returns, thus this is

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another example of Mr. Tavakoli trying to avoid the consequences of his actions, or trying to point the finger at someone else when it is time to take responsibility.

[254] In *Druskin v. Cassidy,* [1995] B.C.J. No. 717 (S.C.) the plaintiff claimed soft tissue injuries to the lower back and neck. At trial, the plaintiff admitted that he had not disclosed all earned income on his tax returns. The Court found this admission undermined the plaintiff's credibility, stating at para. 20:

> 17. The plaintiff acknowledged in cross-examination that a portion of the revenue of his drywall business comes from cash payments not disclosed in financial statements, his tax returns or his evidence-in-chief. This is no slight indiscretion as he seeks damages for lost income based on the difference between his declared income and what he would have earned as a full time union drywaller. Re-direct examination endeavoured to minimize the magnitude of undisclosed income and cross-balance it with similar pre-accident nondisclosures, but the plaintiff came too late to an unconvincing penitence. While mere failure to report income on tax returns does not preclude an award based on actual income, *Iannone v. Hoogenraad*, [1992] 66 B.C.L.R. (2d) 106 (B.C.C.A.), it has an adverse affect on credibility in circumstances such as these.

[255] Likewise to the plaintiff in *Druskin*, Mr. Tavakoli has not declared a significant portion of his income as a tile setter on his Income Tax Returns. Resultantly, this has an adverse affect on his credibility.

[256] These examples of illegal behaviour or brushes with law enforcement indicate a certain attitude on the part of Mr. Tavakoli which appears to place him above the law or law enforcement. Even though I can accept using illegal means to escape Iran as there was a war taking place with a notorious, oppressive leader, which would place Mr. Tavakoli in a situation of duress and would justify his using of smugglers and falsified passports to get into Canada, there is no reasonable explanation for his continued illegal behaviour once living comfortably and safely within Canada's borders. For example, there was no element of necessity involved in his decision to steal a pan. I am aware that shoplifting a pan is not an egregious offence, particularly considered on its own, however, this is not an isolated incident. Rather, it is just another example of Mr. Tavakoli ignoring other's interests and the law to put himself ahead.

[257] Further, Mr. Tavakoli escaped Iran and was living and working in Greece when he falsified passports to enter Canada, which can hardly be compared to a situation such as the one taking place in Iran when he left. There was no war or oppression in Greece, hence, there was no necessity or flight circumstances that might justify his illegal behaviour. Also, I have difficulty believing that Mr. Tavakoli does not remember, or remembers incorrectly, incidents such as being charged with assault or being alone as opposed to with his then girlfriend when a gun is apparently put to his head by a police officer. These are but a few examples of discrepancies or inconsistencies between Mr. Tavakoli's testimony and medical or legal records. Insofar as Mr. Tavakoli's credibility is concerned, these incidences are noted by the Court.

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Conclusion

[258] Taking all these factors into account, it is my view that Mr. Tavakoli is not credible. He has not accurately presented his condition to his treatment providers or to expert witnesses called upon to examine him for the purpose of this litigation. The inconsistencies between what he has told these medical providers and experts are significant, as are the noted differences between what Mr. Tavakoli reports as opposed to what is objectively found on examination. There are also marked discrepancies in Mr. Tavakoli's testimony alone, particularly when he was questioned in cross examination. This is further compromised by video surveillance which shows Mr. Tavakoli performing tasks which he has opined he cannot do and on assessment has demonstrated an inability to do. Further, the level of exaggeration or drama present in Mr. Tavakoli's reports to care givers and examiners is significant, as are his test results for exaggeration. Mr. Tavakoli has undermined his credibility further by denying that the injuries he claims to suffer from relate to a later motor vehicle accident in 2006, when in fact he commenced an action after the 2006 accident claiming compensation for exactly the same injures. Additionally, Mr. Tavakoli has failed to disclose significant amounts of revenue on his income tax returns in the past and has attempted to direct responsibility for the discrepancies between actual and reported income to Mr. Wall. Mr. Tavakoli is simply not credible. This conclusion has a very significant bearing upon the crucial issue to this matter, which is the extent to which Mr. Tavakoli has honestly and accurately represented his complaints, and the subsequent effect on proving causation for the alleged injuries.

General Damages

[259] Liability for the accident has been admitted. However, Mr. Tavakoli bears the onus of proving on a balance of probabilities that the accident for which the Defendant has admitted liability caused the injuries and complaints for which he seeks damages: *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 13. The plaintiff must prove all of the elements of an action founded in negligence on a balance of probabilities. This includes proof that the negligence of the defendant caused or contributed to any of the injuries suffered by him. If the accident was a possible, not a probable cause of the injury, then the plaintiff has not proven his case: *Chaban v. Olson* 1999 ABQB 1039 at para. 41. The plaintiff must prove causation by meeting the "but for" or "material contribution" test: *Athey* at para. 41. Generally, merely proving an increase in the risk is not enough: *Athey*, at para. 28.

[260] As Mr. Tavakoli's complaints and symptoms as reported to all of his professional caregivers and expert examiners are subjective in nature, and as I have made a determination as to his credibility in this regard, none of his testimony will be accepted to establish his claim. Therefore, I am left with the objective findings of the medical professionals who treated and examined Mr. Tavakoli, without the influence of his subjective reports of injury.

Exaggeration and Malingering

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[261] There was a general view, with the exception of Mr. Conway, on the part of the experts in the physical, psychological and psychiatric fields that Mr. Tavakoli's test results suggested an intention to exaggerate his conditions. Similarly, Mr. Tavakoli's pattern of behaviour under examination and when observed suggests a tendency to exaggerate. At no time, and by no expert was the conclusion put forward that this exaggeration was unconscious. Rather any assertion by a treatment provider or expert that Mr. Tavakoli was exaggerating was concluded to be conscious and deliberate. Further, certain examiners went so far as to conclude that Mr. Tavakoli was malingering.

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[262] Based upon the medical reports, the contradictions in Mr. Tavakoli's testimony and the video surveillance taken, I am satisfied that Mr. Tavakoli has grossly exaggerated the seriousness of any injuries he may have sustained in the 2002 accident. Indeed, he has gone beyond the limit of exaggeration into the realm of intentional fabrications.

[263] In *Simmons v. Koenig* 2001 ABQB 152, the Court was faced with a similar predicament when a plaintiff was found to have grossly exaggerated and at times lied about the seriousness of any injuries sustained in a car accident. In that case the plaintiff allegedly sustained a soft tissue injury to his neck and shoulder in a motor vehicle accident which developed into Chronic Myofascial Pain Syndrome and depression. Video surveillance was submitted that contradicted the plaintiff's testimony about his cervical range of motion and the Court also noted examples in his testimony where he was not truthful or was inconsistent. The Court considered the B.C. Court of Appeal decision in *Sekhon v. Gill* (1991), 61 B.C.L.R. (2d) 273 (C.A.), which considered the effect of a plaintiff's lack of credibility on a personal injury claim. Southin J.A. for the Court in *Sekhon* stated at para. 22 - 24:

> In the absence of other authority, I am not prepared to hold that, as a matter of law, a plaintiff who, in fact, has suffered damage from the negligence of the defendant is by a finding that he has lied about the extent of his injuries to be deprived of compensation for the injuries he, in fact, had for two reasons: First determining credibility is often a daunting task, which in civil cases is determined on a balance of probabilities. Odd though it may seem to a layman, a finding by a judge on a balance of probabilities, that he does not believe a witness is not the equivalent of a finding that, by his evidence, that witness has attempted to commit a fraud on the Court. The latter is a graver finding which requires more compelling evidence then does the finding of credibility which often is upon a knife edge.
>
> Secondly, such abuse of the court may be better addressed either by an order depriving the plaintiff of costs or, in extreme circumstances, by ordering the plaintiff to pay the costs of the defendant.
>
> Thirdly, assuming without deciding, that the principle alluded to by Mr. Justice D.B. McKinnon does, in fact exist, I am of the opinion that a defendant who desires to put it forward as a bar to recovery by an injured plaintiff must raise the

> allegation of fraud in the Court below in order that the learned judge can address the question of whether the evidence meets the stringent requirements of a finding of a deliberate attempt to commit a fraud on the court.

[264] After considering the above quote from *Sekhon*, the Court in *Simmons* then stated at para. 169:

> The defendant has not raised the allegation of fraud specifically against [the plaintiff]. However, the difficulty with which I am now faced, given my findings on the credibility of [the plaintiff], is whether there is any objective evidence or any other evidence to support [the plaintiff's] claim. In my view, there is little objective proof supporting his claim. It is difficult to sift through the evidence and to separate the truth from the lies and the gross exaggerations to determine whether he did suffer some injury and to what extent.

[265] In turn, the plaintiff's claim was dismissed in its entirety in *Simmons* as the Court found that the evidence did not meet the civil standard of proof.

[266] The above statement of principle from *Sekhon* was also adopted by Johnstone J. in *Alnashmi v. Arabi* 2000 ABQB 320. In *Alnashmi*, the plaintiff motorist was rear-ended and claimed soft tissue injuries, headaches and a knee and leg injury as a result. The plaintiff had been in a previous accident which he had not disclosed to doctors, and had claimed benefits for lost employment income from that previous accident while continuing to work at that time. The Court found little objective proof that the plaintiff's complaints were anything more that the result of the earlier accident, or manufactured by him over time, in order to facilitate a claim against the defendants far exceeding the actual event. The Court also agreed with the defendants' allegation of fraud, which the Court found to destroy the plaintiff's credibility and subsequently dismissed the plaintiff's claim for general damages as a result of there being no objective findings by the plaintiff's caregivers to meet the civil burden of proof. The Court noted the plaintiff's gross exaggeration and lies in relation to his symptoms. At para. 61, Johnstone J. stated:

> Based upon the medical reports, the contradictions in the plaintiff's testimony, the videotapes taken, and the surveillance of [the plaintiff], I am satisfied that the plaintiff has grossly exaggerated the seriousness of any injuries he may have sustained in the 1995 accident. Indeed he has gone beyond the limit of exaggeration into the realm of deliberate lies.

[267] While the plaintiff in *Alnashmi* introduced evidence of his injuries through his family physician, Johnstone J. discounted this evidence, citing the plaintiff's "consistent denial of prior injuries, misreporting and the tainted evidence of the regular treating physician".

[268] Although the Defendant has not alleged fraud in the present case, as was specified by Southin J.A. in *Sekhon*, in *Simmons* and *Alnashmi*, the Alberta Courts interpreted the law from *Sekhon* as not requiring such an allegation and dismissed the personal injury claims on the basis

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of no objective evidence substantiating the plaintiff's claim, where the plaintiff's credibility had been undermined.

[269] The difficulty that I am now faced with, given my findings on the credibility of Mr. Tavakoli, is whether there is any objective evidence or any other evidence to support Mr. Tavakoli's claim. In my view, there is little objective proof supporting his claim. It is difficult to sift through the evidence and to separate the truth from the gross exaggerations and lies to determine whether he did suffer some injury and to what extent. In *Simmons* and *Alnashmi* the Court cited Southin J. (as she then was) in *Le v. Milburn*, [1987] B.C.J. No. 2690 (S.C.) at para. 2, which read as follows:

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

[270] I find these words relevant to Mr. Tavakoli's situation. What objective proof there is I find wanting given the predilection of Mr. Tavakoli to either give erroneous or massively embellished information to his professional caregivers, or be less candid with some of his professional caregivers and examiners. There is evidence that Mr. Tavakoli is much more capable upon observation or video surveillance than while under examination, that he did not give full effort during many of his examinations and instead that he was exaggerative to a significant degree, that the history of his symptoms given are inconstant with the injuries or disabilities alleged and that he has had a selective memory with respect to his medical past. The evidence does not meet the civil standard of proof on a balance of probabilities.

[271] In summary, I reject Mr. Tavakoli's evidence in its entirety, along with the evidence of experts relying solely on Mr. Tavakoli's self- reported symptoms and I accept the evidence of experts who objectively examined Mr. Tavakoli and based their conclusions on their own observations of Mr. Tavakoli and not his own self-reports. The result is that there is not sufficient evidence to establish the injuries Mr. Tavakoli's alleges and causation of the alleged injuries is not proven.

Soft Tissue (Whiplash; Musculoligamentous) Injuries

[272] Having considered the totality of the evidence, I am not satisfied on a balance of probabilities that Mr. Tavakoli suffered a whiplash-associated injury as a result of the accident. As I have found Mr. Tavakoli's testimony to not be credible, and any diagnosis based solely on his self-reported symptoms to be tainted, I am left with the medical evidence of only a few professionals who saw Mr. Tavakoli and made a diagnosis based on objective findings from their experience with him.

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[273] In this regard, I find Dr. Clarke's testimony to be the most telling, as he is an expert in locating organic, physical problems. Although Dr. Clarke did not see Mr. Tavakoli immediately after the 2002 accident, when he examined Mr. Tavakoli in January 2005, Mr. Tavakoli's self-described symptoms were entirely inconsistent with a soft-tissue whiplash injury. Specifically, Dr. Clarke indicated that individuals wearing seatbelts in a motor vehicle accident, rarely develop pain anywhere but in their necks. However, Mr. Tavakoli reported experiencing burning pain in and under his shoulders, in addition to in his neck, to Dr. Clarke. Mr. Tavakoli also indicated that his entire body was numb after the accident, which is not a typical injury mentioned in this type of accident. Further, Dr. Clarke noted that Mr. Tavakoli was a very fit, athletic and muscular man when the 2002 accident took place, that he still had strong muscle development at the time of the 2005 examination, that he was wearing his seatbelt when the accident occurred, and that he did not hit his head or become unconscious as a result of the impact. As such, Dr. Clarke stated that it is likely that Mr. Tavakoli did not suffer any injury at all, and if he did, 12 weeks would be a very generous time period for this kind of injury to resolve itself.

[274] Also, Dr. Clarke mentioned that Mr. Tavakoli's reporting on examination was so riddled with inconsistences that deciphering what was real and truthful, from what was exaggerating and possibly even a complete fabrication, became nearly impossible. Likewise, after hearing all of the evidence presented in this trial, I feel the same way and am in no better position to disentangle the truth from the web of exaggeration and deceit. Mr. Tavakoli has disadvantaged himself. There is no way of ascertaining what is honest versus what is an embellishment or fabrication in his testimony. Further, Mr. Tavakoli's account of his physical injury after the accident is inconsistent with a whiplash-type injury, thus causation is not proven.

Chronic Pain: Somatoform Disorder

[275] In my view, there was not sufficient evidence at trial to support the conclusion that Mr. Tavakoli developed a Somatoform Pain Disorder, or experienced an aggravation of a pre-existing Somatoform Pain Disorder, as a result of the accident. I have arrived at this conclusion as a result of eliminating Mr. Tavakoli's evidence from my analysis, discounting the tainted evidence of Mr. Tavakoli's caregivers and examiners who relied on his evidence, and accepting the testimonies of Dr. Reesal with respect to Mr. Tavakoli's psychiatric state.

[276] As discussed earlier, many of the treating caregivers and expert examiners in this case did not have Mr. Tavakoli's complete medical history, and as such, their conclusions and diagnoses were not as comprehensive or accurate in depicting Mr. Tavakoli's situation. As I found the testimonies and reports of Dr. Reesal and Dr. Clarke to be the most persuasive, I am in agreement with their conclusions about Mr. Tavakoli; namely that he suffers from no physical injury or ailment, and that he has been embellishing and malingering in representing his current psychological state to the healthcare profession, to his family and friends, and to this Court. This type of behaviour is unacceptable and is not to be rewarded. As such, Mr. Tavakoli has not demonstrated on a balance of probabilities that he suffers from a Somatoform Pain Disorder, or that any psychiatric condition he suffers from was caused by 2002 accident.

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[277] In view of the foregoing discussion, Mr. Tavakoli's claim for general damages is therefore dismissed.

Heard on February, 11th, 23rd, 24th, 25th, 26th, 27th, 2009 and March 3rd, 4th, 5th, 6th, 9th, 10th,11th, 12th, 2009.

Dated at the City of Calgary, Alberta this day of December 21st, 2009

P.M. Clark
J.C.Q.B.A.

Appearances:

Stephen M. K. Hope
for the Plaintiff

David M. Pick
for the Defendant

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