

More From BCSC On Rule 37-B

November 18th, 2008

[Reasons for judgment were released today](#) further interpreting the relatively new BC Rule 37(B) (the rule dealing with formal settlement offers and costs consequences of these in BC Supreme Court Actions).

The facts of this case are a little difficult to extract from the judgement but it appears that the Plaintiff sued for damages as a result of 2 motor vehicle collisions and separate Formal settlement offers were made by the Defendants in each action. Both actions went to trial by jury and damages were awarded.

It appears that the global Jury award exceeded the combined settlement offers but when broken down between the 2 accidents it appears that the settlement offer for the second collision exceeded the damages the Jury awarded for that collision.

The Defendants asked the court to award them costs for beating the Second Accident Rule 37 offer. (I should point out that the settlement offers were made when Rule 37 was still in place but verdict was given after it was repealed by Rule 37B).

The court noted that:

[11] *Rule changes have overtaken this case. Rule 37B retroactively reinstates judicial discretion in the matter of settlement offers and cost awards.*

[12] *As set out in **Bailey v. Jang**, 2008 BCSC 1372, Rule 37B came into force on July 1, 2008. The Rule states that it applies to offers to settle made both before and after July 1, 2008, where no order as to costs has been made. As conceded by the defendants on this application, Rule 37B returns judicial discretion as a major factor in determining an appropriate award of costs. Thus, the new rule makes far less applicable most of the Court of Appeal decisions relied upon by the defence. That is, those which stated Rule 37 is a complete code in relation to which no judicial discretion is applicable.*

The court then refused to exercise its discretion to award the second defendant costs or double costs for exceeding their settlement offer. The court provided the following reasons:

[14] The analysis requires applying the facts to Rule 37B(6)(a):

Whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or on any later date

[15] Here, while I do not find, as urged to do by the plaintiff, that the offer is ambiguous or at least significantly ambiguous, it is clear that to accept the second offer in this case would not have simplified the trial at all. It is reasonable to assume that, particularly with a jury to have settled the second action would tend to leave the jury with more complicated instructions.

The relationship between the terms of settlement offered and the final judgment of the Court

[16] The two offers combined were significantly less than half the award of the jury. Thus, this factor favours not awarding costs to the defendants.

The relative financial circumstances of the parties

[17] *This was a matter of a bus company versus the modest financial circumstances of the plaintiff. If anything, it favours the plaintiff however, I give little weight to this.*

[18] *In all these circumstances – the over-riding principle here is whether, if the offer had been accepted would there have been a significant or any saving in litigation cost to either party or the Court. Here, it would be difficult to see any saving. It was obvious during this trial that the defence intended to call the bus driver and perhaps other witnesses to the second accident to challenge the plaintiff's credibility generally. There was little or no evidence by the plaintiff that painted the second accident as other than minimal physically. The psychological impact was far greater because the second accident occurred just hours following a much more traumatic accident.*

[19] *Thus, there would have been no savings in time at the trial. In these circumstances the defendants are not entitled to any costs of these two actions and the plaintiff will have her costs throughout.*

[20] *There is divided success on this application. However, the plaintiff was successful on the costs issue which took up almost the whole of the submissions. In these circumstances she should have her costs at the lowest scale on this application.*

I will continue to post the BC Supreme Court's interpretation and application of Rule 37B. The factors the courts consider in exercising discretion under this rule should be of particular interest to anyone taking an ICBC injury claim to trial in BC Supreme Court where a formal settlement offer has been delivered.