IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20200320
Docket: M153489
Registry: Vancouver

Between:

Kewal Singh Bains

Plaintiff

And:

Yao Wei-Jing, Shu Hong Zhang and Gurvinder Singh Kalar

Defendants

Before: The Honourable Mr. Justice Groves

Oral Reasons for Judgment

Counsel for the Plaintiff:	R.N.F. Johnston K.N. Floe
Counsel for the Defendants:	D.D. Stewart F. Troen
Place and Date of Trial:	Vancouver, B.C. March 2-5, 9, 10,12 & 20, 2020
Place and Date of Reasons:	Vancouver, B.C. March 20, 2020

[1] **THE COURT:** These are my reasons resulting from a trial in the matter of Kewal Singh Bains and Yao Wei-Jing, Shu Hong Zhang and Gurinder Singh Kalar. The plaintiff, Kewal Singh Bains, is 83 years old and was a retired individual who, in September 2013, close to seven years ago, was involved in two motor vehicle accidents over the course of nine days.

[2] The first accident occurred on September 9, 2013, at or near the intersection of 63rd and Knight and was an impact with a white truck owned and driven by the defendant, Gurinder Singh Kalar. Responsibility or liability for that accident is very much in dispute.

[3] The second accident occurred on September 18, 2019, at the corner of Fraser and 61st in Vancouver. This was while Mr. Bains' vehicle, damaged in the earlier accident, was still under repair and he was in a rental car. He was struck while he had the right-of-way. There is no dispute that the defendants Wei-Jing and Zhang, the driver and the owner of the other vehicle, are legally responsible for the consequences of this second accident.

[4] During this trial, in the six or so days of evidence, the court heard from the plaintiff, two of his granddaughters, Mandy and Sandy Bains, two of his three sons, Darbara or "Darb" Bains and Rajinder or "Raj" Bains; his treating doctor, Dr. Brian Yong, and an orthopedic surgeon retained by the plaintiff to do a medical examination, Dr. Barry Vaisler. The court also heard from a witness to the first accident, John Archer. The defence on the issue of liability called the defendant Gurinder Singh Kalar, and on the damages issue, two private investigators gave evidence. In 2017 and 2019 they conducted surveillance of Mr. Bains near his home. Additionally, the defendants had their own expert, Dr. Osama Gharsaa, an orthopedic surgeon.

[5] As I discuss the conclusions and observations I take from the evidence, I note the issues in dispute to be resolved in these reasons are:

1) Who is liable for the accident of September 9, 2013?

2) What damages are payable to the plaintiff for his non-pecuniary loss?

3) What damages, if any, are payable to the plaintiff for his cost of future care?

4) What damages, if any, are payable to the plaintiff for his loss of housekeeping capacity?

5) Should the court allow an in-trust claim advanced by the plaintiff related to the services provided to him by Mandy, Sandy, Darb and Raj Bains?

6) What is the apportionment of liability, or consequences, as between the two accidents, should liability be found against the defendant in the first accident?

[6] I intend to discuss conclusions from the evidence as necessary within the confines of these six issues. I should note that as is usual with competent counsel, the parties have agreed on the amount of special damages suffered by the plaintiff. They have agreed to those damages at $5,473. I grant judgment for that amount.

[7] Before I begin in detail, I wish to thank counsel for the thorough and effective way they, on both sides, garnered and presented evidence and how they dealt with each other and particularly how they dealt with the inquiries of the court. All sides in this litigation were ably represented by their chosen counsel.

[8] In regards to liability, the first issue, regarding the first accident, the court heard the evidence of three witnesses: the plaintiff, Mr. Bains; the defendant from the first accident, Mr. Kalar; and someone I will describe as a truly independent witness, John Archer.

[9] I start with the evidence of Mr. Archer. He was and is a semi-retired individual who was travelling south on Knight Street on February 9, 2013, as he says he regularly does. He witnessed the accident close hand. He advised that between 9:30 a.m. and 10:00 a.m., he was travelling southbound on Knight. He described the traffic as busy, not bumper to bumper, but the regular traffic he noted on this stretch of the road at that time of day during the week. He confirmed that he was travelling at a speed of 50 kilometres an hour. He indicated that his GPS had confirmed this

after the accident. He testified to being particularly conscious of the speed limit on this section of the road because of the numerous radar traps that he has experienced on this road over the years in both directions.

[10] The matters which led to the accident first came to Mr. Archer's attention when, as he described, around the intersection of 61st and Knight he was passed while driving in the centre lane by a white truck in the passing lane. Mr. Archer described the southbound section of Knight as having three lanes: the passing lane, the centre lane, which he was occupying, and the curb lane. He indicated that the white truck was in the passing lane and passed him just before 61st and moved in front of him into the centre lane.

[11] Mr. Archer then described observing the white truck swing to the right, leave the centre lane and enter the curb lane and, in doing so, hit a blue Toyota, which he first noticed when, as he described, the Toyota as being “air bound”. He indicated that he did not see the white truck indicate a right-hand turn signal to move from the centre lane into the curb lane. After the accident, Mr. Archer observed the white truck pull over in front of the white truck. From this point, the observations of Mr. Archer are particularly noteworthy.

[12] Mr. Archer described himself as in the past being a location scout. He described in his evidence that as a location scout, he was not paid unless he measured things exactly. At this point after the accident, with the help of a camera, perhaps on his phone and a measuring tape of some length, Mr. Archer conducted location observations and measurements. This evidence is particularly crucial, in my view, on the issue of liability, specifically as it relates to Mr. Archer's observations that the impact of the accident happened after the intersection or south of the intersection of 63rd and Knight and not in the intersection, as alleged by Mr. Kalar. This is strongly suggestive that the blue Toyota which was struck, the vehicle operated by the plaintiff, had, in fact, turned the corner and was heading south on Knight Street when the impact occurred.

[13] This observation while driving was confirmed by the measurements taken by Mr. Archer. Mr. Archer observed that moving south from the intersection of 63rd and Knight, along Knight Street there is at a 14 to 17-foot mark a number of trees. He described them as being 14 to 17 feet from the apex of the curb. He stated that the Toyota vehicle came to rest past these trees, which trees were of course on the west side of the road and well south of the actual intersection of 63rd and Knight. The vehicle came to rest past this first set of trees on a bush, but before a second set of trees.

[14] In cross-examination, Mr. Archer's evidence became clearer. He confirmed that he was driving close to 50 kilometres an hour when he was overtaken by the white truck. He confirmed that he was following the white truck from 61st to 63rd at a safe distance. The white truck remained in the centre lane. He confirmed that the white truck swung into the curb lane at a point past the intersection of 63rd.

[15] When challenged about the location of impact, Mr. Archer was firm in his evidence. He provided lay opinion evidence that if the accident had occurred at the corner, as was suggested to him in cross-examination, the blue Toyota would have been "a hood ornament in those trees," suggestive in Mr. Archer's evidence that if the accident had occurred as the defendants allege, Mr. Bains' blue Toyota would have struck the trees.

[16] It is his view that if the impact had occurred at the intersection, Mr. Bains' vehicle would have propelled into the first set of trees, not the location that it was propelled as a result of the accident. He further confirmed that the lane change was below or south of 63rd and Knight. He confirmed that he was focused on the white vehicle. He saw no vehicle on his right on 63rd, in other words no vehicle in the curb lane, and he was pretty sure that he would have noticed a vehicle stopped at a stop sign as he approached 63rd.

[17] Mr. Kalar gave evidence about the accident. He thought the accident was earlier in the morning, approximately two hours prior to when Mr. Archer testified the accident had occurred. He indicated that on the morning of September 9 he was

leaving his girlfriend's home and heading to his home in Surrey. He was travelling south on Knight. He indicated that he got onto Knight Street at 57th Avenue and travelled completely in the curb lane. He says it was his intention in being in the curb lane to exit Knight Street onto Marine Drive, not go over the Knight Street Bridge.

[18] He described how he approached the intersection of 63rd, and when he did, he saw that the blue Toyota began to move out from a stop sign and, despite braking for impact, the accident was unavoidable. He said he saw the vehicle driven by Mr. Bains, approach the intersection, stop at the stop sign and roll forward. He testified he took his foot off the gas to see what Mr. Bains' vehicle would do when it suddenly pulled in front of him causing the collision.

[19] He denied in cross-examination the entirety of the evidence advanced by Mr. Archer about the accident. He denied that he had ever been in the passing lane. He denied that he had ever been in the centre lane. He denied that he moved from the centre lane into the curb lane, and he said the accident occurred in the intersection when his vehicle impacted the vehicle operated by the plaintiff. There are, as such, two completely different versions of this event.

[20] The plaintiff's evidence about the first accident was somewhat limited in that he appears to have suffered some memory loss from the circumstances, which prevented him from providing complete details. The evidence he did recall and attest to was consistent with the evidence of Mr. Archer. The important thing that he did recall and testify to was that there was no vehicle travelling in the curb lane of Knight Street when he stopped at the sign and as such, he had sufficient opportunity to execute the turn.

[21] In regards to the issue of liability, considering all the evidence, I find that Mr. Kalar is 100% responsible for the September 9, 2013 accident.

[22] The evidence of the only truly independent witness, the only witness with no pecuniary or other interest in the result, is the evidence of Mr. Archer, which evidence was clear and unequivocal. He was frankly an excellent fact witness who

clearly had some past experience in recording and measuring observations. Not only was he not challenged significantly in cross-examination, in fact his responses to questions in cross-examination enhanced the answers he provided in direct.

[23] He was clear in his evidence that Mr. Kalar was changing lanes as he travelled south on Knight Street between 61st and 63rd. He was clear that Mr. Kalar travelled for the most part in the centre lane. He was clear that Mr. Kalar did not stay, as he claimed, exclusively in the curb lane, but had been in the passing lane, the centre lane and it was only south of the 63rd Avenue intersection that Mr. Kalar moved into the curb lane.

[24] There is no engineering evidence about impacts, distances or damages to the vehicle which might have been of assistance to the court. That is not a criticism at all of counsel handling this matter, but it is simply a fact. As such, I cannot draw any inferences from the damages to the vehicle or the place of impact other than to say that the damages on the vehicle are potentially consistent with both explanations of the accident.

[25] However, I find that Mr. Archer's observations as to where the vehicle would have landed if impact had occurred as the defendants claim at the intersection of 63rd to be additionally persuasive. His conclusions are logical. If, in fact, Mr. Bains was in the process of making a turn at the intersection of 63rd, as claimed by Mr. Kalar, it is hard to know how he avoided those trees some 14 to 17 feet away from the intersection when his vehicle landed after impact.

[26] There are certain aspects of Mr. Kalar's evidence as well which are simply not believable. He was not believable when pressed about his travelling only in the curb lane. Though he was not challenged on this directly, it seems odd if he was returning to Surrey that he would be travelling in the curb lane so as to exit from Knight Street prior to taking the Knight Street Bridge. Travelling over the Knight Street Bridge is the most direct route to Surrey through Richmond because, after one gets onto the Knight Street Bridge, one drives at freeway speeds on freeways until one reaches North Delta, attached to Surrey.

[27] Mr. Kalar was clear that he was travelling home to Surrey. He indicated an intention to take Marine Drive to achieve this purpose. If one is travelling on Marine Drive toward Surrey, one would encounter numerous lights, have to go through downtown New Westminster, potentially take the Pattullo Bridge or otherwise, and it is a much less direct path to Surrey than would be one travelling on Knight Street. He was not, however, asked about this, and I cannot place much weight on my analysis of that inconsistency. That issue is very minor.

[28] What is not very minor is his lack of believability or lack of candour in his evidence that arose when Mr. Kalar was asked in cross-examination about whether he advanced a personal injury claim and was paid for injury damages resulting from this accident. He said that he could not recall or he did not know if he had retained a lawyer for that purpose or if he had received a settlement. Though that is possible, it is not probable.

[29] Additionally as between Mr. Archer and Mr. Kalar, Mr. Archer is the much more believable witness. I accept his evidence, and I reject Mr. Kalar's. I do not believe Mr. Kalar's explanation for the accident. I prefer the evidence of the independent witness, Mr. Archer, as confirmed by Mr. Bains. I conclude that the accident occurred after the intersection of 63rd and Knight, shortly after, when the white truck operated by Mr. Kalar moved from the centre lane into the curb lane southbound on Knight Street and collided with the vehicle that was operating legally in the curb lane, the vehicle operated by Mr. Bains.

[30] I find Mr. Kalar to have breached s. 151(a) and 151(c) of the *Motor Vehicle Act*, which read as follows, s. 151(a) and (c):

> **Driving on laned roadway**
>
> 151 A driver who is driving a vehicle on a laned roadway\
>
> (a) must not drive it from one lane to another when a broken line only exists between the lanes, unless the driver has ascertained that movement can be made with safety and will in no way affect the travel of another vehicle,
>
> (c) must not drive it from one lane to another without first signalling his or her intention to do so by hand and arm or

> approved mechanical device in the manner prescribed by sections 171 and 172.

[31] Mr. Kalar did not check to see if his lane change would affect travel of another vehicle. I find that Mr. Kalar did not signal his intention to move into the curb lane from the centre lane.

[32] In regards to the argument based on *Heppner v. Zia*, 2008 BCSC 782, advanced by the defence that the court should apportion liability between the two vehicles as a result of the accident, I find the facts in this case are sufficiently different from the case before me and, as such, the principles in *Heppner* are not applicable. That case appeared to involve a defendant who was driving in a lane and was sufficiently close to the intersection when the plaintiff began a right turn into the lane so as to constitute an immediate hazard.

[33] On the facts before me, there was no vehicle in the curb lane southbound on Knight Street when Mr. Bains began and, in fact, completed his turn. It is only the lane change without signalling of Mr. Kalar that caused the accident.

[34] In order to establish contributory negligence, the defendants must show that there was some negligence in regards to the action of Mr. Bains in driving as he did. His evidence was that he stopped, he checked and saw no vehicles in the curb lane and then he began and completed his turn onto Knight Street. He was starting to head south on Knight. He was past the apex of the intersection when he was hit by the defendant, who changed lanes and struck his vehicle. Those are the facts I accept. There is no negligence proven on a balance of probability regarding the actions of the plaintiff and, as such, there is no finding of contributory negligence.

[35] I now turn to my consideration of the plaintiff in regards to his damages claim. The evidence before me painted a very positive picture of the pre-accident condition of Mr. Bains. He was 76 years of age and despite that, he had a very busy life. He had at his home a large garden which supplied food for him and his wife, his son, Raj and their family who resided in the basement suite of his home, the parents of

Mandy and Sandy, his eldest son, Sandy and Mandy testifying to how they regularly found garden produce at their home from their grandfather.

[36] He maintained his lawns and the lawns at his rental property. He babysat with his wife the youngest grandchild, the son of Raj, who lived in the basement. It appears the children of Raj, as there were two just before the accident, had free rein to come up and visit with their grandparents, a circumstance he appears to have enjoyed.

[37] His middle son, Darb, testified. Darb lived close by, and Mr. Bains drove Darb's two sons to school every day, as he had done with his granddaughters, Mandy and Sandy, at earlier times. In addition to driving Darb's two sons, he also drove other neighbourhood children. In addition to driving to school, he would pick these children up, and he was involved in getting them to their numerous activities.

[38] He was very involved with his temple. This was apparently both of social and religious significance. He testified that he attended there almost daily. There was a senior citizen's centre at the temple which he also attended. He would drop off Punjabi language newspapers to his daughter-in-law, the mother of Mandy and Sandy Bains.

[39] During the day he would drive to banks, to stores, and do shopping for himself and his family. He would use his vehicle regularly to drop off meals prepared by his wife for various members of his family, his oldest son, who lived on Knight Street, and his son Darb in particular.

[40] He managed his rental property. This is a home with three rental units in it, or so it appears, at a different location from his residence. Maintaining the rental property involved maintaining the yard, dealing with snow, dealing with all the needs of the three tenants, picking up rental payments and dealing with the ins and outs or moves of tenants as they occurred.

[41] In regards to his elder granddaughters, who he had driven to school in their earlier years, he often would drive them to and from work so as to not require them

to take public transit, even after they were essentially adults. With his middle son, Darb, who built houses essentially on the side (not all the time but seemingly regularly), the plaintiff was very much involved in assisting Darb. Darb worked full-time, and the plaintiff made himself available and assisted Darb in dealing with the trades, dealing with the numerous inspections that happened from time to time and generally making himself available to be a hands-on person at Darb's construction projects when Darb was not available.

[42] There were comments in the evidence by several witnesses about his biking activities with the “other grandpas”. Men seemingly of his age in the neighbourhood would regularly undertake biking activities. There was also long walks in the morning with his wife along the Fraser River trails near his home.

[43] It seems clear that as a 76-year-old, these were all the things which were regularly happening in Mr. Bains' life. This was not challenged at all in the evidence. Frankly, it is a remarkable level of activity for a man of his age. Of considerable note, he did all of this while suffering from limitations. It is clear on the evidence that he retired from work early due to a disability.

[44] This physical disability, which was essentially pain-related, was monitored regularly by medication only. That was the circumstance of Mr. Bains prior to the accident. It was pain that he had, but pain that he dealt with. He was still able to do the numerous activities I have just noted. In addition to these work-related injuries, which appeared to have resulted in a somewhat early retirement, managed with medication, he also hurt himself further while organizing a wedding a few months before the accident, a wedding that had its physical venue in Vancouver. The wedding organization he undertook was for relatives in Calgary who do not reside in Vancouver. It was during one of his attendances at a venue that he fell.

[45] It appears that this also set him back and required additional attendance at a doctor. He was regularly taking prescription medication when he began his doctor-patient relationship with Dr. Yong. Dr. Yong had observed that his injuries were chronic.

[46] Additionally, his eyesight had historically been problematic. There is, however, no evidence that in 2013 he had any restrictions on his ability to drive, and there is evidence that it was only in the coming years that those restrictions began to happen.

[47] It is fair to conclude, and I do conclude, that despite these noted limitations, pain managed by medication, less than perfect eyesight, Mr. Bains was a happy, active, busy 76-year-old who was for all intents and purposes the beloved patriarch of his extended family. Despite some pain, he did everything for everyone in his world – family, friends and neighbours. He had a busy, contented, purposeful life while he daily did numerous tasks for others that he cared about, as well as keeping physically active through walks, bike rides with the grandpas, tending to his gardens and lawns at his home, his rental property, and his son's property.

[48] The two accidents changed all that. It is conceded that by August 2015, or a period around that time, he would not likely have been able to continue to drive due to his unrelated to the accident deteriorating eyesight. It is still the case that he was, prior to the accident, a person who drove for himself and others a considerable amount of the time, and driving was a significant part of his enjoyment of life.

[49] I turn to the medical evidence as to the injuries suffered in the accident. I first turn to the evidence of Dr. Yong. Dr. Yong completed a report dated April 17, 2016, three years after the accident, and his opinion is worth noting for the record. He says in that report:

> Mr. Bains was diagnosed with multiple injuries from the motor vehicle accident: worsening of his chronic pain in the neck, upper back and left arms, soft tissue injuries of the lumbar area of the lower back, right and left knees, and right and left hand and wrist, post-traumatic headaches, insomnia and anxiety, bilateral carpal tunnel syndrome and a medial meniscal tear and medial collateral ligament injury in his right knee. He was also treated with a rigid right splint to treat his carpal tunnel syndrome.
>
> He consulted multiple specialists as detailed earlier in this report, and he has had two surgeries, a carpal tunnel release of the left wrist for carpal tunnel syndrome, and a right medial meniscectomy for his right knee. Despite this treatment Mr. Bains continues to be quite symptomatic. Much of the healing of the soft tissue injuries occurs within the first year following injury, with most healing occurring within the first three years.

> As it has been more than almost three years following the accident, due to the chronicity of his symptoms, it is possible that Mr. Bains' soft tissue injuries could persist indefinitely despite treatment. Mr. Bains continues to be troubled by neck pain, upper back and lower back pain, right and left knee pain, left arm pain and numbness. He continues to have pain at the surgical site of the carpal tunnel released to the left wrist. He reports a marked reduced quality of life as he is living in constant pain and often reports that he has to stay home due to the severity of his symptoms.

[50] Of note, with more information post this report, Dr. Yong resiles from his opinion as to the right knee, noting subsequently to his report the medical records of Dr. Hughes that, in fact, this meniscal tear preceded the accident.

[51] Additionally, in regards to the injuries allegedly suffered by Mr. Bains, I have the opinion of Dr. Barry Vaisler. From his opinion, I note the following:

> Mr. Kewal Bains probably sustained a soft tissue injury to his neck and lower back, an injury to his left shoulder and right wrist and experienced pain in his right knee as a result of the motor vehicle accident of September 9, 2013.
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> The motor vehicle accident of September 18, 2013, probably resulted in a soft tissue injury this his neck and lower back, an exacerbation of pain in his left shoulder and right wrist and developed neurological symptoms in his left upper limb as a result of the motor vehicle accident of September 18, 2013.

[52] Additionally Dr. Vaisler says:

> In my view the injuries are persistent for three years since the motor vehicle accident. Along with the objective spasm of his left trapezius muscle belly, it is more likely than not that he is going to continue to experience intermittent annoying and limited neck pain, especially with activities and posture involving prolonged neck flexion on a permanent basis as a result of the motor vehicle accident.

[53] I should note that Dr. Vaisler in his report confirmed the presence of lumbar disc disease, but he noted that prior to the first accident Mr. Bains was asymptomatic in regards to the complaints about the lumbar portion of his back. It is Dr. Vaisler's opinion that he would have remained asymptomatic had it not been for the motor vehicle accidents.

[54] There is, contrary to the evidence of Dr. Yong and Dr. Vaisler, the opinion evidence of Dr. Osama Gharsaa. Dr. Gharsaa is an orthopedic surgeon, and his report is dated December 5, 2019. His opinion drawn after an examination on

December 5, 2019, over six years after the accident, was that there were no major injuries from either accident. He opined that the first accident likely caused sprain and strain of soft tissue injuries, and the second accident likely caused soft tissue injuries to his neck, left shoulder, left arm, back and right knee and would have exacerbated injuries from the first accident.

[55] Dr. Gharsaa was firm in his evidence and his belief that soft tissue injuries heal in three months. He was reluctant when pressed to conclude or confirm otherwise. He indicated that the plaintiff's current complaints are more likely due to other factors, which he noted as his pre-existing chronic pain, degenerative disc disease and osteoarthritis. He confirmed that the accident may have brought on carpal tunnel syndrome. When asked about Dr. Vaisler's view that the ongoing pain may be caused by injury to the cervical facet joints, he was equivocal and repeated that it was his view that the ongoing pain was related to osteoarthritis, degenerative disc disease or pre-existing conditions.

[56] Balancing the medical evidence, I prefer the evidence of Dr. Yong and Dr. Vaisler. Their reports are thorough and complete, and particularly as it relates to Dr. Yong, he was the treating physician who saw Dr. Bains both before and after the accidents.

[57] Additionally, I have concerns about Dr. Gharsaa's report. He indicated when asked by the court that his method of doing independent medical examinations when he comes to British Columbia for that purpose is to set appointments about one hour apart. That is the routine. He said in his evidence that he had spent around 30 minutes with Mr. Bains tending to the history and conducting the exam. It is of note to me that Mr. Bains has some language difficulties.

[58] Additionally, Dr. Gharsaa's report is a report of December 2019, six and a half years past the accident. My view of his report, which is a skeptical view, relates to how it is possible, six and a half years after an accident, in a 30-minute examination and history, to conclude that there were no injuries from the accident. How could he conclude there were no injuries from the accident but the injuries were related to a

pre-existing condition? It is true that the plaintiff has osteoarthritis and degenerative disc disease. That is admitted, but there is no explanation as to why his limitations relate to those pre-existing, non symptomatic (prior to the accident) conditions, as opposed to injuries from the accident. There is no real basis for the opinion.

[59] There is no analysis or consideration of the information available about Mr. Bains' activities prior to the accident. To accept Dr. Gharsaa's opinion, one would have to believe that three months after the accident Mr. Bains would have recovered from the injuries suffered in the accident, but because he continued to have complaints, there would have to have been an immediate onset of his osteoarthritis or his degenerative disc disease, none of which was noted in the medical records prior. There would have had to be an elimination of the injuries in the accident, an onset of previous non-symptomatic degenerative conditions, and an increase in the pre-existing chronic pain.

[60] His report, in my view, is inconsistent on a factual basis with the believable, uncontradicted evidence of the immediate disability suffered by Mr. Bains, particularly after the second accident. It is inconsistent with the uncontradicted evidence of a man who was functioning, considering his age, at a very high level, being extremely active despite being on pain medication prior to the accident. It is inconsistent with the immediate before-and-after picture as painted by Dr. Yong, who saw him regularly. As such and for those reasons, I conclude that the injuries suffered by Mr. Bains are those as set out in the report of Dr. Yong save and except in regards to the right knee, and as confirmed by evidence of Dr. Vaisler.

[61] Having made that conclusion and as this relates to the loss claims, I have before me a very active patriarch of a large family who, prior to the accident, was busy meeting he and his wife's needs, his family and his community's needs. He managed at least two yards and a big garden. He managed a rental property. He babysat grandchildren. He assisted his son in home construction. He drove all manner of family and friends to all manner of places on a daily basis. He shopped

for he and his wife. He attended to their banking and other needs. Most of this activity stopped as a result of the accident.

[62] In my assessment of Mr. Bains as it relates to his losses, while recognizing that but for the accident Mr. Bains would likely have continued with all these activities, I recognize there would have been some diminution of his activities, namely the driving activities, within about two years or so by late 2015. This is because of his eyesight, but again, but for the accident, much of the other activities he was involved with, which appear to be so meaningful for him, would have continued.

[63] He would still have been able to attend the needs of his grandchildren, obviously without driving, but in particular in regards to his youngest grandchildren who lived in his home.

[64] He would have been able to continue with limited eyesight, to do work in his yard and his garden. In fact, the surveillance evidence in 2017 confirms his efforts to continue to do that. It shows him struggling with his garden work, but still with his eyesight attempting it. He likely could have continued despite his eyesight limitations with the cycling activities, though perhaps in a more limited way. It is of note he was always cycling with the other grandpas.

[65] He would have been able to continue to do much of the work, not all, but much of the work around his rental property. He would have been able to assist his son at construction sites, as he enjoyed doing. I also recognize that it is possible that his osteoarthritis and degenerative disc disease could have eventually slowed him down, but I am not satisfied on a balance of probabilities that those issues are at all explanatory of or are consistent with the immediate drop in his level of activities post-September 2013 accidents.

[66] Turning to the issues of non-pecuniary loss. This head of damage is designed to replace as best a monetary award can the losses to enjoyment of life, the pain caused and, in this case, continued to be experienced by the plaintiff, who as I found

here through no fault of his own was injured in two motor vehicle accidents. These injuries, as I have noted, have profoundly affected his life.

[67] Earlier I commented on what he did prior to the accident. Afterwards, he has a modest, the evidence suggests, one-third to one-half the size garden. He struggles with that. Surveillance evidence shows that he struggles to cut his own lawn, whereas before he cut his own lawn, as well as his son Darb's, and the lawn at his rental property. Walking appears to be his only form of exercise. There is no longer biking and the numerous other activities he was involved in. The former patriarch is now attended to by his family. He is a shell of his former self. His inability to be who he was has affected him profoundly.

[68] In terms of non-pecuniary loss, the cases cited by the defence do not reflect the losses that I have noted in regards to Mr. Bains. They are cases of persons injured but not as profoundly, not in such a life altering way as I find Mr. Bains to have been injured.

[69] Two cases provided by the plaintiff, however, are particularly helpful in determining non-pecuniary quantum. *Popove v. Attisha*, 2019 BCSC 1587 involved a 68-year-old female, slightly younger than Mr. Bains, who had, as is alleged with Mr. Bains, pre-existing degenerative disc disease. She was an active person, not as active as I find Mr. Bains to be prior to the accident and, as a result of accidents, she had to give up a number of things she enjoyed, and reduce other things such as gardening, like Mr. Bains, because of her injuries. The non-pecuniary award in that case was $120,000.

[70] In *Paterson v. Hindle*, 2017 BCSC 1104, the plaintiff, a 79-year-old individual at the time of the accident, someone slightly older than Mr. Bains, was a family matriarch who had to give up driving and much of her family responsibility post-accident because of the injuries. This plaintiff had a pre-existing chronic condition that imposed some limitations. She suffered soft tissue injuries, but additionally suffered from a concussion and had cognitive issues as a result of the injuries,

injuries I find to be slightly more significant than that of Mr. Bains. The award was $125,000.

[71] Here some of Mr. Bains' losses may relate to his considerably increasing vision problems. There need be a modest reduction recognizing that, but still recognizing the profound impact these two accidents have had on his life. There has been a profound impact on his enjoyment of life, his loss of ability to spend his day helping his extended family and community, community being the temple, the neighbouring kids that he drove to school, and his new need, which he finds difficult to deal with, to be reliant on his children. Whereas before his family was reliant on him.

[72] Considering all that, I assess the non-pecuniary damages to be awarded to Mr. Bains at $110,000.

[73] I turn to the issue of cost of future care. Numerous cases of this court have concluded that to support a claim for cost of future care, the test is "medically justified" as opposed to "medically necessary." The claim must also be reasonable. If the treatment is experimental or could potentially be ineffective, the court should exercise caution. If there is a prospect that the claim would not be used, the court should either not order a monetary amount for that need or create a negative contingency in relation to it.

[74] The medical justification for the claim for cost of future care is founded in the report of Mr. Vaisler. Dr. Vaisler recommends swimming, pilates and yoga. He recommends an active neck and back rehabilitation program. He recommends for the left shoulder a course of physiotherapy. He also recommends an MRI for the left shoulder, and he recommends contoured back support and contoured pillow support.

[75] One of the things that is necessary for a cost of future care award is for courts to actually have evidence of cost. In that regard, this claim as advanced is problematic. There is no direct evidence as to the costs of virtually any of these

requested or suggested medically justified treatments resulting from the accident. I am not being critical. This is a modest claim, and it may not have been appropriate to obtain a cost of future care report.

[76] It is argued that he did not attend after a period of time physiotherapy after the accident, but it is noted in the evidence and suggestions in the evidence that he stopped once he was no longer covered by insurance. He went when it was, as was testified to by his two granddaughters, who regularly drove him to this and other appointments.

[77] The only evidence I have which would allow the court to have some factual foundation for costs is in regards to the special damage award and the portion of it that relates to physio and chiropractic treatment. Also, I can take judicial notice, having seen over the years, tens if not close to one hundred claims for losses in motor vehicle cases, I have some knowledge of the cost of physiotherapy.

[78] It would seem to me a balanced reading of Dr. Vaisler's recommendation is that physiotherapy would be required for a period of time to assist Mr. Bains in regards to left shoulder comfort and to assist him in learning how to minimize his pain. It would seem to me that 36 sessions over the course of about a year and a half or so should be sufficient for that. I am aware that the cost of such physiotherapy is generally less than $100. As such, the only claim that I am allowing as cost of future care is a $3,000 claim for physiotherapy for approximately 36 physiotherapy sessions.

[79] There is a claim advanced for his cost of medication. This is not costed. I note that the medication was medication he was on prior to the accident. There is a claim for an MRI. This is also not costed. There is claim for an active rehabilitation program. That is not costed. There is a claim for contoured back support and pillow support. That is not costed.

[80] Turning to the next issue, which is the loss of housekeeping. Loss of housekeeping can be a separate head of damage, or it can be a loss which is

incorporated in non-pecuniary or other head of damage. In regards to a claim for loss of housekeeping, I am not satisfied on the evidence that such a claim has been made out. The one aspect of home care that Mr. Bains has made out in the evidence is a loss of home care as it relates to his yard and garden. That has been included in my analysis of his non-pecuniary loss. I am not satisfied, as suggested by counsel for the defence, that there was a clear loss of traditional housekeeping established in the evidence that would be sufficient to meet the threshold of finding a loss of housekeeping as a separate head of damage. As such, I am not making a monetary award for loss of housekeeping.

[81] Turning to the in-trust claim. That is broken down as between the four members of Mr. Bains' family that provided evidence. Mandy and Sandy, his two granddaughters, testified both as to a two-year period of time that they had to adjust their life in order to drive their grandfather to his numerous appointments related to the accident and to attend to his needs as a result of his inability to drive arising from the accident. They both testified to either giving up social activities or adjusting their work schedule in order to assist their grandfather.

[82] Mandy testified that these trips were done by her almost weekly or more and took up one and a half to three hours. She would adjust or give up her attendance at the gym or her attendance at social activities. Sandy attested to similar obligations as to time and similar obligations as to frequency. She further testified that for a two-year period of time she would occasionally adjust her work schedule to allow her to meet her grandfather's needs and, if the time ran over, she would simply not return to work, no doubt having to make it up at some other time.

[83] Mr. Bains' son Darb testified to managing his father's rental properties. He has been put down on the rental contracts as the primary contact for the rental properties because of his father's injuries. He has attended to fix things at the rental property, to deal with tenant issues, to deal with the ins and outs of tenants at this property. I do note that he would likely have had to provide some but not all of this assistance to his father because of his father's loss of eyesight.

[84] The law related to an in-trust claim, as noted by counsel for the defendants, is summarized in *Bystedt v. Bagdan*, 2001 BCSC 1735. That case, upon review, suggests really a twofold test. The first aspect of the test is that the service must be for the care of the plaintiff resulting from the injuries. The second aspect of the test is that it is done by a family member over and above what would have been expected in a familial relationship.

[85] Considering that test and as it relates to the loss testified to by Raj, which is child minding, meals and general assistance, and much of the loss to Darb, child driving, assisting in home construction projects, those losses are in my view not compensable because they are not services related to the care of the plaintiff resulting from the accident. Raj's loss is that his father could not do for him what he did before. He did say he did some yardwork for his father, but that is not really over and above what it would have been expected.

[86] Darb testified that post-accident 2013 to present he managed rental properties. As I have noted, this loss would have potentially been incurred in a modest way because of the loss of the plaintiff's eyesight, but maintaining a rental property is something that takes time. It is directly related to the care of the plaintiff in that it is one of his sources of income, and it allows it to continue. That is, in my view, over and above what is expected in a family relationship.

[87] Mandy and Sandy I also find have acted in a manner over and above the expectation of a familial relationship, noting that they are grandchildren and not direct children. They have sacrificed work, social events and exercise to assist their grandfather, primarily over a two-year period, with driving him to his numerous appointments and driving him to meet the needs of he and his wife in their home, which but for the accident he would have done himself.

[88] All that being said, I have concluded that it is appropriate in this circumstance to award an in-trust claim in the amount of $10,000. $5,000 of that related to Darb and his managerial efforts for his father' rental property over the years, which would have been an out-of-pocket expense for the father if Darb had not stepped in. In

other words, he would have to have hired a property manager. Further, in making up the $10,000, a claim of $2,500 for both Mandy and Sandy for their efforts in adjusting their lives over a two-year period to attend to their grandfather's needs.

[89] The final issue to be dealt with is apportionment. Having found the defendants in both accidents 100% responsible for the accident, there is not much need to spend time on this issue. Counsel for the defendants, who is one counsel for all defendants, advanced an argument, correct argument I find, that the injuries suffered are largely if not entirely indivisible. Therefore, I attribute damages 50% to the accident of September 9, 2013 and 50% to the accident of September 18, 2013. The September 9, 2013 accident is of the defendant, Mr. Kalar, and the September 18, 2013 accident is the defendants, Wei-Jing and Zhang.

[90] In conclusion, I have determined non-pecuniary loss at $110,000, cost of future care at $3,000, an in-trust claim of $10,000 and special damages at $5,473, for a total award of $128,473.

[91] Have there been offers exchanged, counsel for the plaintiff?

[92] MR. JOHNSTON: Yes, My Lord. Mr. Johnston here. There was an offer made by the plaintiffs on January 24, 2020.

[93] THE COURT: And what was that offer?

[94] MR. JOHNSTON: $125,000 plus costs and disbursements.

[95] THE COURT: All right. Mr. Johnston, do you have anything you want to say about costs?

[96] MR. JOHNSTON: I would submit that double costs should be awarded from the date of that offer, that being January 24, 2020.

[97] THE COURT: Mr. Stewart?

[98] MR. STEWART: Yes, hello.

[99] THE COURT: Yes. On the issue of costs, sir.

[100] MR. STEWART: I think costs should just be as normal, following the event.

[101] THE COURT: Thank you. Costs “as normal” are that when an offer is made and the plaintiff beats the offer, they are entitled to double costs. So the plaintiff --

[102] MR. STEWART: Well, I think there is some analysis -- sorry to interrupt, My Lord. I think there is some analysis as to whether or not that offer should have reasonably been accepted.

[103] THE COURT: So you are wanting to make submissions on costs, then, do you, sir? I will give you that opportunity.

[104] MR. STEWART: Sure.

[105] THE COURT: You set that down through scheduling when and if we are back as a court.

[106] MR. STEWART: Yes.

[107] THE COURT: You have that opportunity. So we will leave the issue.

[108] Mr. Bains is clearly entitled to his costs, but the issue as to the amount of costs is something that if the parties cannot agree, you are entitled to set the matter down. Let me put you on some deadlines, though, all of you, so that does not go off into never-never land.

[109] Mr. Stewart, absent medical emergency or something that may happen, I am going to require you to make your submissions on costs in writing by April 17, 2020.

[110] MR. STEWART: Okay.

[111] THE COURT: Mr. Johnston, you are to reply by April 30, 2020?

[112] Mr. Stewart, you can respond to that by May 7, and once all that has been exchanged, collect up all the submissions and all the case law that you rely on and

send it to me as a package. I will attempt to make a decision absent hearing argument, but if I do need to hear argument, I will be in touch with you. I am suggesting written submissions on the issue of costs. Does anybody have a problem with that?

[113] I will tell you, it would usually be my practice to put you on a deadline and have you appear in front of me and argue it. I am just not sure what is going on in the world, so ...

[114] MR. STEWART: Yeah, this -- this circumstance works for me.

[115] THE COURT: Okay.

[116] MR. STEWART: And, My Lord, Mr. Johnston here, my only question would be what is the best method of transmitting our submissions to you?

[117] THE COURT: You can transmit your arguments to me electronically, but the cases should be delivered somehow in hard copy court scheduling. I am not even sure how that works, to be honest, but I think they are still accepting things.

[118] MR. JOHNSTON: I found that usually calling the registry, they are able to tell us how to get to...

[119] THE COURT: Gentlemen, thank you very much.

"J.R. Groves J."

GROVES J.