SOUTH AUSTRALIA

# THIRTY-THIRD REPORT

of the

# LAW REFORM COMMITTEE

of

# SOUTH AUSTRALIA

to

# THE ATTORNEY-GENERAL

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## RELATING TO LIABILITY UNDER PART IV OF THE MOTOR VEHICLES ACT, 1959-1974

1975

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

B. R. COX Q.C., S.-G.

J. F. KEELER.

K. T. GRIFFIN.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide, South Australia.

# THIRTY-THIRD REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO LIABILITY UNDER PART IV OF THE MOTOR VEHICLES ACT, 1959-1974

*To*:

The Honourable L. J. King, Q.C., M.P.,
Attorney-General for South Australia.

Sir,

You have referred to us for report the question of whether Sections 112, 113, 115, 116 and 118 of the Motor Vehicles Act, 1959-1974, all of which are contained in Part IV of the Act, which base liability for damages on a cause of action in negligence in the use of a motor vehicle, should be amended so as to delete the reference to liability "for negligence".

The reason why these sections are worded as they are is because of the overriding requirement in Section 104 which reads:—

> "In order to comply with this Part a policy of insurance must insure the owner of the motor vehicle to which the policy relates, and any other person who at any time drives the vehicle, whether with or without the consent of the owner, in respect of all liability for negligence 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."

It will therefore be seen that the sections to which you have referred us create liabilities arising out of negligence because that is the liability which has to be covered by compulsory third party insurance under Section 104. Accordingly if an amendment to Part IV is contemplated, it should embrace the provisions of Section 104 as well as the other sections to which you have referred us. It is of course possible to argue that a liability arises out of negligence even though the cause of action sued on is other than negligence, but this is not the way in which the sections have been interpreted in practice.

In fact there are seven causes of action which may arise in connection with motor vehicles which have in the past been usually treated by insurers as covered by Part IV although it was strictly arguable that some of them were not, and in fact the point has, as will be seen later, occasionally been taken in the Courts. The seven causes of action are negligence, nuisance, trespass, strict liability under the rule in *Rylands v. Fletcher L. R.* 3 *H.L.* 330, contribution under Part III of the Wrongs Act, 1939 as amended, causes of action *sui generis* arising under the Motor Vehicles Act itself, and causes of action arising under equivalent legislation in other States and in Territories.

Taking these in order, there is no doubt that on the *ipsissima verba* of the section, negligence is covered as a cause of action by compulsory third party insurance under Part IV of the Motor Vehicles Act.

The real questions arise in relation to the other six causes of action.

Taking them in order, they are:—firstly nuisance. There is a substantial body of authority which holds that in relation to motor vehicles a plaintiff cannot succeed in nuisance unless he can prove negligence. Historically this was not so and the question divided the Court of Appeal in *Dymond v. Pearce* 1972 1 *Q.B.* 496. On this point we refer you also to two articles in legal periodicals: *The Boundaries of Nuisance by Newark* in 65 *L.Q.R.* 480 and *Obstruction on the Highway: Liability for Collision by Samuels* in 117 *Sol. Jo.* 422, which is in part a discussion of *Dymond v. Pearce* (supra).

Whether it be the law today or not that one cannot recover in nuisance in relation to the use of a motor vehicle on a highway without proving negligence does not matter, because if the plaintiff declares in nuisance then he obtains a judgment in nuisance and that is not a judgment in the words of Section 104 creating a "liability for negligence" arising out of the use of the motor vehicle in any part of the Commonwealth: see *Stewart v. Honey* (1972) 2 *S.A.S.R.* 585 *at* 599.

The third possible head of liability is one in trespass. Again questions arise as to whether one can succeed in trespass today in relation to the use of a motor vehicle without proving negligence: see *Elliott v. Barnes* 51 *S.R. N.S.W.* 179 and 68 *W.N. N.S.W.* 133. Probably he cannot but the causes of action are nevertheless different. Mayo J. said in *Armour v. Box L.S.J.S. 1st August*, 1954 *at page* 1:

> "A judgment for damages cannot be rested on both bases (sc. trespass and negligence) unless the circumstances proved indicate that the present is one of those cases (if there be any) in which a right to sue in trespass to the person and a remedy in negligence coincides. A claimant may seek to recover both on the ground of trespass to person and property and on the ground of a breach of the duty to observe due care but before the end of the hearing he must (except in the class of case mentioned), elect on which cause of action he will ask for redress . . . . . unless the facts warrant it, judgment for damages should not be rested on both remedies."

The fourth cause of action is one grounded on strict liability under the rule in *Rylands v. Fletcher L.R.* 3 *H.L.* 330. Neither of the two members of the Committee who acted for insurers whilst in general practice can remember a claim being brought under this head, but it is not difficult to construct a set of facts resembling, but not identical with, those in *Musgrove v. Pandelis* 1919 2 *K.B.* 43 which would produce a claim under Part IV of the Motor Vehicles Act and similar examples could no doubt be found.

The fifth cause of action is a claim for contribution under Part III of the Wrongs Act, 1936-1959 (or its statutory analogue in other States). The question of whether or not in the case of a claim for contribution the words of Section 104 oblige the insurer to pay the claim divided the Full Court in *Stewart v. Honey* (supra).

The sixth basis of liability is the statutory basis under the Motor Vehicles Act which gives rights of action direct against the insurance company instead of against the insured tortfeasor. Hogarth J. said in *Plozza v. The South Australian Insurance Company* 1963 *S.A.S.R.* 122 *at* 126-127:

"In my opinion, however, it is not proper to regard the right to recover judgment against an insurer under s. 113 of the Motor Vehicles Act, 1959-1962, as a cause of action in tort. In my view, the right given by that section to obtain judgment against an insurer is a right *sui generis* conferred by the statute. In this respect it is analogous to the right created by statute for one joint tortfeasor to recover contribution from another, which itself is a cause of action *sui generis* (*Harvey v. R. G. O'Dell* (*Galway, Third Party*) (1958) 2 Q.B. 78). It is apparent that the South Australian Parliament took this view of the right conferred by s. 113 and its predecessors s. 70 (*d*) of the Road Traffic Act, 1934-1960, since it was thought necessary, by s. 26 (*a*) of the Wrongs Act, 1936-1959, to extend the common law meaning of 'tortfeasor' to include an insurer under s. 70 (*d*). I realise, of course, the danger of using one statute for the purpose of interpreting another; but in the present case I think it proper to do so, as both statutes deal with the same topic, and use the same language for that purpose.

The cause of action created by s. 113 of the Motor Vehicles Act, 1959-1962 is a statutory cause of action, the essentials of which are:

1. That the defendant must be an 'approved insurer' within the meaning of Part IV of the Act.

2. That the defendant must have issued a policy of insurance within the meaning of Part IV of the Act, in relation to some motor vehicle (the 'insured vehicle').

3. That a person insured by the policy of insurance in using the insured vehicle must have caused the death of or bodily injury to some person in such circumstances that some person could have recovered judgment against him.

4. That the insured person must be dead, or it must be impossible for him to be served with process.

5. That proper notice of claim must have been given, as provided by the section."

The point under Section 104 was in fact taken on appeal from Hogarth J. in this case. At page 134 of the report there is an editorial note:

"An appeal to the Full Court against this order was dismissed by consent on 7th October, 1963, counsel intimating that a settlement had been reached."

In fact, as is well known to one of the members of this Committee, that settlement was reached because the point was taken that as Section 104 dealt only with causes of action in negligence, and the Judge had held that this was a cause of action *sui generis*, it was not covered by Section 104 and accordingly whatever the merits might be of the judgment in question, the plaintiff had no remedy against the insurance company on the express words of Section 104 and the case was accordingly compromised.

The seventh cause of action is given by the cognate Statutes and Ordinances of the other States and Territories. The enforcement of these in South Australia raises problems under the legislation as it now stands: see *Hodge v. Club Motor Insurance Agency Pty. Ltd. and Australian Motor Insurers Limited* (1974) 7 *S.A.S.R.* 86 and these problems may well include problems of the interpretation of the Commonwealth Constitution: see the same case at page 102.

Mr. Justice Sangster the Chairman of the Premiums Committee informs us that in calculating premiums, all forms of claims arising out of the use of a motor vehicle are included so that if the reform we propose later in this paper were to be adopted, it would have no effect upon the rates of premium charged for compulsory third party motor vehicle insurance.

In the opinion of this Committee it is undesirable that any such points should remain to be taken either under Section 104 or under the Sections to which you have referred us. The clear purpose of the legislation is to enable an injured plaintiff to recover from an insurer or a nominal defendant where there is no insurance cover damages caused by a motor vehicle anywhere in Australia. The position in Victoria, New South Wales, Tasmania, Western Australia, the Australian Capital Territory and the Northern Territory is for all practical purposes identical. The words used in each case are "caused by or arising out of the use of a motor vehicle". Queensland uses a different formula to which we shall return later in this report and Western Australia by Section 6A does use the words "by negligence in the use of" but this is the only exception to the uniform position in all the above States: see as to Victoria, the Motor Car Act, 1958 Sections 47-51 inclusive; New South Wales, the Motor Vehicles (Third Party Insurance) Act, 1942 as amended Sections 15, 16 and 17; Tasmania, the Traffic Act, 1925 as amended Section 65; Western Australia, the Motor Vehicle (Third Party Insurance) Act, 1943 as amended Sections 7-15; the Australian Capital Territory, the Motor Traffic Ordinance 1936 as amended Sections 54-56, 61, 66, 70, 78, 81, 83 and 85; and the Northern Territory, the Motor Vehicles Ordinance 1949 as amended Sections 53-54, 59, 64-65 and 68. The use of this formula therefore would bring South Australia into line with every State except Queensland and excepting one section, which can be disregarded for this purpose, in the Western Australian Act.

However, the use of the words "caused by or arising out of the use of a motor vehicle" has raised its own problems and the matter has gone to the High Court of Australia on a number of occasions. The cases and their results are summarised in an article by Fricke in 43 *A.L.J.* 609. Notwithstanding a careful examination on a number of occasions by the High Court of Australia there are at least two cases subsequent to that article: *Stockdale v. The Insurance Commissioners; Stockdale v. National and General Insurance Co. Ltd.* 1970 *V.R.* 65 and *Johnson & Morris Pty. Ltd. v. The Government Insurance Office (N.S.W.)* (1970) 2 *N.S.W.R.* 201, where the words concerned are once more considered.

The Queensland Motor Vehicles Insurance Act, 1936-1974 Sections 3 and 12 uses the words "caused by through or in connection with a motor vehicle". It is possible that this form of words may avoid the case law centred on the phrase "use of"; and W. B. Campbell J. has suggested that the words "the use of" when compared with the words

in the Queensland sections have the effect of limiting the cover given by the governing section and therefore by the insurance policy which follows it, and not an enlarging effect (*Early v. The Kilcoy Pastoral Company Pty. Ltd.* 1970 *Q.R.* 99 *at* 107). The Committee is, however, not convinced that the wording of the Queensland section does avoid all those difficulties. Several of the cases seem to have turned on whether what has been used has been a "motor vehicle" or not; and it is significant that Mr. Justice W. B. Campbell, in the case just referred to, went on to refer to many of the High Court decisions discussing the phrase "the use of" in coming to his decision. Nevertheless, the Queensland provisions are perhaps wider, and the Government may consider whether as a matter of policy it prefers to have a section on all fours with that used throughout Australia and the Territories, but which has brought about considerable litigation, or the provision of the Queensland Act, which may be broader.

Alternatively the Government may prefer to seek to construct its own formula in an attempt to deal with the difficulties which have arisen in the case law. These difficulties stem essentially from such questions as whether the compulsory insurance policy should cover a lorry while it is being loaded or unloaded, a mobile crane when it has been immobilised and is being used as a crane, and so on. If the Government wishes to cast the net of compulsory insurance as wide as possible it might perhaps prefer such a formula as "caused by through or in connection with any vehicle, tractor, mobile machine, or trailer required by this Act to be registered". On the contrary it might wish to restrict compulsory third party insurance to cases in which the accident arises from the use of a motor vehicle for the purpose of the transport of persons, goods or machinery. The Committee points out that such a formula would indeed restrict the ambit of compulsory insurance from that which it now possesses. But the adoption of either of these possibilities, or any version of them, is a matter of policy for the Government to decide.

We all agree that the words "for negligence" should be excised wherever they occur in this Part.

Mr. Mills who commented on the paper raises the question whether some defining or limiting words such as "in tort" should be added in the sections other than 104. The Committee expresses no opinion on this.

The Committee thanks Mr. E. W. Mills who gave us of his time and wide experience in this field by acting as commentator.

The Committee expresses its appreciation to the Chairman's Associate Miss Anne Wilkinson who did the research on the cognate Statutes and Ordinances referred to in this report.

We have the honour to be

HOWARD ZELLING
B. R. COX
JOHN KEELER
K. T. GRIFFIN

The Law Reform Committee of South Australia

Dated the 3rd day of December, 1974.