

## More Judicial Consideration Of Rule 37B

November 19th, 2008

[Reasons for judgement were released today](#) by Mr. Justice Butler providing more commentary on the new BC Rule 37B. (search this site if you wish to read my numerous previous posts on Rule 37B precedents).

In this case the Plaintiff witnessed a severe motor vehicle collision. He was not involved in the crash nor did he know any of the people involved. He claimed that he suffered from Post Traumatic Stress Disorder (PTSD) and sued for damages for nervous shock. The claim succeeded and damages in the amount of \$11,100 were awarded.

That in and of itself was a first in BC as far as I am aware as previous successful nervous shock cases involved circumstances where the allegedly injured party knew or had family connections to the victims of the collision.

The Defendants delivered a formal offer of settlement which was greater than the judgement amount. The issue now was, what, if any, costs consequences should there be under the new Rule 37B.

In awarding the Plaintiff costs up to the point that the offer was made and in awarding the defendant costs from then onwards the court made the following comments:

[16] One of the goals of Rule 37B, like the former Rule 37, 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....

[20] *While the case was novel for the reason noted above, it was not particularly complex. The foreseeability, proximity and public policy questions have been the subject of other decisions of both this court and the Court of Appeal. Ultimately, my decision rested upon the evidence of the three psychiatrists regarding causation. This should not have surprised the parties, as all three psychiatrists concluded that Mr. Arnold suffered Post Traumatic Stress Disorder ("PTSD") as a result of the nervous shock he experienced at the scene of the motor vehicle accident. The real issue was whether the psychiatric difficulties he encountered approximately a year after the accident were caused by the motor vehicle accident induced PTSD.*

[21] *Mr. Arnold received supportive medical legal opinions from two treating psychiatrists. However, the report of Dr. Smith concluded that Mr. Arnold's subsequent disability was not related to the PTSD or the motor vehicle accident. Once Mr. Arnold was in receipt of that report, he had all of the information he required to properly consider the offer to settle. Within a reasonable period after receipt of the report and the offer to settle, the offer to settle was one that ought reasonably to have been accepted. This is the most significant consideration for me in deciding how to exercise my discretion in this case.*

[22] *A reasonable period of time to consider an offer to settle is seven days: **Bailey v. Jang**, 2008 BCSC 1372. I do not know when Dr. Smith's medical legal report was delivered to Mr. Arnold. If it was delivered prior to the delivery of the offer to settle, then the offer to settle is one that ought reasonably to have been accepted seven days after the date it was delivered. However, if Dr. Smith's report was not delivered until some later date, I conclude that the offer to settle was one that ought reasonably to have been accepted seven days after delivery of the report.*

[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.*

*[24] In the present case, Mr. Arnold has put forward no evidence of special circumstances regarding his finances. He has put forward no evidence of other factors that should be taken into consideration in the exercise of my discretion. Accordingly, I will leave it to other courts to consider when it is appropriate to deprive a party of costs when that party has delivered an offer that ought reasonably to have been accepted.*

Rule 37B precedents are being handed down at a very fast pace by our BC Courts and I will continue to discuss these judgments as they come to my attention, particularly in ICBC or personal injury claims.