SOUTH AUSTRALIA

SIXTY-THIRD REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE AMENDMENT OF SECTION 125 OF THE MOTOR VEHICLES ACT, 1959

1980

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.
THE HONOURABLE MR. JUSTICE WHITE, Deputy Chairman.
THE HONOURABLE MR. JUSTICE LEGOE, Deputy Chairman.
D. W. BOLLEN, Q.C.
M. F. GRAY, S.-G.
D. F. WICKS.
A. L. C. LIGERTWOOD.

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

Mr. D. F. Wicks was absent during the consideration of this report and the Honourable Mr. Justice Legoe was of the opinion that no amendment of the law was required. Accordingly neither member has signed this report.

SIXTY-THIRD REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE AMENDMENT OF SECTION 125 OF THE MOTOR VEHICLES ACT, 1959

To:

The Honourable K. T. Griffin, M.L.C.,
Attorney-General for South Australia.

Sir,

You have referred to us a proposal by the State Government Insurance Commission that Section 125 of the Motor Vehicles Act 1959 should be amended to provide that in a proper case the State Government Insurance Commission may be added as a defendant to an action by a plaintiff seeking damages for bodily injury.

The problem to which you have adverted arises out of the judgment of Mitchell J. in *Savaglia v. MacLennan and Briggs* (unreported, judgment dated 13th May, 1980). In that case, the plaintiff claimed damages for bodily injury suffered in a road accident on 15th November, 1977, when the plaintiff was a passenger in a motor car driven by MacLennan. On 6th February, 1980 the State Government Insurance Commission applied by summons for an order that it have leave to intervene in the action as a defendant. The grounds set out for the application were that the Commission wished to allege that the defendant MacLennan at the time of the collision was affected by the consumption of alcohol and drugs to the knowledge of the plaintiff and that the plaintiff voluntarily accepted the risk of travelling as a passenger in the vehicle driven by MacLennan or alternatively that the plaintiff was guilty of contributory negligence in so doing.

The solicitors for the Commission further submitted that because there was a conflict of interest between the firm in acting for the defendant MacLennan as well as representing the Commission, it was desirable that the defendant MacLennan be separately served and represented and that the Commission have leave to intervene in the action as a defendant and be itself separately represented in the proceedings.

The application to join the State Government Insurance Commission came in the first instance before Deputy Master Ferrett who dismissed the application. An appeal from Deputy Master Ferrett's order was brought before Mitchell J.

Her Honour in her judgment pointed out that under Section 112 of the Motor Vehicles Act the plaintiff, if he obtained judgment in the action against MacLennan, could recover the amount of his judgment, if it were unpaid, from the State Government Insurance Commission. By Section 125 of the Act the Commission was entitled to conduct the action on behalf of MacLennan. For that purpose the Commission could conduct negotiations and pay, compromise or settle the claim. Her Honour further pointed out that, because of the provisions of Section 125, the Commission can in the name of the defendant, allege that the defendant was affected by the consumption of alcohol and drugs to the knowledge of the plaintiff and set up defences of volenti non fit injuria and of contributory negligence. She drew attention to the problem of conflict of interest between MacLennan and the Commission, in that if the Commission proved that the defendant MacLennan was under the influence of alcohol at the time of the collision, this would be a breach of

a term or condition of the insurance policy and that if the plaintiff succeeded either wholly or in part, the State Government Insurance Commission would seek to recover from MacLennan under Section 124a of the Act any moneys paid by the Commission to the plaintiff.

She further noted that if the Commission was not joined as a defendant it was tactically disadvantaged in that it was bound by the defendant's answers if it called him and could not crossexamine the defendant. Her Honour, after dealing with the judgment of the Court of Appeal in England in *Gurtner v. Circuit [1968] 2 Q.B. 587* and with a judgment of Gillard J. in *Bradvica v. Radulovic [1975] V.R. 434* to which we shall return, held that all the issues between the plaintiff and the defendant MacLennan could be litigated in the present proceedings and therefore the words of Order 16 Rule 11 were answered in that the Court could effectually and completely adjudicate upon and settle all questions involved in the cause or matter between the plaintiff and the defendant MacLennan. She accordingly dismissed the appeal. She gave leave to appeal from her decision to the Full Court, but enquiries made by the Committee suggest that that leave to appeal has not been taken up. The State Government Insurance Commission wants Section 125 altered to permit them to appear as a defendant in cases where there is a conflict of interest between the named defendant and the Commission which insures him.

Her Honour adverted to the fact that there were narrower and wider tests as to the application of Order 16 Rule 11 under which the application was made; that the narrower test is that propounded by Devlin J. (as he then was) in *Amon v. Raphael Tuck and Son Ltd. [1956] 1 Q.B. 357;* and that there is a wider test propounded by Lord Esher M.R. in *Byrne v. Brown [1889] 22 Q.B.D. 657,* which was adopted by the Privy Council in *Penang Mining Co. Pty. Ltd. v. Choongsan and Another [1969] 2 M.L.J. 52.* She held that whether the interpretation be wide or narrow as far as the plaintiff was concerned all questions involved in his claim could be effectively and completely adjudicated upon with the State Government Insurance Commission conducting the action in the name of the insured pursuant to Section 125 of the Motor Vehicles Act. We consider later in this report the bearing of the interpretation of Order 16 Rule 11 on the matter that you have referred to us.

As we see it, the problem could arise in any one of three situations:—

1. The State Government Insurance Commission wants to establish a defence to a claim by a plaintiff which the defendant does not want to take, e.g. the plaintiff is his friend; or the facts behind a defence may be embarrassing to the defendant—he was out with a lady, not his wife; or the defence is joint illegal enterprise and the defendant might be prosecuted and there are a number of other permutations and variations which can be thought of.

2. The Commission wants to establish a defence to the plaintiff's claim which will rebound on the named defendant later under Sections 123, 124 or 126, on a claim for a breach of those sections or for breach of a condition of the policy. In the case of a breach of Section 124 or 126, or a breach of a term or condition of the policy, action would then be brought under Section 124a by the Commission against the defendant.

3. The Commission wants to take part in the proceedings for either or any of the reasons in 1 or 2 above but the defendant has a

counterclaim which he wants to set up in the same proceedings in answer to the plaintiff's claim or there is damage to the defendant's property which is not covered by the compulsory third party policy as well as a claim for bodily injury which is so covered.

This problem is not new; it has been under consideration at various times since Section 70f was inserted in the Road Traffic Act 1934 by the amending Act 2332 of 1936 Section 31.

It has been raised as a problem in Court only infrequently over the past forty-four years. Nevertheless it is one that has frequently exercised the minds of solicitors and counsel acting for insurance companies.

There are two basic problems in this area. The first turns on the wording of Order 16 Rule 11 which reads:—

> "(1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.
>
> (2) The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added.
>
> (3) [not applicable]
>
> (4) Every party whose name is so added as defendant shall be served with the amended originating proceeding, or with notice in lieu of service as the case may be, in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against such party shall be deemed to have begun only on such service being effected".

The other is inherent in the judicial process and judicial thinking.

As to the problem of construction, many Judges consider that subclause (1) of Rule 11 controls the interpretation of subclause (2), i.e. provided the Court can deal with the action, as presently constituted, under subclause (1), an application for joinder under subclause (2) will not succeed.

The problem of the judicial mind and the judicial approach to litigation generally is that because applications to join an insurer under subclause (2) are usually made by the insurer and not by any of the named parties to the action, as the subclause would on the face of it envisage, the Judge appears to be acting, if he grants the application, to widen the ambit of the litigation against the desires of the named parties and Judges do not easily, or indeed often, do that.

The fact that this type of action is no longer true inter partes litigation as older generations understood that concept and that there is a large input of public money, both to enable litigants to sue and to meet awards of damages, has not greatly affected judicial thinking. This is a problem in nearly all areas of private law today.

We therefore turn first to a consideration of the relevant sections of the Motor Vehicles Act. By Section 99a of the Act, and applicant for the registration or renewal of registration of a motor vehicle or an exemption or permit in respect of a motor vehicle, must at the time of the application, pay to the Registrar of Motor Vehicles the premium on a policy of insurance in terms of the Fourth Schedule to the Act. The section provides that the applicant must select an approved insurer for this purpose. In fact there is only one approved insurer now writing compulsory third party insurance in South Australia and that is the State Government Insurance Commission.

Section 102 states:

> "A person shall not drive a motor vehicle on a road or on a wharf unless a policy of insurance complying with the Act is in force in relation to that vehicle . . ."

Under Section 104 the policy of insurance must insure the owner of the motor vehicle to which the policy relates and any other person who at any time drives the vehicle, whether with or without the consent of the owner, in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle in any part of the Commonwealth.

By Section 107 any defence the insurer might otherwise have based on *Vandepitte v. The Preferred Accident Insurance Corporation of New York [1933] A.C. 70,* is taken away by statute.

Section 112 provides that where a person has obtained judgment in an action against the insured person for death or bodily injury caused by or arising out of the use of an insured motor vehicle and before the action came on for hearing the insurer knew that the action had been commenced, the judgment creditor may recover by action from the insurer such amount of the money, including costs or a proportion or part thereof, payable pursuant to the judgment as relates to death or bodily injury and has not been paid.

Section 113 gives a direct action against the insurer where the insured is dead or cannot be found.

Section 115 provides for claims against a nominal defendant where the vehicle is not identified.

Section 116 provides for a similar claim against a nominal defendant where the vehicle is uninsured.

Section 123 gives a right of action by the insurer who has paid out a claim for death or bodily injury to recover the money from any person convicted or gaoled for the illegal use of a motor vehicle causing that death or bodily injury.

Section 124a of the Act gives a right to the insurer to recover from the insured any money and costs paid by the insurer for any breach of Sections 124 or 126 of the Act or for breach of a term or condition of the policy of insurance, provided that the insurer has been prejudiced by the breach.

Section 124 is the section requiring notice to be given as soon as practicable of the happening of an accident. Section 126 prohibits an insured person without the consent in writing of the insured, from entering on or incurring any expense in relation to any litigation; making any offer or promise of payment of settlement; making any admission of liability or authorising the repair of a motor vehicle or its dismantling or wilfully causing damage to the motor vehicle involved in an accident.

Section 125 which is the section we have to consider in this report reads as follows:—

"(1) An insurer may, on behalf of an insured person

(a) conduct any legal proceedings in respect of circumstances out of which a claim against the insurer has, or may, arise;

(b) conduct and control negotiations in respect of any claim against the insured person;

and

(c) at any stage of those negotiations or proceedings pay, compromise or settle any claim against the insured person.

(2) The insured person shall sign and execute all such warrants, authorities, and other documents as are necessary to give effect to this section; and, if he makes default in doing so or is absent or cannot be found, the insurer may sign or execute the warrants, authorities, or other documents on behalf of the insured person".

(3) Where—

(a) as the result of the use of a motor vehicle an accident happens which results in the death of or bodily injury to any person, as well as damage to property; and

(b) claims are made in respect of the death or bodily injury and also in respect of the damage to property

then nothing said or done in any negotiations for settlement of either claim, and no judgment given in legal proceedings in respect of either claim, shall be evidence in legal proceedings in respect of the other claim in a case where that other claim was in respect of an insured liability, unless the negotiations or proceedings in respect of the firstmentioned claim were conducted or controlled by the insurer who insured the liability in respect of which the other claim was made, or by a person acting with the authority of that insurer".

It was decided by the High Court of Australia in *Genders v. Government Insurance Office of New South Wales and Another (1959) 102 C.L.R. 363,* that there is no right of recourse directly against an insurance company except in the cases specifically provided for by the statute.

It was held by John Stephenson J. in *Fire Auto and Marine Insurance Co. Ltd. v. Greene [1964] 2 Q.B. 687* that an insurer cannot be added as a defendant unless there is a legal right enforceable against him by one of the parties or some legal duty enforceable by one of the parties against him would be affected and he would be legally bound by the result of the action. This decision was criticized by Lord Denning M.R. in the case to which we have already referred—*Gurtner v. Circuit*—but Lord Justice Diplock (as he then was) was much more guarded in his comment and appeared at page 603 of his judgment to agree with what John Stephenson J. said. Salmon L.J. (as he then was) agreed with both judgments at page 606 so that it is difficult to say what effect Lord Denning's disapproval had in relation to the previous decision.

We have in compiling this report proceeded on the basis that *Fire Auto and Marine Insurance Limited v. Greene* was in fact rightly decided as that appears to us to be so, both on principle and on authority.

However, in *Gurtner v. Circuit and Another [1968] 2 Q.B. 587,* to which we have just referred above, the defendant had emigrated to Canada some years previously and it was impossible to serve him and in

those circumstances the insurer was added as a defendant. This case was applied in the Supreme Court of Victoria in another case to which we have already adverted earlier in *Bradvica v. Radulovic* a judgment of Gillard J. reported in *[1975] V.R. 424.* A similar authority in South Australia is the judgment of Bright J. in *Tsogas v. A.G.C. Insurances (Ltd.) and McGee (1974) 6 S.A.S.R. 590.* In New Zealand on the other hand it has been held that the indemnifier should only be permitted to be represented as a third party: see *Petherick v. Waters and N.I.M.U. Insurance Co. [1937] N.Z.L.R. 309.* Anderson J. held in the Supreme Court of Victoria in *Insurance Commissioner v. Guy [1972] V.R. 274* that an authorized insurer may take over the defence of a person alleged to be the driver of a motor car, notwithstanding that the insurer denies or does not admit that the alleged driver was in fact the driver of the motor car in question. Unfortunately in that case the driver was dead and his widow did not take any part in the argument presented on the case.

A majority in the Full Supreme Court of Victoria held in *Club Motor Insurance Agency Pty. Ltd. v. Swann [1954] V.L.R. 754* that where a plaintiff commences an action claiming damages for personal injury sustained in a motor vehicle collision and the defendant counter-claims damages for personal injury occasioned in the same collision and the claim is not, but the counter-claim is, covered by a compulsory third party policy of insurance, the authorized insurer of the plaintiff is entitled to take over the conduct and control of the action on behalf of the plaintiff insofar as the proceedings relate to the counter-claim. There is of course always the possibility that the Court may order separate trials in such a case, because there still remains the question of conflict of professional duty to which we shall refer later in this report. This course was actually taken by the Supreme Court of New Zealand in *Priest v. Mouat [1937] N.Z.L.R. 431* where the separate issues were on property damage and personal injury damage. This of course is somewhat different in that it is well established that there are separate causes of action for personal injury and for property damage arising out of the same collision: see the judgment of the Court of Appeal in *Brunsden v. Humphrey (1884) 14 Q.B.D. 141.*

It should be pointed out that for some limited purposes the Courts have recognized the differing interest of the insurer and insured. In *McCann v. Parsons (1954) 93 C.L.R. 418* the Court enquired into the question of whether an insurer had discovered fresh evidence or exercised reasonable diligence in preparing for a trial of an action or fell a victim to a contrivance stratagem or deception, or was aware of the truth or was deceived: matters which normally would be regarded as relevant to the conduct of the insured and not the insurer. In *Massalsky v. Cropley (1973) 5 S.A.S.R. 549* Sangster J. held that, under the section which we are now considering Section 125, an insurer was entitled to put forward a plea that the insured person was not the driver of the vehicle, in opposition to admissions by the insured person that he was the driver. In *Albrecht v. Byers and the State Government Insurance Office (Queensland) [1975] Q.R. 403,* Kneipp J. held that the insurer, who was the actual defendant, still had to obtain answers to interrogatories by the insured if it could do so, notwithstanding that the insurance company and not the insured was the defendant. These narrow exceptions are however no answer to the problems which are raised by the present remit.

There is, however, a more serious objection which has to be considered in relation to this matter and it is this:—

If an insurance company instructs a firm of solicitors to defend an action on behalf of a named defendant, although the insurer then has statutory control of the action by virtue of Section 125, that named defendant, nevertheless, becomes the client of the solicitors and is entitled to the benefits of the professional relationship of solicitor and client. If there is any conflict between the insurer and the named defendant the solicitor is put into an impossible situation and cannot ethically continue acting for both the insurer and the named defendant, even though the insurer has the power to conduct the proceedings.

A professional ruling to this effect was given in this State, to the knowledge of one member of the Committee, by Mr. F. E. Piper, Q.C., then President of the Law Society of South Australia, in a motor vehicle accident at Victor Harbor, where as here the insurance company wanted to raise defences of volenti non fit injuria, acceptance of reduced responsibility by the driver, and contributory negligence due to alcohol, and the defendant strongly objected to the defences being raised both on factual grounds and because he was a personal friend of the plaintiff passengers and of the plaintiff in another action, the widow of a deceased husband passenger. Mr. Piper, Q.C., (as he then was) ruled that it was a breach of professional etiquette for a practitioner to go on acting both for the insurance company and for the insured in what was a clear conflict of interest situation. The interest of the insurer in defeating the plaintiff's claim conflicted with the express instructions of the insured and also conflicted with the insured's interest in not having a recovery made against him subsequently by the insurance company on the ground that he was affected by liquor at the time when he was driving the motor vehicle.

That ruling is supported by authority. In *Groom v. Crocker [1939] 1 K.B. 192 at 202-3* Sir Wilfred Greene M.R. recognized that although the insurer was given contractual control of any proceedings brought against the insured the insured retained interests in the proceedings which the insurer and its solicitors were bound to protect. In *McCullum v. Ifield [1969] 2 N.S.W.R. 329 at 330-331* Taylor J. in the Supreme Court of New South Wales confronted the situation where there is a conflict between the interests of insured and insurer and commented:

> "Mr. White (the solicitor for the Government Insurance Office) was not only concerned for the interest of the Government Insurance Office, he was acting for the defendant, and indeed, if there had in this case arisen a situation where the interests of the defendant and those of the insurers conflicted, he would have been bound to cease to act for one or the other. The solicitor for the insurance company who takes over the conduct of the proceedings in the name of the defendant has duties and obligations to that defendant as well as to the insurance company (see *Groom v. Croker [1938] 2 All E.R. 394*)".

The solicitors' duty to the insured is also recognized in the *Club Motor Insurance Agency case,* to which reference has already been made, where Herring C.J. and Barry J. say in their joint judgment at page 756—

> "Although it is probable that the situation that has here arisen was not foreseen when this legislation was framed, the Legislature in enacting Sec. 55 (the analogue of our Section 125) must be taken to have done so with the knowledge of a number of matters surrounding the conduct of litigation in this community. Among these matters were the existence of a well-defined procedure

prescribing the manner in which litigation may be instituted and carried on; the established practice of not revealing to the tribunal, before which the litigation comes for trial, the fact that the defendant is wholly or partly indemnified under a contract of insurance; the usual practice that litigants are represented on the record by solicitors and at the hearing by counsel; and most important for the understanding of Section 55, the well-settled principles concerning the relationship of client with solicitor and counsel whereunder their duty is to promote and safeguard his interests and to consult with him in all matters of doubt (see *Groom v. Crocker [1939] 1 K.B. 194,* per Greene M.R. at pp. 202-203 and per Scott L.J. at p. 222)".

Accordingly any amendment to Section 125 based on the use of the same solicitors for the named defendant and for the Commission is inadequate from a procedural point of view and would produce professional impropriety. Mitchell J. did not decide the case before her precisely on this second point but she has informed the Chairman of this Committee that the matter was raised by her arguendo and that it was very much in her mind both during the argument and when preparing her reasons for judgment.

The following problems of a practical kind arise in the consideration of this matter:—

1. If the State Government Insurance Commission is added as a defendant, there is an extra cost to the plaintiff both in solicitors' costs and in length of time at the trial, in relation to a conflict which may not be the immediate concern of the plaintiff.

2. On the other hand, if the defendant is likely to be involved in separate proceedings later under Section 124a, the defendant must be represented by solicitors and counsel of his own choosing at the trial, for reasons we have already discussed.

3. If the pleadings of the State Government Insurance Commission when added as a defendant cover the whole area of the separate pleadings of the defence, the plaintiff is liable to be crossexamined twice over covering the whole area of the case with consequent loss of time and loss of costs. This may however be inevitable in our present system of adversary litigation.

4. As we have said, this is not a common problem. It has been agitated in Court very few times during the forty-four years that the section, in one form or another, has been in our law. Accordingly it should be treated as the rarity that it is and it should not become common form for the State Government Insurance Commission to be able to be added as a separate defendant in proceedings. A fortiori it should not ordinarily be a separate defendant in proceedings where there can only be one set of solicitors on the record and there is both a claim and counter-claim relating to bodily injury, or alternatively there is a separate claim for property damage which is not ordered to be tried separately. In many cases a separate trial order would be oppressive if the property damage was only a few hundred dollars and a requirement to have two full scale trials would be quite unreasonable.

On consideration of the problems involved, we think that in each of the three situations discussed by us at the beginning of this paper it should be possible for the State Government Insurance Commission to apply to be joined as a defendant but it should not be entitled to do so as of right. It should be a matter for the discretion of the Judge hearing the application. On the application the following conditions should apply:—

1. Order 16 Rule 11 shall not apply to any such application.

2. The application should be by summons setting out the whole of the facts relied on. The Commission must establish as a pre-requisite that it wants to put forward a defence to the plaintiff's claim to which the insured does not consent.

3. If an order is made on the summons the insurer should have no right to the powers under Section 125 (1) *(a)* after the date of the order joining it. If an order is made the insured shall furthermore not need the consent of the insurer pursuant to Section 126 (1) *(a)* to incur further expense in the litigation which is the subject matter of the order.

4. There should be a power in the Judge to strike out the Commission's defence when filed if it is merely a speculative defence. It is possible that this power exists in the court inherently: see *Butcher v. Dowland* ("The Times" 17th October, 1980), a judgment of the Court of Appeal, but the right to do so should be spelt out in the legislation.

5. The Commission shall be entitled to make admissions for the purpose of the trial of the action but such admissions shall not be binding in the trial of any subsequent action by the Commission against the other defendant for recovery under Section 124a.

6. Insofar as the defendant incurs costs—either his own or the plaintiff's—in defending the action and not in exculpating himself from a Section 124a claim, the Commission may as a condition of obtaining their order, be ordered to pay those costs as between solicitor and client in any event.

7. If the defendant is not called as a witness by his own counsel, the Commission shall have the right to call him and to crossexamine him as if he had actually been called by the defendant's own counsel.

8. The Commission should not be entitled to have a right to costs against the insured defendant unless the Court holds that the refusal of the defendant to take the separate plea when filing his own defence was unreasonable.

9. No estoppel shall arise in any proceedings under Section 124a, in respect of any evidence given or admissions made or in respect of any findings by the Court in the action for damages. Nothing said by the insured in crossexamination of him by the insurer shall be admissible, either to the issue or to the insured's credit, in any subsequent Section 124a proceedings against the insured.

With these restrictions, we think that Section 125 could in this limited class of case be amended to provide as we have advised.

We have the honour to be

HOWARD ZELLING

J. M. WHITE

D. W. BOLLEN

M. F. GRAY

ANDREW LIGERTWOOD

Law Reform Committee of South Australia.

27th November, 1980.

D. J. Wooiman, Government Printer, South Australia
200—2.81 A6534 O