IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Takhar v. Insurance Corporation of British Columbia,* 2023 BCSC 718

Date: 20230501
Docket: M179691
Registry: Vancouver

Between:

Dilprit Takhar

Plaintiff

And

Insurance Corporation of British Columbia and John Doe #1 and John Doe #2

Defendants

Before: The Honourable Justice Funt

Reasons for Judgment

Counsel for the Plaintiff:	S. Grochenkov T. O'Mahony
Counsel for the Defendant, Insurance Corporation of British Columbia:	C.C. Godwin P.K. Hamilton
Place and Dates of Trial:	Vancouver, B.C. August 8–12 and 16–19, 2022
Place and Date of Judgment:	Vancouver, B.C. May 1, 2023

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1. INTRODUCTION

[1] On October 21, 2016, the plaintiff was driving his car when it collided with a minivan (the "Accident"). Neither the identity of the driver nor the owner of the minivan is known. The plaintiff has sued the Insurance Corporation of British Columbia ("ICBC") as a nominal defendant.

[2] ICBC has denied liability for the Accident. It says the plaintiff did not make "all reasonable efforts" to ascertain the identity of the driver of the minivan as a plaintiff is required to do under s. 24(5) of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 [*IV Act*].

[3] The plaintiff says that as a result of the Accident, he has suffered, among other injuries, chronic pain, mental injury, and his ankylosing spondylitis ("A/S"), which subsequently became symptomatic in April 2019.

[4] A/S is an often painful inflammatory condition that may affect the sacroiliac joints and spine. After the onset of symptoms, the plaintiff's A/S was diagnosed.

[5] The plaintiff's claim is comprised of:

Non-pecuniary damages	$220,000
Past wage loss	$166,985
Loss of capacity	$605,739
Special damages	$35,114
Future care	$993,083
Lost of housekeeping capacity	$20,000
Total	$2,040,921

[6] For the reasons that follow, the Court dismisses the plaintiff's claim. He did not make "all reasonable efforts" to ascertain the identity of the driver of the minivan as required under s. 24(5) of the *IV Act*.

2. BALANCE OF PROBABILITIES

[7] In *F.H. v. McDougall*, 2008 SCC 53, Justice Rothstein, writing for the Supreme Court of Canada, stated:

> [49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[8] In *F.H.*, Justice Rothstein also stated that "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test": *F.H.* at para. 46.

3. CREDIBILITY

[9] Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal ref'd [2012] S.C.C.A. No. 392 described the assessment of credibility:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); [*Faryna*] *v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time ([*Faryna*] at 356).

4. KEY STATUTORY PROVISIONS

[10] For the case at bar, the key statutory provisions are s. 24(5) of the *IV Act* and s. 68(1) of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [*MV Act*].

[11] Section 24(5) of the *IV Act* reads:

> 24 […]
>
> (5) In an action against the corporation [ICBC] as nominal defendant, a judgment against the corporation must not be given unless the court is satisfied that
>
> (a) all reasonable efforts have been made by the parties to ascertain the identity of the unknown owner and driver or unknown driver, as the case may be, and
>
> (b) the identity of those persons or that person, as the case may be, is not ascertainable.

[12] Section 68(1) of the *MV Act* reads:

> 68 (1)The driver or operator or any other person in charge of a vehicle that is, directly or indirectly, involved in an accident on a highway must do all of the following:
>
> (a) remain at or immediately return to the scene of the accident;
>
> (b) render all reasonable assistance;
>
> (c) produce in writing to any other driver involved in the accident and to anyone sustaining loss or injury, and, on request, to a witness
>
> (i) his or her name and address,
>
> (ii) the name and address of the registered owner of the vehicle,
>
> (iii) the licence number of the vehicle, and
>
> (iv) particulars of the motor vehicle liability insurance card or financial responsibility card and, if applicable, blanket certificate for that vehicle,
>
> or such of that information as is requested.

[13] Stripped to its essentials, s. 24(5) of the *IV Act* instructs that judgment "must not be given unless the court is satisfied that all reasonable efforts have been made" by the plaintiff to ascertain the identity of the other driver. The plaintiff bears the burden of proof. "All reasonable efforts" should be read in the legislative context of s. 68(1)(a) of the *MV Act*, which requires that a "driver […] involved in an accident […] must […] remain at or immediately return to the scene of the accident […]".

[14] Justice DeWitt-Van Oosten, as she then was, in *Rieveley v. Doe*, 2017 BCSC 202, stated:

> [20] A leading authority on the interpretation of this provision is *Leggett v. Insurance Corporation of British Columbia*, [1992] B.C.J. No. 2048 (C.A.). At para. 9, the Court explained the "overall purpose" of s. 24(5):

> […] the overall purpose of the section is to limit the exposure of the corporation to claims brought by persons who, in the matter of seeking to identify those responsible for the accident, have done everything they reasonably could to protect what ordinarily would be their own interests, and which, by virtue of the section, become the interests of the corporation.

[21] The test I must apply is whether the plaintiff has taken steps to identify the unknown owners or drivers "as resolutely and resourcefully as [he or she] would have done" in circumstances where claiming against ICBC as a nominal defendant was not an option (*Leggett*, para. 13, internal references omitted).

[22] To meet the criteria for "all reasonable efforts" under s. 24(5) a plaintiff must act as if the statutory provision is not in existence. In other words, upon sustaining damages from a collision caused by an unidentified owner or driver, a plaintiff cannot look to s. 24 of the *Act* as the remedial avenue of choice, down tools, assume that ICBC will be available as a nominal defendant, and then, relying on this same assumption, decline to embark on inquiries that he or she would otherwise be reasonably expected to make.

[23] On the contrary, plaintiffs bear a positive obligation at the collision scene, and in the days and weeks following the collision, to take all necessary and reasonable steps to establish the identity of the offending owner and/or driver (*Morris v. Doe*, 2011 BCSC 253, at paras. 45–54). This is so even if their efforts do not prove fruitful.

[24] A plaintiff does not bear an "exceptionally onerous" obligation under s. 24(5), particularly where there is no suggestion of fraud on his or her part. However, it is an onus that is not "easily displaced", even where the unidentified owner or driver has fled the scene (*Morris* at para. 47, internal references omitted). See also *Goncalves v. Doe*, 2010 BCSC 1241, at paras. 5–11; *Johal v. Insurance Corporation of British Columbia and John Doe*, [1992] B.C.J. No. 1169 (S.C.), at p. 5.

[25] Whether "all reasonable efforts" have been shown requires a case-by-case assessment, as informed by the unique circumstances of the facts surrounding the collision and the plaintiff's conduct in the days, weeks and perhaps months following.

[26] ”The standard to be met is reasonableness. Whether the conduct falls on one side of the line or the other is a question of fact for the trier of fact": *Holloway v. ICBC and Richmond Cab and John Doe*, 2007 BCCA 175, at para. 12. See also *Nicholls v. Insurance Corporation of British Columbia*, 2011 BCCA 422. There, at para. 26, it was reiterated that the assessment of whether "all reasonable efforts" have been made is a "question of fact to be determined on the circumstances of each case" (internal references omitted).

5. THE ACCIDENT - ANALYSIS

[15] At the time of the Accident, the plaintiff was alone driving a “2001 or 2003” Mercedes M-Class SUV that he had bought at an auction a year or possibly a bit before. The plaintiff testified that:

> A It was in bad condition. Scratches all over. The interior, I mean, it was sometimes working. I bought it at an auction knowing the -- I had taken a friend of mine who had given me an estimate on how much it would cost me to get it running and -- and it was within -- within my budget, so I bought it, but there was a lot of -- it was an old one. I mean, there was a lot of scratches, deep scratches. Yeah.

[16] The plaintiff testified that the Accident occurred at around 2:10 p.m. It was a Friday. It was “windy, raining and stormy” and the “traffic was starting to pick-up.”

[17] A street view of the area of the Accident is attached as Schedule “A” to these reasons. Schedule “A” shows, looking south, the intersection of 208 Street and 87th Avenue, Langley, BC.

[18] Plaintiff’s counsel noted that street view photos such as Schedule “A” are subject to distortions. I agree. That said, Schedule “A” shows the relevant lanes including the right lane of 208 Street as it becomes a merging lane on the south side of 87th Avenue shortly beyond the south-approach curved lane from 87th Avenue.

[19] Towards the horizon, 208 Street rises as the right southbound lane joins the left southbound lane as it approaches an overpass that crosses above Highway No. 1. The first road beyond Highway No. 1 is 84th Avenue. Between 87th Avenue and 84th Avenue, there are no other intersections, adjoining roadways, laneways, crosswalks, or other features of note.

[20] Just before the collision, the plaintiff was travelling south in the right lane of 208 Street. He proceeded through the intersection. There was no evidence or suggestion that he did not have a green light. He testified that he was travelling at 50 to 55 km/h. After the collision, the plaintiff did not stop. He continued on 208 Street travelling beyond the overpass and then turned right onto 84th Avenue where he stopped.

[21] The damage to the plaintiff's car at the point of impact is shown in Schedule "B". As may be seen from Schedule "B", the plaintiff's car was hit on the passenger side near door handle height in the area below the pillar that visually divides the passenger compartment.

[22] The plaintiff was not a credible witness. His testimony was not "consistent with the probabilities affecting the case as a whole and shown to be in existence at the time": *Bradshaw* at para. 186. His testimony was not "sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" that he made "all reasonable efforts" to ascertain the identity of the driver of the minivan.

[23] The plaintiff has not satisfied the Court that he could not have either pulled over at the scene of the Accident or to have waved the driver of the minivan to follow him and to pull-off at 84th Avenue.

[24] In cross-examination, the plaintiff testified:

> Q If I took notes correctly, you testified yesterday that out of the corner of your eye as you were passing the intersection, you saw a silver minivan from your right try to merge onto 208th Street. Is that true?
>
> A Yes, before the 87th intersection.
>
> Q After the 87th intersection?
>
> A I had seen it around the 87th intersection.
>
> Q How much time elapsed between seeing it and the impact?
>
> A Immediate.
>
> Q So you just barely saw it and then the impact occurred?
>
> A Correct.

And further,

> Q You called it a minivan?
>
> A Yes.
>
> Q And it struck your Mercedes on its passenger side, you say?
>
> A Yes.
>
> Q And that was just past the 87th intersection where the merge lane enters 208th?
>
> A Yes.

[25] Based on the plaintiff seeing the minivan “before” and “around the 87th intersection” and the then “immediate” impact, the collision would have occurred at or around where the curved lane from 87th Avenue joins 208 Street. This point of collision is consistent with the damage to the plaintiff’s car shown in Schedule “B”.

[26] I find that it would have been reasonable for the plaintiff to have turned on his hazard lights and to have pulled over towards the side of the road. There would have been a single southbound lane to his left which would allow traffic to pass safely.

[27] The plaintiff’s explanation for not stopping is set forth in his testimony immediately following the above testimony. He testified:

> Q It's fair to say that after the impact you did not see what the other vehicle did?
>
> A That's correct.
>
> Q You never saw the minivan again after the impact?
>
> A That's correct.
>
> Q After the impact you got your vehicle under control and decided that you needed to go somewhere safe to pull over. Is that right?
>
> A Yes.
>
> Q You did not stop your vehicle at the scene of the accident?
>
> A No, because it was an overpass. It's a safety asset.
>
> Q Okay. You never came to a stop as a result of the impact or thereafter until you reached the place you decided to pull over. Isn't that true?
>
> A That's correct.
>
> Q You assumed the other driver would follow you?
>
> A Yes, correct.
>
> Q You didn't communicate with the other driver to suggest that you both travel over the overpass to exchange information?
>
> A There was no time for communication, sir.

[28] I have difficulty finding, as the plaintiff suggests, that the collision occurred near the overpass and not near the south of the subject intersection where the 87th Avenue curved lane joins 208 Street. That said, it would have been reasonable for the plaintiff to slow his car, engage his hazard lights, and wave the driver of the minivan to follow him.

[29] At trial, the plaintiff testified that he looked in his rear-view mirror as he left the scene of the Accident. At his examination for discovery on December 16, 2019, the plaintiff testified that he did not look in his rear-view mirror as he travelled the overpass. At trial, the plaintiff testified:

Q When you were asked that question at your examination for discovery -- first of all, were you asked all those questions, and did you give those answers?

A Yes.

Q And were those answers true?

A Except for this one.

Q This one is wrong because you didn't look – you did look in your mirror?

A I did look in my mirror.

Q And when it was put to you directly that you looked in your mirror and you said no, that was a somehow a mistake, was it?

A Then?

Q That's what you're saying now. You were asked directly if you looked in your mirror after the accident and you said no.

A It happened so fast. I probably forgot. Now I'm remembering things.

Q Okay. And you can remember now better than you could in 2019. Is that right?

A That's -- possibly.

Q Okay. After the accident, you went over the overpass, didn't you?

A Yes.

Q You went over the verge -- over the crest of the overpass and down the other side?

A Correct.

Q And you pulled over on 84th Avenue, didn't you?

A Correct.

Q So you went -- after the accident you went all the way from 87th Avenue to 84th Avenue, didn't you? Is this funny, sir?

A Yes, because the three blocks is the overpass.

Q The question was after the accident you went all the way from 87th Avenue to 84th Avenue, didn't you?

A Yes.

Q And in doing that, you crested the overpass?

A I had to go beyond the overpass and first right, that's where I turned in to.

Q Right. When you went over the overpass, the scene of the accident was no longer visible to you. Isn't that right?

A Yes.

Q So as you crested the overpass and went down the other side and pulled over at the first intersection, you were unable to see what was going on at the scene of the accident. Isn't that true?

A Yes.

[30] I do not accept as true the plaintiff's statement at trial that he looked in his rear-view mirror. He did not make such a statement during his examination for discovery. In my view, this inconsistency reflects both a lack of firmness of memory and an inability "to resist the influence of interest to modify his recollection".

[31] With respect to the plaintiff's turn onto 84th Avenue, the plaintiff testified:

Q Okay. So when you got to 84th, why were you surprised that the other driver wasn't there, then, if you'd looked and seen that he wasn't following you?

A He hadn't pulled over. I didn't see anything in the vicinity. I don't know. That's what I couldn't tell you. I did everything I possibly could.

Q When you got to 84th Avenue, you pulled over. You expected the other driver to be following you, and he wasn't. This is true?

A Or passing me. Yes, correct.

Q Once you realized he wasn't there, did you go back to the scene of the accident?

A No, I could not.

Q Why? Your car was drivable.

A I had just gotten into an accident.

Q Your car was drivable?

A Who said it was drivable?

Q You drove it from 87th to 84th, didn't you?

A That's when the accident happened. As soon as I pulled over, I took a right, it was not drivable after that.

Q It wasn't drivable because there was scratches on the passenger side?

A No.

Q Did you try?

A The left -- one of the wheels was off.

Q How did you drive from 87th --

A Didn't you see --

Q Sorry.

A I saw the picture. One of the wheels is off.

Q How did you drive from 87th to 84th if one of the wheels was off?

A I went straight driving, probably because of the -- it shouldn't have been drivable in the first place. I went and the first place I pulled over, I pulled over, and that's it. I turned the key off. Nothing after that. One of the tires was missing.

[32] In further testimony, the plaintiff changed his testimony regarding the left front wheel:

Q All right. Now, you're looking at a vehicle with a wheel fallen off -- that is off. Is this the photograph that you said -- when you said earlier that you thought there was a wheel off the vehicle at the scene of the accident?

A Yes.

Q This is on the driver's side of the vehicle; right?

A Yes, this is probably due in part to the --

Q Well, you don't know --

A -- tow truck.

Q You don't know what it was due to?

A Yes, I do. It was not -- this was not mentioned to me from ICBC that the damage was here. It was on the other side.

Q Right. Because there was no damage to the front -- to the driver's side of the vehicle; right?

A There was no damage at the scene on the wheel, no.

Q Right. Because the wheel was not off at the scene, was it?

A No, the wheel was on.

Q Yes.

A Yes.

Q You mentioned a few minutes ago before the break that one of the reasons why you didn't go back to see if the other driver was still at the scene of the accident was that one of your wheels were off?

A I didn't say wheels off. I said it was undrivable.

Q And yet you drove it from 87th Avenue to 84th Avenue?

A Yes, I had no choice.

> Q And the vehicle -- and the wheels were all still on the vehicle at the scene?
>
> A Yes.

[33] The plaintiff's testimony that his left front wheel was off when he stopped on 84th Avenue reflects a witness prone to exaggeration and who will adjust his testimony, especially when he perceives it is in his interests to do so

[34] I have considered that the plaintiff said he was in "shock" as a result of the collision. If his "shock" were a true reason for not returning to the scene of the Accident, I do not find it reasonable that he would feel the need to give his incredulous testimony that "One of the tires was missing".

[35] In sum, I do not find the plaintiff to be credible. He did not provide "sufficiently clear, convincing and cogent evidence" to satisfy the Court that he made "all reasonable efforts" to ascertain the identity of the unknown driver of the minivan.

[36] For completeness, I have considered that the parties agree that the "plaintiff was involved in a hit and run motor vehicle accident". The fact that the driver of the minivan may have fled the scene of the Accident and did not report the Accident does not discharge the plaintiff from making "all reasonable efforts" to ascertain the identity of the driver of the minivan. Indeed, where a party makes "all reasonable efforts", there is the real possibility that the licence plate number or other useful information may be obtained.

[37] The plaintiff has not satisfied the Court on a balance of probabilities that he made "all reasonable efforts" to ascertain the identity of the driver of the minivan. The plaintiff's claim is dismissed.

6. CONCLUSION

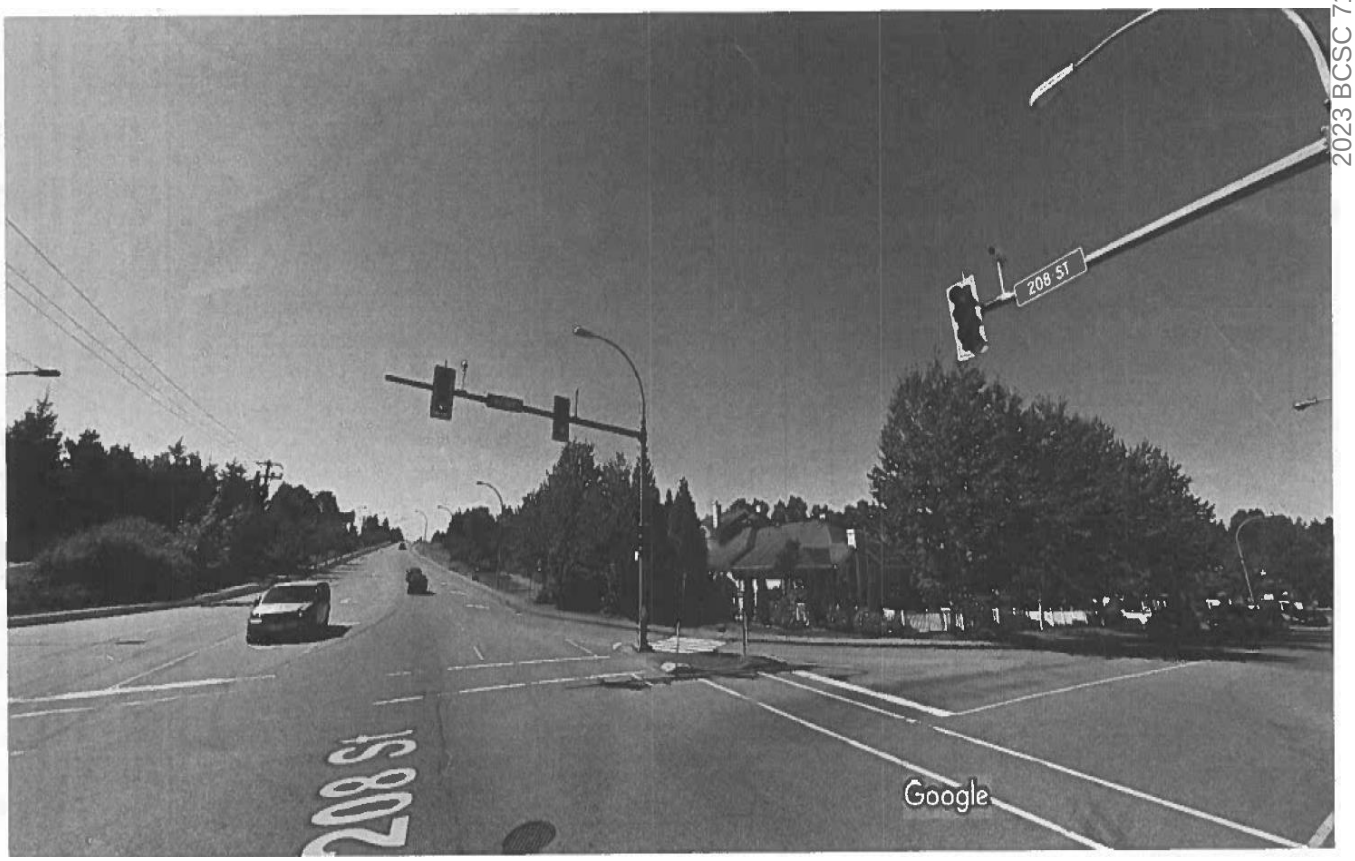
[38] The plaintiff's claim is dismissed.

7. COSTS

[39] If the parties wish to address costs, I ask that they, within 30 days of these reasons, arrange through Supreme Court Scheduling a 9 a.m., 55-minute hearing before me.

"Funt J."

Schedule "A" – Street view photo - 208 Street and 87th Avenue



Schedule "B" – Damage to the plaintiff's car at point of collision