1968 *Present:* **H. N. G. Fernando, C.J., and de Kretser, J.**

RUBY GENERAL INSURANCE CO. LTD., Appellant, *and* S. YASAPALA DE SILVA and others, Respondents

S. C. 50/66—D. C. Ratnapura, 5139/M

Motor vehicle—Insurance against third party risks—Action for declaration of non-liability for breach of a condition in the policy—Necessary parties—Motor Traffic Act (Cap. 203), ss. 99, 100 (4), 102 (4), 105, 109.

[1] *(1910) 13 N. L. R. at p. 320.*

Where, in consequence of the breach of a condition in a policy of insurance against third party risks, the insurer institutes action against the policy-holder under section 109 of the Motor Traffic Act with the purpose of obtaining a declaration avoiding the liability which section 105 of the Act imposes on an insurer to pay the amount decreed against a judgment-debtor in a previous action, it is not necessary that the judgment-debtor should be made a party. It would be sufficient if the judgment-creditor in the previous action is given notice so that he may have the requisite opportunity to intervene.

APPEAL from a judgment of the District Court, Ratnapura.

C. Ranganathan, Q.C., with *S. Nandalochana* and *C. Sanderasekera*, for the Plaintiff-Appellant.

H. Wanigatunga, for the Added Defendants-Respondents.

Cur. adv. vult.

June 28, 1968. H. N. G. FERNANDO, C.J.—

The respondents to this appeal were the Plaintiffs in an earlier action in which they obtained a decree for damages on account of personal injuries caused to them by the negligent driving of a motor bicycle. The defendant in that action had been the rider of the bicycle.

The present appellant, an Insurance Company, had issued a policy of insurance which was in force in respect of the bicycle at the relevant time. The holder of the policy was the person who was then owner of the bicycle, and the certificate of insurance required by s. 100 (4) of the Motor Traffic Act had been issued to that person.

Upon the entry of the decree in the former action, s. 105 of the Act took effect. It is necessary to cite here its relevant provisions :—

> "If, after a certificate of insurance has been issued . . . . . to the person by whom a policy has been effected, a decree in respect of any such liability as is required by s. 100 (1) (*b*) to be covered by a policy (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then . . . . . the insurer shall, subject to the provisions of sections 106 to 109, pay to the persons entitled to the benefit of the decree any sum payable thereunder in respect of that liability."

The appellant company thus became liable in law to pay to the respondents the amount decreed to them in the former action. But ss. 106 to 109 contain exceptions to such liability; and the appellant sought to invoke the exception granted by s. 109 by instituting the present

action for a declaration that a breach had been established of a condition enumerated in subsection (4) of s. 102 of the Act and included in the policy of insurance, namely the condition that the insured motor bicycle shall not be driven by a person who is not the holder of a driving licence. The appellant had no difficulty in establishing the breach of this condition, because it was proved that the person who drove the bicycle at the time of the accident did not hold a driving licence.

Yet the appellant's action was dismissed on the ground that he brought his action only against the holder of the policy of insurance, but not against the person who actually drove the bicycle. Thus the question which arises in the appeal is whether, in an action for a declaration under s. 109 filed with the purpose of avoiding the liability which s. 105 imposes on an insurer to pay the amount decreed against a judgment-debtor in a previous action, it is necessary that the judgment-debtor should be made a party.

Section 109 itself contains no provision as to this matter. All it says expressly is that the insurer who brings an action for a declaration under s. 109 must give notice of the action to the plaintiff in whose favour the earlier decree was entered, i.e., to the judgment-creditor. This notice was duly given to the present respondents, and in fact they intervened and contested the appellant's action for the declaration.

In the absence of any express provision in s. 109 specifying the person against whom the action should be instituted, the question of joinder has in my opinion to be determined on general principles. A policy of insurance is a document constituting a contract between the insurer and the insured ; and a condition contained in such a policy would prima facie be a condition binding on the policy-holder. If then the insurer seeks a declaration that there has been a breach of the condition, it is entirely reasonable that the policy-holder should be named defendant in the action for the declaration, for he is prima facie responsible for the observance of conditions in the policy.

Section 99 of the Motor Traffic Act contains the basic provision that " no person shall use or drive, or cause or permit any other person to use or drive a motor vehicle, unless there is in force in relation to the use of the vehicle by that person or that other person, a policy of insurance .... in respect of third-party risks ". In every case, save perhaps in a very exceptional one, the person who knows whether or not a vehicle is or is not so insured is the owner of the vehicle, for he is the person who would ordinarily effect the insurance. Section 99 fits the common-place situation, for ordinarily the person who uses a vehicle, or permits others to use or drive it, is the owner, and it is he who commits an offence against s. 99 if the vehicle is not insured. Even in the case where the policy contains a condition prohibiting the driving thereof by a person without a driving licence, it is the policy-holder who will know of the condition, and he commits an offence if he permits the vehicle to be driven by an

unlicensed person. The provisions of s. 99 thus confirm the prima facie impression that the policy-holder must be named defendant in an action under s. 109.

Let me consider also whether, in an action under s. 109, any purpose would be served by the joinder of the judgment-debtor in the earlier action.

So far as the insurer (who seeks the declaration of non-liability) is concerned, he does not require any relief against the judgment-debtor. His sole concern is to relieve himself of the liability to pay the amount of the former decree to the holder of that decree, i.e., to the former *judgment-creditor ;* and s. 109 quite reasonably informs the insurer that he can obtain that relief only if he gives notice of his action to the judgment-creditor. So far as the former *judgment-debtor* is concerned, the former decree is fully capable of execution against him, and his legal liability for payment of the amount of that decree is not one whit affected by the result of an action filed by the insurer in terms of s. 109. In these circumstances, there are no considerations of law or common sense which support the possibility that the Legislature entertained any intention that the former judgment-debtor must be made defendant in an action under s. 109. That being so, the only permissible implication is that the Legislature had no intention to provide for any departure from established principles. In the context, two principles apply :—

(1) where a plaintiff seeks relief from the Courts on the ground of a breach of a contract to which the plaintiff is a party, the proper person to be sued is the other party to the contract ;

(2) an Order of a Court will not prejudice a third party (in this case the decree-holder in the former action), unless that third party has an opportunity to oppose the making of the Order.

These principles are fully satisfied, in an action under s. 109, by the joinder of the policy-holder, and by the notice to the former judgment-creditor which gave him the requisite opportunity to intervene.

Counsel appearing for the respondent referred to certain English judgments holding that a third party has a right to sue an insurer for damages for injury caused by an insured vehicle, and that even an insured person himself may recover damages from the insurer for injury caused by the negligence of his own driver. Those judgments will no doubt require consideration in Ceylon if our Courts have to deal with similar claims. But the instant case raises only the question whether s. 109 must be so construed as to require that the negligent driver of a vehicle who has become the judgment-debtor in a decree obtained by a person injured by his negligence, is a " necessary party " to a subsequent action in which the insurer seeks to avoid the statutory liability to pay the amount of the decree to the injured person. Counsel could not urge any considerations of justice or common-sense which might permit a Court to

construe s. 109 in this manner. If the Legislature did intend that the judgment-debtor in the former action is a necessary party to an action under s. 109, I can see no reason why that intention was not expressed.

Before concluding this judgment, I must invite special attention to the reason why in this case innocent pedestrians, injured in a road accident through the negligent driving of a motor vehicle, are disentitled from receiving compensation from the insurer although the vehicle was in fact insured against third party risks in accordance with the Motor Traffic Act. The reason is that s. 102 of the Act permits a policy of insurance to contain an exception from liability if the insured vehicle is driven by a person who does not hold a driving licence. Many policies contain this and other permitted exceptions. The consequence is that injury to innocent third parties is not covered, if an unlicensed person drives the vehicle or if there is a breach of some other permitted condition in a policy. However expedient it may have been for the law to permit such exceptions from liability in the nineteen-thirties (when compulsory insurance was first introduced in Ceylon), the proper authorities must consider whether these exceptions can now be tolerated.

The judgment and decree are set aside, and decree will be entered granting to the appellant the declaration sought in his plaint. I make no order as to costs.

DE KRETSER, J.—I agree.

Appeal allowed.