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Docket: CI 98-01-06570
(Winnipeg Centre)
Indexed as: Voulgaris v. Heartwood Construction Ltd. et al.
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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

CHRIS VOULGARIS,	) Counsel were:
Plaintiff,	) R.N. Kushnier) for the plaintiff
- and -	
HEARTWOOD CONSTRUCTION LTD., VIDEO STOP, 2962129 MANITOBA INC., carrying on business as Subway Sandwiches, UVALDE INVESTMENT COMPANY and MERIT PROPERTIES LTD.,	) M. Green) for the defendant Heartwood) Construction Ltd.)) M. Finlayson) for the defendant Merit) Properties Ltd.
Defendants,	)
- and -	
DOUBLE "B" PAVING (1988) LTD., NATALIE POUND and MURRAY AULD carrying on business under the firm name and style of QUIK-SAND,	)
Third Parties.	) JUDGMENT DELIVERED:) February 23, 2006

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JEWERS, J.

[1] On March 4, 1996, the plaintiff, then aged 55, slipped, fell and allegedly sustained knee and back injuries while walking on the parking lot of a strip mall at 6500 Roblin Blvd. in Winnipeg, Manitoba. He alleges that he slipped on a

piece of cardboard. He brings this action against Heartwood Construction Ltd. ("Heartwood"), a general contractor which was doing renovation work on a Subway restaurant in the mall, and against Merit Properties Ltd. ("Merit"), the occupier and property manager of the mall at the time. The claim against Heartwood is based on negligence for placing and allowing the cardboard to be on the lot in the course of the construction work and against Merit under *The Occupiers' Liability Act*, R.S.M. 1987, c. O8, for failing to take reasonable care to see that the premises were reasonably safe for the plaintiff. The third party claims did not proceed. The claims against 2962129 and Uvalde were dismissed by consent.

[2] The strip mall is located on the south side of Roblin Blvd. and faces in a northerly direction. It consists of a number of separate commercial units, including a Subway restaurant at the eastern end. Along the front of the mall on the north side, there is a concrete sidewalk running the entire length of and immediately adjacent to the building. In front of and to the north of the sidewalk, there is a parking lot consisting of parking stalls on both the south and the north sides of the lot with a lane down the middle. There is a slight slope on the lot from south to north estimated by the expert witness, Dr. Davison, at 2.9 degrees.

[3] At the time of the accident, the plaintiff lived with his wife and members of his family on Malone Street, which is relatively close to and just east of the mall. He related the following. He said he left home at 1:40 to 1:45 p.m. on

March 4, 1996 in order to pick up a video at a video store which was located near the west end of the mall. His wife was on her way to work and so she drove him in the family car and left him at the store. He was there for twenty to thirty minutes and then left and proceeded in an easterly direction along the sidewalk with the intention of leaving the mall premises at an exit way on the east end. The day was cold but not sunny. There was snow but it had not snowed recently. He was "bundled up", wearing a toque pulled down over his ears and head, leather mitts, leather coat and a scarf. His collar was turned up and he was walking somewhat hunched over against the weather. He was wearing snow-boots which had relatively thick and rough treaded soles. The sidewalk was icy and so he was walking very carefully and close to the building so that if he should slip, he would be able to brace himself. He came to a pile of debris – mostly cardboard – which was spread out on the sidewalk in front of the Subway store. He had been walking about sixty to eighty feet along the sidewalk but he did not notice the debris until he was about five to six feet away. He could not continue on the sidewalk and so he turned left onto the parking lot and there stepped with his left foot onto, and slipped on, a loose piece of cardboard. He did the "splits", fell onto the left side of his body and slid about twenty feet down the slightly sloping lot. He had slipped in a northerly direction towards Roblin but managed to regain his feet and he then proceeded in an easterly direction around the pile of cardboard and carried out his original plan of leaving the lot on the east side. There was somewhat of a snow-bank on this

side – about two feet high – which had been trodden down by pedestrians and this is the route which he took. That led him to Sparrow Avenue which ran north and south to the east of the mall and from which he could walk further east to his home on Malone Avenue. That is the route which he took home. He said that en route, he noticed some discomfort in his left knee which subsequently became swollen and painful leading him to seek medical help, which I will describe later in these reasons.

[4] Mr. Turchinetz is a witness of some importance. He testified that he was a sub-contractor working in the Subway premises probably some time after noon on March 4, 1996. He was working installing a wallpaper mural and was facing the front windows of the restaurant with a clear view of the parking lot. He said that he saw a man crossing the parking lot at a forty-five degree angle from the western parking lot entrance towards the pile of debris; that the man was wearing a camel-coloured full-length coat to the knee; that he may remember a wool collar; that the man wore no hat; that he had salt and pepper grey-coloured hair; but that he could not remember a scarf, boots or gloves. He said that the man came to the debris, rummaged through it for about five seconds, then turned north and walked past the debris towards Roblin; and that after two or three strides the man fell on his rear. He said that he did not notice that the man had slipped on cardboard. He said that the man turned and looked behind him; and that the man then turned north-east and walked toward Roblin. In

cross-examination, he acknowledged that the man seemed to be walking in a generally northern direction.

[5] Mr. Turchinetz said that he did not recollect that the surface of the parking lot was icy but that it seemed to him to be more like hard-packed snow.

[6] Mr. Turchinetz did say in court that he believed the plaintiff was the same man that he saw walking across the parking lot. However, I am not able to conclude that this man was necessarily the plaintiff. The eyewitness identification evidence of Mr. Turchinetz is exceedingly frail based as it is on a relatively fleeting observation of a stranger and a recollection of an event occurring almost ten years ago. His description of the clothing worn by the man does not coincide with the evidence of the plaintiff as to what he was wearing, although there is always the possibility that the plaintiff himself did not accurately remember what he was wearing; nevertheless, the plaintiff probably has a better memory of what he was actually wearing than a stranger such as Mr. Turchinetz. Furthermore, the direction taken by this man coming diagonally across the parking lot does not correspond with the evidence of the plaintiff. Of course, the plaintiff may have a faulty recollection in this regard but if his intention was to take the route home which he described, he would not likely have walked out onto the parking lot rather than to have proceeded directly along the sidewalk as he said he did, and I have no particular reason to question the evidence of the plaintiff at least in this respect. Mr. Turchinetz said that the man he observed had salt and pepper grey-coloured hair but there seems little

doubt that the plaintiff did not have such a hair colour. Today, his hair is virtually black with perhaps a bit of grey around the temples. This was confirmed by the plaintiff's barber, Mr. Troia, who testified on rebuttal that he had cut the plaintiff's hair regularly during the past twenty-five years and that he never had grey or "salt and pepper grey" hair except for some grey at the temples and that it was always mostly dark.

[7] It is doubtless quite a coincidence that another person would have slipped and fallen in almost exactly the same place as the plaintiff and at or about the same time. One is tempted to believe that it was the plaintiff but, in my view, that finding is simply not sufficiently borne out on the evidence.

[8] Mr. Turchinetz was a good and, I think, generally reliable witness despite my reluctance to rely upon his identification evidence. He was completely independent and I think he had a reasonably clear recollection of what had occurred. He was able to comment on the condition of the parking lot and he did confirm that the pile of cardboard debris was present.

[9] What was the general condition of the parking lot?

[10] The evidence of the plaintiff was that the lot was icy and an "orphan" – meaning that it was neglected and ill maintained. This opinion was not supported by the evidence and was an example of the gross exaggeration which characterized much of his evidence.

[11] Mr. Karam, the owner of Subway, testified. He said that he received a telephone call from the plaintiff at about 10:00 p.m. in the evening of March 4th

to describe and complain about the accident. He said that he contacted Merit and then first thing the next morning, he went to the site where he saw that the lot was plowed but that there was no grit or sand on it. He said that he told Merit that the lot was icy and needed sand and that he also told Heartwood to move the garbage. But he had no independent recollection and acknowledged that he was relying on the photographs of the surface. Bill Voulgaris, the plaintiff's son, had taken photographs of the site on March 5th and these were placed into evidence at the trial. Mr. Karam was invited to examine the photographs and was not able to see any ice.

[12] Indeed, the photographs do not appear to show any ice with the possible exception of an area on the lot where it seemed that a vehicle had been parked and perhaps melted the snow leaving an icy surface, but this was not in the area where the plaintiff fell and the remainder of the lot as shown in the photos appears to be partly snow-covered but not icy.

[13] Merit had in place a system whereby snow and ice removal as well as sanding and the placing of grit was sub-contracted out to others including Double "B" Paving. That sub-contractor's invoices showed that they had cleared the snow on February 29, 1996 and that they had hauled snow on March 4th. In fact, Mr. Turchinetz recollected that a contractor was on site doing snow removal while he was there earlier in the morning of March 4th. Mr. Hamburg of Merit said he attended the site on March 5th after having been notified by Subway and

found that the lot was clear and that the icy ridges on the sidewalk had been sanded. His diary and notes did not indicate that there was any ice on the lot.

[14] Mr. Turchinetz recalled no ice but rather hard-packed snow.

[15] The only witness who appears to have recalled ice on the lot was the plaintiff but the weight of the evidence was that the lot was not icy and I so find; the lot was cleared and there was probably hard-packed snow which was not shown to be unduly hazardous. The lot was in reasonable condition.

[16] There is no doubt that the cardboard debris was present at the time. The plaintiff, of course, said it was there and that it tended to spread out onto the lot. The presence of the cardboard pile was confirmed by the plaintiff's son, by Mr. Karam, by Mr. Turchinetz and by Gerald Enns of Heartwood on discovery. The presence of the pile is clearly shown in the photographs.

[17] The plaintiff testified that the pieces of cardboard extended across the sidewalk and onto the parking lot. The photographs show this although they do not show any smaller pieces on the lot. These photographs were taken the day following the accident. Mr. Turchinetz confirmed that there were both large and small pieces of cardboard and that there was cardboard on the parking lot.

[18] The preponderance of the evidence is to the effect that not only was the cardboard pile present at the time of the accident but that it extended onto the parking lot itself and I so find.

[19] As will be seen later in these reasons, I generally question the credibility of the plaintiff. Nevertheless, I accept that he probably did slip and fall on the

cardboard. The defendants accept that he did fall although they question whether he slipped on any cardboard. Nevertheless, the cardboard was there. It did extend out onto the lot and it is not unreasonable to believe that there were some pieces of cardboard – smaller or larger – on the lot in the path of the plaintiff. I have already found that the surface of the lot was not icy and so the plaintiff might well not have fallen if he had not stepped on the cardboard which, together with his weight and the hard-packed snow underneath, would have resulted in a toboggan-like effect on the somewhat slippery slope and could have propelled him twenty feet as he said. That this scenario was physically possible was demonstrated by the report of the physicist, Professor Davison, which was not challenged on cross-examination.

[20] I agree with counsel for the plaintiff that the cardboard pile situated as it was presented a dangerous situation in that pedestrians such as the plaintiff could accidentally tread on the loose cardboard pieces and slide and slip on the lot.

[21] There is an issue as to whether Heartwood or its subcontractors were responsible for creating and maintaining the pile of debris. Under the construction contract with the tenant Subway, Heartwood was responsible for "clean-up". But that was as between Subway and Heartwood. Nobody from Heartwood testified at the trial but the plaintiff read into evidence certain portions of the examination for discovery of Mr. Enns who was the *alter ego* of Heartwood. Mr. Enns stated that as between themselves, the general

contractor, that is Heartwood, and the various subcontractors took responsibility for and looked after their own debris. Mr. Enns further stated that it was the habit of Heartwood to place the debris which they generated "just right on the sidewalk." He also stated that the persons responsible for debris removal were himself and one Matthew Tucker, both employees of Heartwood. Presumably, the debris would be removed from time to time although the evidence was not clear as to whether this would have been on a daily basis or less frequently. There was no evidence that any of the sub-trades were accustomed to leaving debris on the sidewalk.

[22] Counsel for Heartwood submits that there was no evidence that the debris in question was left there by Heartwood or the sub-trades. There was evidence from Mr. Turchinetz that there were other trades working in the premises on March 4, 1996 but it was not clear whether they were employees of the contractor or one or more of the subcontractors. In any event, as counsel for the plaintiff points out, no representative of Heartwood testified at the trial, and I can and do draw an adverse inference from this. In my opinion, on the basis of the evidence that was presented, I am entitled to find that Heartwood was the creator of and responsible for the debris. And I do so find.

[23] There was evidence that Heartwood did not need to leave the debris in front of the premises bordering the parking lot but that they could easily have stored it more appropriately and safely at the rear of the premises. I agree with

the plaintiff's submission that Heartwood was negligent by not ensuring that the debris was disposed of promptly in such a way as not to cause harm to others.

[24] Merit was an occupier within the meaning of *The Occupiers' Liability Act* and the duty of an occupier is to take reasonable care in the circumstances to make the premises safe. That duty does not change but the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation – thus the proviso "such care as in all circumstances of the case is reasonable". See ***Waldick v. Malcolm***, [1991] 2 S.C.R. 456.

[25] As far as the liability of Merit is concerned, the surface of the parking lot was in reasonable condition and so they cannot be faulted in that regard. I accept that they were not aware of the presence of the debris. Mr. Hamburg was in the habit of visiting and inspecting the mall premises either once or twice a week and his diary shows that he was there once in the week of January 29th, once in the week of February 19th and once in the week of February 26th, which would have been just before the accident. Construction had been going on during the whole of that period but there was no evidence that when Mr. Hamburg attended, there was any debris present and, indeed, there was no evidence as to how long the pile in question had been there. In my view, there was not sufficient evidence presented from which the inference could be drawn that Merit knew of the debris.

[26] But they were certainly aware that construction activity was going on and they might reasonably have anticipated at least the possibility that this activity would generate garbage or debris. Notwithstanding they apparently took no steps to ascertain what measures the contractors might have in place to contain the debris and did not seek to impose any requirements on the tenant or its contractor in this regard. Nor did they take any active measures themselves to guard against the type of hazard which resulted in the accident in question. On the contrary, their attitude seemed to be – and Mr. Hamburg testified in this vein – that everything was left up to the tenant and the contractor: it was all their responsibility. That might be a reasonable enough attitude to take with respect to the tenant and the contractor but it did not detract from Merit's affirmative duty as an occupier to itself take reasonable steps to keep the premises safe. That was not a duty which could be transferred to others. Counsel for Merit submits that Subway and its contractor were not "children" who could not be trusted to act appropriately. That may be so but one cannot always rely on others to do the appropriate thing at all times particularly where, as here, Merit was under a positive duty to do what it reasonably could to keep the premises safe.

[27] Merit did have in place a system of inspection and maintenance in the sense that there were appropriate arrangements for snow removal and sanding of the lot and sidewalk and I have already found that there was no fault in that respect. But in the circumstances presented by this case, there does not appear

to have been sufficient or indeed any attention paid to other hazards including the construction debris. Merit did engage one contractor, Natalie Pound, who was to attend the premises daily to inspect and ensure the safety of the sidewalks. Ms Pound did not testify and so there was no evidence from her as to whether she ever noticed the construction debris and what, if anything, she did about it. There is no evidence that she ever told Mr. Hamburg of any such debris or that she ever admonished Subway or the contractor for blocking the sidewalk with their garbage. It would seem that she was an independent contractor and not an employee of Merit but there was no reason why Merit could not have – and should not have – instructed Ms Pound to be on the alert for and report on any hazards posed by the construction work. I conclude that Merit was in breach of *The Occupiers' Liability Act*.

[28] As between Heartwood and Merit, I would apportion the blame sixty per cent against Heartwood and forty per cent against Merit on the basis that the greater culpability was that of Heartwood which, after all, created and maintained the dangerous situation.

[29] The plaintiff said that he did not see the debris until he was only five or six feet away from it but he should have seen it sooner because it was in his plain view for the whole distance – some sixty to eighty feet by his estimate – he was proceeding along the sidewalk. He acknowledged that he had seen the piece of cardboard on which he slipped before he placed his foot on it.

[31] In these circumstances, I would hold that the plaintiff was guilty of contributory negligence in that he was or should have been aware of the hazard presented by the cardboard in the winter conditions which were present and he should have taken greater care as to where he was treading.

[32] I would apportion liability sixty per cent against Heartwood and forty per cent against the plaintiff on the same reasoning that I applied in respect of the apportionment between the defendants.

[33] The plaintiff said he hurt his knees and back as a result of the fall. He seemed unsure as to whether one or both knees actually struck the ground but the consensus of the medical opinion appears to be that having regard to his description of the fall, which was that he did the "splits" and went backwards on the left side of his body, it is unlikely that his knees hit the pavement and that if they were injured, it would have been due to the sudden hyper-extension of his legs.

[34] His evidence was that after the fall, he began to feel some discomfort in his left knee as he was walking home and that after he got home, the knee became more painful and swollen; that he telephoned the emergency department of the Grace General Hospital to see if he should come there and they referred him to his family doctor; that he was not able to get an appointment to see his family doctor, Dr. Ross, but that on March 6th he did see Dr. Petrenko who was a colleague of Dr. Ross. According to the medical records, he complained of stiffness and pain of his entire back and pain in the back of the

left thigh and left knee and left Achilles tendon but there was no bruising (or swelling as the plaintiff had testified). Dr. Petrenko referred the plaintiff to Dr. John Wiens, an orthopedic surgeon, for assessment of possible cartilaginous and or ligamentous tears of his left knee and back injury and left Achilles tendon injury.

[35] The plaintiff saw Dr. Wiens on March 7, 1996 and Dr. Wiens reported that the plaintiff had no effusion but a lot of pain with valgus stress of his knee but no significant opening of the medial joint. Dr. Wiens said it was his impression that the plaintiff may well have had a strain of his medial ligament but did not appear to have a significant tear. Dr. Wiens also said it was his impression that the patient did not have a torn meniscus and that for the time being, he should merely be observed.

[36] X-rays done on the same day were reported normal.

[37] Dr. Petrenko referred the plaintiff for physiotherapy.

[38] Dr. Wiens reassessed him on March 20, 1996 and sent him for a bone scan which was normal. Dr. Wiens felt no active treatment was required and told him to resume his normal activities with no follow-up examination felt to be necessary.

[39] Dr. Ross saw him for the first time on March 21, 1996 and again on May 2, 1996 when the plaintiff said he was "getting worse" with right shoulder pain and right-sided neck pains. At this time, Dr. Ross diagnosed myofacio pain in his shoulder and neck. He did not examine the knee because it had been

thoroughly assessed by Drs. Petrenko and Wiens with normal X-ray and bone scan.

[40] On June 26, 1996, the plaintiff reported to Dr. Ross that his left knee was painful, and on July 31, 1996, he complained to the doctor that he was "getting worse" and experienced pain after walking especially in his left knee and lower back. By then he had stopped the physiotherapy. Dr. Ross diagnosed myofacio pain of recent onset unrelated to the accident and referred him to Dr. Arneja, a physiatrist.

[41] On September 11, 1996, the plaintiff was reassessed by Dr. Wiens who felt his symptoms were a result of a "functional component", implying that he could not find an organic diagnosis as a cause of the symptoms. Dr. Wiens encouraged him to resume his normal activities.

[42] On October 3, 1996, he was assessed by Dr. Arneja who initially felt that he had a lumbo-sacral pain with a left patello-femoral joint strain.

[43] On January 6, 1997, he was reassessed by Dr. Arneja who felt that "Mr. Voulgaris had developed a chronic soft-tissue pain syndrome with mild trigger points of the right ilio costalis lumborum and right supra spinatus muscle" but that he had "no evidence of any ligamentous instability or significant patello-femoral or tibio femoral joint arthritis". Dr. Arneja encouraged the plaintiff to increase his activities and begin aerobic conditioning exercises.

[44] On January 16, 1997, the plaintiff was reassessed by Dr. Arneja who felt that there had been improvement and no further investigations were indicated.

[45] On March 13, 1997, he complained to Dr. Ross that his left knee was hurting and had been for two and a half weeks and that he was unable to flex the knee past ninety degrees. Dr. Ross referred him to Dr. Kayler, an orthopedic surgeon, for a third opinion of the knee problem.

[46] On April 18, 1997, he was assessed by Dr. Kayler who noted that he had some "guarding of the knee with moderate restricted range of motion and chiefly medial joint line symptoms".

[47] On May 1, 1997, Dr. Kayler did an arthroscopy of the left knee and found no evidence of a meniscal tear but some thickening of the synovium which was partially resected. The operative report states that there were some mild patello-femoral changes; that there was a mild to moderate synovial reaction throughout the knee; that there was a little fraying of the inner margin of the lateral meniscus but that this was not unstable and did not require surgery; that there was no significant tear of the medial meniscus (which had been suspected); and that there was a fairly thickened plica of senovium. All that was done was that the plica was partially resected. In his testimony, Dr. Kayler elaborated somewhat on his written reports. He said he found nothing significant with respect to the meniscus and it did not need to be trimmed; that he did trim the plica, which is an organic structure – a fold – and not really essential to the knee function; that there was minor osteoarthritis; that none of his findings related to the accident and the plaintiff probably did not injure the spica.

[48] On July 17, 1997, he complained to Dr. Ross that his left knee pain was worse than any pain he had experienced and it was so painful that he could only walk ten minutes at a time in contrast to previously when he used to run three miles per day in 1993, 1994 and 1995. However, on examination Dr. Ross found no effusion of the left knee joint, no swelling and no tenderness with the ligaments intact and almost full flexion with slight patellar tenderness. Dr. Ross advised him to continue his exercises and that he would have to live with his pain as he had nothing more to offer him.

[49] In or about November 1997, the plaintiff was referred to Dr. Craton, a sports medicine physician, who reported that the plaintiff had some ongoing evidence of meniscal dysfunction and some patello-femoral pain with quadriceps wasting. He recommended exercises and referred him for an MRI which identified no meniscal tear and no loose body.

[50] In or about November 1998, Dr. Ross next referred the plaintiff to Dr. Svorkdal at the pain clinic, Health Sciences Centre, who made certain recommendations including a bone scan, a topical anti-inflammatory, icing, a knee brace, etc.

[51] On May 25, 1999, Dr. Kayler reassessed the plaintiff and, in a report dated July 1, 1999, he noted that the plaintiff had continued knee complaints; that he presented with an irritable anterior knee and patellar tendon tenderness; that he told him the prognosis for improvement with any further surgery was guarded at best; that he had some concern regarding a chronic pain syndrome; that "I

would not perform surgery in the presence of ongoing litigation regarding this knee, but would consider it after settlement, if there was still a desire for it then."

[52] Subsequently, Dr. Ross called Dr. Kayler and warned him that the plaintiff was a difficult patient who had been expressing hostility to some of the specialists to whom he had been referred and that Dr. Kayler should be careful in his dealings with him. In fairness, Dr. Kayler did testify that he was not overly troubled by this call.

[53] The plaintiff subsequently discontinued the services of Dr. Ross and in January 2000 began to see another family physician, Dr. Leung Shing.

[54] On February 21, 2001, Dr. Leung Shing reported that since the plaintiff had come under his care, he continued to complain of pain of both knees, especially the left and that his left knee locks and gives way. He referred him to yet another orthopedic surgeon, Dr. Balageorge.

[55] On March 8, 2001, Dr. Balageorge reported to Dr. Leung Shing that the main problem was the left knee, that the left knee had no increased heat or effusion, that the range of motion was from zero to ninety degrees and any motion beyond this causes the plaintiff a great deal of pain throughout the knee, that he is tender in the medial joint line, less so in the lateral joint line and more so in the patello-femoral joint and that he has some atrophy of the muscles on the left quadriceps. Dr. Balageorge noted that X-rays showed no evidence of arthrosis but some minor minimal arthritis changes. He reported "This

gentleman seems to be disabled by left knee pain and is having problems with this. He does not show much arthrosis on his X-rays to account for his pain". He ordered another MRI to rule out any occult causes and also blood tests to rule out any inflammation.

[56] Dr. Leung Shing again referred the plaintiff to Dr. Balageorge who, on May 1, 2003, reported that he was complaining of pain in both knees with swelling and buckling and problems with stairs and kneeling. The doctor said that the right knee had a full range of motion with no increased heat or effusion but with some tenderness. He said that the left knee shows "a great deal of pain" to the patello-femoral joint, not much to the medial or lateral joint line and normal collateral ligaments. Dr. Balageorge did X-rays which really did not show much arthritis in the knee. The doctor said there was also documentation on MRI that he has had meniscal tears and that a left knee MRI done in August 2001 suggested a "horizontal cleavage tear of the medial meniscus" of the left knee and possibly some degenerative changes to the lateral meniscus. The doctor suspected a meniscal tear in the right knee and ordered another MRI.

[57] On March 3, 2004, Dr. Balageorge reported to the plaintiff's lawyer that the MRI to the right knee showed that he has a complete horizontal cleavage tear of the lateral meniscus and also a small parameniscal cyst. He said an arthroscopy of the right knee was planned to trim or actually excise the lateral meniscus. He reported that in regards to the left knee, the plaintiff "seems to have problems related to his patello-femoral joint". The doctor said that

although he expected that the right knee might improve, the prognosis of completely eradicating the pain was somewhat guarded given the longevity of the symptoms and that in regards to the left knee, he expected no changes.

[58] My understanding is that the arthroscopy to the right knee was never done.

[59] He was examined by Dr. Peter MacDonald, an orthopedic surgeon, at the request of counsel for Heartwood, and Dr. MacDonald reported on February 13, 2003 that the clinical exam revealed that he was walking with a cane in the left hand and had an antalgic gait from the left side (disproportionate weight bearing); that he had no obvious atrophy and that there was no obvious swelling or effusion around the left knee; that he was tender along the medial joint line of the left knee; that his range of motion of the left knee was zero to seventy degrees but he was reluctant to go further; that medial and lateral laxity was not abnormal; that he had definite tenderness in the patellar tendon and a positive patellar grind test in both knees.

[60] Dr. MacDonald diagnosed the following: lumbo sacral back strain from a previous motor vehicle accident of 1987 and aggravated by the accident of 1996, which is currently stable and does not seem to be a significant disability; left knee patello-femoral degeneration which is symptomatic with most of the pain coming from the anterior part of the knee and some secondary patello-femoral pain on the right side; medial meniscal tear of a horizontal cleavage nature in the left knee which is not a major cause of disability at the present time.

[61] Dr. MacDonald opined that the injuries originally stemmed from the motor vehicle accident but were enhanced by the accident of 1996. He said that his present disability is for kneeling, squatting, climbing or prolonged standing on hard surfaces, as well as prolonged walking. He said that the restrictions appear to be permanent but may be altered by an arthroscopy.

[62] On May 12, 2003, Dr. Leung Shing reported to the plaintiff's lawyer that he had been developing symptoms of depression, that is, decreased appetite and feeling emotional at times and wanting to cry, and had been referred to Dr. Kowalchuk, a psychiatrist, for further assessment and management.

[63] Dr. Kowalchuk has been treating the plaintiff but did not file a medical report and did not testify at the trial.

[64] The plaintiff's lawyer referred him back to Dr. Arneja who did a complete overview of the plaintiff's case history and reported his findings in a letter dated January 5, 2004. He made the following assessments:

1. A lumbo sacral strain as a result of the accident of 1996 which has significantly improved so that he only has mild restriction of the movements of the lumbo sacral spine;

2. Chronic left patello-femoral strain, mild laxity of the lateral collateral ligament and on MRI a horizontal cleavage tear;

3. Depression;

4. Myofascio pain syndrome, which should be treated with local cooling of the muscles, local Fluoro-Methane spray and stretching exercises;

5. Patello-femoral arthritis which is mild and not uncommon to see in a patient of his age and which has not responded well to treatment

> but "a further approach should be considered including steroids and anti-inflammatory medication".

[65] His prognosis was poor or guarded for significant or complete recovery based on the chronicity of the symptoms, developing chronic pain syndrome and significant disability which is not proportional to the radiological and clinical findings of the left knee joint.

[66] The plaintiff's lawyer referred him to Dr. Globerman, a psychiatrist, who wrote a report dated July 5, 2004 diagnosing the plaintiff with a "Major Depressive Episode with symptoms in the mild to moderate range; that this is currently considered chronic and treatment resistant; that the prognosis for significant improvement remains guarded; and that psychological and pharmacological treatment will continue to be required on an ongoing basis with it being extremely difficult to give an accurate time frame for the duration of the proposed treatment.

[67] Dr. Globerman's assessment appears to have been for medical legal purposes only as he had only seen the plaintiff on one occasion and was not and is not treating him. The psychiatric treatment is being carried out by Dr. Kowalchuk.

[68] Finally, the plaintiff's lawyer asked Dr. Craton to review the plaintiff's medical history and give an opinion as to whether his current complaints of knee pain were related to the accident. Dr. Craton said that "In my opinion, if not for the slip and fall, the patient would not have had this condition leading to the

chronic pain nor would he have had the impairment and disability he experiences at this time".

[69] Throughout the course of his treatment by the various doctors, the plaintiff took physiotherapy treatments at the Corydon Physiotherapy Clinic, the Grace General Hospital and Deer Lodge Centre. Amongst other things, the treatments consisted of education and exercise programs. For the most part, the physiotherapy reports noted improvement but with some "deficits" remaining.

[70] The plaintiff himself gave evidence that his ability to walk is limited, that he has problems on a slope, that there is grinding and locking of his left knee, that he is unable to concentrate, that the medications "knock him out", that he is depressed and taking medication for this and for insomnia, that he has pain and lack of concentration and that he is disabled to the point where he cannot carry on his former occupations of a real estate agent and restaurant operator.

[71] He said that he currently lives in an apartment and does his own cooking but that he does not go out on social occasions because he becomes exhausted and cannot stand.

[72] He said that he is currently applying medication – an ointment – to his knee and that this medication is very expensive.

[73] The general thrust of the medical evidence is that the clinical and physical findings do not account for the severity of the symptoms professed by the plaintiff.

[74] Dr. Wiens concluded that it was his impression that there was a functional component and his recommendation was simply that the patient should be encouraged to resume his more normal activities.

[75] Dr. Kayler referred to "relatively minor findings" on the arthroscopy. In his report of October 2, 1998, he said "he may be one of those persons who is a non-responder to all forms of treatment, and he still has his unsettled injury claim". On cross-examination, he said that patello-femoral arthritis is common in runners; that the knee is often quite functional and there is no interference with one's ability to stand on the job; and that the plaintiff's complaint may be a minor matter which has taken on an aura of seriousness. He said that he felt that the plaintiff had to "get it going".

[76] Dr. Arneja, in his report dated January 5, 2004, referred to "significant disability which is not proportional to the radiological and clinical findings of the left knee joint." On cross-examination, he said that the chronic pain was not explained entirely in medical terms but he would not agree that it was grossly disproportionate and preferred the use of the term "mildly disproportionate". I note, however, that in his report of January 5, 2004, he said that the plaintiff had arthritis which "is mild and not uncommon to see in a patient of his age." So there he agrees with Dr. Kayler.

[77] Dr. Balageorge referred to "minor arthrothosis".

[78] The various physiotherapy reports noted improvement. None of the physiotherapists indicated that the plaintiff's symptoms were so severe as to

disable him from employment. The physiotherapist at Corydon thought that in March 1998, the plaintiff was capable of returning to "some form of work".

[79] These comments certainly raise the question as to whether the plaintiff might not have been and still is exaggerating his symptoms. Of course, another explanation might be that he genuinely has a psychological condition (or neurosis) or a chronic pain disorder which is nevertheless quite as disabling as if his actual physical afflictions were more severe.

[80] There are a number of features in this case which seriously affect and challenge the credibility of the plaintiff and the validity of his professed complaints.

[81] By way of background, I would note that the plaintiff has been a somewhat litigious person. He has been a party to many lawsuits in this court. He has been sued by Las Vegas gambling casinos on lines of credit with them; by some securities brokers on margin accounts; by his former lawyers for fees; by a real estate broker on a commission dispute and even by his current lawyers for fees which were taxed. On the other hand, he has brought some lawsuits himself: he has sued for damages for personal injuries with respect to motor vehicle accidents which occurred in the 1980's (of which more later); his own doctor, Dr. Ross, for alleged malpractice; and, of course, this action. All of this may be considered in the light of a notation by his psychiatrist Dr. Kowalchuk to the effect that it appeared as though he might be somewhat litigation oriented.

[82] The plaintiff generally did not present as a particularly good witness and was most evasive and defensive when responding to questions.

[83] However, what is most revealing is the history of the litigation arising from the automobile accidents in the 1980's and what transpired in the aftermath of that action.

[84] The plaintiff was involved in three motor vehicle accidents on April 19, 1986, November 27, 1987 and April 26, 1988. Each time, his vehicle was struck from behind while stopped. Liability was not in issue. He sued the owners and drivers of the other vehicles for damages arising from personal injuries allegedly sustained in the accidents and the case came on for trial before Lockwood J. of this court, who issued written reasons for judgment on June 4, 1992, reported at 80 Man. R. (2d) 108. The judge found that the injuries suffered in the last two accidents resulted in the development of Achilles tendonitis and ultimately chronic pain syndrome for which there was no present hope of a cure.

[85] At the time, the plaintiff was being treated by a psychiatrist, Dr. Armstrong, who, according to the report, explained that chronic pain syndrome involves experiencing pain where there is no biological evidence to explain it and where the symptoms are greater than would be expected from the organic evidence. The doctor stated that there was little doubt that the plaintiff met the criteria for chronic pain syndrome which was real and to a large degree might be psychosomatic. He stated that regardless of whether it was organically or psychologically based, the pain could be equally disabling and he concluded

that the condition had to be defined as chronic in nature and the chance of its changing in the near future was unlikely.

[86] The judge assessed non-pecuniary damages at $60,000, past loss of income at $80,000, future loss of income at $170,000 and loss of business at $160,000, as well as special damages for medication.

[87] Counsel for Merit observed that the instant case seems like "*déjà vu* all over again". The plaintiff had been suffering from virtually incurable chronic pain syndrome in 1992 and again, allegedly, for the same disorder at the present time.

[88] I have noted the comments of Dr. Armstrong with respect to the poor prognosis for chronic pain syndrome and there was similar evidence from Drs. Arneja and Globerman. When asked on cross-examination if chronic pain syndrome could be cured, Dr. Arneja was most guarded in his answer stating only that it might be "improved"; when asked the same question on his cross-examination, Dr. Globerman said that chronic pain disorder can possibly be cured in the sense that "anything is possible". Both doctors thought the outlook for such a disorder was bleak.

[89] What is extraordinary then in the light of this evidence is the fact that the plaintiff appeared to have made a complete recovery from both the tendonitis and the chronic pain syndrome by the end of 1995. By then he was jogging and running up to three miles a day, felt very well and was seriously contemplating

returning to his former profession as a real estate agent. In 1995, he did very well on a stress test with no untoward physical symptoms whatsoever.

[90] There does not appear to be any medical explanation for his dramatic recovery. It raises the obvious question as to whether he was malingering all along. That question was also an issue in the previous trial and Lockwood J. found that the plaintiff was not malingering. But the judge did not of course foresee the quick and total recovery, the subsequent accident and the development of a second virtually incurable chronic pain syndrome.

[91] Clearly these circumstances invite the very close and suspicious scrutiny of the current claim.

[92] On December 2, 1992, following the award by Lockwood J., the plaintiff made an application for disability benefits under the Canada Pension Plan, supported by a medical report from Dr. Ross, which gave the following "summary and prognosis":

> 52-year-old hypertensive male involved in motor vehicle accident November 25 – 1987 with post-traumatic Achilles tendonitis, L heel among other injuries. Two other car accidents since then exacerbated the injuries. Developed a depression as he couldn't walk.

[93] Dr. Ross stated in his report that the plaintiff had not been examined since 1991 ("since there was no improvement in the tenderness, swelling of the Achilles tendon over four years in spite of a multiplicity of therapeutic modalities").

[94] The plaintiff was granted the disability benefits and was still receiving them at the time of the 1996 accident. He did say that when he was contemplating returning to work just prior to the accident, he telephoned the CPP offices and asked whether the benefits would be affected if he went back to work. He said that they told him to notify them if he did return to work. He did not say, however, that he informed them of the fact that he appeared to be fully recovered.

[95] The application for the benefits contained the following signed by the plaintiff:

> I, the contributor/applicant, agree to notify the Canada Pension Plan of any changes that may affect my eligibility for benefits. This includes: an improvement in my medical condition, a return to full-, part-time, volunteer, or trial period of work; attendance at school or university, trade or technical training; or any rehabilitation.

[96] On cross-examination, the plaintiff acknowledged his signature and when asked why he had not reported the improvement in his medical condition, he was very quick to say that although his leg may have recovered he still had back trouble. This was not a credible response because clearly whatever lingering problems there may have been with his back (and I am not satisfied that there were any), he had virtually made a complete recovery and was eager to get back to work. This is just another example of the questionable credibility which makes it so difficult for me to fully believe his current complaints.

[97] But there is more.

[98] The issue of whether the plaintiff was malingering came up at the previous trial in 1992 and his personal family physician, Dr. Ross, testified that he did not believe that the plaintiff was malingering. However, Dr. Ross testified in the instant case and gave very different evidence. Over the course of time, he had obviously become most skeptical with respect to the plaintiff's complaints. On cross-examination, he agreed that the plaintiff's complaints were absolutely in excess of the clinical findings and were grossly disproportionate to those findings; that psychological factors and secondary gain seem to be at play; that it was absolutely possible that the plaintiff was malingering; that after the MRI tests came back normal, he found himself convinced that the plaintiff was malingering; and that he could say this to a reasonable degree of medical certainty although he could not prove it to be the case.

[99] Counsel for the plaintiff attacked this evidence, submitting that Dr. Ross was frustrated that the plaintiff did not seem to be responding to treatment and was not appreciative of his efforts and the specialists to whom Dr. Ross had referred the plaintiff; and submitting that he was hostile to the plaintiff because of the plaintiff's lawsuit against him. These are all fair comments but they are not consistent with my very good impression of Dr. Ross who seemed to be very experienced, practical, knowledgeable and professional. I would hesitate to think and I would not conclude that Dr. Ross would colour his evidence because of his personal feelings about the plaintiff.

[100] Furthermore, his disillusionment with respect to the plaintiff began to emerge in his clinical notes and correspondence well before the commencement of the lawsuit against him and while he was still the plaintiff's family doctor.

[101] On November 10, 1997, Dr. Ross wrote a letter to the plaintiff's then lawyer which revealed his growing doubts about the plaintiff.

[102] In the letter, he mentioned having examined the plaintiff on March 21, 1996 (actually for the first time after the accident), that the plaintiff stated that he could not put weight on his left leg and that he had pain in the right knee, in the right shoulder and low back. Dr. Ross noted that he was walking and bearing weight as he left the clinic with only a "slight limp", that his presentation was "quite dramatic at the time" and "I felt that he was exaggerating much of his symptoms and I made a note of this in the office chart".

[103] Again, Dr. Ross noted that on November 29, 1996 the plaintiff stated both knees hurt him and made him feel weak and that he was worried because he couldn't put pressure on his knees "even though he could walk into the clinic to see me".

[104] Yet again, Dr. Ross wrote that on September 16, 1997 the plaintiff was complaining that his low back was very painful after walking fifteen to twenty minutes, that he felt he must have injured something in his lower back on the left side, that he was unable to do anything physical for the rest of the day after fifteen minutes of walking, that his left knee was grinding and tended to lock and that his pain was severe and made him feel weak. The doctor commented "In

spite of all this, he stated that he was able to work out on his Stairmaster for twelve minutes at a time."

[105] I have mentioned that the plaintiff is currently being treated by the psychiatrist Dr. Kowalchuk. There was no medical report from Dr. Kowalchuk and he did not testify at the trial. Nevertheless, his chart was filed and it did contain some interesting comments.

[106] On August 12, 2003, there is a reference to the plaintiff being "focused on somatic aches, pains, treatments; on January 19, 2004, a note that "maintains helpless stance to induce care giving behaviour"; on May 31, 2004, there is reference to his mood being low but that he "gets quite animated when discussing federal politics" (!); and on October 4, 2004, there is the statement "He doesn't engage in a therapeutic alliance – more of a litigious alliance."

[107] As counsel for Heartwood observes, when one is malingering – particularly over an extended period – it is not always easy to keep one's story straight and counsel notes a number of inconsistencies and discrepancies in the evidence.

[108] The plaintiff's original and current description of the accident was that he did the splits and fell on his left side, but on October 2, 1996 he told Dr. Arneja that he had landed on his back and that he had hit his right shoulder. This hitting of the right shoulder had never previously been reported.

[109] Then in May 2003, he told Dr. Arneja that he fell on his back and hit his left hip and his head and Dr. Arneja commented that he had hit his head but that

he hadn't lost consciousness; there had been no previous mention of his having hit his head.

[110] On October 2, 1996 he told Dr. Arneja that after the fall, he went home and passed out and was brought to the Emergency Department at the Grace Hospital. He had never mentioned this before and there does not appear to be any question that he did not pass out and that he never did go to the Emergency Department at the Grace.

[111] He was reported to have told Dr. Arneja that the pain in his right knee had started a few months after the accident and in cross-examination Dr. Arneja said that this would have been three to five months; however, when Dr. Arneja saw him on October 2, 1996, January 6, 1997 and January 16, 1997 – eight to ten months after the accident – there were no complaints of right knee pain.

[112] He was reported to have told Dr. Arneja in May 2003 that prior to the accident, he had been walking from one to one and a half miles per day; but curiously, Dr. Arneja's clinical notes for October 2, 1996 state that he had been able to run one and a half to two miles a day.

[113] The plaintiff said that his left knee had begun to swell not long after the accident but Dr. Petrenko saw him two days later and noted that the knee was not swollen.

[114] As counsel for Merit points out, at the initial visit to Dr. Petrenko and the subsequent referral to Dr. Wiens, there was specific mention of the left Achilles tendon complaint which, of course, had been the subject of the previous court

case but thereafter there was no mention of this. Was this because the plaintiff was thinking that he had already got compensation for that problem and so he should now emphasize his back and his left knee?

[115] What is perhaps most interesting and significant is this question of an "antalgic gait", that is to say, bearing weight more on one side than the other in order to favour the supposedly injured limb. It will be recalled that Dr. Ross had mentioned in his letter to counsel that he observed the plaintiff walking with only a slight limp but the many medical reports make reference to the plaintiff having an antalgic gait although they are not consistent: sometimes he is observed to have such a gait; other times not. This prompted counsel for Heartwood to observe that sometimes the plaintiff appeared to have difficulty remembering that he was supposed to be walking in such a way.

[116] No doubt, Drs. Arneja, Craton and Globerman felt that the plaintiff was sincere and was not malingering. However, none of these doctors knew the plaintiff as well as Dr. Ross and none of them were aware of what had transpired with respect to the previous court case and the plaintiff's subsequent miraculous recovery. (Indeed, I am not sure that Dr. Ross fully appreciated this history either.) I would discount their generous view of the plaintiff's credibility. Neither Dr. Craton nor Dr. Globerman were asked how their opinions might have been affected by a consideration of the prior diagnosis of and recovery from chronic pain syndrome but I cannot help but feel that this new knowledge might have changed their opinions. Dr. Arneja was asked how the previous finding of

chronic pain disorder would have affected his opinion and his response was that it might not have made any difference to him. Still, I am of the view that if his opinion was not influenced by this information, perhaps it ought to have been; in fairness he did not go so far as to say that it would not have been changed or at least modified. It would have been interesting to learn the views of Dr. Kowalchuk who, as the plaintiff's treating psychiatrist, would have been much better positioned than the other doctors – particularly Dr. Globerman – to have given an opinion about any alleged chronic pain disorder. The plaintiff chose not to call him, and I have referred to his chart which might be thought to indicate some skepticism.

[116] The onus is on the plaintiff to prove the validity of his claim on the preponderance of the evidence, and I conclude that there is so much doubt about his sincerity and credibility that he has failed to prove that his complaints and alleged disabilities are as severe as he professes them to be. And, in particular, he has failed to prove that he was and is unable to pursue a normal life and occupation either as a real estate agent or restaurant operator.

[117] The plaintiff does have some mild degree of arthritis in his knees which could be symptomatic although not to the extent expressed by the plaintiff; moreover, the symptoms were probably produced by this condition which was exacerbated by the accident.

[118] This is supported by the evidence of Dr. MacDonald to the effect that the plaintiff was suffering from left knee patello-femoral degeneration which

originally stemmed from the motor vehicle accidents but was enhanced by the accident of 1996; (incidentally, according to the findings of Lockwood J., in the April 26, 1988 accident the plaintiff struck both of his knees on the dashboard and so that gives some support to the view of Dr. MacDonald that the injuries originated in the motor vehicle accidents only to be aggravated by the 1996 slip and fall), and also by the evidence of Dr. Craton who noted that the knees were symptom-free just prior to the accident.

[120] As observed by counsel for the plaintiff, he did submit to physiotherapy, medication and the invasive arthroscopy, which certainly suggests an honest belief that he was suffering at least some degree of pain and discomfort. He is still purchasing medications for pain and Dr. Kowalchuk has prescribed drugs for depression and pain disorder.

[121] I have already expressed my strong doubts and reservations about how genuine the plaintiff's complaints really are and so it is very difficult to assess their true degree of severity. I can only deal with the matter on the basis that he has mild arthritis, which was probably aggravated by the accident, and that mild arthritis would presumably translate into no more than mild symptoms and disability. They are probably enough to cause him some degree of discomfort and distress although not to the degree claimed.

[122] Given what I perceive to be the rather mild nature of the complaints but their rather lengthy duration, I would assess general damages at $20,000.

[123] I would assess special damages as follows:

Prescriptions, medications, transportation	$1,001.66
Physiotherapy	670.00
Manitoba Health	2,838.00

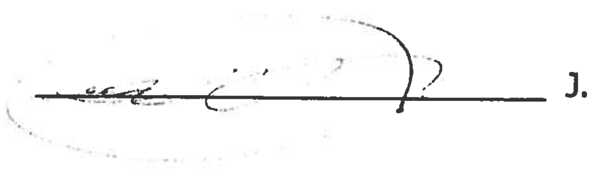
[124] To summarize, the plaintiff's general and special damages are assessed as follows:

(a)	General Damages	$20,000.00
(b)	Special Damages	$4,509.66
	TOTAL	$24,509.66

[125] The plaintiff presented a considerable claim for past and future loss of income but he has not proved that this was related in any way to the accident and it is not allowed.

[126] The plaintiff will then have judgment against Heartwood and Merit for sixty per cent of the damages or the sum of $14,705.00. He will have interest at three per cent for loss of opportunity to invest on the general damages portion of the judgment and pre-judgment interest on the special damages portion. As between the two defendants, Merit will contribute forty per cent of the award.

[127] If the parties cannot agree as to costs, they may be spoken to.

 J.