SUPREME COURT OF QUEENSLAND

CITATION:	*Gideona v Nominal Defendant* [2005] QCA 261
PARTIES:	**DANYELLE HANNA GIDEONA** (plaintiff/applicant/appellant) v **NOMINAL DEFENDANT** **(**defendant/respondent)
FILE NO/S:	Appeal No 1235 of 2005 DC No 802 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil) General Civil Appeal
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	29 July 2005
DELIVERED AT:	Brisbane
HEARING DATE:	18 July 2005
JUDGES:	de Jersey CJ, Williams and Keane JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal granted** **2. Appeal dismissed** **3. The appellant is to pay the respondent's costs of the application for leave and of the appeal to be assessed on the standard basis**
CATCHWORDS:	INSURANCE - THIRD-PARTY LIABILITY INSURANCE - MOTOR VEHICLES - COMPULSORY INSURANCE LEGISLATION - UNINSURED VEHICLES - QUEENSLAND - INTERPRETATION - where appellant suffered personal injuries as a result of an accident involving two motor cycles - where motor cycle that appellant was carrying the appellant as a passenger was covered by compulsory third-party insurance while other motor cycle was not - where the accident occurred on an off-road track on land owned by Queensland Rail - where appellant sued the drivers of both motor cycles for damages - where the Nominal Defendant was joined as a defendant on the basis that one of the motor cycles was uninsured - where learned primary judge held that the Nominal Defendant could not be liable to the appellant because the uninsured motor cycle was not a 'motor vehicle' for the purposes of the *Motor Accident*

Insurance Act 1994 (Qld) - whether the approach to this question adopted in *Kelly v Alford* [1988] 1 Qd R 404 should be followed - whether the uninsured motor cycle was a 'motor vehicle' for the purposes of the *Motor Accident Insurance Act* 1994 (Qld)

INSURANCE - THIRD-PARTY LIABILITY INSURANCE - MOTOR VEHICLES - COMPULSORY INSURANCE LEGISLATION - UNINSURED VEHICLES - QUEENSLAND - USE OF VEHICLE ON PUBLIC OR PRIVATE LAND - where an accident involving two motor cycles occurred on an off-road track on land owned by Queensland Rail - where the site where the accident occurred could only be reached by crossing private land - whether the site where the accident occurred could be considered to be a 'public place'

Motor Accident Insurance Act 1994 (Qld), s 4, s 5, s 20, s 23, s 31(1)(c), s 33(1)
Motor Vehicles Control Act 1975 (Qld), s 4
Transport Infrastructure (Roads) Regulation 1991 (Qld), s 12, s 34, s 49(1)
Transport Operations (Road Use Management) Act 1995 (Qld)
Transport Operations (Road Use Management - Vehicle Registration) Regulation 1999 (Qld), s 10

Brunner v Eldar Trading Pty Ltd [1988] 1 Qd R 19, cited
Kelly v Alford [1988] 1 Qd R 404, disapproved
Lynch v Middleton [1979] Qd R 31, cited
Mason v The Nominal Defendant (Queensland) [1987] 2 Qd R 190, applied
Symonds v The Nominal Defendant (Queensland) [1992] 1 Qd R 444, considered
Vonhoff v Jondaryan Shire Council & Anor [2001] QCA 439; (2001) 34 MVR 409, cited

COUNSEL: M E Pope for applicant/appellant
K N Wilson SC for respondent

SOLICITORS: McInnes Wilson for applicant/appellant
TressCox for respondent

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Keane JA. I agree with the orders proposed by his Honour and with his reasons. Because the determination of the application involves departing from *Kelly v Alford* [1988] 1 Qd R 404, I will express shortly my own approach to the case.

[2] The issue is whether at the time of the collision, the uninsured motor cycle (a trail bike) was a “motor vehicle” as defined in s 4 of the *Motor Accident Insurance Act* 1994 (Qld), that is, “a vehicle for which registration is required under the *Transport Infrastructure (Roads) Regulation* 1991 (Qld) or the *Motor Vehicles Control Act*

1975 (Qld)". If it was, then by s 33(1) of the *Motor Accident Insurance Act*, the respondent Nominal Defendant may be liable as if it were a comprehensive third party insurer of the cycle. By the time of this collision, the *Motor Vehicles Control Act* had been repealed and the successor legislation made no relevant provision in respect of registration. The only relevant requirement for registration emerges indirectly from s 12 of the *Transport Infrastructure (Roads) Regulation*. That regulation prohibits the use of an unregistered vehicle on a road. (It was common ground that this motor cycle was not being used on a "road".)

[3] Any liability of the Nominal Defendant is coterminous with that of a compulsory third party insurer, which takes one back to s 5(1) and (2) of the *Motor Accident Insurance Act*. Both provisions relate to injury caused by, through or in connection with a "motor vehicle" driven on a road or in a public place. It is unnecessary to consider whether the track in question here was a public place, if the motor cycle was not a "motor vehicle" as defined by s 4, that is, a vehicle for which registration was required. As has been seen, registration is required if the vehicle is being used on a road.

[4] This motor cycle was not being used at the time of the collision on a road, but had previously been driven to the track by passing over a road, which raised the approach of *Kelly v Alford*. Because the primary Judge considered that the prior driving on the road was of comparatively minor proportion, he held that the non-road usage was predominant. Because registration was not required in respect of that predominant use, any liability in the Nominal Defendant could not arise.

[5] I respectfully consider the approach in *Kelly v Alford* to be wrong, such that this court should no longer follow it. (It was effectively confined to its own facts by *Symonds v The Nominal Defendant (Queensland)* [1992] 1 Qd R 444, 451-452.) Section 12 of the *Transport Infrastructure (Roads) Regulation* establishes a prohibition. Contravention is an offence (s 49(1)). That tells against adopting any particularly expansive or flexible approach to defining the scope of the prohibition, insofar as it (indirectly) bears on the requirement for registration. In terms, that prohibition relates to actual use of a vehicle on a road (cf. *Vonhoff v Jondaryan Shire Council & Anor* (2001) 34 MVR 409, 411). It was not necessary to drive this unregistered cycle along a road in order to reach the track. There were other means by which the cycle could have been carted to the track if required there. Alternatively, if the driver of the cycle wished to traverse a road in order to get to the track, it was not necessary to register the vehicle for that purpose, because a "limited use permit" for such occasional use could have been obtained (s 34 *Transport Infrastructure (Roads) Regulation* 1991 (Qld)).

[6] What is to my mind the compelling end point is that the statutory prohibition, from which the requirement to register is drawn, does not (the presently irrelevant reference to a "public place" aside) in terms embrace use on a track such as this which is not a road. There is no sufficient ground, whether for reasons of convenience or whatever, for engrafting into the prohibition a scope not presently expressed. Doing so, in order to meet a case like this, would inject undesirable uncertainty into its operation. It should not be necessary, to determine whether registration is required, to make factual assessments of the comparative extent of the intended road, and off-road, usage. The regulation focuses on actual usage, not intended usage. If registration had been felt desirable in a situation like this, then the legislation could clearly have provided for it. It is plainly not part of this court's

function to adopt a strained construction in order to achieve an objective the legislature has apparently not had in mind.

[7] **WILLIAMS JA:** The relevant background facts are fully set out in the reasons for judgment of Keane JA which I have had the advantage of reading.

[8] The obligation to register a motor vehicle in Queensland has always been derived from a provision making it an offence to use a motor vehicle that is not registered on a road; there has never been any statutory provision positively defining when or in what circumstances a motor vehicle must be registered. That position has not changed though the relevant statutory provision has been amended or replaced over the years. The current relevant provision is s 10 of the *Transport Operations (Road Use Management - Vehicle Registration) Regulation* 1999 (Qld) which came into force after the date relevant for present purposes. Clearly therefore the legislature has accepted the fact that the relevant provision providing for registration of a motor vehicle is that provision which makes it an offence to use an unregistered vehicle on a road.

[9] In those circumstances one can only determine whether a motor vehicle is required to be registered by looking at its use at a particular time. Where personal injury has been caused by the use of a motor vehicle then the relevant time for determining whether it was required to be registered was the time when that personal injury was occasioned. That has been the approach applied by the courts in *Brunner v Eldar Trading Pty Ltd* [1988] 1 Qd R 19, *Lynch v Middleton* [1979] Qd R 31, *Symonds v The Nominal Defendant (Queensland)* [1992] 1 Qd R 444, *Mason v The Nominal Defendant (Queensland)* [1987] 2 Qd R 190 and *Vonhoff v Jondaryan Shire Council & Anor* (2001) 34 MVR 409. To the extent that the reasoning in *Kelly v Alford* [1988] 1 Qd R 404 is inconsistent with the reasoning in those cases it should no longer be followed.

[10] I agree with all that is said by Keane JA in his reasons and with the orders he has proposed.

[11] **KEANE JA:** The appellant suffered personal injuries on 11 September 1999 when travelling as a pillion passenger on a motor cycle which collided with another motor cycle on an off-road track at Merrimac on land owned by Queensland Rail. It was common ground that this track was not a road. The track could not be reached save by passing over private land. The appellant was travelling on a Suzuki motor cycle which was covered by compulsory third party (CTP) insurance. The other motor cycle, a Kawasaki, was uninsured.

[12] The appellant brought an action for damages against the drivers of both motor cycles. The Nominal Defendant was joined as a defendant on the basis that the Kawasaki was an uninsured motor vehicle and so, by virtue of the *Motor Accident Insurance Act* 1994 (Qld) ("the Act"), it was deemed to be the CTP insurer of the Kawasaki. The Nominal Defendant contested this proposition on the bases that, first, the Kawasaki was not an uninsured motor vehicle because it was not a "motor vehicle" within the definition of that term in the Act and, second, that the accident did not occur in a public place.

[13] The learned primary judge determined the question which thereby arose as to the Nominal Defendant's liability as insurer of the Kawasaki as a preliminary issue. His

Honour upheld the contentions of the Nominal Defendant and, accordingly, dismissed the appellant's action against the Nominal Defendant.

[14] In relation to this appeal, there is a question as to whether the judgment against the appellant is not a final judgment and thus whether leave is necessary to enable the appeal to proceed. It is not necessary, in my view, to resolve separately the question of whether leave to appeal is necessary. The effect of the decision of the learned primary judge is decisive of the claim of the appellant against the Nominal Defendant. The arguments which the appellant seeks to put in support of her appeal are not without substance and they are of some general importance. It is appropriate in such a case to address the merits of the appeal and to reserve the question of leave.

The legislation

[15] Since the issues in the appeal turn on the proper construction of the Act it is necessary to refer to its material provisions at the time of the accident.

[16] The Act provided relevantly as follows:

(a) by s 5:

"(1) This Act applies to personal injury caused by, through or in connection with a motor vehicle if, and only if, the injury –

(a) is a result of –

(i) the driving of the motor vehicle; or

(ii) a collision, or action taken to avoid a collision, with the motor vehicle …; and

(b) is caused, wholly or partly, by a wrongful act or omission in respect of the motor vehicle by a person other than the injured person.

(2) For an uninsured motor vehicle, subsection (1) applies only if the motor vehicle accident out of which the personal injury arises happens on a road or in a public place."

(b) by s 4:

"'motor vehicle' means a vehicle for which registration is required under the *Transport Infrastructure (Roads) Regulation 1991* or the *Motor Vehicles Control Act 1975*,[1] …

'uninsured motor vehicle' means a motor vehicle for which there is no CTP insurance in force, other than a motor vehicle owned by a self-insurer … "

(c) by s 20:

"(1) A person must not drive an uninsured motor vehicle on a road or in a public place.

Maximum penalty – 80 penalty units.

(2) A person who is the owner of an uninsured motor vehicle must not permit someone else to drive it on a road or in a public place.

Maximum penalty – 80 penalty units … "

(d) by s 23, registration of a motor vehicle brings into force a CTP insurance policy in terms of the Schedule to the Act;

---

1 This definition has since been amended: see *Motor Accident Insurance Amendment Act* 2000 (Qld), s 5. It is this definition, however, which was operative at the date of the accident.

(e) by s 31(1)(c), the Nominal Defendant is made the insurer of a motor vehicle "if the motor vehicle is not insured" under a CTP insurance policy;

(f) by s 33(1), the Nominal Defendant is liable to the same extent "as if the Nominal Defendant had been, when the motor vehicle accident happened, the insurer under a CTP insurance policy under this Act for the motor vehicle".

[17] There can be no doubt that, as a matter of ordinary parlance, the Kawasaki was not insured under a CTP insurance policy. But, equally clearly, that does not mean that the Nominal Defendant was liable as if it were the CTP insurer of the Kawasaki. That is because the Kawasaki was only within the scheme of the Act at all if it was a "motor vehicle"; and it was only a "motor vehicle" if it was a vehicle for which registration is required under the legislation referred to in the definition of "motor vehicle" in the Act set out above. It is necessary, therefore, to turn to this legislation.

[18] The *Motor Vehicles Control Act* 1975 (Qld) had been repealed at the time of the accident by the *Transport Operations (Road Use Management) Act* 1995 (Qld), ("the TORUM"), and the TORUM made no provision of its own for requiring registration or for preserving the requirements of the *Motor Vehicles Control Act* in that regard. At the date of the accident, the *Transport Infrastructure (Roads) Regulation* 1991 (Qld) remained operative.[2] It provided by s 12 relevantly as follows:

> "A person must not use, or permit to be used, on a road, a vehicle (being a motor vehicle or trailer) that is not registered under this regulation, … "

[19] It has been accepted that this kind of prohibition on the use of a vehicle which is not registered imposes a requirement of registration of the vehicle in the sense that the requirement of registration is implicit in the proscription of use of the vehicle while unregistered in certain circumstances.[3] Under the *Transport Infrastructure (Roads) Regulation* 1991 (Qld), the relevant proscription was of use "on a road". Use of an unregistered vehicle in a public place other than a road was not proscribed.

The issues

[20] The appellant contends that, because the Kawasaki was driven upon a road before being driven on the track where the accident occurred, it was required to be registered at the time when the accident occurred. In this regard the appellant relies upon the reasoning of Connolly J in the Full Court of the Supreme Court in *Kelly v Alford*[4] where, with the agreement of the other members of the Court, his Honour said:

> "Now there is in truth no regulation which 'requires' motor vehicles to be registered under the *Main Roads Act* 1920 - 1985 but it has been accepted by this Court in *Brunner v Eldar Trading Pty Ltd* [1988] 1 Qd R 19 that for the purposes of s 4F(1)(b) the relevant provision of that Act is reg 3(1) of the *Main Roads Regulations*

---

2 These regulations have now been superseded by the *Transport Operations (Road Use Management - Vehicle Registration) Regulation* 1999 (Qld) but this change did not become operative until after the time of the accident: see *Motor Accident Insurance Amendment Act* 2000 (Qld), s 5 and *Transport Operations (Road Use Management - Vehicle Registration) Regulation* 1999 (Qld), s 2(1).

3 Cf *Brunner v Eldar Trading Pty Ltd* [1988] 1 Qd R 19 at 20 - 21; *Kelly v Alford* [1988] 1 Qd R 404 at 408.

4 [1988] 1 Qd R 404 at 408.

which provides that, except as is otherwise provided in the regulations, a motor vehicle shall not be used on a road unless – (i) such use is authorised by a permit issued pursuant to reg 3; or (ii) such vehicle is registered. Regulation 103(1) provides a penalty for conviction of a breach of, amongst other regulations, reg 3. It is accepted then that it is to reg 3 that one must turn to determine whether a vehicle is required to be registered within the meaning of s 4F(1)(b)(i). The prime mover and refrigerated van were used on public roads for a significant time as the learned trial judge has found, both before and after 17 August 1978. Their use on each occasion on the public road system involved offences against reg 3 for there is no suggestion that permits were obtained and the registration had lapsed on 19 August 1977. As the vehicles were regularly used prior to and on 17 August 1978 in a manner which was unlawful without registration (for one can put the possibility of permits to one side) one would think, at first glance, that they were fairly described as vehicles which were required to be registered.

However, The Nominal Defendant points to the fact that s 4F is expressed in its first subsection to apply to accidental bodily injury caused by, through or in connection with a motor vehicle and the argument runs that the vehicle in question must answer the description 'uninsured vehicle' at the moment when the bodily injury is sustained. For the same reason, it is said that the words 'at the material time' in s 4F(2) refer to the same moment.

The argument as presented is highly artificial, for it involves the notion of a vehicle being required to be registered while on a public road but not so required as soon as it leaves that road. The requirement might thus arise and lapse many times in the course of the day. In my judgment this artificial construction should be rejected. If a vehicle is in constant use on public roads, it is a vehicle which is required to be registered for, permits apart, it cannot be so used lawfully without registration. These vehicles certainly required to be registered on 17 August 1978 from 4.00 a.m. in the morning when work started until 11.00 p.m. at night which is the approximate time when this accident occurred. Once registered it would, in the ordinary course, have been registered for an annual period.

Reliance was placed on *Lynch v Middleton* [1979] Qd R 31 where it was held that a vehicle used only on private land need not be registered or insured and that it is accordingly not an 'unregistered motor vehicle' within the meaning of s 4F(1)(b). This is, with respect, obviously correct. The case, however, has no bearing on the situation of a vehicle which is being used from day to day on the roads so as to remove the requirement during the periods when they happen to be off the roads. At the time of this accident, the prime mover and refrigerated van were engaged in returning to cold storage the balance of the refrigerated load from which deliveries had been made by way of the public roads throughout the day.

It follows that on the day in question, the vehicles in question were required to be registered and it was required that there be in force, in respect of them, contracts or policies of insurance under the *Motor Vehicles Insurance Act*."

[21] The "artificiality" of the construction of the Act which Connolly J criticized is simply the result of the discovery of the requirement for registration in the prohibition of use of a motor vehicle. That prohibition only applies in certain circumstances: it is hardly surprising that the requirement of registration should only apply in those circumstances because it is only in those circumstances that a contravention of the prohibition might occur. The rejection by Connolly J of the argument advanced by the Nominal Defendant in *Kelly v Alford* has not subsequently commanded unchallenged assent. In *Symonds v The Nominal Defendant (Queensland)*[5] Thomas J explained that *Kelly v Alford* represented a departure from what had previously been understood as the orthodox approach of addressing the question whether registration was required by looking at the circumstances of the use of the vehicle at the material time.[6] Thomas J said:

> "The concept that there are vehicles which are 'required to be registered' and which cannot be used lawfully (even on private land) without registration was for the first time formulated in *Kelly v Alford* [1988] 1 Qd R 404. …
>
> Until *Kelly v Alford*, it had been generally held that if a vehicle was at the material time being used on private property, it was not then required to be registered (*Lynch v Middleton* [1979] Qd R 31). The attention of the courts was concentrated upon the use of the vehicle at the particular time, that is to say the use in relation to which the liability against which the owner is required to insure arose (cf. s 3 of the *Motor Vehicles Insurance Act*). Of course the essential question is the proper meaning of the term 'uninsured motor vehicle' in s 4F of that Act, and s 4F(1)(b)(i) frames the test whether the vehicle is required to be registered under the *Main Roads Act* etc. The operative part of s 4F is the creation of liability in The Nominal Defendant for damages caused by, through or in connection with an uninsured motor vehicle 'for which the owner of such uninsured vehicle would be legally liable under this Act were it insured hereunder at the material time' (s 4F(2)). The core insurance provision is s 3 which requires the 'owner' to have specified insurance during registration. There is therefore much to be said for the correctness of the view that prevailed before *Kelly v Alford* which focused upon the use of the vehicle at the time of creation of the liability rather than upon a morally oriented test whether it ought to have been registered having regard to its use on other occasions. This was consistent with the scheme of the legislation and it had the further merits of simplicity and certainty. There is no express requirement of registration of vehicles; there is only a prohibition of use of a motor vehicle on a road or public place unless registered. (See *Brunner v Eldar Trading Pty Ltd* [1988] 1 Qd R 19; *Main Roads Regulations* 1987 reg 6; *Motor Vehicles Control Act* 1975 s 10).
>
> However *Kelly v Alford* is a decision of this Court and it should be departed from only if it is plainly wrong. As I read that decision, it regards the question whether a motor vehicle is required by the *Main Roads Act* to be registered in accordance with the regulations, as a question of fact, and it regards that question as remaining open even

---

5 [1992] 1 Qd R 444 at 450 - 453.

6 See, eg, *Mason v The Nominal Defendant (Queensland)* [1987] 2 Qd R 190 at 193 - 198.

if the accident in question occurs in a place where the obligation to register does not arise, i.e. on private land. I am prepared to accept that decision, but think it should be confined to its own facts. The facts in *Kelly v Alford* were very strong indeed. There had been commercial use of the vehicles on the same basis as if they were registered. The vehicles were 'in constant use on public roads'. In such a situation the court was prepared to conclude that 'it is a vehicle which is required to be registered for, permits apart, it cannot be so used lawfully without registration'.

The reference to 'permits apart' in *Kelly v Alford* is significant. It appeared twice at critical parts of the judgment. The reference of course is to limited permits which are obtainable from the Commissioner for Main Roads for short-term use of a vehicle on public roads. Their use is authorised by reg 16 of the *Main Roads Regulations* 1987. They may be issued for periods of up to seven days. They may be issued in respect of unregistered vehicles, i.e. where no certificate is in force in respect of the registration of the motor vehicle (reg 16). Such a permit is a perfectly lawful alternative to and less burdensome than full registration which is generally renewable from year to year. It is particularly suitable for vehicles that are not in general use on public roads but where an ad hoc journey is desired to be made. Application for permit is required to be accompanied by evidence of third party insurance under the *Motor Vehicles Insurance Act*, which, it may be inferred, would need to cover the period of the application for permit (reg 16(3)).

Clearly enough the decision in *Kelly v Alford* recognises that persons who might have in mind casual or occasional use of the vehicle on a public road might obtain an ad hoc permit and it seems to concede that such persons could not be required to obtain registration. One would therefore need to look for something more than use which may be regarded as casual or spasmodic. The obligation to register was considered by this Court in *Brunner v Eldar Trading Pty Ltd* [1988] 1 Qd R 19, where it was recognised that the statutory provisions which induce citizens to register vehicles do not in their terms 'require' registration at all. They simply prohibit the use of a vehicle on a road or a public place unless the vehicle is registered (*Main Roads Regulations* 1987 reg. 6; *Motor Vehicles Control Act* 1975 s 10). These prohibitions were regarded in *Brunner* as an implied 'requirement that the vehicle be registered'.

Upon whom is this implied requirement imposed? In each instance (i.e. reg 6 of the *Main Roads Regulations* and s 10 of the *Motor Vehicles Control Act*) the prohibition is directed against the person who is minded to use the vehicle on a road. In practical terms (because of the system of registration approved by the Commissioner) it is the owner on whose behalf the application is made, and it is the 'owner' upon whom the obligation to obtain third party insurance is cast by s 3 of the *Motor Vehicles Insurance Act*.

How then is a court to decide in a particular case that there exists an implied requirement that a particular vehicle be registered? For present purposes attention is confined to a requirement to register

> under the *Main Roads Act* and Regulations. From the very nature of an incident such as the present, where the accident occurs in a place where the use carries no obligation of registration, the use of the vehicle at the critical time is of no avail to the plaintiff. The requirement to register must be proved, if proved at all, by evidence of intention on the part of some person to use the vehicle on a road. That person will be the owner, or at least a person who has the use of the vehicle. Where there is no direct evidence of such an intention, or an admission of it, the necessary intention can be found only by inference from the evidence. In such a case (and the present is such a case) evidence of spasmodic or casual use will not generally be sufficient to justify an inference that within a material time prior to the accident some person intended to use that vehicle on a road. In this context the existence of an intention of isolated or occasional use of a road may be lawfully carried into effect by the obtaining of a permit. In such a case there would be nothing unlawful or contrary to the 'requirement' of the Acts and regulations in using the vehicle on private property without the holding of a subsisting registration certificate.
>
> It seems to me that having regard to the inherent difficulties of proof of the necessary intention, especially where the existence of such an intention is denied, it will be a comparatively rare case where the necessary inference may be drawn in relation to a vehicle which was at the time of the accident being used on private land. *Kelly v Alford* was such a case. It was founded on 'constant use of public roads'. It may well be that that is the principal category where such a finding will be able to be made. *Kelly v Alford* is certainly not authority for the application of some loose test such as 'ought the vehicle to have been registered?'. It seems to me that proof of this issue will generally require a plaintiff to demonstrate a substantial usage of the vehicle upon roads at a time, especially usage close in time to that of the accident."

[22] In the present case the learned primary judge, following the approach suggested in *Symonds v The Nominal Defendant (Queensland)*, concluded that the use of the Kawasaki on a road prior to its off-road use had been *de minimis*. The appellant challenges that finding of fact. In my respectful opinion, while his Honour was correct in deferring to the authority of *Kelly v Alford*, as explained in *Symonds v The Nominal Defendant (Queensland)*, the true task of fact-finding in relation to the use of the vehicle is limited to the use of the vehicle at the material time. In the present case, the material time is the time relevant for the purposes of s 31(1)(c) and s 33(1) of the Act, namely the time when the motor vehicle accident happened. That is the time which is material for the purpose of the inquiry as to whether the Kawasaki was a motor vehicle which was required to be insured under the Act because it is only if that inquiry produces an affirmative answer that the Nominal Defendant becomes the insurer of the Kawasaki.

[23] The statutory language which must now be applied by the courts is somewhat different from that which was operative when *Kelly v Alford* and *Symonds v The Nominal Defendant (Queensland)* were decided, but it cannot fairly be said that any difference in statutory language affords a satisfactory basis for distinguishing *Kelly v Alford* and thus declining to follow it. On the other hand, the approach in *Kelly v*

Alford is productive of uncertainty and inconvenience. For example, the reasoning in *Kelly v Alford* would seem to suggest that where an accident occurred involving an unregistered vehicle, usually used only for work on a farm, being driven on a one-off basis to the local shops, the vehicle would not be required to be registered for the purposes of the Act. That would be a surprising and unsatisfactory result.

[24] Further, *Kelly v Alford* was not a decision which reflected the course of authority. As I have noted, the approach of Connolly J in *Kelly v Alford* does not sit easily with earlier decisions in which the focus of attention was upon the use of the vehicle at the time when the liability for personal injuries was incurred.[7] This approach proceeded on the basis that the requirement to register a vehicle is established by way of implication from the proscription of the use of a vehicle in particular circumstances. As was explained by McPherson J (as his Honour then was) in *Mason v The Nominal Defendant (Queensland)*[8] the question is whether the motor vehicle "required registration … having regard to the fact that it was, at the time of the collision, being used on private land". It is also difficult to reconcile *Kelly v Alford* with the recent decision of this Court in *Vonhoff v Jondaryan Shire Council and Nominal Defendant*.[9]

[25] These considerations suggest that the better course for this Court to take would be to decline to follow the approach which underpinned that decision[10] and, instead, to recognize the evident legislative intention that, for the purposes of the application of the Act, the relevant time for determining whether a vehicle is required to be registered is the time when the accident occurs.

[26] The extent of registration required is established by what is necessary to avoid contravening the statutory prohibition on the use of a vehicle which has not been registered. Whether there has been a contravention of the statutory proscription of the use of an unregistered motor vehicle will necessarily depend upon the circumstances of its use at the particular time at which a contravention is alleged to have occurred. If a contravention **at that time** cannot be made out, then neither can it be said that the vehicle was required to be registered because the requirement of registration is essentially an implication from the prohibition of use of an unregistered vehicle. If use at a particular time in particular circumstances would not involve a contravention of the prohibition on use of an unregistered vehicle, there is no relevant requirement for registration. To infer that other factors, such as prior use or present intention, have any bearing on the question, as this Court did in *Kelly v Alford*, amounts to a clear departure from the plain words of the applicable legislation.

[27] In my respectful opinion, the course of authority, both before and since *Kelly v Alford*, and adherence to the text of the statute requires that the approach of Connolly J in *Kelly v Alford* be no longer followed. In my respectful opinion, this Court should state the position clearly so as to obviate the necessity for a consideration of a false issue, namely whether the use of a vehicle before the time relevant to the issues in the case was *de minimis*.

---

7 Cf *Lynch v Middleton* [1979] Qd R 31 at 32; *Mason v The Nominal Defendant (Queensland)* [1987] 2 Qd R 190 at 193 - 198.

8 [1987] 2 Qd R 190 at 193.

9 [2001] QCA 439 at [14]; (2001) 34 MVR 409 at 413.

10 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438 - 440; *Nguyen v Nguyen* (1990) 169 CLR 245 at 268 - 270.

[28] In my opinion, the Kawasaki was not required to be registered at the time the accident occurred. As a result it did not fall within the definition of "motor vehicle" contained in s 4 of the Act. The Nominal Defendant, pursuant to s 31(1)(c) of the Act, is only deemed to be the insurer of an uninsured "motor vehicle". It follows that the Nominal Defendant could not be liable under the Act in respect of the personal injuries suffered by the appellant.

[29] Having regard to this conclusion, it is unnecessary to consider whether the accident occurred in "a public place". That is because the proscription upon use of unregistered vehicles in s 12 of the *Transport Infrastructure (Roads) Regulation* 1991 (Qld) (and hence the implied requirement to register them) applied only to vehicles to be used upon "a road". The language of the definition in s 4 of the Act is unambiguous in referring to the *Transport Infrastructure (Roads) Regulation* 1991 (Qld) for the definition of the term "motor vehicle" and these regulations do not proscribe use of an unregistered vehicle in "a public place" distinct from a road. There can be no warrant for construing the terms of a penal provision more broadly than its language requires.[11]

[30] In any event, because the place where the accident occurred could not be reached save by crossing over private land, it cannot, in my view, be said to be a public place because it was not a "place of public resort open to or used by the public … or open to access by the public … ".[12]

Conclusion and Orders

[31] In my respectful opinion, it is apparent upon examination that the appellant's substantive arguments cannot prevail. They were, however, arguments which raised an issue of general importance for which there was support in authority. I would, therefore, allow the application for leave to appeal to the extent that such leave is necessary. I would, however, dismiss the appeal. The appellant should pay the respondent's costs of the application for leave and of the appeal to be assessed on the standard basis.

---

11 See, eg, *Hardman v Minehan* [2003] NSWCA 130 at [72]; (2003) 57 NSWLR 390 at 401 - 402.

12 See s 4 of the Act which, at the time of the accident, defined "public place" by reference to s 4 of the *Motor Vehicles Control Act* 1975 (Qld).