

Citation: Plackova v. Turcott et al.
2001 BCSC 644

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Docket: B992684
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SLAVOMIRA PLACKOVA

PLAINTIFF

AND:

**REBECCA ANN TURCOTT
PATRICIA ANN TURCOTT
OLDRICH PREXLER**

DEFENDANTS

**REASONS FOR JUDGMENT
OF THE
HONOURABLE MR. JUSTICE COULTAS**

Counsel for the Plaintiff

Stuart J. Lein

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Date and Place of Trial:

October 11-13, 2000
Vancouver, B.C.

Written Submissions Received:

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[1] On July 19, 1997, the plaintiff was a front-seat passenger in her own automobile being driven by Oldrich Prexler, now her husband. An automobile driven by the defendant, Rebecca Ann Turcott, turned left in front of the plaintiff's vehicle and the automobiles collided. The plaintiff was injured. The defendants admit full liability for the collision.

[2] The plaintiff alleges that in the collision she suffered a serious and permanently disabling injury to her balance mechanism resulting in dizziness and imbalance, for which she seeks damages in excess of \$500,000. The defendants say that if she has a malfunctioning balance mechanism, it did not emanate from the collision. That is the principal issue in this action. It is not disputed that the plaintiff suffered soft tissue injuries in the

collision; the extent and the duration of the soft tissue injuries is in dispute.

[3] The plaintiff has discontinued her claim against Oldrich Prexler.

THE ISSUES

1. The severity and duration of the plaintiff's soft tissue injuries.
2. Was the plaintiff's balance mechanism injured in the collision?
3. Past and future economic loss.
4. The reliability and credibility of the plaintiff.

THE PLAINTIFF

[4] The plaintiff was born in 1971 at Bratislava, Slovakia. She married Oldrich Prexler in 1997. Their son, Timothy, was born June 1, 1998. At the time of trial, she was expecting the birth of a second child to be born in December, 2000.

[5] The plaintiff completed secondary school in Slovakia in 1989, obtained a Bachelor's Degree in 1991 and a Master's Degree in physics in 1994 and in that year, came to Canada to learn English. She worked in Ontario as a nanny and took English classes at Mohawk College in Hamilton, Ontario, coming to British Columbia in 1995 where she worked as a nanny.

[6] Before the 1997 collision ("accident") she was active in sports. She skied in Slovakia and had a seasons' pass at Cypress Mountain for three seasons. She swam, attended a gym three times weekly. She cycled almost every day. She played tennis once or twice a week and skated once a week.

THE ACCIDENT

[7] The plaintiff was wearing a seatbelt. She recalls that the back of her head hit the headrest. An ambulance was called. There was a significant delay before it arrived. While waiting, she walked about and spoke to the defendant, Rebecca Turcott, and others at the scene. Her automobile, a 1990 Dodge Colt sustained about \$5,000 in damages and was written off by the insurers.

[8] I shall treat her soft tissue injuries and her history of dizziness as separate issues. When I speak of dizziness it includes imbalance.

SOFT TISSUE INJURIES - PLAINTIFF'S EVIDENCE

[9] The plaintiff testified she suffered neck, upper back (both sides), and right arm pain immediately following the collision. She developed headaches and experienced sleeplessness. The pain in those areas was constant for the first two weeks. The pain in her neck and shoulders was constant for the ensuing two months and then improved some. She took Robaxicet and Ibuprofen recommended by her physician, Dr. Curry.

[10] She commenced physiotherapy in the first two months after the accident, and later massage therapy. Over time, her symptoms have gradually improved. She continues to have pain in the shoulders and upper back and in her neck. Her right arm pain lasted one year and any physical activity aggravated it. She avoids housework, cooking, sports, computer work; reading and writing affect her neck, shoulder and upper back - any activity that requires her to bend her neck forward. At the time of trial in late 2000, her neck pain is aggravating every day and when her neck is painful it affects her upper back and shoulder areas.

[11] She experienced headaches, constant for two weeks and intermittent thereafter, which last until she sleeps. She takes medication to relieve the pain. Presently, she had headaches once a week.

[12] She gave her estimate of pain in neck, shoulders and upper back on a scale of 0-10, ten being the worst pain imaginable. In the first month, the pain was 9 and it continued to be severe. In 2000, she estimates her pain to be between 2 and 5.

[13] Her present work as a hair transplant technician tires her and so does caring for her two-year old son. She goes to bed between 8:00 p.m. and 9:00 p.m.

[14] She saw Dr. Curry, a physician who has been treating her since the accident. She became Dr. Curry's patient two days after the accident and he has been treating her since that time. I find Dr. Curry has been thoroughly attentive to her needs, sending her to medical specialists for assessment for soft tissue problems and referring her to physiotherapists, massage specialists for treatments. She chose some of those professionals and Dr. Curry complied with her requests.

[15] The defendants say that the clinical records reveal that in the first two years following the accident, the plaintiff attended Dr. Curry on approximately 25 occasions, received 35 physiotherapy treatments from Westwood Physiotherapy, 25 treatments from Coast Therapeutic and one assessment from Eagle Ridge Aquatic Physiotherapy. She was assessed by Dr. MacNiel at the request of the defendants' insurers. She saw Drs. Porayko and Yasin for assessment. I have not counted the number of her attendances upon the various health care providers but counsel for the plaintiff did not challenge those numbers in Reply and I accept the count as accurate.

[16] Dr. Curry has been a family medicine practitioner for 20 years, licenced to practice medicine for 30 years. He wrote a Report on August 1, 2000 and he testified at trial as a witness for the defence. In his August 1st Report, Dr. Curry wrote:

As to the patient's injuries, this patient suffered a soft tissue injury at the time of her motor vehicle accident in the nature of hyperextension and hyperflexion of the neck. This resulted in paraspinal muscle sprain of the neck and soft tissues of the shoulder including the left scapula. This in layman's terms would be described as a whiplash type injury. This initially resulted in some loss of mobility in her neck however, at the time of her last physical

examination by myself, this was evidenced as cogwheel movement type restriction of mobility in all parameters and I feel that probably there is no true restriction of movement of her neck.

The patient's complaint of dizziness are probably not as the result of the motor vehicle accident.

I would confirm that the patient's soft tissue injuries to the neck in the paracervical muscles, the trapezius muscles and the area around the scapula are as a result of the motor vehicle accident of July 19, 1997. The prognosis for this patient's eventual recovery is probably very good, and I do not feel in the long-term that there will be a permanent disability and that resolution of this patient's symptoms will occur.

With regard to further treatment, I feel that psychological counselling will help this patient. I do not feel that any further physiotherapy or manipulative manual therapy of any nature will be of help to this patient and her symptoms should resolve spontaneously. I also feel that his patient's dizziness will resolve spontaneously.

In regards to this patient's future employment, she should be able to continue the type of employment that she was engaged in at the time of and following the accident of July 1997. At the present time I do not feel that this patient would be able to be employed in a labour-intensive type position. However, I feel that in the future with resolution of her symptoms I do not feel that this patient will have any work restrictions due to the motor vehicle accident.

At trial, Dr. Curry explained his term "cogwheel movement type restriction of mobility", describing the movement as an irregular, passive and positive movement, a jerking movement which he said is sometimes considered to be an indication that there is no pain restricting the movement as much as there is a conscious or unconscious willingness to show that there is a true movement of the neck without pain. Sometimes it is associated with symptom-magnification which he explained:

Sometimes if one wants to demonstrate that we still have a problem with a joint, for example, the neck, it is impossible to reproduce this without pain, where the pain, one restricts the movement, whereas the cogwheel movement, as such, is often thought to be an indication of the patient voluntarily or involuntarily is demonstrating pain which is not present...it is exaggeration.

[17] Dr. Curry testified that he reached his conclusion that the plaintiff suffered soft tissue injury because under his palpation he noted tenderness in the cervical soft tissue area radiating down to her back in the area of the trapezius muscle and found tenderness there on subsequent examinations. Because of her continuing complaints of pain, he referred her to specialists for assessment and for treatment, sent her to physiotherapists and massage therapists. He did so, despite believing that after a year following trauma, physical therapy will not benefit a patient. He made the referrals because he hoped to return the plaintiff to full activity.

[18] At trial, Dr. Curry explained why he recommended psychological counselling, in his written Report:

The patient has had symptoms for approximately two years and very often this is considered a prolonged pain syndrome and there are many causes for a - continued pain syndrome or a chronic pain syndrome and one of the causes could be depression. The other - - there are many other causes, personal gain through attention from doctors, gain from physical therapy, gain from the people around her, the sympathy that - or him, the sympathy that one achieves.

In other cases, he has recommended psychological counselling and it is usually a last resort. Up to the time he wrote his August Report, he had not excluded the possibility that there was a physical cause for the patient's pain and it remained a possibility. He had read a report from Dr. Bryce (of whom I shall speak later when considering the issue of dizziness), who had mentioned a possible psychogenic disequilibrium and he knew that another doctor (Dr. Porayko) had spoken of a "suggested element of depression".

[19] In his clinical note of August 11, 1999, Dr. Curry recorded that in his examination he found muscle spasm in the plaintiff's scapular area. With respect to her present capacity to take a labour intensive job, he believes the plaintiff is not physiologically or psychologically equipped for work of that character at the present time because it would exacerbate her symptoms.

OTHER MEDICAL PEOPLE WHO ASSESSED THE PLAINTIFF'S SOFT TISSUE INJURIES

Dr. MacNiel

[20] The plaintiff was seen by Dr. MacNiel on August 11, 1998 on a reference from the defendants' insurers. Her child was then two months old. He examined her and found:

She had neck pain on full extension. There was a full range of motion of her neck and shoulders. Biceps jerks could not be elicited, the triceps and supinator jerks measured 1+ bilaterally. The tone, bulk and power in the musculature controlling the upper extremities was normal. Resisted abduction and external rotation of the right shoulder were powerful without pain. With the patient seated, thoracic rotation was full without discomfort. Resisted neck

extension and side bending were powerful without pain. She was tender at the T6-7-8 posterior interspinous ligaments as well as in the left parascapular musculature. There was no palpable spasm, tenderness, nor was there any trapezius muscular tenderness.

[21] Dr. MacNiel gave his conclusions:

This patient has made a substantial functional recovery from injuries arising out of a motor vehicle accident occurring over one year ago. I believe that she is in an adequate rehabilitation program. I don't think she requires massage therapy to ensure a satisfactory continued recovery. I think she will be fit to return to work as a full-time receptionist by November of this year. I foresee no long term complications arising out of this accident in question. I do not anticipate surgery will ever be required from any injury related to this single episode of trauma...My opinion is based primarily upon the personal history I took from this patient and my own clinical examination of her.

DR. PORAYKO

[22] Dr. Curry referred the plaintiff to Dr. Porayko, a neurosurgeon, who first saw her on August 20, 1998. The plaintiff was taking massage treatments. They were not helping and she asked to be referred to a specialist and Dr. Curry made the referral to Dr. Porayko. In his Report of August 21, 1998, Dr. Porayko recited her history of pain and gave his clinical findings:

The clinical findings indicate improving soft tissue injury to the neck area and residual troublesome soft tissue related pain in the left scapular area. I suggested to her that she instruct the massage therapist to concentrate treatment to the soft tissues of the left scapula rather than to the neck area. She could carry on with her own stretching exercise program and try to remain as active as possible. Overall the prognosis is usually quite good with this type of an injury and most people would tend to experience significant resolution of the effect of the soft tissue injury over a period of a year or two. There are no clinical features to indicate any nerve involvement.

[23] Dr. Curry again referred the plaintiff to Dr. Porayko who saw her October 25, 1999 and wrote a second Report the following day. She complained to him of ongoing headaches, neck pain and stiffness and she described dizziness which Dr. Porayko took for intermittent vertigo. On examination, Dr. Porayko found tenderness along the cervical paraspinal muscles bilaterally particularly on the left side. He found some tenderness also in the left trapezius muscle. Mobility of the neck was in good range in

extension as well as right and left lateral rotation but moderately rigid and painful with forward flexion. The amount of restriction of forward flexion was out of proportion to the movement in other directions. Dr. Porayko recommended that she be assessed by an ENT surgeon for her complaints of "vertigo".

[24] Again, on a reference from Dr. Curry, Dr. Porayko saw her a third time - on February 15, 2000 and reported the next day. He wrote:

I did review the results of the cervical CT Scan with her this taken at R.C.H. February 3/00. Axial views were taken extending from C4 to C7. The Scan was normal.

there is no invasive treatment required for her neck. She is still experiencing the effect of the soft tissue injury to the neck but no structural abnormality was noted on the Scan. The prognosis regarding her neck symptoms still remains guarded in terms of duration and final level of recovery.

DR. NASIF YASIN

[25] At the plaintiff's specific request, Dr. Curry referred her to Dr. Yasin, a specialist in physical medicine, for assessment. He had never used Dr. Yasin before and has not used him since. The plaintiff saw Dr. Yasin on March 30, 1999 and he reported on April 3, 1999. The plaintiff complained primarily of headache and neck and upper back pain. He noted there was no history of ear or visual symptoms, nor dizziness.

[26] She told Dr. Yasin that her household activities, neck movement particularly on the left side, results in an onset or aggravation of pain. She spoke of numbness in the upper left extremity which he noted "seems to be getting better". She spoke of continually experiencing a feeling of tiredness and fatigue and having to limit her activities due to ongoing pain. She was taking Ibuprofen. Dr. Yasin related the results of his examination:

On palpation there was localized tenderness to the midline of the cervical spine, and to the paraspinal muscle. Tenderness was also present at the attachment of tendons and ligaments at the occipital bone nuchal ridges bilaterally. Ligamentous trigger points were present to the left levator, and left infraspinatus muscles.

Neurological examination was intact to all modalities.

He found the history and his physical examination to be consistent with musculoligamentous injury to the cervical spine and related these injuries to the 1997 accident.

[27] Dr. Yasin recommended ligament tightening injections or what is known as "prolotherapy" to help alleviate her symptoms. He discussed the procedure of

that treatment with her and gave her reading material on prolotherapy. She did not take those treatments.

[28] I shall relate my conclusions in respect of soft tissue injury later in these Reasons.

WAS THE PLAINTIFF'S BALANCE MECHANISM INJURED IN THE COLLISION?

[29] The plaintiff alleges that from the time of the collision to the present, she has suffered from dizziness which has affected her life in all its aspects. The defendants deny it, saying that in the first two years following the accident she made only one specific complaint of dizziness, made it to a physiotherapist not to her own doctor or to the various doctors to whom she was sent for assessment of her soft tissue condition, and the one complaint was made at a time when she was taking medication (Robaxicet) and was in the very early stages of pregnancy, when symptoms of dizziness are not uncommon.

[30] The time she began to experience dizziness and imbalance is a critical issue, for the longer the gap between the physical trauma and the onset of those symptoms, the less likely it is that they were caused in the accident.

[31] The plaintiff was assessed for dizziness by the two leading experts in the field in this province - Drs. Longridge and Bryce.

[32] Dr. Longridge accepted her evidence that she had suffered dizziness since the accident and concluded that the accident caused it. Dr. Bryce reached a different conclusion, finding the complaint was not a major complaint for a long interval after the accident and the delay in reporting the condition is significant on the issue of causation. Drs. Longridge and Bryce both wrote Reports and Dr. Longridge testified at trial. He examined the plaintiff on May 23, June 29 and July 11, 2000.

EVIDENCE OF DR. LONGRIDGE

[33] Dr. Longridge testified that two years is a very long time for dizziness to occur after trauma. In his experience, the longest period of delay in experiencing the symptoms of dizziness is six months. He said:

I drew a line at six months and if a patient had not complained of dizziness within six months of an accident, I, on a pure empiric basis, decided that I did not think it was reasonable to ascribe dizziness to an accident. Since then I have come across a publication from London, England by a very well-reputed lady where indeed they have a similar cut-off for clarification purposes, to assess things. So there is a little bit of scientific evidence to back my empiric judgment that something is going on.

[34] Dr. Longridge was aware that from July 19, 1997 to September 19, 1997 and for two years thereafter, there was only one complaint of dizziness and testified that the complaint was "pretty isolated in time". He was asked about the effect of Robaxisal (Robaxicet) and pregnancy on the issue of

dizziness and said the drug is described as having dizziness as a complication and dizziness can be associated with pregnancy.

[35] Dr. Longridge testified he finds it significant that there is not one reference in Dr. Curry's records about complaints of dizziness - from the date of the accident until September, 1999. However, Dr. Longridge accepted the plaintiff's history she gave him about the dizziness coming on shortly after the accident, saying:

...I would be delighted to see 57 references to dizzy and vertigo in the notes. The fact that there aren't any in a patient who is telling me she had these symptoms which she had recounted to me means that unless I'm going to look at the patient and say "You are a liar," I believe the patient. I have no reason to suspect she's doing anything except telling me the truth. And the complaints she has are not ones which produce a single word, dizziness.

[36] He conceded he had reviewed clinical records of her physiotherapists which did not record dizziness and concluded that the plaintiff's history of dizziness was not "clear-cut". He said:

If you read it [my report], it says I would have liked to have seen some comment about dizziness in the two years following the accident, and there is nothing new in what you are saying. It's there in my report. I am unhappy about it. I would like to see it ... because it makes it much easier because I'm calling - I have - a judgment call to make on every patient I see any time I see a patient based on the history, the examinations and the investigation. And it is a much easier call if the history is absolutely clear-cut, ... I have stated in my Report it is not absolutely clear-cut here. That's why you end up in court. It's the ones that aren't clear-cut that end up in court. ...

Dr. Longridge was asked:

Q. It's fair comment to say that you reached a conclusion with respect to whether or not this accident caused her symptoms and then reviewed the records and were disappointed that they didn't support that conclusion as strongly as you would have wished them to do so.

A. Yes, it's a 45/55 call and I agree with you. I would have loved to have seen dizziness mentioned to make it easy, so it's a 20/80 and we wouldn't end up in court.

[37] Dr. Longridge did not review any medical records before he conducted his physical examination and reached his conclusion that the accident caused the plaintiff's symptoms. Later in July, 2000, he read the records and was "disappointed" that the records did not support his earlier conclusion for he felt he had no reason to disbelieve the history the plaintiff related to him, saying he always believed a patient unless there was some "flagrant thing

which does not fit which then makes me doubt and look very hard". He assumes that almost everybody who comes in from an accident is telling him the truth. It is, he says, common practice in all of medicine that if a patient relates complaints, that unless one has very good reason to disbelieve the complaints, one accepts what the patient says. A patient sometimes has symptoms that he or she will not be able to define. He noted that until September, 1997, the patient did not speak of dizziness to the people at Westwood Therapy. Over a three year period, Dr. Longridge had two patients who developed the dizzy condition "out of the blue".

[38] Dr. Longridge was asked in cross-examination:

Q Dr. Longridge,, that's exactly what you have done. You've had - - you don't have any facts as to whether or not she had dizziness for two years. You took her at her word.

A Yes --

Q That is making an assumption.

A - - I agree with you

Q Okay. Similarly, let's just look at the other side of that coin. Assume she did not have complaints of dizziness for the first two years but for that one in September and assume that that it is not caused by the accident but that relates to other causes. Then do you still maintain the accident caused the dizziness in 1999?

A that is completely hypothetical and therefore it is not possibly -- I don't come across hypothetical situations like that, I'm sorry. I don't think it's possible to answer that fairly. Basically I'm using the information I have. If you tell me that she was not on any drugs, she didn't get dizzy, she - -

Q No, I didn't ask you -- I didn't say she's not on drugs.

A Well, I can't answer a question that's hypothetical like that and -- have any meaning. I'm sorry -- it's just - -

MR. PETITT: Your Lordship, if I can ask for your assistance in getting an answer to this question. I don't agree with the witness that it's hypothetical.

THE COURT: Well, the doctor tells you he can't answer it. You can rephrase it if you wish to. I'm not going to force him to answer a question he says he cannot answer.

MR. PETITT:

Q Dr. Longridge, if there were no symptoms of dizziness whatsoever for two years would you say those symptoms that happened two years later are a result of this accident?

A If - - if she had not complained of any dizziness, if she had not been on any medications and had not been pregnant and had no complaints, I would not relate her complaints to the accident.

He was asked:

Q Dr. Longridge, you say the accident caused an injury to her balance system, right?

A Yes.

Q The balance system is the inner ear, the eyes, the body as a whole and it also - -

So inner ear, eyes, body as a whole, those all give messages to the brain which sorts through those messages and tells the body where in space the body is, right?

A That's correct.

Q Okay. And the brain has two aspects to it, the physical and the psychological or mental. The mind and the brain, right?

A Yes.

Q And, you know, there could be some wiring problems in the brain and that could cause problems in the balance system?

A It can.

Q There could be some psychological problems, anxiety, so forth and that can cause problems in the balance system as well?

A It can.

[39] Dr. Longridge is unable to give the location of the damage to her balance but believes the damage is not in the ear. One is left with a symptom complex which Dr. Longridge terms "vestibular mismatch". He concedes there is no anatomical point that one can say "this definitely caused it because it is not yet understood by science". He believes he knows the location but it is like "religion", a belief at this stage, but practically speaking he cannot say where the injury has occurred.

[40] Dr. Longridge testified that dizziness is almost all history - it is based on three things - "history, history, history and the validity of the history". He was asked if the condition of vestibular mismatch resulting in dizziness changes over time. He replied it is not usually a deteriorating condition. One would expect any improvement to occur in the first two years and what is present at that stage is likely to be present in the long term.

[41] The court questioned Dr. Longridge about his conclusion that the accident caused her dizziness problems and that it was a 55/45 call. He replied:

[In the context of 55/45] that miserably is usually the sort of clinical situation where you end up in a court case because its those ones that are close enough that both sides feel its their side whereas when its clear-cut it gets settled. ... This is not a clear-cut case. As I say I am, I am concerned about the two year gap without any mention in the history and I am going on her statements that that is true. If I believe that, then I think she has what I am saying she has. And so - and that is my real concern.

[42] Dr. Longridge was asked about Dr. Mah's conclusion that her dizziness and imbalance would gradually and steadily improve. He did not agree with Dr. Mah's conclusion, saying:

In my experience, standardly, that is what we teach and it is a much more optimistic thing to say to a patient in the hope that it will happen but unfortunately with this particular condition, frequently it's not true.

[43] Dr. Longridge concluded his written report saying:

Unfortunately, therapy for visual vestibular mismatch is extremely limited. There are no effective medications and no satisfactory physical rehabilitation in my experience which can dramatically improve symptomatology. In my opinion, symptoms of this type induced by trauma if present for two years are likely to be present on a long-term, permanent basis.

Dr. Graham Bryce

[44] Dr. Bryce, a specialist in otology and neurotology, assessed the plaintiff on behalf of the insurers on April 18, 2000 and his Report is dated May 23, 2000. At a later time, he reviewed the medical/legal Reports of Dr. Longridge, further reports of Dr. Porayko, further records of physiotherapy and massage therapy and the results of a posturography test conducted by Mr. Malinson and Mr. Malinson's conclusions. Dr. Bryce's second report is dated October 6, 2000.

[45] In his May Report, Dr. Bryce records that the plaintiff described dizziness as coming on soon after the accident. She described right ear pain and headaches exacerbated by concentration, occasional ringing tinnitis and ear pressure. Her complaints were, in part:

...She has ongoing trouble focusing and watching the computer makes her dizzy. Her dizziness is also worse when watching TV or reading the newspaper, walking up or down stairs, or watching her baby walk. A week following the motor vehicle accident she flew to Europe to visit her grandfather. She returned to work part-time in October of '97, and full-time six weeks later. She is now training to be a hair transplant

technician and her principle (sic) difficulties at work relates to neck pain. Her dizziness is "not that bad at work". She has to avoid sports she could previously tolerate, including skiing, tennis, biking, swimming and volleyball. She had no problems with her ears or dizziness prior to the motor vehicle accident.

[46] Dr. Bryce conducted a complete neurotologic examination including general ENT review, examined her for a spontaneous gaze and positionally evoked nystagmus, and assessed her oculomotor, cranial nerve and cerebellar function. He gave his Opinion:

This 28 year old woman was involved in a motor vehicle accident on the 19th of July 1997, in which there is no evidence of significant trauma to the head or spine. There was soft tissue injury to the neck. While she described onset of dizziness within a few days of her accident, the first documented complaint of dizziness in the medical record was made to the physiotherapist on the 19th of August 1999, more than two years subsequent to the motor vehicle accident. there are a number of features of her history and physical examination that suggest a hypersensitive or possibly exaggerated response to normal balance sensations. Her description that she panics after experiencing a physiologic hallucination of movement (this is a common experience for people, for example, sitting in a stationary car, looking out the window as an adjacent bus moves forward) suggests that there is a significant non-organic component to her disequilibrium. She has ongoing complaints of neck discomfort and as neck function is important in the maintenance of equilibrium, it is possible that this is in part contributing to her disequilibrium, although I doubt that this accounts for a major component of her balance symptoms. There is no evidence that the motor vehicle accident of 97/7/19 caused an injury to the peripheral or central balance system beyond mild cervical spinal soft tissue injury. I will defer comment about the significance of this injury to my colleagues with special expertise in assessment of spinal disorders.

He gave his neurotologic diagnosis:

Persistent disequilibrium coming on remotely post MVA - probably functional, possible with a voluntary component and possible exacerbation due to cervical spinal soft tissue dysfunction.

He gave his prognosis:

At present, Ms. Plackova's dizziness is mild and it is quite likely that it is going to continue to

improve. If she has ongoing significant symptoms, counselling with a psychologist may be helpful.

[47] In his later report of October 6, 2000, Dr. Bryce reviewed further medical opinions and investigative reports. He concluded that the posturography tests conducted by Mr. Malinson showed that the sensory organization test was abnormal on all test conditions and related Mr. Malinson's results.

[48] Dr. Bryce gave his opinion in his October Report, writing:

I agree with Mr. Art Malinson's interpretation of the posturography results that they indicate a number of "aphysiologic features" to Ms. Plackova's test results. I disagree with Dr. Longridge's observation that she performed normally in test condition #1. In fact, review of the records shows that she performed at a below normal level on all trials of all test conditions with only on trial of test condition 1 approaching the normal threshold. Some patients with non-organic disequilibrium initiate rapid and inconsistent motor responses that, on motor control testing, can support a diagnosis of malingering or exaggeration. The presence of normal results on motor control testing in a situation where such grossly abnormal sensory organization test results are present does not rule out a non-organic cause for the disequilibrium. Clearly, Ms. Plackova's performance on the sensory organization component of the posturography test is far worse than her ability to maintain equilibrium observed in the course of her independent medical examination and that observed by Mr. Malinson after she had completed the test. This does suggest that her behaviour during testing does not actually represent her true ability. While Dr. Longridge described computerized dynamic posturography as an "objective measure", it is important to understand that this test simply quantifies an individual's level of performance. Performance, of course, depends on physical ability and the application of that ability, and I think that it is likely that Ms. Plackova's ability is substantially better than her performance during posturography indicates.

[49] With respect to Dr. Longridge's conclusion that the plaintiff suffers visual vestibular mismatch, Dr. Bryce wrote:

While Dr. Longridge recognizes Visual Vestibular Mismatch as a "clinical diagnosis", this term is not generally accepted as a diagnosis that confirms structural injury or abnormality of the balance system. I agree that these symptoms constitute a "complex" that patients with balance disturbance can describe. However, the presence of this symptom complex does not allow the localization of specific

pathology within the balance system, nor does it differentiate organic from non-organic causes of disequilibrium.

[50] Dr. Bryce gave his Summary:

The results of Ms. Plackova's posturography support the opinion contained in my 2000/5/23 medical legal opinion, that the disequilibrium Ms. Plackova's expresses at present probably has a significant functional component, possibly with a voluntary element. There may be an element of cervical spinal soft tissue dysfunction contributing to her ongoing disequilibrium. The contribution of her neck symptoms to her disequilibrium is probably less than the functional component of her disequilibrium. I do not think that her functional disequilibrium can be directly attributed to injury subsequent to her motor vehicle accident of July 19, 1997. The possible, relatively minor, cervical spinal contribution to her disequilibrium could be attributed to the accident. I defer to my colleagues with expertise in cervical spinal soft tissue assessment to determine whether or not she has a significant ongoing problem in this area. If not, then the contribution of her cervical spine to ongoing disequilibrium would be less.

DR. STANLEY MAH

[51] The plaintiff was referred by Dr. Curry to Dr. Mah, an ear, nose and throat specialist, after the plaintiff complained to him of dizziness in September, 1999. Dr. Mah assessed her on November 17, 1999. She gave the usual history of problems with dizziness since the accident, told Dr. Mah that she did not have any trouble with the telephone or television. Dr. Mah concluded that she was suffering from a post-traumatic dizziness, unlikely vestibular in nature. He arranged an ENG assessment through St. Mary's Hospital. The plaintiff was reassessed by Dr. Mah on February 8, 2000. She told Dr. Mah that her symptoms of dizziness were persistent and, in fact, were getting worse. She related that any sort of head movement or physical activity brings on symptoms of dizziness and vertigo and is causing her problems with breathing, watching television and caring for her child.

[52] The ENG test from St. Mary's Hospital taken January 18, 2000 showed normal caloric testing, but the testing did re-create her dizziness symptoms. Dr. Mah gave his Impression, writing:

Impression: post-traumatic dizziness, possibly vestibular in nature. ... Caloric testing did simulate her symptoms which does suggest a vestibular origin for her dizziness although the two ears responded equally. In any event, the majority of the vestibular disorders resolved with time and activity. I gave her a vestibular exercise instruction sheet and I have encouraged her to perform these several times per day. If she is no better in the next

several weeks, I would suggest assessment by Dr. Graham Bryce at St. Paul's Hospital or Dr. Longridge with the Vancouver Hospital Dizzy Clinic which may be able to help her further.

[53] In the result, she was assessed by both doctors.

THE PLAINTIFF'S EVIDENCE OF COMPLAINTS OF DIZZINESS

[54] The plaintiff testified dizziness started directly after the accident and it was severe at the accident scene. There, she removed her shoes and she was "walking like a drunk". I pause to say she was at the scene for some time before the ambulance arrived walking about and talking to others, including the defendant, Rebecca Turcott, who testified she saw no sign of dizziness or imbalance. The plaintiff's husband did not speak of it in evidence. There is no mention of dizziness in the ambulance crew report or in the hospital records where she was seen and received an x-ray. She remembers feeling dizzy in the hospital and cannot recall if she spoke of it.

[55] The symptoms of dizziness, continued. At first she attributed the symptoms to Robaxicet prescribed to her by Dr. Curry who told her it might cause dizziness, and the fact she was in early pregnancy, and for those reasons did not mention dizziness to Dr. Curry. Her husband testified he believes her imbalance problems commenced in the fall of 1997 and have continued.

[56] She relates her dizziness to movement - a moving object such as a car, movement of the neck, changing her position from sitting and standing, movement of her head from side to side and up and down. When her movements are slow the dizziness is not so severe. Going up and down stairs causes it, reading affects it after a few minutes. She has not read a book since the July accident. She has problems using a computer, light creates problems and so does reading ledgers. She has a computer at home which she uses only for e-mail and writing letters to her family in Slovakia. Before the accident, she used a computer frequently and browsed and surfed the internet.

[57] Dizziness and nausea prevents her being in shopping malls longer than an hour without feeling nauseated. She does not drive a car because of dizziness. When riding as a passenger in a car, dizziness is worse when it is raining or dark. Turning her head to see her child in the back seat aggravates the condition.

[58] She was able to control the severity of the dizziness because she was not doing anything physical and not reading. However, she returned to full-time work on October 1, 1997 as a receptionist in a hair transplant establishment and remained employed there until May, 1998 just before her child was born. She said the work was not physical and her dizziness did not prevent her doing it. Her son was born on June 1, 1998 and after his birth she was not doing physical tasks because of her soft tissue pain and tiredness. She mentioned dizziness to Dr. Curry after he son was born and he spoke of a hormonal change due to pregnancy and assured her it would correct itself. She again complained of it to him and he told her it was from the ligaments to her neck, that it was normal and would improve. Her symptoms of dizziness were aggravated after her son was born. Her neck pain improved but

the dizziness was worse. While she was taking treatments at Westwood Physiotherapy the clinic noted in its clinical record of September 18, 1997:

Patient notes improvement but still feels tired.
Patient has not gone to doctor yet. Still dizzy a lot.

[59] I pause to say that before that entry she had seen Dr. Curry on July 21, 24, 25, August 20, September 9, 1997 and she saw him again on September 22.

[60] On September 15, 1997, Westwood sent a report to Dr. Curry and did not speak of a complaint or finding of dizziness.

[61] Other than the one report of September 18th, there is no mention of the complaint or finding of dizziness in any other clinical note of Westwood until she ceased treatments there on February 26, 1998.

[62] Dr. Curry referred her to Coast Therapeutic and Sports Massage and she had many. Forty treatments there between March 18, 1998 and August 12, 1998. At the first visit on March 18, 1998 she completed a medical case history. The form listed dizziness and nausea, but the plaintiff did not indicate these were a complaint. The only two conditions she listed were "headaches and pregnancy (current)". There is no reference to dizziness in the clinical notes of that clinic.

[63] From Coast she was referred by Dr. Curry to Coquitlam Physiotherapy. She attended there until February 15, 1999, taking approximately 30 treatments. There is no record in the clinicals there of dizziness or findings of dizziness.

[64] She was referred by Dr. Curry to Eagle Ridge Aquatic Centre Physiotherapy. She was assessed on December 16, 1998 and reported she was not experiencing dizziness or nausea.

[65] She testified, at one point, that she told her practitioners about her dizziness. Later, in cross-examination, she said she understood the word dizzy in July, 1997 but does not remember if she talked about it after the accident.

[66] The plaintiff has skated once and tried to resume playing tennis. Dizziness has prevented both activities.

[67] On her Discovery held in May, 2000, she was asked about her symptoms of dizziness in the period October 1, 1997 to May 23, 1998 and testified:

Everything was moving around me. I have a hard time with my balance -- I could not reach up -- strong movements, bending down and tying my shoes. I have a hard time on the computer because of the (dizziness). I had these symptoms October 1997 to May 23, 1998 while I worked at Micron.

[68] On Discovery, she testified that she told Dr. Curry so frequently about her problems of dizziness that she became bored with telling him. At trial, she confirmed that evidence.

[69] She testified that Dr. Curry referred her to Dr. Wong during her first pregnancy. She believes she probably did not tell Dr. Wong of her dizziness and did not because she did not think it was important; she was more concerned about her other injuries (soft tissue) and she wasn't that dizzy "that much because I wasn't doing too much, just sitting and standing". When asked about her Discovery evidence about her symptoms of dizziness that I have recited, she said she was more concerned about her neck. When pressed to say if she had told Dr. Wong about being dizzy, she said she had dizzy symptoms at the time she was seeing Dr. Wong.

[70] When asked why she did not indicate symptoms of dizziness and nausea in the questionnaire she completed for Coast Massage, she said "probably I wasn't dizzy at that time. I can limit my dizziness. I am not dizzy all the time; dizziness is related to movement".

[71] After the birth of her son on June 18, 1998, for the first two months she remembers having dizziness but it was not "all that bad". Family members came from Slovakia to help her with the new baby and she did not even try to do housework. She did not have enough energy to read. After the birth of her child, almost every day she suffered dizziness, walking on stairs, carrying the baby, with any fast movement of her head. Although she couldn't skate or play tennis, she testified she did not do anything about it.

[72] She was asked about her visit to Dr. MacNiel in August, 1998. She does not remember what she said to him; she does not know if she related her dizziness. His Report does not mention dizziness. She knew she was seeing him because of her claim to the insurers to be paid for her physio and massage treatments and she knew it was important to tell him about all of her symptoms that might relate to the accident. She then testified she did not tell him about the dizziness because "I didn't feel it that much". She can't recall if she spoke of dizziness to Dr. Porayko or to the people at Eagle Ridge Aquatic Physiotherapy.

[73] The plaintiff testified that watching T.V. has made her dizzy. She was asked if she did not tell Dr. Mah in November, 1999 that she was not having difficulty with television and said she could not remember. She told Dr. Yasin in March, 1999 that she had no dizziness or unsteadiness and agreed that she had said so. When asked why she had said so, she replied that she did not have those symptoms on that day.

[74] With respect to Dr. Yasin's recommendation that she take prolotherapy, she agreed she had not. She denied telling Dr. Curry that she had tried to do so and it didn't help. That is not Dr. Curry's evidence.

EVIDENCE OF DR. CURRY ON THE ISSUE OF DIZZINESS

[75] Dr. Curry's clinical notes are in evidence and he testified at trial. I found him credible.

[76] Dr. Curry testified that in the period from the accident in 1997 and for the next two or more years, the plaintiff never related any symptoms of

dizziness to him or to the doctors he sent her to. His clinical records for the first two years following the accident do not contain one reference to dizziness. The first note of dizziness in his clinicals is dated September 9, 1999. It is his practice to keep accurate clinical records of a patient's complaints.

[77] It is Dr. Curry's opinion that the plaintiff's dizziness is not related to the July 19, 1997 accident. The cryptic reference in the plaintiff's complaint of dizziness to Westwood in September, 1997 does not change his opinion. He testified:

Q Why do you believe that this accident did not cause her complaint of dizziness?

A The patient had a number of complaints following the accident and they were fairly specific and even if she had maybe occasionally mentioned dizziness, we all occasionally have dizziness, but a complaint that continues and is repeated is one in which we take greater note, and because of this, there was no specific complaint of dizziness prior to that time.

[78] Dr. Curry does not agree with Dr. Longridge's opinion that the plaintiff's dizziness results from the 1997 accident inasmuch as he was seeing and treating the plaintiff regularly for two years before that symptom appeared.

[79] In cross-examination, Dr. Curry was asked about the validity of his clinical notes and asked about the cryptic note of September, 1997 of Westwood. He testified he was not aware until after he wrote his report of August 1, 2000 of the Westwood clinical note and when asked why he was not aware of it, replied:

A Because there are many minor complaints that one has following a - - any episode. I sometimes get dizzy when I stand up, but I don't make a notation of it, and patients often get dizzy. Unless they complain of something and they come in and they say, "I'm dizzy, I'm unable to walk, I find that my balance is wrong, I'm falling down, I'm bumping into things", that is a specific complaint. If one says, "I came in this morning and on the way in I was a little bit dizzy," if it doesn't corroborate with the other evidence and it doesn't - - it's not a specific complaint, that's one of the many things that the patient mentions, then it's not a specific complaint.

Q All right. And because of that, you may not make a note of it?

A Absolutely.

Q Okay. For example, if someone is complaining of numerous problems that they're having after a motor vehicle accident, it's a situation where they could mention dizziness in passing and you may not make a note of it?

A If it was a recurrent complaint I would make a note.

Q All right.

A But if it's just once and - - visit, I - - I would -- I would annotate it in my mind, but I wouldn't consider it a specific complaint.

Q So it's a situation where on occasion an individual could make a complaint in passing, to use your definition?

A Mm-hmm. If it's a minor complaint, yeah.

Q And you may not make a notation of it?

A Correct, yeah.

[80] Dr. Curry testified that a non-repeated general complaint would not be noted. If the complaint was repeated, he would always note it.

[81] In reference to the plaintiff's evidence that he told her she was experiencing a hormonal change, he said:

A I don't think I would. If it was a -- a change during pregnancy, I would have used the expression hormonal, but I don't think I would have, no, Your Honour.

Q It's possible you did but not likely?

A Not likely.

[82] With respect to the plaintiff's evidence that she did not tell Dr. Curry that she had not taken prolotherapy and did not say she had, Dr. Curry confirmed his clinical note that she had told him that prolotherapy had not helped.

CONCLUSIONS ON THE SECOND ISSUE

[83] I find the plaintiff's dizziness (which includes imbalance) was not caused by the 1997 accident. I find that the complaints of her dizziness problems, generally, are suspect.

[84] The only reference to dizziness in the first two years following the accident is the one cryptic note in the Westwood Physiotherapy clinicals and there is no further reference to this problem in their records although she continued treatment there for months, thereafter.

[85] I accept Dr. Curry's evidence that the plaintiff did not speak of dizziness to him until early September, 1999.

[86] At the time of the September, 1997 complaint, the plaintiff was in the early period of her pregnancy and she was taking Robaxicet. Dizziness is sometimes experienced in early pregnancy and it can be caused by that drug.

[87] In the history, the plaintiff gave to various doctors she was sent to in the first two years after the accident, she did not speak of dizziness nor did she to other health care providers. At trial, she explained that omission saying the dizziness was mild, she did not exert herself physically and

really the dizziness was not a significant problem for her. That evidence conflicts with much other evidence she gave at trial when she spoke of not being able to watch television; reading was a problem; she was not able to participate in sporting activities she had once enjoyed; she had difficulties carrying her child, difficulties going up and down stairs, reaching, bending. She had difficulties in malls; in riding as a passenger in cars. The physical limitations she related on Discovery and confirmed at trial relating to dizziness, were significant. The condition she related was not mild.

[88] I find if she was experiencing those significant limitations caused by dizziness, she would have spoken of them to Dr. Curry whom she saw frequently and to whom she related many other complaints. She would have spoken of dizziness problems to other healthcare providers and to doctors assessing her. She would have spoken of the dizziness problems to Dr. MacNiel who was assessing her for the insurers from whom she was seeking money to pay for her many treatments. The testimony of dizziness she gave to Drs. Longridge, Bryce, Mah and others was untrue.

CREDIBILITY OF THE PLAINTIFF

[89] With respect to her credibility, she was not generally a reliable witness. She was not a credible witness, either. She exhibited a highly selective memory. She remembers conversations and what was said when she expected it would assist her case. However, her evidence is replete with "I don't remember" when the answers would not help her case. I have not related those instances for they occurred so frequently.

DAMAGES

[90] The plaintiff claims damages of between \$500,000 - \$590,000 for impaired earning capacity because of the injury to her balance mechanism. I have found that if she, indeed, suffers from that condition, it is not related to the 1997 accident and thus, the defendants are not liable to compensate her at all for loss of opportunity for that malady.

[91] There is an issue about the severity of her dizziness. Dr. Bryce is skeptical, so was Mr. Malinson who conducted tests in respect of it. I need not resolve the conflict because of my finding her balance mechanism was not damaged in the accident.

[92] Dr. Bryce suggests there is a possibility that her dizziness may be related, in part, to the soft tissue injury in her neck. Were that so, one would have expected complaints of dizziness to arise when the soft tissue injuries to her neck were the most troublesome. There was no complaint of dizziness at that time. The complaint arose spontaneously two years after the accident at a time when she says the soft tissue injuries were considerably improved.

[93] The plaintiff says that in 1996, she decided to take training as a radiation therapist at the B.C. Cancer Agency ("Agency") and sent in her application and copies of her degrees obtained in Slovakia. The Agency informed her that before she could apply she must have completed university/college (or equivalent) courses in English. The Agency would not interview her until she obtained that qualification. She has never obtained it and has never applied to the Agency.

[94] She had commenced taking English courses at Capilano College in 1996, one course each semester, one day a week, for a four hour session, and she passed the courses. She enrolled again on August 20, 1997 for the fall semester and continued the English course there until September 29, 1997, but withdrew finding it difficult to read and to do her homework because of fatigue. However, On October 1, 1997, she commenced a full-time job as receptionist at Micron Laboratories and worked there full-time until May 23, 1998 leaving just before the birth of her child. Before the accident she had worked there part-time, commencing in May, 1997.

[95] She remained away from work raising her young child until April, 2000 when she commenced work again, work which she was doing at the time of trial, and enjoying it.

[96] Despite being able to work full-time at Micron, she did not enroll again to complete her English courses. The course would have taken four hours, once weekly. Her failure to complete her English course and her failure to pursue a career at the Agency is her doing, and cannot be laid upon the defendants.

[97] The plaintiff claims a sum for past income loss. There was no loss.

[98] I find that the plaintiff did suffer soft tissue injury in the accident. Because she is neither a credible nor reliable witness, it is difficult to find the extent and duration of those injuries. The defendants say she had recovered by August or November, 1998. I do not think so. Dr. Curry notes spasm in August, 1999. Physiotherapists record symptoms beyond August, 1998. I note, however, that she was able to commence full-time work on October 1, 1997.

[99] For soft tissue injuries I award \$17,000 in damages. For "Specials" I award \$854.

COSTS

[100] Costs were not addressed by counsel and they have leave to do so, in writing.

"G.R.B. Coultas, J."
The Honourable Mr. Justice G.R.B. Coultas