

**CITATION:** Hooper v. The Economical Insurance Group, 2015 ONSC 2745  
**COURT FILE NO.:** CV-11-423853  
**DATE:** 20150427

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
)  
JUDITH HOOPER ) *Joseph Howlett* for the Plaintiff  
)  
Plaintiff )  
)  
– and – )  
)  
JOHN DOE and THE ECONOMICAL ) *Kevin J. Lasko* for the Defendant, The  
INSURANCE GROUP and ALL STAR ) Economical Insurance Group  
TAXI SERVICES INC. and 8311863 )  
ONTARIO LIMITED, formerly, ALL )  
STAR TAXI SERVICE INC. )  
)  
Defendants )  
) **HEARD:** April 9, 2015

**PERELL, J.**

**REASONS FOR DECISION**

**A. INTRODUCTION AND OVERVIEW**

[1] The Plaintiff, Judith Hooper, was injured in a motor vehicle accident that involved an unidentified taxi owner or driver. She sued the unidentified driver as “John Doe”. Ms. Hooper also sued a taxi-dispatch company, which she misnamed as: “All Star Taxi Services Inc. and 8311863 Ontario Limited, formerly, All Star Taxi Service” but was actually “935461 Ontario Ltd.” The right taxi-dispatch company, nevertheless, defended, and I shall refer to it as “All Star.” And, Ms. Hooper sued her insurer, the Defendant, The Economical Insurance Group. She sued Economical Insurance for its unidentified automobile insurance coverage pursuant to the OPCF 44R Family Protection Endorsement, which is a standard form endorsement for automobile insurance policies.

[2] Economical Insurance now brings a motion for a summary judgment. It submits that: (1) Ms. Hooper did not take reasonable steps to identify the taxi driver; and (2) she failed to provide notice of her claim to Economical Insurance in accordance with statutory requirements and the terms of her insurance policy. In short, Economical Insurance denies that Ms. Hooper is entitled to unidentified automobile insurance coverage.

[3] Ms. Hooper resists the motion for summary judgment, and in responding to the motion, she seeks, if necessary, relief from forfeiture.

[4] For the reasons that follow, I grant Economical Insurance's summary judgment motion.

[5] By way of overview, Ms. Hooper's entitlement to unidentified motorist insurance coverage depends upon establishing that the identity of the owner or driver of the taxi "cannot be ascertained." In my opinion, it is not the case that the owner or driver of the taxi cannot be ascertained and accordingly, Ms. Hooper does not qualify for unidentified automobile/motorist insurance coverage.

[6] The above finding makes it unnecessary to determine: (1) whether Ms. Hooper failed to provide notice of her claim to Economical Insurance in accordance with statutory requirements and with the terms of her insurance policy; and, (2) if she failed to provide notice as required by the statutory terms and the policy, whether she is entitled to relief from forfeiture.

## **B. FACTUAL AND PROCEDURAL BACKGROUND**

### **1. Uninsured Automobile Coverage for Unidentified Automobiles**

[7] At the time of the accident, Ms. Hooper was an insured driver. Her policy was a standard automobile policy issued by Economical Insurance with policy limits of \$1 million. Ms. Hooper's policy included the OPCF 44R Family Protection Endorsement for accidents involving an unidentified and underinsured driver.

[8] Section 265 of the *Insurance Act*, R.S.O. 1990, c. I.8, addresses insurance coverage when there is an uninsured automobile or unidentified automobile as follows:

#### *Uninsured automobile coverage*

265. (1) Every contract evidenced by a motor vehicle liability policy shall provide for payment of all sums that,

(a) a person insured under the contract is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injuries resulting from an accident involving an automobile;

(b) any person is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injury to or the death of a person insured under the contract resulting from an accident involving an automobile; and ...

subject to the terms, conditions, provisions, exclusions and limits as are prescribed by the regulations.

#### *Definitions*

(2) For the purposes of this section,

....

"unidentified automobile" means an automobile with respect to which the identity of either the owner or driver cannot be ascertained;

....

[9] R.R.O. 1990, Reg. 676 sets out the terms, conditions, provisions, exclusions and limits concerning payments under a motor vehicle liability policy pursuant to subsection 265 (1) of the *Insurance Act* with respect to unidentified automobiles. The relevant provisions of the Regulation are set out below.

R.R.O. 1990, REGULATION 676  
UNINSURED AUTOMOBILE COVERAGE

1. The terms, conditions, provisions, exclusions and limits set out in the following Schedule apply to payments under a motor vehicle liability policy under subsection 265 (1) of the Act and shall be attached to or included in every motor vehicle liability policy, as a Schedule in or to the policy.

SCHEDULE  
UNINSURED AUTOMOBILE COVERAGE  
APPLICATION

1. This Schedule applies to the payments provided for under every contract evidenced by a motor vehicle liability policy under subsection 265 (1) of the Act.

LIMITS AND EXCLUSIONS

2. (1) The insurer shall not be liable to make any payment,

(a) for any amount in excess of the minimum limits for automobile liability insurance in the jurisdiction in which the accident occurs regardless of the number of persons injured or killed or the damage to the automobile and contents, and in no event shall the insurer be liable for any amount in excess of the minimum limits set out in section 251 of the Act;

...

(c) where the person insured under the contract is entitled to recover money under the third party liability section of a motor vehicle liability policy;

...

ACCIDENTS INVOLVING UNIDENTIFIED AUTOMOBILES

3. (1) This section applies if an unidentified automobile has caused bodily injury or death to a person insured under the contract.

(2) The person, or his or her representative, shall report the accident to a police officer, peace officer or judicial officer within twenty-four hours after it occurs or as soon as is practicable after that time.

(3) The person, or his or her representative, shall give the insurer a written statement within thirty days after the accident occurs or as soon as is practicable after that date setting out the details of the accident.

(4) The statement shall state whether the accident was caused by a person whose identity cannot be ascertained and whether the person insured under the contract was injured or killed and property was damaged in the accident.

(5) The person, or his or her representative, shall make available for inspection by the insurer upon request the automobile in which the person was an occupant when the accident occurred.

...

## APPLICATION OF GENERAL PROVISIONS

10. In so far as applicable, the general provisions, definitions, exclusions and statutory conditions as contained in a motor vehicle liability policy also apply to payments under the contract under subsection 265 (1) of the Act.

11. In this Schedule, “person insured under the contract”, “unidentified automobile” and “uninsured automobile” have the same meaning as in subsection 265 (2) of the Act.

[10] Section 15 of the OPCF 44R Family Protection Endorsement provides procedures for giving notice of an accident as follows:

15. The following requirements are conditions precedent to the liability of the insurer to an eligible claimant under this change form:

(a) the eligible claimant shall promptly give written notice, with all available particulars, of any accident involving injury to or death of an insured person and of any claim made on account of the accident;

(b) the eligible claimant shall, upon request, provide details of any policies of insurance other than life insurance to which the eligible claimant may have recourse; ...

[11] Economical Insurance’s policy addresses unidentified automobile insurance coverage in section 5 as follows:

### **5.1.3 What is an Unidentified Automobile**

An unidentified automobile is one whose owner or driver cannot be identified.

### **5.2.1 Claims by You or Other Insured Persons for Bodily Injury**

We will pay any amounts you or other insured persons have a legal right to recover as damages from the owner or driver of an uninsured or unidentified automobile for bodily injury resulting from an accident involving an automobile, up to the limits in this section.

### **5.3.4 Conditions Applying to Claims for Bodily Injury or Death**

A person entitled to claim compensation for the bodily injury or death of an insured person must:

- give us written notice of the claim within 30 days of the accident or, if unable, as soon as possible after that.
- provide us with as much evidence as possible in support of the claim, giving details of the accident and the resulting loss. This should be done within 90 days of the accident or, if unable, as soon as possible after that.
- ...
- provide us with details of any other insurance policy, other than a life insurance policy, under which there is a right to compensation.

### **5.3.5 Accidents Involving Unidentified Automobiles**

If an unidentified automobile causes bodily injury or death to an insured person, the insured person or their representative must report the accident within 24 hours, or, if unable, as soon as possible after that, to a police officer or similar authority.

You or other insured persons must give us a written statement within 30 days of the accident, or, if unable, as soon as possible after that, giving a detailed description of what happened. It must also detail the extent of the injuries suffered. A representative can make the statement. The statement must say whether the accident was caused by someone whose identity cannot be determined by you or other insured persons and any property damaged in the accident. The automobile in which you or other insured persons were an occupant at the time of the accident must be available for inspection at our request.

## 2. The Accident and Ms. Hooper's Communications with All Star

[12] All Star operates a taxi dispatching/brokerage service in the City of Mississauga. It does not own the taxis or the taxi licences of the vehicles that it dispatches. The drivers are not employees of All Star.

[13] In August of 2009, All Star had an insurance policy with Lombard General Insurance Company of Canada (now known as Northbridge Insurance). The policy provided coverage for 22 drivers that used All Star's services. The drivers were noted as additional insureds and the policy listed a specific number of insured vehicles. All other taxicab drivers that used All Star for dispatching services in August 2009 were required to have their own insurance.

[14] In accordance with Schedule 5 of City of Mississauga By-Law No. 420-04, All Star filed a list of its drivers with the City. The list of drivers for August 2009 identifies 227 drivers for 139 vehicles.

[15] All Star maintains dispatch records including time, date and location of pick-up for a period of three months in accordance with the City of Mississauga By-Law No. 420-04, Schedule 5-3(4). This by-law requires taxicab drivers to retain, for at least 12 months, trip sheets listing, amongst other things, the location and time of the beginning and end of every trip.

[16] All Star has a Driver's Handbook that is given to every All Star driver. The Handbook requires drivers, after an accident occurs, to prepare an accident report containing all pertinent details.

[17] On August 27, 2009, at approximately 7:40 a.m., Ms. Hooper was picked up from her home by an All Star branded taxi. She wished to be driven to work. She regularly used taxis for this purpose. Ms. Hooper recalls the driver to be a large man with medium brown skin wearing a salmon-coloured turban. On route, she asked the driver to make a stop so that she could withdraw cash from an ATM to pay him. She was driven to a branch of the TD Bank, and she went to withdraw funds. She returned to the vehicle, and while getting back into the taxi, the driver put the vehicle into motion. Ms. Hooper fell to the ground and injured herself. The driver drove her to the hospital. He charged her for the fare and departed. She was treated at the hospital. She did not notify the police about the accident. She did not go to work. She went home and her son suggested she contact a lawyer.

[18] In the afternoon on the day of the accident, Ms. Hooper phoned All Star and spoke to a woman dispatcher, whose name she did not record. She recognized the voice as the woman that she had spoken to in the morning when she called for the taxi. Ms. Hooper asked for the name of the driver, but she was told that there were no records to identify the driver. Ms. Hooper was cross-examined about her conversations with All Star. In her cross-examination, she testified:

Q.44 From the affidavit, it doesn't appear to me that you know exactly when you called; in other words, the date?

A. Well, the first time I called was the afternoon of the accident date, when I got home and somewhat settled a few hours later.

Q.45 Now, you've said the first time, so I take it there was more than one?

A. Oh, yes, because I couldn't get answers from them. She told me she remembered me calling for a cab, because I was a regular. But she said that the way their dispatch works, she was not able to tell me what driver it was.

Q.46 So how many times did you call?

A. Three that I remember. I think I gave it to the lawyers after that.

...

Q.61 ... Do you recall what you told this woman during the telephone call that you have with her in an effort to get information?

A. Well, the first time I called, I just said that, you know, this is the girl from my address, because I always called in, and I said: I'd like to know the name of the driver who picked me up this morning. She put me on hold and came back and told me that their dispatch did not work like that. She wouldn't be able to give me a driver's name.

Q.62 Would that have been on the first time that you called?

A. Yeah, that was the first time.

Q.63. All right. And so what made you call a second time?

A. Well, a second time to try and get someone with authority to see if I could find out anything else, and I basically got the same answer.

Q.64 Same person?

A. Yes. She wasn't going to transfer me to anyone. This is how it works. They couldn't give me any information.

Q.65 And the third time?

A. Same thing. I just handed it to the lawyers. I'm not going to get anywhere with these people.

[19] On the day of the accident or soon thereafter, Ms. Hooper retained the law firm of Grillo Barristers.

[20] There is no accident report at All Star of the August 27, 2009 accident. Ms. Hooper did not write All Star or visit its offices to determine John Doe's identity. She did not place advertisements or contact the hospital in an effort to identify John Doe. She believes that her lawyers made efforts to identify the taxi driver. She does not, however, specify the basis for this belief, and there is no evidence from the law firm as to what attempts, if any, it made to identify the driver.

[21] Pausing here before turning to Ms. Hooper's communications with Economical Insurance, it would appear that Ms. Hooper was misled by All Star. It may be true that its dispatcher did not know the identity of the driver to whom the taxi had been dispatched to pick her up on August 27, 2009, but if not that day, within days, All Star would have been able to ascertain who the driver was from its dispatch records and the information was available from the driver's trip sheets. In the worst case, 227 All Star drivers could have been contacted to ascertain who drove Ms. Hooper from her home to the hospital.

### 3. Ms. Hooper's Communications with Economical Insurance

[22] As noted above, Section 5.3.5 of the insurance policy stipulates that an insured person must give Economical Insurance a written statement detailing what happened within 30 days of the accident, or, if unable, as soon as possible thereafter. Ms. Hooper never gave a written statement to Economical Insurance. She did, however, the day after the accident, contact Economical Insurance about a claim for Accident Benefits.

[23] The notes from what appears to be two conversations between Ms. Hooper and Economical Insurance the day after the accident were produced by Michael Scott, who is employed as a Senior Casualty Specialist. The notes state:

CDS 475515 – Judith Hooper  
 28 AUG 2009 11:48:23 Notes: Brestovac, Sandra (SQB)  
 Work Plan: Insured called to advise she was injured while entering a taxi.

Did this person go to a hospital script:

Taxi driver drove insured to the hospital and charged insured for fare. Credit Valley Hospital emergency. Mississauga. X-rays were done at hospital, nothing prescribed.

28-AUG-2009 12:12:41 \*\*\*SQB\*\*\*CDS AB Adjusting Note  
 COVERAGES  
 Policy Period ...  
 Inception Date: ...  
 Vehicle: AB CLAIM ONLY  
 Coverages: 1 million liability, 500 AP, income benefits 400  
 Exclusions: NONE

Task Name: AB  
 Spoke to: Judith Hooper

What are your injuries? – entire right side of face is swollen and bruised, 1 stich in right eyebrow, right arm is scraped and cut, right side of body is sore and stiff.

Did any party of your body hit the interior of the vehicle? Did an ambulance come to the scene? – no

Did you go to the hospital? Yes, taxi driver drove insured to the hospital and charged insured for fare. Credit Valley Hospital Emergency, Mississauga.

Are you seeking treatment or have you been referred for treatment? – x-rays were done at hospital, nothing prescribed. Lawyer suggested insured to have an assessment.

....

Did any police come to the scene? – no

....

Do you wish to present an Accident Benefits claim? Yes

...Insured would like to attend their own clinic for their treatment – uk name of clinic, recommended by lawyer

[24] Economical Insurance opened an accident benefits file and began to process payments to Ms. Hooper.

[25] On April 6, 2011, Ms. Hooper commenced a tort action. She named John Doe, All Star, and Economical Insurance as defendants. Economical Insurance was joined for the unidentified, uninsured and underinsured coverage. The Statement of Claim was the first notice Economical Insurance had that a claim for coverage under OPCF 44R would be made.

#### 4. **The Progress of the Tort Action**

[26] As just noted, on April 6, 2011, Ms. Hooper commenced a tort action

[27] On August 24, 2011, All Star delivered its Statement of Defence. It denied liability because it just dispatches taxis and was not the owner of the vehicle that had transported Ms. Hooper nor the employer of the driver or owner of the vehicle.

[28] On March 9, 2012, Economical Insurance delivered its Statement of Defence and Crossclaim against All Star and John Doe.

[29] On August 27, 2013, Ms. Hooper discontinued her action against John Doe, apparently because he could not be identified and located.

[30] On March 20, 2014, Master Graham granted a Consent Order dismissing Ms. Hooper's action against All Star without costs. Economical Insurance took no position on the motion.

[31] Master Graham's Order granted leave to Economical Insurance to continue its crossclaim against John Doe and All Star.

### **C. DISCUSSION AND ANALYSIS**

[32] Economical Insurance denies that Ms. Hooper is entitled to unidentified automobile insurance coverage. It submits that: (1) Ms. Hooper did not take reasonable steps to identify the taxi driver; and (2) she failed to provide notice of her claim to Economical Insurance in accordance with statutory requirements and the terms of her insurance policy.

[33] Economical Insurance's two arguments are mutually exclusive. The unarticulated premise of the first argument is that there is no "unidentified automobile" because with due diligence the identity of the owner or driver would have been "ascertained" and therefore, it is not the case that there is "an automobile, with respect to which the identity of either the owner or driver cannot be ascertained."

[34] There is strong authority in support of Economical Insurance's argument.

[35] In *Vescio v. Peterman* (1999), 45 O.R. (3d) 613 (C.A.), rev'g (1998), 37 O.R. (3d) 661 (Gen. Div.), in March 1990, the Vescios were in a motor vehicle accident in Toronto. Their vehicle was struck by a hit-and-run driver, who they chased. They noted the licence plate of the unidentified driver's vehicle as 994JVE and reported it to the investigating police officer. However, the police officer mistakenly thought the "4" was a "9," and he conducted a search of licence number 999JVE and reported to the Vescios that the owner of the vehicle was Ms. Peterman. She denied being involved in the accident. The Vescios retained a lawyer and they sued Ms. Peterman and also their own insurer, Safeco, based on the unidentified driver endorsement. In November 1990, the Vescio's lawyer had a search done of the correct licence

number and learned that the vehicle was a rental vehicle that had been leased from Budget Car Rentals Toronto Ltd. with a St. Catharines address. The Vescios were not told of the lawyer's discovery until the summer of 1997, and no explanation was provided as to why the action proceeded against Ms. Peterman in the face of the knowledge of the true facts. The action was dismissed against her on consent on the second day of the trial but continued against Safeco.

[36] Reversing the trial judge, the Court of Appeal held that in order for the Vescios to have unidentified driver insurance, the onus was on them to prove that the identity of the driver "cannot be ascertained" and that they failed to do so because their lawyer's knowledge was imputed to them and the lawyer had information from which the identity of the driver might have been ascertained. The Court's short endorsement stated:

1. In determining whether or not the plaintiffs had met their onus of establishing, on a balance of probabilities, that the identity of the driver could not be ascertained, the trial judge refused to impute to them the knowledge of their solicitor.

2. With respect, we are of the view that the learned trial judge erred in this regard. In the circumstances of this case, there was no basis for departing from the general rule set forth by this court in *Re Durbin and Monserat Investments Limited* (1978), 87 D.L.R. (3d) 593 at 595 that in the ordinary case, the knowledge of the agent is imputed to the principal, there being a "presumption that an agent will communicate his knowledge to the principal because it is his duty to do so." The plaintiffs chose not to lead evidence from their solicitor and, accordingly, the record is silent as to the reason for his failure to disclose the information he had obtained as a result of the motor vehicle search and any follow-up information in his possession. It was, therefore, not open to the trial judge to conclude that his failure to disclose fell within any of the recognized exceptions to the presumptive rule.

3. Contrary to the position of the respondents, the issue in this case is not properly cast in terms of the plaintiffs' contractual duties under the policy to ascertain the identity of the driver. The plaintiffs cannot escape the fact that regardless of any contractual duties, their solicitor had information from which the identity of the driver may well have been ascertained. This is fatal to the plaintiffs' claim since the plaintiffs bore the onus of establishing that the identity of the driver could not be ascertained by reasonable means.

4. Accordingly, the appeal is allowed, the judgment is set aside, and the action against the appellant is dismissed. The appellant is entitled to its costs at trial and on appeal.

[37] In *Leggett v. Insurance Corporation of British Columbia* (1992), 72 B.C.L.R. (2d) 202 (C.A.), after Mr. Leggett's vehicle was struck from behind, he got out, saw minor damage and agreed with the other driver that each would look after his own damage. Mr. Leggett then drove off without having recorded anything by which the other vehicle, its owner or driver, might be traced. The next morning he developed symptoms of a spinal injury. He returned to the scene of the accident in the futile hope that he would see the other driver again and he put advertisements in the newspapers seeking information. After these efforts proved useless, he sued the Insurance Corporation of British Columbia for unknown driver coverage. Under the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1979, c. 204, there was an obligation on the insured to show that the "identity [of the unknown driver] is not ascertainable."

[38] Reversing the trial judge, Justice Taylor for the British Columbia Court of Appeal stated at paras. 11-15 of his judgment:

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), 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 in-tended to pursue any right of action which he or she might have arising out of the accident".

14. In the present case the reason for failing to discover and record the required information was that the respondent had decided not to pursue any claim which he might have.

15. It is not, in my view, possible for this claimant to establish that he acted reasonably simply because the full extent of damage done was not known to him at the time of the accident—that is to say, in this case, because he did not then know he had suffered personal injury. The question, in my view, is not whether Mr. Leggett acted reasonably in deciding initially to abandon whatever rights he had, but whether he acted as a reasonable person would have acted who wanted to protect those rights, whatever they might prove to be. I would allow the appeal and dismiss the action.

[39] It may be noted that Justice Taylor refers to the Ontario case of *Rossiter v. Chaisson*. This case did not involve insurance coverage for an unknown driver; rather, it involved a claim made by Mr. Rossiter, an injured motorist, to the unsatisfied judgment fund under s. 93(b) (2) of the *Highway Traffic Act*, R.S.O. 1993, c. 288.

[40] Mr. Rossiter knew that the defendant Mr. Chaisson was the negligent driver who had caused the accident. Mr. Rossiter had sued and obtained a default judgment. The judgment, however, proved unenforceable, because Mr. Chaisson, a transient labourer, could not be located. Justice Gale, as he then was, dismissed the action against the province's fund, because Mr. Rossiter had not taken "all reasonable steps" as required by the statute to recover the judgment against Mr. Chaisson.

[41] Justice Gale stated at p. 265 of the O.W.N. report of his judgment:

It is true that the Act was amended for the relief of unfortunate persons who would otherwise be unable to collect on judgments for damages resulting from the operation of a motor vehicles in Ontario, but it was not intended to excuse those persons from making logical endeavors to retrieve what was due to them from the wrongdoer, and that is why resort cannot be had to the fund until "all reasonable steps to recover the amount of the judgment" have been taken.

[42] Justice Gale was discussing a claim to the unsatisfied judgment fund, but much the same thing can be said about unidentified driver coverage under an insurance policy. The coverage

was introduced to provide relief to unfortunate persons who would otherwise be unable to recover a judgment for damages from the operation of a motor vehicle. But this insurance coverage is not available unless the identity of the other driver cannot be ascertained, and thus there is an obligation on claimants to exercise some reasonable due diligence to identify the wrongdoer, who it may be noted in the case at bar would certainly have been an insured driver because of the requirements of Mississauga By-Law No. 420-04, noted above.

[43] In *Donovan v. McCain Foods Ltd.*, [2004] N.J. No. 70 (S.C.T.D.), Ms. Donovan was a driver, and her vehicle was rear-ended in a collision involving three vehicles. After the accident, all three drivers got out of their vehicles and spoke to each other. Believing that there was no damage to her vehicle and feeling no injury herself, Ms. Donovan chose not to get any identifying information from either of the other drivers. Later in the day she started to experience pain. The identity of the driver at fault was never ascertained, and she claimed against the insurer for unidentified driver coverage.

[44] Justice Orsborn dismissed Ms. Donovan's claim after concluding that she had failed to establish that she was injured by a driver or owner whose identity cannot be ascertained. Justice Orsborn stated at paras. 35 and 44 of his judgment:

35. It seems to me that, to establish that the identity of a driver or owner "cannot be ascertained", a claimant must prove that, in all of the circumstances, had the claimant or others acting on the claimant's behalf taken such steps or made such inquiries as were reasonable in those circumstances, the identity of the offending driver or owner could not have been ascertained. The establishment of this 'inability to ascertain' then entitles the claimant to recover from his or her own insurer, rather than against the person actually at fault, assuming of course that the other preconditions to recovery are satisfied.

44. Turning at last to the case at hand, the evidence is, and I accept, that immediately following the accident Donovan could have easily ascertained the identity of the at fault driver or owner. She chose not to do so. In the face of this evidence, Donovan cannot prove that the identity of the driver or owner "cannot be ascertained" - that, in all the circumstances, such identity could not have been ascertained after Donovan was aware of the fact of the accident.

[45] In the case at bar, the evidence establishes that the identity of the driver of the taxi was ascertainable before a claim was made for unidentified driver coverage, and, indeed given that there were 227 drivers at the time driving 139 vehicles, all of whom were listed under Mississauga's by-law, it is conceivable that the identity of the driver could be ascertained today, although any claim would likely be statute-barred.

[46] The point is that there was a time after the accident when the identity of the driver was ascertainable by Ms. Hooper's efforts or by the efforts of her lawyers with a little imagination, and thus she does not meet the onus of showing that the identity of the driver "cannot be ascertained."

[47] In these circumstances, she has no insurance coverage to forfeit, and thus it is not necessary to consider Economical Insurance's mutually exclusive second argument that Ms. Hooper failed to comply with the notice provisions of the insurance policy.

#### **D. CONCLUSION**

[48] For the above reasons, I grant Economical Insurance's summary judgment motion and I dismiss Ms. Hooper's action.

[49] If the parties cannot agree about costs, they may make submissions in writing beginning with Economical Insurance's submissions within 20 days of the release of these Reasons for Decision, followed by Ms. Hooper's submissions with a further 20 days.

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Perell, J.

Released: April 27, 2015

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**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

JUDITH HOOPER

Plaintiff

– and –

JOHN DOE and THE ECONOMICAL INSURANCE  
GROUP and ALL STAR TAXI SERVICES INC. and  
8311863 ONTARIO LIMITED, formerly, ALL STAR  
TAXI SERVICE INC.

Defendants

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**REASONS FOR DECISION**

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PERELL J.

Released: April 27, 2015