COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Takhar v. Insurance Corporation of British Columbia,* 2024 BCCA 275

Date: 20240724
Docket: CA49099

Between:

Dilprit Takhar

Appellant
(Plaintiff)

And

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

Respondents
(Defendants)

Before: The Honourable Madam Justice Bennett
The Honourable Justice Griffin
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated May 1, 2023 (*Takhar v. Insurance Corporation of British Columbia*, 2023 BCSC 718, Vancouver Docket M179691).

Counsel for the Appellant:	T.R. O'Mahony
Counsel for the Respondent, Insurance Corporation of British Columbia:	C.C. Godwin
Place and Date of Hearing:	Vancouver, British Columbia June 4, 2024
Place and Date of Judgment:	Vancouver, British Columbia July 24, 2024

Written Reasons by:
The Honourable Madam Justice Horsman

Concurred in by:
The Honourable Madam Justice Bennett
The Honourable Justice Griffin

Summary:

The trial judge dismissed the appellant's action for damages for injuries alleged to have been caused by a motor vehicle accident on the basis that he had not made "all reasonable efforts" to identify the other driver, as required by s. 24(5) of the Insurance (Vehicle) Act. On appeal, the appellant argues that the judge made legal and factual errors in his analysis. Held: Appeal allowed, new trial ordered. The judge's assessment of the reasonableness of the appellant's conduct reflects palpable and overriding error. The judge ignored a substantial body of evidence that was relevant to the appellant's position and condition at the time of the accident. The appropriate remedy is to remit the matter back to the Supreme Court for a new trial.

Reasons for Judgment of the Honourable Madam Justice Horsman:

Overview

[1] The appellant appeals the dismissal of his claim for damages for injuries he allegedly suffered in a motor vehicle accident in 2016 (the "Accident"). The appellant claimed that he was sideswiped by another vehicle while driving along a busy street in Langley, BC. The appellant drove some distance from the scene of the Accident before stopping and calling the police. The driver of the other vehicle did not stop at the scene, and did not report the accident to the respondent, the Insurance Corporation of British Columbia ("ICBC"). It was common ground at trial that the Accident had, in fact, occurred—that is, that the appellant had not manufactured a fraudulent claim.

[2] As the other driver could not be identified, the appellant named ICBC as a defendant in the action pursuant to s. 24 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231. Section 24 provides that an action for damages arising out of the operation of a vehicle may be brought against ICBC as a nominal defendant where the identity of the owner and driver of the other vehicle is not ascertainable. Section 24(5) provides that judgment must not be granted against ICBC unless the court is satisfied that the plaintiff has made "all reasonable efforts" to ascertain the identity of the unknown owner or driver.

[3] The trial judge dismissed the action on the basis that the appellant had not made all reasonable efforts at the time of the Accident to ascertain the identity of the

driver of the other vehicle. The judge did not accept the appellant's explanation that he was injured and in shock, and this accounted for his actions in the immediate aftermath of the Accident. He found that the appellant was not a credible witness.

[4] On appeal, the appellant alleges legal and factual errors by the judge in his analysis of the reasonableness of the appellant's conduct. For the reasons that follow, I am of the view that the judge's factual finding that the appellant did not make all reasonable efforts to identify the other driver reflects palpable and overriding error, and, therefore, the appeal must be allowed.

The Accident

[5] The Accident occurred on the afternoon of October 21, 2016. It was a rainy day. The appellant was alone in his car driving south on 208 Street in Langley, BC. 208 Street has two southbound lanes as it approaches the intersection with 87th Avenue. After the intersection, the right-hand lane becomes a merging lane, and 208 Street is reduced to one southbound lane as it traverses an overpass over Highway 1. The first intersection with 208 Street beyond the overpass is 84th Avenue. There are no intersections between 87th Avenue and 84th Avenue.

[6] The appellant was in the far right-hand lane of 208 Street as he proceeded through the intersection with 87th Avenue on a green light. Immediately after the intersection, the appellant was sideswiped by another vehicle that appears to have been turning right onto 208 Street from 87th Avenue. The appellant caught a brief glimpse of the other vehicle before the impact. He described it as a silver or grey minivan. He did not note the licence plate number. The other vehicle struck the right side of the appellant's vehicle. The collision caused significant damage to the passenger side of the appellant's vehicle, as reflected in photographs that were in evidence at trial.

[7] The appellant did not immediately stop at the scene of the Accident. Instead, he continued to drive south on 208 Street over the Highway 1 overpass, before turning onto 84th Avenue and stopping. In his evidence at trial, the appellant stated,

among other things, that he was in shock, having hit his head in the Accident, and was trying to maintain control of his vehicle.

[8] After he pulled over on 84th Avenue, the appellant called 911. Police and fire personnel attended. As reflected in the contemporaneous police notes, the appellant stated that he had "hit his head from the collision, and was in shock and could not provide exact details". The appellant was transported to Langley Memorial Hospital in an ambulance. The Hospital's Emergency/Ambulatory Care Clinical Record indicated diagnoses of a concussion and cervical spine injury.

[9] The driver of the vehicle that struck the appellant was never identified.

The trial

[10] The trial of the issues of liability and damages proceeded over ten days in August 2022. ICBC denied liability on the basis that the appellant had not made all reasonable efforts to ascertain the identity of the driver or owner of the other vehicle as required under s. 24(5) of the *Insurance (Vehicle) Act*. In the event that liability was established, ICBC conceded that the appellant suffered compensable injuries in the Accident, but disputed that the injuries were as serious as the appellant claimed.

The evidence of efforts by the appellant to identify the other driver

[11] As noted, the appellant did not stop at the scene of the Accident. He also did not attempt to communicate with the other driver, such as by putting on his hazard lights or waving to the driver to follow him. The location at which the appellant pulled over on 84th Avenue was out of view of the Accident scene.

[12] In his direct examination, the appellant explained that he hit his head in the collision and he was in shock. He stated that it took him time to bring his vehicle under control. He pulled over and stopped at the first safe opportunity when he turned onto 84th Avenue. In cross-examination, the appellant gave inconsistent evidence as to his reasons for failing to pull over at the scene of the Accident or to immediately return to the scene. In addition to stating that he was in shock, the

appellant also suggested, erroneously, that his vehicle was undriveable because it was missing a tire.

[13] The day after the Accident, the appellant asked his friend, Ashwan Singh, to put up signs at the scene asking for witnesses. The appellant testified that he asked Mr. Singh to do this because he was not feeling well and was "bedridden". Mr. Singh placed signs at the Accident site on two occasions—on October 29 and November 17, 2016. He also put up a sign at a grocery store that appeared to be the only commercial establishment in the area. The appellant later wrote a letter to the RCMP inquiring as to the status of the investigation, but he did not receive a response.

The evidence of the appellant's Accident-related injuries

[14] The appellant tendered expert evidence from a number of witnesses, including Dr. Navraj Heran, a neurosurgeon, and Dr. Daniel Ngui, the appellant's family doctor. These experts opined that the appellant suffered injuries to his neck, shoulder, and back in the Accident, as well as psychiatric injuries. Both experts also stated that the appellant had suffered a concussion in the Accident. The appellant's condition deteriorated significantly in 2019. He was diagnosed with ankylosing spondylitis, an autoimmune condition affecting the spine. A significant issue of contention at trial was whether there was any causal link between the Accident and the development of the appellant's ankylosing spondylitis.

[15] The cross-examinations of Drs. Heran and Ngui focussed on the nature and extent of the Accident-related injuries to his back. Neither expert was challenged on their diagnosis of a concussion.

[16] The diagnosis of a concussion was also consistent with the lay witness evidence at trial. The appellant testified that in the days and weeks following the Accident, he experienced symptoms such as vomiting, dizziness, and pounding headaches. There was corroborating evidence about the deterioration in the appellant's condition after the Accident from his friends and family members. These witnesses testified to the appellant's post-Accident issues with memory, the

deterioration in his mental state and energy level, and the fact that he appeared largely home-bound.

The trial judgment

[17] The issue of liability turned on the question of whether the appellant had made all reasonable efforts to identify the driver of the other vehicle at the time of the collision. The judge found that it would have been reasonable for the appellant to have turned on his hazard lights and pull over in the merge lane of 208 Street at the time of the collision. Such action, the judge found, would have left a lane free for the safe passage of other traffic. Alternatively, the judge found that it would have been reasonable for the appellant to slow his car, engage his hazard lights, and wave the driver of the minivan to follow him.

[18] The judge found that the appellant was not a credible witness. He noted inconsistencies in the appellant's evidence, including his testimony that a tire had fallen off his vehicle. For this reason, the judge did not accept the appellant's explanation for his actions after the Accident. The judge stated:

> [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.
>
> ...
>
> [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.

[19] Accordingly, the judge concluded that the appellant had not met his burden under s. 24(5) of the *Insurance (Vehicle) Act* to show that he had undertaken all reasonable efforts to identify the other driver, and, on this basis, he dismissed the action. The judge did not provisionally assess damages. He did not review the

evidence concerning the appellant's condition following the Accident, other than the appellant's own evidence.

On appeal

[20] The appellant alleges two errors by the judge:

a) He erred in law by misapplying the test for assessing "all reasonable efforts" in the context of s. 24 of the *Insurance (Vehicle) Act*;

b) He committed a palpable and overriding error of fact in ignoring evidence of the appellant's position and condition at the time of the Accident.

Discussion

The legal framework for assessing "reasonable efforts" under s. 24 of the *Insurance (Vehicle) Act*

[21] Section 24 of the *Insurance (Vehicle) Act* provides that a plaintiff may bring an action against ICBC as nominal defendant. In order to grant judgment against ICBC under this section, the court must be satisfied that the two requirements in s. 24(5) are met:

> (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.

[22] A plaintiff seeking judgment against ICBC bears the burden of satisfying the court that they made all reasonable efforts to ascertain the identity of the other driver: *Emerson v. I.C.B.C. et al.,* 2002 BCCA 597 at para. 13. No particular steps are prescribed. A finding of what constitutes "all reasonable efforts" is a question of fact to be determined on the circumstances of each case: *Nicholls v. Insurance Corporation of British Columbia*, 2011 BCCA 422 at paras. 26–27; *Greenway-Brown v. MacKenzie*, 2019 BCCA 137 at para. 68, leave to appeal to SCC ref'd, 38696 (12 December 2019); *Holloway v. I.C.B.C. and Richmond Cabs and John Doe*, 2007 BCCA 175 at para. 12, leave to appeal to SCC ref'd, 32055 (1 November 2007).

[23] The standard to be applied under s. 24(5) of the *Insurance (Vehicle) Act* is reasonableness. The test has a subjective component. As explained by Taylor J.A. in *Leggett v. Insurance Corporation of British Columbia* (1992), 72 B.C.L.R. (2d) 201, 1992 CanLII 1263 (C.A.):

> [11] I do not think the words "not ascertainable" should be strictly interpreted, so as to mean "could not possibly have been ascertained". I think they are to be interpreted with reference to subsection (5) so as to mean "could not have been ascertained had the claimant made all reasonable efforts, having regard to the claimant's position, to discover them". Where a person knows that he or she has been involved in a motor vehicle accident, but refrains even from recording the licence number of the other vehicle, when that number is visible and the claimant could, had he or she wished, reasonably have recorded it, such a claimant must, in my view, find it particularly difficult, and probably impossible, to establish that he or she made all reasonable efforts to discover the identity of the owner and driver of that vehicle for the purposes of the section.
>
> [12] The test seems to me to be subjective in the sense that the claimant must know that the vehicle has been in an accident and must have been in such a position and condition that it would be reasonable for the claimant to discover and record the appropriate information. But the claimant cannot be heard to say: "I acted reasonably in not taking the trouble to find out".
>
> [Emphasis added.]

[24] In its submissions on appeal, ICBC urges this Court to endorse the two-stage analysis to the question of whether the plaintiff has made “all reasonable efforts” that is set out in *Cook v. Kang*, 2020 BCSC 526 at para. 179. Under this approach, the reasonableness of the plaintiff’s efforts is separately analyzed during two distinct time periods: (1) at the collision scene, and (2) in the days and weeks following the collision. In *Cook*, the judge held, at the first stage of this analysis, that the plaintiff had not made reasonable efforts to ascertain the identity of the other driver at the collision scene. On this basis, the judge found that the plaintiff had not discharged his onus under s. 24(5) of the *Insurance (Vehicle) Act* despite the reasonable efforts he made to identify the other driver in the days and weeks following the collision: at paras. 179–187. Relying on *Cook*, ICBC argues that this Court should establish a rule that reasonable efforts by a plaintiff after a collision (“stage 2”) cannot “cure” their failure to take steps to ascertain the identity of the other driver at the scene of the collision (“stage 1”).

[25] I am not persuaded that the two-stage analysis set out in *Cook* is consistent with the language of s. 24(5) of the *Insurance (Vehicle) Act* or with the jurisprudence interpreting that provision. Undoubtedly, the question of whether a plaintiff has made all reasonable efforts to identify the other driver requires consideration of the plaintiff's conduct at the time of the collision, as well as afterwards. This is because the question of whether the standard has been met must be assessed in the full circumstances of the case. It is a single inquiry into the reasonableness of the plaintiff's efforts. There is, in my view, no justification in the language of s. 24(5), or the relevant case law, to bifurcate the analysis so as to create artificial constraints on what is meant to be a holistic assessment. The only qualification on the language of s. 24(5) that has been recognized by this Court to date is the requirement that the plaintiff's subjective condition be considered. As stated in *Nicholls*:

> [31] Thus, the only qualification on the requirement of "all reasonable efforts" in s. 24(5) is the subjective aspect of the test that requires the "position and condition" of the plaintiff to be considered in determining what efforts are reasonable in the circumstances. In all cases, the single standard to be met is one of reasonableness.
>
> [Emphasis added.]

[26] For these reasons, I would not endorse a change to the long-standing test under s. 24(5) by adopting the two-stage analysis applied in *Cook*. In every case, the question of whether the plaintiff made all reasonable efforts to identify the other driver must be determined in all the circumstances, having regard to the position and condition of the plaintiff. The analysis should not be bifurcated into distinct time frames.

The first alleged error: Did the judge misapply the law?

[27] The first error alleged by the appellant concerns the judge's statement that the phrase "all reasonable efforts" in s. 24(5) of the *Insurance (Vehicle) Act* must be read "in the legislative context" of a driver's obligation under s. 68(1)(a) of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, to remain at the scene of an accident. The appellant says that the judge, at least inferentially, interpreted s. 24(5) to require a plaintiff's strict compliance with s. 68 of the *Motor Vehicle Act* in order to discharge

their burden to demonstrate they made all reasonable efforts. While the appellant acknowledges that the requirements of the *Motor Vehicle Act* may inform the assessment of whether a plaintiff has acted reasonably, he says it was wrong in law for the judge to find that compliance with the *Motor Vehicle Act* was required in order for a plaintiff to discharge their burden under s. 24(5).

[28] I am not persuaded that the judge erred in the manner alleged by the appellant. I agree that a plaintiff's failure to comply with the requirements of the *Motor Vehicle Act* does not, in itself, mandate the dismissal of an action against ICBC under s. 24 of the *Insurance (Vehicle) Act*. However, I do not read the judge's reasons to suggest otherwise. The judge stated that s. 68 of the *Motor Vehicle Act* provided relevant legislative context, but he plainly did not consider it determinative. The judge went on to consider the reasonableness of the plaintiff's conduct in failing to remain at the scene of the Accident. I see no legal error in the judge's reference to a driver's general obligation under s. 68 as a relevant factor in the analysis. The appellant acknowledges that the requirements of the *Motor Vehicle Act* may inform the analysis of reasonableness under s. 24(5). This is consistent with the general principle that statutory standards may be relevant to the assessment of what is reasonable conduct: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 29, 1999 CanLII 706.

[29] The appellant further submits that the judge's analysis did not consider the full circumstances, and that he ignored relevant evidence. However, these alleged errors are not errors of law. Rather, they relate to the judge's factual finding that the appellant did not make all reasonable efforts to identify the other driver, and must be assessed under the deferential standard of review of palpable and overriding error.

The second alleged error: Did the judge make a palpable and overriding error in his factual finding?

[30] The standard of review for findings of fact is palpable (obvious) and overriding (material) error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 5–6, 10, 19–23. Appellate intervention is justified if the judge has ignored conclusive or relevant

evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114 at 121, 1994 CanLII 106.

[31] The appellant argues that the judge committed a palpable and overriding error in failing to consider relevant evidence, including unchallenged medical evidence, regarding his impaired condition at the time of the Accident. The appellant says that his evidence that he was in shock at the time of the collision is consistent with a large body of evidence that tended to support the conclusion that he suffered a head injury in the Accident. This evidence, the appellant argues, was directly relevant to his position and condition at the time of the Accident, but was wrongly overlooked by the judge in applying the standard of reasonableness.

[32] ICBC, in response, emphasizes the deferential standard of review that applies to the judge's factual finding. It argues that the allegation that the appellant was "in shock" relies entirely on the evidence of the appellant, and there was ample support for the judge's finding that the appellant's evidence was not credible.

[33] I agree with ICBC that there was a sound basis in the evidence for the judge to be concerned about the appellant's credibility. However, I do not agree that the only evidence of the appellant's condition at the time of the Accident came from the appellant himself. The appellant's evidence that he was injured and in shock, and that this explains his actions immediately following the collision, is consistent with a substantial body of other evidence that is not reviewed by the judge. The other evidence includes:

a) the photographs of the damage to the appellant's vehicle in the Accident, which is consistent with an impact severe enough to cause him to strike his head;

b) the police notes of their interview with the appellant at the time of the Accident, which would at least be admissible to rebut any allegation that

the appellant later fabricated a head injury as a way of explaining his actions;

c) the unchallenged opinions of Drs. Heran and Ngui that the appellant suffered a concussion in the Accident; and

d) the evidence of the appellant's family members and friends that the appellant experienced symptoms consistent with a concussion in the immediate aftermath of the Accident, including memory loss, reduced energy level, and an inability to leave his house.

[34] I do not accept ICBC's argument that the judge's finding that the appellant was not a credible witness invariably taints the credibility of his other witnesses. While ICBC asserts that the medical diagnosis of a concussion depends solely on the appellant's self-report of symptoms, this assertion is speculative. The experts were not cross-examined on this diagnosis. The appellant's lay witnesses testified not only to what the appellant told them about his injuries, but also of their observations of his physical and mental condition after the Accident. More to the point, it cannot be said with any certainty that the judge considered the other evidence to be unreliable or lacking in credibility. He simply did not refer to it.

[35] In light of the record, it was insufficient, in my respectful view, for the judge to decide the case on the basis of a finding that the appellant was not credible without considering the totality of the evidence bearing on his condition at the time of the Accident. I appreciate that a judge is not required to reference every piece of evidence in the course of their reasons for judgment. Here, however, the evidence ignored by the judge was highly relevant to the very question that the subjective aspect of the test of "all reasonable efforts" required the judge to determine; that is, the position and condition of the appellant at the time of the Accident. Yet, beyond concluding that the appellant was not a credible witness, the judge made no findings regarding his condition at the time of the Accident.

[36] The judge's error in ignoring relevant evidence was palpable, in the sense of being obvious. The error is also overriding because the evidence that was ignored may well have altered the outcome of the analysis. If, in fact, the appellant was injured and concussed in the Accident, this would provide important context for assessing the reasonableness of his actions in failing to immediately pull his vehicle over at the time of impact.

Disposition

[37] The appellant seeks orders allowing the appeal, finding that he met the requirements of s. 24(5) of the *Insurance (Vehicle) Act*, thus establishing liability, and remitting the matter back to the Supreme Court for the assessment of damages. I am not persuaded such orders are properly within the role of an appellate court within the context of this appeal. The orders sought would require this Court to make credibility findings about evidence that was not addressed in the Court below, and that has overlapping relevance to the issues of liability and damages. This is not a case, in my view, in which it is feasible or in the interests of justice for this Court to undertake its own assessment of the evidence and make factual findings: *West Moberly First Nations v. British Columbia*, 2020 BCCA 138 at para. 135.

[38] Accordingly, I would allow the appeal, set aside the dismissal of the action, and remit the matter to the Supreme Court for a new trial.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Justice Griffin"