IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

Kushan Ediriweera of,

40, Lake Gardens,

Rajagiriya.

Represented by his duly appointed next Friend.

Chandra Ediriweera of,

40, Lake Gardens,

Rajagiriya.

Plaintiff

Case No. SC. Appeal 65/2016

Case No. SC/HC/CA/LA/137/2013 **Vs.**

Case No. WP/HCCA/COL/123/2011

Case No. 58123/MR

1. Sadhasivam Sivagankan,

   442, High Street, Tooting,

   London, United Kingdom and

   439, Galle Road,

   Colombo 06.

2. Tissaweerasingham Sundhararajan of,

   439, Galle Road,

   Colombo 06 and of,

   17, De Mel Road, Mount Lavinia.

Defendants

3. Union Assurance Limited of,
No. 20, St. Michael's Road,
Colombo 03.

Added Defendant

AND BETWEEN

In the matter of an application, inter alia, under Section 757 of the Civil Procedure Code and Sections 5A (1) and 5A (2) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 for leave to appeal from the Order made by the Learned Additional District Judge in DC Case No. 58123/MR and Delivered in open court on 24.10.2011.

Union Assurance Limited of,
No. 20, St. Michael's Road,
Colombo 03.

Added Defendant – Petitioner

Kushan Ediriweera of,
40, Lake Gardens,
Rajagiriya.
Represented by his duly appointed next Friend.

Chandra Ediriweera of,

40, Lake Gardens,

Rajagiriya.

Plaintiff - Respondent

1. Sadhasivam Sivagankan,
   442, High Street, Tooting,
   London, United Kingdom and
   439, Galle Road,
   Colombo 06.
2. Tissaweerasingham Sundhararajan of,
   439, Galle Road,
   Colombo 06 and of,
   17, De Mel Road, Mount Lavinia.

Defendant – Respondents

AND NOW BETWEEN

In the matter of an application for Special Leave to Appeal to the Supreme Court under and in terms of Article 128 of the Constitution.

Kushan Ediriweera of,

40, Lake Gardens,

Rajagiriya.

Represented by his duly appointed next
Friend.

Chandra Ediriweera of,
40, Lake Gardens,
Rajagiriya.

Plaintiff – Respondent - Petitioner

Vs.

1. Sadhasivam Sivagankan,
   442, High Street, Tooting,
   London, United Kingdom and
   439, Galle Road,
   Colombo 06.
2. Tissaweerasingham Sundhararajan of,
   439, Galle Road,
   Colombo 06 and of,
   17, De Mel Road, Mount Lavinia.

Defendants – Respondents –Respondents

3. Fairfirst Insurance Limited (formerly known as Union Assurance General Limited) of,

No. 33, St. Michael's Road,

Colombo 03.

Added Defendant – Petitioner – Respondent

Before: Vijith. K. Malalgoda, PC, J

S. Thurairaja, PC, J and

E. A. G. R. Amarasekara J

Counsel: Chandaka Jayasundara, PC with Shivan Kanagiswaran and Naduni Madara for Plaintiff – Respondent – Petitioner instructed by Kularatne Associates.

S. A. Parathalingam, PC with Kushan D' Alwis, PC and Hiran Jayasuriya for Added Defendant- Petitioner – Respondent.

Argued on: 29th July 2019

Decided on: 11th September 2020.

E.A.G.R. Amarasekara, J.

The Plaintiff – Respondent – Petitioner (hereinafter referred to as the Plaintiff or the Petitioner) instituted action in the District Court of Colombo against the 1st and 2nd Defendant – Respondent – Respondents (hereinafter referred to as the 1st and 2nd Defendants) and sought a judgment in a sum of Rs.700 million. Subsequent thereto, the Union Assurance General Limited was added as the 3rd

Defendant (hereinafter sometimes referred to as the 3rd Defendant or the Added Defendant).

This action was originally instituted owing to an accident in which the Plaintiff was knocked down and seriously injured by a vehicle bearing Registration No. WP HA 7159 driven by the 1st Defendant driver on Galle Road, Colombo 3 on 19th of July 2005.

Thereafter, the trial was fixed ex parte against the 1st and 2nd Defendants and inter parte against the 3rd Defendant. With regard to the inter parte trial at the District Court, 10 admissions were recorded and 16 issues were raised. However, the parties agreed to take issue no. 10 as a preliminary issue of law, which was based on two admissions i.e. admission no 3 and 10. The said issue and admissions are quoted below.

"Issue No. 10;

a. in view of the admissions no. 3 and 10, is the 3rd Defendant entitled to a declaration of non liability under Section 109 of the Motor Traffic Act No.14 of 1951 as amended?
b. If the above is answered in favour of the 3rd Respondent, should the Plaintiff's action against the 3rd Respondent be dismissed *in limine*?"

Admissions Nos 3 and 10;

> "3. It is admitted that the 1st Defendant drove the vehicle after consuming intoxicating liquor at the time of the accident.
> 10. It is admitted that the 3rd defendant has sent a notice to the Plaintiff under Section 109 of the Motor Traffic Act and the Plaintiff has received the same."

Thus, admittedly, at the time of the accident the 1st Defendant driver was driving the vehicle after consuming intoxicating liquor. The 2nd Defendant was the registered owner of the said vehicle and it was further admitted that the 1st Defendant drove the said vehicle under express or implied permission of the 2nd Defendant. It was common ground that the vehicle in question was insured by the added 3rd Defendant in terms of insurance policy No. LMMVDP/00162.

It was not in dispute that the said insurance policy had a term under general exceptions which states "**The *Company is not liable under the policy in respect of: ……..***

5) any accident or loss damage arising directly or indirect *(Sic)* ***whilst the insured driving such motor vehicle having consumed any intoxicating liquor or drugs or any person having consumed any intoxicating liquor or any drugs driving such motor vehicle***" – vide item 5 of the general exceptions of the Insurance Policy.

It appears that the position of the Added Defendant was that, since there was a term in the policy as stated above denuding the liability when the vehicle was driven by the insured or any person having consumed intoxicating liquor or drugs, 1st Defendant driver fell within the category of 'named person' under Section 102(4) (c) (i) of the Motor Traffic Act and as such the added defendant was entitled to a declaration of non- liability in terms of Section 109 of the said Act. Thus, the added defendant moved to dismiss the action against him *in limine*.

By Order dated 24.10.2011, the Learned District Court Judge held in favour of the Plaintiff – Petitioner on the basis that;

- 3rd party insurance being a statutorily introduced compulsory legal requirement aimed at the safety and well-being of the public at large should only be restricted by the statutorily permitted limitations as specified in Section 102 (4) (c) and therefore any exemption clause based on limb (i) should have specified, ascertainably and precisely, the person or persons intended to be named in the policy to be considered as excluded drivers, and the wording of this particular item 5 of the general exceptions does not satisfy this requirement as it lacks in precision.
- Unlike the immediate parties to a contract who can look after themselves in entering into terms, the third parties do not have the same opportunity to decide the terms of the policy. Thus, their rights have to be safeguarded by the courts in the interest of justice.
- Public policy does not encourage the efficacy of such illusory wordings, used by the parties to the policy, to adversely affect the members of the public who are not parties to the policy.

Further the Learned District Judge appears to have expressed the view that exception clauses must be construed strictly and the benefit of any ambiguity has to be given to the person against whom it is set up.

Being dissatisfied with the Order of the Learned District Judge, the Added Defendant filed a leave to appeal application in the High Court of the Western Province (Civil Appellate) Holden in Colombo, against the said order.

The order of the Learned District Judge dated 24.10.2011 was set aside by the Learned Judges of the High Court by the Judgment dated 08.03.2013.

The High Court seems to have misstated when it says in its judgment that it was an admitted fact that the first defendant was intoxicated or under the influence of liquor when he drove the car at the time of accident. Nevertheless, it is an admitted fact that the 1st defendant driver drove the vehicle after consuming intoxicating liquor at the time of the accident and it was common ground that there was a term in the insurance policy as described above as item 5 under general exceptions to disclaim any liability by the insurer. However, terms or conditions in a policy of insurance basically represent the agreement between the parties to the policy but not with the third parties who have no voice in the agreement between the insurer and the insured. Thus, the matter to be resolved is whether the insurer can deny his liability towards third parties due to the said term included as item 5 under general exceptions. In other words, can the insurer name a person as contemplated by Section 102 (4) (c) (i) in the manner described in the aforesaid term, namely item 5 under general exceptions of the policy. It appears from the judgment given by the Learned High Court Judges that they were of the view that the said term found as item 5 under the general exceptions is clear enough for the insurer to deny his liability. Thus, the conclusion of the High Court is that the policy names the 1st defendant adequately as excluded driver under aforesaid Section 102 (4) (C) (i).

Being aggrieved by the said Judgment of the High Court, the Plaintiff- Petitioner preferred an application before the Supreme Court. In the Supreme Court, leave to appeal was granted on the following questions of law as set out in paragraph 36 (a) (i) to (iv)of the petition dated 4th April 2013;

"*Did their Lordships of the High Court err in law and misdirected themselves in law in not considering the question that:*

(i) *The intention of the legislature was to limit the category of "excluded drivers" to those specifically contained in Section 102(4)(c) and*

(ii) *Any exclusion of liability that falls outside the said provisions would be deemed to be of "no effect" as per Section 102(1) of the Act*

(iii) *The exclusion relied upon by the Petitioner clearly does not fall within the limited categories specified in Section 102(4)(c) of the Act and as such cannot be relied upon to escape liability*

(iv) *A condition excluding drivers, as set out in General Condition 5 of the policy, is clearly not permitted by Section 102 of the Act and does not therefore relieve the Petitioner from the obligation imposed by Section 105 of the Act and such the Petitioner is not entitled to a declaration under Section 109 as sought by it."*

It is the contention of the Plaintiff- Petitioner in this court that;

1. The Insurance policy was entered into between the 3rd defendant and the 2nd defendant and as such, the terms and conditions governing the said policy are of no consequence to and have no effect on an innocent third party, such as the plaintiff who was not privy to terms and conditions.
2. The Motor Traffic Act limits the category of 'excluded drivers' to Section 102 (4) (C) and any exclusion of liability outside the said provision is of 'no effect' and that the exclusion relied upon by the Added Defendant insurer, namely to exclude liability on damages when the harm was caused by drivers while having consumed any intoxicating liquor or drugs, is outside the scope of Section 102 (4) (C). Thus, the added Defendant is not entitled to a declaration under Section 109, specifically since a condition excluding drivers as set out in item 5 of the general exceptions of the policy is clearly not permitted by Section 102.
3. The driver of the motor vehicle in question being a person driving with express permission of the policy holder and holding a valid driving license, was an authorized driver in terms of the insurance policy. Thus, the Added Defendant cannot now say that an authorized driver who has breached the general exceptions of the policy is an excluded driver.
4. The law requires every person who uses a motor vehicle on the road to obtain insurance for third party claims. To widen the exceptions set out in Section 102 (4) in such a manner so as to surreptitiously include the

conditions of the policy, which are specifically excluded by Section 102(1) of the Act, would defeat the very purpose of requiring to obtain insurance for third party claims.

It is submitted to this court, on behalf of the Added Defendant that;

1. The legislature has enacted provisions in the Motor Traffic Act to allow the Insurance Company to disclaim liability in limited circumstances. Thus, a declaration of non-liability can shield an Insurance Company from liability towards 3rd parties.
2. The Legislature through Section 102(4) of the Motor Traffic Act has permitted the insurer to name the people who are not authorized to drive. In the present case "a person under the influence of intoxicating liquor" is a person not allowed to drive under the policy which in turn then falls within Section 102(4)(c)(i) and it is an admitted fact that the 1st defendant driver was under the influence of intoxicating liquor. As such the 1st defendant was a named person in the policy who is not allowed to drive or is excluded from driving. (However, this Court observes what was admitted was that the 1st defendant drove the vehicle at the time of the accident after consuming intoxicating liquor but not that he was under the influence of liquor. It is further observed that what appears to have been purportedly excluded from liability by item 5 of the general exceptions of the policy is any accident or damage or loss caused by drivers who drives after consuming intoxicating liquor, including the insured.)
3. At the time of the accident the vehicle was driven by a person having consumed intoxicating liquor, which amounts to a breach of essential condition of the policy.

Thus the 3rd Defendant (Added Defendant) argues that it is entitled to a declaration of non-liability and henceforth action against it should be dismissed *in limine*.

In my view, the fundamental issue is whether the term found in item 5 of the general exceptions of the policy is sufficient to treat the 1st Defendant driver as a named person as contemplated in Section102 (4)(c)(1) of the Motor Traffic Act and if so, whether the 3rd Defendant is entitled to a declaration of non-liability. It is evident from the Judgment of the learned District Judge that he considered the said term as

one lacks precision and definiteness to name the 1st Defendant as an excluded driver. On the other hand, the Learned High Court Judges considered the said term is clear and sufficient to treat 1st Defendant Driver as one named in terms of the Section 102 (4)(c) of the Motor traffic Act.

Analysis

In order to resolve the said issue, this court has to draw its attention to the provisions of the Motor Traffic Act No 14 of 1951 as amended in relation to insurance covering third-party risks, intention of the legislature making the third-party insurance mandatory and how they apply to the admitted facts of this case.

Section 99(1) of the Motor Traffic Act states "…***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..***" Thus, having a valid insurance or a security that covers third party risks is made mandatory by the legislature for the use of a vehicle on a highway.

It appears that mandatory third-party insurance which was similar to aforesaid Section 99(1) of the present Act was first introduced by Section 127(1) of the Ordinance No. 45 of 1938. There seems to be a provision for mandatory insurance against third -party risks even in section 61 of the Motor Cars ordinance No.20 of 1927 which was to come into operation only with a declaration by regulation by the Governor. However, following excerpts taken from the Hansard of 1938(Volume 2- July to September) is very much relevant in comprehending the intention of the legislature when the said similar provision was introduced in 1938. (It seems that on this occasion the mandatory insurance for third-party risks was not included in the original bill but due to deliberations made by the honourable members, those were included prior to the passing of the bill)

(quote)

"*Then, Sir, the other point, in broad outline, is third-party insurance, which has been mentioned so often. The Hon. Member for Kandy said that he would not insist now on third-party insurance because there were a great many*

unsatisfactory insurance companies and all the money was drained away into foreign channels.

Sir, the matter is not so simple as all that. I think it is a characteristic of the use of machines that we are able to become a trifle callous. The question is not whether a certain amount of money is to go here or there; the question is whether, having put machines on the road, we are going to run over people, maim them for life; injure children of five and eight and ten years to such an extent as not to give them a chance in life—send them into the world without hands, without arms—send them to their graves by depriving them of the means of existing. That is the question. That is not a question to which we can shirk the answer; it is not a matter in which we can shirk our responsibility for one moment. The problem has to be faced in spite of all the difficulties.

There was a very interesting passage in the debate in connection with the introduction of the Motor Bill in the House of Commons. It was this, -

'As against that, the Government had to face the great difficulties involved in compulsory third-party insurance, but on balance, we decided that we would face the difficulties and deal with an intolerable injustice which ought not to be allowed to exist.'

And that, Sir, is the spirit in which we should approach this question… The public safety and the public interest must come first, and there can be no public interest where we acquiesce in people being maimed and driven out, never heard of, never cared for." (unquote)-- { On July 13th 1938 at 5.19 p.m., at page 1782 – 1783 by the Hon. Mr. ALUWIHARE (Acting Minister for Agriculture and Lands) in 1938 Hansard Vol.2}.

(quote)

"***To my mind the daily holocaust of killed, maimed and injured people must be the first consideration. In the absence of third-party insurance I am not in support of this or any other Motor Bill.***" (unquote) --(On 13th of July, at 5.35 P.M. at page 1785 of the same Hansard by Mr. Freeman)

(quote)

"…I should now, like to deal with the main subject on which I propose to speak and that is the question of third-party insurance. I can assure you that all Members who commented on this particular omission feel that third-party insurance is absolutely imperative in the interest of the public and they are actuated by no other motives whatsoever……..
…all we seek to do by the introduction of compulsory third-party insurance is to provide compensation for the poor that are crushed." (unquote)-- {On 13th July 1938, at 5.53 p.m., at pages 1787 and 1789 of the same Hansard, by Mr. Gaddum (Nominated Member);}

(quote)

"…….This insurance is an insurance that is imposed by the state in the public interest……" (unquote)--{ On September 21st at page 3371 of the same Hansard by Hon. Mr. Bandaranaike,}

The above excerpts from the Hansard indicate that the legislature wanted to introduce compulsory third-party insurance to safeguard public from possible risks and hazards that may be caused by allowing potentially dangerous machines on places where the public have access or right of way (See the interpretation given to the term 'Highway' in the said Ordinance as well in the present Motor Traffic Act prior to the 2009 amendment.). As mentioned before Section 127(1) of Ordinance No.45 0f 1938 is very much similar to the Section 99(1) of the present Motor Traffic Act. Thus, the State Policy throughout in this regard appears to have been focused on the need to safeguard public safety. Thus, third-party insurance was introduced and maintained up to date for the interest of the Public.

The reference to a statement made in the House of Commons during the debate quoted above indicates that, during the colonial era, when the request was made to include third-party insurance, our legislature was influenced by the rationale that caused the introduction of mandatory third-party insurance by the colonial masters in the United Kingdom.

In the English case of ***Gardner V. Moore (1984) 1 All.E.R 1100*** **at 1105** it was stated *"…The policy of insurance which a motorist is required by statute to take out must cover any liability which may be incurred by him arising out of the use of*

the vehicle …The injured third party is not affected by the disability which attach to the motorist himself…" and also in the case of ***White (A.P) v. White and the Motor Insurers Bureau (2001) 2 All E R 43 at 45 & 46*** it was stated; *"compulsory insurance in respect of the driving of motor vehicles was first introduced in 1930. Before then, most motorists chose to insure themselves against third party risks. But there were cases of serious hardship where the person inflicting the injury was devoid of financial means and, being uninsured, was not able to pay the damages for which he was liable. It was primarily to meet these cases of hardship that the Road Traffic Act 1930 was enacted."* Thus, it is clear that the rationale of introducing mandatory third -party insurance was to relieve third parties from hardships caused by motorists irrespective of the financial disabilities of the wrong doing motorists.

Even our courts in **Royal Insurance Co. Ltd. V Ven. J. A. R. Navaratnam 60 NLR 520 at 524** held that "*The Legislature's intention as appearing from Sections 100 and 105 was apparently that ……..if the owner or driver of the vehicle becomes liable under the ordinary law to pay damages in consequence, those damages should, if not paid, be automatically recoverable from another source. The alternative source which the statute provides is one which can reasonably be expected to be in funds for the purpose, namely, an approved insurer. Accordingly the statute compulsorily provided for insurance against third party risks. It is noteworthy that Section 105 does not provide even that the liability of the insurer to pay will arise only if and when the insured person himself fails to pay the amount of the decree. Once the decree is entered, the section casts a direct obligation on the insurer to pay the damages*."

The above quotes from the said decisions also confirm that the mandatory third-party insurance is for the benefit of the public who uses the Highway.

While Section 99 (1) of the present Act makes third party insurance a mandatory requirement, Section 100 (1)(b) of the Motor Traffic Act mandates that a policy of insurance in relation to the use of a motor vehicle must be a policy which insures in accordance with the provisions of paragraph (c), such person, persons or classes of persons as may be specified in the policy in respect of <u>any liability</u> which may be incurred by him or them in respect of the death of or bodily injury to <u>any</u>

person caused by or arising out of the use of motor vehicle on a highway." (Emphasis by underlining done by me)

According to the said Section, the insurer through its policy of insurance has to undertake to insure the person or persons or classes of persons specified in the policy in respect of the death of or bodily injury to a third party caused or arising out of the use of motor vehicle on a highway. Thus, an insurance cover can be issued to cover the liability of a single person or many specified in the policy (However, as per the proviso to the said Section the policy need not cover death or injuries arising out of and in the course of employment as well as any contractual liabilities).

Furthermore, Section 102 (1) of the Motor Traffic Act, restrain the imposition of conditions by the parties to the policy, which restricts the liability set out in Section 100(1)(b) subject to what is set out in Section 102 (4) of the said Act. Section 102(1) states "***Where a certificate of insurance has been issued in connection with a policy of insurance, so much of the policy as purports to restrict, or attach conditions, to the insurance of any person insured thereby shall, save as is otherwise provided in subsection (4), be of no effect as respects any such liability as is required to be covered by Section 100 (1) (b)*****".**

Thus, even though, as per Section 100(1)(b), the use of conditions that affect or restrict liability with regard to third parties are not permitted, the Motor Traffic Act itself, through its Section 102(4) permits certain conditions or restrictions that can be included in a policy of insurance, which may exclude the liability of the insurer to satisfy the decree of court contemplated in Section 105(1), in relation to third-party cover . {Section 102(4) will be discussed later in this judgment as it is the most relevant provision to the matter at hand}

Section 105(1) states, **"*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, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, 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 any sum payable in respect of interest on that sum under such decree."

Therefore, if there is a valid insurance policy covering third-party risks, the Motor Traffic Act imposes a statutory obligation on the insurer to satisfy the decree unless he can disclaim liability under Sections 106 to 109.

Sections 106, 107 and 108 of the present Motor Traffic Act deal with situations where notice of action is not given to the insurer, non-liability due to cancellation of the policy prior to the event and non-liability due to misrepresentation respectively. Those sections have no relevance to the matter at hand since the Learned District Judge's order which was reversed by the impugned Judgment of the Learned High Court Judges was made in relation to the aforementioned issue no.10 raised at the original court. The said issue advances the entitlement of the insurer for a declaration of non-liability only under Section 109 of the Motor Traffic Act.

It was held in **The Ceylon Insurance Co. Ltd V Richard 53 NLR 64** *"As between insurer and insured, their rights and obligations inter se are measured solely by the terms of their contract, so that the contractual duty of the former to indemnify the latter may be avoided on any lawful ground which the parties might mutually agree upon. As far as the injured party is concerned, however, his right against the insurer to claim direct satisfaction of a decree entered in his favour against the insured is unaffected by the terms of the contract itself unless the insurer is protected by a declaration (under Section 137) that there has been a breach of condition in the policy which falls within one or other of the categories of excepted conditions enumerated in section 130(4)".* Sections 137 and 130(4) referred here are the parallel sections in the Act No.45 of 1938 to the sections 109 and 102(4) of the present Motor Traffic Act. Thus, it is clear that the rights of the third parties are statutory protected rights subject to the statutorily, allowed exclusions of liability of the insurer while rights of the parties to the policy are governed by the lawful terms of the contract between the parties. In **Ruby General Insurance Co. Ltd V S. Yasapala De Silva 71 NLR 54,** in appeal, the declaration of non-liability was granted to the Insurance Company on a breach of a condition of the policy, namely the condition that forbade the vehicle being driven by a person not holding a driving licence. It is true that it was a condition agreed by the parties to

the policy but as well as a permitted condition allowed by the statute itself to exclude liability. Anyhow, H.N.G. Fernando C.J at the end of the judgment in agreement with De. Kretser, J has commented on the inappropriateness of having statutorily permitted exceptions to escape from liability against third-parties. As those statutorily permitted exceptions are still in force, it is necessary to see whether the added 3rd Defendant is entitled to a declaration of non-liability based on the term it relies on.

The first part of the said Section 109 read as follows;

"No sum shall be payable by an insurer under Section 105 in respect of any decree if, in proceedings commenced before or within three months after the institution of the action in which the decree was entered, the insurer has obtained from a court of competent jurisdiction a declaration that a breach has been established of a condition specified in the policy, being one of the conditions enumerated in Section 102(4)"

Thus, it is clear that the 3rd Defendant relies on the stipulations in subsection 102(4) which allows certain conditions to be incorporated in the policy which states as follows;

"102(4). Nothing in subsection (1) shall apply in the case of any condition in a policy of insurance, being a condition which-

- ***(a) excludes the use of the motor vehicle to which the policy relates-***
  - ***(i) for business purposes, except by the insured, or by some other named individual, in person;***
  - ***(ii) for business purposes, other than the business purposes of the insured;***
  - ***(iii) for the carriage of goods or samples in connection with any trade or business;***
  - ***(iv) for the carriage of persons or goods for fee or reward;***
  - ***(v) for organized racing or speed testing;***
  - ***(vi) on a contract of letting and hiring;***
- ***(b) provides that the motor vehicle shall not be driven by a person other than-***
  - ***(i) the insured or any person driving with his express or implied permission;***

(ii) the insured or any person employed by him;

(iii) any person or persons named in the policy;

(c) provides that the motor vehicle shall not be driven by-

(i) any person or persons named in the policy;

(ii) any person who is not the holder of a driving licence;

(iii) any person whose driving license has been cancelled or suspended or who is for the time being disqualified for obtaining a driving licence; or

(d) in the case of a motor cycle which has no side car attached thereto, provides that no person other than the driver shall be carried thereon;

(e) excludes liability for injury caused or contributed to by conditions of war, riot or civil commotion."

The 3rd defendant's claim for declaration of non-liability is not based on a condition that relates to the use of the motor vehicle. Neither the said condition relates to a motor cycle which has no side car nor to injuries caused or contributed by conditions of war, riot or civil commotion. Hence, it is not necessary to discuss subsections 102(4)(a)(d) and (e) quoted above. As mentioned above the 3rd Defendant's position is that the 1st Defendant Driver can be considered as a named person in terms of subsection 102 (4) (c) (i), the most relevant provision is subsection 102(4)(c)(i). However, subsections 102(4)(b) and 102(4)(c) relates to permitting of conditions that exclude certain person or persons or category/ genre of persons driving the vehicle which is the subject matter of the policy of insurance. When these two parts of subsection102(4) , namely 102(4) (b) and 102(4)(c), are read with the subsection 102(1), which restrict conditions that deters the liability to pay third parties, it is clear that, as far as the availability of declaration of non-liability for the insurer is concerned, the legislature's intention was to limit such exclusions or restrictions as to who drives the vehicle to the person or persons or category of persons as recognized by these two subsections. Therefore, in deciding the scope of different limbs of those two subsections it is prudent to consider both these subsections together since it may help to avoid conflicting situations.

While aforementioned Section 102(4)(b)(i) allows to exclude drivers other than the insured and the drivers permitted by the insured, Section 102(4)(b)(ii) allows to exclude drivers other than the insured and any person employed by him. When

a condition is permitted as per 102(4)(b)(i), the policy contemplates only covering the liability caused by the insured or the persons permitted to drive by the insured. This is more likely, but may not be limited, to happen when the vehicle is intended for the personal use of the insured; In other words, where the policy covers the personal use of the vehicle by the insured himself or through drivers permitted by him. When a condition is permitted as per 102(4)(b)(ii), the policy contemplates only covering the liability caused by the insured or by a person employed by him. This is more likely, but may not be limited, to happen when the vehicle is intended to be used for the business or trade purposes of the insured and/or is intended to be driven by the insured or a driver employed by the insured; In other words, where the policy covers business or trade use including the personal use by the insured by himself or through an employed driver. In both these occasions the insured, persons who are permitted to drive by the insured and the employee/ employees of the insured as the case may be become authorized drivers as per the policy while all others become excluded drivers. I also observe that these two subsections, namely 102(4)(b)(i) and (ii), have a direct relation to our civil law on delictual liability in relation to accidents which is based on the Roman Dutch Law remedy, Aquilian Action. To successfully claim damages, one has to prove the wrongful act and dolus (willful or intentional act) or culpa (negligence) of the wrong doer. Thus, our system is a fault-based system and where the fault of the wrong doer is proved liability may be direct or vicarious. It is my view that these two sub sections, namely 102(4)(b)(i) and (ii) are drafted in a manner that would safeguard the third party rights when the insured is liable directly or vicariously; in other words when the insured is the wrong doer or where he is liable vicariously for the wrong doing of drivers who drive with his permission or as his employees. Subsection 102(4)(b)(i) contemplates where direct or vicarious liability might arise by the use of vehicle by the insured or close acquaintance, like family members and friends etc., since this limb of the section is, as said before, more likely concerns an insurance policy that covers the personal use of the vehicle, and subsection 102(4)(b)(ii) contemplates where direct or vicarious liability might arise by the use of vehicle by the insured or an employed driver by the insured since this limb of the section, as said before, more likely concerns an insurance policy that covers the use of the vehicle for business and trade purposes as well as certain instances of personal use.

The aforementioned subsection 102(4)(b)(iii) allows the insurer to exclude drivers other than the person or persons named in the policy. This is more likely to happen when the owner of the vehicle or the one who gets the insurance cover does not intend to drive the vehicle or does not want his close acquaintance or employees to drive the vehicle unless any of them is the named person in the policy; Perhaps situations contemplated here may include where the vehicle is given to use by some other person than the insured according to that person's own will or where depending on the circumstances vicarious liability may fall on the insured. Following among others may provide few illustrations where the permitted drivers have to be named in the policy.

a) A father who does not want or capable to drive gives his vehicle for the business purposes of his son to use according to son's own will. He can agree with the insurer to issue a policy including a third-party cover for his vehicle naming the son and his employees as the permitted drivers while excluding all others including himself.
b) A is unable to drive due to some disability and he gives his vehicle on an agreement to B to use by B for a monthly payment. He can agree with the insurer to issue a policy for his vehicle including a third-party cover naming B as the permitted driver excluding all others including himself.
c) A company gives a vehicle to a named executive or a director with a third-party cover excluding all others as permitted drivers.
d) A Company that publish a News Paper or broadcast or telecast news come into agreement with a freelance reporter to use the reporter's family vehicle for the travels relating to news reporting and also agree to provide a third-party insurance cover for incidents that may happen when the reporter drives the said vehicle. The company agree with the insurer to issue a policy covering third-party risks naming the reporter as the permitted driver and excluding all others. In this occasion other members of the reporter's family may need another policy for their use.

When subsection 102(4)(b) allows the parties to the policy to exclude all others other than the permitted drivers as provided by each limb as the case may be, for the purpose of clarity, on certain occasion they may need to name the person or persons who are not permitted to drive the vehicle. For example, in the above

illustrations a) and b), the parties may prefer to name the owner of the vehicle who takes the insurance cover for the vehicle as an excluded driver while in illustration d) they may prefer to name everyone other than the reporter including his family members as excluded drivers. Thus, need for such clarifications may be among other things that there is a provision allowing to name the excluded driver or drivers in subsection 102(4)(c)(i). Subsection 102(4)(c)(i) will be discussed later in this judgment.

In **Royal Insurance Co. Ltd. V Ven. J. A. R. Navaratnam 60 NLR 520** H N G Fernando J (as he then was) seems to have expressed the opinion that separate limbs of Section 102(4)(b) is rather a description of permitted drivers than who may be excluded as drivers. It is true that while referring to exclusion of all others other than the person or persons or category of persons named there, each limb of Section 102(4)(b) indicate who are permitted drivers. He further has expressed that all three limbs in Section 102(4)(b) has to be considered as a composite description of persons who shall not be specified as excluded drivers and those three limbs should not be read disjunctively. However, I do not think that this would compel the parties to a policy to cover all the categories permitted by those three limbs, namely the insured, persons permitted by the insured and the persons employed by the insured, and named person, in each and every policy issued on the ground that they are the possible users of a vehicle. Parties are at liberty to select whom they are going to cover taking each limb separately or in combination. What may be necessary is to include all possible drivers as per the intended use of the vehicle. It is relevant to note that as per Section 100(b) even a single person can be covered by a policy. In terms of Section 99(1) it is upon the person who uses or drives or causes or permits any other to use or drive to see whether there is a third-party cover for the driver or user when the vehicle runs on the high way. If he fails, he may be faced with penal measures. Duty cast on the user or driver or one who causes or permits to use or drive cannot make the parties to the policy, including the insurer, bound to enter into an agreement to cover all the permitted drivers contemplated under all three limbs for third-party risks. If it is the insured who use or drive or causes or permits to use or drive, then it is his duty to see that driver is a permitted driver with a third -party cover. In the illustration (d) given above, the newspaper company need not get any cover for all the possible users of the vehicle. Thus, when one gets a third party cover

for the insured and persons who drives with his consent, I do not think there is any impediment to name his employees and all others as excluded drivers and, in the same manner when one gets a cover for his trade purposes there cannot be any impediment to name all others except the insured and the employees as excluded drivers. Similarly, when a third-party insurance cover is taken for a named person in the policy there is no bar to name all others including the one who enters into the policy as excluded drivers.

As said before our delictual liability to pay damages to or compensate the victim of an accident is still founded on proof of fault, despite the fact that it appears that some countries have done away with the fault-based system to pay damages or compensation. Even though, with the introduction of autonomous vehicles without drivers and computerized automated machines, our system based on fault may fail, still we have to consider and interpret our law in accordance with the principles of law we follow. Thus, the subsection 102(4)(b) is drafted to safeguard third-party rights when damages are caused due to the fault of the insured or fault of other drivers for which the insured become vicariously liable or for the fault of the named person or persons as agreed by the insurer and one who takes the insurance cover. A policy of accident insurance is basically to indemnify the liabilities of the insured, and the parties to the policy also can agree to indemnify the liabilities of the named person in the policy. The insurer is paid a consideration for the cover given by the policy. If the provisions of subsection 102(4)(b) were not there, the insurer may have to pay for the fault of unauthorized drivers not concerned in the policy due to the mandatory provision for an insurance cover for third-party risks, for example, pay to the victim of an accident caused by a driver who robbed the vehicle, for whose actions neither consideration is paid for the insurer nor the insured is liable directly or vicariously.

However, the legislature has decided to allow further exclusions of drivers as contemplated in subsection102(4)(c). This has to be comprehended in the background of exclusions allowed by the subsection 102(4)(b), since the said Section 102(4)(b) has provisions to exclude unauthorized drivers for whose action insurer need not pay, while the insured, drivers permitted by him or his employees or the named person in the insurance cannot be excluded, as the case

may be, to ensure the payment for the loss caused to the third-parties. Hence, the exclusions allowed by Section 102(4)(c) may not be limited merely to further clarify who are excluded by naming them as aforementioned but also to further exclude certain drivers even though they may come within the category of drivers who cannot be excluded or are permitted in terms of the different limbs of the subsection 102(4)(b). Thus, a question arises as to what extent the law allows to exclude persons as drivers under subsection 102(4)(c).

The first limb of subsection 102(4)(c), namely 102(4)(c)(i), allows the parties to the policy, to exclude any person or persons named in the policy as drivers. The other two limbs, namely section 102(4)(c)(ii) and (iii) allow the parties to the insurance policy to exclude;

- Any person who is not the holder of driving licence,
- Any person whose driving licence has been cancelled or suspended or who is for the time being disqualified for obtaining a driving licence.

It is fathomable why the legislature allows to exclude persons who does not have a valid licence. It is said before, that the need for an insurance covering third-party risks was made mandatory for the benefit of the public at large. In the same manner public interest requires to discourage engagement of persons without valid driving licence as drivers. On the other hand, if these provisions to exclude persons who do not have valid driving licence were not there, unskilled drivers or drivers whose competency was not tested by the authorities may be used to drive vehicles by vehicle owners, to the detriment of the public as well as insurance companies even though there may be penalties for driving without licence when they are caught by the law enforcement authorities. As I mentioned before, our system of compensating the loss caused by an accident is based on the proof of fault of the wrong doer and the compulsory insurance to cover third party risks is to guarantee the payment of damages and/or compensation that may be ordered by a decree that follows such proof, as the case may be, against the insured or his employees or drivers permitted by him or by a named person or persons in the policy. As said before the said decree may be based on direct or vicarious liability. However, what I observe is that not having a valid driving licence, though, according to the circumstances, may be supportive of proving fault based on dolus or culpa yet not decisive in proving fault, since there may be drivers who

are skilled but do not have a driving licence; for example a skilled driver who does not hold a driving licence since he has not reached the necessary age limit or a person who holds a driving licence for all category of vehicles from a foreign country and have considerable experience without any bad record but does not have a local or international driving licence. Thus, lack of a valid driving license on certain occasions may only prove a legal requirement to drive on the highway but not ingredients to prove dolus or culpa.

In the backdrop of the aforesaid discussion, now I would like to discuss the most relevant provision of the Motor Traffic Act which is relevant to the matter at hand, namely Section102(4)(c)(i) of the Motor Traffic Act.

As mentioned before, this Section 102(4)(c)(i) permits the parties to exclude drivers named in the policy. The question is whether the parties to the policies has unrestricted permission to name anyone as they wish and agree, so that the insurer would be able to claim a declaration of non-liability. Can they do it according to their own whims and fancies even disregarding the public interest which the legislature tried to serve by bringing in mandatory cover for third-party risks? The answer can be reached if one looks at the following situations:

a) When an insurance company issue a policy excluding drivers other than the insured and the drivers driving with the insured's express or implied permission as per Section 102(4)(b)(i), can it exclude the same person or persons, namely insured, or the person or persons driving with the insured's permission, under Section 102(4)(c)(i) by naming them as persons who shall not drive the vehicle?
b) In the same manner, when an insurance company issue a policy excluding drivers other than the insured or his employees or a named person or persons in the policy, as the case may be, as per Section 102(4)(b)(ii) or (iii), can it exclude same permitted drivers,(namely insured, person or persons employed by him or person or persons named in the policy, as the case may be), under Section 102(4)(c)(i) by naming them as persons who shall not drive the vehicle ?
c) In the same manner, when an insurance company issue a policy taking into consideration more than one situations contemplated in Section 102(4)(b) together, for example taking insured, persons driving with the permission

of the insured, persons employed by the insured and the named persons in the policy as permitted drivers, can it exclude them under Section 102(4)(c)(i) by naming them as persons who shall not drive the vehicle?

My view is that it cannot be done. Only exception I can think of is that when such naming specifically identifies the person or persons to be excluded where there are many authorized drivers , since, if the insurer is allowed to name, in toto, who are considered as authorized drivers under separate limbs in Section 102(b) as persons who are not permitted to drive under Section 102(c)(i), in fact, in such occasions there will not remain any third-party cover in relation to the permitted drivers in terms of Section102(4)(b). On the other hand, if it is allowed to use wider terms without precision, insurer would be able to draft such terms to escape liability in a manner harmful to the public interest. Such nominations definitely defeat the intention of the legislature which is expressed by bringing in mandatory third-party insurance, namely priority to preserve public safety and interest. As such, I cannot think that, by Section 102(4)(c)(i), the legislature intended to allow the parties to the policy to name drivers so that the insurer can claim exclusion from liability against the public interest which the very introduction of the insurance to cover third-party risks intended to safeguard. Thus, what is allowed by the said section is naming of drivers as far as it does not conflict with the public interest which was intended to be protected by bringing in legislation to introduce mandatory insurance to cover third-party risks. Thus, the parties to the policy cannot name any person as an excluded driver without any limitation and as per their wish but they can name any person or persons as excluded drivers as far as such naming will not affect the public interest and public safety which was intended to be protected by bringing in mandatory third-party cover. Hence, as mentioned before parties may use the said section to further clarify the persons who were excluded from driving in terms of Section 102(4)(b) and it may also be used to name precisely identified person or persons, though in general they may be included in permitted drivers in terms of Section 102(4)(b) but when their exclusion is not in conflict with the public safeguard and interest which was intended to be protected by bringing in mandatory insurance cover for third-party risks. For example, if the insured, respecting his obligation to maintain uberima fides in entering in to the insurance contract, reveals that there is a person among his employees or family members whose mental condition on

certain occasion become unstable, though the said person still has a valid driving licence issued by the authorities, I do not think there is any bar to name such person as an excluded driver under Section 102(4)(c)(i). Such nomination will not make, in my view, any conflict with the public safety or interest that was intended to be protected by the introduction of mandatory cover for third-party risks and further the owner of the vehicle or the insured would be able to advice himself that he would not be protected under the cover if he engaged the said identified person as a driver. In my view, giving an insurance cover for a person who may become mentally unsound, might not ensure the public interest where the compensating the loss is based on the proof of fault on the part of the wrong doer. Thus, a validity of naming drivers under Section102(4)(c)(i) as excluded drivers against third-party risks depends on the circumstances of each case. If such naming is against the public interest which the legislature expected to protect through the introduction of mandatory third-party insurance, such naming cannot be considered as a valid one to escape from the liability.

The Learned High Court Judges have quoted the following passage from **Emjay Insurance Co. Ltd V P. S. William 70 NLR 566.**

"***An insurer is entitled to obtain a declaration of non liability under section 109 of the Motor Traffic Act if he establishes that the accident in question was caused by the motor vehicle when it was being driven by the owner (the Insured) in breach of a specific condition in the policy of insurance that it should not be driven by any person who is not the holder of a driving licence. In such a case the inclusion of another condition in the policy that the vehicle should not be driven by any person other than the insured is not material***."

However, this decision could be distinguished from the case at hand for reasons mentioned below;

1. The condition relied on by the insurer in the said case falls within the ambit of section 102(4) (c)(ii) and not of section 102(c)(i) where the parties to the policy name the person who shall not be allowed to drive. In terms of 102(c) (ii), even though the person who does not hold a driving licence cannot be identified as Mr. X, Y or Z at the time of entering into the policy, the legislature itself has identified a category of persons and has decided to allow to include a condition in the policy to the effect that a person who he

is not a holder of a driving licence shall not drive the vehicle, most probably, as described above for the interest of the public.

2. The said case appears to have been between the parties to the policy, namely insured and the insurer, who are bound by the terms of the agreement where the third-party rights emanate from the statutory provisions.

Now I would consider whether the relevant item 5 under the general exceptions of the policy is acceptable for the issuance of declaration of non-liability of the insurer in terms of Section 102(4)(c)(i). As mentioned before the said item reads as follows;

"**The Company shall not be liable under this policy in respect of;**

5) any accident or loss damage arising directly or indirect (Sic) **whilst the insured driving such motor vehicle having consumed any intoxicating liquor or drugs or any person having consumed any intoxicating liquor or any drugs driving such motor vehicle"**

Section 102(4)(c)(i) allows the parties to the policy to name who shall not drive the vehicle. The words 'to name' here, in my view is used to mean something similar 'to specify', 'to indicate', 'to mention', 'to nominate', or 'to identify' etc. When one look at the above term contained in item 5, it does not name the insurer or any other person as a person who shall not drive but it says the company shall not be liable if they drive having consumed intoxicating liquor or drugs. In fact, it does not exclude insurer or any other person from driving but it names a situation they shall not drive. Identification of the person who shall not drive is not definite at the time of entering to the policy and it is contingent on whether the said person would consume intoxicating liquor or drugs or not, prior to a point of time in future when he will drive.

On the other hand, if it is allowed to name using wider terms and or without specificity and in a manner the identification to be dependent on what may or may not happen in the future, the parties to the insurance policies would be able to defeat the intention of the legislature, which was to protect the public, by naming drivers using terms such as used in the above item 5 as well as ' insured or any other persons driving negligently and or recklessly' or 'insured or others driving without taking necessary precautions to avoid an accident' etc.

One may argue terms excluding drunken drivers is for the interest of the public and therefore it is not in conflict with the intention of the legislature shown by bringing in insurance to cover third-party risks. A cursory glance may give such an impression but when one looks deep into the issue it is not so. In this aspect one has to examine what was intended by the legislature to be remedied by introducing third-party insurance. It is clear due to what is mentioned before that the insurer has to satisfy a decree against the persons covered by the policy when it is given in favour of a third party unless the insurer is entitled to get a declaration of non-liability as per the provisions of the Motor Traffic Act. This liability to satisfy the decree is there irrespective of the financial capability or incapability of the people whose liability is insured by the policy. Thus, what was intended was to cover the liability of the persons who are insured or covered by the policy. As indicated above under our law liability arises with the proof of fault of the wrong doer. Hence, what was intended to remedy by the third-party insurance cover is the harm caused by the fault. Proof of Drunkenness or acts of negligence and recklessness are decisive in proof of fault of the wrong doer. If in the guise of naming drivers, it is allowed to claim non-liability on such wrongs, the object of bringing in mandatory insurance to cover third-party risks would fail, since it makes the wrong doers, whose fault was to be remedied by third -party cover, excluded drivers. Thus, such naming is contrary to the public interest, which the legislature intended to safeguard by providing mandatory third-party insurance. Thus, I am not inclined to think that the legislature intended to allow naming of drivers under Section 102(4)(c)(i) in a manner to defeat the public interest as found in the said impugned item 5 of the policy; In other words, such naming allows to remove the fault which was to be remedied, from the remedy provided by introducing mandatory third-party cover making the remedy redundant.

Learned District Judge in his order has commented that public policy does not allow the illusory wordings used by the parties to the policy to adversely affect the members of the public who are not parties to the policy. **Wharton's Concise Law Dictionary, 16th edition reprint 2016, Universal Law Publication (An Imprint of 'LexisNexis') , page 192**, with reference to **Central Inland Water Transport Corporation Ltd. V Borja Nath Ganguly, AIR 1986 SC 1571, Shri Parsar V Municipal Board,(1997) 1WLC 443, Oil and Natural Gas Company Ltd. V Saw**

Pipes Ltd. AIR 2003 SC 2629 and few more Indian Cases, defines 'Public Policy' as a term that connotes some matter which concerns the public good and the public interest. As shown above the impugned naming of the excluded driver is in conflict with the public interest that the legislature intended to protect.

Thus, in my view, the Learned District Judge correctly identified the lack of specificity and precision in naming a person or persons as excluded drivers as well as the conflict with the public policy which do not allow to name excluded drivers in the manner done in the impugned term found in item 5 of the general exceptions of the insurance policy, which the Learned High Court Judges failed to appreciate and came to a wrong finding that item 5 is sufficient to exclude liability of the insurer. Therefore, this appeal should be allowed.

Further I observed that even in the relevant insurance policy excluded driver stipulated in the general exceptions of the policy has been defined only as;

- Any person other than the policy holder or a person driving with the policy holder's express or implied permission.
- Any person who is not the holder of a driving licence valid to drive such class of vehicle unless he has held and is not disqualified from obtaining such licence.

Hence, it is clear even at the time of entering into the policy, parties did not consider what is there in item 5 as an exclusion of drivers. Perhaps, it would have been included there to claim from the insured the amount that might have to be paid to third-parties. Even though the impugned term has no effect against a third-party whose rights emanates from the statutory provisions it is valid between the parties to the policy.

The 3rd Defendant argues that the plaintiff is not without a remedy as he can get a decree against the 1st and the 2nd Defendants. Such remedy on direct liability and vicarious liability is always there but what the introduction of mandatory third-party insurance meant is to protect the public from difficulties that the public faces due to financial situations of the wrongdoer and the person vicariously liable for the acts and deeds of the wrong doer.

For the foregoing reasons, I answer the questions of law Nos (iii) and (iv) affirmatively and therefore, answering (i) and (ii) do not arise. However, with

regard to questions of law No.(i) and (ii), I observe that permission to exclude drivers are not limited to Section 102(4)(c) as mentioned in question of law No.(i) but 102(4)(b) also allows to exclude persons other than persons named in the said section as drivers. Any exclusion of drivers contrary to Section 102(4), inclusive of 102(4)(b) and (c), has no effect with regard to third-party risks.

Hence, the judgment of the High Court dated 08.03.2013 is vacated and the order of the learned District Judge dated 24.10.2011 refusing to dismiss the action against the 3rd Added Defendant is restored with costs.

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Judge of the Supreme Court.

Vijith. K. Malalgoda, PC, J

I agree.

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Judge of the Supreme Court.

S. Thurairaja, PC, J

I agree.

.....

Judge of the Supreme Court.