HIGH COURT OF AUSTRALIA

McHUGH, GUMMOW, HAYNE, CALLINAN AND HEYDON JJ

ALLIANZ AUSTRALIA INSURANCE LIMITED APPELLANT

AND

GSF AUSTRALIA PTY LIMITED & ANOR RESPONDENTS

Allianz Australia Insurance Limited v GSF Australia Pty Limited
[2005] HCA 26
19 May 2005
S247/2004

ORDER

1. *Appeal allowed.*

2. *The first respondent (GSF Australia Pty Ltd - "GSF") pay the costs of the appellant (Allianz Australia Insurance Ltd - "Allianz").*

3. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 1 July 2003 and in their place order:*

    (a) the appeal to the Court of Appeal is allowed;

    (b) GSF pay the costs of Allianz of the appeal to the Court of Appeal;

    (c) Orders 1, 4 and 5 of the orders of the District Court of New South Wales made on 14 June 2002 are set aside and in their place order:

        (i) judgment for the plaintiff against GSF in the sum of $450,000;

        (ii) judgment for Allianz against GSF;

        (iii) GSF pay the costs of Allianz in the District Court.

On appeal from the Supreme Court of New South Wales

Representation:

K P Rewell SC with P S L Dooley for the appellant (instructed by TL Lawyers)

L King SC with J W Catsanos for the respondent (instructed by Blake Dawson Waldron)

CATCHWORDS

Allianz Australia Insurance Limited v GSF Australia Pty Ltd

Insurance – Motor vehicles – Third party liability insurance – Truck and trailer provided by first respondent to convey packed containers of food to airport – Appellant insurer of vehicle – Second respondent an employee of first respondent – Second respondent suffered back injury while assisting in unloading containers after vehicle's lifting mechanism became inoperative – Whether second respondent's injury an "injury" within the meaning of the *Motor Accidents Act* 1988 (NSW).

Insurance – Motor vehicles – Third party liability insurance – Causation – Whether second respondent's injury a result of and caused during use or operation of the vehicle by a defect in the vehicle – Utility of "common sense" tests for causation and notions of proximate cause.

Statutes – Construction – Purposive construction – Where object of the *Motor Accidents Act* 1988 (NSW), as amended, to contain overall costs of compulsory third party insurance scheme within reasonable bounds – Whether consistent with an expansive notion of causation of injury.

Words and phrases: "a result of", "caused".

Motor Accidents Act 1988 (NSW), ss 3(1), 69(1).

1 McHUGH J. The central issue in this appeal is whether an injury sustained by an employee while unloading containers from a vehicle whose unloading mechanism was defective was an "injury" as defined by s 3(1) of the *Motor Accidents Act* 1988 (NSW) ("the Act") (as amended by the *Motor Accidents Amendment Act* 1995 (NSW)).

2 In my opinion, the injury that the employee suffered was not an injury for the purpose of the Act. That is because in an unloading case there is no "injury" within the meaning of the Act unless the injury was the result of and *caused by a defect* in the vehicle. Whether or not a defect causes an injury for the purpose of the Act has to be evaluated in the light of the objects of the Act. Those objects demonstrate that the defective unloading mechanism did not cause the injury because the defect was merely a condition and not a cause of the injury. It was the unsafe system of the employer – not the defect in the vehicle – that caused the employee's injury.

Statement of the case

3 Garry Oliver sued GSF Australia Pty Ltd ("GSF"), his employer, for damages in the District Court of New South Wales. The action was settled. GSF conceded that it was negligent in requiring Mr Oliver to work under an unsafe system of work. However, a dispute arose as to which of two insurers should indemnify GSF: the compulsory third party insurer of the vehicle, Allianz Australia Insurance Ltd ("Allianz") or the workers' compensation insurer, QBE. As a result, Mr Oliver and GSF made two agreements concerning the damages that Mr Oliver was to receive. If QBE was liable to indemnify GSF, Mr Oliver was to receive $450,000, based upon a notional assessment of damages under the *Workers Compensation Act* 1987 (NSW) ("the Workers Compensation Act"). If Allianz was liable, Mr Oliver was to receive $460,000, based on a notional assessment of damages under the Act.

4 Allianz applied to be, and was, joined as a party to the District Court proceedings between Mr Oliver and GSF. The District Court (Delaney DCJ) held that Mr Oliver's injury gave rise to an indemnity by Allianz because the injury occurred in circumstances that made it an "injury" as defined by s 3(1) of the Act. The injury was therefore covered by the motor vehicle policy issued by Allianz. His Honour entered judgment in favour of Mr Oliver for $460,000 and ordered that Allianz pay GSF "by way of indemnification" the sum of $230,000 on the basis that it was a case of "dual insurance".

5 Allianz appealed to the Court of Appeal on the ground that the injury was not an "injury" within the meaning of that term as defined in s 3(1) of the Act. By majority (Mason P and Davies AJA, Santow JA dissenting), the Court of Appeal dismissed Allianz's appeal.

The material facts

6 GSF employed Mr Oliver as a maintenance technician. On 12 February 1998, it directed him to assist in unloading airline containers from the back of a truck owned by GSF. The truck had been specifically modified to facilitate the unloading of airline containers. Rollers had been installed on the floor of the trailer and a T-bar mechanism, which was an electric/pneumatic device, was used to push the airline containers to the rear of the truck, where they could be removed by a forklift truck. The T-bar mechanism was driven by a motor and a gearbox and was activated by pushing a button on a panel at the rear of the truck. The effect of the T-bar and roller system was that no manual effort was required to move the containers to the rear of the truck.

7 On 11 February 1998, the gearbox broke and the T-bar unloading mechanism became inoperative. GSF knew that the unloading mechanism had become inoperative but did not repair it. Instead, it directed Mr Oliver and another employee to perform the task of unloading the truck manually. GSF gave Mr Oliver no instructions as to how to unload the truck. Mr Oliver and his colleague used pinch-bars or crowbars to manoeuvre the containers along the rollers to the rear of the truck, where the containers would be lifted off by forklift. The containers weighed approximately one tonne each. It was not disputed that this was an unsafe system of work. In the course of this work, Mr Oliver suffered an injury to his lower back.

The legislation

8 The difficulty of the case arises from the failure of the Act to state expressly or inferentially that that Act does not apply if the Workers Compensation Act or, indeed, any other statutory public liability scheme, applies to the facts of the case. Part 6 of the Act governs the award of damages for injuries sustained in incidents involving motor vehicles. That Part is "concerned with controlling the amount of recoverable damage under the legislation to ensure that the scheme under the legislation is affordable."[1] Section 69(1) provides that the Part "applies to and in respect of an award of damages which relates to the death of or injury to a person caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle." Section 69(1) is the principal operative provision governing the award of damages under the Act[2].

---

1 *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2003) 57 NSWLR 321 at 329 [32] per Santow JA.

2 Part 6 provides for the awarding of damages and deals with matters such as the determination of economic and non-economic loss, including the claimant's prospects of future economic loss, applicable discount rates, payment of interest,

(Footnote continues on next page)

For the purposes of this appeal the key term in s 69(1) is "injury", which is defined in s 3(1) of the Act as follows:

> "***injury***:
>
> (a) means personal or bodily injury caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle if, and only if, the injury is a result of and is caused during:
>
> (i) the driving of the vehicle, or
>
> (ii) a collision, or action taken to avoid a collision, with the vehicle, or
>
> (iii) the vehicle's running out of control, or
>
> (iv) such use or operation by a defect in the vehicle, and
>
> (b) includes:
>
> (i) pre-natal injury, and
>
> (ii) psychological or psychiatric injury, and
>
> (iii) damage to artificial members, eyes or teeth, crutches or other aids or spectacle glasses."

9 This definition of injury was inserted by the *Motor Accidents Amendment Act* 1995 (NSW)[3] ("the 1995 Act"). The appeal concerns the application of par (a)(iv) of the definition of "injury" in s 3(1) of that Act. It gives rise to the issue whether Mr Oliver's injury was "caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle if, and only if, the injury is a result of and is caused during … such use or operation by a defect in the vehicle".

10 The definition of "injury" mirrors the terms of s 69(1). The words of s 69(1) emphasise two basic requirements for the Act to apply[4]: the injury must be caused "by the fault of the owner" of the vehicle and the injury must be caused by the fault of the owner "in the use or operation of the vehicle".

---

the effect of defences such as contributory negligence and voluntary assumption of risk, the non-applicability of exemplary or punitive damages and the apportionment of damages.

3 Schedule 1, Item 4.

4 *Allianz* (2003) 57 NSWLR 321 at 329 [34].

11 The rest of the definition of injury in s 3(1)(a) is then incorporated into s 69(1) by reference[5]. For sub-par (iv) to apply, the injury must be "a result of and is caused during … such use or operation by a defect in the vehicle".

Significance of definition sections

12 Except in rare cases, definitions are not intended to enact substantive rules of law. Their function is to aid the construction of those substantive enactments that contain the defined term or terms. Moreover, the meaning of the definition depends on the context and object of the substantive enactment. As I pointed out in *Kelly v The Queen*[6]:

> "[T]he function of a definition is not to enact substantive law. It is to provide aid in construing the statute. Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment. … [O]nce … the definition applies, … the only proper … course is to read the words of the definition into the substantive enactment and then construe the substantive enactment – in its extended or confined sense – in its context and bearing in mind its purpose and the mischief that it was designed to overcome. To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment. … [T]he true purpose of an interpretation or definition clause [is that it] shortens, but is part of, the text of the substantive enactment to which it applies."

13 In this case, therefore, the definition of "injury" is to be read into and applied in respect of s 69(1) of the Act. When that is done, the sub-section, with that term defined, must be construed in the context in which it appears and in light of the objects of that Part and the Act as a whole.

Parties' submissions before this Court

14 Allianz submitted that Mr Oliver's injury was not "a result of", in any legally causal sense, the use or operation of the vehicle. It contended that Mr Oliver's injury was caused by his participation in the unsafe system of work. Such use or operation of the vehicle as occurred was merely incidental. Allianz

---

5 *Allianz* (2003) 57 NSWLR 321 at 329 [34].

6 (2004) 78 ALJR 538 at 559-560 [103]; 205 ALR 274 at 302.

submitted that the definition emphasises that the defect must be truly causative of the injury, and not merely incidental to it.

15 GSF conceded that sub-pars (i)-(iv) of the definition of injury in s 3(1)(a) limits the class of injuries more generally described in the introductory words of the definition. It conceded that, in construing the definition, one commences with the introductory words and then decides whether any of the four conditions is satisfied. GSF contended that the defective unloading mechanism was *a* cause of Mr Oliver's injury and occurred in the course of the vehicle's use or operation for unloading. Consequently, the requirements that the injury be "a result of" the defect and "caused during … such use or operation by a defect" were satisfied.

Construction of the term "injury" in s 3(1)

16 For the Act to apply in the present case, several requirements of the definition must be satisfied:

1. there must be "fault of the owner … of the vehicle". That is, the owner was negligent or had committed another tort (as "fault" is defined in s 3);

2. the fault of the owner must be "in the use or operation" of the vehicle;

3. the injury must be caused "by" the fault of the owner or driver in the use or operation of the vehicle;

4. the injury must be caused "during" such use or operation of the vehicle;

5. the injury must be a result of such use or operation;

6. the injury must be a result of a defect in the vehicle; and

7. the injury must be caused by a defect in the vehicle.

17 The definition of "injury" emphasises the element of "cause" as the key factor that governs the entitlement to compensation. So far as sub-par (iv) is concerned, the definition has a dual aspect of causation. The first aspect appears in the introductory words of the definition and considers causation from the point of view of a human actor (the owner or driver): "caused by the fault of the owner … of a motor vehicle in the use or operation of the vehicle". The second aspect requires the injury to be the result of something inanimate, namely, a defect in the vehicle. The second aspect also contains a temporal requirement, namely, that the injury must be "caused during" the relevant timeframe.

18 The definition requires the injury to be caused *by* something inanimate only where there is a defect in the vehicle ("the injury is a result of and is caused

during ... such use or operation by a defect in the vehicle"). The other conditions in sub-pars (i)-(iii) require that the injury:

- be *a result of* the driving of the vehicle or a collision (or action taken to avoid a collision) or the vehicle running out of control,

- be *caused during* the driving, the collision (or action taken to avoid a collision) or the vehicle running out of control (the temporal requirement).

The first aspect of causation: "caused by the fault of the owner … in the use or operation of the vehicle"

19 This part of the definition considers causation from the point of view of a human actor. The injury must be "caused by the fault of the owner … in the use or operation of the vehicle". This part of the definition can be broken down into its constituent elements: there must be "fault" of the owner, that fault must be "in" the use or operation of the vehicle and the injury must be "caused by" the fault of the owner in that use or operation.

20 In this case, the fault (negligence) of the defendant employer and the causal impact of that negligence was conceded before the Court of Appeal[7]. The direction given by the employer resulted in an unsafe system of work. There was no dispute that GSF was negligent in using an unsafe system of work that required Mr Oliver to carry out the task of manually manoeuvring the containers to the rear of the truck. GSF also conceded before the Court of Appeal that the fault of the owner occurred "in" the use or operation of the vehicle as that expression appears in the introductory words of s 3(1)(a) of the Act[8].

21 Santow JA took the view that the word "in", in the expression "in the use or operation of the vehicle", simply meant "in relation to" or "in the course of"[9]. This construction is correct because the words focus on the fault of the owner in its capacity as owner. Failure by the owner to fix the defective unloading mechanism satisfies this requirement, as would a direction to use an unsafe system of work to unload the vehicle.

---

7 *Allianz* (2003) 57 NSWLR 321 at 335 [62] per Davies AJA.

8 *Allianz* (2003) 57 NSWLR 321 at 335-336 [63] per Davies AJA.

9 *Allianz* (2003) 57 NSWLR 321 at 330 [38].

22 In the Court of Appeal, GSF also conceded that the injury was caused by the fault of the owner of the vehicle in the use or operation of the vehicle. As Davies AJA observed[10]:

> "The vehicle ought not to have been used to transport the employer's goods whilst its unloading mechanism, the T-bar, was inoperable. The employer's goods were too heavy to be moved manually without a risk of injury of the type which Mr Oliver suffered."

The second aspect of causation: preliminary matters

23 The second aspect of causation relates to the four conditions that limit the general class of injuries to which the Act applies. Where there is a defect in the vehicle, the injury must be "a result of and is caused during ... such use or operation by a defect in the vehicle".

24 The expression "caused during such use or operation" imposes a temporal causal requirement. Where there is a defect in the vehicle, the defect must be operative when the injury is sustained and the vehicle must be in "such use or operation" to which the fault of the owner attaches when the injury is sustained. Allianz conceded that Mr Oliver's injury occurred during the use or operation of the vehicle[11].

25 Further, the expression "such use or operation" in s 3(1)(a)(iv) refers to the "use or operation" of the vehicle in the opening words of the definition. In *Zurich Australian Insurance Ltd v CSR Ltd*, the New South Wales Court of Appeal held correctly that "such" generally refers to use and operation in the introductory paragraph, not to sub-pars (i), (ii) and (iii) in the definition[12].

26 Allianz contended that the effect of the word "such" in sub-par (iv) is to confine the operation of the defect provisions to the use or operation of the vehicle in the senses referred to in s 3(1)(a)(i)-(iii). It contended that this construction is consistent with the legislative purpose of the section as evidenced by the Second Reading speech[13]. This construction must be rejected for three reasons. First, the construction would make sub-pars (i), (ii) and (iii) redundant.

---

10 *Allianz* (2003) 57 NSWLR 321 at 335-336 [63].

11 *Allianz* (2003) 57 NSWLR 321 at 336 [64] per Davies AJA.

12 (2001) 52 NSWLR 193 at 201 [32] per Spigelman CJ, Mason P and Handley JA agreeing.

13 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 16 November 1995 at 3322.

Secondly, this conclusion is not consistent with the use of the disjunctive "or" between each sub-section. Thirdly, the construction is also inconsistent with s 3(6), which provides that a reference to the use or operation of a motor vehicle includes a reference to the maintenance or parking of the vehicle[14]. An "injury" within the meaning of the Act may therefore occur while a person is performing maintenance on the vehicle, which generally occurs when the vehicle is not in motion.

27 The question then arises whether the unloading of the trailer constitutes "such use or operation" of the vehicle for the purposes of the Act. Davies AJA held that "[t]he loading or unloading of a vehicle, ... which was designed to transport goods, may be a part of the use or operation of a vehicle"[15], and "[t]he loading and unloading of the employer's vehicle were essential parts of the operation for which the vehicle was used ... [which was] the transport of the loaded containers from the employer's premises to the airport."[16] This conclusion accords with the statement of Windeyer J in *Government Insurance Office of NSW v R J Green & Lloyd Pty Ltd*[17] where his Honour said:

> "Any use that is not utterly foreign to its character as a motor vehicle is, I consider, covered by the words ['use of a motor vehicle']. … The loading of a vehicle designed to be used, and ordinarily used, for the carriage of goods is a necessary element in its ordinary use. Loading it is incidental to the use of it in the normal way."

28 In *R J Green & Lloyd*, this Court accepted that the word "use" has a wide meaning and covers loading and unloading.

29 In *NRMA Insurance Ltd v NSW Grain Corporation*[18] – which was decided before the commencement of the 1995 Act – the Court of Appeal held that the Act applied to injuries sustained during loading and unloading operations. The Act did so where an injury was caused by the fault of the owner in the use or

---

14 Section 3(6) has always been in these terms.

15 *Allianz* (2003) 57 NSWLR 321 at 336 [64], citing *NRMA Insurance Ltd v NSW Grain Corporation* (1995) 22 MVR 317; *Zurich Australian Insurance Ltd v CSR Ltd* (2001) 52 NSWLR 193.

16 *Allianz* (2003) 57 NSWLR 321 at 336 [64].

17 (1966) 114 CLR 437 at 446-447.

18 (1995) 22 MVR 317. Cases which turned on the definition of "use or operation of the vehicle" include *Mercantile Mutual Insurance (Australia) Ltd v Moulding* (1995) 22 MVR 325 and *Prospect County Council v Foster* (2001) 33 MVR 228.

operation of the vehicle. The Court held that an unsafe system of work that involved loading or unloading operations could constitute "fault of the owner … in the use or operation of the vehicle" within the meaning of the Act.

30 The amendments effected by the 1995 Act do not result in the Act automatically excluding acts of loading and unloading a vehicle from the concept of "use or operation" of the vehicle. The Act restricts the circumstances in which the Act governs an injury sustained during loading and unloading operations (the injury must be "a result of and is caused during … such use or operation by a defect in the vehicle"). However, the Act neither expressly nor inferentially excludes all loading and unloading activities from the expression "use or operation" of the vehicle. Its application is governed by the cause of the injury, but not by the activity in which the person injured was engaged when the injury was sustained.

The third aspect of causation: "a result of and is caused … by a defect in the vehicle"

31 There was a defect in the vehicle within the meaning of the definition. In its ordinary usage, a defect means "a lack or absence of something necessary or essential for completeness; a shortcoming or deficiency [which] may be either major or minor."[19] It may be a defect in the design or the original construction of the vehicle or may arise because the vehicle is not kept in proper condition[20]. One of the important functions of the vehicle was the use of a T-bar mechanism to push containers to the rear of the truck where they could be unloaded. This function was incapable of being performed because the mechanism was defective. As Mason P pointed out[21] "[t]here was a defect in the vehicle because one of the important things it was designed to do was not functioning, that is, was defective." Santow JA[22] and Davies AJA[23] agreed.

---

19 *Topfelt Pty Ltd v State Bank of New South Wales Ltd* (1993) 47 FCR 226 at 237 per Lockhart J.

20 See the discussion of Spigelman CJ in *Zurich* (2001) 52 NSWLR 193 at 202-207 [42]-[71].

21 *Allianz* (2003) 57 NSWLR 321 at 323 [3].

22 *Allianz* (2003) 57 NSWLR 321 at 326 [23], 333-334 [51].

23 Davies AJA held that "[o]nce the gearbox to the T-bar had failed and the T-bar was inoperable, the vehicle was unsuitable for the function it was designed to perform, the transport of the employer's goods." *Allianz* (2003) 57 NSWLR 321 at 336 [66], citing *Zurich* (2001) 52 NSWLR 193 at 202-207 [42]-[71].

32 In *Zurich*[24], Spigelman CJ drew a distinction between a "defect" and a "negligent user" for the purposes of the Act, although he acknowledged that the distinction "may not always prove helpful":

> "The defect must be '*in*' the vehicle. A vehicle is not 'defective' only because its operation in a particular manner may lead to injury. However, the manner in which it is intended to operate may determine whether there is a 'defect' '*in*' the vehicle."

His Honour also thought that an appropriate perspective from which to approach the question of a "defect in the vehicle" for the purposes of the Act is the fitness of the vehicle for its intended use[25].

33 Allianz contended, however, that, because there was a negligent use of the vehicle – the inability to use the out-of-repair lifting mechanism and the requirement to lift manually – there was no "defect" in the context of its "intended use". Nor was there a "defect" in the sense of an inherent defect. Santow JA correctly rejected this contention saying[26] that "a lifting mechanism that is out of repair, taking into account its intended use as a lifting mechanism, clearly represents a defect in the vehicle."

"[A] result of and … caused … by a defect in the vehicle"

34 In considering the construction of the requirement that the injury be "a result of and ... caused … by a defect in the vehicle", two matters must be noted.

1. First, the second aspect of causation in the definition requires the injury to be caused by something inanimate (a defect in the vehicle).

2. Secondly, the approach to the question of causation must be considered in the context of the Act.

35 One difficulty with the definition of injury is that it imposes a causal requirement in respect of something inanimate – a defect in the vehicle – as if the defect itself could "cause" the injury. As I pointed out in *Insurance Commission of Western Australia v Container Handlers Pty Ltd*, leaving aside natural catastrophes such as volcanoes, earthquakes and tidal waves, inanimate objects

---

24 (2001) 52 NSWLR 193 at 206-207 [68] (emphasis in original).

25 *Zurich* (2001) 52 NSWLR 193 at 206 [67].

26 *Allianz* (2003) 57 NSWLR 321 at 334 [53].

do not cause anything. Inanimate objects (even defective ones) are not the cause of the harm that people suffer by coming into contact with them. I stated[27]:

> "Both scientific and modern common law doctrines of causation as well as common sense … 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. … [T]he notion that a vehicle may cause death or bodily injury without human intervention is not easy to understand."

36 This reasoning applies to defects in inanimate objects. The expressions "a result of … such use or operation by a defect in the vehicle" and "caused … by a defect in the vehicle" look to the defect in the vehicle as the harm-causing instrument and require a connection between the vehicle as the harm-causing instrument and the injury.

37 Although the expression "a result of … [the] defect" requires a causal connection between the defect and the injury, that connection does not have to be a "direct" connection or the only connection. The section speaks of the injury being "a" result of, not "the" result of, the defect. Mason P thought that, because the injury must be "a result of" and not "the result of" the defect, the injury need not be the "direct" or "effective" or "efficient" result of the defect[28]. The use of the indefinite article "a" instead of the definite article "the" suggests that the defect in the vehicle does not have to be the sole or even the predominant cause of the injury.

38 Nevertheless, there must be a connection between the defect and the injury. The defect must be one of the elements in the chain of events that leads to the injury. The causal inquiry as to whether the injury is "a result of … [the] defect" requires a less direct connection than the inquiry as to whether the injury is "caused … by [the] defect". The expression "a result of" emphasises the result or effect of the defect, rather than the defect causing the result. The term "result" emphasises effect and is less concerned with the proximity of cause and effect.

39 In contrast to sub-pars (i)-(iii) of the definition, the expression "a result of" appears to have little work to do in relation to sub-par (iv). Sub-paragraphs (i)-(iii) impose a temporal requirement – that the injury be caused during the driving of the vehicle, a collision (or action taken to avoid a collision) or the vehicle's running out of control – and a causal requirement – that the injury be a result of those activities. But sub-par (iv) imposes the temporal requirement that

---

27 (2004) 78 ALJR 821 at 826-827 [18]; 206 ALR 335 at 342.

28 *Allianz* (2003) 57 NSWLR 321 at 324-325 [15] per Mason P.

the injury be caused during the use or operation of the vehicle and the causal requirement that the injury be caused by the defect.

40 One construction of the definition that gives "a result of" some work to do in sub-par (iv) is to hold that the expression requires the injury to be "a result of" the use or operation of the vehicle. In other words, there must be a temporal causal connection between the use or operation of the vehicle, the defect and the injury sustained. The defect must somehow operate during the use or operation of the vehicle as a factor that brings about the injury. The mere fact that there is a defect in the vehicle is not sufficient to satisfy the requirement that the injury be "a result of" the defect.

The causal inquiry in s 3(1)(a)(iv)

41 In the end, the outcome of this appeal turns on the construction of the words "caused … by a defect in the vehicle". The language of the Act reflects the concept of causation at common law. This suggests that the inquiry into the question of causation under the Act does not differ materially from the "common sense" test for causation at common law. However, because the task before the Court is one of statutory construction, the question of causation must be determined in light of the subject, scope and objects of the Act. The common law concept of causation is concerned with determining whether some breach of a legal norm was so significant that, as a matter of common sense, it should be regarded as a cause of damage[29]. In the present case, however, common law conceptions of causation must be applied having regard to the terms or objects of the Act. Those terms and objects of the Act operate to modify the common law's practical or common sense concept of causation. The inquiry into the question of causality is therefore not based simply on notions of "common sense". In *NRMA Insurance Ltd v NSW Grain Corporation*[30], Clarke JA said that the Act compels a "common sense" approach to the question of causality of the injury (as prevails in relation to the common law):

> "[The Act] propounds an inquiry on causation identical with that undertaken in determining whether the negligence of the person claiming indemnity 'caused' the damage and thus was liable for it. That test has now been firmly based on common sense. … It would not be reasonable, in my opinion, to attribute to the legislature an intention that the expression 'caused by' in the statutory policy should enliven a test of causation different from the test by which the party claiming indemnity had been found liable."

---

29 *Henville v Walker* (2001) 206 CLR 459 at 490 [97] per McHugh J.

30 (1995) 22 MVR 317 at 320.

42 However, the purpose of the inquiry must be ascertained before the application of any notion of "common sense". The purpose of the causal inquiry is critical because it conditions the result. Once the purpose of the inquiry is ascertained, the question of causality must be determined in light of the subject, scope and objects of the Act. Both Mason P[31] and Santow JA[32] acknowledged the importance of considering the purpose of the causal inquiry because the purpose "conditions the outcome of any application of common sense to its answer"[33].

43 Although the Act establishes a compulsory third party insurance scheme for motor vehicle injuries, the Act does not and was never intended to provide a universal, comprehensive scheme to award damages to every person who sustains an injury that was in some way connected to a motor vehicle. The Attorney-General made a statement to this effect when he gave the Second Reading speech for the 1995 Bill[34]:

> "The CTP policy and the motor accidents scheme simply are not, and were never intended to be, a comprehensive accident compensation scheme providing substantial damages in all cases of injuries connected in some way to the use of a motor vehicle."

44 To the extent that *Gunter v State Transit Authority of NSW*[35] suggests that the purpose of the Act is to provide a universal coverage scheme for all motor vehicle accidents, it should not be followed.

The objects of the Act

45 The 1995 Act inserted ss 2A, 68A and 2B into the Act. Section 2A sets out the objects of the Act, which include the following:

---

31 *Allianz* (2003) 57 NSWLR 321 at 323 [7], citing *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 at 29-30 per Lord Hoffmann.

32 *Allianz* (2003) 57 NSWLR 321 at 330 [40], citing *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 at 29 per Lord Hoffmann.

33 *Allianz* (2003) 57 NSWLR 321 at 330 [40].

34 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 16 November 1995 at 3322.

35 [2004] NSWCA 330 at [16] per Young CJ in Eq, Tobias JA and Wood CJ at CL agreeing.

"(2) It must be acknowledged in the application and administration of this Act:

(a) that participants in the scheme under this Act have shared and integrated roles with the overall aim of benefiting all members of the motoring public by keeping the overall costs of the scheme within reasonable bounds so as to keep premiums affordable, and

…

(c) that:

(i) the premium pool from which each insurer pays claims consists at any given time of a finite amount of money, and

(ii) insurers are obliged under this Act to charge premiums that will fully fund their anticipated liability, and

(iii) the preparation of fully funded premiums requires a large measure of stability and predictability regarding the likely future number and cost of claims arising under policies sold once the premium is in place, and

(iv) the stability and predictability referred to in subparagraph (iii) require consistent and stable application of the law."

Section 68A provides that the objects of Pt 6 are:

"(a) to control the amount of damages that may be awarded to a claimant for the purpose of ensuring that the scheme under this Act is affordable, and

(b) to achieve this control by the deliberate strategy of placing the burden of ensuring affordability on those who suffer relatively minor injuries so that sufficient funds are available to more fully compensate those who suffer more severe injuries."

46 Section 2B provides that in interpreting the Act, a construction that would promote the object of the Act is to be preferred to a construction that would not promote that object. The above objects indicate that insurers are obliged to charge premiums that will fully fund their anticipated liability and that the premium pool from which claims are paid is finite. They also indicate a need to keep the overall costs of the scheme within reasonable bounds so as to keep premiums affordable. The amendments disclose a cost-saving objective.

47 The Second Reading speech also suggests that the Legislature intended to amend the relevant sections of the Act so as to limit the scope of the motor accidents scheme in New South Wales by keeping premiums under control, perhaps even reducing them. The critical part of the second reading speech for the 1995 Bill is the following statement by the Attorney-General[36]:

> "Common sense and community expectations generally demand that the CTP policy provide coverage in respect of injuries which arise from crashes and collisions on the roads or from vehicles running out of control. Over the years the courts have interpreted the CTP policy as providing for a wide range of injuries often unrelated to motor accidents. For example, the CTP policy has been held to cover injuries sustained during the loading and unloading of vehicles, and injuries sustained while standing on the back of a stationary trailer, and injuries involved in the use of a firearm in a vehicle.
>
> It is therefore proposed to amend the definition of 'injury' to adopt an approach similar to that taken in Queensland, South Australia and Western Australia, where 'injury' is qualified in terms of its cause."

48 Santow JA held, correctly in my opinion, that, consistent with the Minister's Second Reading speech, the Act announces its own purposes in s 2A, and that cost-saving is the predominant consideration[37]. His Honour held that in light of the cost-saving purposes of the Act, the breadth of its application is a relevant consideration. He found that "[i]f motor accident liability encompasses what is really employer liability, that purpose is clearly not served."[38] Given also that s 2B directs a construction of the Act that promotes its object over one that does not, "[a]ny narrowing of its coverage readily supports the cost-saving objects of the … legislation. Any extension does the opposite. … The 1995 amendments were introduced to narrow the definition of injury and thus its reach."[39]

49 In pursuit of the Act's objects, Parliament has limited the scope of the Act by means of the concept of causation. The amendment requires a close causal connection between the use of the vehicle and the injury. Mere connection "in some way to the use of a motor vehicle" is not enough to bring an injury within

---

36 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 16 November 1995 at 3322.

37 *Allianz* (2003) 57 NSWLR 321 at 332 [44].

38 *Allianz* (2003) 57 NSWLR 321 at 332 [44].

39 *Allianz* (2003) 57 NSWLR 321 at 332 [44].

the scope of the Act. The general class of injury described in the introductory expression of the definition of injury in s 3(1) still includes injuries sustained during loading and unloading operations. However, the four conditions in sub-pars (a)(i)-(iv) limit the class more generally described in the introductory expression.

50 The history of the legislation shows how unloading and similar cases were removed from the scope of the Act. The Act effectively replaced the *Motor Vehicles (Third Party Insurance) Act* 1942 (NSW) ("the 1942 Act") as the compulsory third party insurance scheme for motor vehicle injuries after 1 July 1989. Since the introduction of the Act and the subsequent amendments to that Act, the circumstances in which an injury is governed by the Act have been qualified by a tighter definition of cause. Under the 1942 Act, the third party insurance policy was required to provide cover in respect of any injury that was "caused by or arising out of the use of the motor vehicle"[40]. Under that Act, most loading and unloading injuries fell within the "arising out of" limb, particularly where the only connection with the vehicle was that goods were being loaded into or unloaded from the vehicle[41].

51 The expression "arising out of" does not and never has appeared in the Act. Thus, the Act has a narrower scope than the 1942 Act. The words "caused by" are narrower than the words "arising out of" and require a closer causal connection between the event or activity and the injury than the latter phrase implies. However, the removal of the words "arising out of" from the operative provision of the Act does not operate to exclude all loading and unloading cases. Although "arising out of" permitted the 1942 Act to respond in circumstances of "attenuated causation", the Act still applies to injuries sustained during unloading activities, but only "if, and only if" the injury is "caused … by" a defect in the vehicle.

52 As enacted, the Act effectively restricted claims in loading and unloading cases to circumstances in which the injury was "caused by the fault of the owner … in the use or operation of the vehicle." The Act no longer covered loading and unloading cases where the injury simply arose out of the use of the vehicle. Despite the change in focus of the causal inquiry, as I have indicated the New South Wales Court of Appeal has held that the Act continues to apply to injuries sustained during loading and unloading operations. It applies where the injury

---

40 1942 Act, s 10(1)(b).

41 See, eg *Government Insurance Office of NSW v R J Green & Lloyd Pty Ltd* (1966) 114 CLR 437.

was caused by the fault of the owner in the use or operation of the vehicle[42]. However, the amendments bring about the result that the Act does not apply to injuries sustained during loading and unloading operations where there is no defect in the vehicle.

53 The above examination of the subject, scope and purpose of the Act suggests three matters that are relevant in the construction of Pt 6 of the Act. First, the Act does not provide a universal compensation scheme for all injuries sustained in connection with a motor vehicle. Second, cost-saving and the need to keep the scheme affordable are significant objects of the Act. Third, the Act has tightened the definition of injury by reference to its cause. These three matters indicate that, in the inquiry into the question of causality, an approach that limits the scope of the Act is preferable to one that would extend its application. This in turn suggests that a close causal connection is required for the injury to satisfy the requirement the injury be "caused … by a defect in the vehicle".

54 In addressing the question of causality, metaphysical concepts such as "proximate cause" or "immediate cause" should be avoided, because they provide little, if any, assistance in resolving questions of causation under this Act. The task is to identify the factors that contributed to the injury and determine whether, for the purposes of obtaining damages under the Act, the injury was caused by a defect in the vehicle and not by some other factor. To paraphrase Lord Hoffmann in *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd*[43], causality is determined in light of the subject, scope and objects of the Act. At common law, injury may be "caused ... by a defect" even if the act or event in question did no more than materially contribute to the injury[44]. The courts have given an expansive meaning to the

---

42 See, eg, *NRMA Insurance Ltd v NSW Grain Corporation* (1995) 22 MVR 317 at 318-319, where the Court applied the following three-stage test:

1. Does the evidence establish that there was "fault of the owner or driver … of the vehicle", that is, that the owner was negligent or had committed another tort (as "fault" is defined in s 3)?

2. If yes, did the fault of the owner or driver cause the injury to the claimant?

3. If yes, was the fault of the owner or driver in the use or operation of the vehicle?

43 [1999] 2 AC 22 at 31.

44 See *Henville v Walker* (2001) 206 CLR 459 at 469 [14] per Gleeson CJ, 480 [60]-[61] per Gaudron J, 493 [106] per McHugh J.

word "cause". For example, material contribution may constitute a "cause" for the purpose of determining culpability and a contributory cause may constitute a "cause" for the purposes of tort law[45]. Under the Act, however, there must be a finding that, of the entire set of circumstances that contributed to the injury, it was "a defect in the vehicle" that caused the injury.

55 As I pointed out in *Henville v Walker*[46], in some situations, the applicable legal framework requires a finding that no causal connection exists for legal purposes even though a physical connection exists between the thing complained of and the damage. In other situations, the legal framework may require a finding that a causal connection exists even though no such physical connection exists. Given the objects of the Act, if the fault of the owner merely provides the reason why the injured person acted, it will not be sufficient to establish a causal connection unless the purpose of the Act is to prevent persons suffering detriment in circumstances of the kind that occurred. Where several factors operate to bring about the injury to a plaintiff, selection of the relevant antecedent (contributing) factor as legally causative requires the making of a value judgment and, often enough, consideration of policy considerations[47]. This is because the determination of a causal question always involves a normative decision.

Application of the definition

56 As I earlier pointed out, the definition of "injury" in s 3(1) of the Act contains a triple causation requirement. All requirements must be satisfied for the Act to apply. The first aspect (whether the injury was caused by the fault of the owner in the use or operation of the vehicle) is satisfied in the present case. It is satisfied because GSF failed to maintain the vehicle and negligently instructed its employees to unload the vehicle despite the vehicle's unloading mechanism being out of operation.

57 In my opinion, however, the second and third requirements of the causal inquiry (whether the injury was "a result of and … *caused* during ... such use … *by* a defect in the vehicle") was not satisfied. Mr Oliver's injury was no doubt a result of the defect. But it does not follow that, for the purposes of the Act, the injury was caused by the defect in the vehicle. Where the injury is sustained as a consequence of a defect in the vehicle and does not fall within sub-pars (i), (ii) or

---

45 See, eg, *Chappel v Hart* (1998) 195 CLR 232 at 239-240 [11]-[12] per Gaudron J, 243-245 [26]-[28] per McHugh J.

46 (2001) 206 CLR 459 at 491-492 [100]-[101], [103].

47 *Allianz* (2003) 57 NSWLR 321 at 331 [42] per Santow JA, citing *Chappel v Hart* (1998) 195 CLR 232 at 255 [62] per Gummow J.

(iii), it will not be "caused ... by" the defect unless the connection between the defect and the injury is more than "a result of" the defect. When the case falls within sub-par (iv), the definition applies only where "the injury is a result of and is caused ... by a defect".

58 In the present case, two matters contributed to bring about Mr Oliver's injury:

1. the unremedied defect in the unloading mechanism, which rendered the mechanism inoperative; and

2. the employer's negligent direction to Mr Oliver to unload the containers manually.

59 Of these two elements, it was the second that proved decisive. The unremedied defect, like Mr Oliver's employment and the containers on the vehicle, was merely one of a myriad of background facts that had to exist for the injury to occur. Even if the common law test of causation had to be applied without regard to the context and objects of the Act, I would conclude that, for the purpose of legal responsibility, the passive condition of the defective mechanism was not a cause of Mr Oliver's injury. It was the employer's direction that was significant. Where a person directs another person to take a step that places a person in proximity to a passive condition of danger, it is often the case that it is the direction rather than the condition that causes any subsequent harm. That will generally be the case where the danger consists in some natural phenomenon, such as a cliff or deep water. Leaving aside earthquakes, volcanoes, tidal waves and similar conditions, inanimate objects do not cause harm without human intervention. Where the passive condition has been created by the agency of a third party or the plaintiff, however, the direction may simply be one of two or more causes: creating the danger and directing the injured person to do something near or in relation to the danger. In some circumstances, the omission to repair the danger as well as the direction, may also constitute joint causes of the injury. In a different context, GSF's failure to repair the unloading mechanism could "cause" the injury suffered by a person when using or operating the vehicle.

60 In the present case, however, Mr Oliver's injury was not a consequence of contact with or use of the unloading mechanism. Even on a common law approach to causation, uncontrolled by the objects of the Act, the defect in the vehicle did not cause Mr Oliver's injury because it had no physical connection with the injury. There was no direction to use the defective loading mechanism. On the contrary, there was a direction to work without it.

61 But even if at common law, the defect in the vehicle caused the injury, the objects of the Act show that it did not cause it for the purpose of the Act. Given that the objects of Pt 6 and the Act as a whole emphasise cost-saving

considerations, an expansive interpretation of the definition of injury would not promote the objects of the Act or Pt 6. Given this consideration and the Legislature's intention to restrict the application of the Act in unloading cases, the best construction of the definition is that, in its application to such cases, there must be a close physical connection between the defect and the injury. And that physical connection must exist in circumstances that would make it consistent with the subject, scope and purpose of the Act for the Act to apply to the injury. Here there was no physical connection. Moreover, the scope and purpose of the Act indicate that, far from the Act being intended generally to cover unloading cases, it was intended to apply to them only in special circumstances.

62 GSF contended that there was a physical connection between the defect and the injury because there *was* human involvement with the defect. This contention has no substance. According to this contention, the defect operated in the causal sense because what was done was an attempt to cope with or accommodate the defect. GSF submitted that the gearbox had broken, rendering the T-bar mechanism inoperable, and this meant that the whole unloading apparatus was defective, including the T-bar, the motor and the rollers. It contended that the rollers were part of the defect because they were not working as they were intended to work and were "out of action". It contended that the defect was part of the use of the vehicle because the vehicle was not taken out of operation or immediately repaired. Instead, Mr Oliver and another employee had to "work with it, accommodate it, cope with it". GSF submitted that the requirements of the Act are satisfied where the defect is "one of a number of things necessary to complete the occurrence of the injury and which is operative at all times". That proposition, so it claimed, was satisfied in this case because Mr Oliver and his colleague were "coping" with the defect and "trying to accommodate it – they [were] actually using the damaged or the non-working thing at the time". However, none of these submissions establish a physical connection between the defective unloading mechanism and the injury. At their highest, they do no more than explain the reasons why Mr Oliver and his colleague were doing what they did.

63 In support of its submission, GSF also relied on the Court of Appeal's decision in *Zurich*. There the Court held that the employee's injury was "caused … by a defect in the vehicle" in circumstances where the employee injured his back while lifting a loading ramp that formed part of a custom built trailer attached to a truck. The trailer had no aids to assist in the lowering and lifting of the ramps and the worker had no assistance from any colleague. Lifting the ramp manually was the intended use of the vehicle. The Court of Appeal found that the absence of any hydraulic or mechanical lifting mechanism to assist in lifting the ramps was a defect in the design of the vehicle, because it required a worker to behave in a way that was unsafe. This defect was the direct cause of the worker's injury. The employer's negligent instruction was merely to use the vehicle for the purpose and in the manner for which it was intended. This instruction did not operate to take the injury outside the scope of the Act.

64 In both *Zurich* and the present case, the worker was instructed to do something which led to the worker being injured. In *Zurich*, however, the instruction was to use the vehicle for the purpose and in the manner for which it was intended. In the present case, Mr Oliver was instructed to use the vehicle in a manner other than its intended use. And he was instructed to use the vehicle in a way that did not involve the use of the defective part, which was the T-bar mechanism. *Zurich* does not assist GSF's contentions.

65 In my opinion, therefore, the majority of the Court of Appeal erred in finding that, although the negligent direction of the employer was the major reason for Mr Oliver's injury, the involvement of the defect in the vehicle was sufficient to satisfy the definition of the term "injury" in the Act. Mason P erred by conflating the separate concepts of "cause" and "result" in the definition, giving the expression "caused … by" no independent work to do. His Honour used the words "a cause" interchangeably with the words "a result of". He considered only the words "a result of" and failed to consider the words "caused … by". In so doing, he failed both to give the expressions different meanings as required by the Act and to give them cumulative effect. Davies AJA erred because he appeared to hold that the causation requirements of the Act were satisfied if the defect was a link in the causal chain and an element without which the injury would not have occurred[48].

Order

66 The appeal must be allowed.

---

48 *Allianz* (2003) 57 NSWLR 321 at 337 [70].

GUMMOW, HAYNE AND HEYDON JJ.

The facts

67 The first respondent ("GSF") conducted a business in which food was packed for conveyance by airlines in containers which were too heavy for manual handling. GSF provided a truck with a trailer attached for the conveyance of packed containers from its premises to an airport. The trailer, which for relevant purposes has been considered as a part of the vehicle, had six rows of rollers. At the premises of GSF, containers were placed on the rollers and pushed inside the trailer by use of a forklift. At the front end of the trailer there was a T-bar and underneath the trailer a motor and gearbox to drive the T-bar. At the airport, the containers were unloaded from the trailer by means of the motorised T-bar which pushed the containers back along the rollers until they were discharged. On the day in question, 12 February 1998, the gearbox had broken down and the T-bar was inoperable.

68 The second respondent (Mr Oliver) was employed by GSF as a maintenance fitter. He was not usually involved in loading and unloading operations. On 12 February 1998, he was instructed to go to the airport with another employee to assist in unloading containers. Mr Oliver and his fellow employee were given crowbars and directed to insert these between the rollers and lever the containers to the rear of the trailer. In the course of performing this work, Mr Oliver sustained a back injury.

69 The insurer of GSF under the workers compensation legislation was QBE Workers Compensation (NSW) Ltd ("QBE"). The appellant ("Allianz") was the insurer of the vehicle under the compulsory third party ("CTP") insurance scheme.

The litigation

70 The action instituted by Mr Oliver against GSF in the District Court of New South Wales was referred to arbitration and, on 21 November 2001, an award was made in favour of Mr Oliver. Thereafter, GSF applied to the District Court for a limited rehearing, pursuant to s 18 of the *Arbitration (Civil Actions) Act* 1983 (NSW).

71 At this stage, the active dispute turned upon a particular aspect of the case. Did the facts and circumstances leading to Mr Oliver's injury give rise to an indemnity under either or both of the *Workers Compensation Act* 1987 (NSW) ("the Compensation Act") and the *Motor Accidents Act* 1988 (NSW) ("the Motor Accidents Act")? It was agreed that, if damages were assessed only pursuant to Pt V of the Compensation Act, there should be a verdict for $450,000 in

Mr Oliver's favour; if they were assessed pursuant to the Motor Accidents Act, then the sum should be $460,000.

72 Section 47A of the Motor Accidents Act states:

> "An insurer may apply to the court to be joined as a party to legal proceedings brought against a defendant who is insured under a third-party policy with the insurer in order to argue that in the circumstances of the case it has no obligation under the policy to indemnify the defendant."

An order under s 47A was made in the District Court joining Allianz as a party to the proceedings. The other insurer, QBE, has not become a party, but in substance the dispute has been between the two insurers.

73 The District Court held that the provisions of the Motor Accidents Act were attracted and that there should be judgment in favour of Mr Oliver against GSF in the larger sum of $460,000. It entered judgment accordingly.

74 In addition to entering judgment in favour of Mr Oliver against GSF in the sum of $460,000, the District Court ordered that Allianz pay GSF "by way of indemnification" the sum of $230,000. This order was made on the concession that, because it had been established that Mr Oliver's claim fell within both legislative regimes, the case was one of "dual insurance".

75 Allianz appealed to the New South Wales Court of Appeal seeking to set aside the judgment against it obtained by GSF and an order that there be judgment in favour of Mr Oliver against GSF in the sum of $450,000, that is to say, on the footing that only the Compensation Act applied. The Court of Appeal (Mason P and Davies AJA; Santow JA dissenting) dismissed the appeal[49].

76 In this Court, Allianz seeks orders to the effect of those it unsuccessfully sought in the Court of Appeal. GSF is the first respondent and Mr Oliver the second respondent. Mr Oliver played no active part in the appeal and his position has been protected by arrangement between the other parties after the grant of special leave. It also should be noted that motor vehicle accidents occurring after 5 October 1999 are governed by the *Motor Accidents Compensation Act* 1999 (NSW) ("the 1999 Act") and not the Motor Accidents Act (s 2AA), but nothing for this appeal turns on that[50]. Other aspects of the

---

49 *Allianz Aust Insurance Ltd v GSF Aust Pty Ltd* (2003) 57 NSWLR 321.

50 In particular, the definition of "injury" in s 3 of the 1999 Act does not differ from that on which this case turns.

scheme established by the Motor Accidents Act were considered by this Court in *Russo v Aiello*[51].

The legislation

77 The critical question on the appeal is the contention, which the majority in the Court of Appeal accepted, that the facts and circumstances gave rise to "injury" within the definition in s 3(1) of the Motor Accidents Act. The submission by Allianz that the Court of Appeal erred should be accepted and the appeal allowed.

78 Part 6 of the Motor Accidents Act (ss 68-82A) is headed "Awarding of damages". Section 69(1) states:

> "This Part applies to and in respect of an award of damages which relates to the death of *or injury to* a person *caused* by the fault of the owner or driver of a motor vehicle *in the use or operation of the vehicle*." (emphasis added)

The term "injury" is then defined in s 3(1) as follows:

> "***injury***:
>
> (a) means personal or bodily injury *caused* by the fault of the owner or driver of a motor vehicle *in the use or operation of the vehicle if, and only if, the injury is a result of and is caused during*:
>
> (i) the driving of the vehicle, or
>
> (ii) a collision, or action taken to avoid a collision, with the vehicle, or
>
> (iii) the vehicle's running out of control, or
>
> (iv) *such use or operation by a defect in the vehicle*, and
>
> (b) includes:
>
> (i) pre-natal injury, and
>
> (ii) psychological or psychiatric injury, and

---

51 (2003) 215 CLR 643.

(iii) damage to artificial members, eyes or teeth, crutches or other aids or spectacle glasses." (emphasis added)

79 It will be apparent that the opening words in the definition "caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle" mirror those in the substantive provision in s 69(1). Section 69(1) was in the same form when the Motor Accidents Act was enacted in 1988. The present definition of "injury" was inserted by the *Motor Accidents Amendment Act* 1995 (NSW) ("the 1995 Act")[52]. The original definition it replaced did not mirror s 69(1); rather, it stated that "'injury' means personal injury" and that "injury" included what now appears as par (b) of the present definition. The 1995 Act also included (as s 2A and s 2B) provisions dealing with the object and interpretation of the legislation. Further reference will be made to s 2A and s 2B later in these reasons.

80 The evident purpose of the 1995 Act, which is confirmed by the Second Reading Speech in the Legislative Council on the Bill for the 1995 Act[53], was to limit the definition of injury by its cause and to narrow what the legislature considered the overbroad reading in the case law of the expression in s 69(1) "caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle".

81 In the Second Reading Speech the Attorney-General said[54]:

> "The CTP policy and the motor accidents scheme simply are not, and were never intended to be, a comprehensive accident compensation scheme providing substantial damages in all cases of injuries connected in some way to the use of a motor vehicle. Common sense and community expectations generally demand that the CTP policy provide coverage in respect of injuries which arise from crashes and collisions on the roads or from vehicles running out of control. Over the years the courts have interpreted the CTP policy as providing for a wide range of injuries often unrelated to motor accidents. For example, the CTP policy has been held to cover injuries sustained during the loading and unloading of vehicles,

---

52 Sched 1, Item 4.

53 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 16 November 1995 at 3320-3324.

54 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 16 November 1995 at 3322.

> and injuries sustained while standing on the back of a stationary trailer, and injuries involved in the use of a firearm in a vehicle.
>
> It is therefore proposed to amend the definition of 'injury' to adopt an approach similar to that taken in Queensland, South Australia and Western Australia, where 'injury' is qualified in terms of its cause."

The Western Australian legislation of which the Attorney-General spoke was considered by this Court in *Insurance Commission (WA) v Container Handlers Pty Ltd*[55].

82 In the present case, Mason P said that the definition of "injury" was "the gateway that controls access to an award of damages under Pt 6 of the [Motor Accidents Act] (see also s 69 thereof)"[56]. His Honour held that "[t]here was a defect in the vehicle because one of the important things it was designed to do was not functioning, that is, was defective"[57]. He added that the definition uses the term "a result of" not "the result of" and that "the defect was a cause of the compensable injury. Or, to use the language of the definition, the injury was 'a result of' the defective vehicle provided to Mr Oliver in circumstances rendering its owner at fault."[58] The immediate difficulty with this reasoning is that it gives insufficient attention to the phrase as a whole as it appears in the definition, namely "if, and only if, the injury is a result of and is caused ...".

83 The other member of the majority, Davies AJA, held that the defect in the vehicle formed "part of the chain of events which led to the injury" and was "one of the factors constituting the fault of [GSF]"[59]. It will be apparent that this reasoning construes the definition as if it contained words such as "arising out of" which require no direct or proximate causal link, and gives insufficient attention to the words "if, and only if" in the definition.

---

55 (2004) 78 ALJR 821; 206 ALR 335.

56 (2003) 57 NSWLR 321 at 323.

57 (2003) 57 NSWLR 321 at 323.

58 (2003) 57 NSWLR 321 at 324-325.

59 (2003) 57 NSWLR 321 at 337.

Previous interpretation

84 Before turning to the disposition of the present appeal, something more should be said of the New South Wales legislative history. The third party policy first required by s 10 of the *Motor Vehicles (Third Party Insurance) Act* 1942 (NSW) ("the 1942 Act") was to provide for insurance "against all liability incurred by [the] owner ... in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle"[60]. The phrase "arising out of" was construed as extending to a result that was less immediate than the "direct" or "proximate" relationship of cause and effect indicated by the phrase "caused by".

85 For example, in *Government Insurance Office of NSW v R J Green & Lloyd Pty Ltd*[61] and *Fawcett v BHP By-Products Pty Ltd*[62], claims for injuries in the course of loading operations were upheld in this Court as within the scope of the 1942 Act. These and other authorities were considered in *Container Handlers*[63] as indicative of the change in direction made by the later legislation in Western Australia.

86 The words "arising out of" were banished from the legislation. They did not appear in the form of third party policy required by s 9 of the Motor Accidents Act. Rather, in its initial form[64], s 9 substantially replicated the terms of s 69(1), which after the 1995 Act appeared in the opening words of the definition of injury in s 3(1). It might have been thought that the new expression, "in the use or operation", narrowed the scope of the legislation. However, in *NRMA Insurance Ltd v NSW Grain Corporation*[65], the New South Wales Court of Appeal held that an injury sustained in 1990 during the course of unloading a

---

60 The 1942 Act continues to govern the death of or bodily injury to a person arising out of the use, before 1 July 1987, of a motor vehicle (s 3(d) of the 1942 Act).

61 (1966) 114 CLR 437.

62 (1960) 104 CLR 80.

63 (2004) 78 ALJR 821 at 829-830 [33]-[34], 837 [77]-[79], 841 [101], 845 [131], 851 [154]; 206 ALR 335 at 346-347, 356-357, 362, 368, 376.

64 Section 9 was omitted and a new section including the same relevant phrase was inserted by the 1995 Act, Sched 1, Item 6. The new section in turn was repealed by the 1999 Act, Sched 3, Item 6.

65 (1995) 22 MVR 317.

grain elevator from a truck was caused by the fault of the owner or driver "in the use or operation" of the vehicle. *NRMA* was decided before the commencement of the 1995 Act and under the Motor Accidents Act in its preceding form. But the outcome in that case is illustrative of the situations to which the legislature gave further attention in the 1995 Act.

Construction of the definition of "injury"

87 Nevertheless, in the present case, it was conceded that Mr Oliver's injury occurred "in the use or operation of the vehicle", as first mentioned in par (a) of the definition of "injury". The appeal was fought in the Court of Appeal and in this Court upon the question whether the second branch of par (a), in particular sub-par (iv), applied. This speaks of an injury which is caused by the use or operation (in the conceded sense) of the vehicle and which is a result of and is caused during such use or operation by a defect in the vehicle.

88 The history of the legislation indicates that the second branch of par (a) of the definition of "injury" was introduced to curtail what otherwise was the scope of the preceding matter in par (a). In *Zurich Australian Insurance Ltd v CSR Ltd*[66], the New South Wales Court of Appeal held that the word "such" in sub-par (iv) refers not to the driving, collision, running out of control and other matters referred to in sub-pars (i), (ii) and (iii), but to the words "use or operation" in the opening words of the definition; the phrase was repeated to fix a time dimension for sub-par (iv).

89 The parties to the appeal did not challenge *Zurich*. The repetition of the same phrase "use or operation" is important in construing the definition. The adverb "during" appears before sub-pars (i)-(iv) and has a ready association with the events set out in sub-pars (i), (ii) and (iii). However, the text "during ... by a defect in the vehicle" would have no sensible meaning were not the words "such use or operation" added to identify that activity during which the injury is sustained. That activity is identified not by referring to sub-pars (i), (ii) and (iii) but by picking up the phrase "use or operation" appearing earlier in the definition. We would not be prepared to differ from the decision in *Zurich*.

90 However, what is clear from the course of the legislative history since the introduction of the 1942 Act is that the New South Wales Court of Appeal misconstrued that history in *Gunter v State Transit Authority of NSW*[67]. Young CJ in Eq, with whom Tobias JA and Wood CJ at CL agreed, there said:

---

66 (2001) 52 NSWLR 193 at 201.

67 [2004] NSWCA 330 at [16].

> "When one looks at the history of the legislation the fact that [the 1999 Act] has the main objects of providing a universal scheme to provide compensation for compensable injuries sustained in motor accidents to achieve optimum recovery for persons injured in motor accidents becomes abundantly clear."

91 Whatever may have been the policy manifested in the 1942 Act, there had been a pronounced shift against such "optimum recovery" by the time of the enactment of the 1995 Act.

92 The concession to which reference has been made forecloses any issue whether the injury suffered by Mr Oliver was caused by the fault of GSF in the use or operation of the vehicle. However, the case only falls within the definition "if, and only if" the injury was a result of and was caused during that use or operation by a defect in the vehicle.

93 In argument, some suggestion was conveyed that the terms "result" and "cause" have different meanings and, in particular, that "cause" narrows "result". That is not so. The drafting in this second part of par (a) of the definition seeks to accommodate two cumulative criteria and does so by telescoping them into a grammatical contortion.

94 One criterion is that the injury be sustained during certain events, including the driving of the vehicle or a collision with the vehicle or its running out of control. The other criterion is that the injury be sustained as a consequence of those events. The phrase "a result of" is linked to the first or temporal criterion; the phrase "is caused" is linked to the second criterion. For sub-par (iv), the temporal criterion is that the injury be a result of the use or operation of the vehicle because it was sustained during that activity. The other criterion is that the injury be caused by a defect in the vehicle.

Conclusions

95 The facts do not sustain a contention that Mr Oliver's injury was caused by a defect in the vehicle. Had the vehicle been functioning in the ordinary way, there would have been no occasion for GSF to send Mr Oliver and his co-worker to the airport and to arm them with crowbars. However, that could be said of a range of circumstances but for the occurrence of which Mr Oliver would not have sustained his back injury. The question, as Santow JA correctly said in his dissenting judgment, was whether the state or condition of the vehicle is to be

treated as causative in the relevant legal sense required by the Motor Accidents Act[68].

96 Santow JA also emphasised that this question of causality was not at large or to be answered by "common sense" alone; rather, the starting point is to identify the purpose to which the question is directed[69]. Those propositions should be accepted. The following may be added.

97 First, in *March v Stramare (E & M H) Pty Ltd*[70], McHugh J doubted whether there is any consistent "commonsense notion of what constitutes a 'cause'", and added[71]:

> "Indeed, I suspect that what commonsense would not see as a cause in a non-litigious context will frequently be seen as a cause, according to commonsense notions, in a litigious context. This is particularly so in many cases where expert evidence is called to explain a connexion between an act or omission and the occurrence of damage. In these cases, the educative effect of the expert evidence makes an appeal to commonsense notions of causation largely meaningless or produces findings concerning causation which would often not be made by an ordinary person uninstructed by the expert evidence."

98 Secondly, the significance at general law of the identification of purpose is illustrated by decisions influenced by the changing state of the principles of contributory negligence. In *March*[72], and more recently in *Andar Transport Pty Ltd v Brambles Ltd*[73], reference was made to the operation of a defence of contributory negligence as a complete answer to an action in negligence and to its significance for reliance upon notions of "sole" or "effective cause". Further, speaking of that defence in its unreformed operation, McHugh J said in *March*[74]:

---

68 (2003) 57 NSWLR 321 at 331.

69 (2003) 57 NSWLR 321 at 330. See also at 323 per Mason P.

70 (1991) 171 CLR 506 at 532.

71 (1991) 171 CLR 506 at 533.

72 (1991) 171 CLR 506 at 511, 532-533.

73 (2004) 78 ALJR 907 at 916-917 [38]-[39]; 206 ALR 387 at 399-400.

74 (1991) 171 CLR 506 at 533.

> "It is understandable that, in the days when any contributory negligence on the part of a plaintiff was sufficient to deprive him or her of a verdict, judges should sanction tests for determining causation which in practice allowed juries to avoid the consequences of a strict application of the doctrine of contributory negligence. In that context, instructions to determine whether a particular act or omission was a cause of damage according to commonsense notions were appeals to extra-legal values to determine 'hard cases'."

99 Thirdly, the case law construing s 82 of the *Trade Practices Act* 1974 (Cth) ("the TP Act") illustrates and emphasises that notions of "cause" as involved in a particular statutory regime are to be understood by reference to the statutory subject, scope and purpose. Section 2 of the TP Act states:

> "The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection."

Section 82 entitles a person to recover the amount of the loss or damage suffered by conduct done in contravention of a large number and range of provisions designed to further the stated object in s 2.

100 In *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*[75], Gleeson CJ said of the construction of s 82:

> "When a court assesses an amount of loss or damage for the purpose of making an order under s 82, it is not merely engaged in the factual, or historical, exercise of explaining, and calculating the financial consequences of, a sequence of events, of which the contravention forms part. It is attributing legal responsibility; blame. This is not done in a conceptual vacuum. It is done in order to give effect to a statute with a discernible purpose; and that purpose provides a guide as to the requirements of justice and equity in the case. Those requirements are not determined by a visceral response on the part of the judge assessing damages, but by the judge's concept of principle and of the statutory purpose."

---

75 (2002) 210 CLR 109 at 119 [26].

The upshot in *I & L Securities* was the holding stated by Gaudron, Gummow and Hayne JJ[76]:

> "[T]he question presented by s 82 of [the TP Act] is not what was the (sole) cause of the loss or damage which has allegedly been sustained. It is enough to demonstrate that contravention of a relevant provision of [that] Act was *a* cause of the loss or damage sustained." (original emphasis)

101 On the other hand, the subject, scope and purpose of the 1995 Act, and the changes it made to the Motor Accidents Act, point in the other direction. The text of the new definition of "injury" manifests that legislative policy of restricting previous overbroad interpretations of the CTP insurance legislation. A stated object of the changes made by the 1995 Act was (s 2A(1)(b)) the reinstatement of a common law based scheme but (s 2A(2)(a)) to keep premiums "affordable" by containing "the overall costs of the scheme within reasonable bounds". A construction which promotes that object is to be preferred (s 2B(1)).

102 The use in the definition of the emphatic and intensive phrase "if, and only if" directs attention to notions of predominance and immediacy rather than to more removed circumstances. The definition of "injury" looks, for the CTP insurance system, to notions of proximate cause found in insurance law[77]. That construction is consistent with the subject, scope and purpose of the 1995 Act.

103 It was the system of work adopted by GSF to deal with the problem of unloading presented by the failure in operation of the motorised T-bar and, in particular, the direction to use the crowbar to lever the containers which had a predominant quality for, and an immediacy to, Mr Oliver's injury. The defect in the T-bar was not a defect by which the accident was caused in the necessary statutory sense.

Orders

104 The appeal should be allowed with the costs of Allianz to be paid by GSF. The orders of the Court of Appeal should be set aside. In place thereof, the appeal to that Court should be allowed, GSF should bear the costs of Allianz of

---

76 (2002) 210 CLR 109 at 128 [57] (footnotes omitted). See also at 121-122 [33] per Gleeson CJ, 132 [69] per McHugh J.

77 See *Australian Casualty Co Ltd v Federico* (1986) 160 CLR 513 at 534-535; *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 511.

that appeal, orders 1, 4 and 5 of the orders of the District Court dated 14 June 2002 should be set aside and orders made that (a) judgment be entered in favour of the plaintiff against GSF in the sum of $450,000, (b) judgment be entered in favour of Allianz against GSF, and (c) GSF pay the costs of Allianz in the District Court.

105 CALLINAN J. As well as a question of causation this appeal raises a question whether courts may bring to the construction and application of amending legislation an inclination to read it as intended to produce a result that the legislature has fairly and clearly eschewed, and with a view to effecting a form of justice according to a judge's, or judges' particular perceptions of moral responsibilities or to who happens to be the longer-pocketed defendant.

106 It is understandable that legislators become exasperated with courts that fail to give effect to the manifest intention of legislation, especially legislation enacted to arrest judicial trends that have become entrenched over the years. In my opinion this is a case in which they would be justified in doing so, because both of the courts below not only misconstrued what I consider to be the tolerably clear meaning of such legislation, but also disregarded the plain language of a second reading speech to which resort could and should have been had if the language were thought to be ambiguous. The legislation in question is the *Motor Accidents Act* 1988 (NSW) ("the Act"), in particular the definition of "injury" in s 3(1) which was introduced in 1995 by the *Motor Accidents Amendment Act* 1995 (NSW) ("the Amendment Act") and which is ultimately relevantly concerned with the allocation of financial responsibility for personal injury between users and owners of motor vehicles on the one hand, and employers and others utilising them for various purposes on the other.

Facts

107 The business of the first respondent was the packing of food in airline containers for transport by aeroplanes. The containers were carried on the ground in a truck. The truck was fitted with a set of rollers on its floor and a motorised T-bar to enable the containers to be more easily loaded and unloaded from it. The T-bar on the vehicle with which this appeal is concerned became inoperative to the knowledge of the first respondent on the day before the second respondent suffered injury.

108 The second respondent was a technician employed by the first respondent. He was not usually required to load and unload containers. On 12 February 1998 he was however instructed by the first respondent to assist another employee to unload containers at the airport in Sydney. The second respondent and the other employee were given crowbars which they were instructed to insert between the rollers on the floor of the trailer so as to lever the containers along the rollers. It could not seriously be disputed that this method of moving the containers was an unsafe one. In the result, in implementing it, the second respondent suffered injury.

The proceedings in the District Court

109 The second respondent sued the first respondent for damages for personal injury in negligence in the District Court of New South Wales. By its defence

the first respondent contended that the second respondent's claim was one to which, if it were liable, the *Workers Compensation Act* 1987 (NSW) ("the Compensation Act") applied, rather than the Act. If this contention were correct the practical effect would be that the second respondent's entitlement to damages would be less than he might otherwise recover, and in particular less than what he might recover if the Act applied, although in the circumstances the difference would not be a large one. Whether the Compensation Act or the Act should apply was therefore a matter of much greater concern to the respective insurers under those Acts, between which the real contest in the District Court would be fought. The appellant as the insurer of the truck under the Act accordingly applied to, and was granted leave by the District Court to be joined as a party to the proceedings in order to argue that in the circumstances it had no obligation under the policy to indemnify the first respondent.

110 In the first instance the action proceeded to arbitration pursuant to s 63A of the *District Court Act* 1973 (NSW). An award was made on 21 November 2001. On 17 December 2001 the first respondent applied to the Court for a re-hearing of the arbitrated action pursuant to s 18 of the *Arbitration (Civil Actions) Act* 1983 (NSW)[78].

111 By the time that the matter came on for the re-hearing before Delaney DCJ leave had been granted to the second respondent to add particulars of negligence to his statement of claim directed to the negligence of the first respondent as an employer, the better and more clearly to define what were the true issues, and in particular, to raise more clearly the question whether the second respondent's claim was governed by the Act or the Compensation Act. It was agreed for the purposes of the re-hearing that the first respondent had been negligent, and that the second respondent's damages should be $450,000.

112 The trial judge identified the principal question before him as being whether the circumstances leading to the injury suffered by the second respondent were to be the subject of indemnity pursuant to the Act or the Compensation Act. As to that his Honour held that the injury suffered by the second respondent arose in the use or operation of the vehicle which had been set up in a specific way for a specific purpose. He regarded himself as bound by two

---

78 Section 18 provides:

"**Application for rehearing**

(1) A person aggrieved by an award of an arbitrator may apply for a rehearing of the action concerned.

(2) The applicant may (but need not) in the application request that the rehearing be a full or a limited rehearing."

other cases, *Mayne Nickless Ltd v Symen*[79] and *Zurich Australian Insurance Ltd v CSR Ltd*[80] to reach his conclusion. He expressly rejected two other related submissions made by the appellant: that it was the system of work which led to the injury; and that the defective T-bar was not materially or at all causative of it. Accordingly, judgment was entered in favour of the second respondent against the appellant.

The appeal to the Court of Appeal

113 The appellant unsuccessfully appealed to the Court of Appeal of New South Wales (Mason P, Santow JA (diss) and Davies AJA)[81].

114 All members of the Court of Appeal accepted that the outcome of the case depended upon the meaning to be attributed to "injury" which was defined by s 3(1) of the Act as follows:

> "(a) means personal or bodily injury caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle if, and only if, the injury is a result of and is caused during:
>
> (i) the driving of the vehicle, or
>
> (ii) a collision, or action taken to avoid a collision, with the vehicle, or
>
> (iii) the vehicle's running out of control, or
>
> (iv) such use or operation by a defect in the vehicle."

115 All members rejected the appellant's submission that there was no defect in the vehicle. The appellant conceded that the first respondent's fault occurred during the use or operation of the vehicle but not that the injury suffered by the second respondent was an injury within the meaning of the definition. The majority were also of the view that the defect was causative of the second respondent's injury. Santow JA was of a different mind on that issue.

116 Mason P referred in his reasons for judgment to the legislative history and the second reading speech for the Amendment Act which inserted the definition of injury in s 3, but was unwilling to infer anything from those except that the

---

79 (2001) 34 MVR 18.

80 (2001) 52 NSWLR 193.

81 *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2003) 57 NSWLR 321.

definition of injury was intended to be narrower than its predecessor. His Honour also said that he was unable to derive any assistance in construing the definition "by recognising that cost-saving considerations (so far as vehicle owners are concerned) informed the amendment[82]."

117 His Honour then said this[83]:

> "One could throw into the opposite scales the fact that compulsory insurance of motor vehicles continues as a beneficial reform enacted to ensure that victims of motor vehicle accidents have a deep-pocketed defendant to sue. The narrower the scope given to 'injury' under the amendment, the narrower will be the ultimate umbrella of protection for victims, not all of whom can fall back on claiming against a defendant who is insured under the *Workers Compensation Act* 1987."

118 Later in his judgment his Honour turned to his own notions of moral responsibility "[underlying] causation issues arising in tort law ... the context [requiring] that the interests of potential victims (not all of whom are employees) [have] access to an insured defendant ... ."[84]

119 After expressing his disagreement with the reasoning of the dissenting judge, his Honour emphasised that the definition spoke of the injury being "a result of" and not "the result of" relevant events. It followed, his Honour thought, that for the injury to be an injury within the definition it was not necessary that it be the "direct" or "effective" or "efficient" result of the defect. He added that "[t]he presence of 'if, and only if' [did] not undercut this, because those words have their own work to do"[85]. His Honour did not say what that work is. He concluded that the injury was "'a result of' the defective vehicle provided to [the second respondent] in circumstances rendering its owner at fault. It does not matter that it was also a result of negligence in the [first respondent's] instructions to [the second respondent]."[86]

120 Davies AJA, who reached the same conclusion as the President, read the words in the definition "by a defect in the vehicle" as relating to, and qualifying both words "result" and "cause".

---

82 (2003) 57 NSWLR 321 at 323 [4].

83 (2003) 57 NSWLR 321 at 323 [4].

84 (2003) 57 NSWLR 321 at 323 [8].

85 (2003) 57 NSWLR 321 at 325 [15].

86 (2003) 57 NSWLR 321 at 325 [16].

121 Davies AJA dealt with the submissions of the appellant in this way[87]:

> "The final and crucial submission made by [Counsel for the appellant] was that [the second respondent's] injury was caused not by the defect in the vehicle but by the [first respondent's] negligence in directing that the defective vehicle be used and that the goods be moved manually during the unloading process. In my opinion, [Counsel's] submission that the injury was caused by the use of the defective vehicle but not by the defect itself has a subtlety about it that does not meld well with the common law's robust, commonsense approach to issues of causation.
>
> A similar and equally subtle argument was rejected by Clarke JA, with whom Priestley JA and Powell JA agreed, in *NRMA Insurance Ltd v NSW Grain Corporation*. His Honour rejected the proposition that, because the employer had failed to employ a safe system of work, that meant that the employer's negligence was not negligence 'in the use of the vehicle'[88]. Clarke JA rejected the contention that the issue of causation should be considered under the rubric of 'efficient cause', 'real cause' or 'effective cause' holding[89] that issues of causation should be determined upon a practical commonsense basis as laid down in *March v Stramare*[90], *Halvorsen Boats Pty Ltd v Robinson*[91] and *Fitzgerald v Penn*[92].
>
> I agree with the approach taken by Clarke JA. There is nothing in the content of the definition to require the term 'caused' to carry a meaning more limited than the term ordinarily bears in the law of negligence. The words in the definition, 'if, and only if,' do not narrow the meaning of the subsequent words 'caused ... by a defect in the vehicle'. Indeed, the context of the definition is such as to attract the ordinary meaning of the term as it is used in negligence cases. I do not accept [Counsel's] submission that the definition requires one to look for 'a direct cause' or 'the proximate cause' of the injury. Such an approach has long since been rejected. The definition requires one to determine whether, as a matter of fact, the injury

---

87 (2003) 57 NSWLR 321 at 336-337 [67]-[70].

88 (1995) 22 MVR 317 at 319.

89 (1995) 22 MVR 317 at 320.

90 *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506.

91 (1993) 31 NSWLR 1.

92 (1954) 91 CLR 268.

resulted from and was caused by the defect in the vehicle. The approach enunciated in *March v Stramare* should be adopted.

It would be inconsistent with the terms of the definition if the employer's fault in the use or operation of the vehicle, which lay in its decision to use the vehicle for the transport of its goods when the vehicle was not fit for that use, was regarded as leading to the conclusion that the employee's injury, which was occasioned by and during such use and operation, did not result from and was not caused by the defect. The definition of 'injury' contemplates that there will be both elements, injury caused by the negligence of the owner in the use and operation of the vehicle and injury resulting from and caused by a defect in the vehicle during the course of that use and operation. The definition contemplates that the relevant facts may satisfy all of these elements."

122 His Honour expressed his conclusions as follows[93]:

"The definition operates in the context of claims for negligence. It defines those injuries to which the Act applies, the claims in respect of which are limited as the Act specifies. It follows that the concept of fault flows through all elements of the definition. The element 'injury which is caused by the fault of the owner or driver' encompasses the element which follows, 'injury caused ... by a defect in the vehicle'. In a case where sub-par (iv) of the definition applies, the defect will form part of the chain of events which led to the injury and will be one of the factors constituting the fault of the owner or driver.

Adopting a commonsense approach, the learned trial judge concluded that [the second respondent's] injury was a result of and was caused by the defect in the vehicle. I see no error in that conclusion."

In dissent Santow JA identified the issues involved in the resolution of the appeal as being whether the second respondent's injury was the result of, and caused by the defective mechanism, or, as a result of, and caused by the first respondent's negligent direction, or as Davies AJA would have it, both: and whether the bodily injury was caused "in the use or operation of the vehicle" and "during ... such use or operation".

123 As to the first of these, Santow JA concluded that it was the first respondent's negligent direction and not the antecedent defect that was the legal cause of the injury, but even if both were causal then the injury was a result of the defect coupled with the negligent direction, both being essential conditions for that result, with the first respondent's negligence being far more significant.

---

93 (2003) 57 NSWLR 321 at 337 [71]-[72].

Commonsense compelled this conclusion because the injury could not be regarded as the result of the defect alone but required the active and negligent intervention of the first respondent for its occurrence.

The appeal to this Court

124 The appellant argues that the cause of the second respondent's injury was the negligent direction of the first respondent, and not any defect in the vehicle, and that on its proper construction, the definition of injury did not extend to an injury such as this one, sustained whilst the vehicle was not in motion. Before I deal specifically with those arguments I make these observations.

125 Motor vehicles in modern times are indispensable not only for social intercourse but also for industry and commerce. Almost every employer in industry or commerce uses one or more of them, often adapted to the particular activities of that employer. Both the workplace and the roads can be hazardous places. For the better security of those in and on them, legislatures in Australia long ago enacted legislation to compel employers and owners of motor vehicles to effect insurance to ensure that those negligently injured by these hazards have recourse to a sufficient fund to compensate them. It is not surprising therefore that there have often been, as here, contests between the insurers responsible under the respective enactments. The insurer of the motor vehicle has been a rare victor in those contests, even though the injury in question has frequently borne the appearance of an industrial, rather than a motor vehicle misadventure. This was a result, in part at least, of an almost universal judicial tendency to read as expansively as possible[94], whether this was the legislative intention or not, such statutory expressions as "by through or in connexion with a motor vehicle", "arising out of the use of a motor vehicle", and like phrases and clauses. An extreme example of this judicial trend, as I pointed out in *Insurance Commission of Western Australia v Container Handlers Pty Ltd*[95], with which this case can be compared, is *Dickinson v Motor Vehicle Insurance Trust*[96]. That case was specifically referred to in the Parliament of Western Australia as the catalyst for changes to Western Australian legislation similar to the Amendment Act here. Whether these expansive readings were intended or not by legislatures I cannot say, but I am inclined to question whether they were. The consequence of them has been the exoneration of industry and commerce from the liability of higher premiums at the expense of the general body of owners of motor vehicles.

---

94 For example see *Gunter v State Transit Authority of New South Wales* [2004] NSWCA 330 at [16]-[18].

95 (2004) 78 ALJR 821; 206 ALR 335.

96 (1987) 163 CLR 500.

126 Involved in, or associated with this trend has been a tendency to import into the exercise of construing such legislation, attenuated meanings given to "cause" and like words by the common law. True it is that expressions used in legislation will frequently and rightly be taken to bear the meaning given to them by the common law, but sometimes as here, it will be apparent that something different and stricter was intended[97].

127 It is against that background that a number of state legislatures have moved to ensure that the burden of claims made in circumstances in which the use of a motor vehicle was peripheral, or contributory only, to an injury negligently inflicted, be borne by those responsible or substantially responsible for it, industry, or, in appropriate cases, persons able to effect public risk insurance[98].

128 So much was in terms said by the Attorney-General in his second reading speech for the Amendment Act[99]:

> "The CTP policy and the motor accidents scheme simply are not, and were never intended to be, a comprehensive accident compensation scheme providing substantial damages in all cases of injuries connected in some way to the use of a motor vehicle. Common sense and community expectations generally demand that the CTP policy provide coverage in respect of injuries which arise from crashes and collisions on the roads or from vehicles running out of control. Over the years the courts have interpreted the CTP policy as providing for a wide range of injuries often unrelated to motor accidents. For example, the CTP policy has been held to cover injuries sustained during the loading and unloading of vehicles, and injuries sustained while standing on the back of a stationary trailer, and injuries involved in the use of a firearm in a vehicle.
>
> It is therefore proposed to amend the definition of 'injury' to adopt an approach similar to that taken in Queensland, South Australia and Western Australia, where 'injury' is qualified in terms of its cause.

---

97 *McCann v Switzerland Insurance* (2000) 203 CLR 579 at 637-640 [190]-[193]. See also *Shipping Corporation of India Ltd v Gamlen Chemical Co (A/Asia) Pty Ltd* (1980) 147 CLR 142 at 164 per Mason and Wilson JJ; *Great China Metal v Malaysian Shipping* (1998) 196 CLR 161 at 244 [230].

98 See *Motor Accident Insurance Act* 1994 (Q); *Motor Vehicle (Third Party Insurance) Act* 1943 (WA); and *Motor Vehicles Act* 1959 (SA).

99 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 16 November 1995 at 3322.

> Similarly, the expression 'motor vehicle' is widely defined in the Act and covers go-karts and other vehicles, such as forklifts, not normally associated with use on the dedicated public road network. Accidents involving such vehicles have given rise to claims against the Nominal Defendant under the *Motor Accidents Act*. Under the *Construction Safety Act* the WorkCover Authority licenses go-kart facilities and public liability insurance is compulsory. It is considered that claims for injury arising from the use of such vehicles should properly be made under such public liability policies and not against the Nominal Defendant."

129 Before I turn to the construction of the definition of injury I should deal with the appellant's submission that, if the failure of the T-bar was a defect in the vehicle, it did not cause the injury, or, to put it the other way that the definition does, the injury was not a result of the defect. I would accept this submission. The T-bar was inoperable. The first respondent well knew this. Nonetheless it chose to use the vehicle to carry containers and to give a negligent and dangerous direction as to the movement of the containers. Because the T-bar was inoperable it could not and did not play any part in the events leading up to the second respondent's injury. That was a result of the negligently devised system of work and instructions that the first respondent elected to adopt. Any imperative to use the vehicle with its inoperable T-bar could only have been a self-imposed commercial one. There must come a time in relation to the occurrence of a known malfunction, when its capacity to cause a result should be regarded as spent. This, in light of the fact that the stoppage happened on the previous day, was what occurred in this case. In any event, even if the injury could be regarded as a result of a defect it could not, for the reasons I have given, be said to have been caused by it. Realistically and rationally this was an industrial accident in which, because it was not operable or operating at all, the T-bar played no part.

130 I am however of the view that the injury here otherwise falls outside the definition. This is a conclusion that I would reach without recourse to the second reading speech. Any part of a definition, as indeed any section of an enactment, is to be read as a whole with the rest. On a first reading of the whole of the definition, the reader should be immediately struck by the emphasis which is placed upon the notion of movement, of the driving of the vehicle, or its operation to avoid a collision whilst moving, or of its running out of control. It equally strikes me as an unlikely proposition that it was intended that, for a relevant injury to have occurred, the vehicle must always have been in motion, except in the case of an injury resulting from a defect in it[100].

---

100 cf *Insurance Commission of Western Australia v Container Handlers Pty Ltd* (2004) 78 ALJR 821 at 829 [32]; 206 ALR 335 at 345-346.

131 It is significant that after the words "is a result of" no expression such as "or is contributed to by" is used. The indefinite article "a" does not imply in my opinion that one of multiple causes may suffice[101], even if "cause" and "result" were taken as synonyms in the definition. Each of the separate expressions "is a result of" and "is caused during" has to be given its full and presumably different meaning. They have a cumulative reinforcing effect. Each has its own separate and important work to do. The words "if, and only if," refer both to result and the event or, to put it another way, what is happening in relation to the vehicle *when* the injury is caused. It follows that sub-par (iv) of the definition should be read in this way: "'injury': (a) means personal ... injury caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle if, and only if, the injury is caused during such use or operation of the vehicle of the kind referred, or by a defect in it". "Such" is the key word. It means "[o]f the character, degree, or extent described, referred to, or implied in what has been said[102]." Furthermore, the expression "use or operation" as used in the introductory words of the definition have separate and sufficient work to do. That work is to identify the event in the course of which there is fault, the "fault" earlier referred to. The use or operation of the vehicle earlier described and referred to in sub-par (iv) is the use or operation of the vehicle in the manner most recently and proximately referred to in the definition, that is, in motion, as set out in sub-pars (i), (ii) and (iii).

132 In *Zurich Australian Insurance Ltd v CSR Ltd* Spigelman CJ rejected a submission that "such" should be read as having the application that I would give it. His Honour said[103]:

> "The second submission was that the word 'such' in (a)(iv) did not refer to the words 'use or operation' in the opening words of par (a), but referred to the 'use or operation' comprised in (i), (ii) and (iii), that is, 'driving', 'collision' and 'running out of control'. This construction would deprive (iv) of all content. Paragraph (a)(i) applies to any injury 'caused during ... driving'. That encompasses every injury 'caused during ... driving ... by a defect in the vehicle'. The same is true of par (ii) and par (iii). The construction advanced by the appellant would leave (iv) with no work to do.
>
> The word 'such' in (iv) is, in my opinion, a reference to the preceding use of the precise words which immediately follow it, that is, 'use and operation'. The repetition of this phrase in (iv) was necessitated

---

101 cf *Great China Metal v Malaysian Shipping* (1998) 196 CLR 161 at 244 [230].

102 *Oxford English Dictionary*, 2nd ed (1989), vol 17 at 101.

103 (2001) 52 NSWLR 193 at 201 [31]-[32].

> by the fact that the sub-paragraphs are all qualified by the word 'during'. It makes sense to speak of something occurring 'during' driving, a collision or running out of control. It makes no sense to speak of something occurring 'during' a defect. The words are repeated to identify a time dimension for (iv)."

133 I am unable to agree. The expression "use or operation" is explained, qualified and further refined by sub-pars (i), (ii) and (iii). The word "such" is a reference to that expression as so refined or qualified. Sub-paragraph (iv) does have work to do. It is important to note that the introductory words of the definition speak of the fault of the *owner* or driver of a motor vehicle. An owner who is not driving the vehicle would not ordinarily be at fault and responsible for an injury within sub-pars (i) and (ii). An owner although he or she could conceivably be at fault when the vehicle ran out of control as contemplated by sub-par (iii), would generally be unlikely to be so. More probably such an event would result from a failure of the last driver to secure the vehicle properly after driving it, or to control it properly when driving it. A running out of control could also be of course a result of a failure by the owner to rectify a defect such as a malfunctioning brake or gearbox. On the other hand the "fault" of an owner would be more likely to be the failure say, of that owner to service the vehicle regularly in order to discover some defect in it, or to rectify a defect in it of which he or she should be aware. In other words the purpose of sub-par (iv) is to sheet home liability for an injury caused by the fault of the owner, if the injury is a result of a defect causing it, during *such* use or operation, that is, whilst it is being driven as contemplated by sub-pars (i) and (ii) or running out of control as contemplated by sub-par (iii) in circumstances in which the driver has not been at fault.

134 There is this further point which supports the construction that I prefer. It is that from 1942 until 1988, the relevant definition and policy used the words "arising out of" before the expression "use of a motor vehicle". That language has now been significantly altered by the deletion of the words "arising out of". Those words, as pointed out by Windeyer J in *Government Insurance Office of NSW v R J Green & Lloyd Pty Ltd*[104], are words of very considerable generality. Their removal provides a further indication of a legislative intention to treat a relevant injury as one caused by fault in the use of a motor vehicle in the course of a use for which it is primarily intended, as a means of movement.

135 If there were any doubt about any of these matters the doubt could have been resolved by reference to the second reading speech. It is difficult to imagine how the speech could have made it plainer. Take for example these words " ... the CTP policy has been held to cover injuries sustained during the

---

104 (1966) 114 CLR 437 at 447.

loading and unloading of vehicles ... ". Take also the reference to the qualification of injury "in terms of its cause". But the clearest indications of all in the second reading speech are the statements that the motor accident scheme was never intended to be a comprehensive motor insurance scheme providing substantial damages in all cases of injuries *connected in some way* with the use of a motor vehicle, because, "[c]ommon sense and community expectations generally demand that the CTP policy provide coverage *in respect of injuries which arise from crashes and collisions on the roads or from vehicles running out of control*". That is to say far more than what the President in the Court of Appeal derived from it, that the speech conveyed only that the definition of injury was intended to be narrower than its predecessor.

136 The majority in the Court of Appeal did not consider the definition to be clear. That being so they were, by s 34 of the *Interpretation Act* 1987 (NSW) required to have regard, among other things, to the second reading speech. This in my opinion, they did not do. The Court of Appeal erred in this regard. They also erred in adhering to an approach to the construction of the definition which had been adopted in the past to different legislation by the courts, and which was the subject of explicit criticism in the second reading speech. The President of the Court of Appeal chose to substitute his own perception of moral responsibility for the statutory imposition of the burden of damages, and elected to decide the case according to his perception of who, in other factual situations might be better able to satisfy the judgment. Absent a clear statement to that effect in legislation, or relevant extrinsic materials in case of doubt, such a consideration cannot be relevant to the construction of legislation, and certainly not in a case such as this one where the legislature has done everything that it reasonably can to put its intention beyond doubt. It is not for any court to decide cases and construe enactments on the basis of who may have the longer pocket. The President acknowledged that the contest here was not between an impecunious defendant and a long-pocketed one because the contest was a contest by legislative mandate between two long pockets, each an insurer under a statutory scheme. But his Honour allowed the possibility that there might be a contest in another case between an impecunious defendant and an insurer of a motor vehicle, a long-pocketed party, to infect his approach to the proper construction of the definition, and that too was erroneous. The other member of the majority, Davies AJA, also approached the construction of the definition erroneously. His Honour said first, and to this extent, correctly, that the approach of the common law to issues of causation has been robust, some might say, on occasions far too robust. Statutes should not however be construed upon the basis of any predisposition towards robustness, particularly where, as here, the legislature sought to correct undue judicial robustness in the past.

137 The appeal should be allowed with costs. I would make the following orders:

1. Appeal allowed.

2. The first respondent (GSF Australia Pty Ltd - "GSF") pay the costs of the appellant (Allianz Australia Insurance Ltd - "Allianz").

3. Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 1 July 2003 and in their place order:

    (a) the appeal to the Court of Appeal is allowed;

    (b) GSF pay the costs of Allianz of the appeal to the Court of Appeal;

    (c) Orders 1, 4 and 5 of the orders of the District Court of New South Wales made on 14 June 2002 are set aside and in their place order:

        (i) judgment for the plaintiff against GSF in the sum of $450,000;

        (ii) judgment for Allianz against GSF;

        (iii) GSF pay the costs of Allianz in the District Court.