

Citation: Plackova v. Turcott et al  
2001 BCSC 1213

Date: 20010823  
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

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

Counsel for the Plaintiff:

Stuart J. Lein

Counsel for the Defendants:

Timothy H. Pettit

Written Submissions Received:

July 5, 15, 24, 2001

[1] These Reasons address "costs" following a three-day trial.

[2] On July 19, 1997 the plaintiff was injured in an automobile accident. Liability was admitted by the defendants. At trial the plaintiff claimed damages for soft tissue injury and damage to her balance mechanism and sought judgment in a global amount between \$643,000 and \$708,000, including a very large sum for loss of opportunity to earn resulting from her damaged balance mechanism and she claimed damages for past income loss.

[3] In the result, I found that if her balance system was damaged, it was not caused in the subject accident. I found that she had suffered soft tissue injury in the accident and awarded her \$17,000 damages for that injury; that sum was considerably less than she was seeking under that head of damages. Prior to trial the defendant made an offer to settle the plaintiff's claim

for \$16,300 plus costs. The plaintiff did not accept that offer and did not put forward a counter offer.

[4] I made findings of credibility unfavourable to the plaintiff, saying in my Reasons handed down on April 30, 2001:

...She was not generally a reliable witness. She was not a credible witness, either. She exhibited a highly selective memory...

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...

[5] The plaintiff seeks an award of 50% of the costs of the action and submits the defendant should not be entitled to any costs. I am not prepared to make such an order for it would create an unjust result. The plaintiff's success in this action was minimal and the defendants' success very substantial. The outcome was affected by the plaintiff who was neither reliable nor credible.

[6] The defendants offer of settlement prior to trial was not accepted and it fell short of the amount the plaintiff was awarded for soft tissue injury. I do not consider the defendants' offer of settlement to be something I should take into account. In *Gaudiuso v. Walker* (1991), 84 D.L.R. (4<sup>th</sup>), 382 (BCCA) Macfarlane J.A., delivering the judgment of the court, said at p. 2,

Counsel for the appellant submits that the degree of success test may have been appropriate but submits that the trial judge erred in taking into account the amounts advanced or paid into court and the difference between the plaintiff's offer to settle and the amount awarded in damages. He also submits that the defendants did not enjoy "much greater success" than the plaintiff.

The defendants advanced and paid into court \$3,084.22 less than the amount of the judgment and argued before the trial judge that that was a factor that went to the question of costs. I agree with counsel for the appellant that that was not a proper consideration. I agree with McLachlin J., as she then was, who said this in [page 384] *Nicholls v. Township of Richmond* (1985), 50 C.P.C. 171 at p. 183, [1985] 3 W.W.R. 543, 60 B.C.L.R. 320 (S.C.):

I have concluded that the fact that the defendants made a payment into court which fell only \$2,948.24 short of the amount ultimately awarded, is not a proper ground for diminishing the plaintiff's costs to it. The general rule is that only payment into court of an amount equal to or greater than the amount ultimately awarded justifies exercise of the Court's discretion to award costs to the defendant.

The Court of Appeal set aside the trial judge's award of costs in which she ordered that the plaintiff receive 30% of his costs and the defendant 70% of his costs, and awarded the plaintiff 70% of the costs, without set-off. The court did not say that in all cases, the largely successful party should not be awarded costs and denied set-off.

[7] With respect to the success at trial, on the principal issue - the causation of the plaintiff's alleged injury to her balance system, the defendant was entirely successful. The plaintiff sought large damages for her injuries including soft tissue injury, and was awarded \$17,000. She was denied any damages for past income loss or future loss of opportunity to earn. The defendant successfully proved the plaintiff to be unreliable and not credible. The trial was made more difficult and prolonged because of credibility matters.

[8] Rule 57(9) of the *Rules of Court* provides that costs shall follow the event unless the court otherwise orders. I find that such an order in this case should not be made. Rule 57(15) gives the court discretion in awarding costs that relates to some particular issue or part of the proceedings, or may award costs except so far as they relate to some issue or part of the proceedings.

[9] In **Rooney v. Chan** (1992), 76 B.C.L.R. (2d) 186 (SC), Boyd J. discussed the "degree of success" test, saying at pp. 187 and 188:

The genus of the "degree of success" test is found in Supreme Court R. 57(8) (now S. 15) which allows the trial judge to exercise his or her discretion in awarding costs where the successful litigant has been unsuccessful on an "issue" or "part" of the proceeding.

And at p. 189 Boyd J. said:

The Court has the discretion to depart from the normal rule that costs follow the event. This discretion will often be exercised against the plaintiff where the plaintiff has exaggerated the extent of his injuries and his or her credibility has been questioned. However, irrespective of a finding of credibility against the plaintiff, the "degree of success" test may still be applicable. Its application may depend upon (a) the extent to which the claims advanced and the offers to settle on the plaintiff's behalf exceed the eventual award; (b) whether the amounts paid into Court approach the eventual award; (c) whether a discernible issue or head of damage has been decided against the plaintiff; (d) whether it was reasonable to raise the particular issue; and (e) where the predominant issue at trial is the quantification of damages.

[10] Some of those factors spoken of by Boyd J. are still relevant and applicable. I conclude that since the Court of Appeal decision in **Gaudiuso** (supra), the factor of how close the amounts paid into court or offered by the defendant approach the eventual award, is not relevant.

[11] Boyd J. referred to the decision of Legg J. (as he then was) in **Waterhouse v. Fedor** (1987), 13 B.C.L.R. (2d) 186 (SC) in which he outlined

the two methods of determining the "degree of success", and to the decision of Toy J. (as he then was) in **Boerner v. Sohochoff**, [1987] B.C.W.L.D. 3234. In the result, Boyd J. did not depart from the usual rule that costs follow the event, for she found that the plaintiff's lack of success turned upon a complex medical issue and the plaintiff had not exaggerated his symptoms nor was his credibility in any way wanting.

[12] I award the plaintiff 20% of her costs and the defendants 80% of their costs at scale 3, to be set-off one against the other.

[13] With respect to disbursements, I find that the plaintiff is not entitled to her disbursements relating to the issues of imbalance and income loss, including those related to Drs. Longridge and Mah, Vocational Counselling Group and Associated Economics. The defendant is allowed all disbursements relating to the issues of imbalance and income loss, including those relating to Heather McIntosh, Drs. Bryce, Curry, Wong, and St. Mary's Hospital Records, FBIG Investigators and Multi-Line Claims Services.

[14] There will be a set-off of costs and disbursements as between the parties.

[15] The defendants are awarded costs of the written submissions on the "costs" issue.

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