

## A Great Rule 37-B Precedent - Reality Of Insurance In ICBC Claims Discussed

September 10th, 2009

Reasons for Judgement delivered by Madam Justice Dorgan on July 30, 2009 were recently transcribed and have come to my attention applying Rule 37B in a favourable way to a Plaintiff who failed to beat an ICBC formal offer of settlement.

In this case (Robbeson v. Gibson) the Plaintiff was injured in a BC Motor Vehicle Collision. The Defendant (insured by ICBC) made a formal offer of \$82,100 under Rule 37B. At trial the Jury awarded the Plaintiff \$52,700 for damages. In other words, ICBC beat their formal settlement offer.

The defendant (through ICBC) brought a motion seeking to deprive the Plaintiff of her costs from the date of the formal offer forward and further seeking to have the Plaintiff pay the Defendant's costs and disbursements from the date of the formal offer forward. Such an order is not unusual when ICBC beats a formal offer at trial. If this motion was granted the punishing effect would in essence leave the Plaintiff with \$0 as the costs consequences would eat up almost the entire \$52,700 awarded by the Jury.

Madam Justice Dorgan refused to grant the Defendant's application and instead ordered that the Plaintiff '*be deprived of all tariff items to which she would otherwise be entitled*' from a few weeks following the delivery of the formal offer through trial and further awarding the Plaintiff to '*all disbursements incurred from the commencement of the action to the conclusion of trial*'.

In reaching this conclusion Madam Justice Dorgan made some important comments when applying Rule 37B which I highlight below:

On the topic of the purpose of Rule 37B the Court stated "*the cost consequence (of Rule 37B) is meant to encourage litigants to reach settlements; reasonable settlements, and to impose penalties on those litigants who decline to accept offers which are reasonable in all of the circumstances...*"

In considering "*the relationship between the offer and the final judgement*" the Court held that the gap between \$80,000 and \$52,000 was not 'dramatically divergent'. Specifically Madam Justice Dorgan noted that "*the swing is not wild...the relationship between the offer and the award is, in my view, a neutral factor on the question of costs*'. In coming to this conclusion it was noted that "*the overall award clearly reflects the jury's conclusion that the plaintiff was injured as a result of the defendant's negligence and that she suffered losses, both non-pecuniary and pecuniary*".

When considering the relative financial circumstances of the parties the Court seems to have considered the fact that the Defendant was insured by ICBC. Judgements to date are still inconsistent in determining whether a policy of insurance is a relevant consideration under Rule 37B. Madam Justice Dorgan did not ignore the reality that this case was defended by ICBC through a policy of insurance as opposed to directly financed by the Defendant. Addressing this issue the court noted as follows "*the defendant's financial position is unknown. While he testified, he did not actively involve himself in this litigation. ICBC defended the case. I have no need to, nor should I, go into a comparison of the financial circumstances of a corporate citizen versus a private citizen, but each of the two citizens is entitled to competent counsel, entitled to pursue their claim on the basis of advice received by each of those counsel, and that is what happened here. On the issue of financial circumstances, I am advised that the jury award, as I have earlier*

*said, will be effectively cancelled if the defendant obtains a costs order from the date of the offer to the conclusion of trial...It is reasonable for me to conclude that (the plaintiff) has significant disbursements from prosecuting her claim. Certainly, the trial disbursements would be significant. In all those circumstances, this factor, I am satisfied, favours the Plaintiff<sup>6</sup>*