

CANADA / JUDGMENT

Hoflin v. Doe

2022 BCSC 1473

COURT

Supreme Court of British Columbia

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2022 BCSC 1473 Hoflin v. Doe

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hoflin v. Doe,

2022 BCSC 1473

Date: 20220824

Docket: S172975

Registry: Vancouver

Between:

Cindi Hoflin

Plaintiff

And

John Doe and Insurance Corporation of British Columbia

Defendants

Before: The Honourable Mr. Justice Coval

Reasons for Judgment

Counsel for the Plaintiff:

G. Kehler

I. Yang

Counsel for the Defendants:

S. Laudadio

Place and Date of Summary Trial:

Vancouver, B.C.

July 20, 2022

Place and Date of Judgment:

Vancouver, B.C.

August 24, 2022

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- [1] In this summary trial, the Insurance Corporation of British Columbia ("ICBC") seeks to dismiss Ms. Hoflin's claim under the unidentified driver provisions in the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 ("Act"), for her failure to comply with the requirements in ss. 24(2) and 24(5).

- [2] On April 5, 2015, Ms. Hoflin was injured in a most unusual way. While working in a lumber yard, she was counting the items in the back of a customer's van when the customer suddenly slammed the rear hatch on her head. Ms. Hoflin was knocked to the ground and briefly unconscious. After recovering somewhat, she completed the transaction and the customer drove away. He and his van remain unidentified.
- [3] Ms. Hoflin sues ICBC under the unidentified driver provisions in s. 24 of the Act. ICBC applies to strike her claim because: (a) contrary to the notice provision in s. 24(2), she did not provide written notice to ICBC within six months of the accident; and (b) contrary to the identification obligations in s. 24(5), she made no effort to ascertain the driver's identity or licence plate number at the scene despite the opportunity to do so.
- [4] Ms. Hoflin argues that the s. 24(2) deadline should be extended given the unusual circumstances of her accident. She says she had no reason to know of a potential unidentified driver claim until a year later when she was advised by a lawyer.
- [5] Regarding s. 24(5), Ms. Hoflin argues that the unusual nature of the accident, combined with her compromised state immediately afterwards, entail she was not unreasonable in failing to obtain the driver's identification at the scene.
- [6] For the reasons that follow, I find that Ms. Hoflin's claim against ICBC is barred by s. 24(2), for failure to provide written notice within six months of the accident.

Facts

- [7] There is no disagreement about the facts.

The accident

- [8] Ms. Hoflin's accident occurred in the Rona lumber yard, 21213 Lougheed Highway, Maple Ridge, British Columbia.
- [9] On April 5, 2015, she was working alone in the yard. Around 1 pm, while operating a forklift, she saw a light-coloured van waiting at the pay booth. She drove over to the booth and got off the forklift to help the customer.
- [10] She does not recall ever before seeing the customer or his van. She recalls him as a Caucasian, mid-20s to 30s, clean-shaven with light-coloured hair. He was by himself.
- [11] Ms. Hoflin went to the rear of the van to inspect the customer's purchases. He got out and stood behind her. She told him she needed to see what he had collected. He move beside her and opened the back hatch. She saw a load of lumber and crouched down to count the pieces. While she was doing this, the customer suddenly slammed the back hatch on the top of her head. Ms. Hoflin had not indicated she was finished looking inside or moved in any way to give that impression. She has no idea why he did this or whether it was accidental or intentional.

- [12] Ms. Hoflin next recalls being on the ground. She believes she was briefly unconscious. The customer apologized, asked if she was okay, and helped her up and into the seat in the pay booth.
- [13] Ms. Hoflin recalls that her main concern was doing her job and dealing with the customer because he wanted to leave. She charged him for his items, opened the gate, and he drove away. She does not recall whether he paid by cash or credit.
- [14] Her evidence is that she was shaken and confused and so did not think to record the van's licence plate or ask for the customer's identification. A few minutes after the incident she began to feel pain.
- [15] After the customer left, Ms. Hoflin sat in the booth by herself feeling dizzy. A co-worker arrived whom she told what had happened. She said she was in pain and dizzy, and asked to take her lunch break early. She went home for an extended lunch break to lay down.

Efforts to identify the driver

- [16] After returning to work later that day, Ms. Hoflin reported the incident to her manager and asked for a copy of the receipt issued to the customer. He was unable to find a copy. She asked the other employees if they witnessed what occurred but none had seen any of it. By then, she had pain in her neck and head and felt nauseous. She went to the doctor and then home.
- [17] On April 7, 2015, two days after the accident, Ms. Hoflin advised her WorkSafeBC representative. She applied for compensation under the Workers Compensation Act, R.S.B.C. 1996, c. 492 ("WCA"), which she has been receiving ever since.
- [18] Two weeks later, she followed up with her manager to locate a copy of the customer's receipt, but one could still not be found. She investigated the security camera footage but the cameras were not operational.
- [19] Ms. Hoflin's evidence is that she took these steps because of her potential claim against the customer. At the time, she was unaware of a possible claim against the owner of the van or ICBC. Eventually, as she could not identify the customer, she gave up on the lawsuit.

Ms. Hoflin learns of her s. 24 claim

- [20] On April 14, 2016, in a casual conversation in a supermarket parking lot with Mr. Kehler, an acquaintance and now her lawyer, Ms. Hoflin recounted what had happened to her. Mr. Kehler advised of her potential claim. They agreed he would contact WorkSafeBC to determine the status of her situation and whether a lawsuit might be commenced against ICBC for compensation greater than what she was receiving.

[21] In July 2016, WorkSafeBC authorized Ms. Hoflin to pursue this claim. She promptly notified ICBC of the incident and her injuries through its Dial-A-Claim process. By letter of August 12, 2016, Mr. Kehler reported the claim to ICBC.

[22] The notice of civil claim was filed on March 30, 2017.

[23] Ms. Hoflin has followed up regarding any records or surveillance that might identify the customer or his van, but nothing has emerged.

Section 24

[24] The relevant portions of s. 24 say:

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.

(2) Proceedings must not be brought against the corporation as nominal defendant under this section unless the person bringing them gives written notice to the corporation as soon as reasonably practicable and in any event within 6 months after the accident that caused the non-vehicle property damage.

(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.

Subrogation under the Workers Compensation Act

[25] At the time of her accident, the subrogation of Ms. Hoflin's claim to WorkSafeBC was set out in s. 10(6) of the previous WCA.[1]

[26] Section 10(6) gave WorkSafeBC exclusive jurisdiction to decide whether to sue, and whether to do so in its own name or that of Ms. Hoflin. If the subrogated claim succeeded, she would receive any excess recovered over the health care costs and wages WorkSafeBC was obligated to pay her.

[27] Section 10(6) said:

- (6) If the worker or dependant applies to the board claiming compensation under this Part, neither the making of the application nor the payment of compensation under it restricts or impairs any right of action against the party liable, but as to every such claim the board is subrogated to the rights of the worker or dependant and may maintain an action in the name of the worker or dependant or in the name of the board; and if more is recovered and collected than the amount of the compensation to which the worker or dependant would be entitled under this Part, the amount of the excess, less costs and administration charges, must be paid to the worker or dependant. The board has exclusive jurisdiction to determine whether to maintain an action or compromise the right of action, and its decision is final and conclusive.

Parties' Positions

- [28] Ms. Hoflin makes a two-pronged argument for extending the s. 24(2) deadline for written notice. First, she relies on *Mudrie v. Grove*, 2010 BCSC 1113, to argue that the deadline should be extended until she learned of her potential claim under s. 24. Second, she relies on *Yaremy v. Insurance Corporation of British Columbia*, 2010 BCCA 418, to argue that time did not run under s. 24(2) until WCB authorized her to bring her claim.
- [29] ICBC concedes that, under the case law, the s. 24(2) deadline can be extended beyond six months in some circumstances. It argues, however, that this is not such a situation because, on April 5, 2016 when the accident occurred, Ms. Hoflin knew all the essential facts giving rise to her s. 24 cause of action. All she lacked was the legal knowledge that this gave her a potential claim against ICBC, which ICBC argues cannot postpone the s. 24(2) deadline.
- [30] ICBC further argues that none of the cases relied on by Ms. Hoflin come close to extending the initial notice to ICBC some 16 months after the accident, as Ms. Hoflin seeks here.
- [31] Finally, ICBC argues that, as a subrogated claim, the person bringing the claim is actually WorkSafeBC. It says WorkSafeBC's representatives are sophisticated and experienced regarding these issues and there is no basis to extend the s. 24(2) deadline for them to have reported the accident.
- [32] Regarding s. 24(5), Ms. Hoflin argues that she did not fail to make all reasonable efforts in the aftermath of her accident. She was too shaken and confused to realize she should obtain the customer's name or licence plate.

- [33] ICBC acknowledges that Ms. Hoflin was dealing with traumatic circumstances. It argues, however, that she was able to collect herself to the extent of calculating the amount owing for the lumber, charging the driver for his purchases, and operating the gates for his departure. It submits that, in such circumstances, Ms. Hoflin was reasonably capable of ascertaining the customer's identity and license plate, particularly given her opportunity to do so while he was in the enclosed yard paying her for his purchases.

Analysis and Findings

Section 24(2)

- [34] Section 24 gives a plaintiff, alleging bodily injury caused by an unidentified driver and owner, a claim for damages against ICBC as nominal defendant.
- [35] Section 24(2) prohibits such proceedings if the plaintiff fails to give ICBC written notice as soon as reasonably practicable and in any event within six months of the accident. Its purpose is to limit ICBC's exposure to liability by providing an opportunity, reasonably soon after the accident, to ascertain the identity of the motorist and investigate the accident (*Parmar Estate v. British Columbia*, 2017 BCSC 223, para. 9).

Is the deadline extended by the discoverability rule?

- [36] Ms. Hoflin's uncontested evidence is that she was unaware of her s. 24 unidentified driver claim until April 14, 2016, when she discussed what happened with Mr. Kehler. She argues that, in these unusual circumstances, the s. 24(2) deadline should be extended, as it was in *Mudrie* for a plaintiff who did not realize he had a s. 24 claim.
- [37] In *Mudrie*, the plaintiff reasonably believed he had identified the other driver at the accident scene. He obtained their name, address, telephone number and insurance details. Not until a year later did his lawyer learn that the information was false and did not correspond to an actual person or vehicle.
- [38] Justice A. Saunders held that Mr. Mudrie's s. 24(2) deadline was extended by the "discoverability rule". An interpretive tool for construing limitations statutes, the rule may be implemented to avoid the injustice of precluding an action before the person is able to raise it. It has been applied even to provisions such as s. 24(2) where the statutory language appears to prohibit any extension.
- [39] Justice Saunders quoted from the Supreme Court of Canada's description of the rule in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549. *Peixeiro* concerned whether the commencement of the two-year deadline in the Ontario Highway Traffic Act should be extended for a plaintiff who did not meet the threshold requirements for tort liability until well after the accident. Under Ontario's no-fault insurance system, actions in tort were barred unless the injury reached a certain level of impairment and permanence. Despite reasonable due diligence, the plaintiff was unaware of the serious nature of his injuries until more than two years after the accident.

[40] Justice Saunders quoted the following description of the discoverability rule from Justice Major's decision in *Peixeiro*:

[36] Since this Court's decisions in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, and *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at p. 224, discoverability is a general rule applied to avoid the injustice of precluding an action before the person is able to raise it. See *Sparham-Souter v. Town & Country Developments (Essex) Ltd.*, [1976] 1 Q.B. 858 (C.A.), at p. 868 per Lord Denning, M.R., citing *Cartledge v. E. Jopling & Sons Ltd.*, [[1963] A.C. 758 (H.L.)]:

It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and, therefore, before it is possible to raise any action.

See also *M. (K.) v. M. (H.)*, [[1992] 3 S.C.R. 6], at p. 32, and *Murphy v. Welsh*, [[1993] 2 S.C.R. 1069], at pp. 1079-81.

[37] In this regard, I adopt Twaddle J.A.'s statement in *Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200 (Man. C.A.), at p. 206, that the discoverability rule is an interpretive tool for the construing of limitations statutes which ought to be considered each time a limitations provision is in issue:

In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed.

[38] The appellant submitted here that the general rule of discoverability was ousted because the legislature used the words "damages were sustained", rather than the date "when the cause of action arose". It is unlikely that by using the words "damages were sustained", the legislature intended that the determination of the starting point of the limitation period should take place without regard to the injured party's knowledge. It would require clearer language to displace the general rule of discoverability. The use of the phrase "damages were sustained" rather than "cause of action arose", in the context of the HTA, is a distinction without a difference. The discoverability rule has been applied by this Court even to statutes of limitation in which plain construction of the language used would appear to exclude the operation of the rule. *Kamloops*, *supra*, dealt in part with s. 739 of the *Municipal Act*, R.S.B.C. 1960, c. 255, which required that notice should be given within two months "from and after the date on which [the] damage was sustained". However, this Court applied the discoverability rule even with respect to this section; see *Kamloops*, *supra*, at pp. 35-40.

[39] I agree with the Court of Appeal that to hold that the discoverability principle does not apply to s. 206 HTA would unfairly preclude actions by plaintiffs unaware of the existence of their cause of action. In balancing the defendant's legitimate interest in respecting limitations periods and the interest of the plaintiffs, the fundamental unfairness of requiring a plaintiff to bring a cause of action before he could reasonably have discovered that he had a cause of action is a compelling consideration. The diligence rationale would not be undermined by the application of the discoverability principle as it still requires reasonable diligence by the plaintiff.

[Emphasis added.]

[41] Peixeiro applied the discoverability rule to postpone the running of time in order to avoid the injustice of precluding an action before the plaintiff, acting reasonably, knew the material facts underlying his cause of action (Peixeiro, para. 33).

[42] Justice Saunders applied the discoverability rule to hold that s. 24(2) started to run only after the plaintiff, acting reasonably, learned that the other driver was unidentified. He found this was required to avoid an unreasonable and unjustified outcome:

[42] To bar a claim on the basis of a plaintiff's failure to have given notice of an accident when there was no reasonable way for the plaintiff to know that the other driver's actual name had not been given would be "unreasonable and unjustifiable in principle".

[43] Unlike in Peixeiro and Mudrie, Ms. Hoflin was aware of all the material facts underlying her s. 24 cause of action within days of her accident. That is, she knew that she had been physically injured by the customer in a manner involving the use of his vehicle, and that she was unable to identify him. What she lacked, for almost a year, was the legal knowledge that these unusual circumstances gave her a claim under s. 24.

[44] In my view, the fact that she lacked the legal knowledge of her s. 24 claim falls outside the discoverability rule as described in Peixeiro and Mudrie. In both those cases, time was extended because it was not reasonably possible for the plaintiffs to bring their claims. In Peixeiro that was because the plaintiffs' requisite injuries had not emerged. In Mudrie it was because the absence of the driver's identity had not emerged.

[45] I see nothing in those cases, however, to suggest that the rule extends, or should extend, to circumstances where it is reasonably possible for the plaintiff to bring her claim, and she is aware of all the material facts that would constitute it, but she lacks the legal knowledge that the claim exists. As quoted above, Peixeiro says the discoverability rule is "applied to avoid the injustice of precluding an action before the person is able to raise it." That was not Ms. Hoflin's situation.

[46] I therefore find that the discoverability rule does not apply in these circumstances to extend the s. 24(2) deadline. Ms. Hoflin's proceedings against ICBC are therefore barred by s. 24(2) for failure to give written notice within six months after the accident.

- [47] In case this conclusion is incorrect, I will go on to consider the parties' other arguments regarding extension of the s. 24(2) deadline.
- [48] First, there is the question of whether Ms. Hoflin exercised reasonable due diligence regarding her legal situation. As stated in Peixeiro, even if the discoverability rule applies, it still requires reasonable due diligence by a plaintiff (para. 39).
- [49] Ms. Hoflin's evidence is that, shortly after the accident, she understood she might have a personal claim against the customer who injured her. Having been unable to ascertain his identity, however, she gave up on the possibility of suing. As described above, she learned of her potential claim under s. 24 approximately a year after her accident, in a casual conversation about her situation with an acquaintance who was a lawyer.
- [50] I find that Ms. Hoflin did not fail to exercise reasonable due diligence. Given the unusual role of the van in her accident, and her inability to identify the customer despite reasonable efforts, it was not unreasonable for her to refrain from obtaining legal advice about her situation. In my view, this finding is supported by the fact that she applied to WorkSafeBC and began receiving benefits. It would not be unreasonable for her to expect that, in those circumstances, WorkSafeBC representatives would advise if there were additional claims she might pursue. In my view, there is nothing in the evidence to indicate Ms. Hoflin should have realized that, despite her inability to identify the driver or his van, she might still have a cause of action worth exploring.
- [51] Second, ICBC argued that, even if the discoverability rule applied to Ms. Hoflin, it should not save her claim because the claim was subrogated to WorkSafeBC and the discoverability rule should not extend the s. 24(2) deadline for that organization. ICBC argued that WorkSafeBC being a sophisticated party with experience in such matters, it had no justification for failing to identify the cause of action and providing notice within the six-months.
- [52] This seems to be an argument of first impression, as ICBC had no case law in support. In my view, the argument fails because s. 24(2) imposes the notice obligation on "the person bringing" the proceedings. In this case, that is Ms. Hoflin, not WorkSafeBC. The wording of s. 24(2) therefore does not support dismissing the claim for WorkSafeBC's failure to give notice because the deadline does not actually apply to WorkSafeBC. This conclusion might be different if WorkSafeBC had brought the claim under its own name, as it was entitled to do under WCA, s. 10.[2]

Is the deadline extended by subrogation?

- [53] Ms. Hoflin argued that, if the s. 24(2) deadline was not extended by the discoverability rule, it should be extended because her claim was controlled by WorkSafeBC, under WCA s. 10(6). She was therefore not legally entitled to bring it until it authorized her to do so in July 2016.

- [54] Ms. Hoflin relied on Yaremy. While at work, Mr. Yaremy was injured by a hit-and-run driver. He claimed benefits under the WCA. Under s. 10(6), control over his claim was surrendered to WorkSafeBC. He was legally unable to bring his action until WorkSafeBC advised that it would not be pursuing the subrogated claim (or he withdrew his WCA application for benefits). Not until just after expiry of the two-year limitation period in the Limitation Act, S.B.C. 2012 c. 13, did WorkSafeBC advise it would not be pursuing a subrogated action.
- [55] Justice Garson, for the majority of the Court of Appeal, held the limitation period was postponed because Mr. Yaremy was legally unable to bring his claim until WorkSafeBC advised him it would not be doing so:
- [89] Mr. Yaremy understood that he could not without the Board's approval pursue a civil claim and at the same time claim benefits. His right to a civil action was encumbered by his desire for the financial certainty of the benefit scheme including surgery to which, as an injured worker, he was entitled. I would hold that he was not in his circumstances able to bring a civil action, and thus s. 6(4) of the Limitation Act allows for the postponement of the limitation period.
- [90] Accordingly, I would hold that the chambers judge did not err in concluding that the limitation period was postponed until the date upon which the Workers Compensation Board advised Mr. Yaremy that it would not be pursuing a claim against ICBC on his behalf and thus freeing him or unencumbering him from doing so himself.
- [Emphasis in original.]
- [56] In my view, Yaremy does not assist Ms. Hoflin. In Yaremy, the WCA precluded the plaintiff from bringing his claim until after the limitation period expired.
- [57] In this case, the WCA did not preclude Ms. Hoflin from giving the s. 24(2) written notice within the six-month statutory deadline. Section 10(6) did preclude her from bringing her claim until she had WorkSafeBC's consent to do so. But s. 24(2) did not require her to commence her claim within the deadline, only to give notice that an accident has occurred with an unidentified motorist (Parmar, para. 9).

Section 24(5)

- [58] Despite having found Ms. Hoflin's claim defeated by s. 24(2), for completeness I will consider ICBC's alternative argument under s. 24(5).
- [59] Under s. 24(5), the plaintiff must make "all reasonable efforts" to ascertain the identity of the unknown owner and/or driver. The purpose of the section is to limit ICBC's exposure "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" (Leggett v. Insurance Corporation of British Columbia (1992), 72 B.C.L.R. (2d) 201 (C.A.), para. 9).

[60] The test is summarized by Harris J. (as he then was) in *Goncalves v. Doe*, 2010 BCSC 1241. The following is most relevant here:

[61] The appropriate test to determine whether all reasonable efforts have been made is: Did the plaintiff do all that he would have to identify the other parties involved if he intended to pursue legal action against them, if ICBC were not potentially liable under s. 24 of the Insurance (Vehicle) Act?: *Leggett v. Insurance Corporation of British Columbia* (1992), 72 B.C.L.R. (2d) 201 (C.A.) at para. 13.

[8] "All reasonable efforts" does not mean "all possible efforts". "Reasonable" means "logical, sensible and fair," and does not mean "absurd, whimsical or unwarranted": *Slezak* at para. 40.

[9] Similarly, "not ascertainable" does not mean "could not possibly be ascertained," but instead means "could not reasonably be ascertained": *Leggett* at para. 11.

[11] "All reasonable efforts" includes a subjective aspect. In deciding whether all reasonable efforts were made, consideration must be given to the plaintiff's physical and mental state at the time of the collision, and the circumstances surrounding the collision: *Holloway v. I.C.B.C. and Richmond Cabs and John Doe*, 2007 BCCA 175, at para. 13.

Did Ms. Hoflin make all reasonable efforts?

[61] ICBC's argument focussed only on Ms. Hoflin's conduct at the time of the accident, not her efforts afterwards. They argued she breached s. 24(5) by failing to take any steps to obtain identifying information of the customer or his van, despite the opportunity to do so while he was paying for his lumber before being able to leave the yard.

[62] There is no question Ms. Hoflin had the opportunity to ascertain the customer's identity and the van's license plate number. But was her failure to do so unreasonable given her condition at the time and the circumstances surrounding her injury? Lack of clear thinking and composure due to the circumstances of the accident can justify such a failure (*Holloway v. Insurance Corporation of British Columbia*, 2007 BCCA 175, paras. 14-15).

[63] Regarding Ms. Hoflin's condition at the time, ICBC relies on her ability to calculate the amount the driver owed for his lumber and negotiate payment. They say she therefore must have been capable of obtaining his identification and the vehicle's licence plate.

[64] Ms. Hoflin's affidavit evidence is:

I also remember that my main concern was doing my job and dealing with the customer because he wanted to leave. I charged the customer for his purchase, opened the gate, and he left. I do not remember how he paid (cash or credit). I was very shaken up and confused and as a result I did not think to record the licence plate of the van or ask for identification from the driver.

I recall that after the customer left I sat in the booth by myself, feeling dizzy. A short time later, my co-worker, Brandon, arrived at the pay booth. I told him what had happened and that I was in pain and felt dizzy. I asked him if I could take my lunch break early and he agreed. I then went home for an extended lunch break so that I could lie down.

[65] She also relies on the following from her discovery evidence, which ICBC put into evidence at the summary trial:

Q67 But you knew you were just hit? Did you know what happened?

A Well, he was helping me - he was helping me up. And all I was - well, I wasn't thinking, right? And he was helping me up. And I didn't really feel the pain till a couple minutes later, and then it really hit. But at the time I was more concerned dealing with him.

Q68 Okay.

A Because he was trying to leave and I had the gate down. So I charged him. I said, "You can't leave till I charge you." And I was trying to get up. I don't know. I was focused on work. So anyway, I charged him, opened the gate, and he left.

And then my co-worker arrived immediately after. And I said, "Can I take my lunch early? This just happened, and I don't feel" - I said, "It really hurts." So it was - I don't remember when it started hurting, but I know at that point, a couple seconds later, I needed to go home.

Q101 Okay.

A That was what was going through my mind. So my basic concern was, "I'm gonna charge you with what you've got."

Q.102 Okay

A. Like I wasn't really thinking straight.

[66] Ms. Hoflin's situation resembles the circumstances in *Holloway*. In that case, a vehicle struck the plaintiff's right hip and knee while she was crossing the street. She fell onto the hood and was carried 10 metres before sliding to the ground. After getting up, she had a brief discussion with the driver who shouted at her for stepping in front of his car. She walked away while he inspected his vehicle. Around five minutes later, having somewhat recovered from her shock, she came back to get his information but he was gone.

[67] In *Holloway*, ICBC argued that the plaintiff's conduct immediately after the accident indicated her ability to obtain the driver's information. The plaintiff, on the other hand, argued that her "condition" was such that her failure was not unreasonable (paras. 14-15). Chief Justice Finch, writing for the majority, said that "the important question was not whether the plaintiff had the opportunity to obtain the necessary information, but why she failed to act on that opportunity." He found the evidence supported the trial judge's conclusion that the post-accident circumstances left the plaintiff "in such a condition that it was not reasonable for her to obtain the information before it was too late".

[68] In this case, there is no evidentiary basis to question Ms. Hoflin's description of what occurred and the condition she found herself in as a result. I accept that, although she had the wherewithal to complete the sale of the lumber products, she was shaken, confused and not thinking straight. In that state, her failure to obtain the requisite information before the customer drove away was not unreasonable.

[69] I therefore dismiss ICBC's application to dismiss Ms. Hoflin's claim under s. 24(5).

Conclusion

[70] Ms. Hoflin's claim against ICBC is dismissed under s. 24(2) of the Act, with costs at Scale B.

[71] The parties agreed that the action would continue against the John Doe defendant regardless of the outcome of this summary trial.

"Coval J."

[1] In the new Act, Workers Compensation Act, R.S.B.C. 2019, c. 1, see s. 130.

[2] The plaintiff's Book of Authorities also included cases such as *Epp v. Harden Estate* (1988), 24 B.C.L.R. (2d) 89 (S.C.), *Goltzman v. McKenzie* (1989), 36 B.C.L.R. (2d) 228 (C.A.) and *Hecker v. Thomson*, [1990] B.C.J. No. 2213 (C.A.). But, to my understanding, plaintiff's counsel did not rely on these cases. Presumably, this is because they are distinguishable in that, unlike here, ICBC came to know of the unidentified driver situation within the six-month deadline despite the plaintiffs themselves not having given written notice.

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