HIGH COURT OF AUSTRALIA

McHUGH J,
GUMMOW, KIRBY, CALLINAN AND HEYDON JJ

INSURANCE COMMISSION OF WESTERN AUSTRALIA APPELLANT

AND

CONTAINER HANDLERS PTY LTD & ORS RESPONDENTS

Insurance Commission of Western Australia v Container Handlers Pty Ltd
[2004] HCA 24
26 May 2004
P37/2003

ORDER

1. *The appeal is allowed.*

2. *Container Handlers Pty Ltd is to bear the costs of Insurance Commission of Western Australia.*

3. *Orders 1, 2 and 3 of the Full Court of the Supreme Court of Western Australia made on 3 October 2001 are set aside and, in place thereof, it is ordered that the appeal to that Court by Container Handlers Pty Ltd against Insurance Commission of Western Australia is dismissed with costs.*

On appeal from Supreme Court of Western Australia

Representation:

B W Walker SC with P J Brereton for the appellant (instructed by Phillips Fox)

D F Jackson QC with G R Hancy for the first respondent (instructed by Mullins Handcock)

No appearance for the second and third respondents

CATCHWORDS

Insurance Commission of Western Australia v Container Handlers Pty Ltd

Insurance – Motor vehicles – Third party liability insurance – Prime mover and low loader – Where plaintiff injured while making repairs to vehicle – Directly caused by, or by the driving of, motor vehicle.

Insurance – Motor vehicles – Third party liability insurance – Construction of term of insurance contract in light of legislative policy.

Statutes – Construction – Purposive construction – Use of extrinsic materials to aid statutory construction.

Words and phrases – "Directly caused by, or by the driving of, [a] motor vehicle", "caused by [a] motor vehicle if a consequence of the driving of that vehicle or of the vehicle running out of control", "a consequence of", "driving".

Motor Vehicle (Third Party Insurance) Act 1943 (WA), ss 3(1), 3(7), 4(1), 6(1), Schedule.

1 McHUGH J. During the course of transporting a truck on a low loader attached to a prime mover in outback Western Australia, Mr Ashley Sutton suffered a "brutal injury" when, after having stopped to repair the low loader, a jack slipped and caused an axle of the low loader to fall, crushing his left hand against the chassis[1]. The injury was the result of the negligence of Container Handlers Pty Ltd ("Container Handlers"), the owner of the prime mover and low loader, and its employee, Mr Jason Reibel[2]. Mr Reibel was the driver of the prime mover which was hauling the low loader. Mr Sutton and Mr Reibel were carrying out the repair work after Mr Sutton noticed smoke and fumes coming off one of the left rear wheel hubs of the low loader. Mr Sutton said that there was a lot of grease everywhere and that the wheels "were sort of out of shape, so it looked pretty serious."[3] When Mr Sutton told Mr Reibel what he had seen, Mr Reibel said that they would have to take both wheels off the low loader. The injury to Mr Sutton occurred shortly after Mr Reibel and Mr Sutton commenced the repair work.

2 The issue in this appeal, brought against an order of the Full Court of the Supreme Court of Western Australia, is whether the bodily injury suffered by Mr Sutton was "directly caused by, or by the driving of, [a] motor vehicle" within the meaning of the standard form policy set out in the Schedule to the *Motor Vehicle (Third Party Insurance) Act* 1943 (WA) ("the Act"). Policies in that form had been issued by the appellant, the Insurance Commission of Western Australia ("the ICWA"), to Container Handlers, the first respondent, in respect of each of the prime mover and low loader[4]. The Full Court held that the policy indemnified Container Handlers in respect of its liability for Mr Sutton's injury[5].

3 In my opinion, the Full Court erred in finding that liability for the injury was within the scope of the indemnity given by the policy. Container Handlers conceded that the injury was not directly caused by the driving of the vehicle, but claimed that it was directly caused by the vehicle. However, under the Act, bodily injury is not to be taken to be directly caused by the vehicle unless it is "a consequence of the driving of that vehicle or of the vehicle running out of

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1 *Sutton v Container Handlers Pty Ltd* [2000] WADC 254 at [7] per Nisbet DCJ.

2 Nisbet DCJ's judgment refers to the driver as "Mr Reiball"; however, this appears to be an error, as the pleadings and transcript before his Honour refer to "Mr Reibel".

3 *Sutton* [2000] WADC 254 at [3].

4 It is convenient to refer to these policies as one policy.

5 *Container Handlers Pty Ltd v Insurance Commission of Western Australia* (2001) 25 WAR 42 at 56 per Roberts-Smith J, Wallwork and Wheeler JJ agreeing.

control."[6] In my opinion, the injury to Mr Sutton was not a consequence of the driving of the vehicle because it did not result from any feature of the driving of the vehicle[7].

Statement of the case

4 Mr Sutton successfully sued Container Handlers for damages for negligence in the District Court of Western Australia[8]. In the action, Container Handlers brought a third party claim against its insurer, the ICWA, claiming that it was entitled to be indemnified under the policy in respect of its liability to Mr Sutton. The trial judge, Nisbet DCJ, dismissed the third party claim. His Honour held that the injury to Mr Sutton was not directly caused by the driving of the vehicle[9]. The trial judge said that the most that could be said is that, if the vehicle had not been driven, or at least driven on such bad roads, the repairs would not have been necessary[10]. His Honour also found that the injury was not directly caused by the motor vehicle because the true direct cause of the injury was the negligent repair by Mr Reibel[11].

5 Container Handlers appealed to the Full Court of the Supreme Court of Western Australia against the dismissal of the third party claim. The Full Court (Wallwork, Wheeler and Roberts-Smith JJ) unanimously upheld the appeal in relation to the third party claim against the ICWA[12]. Roberts-Smith J (with whom Wallwork and Wheeler JJ agreed) said[13]:

> "In my opinion, on the facts in this case, the injury was directly caused by the vehicle and was a consequence of the driving of it. The driving of the vehicle along unsealed desert roads in extreme heat causing

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6 Section 3(7).

7 There was no suggestion that at the relevant time the vehicle was running out of control.

8 *Sutton* [2000] WADC 254.

9 *Sutton* [2000] WADC 254 at [27].

10 *Sutton* [2000] WADC 254 at [27].

11 *Sutton* [2000] WADC 254 at [27].

12 *Container Handlers Pty Ltd* (2001) 25 WAR 42 at 56 per Roberts-Smith J, Wallwork and Wheeler JJ agreeing.

13 *Container Handlers Pty Ltd* (2001) 25 WAR 42 at 56.

> the wheel hubs to overheat and seize up necessitating removal of the wheels and chaining the axle are matters which fall within the operation of the vehicle. Unlike the factual situation in [*State Government Insurance Commission v Sinfein Pty Ltd*[14]], the distinct acts of negligence by Container Handlers, or those of its employee driver for which it was liable in tort, were aspects of the fact of operation of the vehicle and so of the driving of it. These included the unserviceable nature of the hydraulic power unit of the low loader and those findings of [Nisbet DCJ] as to the driver's negligence ...
>
> In my view there was here a sufficient proximate or direct connection between the driving and [Mr Sutton's] injuries for them to have been regarded as directly caused by the driving. There were no matters of intervening negligence sufficient to remove the injuries from proximity to the driving of the vehicle. This was not a situation in which the vehicle was being worked upon independently of the driving of it. The mechanical problem occurred in the course of the driving from Telfer to Port Hedland. The breakdown occurred in a remote desert location. Repairs had to be effected for the purpose of enabling the vehicle to complete its journey and as part of the driving of it. The events were not merely preparatory, nor did they involve some activity associated with the vehicle (such as merely loading or unloading it) and nor was there some intervening cause or event (such as repair work being undertaken in a mechanical workshop or garage during a break in the journey) nor lapse of time sufficient to break the direct chain of causation between the driving and the injury. The injury was caused by the vehicle as a direct consequence of the driving of it."

6 Subsequently, this Court granted the ICWA special leave to appeal against the decision of the Full Court in relation to the third party claim.

The material facts

7 Mr Sutton was a crane driver employed by Brambles Australia Ltd ("Brambles") at Port Hedland in Western Australia. Brambles had secured a contract for one of its cranes to undertake work at Camp Tracey, which is located in the remote outback of north-west Western Australia. At Camp Tracey, Mr Sutton was to load three or four uranium containers onto a truck and then proceed to the Nifty Strikes Copper Mine ("Nifty"), where he was to do lifting work during a mining processing works maintenance shutdown.

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14 (1996) 15 WAR 434.

8 Brambles contracted with Container Handlers for the crane to be transported to Camp Tracey and then on to Nifty. Mr Sutton was to accompany the crane while it was transported. Container Handlers provided a prime mover with an attached low loader onto which the crane was loaded. Both vehicles were owned by Container Handlers and were registered vehicles under the *Road Traffic Act* 1974 (WA). It is convenient to refer to the vehicles jointly as "the vehicle". Mr Reibel was the driver of the vehicle. On the morning of 12 March 1998, after loading the crane onto the low loader, Mr Sutton and Mr Reibel drove from Port Hedland to Camp Tracey. The following day, after completing the work at Camp Tracey, they drove to Nifty. At various times during the journey, the roads were so bad that the crane had to tow the vehicle. Mr Sutton gave evidence that breakdowns occurred "quite a lot" and that the men worked as a team in order to keep going[15].

9 On 14 March 1998, Mr Sutton received instructions to leave the crane at Nifty and return to Port Hedland with Mr Reibel. The following day, Mr Sutton and Mr Reibel loaded a large mine transport truck known as a "Haulpak" onto the low loader for transportation back to Port Hedland. They then set off from Nifty. At approximately midday, Mr Reibel stopped the vehicle in order to carry out a routine inspection. This was his usual practice and such inspections had been carried out during the earlier parts of the journey. It was an exceptionally hot day and the road was rough and sandy. During the course of the inspection, Mr Sutton noted smoke and fumes coming off one of the left rear wheel hubs of the low loader, the third set from the rear. He gave evidence that there was a lot of grease everywhere and that the wheels "were sort of out of shape, so it looked pretty serious." He told Mr Reibel.

10 Mr Reibel inspected the wheels and decided that they would have to come off and that the axle would have to be chained so as to prevent it from dragging along the road. Mr Sutton assisted Mr Reibel to remove both wheels. Mr Reibel put a chain through two load-securing holes located in the side of the low loader. There were hooks on the ends of the chain. Mr Reibel's plan was to jack up the axle and then connect the hooks with each other to form a cradle to hold the axle. Mr Reibel jacked up the axle while Mr Sutton attempted to connect the hooks. Mr Sutton was precariously positioned in the wheel hub area of the low loader. He steadied himself by placing his left hand on the chassis. It soon became evident that the chain was not long enough. While Mr Reibel was attempting to jack the axle higher so that the ends of the chain would meet, the axle slipped off the jack. This caused the trail arm assembly that was connected to the axle to drop onto the chassis, crushing Mr Sutton's hand.

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15 *Sutton v Container Handlers Pty Ltd*, District Court of Western Australia, Transcript, 21 August 2000 at 38.

11 It is upon these facts that the question arises as to whether the ICWA is liable to indemnify Container Handlers under the policy it issued. The ICWA was established by the *Insurance Commission of Western Australia Act* 1986 (WA). One of its functions is to issue, and to undertake liability under, policies of insurance as required by the Act[16]. There was a statutory policy of insurance in the form of the Schedule to the Act in relation to each of the prime mover and the low loader. The third party claim was based on those policies. As noted earlier, it is convenient to refer to them as one policy. The construction of the policy requires an examination of the Act as well as the contents of the standard form policy set out in the Schedule ("the statutory policy").

The Act

12 The Act relevantly provides:

"**3. Interpretation**

...

(7) For the purposes of this Act, the death of or bodily injury to any person shall not be taken to have been caused by a vehicle if it is not a consequence of the driving of that vehicle or of the vehicle running out of control.

...

4. Insurance against third party risks

(1) When any motor vehicle is on a road there is required to be in force in relation to the motor vehicle a contract of insurance entered into by the owner of the motor vehicle under which the owner has insured subject to and in accordance with this Act against any liability which may be incurred by the owner or any person who drives the motor vehicle in respect of the death of or bodily injury to any person directly caused by, or by the driving of, the motor vehicle.

...

6. Requirements in respect of policies

(1) In order to comply with this Act a policy of insurance must –

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16 *Insurance Commission of Western Australia Act*, s 6(a).

(a) be issued by the Commission;

(b) except as provided in this section insure the owner of the vehicle mentioned in the policy and any other person who at any time drives that vehicle, whether with or without the consent of the owner, in respect of all liability for negligence which may be incurred by that owner or other person in respect of the death of or bodily injury to any person directly caused by, or by the driving of, the vehicle in any part of the Commonwealth; and

(c) be in a form substantially similar to that contained in the Schedule.

...

Schedule

INSURANCE POLICY – issued under the *MOTOR VEHICLE (THIRD PARTY INSURANCE) ACT 1943*

[s 6]

The INSURANCE COMMISSION OF WESTERN AUSTRALIA, subject to the warranties and conditions contained in this Policy and to the provisions of the *Motor Vehicle (Third Party Insurance) Act 1943*, in this Policy referred to as **'the Act'**, agrees to insure the owner of the motor vehicle described in the Traffic Licence issued herewith and any other person who drives that motor vehicle, whether with or without the consent of the owner, in respect of all liability for negligence which may be incurred by the owner or other person in respect of the death of or bodily injury to any person directly caused by, or by the driving of, that motor vehicle in any part of the Commonwealth during the period from the date of the issue of this Policy to the date of expiry of the said Traffic Licence.

...

CONDITIONS

...

3. The Commission is entitled to all rights remedies and benefits which may accrue to it by virtue of the Act.

4. This contract of insurance is subject to the provisions of the Act."

13 The formula "directly caused by, or by the driving of, [a] motor vehicle" was introduced into the Act by the *Motor Vehicle (Third Party Insurance)*

Amendment Act 1987 (WA) ("the Amendment Act"). The formula is used throughout the Act[17]. Before the Amendment Act, the statutory policy used the phrase "caused by or arising out of the use of such [a] motor vehicle"[18]. This Court considered those words in *Dickinson v Motor Vehicle Insurance Trust*[19] and held that injuries caused to a child left in a stationary vehicle, which subsequently caught fire as a result of another child playing with matches, arose out of the use of the vehicle. The Court stated in a joint judgment[20]:

> "Thus the occupation of the motor car by the appellant and her brother as passengers whilst the car was stationary and their father was absent, was a use of the vehicle within the meaning of the [*Motor Vehicle (Third Party Insurance) Act* 1943 (WA)]. The interior of the motor car caught fire whilst it was in use in that way. The injuries which the appellant sustained as a result arose out of that use."

14 The second reading speech made by the Deputy Premier, Mr Malcolm Bryce, in relation to the Motor Vehicle (Third Party Insurance) Amendment Bill 1987 (WA) ("the Amendment Bill") indicates that the Amendment Act was intended to overcome the decision in *Dickinson* and to tighten the scope of the statutory policy. The Deputy Premier said[21]:

> "The need to amend the Act arose from the now well-known High Court of Australia judgment in Dickinson v Motor Vehicle Insurance Trust handed down on 13 October 1987.
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> ... The decision in the Dickinson case is generally considered to have opened the floodgates for the entitlement of persons injured in stationary motor vehicles to recover damages from the State Government Insurance Commission ...

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17 See long title, ss 3(4), 3A, 4(1), 7(1), 7(2), 7(3), 7(6), 8(1), 8(5), 8A(1) (now repealed), 10(1), 11(3), 12(1), 14, 15, 16(1), 17, 29(1), 29A, 33(3) and the Schedule.

18 See, eg, s 4(1) of the Act as at 15 December 1987.

19 (1987) 163 CLR 500.

20 *Dickinson* (1987) 163 CLR 500 at 505.

21 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 1987 at 5759-5760. The same second reading speech was given in the Legislative Council: Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 2 December 1987 at 7070-7072 per Kay Hallahan.

> It is important to consider historically the purpose for which [the Act] was introduced. In moving the second reading of the Motor Vehicle (Third Party Insurance) Bill, the Minister for Works said in the Legislative Assembly on 28 September 1943 –
>
> > The general principle laid down in the Bill is that before a licence can be issued a policy of insurance must be taken out by the owner of every motor vehicle, which will cover the legal liability of any person driving the vehicle, whether lawfully or unlawfully, in the event of death or bodily injury occurring to any third person.
>
> It is clear, therefore, that the Parliament thus intended that the liability of the Motor Vehicle Insurance Trust was to be limited to the payment of damages for injury or death sustained by persons in consequence of the negligent driving of motor vehicles. ...
>
> In some sections of [the Act] appears 'caused by the use of', 'in the use of', 'arising out of the use of', 'in the use of a motor vehicle', 'caused by or arises out of the use of', 'as the result of the use of a motor vehicle', 'caused by or arising out of the use of'. This wording must be deleted from the insurance policy and [the Act] so that similar claims against the third party insurance fund of the State Government Insurance Commission will be outlawed.
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> ...
>
> The full implications of [Dickinson] are still largely unknown. Unless [the Act] is suitably amended, it is anyone's guess as to the scope of claims which may ultimately be found to fall within the meaning of the words 'in the use of a motor vehicle'."

Operation of s 6(1)(b) of the Act and the Schedule

15 The phrase "directly caused by, or by the driving of, [a] motor vehicle" can be broken into two separate and distinct limbs. The statutory policy therefore applies where the death or bodily injury is:

(a) directly caused by the motor vehicle; or

(b) directly caused by the driving of the vehicle.

16 In this Court, Container Handlers correctly conceded that the driving of the motor vehicle did not directly cause the injury to Mr Sutton. Accordingly, the only question in the appeal is whether the injury was directly caused by the motor vehicle.

17 As the second reading speech indicates, the Act was amended to delete expressions such as "caused by the use of", "in the use of", "arising out of the use of", "in the use of a motor vehicle", "caused by or arises out of the use of", "as the result of the use of a motor vehicle" and "caused by or arising out of the use of". In their place was substituted the expression "directly caused by, or by the driving of, [a] motor vehicle". In addition, the meaning of the expression "directly caused by ... [a] vehicle" was restricted by the terms of s 3(7).

18 The expressions "directly caused by ... the vehicle" and "directly caused by ... that vehicle" are curious. At first sight, they seem to proceed on the same theory as the law of deodands – that inanimate objects are the cause of the harm that people suffer by coming into contact with them. Both scientific and modern common law doctrines of causation as well as common sense, however, deny that inert objects such as vehicles cause anything. Whilst the use of inert objects may have effects, this is because they are the instruments by which living creatures bring about those effects. Dynamic physical events such as floods, earthquakes, volcanoes and tidal waves may bring about effects and properly may be regarded as causing those effects. Nevertheless, the notion that a vehicle may cause death or bodily injury without human intervention is not easy to understand. What, then, do the words in s 6(1)(b) and the Schedule mean when they refer to "the death of or bodily injury to any person directly caused by ... [a] vehicle"?

19 There are two views as to the meaning of the expression "the death of or bodily injury to any person directly caused by ... [a] vehicle". The first view is that the expression simply looks to the vehicle as the harm-causing instrument and requires a direct and immediate connection between the vehicle as the harm-causing instrument and the death or bodily injury. Two considerations support this view. One is that the expression "directly caused by ... [a] vehicle" is in apposition to the expression "directly caused by ... the driving of ... [a] vehicle". The apposition of the two expressions indicates that the first limb means what it says and that, for the purpose of the Act, the vehicle itself can be regarded as causing death or bodily injury. The second consideration is that the expression "directly caused by ... [a] vehicle" was substituted for expressions such as "caused by the use of" and "arising out of the use of" which had implied a causal connection between a human actor and the death or bodily injury. The absence of a reference, express or implied, to an actor in the first limb in s 6(1)(b) and the Schedule indicates that it is the vehicle itself that is deemed to cause the death or bodily injury.

20 The second view of s 6(1)(b) and the Schedule is that they look to s 3(7) and require the words of that sub-section to be read into their provisions so that the causal agent is always a driver or at least a person controlling the vehicle. One considerable difficulty with this view is that it renders redundant the second limb in s 6(1)(b) and the Schedule.

21 In my view, for the reasons set out above and more particularly because of the relationship of s 3(7) to s 6(1)(b) and the Schedule, the first of these two views is the correct one. The expression "directly caused by ... [a] vehicle" looks to the vehicle as the harm-causing instrument and requires a direct and immediate connection between the vehicle as the harm-causing instrument and the death or bodily injury.

Operation of s 3(7) of the Act

22 Section 3(7) of the Act provides that the death of or bodily injury to any person shall not be taken to have been "caused by" a vehicle if it is not a consequence of the driving of that vehicle or of the vehicle running out of control. The trial judge held that there was no occasion to refer to s 3(7) of the Act in interpreting "caused by" a motor vehicle because the policy contained all the terms of the insurance[22]. The Full Court rejected this approach and concluded that the proper approach was to regard the cover provided by the statutory policy and the liability created by the Act as coterminous[23]. Roberts-Smith J said that it would be anomalous if the cover provided by the statutory policy was more or less than the liability imposed by the Act[24]. In my opinion, the Full Court was correct in holding that it is necessary to refer to s 3(7) in interpreting the statutory policy[25]. Indeed, the issue in this Court largely concerns the manner in which s 3(7) operates in the context of the Act.

23 In the Full Court, Roberts-Smith J said[26]:

> "It is to be noted that the definition in s 3(7) applies to the phrase 'caused by a vehicle' – not 'directly caused by a vehicle'. The word 'directly' still has work to do which must be more than a reiteration of the words 'caused by'. The approach required is to pose the question in two parts: first, was the injury directly caused by the vehicle; secondly, was

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22 *Sutton* [2000] WADC 254 at [22] per Nisbet DCJ.

23 *Container Handlers Pty Ltd* (2001) 25 WAR 42 at 53 per Roberts-Smith J, Wallwork and Wheeler JJ agreeing.

24 *Container Handlers Pty Ltd* (2001) 25 WAR 42 at 53.

25 *Container Handlers Pty Ltd* (2001) 25 WAR 42 at 53 per Roberts-Smith J, Wallwork and Wheeler JJ agreeing. See also references to the Act in the opening words of the governing clause of the standard policy and in conditions 3 and 4. See also s 4(1) of the Act and *Government Insurance Office of NSW v R J Green & Lloyd Pty Ltd* (1966) 114 CLR 437 at 441-442, 444 per Barwick CJ.

26 *Container Handlers Pty Ltd* (2001) 25 WAR 42 at 54.

> the injury a consequence of the driving of the vehicle or of the vehicle running out of control?
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> Here, [Mr Sutton's] injury was directly caused by the low loader. The axle of the vehicle fell and crushed his hand against the chassis. It is the second question which is difficult. Was the injury a consequence of the driving of the vehicle? I accept it does not have to be a *direct* consequence of the driving." (original emphasis)

24 The ICWA submits that the question "was the injury directly caused by the motor vehicle?" cannot logically be broken into two parts – it is the whole and only question to be asked. The ICWA contends that, on the proper construction of the policy, that question falls to be determined by asking whether the injury was a "direct consequence" of the driving of the vehicle or of the vehicle running out of control. On this hypothesis, s 3(7) operates to differentiate between those consequences that are causal and those that are not. Container Handlers, on the other hand, submits that the two-stage approach taken by the Full Court is correct. It contends that, although the driving of the vehicle did not directly cause the injury to Mr Sutton, the vehicle did directly cause the injury and the injury was a consequence of the driving of the vehicle.

25 Section 3(7) appears under the heading "Interpretation", which suggests that it is a definitional provision. However, in *State Government Insurance Commission v Wagner*, Olsson J said in obiter that a similar sub-section in the equivalent South Australian legislation was essentially an exclusionary provision[27]. His Honour articulated the two-stage test to be applied for the purpose of determining whether liability arises under the statutory cover[28]:

> "It is at once to be observed that, in determining whether liability arises under the statutory cover in this case, a successive, two stage, process of evaluation necessarily arises.
>
> In the first instance ... the question must be asked: 'Did any relevant liability in respect of bodily injury "arise out of the use" of the vehicle in question?' in the sense in which that phrase is used in the Schedule.
>
> If the answer to that question is in the affirmative a second question must then be posed and answered. That question is: 'Has it been demonstrated that the bodily injury is not a consequence of the driving of the vehicle?'"

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27 (1993) 62 SASR 175 at 180.

28 *Wagner* (1993) 62 SASR 175 at 179.

26 In *Motor Accident Commission v ANI Corp Ltd*, Cox J in the Full Court of the Supreme Court of South Australia refused to follow the dicta of Olsson J[29]. Cox J said that the sub-section of the South Australian legislation in question did not express a qualification, condition or exception to a general obligation, undertaking or liability created by the policy of insurance set out in the relevant Schedule to that legislation; rather, the sub-section limited the scope or meaning that would otherwise be given to the expression "caused by or arising out of the use of"[30]. His Honour said that in substance the legislature had defined a term or expression used in the Schedule[31]. Lander J agreed that the sub-section was a definitional provision and said that it did not purport to include any condition for indemnity under the statutory policy, but merely provided for the scope of the indemnity under that policy[32].

27 In my opinion, the true construction of s 3(7) is one somewhere between these competing views. To regard s 3(7) as a mere definition of the words "caused by ... [a] vehicle" is to overlook its content, structure and effect. First, s 3(7) does not use the term "directly". It is therefore at best a definition of only part of the first limb of the statutory formula, namely, "directly caused by ... [a] vehicle". Second, unlike a true definitional clause, it does not take the expression "caused by ... [a] vehicle" and declare that it means "a consequence of the driving of that vehicle or of the vehicle running out of control." Instead, its structure assumes that what is "not [to] be taken to have been caused by a vehicle" is within the expression "directly caused by ... [a] vehicle". Then, by using a double negative in the passive voice, it *excludes* what would otherwise be within the ordinary meaning of that expression. Third, s 3(7) cannot be sensibly used as a definition without excising certain words in s 6(1)(b) and the Schedule – particularly the word "caused" in the first limb – and reversing the passive tense and negative structure of s 3(7) and then rewriting the words of s 6(1)(b) and the Schedule. Thus, to read s 3(7) as a true definitional provision requires s 6(1)(b) and the Schedule to be rewritten as follows:

> "insure ... in respect of all liability ... in respect of the death of or bodily injury to any person *directly in consequence of the driving of that vehicle* or of the vehicle running out of control *or directly caused by the driving of the motor vehicle*."

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29 (1997) 26 MVR 57 at 63-64.

30 *ANI Corp Ltd* (1997) 26 MVR 57 at 64.

31 *ANI Corp Ltd* (1997) 26 MVR 57 at 64.

32 *ANI Corp Ltd* (1997) 26 MVR 57 at 74. See also *WorkCover Corporation v Reiter* (1997) 70 SASR 347 at 363-364.

28 Thus, to treat s 3(7) as a true definitional provision has the result that the first limb – "directly caused by ... [a] vehicle" – is completely covered by the second limb – "directly caused by ... the driving of ... [a] vehicle" – except for those cases where the vehicle runs out of control. In other words, it renders redundant the first limb, that is, "directly caused by ... [a] vehicle". I cannot believe that any parliamentary drafter would go to such trouble to achieve the effect that the true definition theory of s 3(7) requires. The drafter could have achieved that effect simply by using the words "death of or bodily injury to any person directly caused by the driving of the vehicle or by the vehicle running out of control". It would require a low estimate of the drafter's drafting ability to believe that he or she would have used the first limb and the ungainly language of s 3(7) to achieve this result when it could have been achieved so simply.

29 All these considerations point strongly – indeed overwhelmingly – against the view that s 3(7) is a true definitional provision.

30 The better view of the relationship between s 3(7) and s 6(1)(b) and the statutory policy is that s 3(7) limits rather than defines or excludes the operation of s 6(1)(b) and the statutory policy. If the indemnity is activated only because the death or bodily injury was *directly caused by the vehicle*, s 3(7) makes it necessary to determine whether the death or injury was a consequence of the driving of the vehicle or of the vehicle's running out of control. Thus, s 3(7) limits the scope of the words "directly caused by ... [a] vehicle" in s 6(1)(b) and the statutory policy by imposing an additional requirement. Even if the vehicle directly caused the death or bodily injury, the statutory policy applies only if the person suing on the indemnity also shows that the death or bodily injury was a consequence of the driving of the vehicle or of the vehicle's running out of control.

31 The interpretation put forward by the ICWA effectively merges the two separate and distinct limbs of the statutory formula into one broad question: was the death or bodily injury directly caused by the driving of the vehicle or the vehicle's running out of control? As I have indicated, this would render the first limb of the statutory formula superfluous unless the death or injury were a direct consequence of the vehicle's running out of control.

32 Moreover, acceptance of the ICWA's interpretation requires reading the term "directly" – which does not appear in s 3(7) – into that sub-section. That interpretation effectively seeks to replace the words "a consequence of" with the words "a direct consequence of" or "directly caused by". It gives the words "caused by ... [a] motor vehicle" in the statutory policy no content at all, except that which can be derived from s 3(7). It is clear that under the first limb of the statutory formula, "directly" is relevant only to the question whether the injury was caused by the motor vehicle. That question looks to the direct connection between the injury and the motor vehicle, not the injury and the driving of the

motor vehicle. It is not correct for the ICWA to submit, as it did, that Container Handlers' interpretation gives "directly" no work to do.

33 In support of its construction argument, the ICWA refers to statements in the second reading speech to the Amendment Bill that the object of the 1987 amendments was to indemnify in respect of "the payment of damages for injury or death sustained by persons in consequence of the *negligent driving* of motor vehicles."[33] (emphasis added) However, while statements in second reading speeches concerning legislative intent are a guide – often a useful and sometimes a definitive guide – as to the meaning of the legislation, they do not replace the words of the Act[34]. Under s 6(1)(b) and the Schedule, the cover provided by the statutory policy is for "all liability for negligence", not merely liability for negligent driving. In the seminal case of *Government Insurance Office of NSW v R J Green & Lloyd Pty Ltd*, this Court considered the wording of legislation similar to the predecessor of s 6[35]. Barwick CJ, who gave the leading judgment, said that it is the bodily injury that must be caused by, or arise out of, the use of the motor vehicle, not the liability for that injury[36]. His Honour said that liability may arise from a tortious act other than the negligent use of a motor vehicle[37]. In the present case, the Full Court accepted that this distinction is maintained in the present statutory formulation[38]. The Full Court therefore concluded that under the statutory policy, cover may apply where the death or injury was directly caused by a vehicle, even if liability in negligence arises out of an unsafe system of work[39]. The statutory policy will also apply if, by reason of a defective

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33 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 1987 at 5759 per Malcolm Bryce.

34 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 per Mason CJ, Wilson and Dawson JJ.

35 (1966) 114 CLR 437.

36 *R J Green & Lloyd Pty Ltd* (1966) 114 CLR 437 at 444. See also *Sinfein Pty Ltd* (1996) 15 WAR 434 at 460 per Parker J; *Government Insurance Commission (WA) v CSR Ltd* (1999) 29 MVR 29 at 32 per Pidgeon J, Ipp and Wallwork JJ agreeing.

37 *R J Green & Lloyd Pty Ltd* (1966) 114 CLR 437 at 444. See also *Dickinson* (1987) 163 CLR 500 at 504-505.

38 *Container Handlers Pty Ltd* (2001) 25 WAR 42 at 56 per Roberts-Smith J, Wallwork and Wheeler JJ agreeing.

39 *Container Handlers Pty Ltd* (2001) 25 WAR 42 at 56 per Roberts-Smith J, Wallwork and Wheeler JJ agreeing.

inspection system, the brakes on a vehicle fail and cause a collision, even though the driver was not negligent with respect to the collision.

34 The interpretation proposed by the ICWA may be contrasted with the interpretation adopted by the Full Court. The Full Court's interpretation recognises the separate areas of operation of the two limbs. At the same time the Full Court's approach gives effect to the intention of the legislature as it was expressed through the Amendment Act. That intention was to narrow the scope of the statutory policy by connecting liability under the statutory policy with the locomotion of the vehicle insured. The link with the locomotion of the motor vehicle is maintained through the requirement that the injury be a consequence of the driving of the vehicle or its running out of control. This interpretation of s 3(7) reverses the effect of the decision in *Dickinson* and earlier cases[40] while maintaining the distinction in s 6(1)(b) and the statutory policy between death or injury directly caused by driving and death or injury directly caused by the vehicle. It effectively adopts part of the argument of the insurer that failed in *R J Green & Lloyd Pty Ltd*[41]. In that case, the insurer argued[42] that:

> "injury will not be caused by or arise out of the use of a motor vehicle within the meaning of the policy unless the motor vehicle is in motion, or some part of it is in operation so that the injury is caused by or arises out of the use involving that motion or that operation."

Under the 1987 amendments, the insured must show that the death or injury was either directly caused by the driving or directly caused by the vehicle in consequence of the driving or uncontrolled motion of the vehicle.

35 Accordingly, the Full Court was correct in its articulation of two questions the answers to which determine whether liability arises under the statutory cover.

36 It is appropriate to consider each question in turn.

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40 See, eg, *Fawcett v BHP By-Products Pty Ltd* (1960) 104 CLR 80 at 87 per Menzies J; *R J Green & Lloyd Pty Ltd* (1966) 114 CLR 437 at 441-442 per Barwick CJ; *Commercial and General Insurance Co Ltd v Government Insurance Office (NSW)* (1973) 129 CLR 374 at 379 per Menzies, Walsh and Mason JJ. In *Dickinson*, although the lighting of the match was not a consequence of the driving of the motor vehicle, the plaintiff's subsequent injuries were held to have arisen out of the use of the vehicle.

41 (1966) 114 CLR 437.

42 *R J Green & Lloyd Pty Ltd* (1966) 114 CLR 437 at 441 per Barwick CJ.

Question 1: Was the injury directly caused by the motor vehicle?

37 There is no doubt that "motor vehicle" as defined in s 3(1) of the Act encompasses both the prime mover and the low loader. Although the low loader is not propelled by its own power, the definition of "motor vehicle" in s 3(1) "includes a caravan, trailer or semi-trailer drawn or hauled by a motor vehicle." Nisbet DCJ said[43]:

> "Whether [Mr Sutton's] injuries were directly caused by the vehicle ie. the low loader represents a greater difficulty because in one complete sense they were: part of the low loader crushed [Mr Sutton's] hand, but it seems to me that the true direct cause was the negligent repair of the vehicle by [Mr Reibel]. On the face of it this may be a fine distinction but it is a distinction I draw nevertheless, and not without some misgiving as to its correctness, because I am mindful of what Parker J foreshadowed in [*Sinfein Pty Ltd*[44]] when he said:
>
> > 'I expect that the significance to be properly attached to the phrase "directly caused by" will only emerge from a course of decision involving a variety of factual situations.'"

38 The Full Court reversed this finding. Roberts-Smith J said that Mr Sutton's injury was directly caused by the low loader because its axle fell and crushed his hand against the chassis[45].

39 The ICWA argues that a vehicle does not cause an injury simply because part of the vehicle falls on the injured person. However, as I have indicated, this conclusion is based on a faulty analysis of the effect of s 3(7), so as to require that the injury be "directly caused" by or a "direct consequence of" the driving of the vehicle. In my view, the Full Court correctly concluded that Mr Sutton's injury was directly caused by the vehicle.

Question 2: Was the injury a consequence of the driving of the vehicle?

Meaning of "a consequence of"

40 The ICWA contends that the falling of the axle was not a direct (or even indirect) consequence of the driving of the vehicle. It submits that common sense and experience show there was no causal connection at all between the

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43 *Sutton* [2000] WADC 254 at [27].

44 (1996) 15 WAR 434 at 462.

45 *Container Handlers Pty Ltd* (2001) 25 WAR 42 at 54.

driving of the vehicle and the injury, once regard is had to the intervening acts associated with the repair of the vehicle. The ICWA contends that the injury was a consequence of the negligent acts of Container Handlers and Mr Reibel, namely, the failure to provide a safe system of work and the negligent carrying out of the repairs, and that the driving of the vehicle was merely the occasion for that negligence to operate.

41 In reply, Container Handlers submits that the relationship between the driving and the consequent injury need not be immediate, nor need it be direct. It contends that the injury may be a consequence of the driving even though other causally relevant events intervene. It argues that in this case the injury was a consequence of the driving of the low loader, because there was an unbroken sequence of causally connected events commencing with the driving and leading to the injury. It submits that the driving caused a mechanical problem which required immediate action. The driving of the vehicle therefore generated a risk that Mr Sutton or Mr Reibel might be injured when attempting to correct such a mechanical problem. That risk eventuated. The intervening acts of the driver and Mr Sutton, therefore, did not preclude a finding that there was a relationship of cause and consequence between the driving and the injury, as they were elements in the sequence of causally related events. In support of its argument, Container Handlers refers to a number of tort cases which address the issue of the requisite causal connection for the purpose of establishing liability[46]. It submits that in this case the fact that the vehicle had to be repaired was "the very kind of thing" likely to result from Container Handlers' negligence. The ICWA answers that submission by contending that "consequence of" is not the same as the requisite causal connection for the purpose of establishing tortious liability. A negligent act can be a direct or indirect contributing cause of the intervening act and therefore remain a cause of the damage in an action in tort. The ICWA also submits that the chaining of the axle cannot possibly be described as the very risk arising from the manner of driving.

42 In my view, cases which deal with causation in tort provide little assistance in the present appeal. Those cases consider the causal connection between a particular breach of duty and a particular loss or damage. As I have stated, under the Act it is necessary to establish a link between the driving of the vehicle and the death or bodily injury in question, not between the basis for liability and the death or injury.

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46 *Chapman v Hearse* (1961) 106 CLR 112; *Caterson v Commissioner for Railways* (1973) 128 CLR 99; *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1.

43 The word "consequence" is an ordinary English word and should be interpreted as such. *The Australian Oxford Dictionary*[47] defines "consequence" as "the result or effect of an action". It is therefore necessary to determine whether a reasonable person, properly instructed as to the meaning of s 3(7), would regard the death or injury as an effect of *the* driving of the vehicle.

44 The statutory context of the words tends against the view of Olsson J in *Wagner* that the injury must result from the driving in terms of proximate cause and effect[48]. To equate consequence with proximate cause is tantamount to saying that there must be a direct, dominant or immediate connection between the driving and the death or injury. If the words "in consequence of" were given that interpretation, the first limb of the statutory formula would again merge with the second. The legislature has chosen to use the term "a consequence" in s 3(7) in preference to the terms "direct cause" or "proximate cause"; in doing so, it is likely that it intended the term "a consequence" to have a different meaning from "direct cause" or "proximate cause"[49].

45 In *Wagner*, King CJ said that it may be true that the phrase "in consequence of" emphasises the *sequential as distinct from the causal* nature of the required link to a greater extent than the expression "caused by or arising out of"[50]. However, his Honour went on to say that he found it "difficult to envisage concrete examples in which bodily injury could be said to be 'in consequence of' driving although it could not at least be said to be 'arising out of' the driving."[51] Whether or not this is so, in the context of the Act the expression "a consequence of" emphasises the result or effect of the driving rather than the driving causing the result. This distinction is important in an insurance context where cause is frequently – perhaps usually – equated with "proximate" or "dominant" cause.

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47 *The Australian Oxford Dictionary*, (1999) at 284.

48 (1993) 62 SASR 175 at 182.

49 See also the comments of King CJ in *Wagner* (1993) 62 SASR 175 at 176:

> "I have no difficulty in accepting that injury is in consequence of driving if it is caused by some act, such as adjusting a seat belt, which is preparatory to driving and is immediately connected with the intended driving. The same can be said of actions subsequent to the driving but flowing from it and closely connected with it, such as applying a locking device or handbrake or closing windows immediately after bringing the vehicle to a standstill even after switching off the motor."

50 (1993) 62 SASR 175 at 176.

51 *Wagner* (1993) 62 SASR 175 at 176.

Although "consequence" involves notions of causation, the term "consequence" – with its emphasis on effect – places less emphasis on the proximity of cause and effect than the term "cause" may do in various contexts. As Taylor J explained in *The Commonwealth v Butler*[52]:

> "an 'effect' may be caused, in the legal sense, by circumstances *apparently remote* for the chain of causation may be shown to have continued unbroken by any other intervening cause to the effect in question." (emphasis added)

Meaning of "driving"

46 The Full Court held that "driving" within the meaning of the Act extended to include both the manner of control of a motor vehicle and the fact of its operation[53]. Roberts-Smith J said[54]:

> "In the present case it is arguable that it was the manner of control of the rig which commenced the chain of causation which culminated in the bodily injury to [Mr Sutton]. I refer to the 'manner of control' in the sense of the way in which the rig was driven along unsealed, rough, desert tracks in extreme heat causing the wheel hubs to overheat and seize up so as to require removal of the wheels and the chaining of the axle."

Later in his reasons, his Honour said[55]:

> "The driving of the vehicle along unsealed desert roads in extreme heat causing the wheel hubs to overheat and seize up necessitating removal of the wheels and chaining the axle are matters which fall within the operation of the vehicle. Unlike the factual situation in [*Sinfein Pty Ltd*], the distinct acts of negligence by Container Handlers, or those of its employee driver for which it was liable in tort, were aspects of the fact of operation of the vehicle and so of the driving of it. These included the unserviceable nature of the hydraulic power unit of the low loader and those findings of [Nisbet DCJ] as to the driver's negligence".

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52 (1958) 102 CLR 465 at 476.

53 *Container Handlers Pty Ltd* (2001) 25 WAR 42 at 53 per Roberts-Smith J, Wallwork and Wheeler JJ agreeing.

54 *Container Handlers Pty Ltd* (2001) 25 WAR 42 at 53.

55 *Container Handlers Pty Ltd* (2001) 25 WAR 42 at 56.

47 The ICWA submits that the Full Court erred in regarding acts that were "aspects of the fact of operation of the vehicle" as acts of "driving". It submits that such a conclusion does great violence to what is ordinarily understood to be the "driving" of a motor vehicle. Further, such a conclusion would defeat the legislative intention expressed through the 1987 amendments. The Amendment Act replaced the word "use" with "driving" in order to avoid the result for which Container Handlers contends.

48 In response, Container Handlers argues that "driving" includes all the normal incidents of driving. It submits that the nature of the vehicle in this case meant that parts had to be checked and fixed in order that the vehicle could continue to be driven, and that the checking and fixing were part of the driving. Alternatively, it submits that the injury was a consequence of the driving of the vehicle in the sense that the driving led to the need to chain the axle[56].

49 In support of its conclusion that "driving" includes both the manner of control of a motor vehicle and the fact of its operation, the Full Court[57] referred to the following statement of Parker J in *Sinfein Pty Ltd*[58]:

> "In the context of ss 3 and 4 of the Act it is possible that the notion of 'the driving of' a motor vehicle could be confined to denoting the quality, nature or manner of the control exercised by the driver over the motor vehicle (relating to the manner of control), or it could extend to the wider denotation of mere fact or circumstance that a motor vehicle is operated or driven (relating to the fact of operating). The wider includes the narrower denotation. While the history and in particular s 3(7) could possibly be seen as affording some justification for adopting the narrower denotation of driving, there is no convincing basis for taking such a limited view so that it must be accepted that 'driving' within the meaning of the sections extends to include both the manner of control of a motor vehicle and the fact of operation of a motor vehicle."

50 It seems that Parker J, in referring to the "mere fact or circumstance that a motor vehicle is operated or driven", was referring to an act that can properly be

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56 This submission was raised during the course of oral argument: *Insurance Commission of Western Australia v Container Handlers Pty Ltd* [2003] HCATrans 415 at lines 2149-2156, 1943-1979 and 1948-1985 respectively. Container Handlers' written submissions seemed to indicate that it agreed with the ICWA's submission that the relevant repair work did not form part of the act of driving.

57 *Container Handlers Pty Ltd* (2001) 25 WAR 42 at 52 per Roberts-Smith J, Wallwork and Wheeler JJ agreeing.

58 (1996) 15 WAR 434 at 460.

called an act of "driving". In my view, the Full Court misinterpreted his Honour's judgment so as to encompass acts that do not fall within the meaning of "driving", acts such as equipping the vehicle and undertaking repairs.

51 The amendments enacted by the Amendment Act were intended to reduce the scope of indemnity imported by the word "use". The intention was effected by replacing the word "use" with the word "driving". "Driving" is a much narrower concept than "use". Under earlier legislation dealing with the insurance of motor vehicles – particularly under compulsory third party insurance legislation – courts had interpreted the word "use" to include activities with respect to a motor vehicle that would not ordinarily be regarded as acts of driving[59].

52 The Act does not define "driving". The debate regarding the Amendment Bill in the Legislative Council indicates that the word was to have its ordinary English meaning[60]. *The Australian Oxford Dictionary*[61] and *The New Shorter Oxford English Dictionary*[62] relevantly define "drive" as to "operate and direct the course of" and to "operate and control the course of" a vehicle respectively. Thus, when the Act refers to a consequence of the "driving" of the vehicle, it refers to a consequence of the actual operation and control of the direction and speed of the vehicle. This is confirmed by the expression "or of the vehicle running out of control" in the second part of s 3(7), which conveys the notion of a vehicle in motion. This meaning of the word "driving" also finds support in a number of cases, in which the notion of driving has been held to comprehend the controlling of the movement and direction of the vehicle in a substantial sense[63]. Reconciling the outcomes in these cases, however, is probably impossible. The inconsistencies in the conclusions reached by the courts when applying the concept of "driving" show that it is not always easy to draw a line between an

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59 *Heath v Corporation of City of Tea Tree Gully* (1996) 66 SASR 548 at 549 per Cox J.

60 Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 10 December 1987 at 7716 per John Williams.

61 *The Australian Oxford Dictionary*, (1999) at 399.

62 *The New Shorter Oxford English Dictionary*, (1993), vol 1 at 751.

63 *Ames v MacLeod* [1969] SC 1 at 3 per Lord Justice-General (Clyde), 3-4 per Lord Guthrie; *R v MacDonagh* [1974] QB 448 at 451 per Lord Widgery CJ; *MacNaughtan v Garland; Ex parte MacNaughtan* [1979] Qd R 240 at 244 per Kelly J, Stable SPJ and Dunn J agreeing; *Bassell v McGuiness* (1981) 29 SASR 508 at 512 per King CJ (Mohr J agreeing), 522-523 per Matheson J; *Tink v Francis* [1983] 2 VR 17 at 19 per Young CJ, 27-29 per McInerney J, 57 per Southwell J.

activity that can be described as "driving" and one that cannot be so described. In any event, neither the decisions nor the reasoning in each case support the proposition that, after the driver has stopped and got out of the vehicle, he or she is still driving it.

Application to the facts

53 In order for the low loader to be "driven", it had to be attached to a prime mover and towed or hauled. The controlling of the direction and movement of the prime mover with the low loader attached was the driving of the low loader for the purposes of the policy. While the repair of a vehicle during the course of a journey may fall within the meaning of "use"[64], it clearly does not amount to the "driving" of the vehicle. Nor can it be said that the preceding acts of negligence by Container Handlers constituted the driving of the vehicle. As the ICWA submits, such an interpretation leads to absurd results. It would mean, for example, that an owner is driving the vehicle for the purpose of the Act when he or she fails to inspect repair equipment before the commencement of the journey that gives rise to the relevant injury. In my view, the Full Court erred in finding that[65]:

> "the distinct acts of negligence by Container Handlers, or those of its employee driver for which it was liable in tort, were aspects of the fact of operation of the vehicle and so of the driving of it. These included the unserviceable nature of the hydraulic power unit of the low loader and those findings of [Nisbet DCJ] as to the driver's negligence".

54 However, as long as the death or injury was the effect of conduct that properly can be categorised as the "driving" of the vehicle, the statutory policy would encompass liability for that death or injury. The question then is whether the injury suffered by Mr Sutton was a consequence of Mr Reibel's control of the movement and direction of the vehicle.

55 In the District Court, Nisbet DCJ said[66]:

> "[I]f the vehicle had not been driven and, probably, driven along such bad roads, the low loader's wheel bearings (I presume that's what failed) would

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64 See, eg, *Government Insurance Office of NSW v King* (1960) 104 CLR 93 at 96 per Dixon CJ, 100-101 per Menzies J, 105 per Windeyer J.

65 *Container Handlers Pty Ltd* (2001) 25 WAR 42 at 56 per Roberts-Smith J, Wallwork and Wheeler JJ agreeing.

66 *Sutton* [2000] WADC 254 at [27].

> not have developed the problems they did necessitating the wheels being removed."

56 In the Full Court, Roberts-Smith J expressed a similar view. His Honour said[67]:

> "I refer to the 'manner of control' in the sense of the way in which the rig was driven along unsealed, rough, desert tracks in extreme heat causing the wheel hubs to overheat and seize up so as to require removal of the wheels and the chaining of the axle."

57 *Transport Accident Commission v Treloar*[68] gives some support for these views. In that case McGarvie and Gobbo JJ held that an incident is caused by the driving of a motor car if it is "caused by some feature of the driving such as the speed at which, the inattention with which or the *place to which the car is driven*."[69]

58 Container Handlers relies on a number of South Australian cases which consider whether an injury was "in consequence of the driving" of a vehicle[70] in support of its submission that it is sufficient that a connection between the injury and the control and movement of the vehicle exists that is not merely a temporal connection. In *WorkCover Corporation v Reiter*[71], for example, the plaintiff was injured in the course of unloading wool bales from a stationary trailer, which was attached to a prime mover. The motion of the driving of the prime mover had destabilised a bale of wool. As the bale was unloaded, it fell off the trailer, striking the plaintiff. The Full Court of the Supreme Court of South Australia held that the required connection was present between the control and movement of the prime mover and the plaintiff's injury[72].

59 Section 99(3) of the *Motor Vehicles Act* 1959 (SA), the sub-section considered in the South Australian cases, is different from s 3(7) of the Act. Section 99(3) provided at the relevant time that "death or bodily injury will not

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67 *Container Handlers Pty Ltd* (2001) 25 WAR 42 at 53.

68 [1992] 1 VR 447.

69 *Treloar* [1992] 1 VR 447 at 450 (emphasis added).

70 *Wagner* (1993) 62 SASR 175; *Heath* (1996) 66 SASR 548; *Reiter* (1997) 70 SASR 347.

71 (1997) 70 SASR 347.

72 *Reiter* (1997) 70 SASR 347 at 367 per Lander J, Doyle CJ and Bleby J agreeing.

be regarded as being caused by or as arising out of *the use of* a motor vehicle if it is not a consequence of" the driving of the vehicle (emphasis added). Despite the difference in wording between the South Australian legislation and s 3(7) of the Act, statements in the South Australian cases construing the words "consequence of" assist in construing the same term in s 3(7).

60 However, the decisions in the South Australian cases do not otherwise support Container Handlers' submissions. On the contrary, the cases deny the broad proposition for which Container Handlers contends. Thus, in *Wagner*[73], the Full Court of the Supreme Court of South Australia held that an injury sustained while a backhoe was being prepared for digging was not a consequence of the driving of the vehicle. In that case the plaintiff was employed to operate a front-end loader equipped with a backhoe. The loader was registered as a motor vehicle. When the backhoe was to be used, the wheels of the vehicle were raised and it was incapable of being driven along a road. After driving the vehicle to a work site, the plaintiff sustained injury when the vehicle had been so stabilised and he was preparing to use the backhoe for digging. The Court unanimously held that the injury was not a consequence of the driving of the vehicle. The Court held that there was a distinct separation between the activity of driving and the activity of preparing the vehicle for digging[74].

61 In *Heath v Corporation of City of Tea Tree Gully*[75], the plaintiff sustained injury while loading the bucket of a front-end loader with concrete slabs. The driver of the loader had tilted the bucket in order to assist the plaintiff. At the time, the loader was stationary at the kerb, but the driver intended to drive it to a truck "to drop off the load"[76]. A majority of the Full Court of the Supreme Court of South Australia (Cox and Debelle JJ, Prior J dissenting) held that the injury was not "a consequence of" the driving of the loader. Cox J said[77]:

> "Whatever the words 'a consequence of' connote, it must be more than a mere temporal relationship. It is important, in my view, to ensure that the clear policy of the subsection is not undermined by straining the terms 'a consequence of' and 'driving' and the composite expression beyond their normal meaning."

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73 (1993) 62 SASR 175.

74 *Wagner* (1993) 62 SASR 175 at 176 per King CJ, 177 per Millhouse J, 182 per Olsson J.

75 (1996) 66 SASR 548.

76 *Heath* (1996) 66 SASR 548 at 556 per Debelle J.

77 *Heath* (1996) 66 SASR 548 at 550, Debelle J agreeing at 555.

62 His Honour went on to say[78]:

> "I do not think that anyone would say that the plaintiff's mishap was a consequence of the driving of the vehicle. On the contrary, it would be regarded purely as a consequence of the loading operation."

63 Although cases in other States may be useful when considering whether death or injury is a consequence of the driving of a vehicle, those cases must be read in the light of the legislative history and purpose of the Act. That history and purpose is found in the scope of the Act as perceived when it was enacted in 1943, the decision in *Dickinson*[79] and the Amendment Act enacted in response to that case. According to the second reading speech for the Amendment Bill, the Act was originally perceived as confined to indemnifying against the consequences of negligent driving. However, *Dickinson* held that injuries sustained by a passenger when a stationary car caught fire while the driver was absent arose out of the "use" of the vehicle. This was seen as repudiating the purpose of the Act. To overcome the effect of *Dickinson*, the legislature repealed all expressions such as "caused by the use of", "arising out of the use of", "in the use of a motor vehicle", "caused by or arises out of the use of" and "as the result of the use of a motor vehicle". It then narrowed the indemnity by requiring that death or injury be directly caused by the driving of the vehicle or, if directly caused by the vehicle, that death or injury be a consequence of the driving of the vehicle or of the vehicle's running out of control. The legislative history of the Act shows, therefore, that the indemnities given by policies issued under the Act no longer cover liabilities that merely arise out of the use of motor vehicles. To come within the indemnity given by a policy, there must be a causal connection between the death or injury and *the* driving of a motor vehicle.

64 It is true that, if death or injury is directly caused by the vehicle, it is not necessary that it be directly caused by the driving of the vehicle. It is sufficient if the death or injury is *a* consequence of the driving. Whichever limb of the indemnity is invoked, however, the legislative history and purpose of the Act demonstrate that there must be a causal link between the death or injury and some feature of the driving of the vehicle. It is not enough that the death or injury is the result of the use of the vehicle. The death or injury must be a consequence of *the* driving of the vehicle. The definite article "the" in front of "driving" emphasises the need to find a causal connection between the death or injury and some feature of the driving of the vehicle. It is at this stage that the case for Container Handlers fails.

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78 *Heath* (1996) 66 SASR 548 at 551.

79 (1987) 163 CLR 500.

65 Nothing in the evidence suggests that any particular feature of the driving of the vehicle brought about the injury to Mr Sutton. Nothing in the evidence suggests that some feature of the driving, such as running into a drain or avoidable pothole or driving at excessive speed, caused the low loader's wheel bearings to fail or the wheels to lose their shape. If some feature of the driving had this effect, it might plausibly be suggested that Mr Sutton's injury was a consequence of that driving, because it led to the repair work which in turn led to the injury. On that hypothesis, the injury was arguably *a* consequence, although not a direct consequence, of the driving of the vehicle. Nevertheless, nothing in the evidence suggests that the injury to Mr Sutton was the result or effect of some feature of the driving of the vehicle.

66 The mere fact that Mr Sutton's injury would not have occurred if the vehicle had not been driven from Port Hedland to Camp Tracey and then to Nifty or from Nifty to Port Hedland does not mean that, for the purpose of the Act, the injury to Mr Sutton was a consequence of the driving of the vehicle. The use of the vehicle to transport a heavy crane and a mine transport truck on bad roads was a necessary pre-condition for the sustaining of the injury. However, the injury was not a consequence of any *feature* of the driving of the prime mover and its attached load. The injury was not a result or effect of some feature of the driving of the vehicle. Taylor J's remarks in *Butler*[80], although phrased in terms of "cause" and "effect" rather than "consequence", are instructive in this context:

> "[T]he cause of an event is not established in the legal sense by showing, without more, that in the absence of a proved set of circumstances the event would or may not have happened, or, that a proved set of circumstances, in the widest sense, contributed to the happening of the event."

Once it is understood that using the vehicle is not equivalent to *the* driving of it, it is impossible to hold that the injury to Mr Sutton was a consequence of the driving of the prime mover and low loader. His injury was not a consequence of any feature of the driving of the vehicle.

67 On the evidence, therefore, the injury to Mr Sutton was not a consequence of the driving of the vehicle for the purposes of determining liability under the policy. Accordingly, the Full Court erred in holding that Container Handlers was entitled to indemnity under the policy.

Order

68 The appeal must be allowed.

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80 (1958) 102 CLR 465 at 476-477.

69 GUMMOW J. This is an appeal from the orders of the Full Court of the Supreme Court of Western Australia (Wallwork, Wheeler and Roberts-Smith JJ)[81] upholding in part an appeal from the orders of the District Court of Western Australia (Nisbet DCJ)[82].

The facts

70 The facts giving rise to this appeal fall within a narrow compass. On an exceptionally hot day in March 1998, Mr Ashley Sutton was travelling as a passenger in a prime mover driven by Mr Jason Reiball, an employee of the first respondent, Container Handlers Pty Ltd ("Container Handlers"), in a remote part of Western Australia inland from Port Hedland. Attached to the rear of the prime mover was a form of trailer known as a low loader. At about midday, Mr Reiball brought the prime mover and low loader to a halt and carried out an inspection of both vehicles. That inspection revealed that smoke and fumes were coming from one of the rear wheel hubs of the low loader. Mr Reiball determined that the two wheels behind the wheel hub were out of shape and would have to be removed. The axle that was supported by the two damaged wheels would then have to be "chained up" in order to prevent it from dragging against the ground during the remainder of the journey.

71 Mr Sutton assisted Mr Reiball to remove both wheels. Both men then attempted to use a chain to secure the axle. That process involved using a jack to lift the axle to a height sufficient to allow the chain to fit beneath it. However, during this process, the axle slipped off the jack and the trail arm assembly that was connected to the axle fell against the chassis of the low loader, trapping Mr Sutton's hand beneath it. Mr Sutton's hand was severely injured.

The litigation

72 Mr Sutton commenced in the District Court of Western Australia proceedings against Container Handlers alleging negligence. Nisbet DCJ gave judgment in favour of Mr Sutton and awarded him damages of $926,043.36. His Honour found that a prudent employer in the position of Container Handlers would have properly equipped its vehicles for the carrying out of emergency roadside repairs to wheels and axles and that Container Handlers had failed to do so in the present case. The trial judge also found Container Handlers vicariously liable for the negligence of Mr Reiball in failing, among other things, to ensure Mr Sutton was clear of the chassis of the low loader prior to Mr Reiball's attempt

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81 *Container Handlers Pty Ltd v Insurance Commission of Western Australia* (2001) 25 WAR 42.

82 *Sutton v Container Handlers Pty Ltd* [2000] WADC 254.

to jack up the axle. Neither the judgment in favour of Mr Sutton, nor the findings against Container Handlers or Mr Reiball in respect of negligence, were the subjects of an appeal to the Full Court.

73 As part of the proceedings at trial, Container Handlers brought two third-party claims upon several policies of insurance. The first was brought against the appellant, the Insurance Commission of Western Australia ("the Insurance Commission"), upon compulsory third-party insurance policies, and the second against Union des Assurances de Paris ("UAP") upon a policy entitled "General and Products Liability Policy". Both claims failed at first instance. On appeal, the Full Court upheld the third-party claim against the Insurance Commission but dismissed the appeal in so far as it concerned UAP.

74 The Insurance Commission now appeals to this Court against the orders of the Full Court obliging it to indemnify Container Handlers for the damages payable to Mr Sutton. The Insurance Commission joined UAP as second respondent and Mr Sutton as third respondent. After the conclusion of argument on the appeal, the Insurance Commission discontinued its appeal against Mr Sutton. He had played no active part in the appeal.

75 The primary issue in this appeal is the extent to which policies of insurance issued by the Insurance Commission in respect of the prime mover and low loader respond to the injury suffered by Mr Sutton. By virtue of the provisions of the *Motor Vehicle (Third Party Insurance) Act* 1943 (WA) ("the Motor Vehicles Act"), to which it will be necessary to refer below, the policies will only apply if the injury suffered by Mr Sutton was "directly caused by, or by the driving of, [a] motor vehicle". The Insurance Commission submits that the injury suffered by Mr Sutton falls outside that expression. As will appear from these reasons, that submission should be accepted with the result that the appeal should be allowed with costs, the relevant orders of the Full Court should be set aside and, in place thereof, the appeal by Container Handlers to that Court against the Insurance Commission should be dismissed with costs.

The Motor Vehicles Act

76 Since its enactment, the Motor Vehicles Act has provided for a regime of compulsory third-party insurance in respect of motor vehicles. However, the extent of the liability covered by insurance policies issued pursuant to the Act has changed over time.

77 Prior to 1987, the Motor Vehicles Act was concerned with insuring against liability in respect of deaths or bodily injuries "caused by or arising out of the use of" a motor vehicle. A policy of insurance in that form and issued pursuant to the Act was considered by this Court in *Dickinson v Motor Vehicle*

Insurance Trust[83]. The Court held that injuries sustained by a child inside a parked car as a result of the child playing with a box of matches left by the child's father (who had gone shopping) fell within the terms of the policy. In reaching this conclusion, Mason CJ, Wilson, Brennan, Dawson and Toohey JJ said[84]:

> "Whether or not the appellant's injuries were actually caused by the use of the motor car, it is sufficient to say that they arose out of such use. The test posited by the words 'arising out of' is wider than that posited by the words 'caused by' and the former, although it involves some causal or consequential relationship between the use of the vehicle and the injuries, does not require the direct or proximate relationship which would be necessary to conclude that the injuries were caused by the use of the vehicle[85]."

78 The construction adopted in *Dickinson* echoed a similar conclusion reached by Windeyer J in *Government Insurance Office of NSW v R J Green & Lloyd Pty Ltd* in the context of the *Motor Vehicles (Third Party Insurance) Act* 1942 (NSW)[86]. His Honour had said[87]:

> "The words 'injury caused by or arising out of the use of the vehicle' postulate a causal relationship between the use of the vehicle and the injury. 'Caused by' connotes a 'direct' or 'proximate' relationship of cause and effect. 'Arising out of' extends this to a result that is less immediate; but it still carries a sense of consequence."

The imposition of a requirement of directness or proximity in respect of the expression "caused by" no doubt reflected the common law rule that, in the words of Lord Lindley, "[i]n an action on a policy [of insurance] the causa proxima is alone considered in ascertaining the cause of loss"[88].

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83 (1987) 163 CLR 500.

84 (1987) 163 CLR 500 at 505.

85 *State Government Insurance Commission v Stevens Bros Pty Ltd* (1984) 154 CLR 552 at 555, 559.

86 (1966) 114 CLR 437.

87 (1966) 114 CLR 437 at 447.

88 *Fenton v Thorley & Co Ltd* [1903] AC 443 at 454. See *Clover, Clayton & Co Ltd v Hughes* [1910] AC 242 at 245; *Australian Casualty Co Ltd v Federico* (1986) 160 CLR 513 at 534-535.

79 The legislative materials[89] disclose that it was as a result of the Court's decision in *Dickinson*, and the apprehended adverse impact of the decision on the price of compulsory third-party insurance premiums, that the *Motor Vehicle (Third Party Insurance) Amendment Act* 1987 (WA) ("the Amendment Act") was enacted by the Parliament of Western Australia. That statute brought into force the regime with which this appeal is concerned. The principal changes effected by the Amendment Act to the Motor Vehicles Act and to the terms of insurance policies issued pursuant to the regime are reflected in the long title to the revised Motor Vehicles Act. The long title now indicates that the purpose of the legislation is to ensure that "owners of motor vehicles whilst on a road, [are] insured against liability in respect of deaths or bodily injuries *directly caused by, or by the driving of, such motor vehicles*, whether caused on or off a road" (emphasis added).

80 Section 4(1) of the revised Motor Vehicles Act describes the obligation to acquire insurance in the following terms:

> "When any motor vehicle is on a road there is required to be in force in relation to the motor vehicle a contract of insurance entered into by the owner of the motor vehicle under which the owner has insured subject to and in accordance with this Act against any liability which may be incurred by the owner or any person who drives the motor vehicle *in respect of the death of or bodily injury to any person directly caused by, or by the driving of, the motor vehicle*." (emphasis added)

"Motor vehicle" is defined in s 3(1) to mean any vehicle propelled by gas, oil, electricity or any other motive power, not being animal power, required to be licensed, and complying with the requirements necessary for licensing under the *Road Traffic Act* 1974 (WA)[90], and includes caravans, trailers or semi-trailers drawn or hauled by a motor vehicle. It has been accepted throughout the course of the litigation that both the prime mover and low loader fell within this definition of motor vehicle and that, as a result, both vehicles were required to be insured in accordance with s 4(1) of the Motor Vehicles Act.

81 Section 6(1) of the Motor Vehicles Act sets out the requirements that a policy of insurance must fulfil in order to comply with the terms of s 4(1). First, the policy must be issued by the Insurance Commission. Secondly, the policy must insure the owner of the vehicle mentioned in the policy and any other

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89 In particular, the Second Reading Speech of the Deputy Premier: Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 1987 at 5759-5760.

90 See ss 15, 16 with the First Schedule.

person who at any time drives that vehicle, whether with or without the consent of the owner, in respect of all liability for negligence which may be incurred by that owner or any other person in respect of the death of, or bodily injury to, any person "directly caused by, or by the driving of, the vehicle" in any part of the Commonwealth. Lastly, the policy must be in a form substantially similar to that contained in the Schedule to the Motor Vehicles Act. Given the terms of the policy contained in the Schedule, compliance with this latter requirement will result in compliance with the balance of s 6(1).

The policies

82 It is accepted by both parties that the Insurance Commission issued policies in favour of Container Handlers in respect of the prime mover and low loader in the terms contained in the Schedule to the Motor Vehicles Act.

83 The policy contained in the Schedule is headed "INSURANCE POLICY – issued under the *MOTOR VEHICLE (THIRD PARTY INSURANCE) ACT 1943*". The governing clause provides as follows:

> "The [Insurance Commission], subject to the warranties and conditions contained in this Policy and to the provisions of the [Motor Vehicles Act], in this Policy referred to as 'the Act', agrees to insure the owner of the motor vehicle described in the Traffic Licence issued herewith and any other person who drives that motor vehicle, whether with or without the consent of the owner, in respect of all liability for negligence which may be incurred by the owner or other person *in respect of the death of or bodily injury to any person directly caused by, or by the driving of, that motor vehicle* in any part of the Commonwealth during the period from the date of the issue of this Policy to the date of expiry of the said Traffic Licence." (emphasis added)

The policy then sets out several warranties as follows:

> "The owner warrants that the vehicle will not be –
>
> (a) used for any other purpose than that stated by the owner in his application for this Policy;
>
> (b) driven in an unsafe or damaged condition;
>
> (c) driven by or in charge of himself or any other person who is unlicensed to drive or who is under the influence of intoxicating liquor.
>
> It shall be a defence to any action in respect of the warranty contained in subclause (c) if the owner proves that the vehicle was so driven or in charge of such other person without his knowledge or consent."

84 The final section of the policy is headed "CONDITIONS" and provides that:

> "1. The owner and any other person claiming indemnity under this Policy shall comply with the provisions of sections 10 and 11 of the Act.
>
> 2. Sections 7(5) and 15 of the Act are deemed to be incorporated in this insurance.
>
> 3. The [Insurance Commission] is entitled to all rights remedies and benefits which may accrue to it by virtue of the Act.
>
> 4. This contract of insurance is subject to the provisions of the Act."

85 No reliance is placed upon conditions 1 and 2 of the policy. However, conditions 3 and 4, together with the opening words of the governing clause, indicate that the policy must be read in conjunction with, and subject to, the provisions of the Motor Vehicles Act. That approach to the construction of the policy is supported by s 4(1), which, as indicated earlier in these reasons, requires the insuring of a motor vehicle to be carried out "subject to and in accordance with this Act". The result is that provisions of the statute, including s 3(7) to which further reference will be made, are to be "read into" the policies.

86 The Full Court concluded that the policies issued by the Insurance Commission in respect of each vehicle were "coterminous" with the provisions of the Motor Vehicles Act[91]. That approach may be accepted so long as it is remembered that it is the policy issued in respect of each vehicle, as construed in accordance with the Act, which grounds any liability of the Insurance Commission in the present case. It is convenient now to consider the extent of the Insurance Commission's liability under the policies.

Extent of liability

87 There is no dispute that the damage suffered to Mr Sutton's hand amounted to a bodily injury within the meaning of the policy. What remains in issue is the meaning of the expression in the governing clause set out above, "directly caused by, or by the driving of, [a] motor vehicle".

88 In the submission of the Insurance Commission, that expression can be separated into two criteria so that the policy responds if an injury is either: (a) directly caused by a motor vehicle or (b) directly caused by the driving of a

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91 *Container Handlers Pty Ltd v Insurance Commission of Western Australia* (2001) 25 WAR 42 at 53.

vehicle. Container Handlers accepts that bifurcation and has sought to place no reliance upon the second of the two criteria. Accordingly, attention only need be focused on the extent to which Mr Sutton's injury was directly caused by the vehicle.

89 The phrase "caused by … [a] motor vehicle" appears in numerous places throughout the Motor Vehicles Act and in the policy. On its face, the phrase would appear to contemplate injuries caused by a vehicle in a wide variety of circumstances. However, the phrase must be read in the light of s 3 of the Motor Vehicles Act. That section is headed "Interpretation". Sub-section (7) provides:

> "For the purposes of this Act, the death of or bodily injury to any person shall not be taken to have been caused by a vehicle if it is not *a consequence of the driving of that vehicle or of the vehicle running out of control*." (emphasis added)

90 The phrase "caused by … [a] motor vehicle" is preceded in the governing clause of the policy by the adverb "directly". This word qualifies the whole of what follows. That is divided into two branches; the first has just been stated. The second is "caused … by the driving of" the motor vehicle. However, s 3(7) applies according to its terms only to one of those branches. That is the first branch and, as noted above, it is with that branch that this appeal is concerned.

91 Roberts-Smith J, with whom Wallwork and Wheeler JJ agreed, held that the effect of s 3(7) was quite different. Their Honours treated it as dividing the question of whether an injury was directly caused by a motor vehicle into two parts: first, was the injury "directly caused" by a vehicle, and secondly, was the injury a consequence of the driving of the vehicle or of the vehicle running out of control[92]. Their Honours accepted that, by virtue of s 3(7), the injury need not be a direct consequence of the driving or of the vehicle running out of control for the purposes of the second question[93]. The Full Court's approach, which is adopted in modified form by Container Handlers in this Court, should not be accepted.

92 Section 3(7) is an interpretation provision. It does not enjoy a substantive effect independently of the phrase "caused by … [a] motor vehicle" as found in the policies. Rather, the sub-section operates to limit the meaning otherwise to be attributed to that phrase, which has been identified above as "the first branch".

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92 *Container Handlers Pty Ltd v Insurance Commission of Western Australia* (2001) 25 WAR 42 at 54.

93 *Container Handlers Pty Ltd v Insurance Commission of Western Australia* (2001) 25 WAR 42 at 54.

It follows that, contrary to the reasoning of the Full Court, s 3(7) does not operate as a criterion separate from, and in addition to, the requirement that the injury be caused by a vehicle.

93 The absence of the word "directly" from s 3(7) is significant. That circumstance indicates that s 3(7) is concerned with the *cause* of the injury (being the driving of a vehicle or the vehicle running out of control), rather than the quality of the *connection* between that cause and the injury. As a result, s 3(7) does not remove the requirement that an injury be "directly" caused by a vehicle or, to frame the requirement in terms of s 3(7), that the injury be directly caused by the driving of a vehicle or by a vehicle running out of control.

94 In its written submissions, Container Handlers conceded that Mr Sutton's injury was not *directly* caused by the driving of the prime mover and low loader. Nor is it suggested that Mr Sutton's injury was directly caused by the vehicles running out of control. Once there is appreciated the proper construction of the phrase "directly caused by … [a] motor vehicle " in the light of s 3(7), Container Handlers' concession is fatal to its success in this appeal. Therefore it is unnecessary to consider the submissions made by the parties as to the proper meaning of "driving" and the existence or otherwise of a causal connection between that driving and Mr Sutton's injury sufficient to give rise to liability under the policies.

Conclusion

95 The appeal should be allowed. Container Handlers should pay the costs of the Insurance Commission. Orders 1, 2 and 3 of the Full Court should be set aside and, in place thereof, the appeal by Container Handlers to that Court against the Insurance Commission should be dismissed with costs.

96 KIRBY J. This appeal concerns the operation of a policy of compulsory motor vehicle insurance.

The context of a statutory policy of insurance

97 The law books are full of disputes over the meaning of insurance policies. Because disputes about language are notoriously liable to produce different outcomes[94], a rule of construction was long ago adopted by the English courts to the effect that intractable ambiguities in printed instruments, such as insurance policies, should be resolved in favour of the person receiving them and against the person propounding them[95]. This was a useful rule. Amongst other things, it encouraged insurers to express policy conditions clearly where they limited recovery, so that the insured would know precisely whether it was entitled to indemnity or not.

98 The maxim was applied by this Court from its earliest years[96]. It may occasionally still be useful where dictionaries and logic alone do not resolve an ambiguity[97]. However, the limitations and defects of the maxim were also recognised long ago[98]. It did not afford an alternative to proper legal analysis. This appeal, which concerns a statutory policy of insurance, illustrates another limitation in the usefulness of the maxim.

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94 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 77 ALJR 1515 at 1524 [42] per McHugh J; 200 ALR 157 at 168.

95 The applicable maxim was *verba cartarum fortius accipiuntur contra proferentem* (the words of a deed should be construed strongly against the grantor). See Co Litt 36a; Bac Max 3. See further *Cornish v Accident Insurance Co* (1889) 23 QBD 453 at 456 per Lindley LJ; *Elderslie Steamship Co Ltd v Borthwick* [1905] AC 93 at 96 per Lord Macnaghten, 96-97 per Lord Lindley.

96 *Western Australian Bank v Royal Insurance Co* (1908) 5 CLR 533 at 554, 559, 567, 574.

97 *Halford v Price* (1960) 105 CLR 23 at 30; *Federation Insurance Ltd v R Banks* [1984] VR 525 at 528, 543; *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 at 510; *CE Heath Underwriting & Insurance (Aust) Pty Ltd v Edwards Dunlop & Co Ltd* (1993) 176 CLR 535 at 548; *Johnson v American Home Assurance Co* (1998) 192 CLR 266 at 274-275 [19]; *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 602 [74]; *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2004) 78 ALJR 508 at 537 [167]; 205 ALR 232 at 272.

98 *Taylor v Corporation of St Helens* (1877) 6 Ch D 264 at 270-271 per Sir George Jessel MR; *A/S Ocean v Black Sea & Baltic General Insurance Co Ltd* (1935) 51 Ll L Rep 305 at 310; *Parkinson v Barclays Bank Ltd* [1951] 1 KB 368 at 375.

99 In construing a policy, issued in terms adopted by a Parliament to achieve legislative objectives, the interpreter enters a different realm of discourse. The object there is not, as such, to uphold a bargain fairly defined between private parties. Ultimately, it is to uphold the purpose of the legislature in enacting that form of policy.

100 This is the context in which the problem presented by this appeal[99] must be decided. The facts and circumstances giving rise to the controversy are explained by McHugh J[100], Gummow J[101], Callinan J[102] and Heydon J[103]. The key provisions of the statutory policy issued by the appellant (Insurance Commission of Western Australia) to the first respondent (Container Handlers Pty Ltd) are set out[104]. So are the relevant provisions of the *Motor Vehicle (Third Party Insurance) Act* 1943 (WA) ("the Act")[105], as amended following the decision of this Court in *Dickinson v Motor Vehicle Insurance Trust*[106]. It is unnecessary to repeat this material again. I can go straight to the controversy for decision.

The background: *Dickinson's* case

101 *Dickinson* was a case addressed to the previous, more familiar and broader language of the Act before its amendment in Western Australia in 1987[107]. As the passages from the legislative records cited by Heydon J demonstrate[108], it was

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99 From the Full Court of the Supreme Court of Western Australia: *Container Handlers Pty Ltd v Insurance Commission of Western Australia* (2001) 25 WAR 42.

100 Reasons of McHugh J at [7]-[10].

101 Reasons of Gummow J at [70]-[71].

102 Reasons of Callinan J at [121]-[125].

103 Reasons of Heydon J at [138]-[140].

104 Reasons of McHugh J at [12]; reasons of Gummow J at [82]-[85]; reasons of Callinan J at [129]; reasons of Heydon J at [140].

105 Reasons of McHugh J at [12]; reasons of Gummow J at [80]-[81]; reasons of Callinan J at [126]-[128]; reasons of Heydon J at [140].

106 (1987) 163 CLR 500.

107 By the *Motor Vehicle (Third Party Insurance) Amendment Act* 1987 (WA).

108 Reasons of Heydon J at [148]-[152].

a clear purpose of those amendments to reduce the scope of the indemnity offered by the policy then provided by the Act. The proponents of the change aimed to lower the costs of premiums levied in respect of the policy. This measure was one of many enacted throughout Australia to diminish the burdens of insurance premiums for motor vehicle owners, employers and others involved in risk[109].

102 Because there are so many motorists, obliged by the Act to obtain third party policies, the reduction or containment of insurance premiums became an electoral issue[110]. The limitation of the scope of the indemnity provided by the policy was clearly deliberate. Necessarily, it would sometimes leave persons unprotected whose injuries arose out of the use of a motor vehicle who would have been protected by the Act in its earlier form. However, that was no more than the necessary consequence of the change in the legislation.

103 Mr Ashley Sutton suffered such an injury. It gave rise to his action against the first respondent and the first respondent's demand on the Commission[111]. So far as is known, Mr Sutton, an employee of an independent contractor and not an employee of the first respondent, will recover his judgment from the first respondent, following the negligence found at trial and unchallenged in this appeal. He will do so whatever is the outcome of the appeal. Nevertheless, cases will arise, and can readily be imagined, where, unless recovery could be secured from an insurer, under the policy issued pursuant to the Act, no monetary damages would be available to the injured person or that person's dependants. In such a case, the insured and the injured person would be unable to look to the insurer for indemnity. A judgment in negligence would be valueless.

104 These facts, and the large number of policies issued by the Commission under the Act, warranted the grant of special leave. In my opinion, the appeal must be allowed. My reasoning is substantially the same as that of Heydon J.

105 The critical consideration that, for me, resolves the construction of the policy contrary to the propositions advanced by the first respondent, is the fact that it was the clear purpose of the Western Australian Parliament, in adopting

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109 Masel (ed), *The Laws of Australia: Torts*, (2003) at 596 [33.10:7].

110 There have been similar amendments to the law governing third party compulsory motor vehicle insurance in other States: see eg *Motor Accidents Compensation Act* 1999 (NSW); *Motor Accident Insurance Act* 1994 (Q), s 5; *Motor Vehicles Act* 1959 (SA), Sched 4.

111 Reasons of Gummow J at [72]-[75].

the amendments that introduced the words now in contention, to reduce the ambit of the indemnity. Those words restricted the Commission's liability by reference to the limiting notions of causation (*directly*)[112] and locomotion (*driving*) of the insured motor vehicle[113]. Although the use of words such as "direct" and "proximate" has been criticised by courts in the context of the legal notion of causation at common law, the introduction of the word "directly" into the Act obliges courts to give that word due meaning[114]. It cannot be ignored simply because courts disapprove of such notions. In this case, it confines the scope of the indemnity provided by the statutory policy.

106 Within the principles adopted by this Court in *Dickinson*, in explaining the former language of the Act ("caused by or arising out of the use of" a motor vehicle), the injury to Mr Sutton would almost certainly have qualified for indemnity of the first respondent by the Commission. Mr Sutton's injury, even if not "caused by" the use of a motor vehicle, would then have been viewed as one "arising out of" such use. The latter concept was wider than the concept of causation, appearing on its own[115]. But what of the protection under the Act as amended?

107 The adoption of the present language, by the 1987 amendments, signalled a change in two important respects. First, the broader words of connection ("arising out of") were deleted; secondly the adverb "directly" was inserted to modify the words "caused by". In the context of the purposes of Parliament, and the terms of the repeated references in the Act and in the statutory policy to these changes, it is clear that the word "directly" governed not only the words "caused by" but also the phrase within commas (", or by the driving of,"). In this Court, the first respondent conceded as much. In my view, that was a proper concession.

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112 Reasons of Heydon J at [154]-[157]. See further *Weld-Blundell v Stephens* [1920] AC 956 at 983-984; *Duce v Rourke* (1951) 1 WWR (NS) 305 at 306, 351; *Australian Casualty Co Ltd v Federico* (1986) 160 CLR 513 at 521, 534-535; Keeton et al (eds), *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 293-294.

113 "[I]n respect of the … bodily injury to any person *directly* caused by, or by the *driving* of, the motor vehicle": the Act, s 4(1) (emphasis added). See *Transport Accident Commission v Treloar* [1992] 1 VR 447 at 449-450.

114 See *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 509-510; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 6-7.

115 *Dickinson* (1987) 163 CLR 500 at 505. See reasons of Gummow J at [77].

108 Confined to the terms of s 4(1) of the Act and the insuring clause of the statutory policy, the first respondent could arguably contend that Mr Sutton's injuries were "directly caused by" the motor vehicle, in the usual sense of those words. Under the Act, the term "motor vehicle" included the "low-loader" ("trailer"). The trailer had developed a defect during driving. It was whilst attempting to repair that defect that the incident occurred that caused the chassis of the trailer to fall. It was that event, in turn, that trapped Mr Sutton's hand and injured him.

109 Without more, an argument would arise that, viewed in isolation, the uncontested "bodily injury" to Mr Sutton was "directly caused by" the motor vehicle, in the sense that it was immediately caused by contact with part of that vehicle. Arguments to the contrary would lay emphasis on the intervening causative agents, namely the first respondent's employee, Mr Reiball, or the first respondent itself, in failing to provide proper equipment for the eventuality of breakdown that occurred. However, I would accept direct causation "by … the motor vehicle", in the sense of the direct physical engagement of part of the trailer with the hand of Mr Sutton.

The statutory limitation of the ambit of indemnity

110 The critical phrase in the statutory policy does not, however, appear in isolation. By condition 3 of the policy, it is provided that the Commission is entitled to "all rights remedies and benefits that may accrue to it by virtue of the Act". By condition 4, the contract of insurance is rendered (as it would in any case have been) "subject to the provisions of the Act"[116]. And once the Act is incorporated, it imports s 3(7) into the policy. It is in that sub-section that a clear indication is provided limiting still further the ambit of the insuring clause in respect of that part of the cover in the policy concerned with bodily injury "caused by a vehicle". Those who drafted the insuring clause were presumably concerned about the potential risk inherent in the expression "caused by a vehicle". Hence the language of s 3(7), with its confusing double-negative.

111 The provision in s 3(7) of the Act that a bodily injury shall not be "taken" to have been "caused by a vehicle" is clearly in the nature of a limiting definition of that phrase as it appears elsewhere. It imports a requirement that would not otherwise have been read into that expression. This is that, to call on the policy, the injury must be "a consequence of the driving of that vehicle or of the vehicle running out of control". It was never suggested that the last mentioned expression could apply to the circumstances in which Mr Sutton was injured. This left as the only basis for claiming indemnity from the Commission a suggestion that the injury had been "caused by a vehicle" in the sense of being "a

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116 Reasons of Heydon J at [140].

consequence of the driving of that vehicle". But does Mr Sutton's injury fall within that phrase?

112 The Commission advanced two answers to this question. First, the injury to Mr Sutton was not "a consequence of the driving" of the vehicle in the ordinary sense of those words. It was a consequence of the failure of the first respondent to provide proper equipment for a predictable breakdown of the vehicle and a consequence of the negligent way in which Mr Reiball performed the repair of the trailer, the doing of which directly caused the injury to Mr Sutton's hand.

113 Secondly, even if, contrary to this contention, the first respondent could come within s 3(7), taken on its own, the Commission urged that the purpose and operation of that sub-section was not designed to afford a distinct, separate and free-standing criterion of indemnity[117]. Its language ("shall not be taken") makes it clear that the sub-section was a special definition of the phrase "caused by a vehicle". Accordingly, the operative provisions of the sub-section are to be inserted into the statutory insuring clause where that phrase appears. Doing this leaves the remaining words still governed by the adverb "directly", appearing before the defined words. Indemnity is not provided unless the bodily injury was *directly* a consequence of the *driving* of that vehicle. It is unsurprising that "directly" was not repeated in s 3(7) of the Act. There was no need to do so. That word, appearing in the substantive provisions of the Act (ss 4(1) and 6(1)) and in the statutory policy, already governed the defined expression.

The error of the Full Court

114 To the extent that the Full Court mistook s 3(7) of the Act as a separate foundation for indemnity, and not as a definitional provision confining still further the ambit of that indemnity, it erred. Its error is made plain by an analysis of the language of the policy read in the light of the Act, understood so as to achieve the statutory purposes. The purposive construction of legislation is now the settled approach of this Court[118].

115 There is no reason to withhold that approach in this case because the subject of the legislation concerns a policy of insurance or because that insurance is compulsory for motor vehicle owners or because it is important to provide

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117 Reasons of Gummow J at [92]-[94].

118 *Bropho v Western Australia* (1990) 171 CLR 1 at 20; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[70]. See also *Interpretation Act* 1984 (WA), s 18.

effective coverage for relevant events involving motor vehicles and injured persons. All of these considerations may be accepted. Faced with real ambiguities, the Act would be treated as beneficial and protective. In other contexts, its words might be given a broad construction[119]. However, in deriving the meaning of the words of the Act critical to this appeal, it is impossible to ignore the statutory history and legislative purpose of the 1987 amendments that introduced those words. The purpose of reducing the ambit of coverage, and hence the amount of premiums, was clearly intentional. Courts must give effect to, and not frustrate, such a purpose when it is clear from the language of the legislation. They must do so whatever their views may be about the wisdom of its policy[120].

116 Of course, each case of causation, including *direct* causation, depends on its own facts. Line-drawing is inescapable in the determination of issues of causation for legal purposes[121]. In respect of compulsory motor vehicle insurance, it frequently arose under the previous insuring clause[122]. The present Act, with its new formula, is no different in this respect.

117 Approaching the application of the policy in this way, I would accept that Mr Sutton's injury was directly caused by the motor vehicle. However, it was not a consequence of the driving of the vehicle. The Commission must succeed.

118 Hard and fast rules cannot be provided by particular instances. Cases, such as the present, may sometimes suggest the way that courts should approach the statutory language from the standpoint of achieving its purpose. Nevertheless, individual instances are no more than that. They do not afford binding precedents to be used in resolving cases involving different facts[123].

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119 *Ricketts v Laws* (1988) 14 NSWLR 311 at 315, 319; *State Government Insurance Commission v Sweeny* (1989) 52 SASR 139 at 143, 147.

120 *Purvis v New South Wales (Department of Education and Training)* (2003) 78 ALJR 1 at 6-7 [18]-[20] per McHugh and Kirby JJ (diss); 202 ALR 133 at 139-140.

121 See eg *Chappel v Hart* (1998) 195 CLR 232; *Rosenberg v Percival* (2001) 205 CLR 434.

122 See eg *Government Insurance Office of NSW v King* (1960) 104 CLR 93 at 99-101, 105.

123 *Joslyn v Berryman* (2003) 77 ALJR 1233 at 1251 [100], 1262 [158]; 198 ALR 137 at 162-163, 177.

Inevitably, borderline cases will continue to present[124]. However, this was not one of them.

Orders

119 It follows that I agree that the appeal must be allowed.

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124 See *Workcover Corporation v Reiter* (1997) 70 SASR 347.

120 CALLINAN J. The real issue in this case is the extent to which the legislature of Western Australia, in enacting the *Motor Vehicle (Third Party Insurance) Amendment Act* 1987 (WA) ("the Amendment Act"), confined or reduced the liability, ultimately of the insurers of motor vehicles, for injuries associated with the use or driving of them.

Facts

121 On 15 March 1998 Mr Sutton was a passenger in a prime mover which was towing a low loader on a roadway in a remote part of Western Australia. The day was extremely hot and the road was rough and sandy. At about midday the driver, Mr Reiball, stopped the prime mover to make an inspection in accordance with his usual practice. Smoke and fumes were being emitted from one of the rear wheel hubs of the low loader. He noticed that the wheels were out of shape. He decided that they would have to be removed, and that the axle would need to be chained up so that it would not drag on the ground when they recommenced driving.

122 Mr Sutton assisted Mr Reiball to remove both wheels. They then tried to secure the axle with a chain which was not quite long enough to enable it to be easily clasped in position. Mr Sutton steadied himself by placing his left hand against the chassis of the low loader. While Mr Reiball was trying to jack the axle higher, the axle slipped from the jack and the trail arm assembly connected to the axle dropped on to the chassis, trapping and seriously damaging Mr Sutton's hand.

Proceedings at first instance

123 Mr Sutton sued the first respondent ("Container Handlers") in negligence. Container Handlers was Mr Reiball's employer. Mr Sutton was successful. The judge at first instance held that an injury of the kind sustained was entirely foreseeable: that Container Handlers should have equipped its vehicles so that emergency repairs could be safely carried out. An additional default on the employer's part was a failure to provide an hydraulic power unit in good working order and condition. The trial judge held that Container Handlers was vicariously liable for the negligence of Mr Reiball. As the person in charge, he should have told Mr Sutton to leave the position that he had taken up and to attempt to connect the chain only when it was safe for him to do so. He should not have used the faulty jack without first ensuring that the ground on which it stood was stable. Had Mr Reiball inspected the equipment before embarking on the journey he would have ascertained that it was inadequate: and, he could and should have then requisitioned appropriate equipment from his employer.

124 Judgment was given in favour of Mr Sutton against Container Handlers in the sum of $926,043.36. Container Handlers brought two third party claims, the first against the Insurance Commission. The Insurance Commission was

established by the *Insurance Commission of Western Australia Act* 1986 (WA). The prime mover and the low loader were both registered under that Act. A statutory policy of insurance in a form in the Schedule to the *Motor Vehicle (Third Party Insurance) Act* 1943 (WA) ("the Act") had been issued. The second third party claim was brought against another insurer, the second respondent, Union des Assurances de Paris. That claim was for indemnity under a policy of insurance issued in respect of Container Handlers' business. Both third party claims failed at first instance.

The Full Court of Western Australia

125 Container Handlers appealed against the dismissal of the third party claims. There was no appeal against the judgment in favour of Mr Sutton and none of the trial judge's findings of fact as to negligence were challenged in the Full Court. The Full Court upheld the appeal with respect to the first third party claim but dismissed the appeal in so far as it concerned the second of them. The decision was unanimous: Wallwork and Wheeler JJ agreeing with the reasons for judgment of Roberts-Smith J.

The appeal to this Court

126 It is convenient to set out the relevant provisions of the Act. Section 3(7) provides:

> "For the purposes of this Act, the death of or bodily injury to any person shall not be taken to have been caused by a vehicle if it is not a consequence of the driving of that vehicle or of the vehicle running out of control."

127 Section 4(1) provides:

> "When any motor vehicle is on a road there is required to be in force in relation to the motor vehicle a contract of insurance entered into by the owner of the motor vehicle under which the owner has insured subject to and in accordance with this Act against any liability which may be incurred by the owner or any person who drives the motor vehicle in respect of the death of or bodily injury to any person directly caused by, or by the driving of, the motor vehicle."

128 And s 6 states:

> "(1) In order to comply with this Act a policy of insurance must —
>
> (a) be issued by the Commission;
>
> (b) except as provided in this section insure the owner of the vehicle mentioned in the policy and any other person who at

any time drives that vehicle, whether with or without the consent of the owner, in respect of all liability for negligence which may be incurred by that owner or other person in respect of the death of or bodily injury to any person directly caused by, or by the driving of, the vehicle in any part of the Commonwealth; and

(c) be in a form substantially similar to that contained in the Schedule."

129 The statutory form of policy set out in the Schedule contained this clause.

"The INSURANCE COMMISSION OF WESTERN AUSTRALIA, subject to the warranties and conditions contained in this Policy and to the provisions of the *Motor Vehicle (Third Party Insurance) Act 1943*, in this Policy referred to as '**the Act**', agrees to insure the owner of the motor vehicle described in the Traffic Licence issued herewith and any other person who drives that motor vehicle, whether with or without the consent of the owner, in respect of all liability for negligence which may be incurred by the owner or other person in respect of the death of or bodily injury to any person directly caused by, or by the driving of, that motor vehicle in any part of the Commonwealth during the period from the date of the issue of this Policy to the date of expiry of the said Traffic Licence."

Construction and legislative intent

130 The words "directly caused by, or by the driving of, [a] motor vehicle" in the policy were inserted by the Amendment Act to commence on 16 December 1987. *Dickinson v Motor Vehicle Insurance Trust*[125], which had just been decided by this Court, was the catalyst for the changes brought about by the Amendment Act. At the same time, the word "directly" was inserted in the places in which it now appears in the Act. In moving the second reading of the Bill for it the Deputy Premier said this[126]:

"The need to amend the Act arose from the now well-known High Court of Australia judgment in Dickinson v Motor Vehicle Insurance Trust handed down on 13 October 1987.

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125 (1987) 163 CLR 500.

126 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 1987 at 5759-5760.

> … The decision in the Dickinson case is generally considered to have opened the floodgates for the entitlement of persons injured in stationary motor vehicles to recover damages from the State Government Insurance Commission ...
>
> It is important to consider historically the purpose for which the Motor Vehicle (Third Party Insurance) Act was introduced. In moving the second reading of the Motor Vehicle (Third Party Insurance) Bill, the Minister for Works said in the Legislative Assembly on 28 September 1943 –
>
> > The general principle laid down in the Bill is that before a licence can be issued a policy of insurance must be taken out by the owner of every motor vehicle, which will cover the legal liability of any person driving the vehicle, whether lawfully or unlawfully, in the event of death or bodily injury occurring to any third person.
>
> It is clear, therefore, that the Parliament thus intended that the liability of the Motor Vehicle Insurance Trust was to be limited to the payment of damages for injury or death sustained by persons in consequence of the negligent driving of motor vehicles …
>
> Government policy is to minimise future increases in compulsory third party insurance premiums ...
>
> The full implications of [*Dickinson*] are still largely unknown. Unless the Motor Vehicle (Third Party Insurance) Act is suitably amended, it is anyone's guess as to the scope of claims which may ultimately be found to fall within the meaning of the words 'in the use of a motor vehicle'."

131 The legislature therefore clearly set out to arrest the judicial trend, of which *Dickinson* is, if not the high water mark, not much less than a lap of the tide below it, of regarding the merest connexion of a motor vehicle with the infliction of personal injury as an occasion for holding that the injury was caused by, through, or in connexion with, or as arising out of, the *use* of a motor vehicle. There are many examples of this in cases in which similar statutory formulae have been considered. In *Government Insurance Office of NSW v R J Green & Lloyd Pty Ltd*[127] it was held that an injury sustained during the loading of a stationary truck was an injury arising out of the "use" of a motor vehicle for the purposes of the *Motor Vehicles (Third Party Insurance) Act* 1942 (NSW). Similarly, in *Commercial and General Insurance Co Ltd v Government Insurance Office (NSW)*[128] an injury arising out of the negligent use of a mobile

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127 (1966) 114 CLR 437.

128 (1973) 129 CLR 374.

crane was also held to be an injury arising out of the use of a motor vehicle within the meaning of that Act. In South Australia, the *Motor Vehicles Act* 1959 (SA) also used the formula injury "arising out of the use of" a motor vehicle. This Court held in *State Government Insurance Commission v Stevens Bros Pty Ltd*[129] that an injury caused by a mobile compressor that was being transported on a truck fell within the statutory formula because the machine was designed to be transported from place to place as required by a motor vehicle.

132 To give the relevant provisions the meaning Container Handlers seeks to place upon them would be to ignore, or to give insufficient weight to the repeated use of the word "directly". But of greater significance it would also be to fail to give effect to the intention manifest in s 3(7) of the Act, that the injury is *not* to be taken to have been caused by a vehicle if it is not a consequence of the driving of the vehicle, or of the vehicle running out of control. The words "running out of control" clearly refer to and are confined to the notion of a vehicle in motion. The word "driving" should be read to the same effect. The two phrases in which the words separately occur are plainly related and the word used in the latter, "running", conveying the idea of motion, strongly suggests that "driving" in the former is used in the same sense. The structure and language of s 3(7) also lead to the same conclusion.

133 It may be readily accepted that the legislature was well aware of the expansive meaning that the courts have given to the word "cause"[130]. The selection of the word "consequence" was no doubt carefully considered. It was intended to cut down the expansive meaning which might otherwise, consistently with the approach in other cases, have been adopted. If it were otherwise, and "driving" were to be given the meaning that Container Handlers contends it to have, a relevant injury might be taken to have been sustained absent any negligent human agency in the driving of a motor vehicle: even if, for example, as a result of wear and tear flowing from the driving of it over a long period, an axle fractured while it was stationary in a garage and caused the body of it to collapse and fall upon a passer by. This would be a highly unlikely and unintended result. What is required is more than a *sine qua non*. The word "directly" and the language of s 3(7) are imperious: the insurer will only be

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129 (1984) 154 CLR 552.

130 See for example the gloss that has been applied to the word "caused". Material contribution may constitute a cause: *Chappel v Hart* (1998) 195 CLR 232 at 239-240 [9]-[12] per Gaudron J. A contributory cause may be sufficient to constitute a cause for the purposes of the law of tort: *Fitzgerald v Penn* (1954) 91 CLR 268 at 276. See also *Chappel v Hart* (1998) 195 CLR 232 at 243-245 [24]-[28] per McHugh J and also, in a criminal context, *Osland v The Queen* (1998) 197 CLR 316 at 403-404 [221]-[225] per Callinan J.

liable if a personal injury or death has been *directly* caused by the driving, that is the operation of a motor vehicle while it is in the control of a driver in the course of putting it into, keeping it in, or bringing its motion to a conclusion, or if the motion is uncontrolled. The correct way of characterizing Mr Reiball's activities was not as driving either of the vehicles, but of preparing them for driving, that is of being put in motion[131]. What happened to Mr Sutton in the course of that was not a consequence of the driving or the running out of control of the vehicles.

The first respondent's argument

134 Container Handlers submitted that significance should be attached to the indefinite article before "consequence" in s 3(7). The policy did not require that the injury be *the* consequence of the driving. All that was required was that it be *a* consequence of the driving. Mr Sutton's injury was a consequence of the driving of the low loader. There was an unbroken sequence of causally connected events commencing with the driving and culminating in the injury. The low loader was driven in the desert on rough unsealed roads, and in conditions of great heat. But for that "driving" of the combined vehicles there would not have been a mechanical problem requiring an immediate response.

The first respondent's argument rejected

135 That approach would require the Court to do what the Act directs it not to do, in effect to look to and give effect to the indirect and more remote causes and to ignore the direct ones: the negligence of Mr Reiball and his employer in relation to the chain and the provision of the other equipment, and the method chosen to make the vehicle safe to be put in motion. It would require the Court to read "a consequence" as meaning "cause", a word already used and not repeated in s 3(7), and to invite courts to give to the former the same sort of expansive meaning as they have given "cause" from time to time. It would also require the Court to treat the words "a consequence" as if they required the application of a "but for" test, a test which in general this Court has rejected[132].

136 The appeal should be allowed with costs. Orders 1, 2 and 3 of the Full Court of the Supreme Court of Western Australia made on 3 October 2001 should be set aside and, in lieu thereof, it should be ordered that the first respondent's appeal to that Court against the appellant be dismissed with costs.

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131 cf *Government Insurance Office of NSW v King* (1960) 104 CLR 93 at 99-100.

132 See *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 516-517 per Mason CJ, 522-523 per Deane J, 524 per Toohey J, 525 per Gaudron J.

137 HEYDON J. This appeal from a decision of the Full Court of the Supreme Court of Western Australia concerns the proper construction of a policy of insurance contained in the Schedule to the *Motor Vehicle (Third Party Insurance) Act* 1943 (WA) ("the Act"). The issue arises because of a physical injury suffered by the plaintiff in the following circumstances.

Background

138 On 15 March 1998, in the course of a journey in the north-west of Western Australia, the plaintiff, a crane driver, was travelling as a passenger in a prime mover to which was attached a low loader. The driver was an employee of the defendant ("Container Handlers"). Container Handlers owned and operated the vehicles, and used them in a transport business. In the previous three days, pursuant to a contract between the plaintiff's employer and Container Handlers, the vehicles had transported a crane from Port Hedland to various places in which time the plaintiff operated the crane. The crane had then been unloaded and left behind, and on 15 March 1998 the vehicles were carrying a back load to Port Hedland. The weather was extremely hot and the road was rough and sandy. Around midday the driver brought the vehicles to a halt in order to conduct a routine inspection. The plaintiff noticed the emission of smoke and fumes from one of the rear wheel hubs of the low loader. The driver, after examining the wheels, decided that both wheels on that end of the axle would have to be removed and that the relevant axle should be chained up before the journey recommenced. This was not the first occasion over the four days on which mechanical faults had emerged. The plaintiff began to assist the driver in the chaining up process. While they were carrying it out, the axle slipped, jammed the plaintiff's left hand against the chassis, and injured it badly.

139 The plaintiff sued the defendant, alleging that the defendant was directly liable for negligently breaking a duty of care it owed the plaintiff, and that the defendant was vicariously liable for the driver's negligent breach of a duty of care which he owed the plaintiff. The trial judge (Nisbet DCJ) upheld these allegations and rejected a plea of contributory negligence[133]. These conclusions were not challenged in the Full Court or this Court. Nor was the verdict in the plaintiff's favour of $926,043.36.

140 The defendant made a third party claim against the present appellant ("the Insurance Commission"). The claim was made under two policies of insurance with the Insurance Commission which were compulsory under s 4(1) of the Act. It provided:

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133 *Sutton v Container Handlers Pty Ltd* [2000] WADC 254 at [9]-[18].

> "When any motor vehicle is on a road there is required to be in force in relation to the motor vehicle a contract of insurance entered into by the owner of the motor vehicle under which the owner has insured subject to and in accordance with this Act against any liability which may be incurred by the owner or any person who drives the motor vehicle in respect of the death of or bodily injury to any person directly caused by, or by the driving of, the motor vehicle."

It was common ground that both the prime mover and low loader fell within the meaning of "motor vehicle" as defined in s 3(1) of the Act[134]. Section 6(1) of the Act provided:

> "In order to comply with this Act a policy of insurance must –
>
> (a) be issued by the Commission;
>
> (b) except as provided in this section insure the owner of the vehicle mentioned in the policy and any other person who at any time drives that vehicle, whether with or without the consent of the owner, in respect of all liability for negligence which may be incurred by that owner or other person in respect of the death of or bodily injury to any person directly caused by, or by the driving of, the vehicle in any part of the Commonwealth; and
>
> (c) be in a form substantially similar to that contained in the Schedule."

The Schedule to the Act set out the terms of a policy of insurance ("the policy"). The insuring clause was:

> "The INSURANCE COMMISSION OF WESTERN AUSTRALIA, subject to the warranties and conditions contained in this Policy and to the provisions of the *Motor Vehicle (Third Party Insurance) Act 1943*, in this Policy referred to as 'the Act', agrees to insure the owner of the motor vehicle described in the Traffic Licence issued herewith and any other person who drives that motor vehicle, whether with or without the consent of the owner, in respect of all liability for negligence which may be incurred by the owner or other person in respect of the death of or bodily injury to any person directly caused by, or by the driving of, that motor vehicle in any part of the Commonwealth during the period from the date

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134 However, the courts below and the parties in this Court analysed the controversy as though there was one vehicle and one policy. These reasons also adopt this convenient course.

> of the issue of this Policy to the date of expiry of the said Traffic Licence."

Conditions 3 and 4 provided:

> "3. The Commission is entitled to all rights remedies and benefits which may accrue to it by virtue of the Act.
>
> 4. This contract of insurance is subject to the provisions of the Act."

Section 3(7) of the Act contained a provision relevant to the construction of the expression "caused". It provided:

> "For the purposes of this Act, the death of or bodily injury to any person shall not be taken to have been caused by a vehicle if it is not a consequence of the driving of that vehicle or of the vehicle running out of control."

141 The defendant's third party claim against the Insurance Commission was based on the contention that the plaintiff's injuries were caused by, or by the driving of, the defendant's vehicle. The trial judge rejected that contention. He said that though the defect in the low loader would not have developed but for its having been driven along bad roads, driving was not the "proximate" cause of the plaintiff's injuries, and though in one sense the low loader caused the injury when it crushed the plaintiff's hand, the "true direct cause" was the driver's negligent repair of the defect. Hence the defendant's claim for indemnity against the Insurance Commission failed[135]. The Full Court (Wallwork, Wheeler and Roberts-Smith JJ) disagreed[136]. The trial judge also rejected claims by the defendant against a second third party on an insurance policy[137]. The Full Court agreed with that conclusion[138] and that outcome is not challenged in this Court.

The issue

142 The present controversy turns on the meaning of the expression "in respect of the death of or bodily injury to any person directly caused by, or by the driving

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135 *Sutton v Container Handlers Pty Ltd* [2000] WADC 254 at [27]-[28].

136 *Container Handlers Pty Ltd v Insurance Commission of Western Australia* (2001) 25 WAR 42 at 48-56 [14]-[52].

137 *Sutton v Container Handlers Pty Ltd* [2000] WADC 254 at [29]-[38].

138 *Container Handlers Pty Ltd v Insurance Commission of Western Australia* (2001) 25 WAR 42 at 56-64 [53]-[93].

of," a motor vehicle. That expression relevantly appears three times – in s 4(1), in s 6(1) and in the Schedule containing the policy. In the courts below the trial judge did, but the Full Court did not, exclude s 3(7) as being irrelevant to the construction of the policy[139]. The Full Court thought the cover provided by the policy and the duty created by s 4(1) were coterminous. It did so because the contrary position would be anomalous, because the duty created by s 4(1) is to enter a contract of insurance "subject to and in accordance with this Act", and because Condition 4 of the policy provided that the contract was "subject to the provisions of the Act". Further, the requirement of s 4(1) and s 6(1)(b) that the policy is to respond to liability "in respect of all liability for negligence which may be incurred by that owner or other person in respect of the death of or bodily injury to any person directly caused by, or by the driving of," a motor vehicle, and the requirement of s 6(1)(c) that the policy is to be in a form substantially similar to that contained in the Schedule, suggest that the interpretative aid supplied by s 3(7) should be employed in construing the expression "caused" not only in s 4(1) and s 6(1)(b), but also in the policy. That conclusion is further supported by the reference to the Act in Condition 3 of the policy. It was correctly agreed in this Court that that approach was sound.

143 It was also common ground that the word "directly" in the policy governs both "caused by … that motor vehicle" and "caused by … the driving of … that motor vehicle". That approach too is correct.

144 Taken at its widest, then, the issue posed by the policy in relation to the present facts is whether the liability of Container Handlers in respect of the bodily injury to the plaintiff was:

(a) directly caused by the insured vehicle – and, pursuant to s 3(7), the injury is not to be taken to have been so caused if it is not a consequence

  (i) of the driving of the vehicle, or

  (ii) of the vehicle running out of control; or

(b) directly caused by the driving of the insured vehicle.

The Full Court's reasoning

145 The Full Court held that the plaintiff's injury was directly caused by the insured vehicle. "The axle of the vehicle fell and crushed his hand against the

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139 Compare *Sutton v Container Handlers Pty Ltd* [2000] WADC 254 at [22] and *Container Handlers Pty Ltd v Insurance Commission of Western Australia* (2001) 25 WAR 42 at 53 [36]-[37].

chassis."[140] The Full Court then turned to the inquiry called for by s 3(7), identified in issue (a)(i) above, namely whether the injury was a consequence of the driving of the vehicle. On this, the Full Court found that the injury did "not have to be a *direct* consequence of the driving"[141] and that the injury was a consequence of the driving of the vehicle[142]:

> "The driving of the vehicle along unsealed desert roads in extreme heat causing the wheel hubs to overheat and seize up necessitating removal of the wheels and chaining the axle are matters which fall within the operation of the vehicle … [T]he distinct acts of negligence by Container Handlers, or those of its employee driver for which it was liable in tort, were aspects of the fact of operation of the vehicle and so of the driving of it."

146 The Full Court continued[143]:

> "[T]here was here a sufficient proximate or direct connection between the driving and [the plaintiff's] injuries for them to have been regarded as directly caused by the driving. There were no matters of intervening negligence sufficient to remove the injuries from proximity to the driving of the vehicle. This was not a situation in which the vehicle was being worked upon independently of the driving of it. The mechanical problem occurred in the course of the driving … to Port Hedland. The breakdown occurred in a remote desert location. Repairs had to be effected for the purpose of enabling the vehicle to complete its journey and as part of the driving of it. The events were not merely preparatory, nor did they involve some activity associated with the vehicle (such as merely loading or unloading it) and nor was there some intervening cause or event (such as repair work being undertaken in a mechanical workshop or garage during a break in the journey) nor lapse of time sufficient to break the direct chain of causation between the driving and the injury."

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140 *Container Handlers Pty Ltd v Insurance Commission of Western Australia* (2001) 25 WAR 42 at 54 [40].

141 *Container Handlers Pty Ltd v Insurance Commission of Western Australia* (2001) 25 WAR 42 at 54 [40] (emphasis in original).

142 *Container Handlers Pty Ltd v Insurance Commission of Western Australia* (2001) 25 WAR 42 at 56 [50].

143 *Container Handlers Pty Ltd v Insurance Commission of Western Australia* (2001) 25 WAR 42 at 56 [51].

147 In this Court Container Handlers correctly conceded that the injury was not a consequence of the vehicle running out of control, thus rendering issue (a)(ii) above irrelevant. Container Handlers also conceded in this Court that the injury was not directly caused by the driving of the insured vehicle; so far as that concession went, issue (b) also became irrelevant. This latter concession, if sound, cast a shadow over the validity of the Full Court's reasoning, since its conclusion that the injury was a consequence of the driving of the vehicle rested on its view that the injury was "directly caused by the driving".

The Second Reading Speech

148 The division in the lower courts and the character of the opposing arguments in this Court are such that the statutory language may fairly be called "ambiguous or obscure", thereby permitting recourse to the Second Reading Speech introducing the relevant parts of the legislation when they were enacted: see the *Interpretation Act* 1984 (WA), s 19. In any event, the Second Reading Speech may be resorted to in order to examine the mischief which Parliament may have considered to be inherent in the then state of the law[144].

149 The immediate background to the relevant provisions so far as they were affected by amendments made in 1987 was the decision in *Dickinson v Motor Vehicle Insurance Trust*[145]. In that case a father had parked his car and left it temporarily in order to do some shopping. He left in the car his four and a half year old son and his two year old daughter. The son found a box of matches, played with them, and caused a floor mat to catch alight. The daughter (who was asleep) was burned in the ensuing fire. The father was held negligent. The trial judge and the High Court, but not the Full Court of the Supreme Court of Western Australia, held that the respondent was obliged to indemnify the father by reason of the Act as it then stood and by reason of the statutory policy in place under the Act, which covered "all liability for negligence which may be incurred … in respect of … bodily injury to any person caused by or arising out of the use of" the vehicle. The High Court said that the question was not whether the father's negligence was in the use of the motor car, but whether the daughter's injuries were caused by or arose out of the use of the motor car[146]:

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144 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

145 (1987) 163 CLR 500.

146 (1987) 163 CLR 500 at 505 per Mason CJ, Wilson, Brennan, Dawson and Toohey JJ.

> "The test posited by the words 'arising out of' is wider than that posited by the words 'caused by' and the former, although it involves some causal or consequential relationship between the use of the vehicle and the injuries, does not require the direct or proximate relationship which would be necessary to conclude that the injuries were caused by the use of the vehicle …
>
> There can, in our view, be no doubt that the motor car was being used within the meaning of the Act at the time at which the appellant sustained her injuries. It was in use to carry the appellant and her brother as passengers in the course of a journey which was interrupted to enable the father to do some shopping. There is no suggestion that the interruption was other than temporary. 'Use' for the purposes of the Act extends to everything that fairly falls within the conception of the use of a motor vehicle and may include a use which does not involve locomotion … Thus the occupation of the motor car by the appellant and her brother as passengers whilst the car was stationary and their father was absent, was a use of the vehicle within the meaning of the Act. The interior of the motor car caught fire whilst it was in use in that way. The injuries which the appellant sustained as a result arose out of that use."

150 The High Court gave judgment in that case on 13 October 1987 and the Government of Western Australia responded quickly. On 12 November 1987 the Deputy Premier delivered the Second Reading Speech in the Legislative Assembly on the Motor Vehicle (Third Party Insurance) Amendment Bill ("the Bill") which, on enactment, inserted s 3(7), and brought s 4, s 6 and the Schedule into the form of the Act relevant to this case. In summary, the Bill replaced references in those and many other parts of the Act to injury caused by or arising out of the use of vehicles with references to injury directly caused by, or by the driving of, vehicles.

151 In his Second Reading Speech the Deputy Premier said[147]:

> "This Bill amends the Motor Vehicle (Third Party Insurance) Act 1943. The need to amend the Act arose from the now well-known High Court of Australia judgment in Dickinson v Motor Vehicle Insurance Trust handed down on 13 October 1987.
>
> … The decision in the Dickinson case is generally considered to have opened the floodgates for the entitlement of persons injured in stationary motor vehicles to recover damages from the State Government Insurance Commission – by way of simple example, the loading and unloading of

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147 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 1987 at 5759-5760.

goods-carrying motor vehicles, which in ordinary circumstances would be the subject of workers' compensation claims …

It is important to consider historically the purpose for which the Motor Vehicle (Third Party Insurance) Act was introduced. In moving the second reading of the Motor Vehicle (Third Party Insurance) Bill, the Minister for Works said in the Legislative Assembly on 28 September 1943 –

> The general principle laid down in the Bill is that before a licence can be issued a policy of insurance must be taken out by the owner of every motor vehicle, which will cover the legal liability of any person driving the vehicle, whether lawfully or unlawfully, in the event of death or bodily injury occurring to any third person.

It is clear, therefore, that the Parliament thus intended that the liability of the Motor Vehicle Insurance Trust was to be limited to the payment of damages for injury or death sustained by persons in consequence of the negligent driving of motor vehicles. Although the terminology appearing in the Motor Vehicle (Third Party Insurance) Act 1943 successfully withstood the test of time, all that has now changed with the High Court of Australia judgment of Dickinson v the Motor Vehicle Insurance Trust.

The Motor Vehicle Insurance Trust statutory third party insurance policy currently states –

> caused by or arising out of the use of such motor vehicle.

In some sections of the Motor Vehicle (Third Party Insurance) Act appears 'caused by the use of', 'in the use of', 'arising out of the use of', 'in the use of a motor vehicle', 'caused by or arises out of the use of', 'as the result of the use of a motor vehicle', 'caused by or arising out of the use of'. This wording must be deleted from the insurance policy and the Motor Vehicle (Third Party Insurance) Act so that similar claims against the third party insurance fund of the State Government Insurance Commission will be outlawed.

…

The High Court of Australia decision in the case of Dickinson v the Motor Vehicle Insurance Trust can only be described as a landmark ruling for the third party insurance fund of the State Government Insurance Commission. The full implications of this decision are still largely unknown. Unless the Motor Vehicle (Third Party Insurance) Act is suitably amended, it is anyone's guess as to the scope of claims which may ultimately be found to fall within the meaning of the words 'in the use of a motor vehicle'."

152 It is evident from this Second Reading Speech that the Deputy Premier was concerned to remove the words "arising out of" from the Act because they were, as the High Court said in *Dickinson v Motor Vehicle Insurance Trust*[148], wider than the words "caused by". The suggestion by the High Court that "arising out of" does not require the "direct or proximate relationship" conveyed by the word "caused" evidently stimulated Parliament not merely to narrow the indemnity, by limiting recovery by the word "caused", but also either to emphasise that narrowing of indemnity or further to limit the indemnity by requiring that the death or injury be "directly caused". It is plain that at the very least the amendments were not to be construed as favourable to any possibility of wide recovery.

153 On the true construction of the policy in the light of s 3(7), it will not indemnify the owner or driver in respect of liability for negligence which may be incurred by that owner or driver in respect of death or bodily injury to any person caused by the motor vehicle, unless the death or injury is directly caused by the driving of the vehicle or by its running out of control. The full range of possible causes of injury by the agency of a motor vehicle is cut down to those which can be characterised as being a consequence of its driving or its running out of control, and further cut down by the requirement that the causal relationship must be characterised as being direct and not something wider. Since the language of the Schedule and s 3(7) is plainly intended as a means of narrowing the scope of indemnity, it is further appropriate to construe the word "consequence" as referring to something narrower than the wide ideas often encompassed in law by references to "causation" and its derivatives: "consequence" here refers to a narrower segment of the wider class of "causes". So far as the process of cutting down is effected by the reference to the driving of the vehicle, the expression is preceded by the definite article, and is used in the composite phrase "a consequence of the driving of that vehicle or of the vehicle running out of control". In that context at least, the words "the driving" refer to the actual control and management of the vehicle while it is in locomotion. "*The* driving" of a vehicle, in at least its core meaning in this context, is the activity conducted by a human being in the driver's seat who manages and directs the course of its movement by operating the controls – preparing to start, starting, accelerating, braking, steering, giving appropriate signals, operating the horn and lights appropriately, stopping and turning the engine off. In contrast, when the vehicle runs out of control, it is because the course of its movement has ceased to be managed and directed by the operation of the controls, or because, while stationary, its brakes have failed or it has been struck by another vehicle and it has moved off out of control.

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148 (1987) 163 CLR 500 at 505.

154 The Second Reading Speech revealed an antipathy to the result in *Dickinson v Motor Vehicle Insurance Trust*[149] and a desire to adopt a narrower test for indemnity than the test ("caused by or arising out of the use") which led to that result. The 1987 amendments are also to be read against the background of authority of this Court distinguishing between driving a vehicle, which was using it, and doing an act intended to make it fit to be driven, which was not using it[150]. The concerns expressed in the Second Reading Speech point strongly against a construction of the legislation which would widen indemnity by overturning that distinction.

155 It is true that there is an overlap between the two limbs of the policy in relation to driving. This is not an effective answer to the construction advanced above. The overlap exists whatever the construction of "directly" and whatever the construction of "driving".

156 Here the injury was not "directly" caused by "the driving" of the motor vehicle. It is necessary to commence with the Full Court's analysis, for its orders are not to be set aside merely by reason of Container Handlers having declined to support part of its reasoning and having advanced a more truncated posture. Errors in the reasoning of the Full Court can be identified in three ways.

157 First, the Full Court fails to give full effect to the word "directly" in the policy, and construes it as if it meant "directly or indirectly". It does so by noting that the word "consequence" in s 3(7) is not qualified by the adjective "direct", and by adopting a process of elision between the reference to non-direct consequences in s 3(7) and the reference to direct causation in the policy. The Full Court's reasoning construes the words "directly" and "consequence of the driving" so broadly as to encompass relationships of causation which are much wider than those words will accommodate. This can be illustrated by the Full Court's statement that arguably it was the way in which the vehicle was driven along rough roads in extreme heat which caused the wheel hub to overheat so as to require its removal and the securing of the axle[151]. The word "directly" points against the inclusion of so long a causal chain.

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149 (1987) 163 CLR 500.

150 *Government Insurance Office of NSW v King* (1960) 104 CLR 93 at 96 per Dixon CJ, 99-100 per Menzies J, 105-106 per Windeyer J. In particular at 100 Menzies J said: "the greaser who is crushed by the car when a power hoist supporting it fails" does "not suffer bodily injury caused by or arising out of the use of the motor vehicle that is being … serviced".

151 *Container Handlers Pty Ltd v Insurance Commission of Western Australia* (2001) 25 WAR 42 at 53 [35].

158 Secondly, the Full Court adopted an untenable construction of "driving". It said that the "distinct acts of negligence by Container Handlers, or those of its employee driver … were aspects of the fact of operation of the vehicle and so of the driving of it. These included the unserviceable nature of the hydraulic power unit of the low loader and those findings of his Honour as to the driver's negligence … referred [to] above."[152] These findings were[153]:

> "[The driver] should have instructed [the plaintiff] to get out of the position that he was in and to attempt to connect the chains securing the axle to the tray only if it was safe for him to do so. He should not have used the particular jack that was used without first ensuring that it had a firm, stable footing and could get sufficient purchase on an appropriate part of the axle so as to prevent it from slipping. The driver should not have commenced to jack the axle without ensuring [the plaintiff] was in the clear. Finally, … the driver had failed to inspect his emergency repair equipment before commencing the journey, because had he done so, he would have ascertained that he did not have sufficient equipment to effect any emergency roadside repairs with wheels and tyres and should have requisitioned the appropriate materials from his employer."

And "the distinct acts of negligence by Container Handlers" were described thus[154]:

> "[I]t was entirely foreseeable that an injury of the type sustained by [the plaintiff] could be sustained by persons attempting to effect emergency roadside repairs to a vehicle such as this. A prudent employer in the position of the defendant should have properly equipped its vehicles for the carrying out of emergency roadside repairs to the wheels and axles of its low loader. The defendant had failed to do that. There was no trolley jack of sufficient lifting capacity to lift an axle of the prime mover and the low loader. The only jack which was available was inadequate. Additionally, braces or supports should have been provided so that the axle was at all times supported. There were no such braces or supports; nor were any planks or blocks provided to afford the trolley jack a secure

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152 *Container Handlers Pty Ltd v Insurance Commission of Western Australia* (2001) 25 WAR 42 at 56 [50].

153 *Container Handlers Pty Ltd v Insurance Commission of Western Australia* (2001) 25 WAR 42 at 46 [9].

154 *Container Handlers Pty Ltd v Insurance Commission of Western Australia* (2001) 25 WAR 42 at 45 [6].

footing and nor were chains of sufficient length provided to enable an axle to be secured to the bed of the tray."

159 The Insurance Commission submitted that to say that the acts of negligence of Container Handlers and its driver were aspects of "driving" entailed the following absurd consequences:

(a) Container Handlers was driving the vehicle

(i) when it failed, months or days before the injury and before any movement of the vehicle on the three days before the day the injury occurred, properly to equip the vehicle for carrying out emergency repairs by failing to supply a proper trolley jack, or braces or supports for the axle, or planks or blocks for the trolley jack, or sufficiently long chains;

(ii) when, at the same time, it failed to provide a hydraulic power unit in working order;

(b) the driver was "driving" the vehicle when he failed to inspect his emergency repair equipment before the commencement of the journey.

160 In substance these arguments are sound. Each of these items of conduct falls well outside the reach of the expressions "driving" or "consequence of the driving". They go no closer to "driving" than being acts preparatory to driving. They are not consequences of the driving, for it cannot be the case that everything related to wear and tear caused by the driving of a vehicle at any time since it was new was a consequence of the driving in this context. They are items of negligence in relation to which the aftermath of the relevant driving merely affords an occasion for the negligence to cause injury.

161 Thirdly, even the events which took place after the time when the plaintiff noticed the smoke and fumes until the time when the plaintiff was injured cannot be described as a "consequence of the driving". No doubt the driver stopped the vehicle so as to inspect it with a view to ensuring that it was capable of resuming its movements when he restarted the engine. No doubt his perception that there might be some problem which inspection might detect or avert was in part a perception that driving which had already been undertaken in rough and hot conditions could have caused such a problem, and no doubt that perception was accurate. No doubt the smoke and fumes noticed by the plaintiff were a consequence of the driving. But in the context of the policy and s 3(7), the conduct of a person, after a vehicle has come to a stop and the engine has been turned off, who checks for defects in it with a view to improving its performance before it is placed in motion again, is not "driving". Hence the failure of the driver to give the plaintiff proper instructions, to use the jack with an appropriate

footing, and to ensure that the plaintiff was in the clear before jacking commenced, were not within the expression "driving".

162 It was perhaps as part of an endeavour to sidestep these criticisms, made in the Insurance Commission's written submissions, of the Full Court's reasoning that Container Handlers in its answer to them for the first time declined to support part of that reasoning and conceded that the driving of the vehicle did not directly cause the plaintiff's injury. But its truncated posture is equally open to criticism. It contended that the injury was directly caused by the vehicle and was a consequence of the driving of the vehicle, even though other causally relevant events had occurred before the injury, and that there need not be an immediate relationship between the driving and the injury. The driving of the vehicle on rough roads in conditions of extreme heat caused the risk and the actuality of a mechanical problem requiring immediate action. Alternatively, it contended that the chaining up process which resulted in the injury was part of the ordinary driving of the vehicle. The difficulties in those arguments are that they dilute the meaning of "directly" too much, by extending it to include "indirectly", thereby impermissibly overlooking the significance of that word in s 4, s 6 and the Schedule, and attribute to the words "the driving" in that context a meaning which is wrong.

Orders

163 The following orders should be made.

1. The appeal is allowed.

2. The first respondent is to pay the costs of the appellant.

3. Orders 1, 2 and 3 of the Full Court of the Supreme Court of Western Australia made on 3 October 2001 should be set aside and, in lieu thereof, the appeal by the present first respondent to that Court against the present appellant is dismissed with costs.