A Good Day for Access to Justice in BC - More On Rule 37B And BC Injury Cases

April 16th, 2009

Very important reasons for judgment were released today (AE v. DWJ) by the BC Supreme Court giving more interpretation to Rule 37B.

Rule 37B is still relatively new and the courts have not come up with a consistent application of this rule. Today's case takes this rule in a potentially new direction that can make access to justice a little less costly and risky for Plaintiff's advancing injury claims.

In today's case the Plaintiff was awarded damages of $348,075 after taking into account contributory negligence. After statutory deductions the judgment in the Plaintiff's favor was less than the Defendant's formal offer of settlement.

The Defendant's lawyer applied to court for an order that "*the defendant should receive his costs (*After the date that they made their formal settlement offer)".

In declining to make this order Mr. Justice Goepel stated that under Rule 37B *"the court cannot award costs to the defendant (*where the defendant beats their formal settlement offer at trial*) but is limited to depriving a party of costs or awarding double costs*". This is the first case I'm aware of interpreting Rule 37B in this fashion.

Below I reproduce the highlights of Mr. Goepel's reasoning:

Judicial Discretion In Awarding Costs

[48] The discretion a Supreme Court judge has in awarding costs was summarized in ***Stiles v. British Columbia (Workers' Compensation Board)*** *(1989), 38 B.C.L.R. (2d) 307 at 310, 39 C.P.C. 2(d) 74 (C.A.):*

The power of a Supreme Court judge to award costs stems from s. 3 of the Supreme Court Act which confirms that the judges of the Supreme Court have the inherent powers of a judge of superior court of record. The power to award costs is governed by the laws in force in England before 1858 and by the enactments, including the Rules of Court, affecting costs made in British Columbia since 1858. Generally, the decisions on costs, including both whether to award costs, and, if awarded, how to calculate them, are decisions governed by a wide measure of discretion. See Oasis Hotel Ltd. v. Zurich Ins. Co., 28 B.C.L.R. 230, [1981] 5 W.W.R. 24, 21 C.P.C. 260, [1982] I.L.R. 1-1459, 124 D.L.R. (3d) 455 (C.A.). The discretion must be exercised judicially, i.e. not arbitrarily or capriciously. And, as I have said, it must be exercised consistently with the Rules of Court. But it would be a sorry result if like cases were not decided in like ways with respect to costs. So, by judicial comity, principles have developed which guide the exercise of the discretion of a judge with respect to costs. Those principles should be consistently applied: if a judge declines to apply them, without a reason for doing so, he may be considered to have acted arbitrarily or capriciously and not judicially.

[49] In ***Cridge****, Lowry J.A. noted the right of the Lieutenant Governor in Council to restrict the exercise of a Supreme Court judge's discretion in awarding costs at para. 23:*

While, subject to abiding by established principles, a Supreme Court judge has a broad discretion in awarding costs, it remains open to the Lieutenant Governor in Council in promulgating the Rules of Court to restrict the exercise of that discretion as may be appropriate where it is thought that to do so will achieve a desired objective. The purpose of Rule 37 is to encourage the settlement of litigation through prescribed consequences in costs as in sub-rule (24). Given that the sub-rule provides for the litigants' entitlement to costs while affording no

discretionary alternative, I consider it clear that there is no room for judicial discretion where sub-rule (24) applies.

[50] A trial judge cannot impose cost sanctions that are not authorized by the Rules. An example of an ill fated attempt to do so is ***Kurtakis v. Canadian Northern Shield Insurance Co.****(1995), 17 B.C.L.R. (3d) 197, 45 C.P.C. (3d) 294 (C.A.). In* ***Kurtakis****, the trial judge awarded the plaintiff three times special costs. The Court of Appeal reversed noting at para. 9 that there was "no statutory authority for such an order … and therefore no basis upon which such an order could be made."*

[51] Rule 37B has returned to judges a broad discretion in regards to costs orders arising from an offer to settle. The discretion is however not unlimited and must be exercised within the parameters set out in the Rule. Rule 37B(5) dictates the cost options open to a judge when an offer to settle has been made. A judge can either deprive the party, in whole or in part, of costs to which the party would otherwise be entitled in respect of steps taken in the proceeding after the date of the delivery of the offer to settle or award double costs of some or all of the steps taken in the proceeding after the delivery of the offer to settle. As noted in ***Baker****, the section is permissive and a judge is not compelled to do either.*

[52] What a judge cannot do, however, in my respectful opinion, as a result of an offer to settle, is to order costs to a defendant where the offer to settle was in an amount greater than the judgment. While that cost option had existed since the time of the 1890 rules, either as an exercise of the court's discretion or because it was mandated by the terms of the rule, it is not an option available under Rule 37B. The drafters of Rule 37B(5) have removed that option and presumably determined that the potential deprivation of costs to which a plaintiff would otherwise be awarded is a sufficient incentive for plaintiffs to settle litigation. As noted in ***Cridge****, the Lieutenant Governor in Council has the right to limit the court's discretion. Accordingly, I hold that pursuant to Rule 37B(5) the court cannot award costs to the defendant but is limited to depriving a party of costs or awarding double costs*

[53] The defendant does not seek double costs in this case. It would be a rare case that a plaintiff who recovers damages would face the sanction of double costs. I would expect those sanctions would be limited to situations in which a plaintiff's case is dismissed or when the plaintiff was awarded more than its offer to settle.

If this precedent holds then Plaintiffs will face fewer financial risks when proceeding to trial. The costs consequences of going to trial and losing (not beating an ICBC formal offer of settlement) can be prohibitive and today's case may lead the way to better access to justice in British Columbia for the victims of others negligence.