IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jaafar v. Insurance Corporation of British Columbia,* 2024 BCSC 1871

Date: 20240913
Docket: M205359
Registry: Vancouver

Between:

Zmnako Aziz Jaafar

Plaintiff

And

Insurance Corporation of British Columbia, John Doe, Jane Doe, and John Doe Corporation

Defendants

Before: The Honourable Justice Marzari

Oral Reasons for Judgment

In Chambers

The Plaintiff, appearing in person:	Z.A. Jaafar
Counsel for the Defendant Insurance Corporation of British Columbia:	S. Purcarin
No other appearances	
Place and Date of Summary Trial:	Vancouver, B.C. September 13, 2024
Place and Date of Judgment:	Vancouver, B.C. September 13, 2024

[1] **THE COURT:** The Insurance Corporation of British Columbia (“ICBC”), as the nominal defendant in this personal injury claim, applies by way of summary trial to dismiss the plaintiff's claim for failure to comply with s. 24(5) of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 [*Act*]. That provision requires plaintiffs who bring an action against ICBC as a nominal defendant, because they do not know the identity of the car owner or driver involved in the accident, to show that the driver and owner information was not ascertainable and that they made reasonable efforts to find that information.

[2] The action is brought by the plaintiff, Mr. Jaafar, for a rear-end collision that is said to have occurred on March 22, 2018. He reported that accident to ICBC approximately a month later in mid-April of 2018, with no information with respect to the defendant driver.

[3] Mr. Jaafar was discovered in December 2022 and excerpts of his examination for discovery are before me in evidence on this summary trial. Although Mr. Jaafar did not file a response or his own evidence, he does not dispute the basic facts arising from his evidence on discovery, which I find include the following.

a) First, the accident was a rear-end collision.

b) Second, Mr. Jaafar did not strike his head or any part of his body as a result of this rear-end impact, he was not in pain, and he was able to think clearly.

c) Third, the driver of the car that rear-ended Mr. Jaafar got out of his car to apologize and take responsibility. Mr. Jaafar's evidence on discovery was that he believed the driver would have given him his information had he asked for it.

d) However, Mr. Jaafar chose not to ask for that information because there were only minor scratches to his car, no one was hurt, and the would-be defendant driver had a nine or 10-year-old child with him in the car.

e) It was only later that evening that Mr. Jaafar started to experience pain. He went to the emergency ward and had to wait many hours to be seen and was not given relief. He went to see a doctor who, after one or two visits, suggested he make a claim against ICBC.

f) Mr. Jaafar posted notices after his lawyer told him to. Mr. Jaafar's discovery evidence varies as to when he posted that information. Based on the discovery evidence before me, which is the only evidence I have on this point, I find that Mr. Jaafar posted notices seeking information about the would-be defendant driver, with his name, his phone number, and the date of the accident, and asking people to contact that number. He posted the “pieces of paper”, as he called them, in the area of the accident. The clearest indication of timing of the posting of those notices is that he did so after speaking to his lawyer, approximately a week after bringing his car in for assessment by ICBC.

[4] I accepted a late affidavit from ICBC counsel that places the repair estimate in mid-May 2018, so approximately eight weeks after the accident. I find that it was about nine weeks or so after the accident, that Mr. Jaafar posted the flyers.

[5] I also reviewed an unsworn letter provided by Mr. Jaafar at this summary trial, sent to ICBC counsel in July 2024, showing pictures of notices posted on wooden poles and street signs, although the photos do not allow me to determine where and when those photos were taken on their face.

[6] I am prepared to give Mr. Jaafar, who is self-represented, the benefit of that doubt that he posted the information shown in the unsworn photographs when he stated he did so in his examination for discovery, which would have been around late May 2018.

[7] Mr. Jaafar states in the examination for discovery that he suffered serious neck pain in the days and years since the accident. In unsworn submissions, he tells

me that the pain in his neck has led to a surgery and other changes in his life. He blames the failure of his marriage, for example, on that pain.

[8] I accept that the evidence before me, even without Mr. Jaafar's submissions, supports that the accident occurred and that Mr. Jaafar has suffered neck pain since very shortly after that accident. There is sufficient evidence before me on the summary trial that I would not strike the claim for lack of evidence of injury.

[9] Mr. Jaafar has not filed any responsive materials to ICBC's summary trial application before me. He did not file a response or an affidavit. I accept counsel for ICBC's assurance that when Mr. Justice Mayer adjourned this summary trial in June earlier this year and gave Mr. Jaafar until July 15 to file that material, Mayer J. took the time to explain what was required to respond to the summary trial application, and noted resources available to Mr. Jaafar to help him prepare those response materials.

[10] Despite the absence of responsive material, I did allow Mr. Jaafar to provide submissions in response to this application. In his submissions, Mr. Jaafar did not deny the truth or accuracy of any of the discovery evidence I have noted above or other affidavit evidence relied upon by ICBC. In fact, he was of the view that this matter was already abandoned when he parted ways with his lawyer some time ago. He sought out other lawyers, but they all required that he pay his first lawyer.

[11] Mr. Jaafar states that he has no intention of proceeding with the trial of this matter set for November 4 of this year, and he currently lives in Buffalo, New York. He does not intend to attend at the trial and he considers that it is ICBC who keeps bothering him with letters and applications for a claim he has generally given up on.

[12] I turn then to the crux of this application which is whether Mr. Jaafar has, in the evidence before me and on the facts I have accepted above, met his burden to proceed against ICBC as a nominal defendant in the absence of the owner or driver of the car being ascertained.

[13] Section 24(5) of the *Act* provides:

> (5) In an action against the corporation as nominal defendant, a judgment against the corporation must not be given unless the court is satisfied that
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> > (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.

[14] Section 24 of the *Act* gives a plaintiff alleging bodily injury caused by an unidentified driver a claim for damages against ICBC as a nominal defendant. In order for the plaintiff to be able to recover any damages from ICBC, however, the following conditions must be met:

a) the loss must have occurred on a highway in British Columbia;

b) the bodily injury must have arisen out of the user operation of a motor vehicle; and

c) the names of both the owner and driver must not have been ascertainable.

[15] ICBC concedes that the first condition is met in this case as the accident occurred on or near Highway 1, and so was on a highway under the *Act*. ICBC concedes that the second condition has also been met, in that the plaintiff's alleged loss arose out of the user operation of a motor vehicle.

[16] ICBC says, however, that the third condition has not been met. ICBC says that the name of the other driver was, in fact, ascertainable at the time of the accident, but the plaintiff failed to take steps to obtain this information as required by s. 24(5) of the *Act*.

[17] The leading case on what is required of a plaintiff to comply with s. 24(5) of the *Act* and still maintain the action against ICBC as a nominal defendant, rather than against a John Doe or Jane Doe alone, is *Leggett v. ICBC* (1992*)*, 72 B.C.L.R. (2d) 201, 1992 CanLII 1263 (C.A.). The facts of the *Leggett* decision are remarkably similar to the circumstances in this case. At paras. 3, 4, the Court of Appeal for British Columbia reviews the background factual basis of the case as follows:

> 3 After his car had been struck from behind, Mr. Leggett got out, saw some minor damage to the trailer hitch on the back of his vehicle and to the front bumper of the other vehicle, and had a discussion with the other driver which resulted in an agreement between them that each would look after his own damage.
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> 4 Mr. Leggett then drove off without having recorded anything by which the other vehicle, its owner or driver, might be traced. The next morning he developed symptoms of the spinal injury, particularly to his lower back, in respect of which he seeks damages in his present action against the corporation. Mr. Leggett went on 10 days to the scene of the accident, at about the time the collision occurred, in the hope of seeing the vehicle concerned and being able to record its licence number. He also spoke to a resident near the scene, and put advertisements in newspapers, seeking information which might be of assistance in discovering the identity of the driver or owner of the other vehicle. All these efforts proved fruitless.

[18] The trial judge in *Leggett* was of the view that Mr. Leggett's ignorance of his injury until the following day made it reasonable that he would not, until then, make any efforts to obtain identification particulars. The judge found that the efforts which Mr. Leggett thereafter made to trace the owner and driver were reasonable for the purposes of then s. 23(5) (which is now 24(5) of the *Act*).

[19] The Court of Appeal did not agree with the trial judge in that respect, and overturned that decision. The reasons for that start at para. 9 of the *Leggett* decision, and at para. 10 Justice Taylor, concurred in by the rest of the Court, stated:

> 10 The corporation's exposure under the section is limited to claims brought by those who <u>could not</u> have ascertained the identity of the parties responsible. It does not, in my view, extend to claims by those who have <u>chosen not</u> to do so.
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> [Emphasis in original]

[20] And at para. 12, the Court of Appeal says:

> 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".

[21] At para. 13, the Court of Appeal discusses a similar situation:

> 13 I think that in essence the test is that which was formulated by Hinkson, L.J.S.C. (as he then was) in *King et al v. A.G. (B.C.)* (1968), 1968

> CanLII 595 (BC SC), 66 W.W.R. 223 (B.C.S.C.), following *Rossiter v. Chaisson*, [1950] O.W.N. 265 (Ont. H.C.). In the *King* case, which was decided under the then Section 108 of the *Motor Vehicle Act*, R.S.B.C. 1960 Chapter 253, the judge (at p. 226) held the appropriate test to be whether the claimants had "pursued the investigation to identify the vehicle and its owner and driver as resolutely and resourcefully as they would have done in like circumstances" had there been no such provision. In order to accommodate the current statutory requirement in the present context, I would add, after the words "would have done in like circumstances", the words "if the claimant intended to pursue any right of action which he or she might have arising out of the accident".
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> [Emphasis added]

[22] At paras. 14 and 15, the Court of Appeal stated:

> 14 In the present case the reason for failing to discover and record the required information was that the respondent had decided not to pursue any claim which he might have.
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> 15 It is not, in my view, possible for this claimant to establish that he acted reasonably simply because the full extent of damage done was not known to him at the time of the accident--that is to say, in this case, because he did not then know he had suffered personal injury. The question, in my view, is not whether Mr. Leggett acted reasonably in deciding initially to abandon whatever rights he had, but whether he acted as a reasonable person would have acted who wanted to protect those rights, whatever they might prove to be.

[23] Counsel for ICBC referred me appropriately to a 2007 Court of Appeal decision, *Holloway v. I.C.B.C. and Richmond Cabs and John Doe*, 2007 BCCA 175 where the Court of Appeal upheld a finding by the trial judge that the s. 24(5) requirements had been met by a pedestrian plaintiff who had been struck by a car at her right knee and hip and carried 10 metres by that car. Her evidence was that she then retreated from the driver after the driver began yelling at her. When she came back to speak with him, he had driven away. The trial judge found that the driver information was not reasonably ascertainable in those circumstances by the plaintiff because of her condition immediately after the accident.

[24] I agree with ICBC that this case is distinguishable from the case at bar. Here Mr. Jaafar was not injured, had a cordial conversation with the defendant who took responsibility, and expressly agrees that he would have been given the defendant's information had he asked, but that he chose not to ask at the time.

[25] Justice Armstrong provided a review of more recent case law on this point in *Springer v. Kee*, 2012 BCSC 1210 at paras. 48–52. He stated:

> [48] The plaintiff's duty is to make all reasonable efforts to identify the other party involved in the collision. This is a continuing obligation that first arises at the scene of the collision and continues for a reasonable time after.
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> [49] The interpretation of "reasonableness" in the context of this section is measured by whether Mr. Springer did everything he reasonably could have done to protect what would ordinarily be his interest if ICBC was not involved in funding the claim (*Leggett*, at paras. 9 and 13).
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> [50] The assessment of his efforts focuses on steps that are "logical, sensible, and fair" but not "absurd, whimsical or unwarranted" . . . The plaintiff is not required to take steps that are "highly unlikely" to produce any result (*Liao v. Doe*, 2005 BCSC 431 at para. 14; *Goncalves v. Doe*, 2010 BCSC 1241 at para. 10).
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> [51] The plaintiff's efforts do not require him to turn over every stone.
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> [52] Mr. Springer's failure to take steps to identify the unknown driver at the scene is an impediment to the court granting judgment for the statutory benefits otherwise recoverable under the *Act* (*Morris v. Doe*, 2011 BCSC 253; *Tessier v. Vancouver (City)*, 2002 BCSC 1938).

[26] Justice Armstrong cites several cases in those sections. At para. 59, Armstrong J. summarizes them:

> [59] The plaintiff must be resolute and resourceful in undertaking the ongoing obligation to ascertain the identity of the unknown owner/driver. The plaintiff's obligation to make reasonable efforts exists in the immediate aftermath of the collision and extends over days and possibly weeks . . .

[27] At para. 73, Armstrong J. cites Justice Ker in *Morris* at paras. 51 and 54:

> [51] While one of the purposes of s. 24(5) is to protect against the potential for fraudulent claims, that is not its sole purpose. Its broader purpose is to protect those who have done everything they reasonably could to protect what ordinarily would be their own interests. What constitutes all reasonable steps as contemplated by s. 24(5) of the *Act* must be determined in light of the purpose of the section and the circumstances of the particular case. The test which emerges from the purpose of the section was stated by Taylor, J.A. in *Leggett* at page 206 [para. 13] as follows:
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> > ... whether the claimants had "pursued the investigation to identify the vehicle and its owner and driver as resolutely and resourcefully as they would have done in like circumstances" had there been no such provision. In order to accommodate the current statutory requirement in the present context, I would add, after the words "would have done in like

> circumstances," the words "if the claimant intended to pursue any right of action which he or she might have arising out of the accident."
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> . . .
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> [54] Two specific time periods are relevant under the s. 24(5) inquiry: the time of the accident and the days or weeks following the accident. If reasonable efforts could not be made at the time of the accident, e.g. due to shock or injury; a belief that the party has not sustained any injury; or the driver fled the scene before information could reasonably be obtained, the court examines the steps taken by the plaintiff to ascertain the identity of the negligent driver in the days or weeks following the accident. What constitutes all reasonable efforts is a factual issue decided on a case by case basis.

[28] I would note that the test as articulated in *Morris* by Ker J. is that you would only have to go to the second part of the inquiry if there is a reasonable basis for not obtaining the information in the first instance, although not perceiving the potential injury is one of those conditions that she notes.

[29] Upon consideration of this helpful review of the law, and the uncontested facts before me, I find that the identity of the driver was reasonably ascertainable by Mr. Jaafar at the time of the accident, and furthermore, that he did not take prompt steps to ascertain the identity of the driver or owner of the vehicle once he knew of his injuries. The steps he did take did not meet the standard of the resolute and resourceful pursuit that would have been reasonably expected in the absence of the benefit of s. 24 of the *Act*.

[30] The law is clear that this is his burden to make out and it is not made out in this case.

[31] I therefore dismiss the claim. Subject to further submissions, I would strike the trial date of this matter currently set for November 2024.

[32] Is there anything further?

[SUBMISSIONS ON COSTS]

[33] THE COURT: All right. I understand your concern, Mr. Jaafar. I think your concern is that it was your lawyer who really pushed you to pursue this case and

then stopped at some point. That might give you some claim against your lawyer, but it does not give ICBC a claim in costs against your former lawyer.

[34] I am satisfied that ICBC is entitled to costs of the action, including this application. Mr. Jaafar, if you think you have a claim against your lawyer in relation to those costs, that will be something that you will have to raise with your lawyer directly.

[35] I am granting ICBC an order for costs of the action.

[REVIEW OF VETTED ORDER]

[36] THE COURT: This order does appear to conform to the order I have just made. Mr. Jaafar, it says that the action is dismissed for failure to comply with the requirements of s. 24(5) of the *Act* and that the applicant be awarded costs of this application and the action. Are you prepared to sign that order?

[37] ZMNAKO JAAFAR: No.

[FURTHER DISCUSSION REGARDING VETTED ORDER]

[38] THE COURT: I am satisfied that this form of order does reflect the order that I made. It does not say that the trial date is struck but I think that follows automatically. Having heard from Mr. Jaafar, I am going to waive the requirement that he sign the order. The plaintiff's signature on this order is dispensed with, and I have initialled that, and I have signed the order.

"Marzari J."