Hearsay Evidence: BC Injury Trials And Missing/Deceased Witnesses

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Hearsay evidence is an out of Court statement introduced at trial for the truth of its contents. In British Columbia hearsay evidence is admissible in certain circumstances. BC Courts apply a '*principled exception*' to the general rule against hearsay evidence in circumstances where there is sufficient '*necessity and reliability*'.

What happens if a key witness dies before a personal injury claim in BC heads to trial? Can previously recorded evidence from that witness be introduced under this '*principled exception*'? Reasons for judgement were published this week on the BC Supreme Court website dealing with this issue.

In this week's case (Simon v. Portsmith) the Plaintiff suffered very serious injuries when he was struck by a vehicle as he was walking along a highway in Salmon Arm, British Columbia.

A key question at trial was weather the owner of the vehicle consented to the driver operating the car.
Another important issue was where the Defendant driver lived at the time of the accident. The owner of the vehicle could have been '*vicariously liable*' for the driver's actions depending on the answers to these questions.

A witness by the name of Mr. Stushnov was expected to give evidence on where the alleged driver was living at the time of the crash. Prior to trial Mr. Stushnov swore an affidavit setting out his evidence on this point. The witness died unexpectedly prior to trial. The Defendant tried to introduce the affidavit as evidence. The Plaintiff objected. Mr. Justice Boyce let the evidence in providing the following useful analysis:

[13] In the case at bar, the plaintiff concedes that the evidence is necessary. Mr. Stushnov is no longer available to testify. The issue is whether the evidence meets the threshold reliability test.

[14] The evidence was taken under oath before a lawyer. Mr. Stushnov was not involved with the events giving rise to this claim in any way. There is no suggestion that he had any personal relationship with Mr. Portsmith other than by providing him a place to live for a period of time. There is no suggestion of any reason that he might have to not tell the truth. He had no interest in the outcome of this proceeding. He was an independent witness.

[15] It is of course true that the plaintiff would now have no way to test Mr. Stushnov's credibility through cross-examination. However, as counsel for the plaintiff on this motion frankly stated, when the matter was before the court on the Rule 18A application, the credibility of Mr. Stushnov was not in issue and was not raised. What was in issue was the credibility of Mrs. Bostock.

[16] Further, as noted by counsel for the defendant, plaintiff's counsel has known since 2005 what evidence Mr. Stushnov was expected to give. They chose not to interview the witness to test his credibility.

[17] This evidence is clearly important to the defence. In my view, despite the fact that the plaintiff does not have the ability to cross-examine the deponent, which is something that is often the case when resort has to be made to hearsay evidence, the circumstances surrounding the making of the statement provide sufficient safeguards of reliability to justify its admissibility. The affidavit will therefore be received in evidence.