SOUTH AUSTRALIA

TWENTIETH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY GENERAL

—

RELATING TO SECTION 124 OF THE MOTOR VEHICLES ACT 1969-1970

1971

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:—

The Honourable Mr. JUSTICE ZELLING, C.B.E., Chairman.
B. R. COX, Q.C., S.-G.
K. P. LYNCH.
*R. G. MATHESON.
JOHN KEELER.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide 5000.

*NOTE:—Mr. R. G. Matheson was on leave overseas when this Report was signed.

TWENTIETH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO SECTION 124 OF THE MOTOR VEHICLES ACT, 1969-1970

To:

The Honourable L. J. King, Q.C., M.P.,
Attorney General for South Australia.

Sir,

You have referred to us the question of possible reform of Section 124 of the Motor Vehicles Act, 1969-1970 in the light of the judgment of the Honourable the Chief Justice in the case of *Surrey Insurance Company Limited* v. *Nagy and Nagy*.

The Committee enquired of the Honourable the Chief Justice whether he would be kind enough to furnish us with some notes of the amendments he had in mind and with his usual painstaking thoroughness he supplied us with a full memorandum on the matter which is annexed to this Report. A copy of the Section in question follows the memorandum.

Taking the Chief Justice's recommendations in the order in which they appear in his memorandum:

1. The Committee is of opinion that the matters referred to by the Honourable the Chief Justice should not be defences to criminal prosecutions for breaches of the first three subsections but that lack of knowledge by the owner of the occurrence of the accident should be a defence and that legislation couched in the terms of Section 20 (1) (*a*) of the Motor Vehicles (Third Party Insurance) Act of New South Wales would sufficiently cover this point.

   The Committee also considered that provision should be made as in the New South Wales Act to enable the driver and owner to use the same form in order to give notice as this is the normal procedure with insurance companies.

   In relation to civil proceedings we think that the Chief Justice's suggested amendment ought to be written into the legislation.

2. In relation to the Chief Justice's comments under paragraph 2 we do not see that the words "an insured person" are necessary in this connection although there are real differentiations between the other three descriptions which need to be preserved.

   Apart from this we do not agree that any other amendment is required under this heading.

3. We entirely agree with respect with the Chief Justice's suggestion under paragraph 3 and we would go further in that we feel that the insurer's right of recovery ought to be limited to the actual loss sustained by the failure to give notice and not as at present to the total amount paid out. For example where, if the insurance company had been given proper notice the only result of receiving such notice would have been that the total judgment could have been reduced by some percentage

for contributory negligence, then it is the quantum of that percentage which ought to be the limit of the insurance company's recovery. Equally, if the insurance company could for example have reduced the damages by excluding or modifying a particular head of damage but in no other way then that should be the limit of its recovery and the burden of proof should be on the insurance company to prove its loss.

4. As far as paragraph 4 of the Chief Justice's memorandum is concerned we respectfully agree with it *in toto*.

We have the honour to be

HOWARD ZELLING

K. P. LYNCH

B. R. COX

JOHN KEELER

The Law Reform Committee of South Australia

MEMORANDUM FROM THE CHIEF JUSTICE TO ZELLING J.

I understand that some memorandum is required from me in relation to my criticisms of Section 124 of the Motor Vehicles Act, 1969-70. I refer to my judgment in the case of *Surrey Insurance Co. Ltd.* v. *Nagy and Nagy* 1968 *S.A.S.R.* 437 at p. 440-3 where my comments are set out in full. However, I recapitulate briefly. I attach a copy of sec. 124 for the sake of convenience.

I make the following comments:—

1. The section rings the changes in a confusing way on the driver and the person in charge at the time of the accident, on whom certain obligations are cast by sub-sec. (1), the owner, on whom certain obligations are cast by sub-sec. (2), and the insured person, on whom certain obligations are cast by sub-sec. (3) and a heavy civil liability is imposed by sub-sec. (4). The phrase "insured person" may cover the driver as well as the owner or other actual party to the insurance contract, see the definitions in sec. 99 (1) and sec. 104 (1) (*b*). The driver and the person in charge are liable to the penalties imposed by sub-sec. (1) if they fail to give the necessary notice *forthwith* to the insurer. However, if the person in charge is neither the owner nor the driver, he is not an insured person and is not caught by sub-secs. (3) and (4), whereas they probably are.

2. It seems to me hard to impose these obligations on the driver when he is not the owner of the vehicle, unless he is driving without the owner's consent or without a reasonable belief that he has such authority, or unless, perhaps, he fails to report the accident to the owner. He may not know who the insurer is. In Nagy's case above the driver was a boy of 16, driving his father's car with his father sitting beside him and he was sued by the insurance company, together with his father. Fortunately, in that case the necessary procedural formalities for suing an infant were not observed. In theory, however, such a boy driver could well be liable both to the penalty under sub-sec. (1) and to a civil claim for an enormous amount under sub-sec. (4) if he is covered in the definition of insured person, as I think he probably is, simply because he failed to give notices about the necessity of which he would know nothing to an insurance company of whose identity he might well be ignorant. Similar remarks apply to an employee driving his employer's vehicle. For a more reasonable type of legislative provision giving a right of recovery over against the driver I refer to secs. 17 and 32 (1) (*b*) of the New South Wales Motor Vehicles (Third Party Insurance) Act 1942-1965.

3. The section lacks the usual reliefs given by sections like sec. 29 of the Workmen's Compensation Act. Notice has to be given *forthwith* under sub-sec. (1) and *immediately* under sub-secs. (2) and (3). The party might be in hospital after the accident. There is no provision that the failure to give notice is excusable if it is due to illness, mistake or other reasonable cause, or if it has caused no prejudice to the insurer. The insurer may well know all about the accident very soon after it happened from some other source, but that is no defence.

4. Apparently under sub-sec. (4) the insurer can recover all money paid, irrespective of the reasonableness of his action in settling the claim. He can, in short, if he fails to get from an insured person any of the notices required by sub-secs. (1), (2) and (3), deal with the claim without the knowledge of, or even against the wishes of, the insured person in any way he pleases and recover the full amount from the insured person.

5. Sub-sec. (5), if taken literally—and as I said in Nagy's case I think any court would struggle against taking it literally—prevents an insured person sued under sec. 124 from proving that he did, in fact, give the requisite notice, because if he were so sued it would be in a civil proceeding and the sub-section makes the notice inadmissable except in criminal proceedings.

I would suggest that:—

1. It should be a defence both to any prosecution for breach of sub-secs. (1), (2) and (3), and, more importantly, to any civil proceedings under sub-sec. (4), that the failure to give the notice was excusable by reason of mistake, illness, absence or other reasonable cause, or that the insurer was not prejudiced by the lack of notice.

2. Instead of variegating the description of the person liable under the various sub-sections on no very clear principle, between "driver", "person in charge", "owner", and "an insured person", I would suggest that it be carefully considered just what liabilities it is desired to impose on just what persons. As I have said, I can see little justification for imposing even the criminal, still less the civil, liability on the driver, at least when he is driving with the authority of the owner, or reasonably thinks he has such authority and reports the matter to him. I feel that it is unreasonable to compel the driver to make a lot of enquiries about the identity of the insurer or to make reports to the insurer if he is not the party contracturally bound by the insurance policy, particularly when the owner is his employer or his parent and the appropriate person to handle all these matters.

3. I suggest consideration be given to allowing an insured person sued under sub-sec. (4) to dispute the claim if the insurer has acted unreasonably, in relation either to liability or quantum.

4. I suggest that sub-sec. (5) be altered to provide that the notice shall be admissible in any civil proceedings under sec. 124 as well as in any criminal proceedings.

J. J. BRAY,
Chief Justice

9th December, 1970

Section 124:

"(1) Upon the happening of an accident which results in the death of or causes bodily injury to any person and is caused by or arises out of the use of a motor vehicle, the driver and the person in charge thereof shall forthwith give to the insurer concerned a written notice setting forth the following information with as full particulars as such person is able to give:—

(*a*) The fact of the accident;

(*b*) The time and place at which it occurred;

(*c*) The circumstances of the accident;

(*d*) The name and address of any person killed or injured in the accident; and

(*e*) The names of any witnesses of the accident.

Penalty: Twenty dollars.

(2) When neither the driver nor the person in charge of a motor vehicle concerned in an accident such as mentioned in subsection (1) of this section is the owner of the motor vehicle the owner shall give a like notice immediately upon the accident coming to his knowledge.

(3) When a claim is made upon an insured person in respect of an accident, he shall immediately give notice of that claim to the insurer concerned, and supply to that insurer such particulars of the claim as he requires.

Penalty: Twenty dollars.

(4) If an insured person fails to comply with a requirement of this section the insurer may recover from him all money paid and costs incurred by the insurer in relation to any claim arising out of the accident in respect of which such failure occurred.

(5) A notice given in compliance or purported compliance with this section shall not be admissible in evidence in any proceedings except proceedings for an offence against this section."