

Cellphone recording after a car crash could be useful in court

IAN MULGREW
VANCOUVER SUN



Next time you're in a fender-bender, try using your cellphone not only to get a photo of the damage, but also to record the other driver's lame excuses.

It will be duelling mobiles after B.C. Supreme Court Justice William Ehrcke's fascinating decision in a civil suit over an

automobile accident.

In the personal injury trial, plaintiff Jodi Evelyn Jones sought to introduce into evidence a conversation she had at the scene with the defendant, Chun Wah Ma.

Immediately after the accident, Jones got out of her vehicle, approached the driver of the other vehicle, Ma, and asked if she was okay.

Ma nodded yes: She said she was sorry, that she was lost, that she had wanted to make a U-turn, that she had caused the accident, and that it was her fault.

Jones had a cellphone with

her, and rather than write the statement down, she asked Ma if it was okay if she recorded their conversation on the cellphone.

Ma agreed and Jones then pressed the record button.

In that short conversation Ma repeated what she had earlier said.

At trial, however, she objected to the recording being used against her, saying it should be excluded as hearsay.

Justice Ehrcke conducted a voir dire — a trial within a trial — to determine its admissibility.

Ma testified that she generally

understands English, but sometimes has difficulty when people speak quickly.

She said she hit her head on the windshield when the accident occurred.

She said she remembered the conversation and that she understood the plaintiff wanted to make an audio recording. She said she did not understand the recording would be used in a lawsuit and that it would be different if she had known.

She did not know why she said she was lost, because in fact she was not lost, but was looking for a place to park.

"The fact that the defendant did not understand at the time of the conversation that what she said might be used in litigation is not a basis for excluding the evidence," Justice Ehrcke concluded.

"Unlike a criminal case, there is no issue here about voluntariness of a statement to a person in authority and no issue about compliance with the requirements of the Canadian Charter of Rights and Freedoms[Jones] was not a person in authority and ... she was not a state agent, as those terms are used in the context of

confessions in criminal cases."

The evidence was admissible, he said:

"[Ma's] concern that only part of the conversation was recorded, that [she] had hurt her head, that [she] did not know the use to which the recording would be put, and that the statement might therefore not be reliable, are matters that can be explored in cross-examination and may go to the weight to be attached to this evidence."

So drivers, keep that cellphone handy!

imulgrew@vancouversun.com

2010 BCSC 866 Jones v. Ma

<http://www.courts.gov.bc.ca/jdb-txt/SC/10/08/2010BCSC0866.htm>

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: **Jones v. Ma,**
2010 BCSC 866

Date: 20100531
Docket: M090334
Registry: Vancouver

Between:

Jodi Evelyn Jones

Plaintiff

And

Chun Wah Ma and Kin Shu Chau

Defendants

Before: The Honourable Mr. Justice Ehrcke

Oral Ruling on *Voir Dire*

Counsel for the Plaintiff:

D.J. Renaud
A. Jaffer-Jeraj

Counsel for the Defendants:

D. McWhinnie

Place and Date of Trial/Hearing:

Vancouver, B.C.
May 31, 2010

Place and Date of Judgment:

Vancouver, B.C.
May 31, 2010

[1] **THE COURT:** In this personal injury trial, the plaintiff seeks to introduce into evidence a conversation she had with the defendant, Chun Wah Ma, at the scene of the motor vehicle accident. Immediately after the accident occurred, the plaintiff got out of her vehicle, approached the defendant driver of the other vehicle, and asked her if she was okay. She nodded yes. The defendant Ma said she was sorry, that she was lost, that she had wanted to make a U-turn, that she had caused the accident, and that it was her fault.

[2] The plaintiff had a cell phone with her, and rather than write the statement down, she asked the defendant if it was okay if she recorded their conversation on the cell phone. The defendant said yes. The plaintiff then pressed the record button and had a short conversation, the recording of which is now tendered in evidence. In that conversation the defendant Ma repeated what she had earlier said, namely, that she was lost, that she had wanted to make a U-turn, that she caused the accident, and that it was her fault.

[3] A *voir dire* was held to determine the admissibility of this evidence, as the defendant objects that it is inadmissible hearsay. On the *voir dire*, the plaintiff agreed in cross-examination that she did not tell Ms. Ma that their conversation would be used in a lawsuit. She also agreed that Ms. Ma had a red spot on her forehead, which looked like a place where she hit her head in the accident.

[4] Ms. Ma testified on the *voir dire* and said that she generally understands English, but sometimes has difficulty when people speak quickly. She said she hit her head on the windshield when the accident occurred. She said she remembered the conversation and that she understood the plaintiff wanted to make an audio recording. She said she did not understand the recording would be used in a lawsuit and that it would be different if she had known. She did not know why she said she was lost, because in fact she was not lost, but was looking for a place to park.

[5] Counsel for the defendant submits that the conversation is hearsay and should not be admitted in evidence.

[6] Counsel for the plaintiff submits that the statements of the defendant Ma are admissions by a party, and are therefore either not hearsay or are admissible as a traditional common law exception to the hearsay rule.

[7] In response, counsel for the defendant submits that all the traditional exceptions to the hearsay rule are now subject to

a reliability/necessity analysis under the principled approach to hearsay set out by the Supreme Court of Canada in *R. v. Starr*, [2000] 2 S.C.R. 144. Counsel for the defendant relies on the decision of this court in *Pasko v. Pasko*, 2002 BCSC 435.

[8] With respect, I do not find the *Pasko* decision helpful on this point, as it dealt with a very different question of the admissibility of a statement made by a person who was deceased at the time of trial. It did not deal with the issue before me, namely the admissibility of an out-of-court admission by a party to a lawsuit.

[9] That issue was specifically addressed by the Ontario Court of Appeal in *R. v. Foreman* (2002), 62 O.R. (3d) 204 (C.A.). In that case Doherty J.A., delivering the judgment of the Court, said at pages 215 to 216:

Admissions, which in the broad sense refer to any statement made by a litigant and tendered as evidence at trial by the opposing party, are admitted without any necessity/reliability analysis. As Sopinka J. explained in *R. v. Evans* [1993] 3 S.C.R. 653, at page 664:

The rationale for admitting admissions has a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at all. The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements. As stated by Morgan, "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of oath" (Morgan, "Basic Problems of Evidence" (1963), pp. 265-6, quoted in McCormick on Evidence, *ibid.*, p. 140). The rule is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases. [Emphasis in original].

[10] I agree with that statement of the law. It was adopted by our Court of Appeal in *R. v. Terrico*, 2005 BCCA 361. Admissions made by one party to litigation are generally admissible if tendered by the opposing party, without resort to any necessity/reliability analysis.

[11] The evidence tendered by the plaintiff in this case of her conversation with the defendant Ma at the scene of the accident is admissible in evidence.

[12] The cell phone recording which was marked as Exhibit A on the *voir dire* and the transcript of the recording which was marked as Exhibit B may now both be marked as exhibits on the trial proper.

[13] The fact that the defendant did not understand at the time of the conversation that what she said might be used in litigation is not a basis for excluding the evidence. This is a civil case. Unlike a criminal case, there is no issue here about voluntariness of a statement to a person in authority and no issue about compliance with the requirements of the *Canadian Charter of Rights and Freedoms*. Counsel for the defendant agrees that the plaintiff was not a person in authority and that she was not a state agent, as those terms are used in the context of confessions in criminal cases.

[14] The defendant's concern that only part of the conversation was recorded, that the defendant had hurt her head, that the defendant did not know the use to which the recording would be put, and that the statement might therefore not be reliable, are matters that can be explored in cross-examination and may go to the weight to be attached to this evidence. They do not form a basis for the exclusion of the evidence.

The Honourable Mr. Justice W. F. Ehrcke