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Even More Analysis Of Rule 37B

January 28th, 2009

Well the cases seem to be coming in at a good pace and hopefully Rule 37B will start seeing some consistency in its interpretation by the BC Supreme Court.

Today another case was released by the BC Supreme Court applying and interpreting this rule. In this case the Plaintiff was involved in a motor vehicle collision and sued for damages. The Defendants made an offer to settle for $16,000 plus costs under the old Rule 37. The Plaintiff rejected the offer, went to trial and was awarded just over $12,000. Madam Justice Morrison made the following findings about the costs consequences flowing from these facts:

Policy Reasons for the Offer to Settle Rule

[42] I turn first to the policy reasons behind the new rule.

*[43] The Court of Appeal commented on the purpose of the former Rule 37 in several cases. Although Rule 37 was repealed and replaced with Rule 37B, the underlying rationale of Rule 37 is, in my opinion, still informative. Rule 37 was designed to encourage settlement. In **MacKenzie v. Brooks**, 1999 BCCA 623, 130 B.C.A.C. 95, the court made the following comment on the purpose of Rule 37:*

[21] Rule 37 is clearly designed to encourage the early settlement of actions. It does so by rewarding the party who makes an early and reasonable settlement offer, and by penalizing the party who declines to accept such an offer. The reward or penalty takes the form of costs (in some cases, double costs) from the date the offer is made. The significant role which costs now play in the litigation process operates as a powerful incentive to parties to make early offers of settlement under the Rule and to accept reasonable offers.

*[44] In **Skidmore v. Blackmore** (1995), 2 B.C.L.R. (3d) 201, 122 D.L.R. (4th) 330 (C.A.), the Court of Appeal commented on an older version of Rule 37 and Rule 57(9) (costs follow the event) at para. 37:*

[37] These Rules are designed to discourage frivolous actions and defences and to encourage the parties to make reasonable offers to settle as early as possible. Thus, party and party costs serve many functions. They partially indemnify the successful litigant, deter frivolous actions and defences, encourage both parties to deliver reasonable offers to settle, and discourage improper or unnecessary steps in the litigation.

*[45] Rule 37B is still designed to discourage frivolous actions and encourage parties to make and accept reasonable offers. In Alan Seckel & James MacInnis, **B.C. Supreme Court Rules Annotated 2009** (Toronto: Thomson, 2008), the authors commented on the introduction of Rule 37B. They say that the new rule was necessary because the old rules had become dysfunctional, largely because of the lack of flexibility. They describe the new rule as a welcome improvement. They add at 373 that "the difficulty with Rule 37B will invariably be its lack of direction for parties and trial judges as to how to effect fairness in the face of the same problems which made interpretation and application of Rules 37 and 37A so difficult."*

*[46] I agree in this respect with the following observation by Hinkson J. in **Bailey v. Jang**, 2008 BCSC 1372, a personal injury case heard before a jury, at paras. 17-18:*

*[17] In **Mackenzie v. Brooks et al**, 1999 BCCA 623 (sub nom. **Mackenzie v. Brooks et al**) 130 B.C.A.C. 95 at p. 21, the British Columbia Court of Appeal described the predecessor rules to Rule 37B as designed to encourage settlement by, among other things, "penalizing the party who declines to accept" an offer to settle.*

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[18] While Rule 37B has brought about the reversion from a strict code to a reliance on judicial discretion with respect to costs, the use of costs to encourage or to deter certain types of conduct remains, albeit based upon the factors set out in subrule 37B(6).

The Factors under Rule 37B

[47] I turn now to the factors under Rule 37B.

[48] In my opinion, given the fact that the offer was made three years and almost four months after the date of the accident and well over a year after the action was commenced, the plaintiff should have known what medical information was available to him. I agree with the defendants that this is a case where Mr. Leus was working full time from the date of the accident. It is true that in Fast Track Litigation it is not cost efficient to end up with several medical legal reports from one doctor. However, Mr. Leus did not have any information from Dr. Hodgeson, informal or otherwise, at the time of the offer.

[49] As the defendants point out, the plaintiff could have contacted Dr. Hodgeson earlier. By the time the report was requested, it was already 60 days before the trial so the rule requiring notice could not have been met in any event. The further requests that were made were well within the 60 days.

[50] The offer was made in timely manner and at a time when the plaintiff should have known his case. It was an offer that ought reasonably to have been accepted at the date of the offer.

[51] While I have considered the argument that the defendants, because of the participation of ICBC, can take advantage of making an early, low offer, in my opinion there is no such unfairness demonstrated.

[52] In this case, $16,000 is a more favourable amount to the plaintiff than the $12,748.48 ordered by the court. This factor favours the plaintiff being penalized for not accepting an award 20 percent greater than the judgment. The fact that the numbers are low does not change the analysis.

[53] The plaintiff argues that he should get preference under this factor because ICBC has significantly more resources to absorb the costs of litigation than he does and, as a result, ICBC is in a unique position to make early offers to settle.

[54] The defendants argue that ICBC is not a party and the legal principles that developed under the old rule should still apply. It would not be fair, they argue, if they were forced to pay the entire judgment, disbursements, and their own costs after they made a reasonable formal offer that was more than the final award.

[55] Different views have been expressed by members of the court on the question of the relevance of fact that the defendants have insurance.

*[56] Mr. Justice Hinkson made the following comments in **Bailey** at paras. 32-34:*

[32] Second, [the plaintiff] places her financial position against that of ICBC, as opposed to that of the defendants.

[33] While I accept that it is likely that most drivers in British Columbia are insured by ICBC, the wording of subrule 37B does not invite consideration of a defendant's insurance coverage. There may be good policy reasons for this. Insurance coverage limits with ICBC are not universal, and will vary from insured to insured. Certain activities may result in a breach of an individual's insurance coverage, or the defence of an action under a reservation of rights by ICBC. A plaintiff will not and likely should not be privy to such matters of insurance coverage between a defendant and ICBC.

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[34] The contest in this case was between the plaintiff and the defendants, and the insurance benefits available to the defendants do not, in my view, fall within the rubric of their financial circumstances, any more than any collateral benefit entitlement that a plaintiff may have would affect that person's financial circumstances for the purpose of determining their loss.

[57] Mr. Justice Butler in ***Arnold*** *said that the mere fact that the defendant is insured is not enough to deprive the defendant of costs at para. 23:*

[23] Mr. Arnold has asked that I take into account the relative financial circumstances of the parties when exercising my discretion. I find that I am unable to do so. First, Mr. Arnold has provided no evidence regarding his financial circumstances other than the assertion that the likely result of a costs award in favour of the defendant will leave him with no recovery from the action. Rule 37B gives this Court greater discretion than it had under the old Rule 37. It specifically allows the Court to consider the relative financial circumstances of the parties. However, there will always be a substantial difference between the relative financial circumstances of the usual personal injury plaintiff and the defendant's motor vehicle insurer. That difference, in and of itself, is not enough for the Court to exercise its discretion to deprive the defendant of costs. If that was the intent of the new rule, it would have been more clearly articulated.

[58] Conversely, Madam Justice Boyd in ***Radke v. Parry****, 2008 BCSC 1397, did consider the fact that the defendants were insured by ICBC at para. 42, a case where costs were awarded against the defendants:*

[42] In the case at bar, on a review of the Rule and the authorities, I conclude that the plaintiff is indeed entitled to double costs from the date of the August 12th offer of settlement forward…It is also clear that there is a substantial disparity in financial circumstances between the parties. The defendants, represented by ICBC, had substantially greater resources to finance a trial than the individual plaintiff. Had the defendants accepted the plaintiff's initial reasonable offer, the plaintiff would not have had to incur the significant costs associated with nearly two weeks of trial.

[59] Even if there may be cases in which the fact that a party is insured may be relevant to that party's financial circumstances and hence the party's ability to pay a costs award, this is not one of those cases. Here, there is very little information about the actual financial circumstances of the plaintiff, Mr. Leus. Though Mr. Leus says he has a mortgage and a family to support, no details are provided as to his actual income and expenses. Nor is there much information about the actual financial information of the defendants, John Laidman, Marjorie Laidman, and Ference Sandor. The Court cannot draw permissible inferences from the very

[60] The defendants argue that Rule 57(10) should be considered whereas the plaintiff says that the Court is only being asked to decide entitlement to costs and not quantum, so Rule 57(10) is not applicable.

[61] Rule 57(10) says:

A plaintiff who recovers a sum within the jurisdiction of the Provincial Court under the Small Claims Act is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders.

[62] I am satisfied that Mr. Leus has shown that at the time his claim was initiated, there was a sufficient reason to bring the action in Supreme Court. The amount he was claiming was close to the line; it was appropriate to use the discovery process to obtain evidence of the others involved in the accident: ***Reimann v. Aziz****, 2007 BCCA 448, 72 B.C.L.R. (4th) 1.*

Conclusion

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[63] In conclusion, the purpose of Rule 37B is to encourage settlement and avoid frivolous use of court resources by imposing punitive cost sanctions. In the present case, the defendants made a reasonable offer to settle that ought to have been accepted by the plaintiff. The offer was 20 percent higher than the plaintiff's final award. Given the overarching purpose of Rule 37B, Mr. Leus should be denied his costs, including his disbursements of $7,500, from the date of the offer, because he failed to accept the offer to settle.

[64] However, though the court could award the defendants single costs, I have decided it is not appropriate to do that in the particular circumstances of this case. The decision depriving the plaintiff of his costs meets the objectives of the Rule. I have considered, in particular, the size of the award, the fact that it was less than $4,000 lower than the offer, and the impact of this decision on what Mr. Leus will actually receive.