IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fearon v. Doe,*
2024 BCSC 2291

Date: 20241217
Docket: M210655
Registry: Vancouver

Between:

Larrissa Kady-Ann Fearon

Plaintiff

And

John Doe and/or Jane Doe and Insurance Corporation of British Columbia

Defendants

- and –

Docket: M210593
Registry: Vancouver

Between:

Shawayne Cecil Powell

Plaintiff

And

Joshua David Cayer, John Doe, Insurance Corporation of British Columbia, Larrissa Fearon, and Cordwell Fearon

Defendants

- and –

Docket: M210594
Registry: Vancouver

Between:

Duwayne Doras Fearon

Plaintiff

And

Joshua David Cayer, John Doe, Insurance Corporation of British Columbia, Larrissa Fearon, and Cordwell Fearon

Defendants

Before: The Honourable Mr Justice Crerar

Reasons for Judgment

Counsel for the Plaintiff, Larrissa Kady-Ann Fearon, in Action No. M210655:	D.S. Klein
Counsel for the Plaintiff, Shawayne Cecil Powell, in Action No. M210593, and the Plaintiff, Duwayne Doras Fearon, in Action No. M210594:	N.M. Kelly H. Siegmund
Counsel for the Defendant, Insurance Corporation of British Columbia, in Actions No. M210655, No. M210593 and No. M210594:	R.W. Parsons E. Tolfo
No other appearances	
Place and Dates of Trial:	Vancouver November 25-27, 2024
Place and Date of Judgment:	Vancouver December 17, 2024

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I. INTRODUCTION

[1] At around 4 am on February 3, 2019, a stolen GMC Sonoma pickup truck, driving at high speed up Sussex Avenue in Burnaby, ran a stop sign and entered the intersection with Beresford Street.[1] The truck hit the driver's side of the Mercedes containing the three individual plaintiffs, in a T-bone collision, spinning it around. The truck wound up in the bushes lining the paved BC Parkway path running parallel to the Skytrain line, just east of Metrotown Mall and the Metrotown Skytrain station. The driver of the truck, likely wearing a black and white hoodie, fled the scene.[2] His identity remains unknown.

[2] The plaintiffs admit that they took no steps to try to ascertain the identity of the hit-and-run driver for over a year. On March 2 and 3, 2020, a private investigator hired by counsel for Messrs Fearon and Powell placed signs around the area, and posted advertisements on Craigslist and in the local *Burnaby Now* newspaper, seeking witnesses and information. Those efforts yielded no clues.

[3] The defendant Insurance Corporation of British Columbia ("**ICBC**") asserts that the plaintiffs failed to acquit their duty under the *Insurance (Vehicle) Act*, RSBC 1996, c 231, s. 24(5)(a) to make "all reasonable efforts …. to ascertain the identity of the unknown…driver."

[4] This is the sole issue in this brief trial of these three actions. ICBC admits the liability of the unknown driver. While each plaintiff (the driver Larrissa Fearon, the front passenger Duwayne Fearon (her brother), and the back passenger Shawayne Powell (their cousin)) referred to what appear to be lingering soft-tissue injuries in their necks, shoulders, and backs, for which ICBC has provided some preliminary payments for treatments, the issue of damages has been left to a future second trial, which will not occur if this Court finds that the plaintiffs failed in their s. 24(5) duty.

II. LAW

[5] At common law, the victim of a hit-and-run driver would be left with no viable cause of action for compensation against an unknown driver; ICBC would have no

obligation to compensate the victims. Section 24 of the *Insurance (Vehicle) Act* statutorily creates a means to a remedy for a victim to claim against ICBC for damages inflicted by an unknown driver:

> **Remedy for damage in hit and run accident**
>
> **24**(1) Subject to subsection (1.1), if damage to non-vehicle property arises out of the use or operation of a vehicle on a highway in British Columbia and
>
> (a) the names of both the owner and the driver of the vehicle are not ascertainable, or
>
> (b) the name of the driver is not ascertainable, and the owner is not liable to an action for damages for the non-vehicle property damage,
>
> any person who has a cause of action
>
> (c) against the owner or the driver, as referred to in paragraph (a), or
>
> (d) against the driver, as referred to in paragraph (b),
>
> in respect of the non-vehicle property damage may bring an action against the corporation as nominal defendant, either alone or as a defendant with others alleged to be responsible for the non-vehicle property damage.

[6] Subsection 24(1) thus puts ICBC into the place of the wrongdoer even though ICBC will not: (1) have recourse to look to the other driver for assistance in resisting the claim; (2) be reimbursed if there has been a policy breach; or (3) receive contribution by way of increased premiums: *Leggett v. British Columbia (Insurance Corp. of)*, (1992) 96 DLR (4th) 12; 1992 CanLII 1263 (BCCA) at para 9 [*Leggett*], *per* Mr Justice Martin Taylor.

[7] As a counterbalance, s. 24 also imposes duties on the victim to take all reasonable efforts to ascertain the identity of the driver, and expressly forbids a court from awarding judgment against ICBC unless the plaintiff proves that they have made all reasonable efforts in the circumstances:

> (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
>
> (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.
>
> [emphasis added]

[8] *Leggett,* a leading authority, sets out the purposes of the provision:

> 9 The section provides a means by which a person who has suffered injury or property damage in a motor vehicle accident may obtain compensation from the government insurer even though the driver said to be at fault, and the owner of the vehicle which was being driven by that person, are insured in another jurisdiction or not insured at all, even though the corporation will, in any event, be unable to look to the other driver for assistance in resisting the claim, and even though the corporation will be unable to obtain reimbursement in the event the other driver is uninsured or there has been a policy breach, or to obtain contribution by way of increased premiums through forfeiture of the other party's 'safe driving' discount. As the trial judge recognized, ***protection against fraudulent claims is only one of the purposes of the requirement that the claimant show inability to identify the other driver and owner as a condition of being able to claim under the section. In my view 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.***
>
> [emphasis added]

[9] *Leggett* sets out the post-accident diligence expected of a hit-and-run victim:

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

> 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".
>
> [Bold underlining in original; bold italics added]

[10] In *Takhar v. ICBC*, 2024 BCCA 275 at para 23 [*Takhar*], the Court of Appeal recently endorsed *Leggett*, expressly quoting its paras. 11–12. The Court confirmed that whether the plaintiff expended “all reasonable efforts” sufficient to satisfy s. 24(5) is a fact-specific enquiry:

> [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).

[11] The plaintiff bears the persuasive burden of establishing on a balance of probabilities that they made all reasonable efforts to ascertain the identity of the unknown driver: *Clark v. Insurance Corporation of British Columbia*, 2022 BCSC 451 at para 27 [*Clark*]; *Takhar* at para 22; *Emerson v. Insurance Corporation of British Columbia*, 2002 BCCA 597 at para 13. This onus, although not exceptionally onerous, is not one easily displaced, “even in circumstances where the unidentified [driver] has fled the scene”: *Morris v. Doe*, 2011 BCSC 253 at para 47 [*Morris*].

[12] In *Avishek v. ICBC*, 2023 BCSC 1856 [*Avishek*], the recent decision most relied upon by the plaintiffs, Madam Justice Ahmad helpfully summarises the legal

principles guiding the determination of whether a plaintiff has acquitted their s. 24(5) duty to take all reasonable efforts:

> [41] To discharge the obligation imposed by s. 24(5), a plaintiff must take steps as "'***resolutely and resourcefully as they would have done'*** in like circumstances had there been no possibility to claim against ICBC as a nominal defendant": *Ghuman v. ICBC*, 2019 BCSC 3 at para. 35, citing *Leggett v. Insurance Corporation of British Columbia*, 72 B.C.L.R. (2d) 201 at para. 13, 1992 CanLII 1263 (C.A.).
>
> [42] More specifically, "all reasonable efforts" imposes on a plaintiff 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" even if those steps "do not prove fruitful"***: *Rieveley v. Doe*, 2017 BCSC 202 at para. 23, citing *Morris v. Doe*, 2011 BCSC 253 at paras. 45–54.
>
> [43] There are ***no specific or prescribed steps to satisfy s. 24(5). 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. In this context, reasonableness has a subjective component and takes into account the "position and condition" of the claimant in the circumstances of the case: *Greenway-Brown v. MacKenzie*, 2019 BCCA 137 at paras. 65–69, citing *Nicholls* at paras. 29, 31, and *Leggett*.
>
> [44] The plaintiff is ***not required to turn over every stone or take steps that are highly unlikely to produce any result***: *Springer v. Kee*, 2012 BCSC 1210 at paras. 50–51.
>
> [emphasis added]

[13] While all reasonable efforts must be determined based on a holistic view of the particular facts of each case, the following principles and themes emerge from the s. 24(5) jurisprudence, as summarised in Madam Justice Ker's helpful *Morris* compendium, updated here to 2024:

> a. depending on the plaintiff's condition at the scene of the accident, it may not be realistic to expect the plaintiff to obtain particulars as to the identity of the offending driver particularly where the plaintiff is in shock or confused or injured: *Tessier v. Vancouver (City)*, 2002 BCSC 1938; *Hocaluk v. Insurance Corporation of British Columbia*, 2007 BCSC 170; *Ingram v. Insurance Corp. of British Columbia* (1994), 1994 CanLII 1439 (BC CA), 45 B.C.A.C. 218 [*Ingram*]; *Holloway v. ICBC*, 2007 BCCA 175, at para. 14; *Larsen v. Doe*, 2010 BCSC 333 [*Larsen*]; *Becker v. Insurance Corp. of British Columbia*, 2002 BCSC 1106 [*Becker*], at para. 20; *Nelson v. Insurance Corporation of British Columbia*, 2003 BCSC 121 at paras. 19-20 [*Nelson*]; *Morris* at para. 65; *Takhar*; *Avishek* at para 53;

b. failure to record a licence plate number at the time of the accident when the plaintiff has the opportunity to do so or obtain information as to the driver's identity, either personally or through the assistance of others, but does not take advantage of the opportunity amounts to a failure to take reasonable steps at the time of the accident: *Burley v. Insurance Corporation of British Columbia*, 2003 BCSC 1837 at paras. 23-24 [Burley]; *Watson v. Insurance Corporation of British Columbia*, 2004 BCSC 1695 [*Watson*]; *Cannon v. Insurance Corporation of British Columbia,* 2005 BCSC 602; *Jaafar v. Insurance Corporation of British Columbia*, 2024 BCSC 1871;

c. simply notifying the police of the accident may not be sufficient to satisfy the requirements of s. 24(5): *Tessier* at para. 17; *Becker* at para. 18; *Morris*; *Springer v. Kee*, 2012 BCSC 1210 at paras. 81, 91 [*Springer*];

d. the *Act* does not put the responsibility to find the unidentified driver on the police; rather the responsibility lies with the plaintiff: *Becker* at para. 17;

e. where a plaintiff does notify the police of the accident, it is not reasonable for them to simply assume the police will make the necessary inquiries without following up with the police and checking to see if there was an investigation and if so what progress was being made in it: *Becker* at paras. 17-18; *Tessier* at para. 17; *Goncalves v. Doe*, 2010 BCSC 1241 at para. 23 [*Goncalves*];

f. simply reporting the matter to the police and ICBC, without more, has led to the dismissal of a plaintiff's action for failure to comply with the requirement of taking all reasonable steps to ascertain the identity of the driver: *Meghji v. Insurance Corp. of British Columbia,* [1998] B.C.J. No. 3107 (P.C.) (QL);

g. where the police attend the scene of the accident and take witness statements and indicate they are investigating the hit and run accident, it may not be necessary for the plaintiff to take any additional steps, depending on the circumstances: *Hough v. Doe*, 2006 BCSC 1450 [*Hough*], at paras. 16-17 & 21; *Ingram* at para. 13;

h. a plaintiff placed in a position of danger at the time of the accident cannot be expected to remain in that position to obtain details of a licence plate and movement to a position of safety before trying to obtain any licence information does not constitute a failure to take reasonable steps at the scene of the accident: *Nelson* at paras. 19-20;

i. posting signs in the area of the accident and/or advertising in local newspapers in an effort to find witnesses within a reasonable time after the accident where the accident occurs at a busy intersection is a reasonable and expected step as it is possible that someone present at the time of the accident could be of assistance in ascertaining the identity of the driver of the vehicle that left the scene: *Johal v. Insurance Corp. of British Columbia* (1992), 9 C.C. L.I. (2d) 172 [*Johal*]; *Fan v. Doe,* 2009 BCSC 568 [*Fan*]; *Nelson* at paras. 21-22; *Godara* at paras. 51-54; *Tessier* at para. 17; *Halfyard v. Insurance Corporation of British Columbia*, *(*1993), 26 C.C.L.I. (2d) 320; *Ghuman v. Insurance Corp. of British Columbia*, 2019 BCSC 3, at para. 66 [*Ghuman*]; *Larsen*;

j. failing to post signs at the scene of the accident or place advertisements in the newspaper in a timely manner or in a manner that provides insufficient detail where it is possible that there were potential witnesses who may have information about the accident will result in a denial of coverage under s. 24 of the *Act*: *Johal; Fan; Burley; Becker; Nelson* at paras. 21-22;; *Li v. Doe*, 2015 BCSC 1010, at para. 96 [*Li*]; *Morris* at para. 75;

k. repeatedly canvassing regular patrons of the business where the plaintiff's vehicle was damaged in the parking lot of the business may constitute reasonable steps to ascertain the identity of the driver: *Janzen v. Insurance Corporation of British Columbia*, 2004 BCPC 437;

l. posting signs and advertising in local newspapers may not be a reasonable step where the accident occurs on a high speed area of highway or a on highway in an area that is undeveloped and sparsely populated: *Hough* at para. 24; *Goncalves* at para. 16-21; *Nicholls v. Insurance Corporation of British* Columbia, 2011 BCCA 422 at para. 38 [*Nicholls*]; *Avishek* at paras. 69, 74;

m. once it is found that a plaintiff acted reasonably in believing they had the information that would be required, such as a licence plate number, there is no onus cast upon them to undertake a highly speculative further investigation upon being advised they have the wrong license plate number: *Smoluk v. ICBC* (1993), 1993 CanLII 2167 (BC CA), 26 B.C.A.C. 23; *Walker v. Farnel* (1995), 36 C.C.L.I. (2d) 312, at para. 24;

n. a plaintiff will not be foreclosed from pursuing ICBC as the nominal defendant in a hit and run case where they rely upon information provided by the offending driver that subsequently turns out to be untruthful: *Mudrie v. Grove*, 2010 BCSC 1113, at paras. 33-36;

o. failure to follow up on directions to take additional steps such as posting signs for witnesses or advertising, once advised the recorded licence plate number is incorrect will result in a denial of coverage under s. 24 of the *Act*: *Watson*;

p. failing to make a timely report to the police and failing to follow up on available information from the scene of the accident such as information in the possession of ambulance personnel who attended the scene will result in a denial of coverage under s. 24 of the *Act*: *Johal; Li* at paras. 83, 87;

q. the failure of ICBC adjusters to advise the plaintiff that other steps to try and ascertain the identity of the driver should be undertaken does not relieve a plaintiff of the obligation to take all reasonable steps to ascertain the unknown driver's identity: *Tessier* at para. 19; *Fitger v. John Doe*, 2015 BCSC 1855, at para. 17 [*Fitger*]; *Li* at para. 116; *Springer* at para. 85;

r. where a plaintiff reasonably relies on others to investigate the identity of the driver, and those others take reasonable steps, it may acquit the plaintiff's s.24 duty: *George v. Doe*, 2015 BCSC 442, at para 31 [*George*].

[14] That said, none of these factors is determinative in the abstract. As stated by Madam Justice Donegan (before her translation to the Court of Appeal) in *Ghuman*:

> [60] In other words, just like other potential steps (such as posting signs at the scene), whether and when police must be called is a function of what is reasonable in the circumstances of each case. Just as the posting of signs seeking potential witnesses could reasonably be seen as unnecessary where it would be reasonable to believe signs would be of no assistance (see *Nicholls* at paras. 36-38 and *Rieveley* at paras. 36-44), immediately calling police may not be necessary where the circumstances are such that a plaintiff reasonably believes such a step would not likely lead to the identification of the unknown driver and/or owner.

III. DISCUSSION AND DECISION

[15] With some regret, this Court cannot allow the claim, as the plaintiffs have not met their onus to take all reasonable steps in the circumstances. The plaintiffs did not take the reasonable steps to seek to learn the identity of the driver "resolutely and resourcefully", as they would have done had there been no statutory s. 24 ICBC safety net, as required by the statute and the jurisprudence. Rather, the plaintiffs frankly admit that they took no steps whatsoever for over a year to obtain information that could assist in identifying the fugitive driver. Given their situation and circumstances, they could and should have taken various minimally burdensome steps to fulfil their obligation under s. 24(5). Accordingly, "a judgment against the corporation must not be given," to use the prohibitory wording of the statute.

[16] While the collision left the plaintiffs dazed and shaken up, all three plaintiffs were discharged from hospital within two hours; they were not in a coma or otherwise suffering from a post-accident mental or physical condition, preventing them from taking "all reasonable efforts…to ascertain the identity of the unknown driver" in the days and weeks following the accident. It would have taken little effort to put up signs and advertisements seeking witnesses to and information about not only the collision, but also about the flight of the unknown driver. Although the area was dark (albeit with some streetlights), with few people present at 4 am, there is a real possibility that someone in the area could have heard the speeding pickup truck or the loud squeal of brakes and the bang of the vehicular collision, or have witnessed the collision or the unusual sight of the fleeing driver, who himself might well have been injured or dazed from the collision and thus even more conspicuous.

[17] Despite the early hour, at least four individuals directly witnessed the aftermath of the accident: two men[3] playing a videogame in a nearby apartment building, both of whom rushed to the scene of the accident upon hearing the brakes and collision, as well as two other passers-by, including one who called 911. Those two young men in fact attempted to chase down the fugitive driver, reckoning that he would have fled away from Metrotown Station, towards the east, where there was a school as well as alleyways. The area was lined with several low-rise apartment buildings, all filled with potential witnesses to the collision or the flight. The fugitive's family, friend, or roommate, upon seeing a sign or advertisement, might have done the right thing, and reported the fugitive's unusual return home, perhaps out of breath, perhaps dazed, perhaps injured, early in the morning.

[18] Such signs might also have generated clues about the driver, through a sighting of the stolen pick-up truck in the two days between its theft and the collision. The vehicle had in fact been stolen from that same neighbourhood: roughly 1.5 kilometres away from the accident scene. A timely sign highlighting the truck's involvement in a recent hit-and-run accident might have prompted a witness to recall seeing it parked or driving in the preceding days, leading to possible identification of the driver. It might have prompted a family member or friend or associate or neighbour of the fugitive driver to recall and report that they had observed him driving a seemingly newly-acquired pickup truck.

[19] The s. 24(5) jurisprudence indicates a general expectation that the plaintiff will take the minimally burdensome step of posting signs or advertisements in a reasonable effort that may possibly obtain information about the unknown driver, except in circumstances where it would be clearly fruitless or "highly unlikely" to generate information: *Morris* at para 75; *Becker* at para 16; *Fan* at para 26; *Nelson* at paras 21-22; *Godara v. ICBC*, 2008 BCSC 183 at paras 51-54; *Tessier* at para 17; *Li* at para 93; *Johal* at para 6; *Burley* at para 26, *Hough* at para 24.

[20] It cannot be said that the timely placement of signs and advertisements would have been an "absurd, whimsical, or unwarranted" step to identify the fugitive driver.

Rather, placement of signs and advertisements would have been a "logical, sensible, and fair" step, to use the phrases in *Nicholls* at para 33. The plaintiffs have not established that such steps would have been "highly unlikely" to produce any result: *Li* at para 75. Such steps would not have been difficult, burdensome, or expensive. Nor would they have been counterintuitive or obscure. Signs on telephone poles seeking witnesses to accidents are commonplace. Even if it did not naturally occur to the plaintiffs that they might bear obligations of their own in making an accident claim for compensation, Ms Fearon retained a law firm (a now-defunct firm that purported to specialise in ICBC work) the very week of the collision, and Mr Powell also sought legal advice.[4] The plaintiffs' own posting of signs and advertisements a year after the collision acknowledges to some extent that those steps were expected and might well have assisted in identifying the fugitive driver, had they been done in a timely manner.

[21] The plaintiffs argue that the early hour of the accident, on a dark street with little foot or vehicular traffic at that time, indicates that it is unlikely that any witnesses would have come forward. I have already addressed the factual concerns with that argument above: even at 4 am, there were no fewer than four witnesses nearby; signs and advertisements could well have prompted more witnesses to step forward, from any of the many nearby apartment buildings, or Metrotown Mall or Station, or otherwise.[5] The locations—highways and remote locations—of the accidents in most of the plaintiffs' cases cited for this proposition made the possibility of meaningful witnesses in those cases far less likely: *Jennings* at paras. 12, 69–70, *Avishek* at paras. 47, 57, 64, 67; *Hough* at paras. 24–25; *Goncalves* at paras. 16–20; *Burton v. ICBC,* 2011 BCSC 653 at para 30, *Nicholls* at para 5; *Slezak* 2003 BCSC 1679 at para 46, *Ryan v. Drybrough*, 2005 BCSC 1946 at para 1 [*Ryan*]; and *Houniet v. Insurance Corporation of British Columbia*, [1982] B.C.J. No. 692 (S.C.), at paras 3, 22. The sparsely populated highway described in *Hough* contrasts to the densely populated site of the present accident:

> [25] In stark contrast to the foregoing example, the instant collision occurred along an undeveloped and sparsely populated stretch of the Trans-Canada highway where there are no pedestrians and where vehicles travel at

> speeds in excess of 100 km/h. A collision which occurs in such a location and circumstances is likely to be witnessed by relatively few people, if any. The speed at which the offending vehicle would be travelling would seriously hamper the ability to observe and note a licence plate number. The likelihood that a witness would recognize the driver or the car is miniscule. In the days following the collision, the task of locating any witnesses would be daunting. The highway serves many people from far-off places travelling considerable distances to an array of destinations. It would be a far-fetched exercise to post a notice at the accident scene or advertise in a local newspaper, and there would be no-one to canvass.

[22] Indeed, in *Goncalves* at para 18, the Court noted that the accident location lacked posts or other suitable locations where signs could be safely affixed. Similarly, *Avishek* at para 68 noted that there were few posts or structures on which a sign could even be posted.

[23] Of course, timely signs or advertisements in the critical days or weeks following the collision may in the end not have gathered any further evidence. But thanks to the plaintiffs' inactivity, we will never know whether that evidence was lost. By the time Messrs Powell and Fearon (but not Ms Fearon) took such steps, 13 months later, the futility of those steps was nearly a foregone conclusion. Time is of the essence when it comes to locating witnesses. As stated in *George* at para 41:

> In order to be "reasonable", those efforts had to be made soon after the collision happened - not years after the accident when there was no reasonable prospect that a potential witness could be found who would be able to recall anything that would help to identify the John Doe driver.

[24] The plaintiffs argue that they acted reasonably in not taking any steps, as they knew that the police were investigating the collision. They argue that they properly assumed the collision would be thoroughly investigated, as it involved not one but two crimes: the theft of the vehicle, and the flight from the collision. They argue that apart from this reasonable reliance, the unsuccessful police investigation also indicates that any efforts by the plaintiffs would have been futile. The plaintiffs argue that the police conducted an extensive and thorough investigation of the collision, including interviews with the plaintiffs and a witness, a police dog search, and a forensic examination of the interior of the pickup truck. Police inquiries yielded no useful surveillance video evidence. Ultimately, the police closed their file seven

days after the accident, concluding that "[u]nfortunately, no further information is available to continue investigation."

[25] The testifying officer confirmed that he did not consider putting up signs soliciting witness information. While the officer did not explain whether this was due to its futility, or police policy, or limited resources, or otherwise, the plaintiffs encourage the Court to infer from this evidence that a professional investigator considered signs to be a fruitless exercise. The plaintiffs cite *Hough*; *Daniels v. Insurance Corp. of British Columbia,* [1985] B.C.J. No. 1444 (S.C.); *Ingram*; and *Ryan* where courts found that the plaintiffs acted reasonably in relying upon the police to conduct the investigation.

[26] The oft-cited *Becker*, where the Court found that the plaintiff had failed to acquit his s. 24(5) duty, speaks most directly to this issue. The *Becker* plaintiff protested that he relied upon the efforts of the RCMP to locate the driver. In that case, as here, the plaintiff made no inquiries for 13 months to determine the status of the police investigation: there, as here, such inquiries would have revealed that the police had stopped their investigation soon after the accident, such that any ongoing reliance was unreasonable: para 17. The *Becker* Court surveys the bulk of the jurisprudence confirming that, generally, reliance on the police, particularly without timely plaintiff inquiries, will be insufficient to fulfil the s. 24(5) duties:

> [18] ***It was not reasonable for Mr. Becker to have no contact with the R.C.M.P. until almost 14 months after the accident. Without the knowledge that the police were actually attempting to locate the driver, it cannot be said that there was reliance on the police. If a party wishes to rely on the police to undertake the investigations which are his or her responsibility, it is incumbent upon a plaintiff to monitor the efforts that are being made so that their own efforts can come into play if the police have been unsuccessful.*** In *Cairns*, supra, that was being done. I adopt the statement made in *Ingram*, supra, that, as a "general statement", it is not appropriate for a Plaintiff "... to rely upon the police to obtain the information required." (at para.13) I also adopt the statement made in *Tessier v. City of Vancouver and Insurance Corporation of British Columbia*, unreported oral reasons on February 7, 2002 (Supreme Court of British Columbia Action No. B991258 – Vancouver Registry), where Barrow, J. stated: ***"In my view, it would be rare to find circumstances in which simply notifying the police was sufficient to satisfy the requirements of section 24(5)...".*** It was not reasonable for Mr. Becker to assume that the police would make the

> necessary inquiries when he had no idea whether they were making such inquiries and when he did not check to see what progress they were making.
>
> [emphasis added]

[27] Other authorities confirm that, generally, merely reporting the incident to the police will not fulfill the plaintiffs' s. 24(5) duties: plaintiffs cannot offload their s. 24(5) responsibility onto the police, and, at a minimum, the plaintiff is expected to follow up with the police, either directly or through their counsel: *Goncalves* at para 23; *Tessier* at para 17; *Clark* at para 40; *Morris* at paras 69 and 73; *Ingram* at para 5:11. Here, had the plaintiffs followed up with the police in a timely manner, they would have learned that the police were in fact no longer investigating the matter, and that their assumptions and reliance were incorrect, and that all hope of finding the fugitive driver rested on their proactivity.

[28] Finally, in addition to the factors already identified above, most of the plaintiffs' cases can be further distinguished by the fact that the plaintiffs in those cases exhibited at least some proactivity in addition to their reporting to the police. In *Hough*, for example, the plaintiff at least followed up with the police: paras 23, 28. In *Rieveley v. Doe*, 2017 BCSC 202, the plaintiff similarly took proactive steps, including seeking video evidence, and relying on his lawyer to post advertisements: paras 16–17. In *George*, the plaintiff knew that his cousin, the co-occupant of the vehicle, had posted a sign at the intersection, and placed an advertisement on Craigslist right after the accident, and took other steps through his lawyer. In *Ingram*, the plaintiff through his counsel sought to obtain police and other records concerning the accident and investigation: para 5:11-14. In *Burton*, the plaintiff, with her husband and friends, actively tried to locate the vehicle: para 32.

[29] Counsel was unable to locate any recent case in which a report to the police, with nothing more, satisfied the all reasonable efforts requirement of s. 24(5). Further, counsel presented no case where a plaintiff, such as the present, who takes absolutely no timely proactive steps to try to determine the identity of the fugitive driver, is relieved of the consequences of s. 24(5).

[30] I will conclude by addressing an overarching argument of the plaintiffs: that *Leggett* must be read in its factual context, and that subsequent jurisprudence must be treated with caution as overlooking that context. Specifically, *Leggett* did not involve a hit-and-run driver, and involved no element of criminality. Rather, the *Leggett* plaintiff, after a minor collision, had a discussion with the other driver, and, believing that he had suffered no injury, failed to take his name or licence number. The *Leggett* plaintiff clearly chose not to take these reasonable and minimal steps, leading to the Court's observation, again, that:

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

[31] The plaintiffs thus argue that *Leggett* turns on the wilful and conscious decision of the plaintiff in that case not to take reasonable steps to obtain the other driver's identity. In the present case, the plaintiffs' lack of action did not stem from a wilful decision, but rather ignorance or haplessness. Jurisprudentially, any authorities that impose a duty on a plaintiff driver to take reasonable investigatory steps outside of the *Leggett* context of a conscious decision not to readily obtain identity information from the other driver must be treated with caution.

[32] With respect, this argument is untenable in light of the plain language of the statutory s. 24(5) heading: "Remedy for damage in hit and run accident." That subsection governs all situations where the identity of the other driver is unknown, whether through criminal and evasive action, as in the present circumstances, or more benign haplessness, as in *Leggett.*

[33] The argument is also untenable in light of the Court of Appeal's recent decision in *Takhar*, confirming the *Leggett* analysis in the specific context of a hit-and-run driver. *Takhar* confirms that there are no restraints on the holistic *Leggett* inquiry, beyond the express *Leggett* requirement to consider the objective reasonableness of steps expected of the plaintiff given their subjective physical or

mental state after the accident. *Takhar* specifically confirms that the court must consider whether the plaintiff has made all reasonable efforts to identify the other driver based on their conduct and ability, both at the time of the collision as well as afterwards:

> [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]

[34] *Takhar* accordingly declined to "endorse a change to the long-standing test under s. 24(5)", as set out in *Leggett* at paras 11-12: para 26.

[35] A similar observation could be made with respect to Ms Fearon's argument, based on a passage in the pre-*Leggett* case of *Johal v. Insurance Corporation of British Columbia*, [1992] BCJ No. 1169; 9 CCLI (2d) 172 (SC) that the approach to "all reasonable efforts" may be relaxed when fraud is not alleged, as here:

> The test which the plaintiff must meet is to satisfy the court that he made "all reasonable efforts". In a case such as this, where there is no suggestion of fraud, I would regard "reasonable" as the fundamental element of the test. It should not be made so exacting that it cannot be met. But, on the facts proved here, I cannot be satisfied that the plaintiff has met the test.

[36] *Takhar* and *Leggett*, and other Court of Appeal decisions, have not cited *Johal* for a relaxed or differing s. 24(5) approach where no fraud is alleged. In any

case, even a relaxed approach to “all reasonable efforts” will not save the present case, where the plaintiffs made zero timely efforts to search out information about the fugitive driver.

[37] The plaintiffs have failed to prove that they met the requirements under s. 24(5). Their claims are dismissed.

IV. UNFAIRNESS CONCERNS

[38] I stated that I reach this conclusion with some regret, joining the chorus of other jurists noting that the potential unfairness of s. 24(5), while still dismissing the claims of laggard plaintiffs. It would be responsible and simple for ICBC to remind a plaintiff, at the time they report an accident, of their duties under s. 24(5). Such a reminder could be included, at no burden to ICBC, as standard language on ICBC claims forms and other preliminary correspondence. ICBC’s silence makes s. 24(5) seem and serve as a trap for the unwary.

[39] As stated by Justice Armstrong in *Springer*:

> [86] It seems grossly unfair and against the public interest for ICBC to make representations to a claimant, leading him to think his claim had been accepted and that they were intending to offer him a settlement but, after the passage of time and without warning, tell him he has failed to meet the technical requirements of the *Act* depriving him of a settlement and denying his claim. During the passage of two prior years, they invited settlement on several occasions; however, when the time came to pay the plaintiff’s damages, they then raise the defence under s. 24(5) of the *Act*. Although there is no obligation for ICBC to remind a plaintiff of the requirements of s. 24(5), it seems to me ICBC had a duty to qualify their settlement discussions so as not to mislead the plaintiff.
>
> …
>
> [91] It seems to me that, notwithstanding the unfairness to the plaintiff who has indirectly relied on ICBC to ascertain that he has complied with the Act as evidence that he was not required to take further measures to perfect his claim, Mr. Springer has not taken the steps required after the accident under s. 24(5) of the Act to find the unidentified motorist.

[40] As stated by Justice Meiklem in *Fitger*:

> [10] Ignorance of the provisions of s. 24(5) is not an uncommon phenomenon. I do not know whether ICBC has a policy of deliberately not informing claimants such as Mr. Fitger of their s. 24(5) obligations, but there

> certainly does appear to be a practice of not advising claimants of their obligations, despite comments from the court about the unfairness that is apparent when lay people place reliance on claims being processed as if valid, and are then belatedly faced with the invocation of s. 24(5) if settlement is not reached: *Springer v. Kee*, 2012 BCSC 1210 at paras. 82-93 and *Li v. John Doe 1*, 2015 BCSC 1010 at paras. 105-116.
>
> ….
>
> [17] In my view, ICBC's failure to inform the plaintiff of his s. 24(5) obligation was ill-advised from a public interest perspective. To continue to process his claim without comment on his accident-day inaction and then surprise him by pleading and pursuing a s. 24(5) defence was unfair from the plaintiff's perspective. These facts do not, in the circumstances of this case, amount to conduct warranting the application of the doctrine of estoppel to the limited remaining issue in regard to s. 24(5).

[41] As stated by Justice Barrow in *Tessier*:

> [21] I am troubled by the issue of costs. If it had been established that the plaintiff had attended at the Insurance Corporation of British Columbia and dealt with its agents and that she, as an elderly woman, had not been advised of the requirements of section 24(5), an award of costs may well not have been made. In saying that I would not for a moment impose an obligation on the Insurance Corporation of British Columbia to advise someone as to how they might discharge the obligation of section 24(5). It does not, however, seem to me to be overreaching to simply point out the provisions to an unrepresented elderly claimant who to any reasonable observer may well be relying prudently or otherwise on the representations of the Insurance Company's employees. Counsel for the Insurance Corporation quite rightly points out that there is no obligation on the Insurance Company's employees to do that.

[42] As these authorities establish, however, the statute and jurisprudence make quite clear that there is no obligation on ICBC to inform plaintiffs of their statutory duties. Justice Armstrong in *Li* confirms that it is not the role of the court to read into the statute such an unstated obligation—any such change must be left up to the Legislature:

> [109] To establish a public policy placing ICBC under an obligation to inform victims of hit-and-run accidents that there is a requirement to take steps beyond simply reporting their claim to ICBC would be a substantial departure from the current jurisprudence concerning that type of claim; it would require a change to s. 24 of the *Act*.
>
> …
>
> [112] In my view, ICBC has policy obligations that extend beyond their mere role as an adversary in processing "hit and run" claims. ICBC operates in the

> public interest and it would be contrary to public policy and to a harmonious contextual interpretation of the legislation to allow it to escape claims that could be properly advanced if they were in the public interest.
>
> [113] In *Niedermeyer v. Charlton*, 2014 BCCA 165 the Court of Appeal addressed the public policy aspect of releases designed to shield the negligent driver of a motor vehicle from liability for an auto accident. Although the issue was different, Garson J.A. addressed the role of ICBC in administering the universal automobile insurance scheme designed to provide coverage for injuries sustained in car accidents. She said:
>
> > In my view, the ICBC regime is intended as a benefit for the public interest just as is human rights legislation. It would be contrary to public policy and to a harmonious contextual interpretation of the legislation to allow private parties to contract out of this regime.
>
> [114] In my view, the public policy issue on this point should be addressed by the legislature; it can impose on ICBC an obligation to inform its insureds of the more obscure aspect of s. 24(5).
>
> …
>
> [116] Levine J.A.'s remarks are apposite to the circumstances of this case. Motor vehicle accident victims need and expect peace of mind when dealing with ICBC in regard to hit-and-run claims. There is no current obligation to compel the corporation to inform claimants of the existence of s. 24(5) so as to alert those people of the risks and pitfalls that arise if they fail to take necessary steps to identify the other motorist.

[43] In any case, plaintiffs' counsel does not ask me to decide this issue: responsibly, in light of the overwhelming jurisprudence cited above. Further, given that at least two plaintiffs specifically obtained legal advice soon after the collision, and as they suffered from no mental or physical infirmity, and as they are reasonably well educated, the concern about unfairness weighs less heavily in the present circumstances.

V. CONCLUSION

[44] The Court commends all counsel for their superb advocacy, organisation, and presentation of their cases, and their constructive and cooperative approach towards the efficient conduct of this trial.

[45] ICBC has been successful in each action. It is presumptively entitled to its costs in each action at Scale B. If any party wishes to displace this presumption, that party will advise the other within 15 days of these reasons, and schedule with the

Registry a date as soon as reasonably practicable to argue the matter. Each party will provide a written argument to the other parties and to the Court at least seven days before the hearing date.

"Crerar J"

[1] The truck was stolen from the defendant Mr Cayer, who is only named as a defendant as the registered owner of the vehicle, and against whom no wrongdoing was alleged. The proceedings have been discontinued against him.
[2] Mr Fearon testified that soon after the accident, he saw a person wearing a black and white sweater or hoodie running from the scene. He did not actually see the person emerge from the pickup truck, however.
[3] As an explanation for why he would be up playing EA Sports NHL Hockey at 4 am, the witness sheepishly explained: "I was in my 20s".
[4] Not the present law firms representing the plaintiffs.
[5] The Skytrain would start running within the hour: at 5 am.