The Judicial Interpretation of "Reasonable Efforts" under Section 7(5) of the *Motor Vehicle Accident Claims Act*

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Section 7(5) of the *Motor Vehicle Accident Claims Act*, RSA 2000, c. M-22 allows a plaintiff to sue the Motor Vehicle Accident Claims Administrator for damages if, after having made "reasonable efforts", the identity of the defendant(s) cannot be ascertained. The section provides:

> "In an action against the Administrator as nominal defendant, a judgment against the Administrator shall not be granted unless the court is satisfied that all reasonable efforts have been made by the parties to ascertain the identity of the unknown owner and operator and that the identity of the owner and operator cannot be ascertained."

As the court observed in ***Webb v. Alberta (Administrator, Motor Vehicles Accident Claims Act)***, [2004] A.J. No. 1618, 9 M.V.R. (5th) 27 (QB); aff'd 2004 ABCA 383, 357 A.R. 222 (CA),

> "The purpose of Section 7(5) of the ***Motor Vehicle Accident Claims Act*** is to allow plaintiffs who have done everything they could to protect their interest to recover damages. The fund applies to the benefit of plaintiffs who, through no fault of their own, are not able to recover against the wrongdoer. It does not protect plaintiffs who allow opportunities to identify wrongdoers to pass by and later decide they wish to make a claim." (QL at para. 8 (QB))

A review of both the recent Alberta cases interpreting the phrase "all reasonable efforts" as it appears in section 7(5) of the Act, and those decisions considering similar provisions from other Canadian jurisdictions, suggests that the key elements of the inquiry to be undertaken when considering whether a plaintiff has, in fact, made "all reasonable

efforts" to ascertain the identity of the unknown owner and operator of a vehicle involved in a collision are these:

(i) Each case in which the inquiry is undertaken must be decided on its own facts.

(ii) The reasonableness of the plaintiff's steps to ascertain the identity of the driver must be assessed at two points in time: (1) at the scene of the accident, and (2) subsequent to the accident.

In assessing the reasonableness of the plaintiff's efforts at the time of the accident, a court must consider all of the circumstances at the time of the accident, including the plaintiff's mental and physical condition.

The reasonableness of the plaintiff's efforts to ascertain the identity of the driver after s/he learns of his/her injury must also be assessed by reference to the phrase "all reasonable efforts." The phrase, however, does not impose a standard of perfection. Rather, in order to succeed, the plaintiff's efforts must be reasonable in the sense of being logical, sensible, or fair.

(iii) The plaintiff is required to take steps that are reasonably available to the injured person. The plaintiff is not required to undertake steps that are futile or which involve the expenditure of unreasonable sums of money. There is no obligation on the plaintiff to have gone to absurd, whimsical, or unwarranted lengths or to have performed futile tasks in seeking to ascertain the driver/owner's identity.

(iv) The issue is whether the plaintiff has acted as a reasonable person would have acted to preserve whatever rights he or she might prove to have. In this regard, "all reasonable efforts" does not mean "all possible efforts".[i]

Hagan v. John Doe, 2003 ABQB 897, 342 A.R. 44 (QB), a decision of Marceau J, is a good starting point in the discussion of those actions/steps that have been judicially identified as constituting "reasonable efforts" on the part of a plaintiff to ascertain the identity of an unknown owner and operator of a vehicle. This judgment is particularly instructive as it discusses both the Alberta law as well as the prevailing judicial views on "reasonable efforts" found in other Canadian jurisdictions.

In ***Hagan***, the plaintiff was thrown from her bicycle when she was struck by a truck at an intersection. The driver of the truck took Hagan to a bicycle repair shop, paid for half of the repair costs, and then left. Hagan never learned his name but did discover that he was a student working in Edmonton for the summer.

It was her evidence that she was dazed after the accident and felt uncomfortable being with the driver of the truck. As she just wanted to get away from him and did not think that she was hurt, Hagan did not ask for his identification.

When she met a friend shortly after, the friend took Hagan to the hospital. She remained in hospital for three nights and required surgery. The accident was reported to police while Hagan was in the hospital but the police did not attempt to identify the truck driver.

Several months later, Hagan hired a private investigator to try to locate the driver. She also contacted local construction companies to try to find the truck that hit her. Unfortunately though, these attempts were unsuccessful.

When Hagan initiated an action for damages against the Administrator of the *Motor Vehicle Accident Claims Act*, as a nominal defendant, damages and the percentage of liability of the unknown defendant driver (John Doe) were agreed upon and the only issue before Mr. Justice Marceau was whether the action against the Administrator was barred because Hagan had not satisfied the court that she made all reasonable efforts to ascertain the identity of the unknown driver.

In considering the nature and sufficiency of Hagan's efforts to ascertain the identity of the unknown driver, Marceau J reviewed numerous cases discussing this issue – both under the Alberta *The Motor Vehicle Accident Indemnity Act*, 1947, ch. 11, and the earlier *Motor Vehicle Accident Claims Act*, RSA 1980, c. M‑21. He also noted the similarities between the language in the Alberta Act and similar legislation in the Provinces of British Columbia, Newfoundland and Labrador, and Ontario, and reviewed numerous cases arising out of those jurisdictions. (QL at para. 28-45)

Based on his review of the authorities, Marceau J described the test in regard to the reasonableness of a plaintiff's efforts to ascertain the identity of an unknown driver (under the predecessor to section 7(5) of the Act) as follows:

> "… **Therefore, the phrase "all reasonable efforts" in s. 9(6) requires a plaintiff to take steps that are reasonably available to the injured person, but does not require him or her to undertake steps that are futile or which involve the expenditure of unreasonable sums of money.**
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> The Alberta cases indicate that each case must be decided on its own facts and that the plaintiff's state of mind is significant in determining whether he took reasonable steps at the scene of the accident. …
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> . . .
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> **The reasonableness of [the plaintiff's] steps to ascertain the identity of the driver must be assessed at two points in time: (1) at the scene of the accident, and (2) her subsequent efforts.**
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> **In assessing the reasonableness of [the plaintiff's] efforts at the time of the accident, a court must consider all of the circumstances at the time of the accident, including the plaintiff's mental and physical condition.**
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> **. . .**
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> **The reasonableness of [the plaintiff's] efforts to ascertain the identity of the driver after she learned of her injury must also be assessed by**

> **reference to the phrase "all reasonable efforts." The phrase, however, does not impose a standard of perfection.**
>
> **In order to succeed, [the plaintiff's] efforts must be reasonable in the sense of being logical, sensible, or fair. In addition, there was no obligation on her to have gone to absurd, whimsical, or unwarranted lengths or to have performed futile tasks**. …" (QL at para. 48, 50, 55-56, 61-62)(Emphasis added)

Then, in applying the foregoing test to the facts before the court, Marceau J concluded as follows:

> "Ms. Hagan has discharged her duty to make reasonable efforts to ascertain the identity of the driver. While her actions at the scene of the accident may have fallen short of those of the reasonable healthy person, I have no doubt that her mental condition, precipitated by the accident, prevented her from taking all the steps expected of the average healthy person within the short period of time she was with the unidentified driver.
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> I am not prepared to import into Alberta an increased onus on the plaintiff in these types of cases. To do so would make access to the Fund unreasonably restrictive. The standard is negligence, not perfection. **The reasonableness of the plaintiff's actions at the scene of the accident must take into account the surrounding circumstances in each individual case, including the physical and mental condition of the plaintiff.**
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> On the facts of this case, Ms. Hagan, and the people working on her behalf, employed reasonable methods to displace the onus created by section 9(6) of the *Motor Vehicle Accident Claims Act*.
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> I am satisfied that Ms. Hagan made all reasonable efforts and therefore she can maintain an action against the Administrator of the *Motor Vehicles Accident Claims Act*." (QL at para. 68-71)(Emphasis added)

Webb v. Alberta (Administrator, Motor Vehicles Accident Claims Act), [2004] A.J. No. 1618, 9 M.V.R. (5th) 27 (QB); aff'd 2004 ABCA 383, 357 A.R. 222 (CA), is another decision in which the plaintiff Webb sought damages from the defendant Administrator of the *Motor Vehicle Accident Claims Act* and in which it was contended that "all reasonable efforts" had not been made to identify the driver whose actions caused the collision.

Webb was a passenger in a taxi, which was struck from behind while stopped at a red light. After the collision, the taxi driver got out of the cab and had a brief discussion with the other driver, but did not obtain any information. Webb did not ask the name of the taxi driver or the driver of the other vehicle at the time.

Subsequently, Webb discovered she had suffered injuries and she attempted to find out the name of the other driver from the taxi driver. Unfortunately, she was unsuccessful.

The Administrator claimed that Webb had not made reasonable efforts to determine the identity of the driver of the other vehicle, and was therefore not entitled to compensation under the Act. After reviewing the evidence, however, Hawco J ruled that Webb had, in fact, made reasonable efforts to determine the identity of the driver by contacting the taxi driver. The Justice also opined that Webb had been entitled to assume that the taxi driver would obtain the other driver's information, including name and insurance particulars.

Mr. Justice Hawco reasoned:

> "The issue in this case is whether Ms. Webb did make all reasonable efforts to ascertain the identity of the unknown driver. In my view, she did.
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> This is a rather unusual case. It is unusual in the sense that it falls outside the ratio of most, but not all of the case law in the subject. Normally, if a person has done as little as Ms. Webb did following an accident, she would not be successful.
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> I agree with Mr. Roberts' position stated at paragraph 19 of his brief that:
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> > **The purpose of Section 7(5) of the Motor Vehicle Accident Claims Act is to allow plaintiffs who have done everything they could to protect their interest to recover damages. The fund applies to the benefit of plaintiffs who, through no fault of their own, are not able to recover against the wrongdoer. It does not protect plaintiffs who allow opportunities to identify wrongdoers to pass by and later decide they wish to make a claim.**

> I also agree with the following statement in Leggett v. Insurance Corp. of British Columbia [1992 Carswell BC 295 (B.C.C.A.)] at paragraph 10 and 11:
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> > 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.
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> Quoting, from Justice Taylor of the BC Court of Appeal:
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> > **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.'**
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> Having said that, what distinguishes this case is that, in my view, Ms. Webb was entitled to assume that when her cab driver was speaking with the other driver, he would obtain from him his name and insurance particulars. This is not the same as the situation in Magel v. Insurance Corp. of British Columbia [1992 Carswell BC 1161 (B.C.S.C. [In Chambers])], again referred to by Mr. Roberts, where a plaintiff was denied the right to recover when her friend, who was involved in an accident, did not obtain the particulars about the other driver. In that case, the plaintiff was aware that the friend had not obtained that information. …
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> In this case, Ms. Webb was not suffering from shock or confusion. Her mental state was fine and it was not in issue at all. The question is whether her action or inaction was a logical and sensible action or reaction to the accident at the time. In my respectful view, I believe that it was. I believe she was quite justified in assuming that her professional driver had done all that he was required to do which would be to get the name, address, and insurance particulars of the other driver or, at the very least, the motor vehicle license plate of the other vehicle. The plaintiff is entitled to damages, which I understand has been agreed upon at $10,000, and costs." (QL at para. 6-12)(Emphasis added)

For the Court of Appeal, Costigan JA confirmed that Mr. Justice Hawco had not made a palpable and overriding error in concluding that, in the circumstances of the case, Webb

had made all reasonable efforts to ascertain the identity of the owner and operator of the van.

In ***Turner v. John Doe***, [2006] A.J. No. 657 (QB), the plaintiff Turner was following Skaff when her vehicle came into collision with the rear of the Skaff vehicle. It was Turner's position that she was stationary about a half car length behind Skaff when her vehicle was struck from behind by a third vehicle which in turn forced her vehicle into the rear of the Skaff vehicle.

The identity of the driver and owner of the third vehicle was unknown and they were thus represented by the Administrator of the *Motor Vehicle Accident Claims Act*.

In this regard, one of the issues the court was required to decide was whether the plaintiffs made reasonable efforts – as required by section 7(5) of the Act – to ascertain the identity of the owner or operator of the third vehicle.

In the course of his consideration of this issue, Murray J commented on the historical approach to the interpretation of the phrase "all reasonable efforts" and the requirements imposed upon a plaintiff thereby, saying:

> "Mr. Justice Marceau of this Court in the case of ***Hagen v. Doe***, [2003] A.J. No. 1345 reviewed the history of the legislation and at para. 48 said:
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> > It seems to me that s. 9(6) in fact codifies the meaning that Egbert J. assigned to the word "ascertainable" in Dowhaniuk. Therefore, the phrase "all reasonable efforts" in s. 9(6) requires a plaintiff to take steps that are reasonably available to the injured person, but does not require him or her to undertake steps that are futile or which involve the expenditure of unreasonable sums of money.
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> Mr. Justice Johnson, speaking for our Court of Appeal in ***Edmonds v. Supervisor of Motor Vehicles Branch*** (1956), 19 W.W.R. 206 dealing with the term "ascertainable" in an earlier section of the Act, adopted Mr. Justice Egbert's meaning of "ascertainable" in ***Dowhaniuk*** [1955] 1 D.L.R. 560 and went on to point out that one must consider the circumstances of the case which would have rendered the unknown owner

or driver "ascertainable". His Lordship pointed out an injured person should not be deprived of his or her rights under the Act by default of a third party not his servant or agent and at p. 210 said:

> To argue that he must do something, no matter how futile it may be, is to go beyond the plain meaning of the language used in the section. In my view, the learned trial judge was wrong in holding that on the evidence the driver of the truck "was not an unascertained driver within the meaning of the Act," to use his language.

Counsel in ***Edmonds*** conceded that newspaper or radio advertising would be useless." (QL at para. 26-27)

Murray J continued:

> "On the basis of the evidence I have accepted in this case, I am satisfied that Turner's conduct prior to the Pontiac disappearing was reasonable. She thought Skaff was injured and therefore went to see her first. When she found that was not the case she returned but before she could speak to the Pontiac's driver who was standing at the rear of her car, she was required to deal with her one-year-old child who was crying. The driver of the Pontiac had pulled around the corner into the bus stop, parked behind Turner, got out of her vehicle and was seen by Turner to be inspecting the damage to their respective vehicles. Were it not for the crying of the baby whose condition Turner had no way of knowing at that time, she would have exchanged information with that person. To my mind, it was perfectly reasonable for a person in Turner's situation to assume that the driver of the Pontiac would remain until the parties involved in the accident had discussed the matter and would not leave without first advising her or indeed Skaff.
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> The driver of the Pontiac had acted as one would expect a responsible driver to act, up until the point she left.
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> Turner reported the accident to a police officer that evening and identified the driver of the Pontiac vehicle as a "young blonde female in a white Grand Am-type car" as noted by the officer. There were no suggestions made as to what else she might have done in order to comply with s. 7(5) of the Act. As in ***Edmonds***, counsel for the Administrator did not suggest that Turner should have posted signs, taken out newspaper or radio advertisements, etc., seeking advice as to the identity of the driver of the Pontiac. To my mind, given the behaviour of the driver of the Pontiac, it would be fanciful to think that she would respond. In the result, I am satisfied that Turner did what she could and that what she did was reasonable in the context of s. 7(5) of the Act.

> Thus, I find that in the circumstances s. 7(5) of the Act does not preclude Turner's claim against the Administrator." (QL at para. 28-30)

The final (relatively recent) decision in which section 7(5) was considered is that of ***Palmer v. John Doe I***, 2005 ABQB 176, [2005] A.J. No. 279 (QB). In that case, Clark Palmer alleged that his leg had been severely injured when, as a pedestrian in a parking lot, he was hit and knocked to the ground by a vehicle. He contended that the vehicle failed to remain at the scene of the accident.

Because he did not know the name of the driver or the name of the owner of the vehicle, Palmer named The Administrator of the Motor Vehicle Accident Claims Act as a nominal defendant. When the matter came before Mr. Justice Moore as the trial of an issue, the single issue to be adjudicated was whether Palmer had made all reasonable efforts to ascertain the identity of the unknown owner and the unknown operator of the vehicle.

Discussing whether Palmer had made "reasonable efforts" to ascertain the identity of the unknown owner and the unknown operator of the motor vehicle, Moore J made the following observations:

> "Clark suffered severe injuries to his left leg. Clark says that his leg injuries were caused by a bizarre assault – an assault by a man driving a half-ton truck over Clark's left leg on two separate occasions. After this bizarre and vicious assault, what immediate reasonable efforts did Clark take to try to ascertain the identity of the driver or the owner of the half-ton truck? For the next seven hours after the assault, Clark made no efforts to identify the driver or to identify the owner of the half-ton truck.
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> One of the primary jobs of the police is to conduct investigations. Clark's leg was deliberately run over (twice) by the half-ton truck at approximately 3:00 a.m. on June 11th 2000, but Clark did not report the assault to the police until 3:30 p.m. on June 13th 2000. When is the best time to report a hit and run incident? When is the best time to report a vicious assault? The best time to report is immediately." (QL at para. 14-15)

After reviewing the conflicting statements Palmer had given to the police, Mr. Justice Moore noted that his parents also took active steps to try to ascertain the identity of the driver of the vehicle and the identity of the owner of the vehicle involved. In fact, they had hired a private investigator and had tried to assist the police with their investigation.

Notwithstanding this, Moore J concluded:

> "Clark did not make all reasonable efforts to ascertain the identity of the driver of the vehicle or to ascertain the identity of the owner of the vehicle. Clark should have reported the combined assault and hit and run to the police immediately after the ugly event outside Denny's Restaurant in Motel Village.
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> Clark had a valid medical reason for making a big mistake in his statement to Constable Mah on June 13th. However Clark had no valid reason to delay until July 16th before correcting his mistake. …
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> . . .
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> The right to collect money from the Administrator is a right only given by statute. A claimant must do everything correctly to come within the provisions of the statute. Any money paid out by the Administrator is taxpayers' money – public money that should be treated carefully.
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> The Administrator should always be alert to the fact that any claimant may be involved in some sort of scam. It would be easy to advance a fraudulent claim against the Administrator.
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> All of the cases regarding this issue are very fact specific, and on the facts of this case I find that Clark did not comply with the provisions of our Act. I am not satisfied that Clark made all reasonable efforts to ascertain the identity of the owner and the identity of the operator of the motor vehicle. All of the plaintiff's claims fail. …" (QL at para. 40-47)

The language of section 24(5)(a) of British Columbia's *Insurance (Vehicle) Act*, RSBC 1996, c. 231, mirrors that of section 7(5) of the Alberta *Motor Vehicle Accident Claims Act*. Section 24(5) states that in an action against the Insurance Corporation of British Columbia as nominal defendant, a judgment must not be given unless the court is satisfied that "all reasonable efforts" have been made by the parties to ascertain the

identity of the unknown owner and driver, and that the identity of those persons is not ascertainable.

As would be expected, there are myriad authorities in which the application and interpretation of section 24(5) have been featured. The leading decision in this regard, however, is that of the British Columbia Court of Appeal in ***Leggett v. Insurance Corp. of British Columbia***, [1992] B.C.J. No. 2048, 72 B.C.L.R. (2d) 201 (CA); leave to appeal to SCC refused, [1993] 2 S.C.R. viii, 153 N.R. 157 (note) (SCC).

There, the appellate court held that the test of reasonableness in section 24(5)(a) is whether the claimants have pursued the investigation to identify the vehicle and its owner and driver as resolutely and resourcefully as they would have done in like circumstances if those claimants intended to pursue any right of action which they might have arising out of the accident. (QL at para. 13)

In ***Nelson v. Insurance Corp. of British Columbia***, 2003 BCSC 121, 45 C.C.L.I. (3d) 259 (SC), the court described the onus upon a plaintiff seeking to establish the identity of a vehicle and its driver as follows:

> "The onus is on the plaintiff to establish that she made all reasonable efforts to establish the identity of the driver. Although each case must be decided on its own facts, the authorities indicate that the onus is not one easily displaced, even in circumstances in which the unidentified vehicle has fled the scene. See: ***Powell v. Insurance Corp. of British Columbia*** (2000), 15 C.C.L.I. (3d) 215 (B.C.S.C.); 2000 BCSC 1; ***Gelinas v. John Doe*** (2000), 29 C.C.L.I. (3d) 63 (B.C.S.C.); 2000 BCSC 1817; and ***Kozlova v. Insurance Corp. of British Columbia*** (1999), 11 C.C.L.I. (3d) 53 (B.C.S.C.)." (QL at para. 17)

More recently, in ***Springer v. Kee***, 2012 BCSC 1210, 37 M.V.R. (6th) 220 (SC), Armstrong J stressed that a plaintiff's duty (under section 24(5)(a)) to make all reasonable efforts to identify the other party involved in the collision is a continuing one that first arises at the scene of the collision and continues for a reasonable time after.

Mr. Justice Armstrong further emphasized that the interpretation of "reasonableness" in the context of the section was to be measured by whether the plaintiff did everything s/he reasonably could have done to protect what would ordinarily be his interest if the third party (ie. ICBC or the Administrator of the Motor Vehicle Accident Claims Act) was not involved in funding the claim.

In this regard, the judicial assessment of a plaintiff's efforts will focus on steps that are "logical, sensible, and fair" but not "absurd, whimsical or unwarranted." A plaintiff is not, therefore, required to turn over every conceivable stone and take steps that are "highly unlikely" to produce any result. (QL at para. 47-51)

As the court made clear in ***Wallman v. Doe***, 2014 BCSC 79; 30 C.C.L.I. (5th) 6 (SC), where the reasonableness of a plaintiff's efforts under section 24(5) to ascertain the identity of the unknown owner and driver or unknown driver are concerned:

(i) the test of reasonableness is subjective (in the sense that the plaintiff must have been in a position and condition to obtain the appropriate information);

(ii) the standard required of the plaintiff is not perfection; and,

(iii) reasonableness is to be decided on the basis of all the circumstances of the case. (QL at para. 433)

The foregoing governing principles were aptly summarized by Harris J in ***Goncalves v. John Doe***, 2010 BCSC 1241, [2010] B.C.J. No. 1748 (SC):

> "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.

> The requirement to make all reasonable efforts is not limited to the immediate aftermath of the collision. To satisfy this test, the plaintiff must have made all reasonable efforts at the scene of the collision to identify the other parties. The plaintiff must also have made all reasonable efforts to identify the other parties in the days and, possibly weeks, that followed the collision: *Slezak v. ICBC*, 2003 BCSC 1679, at para. 42.
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> "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.
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> Similarly, "not ascertainable" does not mean "could not possibly be ascertained," but instead means "could not reasonably be ascertained": *Leggett* at para. 11.
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> 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.
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> "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." (QL at para. 6-11)[ii]

While the British Columbia legislation and case law seems to be that most often referenced by the Alberta courts in the course of their deliberations pertaining to section 7(5), we also highlight the following interpretations that the courts of the Provinces of Nova Scotia, Ontario and have assigned to the phrase "all reasonable efforts" as it pertains to the attempts of an injured party to ascertain the identity of an unknown driver, vehicle operator or vehicle owner that has been involved in a collision.

Section 256 of the Nova Scotia *Motor Vehicle Act*, RSNS 1989, c. 293, deals with hit and run claims and states, at subsection (5):

> "(5) If, on the trial of an action brought under this Section, the court is satisfied

> (a) that the plaintiff would have a cause of action against the owner or driver of the motor vehicle in respect of the death or personal injury occasioned by the motor vehicle;
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> **(b) that all reasonable efforts have been made to ascertain the identity of the motor vehicle and of the owner and driver thereof**;
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> (c) that the identity of the motor vehicle and the owner and driver thereof cannot be established, or where the vehicle was in the possession or charge of a person without the consent of the owner, that the identity of the driver cannot be established; and
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> (d) that the action is not brought by or on behalf of an insurer in respect of any amount paid or payable by reason of the existence of a policy of automobile insurance within the meaning of Part VI of the Insurance Act and that no part of the amount sought to be recovered in the action is sought in lieu of making a claim or receiving a payment which is payable by reason of the existence of a policy of automobile insurance within the meaning of that Act and that no part of the amount so sought will be paid to an insurer to reimburse or otherwise indemnify the insurer in respect of any amount paid or payable by it by reason of the existence of a policy of automobile insurance within the meaning of that Act,
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> the court may order the entry against the Registrar of any judgment for damages that it might have ordered against the owner or driver of the motor vehicle in an action by the plaintiff." (Emphasis added)

Rushton v. Nova Scotia (Registrar of Motor Vehicles), [1994] N.S.J. No. 32, 111 D.L.R. (4th) 267 (CA), appears to be the only decision considering the nature and effect of the subsection. There, the Nova Scotia Court of Appeal opined that the trial judge had been correct in ruling that all reasonable efforts had not been made to ascertain the identity of the motor vehicle and its owner and driver:

> "After citing s. 256(5)(b) the trial judge said:
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> > "The burden is upon the plaintiff on a balance of probabilities to show she made all reasonable efforts to ascertain the identity of the vehicle and its owner and operator."

The appellant made no effort to ascertain the identity of the motor vehicle, or the owner or driver thereof beyond walking with a friend, around the parking area of Scotia Square the day after the accident.

The trial judge later remarked:

> "Despite considerable sympathy for the plaintiff's situation I have concluded that her action against the Registrar fails. The language in the Motor Vehicle Act is clear. **The provisions state 'all reasonable efforts'. It does not say 'some effort'. Rather, the legislature has chosen its words carefully. The phrase is 'all reasonable efforts'. Nor does it say the victim must 'expend every conceivable effort'. That implies to me this question - are the steps or actions taken, when considered objectively, all that one would expect of a reasonable person who had suffered a loss and wished to assert a claim?** With the greatest of respect, Mrs. Rushton did not meet such a standard."

The trial judge properly directed his attention to the statutory burden upon the appellant under s. 256(5)(b) "so that the proper tortfeasor could be joined in the action". That burden is logical. If it were not imposed, then a claimant could refrain from expending such reasonable efforts and at trial in a suit against the Registrar simply allege negligence on the part of the unknown tortfeasor content that he or she would not be met with evidence to the contrary.

After reciting the minimal effort expended by the appellant to ascertain the identity of the motor vehicle and of the owner and driver thereof and considering some of the applicable law the trial judge commented:

> "In conclusion, it does not appear as though the plaintiff made any reasonable effort to ascertain the identity of this vehicle or its driver beyond simply walking around the levels of the parkade the next day with a friend. No notices were posted within the parking lot. No advertisements were placed in a local newspaper. No effort was made to contact the Halifax Police Department. There was no attempt by the motorist to avoid detection. I conclude that the plaintiff's actions, limited as they were, fall far short of the statutory obligation required by the Motor Vehicle Act. For all of these reasons Mrs. Rushton's claim against the Registrar is dismissed."

To simply walk around the parking area the day after the accident and do nothing further to meet the burden of ascertaining the identity of the motor vehicle, its owner or driver is not sufficient to satisfy the

> **requirements of the Act. The appellant cannot take refuge in the position that any further effort in this respect would be futile.** See Re Beaulieu [1974] 2 W.W.R. 62 (Man. Q.B.); Dyer v. Registrar of Motor Vehicles (1959) W.W.R. 365 (Man. Q.B.); Lovett v. Registrar of Motor Vehicles 4 N.S.R. (2d) 670 and the cases cited therein."
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> We have read the record, the factums of counsel and heard the submissions of appellant's counsel. It is our unanimous opinion that the trial judge did not err in reaching his conclusion that the appellant had not satisfied him "that all reasonable efforts have been made to ascertain the identity of the motor vehicle and of the owner and driver thereof". (QL at para. 5-11)(Emphasis added)

Section 17 of the Ontario *Motor Vehicle Accident Claims Act*, RSO 1990, c. M-41, provides:

> "In an action against the Superintendent, a judgment against the Superintendent shall not be granted unless the court in which the action is brought is satisfied that all reasonable efforts have been made by the parties, other than the Superintendent, to ascertain the identity of the motor vehicle and of the owner and driver thereof."

While this provision has received very little judicial attention, in ***Parraga v. Ontario (Superintendent of Financial Services)***, [2006] O.J. No. 804 (SCJ), Wright J opined that the plaintiff had not made "all reasonable efforts" because he had failed or neglected to report the accident to the police, and had made no attempts to obtain a police report he alleged would show he had advised officers about the accident.

Finally, in ***Coates v. Gnanendran***, [1995] N.J. No. 124, 129 Nfld. & PEIR 327 (SCTD), Green J discussed the nature of the inquiries to be conducted by a plaintiff to satisfy the test requiring "all reasonable efforts" be made to identify the owner and/or driver/operator of a vehicle involved in a collision.

While the Justice's comments were made in relation to what was then the *Judgment Recovery (Nfld.) Ltd. Act*, RSN 1990, c. J-3, they remain instructive of the nature of the inquiry undertaken:

"The purpose of the legislation is to relieve against the hardship that an accident victim would otherwise suffer as a result of not being able to identify and sue the person who negligently caused the loss. It is not designed to provide an easy means for a plaintiff to obtain compensation without taking reasonable self-help measures to recover in the normal way by seeking out and suing the perpetrator. Before exposing the unsatisfied judgment fund to potential liability, therefore, the Plaintiff must convince the court that he or she has made appropriate efforts to identify the alleged negligent actor.

Most provinces have had legislation similar in type to that of Newfoundland on this issue, although the specific language stipulating the extent of the efforts to be made varies. Common language includes a requirement that "all reasonable efforts have been made" or that the applicant has made or caused to be made "the most thorough searches and inquiries". In this latter type of provision, however, the legislative requirement to make the most thorough searches is placed on the applicant, whereas in the Newfoundland legislation and in other jurisdictions employing the "reasonable" standard, nothing is expressly said about who must conduct the searches. Thus, emphasis placed on the requirement for specific efforts by the applicant in some of the cases may not be wholly applicable in the Newfoundland context. From the cases cited in argument, I extract the following principles that I deem applicable:

1. An applicant must follow up obvious leads to determine identity: Parks v. Party Unknown (1992), 125 N.B.R. (2d) 39 (N.B.Q.B.) [where the applicant could have inquired at a school board office to determine the identity of an unidentified, but numbered, school bus but did not do so and relied instead on a statement that the matter had been unsuccessfully investigated by the police, without detailing what efforts, if any, the police had made; thus, the result was that there was no evidence of any real effort made by the police or the applicant to find the owner and operator of the bus]

2. Searches should be made at the earliest opportunity: Re Paley and Registrar of Motor Vehicles, supra, [where the applicant did nothing to inquire about the identity of the owner of the vehicle until she saw a solicitor some months later]

3. Ignorance of one's rights to sue the Minister is no excuse for delaying a search or for not searching at all: Re Paley and Registrar of Motor Vehicles, supra

4. Where the only evidence of the involvement of the unidentified vehicle in the accident comes from the plaintiff or other interested party, the court will scrutinize very carefully the efforts made by

> the plaintiff to identify the vehicle, so as to ensure that a fraud is not being committed on the court: Re Paley and Registrar of Motor Vehicles, supra

It has also been suggested that another principle evident from the cases is that the duty to make thorough searches is not performed by leaving the matter to a police investigation. Such a proposition must be viewed in the context of the applicable legislation, which does not expressly require that the searches must be made by the applicant. Clearly, where the applicant makes no inquiries himself and either does not bother to inquire of the police or to call the police to the scene of the accident, it will not be enough for the applicant to say that he assumed that the police were doing a full investigation. On the other hand, if it appears that the police were involved in investigating the accident at an early date and in fact followed up all reasonable leads so that nothing else could realistically have been done, that may well be enough to satisfy the requirement for "thorough searches".

Most of the cited cases which deal with the role of the police in the investigation involved situations where there was little or no evidence put before the court as to what actual efforts had been made by the police to discover the identity of the vehicle leg. Parks v. Party Unknown, supra; Re Paley and Registrar of Motor Vehicles, supra) or the police were not made aware of the existence of an accident until a later date leg. Haley v. Registrar of Motor Vehicles for Nova Scotia, supra; Re McDonald v. The Registrar of Motor Vehicles, supra; In Re The Highway Traffic Act; Brooking v. Registrar of Motor Vehicles (1948), 56 Man. R. 99 (K.B.)).

. . .

It was also argued by counsel for the Minister, citing Re Paley and Registrar of Motor Vehicles, supra, p. 660 that it is not sufficient for the applicant to claim that under the particular circumstances, any search engaged in by him would be futile. I cannot accept the proposition that even though all reasonable inquiries have been made by others and it is apparent that further efforts would be futile, the applicant must nevertheless engage in those futile activities as a condition of being able to sue. As indicated above, the Act does not require that the searches be necessarily conducted by the applicant himself. Thus, if the evidence before the court is that a full and thorough search and inquiry has been undertaken by the police or by others, from which a reasonable inference can be drawn that no other reasonable steps could be taken to ascertain the identity of the owner or driver, it is not necessary for the applicant nevertheless to go further and "re-invent the wheel"." (QL at para. 39-44)

END

[i] Reference: ***Hagan v. John Doe***, 2003 ABQB 897, 342 A.R. 44 (QB); ***Webb v. Alberta (Administrator, Motor Vehicles Accident Claims Act)***, [2004] A.J. No. 1618, 9 M.V.R. (5th) 27 (QB), aff'd, 2004 ABCA 383, 357 A.R. 222 (CA); ***Turner v. John Doe***, [2006] A.J. No. 657 (QB); ***Palmer v. John Doe I***, 2005 ABQB 176, [2005] A.J. No. 279 (QB); ***Leggett v. Insurance Corp. of British Columbia***, [1992] B.C.J. No. 2048, 72 B.C.L.R. (2d) 201 (CA); ***Springer v. Kee***, 2012 BCSC 1210, 37 M.V.R. (6th) 220 (SC); ***Wallman v. Doe***, 2014 BCSC 79; 30 C.C.L.I. (5th) 6 (SC); ***Goncalves v. John Doe***, 2010 BCSC 1241, [2010] B.C.J. No. 1748 (SC)

[ii] The above-referenced summary of the law provided by Harris J was expressly endorsed in the decision of Mr. Justice Macaulay in ***Burton v. Insurance Corp. of British Columbia***, 2011 BCSC 653, 97 C.C.L.I. (4th) 255 (SC), QL at para. 28.