More From BCSC On Rule 37B And ICBC Claims

February 12th, 2009

Reasons for judgement were released today (Lumanian v. Sadler) by the BC Supreme Court giving further consideration to Rule 37B in an ICBC claim.

In this case ICBC made a settlement offer before trial. The Plaintiff proceeded to trial and ultimately received judgement below ICBC's formal offer. In an application for costs the court refused to award ICBC costs or double costs but did deprive the Plaintiff of costs from the date of the offer onward.

The court's key reasons are set out below.

Costs

[17] ICBC presented a formal offer to settle on May 23, 2008, in the amount of $110,000 "after taking into account Part 7 benefits paid or payable," and any advances, plus costs and taxable disbursements. There is no disagreement that the plaintiff should get 75% of her costs up to May 23, 2008.

[18] The plaintiff submits she should have 75% of her costs to the end of trial; or in the alternative, that each party should bear its own costs after the date of the offer. The defendant seeks double costs for all steps in the proceeding after May 23, 2008.

[19] There is no dispute that the offer was a valid offer to settle within the terms of Rule 37, notwithstanding an issue that I will address below.

[20] The relevant subsections of Rule 37B for the purposes of this application are:

(4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.

(5) In a proceeding in which an offer to settle has been made, the court may do one or both of the following:

(a) deprive a party, in whole or in part, of costs to which the party would otherwise be entitled in respect of the steps taken in the proceeding after the date of delivery of the offer to settle;

(b) award double costs of all or some of the steps taken in the proceeding after the date of delivery of the offer to settle.

(6) In making an order under subrule (5), the court may consider the following:

(a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or on any later date;

(b) the relationship between the terms of settlement offered and the final judgment of the court;

(c) the relative financial circumstances of the parties;

(d) any other factor the court considers appropriate.

[21] Recent decisions on this new Rule are clear that the court's discretion is now unfettered, but that the underlying purpose of the old rule – encouraging settlement through the use of costs — remains an important objective.

[22] The amount the plaintiff will receive as a result of the judgment is approximately $81,000 before deductions. The settlement offer was $110,000 plus costs. ICBC submits that the result at trial was a significant win for them, and that the plaintiff, having rejected their reasonable offer, assumed the risk of cost ramifications and should pay double costs as a result.

Ought the offer to have been accepted?/Relationship to final judgment

[23] Although Rule 37B(5)(a) and (b) separate the issues of "reasonable acceptance" and "relationship between the offer and the final judgment," in the circumstances here, where the plaintiff received a substantial award but one which is less than the offer, it is in my view appropriate to consider these factors together. The offer was for $110,000; the award at trial will be between $70,000 and $80,000, depending on deductions, and the plaintiff retains the potential to claim Part 7 benefits up to approximately $138,000.

[24] Argument on this issue proceeded on the basis that the plaintiff would have been required, if she had accepted the offer, to sign a release of her Part 7 benefits. I requested further submissions on that aspect of the argument, based on the decision of the Court of Appeal in ***Anderson v. Routbard****, 2007 BCCA 193, 239 B.C.A.C. 98, in which a similarly worded offer was held to be clear and unambiguous, and was deliberately drafted to ensure that full access to Part 7 benefits remained unimpaired by acceptance of the offer. Although the legislation makes no such differentiation, the Court of Appeal decided in that case that the use of the word "payable" in these offers means only those Part 7 claims that have been submitted and are outstanding at the time of the offer, leaving the rest of the potential Part 7 fund available to be claimed.*

[25] Counsel for ICBC now acknowledges that she was in error in submitting that the plaintiff would have been required to sign a release before accepting the offer, although she says it is common practice to settle both claims at once.

[26] Counsel for the plaintiff says it was clear in all negotiations concerning this matter that ICBC would require a release of both the tort and Part 7 claims if the offer were accepted. He does not go on to say that the offer itself is unclear in these circumstances, but says the issue of the reasonableness of rejecting the offer should be analyzed on the basis that such a release would have been required. Counsel for ICBC disputes plaintiff's counsel's assertion that there was an understanding that acceptance of the offer was predicated on a release of Part 7 claims.

[27] Although in law the plaintiff would not have been required to sign a release of Part 7 benefits as a term of accepting the offer, it appears from the positions of both counsel during oral argument and even from the subsequent written submissions that in the course of settlement negotiations, they both understood that a release would have been required. To resolve the dispute between counsel as to their respective understandings of whether the provision of a release would also have been a condition of the acceptance of the formal offer to settle would require counsel to provide additional information about their discussions and the settlement process. It might even require counsel to give evidence. This application for costs risks being complicated unproductively by such an examination, which would only add expense to the proceeding.

[28] Since I have found that the amount of future care costs is low, I will proceed on the basis that the issue of Part 7 benefits would not be conclusive either way in the assessment of whether or not the offer ought reasonably to have been accepted.

[29] ICBC says the plaintiff was unreasonable in rejecting the offer. She was obviously able to quantify her claim by the time the offer came in, as she submitted her own offer to settle for $185,000 the day before. ICBC then put in its offer, and also participated in mediation which the plaintiff instigated.

[30] Plaintiff's counsel says he had medical and other expert reports backing up his client's position, and to accept the offer would have meant ignoring all their evidence. Counsel for ICBC responds quite properly that a consideration of an offer does not mean that a party must ignore its own evidence; instead it requires an assessment of whether the offer is reasonable and this requires a realistic look at the whole case.

[31] A significant difference between the plaintiff's position at trial and the amount of the award is in the area of future care costs, and this is reflected in the disparity between the plaintiff's own offer and the result at trial. A trial judge is required to look into a crystal ball and assess future care costs for the tort claim based on the evidence adduced at trial, and then to look even further and assess future contractual Part 7 claims that might be made by the plaintiff insured against its insurer for the purpose of deductions from the tort award. This is an exercise fraught with uncertainty and potential unfairness, especially for a plaintiff like Ms. Lumanlan, whose future care costs are not clear and are contingent on whether and to what extent she develops arthritis, whether she moves into a house, whether she assumes care of her son (which she now deposes she is attempting to do), and what career she decides to pursue. She is young; her future plans are uncertain. Prior to the accident she had two good hands. Now she does not.

[32] As counsel for the plaintiff pointed out, this type of claim for future care, unlike one where no future care is required, or one where significant future care is required, is difficult to assess.

[33] The court in this tort action was circumscribed by the lack of evidence, and by its duty to be fair to both the plaintiff and the defendant, which prevents speculation unsupported by evidence. In terms of her relationship with her own insurer, however, within the Part 7 context, the plaintiff may well have to make claims in the future under her insurance contract as she matures and gains perspective on her limitations, especially if the court is shown, by the crystallization of events in the future, to have been unfairly limited by the lack of evidence at the tort trial.

[34] The result at trial was not dismissal of the action; Ms. Lumanlan obtained a not insignificant award. She suffered extensive damage to her hand. She was uncomplaining and not particularly adept at putting forth her evidence, and these limitations did not accrue to her advantage, but she did have a serious claim to advance.

[35] As well, an assessment of non-pecuniary damages, as every trial judge knows, is a difficult and somewhat subjective task, as hard as one tries to be consistent with other judgments. A jury verdict can, of course, be even more disparate when compared to assessments by judges. In my view, one should be cautious, with the advantage of hindsight, in equating having guessed wrongly with having been unreasonable in rejecting an offer, especially when the plaintiff receives a substantial award at trial.

*[36] In **Bailey v. Jang**, 2008 BCSC 1372, the plaintiff's entire claim was dismissed by a jury. Nevertheless, the trial judge held that he was unable to say she had been unreasonable in rejecting the offer. Rule 37B is worded in the affirmative. It is suggested that the court may consider "whether the offer … ought reasonably to have been accepted," not whether the plaintiff was unreasonable in rejecting it. Nevertheless, given the broad discretion now existing in the section, I am of the view that the important conclusion to be taken from that decision is that this consideration is not one to be done with "hindsight analysis."*

[37] The trial judge in that case held that dismissal of the claim was not determinative of the reasonableness of rejection of the offer. Conversely, however, in my view, the size of the award at trial may offer some assistance in assessing the reasonableness of the plaintiff's position at the time the offer was made. Here, the award was significant, although not as high as the offer.

[38] Bearing in mind the above considerations and the relationship between the offer and the eventual award at trial, I am unable to say in all these circumstances that the plaintiff, who did not have the benefit of hindsight, ought reasonably to have accepted the offer at the time it was made and prior to the commencement of the trial.

Financial circumstances

[39] ICBC submits that the relative financial circumstances of the parties should be at best a neutral factor. Although they defended the action, it is really the defendant whose finances are relevant. They will pursue their expenses against him.

[40] The plaintiff submits that ICBC was the party who conducted the litigation, and they did so because the defendant breached his insurance by driving dangerously and injuring the plaintiff.

[41] The fact that the defendant will have to pay ICBC back because he breached his contract through conduct which also resulted in the plaintiff's injury should not be used to her detriment. However, I agree with counsel for the Third Party that it is not reasonable to compare the plaintiff's financial circumstances to those of ICBC, even where ICBC has entered the action as a Third Party.

[42] The plaintiff deposes that she continues to make the salary she made at trial, that is $8.00 an hour, and she has moved out of her parents' house to live with a friend temporarily while she asserts custody/access rights to her son, who is now cared for by her mother.

[43] The defendant, 26, is presently unemployed but intends to look for work as a heavy machine operator, which has been his employment since he was 16, when he gets his licence back later in 2009.

[44] There is not a sufficient imbalance in the parties' relative financial circumstances to make this a significant factor in the present analysis.

Other factors

[45] The plaintiff has presented a draft bill of costs to show what a substantial penalty she should incur if forced to pay double costs to the defendant for steps taken after the offer to settle. It would indeed substantially deplete her award.

*[46] In **Bailey v. Jang,** supra, double costs were awarded to the defendant under the new rule, even though the judge held that the offer was not rejected unreasonably, on the basis that to fail to do so would ignore the deterrent effect of the rule. There, the defendants had made an offer to settle of $35,000 and the jury dismissed the plaintiff's claim entirely.*

[47] Obviously, in the case at bar, the plaintiff's claim was not dismissed. She received an award that is reasonably close to the offer, until reduced by contributory negligence. Under Rule 37(24)(b), which was in effect when the offer was presented, the defendants would have been entitled to double costs only if the action had been dismissed.

[48] ICBC argues that the plaintiff's failure to acknowledge any contributory negligence was a barrier to settlement. The plaintiff did indeed pursue that position at trial.

[49] Counsel for the plaintiff takes the position that the mistake regarding the requirement for a release, which he contends was mutual and which counsel for ICBC contends was not, is another factor to consider. It is

unfortunate that this dispute has arisen and remains unresolved, but as I stated earlier, the ultimate significance of future care claims is small.

Result on costs

[50] Whether or not the plaintiff was under the impression that she would have had to release future Part 7 benefits to accept the offer, it is apparent that she would have to establish entitlement to some $30,000 to $40,000 worth of Part 7 benefits to attain the amount of the offer, and she would, of course, have received taxable costs and disbursements. This is all without regard to her own legal costs, which obviously increased through the trial.

[51] Nevertheless, I have concluded that the plaintiff's decision not to accept the offer was reasonable at the time, and although the award at trial was less than the offer, it was still substantial.

[52] Although the use of hindsight is not appropriate in the consideration of the reasonableness of accepting/rejecting the offer, an overall analysis of all of the factors under Rule 37B must be done with the advantage of hindsight, also keeping in mind the court's unfettered discretion. From that perspective, the plaintiff would have been better off if she had accepted the offer. Her position on some aspects of the trial, such as contributory negligence, appears to have been a stumbling block to settlement.

[53] There should be some consequence in costs as a result, but in my view, it would be unfair and excessively penal to award double costs against the plaintiff, especially where these costs would not have been available under the rule in place when the offer was presented. Given the significant injury to the plaintiff, which was caused by the defendant's foolish and reckless behaviour, and the effect on the award of a further reduction for costs, even if not doubled, and taking into account all of the above considerations, in my view it would not be fair or just to require the plaintiff to pay ICBC's costs after the date of the offer.

[54] In the result, it is appropriate to give the plaintiff 75% of her costs up to the date of the offer and to deprive her of her costs thereafter. Each party will bear their own costs after the date of the offer.

This is the second ICBC Injury Claim that I am aware of that went to trial where ICBC beat their formal offer but were not awarded costs under Rule 37B. It seems that a middle of the road approach is being taken in some circumstances where the 'punishment' purpose of Rule 37B is being fulfilled by simply denying the Plaintiff costs. This may be a just result in cases where ICBC's offer is not much greater than the amount awarded at trial and requiring a plaintiff to pay costs would be prohibitive in relation to the judgement. Interestingly the court here seems to have considered the defendants 'foolish and reckless behaviour' in causing the collision as a factor in determining costs consequences.

The judgements applying Rule 37B to ICBC Injury Claims keep coming and I will keep posting these as they come to my attention.