

DEVELOPMENTS AND REFORMS

Nigeria's Commercial Laws



Essays
in honour of

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Essays in honour of

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DEVELOPMENTS AND REFORMS: NIGERIA'S COMMERCIAL LAWS

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18 THIRD PARTY RIGHTS IN NIGERIA'S INSURANCE LAW

Introduction

A contract of insurance just like any other contract is a contract of two parties. That is, it is an agreement entered into by two people or two sides, who must be *ad idem* on the nature of the contract, have capacity to contract, with intention to enter into legal relations, and allow consideration (the premium) to pass between themselves. This being the case, the nature of the contract is one in which all rights and benefits should ordinarily exist between the two parties to it (i.e. the party giving the consideration and the one who has a reciprocal duty to indemnify the other for consideration received). How therefore does a third party, who is regarded as a complete intruder or stranger to the contract come in to deserve benefits under the contract. The phrase 'third party rights' in any contract seems anomalous, for it presupposes a person not being a party to a contract deriving benefits under it - a case of one reaping where he did not sow. This however need not be so in insurance contracts if we recognise and remember that it is a specialised kind of contract from the general law of contract whose sole aim or purpose is to indemnify one against losses.¹ Premised on this, a third party's right therefore is only contingent upon the rights of one of the parties to the contract (the insured). The aim of this paper is to undertake a review of the development of third party rights in relation to existing principles of the law of insurance, and plot a course for reform as appropriate.

Third Party rights versus The Principles of Indemnity and Insurable Interest

The principle of indemnity is well known as one of the cardinal principles of the law of insurance. Underlining it is the rule that a person effecting insurance (the insured) is to be placed in the same position in which he was before the happening of the event insured against.² The expectation is that the insured must be adequately compensated after he has suffered a loss on an event or accident for which he took out insurance. It must be noted here that all contracts of insurance except life, personal accident and sickness policies are contracts of indemnity. A corollary of this principle is the principle of insurable interest which requires the assured to have insurable interest in the thing or property to be insured in order to be indemnified in the event of a loss.³ This itself (i.e. insurable interest) has been defined as that interest which a person has in 'a thing to whom advantage may arise or prejudice happen, from the circumstances which may attend it.'⁴

1. Note that this is not necessarily so with life insurance, we shall discuss this later.
2. See Ivamy, *General Principles of Insurance Law* (4th ed) 1979. p. 497, see also Raoul Colinvaux, *The Law of Insurance* p. 135.
3. See the case of *Sadler's Co. v. Badcock*. 26 ER 733.
4. See the case of *Lucena v. Crauford* (1808) 1 TAUNT at 325 per Lawrence J. See also the case of *Macaura v. Northern Assurance Co. Ltd* (1925) A.C 619. Cf. s. 7 of the Marine Insurance Act, 1961.

Critically viewed, the insured of course is the person who would have had to be responsible for the loss to the third party in the event of there being no policy of insurance in force. It is this responsibility of his that is being taken over when the insurer pays a third party.

Also with regard to insurable interest, it is not the interest of who derives benefit after a loss has arisen that we are talking about, but that of the person who effected the policy at the inception of the cover. For example, it is the employer who has insurable interest in the life of his employee under employer liability insurance whereas the employee (a third party) may claim in the case of injury or the like at work. But then, insurances like product liability, public liability etc., present a difficulty in this area. Can a manufacturer of a product have insurable interest in the life of the consuming public of his product? With the creation of the 'Neighbourhood principle' by Lord Atkin L.J in the case of *Donoghue v. Stevenson*,⁵ it may be safely argued that a person has insurable interest in the life of any person of whom his action is likely to affect, especially adversely. Thus where there is a legal liability to third parties, then there is an interest insurable on the part of that person who would be liable.⁶ It is instructive to note that there can also exist situations where liability to third parties is statutorily imposed. For instance, in third party compulsory motor insurance cases, insurable interest is derived from the statutory obligation to insure against liability to third parties.⁷

Third Party Rights and the Doctrine of Privity

As earlier noted, one of the strongest arguments against third party rights is its seeming contravention of the age-long doctrine of privity of contract, which disallows a person who is not a party to a contract from deriving benefits or claiming any right under such a contract.⁸ This was the common law position.⁹ Proponents of third party rights however contend that once the contract is that of indemnity between the parties, then the doctrine must not be allowed to frustrate the intention of the parties as long as they know what they are going into at the onset of the contract. This latter view notwithstanding, the rigidity of the common law was such that third parties were still not allowed to directly maintain action against insurers. The only relief offered by the common law is that it allows the insured claiming indemnity to join that from which he is claiming it (the insurer) to an action where he has been sued by a third party. This means that the third party himself cannot sue the indemnitor directly. The insured can however apply to join him (the insurer) under what is known as a third party procedure. It is instructive to note that there is a difference between joining a person as a co-defendant and being joined under a third party proceedings, for different rules apply to both.¹⁰ This position of the common law has presently been altered in Nigeria by a recent provision of statute which we shall examine later in this essay.

5. (1932) A.C. 562.

6. Cf. Funmi Adeyemi, *Nigerian Insurance Law* (1992) p. 25.

7. In Nigeria, this is the Motor Vehicle (Third Party) Insurance Act 1952 and the Motor Vehicles (Third Party) liability insurance Act 1986. See Kehinde Sofola (S.A.N), 'Insurance Company and Third Party rights: A Critical Analysis.' *The Nigerian Insurer* June 1995 No. 3 p. 41.

8. See Chitty on Contracts 23rd ed. vol. I, p. 453.

9. See the case of *Carpenter v. Ebbelwhite* (1938) 4 All ER. 41.

10. See the case of *United Bank of Africa v. Achoru* (1987) 1 NWLR (pt. 48) p. 172 at 180; the dictum of Agbaje J.C.A.

The Various Insurances Under Which Third Party Right May Arise

Bailee's Insurance

A bailee is a person who takes custody of goods belonging to another called the bailor with an undertaking either to keep, return or deliver the goods back to the bailor, or apply it (the goods) according to the bailor's instructions or directions as soon as the purpose for which the goods bailed has been completed.¹¹ The contract between the bailee and the bailor is referred to as the contract of bailment. Today with the growing incidence of shipping and importation in the economy, most carriers of goods are under obligation to protect the goods in their custody until delivery otherwise they are liable for their loss.¹² Other examples are warehousemen, artisans and craftsmen (who retain goods for purposes of repair), wharfingers etc.

Because of the liability for goods in his custody, a bailee is sometimes under obligation to seek insurance cover in order to get indemnified from claims which may arise from the owner of the goods (the bailor), in the event of loss to or destruction of the goods while in bailment. A bailor therefore in this instance is a third party claimant since the insurance contract for the protection of the goods is between the bailee and the insurance company.¹³

Employer's Liability Insurance

At common law, an employer owes a duty of care to his employees. That is, he must take reasonable care to ensure that his employees are not exposed to unnecessary dangers or risk while at work either from their fellow employees or their tools of work. As a result of this duty, an employer sometimes takes out insurance to cover his liability to his employees which may arise as a result of loss arising from employment. This is the employers' liability insurance. In fact it is a compulsory insurance in some other jurisdictions.¹⁴

Apart from this duty at common law, sometimes duties are imposed on the employer under statute.¹⁵ Where this is the case, then the employer may also, pursuant to this statutory duty seek cover for indemnity against claims which may arise from his employees. A claiming employee here, is a third party claimant.

Liability Insurance

The scope of modern insurance law has been extended to cover the assured against losses which he may incur as a result of his various legal liabilities to third parties. Those liabilities could be ones arising from tort, statute or contract. For a third party to

11. See Robert Lowe, *Commercial Law* (6th ed) 1983) p. 403.

12. See the case of *Broadline Enterprises Ltd v. Monterey Marine Corp. & Anor.* (1995) NWLR (pt. 417) Where the Nigerian Supreme Court unequivocally decided that in spite of liability which may arise on an express contract between the parties, there is generally the collateral liability in tort for negligence which also arises if there is a breach of legal duty owed by the bailee to the bailor.

13. For further reading, see Funmi Adeyemi, *op. cit.* p. 221 -223.

14. Britain for example.

15. See e.g. The Workmen's Compensation Decree, 1987, the Factories Decree 1987 etc.

succeed in an action or claim, all he needs to prove is the assured's liability.¹⁶ Examples of liability insurance are, (i) public liability in insurance which may cover the assured against claims arising from his tortious liabilities (e.g. negligence, nuisance or strict liability¹⁷ etc.,) to members of the public (third parties); (ii) product liability insurance which may cover the assured against claims arising from defect or damage in his product. This insurance is usually taken by manufacturers of products or goods which are consumed or used by members of the public who may sustain injury or loss through such usage or consumption as in the case of *Donoghue v. Stevenson* earlier cited. The ratio in that decision has long been applied here in Nigeria.¹⁸ The consumer or user who sustains injury here, is the third party claimant; (iii) professional indemnity insurance which covers the liability of any professional person either to his clients for negligence, or to members of the public who have relied on his advice or instruction even though they are not his clients.¹⁹ His clients and/or the members of the public are the third party claimants here.

Life Insurance

There are today several variations of the life insurance policies which take root from the original and traditional whole life and endowment policies. More or less, the life policy, in whatever form or shape it is couched, is regarded as a saving rather than insurance *per se*. It is therefore not regarded as a contract of indemnity unlike others, for no amount of money could be said to adequately indemnify or compensate for a life lost.

The aspect that is of interest to us under life insurance as relates to third party, is that dealing with whole life policies which leaves a third party or third party claimants after the death of the assured. Usually, much problem is not encountered by the claimant here because he is more often than not named already in the policy as the person entitled to claim on the death of the life assured. The fact therefore, is that he may not be strictly referred to as a third party here, but rather a beneficiary as he is so-called in the policy.²⁰

Motor Insurance (Including Aviation, Marine and Other Moving Or Mechanically Propelled Objects)

This is one area in which third party claims are so prominent that they have almost overshadowed the other insurances where third parties are also involved.

Before 1945, insurance on motor vehicle in Nigeria was voluntary. But beginning from that year, it became compulsory for every user of a motor vehicle to take out insurance covering him for liability against death or bodily injury to third parties if an accident

16. See Funmi Adeyemi op. cit. at p. 194.

17. See the rule in *Ryland v. Fletcher* (1866) LRI Ex. 265.

18. See the case of *Osemobor v. Niger Biscuits Co. Ltd* (1973) 7 CCHCJ 71.

19. See the case of *Hedley Byrne & Co. v. Heller & Partners* (1964) AC. 465.

20. Cf. Funmi Adeyemi op. cit. p. 162 esp. at 173 under Life Assurance claims.

occurs while the vehicle was in use.²¹ A third party here includes the insured himself if he was being driven by a person permitted under the cover at the time of an accident and he gets injured. This was the basis of the decision in the case of *Sule v. Norwich Union Fire Insurance Society*.²² In this regard, a motor vehicle has been defined as anything which is mechanically propelled other than that which moves on rail.²³ This will include things like tractors and other agricultural vehicles, bulldozers and caterpillars. A motor-cycle is specifically mentioned as falling within the meaning of a vehicle in the Act.²⁴

Even though it is not made compulsory, one of the risks usually covered by a marine policy is liability for damage or injury to passengers as well as members of the crew (third parties). The damage or injury could result from any of the 'Perils of the Sea' already insured against. The term has been defined as referring only to 'fortuitous accident or casualties of the sea'.²⁵

In the case of Aviation Insurance, it is usual for the policy to cover liability for injuries or death to passengers and crew members, damage to goods, injury/damage to non-passengers e.g. the falling of an object from the aircraft which injures or causes damage to members of the public, or the crashing of an aircraft into public buildings etc. All these are incidents which could give rise to third party claims.²⁶ It should be noted that an attempt was made at making this form of insurance also compulsory in a place like Britain but this failed.²⁷

Third Party Rights and the Case Law Before 1988

As said earlier on in this paper, a third party is shielded from the contract of insurance which is supposedly between the insured and the insurer and so at common law the doctrine of privity stands strong to prevent him (the third party) from bringing an action directly on such contract. The attitude as well as the pronouncements of the courts follow this age-long doctrine. In *Adeoye v. West African Provincial Insurance Co. Ltd*²⁸ Johnson J. (as he then was) said:

"the third parties, though beneficiaries under the policy are strangers to the contract and no direct provision is made for them therein."²⁹

Earlier in 1965, the Supreme Court had ruled obiter (per Bairamian, JSC) in *Sun Insurance Office Ltd v. Ojemuyiwa*³⁰ whether it would not be realistic in an action of this nature (i.e. third party claim) for the third party to join the insurance company directly. According to the court:

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21. See the Motor Vehicles (Third Party) Insurance Act. cap. 233 laws of the Federation of Nigeria, 1990 vol. X which was the first legislation on insurance in Nigeria. This is sometimes referred to as 'The Act' policy.
22. 1971 (I) NCLR 271 particularly at p. 283 per Johnson J.
23. See s. 2 of the Act.
24. See s. 2
25. See Funmi Adeyemi op. cit. at p. 273.
26. See Macgillivray & Parkington on Insurance Law Relating to all Risks Other than Marine (7th ed) 1981. para. 2111, p. 881.
27. See the British Civil Aviation Act 1949, pt. IV, S. 43 - 46, which was repealed by s. 128 of the English Companies Act. 1967.
28. (1971) 1 UILR 462.
29. Ibid at p. 465.
30. (1965) All NLR 1.
31. Ibid, at p. 5.

"The remaining reflection is that in Nigeria, civil cases are tried by a judge alone, there is no need to conduct these fatal accident cases in a world of make-believe. At present it is usual to name the owner of the vehicle and his driver as the defendants to a suit claiming damages, and to leave the insurers, who control the defence, formally out of the suit, we would ask the solicitors of the parties to consider whether on these third party insurance cases it would not be better to have the insurers also joined.³¹

As earlier observed, this was a statement made obiter and therefore was no authority for joining the insurer directly. On the point Adefarasin J. (as he then was) in the latter case of *Olusanya v. Akintola & Ors.*³² There he said:

"In the Sun Insurance case the Supreme Court acting under Section 117(6) of the Constitution of the Federation, granted leave to appeal to the insurers as a person having an interest in the matter of a claim for damages for negligence within the meaning of Section 117(6) of the Constitution. Since then there appears to be a thinking amongst some legal practitioners that the Supreme Court decision was an authority for joining an insurance company in every running-down case in which the insurance company could be liable for contribution or indemnity. This thinking to my mind, is a complete misunderstanding of the obiter dictum of Bairamian, JSC in the Sun Insurance case. While it is not doubted that an insurance company is entitled to be joined where there is an issue as to whether there is a contract of indemnity between the defendant and the insurance company, a joinder of an insurance company in a claim for damages for negligence simpliciter is quite wrong. What the plaintiff in such a case is claiming against the tortfeasor is damages for his wrong doing. The insurance company is certainly no party to such wrongdoing. It is no wrongdoer. What concerns the company is purely contractual - the contract of insurance.³³

Then again in 1971 the Supreme Court made the position very clear in the case of *New India Assurance Co. Ltd. v. Odubanjo*,³⁴ when it said:

"We think Mr Sofola is quite right in his basic submission that a third party cannot sue the insurer of a wrongdoer at common law or in equity..."³⁵

Later in the judgment, the court added:

"We would only like to add, so far as the passage from *Sun Insurance Office Ltd v. Ojemuyiwa* is concerned ... that it was certainly obiter dictum in the appeal, as that appeal turned upon the interpretation of a statutory provision as to the right of appeal.³⁶

This then was the line of reasoning all the decisions took until 1988. The only instance when the insurer appeared to an action of this nature was when the insured himself as a defendant applied to join the insurer under his contract of indemnity with him.

32. (1970) NCLR 232.

34. (1971) 1 NCLR 363.

36. Ibid, at p. 385.

33. Ibid, at p. 235.

35. Ibid, at p. 377

37. Supra.

This Adefarasin pointed out in *Olusanya's* case,³⁷ that:

"... the actual wrongdoer, the defendant to the claim for damages for negligence, who apprehends a dispute between himself and his insurers as to the liability of the latter under the insurance policy, could apply to join such insurance company. In that case, and not until then, is there also an issue concerning the contract of indemnity."³⁸

Statutory Alteration to the Common Law

In 1988, the Insurance (Special Provision) Decree was passed and section 11 of it provides:

"Where a third party is entitled to claim against an insured in respect of a risk insured against, he shall have a right to join the insurer of that risk in an action against the insured in respect of the claim. Provided that before bringing an application to join the insurer, the third party shall have given to the insurer at least thirty days notice of the pending action and of his intention to bring the application."

Thus, with this provision the common law position was altered to allow a third party claimant bring an action directly against the insurer provided the insured has already been sued and the insurer has been notified of such suit. It is submitted that this provision is a good law in view of the hardship foisted upon third parties under the common law position. Of course the contract of insurance is one of indemnity (apart from the exceptions mentioned earlier) and the parties know this state of fact. Where a third party will be involved later, an insurer already knows this too. He knows that this contract is one in which he is likely to be called upon by a third party to fulfill the promise made to the insured that he would indemnify him (the insured) against all losses and claims by third party but he prefers to hide behind the shield provided by the doctrine of privity to frustrate the payment of just claims. What the attention is focussed on here is mere procedure as opposed to substance. The real questions in joinder should be: (1) Is the insured liable to third party? (2) Has the insurer promised to indemnify the insured against losses to or claims from the third parties? (3) If the answers are in the affirmative, then what harm will befall the insurer if he is joined as a party to the proceedings save for merely upholding the doctrine of privity?

A law properly so called is only useful if it serves the end of justice and does not work hardship on any of the parties to which it is applied. The doctrine of privity here as invoked by the insurer against third parties does not serve the end of justice. The above provision is therefore a welcome development in our insurance law regarding third party rights. In the words of Professor Olusegun Yerokun:

38. *Ibid*, at p. 236. Cf. *New India Assurance Co. Ltd v. Odubanjo* (supra) at p. 385-386 where the court said in so far as the observations in *Sun Insurance Office v. Ojemuyiwa* (supra) were directed to defendant's counsel so that he could consider whether in the particular case it was desirable to bring in the defendants' insurers as third parties, it (the court) was in full agreement. See also D.H Afejuku, *Motor Insurance Law in Nigeria* (1994) p. 87.

“With the amendment, the myth surrounding the common law rule will be removed and the reality exposed by removing the obstacle that prevents bringing an action directly against the insurer, who in the final analysis will pay the claim. The decree now gives the third party the right of action against insurer. The matter concerned is substantial, and not procedural; the constitutionality of the provision can be avoided.”³⁹

This provision has been re-enacted in section 58 of the Insurance Decree (No. 58) of 1991 which is the current law regulating all insurances in Nigeria today.

Conclusion

It is hoped, and fervently too that our courts will rise to the occasion and jettison the garb of the old common law position when issues of joinder come once again before them under this new provision. So far, it appears there are not many contested cases since the enactment of the provision. It would appear the words contained therein are clear enough and there are no ambiguities provided the conditions stipulated are complied with. A somewhat regrettable trend noticeable in practice is that most lawyers join insurers directly in most third party cases without complying with the conditions laid down in section 58 of the 1991 decree. This procedure is wrong and an insurer could apply to be struck out from the writ until the conditions are complied with. For the conditions to be fulfilled, (1) the third party must have brought an action against the insured first, (2) the third party must give at least thirty (30) days notice of such an action to the insurer and of his (third party's) intention to join the insurer to the action at the end of the thirty days, (3) the third party must then bring an application for the joinder at the expiration of the period of the notice which must be made to the court, exhibiting the notice given.

Finally, it is hoped that practitioners would clad the toga of the new law more often so as to test it before our courts. It is rather too early in the day to conclude that it has survived or would survive the doctrine of privity until it is fully tested up to the Supreme Court, in spite of the unambiguity of the provision. Who knows what defences might be raised against it tomorrow? There lies the beauty of the law. It is ever dynamic.

39. See 'Recent Reform of Insurance Law in Nigeria' in (1989) 2 GRBPL No. 4, p. 75 esp. at p. 76.