

More On Out Of Court Statements And Their Use At Trial In ICBC Injury Claims

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Further to my two recent articles discussing this topic reasons for judgement were released today by the BC Supreme Court, Kelowna Registry, demonstrating yet again the powerful impact out of court statements can have in an ICBC claim.

In today's case ([Aymont v. Capp](#)) the Plaintiff sustained serious injuries in a 2004 BC motor vehicle collision. She was driving a Mazda Protege and was exiting a gas station parking lot. She intended on turning left. As she entered the roadway the Defendant approached from her left hand side. A 't-bone' type of collision occurred.

The Plaintiff testified at trial that when the Defendant's vehicle struck hers she was at a stop and her vehicle had not entered the roadway and was "two feet before the fog line". The Defendant disagreed and testified that as he approached the gas station the Plaintiff pulled her vehicle into his lane of travel leaving inadequate time to avoid the collision.

During trial the Plaintiff was confronted with various out of Court statements attributed to her where she discussed the collision. These included statements given to ICBC, a police officer and a chiropractor. These previous statements were summarized as follows by Madam Justice Gropper:

[9] *The day following the accident, May 15, 2004, Ms. Aymont went for treatment to her chiropractor's office, Dr. Susan Holroyd. She says that she felt dizzy and nauseous, disoriented and in a great deal of pain that morning.*

[10] *Dr. Holroyd produced her clinical records, which included a "motor vehicle accident history" form. Ms. Aymont says that she does not recall the form or filling it out. She cannot recall if it is her handwriting on the form or not. The handwritten notations (in italics) on the form state, in relation to the accident:*

State How Accident Happened in your own words.

I had stopped at the entrance of gas st. looked both ways saw no one and began onto road - was hit by a truck travelling very fast.

Where you stopped Yes/No?

No [circled]

Estimate your speed?

10 km/h

Brakes on Yes/No?

No [circled]...

[13] Cst. Rudy Andreucci telephoned Ms. Aymont the day following the accident and they arranged to meet on Sunday, May 16, 2004 at the RCMP Detachment in Westbank. Cst. Andreucci testified that the purpose of the meeting was to give Ms. Aymont a traffic violation ticket. Cst. Andreucci served a violation ticket on Ms. Aymont for a breach of s. 176(2) of the Motor Vehicle Act: emerging vehicle: failure to yield. He noted on the reverse side of the ticket what Ms. Aymont said to him:

04-5-16 V.T issued at office dri Nancy Aymont advised she just didn't see him. She knows better-than go on without being sure....

[15] On May 21, 2004, Ms. Aymont met with Mr. Bonner of the Insurance Corporation of British Columbia ("ICBC") at his office. Mr. Bonner is a bodily injury adjuster. He was the adjuster assigned to Ms. Aymont's file. Another adjuster was assigned to Mr. Capp's file. Mr. Bonner said that he asked questions and typed the answers into the ICBC note taking system on his computer. He prepared a sketch based on the information provided to him by Ms. Aymont. In the statement Mr. Bonner recorded Ms. Aymont stating:

I looked to my right first, and then the left and Bartley Road was vacant, and I thought to myself how often does that happen on a Friday afternoon. After looking right, then left, I looked right again, and that is the last thing I remember... If the other driver wasn't going so fast he probably could have stopped. My husband drove the road the next day. At the 50 km/h speed limit, and stopped without skidding before the driveway... I was knocked out and can't say how far I pulled forward from the exit onto Bartley Road before being hit.

[16] Ms. Aymont also provided a rough sketch showing where the vehicles were as she approached the exit.

[17] Ms. Aymont does not recall saying "I can't say how far I pulled out from the exit onto Bartley before being hit."

[18] Mr. Bonner produced a hard copy of the statement for Ms. Aymont to review. She thought that the second page statement was "all mixed up." Ms. Aymont says she made certain corrections to the statement in handwriting. The last sentence of the statement is "I have nothing to add to this statement, which is true to the best of my memory." Ms. Aymont signed the statement....

The Court ultimately rejected the Plaintiff's evidence and accepted the Defendant's. This verdict was largely reached based on the Plaintiff's prior statements. Madam Justice Gropper gave the following useful reasons demonstrating the damage that can be done with 'prior inconsistent statements':

[77] Mr. Capp's evidence that the Aymont vehicle was moving when he first observed it is consistent with the statements that Ms. Aymont made to her chiropractor. In the form that she completed, or directed Dr. Holroyd to complete, she says that she was not stopped and was moving at about 10 km/hour. In her statement to Cst. Andreucci she stated that she just did not see Mr. Capp's vehicle. She told Mr. Bonner that she had pulled forward from the exit onto Bartley Road before being hit. All of these statements are consistent with the circumstances that Mr. Capp describes.

[78] *I find as a fact that Ms. Aymont was not stopped “well before the fog line”. She was moving from the exit into the southbound lane of travel on Bartley Road. She was going slowly, likely less than 10 km/hour. Her foot was not on the brake. She was not looking in the direction of the oncoming traffic, but was engaged in a conversation with her son Joel who was sitting in the passenger seat, and had turned her face toward him to talk about his drink.*

[79] *Ms. Aymont did not yield the right of way to Mr. Capp who was the dominant driver. ...*

[82] *In all of the circumstances, I find the plaintiff is 100% at fault for this accident.*

This case is also worth reviewing for the Court’s discussion of the duties of expert witnesses. Both the Plaintiff and the Defendant retained experts to give accident reconstruction evidence. The Plaintiff’s expert was soundly criticized for giving evidence as an “advocate” instead of a neutral witness. The criticism can be found at paragraphs 66-73.