

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Prasad v. Ross-Smith*,  
2023 BCSC 513

Date: 20230331  
Docket: M196364  
Registry: Vancouver

Between:

**Shalini Sangeeta Prasad**

Plaintiff

And

**Nicholas Roger Ross-Smith and Avtar Singh Rahi**

Defendants

Before: The Honourable Justice Basran

## Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.  
February 27 to March 3, 2023

Place and Date of Judgment:

Vancouver, B.C.  
March 31, 2023

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## Introduction

[1] On February 19, 2018, Ms. Prasad, the plaintiff, was driving to pick up her daughter from school when her vehicle was rear-ended by a vehicle driven by the defendant, Nicholas Ross-Smith, and owned by the defendant, Avtar Rahi (together, the “defendants”) (the “Accident”). The defendants admit liability for the Accident.

[2] Prior to the Accident, Ms. Prasad was in good physical, mental, and emotional health. She worked two jobs as a care aide at two different facilities, and did this work without any limitations or restrictions. The Accident caused pain in Ms. Prasad’s neck, jaw, left shoulder and arm, and mid back. She also suffered dizziness for two weeks and headaches for approximately three months, after which these symptoms resolved.

[3] Ms. Prasad seeks damages for her pain and suffering, past and future loss of income-earning capacity, loss of housekeeping capacity, and cost of future care. She also seeks special damages.

[4] For the reasons that follow, I have concluded that Ms. Prasad is entitled to:

a) Non-pecuniary damages:	\$95,000
b) Past loss of income-earning capacity:	\$1,471
c) Cost of future care:	\$2,760
d) Special damages:	<u>\$1,150</u>
<b>Total:</b>	<b><u>\$100,381</u></b>

[5] Ms. Prasad is not entitled to damages in respect of future loss of income-earning capacity and loss of housekeeping capacity.

## Credibility Assessment

### **Legal Principles**

[6] It is useful to set out the principles governing credibility determinations. In assessing the truthfulness of the testimony of any witness, I am guided by the test set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.):

[...]. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. [...]

[7] In assessing credibility, I will apply the factors described by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); [*Faryna*] v. *Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time ([*Faryna*] at para. 356).

### **The Parties' Positions and Analysis of Credibility**

[8] Ms. Prasad submits that the evidence she provided was credible and reliable. The defendants essentially agree with this assessment and submit that credibility is not at issue.

[9] The defendants identified an inconsistency between Ms. Prasad's answers at her examination for discovery and trial in respect of her ability to do household chores. During her examination for discovery, she indicated that she did not do many of the household chores immediately after the Accident but was able to do these tasks as of June 2022, when this examination took place. At trial, she testified that she is still unable to do some household chores and relies on her husband and daughters to do these tasks.

[10] I am satisfied that this is a relatively minor inconsistency when considered in the context of the other evidence at trial on the issue of household maintenance.

Ms. Prasad told Dr. Paul Chapman, physiatrist, that she does not generally require assistance with household maintenance. However, in a questionnaire administered by him as part of his assessment of Ms. Prasad, she detailed several specific tasks that she is unable to perform on her own. I am not convinced that this is an inconsistency that diminishes her credibility. Instead, it is an example of her cautious answers to general questions while trying to be truthful and helpful in respect of more specific questions.

[11] In my view, Ms. Prasad testified in a straightforward, understated, and decidedly stoic manner. She answered questions directly and without any hint of exaggeration or embellishment. I was left with the impression that she tended towards minimizing and moderating her evidence so as to err on the side of playing down the effects that the Accident has had on her.

[12] I have no concerns with the credibility of the evidence provided by Ms. Prasad. Nor do I have any doubts about the credibility of the evidence provided by her sister, Sanjeeta Devi, or Ms. Prasad's husband, Sanjeshwaran Naicker.

### **Non-Pecuniary Damages**

#### **Relevant Legal Principles**

[13] Ms. Prasad must prove that the Accident caused his injuries. She need not establish that the admitted negligence of the defendants was the sole cause of her injuries, but she must demonstrate a substantial connection between the Accident and her physical and psychological injuries: *Thompson v. Helgeson*, 2017 BCSC 927 at paras. 28–30.

[14] Some of the relevant factors in assessing non-pecuniary damages include:

- a) the plaintiff's age;
- b) nature of the injury;
- c) severity and duration of the pain;
- d) disability;

- e) emotional suffering;
- f) loss or impairment of life;
- g) impairment of family, marital, and social relationships;
- h) impairment of physical and mental abilities;
- i) loss of lifestyle; and
- j) the plaintiff's stoicism (as a factor that should not penalize the plaintiff)

See *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.

### **The Plaintiff's Position on Non-Pecuniary Damages**

[15] Ms. Prasad emphasized that prior to the Accident, she was healthy, pain free, and had no functional restrictions or limitations. Work was a significant part of her life and left her with little time to do other activities because she worked two jobs for many years and was busy raising two daughters, mostly as a single mother. She did this without pain or discomfort and this is no longer the case.

[16] Ms. Prasad's husband and sister testified to the changes in Ms. Prasad's mood, complaints and displays of pain, difficulty with household chores, and her fatigue at the end of the workday.

[17] With respect to the quantum of her non-pecuniary damages, Ms. Prasad relies on the following cases and submits that with adjustments for inflation, the Court should award her \$130,000 under this head of damage:

- *Broomfield v. Lof*, 2019 BCSC 1155 (\$130,000);
- *Clayton v. Barefoot*, 2018 BCSC 239 (\$130,000);
- *Lock v. Floreani*, 2017 BCSC 1313 (\$115,000);
- *Teunissen v. Hulstra*, 2017 BCSC 1569 (\$110,000); and
- *Lee v. MacLean*, 2022 BCSC 312 (\$130,000).

**The Defendants' Position on Non-Pecuniary Damages**

[18] The defendants acknowledge that Ms. Prasad suffered several soft tissue injuries caused by the Accident and that she continues to experience pain in her neck and back. However, they assert that these injuries are non-disabling and do not impact her functionality to any material degree.

[19] On the quantum of non-pecuniary damages, the defendants rely on the following cases and submit that the Court should award Ms. Prasad \$50,000 to \$75,000 for her pain and suffering caused by the Accident:

- *Allen v. Figueira*, 2020 BCSC 1864 (\$60,000);
- *Jansson v. Malone*, 2021 BCSC 585 (\$55,000); and
- *Liu v. Zhang*, 2019 BCSC 778 (\$60,000)

**Findings of Fact on Non-Pecuniary Damages**

***Ms. Prasad's Pre-Accident Condition***

[20] Ms. Prasad was born in 1981 in Fiji. She was 37 years old on the date of the Accident and 42 at trial.

[21] In June 2003, Ms. Prasad married her first husband who lived in Victoria, BC. She emigrated to Canada later that month. They had two daughters, born in 2004 and 2007.

[22] During her first pregnancy, Ms. Prasad and her first husband began experiencing marital problems. He moved out of their residence in November 2006 and returned in January 2008. He subsequently left the family in December 2010 and never came back. They divorced in 2014.

[23] In February 2009, Ms. Prasad and her sister, Ms. Devi, bought a house together on Wiseton Street, Victoria, BC. (the "Wiseton Street residence").

[24] In August, 2016, Ms. Prasad met her second husband, Mr. Naicker, through a dating site. They married on April 25, 2017 and he moved into the Wiseton Street residence.

[25] In December 2018, the couple separated and Mr. Naicker left the Wiseton Street residence. In March 2021, they reconciled and he returned to their home. Ms. Prasad gave birth to her third daughter in late 2021.

[26] In January and February 2018, immediately before the Accident, Ms. Prasad worked full-time at Sunrise Senior Centre (“Sunrise”) and part-time at Selkirk Place (“Selkirk”). She worked two jobs for approximately 13 of the past 17 years.

[27] Ms. Prasad had no difficulty working these two jobs and had no previous physical or psychological injuries or impairments. She found her work at Sunrise to be more demanding and less enjoyable than her work at Selkirk because it involved more lifting, housekeeping, and laundry tasks, as well as working in the dining room. She enjoyed working directly with residents because she likes caring for people.

[28] Ms. Prasad had no difficulties with cooking, housework, or gardening prior to the Accident.

### ***Circumstances of the Accident***

[29] On February 19, 2018, Ms. Prasad was driving her 2011 Toyota Sienna minivan to pick up her daughter from school. She had stopped on Glanford Avenue in Victoria, BC when her vehicle was struck by a 2005 Dodge Ram 1500 truck driven by Mr. Ross-Smith.

### ***Ms. Prasad's Post-Accident Condition***

[30] Within a few hours of the Accident, Ms. Prasad experienced numbness in her neck, shoulder, and arms, and pain in the middle of her back. She had not previously experienced these types of pain symptoms.

[31] On the following day, Mr. Prasad attended at Burnside Family Clinic and was advised to take some time off work because of the pain in her neck. The doctor who

examined her thought she may have soft tissue injuries and he recommended that she obtained physiotherapy treatment.

[32] After taking three weeks off work, consisting of 14 working days, from both Sunrise and Selkirk, Ms. Prasad returned to work at both places. She found working to be challenging because she experienced pain in her neck, left shoulder and arm, and middle back. She also developed a stiff jaw. She had none of the symptoms before the Accident.

[33] Ms. Prasad felt dizzy for one to two weeks and suffered headaches for three months. Both of these symptoms then resolved. She experiences pain in her jaw, left shoulder and arm, and back every day, as well as some pulling and discomfort in her neck.

[34] On October 11, 2019, Ms. Prasad advised her family physician that her Accident-related injuries were “much better” and her only remaining symptoms were minor left shoulder and left neck pain.

[35] She underwent trigger point injections and found this treatment to be generally helpful but she continued to experience pain in her left neck, shoulder, and arm.

[36] Ms. Prasad tires more easily and finds her work to be challenging because of her pain symptoms. If she extends her shift beyond eight hours, she experiences stiffness and pain in her back and neck. She experiences some discomfort while working.

[37] Ms. Prasad has not seen a doctor regarding her injuries since April 2020.

[38] Ms. Prasad gets massage treatment approximately once a month and finds this helpful. She is able to walk and do some light hiking but she cannot do more rigorous exercises such as weightlifting.

[39] Ms. Prasad finds lifting things somewhat difficult. Her two older children help her carry groceries and she cannot carry her youngest daughter for more than a few minutes.

[40] Ms. Prasad has some difficulty with housework, moving furniture, and yard work. Her family helps her with cooking, cleaning dishes, and sweeping. For example, Mr. Naicker does most of the housework and cooking.

[41] Mr. Naicker described Ms. Prasad as more tense, stressed, and less happy than she was prior to the Accident. She occasionally becomes angry and frustrated with her pain symptoms.

[42] Ms. Devi, Ms. Prasad's sister, observed that Ms. Prasad periodically exhibits pain behaviours in her body language such as wincing and stretching. Ms. Devi also noted that her sister has less energy and is not as active as she used to be prior to the Accident.

[43] By Ms. Prasad's estimation, her symptoms have improved since the Accident by approximately 70% to 80%, however, she has not fully recovered.

### **Medical Expert Evidence**

#### ***Dr. Harpreet Sangha – Physiatrist***

[44] Dr. Sangha is a qualified expert in physical medicine and rehabilitation. In the course of conducting an independent medical examination of Ms. Prasad, he examined her on October 19, 2022 and produced an expert report dated October 23, 2022.

[45] Dr. Sangha observed, on palpation, that Ms. Prasad had generally increased tautness in her neck and around her left shoulder blade. He diagnosed her with left side cervicothoracic and periscapular strain which is the stretching beyond normal limits of the soft tissue, ligaments, and connecting tissues in these areas. This strain causes chronic myofascial pain syndrome in the left side of her neck, shoulder, and mid back. He found that although there is a waxing and waning of symptoms

depending on her activities, her symptoms were ongoing because they were consistently observed by several health care providers.

[46] Dr. Sangha does not expect any significant improvement in Ms. Prasad's condition and considers her condition to be permanent because her symptoms have persisted for over four-and-a-half years and most recovery takes place within the first year with maximal recovery expected by the end of the second year.

[47] Dr. Sangha recommends therapies for the management of Ms. Prasad's pain symptoms including physical therapy, as well as chiropractic and/or massage treatments. He also recommends a trial of active release therapy, heat, stretching, neuromodulation, and exercise. He also recommends an occupational therapy assessment including an in-home assessment because he thinks she is partially disabled.

[48] Dr. Sangha made several findings on the impact of Ms. Prasad's symptoms on her function, including some limitations related to her work as a resident care aide and the impact on her vocational options. He is generally familiar with the nature of the work conducted by care aides, but he defers to the findings of a functional capacity evaluation conducted by an occupational therapist.

[49] Unsurprisingly, Dr. Sangha concludes that Ms. Prasad's symptoms were caused by the Accident.

***Dr. Paul Chapman – Psychiatrist***

[50] Dr. Chapman is also a qualified expert in physical medicine and rehabilitation. For the purposes of completing an independent medical examination, he examined Ms. Prasad on October 18, 2022 and produced an expert report dated November 21, 2022.

[51] As a result of the Accident, Dr. Chapman diagnosed Ms. Prasad with new onset, intermittent, neck stiffness, and mid-back discomfort due to soft tissue

structures related to the Accident. He opines that the tingling and numbness suffered by Ms. Prasad was caused by the Accident.

[52] Dr. Chapman initially did not attribute Ms. Prasad’s jaw stiffness to the Accident because he understood that it first arose three months after it. In cross-examination, he was shown an insurance claim form filled out by Ms. Prasad on February 27, 2018 in which she indicated that she had jaw pain arising from the Accident.

[53] Dr. Chapman drew some distinction between the reference to jaw pain in the insurance claim form and Ms. Prasad’s self-report to him that she had jaw stiffness. He nevertheless agreed that this early report would change his opinion and on a balance of probabilities, he would conclude that her jaw complaint is related to the Accident.

[54] Based on the history he took from Ms. Prasad, she reported “no limitations in carrying out her home duties”. However, in cross-examination, Dr. Chapman acknowledged that Ms. Prasad reported on a questionnaire administered by his office that she needed assistance with several yard maintenance and household cleaning tasks. Dr. Chapman explained that he deferred to Ms. Prasad’s self-reporting to him but he agreed that the questionnaire indicated that she needed help with some household tasks.

[55] Dr. Chapman noted that Ms. Prasad experienced discomfort in the neck, back, and left arm since returning to work in September 2022. She also reported that she no longer requires assistance from her colleagues, that she is able to manage her work duties, and that there is nothing that she cannot or will not do at work.

[56] Dr. Chapman also reported that Ms. Prasad “[...] is engaging in recreational activities to a greater degree at present [...]” compared to before the Accident. Ms. Prasad told Dr. Chapman that she had recovered about 85% of her pre-Accident functioning.

[57] Dr. Chapman does not think that any Accident-related issues will worsen or negatively impact Ms. Prasad's level of function or put her at an increased risk of arthritis or degeneration. He does not find her to be disabled in relation to either work or home. He believes that she is capable of carrying out her job duties full-time.

[58] Dr. Chapman recommends an active exercise-based rehabilitation program instead of passive therapies such as massage or chiropractic treatments. He also suggests that she may benefit for periodic needling treatments (IMS) by a physical therapist.

### **Analysis of Non-Pecuniary Damages**

[59] Prior to the accident, Ms. Prasad was healthy, pain free, and had no functional limitations or restrictions.

[60] Ms. Prasad's work involves lifting things and people, stretching, kneeling, bending, reaching, and squatting. She also has to stoop to help patients put on their socks and shoes. She is on her feet for most of the day and only sits for periodic rest breaks during her shift. Prior to the Accident, she did not experience any significant or persistent pain symptoms associated with the many hours of physically demanding work she performed.

[61] Ms. Prasad has worked the equivalent of two jobs for 13 of the past 17 years and largely raised her two older daughters as a single mother. Understandably, she had little time for other activities aside from occasional walks and light hiking.

[62] The Accident caused ongoing pain symptoms in her neck, left shoulder and arm, and mid back. Ms. Prasad also continues to experience jaw pain that, in my view, was caused by the Accident. I reject the defendants' unsupported contention that this symptom resolved shortly after the Accident. Ms. Prasad's first noticed this pain shortly after the Accident, while also contending with a range of other symptoms, some of which resolved such as headaches and dizziness. I accept her evidence that she has continued to experience jaw stiffness over the past several years and this symptom is ongoing.

[63] The expert evidence of Dr. Sangha and Dr. Chapman largely concurs on the cause, diagnosis, and extent of Ms. Prasad's symptoms. I accept Dr. Sangha's prognosis that her symptoms are likely to continue indefinitely.

[64] More than five years after the Accident, Ms. Prasad continues to experience pain in her neck, left shoulder and arm, mid back, and jaw. These symptoms are relatively mild, non-disabling, yet persistent, and are expected to continue indefinitely. Ms. Prasad suffers pain symptoms that are exacerbated by her work but she is stoic and she perseveres despite these symptoms. Her stoicism is laudable and she will not be penalized for it.

[65] Ms. Prasad's relatively minor, yet ongoing, pain symptoms also cause some limitations in her ability to perform household tasks. She experiences some or all of these symptoms daily but she retains the ability to function effectively. While there is some evidence that her symptoms have affected her mood, Ms. Prasad did not suggest that her symptoms affected her emotionally or psychologically. I am not convinced that the Accident caused any of these types of symptoms. Indeed, she has persevered through several challenging personal circumstances unrelated to the Accident, such as the dissolution of her first marriage.

[66] Taking into account Ms. Prasad's age, mild, yet continuing, pain symptoms, the likelihood that these symptoms will continue indefinitely, and their impact on her work and ability to perform household tasks, I am satisfied that Ms. Prasad is entitled to \$95,000 in respect of damages for her pain and suffering caused by the Accident.

### **Loss of Income-Earning Capacity**

#### **Factual Findings**

[67] After arriving in Canada in 2003, Ms. Prasad worked as a housekeeper at Canadian Forces Base Esquimalt for nine months before she took a maternity leave.

[68] During her first maternity leave, she completed a nine-month resident care aide program at Sprott Shaw College. After graduating from this program and commencing May 5, 2005, she began working as a residential care aide at Sunrise.

She continued working there until March 2020. This work involved caring for ten to eleven senior residents and included moving, toileting, washing, bathing, and dressing them.

[69] On December 3, 2008, Ms. Prasad began working a second job as a resident care aide at Selkirk because she needed to earn more income. She worked 37.5 hours a week at Sunrise and approximately 22 hours a week at Selkirk. Her working hours at Sunrise and Selkirk are from 6 a.m. to 2 p.m. and from 3 p.m. to 9 p.m. respectively.

[70] As previously noted, in February 2009, Ms. Prasad and Ms. Devi bought the Wiseton Street residence. Ms. Devi and her family lived in the lower portion of this residence. At that time, Ms. Prasad, her mother, and Ms. Prasad's two daughters lived upstairs. Mr. Naicker moved into the Wiseton Street residence after he and Ms. Prasad married in April 2017.

[71] In 2016, Selkirk expanded Ms. Prasad's working hours by adding two hours per shift to her schedule (from 3 p.m. to 9 p.m. to 3 p.m. to 11 p.m.). As a result, she worked a total of 16 hours per day (eight hours at Sunrise and eight hours at Selkirk).

[72] However, in 2018, shortly before the Accident, Selkirk reduced Ms. Prasad's hours back to six hours per shift (from 3 p.m. to 9 p.m.). At this time, as in 2008, she was working 37.5 hours at Sunrise and 22 hours per week at Selkirk.

[73] Mr. Naicker works as a marine mechanic in Sydney, BC. He has held this position since May 5, 2017. He currently earns \$37 per hour and works business hours from Monday to Friday. He has very little opportunity to work overtime.

[74] Immediately after the Accident, Ms. Prasad took approximately three weeks off from both jobs and missed 14 working days. A doctor recommended that she return to work by performing light duties work. Ms. Prasad's supervisor at Selkirk said they could not accommodate this request—Ms. Prasad could either take a

leave of absence or perform the required normal work duties. Ms. Prasad needed the income so she returned to work at both Sunrise and Selkirk.

[75] In July 2018, Ms. Prasad missed two weeks of work because she underwent a medical procedure. After taking two weeks off to recover, she returned to working at both Sunrise and Selkirk.

[76] In March 2020, due to COVID-19 restrictions, Ms. Prasad had to choose to work at one location between Sunrise and Selkirk. She chose to continue working at Selkirk because she found working there less physically demanding and more enjoyable than working at Sunrise where she was required to do laundry, dining, and housekeeping tasks in addition to caring for residents.

[77] The restriction on working at only one facility began in March 2020 and continued until January 1, 2023. During this period, in addition to her full-time work at Selkirk, Ms. Prasad could work 22 additional straight time hours per week as part of the “COVID line” as well as overtime. She worked approximately 45 to 55 hours per week during this period.

[78] As previously noted, from December 2018 to until March 2021, Ms. Prasad and Mr. Naicker separated. Ms. Prasad reconciled with Mr. Naicker in March 2021. Both Ms. Prasad and Mr. Naicker testified that Mr. Naicker’s contribution to the household finances reduced Ms. Prasad’s need to work overtime.

[79] In the summer of 2021, Joelle Lund, Ms. Prasad’s previous supervisor at Sunrise asked her to return to work there. Ms. Prasad decided not to accept this offer because she was pregnant and planned to go on maternity leave in September 2021. Ms. Prasad resigned her position at Sunrise in May, 2022.

[80] In September 2021, Ms. Prasad went on maternity leave and she returned to work at Selkirk on September 16, 2022. She estimates that she works approximately 52.5 hours per week at Selkirk, consisting of 37.5 hours of full-time work and two 7.5 hour overtime shifts. Ms. Prasad estimates that she would be able to work two more

overtime shifts per week but for the Accident. This would be an additional 15 hours of work per week.

[81] Ms. Prasad's current rate of pay at Selkirk is \$26.93 per hour. Her overtime rate is 1.5 times this amount.

[82] In June 2022, Ms. Prasad, Ms. Devi, and their respective husbands jointly purchased a residential property located at Phelps Street in Langford, BC (the "Phelps Street residence"). Ms. Devi and her family moved out of the Wiseton Street residence in July 2022 and into the Phelps Street residence. Ms. Prasad testified that her share of the mortgage payments on these two properties is approximately \$2,800 per month.

[83] Ms. Prasad suggested that now that she has purchased another property, she would like to go back to Sunrise but she is not able to do so as a result of the pain caused by the Accident.

[84] In July, 2022, Ms. Prasad's first husband died. Up to that point, he had been paying \$525 per month in child support for their two daughters. In direct examination, Ms. Prasad indicated that she would be working a second job but for the Accident because her first husband passed away and she no longer receives child support from him. Also, Mr. Naicker does not have access to overtime hours whereas she does. She also indicated that the purchase of a second home is another reason why she would like to work more. She asserted that her pain symptoms prevent her from working more hours.

[85] However, Ms. Prasad and Mr. Naicker both confirmed that Ms. Prasad is not working a second job or more overtime because Mr. Naicker is contributing to their family's household finances. Ms. Prasad indicated that she would work more if their circumstances change and if she feels the need to earn more income.

[86] Ms. Prasad earned the following amounts of employment income from 2015 to 2021:

2015	\$85,436
2016	\$87,732
2017	\$88,930
2018	\$63,756
2019	\$81,832
2020	\$97,498
2021	\$67,172

***Functional Capacity Evaluation***

[87] Neeru Aggarwal is a qualified occupational therapist. She assessed Ms. Prasad on November 10, 2022 and produced an expert report dated November 29, 2022.

[88] Ms. Prasad filled out several questionnaires in which she subjectively rated herself as having mild pain, fatigue, and mood changes along with mild disabilities involving some neck movements and in her left upper extremity. The subjective ratings options on these questionnaires are mild, moderate, and severe.

[89] One of the tests Ms. Aggarwal applied was the Reintegration to Normal Living Index in which Ms. Prasad self-reported that she perceives herself as having returned to 92% of her pre-injury function level.

[90] Ms. Aggarwal found that Ms. Prasad put forward full effort during a day of rigorous testing and her reporting was reliable. Ms. Prasad described this day as more rigorous than her usual work day as a care aide.

[91] Ms. Prasad presented with active range of motion within normal limits in her trunk, right and left, upper and lower extremities. She experienced an increasing pain in her left shoulder, neck, and back that she rated at 2-3/10. She had no limitations in movement despite her pain.

[92] Ms. Prasad had normal unilateral and bilateral coordination and dexterity in her hands but showed some evidence of discomfort in her left upper extremity and neck, and reported increasing pain during and following some of the tasks.

[93] The Dictionary of Occupational Titles assesses the strength rating for “health care aides” as Medium. Based on this, Ms. Prasad has the strength capabilities required for her position as a healthcare aide but with limitations due to pain. However, Ms. Prasad does not fully meet the medium physical strength requirements for nurse aides as described in National Occupation Classification 3413 because although she can lift 25 pounds, she was unable to lift 50 pounds which is the amount of weight expected to be lifted according to this guideline.

[94] Ms. Aggarwal also observed that Ms. Prasad has some positional restrictions and cannot stand without breaks or changes in position. These positional limitations make it potentially difficult for her to complete some of her job duties because she is required to stand for most of her shift and they are an impediment for her in completing her job duties without pain consequences. This is because care aides provide personal care to residents such as dressing, grooming, toileting, bathing, and feeding, and they assist in transferring patients from bed to wheelchair and from wheelchair back to bed. Although Ms. Prasad has been performing these activities, she experiences some pain increases from these positions and activities.

[95] Ms. Prasad presented to Ms. Aggarwal as a stoic and matter-of-fact person. She did not overstate her pain nor view it in unrealistic terms.

[96] The testing administered by Ms. Aggarwal indicated that Ms. Prasad does not meet the energy requirements to be a care aide because she was fatigued at the end of her work day.

[97] Over the course of the testing day, Ms. Prasad’s pain and fatigue increased to self-reported levels of 3-4/10. Accordingly, Ms. Aggarwal opined that unless her symptoms improved, it will be difficult for Ms. Prasad to continue to work regular full-time hours. This is because although she is working full-time, she has difficulty engaging in activities outside of work.

[98] Ms. Prasad reported to Ms. Aggarwal that she started yoga and weightlifting after the Accident to maintain her ability to continue working.

## Past Loss of Income-Earning Capacity

### *Relevant Legal Principles*

[99] The principles applicable to the assessment for past loss of income-earning capacity are:

- a) An assessment of a loss of income involves a consideration of hypothetical events.
- b) The plaintiff need not prove these hypothetical events on a balance of probabilities.
- c) A hypothetical possibility will be taken into account provided that the plaintiff establishes that it is a real and substantial possibility, and not mere speculation.
- d) Once a hypothetical possibility is established, the court must consider the likelihood of the event occurring in determining the measure of damages.
- e) A causal connection must be established, on a balance of probabilities, between the Accident and the pecuniary loss claimed.
- f) It is up to the trial judge to determine what approach to use to quantify the loss (i.e., an earnings approach or a capital asset approach).

See: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48 (Goepel J.A. in dissent, but not on this point); *Smith v. Knudsen*, 2004 BCCA 613 at paras. 36–37; *Laxdal v. Robbins*, 2010 BCCA 565 at paras. 19–20.

[100] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47, the court set out a three-step process to assess damages for the loss of future earning capacity:

- a) Whether the evidence discloses a potential future event that could lead to a loss of capacity?
- b) Whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss?
- c) If yes, the court must assess the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring.

[101] This three-step process applies to both past and future income earning capacity claims: *Siu v. Regehr*, 2022 BCSC 1876 at paras. 162–163.

[102] A contingency deduction to a past loss of income-earning capacity may be appropriate where the material risk impairs the plaintiff's ability to maintain employment regardless of the Accident: *Dornan v. Silva*, 2021 BCCA 228 at paras. 81–84; *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at paras. 100–102.

***The Parties' Positions on Past Loss of Income-Earning Capacity***

[103] The parties agree that Ms. Prasad lost income in the amount of \$1,471 in respect of the 14 days of work she missed in the three weeks immediately after the Accident.

[104] Ms. Prasad is not making a claim for past loss of income-earning capacity for the period from when she returned to work three weeks after the Accident to September 2022 when she went back to work after maternity leave. She suggests that she worked through her pain during this period in manner that is unsustainable over the long-term because of her ongoing pain symptoms.

[105] Ms. Prasad asserts that her Accident-related injuries prevented her from working two additional overtime shifts per week over the 20 weeks from September 2022 to the date of trial. She calculates that she would have earned an additional \$606 per week over this period. After applying an estimated tax rate of 18%, she estimates that she has lost income of \$9,937 and she claims this amount in addition to the aforementioned amount of \$1,471 for the three weeks of work she missed immediately after the Accident. Ms. Prasad therefore claims \$11,408 in respect of past loss of income earning capacity.

***Analysis of Past Loss of Income-Earning Capacity***

[106] Immediately prior to the Accident, Ms. Prasad was working 37.5 hours per week at Sunrise and 22 hours per week at Selkirk. This equates to three 7.5 hour-overtime-shifts per week, not four. Ms. Prasad has been working two 7.5 hour-overtime-shifts per week since returning to work in September 2022.

[107] Ms. Prasad found the testing conducted by Ms. Aggarwal to be more gruelling than her typical workday. Although she reported some increase in her pain symptoms over the course of the testing, her pain symptoms remained relatively mild and did not noticeably affect her functionality. Importantly, Ms. Prasad testified that she is able to perform all of the tasks that she is required to do as a care aide and she does not require assistance or accommodations to do them. In my view, this is the best evidence of her functional capacity to work as a care aide.

[108] I accept that Ms. Prasad tolerates some mild pain symptoms over the course of her working day but I am not convinced that she has established that these symptoms affect her functioning. This is because she returned to working two jobs within weeks of the Accident and she testified that she was able to perform all of the required tasks and has been able to continue doing so since returning to work in September 2022.

[109] Ms. Prasad continued working similar hours before and after the Accident. In March 2020, she was required to choose one work location. She chose Selkirk over Sunrise because she preferred working directly with residents as opposed to doing other tasks. Importantly, she continued working 45 to 55 hours per week at Selkirk because she had access to up to 22 hours per week of “COVID line” hours and overtime.

[110] Furthermore, Ms. Prasad and Mr. Naicker confirmed that Ms. Prasad is not working additional overtime shifts because Mr. Naicker is contributing to their household finances. Ms. Prasad indicated that she may work more if her circumstances change and if she feels the need to earn more income. This suggests that she is physically capable of working more and her decision not to do so is based on her financial circumstances, not a lack of capacity to do additional work.

[111] In June 2022, Ms. Prasad and Ms. Naicker took on an additional financial obligation by purchasing the Phelps Street residence along with Ms. Devi and her husband. The decision to make this purchase does not appear to have been affected in any way by any purported limitations on Ms. Prasad’s capacity to work.

[112] When Ms. Prasad returned to work in September 2022, she commenced working full-time and two further 7.5-hour-overtime shifts per week. This is only marginally different than the equivalent of three overtime shifts she was working prior to the Accident.

[113] I am not persuaded that Ms. Prasad has established that there is a real and substantial possibility that she suffered a pecuniary loss in respect of past income-earning capacity from September 2022 to the date of trial. Therefore, as agreed by the parties, she is entitled to \$1,471 for past loss of income-earning capacity in respect of the 14 working days she missed in the three weeks immediately after the Accident.

### **Future Loss of Income-Earning Capacity**

#### ***Relevant Legal Principles***

[114] The court's assessment of a plaintiff's future loss of income-earning capacity involves comparing a plaintiff's "likely" future had the accident not happened to their future after the accident. This is not a mathematical exercise. The court engages in an assessment that depends on the type and severity of a plaintiff's injuries, and the nature of the anticipated employment at issue. Economic and statistical evidence provides a useful tool to assist in determining what is fair and reasonable in the circumstances: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 7.

[115] As noted earlier in this judgment, in *Rab* at para. 47, the court set out a three-step process to assess damages for the future loss of income-earning capacity:

- a) Whether the evidence discloses a potential future event that could lead to a loss of capacity?
- b) Whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss?
- c) If yes, the court must assess the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring.

[116] The third step may involve either the "earnings approach" or the "capital asset approach". The earnings approach is often appropriate where there is an identifiable

loss of income at the time of trial. The capital asset approach is appropriate where the plaintiff suffered a loss of a capital asset rather than a loss of earning capacity. It is also helpful when a plaintiff has yet to establish a settled career path as it creates a more holistic picture of a plaintiff's potential future: *Ploskon-Ciesla* at paras. 16–17.

[117] In *Dornan*, Justice Grauer stated that in undertaking the analysis of positive and negative contingencies, courts are required to assess what happened to the plaintiff in the past, proven on a balance of probabilities. Then, they are required to assess what might happen to a plaintiff in the future. Courts can only consider future possibilities to the extent that they are real and substantial possibilities: *Dornan* at para. 94.

#### ***The Parties' Positions on Future Loss of Income-Earning Capacity***

[118] Ms. Prasad contends that she will be losing annual income of \$30,000 per year based on her assertion that she is unable to work two additional 7.5-hour-overtime shifts per week that would generate weekly income of \$606 (15 hours x \$26.93/hour x 1.5 overtime rate).

[119] The present value of \$30,000 per year over 23 years, assuming an expected retirement age of 65, is \$579,927. Taking into account a negative general contingency of 10%, Ms. Prasad submits that she is entitled to \$520,000 in respect of her future loss of income-earning capacity.

[120] The defendants deny that Ms. Prasad is entitled to damages for future loss of income-earning capacity. They assert that she has not demonstrated that there is a real and substantial possibility of a future event that could lead to a pecuniary loss. They point to Ms. Prasad's evidence that she worked almost 60 hours a week after the Accident until the COVID-19 restrictions came into force in March 2020.

#### ***Analysis of Future Loss of Income-Earning Capacity***

[121] Ms. Prasad seems to have largely recovered from her initial injuries. She is left with relatively minor, yet, persistent pain in her neck, left shoulder and arm, mid back, and jaw. She has worked a very similar number of hours after the Accident as

compared to before the Accident, and she has demonstrably earned more annual income post-Accident, leaving aside 2021 and 2022 when she was on maternity leave for 12 months.

[122] While I accept that Ms. Prasad has some mild pain and discomfort, these symptoms do not appear to be preventing her from working the number of overtime shifts that she chooses. In my view, she has not established a real and substantial possibility that she will suffer a pecuniary loss in the future because of these symptoms. She took on a further financial commitment by buying a second property and described being interested in returning to work at Sunrise because of this financial obligation. This suggests that her pain symptoms are not preventing her from working as much as she would like and, instead, other factors influence this decision.

[123] Ms. Prasad reported minimal pain before the testing she underwent during the functional capacity evaluation with Ms. Aggarwal. While she reported some increase in her pain symptoms to 3-4/10 during the course of her testing, she described this testing as more rigorous than her usual work day.

[124] Ms. Prasad self-reported to Ms. Aggarwal that she had recovered approximately 92% of her pre-Accident functioning. Similarly, she told Dr. Chapman that she had recovered 85% of her pre-Accident function. At trial, Ms. Prasad indicated that she had recovered up to 80% of her pre-Accident function.

[125] Ms. Prasad continued working two jobs and a significant number of hours after the Accident, albeit with some lingering pain symptoms. She continued doing this until her personal circumstances changed such that she no longer needed to work as much overtime as she had in the past. To be clear, Ms. Prasad continues to work very hard. In addition to working full-time for 37.5 hours per week, she usually works two additional overtime shifts per week.

[126] The factors that account for the variation in the overtime Ms. Prasad works do not appear to be related to her Accident related pain symptoms, let alone any

disabling lack of functionality. She and Mr. Naicker both gave evidence that she currently works less overtime because he contributes to the finances of the household. Her decision to work more or less overtime seems to be a function of her ability to meet her financial obligations, not any limitations caused by the Accident.

[127] Based on her relatively mild pain symptoms, seemingly full ability to do her work tasks, and history of hard work post-Accident, I am not convinced that Ms. Prasad's pain symptoms are a determining factor in how many overtime shifts she works. In regards to the relatively mild pain symptoms she experiences while working, I have taken them into account in my assessment of her non-pecuniary damages.

[128] The distinction between working the two overtime shifts (she is currently working) and either the equivalent of three overtime shifts (that she was working prior to the Accident) or the four overtime shifts (that she purports she to want to work) does not appear to be related to the Accident. Therefore, in my view, Ms. Prasad has not established a real and substantial possibility that she will suffer a pecuniary loss in the future. She is therefore not entitled to any damages in respect of future loss of income-earning capacity.

### **Loss of Housekeeping Capacity**

#### **Relevant Legal Principles**

[129] The principles applicable to the loss of housekeeping capacity are:

- Loss of housekeeping capacity may be treated as a pecuniary or non-pecuniary award. This is a question of discretion for the trial judge.
- A plaintiff who has suffered an injury that would make a reasonable person in the same circumstances unable to perform usual and necessary household work is entitled to compensation for that loss by way of pecuniary damages.
- Where the loss is more in keeping with a loss of amenities or increased pain and suffering while performing household work, a non-pecuniary damages award may instead compensate the loss.

- As the award is intended to reflect the loss of a capacity, the plaintiff is entitled to compensation whether or not replacement services are actually purchased.
- Evidence of the loss of housekeeping capacity is provided by the work being performed by others, even if done gratuitously.
- Evidence of a plaintiff's incapacity resulting in actual expenditures, or of family members or friends routinely undertaking functions that would otherwise have to be paid for, supports a separate award of pecuniary damages.
- “[...] pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.”

See: *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 63; *Kim v. Lin*, 2018 BCCA 77 at paras. 28–34; *Riley v. Ritsco*, 2018 BCCA 366 at para. 98; *McKee v. Hicks*, 2023 BCCA 109 at para. 112.

### **The Parties' Positions on Loss of Housekeeping Capacity**

[130] Ms. Prasad asserts that she has difficulty performing household tasks as a result of the Accident. She seeks an award for loss of housekeeping capacity in the amount of \$46,584. This is based on the present value of two hours of assistance per week over 30 years at a rate of \$20 per hour.

[131] The defendants deny that Ms. Prasad is entitled to damages in respect of the loss of housekeeping capacity.

### **Factual Findings and Analysis on Loss of Housekeeping Capacity**

[132] During Ms. Prasad's examination for discovery, she confirmed that she was unable to do household chores for a few weeks after the Accident but she was now able to do these tasks. At trial, Ms. Prasad described some restrictions on her ability to perform household cleaning and other related activities such as lifting and carrying groceries.

[133] I am satisfied that Ms. Prasad is capable of doing most household tasks but she experiences some relatively minor, yet, persistent pain symptoms while doing them. In these circumstances, I am not convinced that she is entitled to an amount of damages in respect of loss of housekeeping capacity because her own evidence suggests that she is capable of doing most of these tasks, albeit with some pain.

[134] Ms. Prasad's pain symptoms while performing household tasks have been taken into consideration in the non-pecuniary damage award for her pain and suffering. She is not entitled to further pecuniary damages for loss of housekeeping capacity.

### **Cost of Future Care**

#### **Relevant Legal Principles**

[135] The principles applicable to the assessment of cost of future care are:

- a) Providing adequate damages for future care of an injured plaintiff is of paramount importance.
- b) The purpose of such an award is to provide for assistance directly related to the injuries caused by the accident.
- c) The test for determining an appropriate award is an objective one based on medical evidence.
- d) The focus should be on the plaintiff, with fairness to the other party being achieved by ensuring that the expenses are legitimate and justifiable.
- e) The plaintiff needs to show: (a) a medical justification for the items claimed; and (b) that the amount claimed is reasonable.
- f) "Medical justification" is broader than "medically necessary".
- g) Medical experts need not expressly approve specific items of future care; it is sufficient if the totality of the evidence supports the award for specific items.
- h) Common sense should be employed in this assessment.
- i) No award should be included for items that would be incurred in the absence of the accident.

See: *Thompson* at para. 149.

### **The Parties' Positions on Cost of Future Care**

[136] Ms. Prasad claims \$2,760 in cost of future care based on 12 massage therapy treatments for two years at a cost of \$115 per session. The defendants counter that massage therapy is a passive treatment that Ms. Prasad would have required in any event given the physically demanding nature of her work.

### **Factual Findings and Analysis of Cost of Future Care**

[137] Ms. Prasad did not require nor did she receive massage therapy prior to the Accident. I reject the speculative assertion that she would have inevitably needed this form of treatment by virtue of the work she performs.

[138] Notably, Dr. Sangha and Dr. Chapman recommended several therapies and treatments that are not sought by Ms. Prasad. These include active release therapy, neuromodulation, an exercise program, further needling treatments, and an in-home occupational therapy assessment. The continuation of access to massage therapy for a defined period is the only treatment for which Ms. Prasad seeks an amount for the cost of future care.

[139] Ms. Prasad has benefitted from massage therapy since the Accident and I am satisfied that she is entitled to the amount requested because it is both medically justified and reasonable given the moderate frequency and reasonable cost of these treatments combined with the benefits she receives from them. Ms. Prasad is therefore entitled to \$2,760 for the cost of her future care.

### **Special Damages**

[140] The parties agree that Ms. Prasad is entitled to \$1,150 for special damages.

### **Conclusion**

[141] Ms. Prasad is entitled to a damages award of \$100,381 consisting of:

a) Non-pecuniary damages:	\$95,000
b) Past loss of income-earning capacity:	\$1,471
c) Future loss of income-earning capacity:	\$0
d) Loss of housekeeping capacity:	\$0
e) Cost of future care:	\$2,760
f) Special damages:	<u>\$1,150</u>
<b>Total:</b>	<b><u>\$100,381</u></b>

**Costs**

[142] If the parties wish to make submissions on costs, they must file written submissions within 30 days of the date of this judgment. The written submissions are to be no more than ten pages, double spaced. After both parties have filed their written submissions, the parties are to file a request to appear to set down an oral hearing of no more than an hour.

[143] If no written submissions are received, Ms. Prasad will have her costs, assessed at Scale B.

“Basran J.”