

## How Can \$125,000 Really Equal \$0 In An ICBC Claim?

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Costs consequences, that's how. If ICBC beats their formal offer at trial they can be awarded costs under Rule 37B. These costs can sometimes exceed the amount of a judgement and [reasons for judgement were released today](#) by the BC Supreme Court demonstrating this principle.

Trials can be risky and expensive and to the victor go the spoils. In today's case the Plaintiff claimed she suffered a brain injury as a result of 2 collisions. The Defendants collectively offered to settle the Plaintiff's claims for \$450,000. The Plaintiff made a settlement offer of \$1,500,000. After a 41 day trial Mr. Justice Gropper of the BC Supreme Court rejected the brain injury claim and awarded damages of \$125,349. The Defendants brought an application to be awarded costs from the date of their respective formal offers and succeeded. In reading the judgement it appears that these consequences are so significant that the Plaintiff may be left with \$0 or perhaps even owe money to the Defendants after all the dust settles. In addressing this reality the court held that such an outcome in and of itself is not enough to extinguish the Defendant's entitlement to costs. Specifically, Mr. Justice Gropper reasoned as follows:

*As stated, the plaintiff received judgment. The defendants' costs and disbursements from the time of the offers may exceed the judgment. This is an appropriate factor to consider in determining the appropriate order for costs. It is not sufficient, in my view, to deny the defendants their costs arising from the offers to settle. If the aim of the rule is to encourage reasonable settlements, denying the defendants their costs in the circumstance does not meet that aim. It may be a reason to deny the defendants double costs, but the defendants have not sought double costs in this matter. While it is an important factor to consider, it is not sufficient, in and of itself, to extinguish defendants' entitlement to the costs.*

Cases such as this which illustrate the potential costs consequences of an unsuccessful ICBC claim need to be reviewed when considering claim settlement. Trials come with risk and settlement offers have to be weighed against this risk. Reasons for judgement don't always reflect who the real winner is. In ICBC claims the real winner is often the party that beats their formal settlement offer and this is not always revealed in judgements.

In addition to illustrating the significant costs consequences which parties can be exposed to in the BC Supreme Court, this case does a good job in discussing Rule 37B. Mr. Justice Gropper summarized the authorities to date applying Rule 37B as follows:

[18] The jurisprudence is developing in this court under Rule 37B(5) in regard to the effect of offers to settle on costs. The following principles have been stated:

1. "...Rule 37B is permissive in nature and provides the Court with a broad discretion to award double costs": **Radke v. Parry**, 2008 BCSC 1397 at ¶37.
2. "...there are important differences between Rule 37B and the predecessor rules, Rule 37 and Rule 37A. Notwithstanding the differences ... the underlying legislative policy remains the same. The goal has been and remains to encourage the early settlement of disputes '... by rewarding the party who makes an early and reasonable settlement offer, and by penalizing the party who declines to accept such an offer' (see **MacKenzie v. Brooks**, 1999 BCCA 623, 130 BCAC 95...)": **Radke** ¶38.
3. "Subrule (5) is permissive. It empowers the court to make either type of order mentioned in the subrule. By necessary implication, it contemplates that the court may make an order that denies one of the two forms of relief set out in the subrule": **BCSPCA v. Baker**, 2008 BCSC 947 at ¶ 15.

4. “[Subrule (5)] does not specifically state that it is possible for the court to order costs to a defendant where an offer to settle was in an amount greater than the judgment. Nevertheless, that is implied in the rule. If the court can deprive a party of costs or order double costs, it must also be able to order costs, the intermediate step between those two extremes”: **Arnold v. Cartwright Estate**, 2008 BCSC 1575 at ¶15.

5. “One of the goals of Rule 37B ... is to promote settlements by providing that there will be consequences in the amount of costs payable when a party fails to accept an offer that ought reasonably to have been accepted. That goal would be frustrated if Rule 37B(5) did not permit the court the option of awarding costs of all or some of the steps taken in a proceeding after the date of delivery of an offer to settle”: **Arnold** at ¶16.

He then went on to decide that the Defendants ought to be awarded their costs in the present case and came to the following conclusion:

[35] *In all of the circumstances, applying the factors addressed by the Rules and the parties, I find that it is reasonable that the defendants recover their taxable costs and disbursements in this action.*

[36] *I therefore order that the defendants Paul be awarded their taxable costs and disbursements from June 8, 2005 onwards. The plaintiff is entitled to her taxable costs and disbursements in the Paul action up to June 8, 2005 only.*

[37] *The defendants Brandy are awarded their taxable costs and disbursements from October 26, 2006 onwards and the plaintiff is entitled to recover her taxable costs and disbursements in the Brandy action up until October 26, 2006.*

What interested me most in these reasons was the judge’s refusal to look at the fact that the Defendant was insured with ICBC when weighing the relative financial circumstances of the parties under Rule 37B(6). The courts are currently split on whether this is a relevant factor and once the BC Courts come up with a consistent analysis of this topic it will be easier for ICBC claims lawyers to better predict the costs consequences for their clients following trial. Hopefully the BC Court of Appeal has an opportunity to shed some light on this subject in the near future.