

# Removing A Claim From Rule 68 - Criteria To Be Considered

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As readers of my blog know Rule 68 is a ‘*proportionality*’ based rule which was brought in a few years ago and was intended to be mandatory to certain claims worth \$100,000 or less in the BC Supreme Court.

Rule 68 has not been particularly successful and many injury lawyers have avoided this rule whenever possible due to its perceived shortcomings. This rule is going to be wiped from the books when the New BC Supreme Court Civil Rules take effect on July 1, 2010. Rule 68 will be blended with the New Rule 15 which really combines the best of our current alternative litigation rules.

Despite Rule 68’s mandatory nature, Rule 68(7) permits parties to get out of Rule 68 if a Court “*so orders*”.

So what factors will a court considering in removing a case from the rule? Reasons for judgement were published last week on the BC Supreme Court website dealing with this issue for what I believe is the first time.

In last week’s case (The Board of Trustees of School District No. 41 v. Crane Canada Co.) the Plaintiff sued for damages as a result of allegedly faulty bathroom fixtures. The case was worth less than \$100,000 but the Defendant’s wanted it removed from Rule 68. They applied for an order under Rule 68(7) and were successful. In removing the case from Rule 68 Mr. Justice Groves provided a list of non-exhaustive factors that could be considered on such applications, specifically the Court held as follows:

*[14] Unfortunately, the criteria to apply to an application to remove a case from Rule 68 has not been effectively resolved by the case law as of yet.*

*[15] On these facts, a number of considerations are appropriately applied to the consideration of whether or not a case should be removed from Rule 68.*

*[16] The following discussion is not meant to be exclusive. It is somewhat factual driven, as must all the cases be. It is not the final word on or is it intended to be a definitive word on when Rule 68 is not appropriate to litigation.*

*[17] Of note first is that Rule 68 has the \$100,000 cap. That does not mean all case under \$100,000 are appropriately litigated under Rule 68. There are many types of cases which fall within the \$100,000 cap and based on a simple analysis of complexity it may be inappropriate to allow a case to continue under Rule 68.*

*[18] Here is an example. A motor vehicle case which is under \$100,000 which involves only an assessment of non-pecuniary damages is clearly a case in which Rule 68 should apply. That, I am probably going out on a limb here to say, is the type of case that Rule 68 was clearly designed to manage. A straightforward piece of litigation.*

*[19] However, sticking within the \$100,000 criteria and the motor vehicle scenario, there are cases in which a claim for damages from a motor vehicle accident might be under \$100,000 but it would not be appropriate for them to continue under Rule 68. That would be a case perhaps where both liability and damages are in dispute and expert evidence is required on both those issues. Additionally, the damages may be under \$100,000 but may involve non-pecuniary damages, past wage loss, cost of future care and future lost opportunity. Though all those heads of damages may still work out to a grand total of damages of less than \$100,000, that type of case with a liability and damage component is clearly one which is in my view too complex and requiring too many potential streams of evidence and expert evidence for it to logically continue under a Rule 68 model.*

*[20] A second consideration that the courts should take in determining whether or not Rule 68 still should apply is whether or not the issues between the parties are of interest only to them or whether or not there is some legal or juristic significance to the litigation. Clearly a dispute between two people about a contract, a property dispute between two neighbours, a simple motor vehicle case, are cases in which the issues between the parties are of interest only to those parties and likely do not have any long-term legal or juristic significance. Case which have long term consequences to litigants or far reaching juristic significance may not.*

*[21] Thirdly, a consideration about removal should be whether or not moving the case to the regular stream would have the effect of putting an end to the litigation because of cost and not allowing the parties to actually pursue their litigation because Rule 68 is not open to them.*

*[22] With those non-exclusive approach, I now turn to an analysis of this case...*

While Rule 68 is being abolished soon this case may still retain some value as a precedent under the New BC Supreme Court Civil Rules as Rule 15-1(6) the 'fast track' rule contains a similar subrule about removing a case from fast track litigation if a Court 'so orders'