ICBC Injury Claims, Trials And Costs

March 20th, 2009

I've written many times about the costs consequences of ICBC Claims and Supreme Court Trials where a formal offer of settlement is made under Rule 37B. What about when no offer is made, what are the costs consequences then? In these circumstances Rule 57(9) of the Supreme Court Rules governs which holds that "*Subject to subrule (12), costs of and incidental to a proceeding shall follow the event unless the court otherwise orders*"

What this basically means is to the victor goes the spoils. If you bring an ICBC Injury Claim to trial in BC Supreme Court and are successful unless the court otherwise orders you will be entitled to your 'costs'. But what happens if you are only partially successful in your ICBC Injury Claim? Can you still get your full costs or can these be split?

Reasons for judgement were released today (Heppner v. Zia) dealing with this issue. In today's case the Plaintiff brought an injury claim following a 2004 motor vehicle collision in New Westminster, BC. Prior to trial the Plaintiff was seeking to settle her ICBC Injury Claim for $349,900 and ICBC was offering $20,000.

After a 15 day trial the court found that the Plaintiff was 50% responsible for the collision. In addition to being found partially at fault, the Court rejected the Plaintiff's claim that she sustained a disc herniation as a result of the collision and that she was permanently disabled from her employment as a result of the collision. In the end the Plaintiff was awarded damages of just over $45,000 for her soft tissue injuries.

In the normal course the Plaintiff would be entitled to her costs as she was awarded an amount greater than ICBC's settlement offer and an amount greater than the Small Claims Court monetary jurisdiction. ICBC, however, argued that they were largely successful in defending the claim in both proving the Plaintiff was partially at fault and in refuting her claim that her disc herniation was related to the collision ICBC argued that the costs should be apportioned accordingly. Mr. Justice Cohen of the BC Supreme Court agreed.

In concluding that the Plaintiff should be deprived of her costs for that portion of the trial which involved the claim of an accident related disc herniation Mr. Justice Cohen summarized and applied the law as follows:

[11] In ***Sutherland v. The Attorney General of Canada***, 2008 BCCA 27 at para. 31, Finch C.J.B.C., for the Court, said, as follows:

The test for the apportionment of costs under Rule 57(15) can be set out as follows:

(1) the party seeking apportionment must establish that there are separate and discrete issues upon which the ultimately unsuccessful party succeeded at trial;

(2) there must be a basis on which the trial judge can identify the time attributable to the trial of these separate issues;

(3) it must be shown that apportionment would effect a just result....

[16] Upon a review of the authorities submitted by both sides, particularly the recent decision of Romilly J. in ***Shearsmith v. Houdek****, 2008 BCSC 1314, I am satisfied that the issue of the plaintiff's disc herniation is a discrete issue upon which the plaintiff did not succeed.*

[17] In the case at bar, the Court noted at para. 290 of the Reasons, that the main thrust of the plaintiff's claim for damages was that she sustained a low back soft tissue injury that eventually lead to disc herniation surgery that has rendered her permanently disabled, and that this outcome was due directly to the accident.

[18] At paras. 291-292 of the Reasons, the Court said, as follows:

[291] The defence position is that given the history and the onset of symptoms of low back pain; the plaintiff's prior history of work related low back injuries and complaints; that the plaintiff's first onset of low back pain after the accident was caused by the same movement of bending forward as caused the plaintiff's work related onset of low back pain; and that the plaintiff was working as hard after the accident as she was before the accident, it is impossible to conclude that the accident caused the plaintiff's chronic low back pain.

[292] The essence of the defence based on causation is that the plaintiff did not complain about low back pain until about two months after the accident, and then only intermittently thereafter. The defendants assert that a significant increase in the plaintiff's low back symptoms and the onset of new symptoms can actually be dated from the plaintiff's fall down the stairs in her home in early March 2005. It was this event, claim the defendants, that caused the plaintiff to undergo disc herniation surgery and is the real reason why she did not return to her occupation as a nurse's aid.

[19] At para. 317 of the Reasons, the Court concluded as follows:

[317] In the result, I find that the evidence does not establish a temporal link between the accident and the onset of the plaintiff's low back symptoms ultimately leading to the diagnosis of disc herniation and disc herniation surgery. In my opinion, the plaintiff has failed to prove on a balance of probabilities that the accident caused or contributed to the plaintiff's disc herniation. She has failed to prove that her disc herniation would not have occurred but for the negligence of the defendants.

[20] Thus, in the circumstances of the case, I disagree with the plaintiff's contention that the plaintiff's disc herniation was not a discrete issue, but merely part of the overall burden on her to prove the extent of the injuries that she suffered as a result of the accident.

[21] I also disagree with the plaintiff that it is not possible to attribute the time taken up in dealing with the issue of the plaintiff's disc herniation, as opposed to the time taken up dealing with the plaintiff's other injuries.

[22] I find that the plaintiff should be denied her costs associated with this discrete issue.

The Court then turned to the issue of liability and the fact that ICBC was successful in proving the Plaintiff 50% at fault for the collision. Mr. Justice Cohen held that in these circumstances the Plaintiff's trial costs should be reduced by 50% and summarized and applied the law as follows:

*[25] Finally, I turn to the matter of s. 3(1) of the **Negligence Act**, R.S.B.C. 1996, c. 333 (the "**Act**"). The defendants submit that the costs awarded in favour of the plaintiff ought to be reduced by 50% to reflect the court's finding on liability.*

*[26] Section 3(1) of the **Act** states:*

Unless the court otherwise directs, the liability for costs of the parties to every action is in the same proportion as their respective liability to make good the damage or loss.

[27] The plaintiff says that an application of s. 3(1) would work an injustice in this case. Her position is that the issue of liability occupied relatively little time at the trial, perhaps no more than a day or two.

*[28] In **Moses v. Kim**, 2007 BCSC 1820, the plaintiff sought 100% of his taxable costs, notwithstanding that he was held 65% responsible for the accident. At para. 13, Gray J., as part of her analysis of whether she should use her discretion to depart from the usual rule, set out the following criteria to be applied by the Court:*

(a) the seriousness of the plaintiff's injuries;

(b) the difficulties facing the plaintiff in establishing liability;

(c) the fact that in settlement negotiations the amount offered was substantially below the ultimate amount;

(d) whether the plaintiff was forced to go to trial to obtain recovery;

(e) the costs of getting to trial;

(f) the difficulty and length of the trial;

(g) whether the costs recovery available to the plaintiff, if costs are apportioned according to liability, will bear any reasonable relationship to the party's costs in obtaining the results achieved;

(h) the positions taken by the parties at trial, in particular whether the positions taken were appropriate and reasonable in the circumstances;

(i) whether the defendants made any settlement offers;

(j) the ultimate result of the trial; and

*(k) whether the plaintiff achieved substantial success that would be effectively defeated if costs were awarded pursuant to s. 3(1) of the **Negligence Act**.*

[29] In the instant case, the Court found that the plaintiff sustained mild to moderate soft tissue injuries as a result of the accident, and held that the general damage award should be based on the fact that her condition had improved and recovered to the stage that by a year post-accident she felt well enough to return to work on a gradual basis. Hence, the plaintiff's general damage award was substantially less than the amount she sought.

[30] As well, the award received by the plaintiff for general damages was substantially less than that offered by her prior to the trial ($349,000), and somewhat closer to the amount offered by the defendants ($20,000). Moreover, the factors of whether the plaintiff was forced to go to trial to obtain recovery, the costs of getting to trial, and the difficulty and length of the trial are applicable to both sides.

*[31] Finally, given the ultimate result of the trial, and the fact that, in my view, the plaintiff did not achieve substantial success that would be effectively defeated if costs were awarded pursuant to s. 3(1) of the **Act**, I find that there are no features of the action to warrant departure from the usual rule.*

[32] Accordingly, the plaintiff's costs shall be reduced by 50% to reflect the division of liability.