Identifying the Correct Defendant in RTA Claims

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This is a brief guide to identifying the correct Defendant(s) in RTA claims. We will consider the position of the Defendant tortfeasor, the hierarchy of claims that can be brought against the tortfeasor's insurer and when claims are correctly to be intimated against the Motor Insurers' Bureau (MIB). There will always be exceptions to the general rules, and the facts of any case should always be carefully reviewed before a decision is taken as to which Defendant(s) to pursue.

The Tortfeasor

In almost all cases, it will be appropriate to name the tortfeasor as the Defendant, although it may not be necessary to do so.

If the negligent driver is known, insured and driving in a personal capacity, the Claimant may:

1. name the individual driver as the sole Defendant; or
2. name the contractual insurer under the European Communities (Rights against Insurers) Regulations 2002 (see below) as the sole Defendant.

If the negligent driver is driving in the course of their occupation, their employer is likely to be vicariously liable for their actions and ought to be named as sole Defendant in place of the individual driver. It will be the employer that holds the relevant policy of insurance.

It is possible to name both the driver (or their employer if driving in the course of their employment) and the contractual insurer as Defendants, although this will often be unnecessary. If, however, the tortfeasor's insurer has not confirmed, pre-issue, its capacity as contractual insurer, or if there are potential indemnity issues *vis-à-vis* the tortfeasor and their insurer, then including the insurer in the proceedings, in addition to the tortfeasor, and pleading the insurer's alternative contingent liabilities (see below), may be the safest course.

Contractual Insurer

As above, if the negligent driver is known and insured, it will likely be open to the Claimant to pursue the contractual insurer as the sole Defendant provided that the requirements of regulation 3 of the European Communities (Rights against Insurers) Regulations 2002 are met, namely:

1. the entitled person (the Claimant) has a cause of action against an insured person in tort (or delict);
2. that cause of action arises out of an accident;
3. the insurer has issued a policy of insurance relating to the tortfeasor's vehicle; and
4. the tortfeasor's vehicle is "*normally based*" in the United Kingdom.

If the above criteria are met, the insurer may be pursued directly as the sole Defendant and will be directly liable to the entitled party (the Claimant) to the extent that it is liable to the insured person. It is therefore crucial to ensure that there are no indemnity issues as between the insurer and the tortfeasor before naming the insurer as the sole defendant under the 2002 Regulations.

Road Traffic Act Insurer

If the contractual insurer refuses to indemnify the tortfeasor, for whatever reason, they will retain a contingent liability to

satisfy an unsatisfied judgment pursuant to section 151 of the Road Traffic Act 1988:

> *"(5) Notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy or security, he must, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment –*
>
> *(a) as regards liability in respect of death or bodily injury, any sum payable under the judgment in respect of the liability, together with any sum which, by virtue of any enactment relating to interest on judgments, is payable in respect of interest on that sum,*
>
> *(b) as regards liability in respect of damage to property, any sum required to be paid under subsection (b) below, and*
>
> *(c) any amount payable in respect of costs."*

In order for the contingent liability to arise, it is necessary to obtain judgment against the tortfeasor. The tortfeasor must therefore be sued as First Defendant, with the insurer named as Second Defendant.

For the avoidance of any doubt, no reference should be made to the 2002 Regulations since this is not the capacity in which the insurer now acts. Instead, the pleadings should make clear that the insurer is being pursued as the Road Traffic Act Insurer and should request a declaration of the insurer's contingent liability.

There are a number of exclusions to liability set out in the 1988 Act. Sections 151 and 152 merit careful reading.

Article 75 Insurer

In some circumstances, e.g. if an insurance policy was incepted by misrepresentation, the insurer may be entitled to avoid the policy of insurance. This situation is covered by Article 75 of the MIB's Articles of Association. By avoiding a policy of insurance, the insurer will become an "Article 75 Insurer" retaining a contingent liability to satisfy an unsatisfied judgment against the tortfeasor. This is sometimes described as the insurer standing in the shoes of the MIB.

Accordingly, the tortfeasor should be named as the First Defendant with the insurer named as Second Defendant.

For the avoidance of any doubt, no reference should be made to the 2002 Regulations, or the 1988 Act, since this is not the capacity in which the insurer now acts. Instead, the pleadings should make clear that the insurer is being pursued as the Article 75 Insurer and request a declaration of the insurer's contingent liability.

It should be noted that, as Article 75 Insurer, the insurer's contingent liability is narrower than that of a contractual or Road Traffic Act insurer, as its contingent liability will only extend to uninsured losses. Since it is standing in the shoes of the MIB, the Article 75 Insurer's liability mirrors the MIB's own liability in uninsured driver cases (see below).

The MIB

Uninsured Drivers – Claims in the County Court (or High Court)

In general, where the identity of the tortfeasor is known, but neither they nor the vehicle they were driving were covered by a policy of insurance at the time of the accident, the claim should be brought against the MIB.

The MIB's liability arises pursuant to various Uninsured Drivers Agreements. The date of the accident will determine which agreement applies. The MIB's website provides access to the Agreements and helpful Notes for Guidance on each. The standard wording for pleadings against the MIB is also set out on the website.

Once again, the tortfeasor must be sued as First Defendant and the MIB as Second Defendant, since the MIB's liability is contingent upon the judgment against the tortfeasor going unsatisfied.

The MIB is only liable to cover uninsured losses such as:

1. death or personal injury;
2. property damage up to £1 million, but only if the Claimant does not have fully comprehensive insurance;
3. credit hire, but only if there is no credit protection insurance in place; and
4. costs (if a mix of insured and uninsured losses are claimed, costs are apportioned *pro rata*).

There are a number of (mostly unusual) exceptions to the MIB's liability set out at clauses 4-10 of the Uninsured Drivers Agreement. These should be reviewed before a claim is issued to ensure none apply to the circumstances of the claim.

Untraced Drivers – Claims through the Untraced Drivers Scheme

If the identity of the tortfeasor cannot be ascertained, the claim should be pursued through the MIB's Untraced Drivers Scheme. This does not involve a County Court (or High Court) claim but rather a claim directly to the MIB.

Pursuant to *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471, it is not possible to bring a claim in the County Court (or High Court) where the identity of the negligent driver is unknown, even where the vehicle has been identified and there is a policy of insurance covering that vehicle. The identity of the owner of the vehicle is also irrelevant since the claim must be advanced against the tortfeasor. A claim will not succeed where it is advanced against the owner of the vehicle who cannot additionally be identified as the tortfeasor.