1952 *Present :* **Nagalingam A. C. J. and Swan J.**

CEYLON MOTOR INSURANCE ASSOCIATION, LTD., Appellant, and THAMBUGALA, Respondent

S. C. 57—D. C. Colombo, 22,799

Motor Car Ordinance, No. 45 of 1938—Insurance against third party risks—Notice of action to insurer by third party—Particulars which should be furnished—Sections 130, 133 (1), 134, 136, 137.

Where notice of a contemplated action is given by an injured third party to an insurer in terms of section 134 of the Motor Car Ordinance, No. 45 of 1938, the particular Court wherein it is proposed to institute the action need not be expressly stated in the notice.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *G. T. Samarawickreme*, for the defendant appellant.

E. B. Wikramanayake, Q.C., with *J. N. Fernandopulle*, for the plaintiff respondent.

Cur adv. vult.

May 20, 1952. NAGALINGAM A.C.J.—

This is an appeal by the defendant company who is an insurer against third party risks of one K. Stephen Perera in respect of motor vehicle bearing registration No. X 4851 from a judgment entered against it decreeing the payment of a sum of Rs. 13,881.22, legal interest and costs, to the plaintiff-respondent who claimed the sum on the basis that he had sustained injuries as a result of the negligent driving of the motor vehicle referred to. The only point for determination is whether notice sufficient and adequate in terms of section 134 of the Motor Car Ordinance, No. 45 of 1938, had been given to the appellant, for it is conceded by the respondent that if no such notice had been given then the appellant company would not be liable to him.

As is well known, prior to the enactment of the provisions of the Ordinance relative to third party risks, there were cases where, though the injured party secured a judgment against the owner of the motor vehicle the reckless and negligent driving of which caused the injury, it was found that the decree was an empty one in the sense that the judgment-debtor was financially incapable of satisfying the debt. The result of the situation thus arising was sought to be remedied by the Legislature by passing an enactment embodying provisions intended to protect society against such unfortunate consequences. The Legislature for the first time in the history of our country passed the Ordinance above referred to, whereby it made it essential for an owner of a motor vehicle to effect insurance against third party risks before putting the vehicle on the road; insurance could be effected only with a person or firm termed under the Ordinance an authorised insurer, that is to say,

one whose ability to meet a third party liability was considered satisfactory. In the light of these observations it must be abundantly clear that the provisions of the law should, if there be any ambiguity, be construed beneficially in favour of an injured party rather than in favour of the insurer, but I am satisfied that on a plain construction of the provisions of the Statute no resort need be had to this principle, for the enactment construed according to its plain language is clear and satisfied the tests both of the spirit of legislation and the letter of the law.

Section 133 of the Ordinance imposes the liability upon an insurer to satisfy decrees obtained by an injured third party against the assured in respect of a vehicle that has been insured with it, subject to certain limitations contained therein which I shall notice presently, provided, of course, it has issued a certificate of insurance as required by section 128 (4). Section 134, however, makes the insurer's liability under section 133 dependent upon his being given notice by the third party, and the relevant provision of the section runs as follows:—

> " No sum shall be payable by an insurer under the provisions of section 133—
>
> (*a*) in respect of any decree, unless before or within seven days after the commencement of the action in which the decree was entered, notice of the action had been given to the insurer by a party to the action ; "

Notice under this provision may be given either before commencement of the action or within seven days after the commencement of the action, and the notice thus required to be given is " notice of the action ". Difficulty is said to arise in construing this provision because the notice that is to be given is stated to be notice of the action, and the question has been raised what is meant by " the action ". Where the notice is given after the commencement of the action, it is easy enough to identify the action by the action that has been filed, and it would be possible not only to specify the particular Court where the action has been instituted but also to particularize the suit by furnishing the specific number assigned to it ; but where notice is given before the commencement of the action, it is said that notice cannot be given of the action because in fact there was no action in existence at the date of the giving of notice so as to permit of a notification of the particular Court or even of any number that may be assigned to it. But it seems to me that when the section refers to " the action " it means the action in which the decree was entered as indicated in the earlier part of the section, and what the section requires is that notice should have been given of the action in which the decree was entered and that notice would be adequate if the action that is filed subsequently can be identified as the action in contemplation of which notice had been given.

Ordinarily speaking, the requisites necessary to identify an action are (*a*) the name of the plaintiff and perhaps his address, (*b*) the name and address of the defendant, (*c*) the nature of the injury and the cause of action that gives rise to the claim, (*d*) the relief or quantum of damages that is claimed. It has, however, been urged on behalf of the appellant that while these requirements may be sufficient where the Legislature

requires notice to be given of an action in the generality of enactments (see the case of *Dulfa Umma et al. v. U. D. C., Matale* [1]), nevertheless in this particular instance under this particular Ordinance the notice that is contemplated requires at least one other particular, in the absence of which the notice cannot be regarded as sufficient within the meaning of that section. It is said that, inasmuch as the action notice of which may be given in the terms set out above is capable of being filed in more than one Court, the particular Court wherein it is proposed to institute the action should also be furnished, though not necessarily, as argued in the lower Court, the date on which it is proposed to file the action or all the essentials that have to be stated in a plaint in respect of such a cause of action in terms of the Civil Procedure Code. There is nothing express in the section itself which requires that the forum wherein the action would be instituted should be notified to the insurer, but it is sought to argue that such a term is implied not because of anything contained in the section itself but because of the supposed objects the Legislature must have had in mind in framing this provision. One of the objects, it is said, was to enable the insurer either to assist the assured in his defence or to take over the defence himself in terms of the contract between the insurer and the assured in respect of the action instituted by the third party against the assured. It is conceded that one of the other objects would be to enable the insurer to obtain a declaration of non-liability under section 136 or 137 of the Ordinance; but a perusal of the provisions of sections 136 and 137 leave no room for doubt that the particular forum where the action is to be instituted by the third party against the assured is unnecessary to enable the insurer under either of those sections to obtain a declaration of non-liability, and it must not be forgotten that section 133 itself expressly refers to the liability accruing to the insurer under it as being subject to the provisions, *inter alia*, of sections 136 and 137.

The question, then, narrows itself down to a determination as to whether the contention that the particular forum should be expressly stated in the notice to the insurer in order that he may take over the defence or assist in the defence of the action instituted against the assured is entitled to succeed. In the ordinary run of cases, one would expect the assured to be the first person to communicate with the insurer in regard to the accident which gives rise to the third party claim, and one would also expect that as it is one of the conditions of liability as between the insurer and the assured, that the assured would also notify the insurer of the particular action commenced against him by the third party for the recovery of damages.

In this case, there is a total absence of evidence as to whether the insurer received notice from the assured, and the case has to be decided on the footing that the insurer, as stated by him, did not receive any notice from the assured either of the accident or of the proceedings commenced against him. It seems to me that the provision as regards notice to the insurer has been framed by the Legislature against a background of knowledge that there is always a condition in the policy issued to the assured that the insurer will not be liable to the assured

[1] *(1939) 40 N. L. R. 474.*

unless notice is given forthwith of the accident and of the proceedings, if any, against him, for if there be a violation of this condition the insurer ceases to be liable for any claim that the assured may make against the insured in respect either of his own vehicle or of damages payable by him to a third party.

But what, then, if in fact the assured fails to notify the insurer of either the accident or of the proceedings commenced against the assured in respect of a third party claim? It seems to me that the Legislature has been alive to such a contingency and has provided section 130 to meet such a situation. Further, on general principles, the insurer would have a right of recourse against the insured where owing to the default of the latter the former has become liable to make payment. Looking at the question from a practical point of view, any authorised insurer alive to his obligations and alive to the circumstance that it has been recognised as an authorised insurer would, if he pursued a policy of business honesty, at least ask the third party who has given him notice of the action before institution of the action to notify it and to give it particulars of the action when instituted, but as I have already indicated, such a course would hardly arise for normally the assured would keep the insurer informed of these relevant facts, but of course in determining the question any consideration of what ordinary business morality should dictate to an insurance company cannot and need not be taken into consideration. One has simply to construe the provisions of the statute. Construing the provision as I have already indicated, there is nothing in the section which requires that the forum should be notified.

It would be convenient at this stage to look at the notice itself, which was sent to the appellant by the respondent, which runs as follows:—

" The Manager,
The Ceylon Motor Insurance Co.,
Fort, Colombo.

Re Car No. X-4851

Dear Sir,

We are instructed by Mr. P. P. Thambugala of Manikkawa Walauwa in Mawanella to file an action for the recovery of Rs. 15,000 against Mr. Kodituwakku Aratchige Stephen Perera of Mawanella being damages sustained by our client as a result of the above car knocking down our client on the 1st September, 1945, by reason of the negligent and careless driving on the part of his driver.

We are given to understand that the above car has been insured with your company.

Our client is still under treatment and unless our client's claim is settled on or before the 31st instant, we are instructed to file action against the owner of the car.

Yours faithfully,
(Sgd.) JAYASEKERE & JAYASEKERE."

The notice specifically gives the name and address of the plaintiff who proposes to file the action, the name of the person against whom it is proposed to file the action and his address, the cause of action including

specific reference to the number of the motor vehicle and the amount claimed. It seems to me that these are all the particulars that the section requires to be furnished. It is true that the notice does not state where the action is proposed to be filed but, as I said earlier, I do not think the phrase " notice of action " involves in it any content as regards the forum where the action is to be instituted. I am therefore of opinion that the notice sufficiently complies with the requirements of the section.

Another ground urged against the sufficiency of the notice is said to be that the notice is not absolute in its terms but is vague in that it leaves uncertain whether the action would be filed or not, depending on whether the claim would be settled or not. The basis of this argument is that the terms of the notice are capable of being construed as meaning that the settlement of the claim is to be made by either the owner of the vehicle or the insurer. I do not think that the notice is capable of such a construction. The intimation that the action would be filed unless the claim was settled prior to a particular date clearly has reference to a settlement being effected by the insurer and not by the assured. That is the plain meaning of the notice and, what is more, that is the meaning in which the notice was understood by the insurer himself, as is apparent from his reply P2, and the only ground upon which he refutes the claim made is that the insured " had failed to report the accident in terms of the conditions of the policy issued to him ". In this view of the meaning to be attached to the notice it cannot be regarded as one involved in any ambiguity. It is obvious that the notice intimates that unless the insurer pays the claim action would be filed, and that is a matter entirely within the insurer's knowledge, and where he does not settle the claim he would know that the action would be filed after the date specified. I therefore hold that the notice P1 is sufficient and adequate in terms of section 133 of the Ordinance.

For the foregoing reasons I would affirm the judgment of the learned District Judge and dismiss the appeal with costs.

SWAN J.—I agree.

Appeal dismissed.