Indexed as:

Lam v. Sorochan Estate

Between
Victor Lam, plaintiff, and
Mark Feehan, administrator ad litem of the Estate of Frank Stephen Sorochan, defendant

[2000] A.J. No. 170

[2000] 7 W.W.R. 262

79 Alta. L.R. (3d) 102

259 A.R. 270

94 A.C.W.S. (3d) 1119

Action No. 9403-04081

Alberta Court of Queen's Bench
Judicial District of Edmonton

Murray J.

Heard: November 15, 1999.
Judgment: filed February 17, 2000.

(127 paras.)

Counsel:

B.G. Doherty and B. Mohan, for the plaintiff.
K. Haluschak and S. Jeffers, for the defendant.

REASONS FOR JUDGMENT

MURRAY J.:--

Introduction:

1 This is an action for damages suffered by the Plaintiff when a motor vehicle he was driving was struck from behind by a motor vehicle owned and operated by Stephen Sorochan who has since passed away. This accident occurred in the City of Edmonton, in the Province of Alberta, on March 7, 1992. Although liability was not admitted, no evidence was called by the defence on that issue and I find that the Defendant was negligent and caused injury as well as loss and damage to the Plaintiff. There is conflicting evidence as to how far the Plaintiff's motor vehicle was moved forward on impact. Suffice to say, the physical damage indicates the impact was severe. The Plaintiff testified the frame of the vehicle was damaged and that it was not repaired. The action came on for trial on November 15, 1999, some seven years and eight months after the accident and evidence concluded on November 25, 1999.

2 This is a unique case in that the Plaintiff was seriously impaired physically prior to the accident, though he was able to work at his chosen trade and live a relatively normal life despite his problems. The allegation is that because of the trauma suffered by the Plaintiff at the time of the accident, which in the normal course of events may not have given rise to prolonged impairment and possibly no disability, the Plaintiff's pre-existing impairment was not only increased but he became disabled and is unable at this time to gain meaningful employment or enjoy many of the activities and pleasures he did participate in and enjoy before the accident. In other words, the Plaintiff had an "eggshell" or "thin skull".

3 The Defendant does not agree that the Plaintiff is disabled, at least not to the extent alleged. The Defendant further contends that the Plaintiff's present condition was not caused by his client's negligence, but rather is such as one would expect the Plaintiff to experience at this point in time, given his long-standing impairment. The current terminology used is that the Plaintiff had a "crumbling skull". The Defendant's submission is that, at most, the Defendant's negligence aggravated a pre-existing condition for a short period of time. The Defendant also points to events said to be unconnected to any negligence of the Defendant which exacerbated the Plaintiff's problems and indeed may account for such problems as he presently experiences. The question of mitigation is also raised.

Facts: - History - Pre-Accident

4 The Plaintiff was born October 13, 1946 in Hong Kong. He was, at the time of the accident, 45 and at trial 51 years of age. He contracted polio myelitis at the age of 9 months, with resulting paralysis to both lower limbs. His left leg had some residual muscle in the hip and knee area which enabled him to move about on crutches. His right leg is shorter and without useful muscle. The result was that the Plaintiff's trunk and upper limbs became very well developed and he was able to move about remarkably well with the aid of crutches and in certain cases, canes. He could also sit and stand with the aid of crutches for prolonged periods of time and became adept at operating a

motor vehicle with hand controls.

5 The Plaintiff, as an infant, had a laminectomy at the L4-5 level of his lumbar spine. This gave rise to speculation that he may have suffered from spina bifida at birth, rather than polio. However, there is no evidence that his condition, either pre- or post-accident, would have been any different had this been the case or that the laminectomy is a factor as far as this action is concerned.

6 The Plaintiff completed his grade 12 in Hong Kong and learned some English. His native tongue is Cantonese and it is evident that even today he is not fluent in the use of English which I am satisfied has given rise to some inconsistencies in what he has told people including, on occasion, those who have seen, examined, and treated him from a medical point of view. The Plaintiff worked for his father in Hong Kong who manufactured air conditioning and like equipment. He came to Canada in 1968, at the age of 22, to take a two-year course in air conditioning and refrigeration at the Northern Alberta Institute of Technology (N.A.I.T.). He also took a course in plumbing. The Plaintiff did not return to Hong Kong, rather, he initially gained employment as a draftsman in Edmonton. He subsequently wrote and passed examinations to become a registered engineering technologist which trade he practised until December 31, 1993. The Plaintiff continued to take related courses, including obtaining a certificate of the Autocad Ver. 12 computer drafting aid in 1993. He has not upgraded his knowledge of this technology which is ever-improving, though intellectually he has that capability.

7 The Plaintiff worked for a number of engineering consultants following graduation. The chronology is set out in Exhibit 11, as are the nature of the work and his duties in the various positions he held. He was never unemployed, though from 1982 until 1987 he was self-employed working for others on a contract basis. The Plaintiff's experience is in commercial construction of various types. In his earlier years he was basically involved in drafting and specification preparation. He then did more complex mechanical layouts and supervised other draftsmen and in due course assumed responsibility for site inspections. This latter responsibility seems to have arisen for the first time in 1987 when he was employed by Abugov & Associates, of which Mr. Brian Soutart was the Edmonton Branch Manager at the time. Mr. Soutart testified that the Plaintiff was physically able to climb ladders so as to reach higher floors and roofs, using his upper body strength to do so. He was also able to traverse uneven construction sites and perform all his duties satisfactorily and without mishap.

8 In 1990 he was recruited by Mr. George Patsicakis of G.P. Valve Engineering Ltd. This was a small firm, often having only Mr. Patsicakis and the Plaintiff as employees. Thus, the Plaintiff's duties were many and varied, including site inspections. Although the amount of climbing may have been somewhat less than when he was employed by Abugov, the evidence is that he performed his job and duties fully and satisfactorily. The Plaintiff's employment involved sitting at a drafting board or desk for lengthy periods of time, standing and moving about for lengthy periods of time and, as noted, doing site inspections.

9 The Plaintiff, during the years that he worked prior to the accident, acquired rental properties, one of which was expropriated by the City of Edmonton prior to the accident and one of which was purchased afterwards with monies received from his Disability Pension which he took out in lump sum form. The Plaintiff managed these properties and did routine maintenance. His tenants were primarily Chinese students from Hong Kong and he claims to have been able to keep his properties occupied through that source.

10 The Plaintiff married his wife Elizabeth in 1980 and they have a daughter presently age 16. Mrs. Lam is a N.A.I.T. graduate in laboratory technology and has worked throughout their marriage. They enjoyed shopping and going to the park as a family. The Plaintiff also was the handyman in the home, doing the routine repairs, including repairs to the roof and, prior to the accident, commencing to construct an addition to the home. He had finished the basement which he used as his office. The Plaintiff managed to shovel the snow and cut the grass on a tractor. He was also very involved in church activities.

11 The only evidence before the Court as to any possibly related medical problem before the accident is a complaint he made on January 30, 1991 when the Plaintiff was seen by his family doctor, Dr. Chiu, for muscle pain and aching shoulders. The Plaintiff could not remember having a problem at that time and the record bears out that this complaint was of a transitory nature. With one exception, this is the last suggestion of a similar problem prior to the accident, though during that period he saw Dr. Chiu on eight occasions for other unrelated problems. The exception is that on October 1, 1991 the Plaintiff complained of numbness in his third and fourth fingers when he woke up. Dr. Chiu identified this as possibly carpal tunnel syndrome. He was seen twice between October 1, 1991 and March 9, 1992, when Dr. Chiu saw him for problems experienced in the accident. On neither occasion was this problem mentioned.

Facts - Post-Accident

Medical Treatment and Examination

12 The Plaintiff, following the accident, dealt with the police and thereafter attended at the Royal Alexandra Hospital emergency ward where he was examined by Dr. Nixon. His complaint was soreness of the back. Dr. Nixon found some soreness and stiffness but "not much distress", his back being "mildly tender" and diagnosed a "contusion back". He also found the Plaintiff's head, neck and chest were unremarkable. X-rays were taken which showed the laminectomy, and a slight curvature of the lumbar spine. No degenerative process was noted. The Plaintiff testified that after the impact he felt dizzy, his back hurt, and he felt numbness in his left hand.

13 On March 9th the Plaintiff attended on Dr. Chiu complaining that he was experiencing pain in rotating his head to the left and right. Dr. Chiu found that his neck was swollen on the left side and tender to the touch. His diagnosis was "contusion of neck". By March 16th the Plaintiff was experiencing tenderness in the lower back as well as swelling of the neck muscle. He advised Dr. Chiu that after his car was struck he got out, was dizzy for a few minutes, that he fell, and that he

experienced "quite a lot of pain in his back immediately". The diagnosis was "strain back".

14 In the Spring of 1992 the Plaintiff was obliged to travel to Hong Kong because of legal proceedings involving his father's estate. He has made a number of trips since, for the same reason, and finds that when he is in Hong Kong he is obliged to walk a good deal and thus feels worse when he returns to Edmonton.

15 On May 2nd he attended on Dr. Chiu who noted that the Plaintiff could no longer work on the job site and climb up and down scaffolding and was restricted to doing desk work only. On June 2nd he reported to Dr. Chin that when he got up from sitting at work he got dizzy and experienced back pain. Except for the instance immediately following the accident, I understand him to mean lack of balance rather than dizziness.

16 Dr. Chiu has continued to attend to the Plaintiff since the accident. Dr. Chiu saw the Plaintiff 44 times until September 17, 1997, 18 of these visits related to problems arising from the accident. Between September 17th and May 12, 1999, Dr. Chiu saw the Plaintiff 9 times, though the reasons for these visits was not stated, nor were the doctor's charts for that period entered as exhibits.

17 Dr. Chiu's conclusion is that the Plaintiff suffered a strain to his lower back muscles which aggravated his pre-existing condition and that his condition has deteriorated since to such an extent that the Plaintiff "could not work at his regular job again". He described the Plaintiff as "a very tenacious, hardworking individual".

18 Dr. Chiu referred the Plaintiff to Dr. Yan, a rheumatologist, on June 11, 1992, who in turn saw the Plaintiff on a number of occasions until May 1, 1996 when he felt that he had exhausted his usefulness. Dr. Yan found the neck and spinal muscles to be tender and weak "with prominent left paravertebral muscular spasm" and weak trunk muscles. He diagnosed the Plaintiff as having a "mechanical back problem", a "strain". In the four-year time frame, Dr. Yan referred the Plaintiff to Dr. Feldman to consider whether or not the Plaintiff's problem was one of post-polio syndrome, the conclusion being that it was not; to the Gross Rehabilitation Clinic; to Dr. Burnham for nerve conduction studies respecting the question of carpal tunnel syndrome; and to Dr. Campbell, a plastic surgeon, respecting the same problem. Dr. Yan also suggested that the Plaintiff see Dr. Steinke, a neurosurgeon, to determine if back surgery might help.

19 Dr. Chiu and Dr. Yan prescribed medication for the Plaintiff's pain, therapy and had x-rays taken, including a CAT-scan of his spine. On March 1, 1995 the x-rays taken by Dr. Yan showed, apart from the laminectomy, degeneration in the lumbar spine but did not show spinal stenosis.

20 The Plaintiff's underlying problem did not change though there were bright spots in his treatment from time to time. He continues to take medication for his pain.

21 Throughout the time that the Plaintiff saw Dr. Yan he continued to exhibit muscle spasm along the left side of his back as well as considerable weakness in his abdominal and para-vertebral

musculare. Dr. Yan testified that because of the Plaintiff's pre-existing condition he needed strong stomach and back muscles to cope. These he had had prior to the accident. The weakening of the muscles which has taken place since the accident has proven to be disabling. By 1993 Dr. Yan diagnosed the Plaintiff as having chronic pain syndrome. Dr. Yan prescribed a wheelchair and a lumbar brace for the Plaintiff to use from time to time.

22 It was Dr. Yan's hope that by attending the Gross Rehabilitation Clinic, which is a multi-disciplined clinic, the Plaintiff's stomach and vertebral muscles could be improved thus reducing his back pain. However, Dr. Yan did not expect any major improvement to occur and such has proven to be the case, though there have been periods when the Plaintiff has felt better. On March 25, 1995 Dr. Yan expressed his opinion to be that the Plaintiff "has a severe and prolonged disability and will have problems pursuing any type of gainful employment, whether full time or part time." At trial Dr. Yan attributed this to a combination of the Plaintiff's pre-existing weakness in his legs and the injuries he suffered in the motor vehicle accident.

23 On August 4, 1995, Dr. Burnham, a physical medicine and rehabilitation expert, performed nerve conduction studies on the Plaintiff's arms. His findings will be discussed later.

24 On December 7, 1995 the Plaintiff attended at the Gross Rehabilitation Centre. The Plaintiff was initially assessed by Dr. Nicas, a specialist in physical medicine and rehabilitative medicine, who approved his admission to the program on January 3, 1996.

25 Dr. Nicas found the Plaintiff to have chronic muscle spasm in his lower lumbar area. He described this as a "lot of-muscle spasm" in the entire back area. Dr. Nicas didn't find any abnormalities in the arms, hands or fingers, except for the middle finger on his left hand. He found the Plaintiff to have a full range of movement in his upper extremities. In the opinion of Dr. Nicas, after three years, pain of this nature becomes chronic and the best treatment is to have a team of professionals work on it. Therefore, he felt that the Plaintiff was a proper candidate for treatment at the Gross Rehabilitation Centre. As Dr. Nicas put it, there had to be something that caused the muscle spasm and a contusion would certainly do it.

26 A team of people at the Clinic trained in occupational therapy, physical therapy and medicine then treated the Plaintiff. He attended daily educational classes as well as sessions on pain management, stress management and relaxation. He was discharged from the program on April 4, 1996. While on the program a wheelchair was again prescribed, which the Plaintiff uses for travelling any distance. He was also fitted with leg braces, which he can use to some extent with canes. His ranges of movement improved during this time frame and he was prescribed exercises to do at home. In the opinion of the physiotherapist, Keith Ross, the wheelchair gave the Plaintiff more mobility. Mr. Ross also felt that the Plaintiff had chronic low back pain and that a van with a lift would help, so that the wheelchair could be readily moved into the van. The Plaintiff testified that currently he leaves the wheelchair in his car and uses crutches to get to his destination. It bothers his back when he has to load and unload the wheelchair into and from the trunk of the car.

27 On November 10th and 20th of 1997, the Plaintiff was seen by Dr. Keegan, a clinical neuropsychologist, at the request of the Plaintiff's counsel. The purpose was to provide a vocational assessment of the Plaintiff using procedures designed to clarify potential job options. This involved a number of written tests of a psychometric nature. He also interviewed the Plaintiff and testified that during the interview the Plaintiff seemed depressed. Dr. Keegan reported that the Plaintiff told him that he had attempted to return to work for one week after the accident but then had taken a one-year leave of absence, after which he attempted to return to work then but was unable to perform his duties. Dr. Keegan acknowledged that the accused had a strong Chinese accent and that he found him difficult to understand at times. Dr. Keegan testified that had he been told that the Plaintiff had worked for the better part of two years after the accident, it would not have changed his findings and opinion.

28 Dr. Keegan's tests disclose that the Plaintiff exhibited significant depression and cognitive limitations which he felt were a result of the depression. It was his opinion that the Plaintiff was not competitively employable at the time and that his future employment prospects were poor. To obtain employment he would require considerable vocational assistance and rehabilitation in combination with psychotherapeutic intervention to help deal with the depression. Dr. Keegan saw the Plaintiff again in 1999 prior to trial and administered one of the tests a second time which dealt with the question of depression. His findings and opinion remained unchanged. The battery of tests which were administered were not placed in evidence. Dr. Keegan was of the view that the Plaintiff was being truthful during his assessment of him though the tests used did not have reliability indicators built into them. It is little wonder that after this period of time the Plaintiff has become depressed and indeed this, as well as being agitated, were evident in his demeanor when giving evidence.

29 It was Dr. Keegan's recommendation that the Plaintiff have therapy for his depression for 15 sessions over 30 weeks, following which an evaluation would be made to determine whether it was worthwhile going further. In the overall picture he felt it may take a couple of years of weekly sessions as well as the need for pain management to help him cope with his problems. He stressed that the passage of time makes this more difficult. Again, this is a matter of common sense. I accept the evidence of Dr. Keegan respecting the Plaintiff's condition and prognosis.

30 On April 7, 1998, Dr. Gross saw the Plaintiff for the purpose of providing a medical-legal assessment. Dr. Gross is well-known to the Courts as an expert in rehabilitation medicine and is the founder of the Centre bearing his name. Dr. Gross concluded his report, which is Exhibit 29, with these words:

> From a functional perspective, it is here that we see that we see (sic) the greatest impact. Individual's (sic) as this function on a very fine line. They have very few muscles to work with and what muscles they do have, have to work overtime to allow for normal activity such as even walking. An injury (even a minor injury) is sufficient to create significant disability. Even muscle spasm or pain to the

> neck and back is sufficient enough to result in loss of independence as we see here. Mr. Lam would likely not have deteriorated to this degree. He is a slender gentleman and is not placing excessive stresses on his body so that it was likely that he would be quite functionally independent for many years. This accident accelerated his dependence on bracing and other modes of transportation.

31 The Plaintiff commenced physiotherapy treatments at Kingsway Physiotherapy Ltd. on June 29, 1992 and carried on until April 20, 1993, having 26 treatments. By November 30th they noted that he seemed to be "overall better" with occasional upper back, lower back and right arm pain. The comment was that he felt "95% better but had occasional upper back, lower back and right arm pain". The Plaintiff denies having said this and testified that he wished to have a different physiotherapist because Mrs. Quon at Kingsway Therapy didn't have enough experience to take care of his problems. When he was reassessed in February 1993 he had more problems with his neck and elbows as well as with his lower back. Again, exercises were initiated which gave him some relief for one or two days. He claims that he said everything was fine because he didn't want to hurt Mrs. Quon's feelings.

32 On July 29, 1993 he commenced therapy treatments with Mrs. Gigi Mak, on referral from Dr. Chiu. Ms. Mak was qualified by the Court as an expert in physiotherapy and gait analysis. She explained through use of photographs, videos, etc. how the Plaintiff managed on his crutches. The key is the strength in his upper torso and arms as well as the remaining muscles in his left leg which enable him to put some weight on it as he passes through in the swinging motion.

33 Since July 29, 1993, Ms. Mak has continued to treat the Plaintiff from time to time. Over that time frame she has seen him some 242 times. Though occasionally improvement and relief from pain have occurred, it has proven to be temporary in nature. His pain is aggravated by prolonged walking, standing, sitting, reading, driving, and change of weather. Ms. Mak testified that the Plaintiff's lower and upper back pain ha& been consistent throughout and that the Plaintiff has muscle spasm in his back which she identifies by palpitation. She told the Court that a patient cannot "cheat" insofar as this is concerned since she feels the tightness in the back. She treats this problem with ultrasound.

34 Ms. Mak testified that the Plaintiff's pain is chronic and that he now must treat himself for his pain and only see her when it is out of control. Ms. Mak had as of September 22, 1999 continuously treated the Plaintiff for his cervical, thoracic and lumbar spinal pain as well as a number of other matters which have manifested themselves since she became his therapist. She felt the Plaintiff was being "genuine" during her treatment of him.

35 On May 28, 1998, slightly in excess of one month after he was seen by Dr. Gross, the Plaintiff was examined by Dr. Feasby, who was qualified as an expert in the field of neurology. Dr. Feasby has worked in the area of evaluation of people suffering from neuromuscular disease with superimposed injuries and currently practices in Calgary. He examined the Plaintiff on a bed at the

Nisku Inn.

36 The picture painted by Dr. Feasby is totally at odds with that of any other medical doctor who examined this man, his therapist, Ms. Mak, and the occupational and physiotherapists at the Gross Clinic who testified. Dr. Feasby found inconsistencies in the Plaintiff's responses to certain tests he performed and concluded that he suspected the Plaintiff was exaggerating his motor and sensory dysfunction in his arms. Dr. Feasby found "no particular tenderness in the lumbar spine". He also found the muscle bulk in his arms and shoulders to be normal and indeed greater than one would have expected, given his height. He found that he had some problem in his shoulder and attributed that to the two falls in June of 1997. Dr. Feasby concluded that since people who have suffered from polio will, many years later, become progressively weaker with wasting in the same area of the body as was initially affected, that the Plaintiff's condition was basically as one would expect even if the automobile accident hadn't occurred. He told the Court that he didn't see anything that could be tied to that accident and that in his opinion, there was no physical impairment as a result of it having occurred.

Post-Accident Injuries

37 In February 1993 the Plaintiff saw Dr. Chiu again and advised that because of his instability since the auto accident he had lost his balance and fallen down the stairs twice. The Plaintiff first fell down in either December 1992 or January 1993 at one of his rental properties. The second fall was a few months later when he fell down the stairs at his home. In both cases the Plaintiff said that the pain in his back caused the balance problem. It was after the first fall that the Plaintiff realized that it was not safe for him to do site inspections.

38 Dr. Yan testified that the Plaintiff's back problem could have a bearing on his balance if the pain were severe enough. He also said that the Plaintiff's weakness places additional stress on the back. This coupled with severe back pain would render him more prone to poor balance. I accept Dr. Yan's explanation.

39 On June 26, 1997 there is a notation in Dr. Chiu's records that the Plaintiff had fallen and hit his right shoulder, hurting half of his body. Four days later he fell and hurt his left shoulder. By September his shoulders were aching and waking him up at night. On September 16th Dr. Chiu noted "arthralgia". The Plaintiff said that the first of the June 1997 falls happened when he was using his crutches, slipped on grass, and his shoulder hit a car bumper. The second happened in the kitchen. Ms. Mak's notes say that it occurred because the Plaintiff slipped on a wet floor. I am not sure whether he was using crutches at the time or not. The Plaintiff claims that this occurred because he experienced pain in the course of moving, lost his balance and fell.

40 On February 4, 1993 the Plaintiff advised Dr. Yan that he had been shovelling snow during a recent snowstorm and as a result his back pains had increased on the left side and up through his shoulders. The Plaintiff, when cross-examined, said that he didn't recall this incident but if Dr. Yan said that, then he must have done so.

Employment

41 Mr. Patsicakis testified that following the accident he noticed a gradual change in the Plaintiff's performance. The Plaintiff complained of headaches and did exercises each hour as well as going to physiotherapy. He started to make errors in his desk work and finally refused to do site inspections. Since there were only the two of them in the office, the person holding the Plaintiff's position was required to do these inspections. Thus, on December 15, 1993 Mr. Patsicakis advised the Plaintiff that because of his inability to do his work, his employment was terminated.

42 On January 21, 1994 the Plaintiff applied for sickness benefits through the Federal Government and for the period January 16, 1994 to May 14, 1994 he received $339.00 per week for 15 weeks. Dr. Chiu provided a medical certificate in support of the Plaintiff's application for these benefits.

43 On January 21, 1994 the Plaintiff completed a further form claiming Unemployment Insurance benefits in which he said that he was ready and willing to work immediately. He claims that someone at the Government told him that he had to say "yes" to these questions because otherwise he would not receive any payments. All these documents are dated the same day. On the one, he said he was unable to work because of back and leg pain; on another Dr. Chiu said that after the car accident he had back pain that prevented him doing his previous work as an inspector; and in the questionnaire he said that he was willing to work immediately. The last form was filled in by someone other than the Plaintiff. I accept the Plaintiff's testimony as to why he signed it in that form. On cross-examination the Plaintiff testified that if he hadn't been laid off he would have continued working until his body couldn't "go ahead" since he needed the money.

44 The Plaintiff testified that he submitted two job applications but received no response. He was looking for work as a mechanical engineering technologist and did not look elsewhere. He testified that he didn't try to get a job after that because of his health but intended, once he recovered, to work. His evidence today is that he exercises to keep his health at its present level but is unable to do anything else.

45 The evidence is undisputed that until the accident occurred, the Plaintiff was able to perform all the duties asked of him as a mechanical technician. He had developed his upper body, arms, trunk and back to such an extent as to in large part compensate for the loss of the use of his legs.

46 The Plaintiff testified that since the accident he was unable to do site inspections nor could he stand, walk or sit for any length of time because of the pain in his back. He did drafting and design work, but because he couldn't sit for any length of time and his back pain he found he couldn't concentrate and thus made mistakes and took longer to do his job. He claims that because of the pain he is unable to maintain the same degree of balance he did before the accident and that this has accounted for his falls on a number of occasions. The Plaintiff testified that after he had fallen down and hurt his shoulders and hands he found that he couldn't work at the drafting board any longer.

Home Life - Post-Accident

47 The Plaintiff claims that he is unable to do the routine maintenance in his home or in his rental properties and has been obliged to engage the services of a rental property manager to do this work. His wife also assists. As well, in his personal life, he is not able to partake in the various activities he did before the accident and his church attendance is substantially less than it was. As the Plaintiff puts it, he tests himself from time to time because he feels guilty about not being able to do what he once was able to do about the home.

48 Dr. Yan testified that when he suggested to the Plaintiff that he take some time away from work to recuperate he was told by the Plaintiff that he didn't wish to do so because of economic recession, financial concerns and the difficulty he would have finding work. The Plaintiff testified that he continued to work after the accident because of financial concerns, until he was dismissed. He needed to pay his mortgages, and support his daughter. He did not want to give up his career and position in society nor did he wish people to feel that he was useless.

49 The Plaintiff now sleeps on the floor and regularly uses a T.E.N.S. machine when he is sitting for a long time. This provides electrical stimuli for pain. He claims that since he has been unable to deal with the maintenance of his rental properties he has lost his Chinese clientele and been obliged to look for occupants in the local market which is not as dependable. He also complains that the people he now rents to cause more damage than his Chinese tenants did.

50 The Plaintiff's complaints, for the most part, have remained constant though his problems have increased in severity.

51 Mrs. Lam verifies her husband's problems. She testified that before the accident she did not look upon her husband as being disabled, whereas since the accident she considers him to be handicapped and unable to share in the homemaking, enjoy his hobbies, etc. She says that he now has a short temper, is impatient, sleeps on the floor to support his back, is wakeful and keeps her awake.

The Law

52 The leading case on the question of causation in Canada now is Athey v. Leonati [1996] 3 S.C.R. 458. This case basically restates the law of causation as it has stood for many years. Mr. Justice Major, speaking for the Court at p. 466 said:

> Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury:...
>
> The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the

negligence of the defendant;

53 It is for the Plaintiff to show that the Defendant's tortious act caused or contributed to the Plaintiff's injury. His Lordship at p. 467 pointed out that:

> In Snell v. Farrell, [1990] 2 S.C.R. 311, supra, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in Alphacell Ltd. v. Woodward, [1972] 2 All E.R. 475, at p., 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary "common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.
>
> It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring ... as long as the defendant is part of the cause of the injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

And again, at p. 472:

> ... The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence ("original position").
>
> However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss.

And again at p. 473:

> The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is

> named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.
>
> The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: Cooper-Stephenson, supra, at pp. 779-780 and John Munkman, Damages for Personal Injuries and Death (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: Graham v. Rourke, 74 D.L.R. (4th) 1, supra; Malec v J.C. Hutton Proprietary Ltd., supra; Cooper-Stevenson, supra, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

And again at p. 477 & 478:

> This appeal involves a straightforward application of the thin skull rule. The pre-existing disposition may have aggravated the injuries, but the defendant must take the plaintiff as he finds him. If the defendant's negligence exacerbated the existing condition and caused it to manifest in a disc herniation, then the defendant is a cause of the disc herniation and is fully liable.
>
> Had the trial judge concluded (which she did not) that there was some realistic chance that the disc herniation would have occurred at some point in the future without the accident, then a reduction of the overall damage award may have been considered. This is because the plaintiff is to be returned to his "original position", which might have included a risk of spontaneous disc herniation in the future. However, in the absence of such a finding, it remains "speculative" and need not be taken into consideration: Schrump v. Koot, 18 O.R. (2d) 337, supra; Graham v. Rourke, 74 D.L.R. (4th) 1, supra. The plaintiff is entitled to the full amount of the damages as found by the trial judge.

54 Defendant's counsel referred the Court to two post-Athey decisions of this Court being Harbora v. McIvor et at (1997), 202 A.R. 99 (Q.B.), a decision of Mr. Justice Binder and S.F.P. v. MacDonald et at (1999), 234 A.R. 273 (Q.B.), a decision of Madam Justice Veit. In both cases, a number of authorities were cited dealing with the issue of causation in unique circumstances. Both Justices acknowledged that Athey, (supra) simply stated what the law has been for many years and applied it to the particular facts as they found them to be in those cases.

55 Madam Justice Veit in the S.F.P., (supra) case referred to a paper delivered by Dean Lewis Klar entitled "Pre-Existing Condition/Causation" on May 4 and 11, 1998 to the Legal Education Society of Alberta. A good portion of that paper is attached to Her Ladyship's decision as Appendix "D". Other decisions referred to by the Defendant in this vein were Martorana v. Lee (1994), 150 A.R. 167, and Kraft Construction Co. (1978) Ltd. v. Guardian Insurance Co. of Canada, [1984] A.J. No. 693, decisions of Mr. Justice Lomas and Mr. Justice MacKenzie, respectively, of this Court.

56 The Plaintiff referred to the case of Lin v. Hyndman Transport Ltd., [1991] A.J. No. 614, [1991] Alta. D. 3374-01, a decision of O'Leary, J. of this Court (as he then was) and Millett v. McDonald's Restaurants of Canada Ltd. (1984) 29 Man. R. (2d) 83, a decision of Mr. Justice Wilson of the Manitoba Court of Queen's Bench. This latter case involved a Plaintiff who had very much the same pre-existing problems as did Mr. Lam.

Issues

57 The overall issue is one of causation and the basic principles affirmed by the Supreme Court of Canada in Athey, (supra) apply. The sub-issues are: firstly, did the negligence of the Defendant cause or contribute to the Plaintiff's injuries? Secondly, what would the Plaintiff's "position" before the tort have been, or as Mr. Justice Major put it, what would the "Original Position" have been? In other words, before the accident, to what extent was the Plaintiff impaired, both in his ability to work and earn a livelihood, and in his ability to perform and partake in normal, everyday functioning within his home and social setting? Thirdly, what is the Plaintiff's position after the accident or his "Injured Position"? Fourthly, assuming that there is a difference between the Plaintiff's "Original" and "Injured" position and since, in this case, the Plaintiff suffered from a serious pre-existing problem, was there a measurable risk that his paraplegia would have detrimentally affected his future regardless of the Defendant's negligence? Fifthly, once again, assuming that there is a difference between the Plaintiff's "Original" and "Injured" positions, was it caused by or materially contributed to by the negligence of the Defendant? As pointed out by Mr. Justice Major at pp. 476-477, was the tort a necessary ingredient in bringing about the Plaintiff's "Injured Position"? Sixth, assuming the answers to numbers 4 and 5 are in the affirmative, then to what extent should the overall damage award be reduced, is the risk measurable or simply speculative? Seventh, was the Plaintiff's injury such that he would, on a balance of probabilities, have returned to his "Original Position" but for the happening of an event or events which occurred prior to trial but which were not caused by or more than minimally contributed to by the Defendant? I agree with Mr. Justice Binder of this Court in the Harbora, (supra) case that in appropriate

circumstances if number 7 is answered in the affirmative then thereafter the Defendant bears no responsibility. I would add that in other circumstances such a finding may only go to the question of contribution from that point in time forward.

Decision: Respecting the Foregoing Issues

58 Firstly, I have found that on a balance of probabilities the Defendant's conduct did cause the Plaintiff injury. I am also satisfied on a balance of probabilities that the Defendant's negligent act materially contributed to the Plaintiff's "Injured Position".

59 Secondly, the evidence is uncontradicted that though the Plaintiff had a serious preexisting problem with his legs, he had managed remarkably well by training himself to function effectively with only partial use of one of them. He had shown the perseverence and courage it takes to overcome this type of difficulty and had made a reasonably good life for himself. His employer was happy with his work and he had accumulated a number of investments out of a modest income. The evidence is that he enjoyed life, was a good husband and in the opinion of Dr. Gross whose evidence I accept, but for the problems he experienced after the accident, the Plaintiff would have been quite functionally independent for many years.

60 Thirdly, this picture of the man changed following the accident on March 7, 1992. The evidence of his employer satisfies me that he went down hill progressively to the point where he could no longer perform his duties, and a year and a half later had to be laid off. The entire pattern of his medical treatment and the complaints which gave rise to them is reasonably consistent. Over a period of seven years there are bound to be variations but effectively, with the exception of Dr. Feasby's findings, he has had problems, particularly with his low back, in the form of muscle spasm and pain. I accept the evidence of Drs. Gross and Keegan that he is not functionally independent, is competitively unemployable and that any hope of him regaining some measure of his prior independence will depend upon whether or not treatment as suggested by Dr. Keegan will bear fruit. I am satisfied that further physio- and occupational therapy is not going to materially improve his condition though physiotherapy may help from the point of view of pain control and maintaining his present physical status. This is his "injured position".

61 Fourthly, apart from his paraplegia, the only condition I am prepared to find had any bearing upon his subsequent difficulties is the carpal tunnel syndrome. The evidence is that people suffering from paraplegia place considerable stress on their arms, wrists, hands and shoulders and in time, will in all likelihood develop carpal tunnel syndrome. The first evidence of this problem was when the Plaintiff saw Dr. Chiu in October of 1991. At that time he had some numbness in the third and fourth fingers of his left hand. The Plaintiff testified that following the accident he experienced numbness in his left hand though he claims it was not the same as he had earlier experienced when he saw Dr. Yan in June of 1992, and by December three fingers were involved which indicated an involvement of both the ulnar and radial nerves.

62 Dr. Burnham saw the Plaintiff on August 4, 1995 and in his report stated that entrapment

neuropathies at the wrists and hands of people using weight bearing instruments such as crutches is common. He found that both median nerves in the right and left arm demonstrated "significant motor and sensory conduction slowing across the carpal tunnel segments" and that there was borderline slowing of both the ulnar nerves' motor and sensory conductors across the wrist and hand segment but that the conductions across the elbow were normal as were the bilateral radial sensory conductions. He concluded that there was borderline dysfunction of both the ulnar nerves at the wrist and hand segments, but did not feel that surgery was appropriate as it should be reserved for severe cases.

63 In his further report of October 21st, (Exhibit 40) Dr. Burnham expressed the opinion:

> ... that the entrapment neuropathies of the median and ulnar nerves at both wrists would be most likely related to the chronic extrinsic pressure at the hands and wrists required by using walking aids such as crutches or canes. Additionally, the extreme wrist extension position required with this type of ambulation could predispose the nerves to injury. I did not get any history of trauma to the wrists or hands related to the motor vehicle accident. It would therefore be improbable that the rear-end collision he was involved in was related to the identified nerve entrapment.

64 He noted that at some future time surgery might be indicated.

65 Dr. Yan, on May 15, 1996, noted that the Plaintiff was having increased tenderness and pain over the medial aspects of both elbows, that his left thumb was occasionally moving by itself and that he seemed to be having numbness more over the ulnar aspect of his hands than before. He noted further that Dr. Campbell had seen the Plaintiff and felt that crutches could be a contributing problem. The Plaintiff was referred back to Dr. Campbell to determine if surgery was called for and in due course, was advised that Dr. Campbell did not think that it was.

66 While at the Gross Clinic in the spring of 1996, it was noted that there was decreased mobility in the Plaintiff's wrists which improved with treatment and that he experienced pain and numbness in his hand. This complaint still persists and has become bilateral though it would seem, more severe in the left hand.

67 I am satisfied that this carpal tunnel syndrome would have occurred whether there was an accident or not. However, because of the increased weight bearing placed on his hands and wrists while using his crutches, etc., due to the pain in his back, this syndrome was exacerbated. The Plaintiff is right-handed and the major problem has consistently been with his left hand. The concern therefore, is his mobility and jobs involving hand dexterity. No one has attempted to measure the risk of this occurring in terms of time. The Plaintiff was, at the time of the accident, 46 years of age and experiencing little if any difficulty either with his back, his wrists or his hands. I think it fair to say that by age 50 or 55, he would have been beginning to experience more trouble and likely by age 55 or 65 would have been in the position he in fact found himself in in 1995 as it

relates to his wrists and hands only.

68 Fifthly, I am satisfied on a preponderance of evidence that the difference between the Plaintiff's "Original" and "Injured" positions was caused by or materially contributed to by the negligence of the Defendant.

69 Sixthly, as noted in my comments under the fourth sub-issue, I am satisfied that there was a measurable risk insofar as the wrists and hands are concerned. The Plaintiff's ability to perform the site inspection duties associated with his job as a mechanical technologist would have been seriously impacted since he relied upon his wrists and hands to climb and get about. He would have been obliged to revert to the type of work he did initially if such work could be found. This involved drafting, and preparing specifications, etc., which are purely sedentary in nature though the Plaintiff testified that the numbness in his left hand interferes with the use of a drafting scale.

70 It may be that, but for the accident, when the wrist problem became serious enough to impede the Plaintiff's ability to perform his work and repair and maintain his apartments and home, an operation could rectify the situation. There was no evidence as to what the chances of such an operation being successful are and if so, to what degree and what would the Plaintiff be able to do; how long the Plaintiff would have been incapacitated; the risk of additional problems; etc. I am unable to speculate on these matters and therefore I will set a figure which I feel is reasonable. The claim which can be related to this wrist and hand problem, including the Plaintiff's future loss of earnings claim, would be reduced by 10 percent.

71 Seventhly, assuming the answers to numbers 4 and 5 are in the affirmative, then, was the Plaintiff's injury such that he would, on a balance of probabilities, have returned to his "Original" Position but for the happening of an event or events which occurred prior to trial but which were not caused by or more than minimally contributed to by the Defendant?

72 The Defendants's counsel points to a number of incidents which occurred subsequent to the accident which either were in fact the cause of the Plaintiff's present condition or aggravated it further and thus accelerated the deterioration in his condition such that the onset of or arrival at his "Injured" condition occurred sooner than would otherwise have been the case. This would involve the same type of analysis as was done in sub-issues 4, 5, and 6, but would focus on this question rather than solely on the Plaintiff's pre-existing condition. The incidents referred to are the snow shovelling incident; travelling to Hong Kong in 1992 and on subsequent occasions, and to Vancouver for vacation; and falling down in 1992 and again in 1997 when he injured his shoulders.

73 These incidents all have aggravated the Plaintiff's condition to some extent, particularly the falls in 1997 involving his shoulders. However, one cannot expect a person to crawl into a shell and do nothing whatsoever. To my mind, the Plaintiff's attempt to shovel snow, his trips to Hong Kong which were necessitated because of problems with his father's estate, and his trips to Vancouver for vacation, may have irritated his condition but do not fall within the ambit of or nature of circumstances contemplated by the seventh issue. Given this man's history of hard work, coping

with adversity, tenacity and pride, it would be out of character not to "test" himself from time to time. There is no evidence that the snow shovelling incident or the travel measurably contributed to his "Injured" condition.

74 I am satisfied and so find that the falls which the Plaintiff experienced were directly attributable to his post-accident condition. He has repeatedly experienced this problem since the accident, commencing in 1992, and most recently the two in 1997 which have caused him shoulder problems. These occurred because as he was moving he suffered pain, lost his balance and fell. There is no reason to doubt this. It is supported by Dr. Yan's evidence and common sense. For many years prior to the accident he managed quite nicely, there is no record of his falling, indeed he was extremely agile. Since the accident he has had a number of these occurrences and I am satisfied that they are a direct result of the injuries suffered by him in the accident and therefore as a result of the negligence of the Defendant.

75 I accept that Dr. Keegan is correct when he says that the passage of time simply makes matters more difficult. Again, this is a matter of common sense. It is also true that the Plaintiff may have been better off if he had taken a number of months off work following the accident. Given his nature, which is supported by his work history prior to the accident, it is not surprising that he tried to keep going. Unfortunately, his condition did not improve.

76 This is a man who did what he could to live a relatively normal life and simply found it was impossible to do so. His wife's description of how he copes at home fits with the pattern painted by the medical doctors, with the exception of Dr. Feasby.

77 The Plaintiff is a highly motivated person who overcame great difficulties by the use of a limited number of tools, i.e. his limited number of muscles. Clearly, the Plaintiff was walking a fine line. An injury to any of those muscles would have a greater negative impact upon him than it would on others who did not rely on those muscles to that extent. Unfortunately, one of the key set of muscles, namely those in the back and in particular in the low back, were injured and one thing led to another, so that after nearly eight years we have a disabled person who at present is unable to work because of a continuation of musculo-skeletal and, in recent years, psychological problems.

78 A word about Dr. Feasby's evidence. It is very difficult to reconcile Dr. Feasby's findings with those of the various specialists who have assessed and/or treated the Plaintiff for the last seven years and indeed are still treating him. None of these people have suggested that the Plaintiff is or was malingering or faking his symptoms. I found those who treated and gave evidence as to the Plaintiff's condition to be credible witnesses. In the case of Dr. Chiu, Dr. Yan, and Ms. Mak, their involvement with the Plaintiff has extended over many years. They would not be "fooled" by the Plaintiff throughout the term of their treatment of him.

79 In addition, the Defendant argues that the Plaintiff failed to mitigate his loss and points to the fact that he did not take time off work and says that although the Plaintiff was able to gain employment of some sort, he simply sought employment as an electrical technologist on only two

occasions. There is no evidence before the Court from either side as to what in fact the Plaintiff might currently do, other than the evidence of Mavis Andrew, an occupational therapist who had experience in functional capacity evaluation and dealt with cost of future care and Rachid Kishani, also an occupational therapist, who did a functional capacity analysis or evaluation of the Plaintiff.

80 Ms. Andrew did her assessment in November of 1997. She testified that from a physical point of view the Plaintiff is competitively employable if accommodated with various types of support mechanisms which she sets out in her report in Appendix "A". These include many devices such as a wheelchair-adapted van, a lightweight wheelchair, arm rests, a scooter which at some point would replace the wheelchair, portable ramps to enable him to enter and exit buildings and a custom-fitted back brace specific to his body measurements to assist him in sitting and walking. In cross-examination she said that she felt the Plaintiff could work part time, given all of the accommodations noted. She did not conduct aptitude studies, nor did she deal with the depression problem. She simply dealt with physical capabilities which were extremely limited. One wonders who might employ such a person so as to allow him to earn a livelihood given his restrictions and the accommodations which Ms. Andrew felt would be necessary to allow him to even work part time.

81 Ms. Andrew observed the Plaintiff doing or attempting to do many movements and activities. She performed a functional analysis which included palpitating of various musculo-skeletal areas of his body. She found his back in general and his shoulders and neck areas to be tender. Her findings are summarized at pages 14 and 15 of her report. She deals with his restrictions in movement, how they affect his daily living, his leisure pursuits, homemaking activities and potential employment capabilities. All reflect a seriously handicapped individual and are consistent with the findings of the medical doctors with the exception of Dr. Feasby, as well as with the Plaintiff's testimony and that of his wife.

Conclusion Respecting Liability

82 Therefore, I find the Defendant solely liable for the accident and all damages resulting therefrom, subject to certain heads of damage being reduced by 10 percent because of the carpal tunnel problem. These will be considered when I consider the question of quantum of damages.

Evidence of the Expert Witnesses

83 A word about the evidence of expert witnesses. The Defendant has argued that an expert opinion is only valid if the underlying facts upon which it is based are established by evidence at trial and this in turn depends upon whether such evidence is accepted by the trier of fact. The evidence of Dr. Keegan and Dr. Andrew is particularly questioned in this context.

84 This, of course, is so if the expert is being asked for his or her opinion based upon a hypothetical fact scenario such as was the case in R. v. English (1982), 47 Alta.L.R. (2d) 372, C.A. cited by the Defendant. However, this is not the situation in this case. Mr. Lam has, over the course

of the past 7 2/3 years, seen a number of health care specialists, at least once, and in a number of cases, many times. Several of these people have been qualified as experts by this Court and have given opinion evidence as such. There have been discrepancies in what they have recorded as being the history given to them by the Plaintiff as well as the complaints he has made from time to time. This information has, of course, been a component of the bases used by those experts in forming the opinions they have testified to and stated in their reports, entered as exhibits.

85 One can hardly expect a Plaintiff who has seen so many doctors so many times, to give identical answers to each such person on each occasion. There are bound to be discrepancies. The comments of Ritter, J. in Beger v. MacAstoker Estate (1996), 45 Alta. L.R. (3d) 16 at pp. 31-33 are appropriate. The evidence given to the experts by the Plaintiff was for the most part consistent.

86 We are concerned with opinions formulated and expressed by people trained to make such assessments. We look to their evidence for assistance in technical areas which the layperson's depth of understanding is inadequate; such as the case before this Court. I was referred to the case of R. v. Lavallee [1990] 1 S.C.R. 852, in the Supreme Court of Canada. I note the comments of Madam Justice Wilson at p. 896 and Mr. Justice Sopinka at p. 900.

87 In my view, there was admissible evidence before each expert upon which that person could found his or her opinion. Once I have cautioned myself as to the inconsistencies which were pointed out by counsel for the Defendant, it becomes a question of the amount of weight I am prepared to give to that evidence.

88 In this case, I accept the Plaintiff's evidence that he suffered these various problems, including the pain, discomfort, etc. that he has outlined over the years to various doctors. The Plaintiff may not have testified to each and every matter which appears in his medical records, the medical reports or the testimony of the expert witnesses. Indeed, he may not have referred in his evidence to seeing one or two of them. Nonetheless, those experts testified that they saw him, what they were told by him, what they found, the tests which they may have had performed, their observations and upon that, based their opinions. This Court has determined the weight it will give to what these witnesses have said when considering the evidence as a whole and answering the questions posed by the issues in this particular case. One must also remember that the Plaintiff does not speak or understand English very well. Substantially, the evidence of the doctors' objective findings and opinions bear out the Plaintiff's complaints. Thus, as far as the foundation for the opinions of the doctors is concerned, I see no problem. In short, I do not accept that the Plaintiff in any way materially misrepresented or falsely stated his actual physical and emotional problems. In my view, this man has not overstated his case nor is he a malingerer.

Pleadings

89 Counsel for the Defendant also argues that the Statement of Claim does not specify that the Plaintiff has suffered depression or chronic pain. The Statement of Claim does allege that the Plaintiff has endured pain, suffering, and loss of enjoyment of the amenities of life and will

continue to do so as a direct result of the injuries caused by the accident and negligence of the Defendant. Paragraphs 4 and 5 comply with R. 104 of the Rules of Court which requires the pleadings to contain only a statement in summary form of the material facts upon which the party pleading relies in his claim or defence. The allegations are appropriate. The specific findings of chronic pain and depression which, in this case, developed as the years passed, falls within the ambit of the claim made. In any event, these allegations have been known to the Defendant since the reports of the expert witnesses in question were made available in 1997, if not before. The Plaintiff has alleged that he suffered pain and suffering, surely chronic pain would be included in that allegation. Depression is a state of mind and simply a name attached to a condition which is a component of the claim for suffering and loss of amenities of life. The Canadian Oxford Dictionary defines "depression" as:

> "a state of extreme dejection or morbidly excessive melancholy; a mood of hopelessness and feelings of inadequacy, often with physical symptoms such as loss of appetite, insomnia, etc.; a reduction in vitality, vigour, or spirits."

90 The Defendant's counsel in argument took the position that because the Plaintiff did not amend the Statement of Claim to include depression and chronic pain in his particulars of injuries suffered, that they should not be considered by the Court. A number of expert witnesses made reference to these problems arising as the years passed. These statements are set out in a number of reports provided to the Defendant's counsel in 1997 and earlier. They come as no surprise.

91 There is no need to amend the pleadings each time a new symptom or condition arises from or because of the injuries allegedly suffered. Rules are in place to enable the Defendant to determine and indeed to insure that he is made aware of symptoms, conditions and problems resulting from the injuries alleged to have been suffered. It is not necessary to amend one's pleadings to state that the Plaintiff has hurt his shoulders because he fell as a result of losing his balance because of the pain he experienced. That is simply a consequence of the injury, so too are the conditions of depression and chronic pain.

Damages

92 The heads of damage claimed in the Statement of Claim are:

> A. Non-pecuniary damages for pain, suffering and loss of enjoyment of the amenities of life;

93 I do not intend to recount the various problems the Plaintiff has. I set the amount at $80,000.00.

B. Pecuniary damages

(1) Special Damages - March 7, 1992 to November 15, 1999

(a) loss of income

(i) employment
(ii) rental properties

(b) cost of care, including equipment, therapy, medication and travel costs
(c) homemaking expense and loss of homemaking capacity

(2) General Damages - November 15, 1999 forward

(a) loss of income

(i) employment
(ii) rental properties

(b) cost of care
(c) loss of homemaking expense and homemaking capability

94 Those heads of damage which I identify will be reduced by 10 percent as earlier discussed.

95 Ronald Galagan was qualified by this Court as an expert chartered accountant with expertise in the quantification of economic loss, past and future. He produced a very comprehensive report dated June 7, 1999 covering the foregoing pecuniary heads of damage which he updated to November 15, 1999. The general assumptions and understandings which are set out in the report commencing at page 7 and deal with the background history of the Plaintiff, his training, earning capacity, rental properties, the difference between Chinese tenants and non-Chinese tenants, his disabilities, etc. These are basically as testified to by the Plaintiff and as found to be the case by this Court. There is information set out in his report which was not dealt with such as the farm which the Plaintiff owns but which has no bearing upon Mr. Galagan's calculations.

96 The materials which Mr. Galagan had available to him are set out at pages 15 to 17 of his report. Such of this information as may have had a bearing on his opinion and calculations was either testified to and/or entered as exhibits, save the various tables, etc. he referred to and used in arriving at life and working life expectancies, various historical rates of interest, inflation, etc.

which are part of his tools in using his expertise and not unique to the Plaintiff's case.

97 Mr. Galagan used age 65 as a retirement date and in my view that is realistic. I have commented upon this earlier. Mr. Galagan used 45.5 years as the Plaintiff's age at the time of the accident which is approximately the case and a fair figure to use for purposes of the calculations. He also used the Canada Life Tables and Alberta Life Tables in arriving at the Plaintiff's pre-accident life expectancy prior to and following age 65 and his life expectancy after attaining the age of 65.

98 Mr. Galagan used a net rate of interest of 3 percent, an inflation rate of 4 percent, a nominal rate of interest inferred of 7.12 percent. These figures are explained in pages 21 to 23 of Mr. Galagan's report. Mr. Galagan used the Actuarial Consultants of Canada Limited information in arriving at the net rate of interest and a single life expectancy, and the Bank of Canada and Canadian Economic Observer to arrive at the rates of inflation and nominal interest rates. On the question of tax gross-up, again this is explained in pages 24 to 26 as are his treatment of contingencies on pages 27 to 28.

99 Mr. Galagan used November 15, 1999 as the cut-off date between past and future loss and expense. The working life expectancy was calculated to June 30, 2011, or age 65, and his life expectancy to December 31, 2024. For the purposes of his calculations Mr. Galagan used 7.7 years as the time from the date of the accident until date of trial, his future employment (working life expectancy) at 11.6 years, and his future cost of care period (his single life expectancy) at 25 years. These figures are reasonable for purposes of calculating those amounts. No exception was taken by counsel for the Defendant to these figures. I accept them as being reasonable and appropriate.

B(1)(a)(i) - Loss of Income - Employment

100 Mr. Galagan deals with the Plaintiff's income prospects at page 29 of his report. I agree with him that the Plaintiff's employment earnings in 1993 were $31,610.00 and that this be increased by inflation only, without any allowance for real wage growth. This is a fair and conservative basis for making this calculation. Therefore, I accept Mr. Galagan's evidence that the Plaintiff lost employment income from March 7, 1992 to November 15, 1999 of $188,701.00.

B(1)(a)(ii) - Loss of Income - Rental Properties

101 The uncontradicted evidence is that prior to the accident the Plaintiff did such repairs as were necessary to the fixtures, appliances, replacement of flooring, clean up when the tenants left, outside maintenance, carpentry work generally, etc. Since the accident he did what he could. However, he has been obliged to hire a caretaker for his rental properties. He must hire skilled tradesmen, when needed, for many jobs he previously did himself. The amounts paid to the caretaker have been $700.00 per month, either made up of $350.00 for an apartment plus $350.00 cash or, if the caretaker lived elsewhere, $700.00 a month. The documentation covers the period January 1, 1993 to December 1, 1998. The Plaintiff's income tax returns show that in 1992 he expended $5,076.00 on caretaking expense. No such expense was shown in his 1991 return. The Plaintiff testified that

since the date of the accident until the time of trial he has continued to pay $700.00 per month. There is no evidence to suggest that this amount is unreasonable. I found that due to the injures suffered in the accident that such a payment was necessary. In 1999 the cost increased to $8,900.00 per year due to the Plaintiff being obliged to pay C.P.P. and U.I.C. for his caretaker. This amounts to $7,778.00 as of November 15, 1999. The overall total expended was $63,254.00 which the Plaintiff is entitled to recover.

102 The Plaintiff's rental income in 1988 amounted to $24,030.00, it rose to $51,663.00 in 1993 and then dropped to $29,235.00 in 1996. Since then it has risen to $41,720.00 in 1998. The drop in 1996 was attributed to the change in tenants from Chinese students to the local marketplace. It is suggested that accommodation be made for this transition. I am not prepared to do this. It may well be the case that because of the Plaintiff's injuries he was unable to properly take advantage of the window of opportunity he had developed with the mainland Chinese student community and therefore had to revert to the local marketplace. However, in my view the evidence is far too vague to justify such an award.

B(1)(b) - Cost of Care to November 15 1999

103 The monies expended are as follows:

1	Kingsway Therapy	$330.00
2	Advance Therapy	$5,557.65
	Total	$5,887.65

3	Wheelchair - February 29, 1996 - Dr. Yan	$1,785.15
4	Leg braces - February 1996 - Gross Clinic	$503.68
5	Parking for treatments, etc.	$552.55
6	Drugs	$24.03
	Total	2,865.41

104 The Plaintiff's is entitled to recover $8,753.06. His counsel produced parking tickets of $2.55 for attending on examinations for discovery at the Defendant counsel's office. These are more appropriately dealt with as a cost item.

B(i)(c) - Homemaking Expense and
Loss of Homemaking Capacity

105 The Plaintiff claims $4,300.00 which he paid to Fung Yu Construction Ltd. to complete the building of an addition to his home. The Plaintiff had commenced this undertaking himself some three years prior to the accident. The $4,300.00 represents labour only and there is no evidence to

contradict the Plaintiff's testimony on this point. This claim is allowed.

106 The evidence has not satisfied me that the Plaintiff's ability to contribute to the management of the household was or is impaired. The concern is his inability to perform tasks which previously he had performed. I have considered the pre-accident lifestyle of the Plaintiff, the duties and responsibilities he performed about the home, the standard which he attained and the nature of the family unit as well as other considerations. In the final analysis I have attempted to place him in the same position he would have been in but for the Defendant's negligence.

107 The Plaintiff testified that since the accident he has been unable to shovel snow, cut the grass, do general handyman work around the home, help with the dishes and laundry, do the yard work and get into and out of the bathtub. Now his wife and daughter do this or they hire someone to do it.

108 Mrs. Lam testified that prior to the accident her husband did or participated in these household functions but that he is unable to do so now, though on occasion he tries to help. As a result, he has little patience and a short temper. Mrs. Lam testified that she does these jobs now as best she can with the help of her daughter. She now has to help the Plaintiff in and out of the bathtub.

109 Ms. Andrew, as noted, attended at the Plaintiff's residence and did a home assessment which included observing what the Plaintiff could and could not do. She confirms in her report the problems the Plaintiff has in living in his home and performing any useful services.

110 Mr. Lam's mother lived with the family until June of 1999 and was able to assist in many of the household duties Mr. Galagan in his report estimated that five hours a week at $8.00 an hour would be a reasonable claim in this regard, resulting in an amount of $2,000.00 per annum. I find this to be a most reasonable amount. Mr. Galagan calculates this to be $15,248.00 to November 15, 1999. I award this sum as the pre-accident loss of homemaking capacity suffered by the Plaintiff.

(2) General Damages - November 15 1999 Forward

(a) Loss of Income

(i) employment

111 The same assumptions apply for the post-November 15, 1999 period to retirement at age 65, or June 30, 2011, the end of the Plaintiff's working life expectancy. Mr. Galagan used a present valued annual income figure of $34,032.00 to make this calculation. This is explained at pages 29 to 32 of his report. Projecting this forward to 2011, the present value is $334,797.00. I accept this as a fair, reasonable and conservative amount. This will be discounted by 10 percent, leaving

$301,317.00 to which the Plaintiff is entitled.

B(2)(a)(ii) - Loss of Income - Rental Properties

112 The only future loss is the caretaker expense from November 16, 1999 to June 30, 2011. Mr. Galagan's calculations, using the $8,900.00 figure and the same interest, inflation and discount factors as he used respecting future loss of employment income, again to age 65, is $87,556.00. This will be discounted by 10 percent, leaving an amount to be paid to the Plaintiff of $78,800.00 before gross-up for taxes.

B(2)(b) - Cost of Care

113 There will be continuing physiotherapy necessary. Ms. Mak's evidence was that by November of 1997 the Plaintiff had reached a plateau where his condition hadn't changed much. Dr. Chiu in his report of October 2, 1999 effectively agreed. Dr. Chiu has continued to treat the Plaintiff with anti-inflammatories and physiotherapy. The Plaintiff still experiences back pain, shoulder pain, numbness in his hands and in his neck area. In Ms. Mak's view, the situation is chronic and it is now up to the patient to treat himself in the main and only come back and see her for ultrasound, etc. when his pain is out of control. She explained that when muscles go into spasm, heat itself will not help and ultrasound is needed.

114 The best one can do in this circumstance is to use the years 1997, 1998 and 1999, and average them. In 1997 he had 49 physiotherapy treatments, in 1998 he had 38, and in 1999 he had 18 to date of trial. Ms. Mak's letter of September 23, 1999 shows 16 treatments to September 22nd and in her evidence at trial she said there had been a "couple" since. A figure of approximately 20 treatments is indicated if this is prorated until the end of 1999. The average for the three years would be approximately 36 treatments per year. Using this figure at $30.00 per treatment, the annual cost would be $1,080.00. This will extend over the lifetime of Mr. Lam and is subject to a 10 percent discount.

115 The services of health care professionals for the most part will be covered by one government health care system or another. The only matters which would not seem to fall within that category are the physiotherapy costs earlier mentioned and possible psychotherapy assistance as mentioned by Dr. Keegan. Unfortunately, there is no evidence before the Court as to whether or not Dr. Keegan's recommendations would be covered by one health plan or another and if they weren't, what the amount would be. This applies to any professional counselling which may be required by the Plaintiff and also to any special retraining, upgrading of special education courses which will likely be needed.

116 The drug accounts are difficult to assess. The amount actually spent by the Plaintiff, out of pocket, over the years, has been minimal. He has obviously had his medications paid for, since they have been consistently prescribed throughout the years by the doctors who treated him. There was no evidence placed before the Court as to who was paying for these items and whether or not such

insurance or subsidization, as the case may be, will continue. I can only assume that since that has been so in the past, it will continue to be so in the future. Nor is there evidence that whoever is making these payments is subrogated for those amounts, nor is such a claim advanced. Given this situation, I am only awarding a small amount for future drugs and medication of a non-prescriptive variety such as some painkillers, liniment, etc. I am arbitrarily fixing this at $120.00 per year for Mr. Lam's lifetime. This award relates to his back problems.

117 Ms. Andrew testified that hot/cold gel packs are advisable to help Mr. Lam's shoulder problems. The initial cost is $10.00 and they must be replaced annually at $10.00 per year. This amount also relates to his back and shoulder problems.

118 The evidence of Ms. Andrew dealt with special modifications needed in the Plaintiff's residence, special equipment for his daily living and indeed special equipment to accommodate him so that he might work part time. She filed an extensive report which is Exhibit 48. These items are of such a nature that the likelihood is that sooner or later Mr. Lam, or anyone else for that matter, would require them, have no further use for them, or would be obliged to live in a facility where care and such equipment was provided. No evidence was adduced as to when this might be. Thus, I am arbitrarily fixing that time as age 78 and unless otherwise stated the replacement and cost of repair of these items will cease at that time.

119 I accept that the Plaintiff requires the following items which relate to both his transportation and home living:

a)	A mini van with wheelchair lift	$21,525.00
b)	Special equipment for the van (which will require replacement every 10 years)	8,300.00
c)	A lightweight wheelchair, which will be replaced every 6 years and require each year at a cost of $200.00	$3,250.00
d)	Orthoptic grip canes (to be replaced every 15 years)	$38.00

e)	Compression tire pump, at an initial cost of $300.00 (to be replaced every 20 years)		$300.00
f)	Portable ramps	$578.00	
g)	Grab bars, etc. in the home (to be replaced every 10 years)		$70.50

120 In the case of the motor vehicle and wheelchair, that initial figure will be reduced by the trade-in or sale price of the vehicle or wheelchair which is presently being used. A present value will be calculated for those items which will require replacement or repair over the years. All items dealing with transportation and home living will be reduced by 10 percent.

121 There were certain items recommended by Ms. Andrew which I do not feel are appropriate. The portable telephone, long handle reacher, Canadian Paraplegic Association membership, Alberta cellular telephone, and the Alberta Motor Association membership, are all items which the Plaintiff ought to have had in any event.

122 Ms. Andrew states in her report that Mr. Lam will require consultation services of an occupational therapist in order to carry out the transportation needs, equipment use and household modifications. She estimates a one-time cost at $2,550.00. This does not seem unreasonable and I award that amount. This will not be reduced by 10 percent.

123 In her report of January 28, 1994, Ms. Mak recommended that the Plaintiff try aquasize classes so as to assist in strengthening his back muscles gradually. The Plaintiff testified that he checked around and found no physiotherapist who had a pool equipped to deal with handicapped people. He tried the University of Alberta Hospital, but was never told when he could come. He asked the insurance company to install a whirlpool in his home. It would appear that his motor vehicle liability insurer under its s. B coverage paid $5,000.00 which Mr. Lam has placed aside to acquire a whirlpool. He testified that he requires another $2,800.00 to complete the installation. On the other hand, Ms. Andrew advises that from her point of view, a whirlpool would have to be installed in the basement of Mr. Lam's home and to get there would require a lift to be constructed. No figures are given. I accept that a whirlpool would be most helpful. However, I am not prepared to speculate as to the cost of a lift. It is evident that the Plaintiff cannot utilize his basement stairs since his evidence is that on occasion he falls when he does so. Thus, how can one facilitate a whirlpool without acquiring a different home? This question is not answered and I am not prepared to speculate as to what it might be.

B(2)(c) - Loss of Homemaking Expense & Homemaking Capability

124 As earlier stated, I am not satisfied that the Plaintiff's ability to contribute to the management of the home was, is or will be impaired. The sole concern is his inability to perform tasks which previously he had performed. I award the same amount annually, post-trial as I did pre-trial to June 30, 2011. Mr. Galagan's figure is $23,244.00, the present value of which is $19,675.00. A discount of 10 percent will be made, leaving $17,707.50.

Tax Gross-Up and Judgment Interest

125 In determining the total monetary losses, a gross-up for taxes is required. I accept Mr. Galagan's comments in this regard as set out in pages 24 through 26 of his report. Given my findings as set out above, Mr. Galagan can now calculate the appropriate tax gross-up amount. He can also do the calculations necessary insofar as all the losses, costs and expenses accepted by me from November 15, 1999 forward are concerned, as well as the pre-judgment interest calculations as provided for by the Judgment Interest Act, R.S.A. 1980, c. J.05 and regulations from time to time made thereunder.

Summary of Judgment

126 The Plaintiff will recover the following damages:

A.	Non-pecuniary	$80,000.00
B.	Pecuniary	
	1. Special damages - March 17, 1992 to November 15, 1999	
	a) Loss of income	
	(i) employment	$181,701.00
	(ii) rental properties	$63,254.00
	b) Cost of care	$8,753.06
	c) Homemaking	$19,548.00
C.	General Damages - November 15, 1999 forward	

a) Loss of income

(i) employment	$301,313.00
(ii) rental properties	$78,800.00

D. Cost of Care (to be calculated as earlier stipulated)

E. Loss of Homemaking Expense & Homemaking Capability	$17,707.50

F. Tax Gross-Up and Judgment Interest to be Calculated

Costs

127 The Plaintiff would in the normal course of events be entitled to his costs of these proceedings based upon the appropriate column of Schedule "C" of the Rules of Court and all reasonable expenses incurred in prosecuting these proceedings. If the parties are unable to agree, they may speak to the question.

MURRAY J.

cp/s/qljpn/qlwag