

1966 *Present* : Sri Skanda Rajah, J., and Siva Supramaniam, J.

EMJAY INSURANCE CO. LTD., Appellant, and P. S. WILLIAM
and another, Respondents

S. C. 393/65—D. C. Colombo, 56178/M.

Motor Traffic Act (Cap. 203)—Sections 102 (4) and 109—Insurance policy covering 3rd party risks—“ Excluded drivers ”—Action by insurer for declaration of non-liability for breach of condition—Quantum of evidence.

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.

¹ (1948) 49 N. L. R. 225.

² (1933) 35 N. L. R. at 351.

³ (1965) 67 N. L. R. 131.

APPPEAL from a judgment of the District Court, Colombo.

E. B. Wikramanayake, Q.C., with *N. C. J. Rustomjee*, for the plaintiff-appellant.

J. A. L. Cooray, for the 2nd defendant-respondent.

Cur. adv. vult.

November 22, 1966. SIVA SUPRAMANIAM, J.—

This is an action by an insurer for a declaration of non-liability under section 109 of the Motor Traffic Act (Cap. 203). The 1st defendant was at all material times the owner of a motor car No. 2 Sri 1290 in respect of which the plaintiff company issued a policy of insurance covering, *inter alia*, 3rd party risks. While the policy was in force the 1st defendant drove the said car on the public highway and collided with the 2nd defendant who was riding a bicycle and caused him injuries. It is established that the 1st defendant was not the holder of a driving licence on the date of the accident. The 2nd defendant has been awarded a sum of Rs. 5,000 as damages by the District Court of Colombo in case No. 55878 filed by him against the 1st defendant. After that action was filed, the plaintiff company instituted the present suit for a declaration of non-liability. It is admitted that the 2nd defendant received due notice in terms of the Proviso to S. 109 of the Act.

It was a condition of the policy that the plaintiff company should not be liable in respect of any claim arising out of any accident while the vehicle was “being driven by.....an excluded driver”. The term “excluded driver” was defined in the schedule to the policy as :

- (1) “ Any person other than the insured or a person driving with the insured’s express or implied permission.
- (2) Any person who is not the holder of a driving licence unless he has held and is not disqualified from obtaining such a licence.”

S. 102 (4) of the Act provides, *inter alia*, as follows :—

“ Nothing in sub-section (1) shall apply in the case of any condition in a policy of insurance, being a condition which—

(a)

(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)

(iii)

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

- (i)
- (ii) any person who is not the holder of a driving licence.
- (iii)"

It will be seen that the condition specified in the policy was one that was permitted by S. 102 (4) of the Act and that the two categories of "excluded drivers" correspond to the classes dealt with in S. 102 (4) (b) (i) and S. 102 (4) (c) (ii) respectively.

It was argued by learned Counsel for the respondent that the class referred to in S. 102 (4) (c) (ii), viz: "Any person who is not the holder of a driving licence" will not include the "insured" as under sub-section (4) (b) (i) the "insured" has been specifically excepted from the definition of "excluded driver". The argument, however, is untenable as the two sub-sections refer to separate and distinct categories. Learned Counsel's submission amounts, in effect, to a request that we should interpolate the words "other than the insured" after the words "any person" in S. 102 (4) (c) (ii). We have no power to do so. In our view there was a breach of an essential condition of the policy and the plaintiff company is discharged from liability and is entitled to the declaration prayed for in the plaint.

We set aside the judgment and decree appealed from and enter judgment for the plaintiff as against the 2nd defendant as prayed for with costs in both courts. The plaint includes a prayer against the 1st defendant as well. The 1st defendant did not file answer or contest the action and was absent at the trial. The District Judge will enter, in the first instance, a decree *nisi* for default against the 1st defendant.

SRI SKANDA RAJAH, J.—I agree.

Appeal allowed.
