

## “Prior Consistent Statements” And ICBC Unidentified Motorist Claims

November 12th, 2010



Generally speaking a person is not allowed to call evidence of ‘*prior consistent statements*’ at trial. The reason is because this offends the rule against hearsay and is an improper attempt to bolster witness credibility. There is a powerful exception to this general rule, however, and this relates to allegations that a witness is fabricating their court-room evidence. This exception was demonstrated in reasons for judgement released today by the BC Supreme Court, New Westminster Registry, in a personal injury lawsuit arising from a hit and run accident.

As I’ve previously written, injury victims have the right to sue ICBC for damages when involved in hit and run accidents in BC. These are commonly referred to as [section 24 claims](#) because injury victims involved in unidentified motorist claims gain the right to sue ICBC directly through section 24 of the *Insurance (Vehicle) Act*.

ICBC often defends section 24 claims by denying the existence of the unidentified motorist and blaming the Plaintiff for their own injuries. When this happens the ‘*recent fabrication*’ exception is triggered in effect opening the floodgates for corroborating evidence at trial.

In today’s case ([Jennings v. Doe](#)) the Plaintiff was injured when a tractor trailer cut him off and forced his vehicle off the road. The Driver of the tractor-trailer left the scene and the Plaintiff could not identify him. The Plaintiff sued ICBC directly for his injuries. ICBC defended the claim denying the existence of the tractor trailer. The Plaintiff attempted to call evidence of prior consistent statements corroborating his courtroom evidence. ICBC objected arguing this was not permissible. Madam Justice Baker disagreed and allowed the evidence in. In doing so the Court gave the following very useful reasons:

[52] *Counsel for the defendants objected to the admission of the testimony of Mr. Simon and Mr. Jennings, Sr., and various documents indicating that Mr. Jennings did, at the earliest opportunity, and consistently since that time, claim that the accident had been caused by the actions of the driver of a tractor-trailer unit. Counsel submitted, correctly, that previous “consistent” statements of a witness are normally not admissible for the truth of their contents, or to buttress the credibility of a trial witness’ testimony. The defendants say they are not asserting a “recent” fabrication, although by implication they are asserting that Mr. Jennings has fabricated a story about how the accident happened.*

[53] *In my view, earlier decisions of this court establish that in circumstances such as these, the previous out-of-court statements are admissible and relevant not for proof of the truth of the out-of-court statements but to rebut any inference that a claimant is lying because he failed to assert his present version of events at the first and any subsequent opportunity when it would be reasonable to expect him to do so, or had made inconsistent claims in the past about the circumstances of the accident.*

[54] *In Vanderbyl v. Insurance Corporation of British Columbia, (1993) 79 B.C.L.R. (2d) (S.C.), at paras. 37 and 38, Mr. Justice Trainor, an experienced trial judge, set out a list of elements to be considered in assessing the credibility of a plaintiff in cases such as these. Among the elements identified by Justice Trainor were the following:*

1. *Whether the plaintiff reported the existence of the unidentified vehicle as soon as reasonably possible to the police or other persons in authority and to I.C.B.C.*

2. *Whether the description of the unidentified motor vehicle given by the plaintiff was as specific as might reasonably be expected from the particular plaintiff in the circumstances.*

3. *Whether the plaintiff's testimony at trial is consistent with statements given to the police, doctors or medical attendants, family members, associated or other witnesses or to I.C.B.C.*

4. *Whether the plaintiff has called witnesses to testify to whom statements were made or who might testify about the plaintiff's actions after the incident.*

...

8. *Whether the plaintiff's actions following the accident are consistent with those one might reasonably expect of a person in similar circumstances.*

[55] *In this case, Mr. Jennings reported the existence of the unidentified vehicle as soon as reasonably possible to the police and to the Insurer. Mr. Jennings told drivers who stopped at the scene and the ambulance attendant – Mr. Simon – that a tractor-trailer unit had been involved and he attempted to make a report to police at the scene, but was prevented from doing so by the ambulance personnel who were concerned about his physical injuries. Mr. Jennings Sr. reported the involvement of a second vehicle to the Boston Bar RCMP Detachment on the day of the accident. Mr. Jennings Sr. reported the circumstances to the dial-a-claim adjuster by telephone and Mr. Jennings made a statement in person and in writing to an adjuster a few days after the accident. The evidence of Mr. Simon about Mr. Jennings' anger and his physical condition when assessed at the accident scene is consistent with what one might reasonably expect of a person in similar circumstances. I believe Mr. Jennings, and I accept his testimony about how the accident happened.*

When advancing a hit and run ICBC claim it is good practice to review hospital, ambulance, police and other records to look for 'prior consistent statements' in the event ICBC alleges recent fabrication at trial.