

TAC update: Unidentified driver & notice requirements under s96(2) of the *Transport Accident Act 1986* (Vic) 1986 judicially considered in *Kirk v Transport Accident Commission* [2019] VCC 1126 (26 July 2019)

### Summary

1. The plaintiff was injured in an accident with an unidentified driver on 8 May 2014. The jury returned a unanimous verdict in favour of the plaintiff.
2. Issues in respect of s96(2) of the *Transport Accident Act 1986* (Vic) (“TA Act”) were left to be determined by Her Honour Judge Kings.
3. Section 96(2) of the TA Act provides that in circumstances where an unidentified vehicle is involved in a transport accident, an injured person can only recover damages in proceedings against the Transport Accident Commission (“the TAC”) if:
  - (a) the injured person, within a reasonable time, provides the TAC with a notice of the claim detailing:
    - date and place of the accident;
    - the general nature of the injury;
    - a short statement of the circumstances of the accident; or
  - (b) where the notice is not given as required by paragraph (a), the injured person satisfies the Court that the TAC has not been materially prejudiced in its defence by any failure to give notice at the proper time, or by insufficiency in the notice.

### *The Issues*

4. The issues for determination were whether the plaintiff:
  - (a) provided notice as required under s96(2)(a) within a **reasonable time** after he knew the vehicle was an unidentified vehicle; or
  - (b) where notice is not given within a reasonable time under s96(2)(a), the plaintiff can satisfy the Court that the TAC has not been **materially prejudiced** in its

defence to the proceedings by any failure of the plaintiff to give notice at the proper time, or by any omission or insufficiency or defect in the notice.

*Reasonable time*

5. The concept of “reasonable time” in the context of this provision had not been judicially considered.
6. At the time of the accident the plaintiff knew the other vehicle was unidentified as it left the scene.
7. The plaintiff had no reason to believe that his injury was serious until at least November 2014, and probably at least February 2015, when a CT scan was performed.
8. The plaintiff lodged his TAC Claim Form on 5 March 2015. It was accepted that the claim form had all the required details under s96(2)(a) [39].
9. The plaintiff did not provide *formal* notice of his intention to recover damages against the defendant under s96(1) until 15 November 2017. It was conceded by the plaintiff’s counsel that this formal notice was not within a reasonable time [22].
10. Judge Kings, however, accepted that by March 2015 the TAC had the information required in accordance with s96 of the TA Act, and that the plaintiff had provided reasonable notice in accordance with s96 [40].

*Material prejudice*

11. The issue of material prejudice did not need to be considered, but Judge Kings was also satisfied that there had been no material prejudice to the TAC [41].
12. The plaintiff’s vehicle had been disposed of on 1 September 2014. The TAC claimed to have suffered prejudice in respect of [49]:
  - (a) a chance to investigate the circumstances of the accident, and the plaintiff’s vehicle including any biomechanical conclusions; and
  - (b) the lack of opportunity to assess the extent of the plaintiff’s injury between May and November 2014.

13. It was submitted on behalf of the TAC that by October 2014, “the trail was probably cold”. However, Her Honour held that there could be no material prejudice as notice was not required to be served before 1 September 2014, and the case for biomechanical evidence was unlikely as Professor Teddy’s evidence was that the mechanism of injury could occur from trivial impact [50].
  
14. In relation to obtaining an earlier medical examination, the defendant was at all times able to obtain an opinion as to the aetiology of the plaintiff’s neck. The matter could have been investigated by the TAC no fault team, but this did not occur. The TAC did not refer the plaintiff for an independent medical examination until April 2016. Accordingly, Judge Kings took the view that there had been no material prejudice [51].

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