Unidentified vehicles and the *Transport Accident Act* 1986:

A case law review and a practical guide

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Section 96 of the *Transport Accident Act* 1986 ("the Act") provides that, subject to certain requirements, the Transport Accident Commission ("TAC") must pay damages to a person who is injured or dies as a result of a transport accident in Victoria that is caused by the negligent driver of an unidentified vehicle.[1]

In 2018, section 96 was amended to include a collision between a pedal cycle and a stationary unidentified vehicle.[2]

Where the requirements are met, the TAC must pay the lesser of:

a) the amount for which the person could have obtained judgment against the owner or driver of that vehicle,[3] or;
b) the amount for which the TAC would have been liable if that vehicle had been identified and subject to the indemnity under section 94.[4]

<u>What must be established</u>

In order to be successful in obtaining damages for negligence in the case of an unidentified vehicle, the plaintiff must establish on the balance of probabilities that:

1. the plaintiff was involved in a transport accident on the subject date with an unidentified vehicle;[5]
2. the plaintiff cannot establish the identity of the vehicle:
    a. at the date of the accident, and
    b. at least until the commencement of the proceeding;[6]
3. there was negligence on the part of the unidentified driver arising out of the incident. Moreover, the unidentified driver was in breach of the established duty owed to other road

[1] Section 96 of the *Transport Accident Act* 1986 also goes to indemnified vehicles. For the purpose of this paper, only unidentified vehicles will be addressed.
[2] *Transport Accident Act* 1986 s 96(1) amended by No. 49/2018 s 9(1).
[3] *Transport Accident Act* 1986 s 96(1)(a).
[4] Ibid s 96(1)(b).
[5] *Love v TAC* (No 2) [2017] VSC 584 [5].
[6] Ibid. See also *Transport Accident Act* 1986 s 96(8).

users to take reasonable care and not expose them to unnecessary or unreasonable risk of injury, and;[7]

4. the negligence of the driver of the unidentified vehicle was the cause of the plaintiff's injuries.[9]

Notice requirement

The Act specifies that damages may only be recovered where the injured person provides notice to the TAC of their intention to make a claim.[10] This notice must:

1. be in writing;
2. be provided within a reasonable time, and;
3. provide the information required by section 96(2)(a)(i) – (iv).

The information required by subsections 96(2)(a)(i) – (iv) is typically information contained within a claim form. This information is:

i) name and address of claimant;
ii) date and place of accident;
iii) general nature of the injuries, and;
iv) a short statement of the circumstances of the accident.

Historically, a popularly held view amongst practitioners was that the written and signed claim form would satisfy the requirement of section 96(2). This view was supported by the finding of Rush J in *Lakic*[11] which concerned multiple accidents, including one in the year 2000 involving an unidentified vehicle. His Honour held that the claim form satisfied the notice requirement under section 96(2). There, the claim form was submitted within a fortnight of the accident, included details of the plaintiff's general practitioner and her employment, notice that the plaintiff had not returned to work and that police had attended the scene of the accident. His Honour further held that it could not be said that the TAC had been materially prejudiced by any failure of the plaintiff to provide notice.

In recent years, however, the TAC has changed the process for lodging a claim so that claims are now lodged over the phone and the form as completed by the TAC phone operator is sent to the injured party only for their review and records. While the injured party no longer personally completes or signs the claim form, it is unlikely that the change in claim lodgement process will impact upon the success or otherwise of a claim under section 96. This is because section 96(2)(b) stipulates that where

[7] *Love (No 2)* above n, [7], [9] – [10].
[9] Ibid, [7].
[10] *Transport Accident Act* 1986 s 96(2)(a).
[11] *Lakic v TAC* [2014] VSC 291.

formal notice is not provided in accordance with section 96(2)(a), a person may still recover damages if they are able to satisfy the Court that the failure to give notice did not materially prejudice the TAC in their defence. Therefore, if the same information is provided under a signed or unsigned claim form, arguably this change will have no impact upon the prejudice caused to the defendant.

It should be noted that section 96(2)(b) is not limited to complete failure to give notice, but also extends to an omission, insufficiency, or defect in the notice.

The TAC continues to rely upon the section 96 notice requirement as a defence, however little case law exists on the point. In the matter of *Love*,[12] the TAC relied upon this defence until day five of the jury trial when it became clear that there was no prejudice to the TAC.

It is best practice to comply with the notice requirements so as to minimise the chance of a successful assertion of prejudice by the TAC. Arguably, a practitioner may be open to a professional negligence claim where they fail to comply with the notice requirements and the TAC is successful in proving material prejudice.

When preparing a section 96 statement, and prior to its submission, it is vital that practitioners closely review any contemporaneous evidence, and not rely solely on the instructions provided by the client. Such evidence includes police collision reports, ambulance records, audio recording of 000 calls, hospital records and witness statements. Failure to do so can result in the plaintiff being heavily criticised and exposes them to attacks on the reliability of their evidence should any inconsistency between the statement and the contemporaneous evidence become apparent at a later point in the proceeding.

<u>What is an 'unidentified vehicle'?</u>

In order for the TAC to pay compensation under section 96, the negligent vehicle must be an 'unidentified vehicle'. This term is defined at section 96(8) as:

> *"…a vehicle the identity of which cannot be established as at the date of an accident, and which remains unidentified at least until the commencement of proceedings under subsection (1)."*

The Supreme Court examined the meaning of an 'unidentified vehicle' in the Ruling of *Batkin.*[13] Here, the Statement of Claim was pleaded in the alternative. The Plaintiff claimed that his injuries were caused when he rode his motorcycle off the racing circuit due to a fellow motorcyclist, Mr Frew, having

[12] *Love (No 2)* above n.
[13] *Batkin v TAC*, Ruling of His Honour Justice Rush, 19 February 2015.

ridden in a manner contrary to the rules of that particular Ride Day. The Statement of Claim went on to plead that, if the accident was not caused by Mr Frew, it was caused by an unidentified vehicle.

The plaintiff later amended his Statement of Claim to remove the allegation concerning Mr Frew, solely alleging the defendant to be an unidentified vehicle. The defence rested on the definition of an 'unidentified vehicle' under section 96(8). The TAC contended that the plaintiff had not demonstrated by proof, that the identity of the unidentified vehicle could not be established until at least the commencement of proceedings.

Rush J found that whether or not a vehicle is an 'unidentified vehicle' is to be determined as a matter of fact.[14] On this point, His Honour examined the word 'established' as contained within the definition. Rush J adopted the interpretation of Chief Justice Dixon in *Cavanagh*.[15] There, Dixon CJ said:

> *"The word 'established' seems to have been employed to convey something more than ascertained and something less than judicially proved by evidence."*[16]

Dixon CJ further clarified that the operation of the words 'cannot be established' is confined to the plaintiff and the plaintiff's representatives. This is because, if the words were to operate universally, there may be any number of persons who might be able to identify the unidentified vehicle but have not come forward.[17]

Rush J considered that Dixon CJ's interpretation of 'established' made matters clear in the present matter, that at the time of issuing proceedings the plaintiff could not establish the identity of the offending vehicle. The plaintiff's viva voce evidence was that, while he believed the negligent rider to be Mr Frew, he had no evidence of this. The plaintiff could only recall seeing a flash of the defendant driver's rear wheel and was unable to positively identify Mr Frew's bike when shown a photograph of a motorbike tendered in evidence.

Rush J ruled that the jury was to be charged on the basis that, for the purpose of section 96(1), the plaintiff's claim concerned an unidentified vehicle. His Honour noted, however, that it was also open to the jury to find that there was no other vehicle at all and that, rather, the plaintiff's injuries were caused by him losing control of his vehicle.

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[14] *Batkin* above n 660.
[15] Ibid 661. See also *Cavanagh v Nominal Defendant* (1958) 100 CLR 375 380.
[16] *Cavanagh* above n 380.
[17] Ibid.

Due inquiry and search

The TAC continues to reference cases such as *Blandford*[18] and *Meakes*[19] in relation to whether, under section 96, the plaintiff has shown that the identity of the negligent vehicle 'cannot be established'.

Legislative context

It is important to note that both of these cases concern New South Wales transport accidents, which were governed by the *Motor Vehicles (Third Party Insurance) Act* 1942 and the *Motor Accidents Compensation Act* 1999 ("the NSW legislation") respectively. To bring a claim under the NSW legislation, the plaintiff must first satisfy the statutory condition that, 'after due inquiry and search', they were unable to establish the identity of the vehicle.

What is due inquiry and search?

In both *Blandford* and *Meakes,* it was held that the plaintiff had failed to satisfy the requirement of 'due inquiry and search'.

In *Blandford*, the High Court held that 'due inquiry and search' means such inquiry and search as would be reasonable in the circumstances, and that no general definition can be given as it would vary with the facts in the case. It was further held that the obligation extends to making note of the registration of the vehicle in circumstances where the vehicle has stopped and is available for the registration to be recorded.[20]

In that case, the plaintiff was crossing a road on crutches, when one of his crutches was struck by a car causing him to suffer injury. The car stopped, but the plaintiff recorded no details of the driver or the car, nor did he take any steps to report the matter to the police. The accident had taken place on 16 May, and it was not until 14 June that a solicitor acting on the plaintiff's behalf had written to the police. It was held by the Court that in those circumstances, it was obvious that the accident had not been reported to the police, and inquiries as to the identity of the vehicle should have been directed elsewhere. The plaintiff was held to have failed to take steps which could reasonably be considered to satisfy the requirement for due inquiry and search.

Due inquiry and search need not only be conducted by the plaintiff but can be performed by the plaintiff's legal representative. In *Blandford*, the search performed by the lawyers was held to be perfunctory.

[18] *Blandford v Fox* [1945] HCA 11.
[19] *Nominal Defendant v Meakes* [2012] NSWCA 66.
[20] *Blandford* above n 245.

In *Meakes*, the New South Wales Court of Appeal was similarly unpersuaded that the plaintiff had taken adequate steps to satisfy the requirement for due inquiry and search. At first instance the trial Judge found that the requirements of due inquiry and search had been satisfied. Sackville AJA found that this was a rare situation in which the trail Judge's finding should be set aside, based on the following:

1. The identity of the vehicle was ascertainable at the time of the accident;
2. The plaintiff was aware of his injuries and aware he had been struck by the vehicle;
3. The plaintiff was not so injured as to be unable to record the registration details of the vehicle, and;
4. An injured person in the plaintiff's position could reasonably have been expected to obtain the relevant details.

When forming this conclusion, Sackville AJA took into account the fact that following the collision, Mr Meakes had access to a pen and paper, had a conversation with the driver, was able to see the registration and gave evidence that he could have recorded the details. His Honour found the trial Judge had erred when giving weight to whether it was "understandable and excusable" for the plaintiff not to have recorded the vehicle identification details in the circumstances.

Implications for the Victorian context

As noted above, the Act does not impose on persons injured in Victoria an identical obligation of 'due enquiry and search' as is created under the NSW legislation. However, as explored in *Batkin,* in Victoria the plaintiff and the plaintiff's representatives must prove that the identity of the offending vehicle 'cannot be established' as at the date of the accident and at least until the commencement of the proceeding. The principles of due enquiry and search in *Blandford* and *Meakes* are likely to be relevant to whether the plaintiff has taken sufficient steps to prove that the identity of the offending vehicle 'cannot be established'.

In *Blandford* the negligent driver stopped but the plaintiff elected not to record its identity. In *Meakes* the plaintiff was a lawyer who was injured while walking between gridlocked cars. Despite having a conversation with the driver of the unidentified vehicle, the plaintiff there again failed to record their identity. It is likely that the claims bought in *Blandford* and *Meakes* would both be unsuccessful in Victoria. This is because in both cases it is arguable that the plaintiffs would fail in showing that the identity of the negligent vehicle could not be established as at the date of the accident and at least until the commencement of the proceeding. The plaintiffs were able to identify the vehicles at the

time of the accident, but were unable to subsequently identify the vehicles for the purpose of their claims due to their failure to record the identities of the vehicles.

In the matter of *Love*, the defendant explored this line of reasoning while cross-examining the plaintiff, where it was put to him that:

> *"…it was implausible that, in circumstances where he was almost run off the road and the motor vehicle was in front of him, he did not take chase or could not identify the motor vehicle or whether it was registered*."[21]

Ultimately, as stated above, failure to comply with section 96 was abandoned as a defence in this case, but it further highlights the TAC's appetite for reliance upon the requirement in section 96(8) when defending these claims. Given that apparent appetite, practitioners should remain mindful of potential arguments about whether a vehicle was identifiable on the day of an accident, and whether a plaintiff should have taken positive steps to identify the vehicle.

Credibility and reliability

The issue of credit and reliability of the plaintiff is central to almost every unidentified vehicle claim. The plaintiff bears the onus of proof. While other evidence will no doubt be examined in such cases, it is the plaintiff's account that must be found, on the balance of probabilities, to be true without the benefit of having the defendant driver's evidence to agitate the plaintiff's version of events.

Propensity to untruthfulness

The Court of Appeal decision in *Casey*[22] followed a Supreme Court jury verdict of no negligence. This case concerned a worker injured in a motor vehicle accident. The appellant's credit was attacked on numerous fronts, including:

1. the appellant plead guilty to obtaining WorkCover benefits fraudulently;
2. video footage that disproved the appellant's claimed physical limitations;
3. the appellant was not forthcoming in his answers to interrogatories regarding the true extent of work completed post-accident. He also made false declarations in certificates of capacity on both the extent of work completed post-accident, as well as declaring he was unfit for work for periods as a result of the transport accident, when these periods of incapacity were caused by factors unrelated to the transport accident;

[21] *Love v TAC* [2017] VSC 584 (Ruling) [33].
[22] *Casey v Transport Accident Commission* [2015] VSCA 38.

4. the appellant had previously failed to declare tax and, at the time of trial, had a tax liability in excess of $100,000;
5. the appellant made a false declaration regarding his business affairs in his written application for bankruptcy;
6. the appellant minimised the true extent of his past marijuana use.

The Court found that this was a genuine series of issues that went to the appellant's truthfulness and reliability. Moreover, it went beyond simply demonstrating a recurrent propensity to untruthfulness. This successful credit attack showed an inclination to be untruthful when seeking compensation, recurrent dishonesty when seeking financial advantage and exaggeration in his evidence on matters affecting quantum.[23]

Past criminal behaviour

The Court of Appeal decision in *Bonavia*[24] also followed a Supreme Court jury verdict of no negligence. There, one ground of appeal was that the trial judge should not have admitted into evidence testimony of the plaintiff's own medico-legal psychiatrist, Dr Weissman, that went to the plaintiff having been charged, tried and acquitted of rape prior to the subject motor vehicle accident. The appellant claimed that the evidence was not relevant, but if it was found to be relevant, its probative value was substantially outweighed by the prejudicial effect to the plaintiff.

Both at first instance and on appeal, the Court found that the evidence was relevant and admissible given that the plaintiff claimed injuries including anxiety, depression and suicidal behaviour. Having claimed psychiatric injury, it was therefore necessary to consider whether the rape allegation and what followed played a part in the plaintiff's current psychiatric state for the purpose of quantum.

It ought to be noted that in addition to the rape allegation, evidence was tendered as to prior criminal convictions of the plaintiff for property offences. Dr Weissman had not, however, been informed by the plaintiff of any other criminal activity other than the rape allegation.

In his charge, Bell J stated:

> *"You may think he was a bit of a rascal, but I really must emphasise to you that even rascals are entitled to their day in court and to the full measure of justice which it is the obligation of a jury to provide…*

[23] *Casey* [24].
[24] *Bonavia v TAC* [2015] VSCA 324.

> *Credibility attacks are permissible. It is valid for a party to say that a witness is not reliable for particular reasons and to invite you to take into account those reasons when determining whether to accept the evidence of the witness. The reasons can be as were put forward here that the witness had been guilty of criminal offending or had been guilty of conduct which tended to suggest that their evidence was not such as to be reliable.*
>
> *That was done in this case. Not by reference to the acquittal on the charge of rape, because I have already told you that can play no part in your considerations whatsoever and certainly not as to credibility, but rather by reference to the other more minor criminal offending which the plaintiff admitted."*[26]

The appellant argued that the mention of the rape allegation caused a "stain" to be cast upon him, which could not be removed by the trial judge's charge to the jury. The Court of Appeal did not accept this argument, rather finding that the trial judge had been vigilant in regulating cross-examination and put in place protections to contain the prejudice. Furthermore, the Court of Appeal opined that such a submission: "…underestimates the capability of jurors and the diligence with which they attend to their duty as the triers of fact."[27] The appeal was dismissed.

Psychiatric conditions and reliability

In the Supreme Court trial of *Love*, the jury was discharged on application by the plaintiff following the defendant's closing address. There, senior counsel for the defendant invited the jury to find that the plaintiff was an unreliable witness for various reasons, including that his previous psychiatric condition made him unreliable.

Justice Zammit found that:

> *"…the use of any evidence about the plaintiff's pre-existing psychiatric condition and blackouts and their effect on his memory at the accident were not relevant and could only be permissible if there was appropriate expert medical evidence on this point*."[28]

Her Honour had directed the parties at the start of the trial that, in the absence of this expert medical evidence, it was only permissible to cross-examine the plaintiff on his pre-existing psychiatric condition for the purpose of assessing general damages. Her Honour found that significant prejudice

[26] Ibid [36].
[27] Ibid [42].
[28] *Love* (Ruling) above n [22].

was caused to the plaintiff by way of the defendant's closing address.[29] The jury was therefore discharged, and the matter proceeded to be heard as a cause.

Failure to call relevant witnesses

In *Casey*, the appellant claimed that he was crossing a road as a pedestrian with two workmates when hit by an unidentified vehicle. At trial, the failure to call these two workmates was left unexplained. The trial judge directed the jury as follows:

> *"Members of the jury, it is for you to consider whether there was a person or persons who you think could have provided relevant evidence about a particular issue who was not called by one or other of the parties who you might have expected to be called. If you think there was such a person, this question arises: what does the law permit you, the jury, to make of the failure to call that person. I can direct you as follows: unexplained failure by a party to call a particular witness does not fill any gap in the evidence called by the other party. You are not permitted to speculate what the witness might have said if called, but you are permitted – not obliged, you are permitted to infer that the evidence of the particular person would not have helped the case of the party who did not call the witness."*[30]

It goes without saying that the evidence of corroborative witnesses is extremely helpful in assisting to prove the plaintiff's account of the accident. It is therefore imperative that practitioners make early attempts to locate witnesses and take supportive statements.

Consistency of evidence

Arguably, the three most vital documents in any unidentified vehicle case are the police incident report, ambulance report and hospital records. When assessing the viability of such a claim, as well as when preparing affidavits, the Statement of Claim and Answers to Interrogatories, close reference ought to be had to these documents.

In the matter of *Love*,[31] Her Honour Justice Zammit considered the ambulance report and hospital records from the same day of the accident to be the strongest and most accurate descriptions of the incident. This is because of their proximity to the time of the incident and as the accounts are made in circumstances where no lawyers are involved, and litigation not contemplated.[32]

[29] Ibid [21].
[30] *Casey* above n [32].
[31] *Love (No 2)* above n.
[32] Ibid [53].

The utility of such documents may vary, however. In *Casey, f*or instance, while the accounts in these documents were consistent, they were founded on statements of the plaintiff whose credit was under attack. The Court of Appeal found that: "…they were self-serving and capable of rejection for the same reasons as his oral evidence".[33]

In *Casey*, the appellant had also provided inconsistent versions of how the accident occurred to various sources. The way in which the case was put at trial was consistent with the clinical records of the first hospital presentation, namely that the appellant was a pedestrian crossing lawfully at traffic lights, when a car struck him while making a left-hand turn. The appellant had told some doctors that the car ran a red light and others that he had no recollection of the accident. The appellant's WorkCover Claim Form and Incolink form also alleged that the car ran a red light. Ultimately, Mr Casey was unsuccessful both at trial and on appeal.

In contrast, in the matter of *Love*, the Court was somewhat forgiving of the low level of inconsistency in the plaintiff's evidence. There, Her Honour stated:

> *"In cases such as this, there are multiple records of the incident given to experts, in answers to interrogatories, and in claim forms. The records and histories are often drafted by solicitors and it is not known how much time the plaintiff actually spent ensuring that the record is accurate. The plaintiff's evidence about the typed response in the TAC claim form, which he did not complete, is a prime example. The plaintiff's evidence was that he did not see the typed entry and if he had he would have told the TAC it was wrong. Interestingly, Dr Andrew McIntosh, the defendant's biomechanist expert, also missed the entry in the TAC claim form."*[34]

Conclusion

The protection afforded by section 96 of the Act is an important one. It serves to ensure that those injured in road accidents in Victoria are not disadvantaged by the mere fact the vehicle involved cannot be identified. Alleged failure to comply with or satisfy the requirements of section 96 continues to be invoked as a defence by the TAC. While the provisions contained therein are seemingly simple, case law illustrates the nuanced manner in which claims involving unidentified vehicles may play out in the Courts.

There appears to be three broad approaches by the TAC when attempting to defeat a plaintiff's claim where section 96 is concerned:

1. Establish the plaintiff's failure to comply with the notice requirements;

[33] *Casey* [42].
[34] *Love (No 2)* above n [52].

2. Demonstrate that the plaintiff has failed to establish that the vehicle was unidentified or to satisfy their obligation to identify the vehicle; and
3. Attack the veracity of the plaintiff's evidence by trying to undermine their credibility and reliability.

Practitioners can strengthen their clients' claims by ensuring their cases are prepared in a manner which lessens their vulnerability to the above attacks.

Practitioners must remain familiar with and keep front of mind the notice obligations set out by section 96(2). In order to best protect the plaintiff's interests, prompt compliance with these provisions after close scrutiny of the material is best practice.

Furthermore, practitioners should be aware that the definition of 'unidentified vehicle', including that it was unidentified at the time of the accident, arguably imposes obligations on the plaintiff to record and retain information at the time of that accident. In circumstances where this has not occurred, a positive obligation similar to that of 'due inquiry and search' as imposed by the NSW legalisation may arise.

Finally, close scrutiny of the plaintiff's credit and the reliability of their evidence will always be required in these cases.