



Insurance Against Third Party Risks

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“In Motor Accidents Undertakers Profit, while underwriters lose”.

The provisions relating to this aspect are described (from section 99 to section 121) under Chapter VI of the Motor Traffic Act (as amended), and by this article, it is expected to discuss some salient features pertaining to Third Party Coverage that drew the attention of Courts frequently.

What is a Third Party Insurance?

This is a *statutory obligation* and thereunder in terms of section 99(1) of the Motor Traffic Act, no person shall use or drive, cause or permit any other person to use or drive, a motor vehicle on a highway unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance, or a security, in respect of third-party risks, in conformity with the requirements of Chapter VI of the Motor Traffic Act (as amended).

Exceptions

However, in terms of section 99(2) of Motor Traffic Act,

(a) **The vehicles belonging to the State** that are used for the purposes of the Government of Sri Lanka,

and

(b) **The vehicles belonging to the Local Government Institutions and the same are driven by an employee of the such institution,** it is not necessary to obtain a Third Party insurance coverage to such vehicle.

Example: Vehicles belonging to the Police Department, three Armed Forces and Ministries of the Government.

(In any event, it could be seen that currently most of the government Ministries obtaining Third Party Insurance coverage in respect of vehicles coming under such ministries.)

Can the Insurance Company restrict its liability on a Third Party Insurance Coverage?

The provisions relating to this are described in sections 100 (1) (b) and 100 (1)(c) of the Motor Traffic Act, and there under an insurer is entitled to make certain limitations set out in section 100(1)(c) in making of payments for the Third Party claims.

However, such limitation does not apply to any compensation awarded to the third party by a court under a decree for the reason that the limitations stipulated under Section 100(1) (c) shall have to be read with sections 105 and 110 of the Motor Traffic Act.

Under the said circumstances, it is very clear that when a court pronounces a judgment in respect of the real damage caused to the third party, the insurer is not entitled to take up a defense by relying on the terms and conditions of the agreement entered into between the parties by stating that the statutory obligations of the insurer is limited to its obligations under the Agreement.

Kushan Ediriweera Vs. Fairfirst Insurance Limited (formerly known as Union Assurance General Limited) and two others (SC Appeal No. 65/2016 dated 11/09/2020).

Is there a Cause of Action accrued to the third party aggrieved by a Motor Traffic Accident

(Plaintiff) against an Insurance Company?

Considering the above question of law, I would draw my attention to the section 105 of the Motor Traffic Act as shown below.

“105(1). if after a certificate of insurance has been issued under section 100(4) to the persons by whom a policy has been effected, a decree in respect of any such liability as is required by section 100 (1)(b) to be covered by a policy of insurance (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, in such an event although the insurer was entitled to prevent or invalidate the Insurance Policy or the insurer prevents or invalidates same, **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, including any amount payable in respect of costs and pay any sum payable in respect of interest on that sum under such decree.

(2) In this section “liability covered by the terms of the policy” means a liability covered by the policy or which would be so covered, but for the fact the insurer is entitled to avoid or cancel or has avoided or cancelled, the policy.” (*emphasis is mine*).

Accordingly, upon analyzing the provisions of the Motor Traffic Act, it is apparent that **a Cause of Action does not accrue to an aggrieved third party (the plaintiff in a case) against an insurance Company (in relation to a motor accident under an insurance coverage) to sue,** and, accordingly,

(a) In a situation where the driver who caused the particular motor accident is not the insured, a

Cause of Action accrues to the aggrieved third party to sue the owner (the insured) of such motor vehicle who employed him and the insured under vicarious liability, subject to the provisions of section 09 of the Prescription



Ordinance.

(b) The Plaintiff having obtained a decree against the insured on a Cause of Action in a case filed

as aforesaid (subject to the provisions laid down in sections 106 to 109 of the Motor Traffic Act) the Plaintiff is entitled to the statutory right under section 105 of the Motor Traffic Act to recover the amounts specified in the said section and the insurance company becomes entrusted with a statutory obligation in respect of same, and,

(c) It is apparent that it is only under the provisions of sections 106 to 109 of the Motor Traffic Act that an insurance company could become non liable from such statutory obligation

as aforesaid.

Is the aggrieved third party (the Plaintiff) obliged to make the Insurance Company a party to such action?

Considering the above question of law, my attention is drawn to the provisions of section 106 of the Motor Traffic Act (as amended) as follows,

“106(1) No sum shall be payable by an insurer under the provisions of section 105-

(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; or

(b) in respect of any decree, so long as execution thereof is stayed pending appeal.

(2) Every notice given under subsection (1) shall-

(a) specify **the name of the court** in which such action is instituted;

(b) specify **the number assigned to the action**;

(c) specify **the names of the parties** to the action;

(d) specify **the number of the insurance policy** in respect of which the action is instituted;

(e) specify the **nature of the action**; and

(f) require the insurer to **answer the plaint before a date to be specified** is such notice (දැන්වීමේ නිශ්චිතව සඳහන් දිනයකට පෙරාතුව පැමිණිල්ලට පිළිතුරු දෙන ලෙස රක්ෂණකරුට නියම කළ යුතු ය.) (3) Every notice **shall be accompanied by a copy of the plaint** filed in the action.

(4) **An insurer to whom such notice is given shall be made a party to such action** and shall be entitled to defend such action. (එම දැන්වීම ලබා දී ඇත්තේ යම් රක්ෂණකරුවකු වෙත ද එම රක්ෂණකරු එම නඩුවේ පාර්ශ්වකරුවකු විය යුතු අතර එම රක්ෂණකරුට එම නඩුවේ විත්තිය වෙනුවෙන් පෙනී සිටීමට හිමිකමක් තිබිය යුතු ය.) (emphasis is mine).

Accordingly, when the said notice is received by the insurance company under and in terms of section 106(1) of the Motor Traffic Act (as amended), an insurance company in order to become non liable from the statutory obligations entrusted upon it, may take one of the two positions by way of its answer to the plaint (පැමිණිල්ලට පිළිතුරු ලෙස), namely,

(I) **The insurer has no any obligation to pay the decretal amount** which has been obtained by the plaintiff under section 105 of the Motor Traffic Act, **as the plaintiff has not given notice of action to the insurer before or within seven days of the commencement of the action in terms of section 106 (1)(a) of the Motor Traffic Act.**

(II) Although a notice is properly given by it to the plaintiff, either before or within seven days of the commencement of the said action as per section 106(1)(a) of the Motor Traffic Act,

(a) When at times of the motor accident relevant to the action took place, **the subject insurance policy has been mutually terminated or the said insurance policy has been annulled and/or cause to annul in terms of section 107 of the Motor Traffic Act, or**

(b) That the insurer has filed a separate action and has obtained a declaration or has taken steps to obtain a declaration in order to become non liable on the basis of **misrepresentation or non-disclosure of a material fact** by the insured at the time of entering into the insurance policy **in terms of section 108 of the Motor Traffic Act, or**

(c) That the insurer has filed a separate action and has obtained a declaration or has taken steps to obtain a declaration in order to become non liable on the basis that the **insured had acted in breach of a specific condition of the insurance policy in terms of section 109 read with section 102(4) of the Motor Traffic Act.**

(However, in the event an insurer wishes to take steps under section 108 and section 109 of the Motor Traffic Act, an insurer should file a separate action against the insured **before or within three months of the filing of an action for damages arising from the motor accident** and the declaration which shall be obtained in such case could be used against the plaintiff in the damages case only **if the insurer has and served the notice on the plaintiff of the said damages case, before or within seven days of the commencement of the subsequent case**

filed by the insurer and the insurer could make the plaintiff of the damages case a party in this case.)

In the said two occasions, if the insurance company wishes to be a party to the said action filed by the aggrieved third party, the insurance company is entitled to be made a party to the said action as of right and shall be entitled to defend the action under section 106(4) of the said Act.

Therefore, it is very clear that, the aggrieved third party (the Plaintiff) has no any obligation to make the Insurance Company a party to such action, because,

- The aggrieved third party has no any cause of action against the insurance company.
- The aggrieved third party has no claim against the insurance company.(except under and in terms of section 105 of the Motor Traffic Act)
- The only obligation of the aggrieved third party is, to give proper notice under and in terms of section 106(1) of the Motor Traffic Act (as amended) to the insurance company.
- Upon receipt of a notice issued under section 106(1)(a) the insurer is entitled to be made a party to the action and shall be entitled to defend the action under section 106(4) of the said Act and it is apparent that there is no any obligation on the plaintiff to make the insurer as a party under section 106(4) of the said Act.

Is the aggrieved third party (the Plaintiff) in a case for damages, obliged to make the Insurance Company a party in terms of the amendment introduced to the Motor Traffic Act by act No. 08 of 2009?

Considering the above question of law, I draw my attention to the legal position prior to the said amendment and after introduction of the said amendment to section 106 of the Motor



Traffic Act by Act No.08 of 2009 (as amended) as follows,

Situation prior to the amendment introduced in section 106 of the Motor Traffic Act by Act No.08 of 2009.

106. (1) No sum shall be payable by an insurer under the provisions of Section 105-

(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; or

(b) in respect of any decree, so long as execution thereof is stayed pending appeal.

Situation after the amendment introduced in section 106 of the Motor Traffic Act by Act No.08 of 2009

106. (1) No sum shall be payable by an insurer under the provisions of Section 105 in respect

of any decree-

(a) unless before or within seven days of the commencement of the action the plaintiff in the action in which such decree was entered has given notice of such action to such insurer; or

(b) so long as execution of such decree is stayed pending appeal.

(2) Every notice given under subsection (1) shall-

(a) specify the name of the court in which such action is instituted;

(b) specify the number assigned to the

action;

(c) specify the names of, the parties to the action;

(d) specify the number of the insurance policy in respect of which the action is instituted;

(e) specify the nature of the action; and

(f) require the insurer to answer the plaint before a date to be specified is such notice.

(3) Every notice shall be accompanied by a copy of the plaint filed in the action.

(4) An insurer to whom such notice is given **shall be made a party of such action** and shall be

entitled to defend such action. (emphasis is mine)

Accordingly, it is very clear that,

a) Under and in terms of section 106(4) of the Motor Traffic Act (as amended) the aggrieved third party (the Plaintiff) has no any obligation to make the insurer (insurance Company) a party to such action.

b) The insurer (Insurance Company) is obliged to have it added as a party to the said case on receipt of such notice from the plaintiff under section 106(1)(a) and it is clearly evident that **only the change introduced to the Motor Traffic Act by Act No.8 of 2009 is that the insurer is given an opportunity to become a party to the action as of right and to appear for the defense.(Which right was not available to an insurer before the amendment introduced to the Motor Traffic Act by Act No. 08 of 2009.)**

Could the decree obtain by the aggrieved

third party (the Plaintiff) against the insured without making the insurer a party to the said action be enforced against the insurer under and in terms of section 105 of the Motor Traffic Act?

Considering the above question of law, my attention is drawn to the judgment of **Justice U. De Z. Gunawardena, Judge of the Court of Appeal (as he then was) in Fernando Vs De Silva (2000(3) SLR 29)** as follows,

In the said judgment in Fernando vs. De Silva and others (2000 (3) SLR 29) it was held, inter alia,

(1) The 1st Defendant Respondent (insured) has no direct interest in the safety of third parties.

The loss against which he (1st Defendant Respondent) seeks protection is not the injury of damage caused by the accident, he seeks protection (under the Policy) against the consequence of the fact that he happens to be responsible for the accident in the circumstances in which it has happened.

(2) The addition of the Insurance Company was not at all necessary for the execution

against the Insurance Company by the money decree that had been entered in favour of the

Plaintiff Appellant.

(3) In terms of S.218 C.P.C., the money to the amount awarded in the hands of the insurer cannot strictly be said to be money (property) belonging to the Judgment Debtor, more so as the 1st

Defendant Respondent (insured) has insured against liability, to third parties arising otherwise

than from contract.

(4) The insurer is legally bound to compensate and the 1st Defendant-Respondents right is not mere right to request that be given assistance or an indemnity – it is a legal entitlement as opposed to a benefit.

(5) One aspect of the **doctrine of Subrogation in relation to an insurer, mean the right of the**

insurer, who has indemnified the insured to step into the shoes of the insured and in the name of the insured pursue any right of action available to the insured which may diminish the loss insured against. The other aspect of the doctrine of the doctrine of subrogation is that the insured cannot make a profit from his loss and that for any profit he does make he is

accountable to his insurer either as constructive trustee or an action in quasi contract for

money had and received.

(6) Even if the money (to the amount of the Judgment) is not held by the added Respondent in

trust yet it can be said to be held on behalf of the Judgment Debtor.

(7) The words ‘shall in S’ 105 of the Motor Traffic Act’ the insurer shall pay to the person

entitled to the benefit of the decree the sum payable thereunder” Denotes an absolute obligation.

(8) The Civil Procedure Code is not exhaustive as to the powers of a court in matters of procedure. The Court has an inherent power to make a particular order, where its decision is based on sound general principles and is not in conflict with them or the intention the legislature.



(9) Courts are expected not to act upon the principle that every procedure is to be taken as

prohibited unless it is expressly provided for by the Code.

(10) As there is no prohibition, legal or otherwise, the Plaintiff-Appellant has the power in

execution the Judgment to “seize and sell or to realize the money by the hands of the Fiscal” all saleable property, whether movable or immovable belonging to the added Respondent (Insurance Company) **It is wholly unnecessary to add the Union Assurance Company as a party.** (emphasis is mine)

Accordingly, it is very clear that the decree obtained by the aggrieved third party (the Plaintiff) against the insured can be enforced against the insurer, without making the insurer a party to the said action under and in terms of section 105 of the Motor Traffic Act (as amended).

Conclusion

(a) In an action for damages the aggrieved third party (the plaintiff) has no obligation to make the insurer a party in his Plaint or subsequently, under and in terms of section 106(4) of the Motor Traffic Act (as amended).

(b) In a situation when there is a third party insurance policy a Cause of Action will accrue to the aggrieved third party (the Plaintiff) against the driver who is responsible for the subject motor accident and when such driver is not the insured, only against the insured who is the owner of the vehicle under vicarious liability. (As in the said action no cause of action would accrue to the aggrieved third party (the plaintiff) against the insurer in respect of a motor accident and **on the said basis as an insurer cannot rely on the provisions of section 09 of the Prescription Ordinance for his benefit.**)

(c) An insurer upon receiving a notice under

section 106(1)(a) of the Motor Traffic Act is entitled under section 106(2)(f),

i) By exercising his statutory right to be made a party to the said action, file a motion before the date specified in the notice and after being a party to the action on the basis specified by me above and thereby can appear for the defense and take all required steps deemed necessary,

ii) Prior to the particular date specified in the said notice, could send a written notice to the plaintiff (without being made a party to the action).

Example: In terms of section 107 of Motor Traffic Act, in a situation in which insurance

policy has been expired prior to the causing of the motor accident, insurer without becoming a party to the action can send only a written notice to the said aggrieved party, that the coverage had expired prior to the occurrence of the accident.

iii) By exercising his statutory right, file a separate action and take steps to obtain a declaration in order to become non liable under and in terms of sections 108 and 109 of the Motor Traffic Act (as amended).

(c) In a situation where a plaintiff has duly given notice to an insurer in terms of section 106(1)(a) of the Motor Traffic Act and the insurer has not taken steps to become a party to the action in terms of section 106(4) of the Act, and when the Plaintiff has obtained a decree against the insurer in terms of section 105 (subject to the right of the insurer to become non liable from paying of compensation under

section 107,108 or 109 of the Motor Traffic Act) although the insurer (Insurance Company) is not a party to the action and without making the insurer a party, the plaintiff is entitled to take out a Writ against the insurer and enforce the statutory rights against the insurer in respect of damages caused to third parties.

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