CITATION: Davies v. The Corporation of the Municipality of Clarington, 2018 ONSC 4370
COURT FILE NO.: CV-00-1075-00CP
DATE: 20180716

ONTARIO

SUPERIOR COURT OF JUSTICE

2018 ONSC 4370 (CanLII)

BETWEEN:	)	
BONNIE DAVIES	)	Jeffrey W. Strype and Kyle Smith, for Class Member Zuber
Plaintiff	)	
– and –	)	
THE CORPORATION OF THE MUNICIPALITY OF CLARINGTON, VIA RAIL CANADA INC., CANADIAN NATIONAL RAILWAY COMPANY, TIMOTHY GARNHAM, THE BLM GROUP INC., APACHE SPECIALIZED EQUIPMENT INC., APACHE TRANSPORTATION SERVICES INC., BLUE CIRCLE CANADA INC., and HYDRO ONE NETWORKS INC.	)	James M. Regan, Q.C. and Angelo Sciacca, for the Defendants Apache Specialized Equipment Inc., Apache Transportation Services Inc., and Timothy Garnham Stephen J. MacDonald, for the Defendant Hydro One Networks Inc. David Merner, for the Defendants VIA Rail Canada Inc. and Canadian National Railway Company
Defendants	)	Alon Barda, for the Defendant BLM Group Inc.
	)	**HEARD:** November 17, 24, 26-28, December 1-4, 2014, May 19, 20, 25-29, June 1-4, 8-12, November 19, 20, 23-27, 30, December 1-4, 2015, February 1-4, 8, 10, 11, 16, 18, 19, 22-24, May 9-13, 16-19, 24-26, 30, 31, June 1-3, 6-10, 13-17, 20-22, September 8, 9, October 21, 24-28, 2016, February 24, May 1, 2, 2017

<u>REASONS FOR DECISION</u>

<u>EDWARDS J.</u>:

2018 ONSC 4370 (CanLII)

Overview

[1] What should have been a leisurely VIA Rail train trip from Toronto to Montreal on November 23, 1999, turned into a nightmare of a derailment and nearly 17 years of litigation. The Plaintiff, Christopher Zuber (Zuber) was a passenger on the train, and as a result of the derailment he was thrown from his seat causing various alleged injuries that generated in excess of 26 weeks of trial time. A class action was commenced in early 2000. The action was certified on August 30, 2000 by MacKinnon J. The liability issue was resolved in 2007 after a trial before Ferguson J.

[2] It is an entirely appropriate question to ask how, what was in essence a damages assessment that for the most part had as its focus the determination of the Plaintiff's past and future income loss, could occupy 26 weeks of trial time. I have no statistics to suggest this is one of the longest personal injury damages trial in Ontario, but I strongly suspect there are few other civil trials that have consumed so much judicial resources. I equally suspect that with the recent decision in *R. v. Jordan*, [2016] 1 S.C.R. 631, 2016 SCC 27 (CanLII); *and R. v. Cody*, 2017 SCC 31, that there will be few repeats of this trial in the future. My Reasons, I hope, will help the reader understand why this trial took so long.

[3] Counsel for the Plaintiff and the Defendants provided extensive written submissions at the end of the trial, that helped focus the evidence that was received over twenty-six weeks and a two year period. What was remarkable from those submissions was the wide divergence of what the two sides saw in terms of the proven damages.

[4] Counsel for the Plaintiff summarized his position as follows:

> Mr. Zuber's case is unprecedented in so many ways; in particular, the amount and quality of supporting witness evidence in this case is unprecedented in Canadian courts. Canadian courts have never seen a personal injury Plaintiff call multiple Vice-Premiers, multiple Ministers, and multitude heads of banks to sing their praises. In this case, those witnesses are just the tip of a very large iceberg.
>
> The income that Mr. Zuber earned before this accident is unprecedented for a personal injury Plaintiff. The position he held within Polish society is unprecedented for a personal injury Plaintiff. Considering all of this along with the clear medical evidence that Mr. Zuber lost this income and this societal status due to the accident, it is submitted that a just award to compensate Mr. Zuber for his losses should be similarly unprecedented.

[5] Counsel for the Defendants, perhaps not surprisingly, see this case from a different perspective. Their position is summarized from the Defendants' written submissions as follows:

> The Defendants submit that Mr. Zuber sustained a minor soft tissue injury to his neck, which was expected to resolve within 6 months. The evidence revealed that Mr. Zuber's business was unaffected by his injury. He lived and worked as normal from 2000-2004. The evidence further revealed that Mr. Zuber's decline in business and health post-2004 were causally related to other factors which were not the responsibility of the Defendants.

[6] So with these divergence points of view, the reader will not be surprised by how the parties summarize what this court should award as damages. The defence suggests the court should award the Plaintiff $30,000 in general damages. The Plaintiff, through his counsel, suggests the appropriate award should be $270,000 for general damages; $2,555,136 US per annum to age 65 for past and future loss of income (plus positive contingencies of 20-40%), less various amounts for amounts actually earned post-accident. The Plaintiff also suggests 63,733 PLN for out-of-pocket expenses and $100 CAD per week for future cost of care (housekeeping). By my calculation, converting the US dollar to Canadian, the Plaintiff seeks in excess of $60,000,000 in damages. To say that the parties have a different view of this case, is probably one of the understatements in personal injury litigation that this or any other court in this country has ever seen.

[7] As this is a damages case, I will review Zuber's background with a particular focus on his pre-accident employment and earnings in an effort to determine a bench mark from which to calculate his past and future loss of income. I will review his post-accident employment and earnings in an effort to gain an understanding of the extent to which, if at all, injuries that Zuber says he suffered in the accident caused him to suffer a loss of income post- accident.

[8] What makes this personal injury trial somewhat unique, is the absence of many of the usual types of documents that our courts typically encounter when called upon to determine a Plaintiff's past and future loss of income. Something as fundamental as the Plaintiff's personal tax returns prior to the accident were never produced, for reasons the Plaintiff asserts related to his lack of knowledge that he had a claim until well past the time when such documents are required to be kept in Poland.

[9] Because the Plaintiff lacked many of the source documents he would normally need to prove his claims for past and future wage loss, the Plaintiff called numerous lay witnesses to lend credibility to his evidence that he was paid millions of dollars in cash between 1992 and 1999. I will review the evidence of these lay witnesses and explain why, for the most part, I found much of their evidence lacking in credibility.

[10] Finally, I will review Zuber's medical history after the accident in an effort to understand the injuries he says he suffered in the accident. As part of that review, I will focus on the medical evidence from various doctors called by Zuber who say that they treated Zuber for his injuries, and compare that evidence to Zuber's level of activity post-accident. I will also explain why I reject the Plaintiff's claim for past and future medical care.

2018 ONSC 4370 (CanLII)

2018 ONSC 4370 (CanLII)

Zuber's Background

[11] Zuber is both a citizen of Poland and Australia. He was born in Poland in 1963, and at the age of 17 he immigrated to Australia out of a desire to get out of the communist country that Poland then was.

[12] Shortly after arriving in Australia, Zuber decided to return to school to complete his high school diploma. He also met his future wife to be, a Hungarian lady born in Australia. He quickly became fluent in English, and according to his evidence he rapidly made his mark in the business world. Because he says he made a lot of money, he and his wife left Australia in 1985 to travel in Europe and North Africa, returning to Australia after nine months. He resumed his business career, earning significantly more than the average person – something he estimated was in the $5,000 to $10,000 per month range.

[13] Zuber then decided to improve his education and began his University education in 1988, majoring in "Travel and Tourism Management". Between 1988 and 1991, Zuber attended Victoria University in Melbourne, Australia. His academic transcript was marked as Exhibit 157. A fair reading of that transcript would suggest that Zuber was less than an average student. The majority of his grades are in the 50% to 59% range. He received his Bachelor of Business Degree in Travel and Tourism Management in May 2000.

[14] At the end of every semester, Zuber testified, he would return to Poland to visit his mother. He would also return with a quantity of jeans that he would sell at a substantial profit of 500%. On one of the trips he met some businessmen on the airplane returning to Australia, who he described as being in significant peril due to hyperinflation in Poland which in the early 1990's, he stated, was running at 100%. He came up with an idea to solve their problem, which included the setting up of a holding company. At the same time he came up with the idea of debt swaps, which required him to buy the debt with a down payment of his own money, ranging from $100,000 to $500,000. It was in this time frame that Zuber returned to Poland, and began earning what can only be described as substantial sums of income from various consulting type jobs.

The Accident

[15] Zuber was in Canada in the fall of 1999 to further his consulting business. He was on his way to Montreal with a Walter Budny (Budny). When the train derailed, he testified that he hit his head on the bulkhead. He testified that Budny would testify that he lost consciousness.

[16] Budny testified that he saw Zuber fly by him like a bag. He did not confirm that Zuber lost consciousness. Given the possibility of a fire Zuber, Budny and the other 100 passengers quickly exited the train and walked a considerable distance, estimated by Budny to have been "a few hundred metres", until they could be rescued by climbing an embankment with the assistance of a rope.

[17] Zuber testified he injured his neck and back. He complained of a headache. He was taken by ambulance to a local hospital where he was examined, underwent some x-rays and was

eventually released. He travelled to Montreal by bus where he met with some business leaders of VIA Rail at a pre-arranged meeting. The meeting had nothing to do with the train crash.

[18] The x-rays that were taken at Lakeridge Health Hospital on November 24, 1999 identified no fracture, and the alignment of the disc spaces in his vertebrae were preserved. After the meeting in Montreal Zuber returned to Poland by plane, in a journey he described as being difficult and painful given the injuries he says he suffered in the derailment. He testified that the pain he was experiencing upon his arrival in Poland was “excruciating”.

2018 ONSC 4370 (CanLII)

Zuber’s Employment 1992-1999

[19] When Zuber returned to Poland from Australia in 1992, he would have been 29 years of age. He had completed his high school diploma and had attended university in Melbourne for four years, which would ultimately lead to the awarding of a Bachelor of Business (Travel and Tourism) eight years later, in 2000. He had not lived in Poland since he left in 1980 when he was 17. He was Polish by birth and his mother still lived in Poland. Despite his relative youth and relative lack of experience in the business world, Zuber testified that in 1992 he earned somewhere between $156,000, $236,000 and $506,000, through various sources (see Exhibits 152C, 152A and 152B, respectively). Between 1992 and 1999, if Zuber’s evidence was accepted, he earned in excess of $9,000,000 cash in US currency.

[20] While I did not have any expert evidence as to the average earnings in 1992 for a Polish worker, I did have evidence from various sources that left me with no doubt that times were very difficult in Poland in the 1990’s. Mr. Miroslaw Styczen (Styczen) was once the Governor of the Province of Bielsko-Biala in Poland. He testified that times were very tough in Poland in this time frame, with hyperinflation and little spare money. Zuber himself testified that in 1992, the average income for a Polish citizen was $14,000 per annum. He also testified that the average income for an “entrepreneur” in 1992 was 500,000 Deutschmarks. As someone who had only just returned to Poland in 1992, in the absence of corroborative/credible evidence one might find it very difficult to accept that Zuber almost immediately upon his return was earning $156,000, let alone the $506,000 suggested by Zuber in his evidence.

Post-Accident Activities

[21] The years post-accident were marked, according to Zuber, by a steady decline in his activity level, reduced travel, and a marked reduction in his ability to carry out his various business activities. All of this is attributable to the accident, according to Zuber. If there was a reduction in Zuber’s ability to carry on his regular activities for reasons related to injuries suffered in the accident, Zuber would be entitled to an award of damages.

[22] Zuber testified that he was unable to attend to many business meetings as the years progressed after the accident. What is significant, is that Zuber - who according to his evidence was in excruciating pain when he got back to Poland after the accident,

nonetheless went on a 10 day trip to Sri Lanka with his future wife in December 1999. In order to catch their flight, Zuber drove from Warsaw to Austria. While Zuber denies he did any skiing while in Austria, pictures were entered into evidence that show Zuber dressed in ski attire. He and his future wife then drove to Frankfurt, Germany, where they caught a flight to Sri Lanka. While in Sri Lanka, there are photographs of Zuber climbing up a large mountain. While Zuber testified these activities were accompanied by significant pain, it is very hard to reconcile what Zuber did immediately post-accident with someone who was supposedly in dire straits.

2018 ONSC 4370 (CanLII)

Zuber as a Witness

[23] The credibility of a Plaintiff in a personal injury action is almost invariably the determining factor in the outcome. A credible Plaintiff will usually do quite well in terms of the damages awarded. Conversely, a Plaintiff who lacks credibility may have difficulties in asserting his or her damage demands. Most Plaintiffs in a personal injury action begin the trial, and will often testify for the better part of a few days in-chief and in cross-examination. I had the opportunity to listen to Zuber's evidence in-chief for approximately 21 days, and 7 days in cross-examination!!

[24] Zuber, for the most part, in his evidence in-chief had what can only be described as an incredible memory for the details of events, times, places and people, dating back many years. His evidence in-chief bore none of the earmarks of someone with a frontal lobe brain injury. In his cross-examination, when confronted with inconsistencies that required explanation he often fell back on the old tired refrain, "I can't remember".

[25] By way of example, Zuber was cross-examined at length regarding the existence of his criminal record in Poland. The so-called criminal record related to events that took place in 1992, when it was alleged he gave false testimony concerning a burglary in March 1992. He was asked if he was charged with a criminal offence. His initial response was he had no memory of those matters, only later to testify the record was "expunged" when it got to a higher court. I do not accept he did not remember something of that nature, when he had an incredible memory for events of a much lesser notoriety in his life.

[26] As a witness he was often admonished by me to answer a simple question with a simple yes or no answer, or a brief response. Zuber impressed me as someone who wanted to expand on his answers as a method of demonstrating how important he was, and to demonstrate that he was someone of great knowledge who could justify the substantial sums of money he says he was paid.

[27] There were many occasions during his evidence in-chief, when Zuber demonstrated how he dealt with the pain he suggests he suffers from in his neck and back. Many times he would grimace and put his hands behind his back, and then bend forward in a bending motion until his torso was horizontal to the ground. Noteworthy, in his cross-examination that went on for many days, he rarely demonstrated the same type of behavior.

[28] Zuber also was extremely defensive when cross-examined in areas that fundamentally went to his credibility. He took great exception to the suggestion that the defence did not accept the quantum of what he says he was earning before the accident.

[29] Zuber was also a witness who would anticipate the question that was about to be asked and volunteer an answer that was completely non-responsive to the question. In doing so, he did not impress me.

[30] Mr. Strype, in his written submissions, suggests that the manner in which Zuber gave his evidence at trial can be explained as a result of a frontal lobe injury to his brain suffered in the accident. Mr. Strype argues that:

> Mr. Zuber repeatedly displayed an inability to concentrate on answering only the questions being asked of him. He would frequently go off on tangents that were unresponsive to the questions being asked. Given the unquestionable evidence supporting Mr. Zuber's capabilities and achievements prior to the accident, it is submitted that his inability to focus during his evidence is demonstrable of the frontal lobe injury that he suffered in the present accident.

[31] Mr. Strype offers as an explanation for some of Zuber's behaviour in court and the way he answered questions, as a brain injury he suffered in the accident and the damage to the frontal lobe area of his brain. Whether Zuber did in fact suffer a brain injury is very much contested by the defence. However, the fundamental problem I have with Mr. Strype's assertion is that for it to be true, one would have expected the same problems with how he answered questions to be manifest in both his evidence in-chief and in cross-examination. Such was, however, not the case.

[32] As previously noted, Zuber demonstrated an incredible memory for events, dates, times and places, when examined by Mr. Strype in-chief. That memory did not hold true when he was cross-examined. If Zuber had a brain injury it is difficult to conceive how his memory was so good when examined in-chief, only to have it disappear during cross-examination when it suited him.

[33] In addition to the concerns expressed above, I have serious misgivings as to whether Zuber complied with orders of the court directed at ensuring he had no contact with intended witnesses. At the beginning of the trial, the usual witness exclusion order was made by the court. In addition to the witness exclusion order, there were a number of times I brought to Zuber's attention the impact of the exclusion order. On June 4, 2015, I specifically warned Zuber that he was not to discuss his evidence with anyone, including his lawyer. At the completion of his evidence, I again warned Zuber about the impact of the witness exclusion order.

[34] As various witnesses were called to testify from Poland, it became quite apparent that Zuber had not complied with the witness exclusion order and, more importantly, ignored my explicit warning not to discuss his evidence with anyone. Two examples of such non-

2018 ONSC 4370 (CanLII)

compliance can be seen in the evidence of Mr. Joseph Smoczynski (Smoczynski) and Dr. Abramczyk, whose evidence I review in greater detail later in these Reasons. As well, it was apparent that Zuber spoke with various other witnesses (Messrs. Abrzej Kalwas (Kalwas), Francis Krok (Krok), Robert Jedreczyk (Jedreczyk), Styczen, Maciej Lesny (Lesny), Janusz Miekus (Miekus), Rainer Steindl, Roman Jagielinski and Dr. Manowiec) subsequent to the completion of his evidence.

2018 ONSC 4370 (CanLII)

[35] An example of a glaring violation of the witness exclusion order can be found in the evidence of Kalwas. Kalwas was, between September 6, 2004 through October 2, 2005, the Minister of Justice for Poland. Amongst other things, Kalwas testified with respect to the "expungement" of Zuber's criminal record and the fact that Zuber is entitled to say he has no criminal record. At page 2,143 of the transcript, Kalwas stated "I received the information from Mr. Zuber that he was - his sentence was expunged from the records". Kalwas confirmed that he had been approached by Zuber two to three months prior to giving his evidence. Kalwas testified on November 30, 2015. This would put the discussion between Kalwas and Zuber as occurring sometime between September and October 2015. Kalwas was asked the following question in cross-examination, "My question, Mr. Kalwas, is that Mr. Zuber told you what had been going on in this trial when you met with him 2-3 months ago in preparation for swearing your affidavit". Kalwas' response to this question was "Yes, definitely he mentioned about this case, about this law suit [sic] in Toronto, Canada". This exchange left me with little doubt that Zuber violated the witness exclusion order, and my specific admonition given to him on at least two occasions not to discuss his evidence with anyone.

[36] While I accept that this trial was somewhat unique given that most of the witnesses testified in Poland via a videolink and the trial took place over a period of two years, this does not justify Zuber's inexcusable contact with witnesses that he knew were about to testify. The fact that there was contact weighs against Zuber's overall credibility.

[37] In my assessment of Zuber's credibility, I have also considered Zuber's previous conviction in Poland for falsely registering a motor vehicle and perjury as a factor weighing against his credibility. Exhibit 151 is a brief of documents admitted for the truth of their contents. Zuber was found guilty by the Provincial Court, 3rd Criminal Division in Poland, as follows:

> 1. The Court declares the defendant Krzysztof Zuber guilty as charged in that, during the period from June 1992 to August 1992 in Bielsko-Biala, Kęty and Ustronie, acting together and in collusion with other persons, within the pattern of continuous series of offences, he did the following:
>
> - In June 1992, he induced Wiesław Wojtas to register at the Transportation Department, Commune Administration Office in Kęty, based on false documents, a "Ford Probe" vehicle proceeding from theft to the detriment of Andrzej Adamek, worth ca. 20,000 new PLN (two hundred million old PLN) and subsequently he sold the vehicle registered

> in this manner to Maria Mirosławska, being aware that the vehicle proceeded from crime.
>
> 2. The Court declares the defendant, Krzysztof Zuber, guilty as charged in committing the act specified in point II of the indictment, which constitutes an offence pursuant to art. 233 par. 1 of the *Criminal Code*, and for this the Court sentences him, based on art. 233 par. 1 of the *Criminal Code*, to 8 (eight) months of deprivation of liberty (jail).
>
> 3. The Court declares the defendant, Krzysztof Zuber, guilty as charged in committing the act specified in point III of the indictment, which constitutes an offence pursuant to art. 233 par. 1 of the *Criminal Code*, and for this the Court sentences based on art. 233 par. 1 of the *Criminal Code*, to 8 (eight) months of deprivation of liberty (jail).

2018 ONSC 4370 (CanLII)

[38] Considerable time and effort went into the whole issue of Zuber's prior involvement with the criminal law in Poland. Much like the process we have in Canada that allows for someone convicted of a criminal offence to apply for a pardon, a similar process applies in Poland. The evidence in this regard left me with little doubt that Zuber was successful in getting his criminal record "expunged". The fact that someone convicted of a crime - whether in Canada or Poland has had their record "expunged" or pardoned, does not mean that the crime never happened. The pardon or expungement simply means, as Kalwas testified to, that the offender - in this case Zuber, can truthfully state they do not have a criminal record. It does not mean that the criminal act never happened.

[39] There were a number of occasions during the course of Zuber's cross-examination when he became quite emotional, and rhetorically questioned defence counsel as to why the defence did not believe him. In essence, Zuber reflected his concern that his evidence and credibility were beyond reproach. While I accept that Zuber is entitled under Polish law to say he has no criminal record, the fact he was convicted of what amounts to a crime of dishonesty - theft and perjury, are facts that allow this court to assess and question the overall reliability and credibility of Zuber's evidence (see *R. v. Stratton*, [1978] O.J. No. 3536 at para. 41, per Martin J.A.). If someone has been convicted of perjury once, it is far from a stretch to imagine someone might be dishonest again – particularly if he was urging a court to award him $60,000,000.

<u>Failure to Produce Documents</u>

[40] The accident occurred on November 23, 1999. Zuber was aware from his travel companion, Budny, that lawyers were involved. Noteworthy, is that Zuber - through his counsel Mr. Strype, commenced his own action on November 23, 2001. Zuber asserts that he did not know of the extent of his claim until much later. He asserted he did not remember the issuance of the claim by Mr. Strype. When asked in cross-examination why he did not have documents to substantiate much of the claim for his loss of income, he stated that in 2004 he did not know about this case and the need to produce documents.

[41] Zuber's evidence as to why he did not have many of the documents to substantiate his claim defies logic, and in my view unfairly places his lawyer in an untenable position. Essentially Zuber places the blame by inference on his lawyer, for not telling him back in 2001 when the claim was issued that he would have to produce things like his tax returns; financial records; banking records; contracts; and other similar documents in order to assert his claim for past and future income loss.

[42] The evidence I heard from Zuber and numerous other witnesses called on his behalf makes it abundantly clear that in Poland - in accordance with Polish law, things like banking records; financial records; and tax returns are only kept for six years. While I did not hear any expert evidence on Polish law regarding the requirement to keep financial and other similar type records for six years, I accept that this is in fact the case given the number of witnesses who testified to the same effect, and it also accords with common sense and closely resembles the Canadian experience.

[43] Both sides spent considerable time in their written submissions addressing what obligation, if any, Zuber had with respect to documentary production arising out of his status as a member of this class action. Mr. Strype is quite correct in his submission that a class claimant like Zuber has no production obligations unless a motion is brought by the Defendant to obtain productions (see s. 15(2), *Class Proceedings Act*). In this case the defence requested, and Zuber consented to an examination for discovery in 2006. Mr. Strype suggests in his written argument that there is a significant difference between a class action like the one involving Zuber and a "normal tort action" which is governed by the *Rules of Civil Procedure* (the *Rules*). Mr. Strype argues that the onus in a class action is on the defence to request documentary discovery from the Plaintiff, while an action brought under the *Rules* casts the obligation on the Plaintiff to list all relevant documents in an affidavit of documents.

[44] Mr. Strype completes his argument with respect to the difference between a class action and a normal tort action with the following suggestion "…Given that the *Class Proceedings Act* places the onus of requesting production from class claimants on the Defendants, the Defendants are not able to criticize the Plaintiff for failing to obtain documents which may, or may not, have been available a decade before the Defendants bothered to request them". In essence, Zuber places the blame for his inability to produce documents on the Defendants. Rhetorically he suggests that if the defence had asked him for the documents back in 2000 - or at any time thereafter prior to the first round of discoveries in 2006, he would have known to preserve such basic documents as banking records; tax returns; originals of contracts, et cetera.

[45] Mr. Gembala (Gembala) was called as a witness on behalf of Zuber. He is a lawyer practising in Poland. He has been Zuber's lawyer since 1993, and continues to be his lawyer. In cross-examination, Gembala was asked if he had advised Zuber to keep relevant documents in connection with this action. Gembala responded, in part, as follows "…If I knew he would launch a law suite [sic] in Canada, most likely I would advise him on keeping all the pertinent documents..." One can only speculate as to why so many documents were never kept by Zuber if he received this advice from his Polish lawyer.

2018 ONSC 4370 (CanLII)

[46] Zuber either knew, or he should have known by the time he instructed counsel to issue a claim on his behalf in late November 2001, that he would ultimately have the onus of proving his damages claim. The statement of claim that was issued in his name, claimed $1,000,000 for damages that included damages for "nervous shock; loss of income; impairment of earning ability; future care costs; medical costs; loss of amenities and enjoyment of life; and out of pocket expenses". I do not accept his evidence that he did not know until 2004 the extent of his claim. Nor do I accept the inference to be drawn from his evidence that no one told him to preserve documents he would need to prove his various claims, especially his incredible past and future loss of income claims.

2018 ONSC 4370 (CanLII)

[47] The thrust of Zuber's argument as to why he did not have so many of the backup documents needed to prove his claim for past and future loss of income, flows from his suggestion he did not know until well after 2004 that he had a claim. I have already given my reasons, in part, why this argument is not rooted in logic, given that he had issued a personal claim for damages in this court as early as November 2001. Despite the fact he may have ultimately discontinued this claim, he nonetheless should have known that he would have to prove his claim and, as such, should have begun the process of preserving documents relevant to his claim. What also puts the lie to Zuber's argument and testimony that he did not know he had a claim, is the fact he began seeing litigation experts as early as May 2002. In May 2002 and again in May 2003, Zuber saw a Dr. Ogilvie Harris for the purposes of a medical legal assessment. While I was given Dr. Harris' reports - along with all the other medical legal experts' reports, Dr. Harris never testified. As the reports were not entered into evidence, I cannot rely on the substance of what is contained in the reports. I do not entirely fault Mr. Strype for not calling this doctor, along with a number of other medical legal experts, as Mr. Strype had time constraints he had to deal with in terms of completing his case. The fact of Zuber's attendance with Dr. Harris was acknowledged by Zuber during the course of his evidence. It is, therefore, very hard to reconcile Zuber's suggestion he had no idea he had a claim until well after 2004, with the evidence that he was seeing a medical legal expert in Ontario as early as 2002 and again in 2003. There can be few other reasons for seeing a medical legal expert than to support a claim for damages. Despite Zuber's protestations to the contrary I have little doubt he knew shortly after the accident that he may have a claim, and simply chose to ignore his obligation to produce documents that would have been available to him and, thus, available to prove his claim – or disprove his claim as the case may be.

[48] There can only be a few reasons why the necessary backup documents were not produced by Zuber. One obvious reason might be that they never existed in the first place. Another reason might be that if records did exist, they would not back up his claim. His tax returns that were produced post-1999 certainly do not corroborate what Zuber asserts he earned in the years post-accident. By inference, it is not unfair to conclude that his 1992 to 1998 tax returns would also not have declared the level of income reflected in Exhibit 152. Another reason, perhaps, is that the records were not produced as they might demonstrate that Zuber was not being truthful to the Polish tax authorities given his failure to disclose the true extent of his earnings. I cannot speculate on why Zuber did not produce documents that might have lent credibility to his claim of his loss of income. He has the

onus of proving his claim. By failing to produce corroborative documents such as banking records; the financial records of the various Bastion companies; VAT records; tax returns for not just himself but also the Bastion companies mentioned in evidence; and original fully executed contracts, Zuber created for himself an almost insurmountable hurdle in discharging his evidentiary burden to prove the extent of his claim for past and future loss of income. The various Bastion companies to which I will refer later in these Reasons were corporations controlled by Zuber.

2018 ONSC 4370 (CanLII)

[49] Zuber, in part, sought to explain the absence of the Bastion financial records by asserting that because Bastion was sold in 2004, he did not have access to those records. This explanation lacks credibility because Zuber began his claim in late 2001. The Bastion records were fully within his control between then and when Bastion was sold in 2004. Zuber asserts he earned a substantial income from his work with the various Bastion companies. What is not clear at all, is what expenses were incurred by Bastion and/or Zuber to earn the income testified to by Zuber and reflected in Exhibit 152. The tax returns that were produced by Zuber reflect that after deduction for expenses Zuber had minimal income. It is one thing to earn gross income. It is quite another story once expenses are deducted. I have little to no basis to determine Zuber's net income, as I do not have in evidence the Bastion financial records. Zuber had access to those records from 1999 through 2004, and his failure to produce those records weighs heavily against the claims asserted on his behalf in this action.

[50] Part of Zuber's claim involves the calculation of not only the income he says he lost, but also the income he actually did earn post-accident. To the extent he was working and earning any income post-accident, it is beyond dispute the defence gets a credit for income earned as against income lost. In that regard, the evidence of Gembala - Zuber's lawyer, is very relevant. Gembala confirmed he continues to act as Zuber's lawyer. He also confirmed his own knowledge of what Zuber has been doing in the most recent past. Noteworthy in that regard was Gembala's evidence that he had documents relating to what he described as "the later years", which I took to mean from 2004 to 2015 (see Gembala transcript, p. 62). Those documents occupy space equivalent to two or three, three ring binders. These documents were never produced by Zuber.

[51] A request was made of Gembala to produce the documents. Gembala quite properly agreed to produce these documents as long as he had his client's consent. Those documents have never been produced. I can think of no plausible reason why legal documents relating to Zuber's business affairs in the time period 2004 to 2015 have not been produced. As with so many aspects of Zuber's non-compliance with his obligation to produce relevant documents in fulfillment of his obligation to prove his case, his failure to voluntarily produce these documents from Gembala weighs against Zuber's overall credibility.

Determining Zuber's Loss of Income

[52] In order to properly determine what, if any past income loss Zuber has suffered as a result of his injuries, the court must determine as best as it can what Zuber was earning prior to

the accident. There are essentially three sources of evidence the court can draw upon to make that determination. The first is Zuber's declared income to the Polish government. The second is Zuber's own evidence. The third are the various lay witnesses who testified as to their knowledge about Zuber's earnings pre-accident.

[53] Before I begin my analysis of the evidence adduced to establish Zuber's loss of income claim, some commentary is needed with respect to the onus of proof required to establish a claim for past and future income loss. One might have expected that counsel would have been in agreement as to what that onus was. Such was not the case.

[54] Mr. Strype, in his written submissions, argues that "the overall standard of proof for a loss of income claim is 'substantial possibility of loss'. In regards to providing the facts that inform that determination, however, the normal civil standard of 'balance of probabilities' applies on the totality of the evidence". Mr. Strype, in his reply written submissions, elaborates on this submission as follows:

> …The test for past loss of income is the same as the test for future loss of income: substantial possibility of loss. This standard applies in any circumstances where this court is dealing with hypothetical events. Past loss of income deals with questions of: What would have happened, if not for the accident? As such any analysis of that question inevitably deals with hypothetical events, as there is no way to know for certain what would have happened, only what did happen. When the court addresses the question 'What did happen?' the balance of probabilities test applies. When the court addresses the question of 'What would have happened?, the substantial possibility of loss standard applies.

[55] The defence takes a contrary position to the one asserted on Zuber's behalf. Relying on the Supreme Court of Canada decision in *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 28, Mr. Regan on behalf of the Defendants argues, in my view correctly, that the onus of proving past events is on a balance of probabilities. The defence also cites the Court of Appeal decision in *Schrump v. Koot*, [1977] O.J. No. 2502 at para. 11, in support of the same proposition.

[56] By characterizing the events of the past as hypothetical events, thus invoking a standard of proof far lower than proof on a balance of probabilities, would allow a Plaintiff to structure his case in a manner never contemplated by the Supreme Court in *Athey*. Zuber has the onus of proving past events on a balance of probabilities, which events include proof of the transactions relied upon in the past in support of his earnings and proof that he was paid in the amounts testified to by Zuber.

[57] I cannot leave this aspect of the case without further commentary on some of the submissions made on behalf of Zuber, in terms of how his counsel say he has met his onus of proof. The suggestion is made that using the old scales of justice analogy the "defendant's pan is perpetually empty. The Defendants did not call a single witness from Poland on any issue whatsoever". Continuing along this vein of argument, it is suggested

2018 ONSC 4370 (CanLII)

on behalf of Zuber that while the court can accept some, none or all of the evidence submitted on Zuber's behalf, that "…the amount of evidence required for the Plaintiff to tip the scales of justice and meet his burden of proof is relatively low, because the Defendants have no evidence in their pan". What this argument fails to recognize, is that if Zuber is not found to be a credible witness and the witnesses called on his behalf are also not credible, then there is no evidence in the Plaintiff's pan.

2018 ONSC 4370 (CanLII)

[58] It is also argued on Zuber's behalf that in assessing whether Zuber has met his onus of proof, the court should take into account that "…we are dealing with a foreign country during a turbulent period of its history". This submission was put to the court in the context of a caution, that I should not take judicial notice of how things are done in Canada and apply them to how things are done in Poland. I agree. It is then suggested that this court should not "…transpose Canadian business or cultural norms on Poland". Again I agree. But I cannot agree with the suggestion that just because the Polish witnesses called on behalf of Zuber are more knowledgeable of Polish customs and business practices, that it follows that their evidence should be accepted by the court. Nor do I accept the suggestion that just because a witness may have occupied some high office in the Polish government or business world, that this makes their evidence *ipso facto* credible.

[59] Whether the evidence is that of a Canadian or Polish citizen, it must always be assessed from the perspective of how a Canadian court assesses evidence. Zuber chose to litigate in Ontario. He did not choose to litigate in Poland. His evidence and the evidence he called will be assessed by Canadian standards.

[60] The tax returns filed as Exhibit 148 establish a level of earnings that is quite at odds with Zuber's testimony at trial. If Zuber's evidence was to be believed, he was earning substantial amounts of cash income that was paid to him largely in US dollars and often outside Poland. A number of lay witnesses gave evidence in an effort to corroborate these cash payments.

[61] Counsel for Zuber submitted in his written reply submissions that "the Plaintiff has an onus to prove his loss of earning capacity. In no way whatsoever, under any law in Canada, does the Plaintiff have any onus to prove that Zuber filed his taxes correctly. Nor are the tax returns considered as the basis for the establishment of the Plaintiff's loss of earning capacity". Later in his reply submissions, Plaintiff's counsel suggested that Zuber's tax returns "became irrelevant in a case like Mr. Zuber's wherein his Polish taxable income is grossly different than his worldwide income".

[62] A Plaintiff's tax return, whether it is filed in Canada or Poland, is a *prima facie* starting point from which to assess what a Plaintiff has earned both pre and post-accident. A tax return, whether it is filed in Canada or Poland, reflects what the taxpayer says is the income he or she is required under the prevailing tax law to declare to the tax authorities. Zuber, through his counsel, suggests his tax returns only reflect his Polish income and not his "worldwide income". The next logical question, of course, is what was his worldwide income and where are the documents that evidence that income? No tax returns were

produced by Zuber for any country other than Poland. In fact, there was no suggestion made by Zuber he filed tax returns anywhere other than Poland.

[63] I entirely agree with the suggestion made by Zuber's counsel that it is not this court's job to determine if Zuber filed truthful and accurate tax returns with the Polish government. Only the Polish government can make that determination. This court is only concerned with whether the Plaintiff has met his onus of proving what he was earning before the accident, as a benchmark of what he might have earned but for the injuries he says he suffered as a result of the accident. It is this court's job to determine that benchmark based on credible evidence adduced at trial.

[64] What a taxpayer declares as income to a taxation authority, whether in Canada or Poland, not only provides a *prima facie* benchmark to determine the loss of income in a personal injury action, but also provides a benchmark in the determination of a Plaintiff's credibility. If a Plaintiff's evidence at trial measures up with his or her tax returns, it will undoubtedly bolster his or her credibility with the trier of fact. If, on the other hand, there is a marked discrepancy between the declared income in a tax return and what a Plaintiff says he or she was *actually* earning, that Plaintiff's credibility may be significantly diminished.

[65] Zuber, in his evidence in-chief, was asked where he was a resident in the tax years 1999 to 2003. Noteworthy in 1999, he testified he was not a resident of Poland and that "…my tax domicile would be normally in Australia, but because in Australia the tax rules state that if a person is deriving income outside of the Territory of Australia it is not taxable in Australia". When asked where he was a resident for tax purposes in 2001, he stated "Well in Australia. Anywhere but not Poland".

[66] Zuber was not qualified to give opinion evidence with respect to the tax laws of either Poland or Australia. It is significant, in my view, that when asked about the 2002 taxation year he considered himself a resident of Australia, and then in the next breath he said "Anywhere but not Poland". His evidence needs to be contrasted with the evidence of two witnesses that were called on his behalf to lend credence to his loss of income claim.

[67] When Zuber was confronted with the obvious discrepancy between his declared income as revealed in the tax returns filed as Exhibit 148, he stated that prior to 2003 he was not considered a resident of Poland for tax purposes and, as such, did not have to declare the cash payments he received. This evidence needs to be contrasted with the evidence of Andrzej Kaczmarek (Kaczmarek), who was employed by the Polish government at the Polish Embassy in Ottawa between 1997 and 2004. Kaczmarek was not qualified to give opinion evidence, but did purport to give evidence in his affidavit filed as part of his evidence in-chief (Exhibit 256) with respect to how "expats" were treated in Poland for tax purposes. He stated that expats were treated differently than Polish citizens in the 1990's, to encourage investment in Poland by expats at a time when the Polish economy was in desperate need of their business, knowledge and skills.

2018 ONSC 4370 (CanLII)

[68] Kaczmarek confirmed that for an expat to receive the benefit of the preferred tax treatment in Poland, they could not be a resident in Poland for more than 183 days. If an expat was a resident outside Poland for more than half the year, they would not be taxed on their worldwide income. If, on the other hand, an expat chose to remain in Poland for more than half a year, then that expat would be taxed not only on the income they earned in Poland but also the income earned outside Poland. As such, if this court accepts the evidence of Kaczmarek, it can readily be seen that if Zuber did not reside outside Poland for more than 183 days per year, he was under an obligation to disclose all of the income he says he was paid in cash between 1992 and 1999 when the accident happened. His tax returns, filed as Exhibit 148, did not make that disclosure in 1999.

[69] Zuber also called as his witness, Mr. Lesny. Mr. Lesny describes himself in the time period 1994 to 1998 and 2001 to 2004 as someone who was employed in various Polish government Ministries, including a stint as Undersecretary of State in the Polish Ministry of the Economy. Amongst other things, in his affidavit he stated that "In Poland, as in other countries, the tax code exempts from tax those who live and earn money in Poland for less than half of the year".

[70] Mr. Lesny testified that he resided at one time in the United States for two years, and in that time frame he was tax-exempt in Poland. He went on to confirm that if a Polish resident lived in Poland for more than six months there was an obligation to report all income to the Polish tax authority, which included foreign income. The court heard no evidence of any permanent address maintained by Zuber outside of Poland. The Plaintiff failed to give any evidence about the number of days for any given year that he resided outside Poland. In the absence of credible evidence establishing Zuber resided outside Poland for more than half of a year, it would appear that Zuber had an obligation - based on the evidence of Mr. Lesny and Kaczmarek, to report all of his income whether it was earned in Poland and/or elsewhere in the world. His failure to do so, in my view, weighs heavily against Zuber's credibility in terms of what he actually did earn prior to the accident.

[71] Zuber's evidence with respect to his so-called status as an expat who was not required to disclose income earned outside of Poland, flies in the face of the evidence he chose to call from both Lesny and Kaczmarek. His evidence also flies in the face of the very tax return he filed in 1999 (Exhibit 148) which provides, in part, as follows: "…The form is to be filled out by persons who satisfy at least one of the following conditions: (4) received income from abroad…" Mr. Strype, in his written submissions at paragraph 691, suggests that there is no evidence to indicate that Zuber should have been deemed a tax resident of Poland before 2003. I disagree. Lesny and Kaczmarek's evidence more than contradicts Zuber's evidence. Zuber's evidence simply makes no sense. Other than his ex-wife and son, he had no connection with Australia after he left in 1992. There is no evidence that in any given year Zuber lived outside of Poland for more than half of a year. Zuber's tax returns filed post-accident either accurately disclosed the entirety of his income or, alternatively, he was not truthful with the Polish tax authorities as his tax returns do not mesh with the income testified to in this court. Either way, the credibility of his evidence with respect to his actual income is very much suspect.

2018 ONSC 4370 (CanLII)

[72] What is also particularly telling about the evidence filed by Zuber from a tax perspective, is the fact that he did not produce any tax returns prior to 1999. He testified that the tax returns prior to 1999 were no longer available as they have been destroyed. It is, apparently, the law in Poland that these types of official documents do not have to be kept after six years.

[73] The explanation by Zuber that he does not have any of his tax returns prior to 1999, rings hollow when it is put in the context of his having commenced an action in the Superior Court of Justice in November 2001. While he may not have known the magnitude of the case that he has now presented to this court, he certainly had the possession of, and control over, various key categories of documents that would have gone a long way to either proving or disproving his income loss claim. The absence of key documents like his tax returns and banking records, seriously calls into question the credibility of his claim that he was receiving hundreds of thousands of dollars in cash between 1992 and 1999. I do not accept as a valid excuse that Zuber was not required to keep these types of records for more than six years as required under Polish law. That may be the law in Poland, but as a Plaintiff in this class action he still had the onus to prove his damages. He knew he had a claim as of late 2001 - if not earlier.

[74] Zuber was cross-examined at some length with respect to the significant disparity in his declared income as per his filed tax returns in 2000 to 2004, and the income reflected in Exhibit 152. He sought to, in part, explain the absence of documentary evidence to prove the level of earnings in this time period by suggesting he was never told - presumably by his lawyers, that these documents would be important. Rather, he thought that the key documents would be those in the pre-accident time frame, i.e. pre-1999. If that was his level of understanding, then this court finds it hard to accept the lack of documentation produced to prove his income earning pre-accident.

[75] Some of the money that Zuber wishes this court to consider as income for the purposes of establishing his earnings capacity was paid to him through what, in essence, is a holding company in Amsterdam. Interdivco received income from a French company, SNET, that Zuber was apparently doing work for in Poland. The income he earned was directed to be paid to Interdivco. Zuber testified that while he did not specifically remember whether Interdivco filed tax returns in Holland declaring this income, he was confident they were. No documentary evidence was filed with the court establishing any payment of tax on the SNET income paid to Zuber through Interdivco. There is simply no excuse for not having this type of confirmatory evidence available when Zuber either knew - or he certainly should have known, that he would bear the onus of proof in his damages claim.

[76] A further difficulty with Zuber's evidence as it relates to his so-called status as an expat, relates to his suggestion that because he held dual citizenship, Polish and Australian, he did not have to declare his cash income earned abroad. If this is the case, then it is open to this court to enquire of the whereabouts of the tax returns that Zuber filed in Australia or anywhere else in the world. When confronted with this obvious inconsistency in cross-examination, Zuber stated "My tax returns reflect the minimum **I decided to pay**". [Emphasis added.] He also stated that he did not know how to fill in a tax return, and that

2018 ONSC 4370 (CanLII)

he employed other people to do this for him. In short, Zuber sought to place the blame on anyone other than himself for what was disclosed to the Polish tax authorities.

[77] Zuber was asked in cross-examination if the Polish tax authorities knew about the extent of the income that is reflected in Exhibit 152. The extent of that income is quite at odds with the amount he actually declared in his tax returns as filed with the Polish government. He explained the discrepancy, in part, by suggesting he was not subject to Polish law as he did not have a permanent address in Poland. The court did not hear, however, where he maintains any address elsewhere in the world. Moreover, none of the lay witnesses suggested that Zuber had anything other than a permanent address in Poland. As well, the tax returns themselves show a Polish address.

[78] It is not uncommon in a personal injury action for one or other side to retain an accountant – sometimes even a forensic accountant, to assist the court in determining a Plaintiff's past and future income loss. In some cases the accountant adds an unnecessary expense to the litigation, both from a time and cost perspective. In other cases, the assistance provided by the accountant goes a long way in assisting the court in its determination of the wage loss claim. Whether the accountant falls in the former or later category is often a function of the facts provided to the accountant and the assumptions the accountant is asked to make. Realistic assumptions, backed up by hard facts, will result in an accounting opinion the court may be prone to follow. Unrealistic assumptions that have little or no evidentiary basis are a waste of everyone's time.

2018 ONSC 4370 (CanLII)

The Accounting Evidence of Mr. Smoczynski

[79] In this case the Plaintiff retained Smoczynski who is a chartered accountant, having received his professional qualifications in Great Britain. He later moved to Poland. The Plaintiff sought to have him qualified to give opinion evidence as it related to Zuber's past and future earning capacity. I released Reasons in the middle of the trial refusing to qualify him in that regard. I extract from those Reasons the relevant portions to assist the reader in understanding my ultimate decision as it relates to what, if anything, the Plaintiff has proven as it relates to his claim for past and future income loss.

[80] Smoczynski prepared three reports for Plaintiff's counsel, the first of which was prepared in 2007, with subsequent reports authored in 2011 and again in 2015. The report prepared in 2015 is dated October 31, 2015. Zuber testified in-chief over the course of 21 days, commencing on November 26, 2014 through and inclusive of June 12, 2015. His cross-examination commenced on November 19, 2015 and ran through November 27, 2015, over the course of seven days. Zuber's evidence in-chief was completed on June 12, 2015, and at the completion of his evidence in-chief I warned him that he was not to speak to anyone about his evidence.

[81] The significance of the warning that I gave to Zuber will become readily apparent in the context of Smoczynski's report of October 31, 2015. The warning is also significant in the context that there was an order excluding witnesses, with the usual exception for the parties and the experts. Smoczynski did not sit in for Zuber's evidence.

[82] In Smoczynski's cross-examination he was asked when he commenced working on the October 31, 2015 report, to which he indicated that his report had commenced approximately six weeks prior to its completion - which given the report is dated October 31, 2015, would suggest that Smoczynski commenced preparation sometime in mid-September 2015.

[83] Smoczynski testified that he spoke to Zuber three to four times in connection with the preparation of his 2015 report. Smoczynski was asked how much time he spent with Zuber in connection with the 2015 report, to which he replied "it takes a long time to work with Mr. Zuber", from which I infer that Smoczynski spent a considerable amount of time with Zuber in connection with the preparation of his 2015 report.

[84] While it was open for Smoczynski to be briefed by Plaintiff's counsel with respect to the evidence as it unfolded during the course of Zuber's evidence - as well as any exhibits that might have been filed with the court, in my view it was entirely improper for Zuber to meet with Smoczynski. To do so was a clear violation of the warning that I had given to him that he was not to discuss his evidence with anyone.

[85] If Smoczynski felt it was necessary to meet with Zuber to obtain the information necessary for the preparation of his 2015 report, Zuber - through his counsel, should have requested an exemption that would have allowed for such a meeting. Counsel for the defence could then have made submissions, and the court could then have considered whether or not it was appropriate for Zuber to meet with Smoczynski. No such request was made.

[86] There is very little jurisprudence that deals with how the court should deal with a situation where there has been a violation of a witness exclusion order, or where a witness has spoken to other witnesses or individuals about his or her evidence when the witness is in cross-examination. Where there has been a breach of a witness exclusion order, the evidence is not automatically excluded. Rather, the trier of fact must determine what weight, if any, should be given to the evidence of the witness testifying where there has been a breach of an exclusion order. See *R. v. Dobberthien*, [1975] 2 S.C.R. 560; and *R. v. Smuk*, 1971 3 C.C.C. (2d) 457.

[87] I did not exclude Smoczynski's evidence on the basis of Zuber's clear violation of the witness exclusion order and my admonition to him not to discuss his evidence with anyone.

[88] Even if I was to exclude the evidence of Smoczynski in relation to the 2015 report, there still remains the evidence that he has provided to the court arising out of his 2007 and 2011 reports. In connection with those reports, Smoczynski testified that he did not

2018 ONSC 4370 (CanLII)

conduct an audit but rather undertook what he described as a "brown bag" assessment or, put differently, an "incomplete records job". He was endeavouring to establish without the benefit of filed income tax returns; original documents; banking records; financial statements; and other typical accounting documents, what Zuber earned between 1992 and 1999 when he was a passenger on a VIA Rail train that derailed. As well, Smoczynski was endeavouring to determine the income that Zuber earned after the accident, from which it could ultimately be determined what Zuber's past and future wage loss is arising out of the injuries suffered in the accident.

2018 ONSC 4370 (CanLII)

[89] In relation to the "incomplete records job" undertaken by Smoczynski, it is important to understand that he did not have access to Zuber's Polish income tax returns prior to 1999, as Zuber testified that these were no longer available given that documents are not required to be kept in Poland for any period greater than six years. A similar excuse was provided for the absence of other types of documentation that would lend credibility to Zuber's pre-imposed accident earnings. Smoczynski also had no information as to the expenses Zuber incurred to earn the income he says he was earning.

[90] Mr. Smoczynski was retained in 2007. Smoczynski testified that when he first met with Zuber in 2007, he asked him to provide as many documents as he could that would lend credibility to the income Zuber asserted he had earned prior and subsequent to the accident. Zuber also came with an Excel spreadsheet that set forth what he says he earned. Smoczynski testified that after he compared the documentation provided to him some things were left out, and further questions were asked of Zuber - the answers to which he took into consideration in coming to the conclusions reached in the 2007 report, together with the schedule attached.

[91] What was particularly significant from Smoczynski's evidence was the fact that he did not keep any notes of his discussions with Zuber, nor did he keep the Excel spreadsheet provided to him by Zuber that formed the basis for the schedule that Smoczynski prepared attached to the 2007 report.

[92] Smoczynski was provided with various contracts that Zuber provided to him, which provided some of the backup for the assertion made by Zuber that he had earned income arising out of those contracts. The contracts apparently had so-called secrecy clauses which required Zuber to insist that the contracts be returned to him. Those documents are no longer available for scrutiny by the court.

[93] Smoczynski was cross-examined at length with respect to the figures contained in the 2007 report and schedule. He was taken to all of the documentation that he relied upon in connection with the figures contained in the 2007 report. Almost without exception, the 29 source documents that he relied upon did not disclose any actual amounts that were paid to Zuber. The inescapable conclusion that I come to with respect to the 2007 report, is that most of the information contained in the schedule attached to the 2007 report came from Zuber alone.

[94] Smoczynski made clear in his evidence that the 2007 report was only a preliminary report, and that it was always his intention to prepare another report if and when additional information became available that would allow for greater scrutiny with respect to the income allegedly earned by Zuber pre and post-accident. A fundamental difficulty with this aspect of Smoczynski's evidence, is that anyone reading the 2007 report would not draw from that report anything other than it was a final report. There is nothing in the report to suggest that it was a preliminary report and that further reports would follow in the future, nor did he keep any of the so-called source documents that he had available to him.

[95] I have little to no confidence in the opinion evidence offered to the court by Smoczynski as it relates to his review conducted in 2007. In essence, his evidence is little more than a regurgitation of what he was told by Zuber. While Smoczynski might now suggest his 2007 report was preliminary in nature, anyone reading it - in my view, would be left with the impression it was a final report to be relied upon by the reader as providing so-called independent expert evidence of Zuber's income between 1992 and thereafter. The 2007 report is anything but independent.

[96] In cross-examination Smoczynski was asked whether his job, as he understood it, was to assess whether what Zuber says "hangs together, i.e. whether it intuitively makes sense". He replied, "Yes". In essence, much of Smoczynski's evidence is nothing more than Zuber's evidence dressed up in the form of an accounting spreadsheet; it is far from an independent review of the evidence aimed at providing the court with an objective assessment of Zuber's earnings pre and post-accident.

[97] What is also particularly telling is the extent to which Smoczynski says he relied on the evidence of Gembala, Zuber's lawyer in Poland. When Smoczynski conducted his review of Zuber's earnings that lead to his 2011 report and his October 2015 report, he testified that he relied on information supplied by Gembala to confirm amounts provided to him by Zuber. In cross-examination, he agreed that he relied heavily on the corroboration of Gembala. Apart from the fact Zuber never testified that Gembala was with him on any of the occasions he was paid large sums of cash, Gembala's evidence did nothing to corroborate Zuber's evidence about the amounts he says he was paid. More significantly, Gembala testified he did not speak to Smoczynski about his report. As such, it is hard to reconcile Smoczynski's reliance on Gembala, when Gembala says he never spoke to Smoczynski about his report.

[98] Gembala was, and still remains Zuber's lawyer in Poland, who provided what can be best described as the equivalent of what a corporate solicitor would be doing for a client in Ontario. He assisted in the drafting of various contracts. In his evidence he was taken to various contracts (Exhibits 23, 24, 31, 35, 40, 62, 70 and 162), and was questioned as to his knowledge of whether Zuber was paid for the work reflected in the contracts. In some cases his answer was he did not know (Exhibit 70), in other cases his answer was he assumed Zuber was paid, and in others he said he was told by Zuber he was paid. As for the Bastion Group of companies, Gembala testified he never looked at the Bastion financial books and records as he was not interested in Bastion's accounting. This

2018 ONSC 4370 (CanLII)

evidence is particularly relevant, as Gembala testified that the only discussions he had with Smoczynski was with respect to the "incoming money for the Bastion companies".

[99] Put very simply, Gembala's evidence does not support the evidence of Smoczynski that Gembala corroborated Zuber's information about his earnings. Gembala was Zuber's lawyer, not his accountant. It is not overly surprising that Gembala appears to have paid little attention to what Zuber received as payment for the various contracts he was shown. At most, to the extent Gembala provided so-called corroborative information that Smoczynski says he relied upon, it was little more than double hearsay – i.e. Zuber himself, hardly objective corroborative evidence one might expect an accountant to rely upon.

[100] Smoczynski was tendered to the court as an expert retained to "confirm the earnings and certain expenditures of Mr. Zuber" (page one of his October 11, 2007 report). Attached to his 2007 report was a three page spreadsheet marked as Exhibit 152B. In cross-examination, he was asked if Exhibit 152B was a "replica" of the Excel spreadsheet that Zuber prepared. Smoczynski responded that he received an electronic copy of Zuber's spreadsheet, which he "updated". He was also asked for the source of the figures reflected in Exhibit 152B. While his evidence in-chief and his report might lead one to believe that he relied on source documents to confirm amounts paid to Zuber, in point of fact when pressed in cross-examination he agreed that almost without exception the figures came from Zuber.

[101] As someone tendered to the court with professed expertise, I was less than impressed with Smoczynski's preparation and basic lack of knowledge in certain areas of his evidence. There were lengthy pauses in his evidence that left me with the distinct impression Smoczynski did not have a good hands-on knowledge of the facts he relied upon in his reports. It also became apparent during cross-examination that there was more than one version of the 2011 report dated April 20, 2011. When asked how this could happen, he testified "I have no idea". He further testified that he assumed there was only one report and did not know there was two versions, and that he was surprised a second version had been signed by a colleague. When asked how many drafts of the 2011 report were done, he again said he did not know. When asked if he received a letter of instruction from Plaintiff's counsel, he replied "that is a good question – perhaps by email". Smoczynski also confirmed that he reviewed the 2011 report and its schedule (Exhibit 152A) with Zuber; that there was a "progression" of three to four drafts; and that changes were made based on Zuber's input. None of the drafts were kept to see the "progression" of the changes.

[102] As a professional accountant trained in Great Britain, I find it inconceivable that Smoczynski came to court with no notes; no working papers; and none of the source documents he says he relied upon to prepare his various reports. He says he relied heavily on information from Gembala, yet he kept no notes of those conversations. Gembala's evidence, as I have already indicated, does not support Smoczynski's assertion that Gembala corroborated many of the figures in his 2011 and 2015 reports.

2018 ONSC 4370 (CanLII)

[103] Another aspect of Smoczynski's evidence that raises doubt about his objectivity, relates to the manner in which he treated the income Zuber says he received from SNET. The contract that Zuber had with SNET called for a monthly retainer fee (initially $3,500 per month, which was raised in subsequent years), plus a monthly expense amount of $1,000 (see Exhibit 40, paras. 5.4.1 and 5.4.2). Zuber testified that despite the wording of the contract, the monthly expenses did not have to be justified with receipts. The thrust of Zuber's evidence was that he was actually paid $4,500 because he did not incur expenses. The monthly expenses of $1,000 were just a means for SNET to disguise what it was actually paying Zuber. While contractually this is not what the contract says, that nonetheless was Zuber's evidence.

[104] Mr. Gilbert Pitance (Pitance) was called as a witness on behalf of Zuber. He was the individual with whom Zuber had the closest contact while representing SNET. Pitance testified that contrary to Zuber's evidence, expenses would only be reimbursed and paid to Zuber if they were approved by SNET. Perhaps more importantly, Pitance testified the expenses were only reimbursed if they were **actually** incurred. [Emphasis added.]

[105] In his evidence, Smoczynski testified that he dealt with the monthly expense figure from SNET as income to Zuber. He did this because of what he was told by Zuber. Even when confronted with the wording in the contract, Smoczynski stated "the wording in the contract is not what happened". In the face of clear contractual wording that differentiates between a monthly retainer fee and expenses, for Smoczynski to simply accept the word of Zuber without seeking evidence from another source, such as SNET, raises real concerns about Smoczynski's objectivity.

[106] Fortunately for trial judges, the Supreme Court of Canada has provided a straightforward framework within which the court must operate in determining whether an expert should be qualified to give expert opinion evidence. This framework involves a two-step process. The two-step process set forth in *R. v. Mohan*, [1994] 2 S.C.R. 9, can be summarized as follows:

1. The party seeking to qualify the expert must establish that the expert evidence meets four threshold requirements – specifically:

   (a) relevance;

   (b) necessity in assisting the trier of fact;

   (c) absence of any exclusionary rule; and

   (d) proffered by a properly qualified expert.

2. If the four threshold requirements are met, the trial judge retains discretion to exclude the evidence if he or she concludes the evidence's prejudicial effect outweighs its probative value. This is often referred to as the trial judge's gatekeeper function.

2018 ONSC 4370 (CanLII)

[107] The gatekeeper function is one that has been around for some time. It is not new. In *R. v. J.-L.J.*, [2000] 2 S.C.R. 600, Binnie J. stated:

> [T]he Court has emphasized that the trial judge should take seriously the role of 'gatekeeper'. The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.

[108] What has been referred to as the path of least resistance by some judges, is to simply admit the expert evidence and then attach little to no weight to the opinion. To adopt that path of least resistance is to abdicate the gatekeeper function. The proper role of the trial judge is to consider the evidence being proffered as expert evidence now, and not leave it to the end of the trial and decide the weight, if any, to be given to the evidence. I do not intend to take the path of least resistance.

[109] Relevance is a threshold requirement for the admission of expert evidence and is to be decided by the trial judge as a question of law (*Mohan*, para. 18). In this case, it would be hard to argue that expert evidence concerning Zuber's past and future wage loss is anything but relevant.

[110] Necessity refers to the ability of the expert to provide assistance to the court in the determination of a particular issue, because the court lacks the ability or the expertise to do so without the benefit of expert opinion evidence (*Mohan*, para. 23). In this case, the assistance of an accountant in determining Zuber's past and future wage loss could be an exercise in "number crunching", or it could be an objective analysis of Zuber's evidence to other corroborative sources of information. The court heard Zuber's evidence in terms of what he says he was paid from various sources over the relevant time periods. The court alone must determine the credibility of that evidence, as for the most part it is not backed up by documentary evidence. Smoczynski was not tendered to the court as a forensic accountant, although he does appear to have that experience in some of his past endeavours. Smoczynski, by his own admission, did not conduct anything approaching a forensic audit of Zuber's income.

[111] If Smoczynski had done something more than essentially rely on Zuber's word for what he says he earned, his evidence may have been necessary to assist the court in its determination of Zuber's wage loss. Smoczynski relied on what Zuber told him and on documents that were reviewed by him, many of which have not been produced in this trial. This court can only rely on the evidence at trial. Smoczynski does not appear to have relied on that evidence, and as such I ruled his evidence was not necessary to assist me in my determination of Zuber's wage loss. As *Mohan* makes clear, it is not enough that the expert evidence may be helpful to the trier of fact. Such a standard sets the bar very low; rather, the standard is one of necessity.

[112] As for the third and fourth threshold requirements for the admission of expert evidence, I am satisfied that there is no exclusionary rule that would preclude the opinion evidence in

2018 ONSC 4370 (CanLII)

this case. In order to testify as an expert, the proposed expert must be shown to have acquired special or particular knowledge through study or experience (*Mohan*, para. 27). It is not disputed in this case that Smoczynski meets this requirement, having qualified as an accountant in the United Kingdom and having practiced as an accountant for many years. The real question is whether he used his expertise as an accountant in proffering the opinions that he did. In my view, he did not.

2018 ONSC 4370 (CanLII)

[113] This, however, does not conclude the analysis the court is required to conduct in determining if Smoczynski is a "properly qualified expert". In *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 S.C.R. 182, at para. 53 Cromwell J. stated that "concerns related to an expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the 'qualified expert' element of the *Mohan* framework". Much has been written about an expert's overriding obligation to the court to provide fair, objective and non-partisan assistance to the court. My review of Smoczynski's evidence has led me to the ultimate conclusion that while he undoubtedly understood what his obligation to the court entailed, he utterly failed in establishing a basic threshold of objectivity. As such, I ruled that Smoczynski was not a properly qualified expert.

[114] In coming to the conclusions that I did as it related to the qualification of Smoczynski as an expert, I recognized that Zuber may conclude I have "pulled the rug from underneath" his claim for past and future wage loss. That conclusion is, however, without merit. Zuber chose Smoczynski as his expert. Zuber chose to provide documents to Smoczynski that he was not allowed to keep and produce for scrutiny by this court. Zuber chose to speak with Smoczynski, when he was specifically admonished by me not to speak with anyone while the trial continued. In short, Zuber was the author of his own misfortune. But perhaps more important is the fact that I do not see Smoczynski's evidence as being necessary. Zuber has testified and presented his case on his wage loss. I have to assess the credibility of that evidence, and will still have to decide what his earning capacity was pre and post-accident. In short, Zuber's claim for past and future wage loss will be for me to decide, not Smoczynski.

Lay Witnesses

[115] In his written submissions, Mr. Strype suggests that Zuber was "an incredibly successful businessman in Poland earning between US $1,000,000 and US $1,800,000 per year from 1992-1998". Mr. Strype also suggests that Zuber "had established himself as a major league player in Poland's business market". It was because of his stature within the Polish business community, it is argued, that Zuber was able to call some of the most influential politicians and business leaders in Poland to testify on Zuber's behalf.

[116] The necessity for most, if not all of the lay witnesses who testified in this trial, was because there was little objective evidence of the vast amounts of cash allegedly paid to Zuber both pre and post-accident. The extent to which the lay witnesses supported Zuber's case, is not found in the number of witnesses who were called to testify about the monies they allegedly paid Zuber. Nor is the fact a witness may have occupied a high

office in Poland necessarily telling in favour of the alleged payments to Zuber. Rather, it is the quality and credibility of the lay witnesses' evidence that must concern this court.

[117] In order to prove his earnings prior to and subsequent to the accident, Zuber - through his counsel, retained Smoczynski to calculate his pre-accident earnings. The basis for these calculations was largely confined to the willsay evidence of witnesses, many of whom testified before this court. In some cases, Smoczynski had access to source documents. Smoczynski produced three charts that were marked as Exhibits 152A, 152B and 152C. While I did not allow Smoczynski's opinion evidence, these exhibits were used at considerable length both in Zuber's evidence in-chief and cross-examination. The income in US dollars asserted in these charts is reproduced below:

Year	Exhibit 152A	Exhibit 152B	Exhibit 152C
1992	$ 236,000	$ 506,000	$ 157,000
1993	752,000	902,000	799,000
1994	1,426,000	1,376,000	1,458,000
1995	1,509,000	1,428,000	1,448,000
1996	1,025,000	974,000	845,000
1997	1,367,000	1,217,000	1,127,000
1998	1,726,000	1,546,000	1,636,000
1998	1,745,000	889,000	1,823,000
TOTAL FOR 1992-1999	$9,786,000	$8,838,000	$9,293,000
2000	544,000	404,000	347,000
2001	1,766,000	1,692,000	1,721,000
2002	707,000	659,000	839,000
2003	96,000	96,000	494,000
2004	100,000	00	226,000
TOTAL FOR 2000-2004	$3,213,000	$2,851,000	$3,627,000

[118] Various lay witnesses testified to support Zuber's assertion that he was paid substantial amounts of cash both prior to and subsequent to the accident. The credibility of whether these cash payments were actually paid to Zuber was, therefore, very much dependent on the credibility of the evidence provided by these lay witnesses.

[119] Mr. Marek Rozylo (Rozylo) was the Regional Operations Director for Southern Poland of the Bank Handlowy (the Bank). According to his evidence, Zuber was recommended to him as someone who could assist with educating bank staff, thereby improving the quality

2018 ONSC 4370 (CanLII)

of their customer service. The work that Zuber did occurred between 1998 and 1999. Mr. Strype argues in his written submissions that both Zuber's activity with the bank and the income from the bank were corroborated by the evidence of Rozylo.

[120] Rozylo testified with respect to the payment in 1999 to Zuber, for services Zuber rendered to the bank. These services are said to have included the provision of an educational program for the staff of the bank. Rozylo stated in his affidavit, Exhibit 241, that the bank paid Zuber $78,000 US by bank transfer in 1999.

[121] In cross-examination, Rozylo confirmed that Zuber was in fact paid in Polish Zloty the equivalent of $78,000, and that this amount was inclusive of Zuber's expenses, whatever those expenses were. He also confirmed that under no circumstances would the bank ever have paid Zuber in cash. Zuber, on the other hand, testified he was paid in cash.

[122] Rozylo, in addition to his affidavit, had also provided a willsay statement that pre-dated his affidavit. In his willsay, Rozylo stated that the bank had paid Zuber "tens of thousands of dollars". He did not specify an exact amount. This creates a credibility problem for both Rozylo and Zuber. The figure of $78,000 is a very specific figure that Zuber gave as the basis for his income loss calculations. It is found in Exhibit 152. I find it difficult to accept that Rozylo would recall the exact same figure as Zuber without having access to the source documents that would have existed in 1999, i.e. the invoice from Zuber and the bank transfer. Neither of these documents were produced. Rozylo's willsay only refers to "tens of thousands of dollars", while his evidence at trial was very specific. It is hard to conceive that Rozylo's memory improved with time, between the time when he prepared his willsay and his trial evidence. I can only infer that this occurred because Zuber helped refresh his memory, which he specifically denied in cross-examination. I therefore have little confidence in Rozylo's evidence.

[123] At its highest, the evidence of Rozylo may support an inference that Zuber did some work for the bank, but it does not corroborate the amount testified to by Zuber because of the inconsistencies referred to above. As well, it does not assist in terms of the net amount paid to Zuber given that Rozylo testified the amount paid to Zuber was inclusive of his expenses. I have no evidence of what those expenses were, and as such no evidence of the net income earned by Zuber from the bank.

[124] I cannot leave Rozylo's evidence without some comment on the balance of his affidavit which was dedicated to what, in my view, is opinion evidence with respect to the Polish banking system in the 1990's. Rozylo was not qualified as an expert and his affidavit was not compliant with Rule 53.03. I give no weight to his opinion evidence as to the state of the Polish banking system in the 1990's.

[125] Between 1992 and 1995, it was Zuber's evidence he was paid US $1,600,000 in cash for services rendered to a company called Multisystem, and a further sum of US $1,139,000 by CanWest between 1996 and 1998. The total between Multisystem and CanWest for the years 1992 to 1998 was US $2,739,000. All of this money was paid in cash, and was paid to Zuber outside of Poland - largely in Russia by two individuals, Mr. Aleksander

2018 ONSC 4370 (CanLII)

Alekseev (Alekseev) and Mr. Krzysztof Iwaniuk (Iwaniuk). As the payments were in cash, it is perhaps not surprising that there is not a single document in the nature of a financial statement; bank statement; receipt; tax return; or any other similar document tendered to this court evidencing the aforesaid payments.

[126] In the written submissions from the Plaintiff, it is argued that the Defendants did not present any evidence to raise any doubt about the facts of the Multisystem/CanWest activity or income, and thus “on a balance of probabilities the facts of this activity and income ought to be accepted by this court”. What this submission seems to forget is the cross-examination of Zuber, Iwaniuk and Alekseev, and what impact the cross-examination may have had on the credibility of these witnesses.

[127] Iwaniuk was called as a witness by the Plaintiff to testify about cash payments made by two companies, Multisystem and CanWest Trading. Iwaniuk was President of Multisystem, which was incorporated in 1989 and went bankrupt in 1996. Iwaniuk was the Director General of CanWest. In his affidavit, Exhibit 243, Iwaniuk set out in a schedule the cash paid to Zuber as follows:

1992	Multisystem	$120,000
1993	Multisystem	$500,000
1994	Multisystem	$500,000
1995	Multisystem	$500,000
1996	CanWest	$455,000
1997	CanWest	$468,000
1998	CanWest	$216,000

[128] The cash payments were made by Iwaniuk to Zuber on behalf of Multisystem, either in Lithuania or Russia. The cash payments were made by Iwaniuk to Zuber on behalf of CanWest mostly in Minsk, and partially in Russia.

[129] Iwaniuk testified he kept a “notebook” of these payments, but the notebook has been destroyed. He was asked about the source of the cash. With respect to the payments made in 1992 to 1994, Iwaniuk stated that the cash came from a bank account in the British Virgin Islands in the name of a company called Altraco. The difficulty with this evidence is that Altraco was not incorporated until 1994 (see Exhibit 147). If the company did not exist until 1994, it is completely lacking in credibility that Iwaniuk could have paid Zuber the cash that he says he paid Zuber between 1992 and 1994.

[130] The Plaintiff, in his reply submissions, suggests that the Altraco referred to in the Multisystem Agreement (Exhibit 9), is not the same as Altraco International Ltd. (Exhibit 147). Further, it is argued that there is no evidence connecting Altraco International Ltd.

2018 ONSC 4370 (CanLII)

to this case in any way at all. Exhibit 147 is a brief of documents that were put together by the defence, and put into evidence by Mr. Strype when Zuber was testifying in-chief. While there was no discussion when this exhibit was tendered into evidence as to whether there was any restriction on the purpose for which the documents were going into evidence, it is a fair inference that the company registration of Altraco International Ltd. was going into evidence because it was a relevant document insofar as the "Altraco" testified to by Messrs. Zuber, Iwaniuk and Alekseev.

2018 ONSC 4370 (CanLII)

[131] Mr. Strype, in his reply submissions, suggests that "Despite Mr. Zuber telling the Defendants to ask Mr. Iwaniuk about the document, (Exhibit 147), the Defendants never put the document to Mr. Iwaniuk. This is problematic for the Defendants, as it means that they have not proven the document". The difficulty I have with this argument is that Iwaniuk was cross-examined about Altraco, and it was his evidence that Zuber set up Altraco through his lawyers in the British Virgin Islands (Iwaniuk transcript, p. 2,685).

[132] The difficulty I have with Mr. Strype's reply submissions as it relates to the whole issue of when Altraco came into existence, is that the evidence of Iwaniuk and Zuber simply did not mesh. Zuber said speak to Iwaniuk and Iwaniuk said speak to Zuber. To suggest that the incorporation document has not been proven when it was filed as an exhibit, and then to suggest that there is nothing linking the Altraco in Exhibit 9 to the incorporation document (Exhibit 147) is, in my view, disingenuous.

[133] This, however, does not end the credibility analysis of Iwaniuk's evidence. He was shown documents that had been marked as Exhibits 8 to 16 in Zuber's evidence in-chief, which purport to reflect the agreements that Zuber says he had with Multisystem and CanWest. Essentially, Iwaniuk confirmed the authenticity of these documents. Iwaniuk was shown Exhibit 147, Tab 34, which contained correspondence on the letterhead of Multisystem with its phone and fax numbers as of February 1992. This is an important time frame, as it is also the time frame when Zuber and Iwaniuk testified Zuber was entering into the agreement with Multisystem – Exhibit 8. The fax and phone numbers for Multisystem on Exhibit 8 are different from the fax number and phone numbers as revealed in Exhibit 147.

[134] When he was confronted with this discrepancy, Iwaniuk attempted to explain it away by suggesting Exhibit 8 had been "recreated" by his secretary when she "spilt coffee" on the original. Until this came out in cross-examination, nowhere in Iwaniuk's evidence in-chief nor his affidavit does he indicate that what purported to be an authentic document (Exhibit 8) had been "recreated". Iwaniuk's explanation for the obvious discrepancy between the phone and fax numbers is, in my view, completely unbelievable. His secretary was never called to confirm this evidence. I heard no evidence that she was unavailable to provide corroborative evidence. In the absence of that evidence I reject Iwaniuk's explanation, and I am left with the inescapable conclusion that Exhibit 8 was created solely for the purposes of trying to lend credibility to Zuber's evidence.

[135] Fundamentally, there is nothing wrong with someone being paid in cash as opposed to by cheque, money transfer, or some other means of payment. In this day and age, however,

where someone is paid in cash there is, in my view, a higher onus on the payee - in this case Zuber, to provide some form of corroborative evidence that the cash was in fact paid and, as such, received. That evidence might come in the form of bank deposits, invoices, receipts and tax returns. Little in the way of that type of evidence was supplied by Zuber. Where the lay witnesses like Iwaniuk had their evidence undermined, it further reinforces the need to heavily scrutinize the credibility of whether the cash was ever paid to Zuber, or if it was then in what amount. I have little to no confidence in Iwaniuk's evidence for the reasons set forth above.

2018 ONSC 4370 (CanLII)

[136] The other person associated with the involvement of Zuber, Multisystem and CanWest, was Alekseev. Alekseev, in his affidavit filed as Exhibit 273, purports to confirm the various cash payments made to Zuber on behalf of Multisystem and CanWest between 1992 and 1998. It is somewhat remarkable that while the payments date back in some cases over 14 years and were made in cash, Alekseev had the exact same recall for the amount paid as did Zuber and Iwaniuk. I find it inconceivable that three individuals could recall the exact same amounts dating back over ten years ago, particularly where in other areas of their evidence they could not recall things that happened one year ago. The only conclusion I can come to that explains how three individuals could recall the amounts paid in the exact same detail as the other, is that they must have colluded together to either refresh their memories or to fabricate their evidence.

[137] While Alekseev in his affidavit purports to have personal knowledge of the payments made to Zuber, his cross-examination revealed a different story. What comes out from the cross-examination is that at best Alekseev knew about the alleged payments to Zuber, but that the payments were made by Iwaniuk. When asked how Iwaniuk made the payments, Alekseev said "I have no idea". It is somewhat hard to understand how someone can purport to know that $500,000 cash was paid to someone, but then does not know how this was done.

[138] Alekseev was asked about the payments made to Zuber by CanWest reflected in Exhibit 152. In cross-examination, he stated he had no dealings with CanWest. If that is the case, I question how he could purport to know anything about payments made to Zuber by CanWest. Alekseev then confirmed in his cross-examination that he had, in fact, discussed the information contained in the schedule of payments with Iwaniuk that are found in his affidavit. There is nothing in his affidavit to suggest the information contained in the affidavit is anything other than his own. When asked when the discussions took place with Iwaniuk, he indicated it was one to two years ago. This is very hard to accept given his affidavit was sworn in May 2015.

[139] Alekseev gave evidence about his relationship with Bastion, Zuber's company. Initially, it looked from his affidavit that he purchased an interest in Bastion. This was clarified by Alekseev as he in fact purchased the Bastion trademark for use in Russia, for which he paid Zuber $270,000. When asked where the cash came from, Alekseev stated it was cash "in his pocket". Perhaps even more remarkably, the agreement with Bastion is dated as of 1997, yet the signature page is signed by reference to a passport of Alekseev which shows a date of issue on July 8, 2003. The handwriting was confirmed by Alekseev as his own.

When confronted with this obvious inconsistency, Alekseev – even before he was asked the question, apologized for the error. I have very little confidence in this or any of Alekseev's evidence. It goes without saying that an agreement made in 1997 could not be signed sometime after July 2003 when Alekseev's passport was issued.

2018 ONSC 4370 (CanLII)

[140] When further pressed in cross-examination about how much of the payments made to Zuber by Multisystem and CanWest were made by Alekseev personally, he stated 95% were made by Iwaniuk. Alekseev could not help the court with how much money was withdrawn, when it was withdrawn, or from which bank it was withdrawn when payments were allegedly made by Iwaniuk. As I have already expressed in my analysis of Iwaniuk's evidence, there are many good reasons to doubt the truth of his evidence. Alekseev's evidence does not in any way corroborate Iwaniuk's evidence, and it certainly does not lend credibility to Zuber's assertion regarding the cash that he says he was paid by either of these gentlemen.

[141] Recalling that Zuber had only just returned to Poland from Australia in the 1991 to 1992 time period and that he had yet to graduate from Victoria University, it is not entirely surprising that the Defendants attacked the credibility of Zuber's evidence that Multisystem had paid him $120,000 in 1992, followed up by US $500,000 in 1993, 1994 and 1995. This is particularly so given the payments were in cash and undocumented. The credibility of all the Multisystem/CanWest payments was seriously undermined by the cross-examination of Iwaniuk and Alekseev, who far from corroborating Zuber's evidence simply left this court with the inescapable conclusion that Zuber had not discharged his onus of proving the payments reflected in Exhibit 152.

[142] Amongst the various ventures that Zuber was involved in between 1992 and the time of the accident in 1999, was an alleged agreement with a company called AsSara owned by a Mr. Wojciech Koc (Koc). The alleged agreement between AsSara and Zuber was marked as Exhibit 24. I say alleged because I have real doubts as to the authenticity of the agreement. I will refer to Exhibit 24 as the AsSara agreement.

[143] Zuber testified he met Koc through a mutual acquaintance, and that he successfully convinced Koc that there was a strong untapped market for AsSara's car alarms in the former Soviet Bloc countries. As such, they entered into a five year contract pursuant to which Zuber would sell the car alarms in the former Soviet countries, for which he would receive commission payments.

[144] Zuber utilized his prior involvement with Multisystem and reached out to Alekseev to assist in the distribution into the CIS countries. Zuber testified he also consulted with AsSara regarding its sales and marketing activity, trained its sales teams, created models for future sales teams and marketed AsSara to car manufacturers like Ford and Fiat. For this Zuber stated he was paid for his services partly in Poland, but for the most (approximately 85%) was paid in the CIS countries.

[145] In his written submission Mr. Strype notes that Koc, in his affidavit (Exhibit 258), "substantiates all the income amounts that Mr. Zuber was paid in each year". As for the

contract with AsSara, Mr. Strype completes his submission as follows: "the original signed copy has been lost to time, but both Mr. Koc and Mr. Zuber confirm that the terms of the version we have before the court as Exhibit 24 are the same as the terms of the signed copy". Mr. Strype also notes that because the defence tendered no evidence to the contrary, that it follows the court should accept the evidence of Koc and Zuber as substantiating what he says he received from the AsSara agreement. I would agree with this submission if the evidence of Koc and Zuber was both credible and reliable. For reasons that follow, I find it neither credible nor reliable.

[146] The AsSara agreement is dated as of January 2, 1995. It is not signed by either party. Koc testified that he found the AsSara agreement on a floppy disk when he was asked by Zuber to try and find evidence of the agreement and cash paid to him to substantiate his claim in this action.

[147] There are a number of material discrepancies on the AsSara agreement that call into question its authenticity. The addresses where Zuber has lived were marked as Exhibit 147. The AsSara agreement provides for an address in January 1995 that does not coincide with the stipulated address for Zuber as revealed in Exhibit 147. In fact, it would appear that the address shown for Zuber on the AsSara agreement made as of January 1995, is an address that Zuber did not live at until 1998.

[148] The date AsSara was incorporated and when a change in its name occurred is also significant as it relates to the information about the parties as shown on the AsSara Agreement. During the course of Zuber's cross-examination, Exhibit 159 was filed as an exhibit. It reveals the corporate registrations for AsSara as filed with the Polish government. AsSara's corporate name changed in 2008. The name on the AsSara agreement is the corporate name as of 2008. When Koc was confronted with the obvious problem of the AsSara corporate name as registered in 2008 on what purported to be a 1992 document, Koc stated that what was produced as Exhibit 24 was an "almost" true copy.

[149] Koc went on in his evidence to suggest that AsSara kept "blueprints" of documents that could be reused, and that his secretary must have inserted the new AsSara name when she was "reusing" the document. The difficulty I have with this explanation, is why would Koc's secretary be reusing an agreement that would have to be "reused" after 2008, i.e. the date when AsSara changed its name? There is little logic to this suggestion. More importantly, Koc's secretary was never called to provide evidence that would lend credibility to Koc's evidence.

[150] Another discrepancy in the AsSara agreement can be found in the "Annex" to the agreement which was marked as Exhibit 261. The Annex was also made as of January 2, 1995. On page one of Exhibit 261 is the date April 5, 2005. Clearly, a document made on January 2, 1995 could not have a date in 2005. When confronted with this inconsistency, Koc tried to again explain it away as something his secretary had done. In the absence of any corroborative evidence from his secretary, I reject this suggestion as having any credibility whatsoever.

2018 ONSC 4370 (CanLII)

[151] As to what Zuber suggests he received pursuant to the AsSara agreement, Exhibits 152A, 152B and 152C, provides different versions of what Zuber says he earned. Exhibits 152A and 152C would suggest Zuber earned a total of US $884,000 between 1995 and 1999. Exhibit 152B discloses no income. When Zuber was cross-examined on this discrepancy, he testified that he was told by Smoczynski only to disclose income earned in Poland. Smoczynski did not confirm Zuber's version of events. As the monies were paid for the most part in Russia, he did not disclose them. Regardless of this explanation, Zuber confirmed that most of the cash was paid to him in Russia, but some of what he was paid pursuant to the AsSara agreement was paid in Poland.

[152] As to who paid Zuber and where he was paid pursuant to the AsSara agreement, Koc - in his willsay (Exhibit 259), stated that Zuber's income was $200,000. In Exhibits 152A and 152B the amounts are very specific, i.e. $145,000, $160,000, $130,000, $260,000 and $320,000, for the years 1995 to 1999 respectively. When confronted with this discrepancy, Koc stated that what he provided in his willsay was only from his memory. Koc was, however, clear in his evidence that what was paid to Zuber was paid in Russia by Alekseev, not him. Koc simply witnessed the exchange of funds. Zuber stated that most of the money was paid to him in Russia, but some was paid in Poland. The evidence of Zuber and Koc in this regard does not match up.

[153] Apart from the discrepancies in the AsSara agreement which I have reviewed above, I found Koc an evasive witness who could not answer a simple question with a simple yes or no. He could provide no supporting documents for the substantial amounts allegedly paid to Zuber. I am left with a real doubt about the authenticity of Exhibit 24, and I have similar reservations about the amount of money Zuber alleges he was paid - totalling $884,000, pursuant to the AsSara agreement.

[154] A more modest amount included in Zuber's list of cash payments pre-accident is an amount of US $50,000, paid by Mr. Wojciech Starowieyski (Starowieyski) in 1999 in relation to the "acquisition of new contracts". Zuber testified that he thought these monies were paid in US cash, but was not sure if it was Polish Zloty. Starowieyski testified that the monies were paid in Polish Zloty and would have been paid after receipt of an invoice from Zuber. Starowieyski also stated that most of the money was paid to Zuber in Poland, but twice he was paid outside Poland.

[155] As the amount in Starowieyski's affidavit evidence (Exhibit 265) is shown in US dollars and his evidence in court was that Zuber was paid in Zloty, Starowieyski was cross-examined on this discrepancy. He stated that the $50,000 figure came from his memory. He was then asked if the figure came from his memory or Zuber's, to which he replied "We jointly came to this figure from our memory". The clear inference from this evidence is that Starowieyski had his memory "refreshed" by Zuber. When further cross-examined on this issue by Mr. MacDonald, Starowieyski agreed that the figure of $50,000 was an estimate.

[156] I heard no evidence from Zuber as to what, if any, expenses he incurred to earn the estimated figure of $50,000. I did hear from Starowieyski that some, but not all of the

2018 ONSC 4370 (CanLII)

cash was paid to Zuber in Poland. Zuber's tax returns for 1999 were filed as part of Exhibit 148. Zuber's declared income from "non-agricultural commercial activity, including freelance activity", was 629,619 Zloty. Against this income was declared 624,009 Zloty in expenses, for a net profit of 5,610 Zloty. Zuber also declared 11,306 Zloty as income from "independent activity". His total declared income for 1999 was 19,916 Zloty. Starowieyski testified that in 1999, one US dollar was the equivalent of three Polish Zloty. As such, Zuber's declared income in 1999 as per his tax return was equivalent to US $6,639. I have little to no confidence in the "estimated" income suggested by Starowieyski, given that the estimate appears to have been a group effort between Zuber and Starowieyski more than 11 years after the alleged payments were made.

2018 ONSC 4370 (CanLII)

[157] Between 1993 and 1995, Zuber alleges in his evidence that he was paid in US cash a total of between $412,000 and $688,000 from a company called Katowicki Holding Weglowy (KHW). These figures are reflected in Exhibits 152A and 152C. Between 1994 and 1996, Zuber maintains he received a further US $662,000 from "SAG". These figures were the subject of so-called corroborating evidence from Mr. Janusz Olesinski (Olesinski), who was a Director of KHW and Vice-Chairman of the Supervisory Board of SAG (Exhibit 249).

[158] The payments made to Zuber, in part, related to an idea that he had in relation to the sale of a special type of rope utilized by mines in the coal industry. He was cross-examined with respect to how much he was paid and where. Some of the money was paid in Russia but he could not recall exactly how much, but believed it was in the order of $100,000. He confirmed that the figure of $18,000 came from information that Olesinski had given to him.

[159] As previously noted in my review of Zuber's evidence, he was involved in a criminal matter that resulted in him being briefly jailed and a criminal conviction that was subsequently expunged. Zuber, in his evidence in-chief, asserted that those involved with KHW were aware that he had been in jail. Olesinski denied he knew anything about Zuber's criminal trial or incarceration. Zuber also asserted in his evidence that the cash amount reflected in Exhibit 152, paid to him by KHW, would be confirmed by Olesinski when he testified.

[160] Olesinski provided evidence to the court by way of *viva voce* evidence, and like all of the other witnesses by way of affidavit and willsay evidence in-chief. In cross-examination, Olesinski confirmed he did not personally pay any cash to Zuber. He could not confirm if Zuber rendered invoices for his work, but did confirm that as KHW was a state-owned corporation it was "most likely" invoices would have been required if Zuber did work for KHW. No invoices were produced to document any payments by KHW to Zuber.

[161] What is particularly telling from Olesinski's evidence, is that as a Director of KHW - and presumably someone of significance in the hierarchy of KHW, he was only paid something that he estimated was in the range of the equivalent of $3,000 to $5,000 per

month. This can be contrasted with the $80,000 Zuber says he was paid in 1993, and the $186,000 Zuber says he was paid by KHW in 1995.

[162] The information in Olesinski's evidence about the estimated amount paid to Zuber by KHW of $400,000 and $600,000 by SAG, came from a Mr. W. Poturalski (Poturalski). This evidence was hearsay evidence. Poturalski was not called as a witness to confirm this evidence. I give no weight to this evidence. Perhaps more importantly, Olesinski - when cross-examined on the source of his information about the amounts allegedly paid to Zuber by KHW, agreed that the information came from Zuber himself. Zuber had told the court that Olesinski would confirm what he was paid by KHW. Olesinski did nothing of the kind. His evidence was not helpful to Zuber's case. In my view, it was to the contrary. Olesinski did nothing more than damage the credibility of Zuber's evidence, and left me with the clear impression that Zuber concocted the evidence to suit his needs.

2018 ONSC 4370 (CanLII)

Volodia Shargut and Ruslan Brytski

[163] Between 1997 and 1999, Zuber became involved in a Ukrainian business venture which for the most part involved the importation of food products from Poland to the Ukraine. Zuber was introduced to two Ukrainian businessmen, Volodia Shargut (Shargut) and Ruslan Brytski (Brytski), by Alekseev. The business venture involved Zuber negotiating an arrangement with the Polish government, pursuant to which the Polish government would sell some of its excess military food reserves to the Ukrainians. Part of this arrangement required Zuber to guarantee the Polish government would be paid if the Ukrainians did not live up to their end of the bargain. For his efforts, Zuber would be paid 30% of the "profits" (Exhibits 306 and 308).

[164] Shargut testified from Kiev, Ukraine, with respect to the business relationship that he had with Zuber commencing in 1997. In Shargut's affidavit filed as his evidence in-chief, Exhibit 306, Shargut states that he approached Zuber in 1997 to see if Zuber could obtain a supply of food products from Poland to be sold to the Ukraine. There was a need for food in the Ukraine at that time, and he was looking for an international partner who could bring in food products that Shargut could distribute through the Ukrainian market.

[165] Shargut's approach to Zuber resulted in an agreement, pursuant to which Zuber - through his contacts, was able to negotiate an arrangement with the Polish government which would sell some of its excess food reserves to Shargut and his business partner, Brytski. In his affidavit, Shargut states:

> Mr. Zuber guaranteed the deal with his own money (i.e. he agreed with the Polish government that he would pay for the goods if myself and my partner did not do so). For making the arrangements and guaranteeing the payment, Mr. Zuber was paid 30% of the profits that we made selling the product in Ukraine.

[166] Shargut states in his affidavit that the business was very successful, and that over the course of three years he paid in US dollars (in the Ukraine) to Zuber $170,000 in 1997, $293,000 in 1998 and $353,000 in 1999.

[167] The payment of the aforesaid amounts should be scrutinized from the perspective that Shargut, at the time that he made these payments was 24 years of age and had just graduated from university. The amounts that were paid also need to be scrutinized from the perspective that they were paid in excess of 15 years ago; paid in cash; and were not documented in any way, shape or form. As well, given the lapse of time they should be scrutinized from the perspective that they completely coincide with the amount testified to by Zuber. One seriously has to question how after 15 years Shargut would have the exact same memory for the amounts paid as does Zuber.

[168] Shargut's affidavit was, according to his evidence in cross-examination, prepared as a result of a meeting or meetings that he had with Zuber's lawyers. In cross-examination he initially stated that when he met with Zuber's lawyers there were "other documents", which he described as agreements with other companies and documents reflecting meetings with Zuber. This evidence is significant in that for all intents and purposes, throughout the trial this court was of the understanding that any documents reflecting the payments made to Zuber had been produced. No documents were produced evidencing the arrangement between Shargut and Zuber.

[169] When further pressed in cross-examination as to what agreements he was shown by Zuber's lawyers, he completely contradicted himself and stated that there were no agreements. He then went on to indicate in cross-examination that he recalled seeing different notes that were shown to him by his secretary, as well as his own notes. When asked to produce the notes, he indicated that as a result of moving from office to office and "some interaction with the police", the notes had been destroyed some time earlier. He stated that his own notes dated back to 1997. Why anyone would keep notes of something that occurred back in 1997 is, of course, open to question in and of itself.

[170] If Shargut's evidence is to be believed, when he met with Zuber's lawyers to prepare his affidavit which was sworn on June 6, 2015, I have absolutely no doubt that those lawyers - who I understand was Mr. Strype, Plaintiff's counsel in this trial, would have been well aware of their obligation to produce those documents to the defence in fulfillment of Zuber's production obligations. I equally have no doubt that Mr. Strype would have fulfilled his obligation in that regard, and the fact that those documents have not been produced in my view does not call into question Mr. Strype's ethics, but rather seriously calls into doubt the credibility of Shargut's evidence.

[171] Shargut was cross-examined at some considerable length with respect to the agreement reached with Zuber in 1997. He was asked as to whether there was any written agreement. He initially left the court with the impression that there was a written agreement, but it could no longer be produced because it had been "20 years" and he had been "moving around from town to town". He then changed his evidence to suggest that it was an oral agreement, or a "friendly agreement". He completed his evidence on this

2018 ONSC 4370 (CanLII)

topic by stating "Maybe there was something in writing". I have little to no confidence in Shargut's evidence in this regard.

[172] Shargut was cross-examined with respect to how the Polish government was paid for the food that was being purchased for re-sale in the Ukraine. On something as fundamental as this, Shargut stated he did not know who paid for the food.

[173] After testifying that he did not know who paid for the food, Shargut went on to say that Zuber was responsible for the goods and that payment would be made in the Ukraine. He further complicated the question of payment by indicating that the truck drivers would pay for the goods, part of which was paid for in Poland.

[174] Shargut was cross-examined with respect to Zuber's entitlement under the arrangement reached with Shargut, and he initially testified that he did not remember what percentage Zuber got of the profits. This is somewhat remarkable given that in his affidavit he indicates that the arrangement required payment to Zuber of 30% of the profits.

[175] In terms of how the actual amounts were paid to Zuber reflected in paragraph 166 above, Shargut was cross-examined on the absence of documentation given his acknowledgement that in order to arrive at 30% of the profits, one would need to know what revenue was generated and what expenses were incurred. Zuber acknowledged initially that he did not have any records of the transactions but his partner, Brytski, did have some of the documentation. He indicated that when his affidavit was prepared in 2015, Brytski had available to him the necessary accounting documentation to determine the 30% profit paid to Zuber. It is particularly significant that Shargut suggests that when his affidavit was prepared in 2015, at a point in time when this trial was well underway, that those documents have never been produced.

[176] What is also particularly telling with respect to Shargut's evidence, is the comparison between a willsay statement that was jointly prepared in his name and Brytski's at a point in time prior to his affidavit, that there is no mention at all with respect to the basis of the percentage payment made to Zuber. There is simply a bald statement made in the first paragraph of the exact same amounts paid to Zuber reflected in paragraph 166 above.

[177] After what can only be described as a very profitable arrangement between Zuber and Shargut between the years 1997 and 1999, for unexplained reasons that relationship terminated, only to be resumed again in 2004. At this point in time, Shargut indicates he and his partner Brytski were looking into starting a business venture to revitalize the Ukrainian energy sector's outdated equipment. He indicates in paragraph 8 of his affidavit that Brytski made efforts with Zuber to identify opportunities in the refurbishment of power lines linking Ukraine, Poland and Slovakia.

[178] In cross-examination, Shargut indicated that Zuber came to the Ukraine "quite frequently" to organize meetings in the energy field. He further confirmed that in the time period 2004 through 2006, Zuber travelled to the Ukraine "frequently" to attend conferences and

2018 ONSC 4370 (CanLII)

was lecturing at the university. He also confirmed that Zuber was able to participate in meetings in the Ukraine in 2009.

[179] On consent of counsel Brytski did not testify, and it was accepted that his willsay affidavit and LinkedIn profile (Exhibits 308 and 309) would form his evidence. In cross-examination Shargut was taken to Brytski's LinkedIn profile and reviewed, at length, the various companies Brytski had been involved in. Particularly noteworthy is there is no reference whatsoever to the time period 1997 through 1999, a time period when according to Shargut's evidence Zuber was paid $353,000 in cash in 1999, which would translate into profits of approximately $1,00,000 for Shargut and Brytski. One might seriously question then why Brytski would not have some reference in 1999 to this business venture that generated substantial profits for him and Shargut, this particularly so given that Brytski only graduated in 1997. When asked why there is no mention in Brytski's LinkedIn profile of the importation of fruits and vegetables during this critical time period, Shargut stated "I shouldn't comment".

[180] Given the numerous inconsistencies in Shargut's evidence, I have no confidence in his evidence as in any way providing corroborative evidence of the cash payments Zuber says that he received from the business relationship that is said to have existed between Zuber, Shargut and Brytski.

[181] In his reply written submissions, Mr. Strype notes that Brytski is a "Colonel of Interpol in the Ukraine and a former mayoral candidate in Kiev. By choosing not to cross-examine Mr. Brytski on his evidence, Mr. Brytski's evidence has gone in uncontested. It is not open to the Defendants to make an allegation that a transaction was a 'complete fabrication', in a situation where they allowed Mr. Brytski's evidence to go in uncontested". This submission needs to be contrasted with exactly how the evidence of Brytski came before the court.

[182] On June 16, 2016, at the completion of Shargut's evidence a discussion took place about the timing of Brytski's evidence which would also have been via video from the Ukraine. While I was not privy to the discussions between counsel, the transcript reveals at page 62 the following: "Mr. Strype –Your Honour, we have reached an agreement that the affidavit of Mr. Brytski, together with his LinkedIn profile which is identified as Exhibit B and the willsay statement, will go in as evidence without cross-examination". Put in the context that there had been an earlier discussion that it was approximately 9:00 p.m. in the Ukraine, I take from the agreement reached between counsel that Brytski's evidence in the form of the willsay and affidavit became exhibits as an accommodation to Brytski and the time of the day in the Ukraine that he would have been testifying. I do not accept Mr. Strype's suggestion that Brytski's evidence went in unchallenged and that the court must accept it.

[183] When Zuber first saw Smoczynski in 2007, he provided him with evidence that he earned $50,000 to conduct research for a company called M.L. Integration. These monies were said to have been earned in 1992. Zuber repeated the same information to Smoczynski

2018 ONSC 4370 (CanLII)

when he prepared his report in 2011. Only in 2015 did he abandon this claim. He did so with good reason.

[184] While Zuber asserted to anyone reading Smoczynski's reports in 2007 and 2011 that he was paid $50,000 by M.L. Integration, this company did not come into existence - operating under the name M.L. Integration Limited, until June 16, 1998 (Exhibit 147). The evidence filed in support of this income came in the form of letters written in 1992 and 1993 (Exhibits 13-15), which purportedly showed an address for M.L. Integration in Reading, Berkshire, England. This was in fact the address for M.L. Integration, but not until May 19, 1998 - some five years after the letters marked as Exhibits 13 to 15 were written. I have no confidence that Zuber earned any income from M.L. Integration, and while he abandoned this claim in 2015 he certainly intended the reader of Smoczynski's 2007 and 2011 reports to believe he had earned $50,000 from M.L. Integration.

2018 ONSC 4370 (CanLII)

Bastion Group of Companies

[185] I have already referred at some length to the Bastion Group of Companies (Bastion). Bastion included the following: Bastion Consulting; Bastion Vogue; Bastion Education; Bastion Personnel; Bastion Publishing; and Bastion Promotion. These various entities were registered in Poland between November 1998 and January 2013 (Exhibit 147).

[186] When Zuber first saw Smoczynski in 2007, he suggested he had earned $200,000 per annum through Bastion. This figure was reduced to $50,000 per annum by the time Smoczynski prepared his reports in 2011 and 2015. Zuber testified that the $50,000 figure was the "absolute minimum" that Bastion earned, and that this would be backed up by the evidence from Gembala.

[187] As previously noted, Gembala did estimate the net profit from Bastion was in the order of $50,000 per annum. However, this evidence was undermined in cross-examination when Gembala candidly admitted he was not interested in the accounting records for Bastion. If Gembala never saw any of the money earned by Bastion change hands and never looked at the Bastion financial records, it is very difficult to accept that Gembala's confirmation of an annualized profit of $50,000 earned by Bastion is anything more than a reflection of what Gembala was told by Zuber.

[188] Zuber's evidence as to what Bastion earned lacks credibility. He would have anyone reading Smoczynski's 2007 report believe that he was earning $200,000 per annum during the time period 1993 to 1997. Apart from the fact it is hard to believe that Zuber, upon his return to Poland began earning $200,000 when the average salary in that time frame was dramatically less, it is even harder to reconcile with the fact that he then revised his own figure down to $50,000 by the time Smoczynski was preparing another report in 2011.

[189] The evidence as it relates to Bastion also lacks any documentary support. Zuber was ordered in 2010 by Lauwers J. to produce bank statements for Bastion. He never complied with that Order, for reasons that go back to his argument he never knew he had a claim until well after he actually issued his own claim in 2001. Zuber had it well within

his power to have kept and produced the financial records for Bastion, which presumably would have assisted the court in understanding not only the income earned, but just as important those records would have disclosed what expenses Zuber was incurring on behalf of Bastion to earn a net profit or loss as the case may be.

[190] What is particularly hard to understand in relation to Zuber's declared inability to produce the Bastion financial records, is reconciling his evidence that he no longer controls Bastion - and therefore has no control over the Bastion financial records, with the evidence of his lawyer Gembala. Zuber suggested in his evidence that he could not produce any of the financial records for Bastion as he had sold his interest in his company sometime in 2004 or 2005. Gembala, when he testified, stated that he held 98 of the 100 outstanding shares for Bastion Consulting in a form of trust for Zuber. Gembala further testified that Zuber was, as of 2016, still the President of Bastion. It should, therefore, have been a relatively easy task for Zuber to have obtained the Bastion financial records at any time between 1999 and 2004, and thereafter an equally easy task to make a simple request of his lawyer to produce those records. Without the financial records for Bastion, this court is simply left to guess as to the revenue and expenses earned and incurred by Bastion.

2018 ONSC 4370 (CanLII)

[191] As with so much of this case, Zuber failed to meet his onus of proof when it came to the income earned by Bastion. That said, I do accept that Zuber did work through the various Bastion entities. That evidence is backed up by Gembala. I equally have little doubt that Zuber - though his various Bastion entities, had achieved a status within the political and business community in Poland that allowed him to live a comfortable lifestyle. What is completely lacking, however, is any corroborative evidence that demonstrates he was earning the kind of income advocated on his behalf by his counsel. If he was earning in excess of $2,000,000 per annum, one might have expected to see him acquiring assets reflective of that income. Such was not the case.

Mr. Krzysztof Horodecki and Ekolog

[192] Amongst the many business ventures Zuber says he was involved in during the mid-1990's, was a retainer with Ekolog. While Ekolog was primarily known as a sewage treatment company, it did have assets in the tourism field which included hotel resorts. Zuber testified he was retained to consult on the marketing and performance of the staff at one of the resorts.

[193] In the information that Zuber gave to Smoczynski, he maintained - as he did to this court, that he was paid $12,000 in 1995 and $15,000 in 1996. Perhaps somewhat remarkably, Zuber had no memory of these payments when he first saw Smoczynski in 2007.

[194] In support of these payments Mr. Krzysztof Horodecki (Horodecki), the owner of Ekolog, was called as a witness. Horodecki was also a former member of the Polish Senate. In his affidavit (Exhibit 277), he confirmed he paid Zuber the US $12,000 and US $15,000 that Zuber had testified to. He further confirmed the monies were paid in cash and barter. In cross-examination Horodecki stated the monies were not in fact paid in US currency, but

rather were paid in Polish Zloty. He also confirmed that what was paid came from his memory. He further testified that as the transactions took place many years ago, he had difficulty with his memory.

[195] Horodecki's affidavit and trial testimony needs to be contrasted with the willsay statement (Exhibit 278) he prepared in 2011. While there is mention made of the US $12,000 and US $15,000 payments, there is no mention that in fact the payments were made in Zloty and also by way of barter. His evidence also needs to be contrasted with the only documentary evidence that substantiates this transaction - specifically Exhibit 155, which included an invoice from Bastion Education to Ekolog dated July 7, 1995 in the amount of 2,000 Polish Zloty.

[196] While the amounts testified to by both Zuber and Horodecki are relatively small in comparison to many of the other amounts Zuber alleges he was paid pre-accident, they further highlight how, in my view, Zuber's evidence detracted from his overall credibility. He would have this court believe, based on his evidence and the evidence of Horodecki, that he was paid in US currency and was paid in cash or barter. Horodecki's evidence did not corroborate Zuber's evidence, as Horodecki says he was paid in Zloty. Exhibit 155, which does seem to confirm that Bastion Education did do work for Ekolog, only confirms that $2,000 Zloty was paid by Ekolog.

[197] It is remarkable that Zuber had no memory of working for Ekolog in 2007 when he first saw Smoczynski, and then remembers this contract work in 2011. What is even more remarkable is that Horodecki, who was candid in his evidence when he stated he had memory problems, had the same recollection as Zuber did for the amounts paid, i.e. $12,000 and $15,000. As with other witnesses, I can only conclude that Zuber assisted Horodecki with his memory. This fundamentally detracts from Zuber's overall credibility.

Ford Euromobile

[198] In 1995, Zuber maintains that he was retained by the owners of a Krakow based Ford car dealership. The retainer involved consulting with respect to staff training and marketing, as well as obtaining the approval from Ford's head office to open further dealerships. Zuber gave Smoczynski differing versions of what he says he was paid by Ford. When he first saw Smoczynski in 2007, he indicated he had been paid $91,500 in 1995 and $51,500 in 1996. By the time Smoczynski was preparing his report in 2015, these amounts had changed to $31,500 and $3,500 for the years 1995 and 1996 respectively.

[199] In addition to Zuber's own evidence, the court has Exhibit 22 which is a Letter of Empowerment from Ford Euromobile and a draft unsigned contract (Exhibit 23) between Bastion Consulting and Ford Euromobile. The draft contract refers to a monthly lump sum of $3,500, payable by Ford to Bastion Consulting. In his written submissions, Mr. Strype suggests that the Ford Euromobile contract was something that Zuber's lawyer, Gembala, had reviewed and consulted on. The defence disputes that this transaction was confirmed by Gembala. While no one from Ford Euromobile was called to confirm the

2018 ONSC 4370 (CanLII)

transaction, Gembala did confirm that Zuber had consulted him about the contract - Exhibit 23.

[200] I accept that Zuber did work for Ford Euromobile. I do not accept that he was paid what is reflected in Exhibits 152A-C. While the draft unsigned contract may reflect that Bastion Consulting would be paid $3,500 per month, the only invoice produced by Zuber suggests otherwise. Exhibit 155 is an invoice from Bastion Education (not Bastion Consulting) to P.H.U. Euromobile dated September 5, 1995, in the amount of 2,000 Polish Zloty. The invoice does not match up with either Zuber's evidence or the contract itself, which suggests a monthly fee of $3,500 to be paid to Bastion Consulting, not Bastion Education. Zuber again did himself a disservice by presenting the court with contradictory evidence that fundamentally undermines his overall credibility.

SNET France (SNET)

[201] As I have already indicated, I am more than satisfied that Zuber had achieved a certain level of credibility in the Polish business community by the time of the accident. As further evidence of that standing, one need only look as far as his contract with SNET. SNET is one of the largest energy producers in France and was, during the course of its relationship with Zuber, owned by the French government. SNET was interested in expanding its presence into Poland and Eastern Europe. Pitance, the Director of International Development for SNET, was given the task of exploring investments into Poland and Eastern Europe.

[202] After making enquiries of the Polish business community with knowledge of the Polish energy marketplace, Pitance was put in touch with Zuber. After conducting appropriate background vetting of Zuber, Pitance was satisfied that Zuber had the knowledge of the Polish energy sector and a contract was signed with SNET in July 1998. The SNET contract (Exhibit 40) called for a retainer to be paid by SNET to Zuber in the monthly amount of $3,500. This increased to $4,500 in July 2000 (Exhibit 41); to $5,500 in July 2001 (Exhibit 42); and $6,500 in January 2004 (Exhibit 43).

[203] As with so much of Zuber's evidence, the documents that he did produce raise as many questions as they provide answers. The contract between SNET and Zuber (Exhibit 40), provides in Article 2 that Zuber's work on behalf of SNET was to be performed only in Poland. If that is the case, then one must question why the involvement of an intermediary company in Amsterdam, Interdivco Amsterdam B.V (Interdivco). Zuber provided an answer to this question, suggesting that Interdivco was set up for a number of reasons. Initially, he said it was set up for research in the Russian market for SNET and for cross- border trading so that no one in Poland would know about this work (Zuber transcript, p. 147 and 386). Later in his evidence he stated he was the principal of Interdivco, which was used for his personal tax "optimization" (Zuber transcript, p. 404).

[204] If Interdivco was set up in connection with Zuber's contract with SNET, then there should be some correlation between the SNET contract and the establishment of Interdivco. The SNET contract with Bastion and Zuber is dated July 30, 1998 (Exhibit 147, Tab 18).

2018 ONSC 4370 (CanLII)

Interdivco was incorporated in Amsterdam on March 22, 1996. Interdivco was incorporated two years prior to any contract between Zuber and SNET, and as such this aspect of Zuber's evidence does not match up with the documents entered into evidence at this trial.

2018 ONSC 4370 (CanLII)

[205] Zuber in his evidence made it quite clear that he was the person behind Interdivco, yet the incorporation documentation shows the sole shareholder and director of Interdivco was "Phibren International Management B.V." There is no mention made of Bastion or Zuber. What is also particularly noteworthy, is the evidence of Pitance - the person at SNET with whom Zuber had most, if not all of his direct dealings. Pitance was shown various invoices from Interdivco. When asked if he knew who or what Interdivco was, Pitance stated he had never heard of this company (Pitance transcript, p. 3,156). It is also interesting to note that Zuber's personal lawyer, Gembala, testified he had nothing to do with Interdivco (Gembala transcript, p. 95).

[206] There is little doubt that Bastion/Zuber were paid not insignificant amounts of money by SNET between 1998 and 2004. Zuber was paid not just the monthly retainer amounts referenced in paragraph 103 above, but also substantial "success fees" based on the equity interest purchased by SNET. One of the success fees paid by SNET to Zuber was well in excess of $1,100,000. The total fees, success fees and amounts paid to reimburse Zuber for expenses, came to approximately $2,882,000. This amount was paid between 1998 and 2006. Between the time when Zuber first began doing work for SNET and when the accident occurred in November 1999, SNET paid Zuber approximately $97,000. It can, therefore, be safely said that the vast majority of Zuber's earnings from SNET were paid to him after the accident. While the actual payments were made by SNET post-accident, it is argued that the defence should not get a credit for amounts paid post-accident as Zuber had done most of the work pre-accident, and as such the SNET payments should - for the most be part, be accrued as if they were earned pre-accident.

[207] What makes the SNET contract and the amounts earned by Zuber difficult to comprehend is the involvement of Interdivco. Zuber, in essence, would have the court believe that Interdivco was nothing more than a means for him to minimize his tax obligation in Poland. It is quite clear that very little of the nearly $3,000,000 earned by Zuber between 1998 and 2006 was declared by Zuber to the Polish taxation authorities when he filed his income tax returns. This, Zuber would argue, was entirely legitimate given the involvement of Interdivco. However, various invoices were marked as exhibits (Exhibits 129, 180, 184 and 191), which on their face appear to be invoices from Interdivco to Bastion for services rendered by Interdivco. Exhibit 129 is an invoice from Interdivco to Bastion in the amount of 896,180 Euros. The description on the invoice reads as follows:

> For professional services rendered in accordance with the contract dated May 26, 1998, including the research and the identification of opportunities in connection with the privatization of the energy sector in Poland on behalf of SNET. Please remit the amount due for the credit of ourselves to the account of Phibren International Management.

[208] The other invoices (Exhibits 180,184 and 191) have similar language, with a total invoiced amount in excess of 1,000,000 Euros. The relatively simple language used on these invoices would leave anyone reading them to conclude that Interdivco was invoicing Bastion for work done on behalf of Bastion. The contract between Interdivco and Bastion has not been produced to provide any explanation for these invoices, this despite an Order made by Lauwers J. on November 2, 2010 to produce the contract between Bastion and Interdivco. No one was called by Zuber to explain these invoices. Pitance had no knowledge of Interdivco. As I have already indicated, Zuber's evidence as it relates to what he earned from the SNET contract and the costs associated with that contract - given the Interdivco invoices, leaves this court with a real doubt as to Zuber's net SNET earnings.

[209] Zuber argues that because of his accident-related injuries he was unable to take advantage of the relationship he had built up with SNET. In his written submissions, Mr. Strype argues that "SNET had clear plans to expand in the Polish market, and these plans involved Mr. Zuber as a central and necessary figure. This should be considered not only as a valuable future contingency, but a very likely future contingency. Mr. Zuber actually had a contract in place with SNET, had already acquired one power plant for them, and SNET's representative told this court that they had the desire and the means to acquire more assets". What this argument fails to address is the reality of what actually took place in the months and years leading up to 2004.

[210] The contract that Zuber entered into with SNET in 1998 was amended over the years, culminating in the agreement that covered the year 2004. This contract (Exhibit 43) provided that if a written agreement between Zuber and SNET was not entered into before September 30, 2004, that it would be automatically terminated on December 31, 2004. In essence, this is precisely what happened. On December 21, 2004, Zuber received a letter from SNET (Exhibit 95) that confirmed a telephone discussion with a Francisco Munoz and Zuber that the SNET contract would not be renewed. The reason for termination given to Zuber does not appear to have been motivated by a lack of performance on the part of Zuber, but rather as a result of a change in ownership at SNET. To suggest that Zuber lost the contract with SNET because of a lack of performance related to injuries suffered in the accident is, in my view, not borne out by the evidence.

[211] What I do take from the evidence as it relates to Zuber's performance of the SNET contract between 1998 and 2004, is that Zuber had achieved a certain level of credibility in the Polish energy community that had allowed him to earn a comfortable living. Given the discrepancies with the invoices from Interdivco and its role in the performance of the SNET contract, I cannot reach any conclusion as to the net income being earned by Zuber from the SNET contract. It is readily apparent though from the evidence, that despite Interdivco's involvement Zuber did receive from SNET over the course of seven years nearly $3,000,000. Most of this income was received by Zuber after the accident. I do not accept the argument made on behalf of Zuber, that most of the money received from SNET after the accident should be attributed to earnings pre-accident. Zuber was active in performing his obligations under the contract with SNET both pre and post-accident. Zuber was incurring substantial expenses that he submitted to SNET for reimbursement

2018 ONSC 4370 (CanLII)

both pre and post-accident. In 2002, he incurred approximately $82,000 in expenses; in 2003 approximately $143,000 in expenses; and in 2004 he incurred approximately $104,000 in expenses that he submitted to SNET for reimbursement. These expenses would only be incurred if Zuber was performing his duties on behalf of SNET. He was earning an income from SNET on an annualized basis. The income received by Zuber from SNET should, therefore, be attributed to the year it was earned and received.

2018 ONSC 4370 (CanLII)

[212] What the evidence from Zuber's role in his performance of the SNET contract also demonstrates, is that despite the accident Zuber was able to travel to meetings and do what was required to meet SNET's expectations. Pitance did comment about his observations of Zuber post-accident, but those observations need to be reconciled with the fact that the SNET contract was renewed three times after the accident. Each time the contract was renewed, it provided for its automatic termination if it was not renewed by SNET prior to its termination date. If Pitance had any concerns about Zuber's physical or mental ability to carry out his obligations under the contract, it is safe to assume that he would have brought those concerns to the CEO/Chairman at SNET responsible for renewing the contract with Zuber. Pitance agreed he never raised any concerns with his superiors at SNET about Zuber's performance, and hence the contract was renewed. Not only was the SNET contract renewed, but Zuber was also rewarded with a higher monthly retainer than provided for in the earlier contract. The renewal of the contract and a higher monthly retainer is hardly consistent with SNET having concerns about Zuber's ability to perform under the contract. For nearly five years after the accident, Zuber satisfied his obligations to SNET. After 2004, SNET's new owners moved in a different direction and Zuber lost the benefit of a very lucrative contract. The evidence does not, in my view, lead me to the conclusion suggested by Zuber's counsel. The accident and the purported injuries suffered by Zuber did not cause Zuber to loose SNET as a client.

Tax Treatment of Zuber's Income

[213] Zuber's tax returns covering the time period 1999 through 2012 were filed as Exhibit 148. Included in that exhibit was correspondence from the Warsaw Tax Office and the Bielsko-Biala Tax Office. The correspondence from the Warsaw Tax Office essentially enclosed the tax returns that form Exhibit 148. The correspondence from the Tax Office of Bielsko-Biala confirms that tax returns covering the time period 1996 to 2002 have been "destroyed".

[214] Zuber, in his evidence, stated that he was not obliged to declare his income that he received outside Poland as he was an "expat". Various witnesses were called on behalf of Zuber to explain the tax treatment of an expat. Whether Zuber was legally required under Polish tax law to declare income earned outside of Poland becomes significant in assessing Zuber's overall credibility.

[215] Kaczmarek was the Senior Trade Commissioner at the Polish Embassy in Ottawa between 1997 and 2004. He was also the Under-Secretary of State for the Polish government between 2005 and 2007. While he was not qualified as an expert in Polish tax law, he did testify to his knowledge of how an expat was treated for tax purposes in Poland.

[216] In his evidence, Kaczmarek explained why during the 1990’s Poland needed to attract former Polish nationals to return to Poland with their business acumen. If someone resided outside of Poland for more than half of a year, then the income earned by that individual did not have to be declared for taxation purposes in Poland. The converse of this was, if someone maintained an address and lived in Poland for more than half the year, that individual was required to declare not only their Polish income but all of their income no matter where it was earned.

[217] Kaczmarek was taken to Zuber’s tax returns, which on the very first page state “The form is to be filled out by persons who satisfy at least one of the following conditions...received income from abroad…” Kaczmarek was also taken to Zuber’s known address in Poland during the relevant tax year, and confirmed that if Zuber was a resident of Poland and lived in Poland for more than half of a year, he would have been obliged to disclose his Polish and worldwide income. Also, Kaczmarek testified that it was “illegal” for Polish nationals to deal in US currency.

[218] If Zuber lived in Poland for more than half of a year and was receiving the large sums of US currency that he said he received beginning in 1992, he was in breach of his legal obligation to disclose that income to the Polish tax authorities. It is difficult to reconcile Zuber’s evidence as to why he did not disclose his income earned outside of Poland on his tax returns, with the evidence of Kaczmarek who was called as his own witness. The only conclusion I can reach is if Zuber was paid in cash outside of Poland, it was in an effort to avoid detection in Poland. What he actually was paid remains a mystery given the absence of credible evidence to substantiate his earnings.

[219] Zuber has the onus to establish on credible evidence what he earned in the years pre and post-accident. While it may have been illegal to deal in US currency in Poland, the fact that Zuber was paid in cash is simply a factor this court has to weigh in determining the credibility of Zuber’s overall evidence. That said, however, Zuber cannot have it both ways. He cannot say he earned a lot more income than is disclosed on his tax returns unless he can establish there was no legal obligation to do so, and then expect the court not to make some negative findings as to his credibility.

[220] Zuber may have been an expat in the sense he left Poland when he was a teenager and immigrated to Australia where he lived until the early 1990’s. There is no evidence he maintained a permanent residence in Australia, or for that matter anywhere else in the world other than Poland. He did return to Poland, and to that extent he may have seen himself as an expat. But none of the evidence I heard would have excused him from declaring all of his income, Polish and “income from abroad”, as stipulated at the very top of the Polish tax return. His failure to be candid with the Polish tax authorities, and in essence his false declaration of his worldwide income, weighs heavily against his overall credibility in the trial before me.

[221] Zuber maintained in his evidence that he did not maintain a residence in Poland, and therefore he would be considered an ex-pat. Apart from the reasons already alluded to as to why this evidence is totally lacking in credibility, it is very hard to reconcile with his

2018 ONSC 4370 (CanLII)

own lawyer's evidence. Gembala testified that after Zuber returned to Poland in 1992, Zuber "spent most of his time" in Poland (Gembala transcript, p. 88).

[222] Zuber, in his evidence in-chief, testified that he was domiciled for tax purposes in Australia. He further testified that the tax laws of Australia did not require him to declare his worldwide income. I heard no evidence, expert or otherwise, on the tax laws of Australia, other than Zuber's unqualified opinion. Zuber left Australia in the early 1990's. Other than one trip when he returned to address issues regarding access to his son, there is no other evidence that would link Zuber to Australia from the time he left. I received no evidence in the form of tax returns filed by Zuber in Australia. In the absence of expert evidence that would somehow corroborate Zuber's evidence that he was domiciled for tax purposes in Australia and did not have to declare his worldwide income in Australia, I completely reject Zuber's evidence in this regard.

2018 ONSC 4370 (CanLII)

The Zuber Pipeline

[223] Zuber testified that in 2003 he developed a plan to build a pipeline from Czechoslovakia to Poland. This pipeline became known during the course of the trial as the "Zuber pipeline". Zuber asserted he lost a substantial sum of money because he could not build this pipeline, for reasons he attributes to the injuries suffered in the accident.

[224] Zuber testified this pipeline was what he described as a very low cost pipeline, which initially had a capacity for 500 million cubic metres of gas per year but was subsequently upgraded to 700 million cubic metres per year. Zuber stated he had developed details and specifications for the pipeline, but because of his injuries and symptoms attributed to those injuries he was not able to get the necessary government decisions that would have allowed him to proceed with the pipeline. Ultimately, the pipeline was built by Moravia Energo with its own financing. Zuber's so-called partner in the Zuber pipeline, Mr. Pitor Szwarc (Szwarc), was only paid a "promotional fee" for his involvement in the ultimate construction of the pipeline. Perhaps of some noteworthiness is the fact that Moravia Energo eventually went bankrupt.

[225] Szwarc testified on behalf of Zuber to lend credibility to the suggestion that the Zuber pipeline was more than just an idea, and that it would in fact have been built by Zuber - thus generating substantial profits, which he has now lost. In his affidavit filed as Exhibit 211 Szwarc, amongst other things, refers to various meetings taking place in Val Gardena, Italy, and in Poland that dealt with "financing, organizing building rights, securing passage rights and connectivity between the two countries". Szwarc continued in his affidavit to state that Zuber could no longer continue with this process due to the injuries suffered in the accident.

[226] While Szwarc says he participated in the aforesaid meetings, none of the other participants who presumably could have testified from a fact perspective about the financing requirements for the pipeline were called as witnesses.

[227] Szwarc testified in cross-examination about the extent of his dealings with Zuber concerning the pipeline. He confirmed that he was in daily contact with Zuber by email, and that they exchanged "tens of thousands of emails" about various business deals, including the pipeline. None of these emails were introduced into evidence. Zuber issued his claim in 2001. The failure of Zuber to produce any of these emails, in my view, as with the lack of documentary evidence in so many other areas of this trial, weighs against the credibility of his claim for loss of opportunity in connection with the Zuber pipeline.

[228] I was not impressed with the evidence of Szwarc. In my view, he lacked objectivity and his evidence was self-serving. In many instances his answers were non-responsive to the question asked, and in many cases his answers provided self-serving answers that were in no way responding to the question posed. His answers were designed to help Zuber, as opposed to aiding in the search for the truth of what happened at the material time.

[229] As for the financing for the pipeline, Zuber testified he had discussions with various parties and was advised by Lesny that he would have no difficulty obtaining the financing.

[230] Lesny was called as a witness to lend credibility to Zuber's assertion that his pipeline would have become a reality, and generated substantial profits that he has been denied due to the injuries suffered in the accident. Lesny was the Vice-Chairman of the Supervisory Board of the BRE Bank. In his willsay filed as Exhibit 219, Lesny confirms that he spoke with Zuber several times about the possibility of financing his pipeline project, and expressed the opinion that the project was "absolutely bankable".

[231] Lesny assisted Zuber in arranging a meeting with Krok who was, at the time, a Director of the BRE Bank and also Vice-President of PGNiG. In doing so, Lesny expressed the opinion that he considered the financing of the pipeline as being quite feasible.

[232] In his affidavit filed as Exhibit 217, Lesny states:

> Based on my background in banking, I have no doubt that Mr. Zuber's project was economically viable, and would have had no difficulty obtaining financing. If Mr. Zuber had succeeded in completing the project it would have assured him of significant profits. Today, having full personal control of a venture such as this would not be possible without majority stake holding of the State (of course in one of the forms permitted under law).

Lesny, in expressing the opinion set forth above was doing so, in my view, as a fact witness. He had not filed a Rule 53.03 compliant expert's report. Counsel did not seek to qualify him as an expert in the field of Polish banking, nor as an expert in the field of pipeline financing. As a fact witness, he might very well be considered as a "participant expert" who would not have to comply with Rule 53.03. While non-compliance with Rule 53.03 obviates the need for the service of an expert report, it does not obviate the need to formally qualify a witness to give opinion evidence. Counsel did not do so, and as such I

2018 ONSC 4370 (CanLII)

give little weight to Lesny's opinion that Zuber would have had little difficulty in obtaining financing for his pipeline.

[233] Krok provided evidence to the court with respect to the Zuber pipeline. Krok holds a PhD in Electron Technology from the Moscow Energy Institute. Amongst other things he worked as the Director and Vice-Manager for BRE Bank, a position that he held until 2003 when he moved into the energy sector with a position of Vice-President of Trade and Marketing of PGNiG.

[234] Krok, in his affidavit filed as his evidence in-chief, states that as Vice-President of PGNiG he met Zuber at the request of Lesny, who was the Undersecretary of State in the Ministry of the Economy in the Polish government.

[235] Krok, in his affidavit, states that Zuber was sent to him by Lesny in order to discuss his plan to build a pipeline from the Czech Republic to Poland. Krok states in his affidavit that he assured Zuber that PGNiG would provide the connection to its network, and also expressed support for the beneficial effect that the pipeline would have on Poland's energy supply.

[236] In his affidavit, Krok states that Zuber's pipeline was planned to cost between 50 million to 60 million PLN, which Krok states was considered to be "viable" at that time. Krok goes on in his affidavit to state that:

> Without a doubt Mr. Zuber's pipeline would have had no issue obtaining funding. This was the sort of project the banks were hoping to find. In my opinion, I would expect that Mr. Zuber's planned pipeline would have been worth four times its invested capital at minimum, once completed and functioning, if he chose to sell.

[237] Krok was neither qualified as an expert in pipeline financing, nor was he qualified as an expert with respect to the valuation of a pipeline. For the same reasons expressed with respect to Lesny's opinion evidence set forth in paragraph 232 above, I give little to no weight to Krok's opinion evidence with respect to the ability of Zuber to obtain financing, and no weight with respect to Krok's evidence with respect to the value of the pipeline if it had been sold by Zuber.

[238] In Krok's cross-examination he confirmed that he did meet with Zuber, and when he did Zuber brought "records" with him to show in connection with Zuber's need for financial assistance. None of those records were produced to the court. It is particularly significant that the meeting with Krok would have occurred sometime in 2004, well after Zuber had commenced his action arising out of the railway accident. Zuber must have known of his obligation to produce all relevant documents as required by the *Rules*. Zuber's failure to produce any records in connection with the proposed Zuber pipeline, in my view, weighs heavily against the credibility of this aspect of his claim.

[239] Zuber had documents that were produced to Krok in connection with the possible financing of his pipeline. That pipeline - if I accept the evidence of Zuber and subsequent

2018 ONSC 4370 (CanLII)

evidence from a Polish pipeline expert, would have generated to Zuber alone profits over a 10 year period of something in excess of $60,000,000. Zuber had the documents, and could easily have put those documents into the hands of a properly qualified expert in Polish banking and/or pipeline financing, who could then have provided an opinion on whether the pipeline would have been financed in Zuber's name. Zuber has the onus of proving the loss of opportunity with respect to his pipeline on a balance of probabilities. His failure to produce any documentation in connection with this loss, at a point in time when he had already issued his claim in this action - together with his failure to produce a properly qualified expert in pipeline financing, leaves me with no choice but to reject this aspect of his claim for damages.

2018 ONSC 4370 (CanLII)

Zuber's Assets and Liabilities

[240] If Zuber's evidence was believed, he had earned in excess of $9,000,000 in US currency between 1992 and 1999. This needs to be contrasted with evidence that I heard from a number of sources, that left me with little doubt that life in Poland during this time period was a challenge in terms of what might be considered the average earnings one might expect in Poland. I have already made reference to Zuber's own evidence that the average annual salary in Poland in this time period was approximately $15,000. From this I infer that if this was the average earnings, that while one would not be living an extravagant lifestyle one could get by. So, if Zuber had earnings that were many multiples times the average salary, and earnings that were paid in US currency in cash (and from the evidence of his 1999 tax return not declared for tax purposes), one might reasonably conclude that Zuber would have assets that at least in part reflected his earnings. One might also reasonably conclude that with those types of earnings Zuber would have little need to take out any loans.

[241] In fact, in 1999 Zuber borrowed $60,000 Canadian from Budny (as reflected in Exhibit 135). Why Zuber had any need to borrow money from Budny in 1999 is beyond comprehension if he had cash earnings in the range of $1,800,000 US (see Exhibits 153A-C). Certainly, one reason he may have needed to borrow money from Budny was because he did not have the cash earnings in 1999 reflected in his evidence.

[242] As well, one has to contrast Zuber's earnings not only pre-accident but also the substantial earnings he says he earned post-accident, together with the evidence about his need to borrow money post-accident. Exhibit 262 is a list of loans that Zuber says he took out in the time period February 2003 through November 2006. These loans totalled approximately 2,100,000 PLN, or approximately US $520,000. If Zuber was earning what he says he was earning pre and post-accident, the same common sense we tell jurors to use in their deliberations causes me to consider why he needed such loans. I have concluded, together with all of the other evidence referred to in these Reasons, that Zuber needed to borrow money because he simply was not earning what he testified to in court.

[243] I have also considered the absence of any evidence that would corroborate Zuber had acquired assets either in Poland or elsewhere that reflected earnings pre-accident of US $9,000,000 between 1992 and 1999. In fact, the only evidence that Zuber had acquired

any real estate or other assets is Exhibit 135, which appears to reflect the sale of an apartment Zuber owned. The sale took place in April 2001 for approximately PLN 605,000, or in US currency approximately $200,000 (3 for 1, PLN/US).

[244] There was other evidence the court heard regarding Zuber's lifestyle both pre and post-accident. I have little hesitation in accepting that Zuber did considerable travelling, both business and pleasure. I accept that he incurred not insignificant expenses entertaining clients and potential clients. I also accept that he likely did earn a more significant income than the average Polish citizen. However, I have also considered Zuber's own evidence that with most of his contracts - or alleged contracts, he prided himself on the fact that his expenses were to be reimbursed by his clients. Thus, much of his so-called lavish lifestyle was funded both pre and post-accident by his clients. So with the same common sense we direct jurors to use, I cannot reconcile Zuber's alleged earnings with the virtual absence of any assets accumulated with that income. I can only conclude the lack of an asset base is, in fact, a reflection of the fact Zuber did not earn what he says he earned.

2018 ONSC 4370 (CanLII)

What Did Zuber Actually Earn Pre-Accident?

[245] Fundamentally, in determining Zuber's past and future income loss I need to determine what did Zuber earn pre-accident as the base, or what I may refer to as the benchmark from which to determine his lost earnings caused by the injuries he suffered in the accident. I will address the issue of causation later in these Reasons. Zuber asserts that the evidence establishes that he earned somewhere in the range of US $8,839,000 and US $9,787,000 between 1992 and 1999 (see Exhibits 152A-C).

[246] Mr. Strype in his written argument suggests that Zuber's income was on the "upswing", and that a conservative method of determining the benchmark would be to average his earnings between 1994 and 1998 ($1,354,000), and then average that figure with his earnings in 1999 (3,756,172) to generate a benchmark average of $2,555,136.

[247] While I would not dispute Mr. Strype's methodology is one that has some appeal, the major difficulty with this method is that I have no confidence - for the reasons I have expressed above, that Zuber earned what he says he earned. Mr. Strype concedes in his written argument that Zuber has the onus of proving his case "on a balance of probabilities". Mr. Strype quite correctly then suggests that one of the ways of describing that onus is the age- old reference to the scales of justice - if the Plaintiff's evidence on one side of the scales is tipped ever so slightly, the onus is met.

[248] Mr. Strype suggests in this case that the scales of justice are overwhelming tipped in favour of the Plaintiff because there was no evidence adduced by the defence. In his written argument, Mr. Strype states:

> …If the Plaintiff can tip the scales even slightly in his favour, then the balance of probabilities standard is met. This is a particularly important analogy in the present case, since, at least in regards the income loss claim, the Defendant's pan is perpetually empty. The Defendants did not

> call a single witness from Poland on any issue whatsoever. They did not call a single witness from Poland to bring Mr. Zuber's reputation in the business community into question or call a single witness to call into question any of Mr. Zuber's business activities…

Mr. Strype continues with this line of reasoning by acknowledging that while the court can accept all, some, or none of a witness's evidence, that because the defence called no evidence as it relates to the loss of income claim the Plaintiff must succeed in having met his onus.

2018 ONSC 4370 (CanLII)

[249] The argument put forward by Mr. Strype would have merit if the witnesses put forth to prove Zuber's income loss claim had not been cross-examined. If their evidence was unchallenged, Mr. Strype would be quite correct that the "Defendant's pan is perpetually empty". What Mr. Strype's argument ignores is that the Plaintiff has the onus of proving his claim. If at the end of the day I am uncertain if the Plaintiff has sustained a loss of income as a result of his alleged injuries suffered in the accident, this court is bound as a matter of law to dismiss the claim. There is no obligation on the defence to call any evidence to disprove the loss of income claim as Mr. Strype suggests. This court is required to consider all of the evidence on a particular issue when coming to a determination. Without exception, Zuber's evidence and the evidence of the various witnesses who were called to essentially lend credence to Zuber's evidence were cross-examined by the defence. Far from lending credibility to Zuber's evidence, most - if not all of these witnesses for the reasons I have explained above, did the exact opposite.

[250] On more than one occasion during both oral and written argument this court was encouraged to take into account when assessing credibility, the positions of authority in Poland that many of Zuber's witnesses occupied. I do not disagree that if one occupies a position of authority - whether it is in Canada or Poland, this can be a factor a court may use to weigh the evidence of a witness. But just because one occupies high office does not make that witness credible. Richard Nixon said he was not "a crook". History may suggest otherwise.

[251] Zuber had the obligation to prove his case. He could prove his case in one of many ways. He could put before the court credible and reliable documentary evidence that would prove what he was earning before the accident. Typically that type of evidence includes tax returns; bank statements; financial statements; and similar "official" type documents. Zuber certainly knew no later than November 2001 when he instructed Mr. Strype to issue a statement of claim, that he had a claim that on paper was pleaded to be worth at least $1,000,000. He knew, or he should have known that as of that date he had an obligation to prove his case, and that to prove his case he would need various types of documents. He appears to have received that advice from Gembala, his Polish lawyer. Zuber, in my view, made a conscious decision not to produce "official" type documents. He made that decision either because the documents did not exist in the first place because the transaction never took place, or he made that decision because the documents did exist – i.e. tax returns from 1992-1998, and they did not confirm the extent of his earnings that he testified to in this court, and they did not assist him with his loss of income claim.

[252] The fact that the documents needed to prove his case were not available was not something new. Nor was the concept that proving his case was going to be difficult, something unknown to Zuber's counsel. Going back to 2010 when Lauwers J. (as he then was) was case managing this matter, the court record reflects that Mr. Strype on a productions motion had advised Lauwers J. that because of the absence of many documentary records he "… would have difficulty in proving the case" (see *Davies v. Clarington*, 2010 O.J. No. 4900, at para. 16).

2018 ONSC 4370 (CanLII)

[253] Even if I had been satisfied on a balance of probabilities that Zuber had established the benchmark from which to calculate his past and future income loss, that would not be the end of the analysis. What Zuber earned (whatever that figure was pre-accident), was only earned after he had incurred expenses. As such, Zuber would be entitled to recover for his past and future income, his net loss after deduction for any expenses incurred. In order to determine Zuber's net income as a benchmark pre-accident, Zuber should have provided the court with evidence of what his expenses were so the net income could be ascertained. Zuber did provide the court with his 1999 through 2012 tax returns which are broken down between revenue and costs, leaving a profit or what I will call net income. They can be summarized as follows, with all amounts in PLN:

	1999	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**
Revenue	640,926.17	6,000.00	220,587.32	381,763.86	263,961.49	278,947.21	114,375.50
Costs	624,009.51	3,000.00	195,858.18	191,575.72	69,435.33	44,624.46	715.75
Profit	16,916.66	3,000.00	25,002.14	190,188.14	194,526.16	234,322.75	113,659.75
	2006	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**
Revenue	11,035.71	26,350.00	13,638.17	3,490.61	3,372.57	30,159.35	9,103.27
Costs	5,760.92	15,273.45	5,778.75	-	333.75	12,883.35	2,735.00
Profit	5,274.79	11,076.55	7,859.42	3,490.61	3,038.82	17,276.00	6,368.27

[254] With this evidence in mind, it is particularly noteworthy that the accident occurred in late November 1999. As such, most of the income Zuber earned was likely earned prior to being injured in the accident. It is also very noteworthy that in 1999 - after expenses, Zuber declared a net total income of approximately 17,000 PLN, or approximately $6,000. His income in 2001 through 2005, net of expenses, was greater than what he was earning before the accident.

[255] Fundamentally, Zuber had the onus of proving on a balance of probabilities what he was earning before the accident, in order to provide the court with a benchmark from which the court could then determine what he might otherwise have been earning but for the injuries he says he suffered in the accident. In determining that benchmark, I have considered the evidence called by Zuber both pre and post-accident. For the reasons which I have reviewed I do not accept that Zuber was a credible witness, nor for the most part have I accepted as credible the evidence of the various witnesses called by Zuber to corroborate his evidence.

[256] The defence was entirely successful, in my view, in undermining both the credibility of Zuber as well as the credibility of the witnesses he called to support his income loss claim. What I have concluded is that Zuber was earning considerably more money, both inside

Poland and outside Poland in the years leading up to the accident, than what is reflected in his 1999 tax return. I have also concluded that Zuber was earning considerably more money than the average Polish citizen was earning. I say this because I am satisfied that the style of life that he led both pre and post-accident, was a style of life that could not be afforded on the basis of what I understood to be the average earnings of a Polish citizen in this time frame, something in the order of less than US $20,000.00 per annum. It is highly unlikely he could have led the style of life that he did, with vacations to the many exotic parts of the world that he visited pre and post-accident, if he was earning what he declared in his 1999 Polish tax return.

[257] I also accept that Zuber probably did have some, but not all of the contracts to which he testified. It would defy logic to suggest all the witnesses called by Zuber were lying about their contractual relationships with Zuber. I come to this conclusion as well because it is clear Zuber had reached a certain level in the Polish business community - how else can one explain the contract he had with SNET and the money he earned from that contract?

[258] What I have little confidence in are the amounts that Zuber says he was paid by those contracting parties with whom he did have contracts. I also was presented with no evidence about what expenses Zuber incurred to earn what he actually did earn. No doubt, some of his contracts required the other contracting parties to reimburse him for some of his expenses. His own tax returns filed in 1999 and thereafter confirm he had expenses which were deducted from his gross earnings to arrive at a net figure. So, I am left to speculate not only about what his actual gross earnings were but also what his true expenses were, and therefore I am left to do nothing more than guess as to what his net income might have been and what his net earnings might have been. The Plaintiff has fundamentally failed to meet his obligation to put credible evidence before this court to arrive at a figure reflecting his income loss.

[259] Zuber chose to present his case in the manner that he did. He chose to ignore the heavy onus that he had to present credible evidence to the court, including his obligation to produce documents that would have been within his possession, power and control, that would have assisted the court in establishing his earnings pre and post-accident. Zuber may feel he has been unfairly treated in the ultimate result I have reached in this case, but he was the one who had the ability to adduce documents like tax returns; bank statements; original contracts; credit card statements; and similar evidence that would have lent credibility to his claims. He knew, or he should have known certainly as early as when he started his own lawsuit in 2001, that he would have to prove his claim. He chose for whatever reason not to provide this court with the tools that it needed to calculate what he was earning prior to the accident, so that the court could establish a credible benchmark from which to make an award of past and future loss of income. Having heard the evidence over many days and weeks of court time, I am still left in the situation of wondering if Zuber did in fact suffer a loss of income following the accident. This leads me inevitably to the conclusion that Zuber has failed to meet his onus of proof of this aspect of his claim and, as such, it must be dismissed.

2018 ONSC 4370 (CanLII)

[260] A fair reading of the Plaintiff's written submissions would lead to the conclusion the Plaintiff fully expects this court to make an award of damages that would make the front page of "The Lawyers Weekly", and other forms of media regularly consulted by the legal fraternity. I very much doubt that anyone - with the exception of the parties and their counsel, will have the time or interest to read these Reasons in their entirety. If the Plaintiff was expecting an award of damages that remotely came close to what is not only pleaded ($50,000,000) but also sought in the written submissions, he would have been well advised to have considered what Lauwers J. had to say in his Reasons of September 2, 2010 dealing with the Plaintiff's motion to increase the prayer for relief from $10,000,000 to $50,000,000. At paragraph 60 of his Reasons, after dealing with the concerns raised by the defence that the only reason for the Plaintiff's motion seeking an increase in the prayer for relief was to "have an in terrorem effect on the Defendants to press the settlement advantage", Lauwers J. stated:

> I have real trouble giving weight to this argument. This motion was argued by as accomplished and experienced an array of senior civil and personal injury counsel as might appear in any Superior Court in this province. They are well familiar with the range of personal injury awards and are well able to assess the risk of whether in a judge-alone trial that the award to Mr. Zuber would exceed $10 million. If it did it would be a record breaker.

[261] Justice Lauwers, of course, could not pre-judge what award the trial judge might make after hearing all of the evidence, but he certainly was making it quite clear to everyone that from a risk perspective it was highly unlikely the case would top out at an amount in excess of the then pleaded amount of $10,000,000, let alone the increased amount of $50,000,000. Zuber only has himself to blame for the ultimate result in this case. He chose not to listen to whatever advice he received during the course of these proceedings, and certainly seems to have rejected the implicit advice he received in the aforesaid Reasons of Lauwers J.

[262] Zuber chose to engage an accountant in Poland who would conduct a "brown bag" assessment of his earnings. He chose to put that expert into the position that he did, and he cannot now complain that this court was left without the assistance of a credible accountant who could provide the assistance to the court that a credible accountant might be expected to provide. Zuber provided his expert with documentary evidence that he then took back from the accountant and ultimately destroyed due to so-called secrecy clauses in the contracts. If the contracts were as secret as Zuber says they were, I fail to understand how he could show them to his accountant and not the court! The contracts, if they existed, could and should have been placed in a sealed envelope. The interests of the contracting parties could have been subject to a court order that protected the confidentiality of the contracts. Instead, Zuber chose to destroy the contracts.

[263] Having reached these conclusions, what comes of them? Clearly, Zuber did not earn the $2,500,000 per annum suggested by his counsel as the basis from which to calculate his past and future wage loss. He did earn something more than the average earnings of a

2018 ONSC 4370 (CanLII)

Polish citizen in the time frame 1992 to 1999 (probably significantly more). But I cannot simply pick a figure out of thin air. Zuber had the onus the law imposed on him to prove his past loss of income on a balance of probabilities. As Mr. Strype conceded to Justice Lauwers many years ago, he knew that he would have difficulty proving his wage loss given the absence of critical documentation. Zuber may have been well advised to have listened to his lawyer, because fundamentally Zuber has not met his onus and I cannot make an award for past loss of income.

2018 ONSC 4370 (CanLII)

Post-Accident Employment and Other Activities

[264] One way of measuring the extent to which injuries suffered in an accident may have impacted a Plaintiff in a personal injury action, is to look at what the Plaintiff has been able to do after the accident. In many cases, the Plaintiff may "get back on his horse" and return to many of his pre-accident activities and employment but function at a reduced level. In other cases, the Plaintiff may cease all pre-accident activities and never return to his former employment, or any employment at all.

[265] The credibility of the Plaintiff may be impacted by the extent to which he or she attempted to mitigate their damages by making an effort to return to their former self. This is particularly so in a jury trial. In this case I had an opportunity to observe Zuber over the course of many weeks, and to assess the credibility of his evidence against much of the evidence that was called on his behalf after he left the witness box. As I have explained, in many instances his evidence simply did not match up with the evidence that was supposedly called to lend credibility to his claims.

[266] What happened after the accident also demonstrates, in my view, why the theory of Zuber's case simply cannot be believed. The thrust of that theory is relatively simple. In essence, Zuber argues that if the accident had never happened and if he had not suffered the injuries that he says he suffered, he would be earning well over $2,000,000 per annum. Subsumed in that argument is the suggestion that but for the accident he would have been involved in many investments, i.e. the pipeline and other energy related ventures. In essence, he argues that he became so totally disabled he could not function as he had pre-accident and, as such, can no longer work as he did pre-accident. A comparison of what Zuber actually did after the accident to this theory, in part, demonstrates why Zuber's theory is without merit.

[267] I have already reviewed in some detail Zuber's involvement with SNET post-accident. While Zuber argues he lost SNET because of the progressive deterioration in his health that he says caused him to miss meetings and pay less attention to detail, the reality is that after the accident his contract with SNET was renewed on three occasions, with increases in his monthly stipend. This demonstrates, in my view, that Zuber was able to function at a level at least commensurate with what he did for SNET pre-accident. He also earned an income from SNET and ILBAU between 2000 and 2004 that is at least commensurate with, if not greater than what he says he was earning pre-accident.

[268] Zuber maintains in his evidence that after the accident he returned to Poland in excruciating pain. I have already commented on the credibility of this evidence in relation to the medical evidence. Zuber's activities in the time frame immediately post-accident also do not line up with someone in extreme pain. In December 1999, within weeks of the accident, Zuber with his soon to be second wife drove to Austria where photographs were taken of Zuber dressed in ski attire on a ski hill (Exhibit 73). Zuber testified he did not ski. Why he would be attired in a fashion associated with skiing - as demonstrated by Exhibit 73, causes me to question the credibility of his assertion that he did not ski. After the trip to the ski hill in Austria, Zuber then flew to Sri Lanka. Photographs in Sri Lanka show Zuber that would suggest he was quite active climbing a significant incline up a mountain. In his evidence in-chief, Zuber was quite categorical that he did not do any climbing whatsoever. When he was shown Exhibit 196, a photograph of some substantial stairs on the mountain, he ultimately conceded that he "walked" up these stairs. As with so much of Zuber's evidence he sought to minimize his activity level when it suited his purpose, and inflate his activity when it equally suited his purpose. This detracted from his overall credibility and affects the court's ultimate disposition of this trial.

[269] After his return to Poland from his vacation in Sri Lanka, Zuber initially testified that he began to miss various meetings because of his injuries. He then confirmed that in the spring of 2000 he attended most of his business meetings, in addition to a number of trips to Paris to present reports. During the time period 2000 to 2002, Zuber received various treatment modalities, such as massage and physiotherapy. He did not produce receipts for this treatment, but acknowledged it did allow him to function much as he did pre-accident.

[270] In his evidence in-chief, Zuber testified about various activities he was able to do pre-accident and how those activities had ceased post-accident. One of the activities he did that completely stopped was horseback riding - this according to his evidence in-chief. In cross-examination, he acknowledged that in 2000 he in fact had ridden a horse on a few occasions. Not only is this evidence at odds with his evidence in-chief and thus impacts on his credibility, one can only speculate given the nature of his alleged injuries how he could ride a horse not long after the accident.

[271] In addition to his trip to Sri Lanka and business trips to Paris in 2000, Zuber also spent days in Tunisia. During this trip Zuber went on a camel ride. He is seen in a photograph holding his ex-wife, and was videotaped climbing a palm tree (Exhibits 73 and 197A). These activities, while minimized by Zuber, nonetheless - in my view, lend credibility to the defence argument that Zuber was not injured in any way remotely close to what Zuber would have this court believe.

[272] In May 2001, Zuber attended a three day conference in Montreal for the Polish National Exhibition. This was followed up with a trip in November 2001 that appears to have involved stops in Montreal, Toronto, Calgary, the Rockies and Vancouver. The purpose of the trip appears to have been a combination of business and pleasure. The business side of things involved meetings with representatives of the Canadian film industry who might be able to assist in the production of a movie starring Zuber's new wife.

2018 ONSC 4370 (CanLII)

[273] Subsequent to the trip to Canada, there are various credit card receipts that strongly suggest Zuber was in Germany and Paris (Exhibit 199). As well, in December 2001 Zuber went on a trip with his new wife to Venezuela. Photographs taken in Venezuela (Exhibit 199) would lead me to conclude Zuber enjoyed an active, enjoyable vacation with his wife.

[274] In March 2002, while enroute to Italy for an energy conference Zuber stopped in Switzerland, and while snowboarding he fractured his left fibula. The fact he was able to snowboard also belies the suggestion he was badly injured in the accident. After treatment in hospital, he also found time while still in a cast to fly to Miami for his wedding reception. He also spent time deep sea fishing. He returned to Poland for a further wedding reception. Perhaps not surprisingly, there are wedding photographs showing Zuber dancing and having what appears to be a good time (Exhibit 195).

[275] The wedding reception in Poland was then followed by a 700 mile motorcycle trip to an energy conference in Amsterdam, an activity that is not consistent with the type of injuries Zuber suggests had impacted on most of the activities he used to do pre-accident.

[276] In May 2002 and again in May 2003, Zuber flew to Canada to be seen by a well-known orthopaedic surgeon. This assessment was set up by his lawyer. After his appointment in Canada in May 2003, Zuber then went to Chicago and California. This vacation or business trip was then followed up with a trip to Amsterdam and Paris in August 2003, and then another trip with his wife and daughter to Cuba in December 2003. It was during the trip to Cuba that Zuber is memorialized on a video skydiving, hardly the activity one would expect of someone complaining of the injuries Zuber complained of in this trial.

The Divorce Proceedings and Defamation Action in Poland

[277] While the first few years of the new millennium involved a new wife and what appears to have been a happy life with many vacations and a young daughter, this all changed in September 2004 when Zuber's wife filed for divorce. While Zuber maintained in his testimony (transcript, p. 853) that the divorce was "amiable", the history of their relationship post-divorce would appear to have been anything but amiable. What can only be described as a fractious relationship post-divorce, in my view provides some - if not a significant explanation for why Zuber may not have done as well in his business as he might have prior to 2004.

[278] In August 2006, Zuber's ex-wife posted on her website that Zuber had been convicted "in several serious criminal trials in Poland and Australia". Shortly thereafter, Zuber testified he had been assaulted by a man and a woman who he asserted were associated with his ex-wife. He testified he was pushed to the ground and kicked. He was seen by Dr. Jewginij Panow on the same day, who took a history from Zuber that he was kicked in the area of his lumbar spine, kidneys and head, with complaints of pain in his lumbosacral spine, his thoracic spine, sacrum, accompanied with headaches and dizziness. Thereafter, Zuber and his ex-wife became embroiled in the Polish legal system.

2018 ONSC 4370 (CanLII)

[279] As a result of his ex-wife's website posting referenced above, Zuber commenced a defamation action in 2007. Zuber testified that what his ex-wife said about his criminal past and the ongoing legal wrangling between him and his ex-wife had no impact, whatsoever, on his business (transcript, p. 870). It is worth contrasting this assertion with the records filed from those proceedings, as evidenced in Exhibit 151.

2018 ONSC 4370 (CanLII)

[280] Zuber is recorded as having testified before the Regional Court for Warsaw in a document dated January 8, 2008. I reproduce relevant extracts of his evidence, as evidenced in this document which forms part of Exhibit 151.

> Witness Krzysztof Zuber testifies: This case concerns making public such terrible and untrue information about me personally, mendacious information. When we were going through divorce with my former spouse, she tried to frighten me many times by saying that she would destroy my career, that she had public media at her disposal and person, including writing personal letters to presidents of various companies in which she called me a drug addict, a criminal, a person who is not a businessman but deals in laundering dirty money…
>
> …She also said this directly to people who were my business partners. One day I found out from one of my employees that a representative of a company which wanted to start doing business with the company of which I am the president read the information that I was a multiple offender. I called Anna Samusionek then and spoke with her on the phone about these circumstances, in the presence of witnesses. She laughed then and said: 'I do exactly as I promised; as long as I don't get half a million and the house'. At the end she said: 'This is nothing yet, you will see what happens next, better hurry'.

[281] Perhaps the most telling piece of Zuber's recorded evidence is found at page 36 of Exhibit 151, where he advised the court in Poland "I had a very good practice for a dozen years or so; since the internet publication I have had no orders, because I could not find a client; the only thing I do is teach as a coach and instructor, I also run courses and sometimes I am asked to give a lecture". Apart from the fact that none of the income he may have earned from these activities was disclosed to this court, what is particularly interesting is that Zuber testified to the Polish Regional Court, presumably under oath, that business was good for a dozen years. I infer from this that since the internet publication was in 2006, that up until then he had what he described as "a very good practice". He then told the Polish Court that since his wife's website posting of his criminal past, he had no orders and could not find any clients. There is no mention to the Polish Court of his alleged injuries suffered in the Canadian railway accident. Surely, if he wanted to be honest with the Polish Court, he would have at least mentioned that his business had been on a downward spiral since 1999 because of his injuries. In essence, that was Zuber's story presented to me during the course of this trial. But such was not the case, his business had suffered grievously because of his ex-wife's internet posting.

[282] The Polish defamation proceedings, coupled with what can be best described as a custody fight between Zuber and his ex-wife, continued through the Polish Courts from 2007 through 2015. In another of the documents which is part of Exhibit 151, is a document dated 12.09.2011. At page 359 of this document, Zuber is recorded as having provided the following testimony:

> …I am convinced that as a result of placing this information on the Internet by the respondent I lost credibility with respect to the work I was performing. At this time my only occupation was conducting training sessions in psychology and business philosophy, where the students were young people, perfectly familiar with media tools. I felt I lacked credibility while being aware that someone among the audience could know the content of this information, which suggested that I was an offender not only in Poland but also overseas, in Australia. By posting this entry, Anna Samusionek took away my reputation with people who respected me…
>
> …I affirm with utmost conviction that Anna Samusionek undertakes these actions in order to deliberately target my good name, my social contacts. She announced such actions earlier, she came and stood in front of my office, telling my employees that I was a mafia man and that the police would show up in a moment to arrest everyone. She did this twice. After this information some of the employees left the office. She was doing this in 2005, immediately after the divorce, so these actions were not caused by fighting for the child – since this I would have been able to at least understand. On other case files there are copies of SMS messages from Anna Samusionek, in which she said that she was going to destroy me medially. She was sending these SMS messages until the end of 2004…
>
> …I had no desire to interact with people after the respondent published these, approximately 09.2006 to 08.2007. I was ashamed of seeing people after this publication. I didn't know how to explain myself. I kept thinking that everyone who spoke with me knew about this publication; I didn't even know how to start a conversation. I was ashamed. This was not about business, because my health condition prevented this, besides I didn't see my daughter for almost a year then. It ended up with Anna Samusionek being penalized by the Court.

[283] The aforesaid extracts from the Polish Court proceedings would leave little doubt in the mind of those hearing Zuber's testimony, that his ex-wife had inflicted irreparable damage to Zuber's reputation and ability to earn an income in Poland. Apart from a very cryptic comment about his "health condition", it is very hard to reconcile Zuber's sworn testimony here in Ontario versus the evidence he gave to the Polish Court. Before me, Zuber testified that his divorce did not impact on his business, yet in Poland the only

2018 ONSC 4370 (CanLII)

conclusion the Polish Court could have been left with is that the downturn in his business was solely due to his wife's defamatory comments on her website.

[284] The mudslinging between Zuber and his ex-wife continued unabated into 2015, when District Court Judge Agnieszka Jazwinska of the Warsaw-Mokotow District Court in Warsaw released her decision dealing with what appears to have been a claim made by Zuber for custody of his daughter, and a counter petition by his ex-wife for similar relief (see Exhibit 200, Document 21). A review of the allegations made by his ex-wife against Zuber included the following: Zuber was a "pedophile; drug addict; alcoholic and thug; he was mentally ill; a multiple convict; he raped minors; and sexually abused his daughter". These allegations were serious, and undoubtedly would have been very hurtful to Zuber. I make no comment on the veracity of those allegations, but they are important as they give context to what was going on between Zuber and his ex-wife, and give credence to the defence argument before me that there are many explanations for why Zuber's business fortunes may have suffered in the period after the accident. It is simply far too easy to simply accept as unchallenged that Zuber's business fortunes declined due to the injuries he says he suffered in the accident.

[285] The claims of both Zuber and his ex-wife were dismissed by the Polish District Court, and the concluding remarks of District Court Judge Agnieska-Jazwinska are worth repeating:

> Although this is of no consequence for the evaluation of social harm resulting from the acts in question, Krzysztof Zuber's attempt to use his less than 13 years (sic) daughter in personal struggles between the parents (the charges presented in points 1 and 2 of the counter-indictment involve situations which supposedly took place in the presence of the child) and Krzysztof Zuber petitioned the court for a direct hearing of the child (page 83) is of consequence for the evaluation of the case as a whole. As stated in the charges, the girl was the main witness to the situations. The Court cannot remain silent on this issue – it is beyond doubt that the parties are clearly not emotionally mature enough to play the role of parents and their struggles have an adverse effect on the welfare of their child in common. The Court has carefully reviewed the 16 volumes of the files of the lawsuit *ex officio* before the Warsaw Praga-Potnoc District Court in Warsaw concerning the taking away of parental authority from Krzysztof Zuber and the lawsuit brought by Krzysztof Zuber, concerning the taking away of parental authority from Anna Samusionek and the establishment of a foster family for the parties' child, and it fully shares the statement of the family court as included in the rationale for its decision issued on September 11, 2014 that "*The parents(...) have completely transferred their family life into the courtroom, dragging their minor daughter into their internal dispute*". The Court also takes note of the conclusions of a family diagnosis and consultation center (RODK) quoted in the rationale, namely that neither parent provides the child with a sense of safety and peace, neither parent is sufficiently competent to responsibly take care of the child and neither

2018 ONSC 4370 (CanLII)

> parent guarantees proper exercise of parental authority, and the conclusion reached by a psychologist expert witness in her opinion, namely that both parties need to undergo a therapy in order to be able to ensure proper development of the child. In the Court's opinion, any hearing of the girl during a criminal trial involving a counter-indictment, initiated by her parents, is undoubtedly incompatible with her emotional welfare. It may be safely assumed that the child is already traumatized enough by the family's situation, widely publicized at some point by tabloids. These circumstances are not understood in the first instance by the child's father, given his reaction to a reconciliation for the sake of the daughter's welfare proposed by Anna Samusionek at the last hearing.

2018 ONSC 4370 (CanLII)

[286] I have reproduced the aforesaid extract from the Reasons of the court in Poland, because they make clear that what was going on between Zuber and his ex-wife was not just a private spat between husband and wife. Rather, their dispute was a nasty fight that involved very personal and hurtful allegations that were, according to the words of the Polish District Court, "…widely publicized at some point in the tabloids". If the fight between Zuber and his ex-wife was widely publicized, it is hardly surprising that Zuber may have found it difficult to keep his business alive. I am more than satisfied that the fight between Zuber and his ex-wife - that appears to have started in 2006 and ran through 2015, is a very plausible explanation for the downturn in Zuber's business and his ability to earn the type of income he was earning not just before the accident, but well after the accident into 2003.

<u>Post-Accident Medical Records</u>

[287] The credibility of a Plaintiff's medical recovery from the perspective of the Plaintiff can, in part, be measured by the medical records of his or her treating doctor. In general terms, if a Plaintiff complains of accident-related injuries to his neck and back, one might surmise that the medical records will also reflect those complaints. Sometimes this is the case, sometimes it is not. The lack of pain complaints is not conclusive that a Plaintiff does not suffer from accident-related chronic pain. However, the lack of pain complaints does require judicial scrutiny.

[288] After Zuber returned from Canada on November 25, 1999, his first visit to seek out medical treatment appears to have been November 29, 1999. At that time the recorded history by the treatment provider, presumably provided by Zuber, related to hoarseness in his throat. There is also a recorded complaint regarding urination, which is also noted in a visit of December 2, 1999. There is no mention of the accident and no mention of neck pain, nor any mention of headaches.

[289] What Zuber complained about to his doctor when he first returned to Poland after the accident is particularly noteworthy, and needs to be contrasted with Zuber's evidence at trial. Zuber testified that he was experiencing "excruciating pain" in the hours and days after the accident. If this evidence is to be believed, it is not unfair to contrast this evidence with his recorded history to his doctor in Poland upon his arrival. Put very

bluntly, if he was experiencing excruciating pain in his neck, why is his first complaint to a doctor when he gets back to Poland about "hoarseness in his throat"? I can only conclude that Zuber was not experiencing "excruciating pain" on his arrival back in Poland, because if he was I have little doubt Zuber would have made that complaint to his doctor.

[290] An x-ray of Zuber's cervical spine was done in February 2000. The notation was "unchanged", which Zuber interpreted in his evidence as normal. Between May 24, 2000 and February 24, 2001, there does not appear in the medical records filed in evidence at trial any complaints made by Zuber related to injuries suffered in the accident. Zuber sought to explain this obvious discrepancy, by suggesting he missed medical appointments but was keeping track of his complaints in notes that he was keeping. When asked where those notes were, he did not know. It is hard to accept this explanation when the very notes Zuber maintains he was keeping are not produced.

[291] One of the ongoing complaints made by Zuber that he relates back to the accident is an ongoing problem with headaches. The first recorded complaint of a headache in the medical records is not found until January 23, 2002, well over two years post-accident. In the absence of complaints in the period immediately post-accident and expert evidence to link the first complaint to a period two years post-accident, it is hard to reconcile the complaints of headaches as being accident-related.

[292] The medical records, in addition to supplying a source of information linking complaints to the injuries suffered in the accident, also reveal that Zuber suffered from other injuries totally unrelated to the accident. In March 2002, he broke his left fibula while skiing in Switzerland. He acknowledged this caused him to be away on sick leave until April 26, 2002. In July 2002, there are recorded complaints of pain in his Achilles for over a year. Zuber tried to explain this notation in the records as being related to the fractured fibula, which makes no sense given the Achilles pain is recorded to have lasted for a year and the broken fibula only occurred a few months prior.

[293] The medical records reflect that on January 16, 2003, Zuber complained that he hit his head and fainted when he was in a car accident. There are also recorded complaints on the same date of headaches, dizziness and Achilles pain. Zuber stated he was not in a car accident, but rather slipped on ice getting out of a car. The medical records also suggest "LOC", a short form for loss of consciousness. Zuber suggested that LOC in Poland means fainting. Zuber is not a medical doctor. His explanation in this regard was unsolicited. No evidence was called from a Polish medical practitioner to corroborate Zuber's assertion that LOC means fainting.

[294] Zuber saw a neurologist on January 17, 2003, who made note of a traffic accident without LOC. There is also a notation of periodic headaches and migraines. Zuber, when challenged in cross-examination, suggested that on that visit the neurologist told him he may have aggravated his injuries suffered in the train accident. Nowhere in that record, however, is there even a mention of the train accident, only a traffic accident.

2018 ONSC 4370 (CanLII)

[295] In one of the medical records for October 4, 2004, there is reference to Zuber complaining of decreased mood, sleep problems and decreased concentration in relation to his then ongoing divorce. Zuber maintained in his evidence that his divorce proceedings were not the cause of those problems; rather, he stated that because of the cumulative problems caused by the train accident that impacted on his business affairs he was very depressed. While the medical records suggest otherwise, in his cross-examination Zuber explained that the doctor took a shortcut to link his depression to the divorce.

[296] The medical records post-accident make very clear that Zuber suffered from a multitude of health problems that had nothing to do with the accident. Those issues included his very bitter divorce from his wife, which on all accounts impacted his mental health. All of these issues caused his doctors to issue medical certificates allowing him to be off work. While Zuber may have suffered injuries in the accident that impacted on his ability to earn an income, any impact on his income earning capacity also has to take into account other non-accident-related issues, which include injuries suffered in a motor vehicle accident; his depression caused by his divorce; and the fact he had degenerative disc disease in his cervical spine that predated the accident.

Dr. Robert Granowski

[297] Dr. Granowski has been one of Zuber's treating physicians in Poland. He is 83 years of age, still practicing two days per week, and has specialized in rehabilitative medicine since 1966. He has a PhD in orthopedic surgery, which he obtained in 1978.

[298] Zuber, in his evidence in-chief, was asked when he first saw Dr. Granowski. He did not specifically answer that simple question (transcript, p. 464, line 4-13), but did testify as to where he saw the doctor. In his evidence in-chief on May 25, 2015 (transcript, p. 2 and following), Zuber was quite specific that he saw Dr. Granowski initially either at his private residence or private clinic, and then the following day at the Arthromed Clinic. As such, he would have had two initial consultations with Dr. Granowski.

[299] As for the treatment that he received when he saw Dr. Granowski, Zuber testified in-chief that Dr. Granowski performed a nerve block between C7 and his scapula to deal with what Zuber described as acute pain in his arms and right hand. If Dr. Granowski did see Zuber on two occasions, and if he performed a nerve block at C7, then one might expect Dr. Granowski to have recorded such a history in his clinical notes. No such history or treatment is recorded.

[300] The importance of Zuber's visit to Dr. Granowski and the nerve block injection cannot be overstated. If Zuber did see Dr. Granowski with complaints of injuries arising from the accident, and if he was treated with a nerve block at C7, such evidence lends considerable credibility to Zuber's story. If on the other hand he did not seek out medical treatment for his alleged injuries until well after the accident, it seriously calls in question whether or not the medical problems then complained of were causally related to the accident.

2018 ONSC 4370 (CanLII)

[301] One of the most significant parts of Dr. Granowski's evidence relates to a document that was marked as Exhibit 263A. The document is in Dr. Granowski's handwriting, and because of the contentious nature of this document I required that Dr. Granowski read - in Polish, exactly what was contained on Exhibit 263A. It was translated for the court by the Polish interpreter present in the courtroom, who had been properly sworn to translate from Polish to English. The document in English reads verbatim as translated, as follows:

> Zuber, Krysztof
>
> 2.01.1963
>
> Address Warsaw, Brgezinska Street 17B
>
> Description of treatment: Railway accident November 23, 1999
>
> Patient sustained head trauma with brain concussion and also with distortion of cervical spine as a result of this trauma. The patient suffers severe pains and severe brachial shoulder pain. Patient has undergone conservative treatment, **unable to work for a period of three months.** [Emphasis added.]

[302] Exhibit 263A has no date. Another copy of Exhibit 263A contains a date stamp of ZUS, which can be best described as the equivalent of the OHIP public health system in Poland. The ZUS date stamp on Exhibit 263A is July 20, 2005.

[303] Dr. Granowski was asked in-chief when he recalled first meeting Zuber. He indicated that the first appointment was on December 20, 1999, sometime between 5:00 p.m. and 6:00 p.m. He was asked what complaints Zuber made when he saw him on December 20, 1999. He indicated that the complaints were as reflected on Exhibit 263A. He also testified that in addition to the complaints reflected in Exhibit 263A, Zuber complained of sleepless nights due to his pain disorder. As well, there were complaints of dizziness. When asked why Exhibit 263A does not reflect any history of sleepless nights or dizziness, Dr. Granowski indicated that "perhaps it was at the bottom of the page" which he could not read.

[304] The significance of Exhibit 263A is found not so much in what it contains, but also what it does not contain. There is no reference to the fact Zuber maintains he saw Dr. Granowski twice - once perhaps at his residence or private clinic, and then the next day at Arthromed. But of greater significance is the absence of any recorded treatment; specifically, a nerve block at C7. There is also nothing recorded in this note that Zuber was referred by Dr. Granowski for an x-ray of his cervical spine.

[305] It is very difficult to conceive that Dr. Granowski would not have recorded the treatment he provided, assuming such treatment was given as testified to by Zuber. My comments in this regard are not to be taken in the context of what the court might expect in terms of a clinical record that is kept by a doctor practising in Canada. I have no evidence as to what the protocol or standards are in Poland that are expected of a treating doctor in terms

2018 ONSC 4370 (CanLII)

of the preparation of and keeping of a clinical note. Rather, my comments are made in the context of what Dr. Granowski reflected in his clinical notes found at Tab 8 of Exhibit 263. In those notes Dr. Granowski records the history he took from his patient, Zuber, and any treatment he provided, such as the prescription of medication; a referral for diagnostic testing; or referrals for physiotherapy.

2018 ONSC 4370 (CanLII)

[306] The evidence of Zuber does not match up with what is reflected in Exhibit 263A. This exhibit, which purportedly reflects a visit to a treating doctor shortly after the accident, is a critical piece of evidence. The clinical note of Dr. Granowski is not dated; it does not reflect two visits as testified to by Zuber; and it reflects no treatment; specifically, a nerve block at C7.

[307] The next recorded visit by Dr. Granowski with Zuber does not occur until January 7, 2001. Thereafter, there are fairly regular visits recorded in 2001, 2003 and 2004. Those visits reflect ongoing complaints recorded by Dr. Granowski of a history of the pain in Zuber's cervical spine, as well as migraine headaches. The last recorded visit with Dr. Granowski in 2004, would appear to be on July 30, 2004. There is then a gap in visits between Dr. Granowski and Zuber of approximately six years. Zuber next sees Dr. Granowski on March 30, 2010. In the five recorded visits with Dr. Granowski in 2010, the clinical notes reflect ongoing complaints in Zuber's cervical spine, with pain and numbness in his hands.

[308] The cross-examination of Dr. Granowski focused almost entirely on Exhibit 263A. Dr. Granowski was asked how he could recall the exact date when the clinical note, Exhibit 263A was prepared, given that the exhibit has no date. He testified that another copy of Exhibit 263A was brought to his office by Zuber and his lawyer in the spring of 2014. He testified that the document he saw in 2014 had the date on it at the very bottom of the page. Dr. Granowski explained that the other version of the document that he was shown by Zuber and his lawyers was discarded during the course of an office renovation. It has not been produced during the course of this trial. Assuming a better copy of this crucial exhibit was in the hands of Zuber and his lawyer - regardless of it having been lost by Dr. Granowski, it is not unfair to suggest that Zuber and his lawyer had an obligation to produce it to the defence. It never was.

[309] If the document existed and was in the hands of his lawyer, it had to be produced. Alternatively, an explanation should have been forthcoming as to why it was never produced. I recognize the predicament that Mr. Strype found himself in given that he could not be both counsel and a witness. But I cannot accept the submission made by Mr. Strype in his written reply submissions, when he states:

> With respect, this trial has taken place 15 years after the event. It is the Plaintiff's submission that the original document in this case might have been located had this trial been held 5 years after the event, such that the above issue would have been non-existent. Given this length of time, the court should not be critical of the evidence of either Dr. Granowski or

> Mr. Zuber, on this point. The other evidence points to the treatment of Mr. Zuber occurring in December 1999, regardless of the document.

What this submission ignores is that in fact a copy of the document is said to have existed, which had the date on it when Zuber met with Dr. Granowski in 2014 in the company of his lawyer. It is inexcusable if the document did exist in 2014 with the date, that it was never produced. Whoever the lawyer was who attended with Zuber in 2014 never testified at this trial. There is no evidence that corroborates Dr. Granowski's evidence. As my reasons below explain, I do not accept Dr. Granowski's explanation as to when he says he saw Zuber.

[310] Mr. Strype argues that the fact Exhibit 263A is undated is irrelevant, as there is other evidence that ties the date to December 20, 1999 as testified to by Dr. Granowski. He points to the evidence of Zuber, who said he underwent an x-ray in February 2000 which was ordered by Dr. Granowski. By inference, if the x-ray was done on February 1, 2000, it had to be Dr. Granowski who had ordered the x-ray. The problem with this argument is that it does not mesh with the actual evidence. Dr. Granowski worked out of two clinics, Arthromed and Lux Med. He did not work out of a clinic called the Damian Clinic. The x-ray was done at the Damian Clinic (Exhibit 262, Tab 1, p. 22). There is no medical record authored by Dr. Granowski that requisitioned the x-ray at the Damian Clinic on February 1, 2000.

[311] It is also intriguing to note that Exhibit 263A appears to have been translated from Polish to English by a translator in Warsaw on February 13, **2001**. [My emphasis.] The x-ray of February 1, 2000, is translated again by a translator in Warsaw on November 24, **2000**. [My emphasis.] Most of the documents in this case were translated from Polish to English. Most of the translations appear to have been done by a Polish translator in Toronto well after the trial before Ferguson J. in 2007. I cannot conceive of any reason why a Polish medical record would have been translated into English in 2000 or 2001. One possible explanation, is Zuber knew in 2000 or 2001 the importance of these documents and the need to have them translated. But that explanation makes no sense given Zuber's explanation for why so many of the documents needed to prove his loss of income were no longer available. He says he did not know he had a claim until many years after the accident.

[312] It seems remarkable to me that if another copy of Exhibit 263A did exist with a date at the bottom of the page, that that document would not have been produced in fulfillment of Zuber's onus to prove his case. It also flies in the face of an Order of this court made on November 7, 2011 by Lauwers J. (as he then was), requiring Zuber to make enquiries of Dr. Granowski with respect to the date of the document. This is particularly so given that Zuber apparently met with Dr. Granowski with his lawyer. At that meeting in 2014, Dr. Granowski testified that Zuber brought with him a better copy of Exhibit 263 which was dated. The fact that the document has not been produced, in my view weighs very heavily against the credibility not only of Dr. Granowski's evidence, but equally weighs heavily against Zuber's credibility in terms of his complete failure in producing relevant documentation to this court.

2018 ONSC 4370 (CanLII)

[313] The credibility of when Exhibit 263A was prepared can also be weighed against the contents of the document itself. The document purports to have Zuber's address as of the reported date of examination on December 20, 1999. The address recorded on Exhibit 263A, does not accord with the address that Zuber provided to the Polish tax authorities in his income tax return for 1999. The address is more in line with the recorded address for Zuber's Bastion Companies as of 2005, not 1999.

[314] Perhaps even more important is the fact that Exhibit 263A purports to establish that Zuber was complaining to Dr. Granowski as of December 20, 1999, that he had been undergoing conservative treatment and had been unable to work for three months. When questioned in cross-examination how, as of December 20, 1999 Dr. Granowski could be taking a history that Zuber had been off work for three months given that the accident occurred on November 22, 1999, Dr. Granowski noted "Yes, I am surprised by that note". There was an obvious inconsistency in a recording that Zuber had been off work for three months as of December 20, 1999, when the accident had only occurred approximately four weeks prior.

[315] Another inherent inconsistency in Exhibit 263A is the type of documentation used to record the history purportedly as of December 20, 1999. Exhibit 263A is on what can best be described as a form of letterhead for "Arthromed 1990". The remainder of the visits recorded by Dr. Granowski while he was at the Arthromed Clinic are completely different from the letterhead used on Exhibit 263A.

[316] For all of the reasons that I have reflected above, I have no confidence in establishing that Exhibit 263A was, in fact, prepared by Dr. Granowski on December 20, 1999. I do not accept Dr. Granowski's evidence that this document was prepared by him on December 20, 1999. I can only surmise that Dr. Granowski either has a faulty memory of when Exhibit 263A was prepared or, alternatively, that his memory has been refreshed by Zuber in an effort to create a document that reflects a medical history dating from December 20, 1999. I give no weight whatsoever to Exhibit 263A. The inconsistencies attached to this document that I have reviewed in detail above also detract from the rest of Dr. Granowski's evidence, and fundamentally calls in question Zuber's overall credibility with this court as well.

Dr. Ireneusz Abramczyk

[317] The importance of contemporaneous clinical notes made by a treating doctor in a personal injury action cannot be overstated, particularly when there are issues of causation raised by the defence. This case is no exception. I have already dealt with the significance of Dr. Granowski's evidence, and the complete lack of credibility of his clinical note purportedly made on December 20, 1999. Having rejected the evidence of Dr. Granowski for the reasons set forth above, the court must find other evidence of contemporaneous complaints made by Zuber to other treating doctors. One such doctor is Dr. Abramczyk.

[318] Dr. Abramczyk is a specialist in orthopaedic trauma, educated and trained in Poland. Dr. Abramczyk has treated Zuber. He has also treated Zuber's daughter and classifies himself

2018 ONSC 4370 (CanLII)

as a friend of the Zuber family, having socialized with the Zuber's "dozens of times". Dr. Abramczyk is one of about 100 doctors practising in Warsaw at what is called the Damian Clinic. The records of the Damian Clinic were filed as Exhibit 262, and included clinical notes made by Dr. Abramczyk. While the records reflect visits made by Zuber within days and weeks of the railway accident, they do not reflect any complaints related to the head (headaches), neck pain or back pain. Dr. Abramczyk, according to his clinical notes and the records of the Damian Clinic, first sees Zuber on March 23, 2002 in connection with a broken fibula that was treated by a "plaster (cast) under the thigh". There are no complaints made on March 22, 2002 that would be causally linked to the railway accident in 1999. Dr. Abramczyk next sees Zuber on August 21, 2002, when he records a history of "pain in both heels in the area of the Achilles tendon with variable intensity. Headaches occur in the morning, slightly less painful after start up". The records reflect Dr. Abramczyk referred Zuber for ultrasound for the Achilles.

2018 ONSC 4370 (CanLII)

[319] The next recorded visit in which Dr. Abramczyk sees Zuber is January 16, 2003, when he takes the following history from Zuber: "…yesterday a car accident, he hit his head. Immediately after the accident, fainted. Currently, the right elbow pain, dizziness, nausea, pain in the neck. Achilles tendon and right calf…." What is particularly noteworthy from my analysis of Dr. Abramczyk's clinical notes, is the absence of any reference to injuries suffered in a railway accident in 1999. In fact, there is a complete absence of any reference to any accident, railway or otherwise, between December 1999 and January 16, 2003. What is also noteworthy from Dr. Abramczyk's evidence in-chief at the trial, is his confirmation that the clinical note of January 16, 2003 is the first clinical note in the Damian Clinic records as a whole, where there are recorded complaints of head, elbow and neck pain.

[320] Dr. Abramczyk next saw Zuber on July 21, 2003. In his clinical note of that date, he records "for a few days cervical spine pain with radiation to the right hand side of the arm. **Three years ago** vertebral fracture of vertebrae C1-C4 referred to have electromyography….recurrence of pain in the cervical spine. MRI large hernia of C4-C5 and C5-C6. Intensive rehabilitation…" [Emphasis added.] The reference to a fracture three years prior is not reflected anywhere in the Damian Clinic records. In cross-examination, when confronted with this glaring inconsistency, Dr. Abramczyk could provide no explanation. He was asked in cross-examination if Zuber had ever told him he had suffered a fracture of his vertebrae, to which he acknowledged he had not made any note of such a history.

[321] The time period after an accident, is a time frame when it is reasonable to assume that a competent doctor doing his or her job, will record the relevant and necessary history from a patient that will assist in the diagnosis and required treatment. The Damian Clinic records reflect many incidents in which Zuber gave a history subsequent to the railway accident of situations in which he was injured. By way of example, he fractured his leg while skiing in 2002 (page 81, Damian Clinic records); a car accident in January 2003 (Dr. Abramczyk's clinical notes); a fall in November 2004 resulting in "problems with the cervical spine" (page 168, Damian Clinic records); July 30, 2005 Zuber was punched in the face; August 18, 2006 Zuber was attacked and assaulted by two persons. Nowhere,

however, does anyone record any history of a railway accident in November 1999, until many years after the event. Most significantly, the Damian records - which reflect visits very shortly after the accident, make no mention whatsoever that Zuber was in a railway accident in Canada, let alone record any history that might reflect being involved in a traumatic situation. If Zuber was in as much pain as he says he was immediately after the accident, it is not unrealistic to suggest he would have walked into the Damian Clinic complaining of headaches, as well as neck and back pain. He did come into the Damian Clinic on November 29, 1999 (four days after the railway accident), with a complaint of hoarseness in his throat. He had an appointment presumably for follow-up on December 15, 1999, an appointment he did not keep. The lack of any contemporaneous history to a treating doctor of accident-related complaints, seriously undermines the credibility of establishing a causal link to Zuber's present medical condition.

2018 ONSC 4370 (CanLII)

Physiotherapist Wojciech Salik

[322] If the Plaintiff did not complain to a doctor in Poland about his injuries suffered in the accident within some reasonable time frame post-accident, did he complain to other treatment providers that might lend credibility to his claim he was injured in the railway accident? Wojciech Salik (Salik) has a Master's Degree in Physiotherapy obtained in Poland. Salik prepared an affidavit (Exhibit 234), which was received as his evidence in-chief. Salik indicates in his affidavit that he began treating Zuber on December 8, 1999, at which time he noted "reduced mobility of the cervical spine, especially during rotation; bending the head to the right increased the pain of the nuchal muscles; pain in his neck increased with movement. He had localized pain in the intra-scapular region of the thoracic spine. My diagnosis was that these symptoms resulted from his hitting the top of his head, causing a strong compressive load of the spine". On its face, this note reflects a contemporaneous complaint of neck pain that is potentially causally linked to the railway accident. But is it credible?

[323] In cross-examination, Salik was asked about where his clinical notes were with respect to the 50 treatments he says he gave Zuber between December 1999 and June 2000. Salik advised he was not required under Polish law to keep any notes. If that was the case, then I question why did he have the note of December 8, 1999 (Exhibit 235) which reflects treatment and history provided, when it is dated June 30, 2000? Exhibit 235 reflects a series of treatments that are found in Exhibit 237. The treatments found in Exhibit 237 reflect various dates in December 1999. On many of the dates in December, Zuber confirmed in his evidence that he was on vacation outside of Poland. It would, therefore, have been impossible for Salik to have provided treatment to Zuber on dates in December, found on Exhibit 237, when he was not in Poland.

[324] In cross-examination, Salik was asked whether anyone had told him Zuber was away on vacation in December 1999 prior to the preparation of his affidavit (Exhibit 234), as the affidavit does indicate he was advised by Zuber's lawyers "….that Mr. Zuber was out of the country near the end of 1999 and at the start of 2000". "I have no recollection of this…" Salik stated in cross-examination he "began to remember the dates sometime last year (2015)". I find it inconceivable that Salik, in his affidavit would say he has no

recollection of Zuber being out of the country, and then suggest in cross-examination he began to get a memory of this in 2015 - 15 years after the event. He was then asked specifically in cross-examination if Zuber had told him about being away on vacation when his records suggest he was getting treatment. Salik denied Zuber brought this to his attention, and when further pressed he simply did not remember.

[325] Salik stated in cross-examination that Exhibit 236 (reflecting treatment given to Zuber to his neck), was created on December 8, 1999. If this is the case, why is it dated June 30, 2000? Salik testified it was prepared at Zuber's request. I have no confidence that Exhibit 236 was created on December 8, 1999. It would have been impossible for him to have known on December 8, 1999 that treatment would cease on June 30, 2000, which is the date on the top right corner of Exhibit 236. Salik's evidence does not provide credible evidence of contemporaneous treatment for complaints of neck pain.

2018 ONSC 4370 (CanLII)

<u>Dr. Jewginij Panow</u>

[326] Dr. Panow has been a treating doctor of Zuber, as revealed by his clinical notes and records, since May 29, 2004. He describes himself as a doctor of rehabilitative medicine, and graduated from medical school in the former U.S.S.R. His speciality training lasted five years. He acknowledged, however, that he is not recognized as a specialist in rehabilitative medicine in Poland because he did not pass his exams. He is, however, qualified as a medical doctor under the equivalent regulatory body in Poland similar to our College of Physicians and Surgeons.

[327] Dr. Panow's clinical notes and records were filed as an exhibit and entered for the truth of their contents. The first clinical note is dated May 29, 2004, when Dr. Panow took a history from Zuber that he had been involved in a train accident and was experiencing pain in his neck, shoulders and right hand. It is also noted that he had no feeling in his right hand, with a reduction in his muscle strength. Noteworthy is the absence of any complaint with respect to headaches. There was also no complaint of issues with depression. The first reported complaint of a headache does not occur until August 18, 2005, when Zuber gave a history to Dr. Panow of being involved in some kind of an assault. Thereafter, there are only two other recorded complaints with respect to headaches.

[328] The clinical records of May 29, 2004, are also noteworthy for the absence of any complaint with respect to the lumbar spine. The first complaint with respect to Zuber's lumbar spine is not found until November 3, 2005. This complaint is also recorded in connection with an assault, when Zuber gave a history of being kicked in the area of his lumbar spine and sacrum.

[329] In Dr. Panow's evidence in-chief, he stated that he did not know Zuber prior to the first recorded visit of May 29, 2004. This evidence needs to be contrasted with Exhibit 299, a letter written by Dr. Panow as a "reference letter", which was apparently written at Zuber's request in connection with divorce proceedings that were before the courts in Poland and, in part, related to the custody of his daughter. Exhibit 299 begins with the

assertion that he had known Zuber since 2001, and that he had seen Zuber socially about a dozen times. He goes on in the letter to indicate that he had visited Zuber at his apartment many times socially. This statement needs to be contrasted with his evidence in-chief that he had not known Zuber prior to 2004, and that from a social perspective - at most, he would have had dinner with Zuber once.

[330] Dr. Panow agreed that the letter was intended to be seen by a judge in Poland dealing with the divorce proceedings that Zuber was involved in with his wife. He acknowledged that the date in the letter is incorrect and it should have stated 2004.

[331] I have little to no confidence with Dr. Panow's evidence that the letter was incorrect as it relates to the date. This is because it goes on further to suggest that his social involvement with Zuber was far more extensive than what he led this court to believe, and involved more than one dinner. I can only conclude that Dr. Panow was providing evidence to a member of the judiciary in Poland that was incorrect or, alternatively, that the evidence that he was providing to this court was incorrect. Either way, it calls into question the credibility of Dr. Panow's evidence in its entirety.

Dr. Palaw Baranowski

[332] Dr. Baranowski is a neurosurgeon, who qualified as a doctor in 1979 and received his specialization in 1985. He first saw Zuber in June 2004, with an initial diagnosis of cervical discography at C5, C6 and C7. He was seen again in November of 2005 when a further magnetic resonance imaging (MRI) was conducted, the results of which were basically the same as his initial visit in 2004. Amongst Zuber's various complaints in November 2005, was an inability to use any means of transportation and an inability to drive. He was having difficulties with concentration and work, and was very irritated in his life.

[333] In September 2011 Zuber was again seen by Dr. Baranowski as an outpatient, complaining of an exacerbation of his various symptoms which were creating difficulties at work and in his private life. Dr. Baranowski was quite clear in his evidence in-chief that all of Zuber's problems were causally linked to his railway accident in 1999.

[334] Dr. Baranowski prepared a report dated October 24, 2015, which had been requested by Zuber's lawyers. Dr. Baranowski was given various documents by Zuber's lawyers, and in his report he concluded:

> The clinical symptoms experienced by Mr. Krysztof Zuber have a fully substantiated post-traumatic background relating to the serious accident of 23 November 1999. My 30 years' experience of spine diseases and injuries treatment allows me to fully agree with the opinion of Professor Bob Karabatsos. The accident caused permanent decrease in the quality of the patient's personal, professional and social life, and its further consequences may lead to progression changes which are already visible throughout the 12 years of observation.

2018 ONSC 4370 (CanLII)

[335] Dealing with the comment "progression of changes which are already visible throughout the 12 years of observation" set forth in the last sentence of Dr. Baranowski's aforesaid report, I note that Dr. Baranowski first saw Zuber in June of 2004. Twelve years of observation would take one through 2016. The last clinical note of Dr. Baranowski was in 2011. I can only conclude that Dr. Baranowski must be mistaken with respect to his statement in the last sentence of his report, that leaves one with the impression that he has been observing Zuber for 12 years.

[336] When questioned in-chief as to his prognosis, Dr. Baranowski indicated that Zuber's medical problems could lead to a "vegetative condition", which he described as someone being "crippled".

[337] Dr. Baranowski was cross-examined with respect to his 2004 report, in which he stated that Zuber had been treated for over a year. The earliest entry reflecting treatment by Dr. Baranowski was in May 2004. When questioned as to how he could state he had been treating Zuber for over a year, Dr. Baranowski indicated that he "may not have had all the documents with him" at the time of the preparation of his report.

[338] Dr. Baranowski was cross-examined with respect to the extent of his knowledge concerning other events in Zuber's life which may have caused him injury. He was not told of the situation in 2003 when Zuber fractured his leg, nor was he told of any other accidents or injuries. When questioned as to whether or not he should have known of all of the other situations in which Zuber may have injured himself before offering an opinion, Dr. Baranowski stated "I am not going to comment or argue with your statement. My final decision was from 2015 which was for claims purposes". Such a statement, in my view, reflects poorly on Dr. Baranowski's evidence, and reflects a doctor who is more intent on advocating for his patient than assisting the court with respect to an opinion that could be susceptible to revision if he had known of all of the relevant facts.

[339] Dr. Baranowski was shown photographs of Zuber on his motorcycle (Exhibit 195), which were taken in May 2004. These photographs are significant in that they reflect the same time period when Dr. Baranowski was first seeing Zuber. When shown these photographs, Dr. Baranowski stated "We are wasting time". This again reflects poorly on Dr. Baranowski, and is a further reflection of his perceived role in advocating for his patient, Zuber.

[340] Dr. Baranowski was taken through the case history of April 27, 2004 through May 20, 2004. In that case history, Exhibit 263, Tab 2, pages 2 to 19, it is noted that the patient (Zuber) is complaining of pain symptoms in his cervical spine, as well as pain and numbness in the upper extremities. The physical examination was noted as "good". As far as his neurological status, there were "no abnormalities". As for his cervical spine, the flexibility was noted as "normal" and there was tendonitis noted with pain around C3 and C4. As for his upper extremities, his active movements demonstrated a "full range" and his muscle strength was noted as "4/4 plus".

2018 ONSC 4370 (CanLII)

[341] When questioned with respect to the contents of the case history reflected above and the suggestion that the range of motion of Zuber's cervical spine was normal, Dr. Baranowski indicated that "someone wrote this down to avoid any further questions". He acknowledged that the clinical examination "did not find any issues". He further stated that the hospital records did not show the "complete picture".

[342] As for the suggestion in his report of October 24, 2005 (Exhibit 304) that Zuber has experienced headaches and dizziness since the time of the railway accident in 1999, Dr. Baranowski was asked where in the complete medical chart there was any reference in the first visits made by Zuber of complaints of headaches and dizziness. Dr. Baranowski spent some considerable period of time reviewing the medical records and gave no answer to this very basic question.

[343] While Dr. Baranowski, like so many of the Polish medical witnesses is an undoubted expert in his field of neurosurgery, he was more an advocate for his patient than the unbiased expert this court expects when a medical witness is providing evidence to the court. The circumstances surrounding the preparation of Exhibit 304, and the involvement of Zuber in the preparation of that report - as reflected in the evidence of Dr. Manowiec, also calls into question the credibility of Dr. Baranowski.

<u>Dr. Radoslaw Manowiec</u>

[344] Dr. Manowiec is a neurosurgeon who works at the military hospital in Warsaw. He completed his initial medical training in 1994, and over a further 11 year period continued his training as a neurosurgeon. He testified that he has been doing neurosurgery, including surgery on herniated discs, since 1995.

[345] Dr. Manowiec began treating Zuber in April 2006. At that time, he saw Zuber in connection with an assault that had occurred a few days previously. Zuber at that time was complaining of problems with his cervical spine, indicating that he had lost consciousness and was having headaches and concussion-like symptoms. Dr. Manowiec ordered further diagnostic tests, including a CT scan and an MRI. Dr. Manowiec testified that during this visit he found out about Zuber's accident in 1999, in which he described having suffered a head and neck injury. Noteworthy, is the fact that nowhere in Dr. Manowiec's clinical notes is there any reference to the train accident when he saw him in April of 2006.

[346] Dr. Manowiec saw Zuber again in August of 2006 in connection with disorders to his cervical spine and his upper extremities. Zuber attended with his MRI that showed multi-level discography. There was no indication of any serious injury to the brain. When questioned in-chief as to whether or not the multi-level discography was related to the assault in August 2006, Dr. Manowiec indicated that discography needs some time to become visible on an MRI. The implication from this evidence is that the discography was not causally linked to the assault of 2006.

2018 ONSC 4370 (CanLII)

[347] Zuber was next seen after his appointment of August 2006, in February 2008. A further MRI was conducted which showed cervical discography with herniation's at C5, C6 and C7. Zuber was complaining of dizziness, headaches and weakening of his muscles, especially on the right side. Zuber was complaining of numbness and heavy swelling which was preventing him – together with all of the symptoms that he was experiencing, from normal activities of daily living. When questioned as to how long Zuber had been experiencing these symptoms, Dr. Manowiec indicated that as far as he knew - based on Zuber's history, these symptoms had continued since the train accident in 1999.

[348] Dr. Manowiec prepared a report dated October 26, 2009, marked as Exhibit 300. Dr. Manowiec diagnosed post-traumatic multi-level discography at C5, C6 and C7, and indicated that the symptoms were "undoubtedly related to the cervical spine injury resulting from the traffic accident in 1999". Dr. Manowiec testified in-chief that the assault which occurred in August 2006 when he first saw Zuber was "a minor injury to the head", and that all of Zuber's symptoms stemmed from the 1999 accident when he was unconscious.

[349] It may very well be that Dr. Manowiec is simply mistaken in Exhibit 300, as well as with respect to his clinical note in February 2008 where he has a history of an accident in 1999 which is described as a traffic accident, a transportation accident or a motor vehicle accident. Regardless of what it was in 1999, Dr. Manowiec was quite clear in his evidence in-chief that he was of the view that the sole cause of the Plaintiff's ongoing complaints was due to the 1999 accident.

[350] In cross-examination, Dr. Manowiec confirmed that there was no mention of the train accident in his initial notes in 2006, and it is not until his report of October 26, 2009 that there was any mention of the 1999 accident. When questioned as to how he could remember the 1999 accident given that there is no reference to it in his clinical notes and records, Dr. Manowiec stated "There are certain things that you remember even 20 years ago".

[351] In cross-examination, Dr. Manowiec acknowledged that he was never told about the incident when Zuber fractured his leg, nor was he told about any of the other incidents when Zuber either fell or was assaulted. He acknowledged that in order for him to give an opinion linking Zuber's symptoms to the train accident in 1999, he should have had a complete history. He further acknowledged that there is no reference in his report of October 26, 2009, of any of the other incidents in which Zuber may have been injured since the train accident.

[352] When questioned in-chief as to whether the assault that initially caused the Plaintiff to see him in August of 2006 had any impact on the earlier injury, i.e. the injury in 1999, Dr. Manowiec stated that it was a minor injury to the head but that "everything stemmed from the 1999 accident when he was 'unconscious'". I note in this regard, that the evidence as to whether the Plaintiff was rendered unconscious as a result of the railway accident in November 1999 is somewhat in dispute, given Budny's evidence who testified that Zuber did not lose consciousness.

2018 ONSC 4370 (CanLII)

[353] Dr. Manowiec was cross-examined with respect to the absence of any recording of complaints related to the 1999 accident when he first saw the Plaintiff in August 2006, in connection with the incident in which he was assaulted. In that regard, Dr. Manowiec somewhat remarkably stated that he had a specific recall of the Plaintiff informing him of the railway accident when he saw him in August 2006, despite the fact that his notes make no reference of that accident. I view this as somewhat remarkable given that the notes were made contemporaneously with the history that he was taking from Zuber, but more importantly nearly 10 years have lapsed since he saw the Plaintiff in 2006. I find it extremely difficult to accept that Dr. Manowiec would have an independent recall of facts that are not reflected in his clinical notes and records.

[354] Dr. Manowiec was questioned in cross-examination with respect to a report dated October 24, 2015, that had apparently not been produced prior to his testimony. Dr. Manowiec stated that the report was requested by Zuber's counsel. He indicated that the report was a "compilation of all of the information" that he was provided. In the first paragraph of the report, Dr. Manowiec states:

> According to the documentation provided by the patient, he was involved in a railway accident in 1999 in which he sustained a serious injury to his head and a concussion, cervical spine injury and injuries to other parts of his body, supervision.

[355] In the fourth paragraph of Dr. Manowiec's report, Exhibit 303, he goes on to state:

> During further follow-up consultations between 2006 and 2012 and currently, a progression of the symptoms has been observed - i.e. vegetative neurosis, physical mobility impairment, exasperating pain syndromes. These result from the head and cervical spine injuries.

[356] I have quoted the aforementioned paragraphs from Dr. Manowiec's report, because they are important in the context of Dr. Manowiec's admission in cross-examination that he had met with Zuber for the purposes of preparing the report approximately two weeks prior. The meeting lasted approximately 30 minutes. The meeting with Dr. Manowiec, therefore, occurred at a point in time when Zuber was subject to the witness exclusion order made at the beginning of this trial. It is quite clear that Zuber, when he saw Dr. Manowiec in October 2015, was not doing so for the purposes of treatment. The sole purpose of the meeting is self-evident, and that is to provide to Dr. Manowiec information that would allow him to prepare a report to further reinforce the Plaintiff's theory of a causal link between injuries suffered in November 1999 and his present presentation. In speaking to Dr. Manowiec, Zuber also ignored my specific admonition to him not to speak to any witness who might testify at this trial.

[357] What is also particularly troublesome from Dr. Manowiec's report, Exhibit 303, is that it leaves the impression that there were follow-up consultations between 2006 and 2012, as a result of which there has been a "progression of symptoms observed". The evidence of Dr. Manowiec at trial is quite clear that he only saw the Plaintiff on three occasions; two

2018 ONSC 4370 (CanLII)

of which occurred in August 2006 and one in February 2008. Since February 2008, there is no evidence that Dr. Manowiec saw Zuber as a treating doctor and, as such, his statement (quoted above) seriously calls into question the credibility of Dr. Manowiec's evidence in its entirety.

[358] What is also particularly troublesome from the cross-examination of Dr. Manowiec as it relates to Exhibit 303, is what appears to be a form of collusion between Dr. Manowiec and Dr. Baranowski. The collusion arises out of the filing of Exhibit 304 - which is a report dated October 24, 2015 authored by Dr. Baranowski, which in many respects is almost identical to the report and language used by Dr. Manowiec in Exhibit 303.

[359] While Dr. Manowiec may very well be an imminently qualified neurosurgeon who provides valuable neurosurgical treatment to his patients in Poland, his evidence in my view is seriously tainted not just because Zuber appears to have been consulting with Dr. Manowiec at a point when he was in cross-examination, but more importantly Dr. Manowiec's report would lead the reader of the report to conclude that he had been consulting with or treating Zuber between 2006 and 2012. Those statements in his report which I have quoted are simply inaccurate. He only saw Zuber on three occasions; most recently in 2008, and certainly not through 2012. I, therefore, accord very little weight to the opinions of Dr. Manowiec.

2018 ONSC 4370 (CanLII)

The Expert Medical Evidence

[360] As with most personal injury trials, I heard evidence from not just treating doctors but also experts retained by both the defence and the Plaintiff. For the most part, those experts provided their opinions on the basis of assessments done many years after the accident, in most cases more than 10 years after. In providing an opinion to the court these experts relied on the history provided by Zuber; the medical records supplied by retaining counsel; and their physical assessment and testing. The reliability of the experts' opinions are, therefore, only as accurate as the history provided by Zuber and the reliability of the medical records supplied to the expert.

[361] I have already given my reasons why the evidence of many of Zuber's treating doctors cannot be relied upon. I have also given my reasons why some of the medical records of these treating doctors cannot be relied upon. Most significant amongst those records, are the records that reflect purported contemporaneous complaints of a head injury associated with headaches and neck pain. The experts retained by either side, could not be expected to look behind the medical records they have been supplied to know that some of these records may be found by the court to be lacking in credibility and reliability. However, to the extent that an expert has relied upon records that suggest Zuber was complaining of neck pain and constant headaches after the accident in support of their ultimate opinion, such opinion is undermined.

[362] Furthermore, to the extent an expert has relied on the history given to them by Zuber, that history needs to be carefully scrutinized to determine if it is accurate. If Zuber's history is not accurate and misled the expert, it again undermines the expert's opinion. An example

that demonstrates this point can be found in a history provided by Zuber to Dr. Kurzman, a neuropsychologist who assessed Zuber in February 2011 at the request of Mr. Strype.

[363] Dr. Kurzman recorded in his report that Zuber had told him that:

> He returned to Poland at the invitation of the Polish government to help the country rebuild its tourism sector….He related that his company became one of the 5 biggest consulting companies in the entire country. He bought and/or built several companies, he helped companies privatize, and he also represented several French Energy Companies in Poland. Mr. Zuber reported that he was also involved in introducing other European companies to the Polish Stock Agency and he helped to introduce capitalism to Polish companies…Mr. Zuber reported that in 2004 he ended up having to sell his business for a rather small sum of money. He has worked little since. He related that he continues to do some training and consulting but on a minimal basis. He noted that he is able to work only 2-3 hours per day and he rarely travels.

[364] So how does the aforementioned history provided by Zuber to Dr. Kurzman match up with the evidence? The statement that he returned to Poland at the request of the Polish government to rebuild the tourism sector is not borne out anywhere in the evidence. There was no evidence that Zuber's company, Bastion, was one of the top five in Poland. Zuber's history to Dr. Kurzman that he represented "several" French energy companies was not consistent with the evidence at trial - that being he represented only one French energy company, i.e. SNET. His history that he "rarely" travels is not accurate, as there was evidence that he was not an infrequent visitor to the Ukraine and had also visited Kenya, Turkey, Paris, Amsterdam, Russia and Cuba. While it may be fair to suggest the frequency of his travelling was not what it might have been prior to 1999, it would not be accurate on the part of Zuber to tell Dr. Kurzman that he "rarely" travels. Finally, there was no evidence at trial to suggest that Zuber had introduced European companies to the Polish Stock Exchange as he had led Dr. Kurzman to believe.

[365] The evidence of Dr. Rathbone, a neurologist who did an assessment of Zuber in 2011 - again at Mr. Strype's request, will also demonstrate the need for an accurate history from the patient. Dr. Rathbone had been told by Zuber that he could only lift his right arm to his shoulder level, and could not raise it above his head. Zuber also told Dr. Rathbone that he had been unable to ride his motorcycle after the accident. In point of fact, Zuber had driven his motorcycle from Poland to Sardinia in 2004, and he had undertaken a motorcycle trip with his wife in 2002. As for his inability to lift his right arm beyond shoulder level, that history was contradicted by photographs of Zuber doing quite the opposite (see Exhibit 195, Tab 2, pages 2 and 7). Perhaps the best evidence to the contrary, is the videotape of Zuber skydiving in Cuba.

[366] Dr. Rathbone was entirely candid in his evidence when he agreed that doctors are, to some extent, "confined by what their patients tell them". Dr. Rathbone also did not have the full picture as he was not told by Zuber about his post-accident incidents when he was injured,

2018 ONSC 4370 (CanLII)

such as the 2003 MVA; a 2004 fall on some stairs; and two assaults in 2005 and 2006. In that regard, Dr. Rathbone was also entirely candid in his admission at trial that had he been able to query Zuber about these incidents, he may have had a more complete appreciation of Zuber's post-accident condition.

[367] Dr. Karabatsos, whose speciality is orthopaedics, saw Zuber at the request of his lawyer in 2013. He received a history from Zuber that he suffered from neck pain and headaches since the accident. It will be recalled, Zuber had testified that after he left Canada and returned to Poland he was in "excruciating pain". His first visit to a doctor upon his arrival in Poland was not for excruciating pain, but rather for "hoarseness" in his throat and an issue with urination. Having rejected the reliability of Exhibit 263 as it relates to when Dr. Granowski first saw Zuber about complaints relating to the accident, there is no credible and reliable evidence that backs up the history provided to Dr. Karabatsos that Zuber had ongoing problems with neck pain and headaches from the time of the accident to when Zuber saw Dr. Karabatsos. Dr. Karabatsos cannot be faulted for relying on Zuber's history. It can readily be seen that if there were medical records that were reliable and credible that backed up Zuber's history, that the doctor's opinion becomes that much more reliable.

Dr. Rathbone

[368] Dr. Rathbone was called as an expert in the field of neurology. While he prepared an initial report in late 2010, this was only a "paper review" of Zuber's medical records. His first actual assessment of Zuber did not take place until February 2011. As part of this assessment, Dr. Rathbone took a history from Zuber. Included in the history was the suggestion made by Zuber that he had been suffering from terrible headaches and neck pain since the time of the accident. Dr. Rathbone was of the understanding, based on his review of the medical records, that Zuber had never complained of headaches prior to the accident.

[369] Dr. Rathbone was of the understanding from Zuber that he went to see a doctor in Poland shortly after his return from Canada, who diagnosed a whiplash-type injury. In point of fact, a review of the medical records shortly after Zuber's return from Canada does not establish a diagnosis from a Polish doctor of a whiplash injury. The first visit to a Polish doctor after his return from Canada was to deal with hoarseness in his throat and a urological complaint.

[370] The absence of any history of headaches, combined with a history of severe headaches and neck pain since the accident is, of course, factually important to any doctor's ultimate diagnosis, as it might relate to a head injury or possible brain injury. The reality of the evidence is that Zuber did not complain of the headaches and neck pain that are reflected in the medical records until some time after the accident. As for his pre-accident medical history, Dr. Rathbone seems to have overlooked the recorded history from Zuber on September 2, 1998, reflected in Exhibit 262 at Tab 1, page 1, that suggests Zuber was complaining to his doctor in Poland of "frequent headaches". Dr. Rathbone cannot be faulted for relying on Zuber's self-described history of complaints of severe headaches

2018 ONSC 4370 (CanLII)

and neck pain since the accident. The reality, however, is that the medical records do not support such a complaint and, as such, Dr. Rathbone's opinion is undermined.

[371] Dr. Rathbone diagnosed Zuber with a mild concussive injury that has left him suffering from post-concussion syndrome, with features of post-traumatic depression and other post- traumatic psychological issues. In coming to this conclusion, Dr. Rathbone - at least in part, relied upon the medical records from Poland which included various diagnostic techniques, including a CT scan and an MRI scan. In formulating his opinion that Zuber had suffered a head injury, Dr. Rathbone looked at the CT scan done on November 7, 2003 in Poland and arrived at the conclusion this CT scan showed shrinkage of the frontal part of Zuber's brain.

[372] The conclusion reached by Dr. Rathbone that the November 7, 2003 CT scan demonstrated shrinkage of the frontal part of Zuber's brain, needs to be contrasted with how the Polish treating doctors interpreted the CT scan. Dr. Malinowski, who is described as the Medical Centre Director at the Lux Med Medical Centre, reviewed the same CT scan as did Dr. Rathbone, and concluded his clinical note of November 8, 2003 as follows: "CT brain normal; complaining of dizziness exacerbating with changes of body position, especially in the morning *illegible* pressure 90/60; skull normal, cranial nerves normal" (see Exhibit 263, Tab 8, page 40). Dr. Malinowski, a treating doctor, did not interpret the CT scan as demonstrating an injury to the frontal part of Zuber's brain. Dr. Malinowski did not prescribe treatment for a brain injury. It is also worth noting that Dr. Steeves, who is a neurologist at St. Michaels Hospital, reviewed an MRI of Zuber's brain done in Toronto on June 29, 2012. Dr. Steeves concluded that the results of the MRI of the brain were within normal limits for a person of Zuber's age. Dr. Steeves was retained as an expert for Zuber. Dr. Steeves also reviewed the November 7, 2003 CT scan as well as a later CT scan done in 2005, and reported these scans as normal.

[373] As I have already made clear, the reliability of any expert's opinion - particularly a medical expert, is dependent on the reliability, credibility and accuracy of the facts upon which the opinion is based. In this case, Dr. Rathbone was never told by Zuber about the various situations after the railway accident when he was injured, such as the 2003 motor vehicle accident; the various assaults he was involved in in 2005 and 2006; a fall down some stairs in 2004; and the skiing accident when he broke his leg. Dr. Rathbone was told by Zuber he could not lift his right arm above his shoulder yet there are photographs that show the contrary, as well as a video of him skydiving. Dr. Rathbone was of the understanding that many of his pre-accident activities, such as motorcycling, had been eliminated because of the injuries he suffered in the railway accident. This history was proven inaccurate at trial. Dr. Rathbone was entitled to accept Zuber's medical history as given to him by Zuber. But where that medical and social history is not borne out at trial, it fundamentally undermines Dr. Rathbone's overall evidence. For this, Dr. Rathbone is not at fault – rather, the fault lies with Zuber for his failure to provide Dr. Rathbone with an accurate and credible history.

[374] Another glaring example of how the history provided to Dr. Rathbone by Zuber conflicts with the objective evidence, is Zuber's suggestion to Dr. Rathbone that his headaches and

2018 ONSC 4370 (CanLII)

neck pain were so severe he had to keep his movements to a minimum. He described his pain in these areas at a level 7 on a pain scale of 1-10, where 10 is extreme pain. The pain was such that he described his neck as feeling like a rock. If the extent of his pain was such as he described it to Dr. Rathbone, and if he had to therefore limit his movements to a minimum, how can one reconcile this evidence with the video of him skydiving? The answer to this question is that you cannot reconcile the two, and that the only explanation is that the video shows Zuber as he was – someone without the disability he complained of to his doctors, and someone without the extent of disability he testified to in this court.

[375] Another glaring contradiction in the histories provided to his various doctors is the history Zuber gave Dr. Rathbone as far as his sex drive is concerned. In his evidence in-chief, Dr. Rathbone testified that Zuber had told him that "he was completely deprived of his sex drive". While I never heard any confirmatory evidence from his second wife or his present live-in female partner that corroborated this evidence, I did hear evidence from Dr. Steeves that he received a history from Zuber that until three years prior to his assessment (October 29, 2012), he "engaged in sexual intercourse on a daily basis". Zuber's history to these two doctors is quite inconsistent, and like so much of Zuber's evidence fundamentally undermines the opinion of his own experts.

<u>Dr. Steeves</u>

[376] Dr. Steeves was called as an expert on behalf of Zuber, and was qualified as an expert in the field of neurology. Dr. Steeves, like so many of the experts who were called on behalf of the Plaintiff, received a history from Zuber that was not reflected in the evidence at trial.

[377] Dr. Steeves examined Zuber in October 2012. Prior to his physical examination, he took a history from Zuber in which Zuber indicated that he had been rendered unconscious at the time of the accident. Zuber also provided a history to Dr. Steeves that he had chronic stiffness and pain in his neck at all times, with episodes of severe pain from the base of his neck at C7 upwards towards his head. Dr. Steeves was advised by Zuber that the severe neck pain triggered severe headaches with migraine type features, and that he had chronic daily headaches which averaged on the VAS scale as six to eight out of ten.

[378] Dr. Steeves was provided with an extensive medical brief, as were all of the experts who testified in these proceedings. Amongst the medical documentation reviewed by Dr. Steeves were the various diagnostic tests conducted in Poland. Unlike some of the medical legal experts who saw Zuber, Dr. Steeves was provided with a history of various incidents post-accident in which Zuber had been injured, including an assault in 2006.

[379] Dr. Steeves in his evidence at trial understood that the headaches, chronic neck and shoulder stiffness, and episodes of pain extending down his arms all began several days after the accident. Dr. Steeves also testified at trial that Zuber suffered from continuous neck pain, rated at 8 out of 10 from the time of the accident to the time when he was first seen by Dr. Steeves in 2012.

2018 ONSC 4370 (CanLII)

[380] Amongst the various complaints reported to Dr. Steeves by Zuber were difficulties raising his right arm. Dr. Steeves also received a history from Zuber that he had problems washing his hair, such that he needed to brace his right elbow against the wall. Dr. Steeves did not have the advantage of observing Zuber as I did throughout the entirety of this trial, nor did he have the advantage of seeing the videotape of Zuber skydiving. He also did not have the various other photographs of Zuber entered as exhibits, demonstrating Zuber participating in various activities that do not evidence the problems alluded to by Zuber when seen by Dr. Steeves.

[381] The importance of an accurate medical history supported by accurate medical documentation cannot be overstated, particularly when the court is called upon to assess the reliability of an expert's opinion. An expert in any field, whether it is medical or otherwise, relies heavily upon the facts provided to him or her in arriving at the opinion offered to the court.

[382] As I have already reviewed in my Reasons, the medical records do not lend support to Zuber's assertion that he has been suffering from severe neck pain and severe headaches from the time of the accident to the time that he was examined by Dr. Steeves. As such, I cannot accept the underlying opinion offered to the court offered by Dr. Steeves, that the accident was the cause of Zuber's ongoing pain and stiffness in his neck and the triggering of the cervicogenic headaches.

[383] It is worth noting that in Dr. Steeves' examination of Zuber he undertook various diagnostic tests, including EMG testing of C6-7 which was normal. Various other tests undertaken by Dr. Steeves were also normal. Despite the normalcy of those tests, which generally speaking might be seen as an objective finding, Dr. Steeves nonetheless reached the conclusion that Zuber must have intermittent irritation of his nerves at the elbows because of his continuous complaints of symptoms. The continuity of the symptoms complained of by Zuber from the time of the accident until he was seen by Dr. Steeves is not borne out by the medical records. The objective normalcy of the diagnostic tests undertaken by Dr. Steeves is a finding that this court can take into account in terms of the overall assessment, not only of Zuber's injuries but also the damages claimed.

Dr. Gary Shapero

[384] Dr. Shapero was qualified as an expert in facet joint testing. He qualified as an MD in 1988, and runs the Shapero Pain Management Clinic where he does approximately 450 facet joint tests per annum. Dr. Shapero did facet joint testing on Zuber on January 22 and 25, 2013. He took a history from Zuber that he had been involved in a VIA Rail train derailment, as a result of which he hit the side of the wall of the train and was knocked unconscious. Zuber told him he was able to walk with assistance a distance of approximately one mile, and was taken to a local hospital where he was discharged with a cervical collar. Zuber told him that he took another train to Montreal after his discharge.

[385] When Dr. Shapero saw Zuber in 2013, he took a history that he had been suffering headaches and neck pain on a daily basis since the time of the accident. He would

2018 ONSC 4370 (CanLII)

experience these problems four to five days per week, and that the pain was severe one to two days per week. The average pain in his neck was at a level six on a pain scale of zero to ten. Significantly, Dr. Shapero did not take a history of any pain radiating into Zuber's shoulders and arms, nor any history of any numbness into his hands and fingers. This is particularly significant given that Zuber gave a history to Doctors Rathbone and Karabatsos of pain radiating into both shoulders, down his arms and into his fingers.

[386] Dr. Shapero injected Zuber's facet joint at the C5 level, and on the first test Zuber indicated this provided pain relief. The pain relief caused Dr. Shapero to undertake a second set of tests three days later. As a result of this testing, Dr. Shapero came to the conclusion it was a positive diagnostic study and the facet joints were contributing to Zuber's neck pain. Dr. Shapero also opined there was a causal relationship between the neck pain as a significant contributor to Zuber's headaches. Dr. Shapero concluded that because the neck pain and headaches began in 1999, there was a causal relationship between the ongoing pain complaints that he was diagnosing in 2013 and, thus, there was a temporal relationship between the VIA Rail accident and his pain complaints in 2013. He also indicated that Zuber's pain complaints were unlikely to spontaneously remit.

[387] In cross-examination, Dr. Shapero was questioned with respect to his state of knowledge of the medical records that had been provided to him. It was quite remarkable that Dr. Shapero, despite having the medicals records available to him, relied entirely on the oral history that was provided to him by Zuber. He stated he believed everything Zuber told him, and that he did not look at the medical records to corroborate Zuber's history.

[388] Dr. Shapero was asked whether or not Zuber had been involved in any other accidents, and whether any such history might affect his diagnosis. Again somewhat remarkably, Dr. Shapero not only did not know of any other accidents, he went on to state that even if Zuber had been involved in other accidents it would not affect his diagnosis, because Zuber had given him a history that his headaches were severe right from the time of the accident. Dr. Shapero was entirely reliant on Zuber's medical history and on Zuber himself.

[389] Dr. Shapero was asked if the evidence established Zuber did not complain of constant unremitting headaches from the time of the accident that this might be a cause for concern. He acknowledged this was a possibility, but would not have changed his diagnosis.

[390] At the bottom of page five of Dr. Shapero's report, there is an indication that a minimum of one week must elapse between the facet joint testing and injections. Dr. Shapero acknowledged that this was part of his protocol, and again somewhat remarkably acknowledged that despite his own protocol he undertook the testing of Zuber with only three days between injections. Dr. Shapero endeavoured to provide an explanation for why he did not follow his own protocol, an explanation that in my view made no sense if it was a protocol that Dr. Shapero always abided by.

2018 ONSC 4370 (CanLII)

[391] I have little to no confidence in Dr. Shapero's opinion for a number of reasons. First, he had available to him the complete medical records, such as they were, and despite the availability of those records appears not to have given any weight to the information that they might have contained. He has relied entirely on the oral history provided to him by Zuber, and never sought any corroboration from the medical records to see if in fact Zuber's history correlated with what other doctors – particularly treating doctors, had recorded.

[392] As well, I find it remarkable that Dr. Shapero would have a protocol of one week between facet joint injections, and felt it appropriate to still proceed with injecting Zuber with a lapse of only three days.

Dr. Perry Cooper & Dr. Gordon Cheung

[393] The Plaintiff and the Defendants both retained neuroradiologists; Dr. Cooper for Zuber and Dr. Cheung for the defence. Their reports were filed on consent. Mr. Strype, in his written submissions, suggests the Plaintiff was deprived of his right to cross- examine Dr. Cheung. The reports were filed on June 15, 2016, at a point in time when it was clear to everyone in the courtroom that the Plaintiff was rapidly running out of time to complete his case. I have reviewed the transcript of February 27, 2017, where there was extensive discussion about the admission of Dr. Cheung's report. My review of that discussion does not lead me to the conclusion urged upon this court in Mr. Strype's written submissions. All counsel had agreed to the admission of these experts' reports, and the Plaintiff has not been deprived of any rights to cross-examine Dr. Cheung. To the extent Zuber had the right to cross-examine, that right was removed by way of the consent of his counsel to admit the reports in the fashion that they were admitted.

[394] Dr. Cooper is a well-known and highly respected neuroradiologist whose evidence has been accepted by the courts in many cases in the past. Dr. Cooper had available to him for review a CT of the head done November 7, 2003; another CT of the head done July 30, 2005; an MRI of the C spine done February 24, 2004; and an MRI of the brain and cervical spine done June 29, 2012. What none of the experts had available to them was any diagnostic tests done prior to the accident. If those diagnostic tests had been available, they would - at the very least, have provided a benchmark from which to compare results done after the accident. It should, therefore, come as no real surprise, that Dr. Cooper could not say whether the changes demonstrated in the various diagnostic tests were caused by the accident or not. At its highest, Dr. Cooper suggests Zuber possibly suffered a brain injury as a result of the accident. As for the disc herniations at C5/6 and C6/7, Dr. Cooper states the obvious - that because he has nothing to compare the imaging studies to pre-accident, "…it is difficult to state when the disc herniations occurred in relation to the accident" (see Exhibit 314, p. 23).

[395] The whole issue of how the disc herniations in Zuber's cervical spine were caused is very much up for debate. Zuber and his various experts link the objective evidence from the various diagnostic tests to Zuber's history of excruciating pain immediately post-accident. The difficulty with any expert concluding that the various diagnostic tests give

2018 ONSC 4370 (CanLII)

confirmation to Zuber's complaints, is that Zuber's evidence in this regard is very much suspect. Zuber never complained to anyone in the medical community upon his return to Poland after the accident that he was suffering from excruciating pain causally linked to the accident. His first complaint was that of hoarseness in his throat and problems with urination.

2018 ONSC 4370 (CanLII)

[396] Dr. Cooper and Dr. Cheung have differing opinions as to their various interpretations of the diagnostic tests available to them. The linkage of any opinion to the probability that Zuber suffered some form of brain injury and/or cervical disc herniation is also dependent on the history relied upon by that expert. Dr. Cooper was unaware of a number of situations post-accident where Zuber was involved in situations where he was injured. Dr. Cooper was also unaware as to the extent of Zuber's level of activity post-accident, both in terms of his physical activity and work activities.

[397] Dr. Cooper offered his evidence to the court in a manner expected of an expert. His report is not that of an advocate whose sole purpose was to lend credibility to the theory of the Plaintiff's case. A careful review of his report does not support the conclusion that on a balance of probabilities, Zuber has suffered a traumatic brain injury causally linked to the accident. At its highest, Dr. Cooper states in his report that because the CT scan of Zuber's head was completed four years after the accident "it is difficult to definitely relate the atrophy to the accident; however this type of head impact, if it caused DAI, certainly could result in cerebral atrophy".

[398] As for the diagnostic testing reviewed by Dr. Cooper of Zuber's cervical spine, Dr. Cooper was could not offer an opinion as to when the disc herniations revealed by such tests actually occurred. He states in his report "again with no prior imaging near the time of the accident it is difficult to state when the disc herniations occurred in relation to the accident". It would have been very helpful to this court, and I suspect very helpful to experts like Dr. Cooper if more of Zuber's medical records had been produced prior to the accident. At most, the court and the experts had available records that predated the accident by little more than a year. No explanation was provided for the lack of medical records that covered an earlier period of time. Unlike Zuber's self-serving evidence that business records like tax returns are only kept for six years in Poland, I heard no evidence concerning the record keeping practices for medical records in Poland.

[399] The concern I express in relation to pre-accident records is perhaps best illustrated in relation to the radiological comments of Dr. Golebiowski (Exhibit 262, Tab 1, p. 22). Dr. Golebiowski reviewed an x-ray taken of Zuber's cervical, thoracic and lumbar spine at the Damian Clinic in February 2000. Amongst other things, he states in his report "physiological curvature of the spine **is found unchanged**". [Emphasis added.] In order for Dr. Golebiowski to make the comment that he did, I agree with Dr. Cheung that it is implicit that Dr. Golebiowski must have been looking at an earlier x-ray of Zuber's spine. It simply would not be possible for a radiologist to say something is "unchanged" unless he was making a comparison to an earlier x-ray. The earlier x-ray was never produced in these proceedings.

[400] Zuber had the onus of proving he suffered a brain injury that was causally linked to the accident. Dr. Cooper's opinion that there is a "possibility" of such a linkage does not come close to meeting that onus. This is not a case where the court has to prefer the evidence of Dr. Cheung over the evidence of Dr. Cooper. Similarly, Dr. Cooper's opinion that it is "difficult" to state when the disc herniation in Zuber's cervical spine occurred, does not assist the court in drawing the conclusion urged on the court by Zuber's counsel.

2018 ONSC 4370 (CanLII)

Future Care Costs

[401] At the commencement of trial, counsel provided the court with copies of various experts' reports to assist the court in understanding the evidence as it unfolded. Many of the experts whose reports were provided to the court were never called as witnesses. In my assessment of the evidence, I have only relied upon the evidence of those experts who either testified *viva voce*, or whose reports were filed on the consent of the party.

[402] Included amongst the various reports provided to the court, were reports prepared by Ellen Lipkus (Lipkus) who is a certified Life Care Planner and an Occupational Therapist. She prepared reports relating to the Plaintiff's long-term needs for future care, and provided an analysis of those costs. The costs were all in Canadian dollars.

[403] It was apparent from a review of Lipkus' reports that she relied upon numerous reports from various medical practitioners, many of whom were not called as witnesses. It was readily apparent to the court when I was first provided with a copy of her report that because the costing for the proposed care modalities was in Canadian dollars, that this could present an issue given that Zuber resides in Poland. I therefore raised with Plaintiff's counsel my concern that any claim for future care costs should consider the fact that Zuber resides in Poland, and as such the costing should reflect Polish medical and rehabilitative costs.

[404] My concern with respect to Lipkus offering an opinion on the need for future care included not only a concern about the costs being in Canadian dollars, but also whether the proposed treatment modalities were even available in Poland and at what cost. I also had a concern about which medical doctors being called by the Plaintiff would offer opinion evidence on the need for any of the care recommended by Lipkus.

[405] The estimated length of this trial, as agreed to by counsel in their request for a fixed date to the Regional Senior Justice, was 12 to 16 weeks. With every week that went by after the estimate of 16 weeks had been exceeded, I impressed on all counsel the need to get the trial completed. Eventually, a line in the sand had to be drawn. Ultimately, Plaintiff's counsel was advised that he would have to complete the evidence on behalf of his client by no later than September 9, 2016. I advised all counsel that the defence would be provided one week to tender its evidence, and the week of October 24, 2016 was set aside in this regard. It was also made clear to Plaintiff's counsel, that if the defence wished to make available to the Plaintiff any part of the week of October 24, 2016 for the purposes of tendering any further evidence on behalf of the Plaintiff, that the court would allow the Plaintiff that indulgence.

[406] September 9, 2016 came and went, and at that point in time Plaintiff's counsel had not called the evidence of Lipkus. Plaintiff's counsel had also not served any supplemental report from Lipkus that dealt with the cost of future care, as it related to costs that might be incurred in Poland as opposed to costs in Canadian dollars.

[407] Further complicating the admissibility of Lipkus' evidence was the fact that many of the medical experts - whose reports Lipkus had reviewed, were never called to give evidence on behalf of the Plaintiff.

[408] On October 20, 2016, i.e. days before the defence was to open its case on October 24, 2016, Plaintiff's counsel obtained a report from Dr. Abramczyk. Dr. Abramczyk describes himself as a "Specialist Orthopedist Traumatologist and Specialist Medico-Legal Insurance Assessor". Dr. Abramczyk had testified on behalf of the Plaintiff on May 18, 2016. His evidence was completed with his cross-examination on May 31, 2016. Dr. Abramczyk is a treating orthopedic doctor practicing in Poland. He had seen Zuber on various occasions after the accident. He did not testify with respect to the need for Zuber's future care.

[409] Dr. Abramczyk's report of October 20, 2016 was served on defence counsel over the weekend prior to the commencement of the defence case scheduled for October 24, 2016. I will reproduce in its entirety Dr. Abramczyk's report as follows:

> I have now had an opportunity to review the future care cost report of Ellen Lipkus OT. I have been asked to respond to the treatment proposals for Mr. Zuber contained in that report. I have been further asked to specify the costs of services in Poland for the treatment recommended in the Lipkus report.
>
> I have been asked to provide this brief report for two reasons.
>
> 1. I am completely familiar with the injuries sustained by Mr. Zuber in a train accident which occurred in Canada in 1999. I confirm that I have testified in the Canadian Court on these issues. I further confirm that I have now been certified as Medical Doctor – Specialist Orthopedist Traumatologist, as well as Specialist Medico-Legal Insurance Assessor.
>
> 2. In my medical opinion as an orthopaedic surgeon, I concur with the recommendations made by Ellen Lipkus in her Future Care Cost report.
>
> 3. Further, I have reviewed the costing of the services in Canada. I can now state that the costs in Canada are more or less the same in Poland at the present time. While some costs may be higher in Poland, other costs may be lower by a small percentage.

2018 ONSC 4370 (CanLII)

4. In my opinion, the costs set out in the Lipkus report in Canadian dollars would be the equivalent costs in Polish Zloty (PLN).

Dr. Ireneusz Abramczyk

Specialist Orthopedist Traumatologist

Specialist Medico-Legal Insurance Assessor

[410] The first issue that the court needs to consider is the admissibility of Dr. Abramczyk's evidence as reflected in his report reproduced above. The second issue that needs to be considered is the admissibility of Lipkus' evidence with respect to the Plaintiff's claim for future care costs. In that regard, with the consent of all counsel the court heard by way of *voir dire* Lipkus' evidence, with the stipulation that if her evidence was to be admitted that the evidence on the *voir dire* would apply to the trial proper.

[411] The importance of Dr. Abramczyk's evidence, as reflected in his one page report reproduced above, cannot be overstated. He would, essentially, be the only doctor who would offer any opinion that the care suggested in Lipkus' report was medically required. None of the other doctors - whether treating doctors or experts comment on this issue, with the possible exception of Dr. Rathbone. Dr. Rathbone notes in his report of February 23, 2011, under the subheading "**Rehabilitation Management"** (or what can also be referred to as the Lipkus report of August 31, 2007), as follows: "Future Cost of Care Analysis. Mr. Zuber sustained significant and multiple injuries as a consequence of a train derailment in November 23, 1999. He requires continuous and consistent assistance in order to maximize his function and improve his quality of life". He goes on to suggest that Zuber should participate in a chronic pain assessment, but other than that does not comment at all on the suggested course of care recommended by Lipkus.

[412] What the Plaintiff sought to do by having Dr. Abramczyk testify about the cost of care in Poland was to essentially recall Dr. Abramczyk. He had already testified, and his evidence was completed at the end of May 2016. He was not asked about the cost of care in Poland; he was not asked if the type of care recommended by Lipkus was even available in Poland; nor was he asked if he agreed with the recommendations made in Lipkus' reports. The concerns that the court had about Lipkus' reports were well known to all counsel, concerns that I had expressed at the outset of the trial nearly two years prior. No reason was offered by Plaintiff's counsel as to why none of these questions were ever put to Dr. Abramczyk when he testified in May 2016. In my view, no reasonable excuse was proffered to the court that would allow the Plaintiff to recall Dr. Abramczyk.

[413] But there are other concerns that I have with his report as reproduced above. It is not Rule 53.03 compliant. Dr. Abramczyk identifies himself in his report as having the designation "Specialist Medico-Legal Insurance Assessor". I have no idea what added qualification this gives Dr. Abramczyk to offer opinion evidence about the costs of medical services in Poland. He gives absolutely no details about the costing of medical services in Poland, and his statement that the medical services are "more or less" the same in Poland gives me

2018 ONSC 4370 (CanLII)

little comfort that he spent much, if any time comparing the various costs between the two countries. His statement that he "concurs" with Lipkus' recommendations equally engenders little confidence in his opinion.

[414] Finally, Dr. Abramczyk's report was - for all intents and purposes, served on defence counsel at the very end of the trial. While it is not uncommon in a judge alone trial for experts' reports to be served out of time and often during a trial, in this trial I had imposed a deadline on the Plaintiff to complete his case, and that was September 9, 2016. The report was served on the defence over the weekend of October 21, 2016. Apart from the fact the report did not comply with Rule 53.03 and was served well out of time, it was also served well after the deadline for the completion of the Plaintiff's case, and well after the 16 week estimate originally suggested to the Regional Senior Justice for the completion of the trial. At some point the court has to say enough is enough, this especially so given the concerns I had raised about Lipkus' report almost from the start of the trial. The Plaintiff was not caught unawares. Through his counsel, Zuber knew about the court's concerns and did nothing about it until the sun had set on the Plaintiff's case. For these reasons, I place no reliance on Dr. Abramczyk's report.

[415] I move then, to the admissibility of Lipkus' opinion evidence that was the subject of a *voir dire*. Plaintiff's counsel argues that in determining the quantum of a Plaintiff's claim for future care costs, the court must apply the "real and substantial possibility test" (see *Graham v. Rourke*, [1990] O.J. No. 2314). I agree. However, before I get to determining whether the Plaintiff has met this onus, I need to determine if Lipkus' evidence is admissible.

[416] To determine the admissibility of Lipkus' evidence, I must consider if it is relevant and reliable. There can be no doubt about its relevance. I have real reservations, however, as to its reliability. Her opinion evidence is, in many respects, based on her review of information supplied to her by Plaintiff's counsel in the form of various reports authored by doctors never called to give evidence in this trial. I refer specifically to the following doctors: Doctors Pilowsky; Ogilvie Harris; Stewart; Marchant; Ko; and Finkelstein. As well, none of the doctors who did testify or whose reports were filed as part of the evidence at trial, commented on the recommendations made by Lipkus as far as Zuber's need for future medical care.

[417] I also had reservations about the reliability of her report as it makes no reference to the cost of care in Poland, nor does she comment on the availability of her recommended care. Plaintiff's counsel referred me to a decision of Lederman J., *Kirwan v. London (City)*, 2011 ONSC 5993, where Lipkus had testified about the cost of care for a Plaintiff resident in Ireland. As Mr. Smith was counsel for the Plaintiff in *Kirwan*, I am told that the defence took issue with her evidence as it did not translate into Canadian dollars. There is no indication the defence objected on the basis that Lipkus' recommendations were not backed up by the evidence from a medical doctor. Ultimately Lederman J., at para. 53, commented on the fact Lipkus had not taken into account the cost of medical services in Ireland, and therefore made a one third deduction reflecting the Irish costs which the court had heard during the trial.

2018 ONSC 4370 (CanLII)

[418] In the trial before me, I did hear some evidence about what Zuber says he paid for massage therapy and physiotherapy. I also heard the evidence of the physiotherapist who provided treatment to Zuber. I heard no evidence about the costs of the following recommendations made by Lipkus: psychological counselling; occupational therapy; personal training; sleep study; vocational counselling; family counselling; various types of medication; housekeeping; case management services; moving costs and others. If the court had the benefit of the type of evidence that Lederman J. had before him in *Kirwan*, it may be entirely appropriate for the court to make a judicial reduction (or addition) to proposed future medical costs incurred in a foreign country. But the court cannot guess. What Plaintiff's counsel essentially proposes in this case (with the exception of perhaps physiotherapy and massage therapy costs), is that I simply accept that Lipkus' costing in Canadian dollars will be the same in Poland.

[419] In my view, in a case where someone residing outside of Ontario asks the court to make an award for future care costs, the Plaintiff must give the court the tools it will need to make that award. The court will need the evidence from a life care planner properly qualified, who can offer opinion evidence about what future medical rehabilitation care the Plaintiff may require and the costs for that care. The costing should then be the subject of expert opinion evidence from the country of origin establishing that the care recommended can be provided in the foreign country, together with the cost of that care. The evidence should also address whether the care in the foreign country is a private cost to the Plaintiff, or whether it is covered by public funding. Finally, the court will require medical evidence from a medical doctor or doctors who can opine about the necessity for the care recommended by the life care planner.

[420] Dealing with the later point about the need for a doctor to provide his or her opinion that future medical care may be required, I rely on the comments of the Court of Appeal in *Degennaro v. Oakville Trafalgar Memorial Hospital*, 2011 ONCA 319, where at para. 36 Rouleau J.A. stated:

> There was, therefore, a basis for awarding damages for the costs of future care. The issue, however, is whether ***the need*** for all of the amounts sought by the respondents was made out. In my view, they were not. In several instances there was simply no evidence to support the claim set out… [Emphasis added.]

Those comments are equally applicable in this case. For whatever reason, Zuber chose not to call any evidence from his various medical witnesses to opine on the need for his future care costs. For the court to give effect to the opinion evidence proffered by Lipkus, would be to enter into the realm of speculation.

[421] Trial judges are constantly reminded by the Court of Appeal that we are the gatekeepers of the evidence that the court receives, this particularly so when it comes to the admissibility of expert evidence. It would be the easy way out in a judge alone trial to ignore the frailties of Lipkus' evidence, but to do so fails to recognize so many things wrong with allowing her to be qualified. Her report provides no help to the court concerning the cost

2018 ONSC 4370 (CanLII)

of care in Poland, or even if some of the modalities recommended are available in Poland. There was no medical evidence supporting the need for the medical care recommended by Lipkus. Her evidence was called well after the deadline for the completion of the Plaintiff's case. If ever there was a case where the court should exercise its gatekeeper function to disallow the evidence of an expert this was the one, and as such I had ruled during the trial that Lipkus would not be qualified as an expert and, as such, I disregard her evidence from the *voir dire* in its entirety.

[422] Plaintiff's counsel, in his written submissions, suggests that even without Lipkus' evidence the court should nonetheless make an award of special damages, recognizing that Zuber testified to the frequency of the physiotherapy and massage therapy treatments he had post-accident and the cost of those treatments. Specifically, it is suggested an award of approximately PLN 64,000, or the equivalent of approximately $21,000. A claim is also advanced for $100 per week for Zuber's life expectancy for future care costs.

[423] In support of the suggestion the court should make an award for the past physiotherapy and massage therapy costs incurred by Zuber, his counsel points to Zuber's evidence in-chief when he testified that in the two or three year period post-accident he spent in excess of $100,000. The inherent difficulty with this argument is that it is not backed up by one single invoice or other evidence of payment. It is also entirely dependent on Zuber's credibility. If he was a credible witness, the absence of backup documentation evidencing the costs of his physiotherapy and massage therapy could be forgiven. But as I have made abundantly clear, his credibility is very much suspect. Simply put, for reasons which I have elaborated on with respect to his claim for loss of income, I do not find that Zuber is credible.

[424] It is also worth contrasting Zuber's evidence to the court about what he says he paid for treatment - $100,000 over a two to three year time frame, and what he told some of the experts who testified. Specifically, Dr. Rathbone testified to a history he took from Zuber to the effect he had spent $20,000 on all rehabilitation treatment. It may be possible to excuse an exact recall of what was spent on physiotherapy and massage given that these expenditures occurred many years ago. It is difficult, however, to reconcile such a discrepancy between Zuber's evidence to this court and what he told Dr. Rathbone.

[425] As with his claim for loss of income, Zuber is the only one to blame when no award is made. I have little doubt Zuber spent some of his own money to fund the cost of physiotherapy and massage therapy. I have little to no confidence, however, in Zuber's evidence as to the quantum. He chose not to present backup invoices or any other type of documentation that might support this aspect of his claim. As with his past loss of income claim, Zuber had the onus to prove his claim. This court, while accepting he did have treatment, cannot simply guess at what that amount was when his credibility is so much in dispute. As well, I have little to no evidence from his treating doctors that suggest they had prescribed the quantum and duration of treatment now claimed for in these proceedings.

2018 ONSC 4370 (CanLII)

[426] Dealing with the claim for future care, Mr. Strype is entirely correct in his written submissions when he argues that where a Plaintiff establishes a real and substantial risk of a future pecuniary loss, that the Plaintiff is entitled to compensation - see *Graham v. Rourke*, at paras. 40-41. What the court still requires are the tools to assess that claim. The tools, of course, are found in the form of evidence and not guesses.

[427] Mr. Strype points to Zuber's evidence concerning the physiotherapy and massage therapy that he has undergone in the past. He argues that from this evidence the court should infer he will need at least one physiotherapy and one massage therapy treatment per week, which will cost $100 per week. What I do not have, however, is any treating doctor - or for that matter any witness, who confirms Zuber will need this level of care for the rest of his life. Zuber may have had treatment in the past. Whether any of that treatment is causally linked to the accident is very much in doubt for reasons I have reviewed at length above. Zuber failed to call any evidence from his various treating doctors and experts to support a claim for future care costs. This court is not imbued with the medical knowledge sufficient to determine that Zuber will need physiotherapy and massage therapy once a week for the rest of his life. The only persons who could give that evidence were within Zuber's control. They were not called, and for that Zuber must bear the responsibility. The claim for future cost of care is dismissed.

Conclusion

[428] So who is the real Mr. Zuber? One may ask, is he the person who revealed himself to the Polish tax authorities as someone earning a minimal income, or is he the person he asked this court to believe was earning well over US $2,000,000 per annum? Is he the person who says he was in excruciating pain immediately after the accident, or is he the person - as revealed in his medical records, as someone whose only real complaint on returning to Poland was of a benign nature?

[429] Zuber was born in Poland and immigrated to Australia where he worked - amongst other things, as a taxi driver. To his great credit he went to university, where he obtained an undergraduate degree in tourism. While his academic results did not signal that he would attain business success, I am satisfied that Zuber had a unique quality that cannot necessarily be taught in University. Zuber had, and likely still has the ability to sell himself to those in business who need his unique talent. His talent lay in his ability to assist people in business adapt to the Polish economy as it moved from the communist era into the new world of the 1990's, and now the 21st century.

[430] Whether Zuber's talent would still be needed in a Poland that has moved past the communist era may be open to debate. Whether the business community in Poland still operates on a cash basis, as it appears to have done in the 1990's and early years of the new millennium, may also be open to debate. That said, I have little doubt Zuber had established himself as someone in the Polish community who could command, and in fact did earn an income that allowed him to live a very comfortable lifestyle. What that income was, however, was never proven at this trial.

2018 ONSC 4370 (CanLII)

2018 ONSC 4370 (CanLII)

[431] As Mr. Strype in his written submissions emphasized, Zuber called as witnesses numerous members of the Polish business and political elite who purported to lend credibility to Zuber's case. It would have been impossible, in my view, for Zuber to have prevailed on these witnesses to testify if he had not established himself in the Polish business community. There is little doubt in my mind that Zuber had established himself in the Polish business community. The fact that his marriage to his second wife apparently achieved notoriety in the local Polish press gives some credence as well to his notoriety in general.

[432] Zuber, unfortunately, however, misunderstood our Canadian system of justice. The fact that he called what he describes as the elite of the Polish business community lends credibility to his business achievements, both pre and post-accident. The evidence of those witnesses could, but ultimately did not lend credibility to what he says he was actually earning pre-accident. Zuber maintains he was earning what by any stretch of the imagination can be classified as incredible amounts of cash income - an income that anyone, anywhere in the world would consider substantial.

[433] Zuber explains the absence of this income on his tax returns by way of a non-sensical theory that is not backed up, in any way, by an expert in Polish tax law. The fact he did not disclose this cash income is but one reason I do not accept Zuber's evidence. The failure to disclose income on a tax return does not mean that someone in the position of Zuber did not earn the income he asserts in a civil action. Rather, someone who chooses not to declare income on his or her tax return may have a more difficult time of proving undeclared income, than if a claim is based on income properly declared to the appropriate tax authorities.

[434] I do not doubt that Zuber earned considerably more income than what he chose to declare in his Polish tax returns. I equally have no doubt that he did not earn the annualized US $2,000,000 plus that is asserted on his behalf in the written submissions by his counsel. If he was earning that kind of income, one might have expected that he would have had assets somewhere in the world that would have reflected that kind of income. No such assets were ever alluded to, let alone proven at this trial. If he had that kind of income, it is hard to understand the loans he needed - as evidenced in part by the loan he had with Budny, and the loan he received from SNET for 60,000 Zloty (Exhibit 282).

[435] If Zuber was earning a cash income in excess of what he declared to the Polish tax authorities, he had it within his power to have produced credible documentation - backed up by credible witnesses, who would have provided this court with the tools it needed to assess his loss of income claim. Zuber maintains he was in considerable pain in the days, months and years that followed the accident. Why else then would he commence an action of his own shortly after the accident if he did not think he had a claim? He had it within his power to have kept relevant documents that would have backed up his story he was earning the cash income he now asserts in this action. Zuber has only himself to blame for not producing credible documentation to back up his pre and post-accident earnings.

[436] Zuber maintains he did not know he had a claim until well into 2004 and beyond. It is hard to reconcile this assertion with the fact he started an action, an action he later abandoned. Zuber had counsel both in Poland and in Canada. One can only surmise that good, competent counsel, would have impressed on Zuber the need to keep all relevant documents that he would need to prove his claim. I have no doubt Zuber received this advice from his lawyer. Zuber ultimately placed his lawyers in the impossible position of trying to prove what potentially may have been the largest personal injury claim for loss of income, without the tools they needed to prove that claim. Mr. Strype fully understood this predicament many years ago, when he admitted to Lauwers J. (as he then was) that he may have difficulty in proving the claim for loss of income.

[437] There were far too many instances during the course of this trial where Zuber and his various supporting cast of witnesses were caught in inconsistencies and outright lies - as it relates to his claim for loss of income, for this court to accept Zuber's theory. I have reviewed those inconsistencies and lies earlier in these Reasons. Zuber may well cry foul when he reads these Reasons and suggest that if I accept he was earning more income than what he declared in his tax returns - but not the US $2,000,000 plus asserted in his written submissions, that I should simply pick a figure as to what he was actually earning. Zuber, however, had the onus to prove his claim. He did not give this court what it needed, that is credible evidence as to the actual income and expenses he earned and incurred both pre and post-accident. I cannot guess as to what his net income was pre-accident. Zuber is the author of his own misfortune.

[438] As to what happened after the accident, both medically and in his business and day to day life, I accept that Zuber may have suffered some minor soft tissue injuries as a result of the accident. I do not accept the suggestion that in the period immediately post-accident, Zuber was suffering in the manner he suggested at trial. The medical evidence in this regard was, like Zuber himself, completely lacking in credibility. The evidence of Dr. Granowski, reviewed above, demonstrates this point. The evidence of his physiotherapist, Salik, also demonstrates this point.

[439] If Zuber was so badly injured in the months and years post-accident, Zuber again had it within his power to have given this court the necessary tools to make this kind of finding. What this court did have, however, was an abundance of evidence that leads me to the conclusion that between the time of this accident and 2003, Zuber continued with his various business activities and declared earned income far beyond what he was declaring pre-accident. He went on numerous trips and vacations. Many of the family photographs taken during these various trips, including the video of him sky-diving, do not lend credibility to Zuber's medical theory that this accident caused him debilitating injuries which have gotten worse with time. The surveillance video of him kayaking also leaves me with a real doubt as to Zuber's level of disability.

[440] Since the accident, it is also apparent that Zuber has been involved in numerous situations where he has been injured, beginning with the injury when he was skiing; a motor vehicle accident in 2003; and a number of assaults. Zuber has also had the misfortune to have gone through what has been described as a very public and acrimonious divorce. To the

2018 ONSC 4370 (CanLII)

extent that Zuber's business activities have been reduced or eliminated since the accident, I do not accept that the injuries suffered in the accident were such that they caused a loss of income. Rather, I have concluded that there are a whole host of reasons why things have changed for Zuber, not the least of which was the acknowledged impact caused by his wife's defamatory comments in the Polish tabloid, as testified to by Zuber during the course of the proceedings in the Polish Court.

2018 ONSC 4370 (CanLII)

[441] Zuber's ongoing relationship with SNET post-accident also helps in formulating an understanding of what was happening in Zuber's life post-accident. If Zuber's health was deteriorating to the extent he wanted this court to believe, then why - one may ask, did both he and SNET enter into amending agreements between 2000 and 2004? (See Exhibits 41-44). As well, the evidence of Pitance confirms that in 2003 Zuber was working hard to introduce SNET and Cargill in cross-border trading in energy with Russia and Poland (see Exhibits 125 and 126). Pitance confirmed that as late as 2004, Zuber was working to bring opportunities to SNET. Ultimately, Zuber's relationship came to an end. It came to an end as many business relationships end, because of a change in ownership and direction at SNET - it did not end because of Zuber's state of health or injuries suffered in the accident.

[442] Zuber had an ability to earn a good income post-accident because he had attained a certain level of credibility in the Polish business community, and he had the physical capability to do so. His health may have deteriorated with time, and may provide some explanation for why his income dropped in 2003 to 2004 and thereafter. I do not, however, accept there is any causal relationship between the accident and the downturn in Zuber's income earning capacity.

[443] As for Zuber's claim for future care costs, that claim from the beginning to the end of the trial was fraught with problems. The Plaintiff's future care expert had provided an opinion that essentially assumed Zuber would require certain types of future medical care that would be provided in Canada. I say assume because the report was based on the cost of care in Canada and not the cost of care in Poland. As well, the Plaintiff's future care expert provided her opinion on various types of medical needs without any opinion from a treating doctor, or qualified medical expert that suggested Zuber required the care she was recommending.

[444] Counsel were reminded from the start of the trial that I had concerns about the Plaintiff's future care expert. I had those concerns because counsel had provided me their experts' reports from the outset of the trial. Despite those concerns, it was not until the very end of the trial that any effort appears to have been made to address those concerns, by obtaining an opinion from a medical doctor that the future care needs suggested by the Plaintiff's future care expert were medically endorsed as reasonable and necessary. For reasons I have already reviewed, I refused to allow that expert to testify. As such, I have no alternative but to dismiss the Plaintiff's claim for future care costs.

[445] As with so many personal injury actions, the credibility of the Plaintiff is fundamental to the outcome of the trial. I have reviewed at length my reasons why I did not find Zuber a

credible witness. I have reviewed at length why I did not find the vast majority of his lay witnesses and medical witnesses as credible witnesses. Zuber had a choice to make when he began this case. He could assert a claim backed up by credible witnesses and credible documentation. Those documents may have demonstrated that while Zuber was playing fast and loose with the Polish tax authorities he was, nonetheless, being honest with this court. Instead, Zuber thought he could prove a level of earnings that defied credulity. Instead, he thought he could prove he was badly injured in the accident, which could be proven through credible contemporaneous medical records. The reality was to the contrary, and for that Zuber must bear the responsibility.

[446] Zuber's lawyers used the building blocks they were given by Zuber. His lawyers cannot be faulted when those building blocks could not sustain the edifice Zuber hoped to build. That edifice came tumbling down as the credibility of the foundation was undermined. Zuber's lawyers did the best they could, but ultimately they could not cover for a client whose credibility has been found wanting by this court.

[447] The onus of proof in a civil action is well understood. Zuber had the onus of proving his claim. It is not for this court to guess at what the true state of Zuber's health was after the accident, nor is it for this court to guess at how, if at all, the accident has caused any long lasting impact on him. It is not for this court to guess at what Zuber was really earning before the accident and how, if at all, the accident impacted on his ability to earn an income post-accident. The court is not in the business of guessing. Rather, trial judges must make their decisions based on the evidence as they find the evidence to be. In this case, I found the evidence presented by Zuber very much lacking in credibility.

[448] The essence of the written submissions presented on behalf of Zuber suggests that the defence did not, for all intents and purposes, call any evidence to refute the claims made by Zuber, and that it therefore follows Zuber must win. I disagree. Such an argument would have the court rely entirely on the evidence in-chief of the witnesses called by the Plaintiff. It would require the court to ignore the totality of those witnesses' evidence, which includes the evidence that came out in cross-examination. As I have already reviewed in detail, much of the evidence called by Zuber in-chief did not stand up in cross-examination - this was particularly so as it relates to Zuber himself.

[449] Fundamentally, Zuber has failed to prove on a balance of probabilities that the accident caused him anything other than relatively minor injuries. He has failed to prove that what injuries he did suffer caused him to lose an income either past or future. He failed to provide the court with the evidence of a future care expert that could establish any loss in terms of his past or future medical rehabilitation needs (assuming that such needs could be causally linked to the accident). He chose to call as his witness an accountant whose evidence was so discredited in cross-examination that I refused to qualify him as an expert.

[450] I am more than aware that my decision in this case may have more than a potentially devastating impact, on both Zuber and potentially his own counsel. Mr. Strype and his firm have dedicated untold resources to this case. It is none of my business, nor should I

2018 ONSC 4370 (CanLII)

consider the impact my decision may have from a costs perspective. I have no information whatsoever as to what the parties may have been prepared to settle for prior to, and perhaps during the trial. Settlement offers will undoubtedly become an issue if the question of costs cannot be resolved between the parties (as I hope will occur). As it relates to his claim for past and future loss of income (which by my calculation would have translated into an award well in excess of US $60,000,000), Zuber would have been well advised to have listened to the comments his counsel made to Lauwers J. on November 7, 2011, reproduced as follows:

> Mr. Strype advises that supplementary Baker Tilly reports dated April 20, 2011 and August 1, 2011 have been produced. Mr. Strype notes that there are now 34 transactions in the updated reports. The evidence of Mr. Zuber is that he was obliged to destroy a number of the underlying contracts. Mr. Strype notes that Mr. Zuber has been able to cooper together drafts of the contracts that witnesses identify as being the same as the executed contracts. Mr. Strype admits that the original documents have been destroyed and recognizes that the destruction of the documents could well make it difficult for Mr. Zuber to prove his loss. (*Davies v. Corporation of the Municipality of Clarington*, 2011 ONSC 6669, at para. 15)

With that concession in 2011, I find it very hard to understand how Zuber could think he would have anything but an uphill battle to convince a trial court as to the veracity of his claim for loss of income.

[451] The end result of a trial that spanned 106 trial days, spread out over more than two years and involved witnesses testifying from various parts of the world, is for the reasons I have reviewed a net recovery to the Plaintiff of an award of $50,000 in general damages. I make no award for past or future loss of income, and no award for past or future care costs. Zuber is entitled to pre-judgement interest on the award of general damages.

<u>Comments on Video Evidence and Trial Management</u>

[452] The vast majority of the witnesses in this case testified via videolink from various locations in Poland, the Ukraine and Russia. At the beginning of the trial, Plaintiff's counsel sought leave to call many of his witnesses by video. With the exception of the Plaintiff and a few other exceptions, accommodating the Plaintiff's request allowed the Plaintiff to call his case in a more cost effective manner than if all of these witnesses had been forced to travel to the courthouse in Oshawa. In fact, many of the witnesses would have simply refused to attend in Oshawa, thereby denying the Plaintiff to call what he believed was relevant evidence.

[453] For the most part, the calling of the Plaintiff's case via video worked very well. There were occasions when the video feed was lost, but those inconveniences were relatively minor in comparison to the added costs that the Plaintiff would have faced if in-person attendance had been required of a witness. The digitizing of the exhibits allowed for

2018 ONSC 4370 (CanLII)

relatively easy access by the witness, counsel and the court, regardless of where the witness was testifying from. Everyone had the ability to be looking at a document via a computer screen when a witness was being examined via video. All counsel should be commended for their efforts in making the video evidence work as well as it did.

[454] For those considering the use of video evidence in the future, one major concern that needs to be addressed is the ability of the court to enforce orders made by the court as it relates to witnesses outside the jurisdiction of the court. Specifically, the ability to enforce an order excluding witnesses became an issue, as demonstrated by the evidence of Smoczynski and Dr. Abramczyk.

[455] Smoczynski is a professional accountant practicing in Poland. He was called as an expert by the Plaintiff. Prior to the finalization of his third report in October 2015, he met with Zuber – this at a point when Zuber was still in cross-examination. Zuber had been admonished by the court not to discuss his evidence with anyone. The court only became aware of the meetings between Smoczynski and Zuber at a point in time when Zuber was in Poland and had completed his evidence.

[456] Dr. Abramczyk testified in cross-examination that he was aware of at least some of the evidence that had been adduced at trial as a result of information provided to him by a Marik Bartkofsky, who was described by Dr. Abramczyk as the person in Poland "in charge of presenting the testimony to the Court". I take from this that Mr. Bartkofsky was retained by Zuber and/or by his lawyers to assist in coordinating the evidence of the various witnesses in Poland. Such a retainer would be perfectly understandable as it was no small feat co-ordinating all of the witnesses who testified from Poland and beyond.

[457] If all Mr. Bartkofsky did was act as a coordinator, no one could complain. Dr. Abramczyk's evidence leaves me with no doubt that Mr. Bartkofsky played a much different role. I infer from Dr. Abramczyk's evidence that he was aware of evidence adduced at trial, such as the video surveillance of Zuber (Exhibit 197F), from information supplied to him by Mr. Bartkofsky. Mr. Bartkofsky could only have obtained that information from Zuber. There is simply no other explanation as to how Dr. Abramczyk could have been aware of this evidence, as I have no doubt whatsoever that Mr. Strype would never have violated the witness exclusion order.

[458] Where counsel and/or the court is considering the use of video to accommodate witnesses outside the jurisdiction, consideration needs to be given as to how best enforce witness exclusion orders so as to ensure there is no collusion amongst witnesses. I had stipulated at the beginning of the trial, that all parties were entitled to have a representative in the conference room where a witness was testifying to ensure that a witness was not being coached, or was in any way testifying in a manner that was not in conformity with our *Rules of Evidence* or *Rules of Civil Procedure*. Where there is a breach of a witness exclusion order, the court in normal circumstances can control its own process through - if necessary, a contempt motion. Where the offending witness is outside the jurisdiction, it is unlikely a contempt motion will have much impact.

2018 ONSC 4370 (CanLII)

[459] Where there is clear evidence that a witness exclusion order has been violated as there was in this case, the court has a number of tools at its disposal to deal with that situation. What tool is used will depend on the facts of the case. The violation may be a minor transgression, where the court might view the situation as one of inadvertence warranting nothing more than a reminder to counsel that the witness exclusion order is there for a purpose. The transgression may be more serious, warranting a *voir dire* that could escalate to a contempt hearing. The transgression may cause the trial judge to draw an adverse inference against the offending party. The facts of the transgression could reach the point where the court has no option other than to declare a mistrial. The mistrial is the nuclear weapon in a judge's toolbox, and I would suggest is one very unlikely to be used where there has been a violation of a witness exclusion order, but it is there. All of these tools need to be canvassed in advance of making an order allowing for a witness to testify via video from outside the country, so that counsel fully understand the implications of what can happen if an order excluding witnesses is not adhered to.

2018 ONSC 4370 (CanLII)

[460] This case is probably one of the longest personal injury trials conducted in the Province of Ontario. Due to its length it was conducted in bits and pieces which is far from an ideal method to conduct any trial, let alone a trial of this length. Civil trials are not getting shorter, especially jury trials. Few litigants in this day and age can afford a trial of this length. Everyone associated with civil litigation (and that includes the Bar, the litigants and the Bench), have an obligation to streamline cases – if we do not, the civil trial may go the same way as the dinosaurs did so many years ago.

[461] In an effort to streamline this case, with the cooperation of counsel many of the witnesses testified in-chief by filing an affidavit. The witness was allowed a brief "warm up" with the lawyer calling the witness, and was then tendered for cross-examination. The preparation of the affidavits were, undoubtedly, a time consuming process for the lawyer tendering that witness to the court. But much time and effort usually goes into the preparation of a witness for his or her evidence in-chief. Consideration might be given in future cases to adopting this method for witnesses other than the parties' experts, and other critical witnesses to a party's case.

[462] There are many other methods by which the court can control its own process in an effort to streamline and shorten a civil trial. These methods may become a more frequently used tool in a judge's war-chest, with the demands now placed on our judicial system by the recent decision of the Supreme Court of Canada in *R. v. Jordan*. One of the tools I suggest that will have to be under consideration in any civil trial is the imposition of time limits. Most litigants cannot afford a trial that lasts two or three weeks, let alone twenty-six weeks. Our judicial system simply cannot afford to allocate the time now taken up by many civil trials, where the amounts at issue (while significant to the litigants) does not correlate to the costs of the trial. The Supreme Court of Canada and the Court of Appeal both impose time limits. Recognizing the obvious differences between a trial court and an appellate court, the time has come where trial judges may feel it appropriate to take a firmer control of the precious time available to conduct a civil trial.

[463] The estimated time for trial must take into account the amount that is realistically at issue, along with the legal issues to be addressed. Once the time allotment has been made, absent exceptional circumstances that time allotment must be adhered to. I use the word allotment as opposed to estimate to send the message that a two week allotment cannot extend to a three week estimate. As part of the allotted time, counsel cannot expect to conduct long drawn out examinations. Counsel will be expected to prepare an outline of the witnesses to be called, and time allotments for examinations in-chief and cross-examinations. Again, absent exceptional circumstances, counsel should be expected to keep to those allotments.

[464] I cannot finish these Reasons without some comment on the civility of counsel within the context of my comments on trial management. There has been much written in the last few years on what some have perceived as the lack of civility amongst some members of the Bar. The Advocates' Society has written on this topic (see *Principles of Civility for Advocates*), and the Ontario Trial Lawyers' Association has published a somewhat similar document: "*The OTLA Code - Standards of Conduct for Excellence*". Counsel have an obligation to put their case fearlessly before the trier of fact. Counsel can do that without being uncivil to their opposing counsel. This case was a demonstration of that fact. I can safely say that over the entire course of this trial, I did not witness one moment where counsel was anything but civil to the court - but perhaps more importantly, civil to each other. Counsel should be commended for the entirely civil way in which this trial was conducted. If there is a problem with civility in general (and I am not sure I necessarily subscribe to the view that the personal injury Bar suffers from this problem), then this trial serves as a reminder to everyone that civility is far from dead.

____

Justice M.L. Edwards

Released: July 16, 2018

2018 ONSC 4370 (CanLII)

CITATION: Davies v. The Corporation of the Municipality of Clarington, 2018 ONSC 4370

2018 ONSC 4370 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

BONNIE DAVIES

Plaintiff

– and –

THE CORPORATION OF THE MUNICIPALITY OF CLARINGTON, VIA RAIL CANADA INC., CANADIAN NATIONAL RAILWAY COMPANY, TIMOTHY GARNHAM, THE BLM GROUP INC., APACHE SPECIALIZED EQUIPMENT INC., APACHE TRANSPORTATION SERVICES INC., BLUE CIRCLE CANADA INC., and HYDRO ONE NETWORKS INC.

Defendants

REASONS FOR DECISION

Justice M.L. Edwards

Released: July 16, 2018