1959 *Present :* **H. N. G. Fernando, J., and Sinnetamby, J.**

ROYAL INSURANCE CO., LTD. (of No. 1, North John Street, Liverpool), *and* VEN. J. A. R. NAVARATNAM *et al.*, Respondents

S. C. 446—D. C. Jaffna, 12,058

Motor vehicle—Insurance against third party risks—Condition in policy that insurer shall not be liable for damage caused while the vehicle is being driven by any person other than the assured—Validity of such condition—Action by insurer for declaration of non-liability—Specification of breach of condition—Motor Traffic Act, No. 14 of 1951, ss. 99, 100, 102 (4), 105, 109.

In regard to insurance against third party risks under section 99 *et seq.* of the Motor Traffic Act, a condition in an insurance policy, which *excludes* driving by an employee of the assured or by a person acting with the assured's express or implied permission, is not a condition authorized by section 102, and therefore does not exempt the insurer from liability to satisfy a decree for damages entered against the assured in respect of death or bodily injury caused to a " third party " while the vehicle is being driven by such an " excluded driver".

In an action instituted by an insurer for declaration of non-liability in terms of section 109 of the Motor Traffic Act, the insurer need not specify the relevant provision of the law relating to the breach of the condition in question. What the section requires is that notice should be given only of the factual particulars of the breach of condition.

APPEAL from a judgment of the District Court, Jaffna.

H. V. Perera, Q.C., with *K. N. Choksy*, for the plaintiff-appellant.

Sam. P. C. Fernando, with *Cecil de S. Wijeratne* and *M. Rafeek*, for the 1st defendant-respondent.

S. J. V. Chelvanayakam, Q.C., with *C. Ranganathan* and *S. Sivarajah*, for the 2nd and 3rd added defendants-respondents.

Cur. adv. vult.

July 6, 1959. H. N. G. FERNANDO, J.—

The decision in this appeal is likely to be of much interest to owners of motor vehicles and to insurance companies. What is principally involved is the question whether a condition in an insurance policy, which *excludes* driving by an employee of the assured or a person acting with the assured's express or implied permission, exempts the insurer from the liability to satisfy a decree for damages entered against the assured in respect of death or bodily injury caused to a "third party" while the vehicle is being driven by such an "excluded driver".

The policy in this case contains a general exception providing that "the Company shall not be liable under this policy in respect of, *inter alia*, any accident, loss, damage and/or liability caused, sustained or incurred whilst the motor car is being driven by an excluded driver". This expression is defined in the schedule to the policy to mean *any person other than the insured.*

It is common ground that the accident which has been the occasion of this action occurred while the insured's motor car was being driven by a mechanic in the employment of a repair garage to which the car had been entrusted for repairs by the insured owner, and there can be no question that the car was so driven with the implied permission of the owner. The accident resulted in the death of one Mr. Ariyanayagam whose heirs, the first and second added defendants, obtained in action No. 11730 D. C. Jaffna a decree for damages against the insured owner, the present first defendant, in a sum of Rs. 25,000.

Under section 105 of the Motor Traffic Act (No. 14 of 1951) the insurance company would be liable to pay the amount of this decree unless it obtains a declaration, for which provision is made in section 109, "that a breach has been established of a condition specified in the policy, being one of the conditions enumerated in section 102 (4)". The present action by the insurance company is for such a declaration, which the company claims on the ground that, because the motor car was driven by the

garage mechanic, there was a breach of the condition earlier mentioned, namely, that the car shall not be driven except by the insured. The question for determination therefore is whether such a condition is one enumerated in section 102 (4) of the Act.

Before examining the condition now in question by reference to section 102, it is necessary to consider the scheme of insurance against third party risks for which provision is made in the Act. Section 99 prohibits the use or driving of a motor vehicle on a highway by any person, unless there is in force in relation to such use by that person a policy of insurance, in respect of third party risks, in conformity with the requirements of the Act. The principal requirement for present purposes is that imposed by section 100, namely, that the policy must insure the insured person (usually that would be the registered owner) in respect of any liability which may be incurred by him in respect of the death of, or bodily injury to, any person, caused by or arising out of the use of the motor vehicle on a highway. In the case of a motor car which is neither a hiring-car nor a lorry, the policy must cover, without monetary limit, any such aforementioned liability which may actually be incurred. Subject therefore to any exception for which the Statute may provide, the policy in such a case has to cover the full amount of a decree entered against the assured in respect of any such liability, and, by reason of the provisions of section 105, the company would be liable to pay the full amount of the decree to the added defendants. Read together therefore the object of sections 99, 100 and 105 is to render the insurer liable, without limit, to satisfy a decree which may be entered against the insured in respect of the death of, or bodily injury to any person caused by or arising out of the use of the motor car on a highway.

Sub-section (1) of section 102 provides that " so much of the policy as purports to restrict, or attach conditions to, the insurance of any person insured thereby shall, *save as otherwise provided in sub-section (4)*, be of no effect" as respects the liability to third party risks which section 100 requires the policy to cover.

The provision in section 102 (4) which is directly relevant for the purposes of this case reads as follows :—

" (4) 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) the insured or any person employed by him ;

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

The learned District Judge has held that the condition in the present policy, in effect " that the car shall not be driven by any person other than the insured ", is a condition permitted by sub-section (4) and that accordingly in terms of section 109 the company is entitled to a declaration that it is not liable to pay the amount of the decree earlier entered. But he held for other reasons, irrelevant for present purposes, but to be discussed later, that the declaration which the insurance company is to get under section 109 will not bind the added defendants. The appeal to this Court by the insurance company has been against this latter finding, but Counsel for the added defendants in appeal has argued that in any event the condition is not one specified in section 102 (4), and that the company is therefore not entitled to the declaration which is sought in this action.

Counsel argued that the condition under consideration does not fall under any one of the paragraphs (i), (ii) and (iii) specified in clause (*b*) as reproduced above. His contention in regard to each of the paragraphs (i) and (ii) is that a condition preventing driving " by a person other than the insured " does not satisfy either paragraph because each of those paragraphs only contemplates the exclusion of persons other than, in the one case, " the insured or any person driving with his express or implied permission", and in the other " the insured or any person employed by him". Therefore, it is said, a condition is only valid under either such paragraph if its terms coincide with the terms of that paragraph. Granting this interpretation for the purposes of discussion, namely, that the exclusion of all persons other than the insured is not permitted either by paragraph (i) or by paragraph (ii), Counsel has yet to overcome paragraph (iii). This paragraph permits a condition restricting driving by any person, other than any person or persons named in the policy. If for instance it is permissible to include a condition that the car shall not be driven by anyone other than " X", there seems no reason why " X " should not be the insured owner himself; if then the insured owner can be named in the condition as the only permitted driver, the objection that in the present case he was not actually named, though in fact clearly mentioned in the policy, would be highly technical. Indeed Counsel does not rely on that technicality. But he argues that, since it is not permissible under paragraphs (i) and (ii) to specify the insured as the only permitted driver, then by implication the same is not permissible even under paragraph (iii). With respect I am not prepared to interpret the clause in this way : taken by itself, paragraph (iii) would authorise the specification of only one named driver and I am unable to read into the paragraph any qualification which is not expressed therein, but which if it exists at all can arise only by implication from the cases dealt with in paragraphs (i) and (ii).

It seems to me nevertheless that Counsel's objection to the condition must succeed, but on rather different grounds, which suggested themselves to me upon the general considerations which Counsel himself urged.

The statutory provision I am considering has no counterpart either in the English or Indian Law, although the history of our section 102 reveals that the Indian Legislature had before it *in draft form* an exception in terms similar to clause (*b*) of our section 102 (4) : that provision however was not passed into law in India. I have therefore to interpret the intention of the Legislature without the assistance of any precedent.

The Legislature's intention as appearing from sections 100 and 105 was apparently that if a person suffers death or bodily injury caused by another person's motor vehicle and 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. We see then that the Legislature not only compels the owner of a motor vehicle, however affluent he may be, to insure himself against the liability specified in section 100, but also directly compels the insurer to pay any sum payable under a decree in respect of such liability. In other words, the Legislature thus provides an assurance to other users of the highway that the damages to which they may become entitled under the ordinary law will be paid by the insurer.

The Legislature, before deciding to provide exceptions to the general principle that a policy of insurance must cover the liability in question, must surely have taken into account the normal " course of business ", so to speak, which obtains with respect to the use of motor vehicles. Users of a highway can reasonably expect that motor vehicles will normally be driven by one of the following, that is, the owner himself (usually the insured person), a person acting with his express or implied permission, or a person employed by him. Use by other persons can fairly be regarded as " extraordinary", at least for the reason that any other person would probably be committing a breach of the civil or criminal law if he were to use or drive the vehicle. If there were to be such an extraordinary use, it would not be unreasonable for a person injured to be met with the maxim " that the loss must lie where it falls ". But the maxim should not in reason be available in a case where the use of a motor vehicle has been in accordance with normal practice, and it is very doubtful whether the Legislature could have had a contrary intention.

Turning again to clause (*b*), it is certainly open to the construction that the condition it contemplates is one composite condition, and that if it is proposed to include a condition in a policy under that clause, the condition must be at least substantially that which the clause contemplates. It is in my view fair to construe the words " other than "' as being

equivalent to " who is not ". The contemplated condition would then be that the car shall not be driven by a person *who is not* :—

(i) the insured or any person driving with his express or implied permission ;

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

(iii) a person named in the policy.

In other words, clause (*b*) only permits the exclusion of persons who are not persons referred to in paragraphs (i), (ii) and (iii), or *vice versa* it is not permissible to exclude driving by the persons of the description mentioned in those paragraphs.

Let us suppose for instance that section 102 authorised a condition prohibiting the carriage in a motor car of anything other than :—

(i) persons ;

(ii) the baggage of persons carried in the car ;

(iii) goods belonging to the insured or to members of his family ;

Would there be any doubt that a valid condition cannot exclude the carriage of anything mentioned in the three paragraphs ? When clause (*a*) of section 104 permits a " condition which excludes the use of the vehicle . . . .

. . . . (ii) for business purposes, *other than* the business purposes of the insured ", it is quite clear that the words " other than " precede a specified purpose which *cannot* be excluded.

A comparison with clause (*c*) of sub-section (4) is useful in this connection. That clause refers to a condition " which 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 licence has been cancelled or suspended or who is for the time being disqualified for obtaining a driving licence ; ".

In clause (*c*) the object of the Legislature is perfectly clear. The *condition there contemplated* is one providing that the vehicle ***shall not be driven*** BY any or all of the persons who are described in the three paragraphs of that clause. In other words, the three paragraphs comprise a description of persons who may be specified in the policy as prohibited or excluded drivers. The structure of clause (*b*) is however quite different. The condition which this clause permits is that the vehicle ***shall not be driven*** BY PERSONS OTHER THAN the persons described in the three paragraphs of clause (*b*). Those three paragraphs therefore, unlike the

three paragraphs in clause (*c*), comprise, *not* a description of persons who may be specified in the policy as prohibited or excluded drivers, but rather a description of persons who may not be so specified. It is only the third paragraph of clause (*b*) which is optional. Two classes of persons must always be "permitted" drivers, i.e., (i) the insured or persons driving with his permission and (ii) persons employed by the insured; but if there is a condition excluding all others, some person or persons can be specifically named under paragraph (iii) as being nevertheless not excluded.

Mr. Perera for the company has referred to one matter which appears to militate against the construction I place on clause (*b*), namely that, if paragraphs (i), (ii) and (iii) were intended to be a composite description of persons who may not be excluded, there should have been no repetition in paragraph (ii) of reference to the insured since the necessary reference had already been made in paragraph (i). While agreeing that there is no convincing answer to this criticism, I am unwilling to draw any strong inference from what might well have been a comparatively minor grammatical error. Save for this one apparent flaw in the language, there is nothing in clause (*b*) repellent to the construction that it was intended to refer compositely to the content of a permitted condition. Indeed, even if paragraphs (i) (ii) and (iii) were to be read disjunctively as permitting separate conditions and the restriction of driving only to one person, the language would still be open to the same objection that the words "the insured" are unnecessarily repeated. To read those paragraphs disjunctively would to my mind lead to an unreasonable conclusion, going a long way contrary to the intention of the Legislature as expressed in the "principal" sections 100 and 105. In my opinion the Legislature did not intend, by sanctioning a condition excluding the driving of a motor vehicle by persons who might normally and reasonably be expected to be driving it, to whittle down the scope of the protection assured to other users of the highway.

In the present case the accident occurred while the car was being driven by a person who had the implied permission of the insured to drive the car. A condition excluding driving by a person of that description being, as I hold, not permitted by section 102, does not therefore relieve the insurer from the obligation imposed by section 105 and is not a condition the breach of which entitles the insurer to a declaration under section 109.

In view of this conclusion I need refer only briefly to the other point involved in this appeal. Section 109 enables an insurer to obtain a declaration which will free him from the obligation imposed by section 105 to satisfy a decree previously entered against the insured person. But one requirement specified in the proviso to section 109 has to be satisfied if the insurer is to become entitled to the benefit of such a declaration. That requirement is that within a limited time the insurer must give notice (of his proceedings for the declaration) to the person who was

the plaintiff in the action in which the earlier decree (against the insured person) was obtained. In that notice the insurer must specify "the breach of condition on which he proposes to rely".

In the present case the insurer, by his letter P31 of 15th November 1954 gave notice that he was filing an action for a declaration under section 109 and stated that the assured "has committed a breach of a condition of the policy which is also a condition enumerated in section 102 (4) (*b*) of the Motor Traffic Act in that he caused or permitted the said car to be driven at the time of the accident by a person other than himself *in terms* contrary to the policy". In my opinion, which is contrary to that formed by the learned District Judge, the insurer adequately and even completely specified in this letter the breach of condition on which he proposed to rely. It was not necessary, as the learned Judge thought, that the insurer should have specified the breach by reference to the particular sub-head in section 102 (4) (*b*). What section 109 requires is that the former plaintiff should be given factual particulars of the breach of condition to be relied upon. The section does not in my view require the insurer to instruct the plaintiff as to the relevant provision of the law which is alleged to sanction the inclusion of the particular condition in question.

There is nothing in my view which conflicts with the view expressed in *The Ceylon Insurance Co. Ltd. v. Richard et al.*[1]. The notice given in that case was clearly defective because it merely stated that there had been "a breach of a condition" and did not specify in any way either what the condition was or in what the breach had consisted. My conclusion on this point is however of no assistance to the company because despite the sufficiency of their notice their action for a declaration must fail.

In pursuance of his conclusion that the condition in the policy is one enumerated in section 102 (4) (*b*) of the Act, the learned District Judge has entered decree granting to the plaintiff a declaration "that the defendant has committed a breach" of that condition and is not liable to indemnify the defendant in respect of the accident. We are not called upon in this appeal to decide whether the abovementioned declaration was correctly granted, because the defendant has not appealed against that decree; and for that reason we are unable to interfere with that declaration, whatever may be its worth. I feel constrained however to point out that the effect of sub-section (1) of section 102 is that a condition in a policy, which is not a condition specified in sub-section (4) of that section, "shall be of no effect as respects any such liability as is required to be covered by section 100 (1) (*b*)". The consequence in my opinion might well be that a condition of the description now in question is of no avail, not only as against a "third party", but also as against the insured himself. Considering that Counsel for the defendant did submit in the lower Court that the condition was null and void, it is surprising that the defendant's advisers failed to appeal against the judgment and decree.

[1] *(1951) 53 N. L. R. 64.*

The decree further orders the plaintiff to pay to the added defendants the amount of the decree and the costs in the earlier case No. 11,730, D. C. Jaffna. In view of the conclusions I have reached on the appeal, this order against the plaintiff gives effect substantially to the provisions of section 105 of the Act and can for that reason be properly allowed to stand. In the result the decree entered in the District Court is affirmed and the appeal is dismissed with costs payable by the plaintiff to the added defendants.

SINNETAMBY, J.—I agree.

Appeal dismissed.