**A. J. ODUBANJO**

**v.**

**NEW INDIA ASSURANCE COMPANY LTD**

HIGH COURT OF LAGOS:

19TH SEPTEMBER, 1968

SUIT NO. LD/303/68

**LEX (1968) - LD/303/68**

OTHER CITATIONS

2PLR/1968/63 (HC)

**BEFORE:** TAYLOR, C.J.,

**REPRESENTATION**

AGUSTO - for Plaintiff

SOFOLA - for Defendant

**ISSUES FROM THE CAUSE(S) OF ACTION**

TORT AND PERSONAL INJURY LAW:- Negligence – Claim for special damages for damages done to vehicle by negligent driving of defendant – Whether proper to proceed directly against the insurer of the vehicle used for negligent driving instead of the driver – Proper order for court to make

INSURANCE AND REINSURANCE LAW:- Motor vehicle insurance – Enforcement of - Rule that a third party cannot sue an insurance company directly for damages arising from negligent driving of a person insured by the company - Proper treatment of - Motor Vehicles (Third Party Insurance Act Acp. 126 SS 10 & I1;Third Parties (Rights against Insurances) Act, 1930 in consideration – Proof of insolvency of insured person – Effect

**PRACTICE AND PROCEDURE ISSUES**

ACTION – PLEADING:- Commencement of an action based on tort of negligent driving – Failure to make requisite disclosure as to person insured or as to who drove vehicle negligently -Whether action maintainable – Duty of court thereto

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The Plaintiffs brought an action for special and general damages not against the actual tortfeasor but solely against the Insurance Company with whom the tortfeasor was insured.

The claim read:-

“The plaintiffs claims against the defendant the sum of two thousand and eleven pounds, eighteen shillings and six pence (£2,011:18:6) being the total of general and special damages suffered by the plaintiff in consequence of the damage done to the plaintiff’s car No. LK 7733 by the defendant’s insured car No. LK 9988 negligently driven.”

There was no disclosure in the claim as to the person insured nor was there any disclosure as to who negligently drove the said vehicle. Neither of these persons were parties to the action. Counsel for the Plaintiff filed a motion seeking to join a second Defendant and also to amend the statement of Claim. The Defendant Company filed a motion to strike out the suit on the grounds inter alia, that it disclosed no reasonable cause of action against the Defendant.

ISSUE(S) FOR DETERMINATION

Whether the suit was liable to be struck out the suit on the grounds inter alia, that it disclosed no reasonable cause of action against the Defendant.

DECISION OF CURRENT COURT

(1) At common law a person injured by reason of another person’s wrongdoing has no right of action against the insurers who have undertaken to indemnify the wrongdoer; his only cause of action is against the other person who has committed the wrong falls to be regarded as a tort or as a breach of contract.

(2) Section 11 of the motor Vehicles (Third Party Insurance) Act, however, enables a third party who has a claim against an assured’s insurers if the assured becomes insolvent; if this condition is fulfilled, the third party is afforded such remedies as the assured had against his insurers.

(3) Section 10 of the Motor Vehicles (Third Party Insurance) Act imposes upon the insurers, once a certificate of insurance has been issued to the person effecting the policy, the obligation to pay to any person entitled to the benefit of a judgement coming within the provision any sum payable under the judgement.

(4) An action in tort for negligent driving is an actio personalis which must be brought against the wrongdoer for only he and the Plaintiff are aware of the circumstances in which the collision occurred. The Defendant Company being invariably unaware of the accident at the time it took place is in no position to defend it on the issue of negligence or no negligence.

(5) In view of the motion brought by the Plaintiff, that if the Defendant Company could be made a defendant, the writ in the form in which it was couched would have to undergo a very drastic operation before it is put right. As it stood, the impression gained from the facts is that the Defendant Company was the owner of the car and the insurers of same.

(6) The action in the form in which it was couched and against the Defendant Company above is without any substance whatsoever must be struck out. This does not prevent the Plaintiff from proceeding afresh after putting his house in order.

Action struck out. Acts referred to: Third Parties (Rights against Insurances) Act (1930) (England). Motor Vehicles (Third Party Insurance) Act Cap. 126 ss. 10 & 11.

Civil Action.

**MAIN JUDGEMENT**

**TAYLOR, C.J.:-**

This is a most novel form of action for special and general damages brought not against the actual tortfeasor but solely against the insurance company with whom the tortfeasor is insured. The claim reads thus:-

“The plaintiff claims against the defendant the sum of two thousand and eleven pounds, eighteen shillings and six pence (£2,011.18s.8d.) being the total of general and special damages suffered by the plaintiff in conse-quence of the damage done to the plaintiff’s car No. LK 7733 by the defendant’s insured car No. LK 9988 negligently driven.”

It is worthwhile noting that in the claim there is no disclosure as to the person insured nor is there any disclosure as to who “negligently” drove the said vehicle. Neither of these persons are parties to the action.

Pleadings were ordered on the 24th June, 1968, and a statement of claim has been filed by the plaintiff but no defence has as yet been filed by the defendant Company who have, instead, filed a motion to strike out the suit on the grounds amongst others that it discloses no reasonable cause of action against the defendants.

A little earlier on I said that a statement of claim has been filed. This is not in point of fact correct for a statement of claim as ordered by Sowemimo J. on the 24th June, 1968 should have been filed at the latest 25th July, 1968. None has been so filed but on the 2nd day of September, 1968 a motion was filed by learned Counsel for the plaintiff. In this motion although the leave of the Court has not been obtained we find the name of one Fatayi Abiodun appearing in the heading as a 2nd defendant. The motion seeks an order for judgement to be entered in the plaintiff’s favour in the absence of a defence and also an order for Fatayi Abiodun whose name already appears as stated above to be joined as 2nd defendant. It also seeks an order for the Amended Statement of Claim to be substituted for the Statement of Claim filed.

I have always understood that an action in tort for negligent drive is an “actio personalis” which must as I have said be brought against the wrong-doer for only he and the plaintiff are aware of the circumstances in which the collision occurred. The defendant Company being invariably unaware of the accident at the time it took place is in no position to defend it on the issue of negligence or no negligence. Whether the defendant Company can be made a defendant or whether Third Party claims can be brought against them I am not required to decide in this application. But this much can be said, and should be said, in view of the motion brought by the plaintiff, that if the Insurance Company can be made a defendant, the writ in the form in which it is couched will have to undergo a very drastic operation before it is put right. As it stands the impression gained or inference drawn by the words:-

“damage done to the plaintiff’s car No. LK 7733 by the defendant’s insured car No. LK 9988 negligently driven.”

is that the defendant Company is the owner of the car and the insurers of same. A passage from the 3rd Edition of Halsbury’s Laws of England Vol. 22 para. 762 to which my attention was drawn by Mr. K. Sofola for the defendant is relevant on this point. It reads as follows:-

“At common law a person injured by reason of another person’s wrong-doing has no right of action against insurers who have undertaken to indemnify the wrongdoer; his only cause of action is against the other person who has committed the wrong, whether the wrong falls to be regarded as a tort or as a breach of contract. The first invasion of this principle occurred when the Third Parties (Rights against Insurers) Act, 1930, received the Royal Assent on 10th July 1930. This Act enables a third party, who has a claim against an assured, to establish a direct right of action against the assured’s insurers if the assured becomes insolvent; if this condition is fulfilled, the third party is afforded such remedies as the assured had against his insurers.”

A little later on at page 375 we find these words:-

“A more drastic provision was accordingly enacted. This provision imposes upon insurers, once a certificate of insurance has been issued to the person effecting the policy, the obligation to pay to any person entitled to the benefit of a judgement coming within the provision any sum payable under the judgement.

There is no need for me to set out the provisions of the Motor Vehicles (Third Party Insurance) Act Cap 126 but suffice it to say that s.10 is the equivalent to the provision contained above. Section 11 is the equivalent of the provision in the English Act of 1930 dealing with the rights that accrue on proof of the insolvency etc. of the insured.

For these reasons, the action in the form in which it is couched and against the defendant Company above is without any substance whatsoever and is struck out. This is of course no bar to the plaintiff to proceed afresh after putting his house in order.

Costs are assessed in the defendant Company’s favour in the sum of 20 guineas.

Action struck out.