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THE LIABILITY OF THE NOMINAL DEFENDANT FOR THIRD PARTY CLAIMS ARISING OUT OF MOTOR VEHICLE ACCIDENTS IN SOUTH AUSTRALIA

INTRODUCTION

South Australia still retains a fault based motor vehicle accident personal injury compensation scheme[1] and the legislation provides for the existence of the office of the Nominal Defendant. In general it is the function of this official to respond, as defendant, to claims arising out of motor vehicle accidents and to pay a plaintiff's personal injuries damages aware in two main situations:

(i) where the injuries in question were contributed to by the fault of the driver of a vehicle, the 'identity of [which] vehicle after due search and enquiry cannot be ascertained'[2]

(ii) where the injuries were caused by 'negligence in the use of an uninsured motor vehicle on a road'.[3]

It is difficult to ascertain with certainty the full scope of the Nominal Defendant's obligations arising out of the latter circumstance. It is essentially a matter of statutory construction but a recent decision of the South Australian District Court has highlighted that the proper ambit of the legislation in this area is most unclear and in some respects may not be as wide as it should be. This is a matter of some concern given that the philosophy behind the statutory creation of the Nominal Defendant's office is that members of the public injured by the fault of another through the use of a motor vehicle, should not be put at risk of being reliant solely on a personal action against a 'man of straw'. The well accepted policy is that motor vehicles are here in abundance to serve the needs of man and that, at least where fault can be shown,[4] the inevitable costs in the nature of personal injury and death ought to be met from the public purse. The problems of statutory interpretation that are to be discussed in this article arise from the meaning of the term 'uninsured motor vehicle'. The problem seems to be peculiar to the legislation in South Australia.

UNINSURED MOTOR VEHICLE

In *Klante v Nominal Defendant and North*[5], Judge Lowrie of the South Australian District Court held that an action was not available against the Nominal Defendant pursuant to s116 of the Motor Vehicles Act 1959 (SA) in circumstances where the plaintiff's injuries were caused (in part)

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1 *Motor Vehicles Act* 1959 (SA) Part IV.

2 The wording is that contained in *Motor Vehicles Act,* 1959 (SA) s115(1)(b).

3 Ibid s116(2).

4 A similar argument is propounded to support the introduction of 'no fault' schemes of compensation for motor vehicle accidents, eg: *Transport Accident Act*, 1986 (Vic), *Motor Accidents (Liabilities and Compensation) Act*, 1973 (Tas) and *Motor Accidents (Compensation) Act*, 1979 (NT). Cf; the NSW 'Transcover' scheme which is not no fault based: *Transport Accidents Compensation Act* 1987 (NSW).

5 (1987) 138 LSJS 23.

by the negligent driving by the second defendant, North, of an uninsured tractor drawing an uninsured combine on a public road. The decision was an unfortunate one on its facts and if left to stand demonstrates a gap in the South Australian scheme, as his Honour himself pointed out.[6] The case will be considered further below, but first it is necessary to consider in some detail the relevant provisions of the Act. It is argued that on any reasonable interpretation of the legislation (including that adopted in *Klante*) there are serious ambiguities and inconsistencies which merit the attention of the legislature. However, an interpretation of the current provisions will be offered that more closely adheres to the text than that put forward in *Klante* and which has the added advantage of being consistent with the perceived policy underlying this part of the legislation.

In the discussion which follows it should be remembered that Part IV of the Act (ss99-134) establishes a regime for the operation of a compulsory third party personal injury insurance scheme. Section 102 provides in part:

> A person shall not drive a motor vehicle on a road or on a wharf unless a policy of insurance complying with this Part is in force in relation to that vehicle: Provided that this section shall not apply in respect of a tractor being driven in pursuance of the provisions of section 12(1) or 13 until the Governor by proclamation[7] declares that this section shall so apply. No such proclamation shall be made until the Governor is satisfied that the committee appointed under section 129 has fixed a uniform rate of premium for insurance in relation to farm tractors throughout the State.

Motor vehicle is very widely defined in Section 5 to mean:

> (a) a vehicle, tractor or mobile machine driven or propelled or ordinarily capable of being driven or propelled by a steam engine, internal combustion engine, electricity or any other power, not being human or animal power;
>
> and
>
> (b) a caravan or a trailer;
>
> but does not include a mobile machine controlled and guided by a person walking, or a vehicle run upon a railway or tramway.

And the term 'trailer' is also widely defined in the same section to mean:

> a vehicle, or a machine on wheels, which is not self-propelled, and is constructed or adapted for being drawn by a motor vehicle, but does not include the rear portion of any articulated motor vehicle.

It is only whilst being driven on a road or a wharf that a motor vehicle needs to be so insured. Section 5 includes also a definition of 'road'

> (a) a road, street or thoroughfare;
>
> and
>
> (b) any other place commonly used by the public or to which the public are permitted to have access.

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6 Ibid at 33.

7 As at the date of writing, no such proclamation had been made.

In Judge Lowrie's opinion neither the tractor nor the combine were required to be insured pursuant to s102. It followed that neither was an 'uninsured vehicle' within the terms of s116(1) and it further followed that no action lay against the Nominal Defendant.

The Statutory Registration Requirements and Exemptions

It is the interaction of s102 with the statutory registration requirements in Part II (ss7-71a) which obscures the scope of the Nominal Defendant's potential liability under s116.

Section 9 provides:

> A person shall not drive a motor vehicle on a road unless that vehicle has been registered under this Act and the registration thereof is for the time being in force: Provided that it shall be a defence to a charge under this section to prove that the motor vehicle was driven in circumstances in which this Act or the regulations permit a motor vehicle to be driven without registration.

The impact of this provision is clear. Third party personal injury insurance (hereafter 'third party insurance') is commonly taken out with the State Government Insurance Commission at the same time as this registration is effected. Indeed the state registration authority makes its resources and administrative procedures available for this insurance to be effected. The Act also makes provision for third party insurance to be taken out with an approved insurer other than the SGIC,[8] but again it is to be effected simultaneously with the vehicle registration and through the agency of the registration authority.[9] Nevertheless the registration and the third party insurance of a vehicle are entirely separate. Section 9 only creates the offence of driving an unregistered vehicle on a road.

There are various exemptions from this Section 9 obligation including those provided for in ss10 to 13. These exemptions are wide ranging and cover such things as vehicles bearing trader's plates, fire fighting vehicles, farm tractors and implements, motor vehicles on wharfs, self-propelled wheelchairs and lawn mowers, and vehicles adapted for the making of fire breaks or destroying noxious weeds. However, the exemptions apply only in narrowly and strictly defined circumstances, for example, by s12(1) a tractor may be driven on a road without registration in various circumstances but only within 40 kilometres of a farm occupied by the owner. However, by s12(2), where there is no workshop at which tractor repairs can be efficiently carried out within 40 kilometres of the farm, then a tractor can be driven without registration, further than 40 kilometres, for the purpose of proceeding to the nearest workshop. It is in the drafting of these exemptions from registration that a curiosity emerges. Four stand out because they purport to permit a 'motor vehicle' to be driven on a road in certain circumstances without registration *or insurance*. These concern the self-propelled wheelchair and lawn mower exceptions[10] and the circumstances set out in ss12(3) and (4):

> (3) A farm implement may without registration or insurance

8 *Motor Vehicles Act* 1959 (SA), s101.
9 Ibid s99a. However all third party insurance is now taken out with the SGIC. See Bollen *Motor Vehicle Law (SA)* par 3273.
10 Section 12a(2), (3).

be drawn by a tractor or other vehicle on roads within 40 kilometres of a farm occupied by the owner of such tractor or motor vehicle.

(4) A self-propelled farm implement may be driven without registration or insurance on roads within 40 kilometres of a farm occupied by the owner of such self-propelled implement: Provided that, if there is no workshop where repairs can be efficiently carried out to the self-propelled farm implement within 40 kilometres of the farm occupied by the owner of the self-propelled farm implement, the self-propelled farm implement may be driven as aforesaid on roads more than 40 kilometres from that farm for the purpose of proceeding to the nearest workshop where such repairs can be efficiently carried out and returning to the farm from that workshop.

The term 'farm implement' is comprehensively defined in subsection (5), but the extent of this definition, apart from noting its wide ambit, is not of present relevance.

The following observations concerning the interaction of the Section 9 prohibition and the various exemptions from it noted above are offered:

(a) The term 'insurance' as used in these provisions is nowhere defined. However, the requirements of Part IV concerning the positive obligation imposed to take out third party insurance are tied to the term 'a policy of insurance' which for the purposes of Part IV *only* is defined in Section 99 as 'a policy of insurance that complies with this part'. Is the term 'insurance' as used in Part II to mean the same thing? If not, what does it mean?

(b) Why have particular types of vehicles in particular circumstances been granted an exemption in Part II from the requirement of Part IV to have third party insurance, if that is what the subsections purport to confer? The s12(3) exemption at first blush is relatively easy to explain, because the exemption only relates to a farm implement which is being drawn by a tractor or motor vehicle. Such vehicles are only exempted (under Part II) from being driven without registration in certain circumstances. Given the broad ambit of the insured risk contained in the standard form third party insurance policy in force[11] the assumption

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11 The policy is that contained in the Fourth Schedule to the Act. The description of the insurable risk is:

'in respect of all liability that may be incurred by the owner or other person in respect of the death of, or bodily injury to, any person caused by, or arising out of the use of, the vehicle in any part of the Commonwealth.'

However, s99(3) of the Act (inserted in 1986) provides:

(3) For the purposes of this Part and the fourth schedule, death or bodily injury shall not be regarded as being caused by or as arising out of the use of a motor vehicle if it is not a consequence of:
(a) the driving of the vehicle;
(b) the parking of the vehicle;
or
(c) the vehicle running out of control.'

At the time of writing a further amendment is before the SA Parliament which if passed would have the effect of replacing sub paragraph (b) with

'a collision or action taken to avoid a collision, with the vehicle when stationary.'

must be that anyone injured by a drawn farm implement would have a cause of action against the owner or driver of the tractor, or motor vehicle concerned, itself an insured vehicle.[12] However, whilst this appears to be a satisfactory explanation, it fails to address the specific exemption, this time as to third party insurance, afforded to tractors in certain circumstances, by s102. This will be considered further below.

The exemption from 'insurance' conferred on self-propelled wheelchairs and lawn mowers and self-propelled farm implements in certain limited circumstances is not so readily explainable. It may be the case that this represents a policy decision based on the supposition that such vehicles will operate on the roads in the circumstances described only rarely and that they are intrinsically less dangerous to other road users, than are motor vehicles generally, including tractors and the other types which as far as s12 is concerned are exempted only as to the registration requirement.

The conflict with s102(1)

Notwithstanding, the suggested explanation above for the position ostensibly established by ss9-13, there would appear to be a clear conflict with the terms of s102(1) which for ease of reference is repeated here:

> (1) A person shall not drive a motor vehicle on a road or on a wharf unless a policy of insurance complying with this Part is in force in relation to that vehicle: Provided that this section shall not apply in respect of a tractor being driven in pursuance of the provisions of section 12(1) or 13 until the Governor by proclamation declares that this section shall so apply. No such proclamation shall be made until the Governor is satisfied that the committee appointed under section 129 has fixed a uniform rate of premium for insurance in relation to farm tractors throughout the State.

The following observations concerning this subsection are offered:

(a) The clear intention is to ensure that the required third party insurance is in force with respect to all motor vehicles driven on a road, save for one limited exception. The literal meaning of the provision supports this.

(b) In this respect, there is a clear conflict between s102(1) and s12(4) (Self-propelled farm implements), s12a(2) (Self propelled wheelchairs) and s12a(3) (Self-propelled lawn mowers) which needs to be resolved. *Klante's* case, it will be recalled, did not concern a self-propelled farm implement, but one drawn by a tractor.

(c) Section 5(2) provides:

> For the purposes of this Act, a person who is driving a motor vehicle and towing another motor vehicle shall be deemed to be driving both motor vehicles.[13]

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12 Cf *Polst v Giffen* [1960] SASR 155 at 156 (Napier CJ), *Saturno v Dunsmore* (1981) 28 SASR 4 at 7 and *O'Neill v The Nominal Defendant* (1961) 61 SR (NSW) 729.

13 A person at the wheel of the towed vehicle will also be a driver of that towed vehicle: *Williams v Ure* (1984) 36 SASR 173; *Bassell v McGuiness* (1981) 29 SASR 508; but cf *Hampson v Martin* [1981] 2 NSWLR 782.

Thus, there would also appear to be a clear conflict between s102(1) and s12(3) (drawn farm implements).

(d) Section 12(1) and, by implication, section 13, exempts tractors in the various circumstances outlined from the registration requirement and as such sits happily alongside s102(1). These circumstances include, for example, where the tractor is being driven on a road within 40 km of a farm occupied by the owner. Nevertheless the legislature has seen fit to grant a specific third party insurance exemption with respect to tractors in those same circumstances by virtue of the proviso to s102(1). With that we can have no quarrel apart from ruefully noting that what was obviously intended as a temporary derogation from the underlying philosophy and purpose of Part IV has been allowed to continue since 1959, when the present Act was originally passed.

(e) Given that the exemptions from 'insurance' contained in Part II do refer to insurance of the type ostensibly required by s102 in Part IV, how is the conflict between Part II and s102 to be resolved? More particularly must drawn farm implements, self-propelled farm implements, wheelchairs and lawn mowers comply with the insurance requirements of s102? The question is of importance not only in order to determine whether the driver commits an offence (the penalty is relatively modest). Section 116 confers a right to sue the Nominal Defendant only where 'negligence in the use of an uninsured motor vehicle on a road' can be shown. 'Uninsured Motor Vehicle' is defined for those purposes in s116(1), in so far as is relevant, as:

> '...a motor vehicle in relation to which no policy of insurance *as required by this Part* is in force...(emphasis added).'

In *Klante*, the plaintiff argued that the emphasised words were adjectival only, that is, that all that had to be shown was that no insurance of *the type* required by Part IV in fact existed. This was, with respect, rightly rejected by Judge Lowrie. In order to join the Nominal Defendant it must be shown that the vehicle and circumstances were such that third party insurance was required to be taken out pursuant to Part IV, but was not taken out. Thus, the resolution of the conflict between s102 and ss12(3), (4), and 12a(2), (3) can be critical to a plaintiff's entitlements.

Resolution of the Conflict between relevant parts of Part II and s102

In *Klante* this conflict concerned a drawn farm implement. The second defendant was driving his tractor along a public road between two sections of his farm. The tractor was drawing a combine, which was wider than the tractor. The facts were set out and examined in careful detail in the judgment but, sufficient for present purposes, it was found that the plaintiff when driving in the opposite direction collided with the combine. The cause of the accident was attributable 80% to the second defendant's negligence and 20% to that of the plaintiff. The combine carried no third party insurance and in these circumstances, Judge Lowrie held that the plaintiff had no cause of action against the Nominal Defendant. His Honour correctly held that there was no requirement to insure the *tractor* in the circumstances, relying on the proviso contained in s102(1). However, he went on to hold that a farm implement drawn by a tractor need not be insured either. The reasoning as reported[14] is brief and not entirely clear:

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14 (1987) 138 LSJS 23 at 33.

> '[Counsel for the plaintiff] also pointed out that Section 102 only specifically mentioned 'tractor' and no other farm implement. The initial words in Section 12 refer only to 'tractor' but farm implements being drawn by tractors are described in sub-paragraph (c) and (3). He contended that as 'farm implements' are not stated in Section 102 thus the combine should be viewed as similar to a trailer and referred to various interpretations and deeming provisions in Sections 5(1) and (2) of the Act. Thus a farming implement should be insured as distinct from the tractor.
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> I believe this submission is answered by the very wording of Section 12.
>
> Section 12 must be read with Section 102.
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> The effect of these sections is that a tractor may draw a farm implement on roads within the required distance of 40 kilometres of the farm without registration or insurance. Consequently, as no insurance is required by the tractor or farm implement and by reason of the wording of Section 116, there is no basis in this situation to join the Nominal Defendant.'

It is respectfully submitted that the better view is that s102(1) does, despite the apparently contradictory terms of s12(3), require a drawn farm implement to be insured. It is submitted that the literal terms of s102 should take precedence over ss12, and 12a, that is, that the only exemption from the insurance requirements should be tractors within the terms of ss12(1) and 13, for the following reasons.

1.Section 12 is a general exemption which falls in Part II of the Act dealing with *registration* requirements, whereas s102 is concerned specifically with the question of *compulsory third party* cover. As argued earlier, registration and compulsory third party cover are two separate requirements. The former is dealt with comprehensively in Part II of the Act and the later also ostensibly comprehensively in Part IV of the Act.

2.Section 102 makes special reference to the particular case of tractors but makes no special allowance for other farm implements, self-propelled or otherwise. The legislative intent of s102 is to derogate as little as possible from the obligation to hold third party cover. This approach is supported by the definition of 'uninsured motor vehicle' in s116(1)a 'a motor vehicle in relation to which no policy of insurance *as required by this Part* is in force. Section 102 is contained in *this part*, namely Part IV, and this section only makes limited exception in the case of tractors.

3.The text of s102 itself supports the proposition that the offence of driving an uninsured vehicle can be committed notwithstanding that the vehicle is exempted by virtue of ss12 or 13. Firstly, the penalty for breach of s102(1) is stated to be a fine and

> '...(except where the motor vehicle concerned was being driven on a wharf for the purpose of loading or unloading cargo, *or being a motor vehicle of any of the classes specified in section 12 or 13 was being driven for any of the purposes and under the conditions described in that section* [sic - those sections]) disqualification from holding and obtaining a driver's licence...(emphasis added).'

In other words, the penalty will vary, where ss12 or 13 apply but the offence against s102(1) still will have been committed. The emphasised wording clearly encompasses the circumstances of s12(3) (drawn farm implements) and s12(4) (self propelled farm implements). Secondly, there is further provision to the effect that the penalty for breach of s102(1) is not to be mitigated *except*:

> '(a) ...
> (b) where the offence consists in driving a motor vehicle of *any of the classes specified in section 12 or 13 for any of the purposes and under the conditions described in that section*, [sic those sections?] or in driving a motor vehicle on a wharf for the purpose of loading or unloading cargo, or where the offence relates to an uninsured trailer, the penalty for the first offence shall be not more than fifty dollars, and for a subsequent offence, not more than two hundred dollars. (emphasis added)'

Again, the emphasised wording clearly encompasses the circumstances envisaged by s12(3) and (4) and implies that there will be a breach of s102(1), notwithstanding the terms of s12. It is pointed out that this evidence internal to s102 makes no reference to s12a(2) (self-propelled wheelchairs) or (3) (self-propelled lawn mowers). The case for compulsory third party insurance of those vehicles is correspondingly weaker, being reliant only on arguments (1) and (2) above.

4. Where the legislation is ambiguous, to deny rather than permit the existence of exemptions from the requirement of insurance, better accords with the writers' understanding of the policy underlying Part IV of the Act. Further, the approach taken in *Klante* appears to disclose a serious anomaly arising from the terms of s115 which reads in part:

> '(1) Where -
> (a) death, or bodily injury, has been caused by, or has arisen out of the use of, a motor vehicle;
> and
> (b) the identity of the vehicle has not after due inquiry and search been ascertained,
> a person who could have obtained a judgment in respect of that death or bodily injury against the driver may recover by action against the nominal defendant the amount of the judgment that he could have received against the driver.'

It would appear that were one of the types of vehicles in the relevant circumstances under discussion, simply to drive off and its identity after due inquiry and search not be ascertainable, a person in the position of Mrs Klante would be entitled to sue the Nominal Defendant. This would be so notwithstanding the fact that had the vehicle stopped and been identified, as in *Klante*, such an entitlement would be lost, given the interpretation of s116 applied in that case. Of course in the latter circumstance, the plaintiff would have a cause of action against the now identified driver. Nevertheless, if the driver, *ex hypothesi* uninsured, was a man of straw, the plaintiff would prefer never to have known of him. It seems curious that the availability of the statutorily granted, superior right of action, should turn solely on whether or not an uninsured driver stops at the scene of the accident.

It is conceded that a necessary consequence of the construction of the relevant sections suggested above, is that the words 'or insurance', where

they occur in ss12 and 12a, are rendered superfluous unless some meaning other than third party insurance within the terms of Part IV can be ascribed to them. It must also be acknowledged that it is most unlikely that the exemption granted refers to say, comprehensive or third party property insurance, since the legislature nowhere imposes an obligation to insure in this manner on the owners of motor vehicles. However, and equally, the alternative reading suggested in *Klante* sits most uncomfortably with the clear terms of s102(1) and (2).

Parliamentary Debate

The extent to which extrinsic evidence, such as Parliamentary debates, can be looked at, to assist in the interpretatioin of South Australian legislation is unclear.[15] Nevertheless a reading of the debates[16] on the Motor Vehicles Bill 1959 (SA) would be instructive should any consideration now be given to amending the legislation in this area. The debates in both Houses were hotly contested and were marked by misconceptions, lack of imagination and a tenacious adherence on the part of some members to vested interests. However, one thing is clear from the debates. All members believed and intended that the exemptions granted in Part II with respect to 'insurance' meant that vehicles which qualified could be driven on a public road without third party insurance having been obtained. In the original bill, this concession was to be directly provided for with respect to tractors by virtue of s12(1). It was deleted in the committee stage in the lower house.

Subsection 12(3) (drawn farm implements) passed through unscathed, the exemption from insurance remained. Whether or not the reason for this differential treatment was that suggested earlier in this article, was not adverted to in debate. However, the subsequent amendment to s102 which in effect restored the tractor exemption (see below) clearly renders even this explanation for the retention of the s12(3) insurance exemption, nugatory. Sub-section 12(4) (self-propelled farm implements) was inserted during the passage of the bill through the Parliament. An attempt to have the words 'or insurance' deleted so as to retain consistency with the tractor provisions was defeated. The arguments which won the day centred around the belief that such implements were inherently less dangerous on the road than were tractors which could reach 25 or 30 miles per hour. A factor not discussed was that whilst farm implements move relatively slowly, other vehicles which may collide with them travel much more quickly. Many accidents are caused by the need for a fast moving vehicle to take evasive action in a situation contributed to or caused by a slower moving vehicle. This will be the case particularly in country regions where traffic tends to travel more quickly than in the city but can also apply to the motorised wheelchair and lawn mower situation. The Playford administration was anxious to include in the Act

15 There is no State legislation equivalent to the *Acts Interpretation Act* 1901 (Cth) s15AB, but for the position at Common Law see: *Commissioner for Prices and Consumer Affairs (SA) v Charles Moore (Aust) Ltd* (1977) 14 ALR 485 at 506 (Mason J), *Victoria v Commonwealth* (1975) 7 ALR 1 at 38 (Mason J) but cf for example: Sholl J in *Re Armstrong and State Rivers and Water Supply Commission (No 2)* [1954] VLR 288; Griffith CJ in *Sydney Municipal Council v Commonwealth* (1904) 1 CLR 208; 213-214; Mason J in *Vacando v Commonwealth* (1981) 37 ALR 317 and *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd* (1982) 39 ALR 521.

16 (1959) Volume 2, Parliamentary Debates SA, *passim*.

as many financial concessions to the farming community as possible. The Act is still littered with concessions to primary producers. There may have been and still are, good reasons for this. Nevertheless, to argue, as was done, that farmers should not be forced to bear the added expense of third party insurance on farm vehicles, yet constituted a group in the community the members of which could be counted on to discharge any damages award made against them, smacks at best of naivete, at worst of hypocrisy. A further problem for the Government was that it thought that third party insurance premiums on tractors would vary markedly depending on the locality, whereas the extent of the risks presented by the infrequent forays of tractors onto the roads were uniformly small. Thus, having lost the battle to exempt tractors completely in s12, the government managed to retrieve the position for the farm lobby by an amendment to s102. The offence of driving an uninsured tractor was not to apply until a uniform premium for tractors was determined by an insurance premiums committee to be set up under s129. No such determination has been made to this day, although it was implied during debate that this should be a matter of a few weeks or months.

At no time during the debates was it discussed that subsections 12(3) and (4) in the final form conflicted with the general requirement of s102. During debate, the penalty provisions of s102 were amended, again to protect the tractor owner, once a uniform premium was set and it became an offence to drive an uninsured tractor on a road at all. The intention seems to have been that a farmer who thereafter breached s102, should not lose his driver's licence and should be liable for a lesser fine. Whilst this was occasioned by the amendment to s12 which when brought into effect would require tractors to be insured, the wording adopted in s102 was and remains (as argued above) sufficiently wide so as to suggest that other farm vehicles would still be in breach of s102, notwithstanding subsections 12(3) and (4).

Section 116 was also inserted in the Act during debate. It was a proposition novel to many members of the South Australian Parliament in 1959, that the Nominal Defendant should be liable not only where a vehicle was unidentified but also where it was uninsured. The debate on this provision clearly supports the interpretation adopted in *Klante* that 'uninsured' for these purposes covers only those vehicles required to be insured under Part IV. There is no doubt that all members understood the provision to operate in this way. However, surprisingly no consideration was given by either side to an expansion of the Nominal Defendant's role to cover accidents involving vehicles which, despite the protestations of many members, were to be exempted from the compulsory insurance requirement.

The impression gained from a reading of the debates in both Houses is that this Act shows the hallmarks of rather far reaching amendments having complex ramifications, being made to various provisions in isolation, in haste and without a full appreciation of the relevance of other related provisions.

Other Jurisdictions

It would appear that the lacuna in the South Australian scheme, illustrated by *Klante*, renders that State unique in this area, with the possible exception of Queensland should legislation, presently mooted, proceed. The Legislatures of Victoria, Tasmania and the Northern Territory

have now enacted so called 'no-fault' compensatory schemes for motor vehicle accident victims and New South Wales has enacted its Transcover Scheme[17] and no more shall be said about those jurisdictions, other than that the issue of whether or not a vehicle is insured, should no longer be of significance to a claimant, in respect of an accident occurring after the relevant scheme came into force. In each of the other jurisdictions, the terms of the comparable legislation are such as to leave little room for the problem to occur. In the Australian Capital Territory, s85(1) of the Motor Traffic Ordinance 1936 provides:

> 'Every claim for damages in respect of the death of, or bodily injury to, any person caused by or arising out of the use of an uninsured motor vehicle in a public street shall be made to the nominal defendant and not to the owner or driver of the uninsured motor vehicle and any proceedings to enforce any such claim for damages shall be taken against the nominal defendant and not against the owner or driver of the uninsured motor vehicle.'

However 'uninsured motor vehicle' is defined in s49 (sufficient for present purposes) as a motor vehicle not being one in relation to which there is in force at all material times a third-party policy which complies with the requirements of the ordinance. It would seem that the nominal defendant is to be liable within the terms of s85(1) whether or not the relevant vehicle was required by the Ordinance to carry third party insurance. In addition, the exemptions provided for in the South Australian Act do not have their equivalent in the ordinance.

In Western Australia, compulsory third party insurance is required by s4 of the Motor Vehicle (Third Party Insurance) Act 1943. By s8, a judgment obtained against the driver at fault can be enforced against the State Government Insurance Commission (formerly against the Motor Vehicle Insurance Trust), where the vehicle in question was uninsured. It is only those motor vehicles required to be licenced (registered) under the Road Traffic Act 1974 which must carry insurance. Under that Act the only exception relevant for present purposes is contained in s15(2)(a) and (b):

> (a) an agricultural implement being towed on a road by another vehicle or
>
> (b) an unlicenced vehicle of any type being towed on a road by a tow truck, as described in the first schedule.
>
> If the towing vehicle or tow truck, as the case requires, is the subject of a vehicle licence or permit.

In this situation, because the *towing* vehicle would be either insured or, uninsured within the meaning of that term in s8, any person injured should not be prejudiced by the fact that the *towed* vehicle may not also be so. This argument was developed earlier in the context of the South Australian s12(3) exemption. However, there, unlike in Western Australia, the accident victim cannot be certain that an uninsured towing vehicle, for example a tractor, will have the nominal defendant standing behind it. Section 19 of the Road Traffic Act makes provision for farming vehicles other than certain types of tractors to be licenced on payment

17 The various schemes are cited in n 4.

of no fee in certain circumstances including, where the vehicle will only travel on a public road when passing from one part of a farm to another. In addition, subsection 19(15) permits a tractor in similar circumstances to be licenced upon payment of a concessional fee. However, these vehicles must still be licenced and thus the subject of third party insurance under the Motor Vehicles (TPI) Act.

In Queensland, the position is to be ascertained by a consideration of the interaction of the Main Roads Act 1920, the Main Roads Regulations 1933, the Motor Vehicles Insurance Act 1936 and the Motor Vehicles Control Act 1975. This interaction is complex. Fortunately, following the Queensland Full Court decision in *Nominal Defendant (Queensland) v Brunner*[18], it need not be detailed here. That case concerned facts analogous to those in *Klante*. An unregistered forklift owned by the first defendant was driven negligently in a public place as defined in the legislation,[19] the Brisbane Markets at Rocklea. As a consequence, the plaintiff was injured. The Nominal Defendant contended that the forklift did not need to be registered[20] and thus was not an 'uninsured motor vehicle'[21] such that the Nominal Defendant could be joined. This argument was rejected. Thomas J concluded his analysis of the legislation with:[23]

> 'In short, if a person is going to use a motor vehicle (as defined) in a public place (as defined) he must register it under that Act and Regulations. If he does so he will inevitably take out third party insurance under the Motor Vehicles Insurance Act.'

In *Mason v Nominal Defendant*[24], the Full Court applied similar reasoning and arrived at (obiter) much the same conclusion with respect to the use of a vehicle on a road. As such, Thomas J was able to observe[25]

> 'that although the matter could have been made clearer and have been expressed in a simpler way, it is possible to see a measure of harmony between the various enactments. The Main Roads Act and Regulations require registration in respect of vehicles used on roads. The Control Act requires registration in respect of vehicles used in public places, and the requirement is that such vehicles be registered under the Main Roads Act and Regulations. The Motor Vehicles Insurance Act requires third party insurance cover in respect of registered vehicles. The Nominal Defendant provisions in that Act (as amended in 1975) provide a defendant and a fund to cover those cases where motor vehicles, although required to be registered under the Main Roads Act or the Control Act have not in fact been registered and are accordingly "uninsured motor vehicles". In this way all members of the public injured by a motor vehicle on a road or in a public place have the benefit of being able

18 (1987) 5 MVR 165 and cf *Mason v Nominal Defendant* (1986) 5 MVR 62.
19 *Motor Vehicles Control Act* 1975, s4.
20 Pursuant to the *Main Roads Act* and Regulations (roads) or the *Motor Vehicles Control Act* (public places).
21 Within the terms of the *Motor Vehicles Insurance Act* s4F(1)(b)(ii).
22 Pursuant to s4F(2).
23 (1987) 5 MVR 165 at 168.
24 Compare n 4 and accompanying text.
25 (1986) 5 MVR 62 at 64ff.

> to bring an action against an insured defendant or against the Nominal Defendant.'

Brunner is of interest for two reasons. First, it seems that, as in Western Australia and the Australian Capital Territory, the Queensland Legislature has been able to avoid members of the public being exposed to the type of risk to which Mrs Klante was exposed.[26] However, the second point of interest is that Legislature's response to the decision in *Brunner*. The case has been considered to give rise to serious consequences. As Thomas J noted at the beginning of his judgment[27]

> 'We were informed by counsel that the case is of some importance to the insurance industry in that its resolution will determine whether the practice of voluntary public risk insurance will continue in respect of vehicles used in public places other than roads, or whether it will be necessary that vehicles so used be registered under the Main Roads Act and Regulations and consequently compulsorily insured pursuant to the Motor Vehicles Insurance Act 1936.'

We understand that legislation will shortly be introduced into the Queensland parliament which if passed will have the effect of ensuring that all off-road vehicles such as forklifts, tractors, front end loaders and golf buggies used as provided for in the proposed legislation will not have to be registered.[28] The consequence of this, as the legislation presently stands, is that compulsory third party insurance will not be required either, in which case it will not be possible to join the Nominal Defendant. Whilst financial considerations may be the reason for this change of approach, in our view it would seem to be a retrograde step. The Queensland public is far better served by a compulsory third party scheme and access to the nominal defendant in the case of 'uninsured' vehicles operating in public places, rather than having to rely on an owner of such a vehicle taking out voluntarily public risk insurance.

Conclusion

The present position following *Klante*, in South Australia, is that drawn farm implements, self-propelled farm implements, self-propelled wheelchairs and lawn mowers do not need to be insured in accordance with Part IV of the Act before being driven on a road in the circumstances described in ss12, 12a and by implication 13. The necessary consequence of this is that persons injured by such vehicles and who can demonstrate fault are precluded from bringing an action pursuant to s116 against the Nominal Defendant and will be left only with a cause of action against the driver or owner of the vehicle concerned. This cause of action in practice often will be worthless. This stands in stark contrast with the position which seems to apply in the other Australian jurisdictions although the ambit of the Queensland changes proposed following *Brunner* are yet to be determined. The consequences which flow from *Klante* lie ill with the perceived philosophy underpinning the existence of the office of the Nominal Defendant. Even if the alternative interpretation of the relevant statutory provisions given above is to be preferred to that given in *Klante*,

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26 Supra at 168.
27 That is, the need to sue an uninsured defendant.
28 Supra at 165-6.

there remain a number of ambiguities and uncertainties that merit the attention of the legislature. It is submitted that consideration should be given to the following:

(a) Is it the present intention of the legislature that Sections 12(3), (4) and 12a(2), (3) are to derogate from the requirement to take out third party insurance set out in s102 in addition to the limited exception provided for in that section? The view might be taken that the risks to third parties are so minor in comparison with that accompanying the use of other motor vehicles, that the imposition upon owners of compulsory insurance is not warranted. Yet, presumably this can be accommodated by the offering of differential premiums. Alternatively, an exception to the need to insure could remain but s116 be amended to extend the Nominal Defendant's liability to the situations under consideration. Surely the Mrs Klantes of this State are not to be singled out by the legislature as not meriting a right of recovery against the Nominal Defendant.

(b) The limited exception conferred, by s102 itself, on tractors in limited circumstances is equally anomalous and ought be reviewed. The exemption was clearly intended to be temporary, but has been allowed to persist indefinitely. In addition, it exacerbates the problem of the drawn farm implement being exempted from insurance. This makes some sense in the context where the tractor exemption (as under s12(1)) only relates to registration (as argued above) but no sense, where s102(1) operates to extend that exemption to third party insurance as well. If it is the case, for one reason or another, that a uniform rate of premium in relation to farm tractors throughout the state cannot be fixed in accordance with the mechanism established by s102(1), then the exemption ought be abolished. Alternatively, an amendment to s116 in the manner suggested in (a) could ensure that a person injured by a tractor on a public road, exempted from the requirement to insure, will not be prejudiced.

Not so important as (a) and (b) but to ensure clarity and certainty in the legislation:

(c) If a reference to 'insurance' is to remain in sections 12(3), (4) and 12a(2), (3) it should be defined so as to clarify whether or not the reference is to the same type of insurance as referred to and defined in Part IV. In addition, Part IV should acknowledge this in some way so as to avoid the contradictions of the present legislation.

(d) Preferably to (c), if there are to be a number of genuine exemptions from the insurance requirements of Part IV, then these should be provided for in Part IV and removed from Part II which should be confined to registration provisions.

POSTSCRIPT

Since writing the above, Cox J has handed down judgment in *McIntyre v The Nominal Defendant and Bruchowski and Norwich Winterthur Insurance (Australia) Ltd* (unreported SASC, 16 March 1989). The case concerned an accident between a tractor travelling at night and which was poorly lit, and a motorcycle rider. The tractor driver was held to be negligent and liability was apportioned two-thirds against him. A tractor is clearly exempted from the compulsory insurance requirement by virtue

of the proviso of s102(1) as long as one of the sets of circumstances envisaged by s12(1) is applicable. In this case, it was argued that the tractor was, at the relevant time, being driven on a road 'within 40 kilometres of a farm occupied by the owner of the tractor...' for one of the permissable purposes. As such, it was not required to be insured and therefore was not an 'uninsured vehicle' for the purpose of rendering the nominal defendant liable pursuant to s116. His Honour was not called upon to decide the particular issues of statutory construction considered in this article. However, he did acknowledge[29] a clearly discernable legislative policy in the Act of 'universal insurance' or 'more accurately of universal availability to a successful plaintiff of [a solvent source] insurer or nominal defendant [to meet any judgment]', which should be reflected in any approach to the interpretation of the relevant parts of the Act. His Honour observed that the tractor in question would be an 'uninsured motor vehicle' within s116 if it were driven on a road other than in circumstances envisaged by s12(1). In such a case, the nominal defendant would be liable. However, if the tractor was being driven in circumstances permitted by s12(1) then judgment would lie against the defendant driver and thus, in this case, his public risk insurer (Norwich). On the facts, his Honour held the former analysis to apply. The tractor driver was not an 'occupier' of the farm to which he had been proceeding. It followed that the tractor ought to have been insured, but was not and was therefore an 'uninsured motor vehicle' within s116. There was a happy ending as far as the plaintiff was concerned. Indeed his chances of finding a solvent source to pay the damages were immeasurably improved by the presence of the public liability insurer. This will not always be the case (as is illustrated by *Klante*) and in any event such a public liability cover may itself be inadequate as to scope or quantum. The case highlights again the sorry state of the legislation and the imaginative and technical techniques of statutory interpretation that the judiciary will have to continue to employ to ensure that the policy of the legislation is effected, until such time as Parliament gets around to amending what in this respect is a very poorly drafted act. At present if a person were to have an accident with a tractor or other farm implement, whether or not a solvent source will be available to pay the damages can only be described as a lottery. It is our present understanding that an appeal has been filed by the nominal defendant in *McIntyre*.

29 CCH, ANZ Insurance Reporters, Report No 88 p4.