

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Niescierowicz v. Brookes*,
2020 BCSC 1590

Date: 20201028
Docket: M156656
Registry: Vancouver

Between:

Marzena Niescierowicz

Plaintiff

And

Ashley Brookes, Susan Brookes and Jerzy Niescierowicz

Defendants

Before: The Honourable Madam Justice Iyer

Reasons for Judgment

Counsel for Plaintiff:

T. Martin
J. Mackoff

Counsel for Defendants:

D.C. Fong
A. Bruschetta, Articled Student

Place and Date of Trial:

Vancouver, B.C.
July 6-10, 13-15 and 17, 2020

Place and Date of Judgment:

Vancouver, B.C.
October 28, 2020

Table of Contents

OVERVIEW..... 3

BACKGROUND..... 3

 Ms. Niescierowicz’s Life before the Accident..... 3

 The Accident and Ms. Niescierowicz’s Injuries..... 5

 Ms. Niescierowicz’s Medical Conditions..... 7

ISSUES..... 9

ANALYSIS..... 9

 Did Ms. Niescierowicz fail to mitigate her losses? 9

 To what amount is Ms. Niescierowicz entitled in damages? 14

 Non-Pecuniary Damages..... 14

 Award for past wage loss and loss of future earning capacity 15

 Cost of Future Care..... 21

 Housekeeping Capacity 23

 Special Damages 24

CONCLUSION..... 24

OVERVIEW

[1] This case arises from a motor vehicle accident that occurred on January 28, 2014, at the intersection of 154th St. and 100th Ave. in Surrey, BC (“Accident”). The plaintiff, Marzena Niescierowicz, was sitting in the front passenger seat, her husband Jerzy Niescierowicz was driving, and two of their sons were sitting in the back. As they travelled through the intersection, Ashley Brookes was turning left in her mother’s car and struck the Niescierowicz vehicle on the right and front.

[2] The defendants admit liability for the accident. The only issues I must decide concern the types and amounts of damages to which Ms. Niescierowicz is entitled to compensate her for the losses she has suffered as a result of the Accident. As the evidence presented by both parties is substantially consistent, my task is less about resolving evidentiary disputes and more about how the law applies to the facts.

[3] In addition to non-pecuniary damages, Ms. Niescierowicz seeks damages for past wage loss, loss of future earning capacity, cost of future care, loss of housekeeping capacity, and special damages. She submits that the total amount to which she is entitled is \$1,344,339.

[4] The defendants agree to the amount sought for special damages. However, they argue that Ms. Niescierowicz failed to mitigate her losses by not attending psychiatric treatment and that her damages ought to be reduced proportionately. The defendants also say that Ms. Niescierowicz has not suffered any loss of earning capacity because her plans to open a daycare were unrealistic. Although the defence did not address all of the heads of damages claimed and failed to quantify a total amount of damages in closing submissions, I estimate that the total amount is in the range of \$100,000.

BACKGROUND

Ms. Niescierowicz’s Life before the Accident

[5] Ms. Niescierowicz was born in Poland in November 1962 and grew up there. After high school, she completed a two-year computer programming course at

college and did well. However, Ms. Niescierowicz decided she wanted to do something different. She worked in various administrative jobs at the Ministry of Education. She started a Bachelor of Education degree and also studied theology on weekends. She was an active volunteer at her church and especially enjoyed working with young children. She also enjoyed travelling in Europe. When she was in Greece, she met Jerzy Niescierowicz, who was working there and planning to immigrate to Canada. They married and their first son was born in Greece. Shortly after, they moved to Canada in the Vancouver area.

[6] From 1992-1997, the Niescierowiczs lived in Surrey. Mr. Niescierowicz had difficulty finding work, as his Polish credentials were not recognized, and money was tight. Ms. Niescierowicz was responsible for taking care of the home and the children: their second son was born in 1995 and their third was born in 1997. Around that time, they decided to return to Poland. While Canada offered their children more economic opportunities, they felt that this was outweighed by the benefits of living close to extended family and within Polish culture.

[7] Initially, everything went well in Poland. In addition to running the household and looking after three active boys, Ms. Niescierowicz worked part time as a bookkeeper. However, after Mr. Niescierowicz was injured in a motor vehicle accident, he could not find work in Poland and was employed in Ireland. This meant that Ms. Niescierowicz had to quit her job to look after the children and run the household, and that Mr. Niescierowicz could not live with them. After about five years of this, the family decided to return to Canada.

[8] Mr. Niescierowicz arrived in the Vancouver area on his own in early 2012 to find work and a home. Ms. Niescierowicz stayed with the boys until the end of their school year. She was solely responsible for packing up the household and moving herself and the three teenage boys to Canada in July 2012.

[9] Upon arrival, Ms. Niescierowicz enrolled the children in schools and enrolled herself in an ESL program for newcomers to Canada. Although she had lived in Canada before, the English she had acquired had atrophied over 14 years in

Poland. The ESL classes ran from 9 am to 2 pm five days a week.

Ms. Niescierowicz started the program in September or October 2012, taking the bus there and back each day. She did well and enjoyed the classes, completing levels 3-6 of an eight-level program. She also continued to run the household and take care of the children. The family was active: they enjoyed hiking and exploring the Lower Mainland and they renewed and expanded their social connections in the Polish community.

[10] In December 2013, Ms. Niescierowicz was healthy and happy. She had no significant medical issues and did not have a family doctor. She was looking forward to completing her ESL program in a few months. She intended to work once she had achieved sufficient English proficiency, as the family needed the money and she needed more to do. She wanted to open a home-based daycare, both because she had enjoyed working with children in the past and because she had spoken to a woman who had immigrated to Canada from Poland and had opened a successful daycare in Maple Ridge. Ms. Niescierowicz intended to get her Early Childhood Education (“ECE”) certification, which would take four to five months of online learning and practicums. She then planned to gain experience by working as a daycare assistant before opening a daycare in her home. Her family supported her plan.

The Accident and Ms. Niescierowicz’s Injuries

[11] Ms. Niescierowicz sustained musculoskeletal and psychological injuries in the Accident. As the Accident occurred close to the Niescierowicz’s home, they drove there right afterwards. Mr. Niescierowicz assisted Ms. Niescierowicz to get out of the car and lie on the couch. She felt pain in her head, throat and chest and was dizzy. She saw a Polish-speaking doctor the next day, on January 29, 2014, and again on February 5, 2014.

[12] Ms. Niescierowicz’s pain persisted, so she went to a walk-in clinic on February 14, 2014. There, she saw Dr. Chemerika who sent her for various imaging tests. These were not remarkable. He also recommended physiotherapy, which she

pursued. Ms. Niescierowicz saw Dr. Chemerika eight times through April 9, 2014. However, Ms. Niescierowicz found it difficult to communicate with Dr. Chemerika so, in May 2104, she began seeing Dr. Tomaszewski, a Polish-speaking family doctor who continues to treat her.

[13] Following the Accident, Ms. Niescierowicz experienced significant psychological symptoms. She experienced such severe claustrophobia during an MRI that Dr. Chemerika needed to have the MRI taken with a different type of machine. Ms. Niescierowicz had not previously experienced claustrophobia. Ms. Niescierowicz displayed symptoms of anxiety and depression. She could not ride in a car or on a bus without great distress and found it hard to cross intersections as a pedestrian. Ms. Niescierowicz had great difficulty with concentration, memory, and motivation. She drastically curtailed her activities. She did not resume her ESL classes. She did as little as possible around the house and lost interest in her appearance. She withdrew from her friends and social circle. Any activity caused her pain. Her family were shocked at these changes, but tried to support her. Her sons tried to engage her in various activities and the family bought a dog to encourage her to go out for walks, but these efforts were met with little success.

[14] When Ms. Niescierowicz first saw Dr. Tomaszewski on May 27, 2014, she reported that her physical symptoms had persisted and she thought that physiotherapy might be making them worse. She told Dr. Tomaszewski about her psychological symptoms. He prescribed some pain medications and ordered further investigations of Ms. Niescierowicz's physical symptoms. These did not reveal any additional Accident-related concerns. Ms. Niescierowicz has continued to see Dr. Tomaszewski monthly since the Accident.

[15] Dr. Tomaszewski also referred Ms. Niescierowicz to a Polish-speaking physiatrist, Dr. Jaworski. She began seeing him on June 13, 2014 and continued to see him regularly at approximately three month intervals since then.

[16] At her first visit with Dr. Jaworski, Ms. Niescierowicz's primary complaints were neck pain and emotional problems. He considered that her anxiety and depression were significant and prescribed medications for depression and anxiety and to help her sleep. Each of Ms. Niescierowicz's visits with Dr. Jaworski contained what he described as a psychological counselling component. By her third visit in October 2014, Dr. Jaworski considered that her psychological symptoms were dominant. He suggested that Dr. Tomaszewski refer her to a Polish-speaking psychiatrist. He reiterated that recommendation in after seeing Ms. Niescierowicz in November 2014, March 2015, June 2015, January 2016, and June 2016.

[17] In September 2016, Dr. Jaworski himself referred Ms. Niescierowicz to Dr. Daszkiewicz, a Polish-speaking psychiatrist.

[18] Ms. Niescierowicz started seeing Dr. Daszkiewicz in February 2017. She continued until May 2017, for a total of five visits. Dr. Daszkiewicz treated Ms. Niescierowicz with cognitive behaviour therapy and prescribed different anxiety medication.

[19] Dr. Daszkiewicz's office was in Maple Ridge. Unless her husband drove her, Ms. Niescierowicz had a long commute by public transit to get to and from appointments. Ms. Niescierowicz found the commute stressful and painful. She also felt she "didn't click" with Dr. Daszkiewicz, and stopped seeing her after the May 2017 session.

Ms. Niescierowicz's Medical Conditions

[20] I heard evidence of Ms. Niescierowicz's medical conditions from five doctors.

[21] Dr. Tomaszewski, Ms. Niescierowicz's treating family physician, prepared an expert report dated February 11, 2020. In it, he opined that Ms. Niescierowicz's "multiple physical and emotional symptoms/difficulties became chronic in nature". In his report, he considers that there is no prospect that Ms. Niescierowicz's condition will improve and it may worsen with aging. He recommends physical therapies and some medication, but no psychotherapy.

[22] Dr. Jaworski, Ms. Niescierowicz's treating physiatrist, prepared three expert reports, dated October 11, 2016, January 19, 2020 and June 29, 2020 (in response to Dr. Sangha's report). His consistently expressed opinion is that the Accident caused Ms. Niescierowicz's neck pain, and triggered psycho-emotional injuries manifesting as anxiety and depression. He diagnosed her as having Somatic Symptom Disorder ("SSD"). In his last report, he stated that any physical injuries caused by the Accident had healed.

[23] In addition to Dr. Tomaszewski and Dr. Jaworski, I heard evidence from three other experts: Dr. Riar and Dr. Fung called by the plaintiff, and Dr. Sangha called by the defence:

- Dr. Kulwant Riar, a forensic psychiatrist with experience in treating psychological injuries, who examined Ms. Niescierowicz in person with an interpreter on February 15, 2017;
- Dr. Kathryn Fung, a psychiatrist with experience in treating chronic pain, who examined Ms. Niescierowicz by videoconference with an interpreter on March 23, 2020; and
- Dr. Harpreet Sangha, a doctor specializing in rehabilitation medicine including chronic pain, who examined Ms. Niescierowicz in person with an interpreter on June 17, 2020.

[24] There is little disagreement among these experts. Dr. Sangha opined that Ms. Niescierowicz suffers from "debilitating physical pain" that is not grounded in a physical injury. In his view, she suffered some physical injuries in the Accident, but these resolved over the following months. In his view, the source of Ms. Niescierowicz's ongoing subjective pain, which he said is real pain, is psycho-emotional. He defers to the psychiatrists and to Dr. Jaworski's opinions on the nature and cause of this condition.

[25] Dr. Fung and Dr. Riar agree with Dr. Jaworski that the Accident caused Ms. Niescierowicz's current psychological/psychiatric conditions. They agree

Ms. Niescierowicz has SSD, major depressive disorder (“MDD”) and generalized anxiety disorder (“GAD”), and that she experiences chronic pain. Both recommend psychotherapy with a Polish-speaking psychologist or counsellor, and that Ms. Niescierowicz see a psychiatrist to prescribe appropriate medications. In their view, these conditions are responsible for Ms. Niescierowicz’s cognitive impairment, which would improve if the underlying conditions could be treated successfully.

[26] All three experts say Ms. Niescierowicz’s condition is chronic and that it will be hard to treat because the Accident occurred so long ago. While they agree that her condition could improve with proper treatment, their prognosis is guarded and they doubt she will recover fully.

ISSUES

[27] As liability is admitted, the central issue in this case is how to quantify Ms. Niescierowicz’s damages. The defence argues that Ms. Niescierowicz failed to mitigate her loss and that this fact should reduce the amount of damages awarded. Accordingly, I will first consider whether Ms. Niescierowicz failed to mitigate her losses and will then consider the various types of damages she claims.

ANALYSIS

Did Ms. Niescierowicz fail to mitigate her losses?

[28] The onus is on a defendant to prove that a plaintiff failed to act reasonably to mitigate their losses. The defendant must show that the plaintiff acted unreasonably in failing to follow recommended treatment and must establish the amount by which the plaintiff’s losses would have been reduced had they followed the recommendations: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57. The second element requires the defendant to prove a real and substantial possibility that some part of the losses could have been avoided: *Forghani-Esfahani v Lester*, 2019 BCSC 332 at para. 69.

[29] Here, the defence argues that Ms. Niescierowicz refused to see a Polish-speaking psychiatrist as Dr. Jaworski recommended and that, had she done so,

there is a real and substantial probability that her mental health condition would have improved. The defence says Ms. Niescierowicz's failure to mitigate means that her damages should be reduced by 30%. Paragraph 41 of the defence submissions capture the tenor of this argument:

In our case, the Plaintiff professes to have complied with all of her doctor's medical advice, but she has clearly back-channeled Dr. Jaworski's recommendations from 2014 onward to surreptitiously block the referral to Dr. Daszkiewicz despite his time and care to her, and wasting her family practitioner's time in translating repeated consulting reports from medical terminology into Polish layman's terms. The Plaintiff was unwilling to attend the recommended course of treatment and her doctor felt unable to force her. The family doctor described a stigma in the Polish community that someone seeking treatment from a psychiatrist must be "nuts".

[30] The defence's characterization of Ms. Niescierowicz as deliberately stymieing her doctors' efforts to provide her with effective treatment has no foundation. None of the witnesses characterized Ms. Niescierowicz as anything other than genuine in trying to get better. The defence submissions are replete similar passages that impugn Ms. Niescierowicz's credibility. I reject them completely. Ms. Niescierowicz's description of her symptoms was fully supported by the various experts who assessed her. Nothing in her evidence or demeanour suggests that she was trying to deceive anyone.

[31] The defence does not expressly suggest what benefit there would be to Ms. Niescierowicz or her family in giving up all the activities that gave her life meaning and joy. I assume that I am to infer it would be financial. However, there is no evidence at all to support this. All of the lay witnesses testified about the dramatic change in Ms. Niescierowicz's affect and behaviour after the Accident, which occurred six years ago. There is no air of reality to the defence's attack on Ms. Niescierowicz's credibility.

[32] Leaving that aside, does the evidence support the defence's claim that Ms. Niescierowicz avoided obtaining psychiatric treatment promptly, thereby increasing her loss? In my view, it does not.

[33] Dr. Jaworski first recommended that Ms. Niescierowicz see a Polish-speaking psychiatrist in October 2014, some nine months after the Accident. As Dr. Jaworski and other experts testified, the disorders with which Ms. Niescierowicz has been diagnosed become chronic and much harder to treat successfully after six months. Even if this first recommendation for psychiatric treatment had been followed, Ms. Niescierowicz's condition was already chronic.

[34] Further and more importantly, the evidence does not establish that Ms. Niescierowicz failed to follow any recommendation Dr. Jaworski made to her.

[35] Dr. Jaworski did not say in his expert report or in his testimony that he ever advised Ms. Niescierowicz to seek psychiatric treatment. He was clear that he suggested this treatment to Dr. Tomaszewski for his consideration. For example, his note regarding his October 27, 2014 appointment with Ms. Niescierowicz states:

I also suggested that Dr. Tomaszewski consider referring her to a Polish-speaking psychiatrist.

[36] All Dr. Jaworski's recommendations about the need for psychiatric treatment are directed to Dr. Tomaszewski, not to Ms. Niescierowicz. As both Dr. Jaworski and Dr. Fung clarified, this is standard practice in the medical profession. Ms. Niescierowicz has not failed to mitigate her losses by failing to undertake a treatment recommendation that was made to her family doctor, not to her.

[37] The defence relies on Dr. Tomaszewski's testimony that he met with Ms. Niescierowicz after he received each of Dr. Jaworski's reporting letters to him and translated them into layman's language in Polish for her. The only mention of psychiatric treatment in Dr. Tomaszewski's notes is dated September 7, 2017, some months after Ms. Niescierowicz stopped seeing Dr. Daszkiewicz. It simply states, "[P]atient doesn't wish to see psychiatrist or psychologist."

[38] The note does not say or imply that Dr. Tomaszewski ever advised Ms. Niescierowicz to see such a professional. It occurs nearly three years after Dr. Jaworski first suggested to Dr. Tomaszewski that he consider making such a referral. In his testimony, Dr. Tomaszewski did not recall Dr. Jaworski as having

suggested that he refer Ms. Niescierowicz to a psychiatrist or psychologist more than once.

[39] On cross-examination, Dr. Tomaszewski testified that in Polish culture great stigma attaches to seeing a psychiatrist, which would explain Ms. Niescierowicz's reluctance to do so. However, Dr. Tomaszewski also testified that he would not have told Ms. Niescierowicz that it is better to seek psychological help sooner rather than later. He said that he would have waited three to six months to see if Ms. Niescierowicz responded to medication before recommending psychiatric/psychological treatment, and that he felt Ms. Niescierowicz was responding to the medication. Dr. Tomaszewski's recollection of his interactions with Ms. Niescierowicz was poor. His expert report does not mention that psychiatric/psychological treatment at all.

[40] Dr. Tomaszewski agreed that he knew that Dr. Daszkiewicz was a Polish-speaking psychiatrist practicing in the Lower Mainland in 2014. He said that if Ms. Niescierowicz had wanted to see her, he would have made the referral, adding that he would not "force" a patient to see a psychiatrist.

[41] Taken as a whole, Dr. Tomaszewski's evidence reflects his ambivalence, if not disinclination, towards psychiatric/psychological treatment. While he said that he explained Dr. Jaworski's letters to Ms. Tomaszewski, he did not say what, if any, advice he gave her about Dr. Jaworski's recommendations. The evidence does not establish that Dr. Tomaszewski ever recommended that Ms. Niescierowicz see a psychiatrist. Ms. Niescierowicz did not fail to mitigate her losses by failing to follow treatment that her family doctor did not recommend.

[42] As I have said, Dr. Jaworski referred Ms. Niescierowicz to Dr. Daszkiewicz directly in September 2016. Ms. Niescierowicz followed his recommendation and began seeing Dr. Daszkiewicz. She attended five sessions before she stopped going. Her two reasons for doing so were that the commute to Maple Ridge was too arduous for her and that she did not "click" with Dr. Daszkiewicz. These are legitimate reasons for discontinuing sessions with Dr. Daszkiewicz. There is no

evidence that any other Polish-speaking psychologist or psychiatrist was working at a location reasonably accessible to Ms. Niescierowicz at the relevant time.

[43] In short, the evidence does not show that Ms. Niescierowicz's family doctor recommended that she see a psychiatrist. When her physiatrist made the referral, she followed his advice and tried it. In her view, the cost to her (the mental and physical distress of the commute) outweighed the benefits (potentially helpful treatment). In the circumstances, that decision was not unreasonable.

[44] The defendants have failed to establish that Ms. Niescierowicz acted unreasonably in failing to follow recommended treatment. Even if it could be said that Ms. Niescierowicz acted unreasonably when she stopped seeing Dr. Daszkiewicz in May 2017, the evidence does not establish a real and substantial possibility that commencing psychotherapy in 2017, three years after the Accident, would have reduced Ms. Niescierowicz's losses.

[45] The defence also suggests that Ms. Niescierowicz failed to mitigate her losses by discontinuing her ESL classes after the Accident. Ms. Niescierowicz testified that pain, anxiety about travelling in a vehicle, and poor memory and concentration meant that she did not resume her ESL classes after the Accident. She tried online course, but could not concentrate or remember.

[46] The defence submissions do not develop this argument, but refer to it as a reason to reduce aspects of the damages award. It is convenient to address it briefly here. All of the medical evidence supports Ms. Niescierowicz's explanation. None of the doctors questioned the genuineness of Ms. Niescierowicz's experience of pain and anxiety associated with vehicle travel. They agreed that the disorders with which she has been diagnosed would impair her concentration and memory. I conclude Ms. Niescierowicz did not fail to mitigate by discontinuing her ESL classes.

To what amount is Ms. Niescierowicz entitled in damages?***Non-Pecuniary Damages***

[47] Non-pecuniary damages are awarded to compensate for the pain, suffering and loss of enjoyment of life. This is a highly fact-drive assessment, guided by factors such as the non-exhaustive list set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, citing *Boyd v. Harris*, 2004 BCCA 146 at para. 42.

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (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, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[48] Both parties referred to cases they consider analogous. The plaintiff cited five cases in which the awards for non-pecuniary damages ranged from \$185,000 to \$200,000: *Felix v. Hearne*, 2011 BCSC 1236; *Gill v. Apeldoorn*, 2019 BCSC 798; *Chaudhry v. John Doe*, 2017 BCSC 1895; *Sebaa v. Ricci*, 2015 BCSC 1492; *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81. She seeks an award of \$190,000.

[49] The defendants cited three cases in which the award for non-pecuniary damages was \$75,000: *Abraha v. Suri*, 2019 BCSC 1855; *Dhanji v. Holland*, 2015 BCSC 1351; *Qiao v. Buckley*, 2008 BCSC 1782.

[50] Having read these authorities, and considering the *Stapley* factors, I find that an award in the range specified by the plaintiff is appropriate. The Accident upended Ms. Niescierowicz's life. The fact that her musculoskeletal injuries were relatively minor and that they resolved does not diminish the severity of her

psychological/psychiatric injuries. I reject entirely the defence theory that Ms. Niescierowicz is malingering or that her experience of pain is less significant because it has a psychological rather than a musculoskeletal origin. The defence's medical expert found Ms. Niescierowicz genuine and believable. He said that her experience of pain is real.

[51] The Accident resulted in Ms. Niescierowicz losing her sense of self-worth. She turned from an energetic and active person into a recluse, unable to perform most of the activities that used to give her joy. Ms. Niescierowicz's role as a homemaker, which included running the household, supporting her husband and children in their endeavours, preparing meals, and preserving important cultural traditions was central to her identity. She has suffered a profound loss. Her condition is chronic, and there is only guarded hope for improvement.

[52] I award Ms. Niescierowicz \$190,000 in non-pecuniary damages.

Award for past wage loss and loss of future earning capacity

[53] It is convenient to consider these heads of damage together because Ms. Niescierowicz was not working – and had never worked in Canada – at the time of the Accident. As a result, both Ms. Niescierowicz's past wage loss claim (referring to pre-trial wage loss) and her projected future loss arise from her career plan, which she did not follow.

[54] The principles governing past and future wage loss awards are well settled. Neither is determined based on a mathematical formula; they are estimates based on the evidence as to where the plaintiff would have been but for the Accident: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141. The plaintiff must show a real and substantial possibility of loss, which requires a realistic comparison between their actual circumstances and where they would have been but for the accident: *Gao v. Dietrich*, 2018 BCCA 372 at para. 36. The court must take into account all positive and negative contingencies in estimating the loss: *Abbott v. Gerges*, 2014 BCSC 1329 at para. 165

[55] Becoming proficient in English was the first step in Ms. Niescierowicz's career plan. At the time of the Accident, she was enrolled in ESL classes five days per week for six hours a day. Having achieved English proficiency, she intended to enrol in an early childhood education program and get her ECE certification. She also intended to get her first aid certificate. Ms. Niescierowicz planned to gain experience working in a daycare setting before opening her own in-home daycare. She would have had the opportunity to do so in the practicum portion of the ECE course and she could have gained more experience after completing it.

[56] The evidence about the licensing requirements for multi-age family childcare satisfies me that Ms. Niescierowicz's anticipated credentials and her home would have met these requirements. The defendants did not really contest this.

[57] Ms. Szlachta is an acquaintance of Ms. Niescierowicz's who operates a similar in-home daycare in Maple Ridge. She testified that she spoke with Ms. Niescierowicz on one occasion about such a business. She said that she would have offered Ms. Niescierowicz a practicum (consisting of 20 work hours) in her daycare or would have allowed her to volunteer there.

[58] Based on Ms. Szlachta's evidence about the fees that she charges for children of different ages, the plaintiff estimates that she would have been ready to open her own in-home daycare in January 2015, starting with two to three children until March 2015. Thereafter, she planned to care for five to six children regularly.

[59] Based on an estimated income of \$900 per month per child, and adjusting for taxes, the plaintiff says she would have earned \$252,369 net in past wage loss but for the Accident.

[60] The plaintiff also contemplates an alternative scenario, that Ms. Niescierowicz might not have opened her own daycare, but instead would have worked at another daycare. Based on the 2018 provincial median salary and adjusting for taxes, the plaintiff says her past wage loss on this scenario would have been \$150,072.

[61] With respect to future wage loss, the plaintiff used a capital asset approach and presented three scenarios:

- Open in-home daycare in January 2015 with 5-6 children for 5 years, then 7 children to age 70: \$918,401
- Open in-home daycare in January 2015 with 5-6 children until age 70: \$721,601
- Work in another childcare facility until age 70: \$437,334

[62] The defence does not contest any of these calculations or provide alternative ones. It takes the position that Ms. Niescierowicz would have had no past or future wage loss because her plan to open a daycare was no more than “wishful thinking” with no real and substantial possibility that it would yield an income.

[63] My assessment of the evidence is that, while Ms. Niescierowicz was optimistic in her estimate of the time it would take to start an in-home daycare, and the steps she had taken were preliminary, there is a real and substantial possibility that she would have accomplished that goal.

[64] Ms. Niescierowicz was well on the way to completing her ESL program as she had finished all but the last two levels. It is more likely than not that she would have finished the program during the summer of 2014. The evidence also persuades me that Ms. Niescierowicz would have enrolled in an online ECE program around September 2014.

[65] Ms. Niescierowicz estimated that the ECE program would take four to five months to complete; however, Tammy Lee, who prepared a vocational assessment of Ms. Niescierowicz, suggested that the online course takes eight to 12 weeks. The practicum component of the course might explain this difference.

[66] In any event, I find that Ms. Niescierowicz would likely have obtained her ECE certification by March 2015. This allows for taking time off at Christmas, as Ms. Niescierowicz and her son explained how important a time that is for the family

and that Ms. Niescierowicz was responsible for virtually all of the preparations. It also allows for time for Ms. Niescierowicz to obtain her first aid certification.

[67] Ms. Niescierowicz testified that she might have worked as an employee in another daycare, but her intention was for the family to buy a townhouse and for her to operate her own daycare from it. In fact, the Niescierowicz' bought a townhouse in 2016. I heard no evidence about whether their residence in 2015 was suitable for an in-home daycare or whether they would have purchased a townhouse sooner if the Accident had not occurred. In light of this, and the fact that Ms. Niescierowicz had done very little research into daycares (for example, she had not visited Ms. Szlachta 's daycare), I find it reasonable to assume that Ms. Niescierowicz would have worked as an employee in another daycare for a year. This would have had the benefit of giving her additional experience in the business and of further improving her English language skills.

[68] I consider it likely that Ms. Niescierowicz would have been licenced and ready to open her own in-home daycare by April 1, 2016.

[69] Ms. Szlachta's evidence was that finding clients was hard in the beginning. She distributed flyers and placed ads in the newspaper. She estimated that it took her about six months to get up and running. She usually has a waiting list for spaces for children under three. The significant shortage of licenced childcare in the Lower Mainland is a well-known fact.

[70] Ms. Szlachta also provided the only evidence of the cost of childcare. She testified that she charges \$1,020 for the youngest children, \$950 for the next age group and \$750 per month for school-age children.

[71] Ms. Niescierowicz was 51 at the time of the Accident. In April 2016, she was 53. She testified that she had no plans for retirement. Her written submissions use a retirement age of 70. The defence did not propose a different retirement age.

[72] The median 2018 salary for a childcare worker was \$35,360. Based on this, I find Ms. Niescierowicz would have earned \$35,000 for 2015-2016.

[73] Ms. Niescierowicz submits that I should use \$900 per child as the basis for determining her wage loss. The defendants did not take issue with this figure. I consider it appropriate.

[74] In her first year of operation, (April 1, 2016 to April 1, 2017), Ms. Niescierowicz would have earned less than later years because of the time needed to establish her business. I estimate that she would have earned \$2,700 per month over 12 months, as she found clients. That amounts to \$32,400 for that year.

[75] From April 1, 2017 to the date of trial (39 months), it is reasonable to assume that Ms. Niescierowicz would have cared for 5 children, a figure that allows for some times when all spots may not have been full. This totals \$175,500.

[76] This amounts to past wage loss of \$242,900. Applying the plaintiff's proposed marginal tax rate of 22% (also not disputed by the defence), Ms. Niescierowicz's past wage loss award is \$189,462.

[77] Turning to loss of future earning capacity, caring for 5 children per year means that Ms. Niescierowicz would have grossed \$54,000 annually for the 13 years until she turned 70.

[78] I agree with the plaintiff that a capital asset approach is appropriate. Applying the CIVJI present value tables, at the prescribed discount rate of 1.5%, the present value of annual earnings of \$54,000 for 13 years is \$633,501.

[79] That amount must be adjusted for positive and negative contingencies. Positive contingencies refer to the possibility that a plaintiff might be able to earn more income than anticipated. Negative contingencies refer to the possibility that the plaintiff might not be as economically successful as projected in the "without accident" scenario. Contingencies must not be speculative.

[80] I place little weight on the defendants' assessment of contingencies because it is premised on their theory that there is nothing wrong with the plaintiff at all and

that even before the Accident, she was not capable of creating and operating a successful daycare business. That position is unsupported by the evidence.

[81] With respect to positive contingencies, although Ms. Niescierowicz's conditions are chronic, the medical experts agreed some improvement is possible. With appropriate treatment and the closure she will get from completing the litigation, Ms. Niescierowicz may improve to the point that she can resume most daily activities of life and perform some part-time voluntary work. However, there is no realistic possibility that Ms. Niescierowicz will ever earn an income.

[82] I do not agree with the plaintiff that that all negative contingencies are speculative. I consider two negative contingencies significant. The first concerns Ms. Niescierowicz's English language skills. She testified that, although she was taking ESL classes full-time, she did not speak English at home even before the Accident. Assuming this practice had continued, it would have had a negative impact on Ms. Niescierowicz's oral fluency. Taking ECE certification online would not have developed that skill. There is a real possibility that it would have taken Ms. Niescierowicz longer to acquire sufficient proficiency in oral English to make her employable at an English-speaking daycare.

[83] Second, and more significantly, it is possible that Ms. Niescierowicz would have chosen to work part-time and/or to retire earlier than age 70. The plaintiff refers to the family's strained finances, Ms. Niescierowicz's late entry to the Canadian workforce and her personal desire to work. I appreciate that Ms. Niescierowicz had a real motivation to work. However, her family was the central focus of her life. She organized her working life around her sons, ensuring that paid work did not interfere with her care of them. Ms. Niescierowicz, her son and her daughter-in-law all testified about the importance of grandchildren to them, and their mutual expectation that, but for the Accident, Ms. Niescierowicz would be actively involved in their care. I consider it likely that Ms. Niescierowicz would have reduced her working time and/or retired earlier than 70 if she had grandchildren.

[84] In light of these contingencies, I award Ms. Niescierowicz \$500,000 for loss of future earning capacity.

Cost of Future Care

[85] A plaintiff is entitled to full compensation for their costs of future care necessary to restore them as closely as possible to their pre-accident condition: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 240. The costs must be medically justified, not medically necessary: *Aberdeen v. Langley (Township)*, 2007 BCSC 993 at para. 120. The question is whether a reasonably-minded person of ample means would incur the expense: *Harrington v. Sangha*, 2011 BCSC 1035 at para. 150. I apply these principles in assessing the costs claimed by Ms. Niescierowicz.

[86] The only evidence on the cost of future care comes from the plaintiff's witnesses, Simone Szarkiewicz, an expert in occupational therapy, and Sergiy Pivnenko, an economist. Neither was shaken on cross-examination, and I have no difficulty relying on their evidence.

[87] Ms. Niescierowicz seeks \$10,000 to cover her future costs of medication based on her current medications and those referred to in the expert reports. She acknowledges that she will not be taking all of these drugs, but her estimate is based on figures provided by Ms. Szarkiewicz and the calculations performed by Mr. Pivnenko. The defendants submit that \$500 is sufficient, based on the annual cost of one drug for less than five years.

[88] The evidence does not establish how many drugs Ms. Niescierowicz will have to take or for how long. Considering her history of prescribed medication since the Accident and that the present value of the lifetime cost of the medications recommended by Dr. Fung is over \$10,000, I award Ms. Niescierowicz the \$10,000 she seeks.

[89] Ms. Niescierowicz seeks an award of \$50,000 to cover therapies recommended by Ms. Szarkiewicz. These include two years of physiotherapy, active

rehabilitation and occupational therapy, about 30 psychological counselling sessions, a driver rehabilitation program, and a private multi-disciplinary pain program. The defence contests all of these claims.

[90] The waiting list for a public pain clinic is about two years. It is unreasonable for Ms. Niescierowicz to have to wait that long. Two years of physiotherapy, active rehabilitation, and occupational therapy are reasonable. I agree that counselling with a Polish-speaking psychologist would be very beneficial to Ms. Niescierowicz. It is not clear to me that driver rehabilitation is appropriate, given that I know little about Ms. Niescierowicz's pre-Accident driving habits and how realistic it is that she will drive again. I award Ms. Niescierowicz \$47,000 for these therapies.

[91] Ms. Niescierowicz claims \$59,976 for the monthly six hours of housekeeping support plus 12 hours annually for seasonal cleaning based on the present value of Ms. Szarkiewicz's recommendations. The defence says that no award is warranted.

[92] I take into account the expert's recommendations that Ms. Niescierowicz make efforts to become more active, including by participating in household tasks that she previously enjoyed. Accordingly, I would apply a slight discount to Mr. Pivnenko's low cost estimate and award \$50,000 for this item.

[93] Ms. Niescierowicz seeks the present value of a lifetime gym membership that Ms. Szarkiewicz recommends. Ms. Niescierowicz testified about how much she enjoys being active outdoors. Dr. Jaworski recommended regular exercise, not necessarily a gym. I decline to award a lifetime gym membership.

[94] I agree with the plaintiff that the \$1,700 claimed for small cleaning tools and a replacement TENS machine is warranted. I also agree with the recommendations for an appropriate mattress and a cervical pillow and award \$4,000 for this item.

[95] Finally, the plaintiff seeks \$5,000 for vocational counselling to assist her in finding volunteer work. I am not persuaded that this will be helpful.

Ms. Niescierowicz's primary barriers to work are her mental conditions. If these can

be alleviated so that she can return to her former self, I have no doubt that she will find ways to make a meaningful contribution to the community.

[96] In total, based on Mr. Pivnenko's present value calculations for these items, I award Ms. Niescierowicz \$112,700 for the cost of future care.

Housekeeping Capacity

[97] The plaintiff seeks \$60,000 for loss of housekeeping capacity, comprised of \$40,000 for past loss and \$20,000 for future loss. The defendants do not address this issue.

[98] In *Kim v. Lin*, 2018 BCCA 77, the Court of Appeal discussed the challenges of valuing a pecuniary claim for loss of housekeeping capacity as distinct from a non-pecuniary damages award and an award for housekeeping as a component of a cost of future care award. The Court wrote:

[33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work — i.e., where the plaintiff has suffered a true loss of capacity — that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

[34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.

[99] My award of non-pecuniary damages reflected the significant loss to Ms. Niescierowicz of her housekeeping capacity. I have also made an award for replacement housekeeping services as a component of the cost of future care award. In my view, these awards adequately address the pecuniary and non-pecuniary aspects of the loss Ms. Niescierowicz suffered in relation to her

housekeeping role. I note that the trial judge in *Kim* declined to make an award for replacement housekeeping services as a component of the cost of future care in light of the award he had made for loss of housekeeping capacity: 2016 BCSC 2405 at para. 233.

Special Damages

[100] The parties agree on an award of \$6,476 for special damages.

CONCLUSION

[101] In conclusion, I award Ms. Niescierowicz the following amounts in damages:

- a) Non-pecuniary Damages: \$190,000
- b) Loss of Past Earning Capacity: \$189,462
- c) Loss of Future Earning Capacity: \$500,000
- d) Cost of Future Care: \$112,700
- e) Special Damages: \$6,476

[102] The plaintiff has asked that tax gross up fees and management fees be assessed post-judgment. The parties are at liberty to make written submissions to me on that issue.

[103] Subject to any matters of which I am unaware, Ms. Niescierowicz is entitled to her costs on Scale B.

“Iyer J.”