

# EXAMINATION FOR DISCOVERY INFORMATION GUIDE



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# EXAMINATION FOR DISCOVERY

## INFORMATION GUIDE

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## WHAT IS IT?

An examination for discovery (EFD) is a time set aside to allow the insurance company (through their lawyer) to ask you questions so that they can learn about your claim.

You will not have to argue or justify your claim. You will simply be required to give factual answers to questions posed to you.

And there are no tactics! The very best formula for success at an EFD is to:

1. Listen carefully to each question;
2. Take as much time as you need to think about what would be an honest and fair answer; and
3. Give that honest and fair answer.

I will refer to that formula for success as the “Golden Rules”, which will be discussed in detail later in this document.

## WHY IS IT NECESSARY?

### Can't they learn about my injuries from the medical / clinical records?

Clinical records and other medical documents tell only part of the story.

They provide only small windows of information, often very brief descriptions of whatever symptom was the focus during a particular appointment.

There are often huge time gaps as well.

Here are some reasons for that:

1. You don't go to your doctor or therapist every time you experience a symptom. You attend as directed to obtain and follow through with care recommendations.
2. And care regularly slows or stops once a condition reaches a plateau. This can leave huge time gaps in your clinical material;
3. Many doctor clinics restrict you from consulting about more than one issue at a time. If seeing a doctor about a cold or flu, you are often restricted from also consulting about injuries. If consulting about one injury symptom, you might also be restricted from consulting about others;
4. Regardless of clinic restrictions, we rarely tell our doctors and therapists everything that is going on for us. Typically, we bring up whatever issue is of particular concern at the time;

5. Doctors and therapists do not transcribe what might be a several minute discussion. You might provide a very detailed description of your symptoms, but only a few words will be noted;
6. The impact that your symptoms have on your day to day life is a very important factor in your claim, but this is something that you are unlikely to bring up during a medical appointment unless specifically asked; and
7. Miscommunications can occur, resulting in errors in clinical notations and reports.

### **Can't they learn about impacts on my income, by reviewing employment records and income tax returns?**

Income tax returns, employment files and payroll printouts tell only part of the story about how your crash injury related symptoms might have impacted on your work.

Here are some reasons for that:

1. Payroll printouts rarely differentiate between sick time taken for colds and flus versus work absence due to crash injury symptoms and related medical appointments;
2. Employment files and payroll printouts don't include information about additional income earning opportunities that you might have declined or not pursued because of injuries, such as:
  - a. Offers of overtime;
  - b. Lateral or promotional job opportunities with your employer, with increased hours or pay; and
  - c. Higher paying job opportunities elsewhere, or supplemental earning opportunities that your injuries might have gotten in the way of;
3. Employment related documents will show earning trends, but with no explanation:
  - a. Perfect employment attendance after a crash might have been a struggle that is not maintainable;
  - b. Very low earnings before a crash might be because of self-employment and:
    - i. the ability to write off business related personal expenses, and/or
    - ii. the use of income splitting; and
  - c. No drop in earnings after a crash won't tell the story of losses arising because crash injuries got in the way of growth; and
  - d. There might have been unreported or under-reported income.

### **How else will they learn about all the other facts that form the foundation of your claim?**

Documentation cannot come close to telling your complete story about:

1. How your life had been leading up to the crash;
2. The many ways your life has changed; and
3. How your life is likely to be impacted into your future.

We are pursuing full and fair financial compensation for all of those changes. It is fair and reasonable that the insurance company have the opportunity to learn everything they need to learn in order to independently assess your claim.

The examination for discovery is that opportunity.

## **WHAT DOES IT LOOK LIKE?**

The EFD is held in a plain office. There will be a large table and some chairs.

A Court Reporter will sit at the end of the table with a neat machine that allows for word for word transcription of what everyone says. If you are interested, ask how the machine works during a break.

The label “Court Reporter” might sound like there’s some sort of a court function. In fact, Court Reporters spend very, very little time in courtrooms. Their only function at the EFD is to officially get your commitment to tell the truth, and then to record the words spoken.

You will be seated at the end of the table closest to the Court Reporter so that he or she will best be able to hear and record what you say.

A lawyer from Hergott Law (typically one of the associate lawyers) will be seated immediately beside you. He or she will be armed with a laptop computer taking memo notes.

A lawyer representing the insurance company will be seated on the other side of the table. He or she is likely to have several binders of your medical, employment and other documents to refer you to.

You will not need to bring any documentation with you.

## **WHAT DO I WEAR?**

There is no dress code. And the transcript (word for word recording of what people say) will not describe your outfit. You are permitted to wear whatever you like.

We recommend that you dress respectfully and comfortably.

Why respectfully? Your examination for discovery is the first time the insurance company’s lawyer will meet you. It will improve our negotiating position if that lawyer likes you and reports back to the insurance company that a judge or jury would like you. Dressing in pyjamas, beach wear and other ultra-casual clothing might not help that!

Why comfortably? We want you as comfortable as possible. Wearing a suit if you never wear a suit will feel awkward and uncomfortable, and that might distract you from listening carefully to the questions posed, thinking about what is an honest and fair answer, and giving that response. It will also make you appear disingenuous.

The Court Reporter is likely to wear typical office attire. The lawyers will dress anywhere from typical office attire up to a suit and tie.

## WHAT IS THE SCHEDULE?

Examinations for discovery usually begin at 10:00 a.m., but there are exceptions to accommodate schedules so please follow whatever timing you are given.

It would be lovely if you planned to arrive with perhaps 10 minutes to spare. That will ensure you are not late and give a couple minutes to touch base briefly with the Hergott Law lawyer attending with you.

Will the world end if something unexpected occurs and you are late? No. The EFD will not proceed without you! We ask that you please give our office a call with a heads up if something unexpected delays you. If you are more than 30 minutes late we will risk the event being rescheduled at your expense, but if we keep the other lawyer informed that timing might be extended.

An EFD is typically broken up into blocks of time that are approximately one hour and 15 minutes long:

- Two sessions in the morning, with a 5-10 minute break in between;
- A lunch break - typically an hour; and
- Another two sessions in the afternoon, with a 5-10 minute break in between, ending no later than 4:00 p.m.

Timing is very flexible, though:

1. If anyone needs an extra break, we take it;
2. The overall length of the EFD can vary depending on the insurance company lawyer conducting it. Some EFDs can be completed before the lunch break, and while it's rare, some go right up until 4:00 p.m., to be continued at a later date;
3. We sometimes will go perhaps a ½ hour past the typical lunch break if the lawyer conducting the EFD thinks it can be wrapped up in that time; and
4. Sometimes, for various reasons, an EFD might end early, a continuation to be scheduled at a later date.

## TONE OF THE EVENT

It will depend on the personalities and relationships.

Just like everyone else in the world, ICBC defence lawyers and court reporters come in all shapes, sizes and personalities. Some are charismatic, chit/chatty and friendly. Some are “all business”. Some are dry and unfriendly.

Personal injury law is a narrow practice area and examinations for discovery are regular, every day, occurrences for the lawyers and court reporters. Hergott Law lawyers are likely attending one or two examinations for discovery per week. You can expect the lawyers and court reporters to be familiar with each other.

Often, that familiarity will result in friendly banter. Sometimes the tone can feel more like a friendly visit than a serious, legal event.

Please do not take a friendly tone as an indication that we are anything less than your fierce and passionate advocates. Positive, friendly relationships with legal “opponents” is common in the legal community, and help when it comes to negotiating settlements.

And please remember that while “on the record”, you are under oath and your answers are being transcribed, regardless of the tone. Always keep the Golden Rules in mind (listen, think, and provide an honest and fair answer).

## **WHAT IF I HAVE TO TRAVEL TO ATTEND?**

We work with a travel agent, Flight Centre, to make travel/accommodations arrangements with those who have to travel to attend their examination for discovery.

If you have to travel, we will put the matter of arranging your travel/accommodations into Flight Centre’s hands. From there, it is your responsibility to ensure arrangements are made.

We pay for your reasonable travel/accommodations expenses “up front” as a disbursement, and claim reimbursement from the defending insurance company as “costs”.

Our contract with Flight Centre includes emergency assistance if there are unforeseen travel complications such as delayed / canceled flights. Ensure you avail yourself of that assistance as may be necessary.

## **MIGHT I BE ASKED IRRELEVANT QUESTIONS?**

It is unlikely that the lawyer representing the insurance company will waste their time asking irrelevant questions.

The more junior the lawyer, though, the more likely they are to follow a standard list of questions because they don’t want to miss anything. To give you an idea about how broad the questions might be, I am attaching an example of such a list.

Here are some examples of types of questions that might seem irrelevant to you, but are likely to be asked:



1. The layout and square footage of your home, and (if applicable) your yard. How might that be relevant? This information helps inform about the scope of housework and yard duties;
2. Who you live with / have lived with, your neighbours, who you hang out with, co-workers and family members. Anyone you have spent time with, or have talked to about your injuries, is a potential “witness” to how your injuries might or might not have been impacting on you;
3. Almost everyone is asked about their height and weight, and whether or not there were weight changes after the injuries, and why. Weight changes are often blamed on an injury-caused reduction in activity.

Please don't let yourself get distracted by thoughts of “How could that be relevant?”. Please simply listen carefully to each question, think about what would be an honest and forthright answer, and give that answer.

## ARE THERE ANY RULES?

Yes, there are some rules. But you don't have to remember them. And you won't fail if you break them!

### No Legal Advice

The Hergott Law lawyer supervising your EFD is not permitted to advise / coach you from the time the event starts through to the very end.

But if ongoing advice and coaching were permitted, we would simply be reinforcing the Golden Rules.

Why this rule? If you could consult with your lawyer about every question posed, EFDs would take weeks! And the answers would be crafted by lawyers - not being honest and fair answers given by you.

Following long established protocols, the supervising lawyer from Hergott Law will avoid circumstances where a confidential discussion could take place, i.e. you will not spend time together during the lunch or other breaks.

### Take Turns

Normal, polite conversations involve all sorts of overlapping discussion.

It is unnatural as heck to wait until the other person has completely stopped talking before responding, which is how it works on a walkie-talkie.

Unfortunately, this unnatural way of communicating is required during an EFD. Why?

1. The “product” of an EFD is a transcript. Overlapping discussion cannot be transcribed; and
2. Even if it could be transcribed, the Court Reporter is incapable of recording two people talking at the same time.

The practical result of overlapping discussion is that the Court Reporter will choose which person's words to record, which can result in a misleading transcription. We don't want that to occur.

You will avoid jumping in before the insurance company's lawyer finishes asking the question by avoiding falling into a "conversation" with the lawyer, and following the Golden Rules.

But it's bound to happen at some point during the EFD that you jump in to respond. That's perfectly ok. One of the lawyers will simply remind you about taking turns. If necessary, the question will be re-asked so that you can give your response in a way that will allow for a clear transcript.

What if it happens again and again and again? No worries. It will just take a lot longer to complete the EFD.

The only concern will be that you obviously will not be taking the time to think about your answers before giving them.

### Use Words

A normal conversation includes all sorts of communication that goes beyond the actual words spoken. Here are some examples:

1. Pointing or gesturing;
2. Nodding or shaking the head;
3. Utterances like "Uh huh";
4. Tone of voice;
5. Pauses and pace of speaking;
6. Facial expression.

None of that is included in the transcript, which result in transcribed answers being incomplete (as with a gesture, utterance or a nod) or misleading.

Any obvious non-verbal communication will be put into words. You will either be prompted to do so, or one of the lawyers will do so. For example:

1. If you point to the left side of your neck when describing your neck symptoms, one of the lawyers might say "For the record, the witness is pointing to the left side of her neck"; or
2. If you nod your head, the insurance company lawyer will prompt you with something like: "Please, I need you to say yes if that is what your nod is intending to communicate".

What if you use non-verbal communication again and again and again? No worries on this front, either. It will just take a longer to complete the EFD.

The only concern will be the extent to which your bare words might be misleading without the non-verbal communication elements. This will best be avoided if you follow our golden EFD rules of taking the time to listen to each question, think about what would be an honest and fair response, and then giving that response.

## **WHAT IS THE ROLE OF MY SUPERVISING LAWYER FROM HERGOTT LAW?**

Examinations for Discovery are typically supervised by an associate lawyer who has familiarized him/herself with your case.

It is typically the supervising lawyer who meets with you to ensure you are prepared for the event.

During the actual examination for discovery, the supervising lawyer will:

1. Keep memo notes of your evidence;
2. Watch out for your comfort, i.e. ensuring water is available on the table and that breaks are taken as appropriate;
3. Police the questioning process by objecting to improper questions (which is rarely necessary); and
4. Ensuring your evidence is reflected in the transcript by reminding you about the rules of taking turns and giving verbal responses, as might be necessary.

Please remember that private discussions with the supervising lawyer are not permitted during the course of the examination for discovery.

And please avoid turning to the supervising lawyer to help you remember things! If appropriate, the supervising lawyer might jump in with a name or other detail you might be having difficulty remembering, but it would be very inappropriate for you to be turning to him or her for help or approval. It is ok, very ok, for you not to remember specific names, dates, or other details.

## **BE AS COMFORTABLE AS POSSIBLE**

The EFD is not about chaining you to a chair, cranking up the heat, shining a bright light in your eyes and torturing you into “breaking”. We want you as comfortable as you can be, so that you can concentrate on our golden rules of listening to each question posed, thinking about what an honest and fair response would be and then giving that response.

Here are some ways that you might maximize your comfort level:

1. Reduce stress by ensuring that you ask any questions you might have about the process that are not answered by this memo or during your preparation meeting;
2. Dress comfortably, as noted earlier in this memo;

3. Take whatever pain medications you would normally take, and come armed with whatever you might need to supplement that;
4. Bring a beverage of your choice, in whatever sort of drinking bottle / mug you wish. If you do not have your own beverage, there will be water (and often coffee / other beverages) available;
5. If you need to take a break outside of the regular breaks, simply alert the supervising lawyer and a break will be taken; and
6. You are not required to maintain a sustained, sitting posture. Feel free to stand, sit, or take whatever posture is most comfortable. Also feel free to stretch as that might ease your symptoms. Of course, it would hurt your credibility if you “put on a show”.

## **GOLDEN RULES FOR HOW TO ANSWER QUESTIONS**

The golden rule is to give forthright and honest answers to the questions posed.

It can be helpful to separate that one, basic, rule into three steps:

### **Listen to the question**

Well, of course! How do you know what the question is unless you listen to it? If you think about this as a separate step:

1. You will naturally avoid jumping in with an answer before the question is fully posed;
2. You will listen to the actual words used, rather than being distracted by non-verbal communication that might include sarcasm or an expectant facial expression; and
3. You will consider the particular question posed rather than being distracted by what might still be on your mind from other questions.

### **Think about what would be an honest and forthright answer to that question**

Once again, of course! How else do you answer a question unless you think? If you think about this as a separate step:

1. You will avoid jumping in with a reactionary answer that might come from a place of defensiveness;
2. You will hopefully be reminded that it is perfectly reasonable to take time to think before responding to questions related to circumstances, conditions and events occurring one, two, three or more years ago; and
3. You will hopefully be reminded of the golden rule of forthright and honest answers.

## Give that answer

Keeping this as a separate step will encourage you to complete the thinking process before giving your answer!

## AVOID THESE DISTRACTIONS

Just like cell phone use and daydreaming can distract us from driving, these unhelpful thoughts can distract us from giving honest and forthright answers at an examination for discovery:

### How might this help, or hurt, my case?

There will be facts that are helpful to your case, and those that are unhelpful.

Events leading to those facts have already occurred. We cannot turn back time to eliminate the unhelpful facts nor to add to the helpful ones.

And we certainly cannot change history with answers given during an examination for discovery.

If you are thinking about how an answer might help, or hurt, your case, you will have a tendency to minimize or avoid the unhelpful facts and exaggerate the helpful ones, thereby distracting you from the golden rule and hurting your credibility.

### Common examples:

1. Failing to fully disclose all post-crash income that had not been reported to the Canada Revenue Agency. It is one thing to under-report to CRA, which is common (though illegal) in our society. Doing so during an examination for discovery will destroy your credibility and kill your case;
2. Exaggerating pre-crash activity levels:
  - a. There is a tendency to list all the various recreational activities that we no longer participate in after a crash, without thinking about the fact that the last time we actually participated in some of those activities was years before the crash;
  - b. When asked about particular activities that we indeed had participated in to some extent leading up to the crash, there is a tendency to over-estimate the level of participation, which can lead to nonsense estimations of spending more hours than there are in a day participating in golf, hiking, bicycle riding, tennis, etc., etc.;
3. Minimizing post-crash function. There is a tendency to give examples of limitations that have not been tested, such as saying that you're not yet been able to return to golf, skiing, or other activities that you might not have attempted to return to;
4. Giving crash injury related explanations for decisions and occurrences where there were other, perhaps even more prominent, factors. An example might be pointing to ongoing symptoms as the reason for early retirement without sharing other factors like achieving full pensionability, lifestyle choices and a horrible relationship with your employer.

## How might this make me look?

There will also be facts that are helpful to your credibility, and those that are unhelpful.

Just like thinking about facts potentially helping or hurting your case can distract you, thinking about how an answer might help, or hurt, your credibility might also distract you from the golden rule.

### Common examples:

1. Failing to admit to tax avoidance. You are likely to be asked whether or not you have always reported all your income to the Canada Revenue Agency. Lying to the CRA is illegal and impacts negatively on your credibility, but it's common in our society and is not remotely as destructive to your credibility as if you lie about that during your examination for discovery;
2. Failing to admit that a resume contains less than 100% forthright information. Again, it's common in our society to sugar coat a resume, and admitting to doing that is not remotely as destructive to your credibility as if you lie about that during your examination for discovery;
3. Exaggerating your level of participation with household chores and yard work. We like to think that we participate more than we actually do and don't want to be disclosed as having been less of a contributor to the household.

By giving honest and forthright answers to questions posed during your examination for discovery, you will not only avoid further damage to your credibility, but you can actually enhance it.

## How do I make my answer as short as possible?

The more words you speak during your examination for discovery, the longer the transcript the defending insurance company has to work with to try to expose inconsistencies.

That can lead to an attempt to use "yes" or "no" answers, or otherwise to give the shortest answers you can.

There is no need to keep talking after you have given an honest and forthright answer, and we recommend that you stop talking after doing so. But adding length to the transcript, with honest and forthright information, will do nothing to hurt your case. Cutting your answer short in a way that will interfere with giving an honest and forthright answer will.

## I'm angry!

You might find yourself starting to feel defensive, pissed off, or angry.

Those types of feelings can lead to giving answers in a reactionary way, without careful thought.

Please be aware that those types of feeling might occur and be cautious to ensure they do not interfere with the Golden Rules.

You might need to force yourself to take extra time to think about the question and what an honest and fair answer might be. Perhaps pause to take a sip of water if you find yourself wanting to climb across the table and throttle the ICBC defence lawyer! If necessary, ask to take a break so that you can step out of the room, allow those feelings to pass, and refocus yourself.

## HOW DO I PREPARE FOR MY EXAMINATION FOR DISCOVERY?

Your credibility will be tested by comparing the story you tell at your examination for discovery with the parts of your story that are told:

1. In the medical records;
2. In your employment records and income tax returns;
3. In photos and videos (from home albums or social media);
4. By others (witnesses); and
5. In various ways in other types of documents.

You will best be able to avoid contradictions by refreshing your memory and being prepared to tell your complete story.

Your memory can be refreshed by:

1. Reviewing the medical, employment records, photographs and other documents. We will be arming you with all of that material in advance of your examination for discovery;
2. Reviewing whatever journaling you have done along the way; and
3. Reviewing whatever memoing that we have done during your Comprehensive Memo Project and update consultations. Note, though, that this memoing was based on what you told us before having the opportunity to refresh your memory from the medical and other documents. The memoing of “at the time” information is reliable. The memoing of historical information might well be inaccurate.

The goal of reviewing the documentation is to refresh your memory, **not to memorize**. It is of no value at all to be able to recite names, dates and other precise information. It is entirely sufficient to simply refresh your memory.

## HOW CAN MY ANSWERS IMPACT MY CASE?

### Credibility is everything

Credibility is everything in a personal injury case because so much of your story can come only from you.

Medical and employment records, photographs/videos and witnesses can tell only part of your story. The only person who can tell your complete story, filling in the massive blanks, is you.

If you have a high level of credibility, i.e. if what you say is reliable and can be counted on to be true, then we can use the complete story you tell to get you compensated for all of your harms and losses.

If what you say is unreliable and cannot be counted on to be true, we lose the ability to fill in the massive blanks with what you have to say. Those massive blanks have to be filled in somehow and we run the risk that they will be filled in ways that hurt your case.

**Example:**

Let's pretend that one of the symptoms you have suffered since the crash is headaches. They came on the morning after the crash and stubbornly failed to resolve even after full courses of therapy. You are left with twice weekly headaches likely to last the rest of your life.

As always, your medical records tell only part of the story. And there is a massive blank when it comes to your headache condition before the crash. There is a notation that you consulted with your doctor six months before the crash, complaining of headaches "two times per week". There are also notations of headaches in the records of a chiropractor who you saw a handful of times in the next 3-4 weeks. There are no notations at all about headaches in the next approximately 5 months leading up to the crash.

The truth about what had occurred is that approximately seven months before the crash you had woken up with a kink in your neck, leading to twice weekly headaches. Not going away on their own, you saw your doctor at approximately the six month point. You were referred to chiropractic care and after a handful of sessions the headaches were 100%, completely gone and you were headache free right up to the crash.

But if we cannot rely on you telling your story, those same medical records could be interpreted in a completely different way. You might have been suffering twice weekly headaches for years and finally consulted with your doctor who referred you for chiropractic care. After a handful of chiropractic sessions that did nothing to help your headaches, you stopped attending. And those twice weekly headaches continued right up to the crash. If so, your headaches now might be no different from what they had been in the years leading up to the crash.

How can your credibility be impacted during your examination for discovery?

Consider how you assess other people's credibility. You are more likely to believe what someone has to say if:

1. What they say does not contradict things you know to be true;
2. What they say fits with your own life experience;
3. They are able to give you specific, rather than vague information;



4. They are forthright, not just telling you part of the story that might make them (or what they are selling you) look good, but also including information that makes them (or what they are selling you) look less favourable; and
5. You can identify with and like the person.

### **Avoid contradicting things the insurance company knows to be true**

Easy, right? Don't lie!!

Not so easy.

Consider the headache example.

Your brief pre-crash episode of headaches, that completely resolved with a handful of chiropractic sessions, was not a significant life experience. By the time of your examination for discovery, perhaps three years after the crash, no surprise if you have completely forgotten about it.

The lawyer representing the insurance company will have gone through your medical records and other documents with a fine toothed comb, and will have those pre-crash clinical notations top of mind when asking: "Did you have any headaches in the couple years leading up to the crash?". Confidently saying: "No, I never had headaches before the crash", will obviously hurt your credibility.

You weren't lying, but you might as well have been.

### **Avoid saying things that don't fit with common life experience**

Once again, easy, right? Don't lie!!

But once again, not so easy.

Consider the headache example again.

You did the work we asked you to do, and reviewed the chronological transcription of your medical records. You were aware of the doctor's and chiropractor's notations of headaches approximately 5-6 months before the crash.

But that wasn't enough to fully refresh your memory, leaving blanks in your own memory.

Just like the insurance company is likely to fill in the blanks in a way that doesn't help your case, you might be inclined to fill in the blanks in a way that you believe will help your case.

You might have completely forgotten when or how that brief episode of headaches started. If asked how long you had headaches before consulting with your doctor, you might say the following (believing that it might be true but not having the specific recollection): "I hadn't ever had a headache before that day I woke up with a headache and went to my doctor".

But that wouldn't fit normal life experience:

1. It would be an extremely rare human being who never, ever had a headache, whether that be because of a cold or flu, allergy, dehydration, periodic kink in the neck, hangover or some other cause; and
2. It would be unusual to get in to see your doctor the same day you had a headache. More likely, you would take a Tylenol or Advil and go on with your day, not bothering to seek medical attention unless the issue became chronic, and then it would take some time to be able to schedule an appointment with your family doctor.

Not intending to lie, you have hurt your credibility.

How do you avoid this?

Go a step further beyond familiarizing yourself with the chronological transcription of your medical records. **Do your best to refresh your memory so that you can tell your complete story.** If gaps remain in your memory, think carefully about what makes the most sense in the context of the clinical notations, the actual memories you have and your life experience.

And when telling those parts of your story, use words that make it clear that they are not specific, clear memories. For example:

1. "I don't remember headaches being a problem for me in the years before the crash, but I would have had headaches from time to time, for example: [whatever circumstances you likely had headaches]"; and
2. "I don't remember exactly when that episode of headaches started, but I know it wasn't longer than a month or two because I wouldn't have waited longer than that to see the doctor".

### **Where possible, give specific, rather than vague information, but don't guess**

You can avoid contradictions by being vague. And vague answers can be technically true. But they hurt credibility.

For example, you cannot possibly be expected to specifically remember the onset, duration and severity of every headache you had in the years leading up to the crash. So it would be technically true if you answered "I don't remember" if asked to describe your pre-crash headaches.

Here are problems with the "I don't remember" approach:

1. You are clearly trying to be unhelpful. Imagine follow-up questions going to the extremes of what your pre-crash headaches might have been, asked sarcastically to expose your stonewalling and forcing you into giving something more of information:
  - a. At the one extreme: "Were you getting constant headaches, every minute of every day?"
  - b. At the other extreme: "Had you never had a headache before in your life?"

2. You are leaving gaps that can be filled by the insurance company. If you can't remember anything about your pre-crash headache pattern, then the defending insurance company can draw their own conclusions;
3. You are hurting your ability to fill in those gaps later, at a trial, if a trial becomes necessary. If at trial, you give a crystal clear story of your pre-crash headaches and how they changed after the crash, you will face a cross-examination where your vague examination for discovery answers are put to you:
  - a. You will have to agree that memories fade, rather than get better, with time, leading to the proposition that your lack of memory at the examination for discovery is likely the truth, versus the crystal clear story you are "making up" at the trial;
  - b. Alternatively, you will face the notion that you were intentionally trying to be unhelpful and stonewall the defending insurance company's lawyer at the examination for discovery.

But if you do not know the answer to a question, and cannot give anything of a helpful response, "I don't know" is the right answer. It is never of value to guess. Guessing opens you up to the risk that your guess might conflict with evidence and hurt your credibility.

### **Be forthright, not avoiding information that might be less helpful to your case**

Consider how it might impact your credibility if you bring up that pre-crash episode of headaches to give a full, forthright answer, rather than waiting to be specifically asked about it.

For example, if you are asked if you were getting any headaches leading up to the crash, it would be technically accurate to answer "No", because the temporary episode of headaches had completely resolved approximately 5-6 months before the crash.

But it would be a more forthright answer to say: "No, but I had experienced an episode of headaches a few months before the crash".

It wouldn't hurt your credibility to give the shorter "No" answer, but it would enhance your credibility to give the more full and forthright answer.

### **No need to suck up, but being pleasant won't hurt**

Being fake hurts credibility, so it's not helpful to put on anything of a show, including feigned pleasantries.

But it is helpful to approach answering questions in a fair, helpful and forthright manner, trying to avoid defensiveness that can come across as hostility or stonewalling.

## **REQUESTS AND CONTINUATION**

Doing your very best to refresh your memory in preparation for the examination for discovery will not make you a walking encyclopedia of your life!

It is likely that you will be unable to give complete information to some of the questions posed. When that occurs, the ICBC defence lawyer is likely to ask that you take steps after the examination for discovery to inform yourself and to give that information to them through your lawyer.

This might also occur if some additional documentation is identified that might be relevant to your case. If so, the ICBC defence lawyer is likely to ask that you obtain that documentation and provide it to them through your lawyer.

The supervising lawyer will keep track of these “requests” and work with you after the examination for discovery to comply with them if it is fair and reasonable to do so.

Additional information and/or documentation produced through these requests might reasonably result in the need for a follow-up examination for discovery so that you can be asked questions about that new information / documentation, which would be scheduled at a later date.

## **WILL THE INSURANCE COMPANY LAWYER TRY TO TRICK ME? (CLINICAL RECORDS)**

The golden rule (listen, think and give honest and forthright answers) should avoid any trickery that might come your way.

But really, insurance defence lawyers have a very small bag of tricks.

One standard series of questions can unfairly lead you to feel that you have to agree to things that would be unfair to agree to. Here is an example series of questions that most people would readily respond “yes” or “no” to as indicated:

1. When you see your doctor, or therapists, you are truthful? (yes)
2. You know that it’s important not to hide anything from them? (yes)
3. You therefore tell them the complete story about what is going on for you? (yes)
4. And you know that they keep notes about what you tell them? (yes)
5. You don’t have any reason to believe that your doctors or therapists might have been dishonest in the note taking they have done, do you? (no)

They then open up a binder of clinical notations and point to an entry your doctor made six months before the crash that says “H/As two times per week”. They then ask you to confirm that when you saw your doctor on that date, you told the doctor you were having headaches twice per week.

After responding to that series of questions, you feel you have to agree!

But if you really think about the question, an honest answer would be more along these lines: “I don’t remember seeing my doctor on that date, and I don’t remember what I told him or her.”. How could you possibly remember any particular doctor visit (unless it was of particular importance to you) or what you actually told the doctor (again, unless it was of particular importance to you).

And in order to make it a forthright answer, you would go on (having refreshed your memory and been prepared to tell your story), to say something along the lines of “But I have a reasonably clear recollection of my symptoms around that time and my best recollection is that I was indeed having approximately twice weekly headaches at the time (assuming that’s true).

Why does it matter? Cherry picking bits and pieces from clinical entries can paint an unfair, inaccurate picture. It is important that your honest and forthright story be told, not an incomplete “bits and pieces” cherry picked story.

If you are ever referred to a clinical entry, medical report, or other document, and asked to confirm that you said this or that as might be recorded or noted, please remember this and give an honest and forthright answer.

## **THE DREADED QUESTION: “WHY?”**

Some insurance company lawyers try to get you to argue your case by asking “Why” questions.

For example:

1. Why did you wait until two weeks after the crash to consult with your doctor?
2. Why didn’t you try sooner to return to work?
3. Why did you stop attending physiotherapy?
4. Why didn’t you return, earlier, to your activities?
5. Did you try chiropractic care? Why not?

If you have a recollection of considering the issue, and the reasons for this or that course of action, then by all means give your forthright and honest responsive answer.

But more likely, when asked about why you did or did not do this or that two, three or more years ago, you will not remember considering the issue, let alone your reasons for your actions. A natural reaction is to feel you have to defend yourself, and to come up with whatever explanations you can for whatever it is that you did or didn’t do way back then.

## **QUESTIONS ABOUT YOUR JOURNAL**

Journals are unique “documents” in a personal injury case.

Unlike medical records, where doctors and therapists make notes about what you tell them, you are the one making notations in your journal.

If a journal is kept on the advice of a lawyer for the purpose of prosecuting a lawsuit, it can remain private and confidential. If it was kept for any other purpose, then a copy of the journal must be provided to the defending insurance company.

We always, every time, advise our clients to keep a journal “for the purpose of prosecuting a lawsuit”. If you started keeping a journal after having consulted with Hergott Law, it is likely that you did so for that purpose.

If you started keeping a journal before consulting with Hergott Law, perhaps you did so on the advice of a different lawyer, or a friend, “for the purpose of prosecuting a lawsuit”. If not, then perhaps (on our advice) the journaling you did after consulting with us was for that purpose.

If you kept a journal, please consider the reason why you kept that journal, and be ready to discuss that when you meet with us to prepare you for your examination for discovery.

## QUESTIONS ABOUT CONFIDENTIAL THINGS

Just like your journal, anything done “for the purpose of prosecuting a lawsuit”, is private and confidential, and should not be discussed at your examination for discovery.

For example:

1. An independent medical examination, arranged by Hergott Law, where the report has not already been shared with your doctor / medical team or the defending insurance company; and
2. Anything at all that you prepared only because of our request.

## Examples of Questions

### The Introduction

Q. I'll just have you state your name for the record, please.

A. Joe Smith.

Q. Thank you. And you've affirmed to tell the truth today?

A. Yes.

Q. And that affirmation is binding on your conscience?

A. Yes.

Q. Excellent. Is there any reason why we should not proceed with this Examination for Discovery today?

A. No.

Q. Good. And before we kind of get going I've just got a couple ground rules. I'm sure Ms. Dean may have run through these for you but just so you and I are clear; first, I'm going to ask that you allow me to completely ask my question before you provide a response and I will do my very best not to talk overtop of you.

Secondly, if you don't understand the question in the form that it's put, I'd ask you to have me clarify the question before you provide a response. Again, that will allow all of us to know exactly what's being asked and what you're responding to.

Lastly, I'm going to ask that you use words to answer my questions. I know that sounds like a silly request but a lot of folks use "um-hmm". They don't think they do but on the record it's a nonresponsive response, so I may just prompt you from time to time if you have that bad habit. Nobody thinks they do it but everybody does. So are we okay with that?

A. Yes.

Q. All right, and if you need anything, water, a break or anything like that, just speak up, it's totally fine.

So I'm just going to put in front of you your Notice of Civil Claim. This is just the initiating document with respect to a lawsuit that you've commenced in respect of a motor vehicle accident dated March 25, 2015. It is Supreme Court of British Columbia court file number KEL-SM-106574, correct?

A. Yes.

Q. And you are the Plaintiff in that action?

A. Yes.

Q. I 'm going to refer to that motor vehicle accident of May 25, 2015 as "the accident". If there's any other accidents that I need to refer to , I ' ll talk about them by their specific dates; is that clear?

A. Yes .

## Address

Q. And what's your present address and phone number?

A. 1509 Rose Meadow.

Q. And is that a street?

A. Drive.

Q. And where is that?

A. West Kelowna.

- Q. What kind of property is that?
- A. It's a house.
- Q. Is that a detached house or a townhouse?
- A. Detached.
- Q. Approximately how many square feet is that house?
- A. Approximately 2,500.
- Q. Okay. How long have you lived there for?
- A. One month.
- Q. Prior to that where did you live?
- A. 809 Old Okanagan Highway.
- Q. And how long had you lived at the Old Okanagan Highway property for?
- A. Approximately one and a half years.
- Q. That's not the same place you were living at the time of the accident, was it?
- A. No.
- Q. Where were you living at the time of the accident?
- A. 6213 Ellison Avenue in Peachland.

### **Height and Weight**

- Q. Now what's your height, sir?
- A. Five-ten and a half.
- Q. And how much do you weigh?
- A. Approximately 180.
- Q. Okay. Is that about the same as you weighed at the time of the accident?
- A. No.
- Q. What was your weight at the time of the accident?
- A. I would have been closer to 190.



- Q. Okay . And to what do you attribute your weight loss since the accident?
- A. I don' t know. I'm not a medical professional.
- Q. Okay . Do you think the accident or your injuries have contributed to your weight loss?
- A. Yes.
- Q. In what way have they done that?
- A. It's affected my appetite considerably.

### **Unreported Income**

- Q. Do you always declare all of your earnings and income to CRA?
- A. No.
- Q. Is it your understanding that you have an obligation to do that?
- A. Yes.
- Q. So tell me about the income, that you say you earn, that you don't declare.
- A. Mostly helping people with electrical problems/plumbing problems; yard work. I would - I would become -- you know, in the slow times, I would just become a handyman.
- Q. ...

### **Injuries**

- Q. I would like you to give me as complete a list as possible of the injuries that you suffered in the accident.
- A. My knee, my back, my shoulder and my neck and the cut on my head.
- Q. Which knee is the injury to?
- A. The right knee.
- Q. What area of your back was injured in the accident?
- A. Lower.
- Q. Other than your lower back injury did you have any other injury to your back?
- A. Just kind of stiff top to bottom, but that was definitely where the most pain was coming from.
- Q. How long did that entire back stiffness last for?

- A. I don't recall off the top of my head.
- Q. A matter of weeks or months after the accident?
- A. Just a couple of weeks where I was kind of feeling like somebody beat me with a baseball bat and then it was just certain spots.
- Q. After that have you had any problems with your back other than your lower back?
- A. No.
- Q. When did you first notice problems with your neck after the accident?
- A. That wasn't for a day or two. Yeah, maybe later the next day or two days later. It just stiffened up.
- Q. Did you have any pain in your neck as well?
- A. Yeah.
- Q. What kind of pain did you get in your neck?
- A. Just tightness, stiffness. I felt like I had been in a car accident.
- Q. As you had. And did that condition get better over time?
- A. Yes, gradually. Yeah.
- Q. Did that pain and stiffness ever go away?
- A. My neck, yeah, I haven't had an issue with my neck for a while.
- Q. When did it get better?
- A. It felt pretty good actually, I don't know, maybe six, eight months later. I didn't really – it was still -- there was still a bit of pain, but it wasn't -- like, it wasn't annoying or anything any more, it wasn't stiff, I wasn't having trouble turning my neck as bad. It didn't take years by any means, I don't think anyways.
- Q. After that six to eight months where after that you, if I understand your evidence, you only had minor pain after that?
- A. Yeah.
- Q. Has that minor pain ever gone away?
- A. Yeah. I don't have any issues with my neck any more.
- Q. Did you take physiotherapy for your injuries?

- A. Yes.
- Q. Did you have physiotherapy to your neck?
- A. I believe I had some stretches, they had me do some stretches with my neck, just kind of pushing and pulling.
- Q. Yeah.
- A. The kinesiologist did a bunch of stuff, same thing, some exercises to stretch it out.
- Q. And did those help?
- A. Yes, actually it did.
- Q. I've seen a note from one of your physiotherapy records, and I'm not going to put it in front of you, but the note says in part neck feels good and then the note is dated April 24th, 2012, which would be about two months after the accident?
- A. Okay.
- Q. Does that sound about the time when your neck issues resolved?
- A. Yeah. I don't remember that far back honestly. If that's what it says, then yeah.
- Q. You might have had some intermittent issues with your neck after that?
- A. I'm not hundred percent sure. Possibly. I know it didn't take too very long for it to heal up. It was just stiff and sore for a while.
- Q. Okay. And you mentioned earlier having an injury to your shoulder. Which shoulder was injured?
- A. My right.
- Q. When did you start noticing a problem with your right shoulder?
- A. Fairly quickly. A bruise on there from where the seatbelt had tightened up. It was just sore and stiff for a while. I had issues swinging a hammer definitely for, I don't know, quite some time.
- Q. Do you know how long those issues with the hammer lasted?
- A. Well, I mean, off the top of my head I can't give you an exact date. Since the accident I'm on again, off again with issues. I don't know if it's old age or what the heck is going on with my arm or my shoulder.
- Q. So when you say on again, off again since the accident, do you still have on again, off again symptoms in the last month?

- A. Not in the last little bit here. The worst is, I don't know, I find my right shoulder -- actually, I had some stuff go on this winter where it was bugging me a lot to swing a hammer.
- Q. What kind of issues would you have swinging a hammer?
- A. Just -- it was almost like a fatigue thing, but it was -- there was a bit of a pinching pain in there after I spent a day beating on something, like, hammering nails or something.
- Q. The cut on your head, how long did that injury last for?
- A. I think it healed up in a week or so.
- Q. Any further issues with your head since then?
- A. No.
- Q. Tell me about the injury to your right knee. You first noticed that immediately after the accident?
- A. Yes.
- Q. And can you describe the injury to your right knee?
- A. Swelling, soreness, hurt to put pressure on it.
- Q. And has that gotten better since the accident? You've had two surgeries on your right knee now?
- A. I still limp, I still have pain in my right knee. It kind of picks and chooses when it wants to be a pain.
- Q. Okay. Are there periods of time when you don't have pain in your right knee?
- A. When I'm sleeping. Honestly, it has been a pain in the butt since day one.
- Q. Has the pain gotten better at all since the injury?
- A. Like, it comes and goes. Some days it's, it feels fairly good, some days it feels like somebody hit me in the knee with a hammer.
- Q. Are you able to rate your pain on a scale of one to 10 where one is very little pain and 10 is the most excruciating pain you can imagine?
- A. Day in and day out is different.
- Q. What's the lowest pain you ever get?
- A. There's some days where it's a one or a two.

- Q. Are there ever days when it's a zero, where there's no pain at all?
- A. No.
- Q. What's the worst it ever gets?
- A. Six.
- Q. Have you, since the accident happened, over time have you gotten more good days than bad days, has it improved in that way?
- A. Yeah, yeah, it is getting better I guess, but it's -- like, it depends. The other issue is when it's cold out it hurts, like, the wintertime it's way worse than the summer.
- Q. Okay. Did you have any previous injury to your right knee?
- A. No.
- Q. There's the WCB injury that we talked about, but that was in 2000; is that right?
- A. That was my left knee.
- Q. That was your left knee, okay. I actually had a note from Dr. Krywulak -- he's the gentleman that did your surgery; right?
- A. Yeah.
- Q. I can't put my finger on it right now, but I seem to recall Dr. Krywulak saying that you had aggravated a pre-existing knee injury in the accident. Do you recall saying that to him at all?
- A. No.
- Q. I'm going to refer you to the notice of civil claim that has been filed in this action and at paragraph 6 of the notice of civil claim it says: As a result of the crash the plaintiff has sustained physical injuries and other loss and damage and in particular has sustained --
- And then there's a list of things from (a) through (h). (a) is injury to the neck, (b) is injury to the right chest, (c) is injury to the right shoulder, (d) is injury to the entire back, (e) is injury to the lower back, (f) is injury to the left knee, (g) is injury to the right knee requiring surgery, and (h) is further particulars of injuries to be determined. Do you see that?
- A. Yeah, I do
- Q. Other than the list at (a) through (g), are there any other injuries that you suffered in the accident?
- A. No.

- Q. Okay. One of the things mentioned on this list is an injury to your left knee and I understood your testimony earlier to be that you didn't injure your left knee in the accident?
- A. No left knee injury in the accident. It was bothered by my over -- by using it too --
- Q. You were kind of compensating for the right knee?
- A. Compensating for the right knee, yeah.
- Q. Another injury listed in here is an injury to the right chest and I understood your evidence to be that that was from the seatbelt?
- A. Yeah, it was just I had a bruise.
- Q. Okay.
- A. Just soreness in the chest I guess. I don't know, I had a bruise there.
- Q. And did that soreness resolve in a short while?
- A. Yeah.
- Q. Tell me about the injury to your lower back. When did you first notice the lower back pain?
- A. Maybe the evening of the accident or the next morning it started to stiffen up.
- Q. And can you describe the pain for me that you had in your lower back?
- A. Sharp pulling pain I guess. It felt like it had been jarred around.
- Q. Was that a constant pain?
- A. Mm'hmm.
- Q. Has it ever gotten better since then?
- A. Yes.
- Q. When did it get better?
- A. Gradually. I can't give you an exact date, but it comes and goes.
- Q. Do you still have intermittent pain in your lower back now?
- A. Yes.
- Q. How often do you get pain in your lower back now?

- A. Actually, quite a bit this year. I had a bunch of little incidents I guess you would call them where the same pain returned, but on again, off again. Probably every, say, four months where I was having an issue, if not less.
- Q. That was a four month period of time where you were getting back issues regularly?
- A. Like, I would get something -- I would have the same re-occurring pain or an injury. Like, I would just stand up and my back would go out, just got progressively worse.
- Q. When was that four month period?
- A. Sorry, I don't really understand.
- Q. You mentioned there was a four month period where your back was getting pain on a regular basis.
- A. Oh. What I meant is, like, there was a stint where my back was really bad while I was -- right after the accident, I'm not sure exactly how long it was, but then about every four months I would have a re-occurring issue.
- Q. So it was quite bad at the outset and then it got better so that you would, every four months, have another incident with back pain?
- A. Yes. And this year has been really bad for it.
- Q. Do you get back pain more frequently now?
- A. Yes.
- Q. How often, like, in the last three months would you, say, have an episode of back pain?
- A. The last three months? I would say I had a week there where it was so bad where I was in excruciating pain and needing Advil like it was going out of style, but in the last three months it's probably been out maybe a total of three and a half weeks. There was a couple of days where it was just, like, two day incidents.
- Q. As you are sitting here now how is your back pain?
- A. It's not horrible right now. I haven't had an issue in the last couple of -- two or three weeks. I had stood up, actually I stood up to -- stood up out of a vehicle and kind of turned a little bit a couple of weeks ago and put it out so badly that I had to, like, grab onto a fence at a gas station and hang myself to relieve the pinched nerve in my back. I felt like a bit of a retard, but it was the only thing I could do to get the nerve to free up.
- Q. All right. Do you limp all the time now?
- A. Yeah. For the most part, yes.
- Q. Are there times where you don't limp?

- A. Yeah, there's good days.
- Q. How frequently do you get a good day when you don't limp?
- A. It's hard to say. Depends on the time of year, what I've been doing, any strenuous activities, and I'll generally limp for a few days after that, but if I have an easy day or easy days in a row -- it all depends on what I'm doing.
- Q. In the last month, say, on a weekly basis how many limp-free days do you think you get?
- A. Like I say, it all depends. Off the top of my head I can't tell you the exact answer to that.

### Activities

- Q. What kind of activities did you take part in before the accident?
- A. I was an avid snowboarder, I played sports with my kids, played baseball, I did a lot of hiking, a lot of biking.
- Q. Did you have a season's pass up at Big White or anything like that for snowboarding?
- A. No. Joanne and I used to take a lot of pride in going to a different mountain every weekend, it was a thing we would like to do, instead of snowboarding at the same hill all the time.
- Q. Where did you snowboard then?
- A. I think maybe Red Mountain.
- Q. Down in Rossland?
- A. Yeah. And there's two in B.C. that we haven't been to.
- Q. How frequently would you get out snowboarding before the accident?
- A. Quite a bit. The year before the accident happened it was maybe four weekends where we weren't snowboarding.
- Q. Do your kids snowboard too?
- A. Yeah.
- Q. Would you take them with you to these different hills?
- A. Yes.
- Q. How long have you been snowboarding for?
- A. Since I was 18.



- Q. Were there other people other than your wife and kids, or other than Joanne and the kids that you went snowboarding with?
- A. Friends of ours, yeah, just odd friends. Sometimes we would meet people up there or make plans on weekends I think a couple of times a year where we would meet friends up at Big White or something and snowboard with them.
- Q. Can I get the names of some friends you went snowboarding with?
- A. Sure. Mitchell Bardeau.
- Q. What's his last name?
- A. Bardeau, B-a-r-d-e-a-u.
- Q. Okay.
- A. Sonya Petraroia.
- Q. How do you spell her first name, is it S-o-n-y-a?
- A. I think so, yeah.
- Q. And the last name?
- A. P-e-t-r-a-r-o-i-a I believe.
- Q. I'm going to make a request for their contact information. Please provide contact information for Mitchell Bardeau and Sonya Petraroia.
- Q. Did you stop snowboarding after the accident?
- A. I did.
- Q. Have you ever gone back to it?
- A. No.
- Q. And is that because of your knee injury?
- A. Yes.
- Q. Do Joanne and the children still go snowboarding?
- A. The kids, yes. Joanne hasn't gone since I haven't gone.
- Q. That's something that she did with you?
- A. Yes.

- Q. What kind of sports did you take part in with the kids other than snowboarding?
- A. Pretty much anything and everything. My daughter was in soccer, we would go down and play soccer in the field, my son plays baseball and lacrosse, did that kind of stuff. We pretty much own every piece of sports equipment you can imagine.
- Q. But you play soccer or baseball or lacrosse with the kids?
- A. Not on a team or anything, but with them at a park, yeah.
- Q. And do you still do those kind of activities since the accident happened?
- A. Here and there. Not as much as I did. I definitely limit myself to kind of -- I don't really -- I'm worried that I'm going to hurt my knee and my back and not be able to work.
- Q. Did you play baseball before the accident?
- A. Yes.
- Q. Was that organized baseball on a team?
- A. Yeah.
- Q. Have you gone back to playing baseball?
- A. I played for a little while, I tried. I just found that I was having -- I was splitting games, so I only played three innings and I was spending, you know, two hours watching and playing baseball and six days recovering from it. My knees just wouldn't -- or my knee, sorry, it wouldn't -- it was really bugging my knee.
- Q. What kind of team did you play on?
- A. Just a local rec league.
- Q. What position?
- A. I was shortstop.
- Q. Was it baseball or softball?
- A. Softball.
- Q. When's the last time you tried playing baseball?
- A. I tried two and a half years ago, three years ago.
- Q. You didn't play last year at all or the year before?
- A. No. I haven't played for two years.

- Q. Any plans to try it again?
- A. I don't think so. It's just -- the amount of time it took to recover from playing one game on a weekend, it just didn't -- it outweighed the pros.
- Q. You mentioned hiking and biking as some of your hobbies. Have you tried those since the accident?
- A. Some biking. We'll take the bikes down and ride along the beach with the kids and stuff. Nothing -- no major strenuous things or anything like that.
- Q. What kind of biking did you do before the accident?
- A. It wasn't much more than that. Maybe just a little more frequent. I'm not a cross-country bicyclist by any means.
- Q. And hiking, what kind of hiking did you do before the accident?
- A. We did a lot of walk-in hiking, a lot of walk-in camping, stuff like that.
- Q. Have you gone back to doing that since the accident?
- A. A little bit. Not as much. Just not as frequently.

## **EFD STANDARD QUESTIONS LIST**

### **A. Formal Matters**

- (1) Full name
- (2) Sworn ("Have you been sworn to tell the truth?")
- (3) Plaintiff ("Are you the plaintiff/one of the plaintiffs in this action?")
- (4) Address
- (5) Date of birth

### **B. Questions Relating to Liability**

- (1) Involvement in accident ("Were you involved in a motor vehicle accident on or about [month, day, year], at or near the intersection of [location] in [city], B.C.?" )
- (2) Years of experience driving motor vehicle
- (3) Holder of B.C. driver's licence (request production and note number and restrictions)
- (4) State of health

- (a) Eyes:
  - (i) when last checked
  - (ii) name of eye doctor
- (b) Other aspects of health that may have affected ability to drive:
- (5) names of doctors involved in diagnosis or treatment
  - (i) medication
- (6) Type of motor vehicle
- (7) If owner: number of years owned motor vehicle  
If not owner: degree of familiarity with vehicle
- (8) Specifications of vehicle:
  - (a) steering
  - (b) brakes
  - (c) engine
  - (d) transmission
- (9) Passengers and their positions in vehicle
- (10) Mechanical condition of vehicle:
  - (a) when last checked or repaired
  - (b) name of garage
  - (c) brakes
  - (d) headlights
  - (e) wipers
  - (f) horn
  - (g) steering
  - (h) tires
- (11) Contributory negligence: seatbelt and headrest

- (a) Seatbelt:
  - (i) lap and shoulder seatbelt
  - (ii) in good working order
  - (iii) catches and maintains person in position if stressed
  - (iv) in use at time of accident
- (b) Headrest:
  - (i) adjustable or not
  - (ii) if adjustable, where was it positioned in relation to top of head
- (12) Events of previous hours:
  - (a) number of hours of sleep
  - (b) ability to drive (drugs, alcohol)
- (13) Visibility:
  - (a) time of day or night
  - (b) degree of light
  - (c) whether street lamps on or other drivers had headlights on
- (14) Road and weather conditions
- (15) Description of highway:
  - (a) direction of road (north-south, east-west)
  - (b) grade
  - (c) locations of street lights
  - (d) stop or caution signs
  - (e) street lamps
  - (f) number of lanes
  - (g) location of medians
  - (h) crosswalks

- (i) lane markings
- (16) Location of parked vehicles
- (17) Concentration and flow of traffic
- (18) Distractions:
  - (a) conversations with passengers
  - (b) radio or cd player
  - (c) smoking
  - (d) cell phone
- (19) How accident happened (“Tell me in your own words how the accident happened.”)
- (20) When first saw other vehicle:
  - (a) direction of travel
  - (b) its position in relation to other vehicles
  - (c) speed
  - (d) whether increasing or decreasing speed
- (21) Path of vehicle at key points up to collision: examine on same points as B.(19) above
- (22) Point of impact:
  - (a) estimated speeds of vehicles on impact
  - (b) portions of vehicles in contact
- (23) Warnings or evasive action:
  - (a) sound of horn
  - (b) sound of brakes
  - (c) attempts to avoid accident
- (24) Movements of body in vehicle:
  - (a) portions of body in contact with vehicle
- (25) Post-impact:

- (a) movements of vehicles post-impact
  - (b) resting places of vehicles
  - (c) skid, track marks
- (26) Damage to vehicles:
  - (a) request photos or damage estimates in possession of ICBC or other insurer
  - (b) other insurer
- (27) Conversation with defendant or others at scene
- (28) Injuries of any other occupants:
  - (a) initial complaints and attendances for treatments
- (29) Charges:
  - (a) whether charges laid
  - (b) disposition of charge
  - (c) if charge not disputed, reason for failing to dispute
- (30) Statements:
  - (a) made to other insurers
  - (b) others (police)
  - (c) questions regarding dominant purpose of statements if privilege is claimed
- (31) Any contact with defendant or other witnesses subsequent to accident:
  - (a) any conversation
- (32) Workers' compensation:
  - (a) did accident occur in course and scope of employment? (see s. 10, Workers Compensation Act)
  - (b) is plaintiff eligible for WC benefits?
  - (c) did plaintiff make a claim for WC benefits?
  - (d) did plaintiff take his or her normal route or deviate from the normal route?

### **C. Quantum of Damages**

- (1) Education:
  - (a) ask for production of school transcript, if appropriate
  - (b) other courses taken: night school, trades courses, first aid, non-credit
- (2) Work history:
  - (a) review jobs
  - (b) list duties
  - (c) person to whom responsible
  - (d) salary
  - (e) dates of employment
  - (f) reasons for leaving
  - (g) obtain personnel file
- (3) Height
- (4) Weight:
  - (a) current
  - (b) at time of accident
- (5) (5) Complaints:
  - (a) initial complaints
  - (b) complaints noted at scene
  - (c) initial medical and hospital visits
  - (d) obtain hospital records by signed consent
- (6) Hospitals:
  - (a) names of hospitals
  - (b) dates of visits
  - (c) nature of complaints



- (d) treatment given
  - (e) advice given
- (7) Names of doctors, chiropractors, physiotherapists, and so on:
  - (a) examine on same points as C.(6) above
  - (b) outstanding appointments
  - (c) any recommended surgery
- (8) Review injuries in statement of claim; determine whether any other injuries than those listed
- (9) For each injury:
  - (a) when first noticed
  - (b) nature of complaint
  - (c) progress of injury at key points (for example, Christmas, summer vacation, when returned to work)
  - (d) whether injury healed (if so, when; if not, present complaints)
- (10) Activities:
  - (a) sports
  - (b) hobbies
  - (c) driving
  - (d) vacations
  - (e) when activities resumed
- (11) Domestic responsibilities:
  - (a) detached residence, apartment, condo
  - (b) garden, lawn
  - (c) responsibilities for maintenance of
  - (d) whether professional help used since accident
  - (e) difficulties performing domestic responsibilities
- (12) Income lost:

- (a) whether specific sum claimed
  - (b) basis of claim
  - (c) ask for production of income tax returns for past three to five years
  - (d) days missed from work
  - (e) date of attempted return
  - (f) lost promotions
- (13) Future loss of income-earning capacity: doctors' advice:
- (a) anticipated date of return to work
  - (b) alternative employment
  - (c) intentions regarding retirement
  - (d) details of pension
- (14) Statements in form of admissions to doctors and other experts in reports: ("Did you tell Dr. [name] that your headaches had cleared up by [month, day, year]?")
- (15) Future care needs
- (16) Mitigation: looking for work
- (a) efforts to obtain other employment
  - (b) resumes (ask for production of specimen or copy)
  - (c) E.I. benefits
  - (d) whether benefits claimed (claimant must satisfy E.I. that he or she is ready and willing to return to work)
- (17) Mitigation: exercise and rehabilitation
- (a) is plaintiff unable to overcome pain with his or her own resources (Maslen v. Rubenstein (1993), 83 B.C.L.R. (2d) 131 (C.A.))?
  - (b) following advice of medical practitioners regarding exercises, medications, proposed surgery
- (18) Medication:
- (a) ask for signed authorization for production of Pharma-net profile

- (19) Collateral benefits:
- (a) whether paid by employer or insurer or CPP
  - (b) whether paid under sick bank entitlement
  - (c) name of insurer
  - (d) whether any repayment agreement signed
  - (e) collective agreement provisions regarding repayment
  - (f) duration of benefits
  - (g) ask for production of documents pertaining to collateral benefits (that is, medical reports, applications)
- (20) Contingencies:
- (a) strikes
  - (b) lockouts
  - (c) possibility of overtime
  - (d) layoffs
- (21) Previous and subsequent accidents and state of health:
- (a) state of health immediately before accident
  - (b) ask for signed authorization for Medical Services Plan printout
  - (c) nature of any previous injuries
  - (d) whether claim made
  - (e) against whom claim made (claim settled)
  - (f) whether pleadings filed
  - (g) names of doctors and hospitals involved
  - (h) if overlapping injuries: condition of injuries in previous accident immediately before subject accident
    - (i) names of lawyers and claims personnel involved
    - (ii) whether release signed: produce

- (22) Special damages

**D. Questions Relating to Production of Documents**

- (1) Names and addresses of occurrence witnesses: whether any statements obtained other than those listed
- (2) Damage to vehicle: request photos, damage estimates of both vehicles
- (3) Request police file and ambulance crew report, by consent
- (4) Produce Medical Services Plan printout for appropriate period for verification of treatment, by consent
- (5) Obtain all clinical records of all practitioners: doctors, physical therapists, chiropractors, by signed consents if possible
- (6) Request notes or diary relating to injuries

**E. Questions Relating to Witnesses**

- (1) Liability witnesses:
  - (a) passengers
  - (b) independent
  - (c) police, ambulance
  - (d) names and addresses of witnesses who reasonably might be expected to have knowledge relating to the question
- (2) Quantum witnesses:
  - (a) spouse or other intimate persons
  - (b) employer, supervisor, co-workers
  - (c) (c) friends who may be able to comment on allegations in statement of claim
  - (d)



**Paul Hergott** grew up on a Farm in Saskatchewan, a child of parents who had served as missionaries in third world countries. A strong work ethic and humility were instilled, a foundation for a legal career going after huge insurance companies to achieve justice for innocent victims of car crashes.

Paul has practiced litigation in the Okanagan since 1996. Word of mouth referrals led to the growth of the personal injury portion of his litigation practice and establishment of this boutique personal injury practice in 2007.

Paul's weekly column "Achieving Justice" has been published for over 10 years, first with Capital News and then also carried by Castanet. The column not only provides a legal resource, but is a key component of Paul's "One Crash is Too Many" campaign.

When not at the office Paul enjoys the beautiful Okanagan with his wife and children. Paul would be happiest outdoors hiking, biking, skiing or trying to make his annual snow hut even larger than the previous years.

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## WHAT OUR CLIENTS SAY

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*"I had recently moved to town and had no idea which office to choose. I drove to the Westside and saw Paul's office from the hwy. But who choses like that right? So I asked 3 different people who did not know each other, and all 3 people said Paul Hergott without hesitation. So I called his office and felt taken care of immediately. Thanks for letting me express myself.... for never trying to tame me... for not letting me lose myself to the process and give up.— J.B / June 2018*



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*"It was a relief to entrust Hergott Law with my personal injury claim. ICBC was pressuring me to settle even though my injuries had not been effectively treated. I didn't know that I had other options and I felt like I would never be able to recover from my injuries. Hergott Law hired a medical specialist who properly assessed my injuries and made recommendations for my treatment needs. Hergott Law kept in touch with me and constantly coached me to follow up with the treatments. They, then, negotiated a fair settlement that was even better than I had hoped for. Jill was very pleasant to deal with. I am very thankful to Paul, Jill and the entire team at Hergott Law for everything that they have done to help me recover. — J.V. / Dec. 2018*

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# HERGOTT LAW

with offices in Kelowna and West Kelowna  
and a satellite office in Vancouver

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**Hergott Law** is a boutique personal injury law firm where we act only for the injured victim, never for ICBC or other insurance companies.



We have physical offices in Kelowna and West Kelowna and the availability of a satellite office in Vancouver. With our paperless office systems we help innocent crash victims across British Columbia pursue fair, financial compensation for their injuries and losses.

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**Call or e-mail us for a free, confidential, initial consultation.**

*To ensure no feelings of obligation, it is our policy that you are not permitted to retain our services during an initial consultation.*

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