

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Fearon v. Insurance Corporation of British Columbia*,
2026 BCCA 81

Date: 20260303
Docket: CA50363; CA50376; CA50377
Docket: CA50363

Between:

Larissa Kady-Ann Fearon

Appellant
(Plaintiff)

And

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

Respondents
(Defendants)

- and -

Docket: CA50376

Between:

Duwayne Doras Fearon

Appellant
(Plaintiff)

And

John Doe and Insurance Corporation of British Columbia

Respondents
(Defendants)

- and -

Docket: CA50377

Between:

Shawayne Cecil Powell

Appellant
(Plaintiff)

And

John Doe and Insurance Corporation of British Columbia

Respondents
(Defendants)

Before: The Honourable Chief Justice Marchand
The Honourable Mr. Justice Grauer
The Honourable Justice Mayer

On appeal from: An order of the Supreme Court of British Columbia, dated
December 17, 2024 (*Fearon v. Doe*, 2024 BCSC 2291,
Vancouver Docket M210655).

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Place and Date of Hearing:

Vancouver, British Columbia
November 10, 2025

Place and Date of Judgment:

Vancouver, British Columbia
March 3, 2026

Written Reasons by:

The Honourable Mr. Justice Grauer

Concurred in by:

The Honourable Chief Justice Marchand
The Honourable Justice Mayer

Summary:

The appellants appeal the trial judge's dismissal of their claim against ICBC. The appellants were driving through an intersection around four in the morning when their car was struck by a stolen pickup truck. The driver of the truck fled the scene on foot. Given the involvement of a stolen vehicle, the police conducted a thorough investigation: using police dogs to track the fugitive driver, canvassing the area for video cameras, and conducting a forensic examination of the vehicle. Despite these efforts, the police were unable to locate the fugitive driver and eventually closed their investigation.

To recover their damages, the appellants sued the respondent Insurance Corporation of British Columbia as nominal defendant as permitted by section 24 of the Insurance (Vehicle) Act, RSBC 1996, c 231 [the Act]. The trial judge dismissed their claim, finding they had not made "all reasonable efforts" to ascertain the unknown driver's identity as required by subsection 24(5) of the Act. The trial judge held that reliance on the police investigation alone was insufficient and found it unreasonable that the appellants waited over a year before taking any steps of their own to identify the unknown driver. The appellants appeal.

Held: appeal allowed.

By assessing the reasonableness of the steps taken by the appellants without placing them in the context of the police investigation, the judge committed an error of law by failing to undertake the holistic, case-specific, assessment the law requires. In this case, the police undertook a significant investigation and had no success identifying the unknown driver. In these circumstances, any further steps the appellants could have taken were highly unlikely to produce any results. Given the criminality involved in this case, it was reasonable for the appellants to rely on the police, rather than undertaking what would have amounted to a criminal investigation of their own. In compliance with section 24(5), all reasonable efforts have been made by the parties to ascertain the identity of the unknown driver, and the identity of that person is not ascertainable. The appeal is allowed and the matter remitted to the trial court for assessment of damages.

Reasons for Judgment of the Honourable Mr. Justice Grauer:**1. INTRODUCTION**

[1] This case concerns a hit-and-run motor vehicle accident that happened on February 3, 2019, at about four in the morning. It was caused by an unidentified driver who stole a pickup truck, ran a stop sign, and slammed it into the vehicle occupied by the appellants. A person wearing dark clothing and a hoodie was seen fleeing the accident scene on foot, disappearing into the darkness.

[2] The RCMP investigated the matter right after the accident, given that a crime had been committed. Their investigation was unsuccessful in identifying any suspects, and they concluded fairly quickly that the driver/thief could not be identified.

[3] The owner of the truck could not, of course, be held responsible, and the identity of the driver was unknown. Accordingly, the appellants sued the respondent Insurance Corporation of British Columbia as nominal defendant as permitted by subsection 24(1) of the *Insurance (Vehicle) Act*, RSBC 1996, c 231 [the *Act*].

[4] Their claim against ICBC was, however, dismissed pursuant to subsection 24(5) of the *Act* because the trial judge found that they had not made “all reasonable efforts” to ascertain the unknown driver’s identity. By that subsection,

- (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.

[5] What concerned the trial judge was that the appellants did not take investigative steps of their own until more than a year later, in March 2020, when they posted notices in the neighbourhood asking for witnesses. In the judge’s view, it was unreasonable for the appellants to have delayed so long before taking what he described as such “minimally burdensome steps”. The trial judge’s reasons for judgment are indexed as *Fearon v Doe*, 2024 BCSC 2291.

[6] The question is whether, in the particular circumstances of this case, the judge erred in coming to the conclusion he did. I refer to the “particular circumstances”, because, as the many judgments that have considered this

subsection make clear, the answer is highly context dependent. What is reasonable turns on the individual facts of each case.

[7] Interestingly, none of the cases cited to us or by the trial judge involved circumstances like those that arose here: a vehicle stolen and operated by an unknown individual, leading to an unsuccessful criminal investigation by the police—as opposed to a vehicle driven by its owner or with the owner’s permission, where identifying the vehicle would lead inexorably to identifying its owner and, likely, who was driving it.

[8] For the reasons that follow, I would allow the appeal.

2. BACKGROUND

2.1 Police action

[9] The collision occurred in a residential neighbourhood in Burnaby, not far from the Metrotown SkyTrain Station. It is not contested that fault for the accident lies with the unidentified driver of the pickup truck, who collided with the appellants’ vehicle at high speed at a T-intersection after running a stop sign. The pickup truck was on the stem of the T, Sussex Avenue. The appellants were proceeding along the top of the T, Beresford Street, heading towards Metrotown.

[10] After the collision, the driver of the truck fled the scene. The owner of the pickup truck had reported it stolen two days earlier.

[11] Constable (now Corporal) Gagné of the Burnaby RCMP attended the scene of the accident and was the lead investigator. He was notified by Emergency Health Services at 4:13 a.m. and arrived at 4:23, accompanied by Constable Rideout. As soon as the licence plates of the vehicles were checked, Constable Gagné knew that the pickup truck had been stolen, a serious criminal offence, and was aware that the person who had operated the truck had fled, adding to the criminality.

[12] When Constable Gagné arrived on the scene, the appellants were being placed in an ambulance, to be taken to Burnaby General Hospital. Constable Gagné arranged for Constable Rideout to follow them there to interview them. One of the appellants, Mr. Fearon, saw a person in a black-and-white hoodie and dark pants running south-east parallel to Beresford, in the direction the appellants had come from, but did not see that person emerge from the truck, and could not give any other description. Neither of the other appellants saw anything at all.

[13] As part of his investigation, Constable Gagné spoke to three witnesses. The first, Mr. Mehmi, had heard the crash and called it in to EHS, but had not seen anything or anyone.

[14] The second, Mr. McGlynn, had been playing video games in his apartment on the second floor of a building half a block away on Sussex Avenue. The first thing he heard was screeching tires. He looked out his window. He saw nothing but heard a crash. His neighbour, Mr. Johnson, was playing the same videogame and heard the noise through his headphone connection to Mr. McGlynn. Mr. McGlynn and Mr. Johnson ran out onto the street. They soon saw what had happened, but there was no one in the truck.

[15] After checking on the appellants, Mr. McGlynn and Mr. Johnson started looking for the driver of the pickup truck. Mr. McGlynn thought the driver would likely have run to the southeast along Beresford. This was because southwest along Sussex would have been towards him, and he would have seen the person, while northwest along Beresford would have been towards Metrotown, which Mr. McGlynn considered unlikely (there were no open shops or restaurants, and the SkyTrain was closed down for the night). After running southeast for a time, Mr. McGlynn and Mr. Johnson gave up and returned to the scene of the accident. Mr. McGlynn spoke to the appellants, who were visibly shaken and could not say what had happened or where the pickup truck driver went.

[16] At trial, Mr. McGlynn testified that there was typically very little traffic in the area, street or pedestrian, at that time of night, and the area was dimly lit. He observed that Metrotown station, 100 yards or so to the northwest, closed down at 1:30 a.m. at which time the area became dead space. It reopened at 5:36 a.m.

[17] Given that he was dealing with vehicle theft and a hit-and-run, Constable Gagné took a number of steps that are followed only in the case of significant criminality, not for motor vehicle collisions generally. The purpose was to identify the person responsible for the crimes. These steps comprised calling in the Police Dog Service to attempt to follow and locate the fugitive driver, checking for video cameras in the area to see if there had been any capture of the collision or of the driver fleeing on foot, and, after the pickup truck had been towed to the police compound, arranging for a forensic examination of it to search for DNA, fingerprints, or anything else that might help identify the driver.

[18] None of these steps yielded useful information. The police dogs were unable to track the driver, there were no video cameras in the immediate area that could have captured the collision, and none within a block or so that could have captured the fleeing driver. The forensic examination turned up no evidence of who had been driving. As a result, the RCMP's attempts to locate the suspect were unsuccessful. None of the witnesses could give a description of the person; the forensic examination turned up nothing; the video canvass was negative; and the police dog service was unsuccessful. Constable Gagné concluded that there was no basis for continuing the investigation, and closed it on February 10, 2019.

2.2 Appellants' action

[19] Each of the appellants gave a statement to the RCMP at Burnaby General Hospital following the collision, and each reported the incident to ICBC.

[20] The appellant Duwayne Fearon testified that he was told by the police officer at the hospital that the police would follow up with them and let them know what was

going on. He did not contact the police to follow-up himself, and heard nothing from them. He was given a number of forms to fill out by ICBC, but was given no advice about what steps should be taken in relation to the unidentified driver.

[21] The appellant Shawayne Powell testified that, after giving his statement, he asked the officer what the next step would be. He said that he was told he did not have to do anything other than report the matter to ICBC, which he did. Again, he received no advice from ICBC about any steps that should be taken in relation to the unidentified driver.

[22] The appellant Larissa Fearon testified that she was told by the police at the hospital that “they would reach back out to us and that the only thing that we needed to do was call ICBC”. Like the others, she received no advice from ICBC about any steps that should be taken in relation to the unidentified driver. She did, however, retain counsel (not the counsel who represented her at the trial or on appeal).

[23] None of the appellants heard further from the RCMP, and none took any active steps themselves to identify the driver of the pickup truck until March 2, 2020. At that time, an agent acting on behalf of Mr. Fearon and Mr. Powell placed ads and posted signs seeking witnesses and information concerning the collision. These produced just one response—from Mr. McGlynn, the videogame player who had attended at the scene.

3. OVERVIEW OF THE JUDGMENT AT TRIAL

[24] The judge began his reasons with a review of the law. He set out subsections 24(1) and (5) of the *Act*, and then turned to the authorities, beginning with *Leggett v British Columbia (Insurance Corp. of)*, 1992 CanLII 1263, 96 DLR (4th) 123 (BC CA):

[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".

[Italic emphasis in original; underline emphasis added by trial judge.]

[25] The judge then quoted from *Takhar v Insurance Corporation of British Columbia*, 2024 BCCA 275 at para 22, where this Court recently confirmed the fact-specific nature of the inquiry into whether a claimant has expended "all reasonable efforts":

[10] In *Takhar v. ICBC*, ... 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).

[Emphasis added.]

[26] The judge then turned to the question of onus, noting that the burden was on the claimant:

[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].

[Emphasis added.]

[27] While the judge was clearly correct about the persuasive burden, I note parenthetically (because in my view it is not without significance) that he editorially altered the passage from *Morris v Doe*, 2011 BCSC 253, he cites in support of the last sentence in that passage. What Justice Ker wrote in *Morris* was this:

[47] ... The onus to be met by plaintiffs on the issue of reasonable steps, although not exceptionally onerous, is not one easily displaced, even in circumstances in which the unidentified vehicle has fled the scene ...

[Emphasis added.]

There is a significant difference between identifying a vehicle that may have been observed on a busy street before leaving the scene (model? colour? licence?), and identifying an individual who stole a vehicle, crashed it, and then ran off into the night (colour of hoodie?). As we must remember, what constitutes “all reasonable efforts” is a question of fact to be determined on the particular circumstances of each case.

[28] The judge then went on to review examples of particular “principles and themes” arising in the case law, noting that no particular factor is determinative “in the abstract”:

[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 on a 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.

[Emphasis added.]

[29] As I discuss in more detail below, the judge concluded, “[w]ith some regret” (at para 15), that the appellants had not met the onus placed upon them to take all reasonable steps in the circumstances:

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.

[30] What were those “various minimally burdensome steps”? In the judge’s view, they ought to have put up signs and advertisements seeking witnesses and information in a timely way. He reasoned as follows:

[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 [footnote omitted] 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....

[31] Although the judge stated in paragraph 17 that “at least four individuals directly witnessed the aftermath of the accident”, the evidence discloses something a little different. The only “witness” referred to by the RCMP in its investigation was Mr. McGlynn. Mr. McGlynn was, as described above, accompanied by his neighbour, Mr. Johnson. A third person, Mr. Mehmi, heard the noise of the crash but otherwise witnessed nothing at all. The fourth person was an individual that Mr. McGlynn thought was “just walking by” after the police and paramedics were already on site, and who “didn’t see anything”. None of them saw, heard or otherwise witnessed anything that could possibly assist in identifying the fugitive driver.

[32] The judge concluded his reasons by addressing unfairness concerns:

[38] I stated that I reach this conclusion with some regret, joining the chorus of other jurists noting ... 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.

[33] In his view, however, the authorities, the statute and jurisprudence all made it quite clear that there is no obligation on ICBC to inform plaintiffs of their statutory duties. While the circumstances of this case may distinguish it from earlier authorities, that conclusion is not in issue on this appeal.

4. ON APPEAL

[34] The appellants do not take issue with the law as canvassed by the trial judge. As they argued the case, the issues come down to these:

1. Although the judge stated the legal test correctly, he erred in law in applying it, thereby altering it. He did so by failing to take context into account, and essentially requiring the posting of ads and posters to establish reasonableness, even though the law is clear that no particular step is required.
2. The judge erred in distinguishing the suggestion in *Johal v Insurance Corp. of British Columbia*, 9 CCLI (2d) 172, 1992 CanLII 2158 (BC SC) that the approach to “all reasonable efforts” may be relaxed where there is no suggestion of fraud. He did so by failing to take into account the full context of what had occurred.
3. The judge made a palpable and overriding error of fact in para 16 of his reasons by reaching entirely speculative conclusions on the possible utility of posting notices or ads.

[35] From the respondent’s perspective, there is one core issue: did the trial judge err in finding as a fact that the appellants failed to make all reasonable efforts to ascertain the identity of the unknown driver? In the respondent’s submission, on any fair reading of the reasons for judgment, the case was dismissed not because the appellants failed to post signs in a timely way, although the judge found that it would have been reasonable for them to have done so. Their claims were dismissed because they failed to take any steps.

[36] As I see it, the issue really comes down to whether the judge erred in principle in applying the legal test, thereby failing to consider whether it was reasonable for the appellants not to take any steps beyond the police investigation.

5. DISCUSSION

[37] In assessing whether a claimant has made all reasonable efforts to ascertain the identity of an unknown owner and/or driver under section 24(5) of the *Act*, context is everything. As the cases make abundantly clear, what is reasonable turns on the particular circumstances of each individual case.

[38] I do not accept the appellants' submission that the reasonableness standard is "relaxed" if there is no element of fraud, based on what was said in *Johal*. As I read that decision, Chief Justice Esson was not speaking of relaxing the standard. What he said at page 175 was this: "In a case such as this, where there is no suggestion of fraud, I would regard 'reasonable' as a fundamental element of the test." That is entirely consistent with subsequent authorities, and I repeat—what is reasonable turns on the particular circumstances of each individual case.

[39] As noted above, none of the cases to which the trial judge referred, or which were otherwise brought to our attention, concerned circumstances anything like those arising here: injuries caused by a stolen vehicle whose unidentified and unidentifiable driver then fled the scene.

[40] In my respectful view, the fundamental error the judge made was to focus on the actions of the appellants without considering them in that context—relying instead on what judges had found "all reasonable steps" to require in very different cases. This led to take the problematic approach identified by this Court in *Takhar*: bifurcating the analysis between events occurring at the scene of the collision and steps taken after the collision, thereby "creat[ing] artificial constraints on what is meant to be a holistic assessment" (at para 25).

[41] In this case, too, the judge created artificial constraints on what should have been a holistic assessment. He did so by turning to discuss what the police did only after concluding that the appellants had failed to meet their onus by taking no steps until posting notices and ads a year later.

[42] These “artificial constraints” fundamentally affected the judge’s assessment of what the standard of reasonable effort required of the appellants after the accident, leading him into what, in my view, was a result contrary to what the law requires.

[43] In discussing the relevance of the police investigation, the judge cited to *Becker v I.C.B.C. et al*, 2002 BCSC 1106, for the proposition that reliance on the police will generally be insufficient to fulfil the duties required by section 24(5):

[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:

[Emphasis added.]

[44] *Becker* involved very different circumstances. The “accident” in question allegedly occurred in broad daylight when an unidentified vehicle reportedly crossed the centreline of the highway, causing the claimant to swerve, go into the ditch and flip his car. There was no collision, no independent criminality, and no investigation beyond speaking to witnesses at the scene. Those witnesses had been in the cars following the claimant, and had not seen any oncoming vehicle.

[45] The judge below correctly observed that merely reporting the accident to the police will not—*by itself*—satisfy the onus, and a claimant cannot offload on to the police their duty to make reasonable efforts. But, as the judge also quoted from *Morris* in para 13 of his reasons, “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”. Missing from the judge’s reasons is an

assessment of whether the actual circumstances of this case should lead to the same conclusion.

[46] By assessing the appellants' own actions without placing them in the context of the police investigation, the judge failed to undertake the holistic assessment that the law requires. As I see it, the judge thereby failed to apply the test correctly, committing an error of law: see *Ding v Canam Super Vacations Inc.*, 2024 BCCA 102 at paras 37–38. This error prevented the judge from properly assessing the conduct of the appellants with a view to the subjective component the cases require, and the totality of the circumstances.

[47] In the result, the judge constrained himself from properly incorporating the full circumstances, including the appellants' understanding that the police were investigating, and, importantly, the results of the police investigation, into his assessment of what was reasonable for the appellants to do in the period following the collision. The judge thereby failed to conduct a factual analysis of the utility of the "steps taken or not taken" by the appellants in the context of the full factual matrix of the collision and what had been learned by the RCMP—the sort of error noted by this Court in *Greenway-Brown v MacKenzie*, 2019 BCCA 137 at para 67. As this Court put it in that case:

[68] The inference I draw from the judge's reasons is that he concluded that the appellant's reliance on the police and ICBC, and her failure to post a sign until six weeks had passed, did not meet the standard of "all reasonable efforts". However, as this court made clear in *Nicholls*, no particular steps are prescribed, and I repeat: a finding of what constitutes "all reasonable efforts" is a question of fact to be determined on the circumstances of each case.

[Emphasis added.]

[48] Here, the police undertook a significant investigation into the identity of the fleeing car thief. To reiterate, they used police dogs to try to track him. They checked the surrounding area for the presence of video cameras that might have captured either the accident or the fleeing driver. They carried out a forensic examination of the stolen vehicle. They interviewed potential witnesses, none of whom had anything

helpful to offer. In terms of the degree of effort involved and the likelihood of turning up useful information, all of these significantly surpassed the “minimally burdensome step of posting signs or advertisements” (at para 19) and were surely reasonable. But they were to no avail.

[49] What more, reasonably, could have been done? On the evidence, nothing. The unidentified driver (if the person seen fleeing was indeed the driver) was seen running into the night with no identifying features visible. The area was dark. It was 4 o'clock in the morning. No one else was around. Even those who responded and were interviewed by the police did not see anything.

[50] Was it reasonable for the appellants to do nothing more until a year later, in the context of litigation? In my view, applying the test properly by taking a holistic view of the circumstances and the police action, it was—for two reasons.

[51] First, as Justice Harris, then of the Supreme Court of British Columbia, wrote in *Goncalves v Doe*, 2010 BCSC 1241:

[10] The plaintiff is not required to take an action to identify the other parties that, while possible, is “highly unlikely” to produce any result: *Liao v Doe*, 2005 BCSC 431, at para. 14.

See also *Ghuman v ICBC*, 2019 BCSC 3 at para 38, per Donegan J., as she then was.

[52] The judge’s assessment of the possible result of posting signs in this case was based not on the evidence of the circumstances existing when the accident occurred—for example a notable accident at a busy intersection as in *Nelson v. Insurance Corp. of British Columbia*, 2003 BCSC 121 at para 12—but on unsupported speculation about the possibility of other persons in neighbouring apartment buildings having something helpful to offer. As the judge put it: “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” (at para 16).

[53] How could that have helped? Even if such persons existed and would have responded to an ad (none did so when the ads were posted), it is virtually inconceivable in the circumstances that they could have added anything about the identity of the fugitive beyond what was already known to the police. There was no “real possibility” here.

[54] The judge went on to suggest this (at para 17):

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.

The appellant submits, and I agree, that this amounts to pure speculation. Again, the law ignores hypotheticals that are not, *on the evidence*, real possibilities.

[55] In the result, the judge failed to take into account the extent and results of the police investigation when purporting to assess whether the steps of posting signs and ads would have been “highly unlikely” to generate useful information (at paras 19–20), concluding that was not the case.

[56] Second, given that a serious crime was involved (beyond the mere fact of a hit-and-run), it is surely reasonable to rely on the police to investigate it, rather than undertake what amounts to a criminal investigation on one’s own, with the attendant personal risk. Arguably, it would be unreasonable to do otherwise. As Constable Gagné put it under cross-examination, “identifying the person would be the police’s job; it is not necessarily the job of the occupants.” Thus, as the judge included among recognized factors at para 13 of his decision:

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....

[57] In my respectful view, the judge’s erroneous approach led him to a result that was not sustainable: imposing an onus on the appellants to take steps that, on the evidence, would almost certainly have been futile, to try to accomplish on their own what the police could not despite an extensive criminal investigation. The standard of reasonable effort does not require that of section 24 claimants in such circumstances.

6. DISPOSITION

[58] For these reasons, I am satisfied that the judge erred in law in concluding the appellants failed to make all reasonable efforts to ascertain the identity of the unknown driver. Given the circumstances, I am further satisfied that, in compliance with section 24(5) of the *Act*, all reasonable efforts had been made by the parties to ascertain the identity of the unknown driver, and the identity of that person is not ascertainable.

[59] I would therefore allow the appeal and set aside the order of the trial judge dismissing the appellants’ actions against ICBC. I would remit those actions to the Supreme Court of British Columbia for the assessment of the appellants’ damages.

“The Honourable Mr. Justice Grauer”

I AGREE:

“The Honourable Chief Justice Marchand”

I AGREE:

“The Honourable Justice Mayer”