

Keeping up to date in the RTA/PI World

Cameron v Hussain

Heather Bell

Unidentified Drivers

In most cases involving an unidentified driver, the identity of the vehicle is also unknown, “hit and run” type accidents where the Claimant gets no details of the offending vehicle or driver. In some cases the Claimant manages to get a valid vehicle registration number, but more often than not there is no current registered keeper and rarely any insurance on that vehicle.

There are a minority of cases where the negligent driver has failed to stop the scene of the accident, a valid vehicle registration number is obtained and that vehicle is insured. It is all well and good if the insured or named driver accepts that they were driving, or they identify the driver and provide their full name and address, so if necessary proceedings can be issued.

Problems can arise when:

- The insured person (or named driver) on the policy of insurance does not co-operate with the insurers;
- The insured person (or named driver) deny they were the driver;
- The insured person claims that the vehicle was stolen but the thief has not been identified; or
- The registered keeper denies they were the driver and they will not say who the driver was.

How can you issue legal proceedings?

- You have no Defendant name and address for the Claim Form; and
- If the insurers are not providing an indemnity, they will not be liable to the insured person, so you will be precluded from a direct cause of action against the vehicle insurer. The European Communities (Rights against Insurers) Regulations 2002 states at 3(2) *...the entitled party may, without prejudice to his right to issue proceedings against the insured person, issue proceedings against the insurer which issued the policy of insurance relating to the insured vehicle, and that insurer shall be directly liable to the entitled party to the extent that he is liable to the insured person.*

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In the past your client would have to be directed to the Motor Insurers' Bureau under the Untraced Drivers Agreement; however the case of *Cameron –v- Hussain & Liverpool Victoria Insurance Company Ltd [2017] EWCA Civ 366* may help you now.

The background to *Cameron* case

Whilst the Claimant was driving her car she was hit by another motorist who failed to stop. The registration number was obtained by a passing taxi driver. The vehicle was insured by Liverpool Victoria.

The registered keeper was a Mr Naveed Hussain. He did not co-operate with the police enquiries into the accident and was convicted of the offence of failing to give information about the identity of a driver.

Liverpool Victoria filed evidence in the lower court that their insured was a Mr Nissar Bahadur, a person who they now believed to be fictitious, such that the policy was obtained by fraud. The registered keeper was not insured on the policy.

In the first instance

The Claimant initially issued legal proceedings against the registered keeper of the vehicle in the belief that he was the driver and later joined the insurer as Second Defendant in order to seek a declaration that they were obliged to satisfy any unpaid judgment against the First Defendant pursuant to section 151 of the Road Traffic Act 1988.

The insurers entered a defence denying its liability to satisfy any judgment against the First Defendant on two grounds, 1) that the First Defendant was not insured on the policy and 2) that the Claimant was unable to prove the identity of the driver at the time of the accident. They later made an application for summary judgment on the basis of the arguments in the Defence. The Claimant made a cross-application to amend the Claim Form and Particulars of Claim so as to substitute, for the First Defendant, a Defendant to be identified only by the following description 'The person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZIZ on the 26th May 2013.'

The District Judge granted the Second Defendant summary judgment and dismissed the cross-application.

Appeal to High Court

The Claimant's appeal was dismissed.

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Appeal to the Court of Appeal

The case was appealed to the Court of Appeal on the following grounds:

- i) Ground 1: English civil procedure permitted proceedings to be issued and orders (including judgments) to be made against unnamed parties where it is necessary and efficacious to obtain justice.
- ii) Ground 2: It was both necessary and efficacious to allow the appellant to proceed against an unnamed defendant in the particular circumstances of this case;
- iii) Ground 3: Permitting the appellant to proceed was consistent with the policy of section 151 of the 1988 Act.

In summary, the main points of the Respondents were:

- i) Ground 1: CPR 7PD 4.1 indicated that the normal rule was that the Defendant should be named and something exceptional was required to displace this. Examples of other parts of the CPR were quoted where there are specific rules which made special provision for circumstances in which defendants did not require to be named, but they did not apply in this case. In the case of *Bloomsbury Publishing Group –v- News Group Newspapers* [2003] EWCH 1206 (Ch) it emphasised that the applicants otherwise would have no remedy. In all domestic cases where orders were made against unnamed parties they involved the making of an injunction. In this case there was no claim for injunctive relief, the appellant would not be without a remedy and the respondent may be prejudiced by a judgment against an unnamed defendant.
- ii) Ground 2: It was not necessary to proceed against the unnamed defendant as the appellant had a perfectly adequate alternative remedy under the Untraced Drivers Agreement.
- iii) Ground 3: Liability under section 151 should have a requirement that the driver be identified, as the insurers would have no opportunity to question the driver, check their version of events, raise concerns of fraud, and would deny the insurers the right of recourse under section 151(8) to seek recovery of any monies they have had to pay out.

Matters in agreement

It was not disputed between the parties that:

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- the registered keeper Mr Hussain was not the driver;
- the unnamed driver was negligent;
- the vehicle was one that required compulsory insurance for third party risks; and
- if the appellant's action were allowed to proceed against the unnamed driver she would be entitled to judgment and the insurers would be liable to satisfy the judgment in accordance with Section 151.

No issues were raised regarding the construction of Section 151 or any other provision of the Road Traffic Act 1988 and therefore this was not considered nor the Consolidated European Motor Insurance Directive 20019/103/EC.

There was also no dispute between the parties that that the insurer would have been entitled under Section 152(2)(a) to have avoided the policy on the grounds of fraudulent misrepresentation however the insurers had not done so and the time for doing so had passed, so bound by the terms of the policy.

The real issues

- Whether the court should permit the Appellant to amend the Claim Form and Particulars of Claim to describe the defendant by the definition mentioned above;
- Where they entitled to make an order; and
- Should such an order be granted?

Conclusion

Lady Justice Gloster concluded in her judgment that in a case such as the present, the court can and should, in accordance with principle, exercise its procedural powers to permit an amendment of the claim form (and the consequent amendment to the particulars of claim) to allow a claimant to substitute an unnamed defendant driver, identified by reference to the specific vehicle which he or she was driving at a specific time and place, and consequently to enable a judgment to be obtained against such a defendant, which an identified insurer is required to satisfy pursuant to the provisions of section 151 of the 1988 Act. Lord Justice Lloyd Jones agreed with her judgment. Sir Ross Cranston dissented on the basis that he did not consider the case exceptional for permission to proceed against an unnamed defendant to be granted and the case should be referred to the UTDA.

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Important/interesting points in the judgments of Lady Justice Gloster and Lord Justice Lloyd Jones

The case provides a good reminder of the relevant points of the Road Traffic Act 1988.

Section 143 states that a person must not use a motor vehicle on the road or other public place unless there is in force in relation to the use of that vehicle a policy of insurance to cover third party risks and the insured person should not cause or permit any other person to use a motor vehicle unless insured.

Section 151 states that the insurers must meet judgments in respect of third party liabilities even if they are not providing an indemnity to their insured and even if the negligent driver was not insured on the policy.

Section 152 states that if a policy was in place in respect of a vehicle at the time of the accident, (the policy was not cancelled nor the insurer apply for a declaration that they are not RTA insurers) if the insurer received section 152 notice within seven days of issue they must satisfy any unpaid judgment.

There is also a reminder that section 143 refers to insurance in force 'in relation to the use of that vehicle,' so if for example a person insures a vehicle for social domestic pleasure purposes, but whilst driving the insured vehicle as taxi for hire and reward is negligent to a third party, and causes injury and damage, the insurers will not be RTA Insurers as the use was not insured on the policy, so the driver is effectively uninsured. This did not apply in the case of *Cameron* though.

There is an interesting reference in the judgment that as a matter of practice most insurers never bring proceedings for a declaration to void the policy due to material non-disclosure of fact or false representation, but do so occasionally in high value cases.

If an insurer takes the economic benefit of receiving premiums, subject to any right to void the policy, they should bear the risk of section 151.

The whole purpose of the Road Traffic Act is to safeguard the rights of third parties who are injured or their property damaged due to the negligence of another driver.

The respondents arguments regarding fraud and the opening of floodgates in respect of receiving claims if a defendant could be named by a description were not accepted. An insurer could stipulate conditions to establish the identity of an insured before a policy was issued and insurers can take steps to void a policy, but if chose not to due to administrative difficulties or otherwise, that was a commercial choice for them.

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It was entirely consistent with the policy of the Road Traffic Act that an insurer's obligation under section 151 is not dependant on identifying the negligent driver by name.

The Supreme Court rules used to state that a defendant must be named, but the CPR only states that the defendant should be named, but exceptions are made, but in cases where proceedings are brought against unnamed drivers, the court should refer to the overriding objective and whether it is just and at proportionate cost to do so.

It was significant in this case that the negligent driver had unlawfully sought to place himself beyond the reach of legal proceedings. Allowing the Defendant to be named by a description was in order to enforce against the insurers under Section 151.

It was accepted that just because the Claimant had another remedy, namely the Untraced Drivers Agreement it should not preclude her from a remedy from the court. It was accepted that a Claimant may consider that the UTDA was an inferior remedy due to the non-recovery of subrogated claims, reduced costs and the MIB being able to control the investigation of the claim.

The judgment also made reference to the fact that whilst they accept the insurers would not be able to contact the unnamed defendant, or seek re-imburement, that was the risk of section 151 and they had chosen that risk in taking out the policy.

It was also mentioned in the judgment that to permit a claimant to proceed against an unnamed defendant would not render the UTDA redundant as this would remain essential for unwitnessed hit and run type accidents where the negligent driver cannot be identified at all.

Going forward

The *Cameron* case does not mean that you can issue legal proceedings in all cases involving an unidentified driver. If you cannot identify an insurer for the negligent driver vehicle, it would be pointless issuing proceedings. The court would be unlikely to grant permission to proceed against an unnamed defendant, as in the *Cameron* case the court clearly permitted this so as to enable the Claimant to enforce against the insurers. Even in the unlikely event you did get the courts permission to name the driver by a description, you cannot enforce against the negligent driver, so you could only look to the MIB under the UTDA, and although they may pay you the judgment damages (if you have complied with the relevant UTDA) as they are supposed to make awards based on what a court in England and Wales may order, but they will only pay a contribution towards costs in accordance with the 2003 or 2017 Agreements, so the Claimant could end up worse off with unrecoverable court fees.

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Although you may have few cases that fit the same scenario as Cameron, it is good that a Claimant can now proceed to litigation and enforce against the insurers under S.151, rather than have to go to the MIB under the UTDA.

If acting for the Defendant Insurer and the Insured's policy has been taken out by means of fraud, misrepresentation or non-disclosure of material facts, if you believe that the Claimant is unable to identify the negligent driver, you may want to consider proceedings to obtain a declaration to avoid the policy, in order to force the Claimant down the route of the UTDA. In the event that the Claimant is able identify the negligent driver, at least the insurer will only be Article 75 insurer and will effectively sit in the shoes of the MIB under the 1999 or 2015 Uninsured Drivers Agreement and will be able to rely upon the clauses and exceptions/exclusions in the relevant Agreement.