

## More On BC Injury Claims, Proportionality And The Mandatory Nature Of Rule 68

September 9th, 2009

Further to my previous postings on [Rule 68 in ICBC and other Injury Claims](#), the Rules mandatory nature was further developed by the BC Supreme Court today.

First a brief background. Rule 68 is a 'proportionality' based rule which limits and alters the types of pre-trial procedures available to litigants in the BC Supreme Court for certain types of cases. Rule 68 also takes away the right to trial by jury for cases where the rule applies.

[Subsection 2 of Rule 68](#) sets out when the Rule applies. One type of action subject to Rule 68 is where a Plaintiff claims for pecuniary and non-pecuniary loss for less than \$100,000. This includes many ICBC and other Injury Claims.

Recent Court Decisions have interpreted Rule 68 as being mandatory when the factors in Rule 68(2) apply. In the case of [Foster v. Westfair Properties \(Pacific\) Ltd.](#) Master McCallum of the BC Supreme Court held that:

*Rule 68 is mandatory and requires that actions qualifying as expedited actions proceed under the provisions of the rule. The absence of the required endorsement is an irregularity that may be remedied by amendment. The commencement of a proceeding without the Rule 68 endorsement does not change the character of the proceeding to permit process outside the limits of the rule.*

Reasons for judgement were released today by the BC Supreme Court illustrating just how far our Courts can go in applying the mandatory nature of this rule.

In today's case ([Uribe v. Magnus](#)) the Plaintiff was allegedly injured in 2007 BC Car Crash. The Plaintiff started a lawsuit but did not make the Claim subject to Rule 68. As the lawsuit progressed the Defendant took advantage of the pre-trial steps available for lawsuits filed outside of Rule 68 including examinations for discovery. Furthermore none of the Rule 68 pre trial requirements were adhered to.

The Defendant took out a Jury Notice and even paid the necessary Jury Fees. The Plaintiff then valued his claim below \$100,000 and as the trial neared brought an application for an order that the lawsuit was 'subject to rule 68'. The defendant opposed this motion arguing that the motion was brought too late in the lawsuit and that it would result in significant prejudice including the loss of right of trial by jury.

The Court granted the motion and noted that "there is no timing limitation in (rule 68)". Master Caldwell went on to make the following comments:

*The concept of proportionality is now formally ingrained in our law by the terms of Rule 68. It is hard to imagine that a simple claim which the plaintiff's counsel himself admits will not exceed \$50,000 and which more likely falls in the \$30,000 to \$40,000 range can justify the overall expense of a three day jury trial. While I accept the submissions of defendant's counsel that the defendant has been prejudiced by the late date of the plaintiff's application, the denial of a jury trial, the fact that they have prepared for a jury trial and the fact that they have had to undertake various steps and procedures which would not have been necessary had the matter been commenced subject to Rule 68 or placed into that rule at an earlier date I*

*am satisfied that these issues can be compensated for by the appropriate order of costs to the defendant while at the same time maintaining and protecting the purpose and mandatory nature of Rule 68.*

The Court went on to balance some the Defence concerns by ordering that the Plaintiff be responsible for the costs for ‘*all procedures undertaken to date which would not have been required or allowed under Rule 68*’. This case is worth reviewing in full for anyone interested in the development of the concept of ‘proportionality’ in BC Supreme Court Injury Litigation.

As readers of my blog may know, the current BC Supreme Court rules are being repealed and replaced with new Rules next summer. [Rule 68 will be repealed and replaced with Rule 15](#). Rule 15 also utilizes the concept of proportionality and today’s case may be telling in the direction BC Courts will take under the new Rules when applying this concept to injury litigation.