HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND HEYDON JJ

NOMINAL DEFENDANT APPELLANT

AND

GLG AUSTRALIA PTY LIMITED & ORS RESPONDENTS

Nominal Defendant v GLG Australia Pty Limited [2006] HCA 11
5 April 2006
S329/2005

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales dated 23 August 2004 and, in their place, order that the appeal to that Court be dismissed.*

3. *(a) The first respondent to repay the sum of $132,370.34 to the appellant plus interest calculated at $32.64 per day from 12 November 2004 until the date when this order takes effect.*

   (b) The order in paragraph (a) is suspended for seven days.

   (c) In the event of the first respondent filing and serving written submissions within that period contending that the order in paragraph (a) is wrong:

      (i) it will remain suspended until further order; and

      (ii) the appellant is directed to file and serve written submissions in reply within a further seven days, and to apply within a further seven days to re-list the matter before a single Justice.

4. *The first respondent to pay the appellant's costs of the appeal to the Court of Appeal and of the proceedings in this Court.*

On appeal from the Supreme Court of New South Wales

Representation:

P J Deakin QC with P J Nolan for the appellant (instructed by Sparke Helmore)

J E Maconachie QC with N J Polin for the first respondent (instructed by Curwood & Partners)

Submitting appearance for the second respondent.

Submitting appearance for the third respondent.

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Nominal Defendant v GLG Australia Pty Limited

Statutes – *Motor Accidents Act* 1988 (NSW) ("the Act") – Scope of indemnity – Scope of definition of "injury" under s 3(1) of the Act – A system of work involving forklift vehicle produced vibrations causing boxes in container to fall and strike worker – Whether injury "is a result of and is caused during ... the driving of the vehicle" under par (a)(i) of the definition of "injury" – Whether *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 79 ALJR 1079; 215 ALR 385 required definition of "injury" to be construed consistently with s 69(1) of the Act – Whether injury "caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle" – Whether fault in failing to devise a safe system of work can be invoked as basis of claim for indemnity under the Act – Causation – Whether direct and proximate relationship between the driving of the vehicle and the injuries.

Statutes – Construction – Purpose of legislation – Extrinsic materials – Use of ministerial second reading speech – Whether any disparity between Minister's speech and law as enacted – Duty of courts to enacted law.

Practice and procedure – Court of Appeal (NSW) – Orders disposing of appeal – Inclusion of orders for costs and interest – Whether such orders involved procedural unfairness in the circumstances.

Words and phrases – "injury".

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

1 GLEESON CJ, GUMMOW, HAYNE AND HEYDON JJ. In its primary aspect this is an appeal from orders of the Court of Appeal, Supreme Court of New South Wales[1], allowing an appeal against orders made by the District Court of New South Wales (Delaney DCJ) relating to the application of the *Motor Accidents Act* 1988 (NSW) ("the Act") to one of two defendants to a claim by a plaintiff for damages for personal injury.

Background facts

2 The trial judge found that on 24 August 1999, the plaintiff, Salim Fahd Tleyji, suffered an injury in the following circumstances. He was an employee of Ready Workforce Pty Ltd, a labour hire company ("the employer"). That company supplied his services to GLG Australia Pty Ltd ("the occupier"). The occupier occupied and operated a warehouse at which the unloading of containers of goods took place. For some months the following system, devised by the occupier, had been in operation. A container to be unloaded would be placed in the yard of the warehouse. The plaintiff and others would place boxes from the container onto a pallet placed on a landing in front of the open container. A forklift truck would go up a ramp to the landing, pick up the pallet, and reverse down the ramp. As the forklift truck went up the ramp it caused vibration which was felt through the ramp, the landing and the container.

3 On the day when the plaintiff was injured, the vibration generated by the forklift truck caused boxes stacked in the container to fall and strike the plaintiff as he stood about a metre inside the container.

4 The trial judge found that both the employer and the occupier were liable, having breached their respective duties of care to the plaintiff. He apportioned the damages between the employer and the occupier in the proportion 25:75. The factual findings just summarised and the conclusions drawn from them are no longer controversial.

The issues in controversy

5 The controversy in this Court stems from the fact that the occupier's forklift truck was insured by CIC Insurance Ltd[2]. By the time of the trial that

---

1 *GLG Australia Pty Ltd v Nominal Defendant* (2004) 41 MVR 196.

2 The Act only required the forklift truck to be insured if it were to be driven on a public street (s 8), but, provided all other requirements were satisfied, the policy responded to events not taking place on a public street.

insurer was in liquidation, and its liabilities under the policy were being dealt with by the Nominal Defendant.

6 Pursuant to s 47A of the Act, the Nominal Defendant applied successfully to be joined as a party "in order to argue that in the circumstances of the case [the insurer had] no obligation under the policy" to indemnify the occupier. Pursuant to s 9 and Sched 1 of the Act, the policy insured "against liability in respect of … injury to a person caused by the fault of the owner or driver of the vehicle". The relevant part of the definition of injury in s 3(1) of the Act was:

> "[I]njury:
>
> (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) …"

7 The interest of the Nominal Defendant served by the application ran in tandem with an interest of the plaintiff. If the plaintiff's claim were for "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" (s 69(1)), Pt 6 of the Act would limit his damages to some degree. If the plaintiff's claim fell outside the quoted words, his damages would be higher. For the occupier, on the other hand, success for the Nominal Defendant and the plaintiff in their arguments would mean that it was without recourse against the Nominal Defendant and exposed to a higher level of damages to be paid to the plaintiff. Thus the issue whether the Nominal Defendant was obliged to indemnify the occupier, and the issue whether the plaintiff's claim against the occupier lay at common law unaffected by the restrictions in Pt 6 of the Act, turned on the identical question: did the plaintiff's injury fall within the definition of "injury" in s 3(1) of the Act?

8 According to the Court of Appeal, the occupier urged on the trial judge a contention – and that it did so is no longer challenged in this Court – that

par (a)(i) of the definition of "injury" applied: the accident was caused by the owner (ie the occupier) or driver of the forklift, because it was a result of and was caused during the driving of the vehicle.

9 The trial judge held, however, that the plaintiff's injury "was not caused by the driving of the forklift in any negligent manner but the pursuit of the system of work which was implemented by [the occupier]". The consequence of this conclusion was that the damages payable by the employer amounted to $281,770.30, and those payable by the occupier were $347,015.30. The reason for the difference lay in the fact that parts of the damages payable by the employer were subject to restrictions under the *Workers Compensation Act* 1987 (NSW), while the damages payable by the occupier were not. A further consequence of this conclusion was that the occupier was not entitled to indemnity from the Nominal Defendant.

10 The Court of Appeal allowed an appeal by the occupier[3].

11 The Court of Appeal started from the uncontroversial proposition that the plaintiff's injury was caused by the fault of the occupier, being the owner of the forklift truck.

12 The Court of Appeal held, first, that the fault was a fault "in the use or operation of the vehicle" within the meaning of the opening words in par (a) of the definition of "injury". It said that "the way the vehicle was used was a necessary and important element in the fault of the owner of the vehicle. The system of work was held to be unsafe because it was such that the container, in which boxes were stacked, was caused to vibrate; and it was the forklift truck itself that caused the vibration."[4]

13 Secondly, the Court of Appeal held that the injury was caused during "the driving of the vehicle" within the meaning of par (a)(i) of the definition of "injury". It held that par (a)(i) could be satisfied even though the fault of the owner lay elsewhere, and for this it cited an earlier decision of the Court of

---

3 For the plaintiff the difference in recovery between his success on the question of the applicability of the Act in the District Court and his failure on it in the Court of Appeal was $51,409.77. Like the employer, the plaintiff is a party to the appeal in this Court, and has submitted to any order the Court may make, save as to costs.

4 *GLG Australia Pty Ltd v Nominal Defendant* (2004) 41 MVR 196 at 207 per Hodgson JA (Tobias JA and McColl JA concurring).

Appeal, *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd*[5]. The Court continued[6]:

> "Since it was the vibration of the container that caused the box to fall on the plaintiff, and since the vibration of the container was caused by the driving of the motor vehicle and occurred during the driving of the motor vehicle, there is no doubt that the requirements of subpara (i) are satisfied, unless it can be said that the causal relationship is not close enough, for some reason. The dissenting judgment of Santow JA in *Allianz* was essentially on the basis that the injury was not caused by the defect in the vehicle in that case, because the defect would have been quite harmless but for an extraordinary direction given by the plaintiff's employer, the owner of the vehicle, to manually carry out a task that should never have been carried out manually. The majority judges disagreed with this view in that case; but I note in any event that in the current case there is nothing of that nature that could be considered as making it inappropriate to treat the injury as truly caused by the driving of the forklift truck. Accordingly, in this case the injury was a result of and caused during the driving of the vehicle."

Subsequent developments

14 The relevant reasons for judgment of the Court of Appeal in this case were delivered on 1 June 2004. The Court of Appeal's reliance on the earlier Court of Appeal decision in *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd*[7] was said by the Nominal Defendant in this appeal to have placed its conclusions in question by reason of this Court having allowed an appeal against that decision on 19 May 2005[8]. Indeed, parts of the Nominal Defendant's arguments were presented on the basis that while the Court of Appeal's position might have been defensible in light of how the definition of "injury" had been construed before the decision of this Court in the *Allianz* case, that reversal revealed the Court of Appeal's position to be untenable.

---

5 (2003) 57 NSWLR 321.

6 *GLG Australia Pty Ltd v Nominal Defendant* (2004) 41 MVR 196 at 207 per Hodgson JA (Tobias JA and McColl JA concurring).

7 (2003) 57 NSWLR 321.

8 *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 79 ALJR 1079; 215 ALR 385.

15 The decision of this Court in the *Allianz* case, while certainly relevant in this appeal, is not directly in point in two respects. The first is that the *Allianz* case turned on par (a)(iv) of the definition of "injury"; this appeal concerns par (a)(i). The second is that in the *Allianz* case the appellant conceded that there was "fault" on the part of "the owner … of a motor vehicle in the use or operation of the vehicle", to quote the opening words of par (a)[9], while in this appeal that matter is contested.

The arguments in this Court

16 *The second reading speech.* The Nominal Defendant's arguments opened by pointing out that the current definition of "injury" in s 3(1) was introduced by the *Motor Accidents Amendment Act* 1995 (NSW) ("the 1995 Act"). The Nominal Defendant then relied on a statement in the joint judgment in this Court in *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* that the purpose of the 1995 Act was to limit the definition of injury by its cause and to narrow the overbroad reading given by the pre-1995 case law to 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"[10]. The Nominal Defendant then quoted a passage from the second reading speech of the Minister responsible for introducing the bill which became the 1995 Act in the Legislative Council, and which the joint judgment had also quoted[11]. The Nominal Defendant also relied on the explanatory note to the bill that became the 1995 Act. That note stated that the definition of "injury" had been changed "in order to remove an overlap that exists between motor accident claims and workers compensation claims"[12].

17 In contrast, the occupier submitted that while the 1995 Act was intended to narrow cover, it was not intended to obliterate it entirely.

---

9 *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2003) 57 NSWLR 321 at 335 per Davies A-JA; *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 79 ALJR 1079 at 1083 [20] per McHugh J and 1094 [87] per Gummow, Hayne and Heydon JJ; 215 ALR 385 at 390 and 405.

10 (2005) 79 ALJR 1079 at 1093 [80]; 215 ALR 385 at 403.

11 *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 79 ALJR 1079 at 1093 [81]; 215 ALR 385 at 403-404.

12 Motor Accidents Amendment Bill 1995 (NSW), explanatory note at 2.

18 *No fault in use or operation of vehicle.* The Nominal Defendant conceded that driving the vehicle up the ramp was the "activity during which the injury [was] sustained"[13], and hence that the injury was sustained during the "use or operation of the vehicle". However, the Nominal Defendant submitted that the words "caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle" meant "caused by a tortious use or operation of the vehicle", since "fault" was defined in s 3(1) as meaning "negligence or any other tort". But since there had been no fault in the relevant use of the vehicle, the actual driving, there was no fault in the sense set out in s 3(1), even though there had been fault in designing the system of work which employed the vehicle. Alternatively, even if "use or operation of [a] vehicle" did not mean "tortious use or operation", failure to provide a safe system of work was outside the meaning of the words "use or operation of [a] vehicle".

19 One point at which the occupier challenged these submissions was the construction of "use or operation" as requiring a tortious use or operation. Another was to deny that there was an exhaustive dichotomy between injuries caused in the use or operation of a vehicle and those caused by employing it as part of an unsafe system of work. Counsel relied on the following rejection by Spigelman CJ in *Zurich Australian Insurance Ltd v CSR Ltd* of an argument that a particular injury caused when a plaintiff lifted a ramp which was part of a trailer was not caused "in the use or operation of" the trailer, but "was caused by an unsafe system of work or in the design of the trailer"[14]:

> "Nothing in the language used [in s 3(1)], or the scope, purpose or operation of the Act, suggests that a dual characterisation of 'fault' is impermissible. The definition applies so long as the fault may be characterised in the way set out within it. It matters not that some other characterisation may also be appropriate."

20 Finally, the occupier submitted that the words in par (a) of the definition of "injury" before "if, and only if" were intended to bear a broad meaning, while the cutting down of the reach of the definition was to be found in the causative considerations appearing after the words "if, and only if".

---

13 *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 79 ALJR 1079 at 1094 [89]; 215 ALR 385 at 405 (the words "such use or operation" in par (a)(iv) refer to the same "use or operation" as is referred to at the start of par (a)).

14 (2001) 52 NSWLR 193 at 201 (Mason P and Handley JA concurring).

21 *Causation.* The Nominal Defendant submitted that the Court of Appeal erred in applying a common law test of causation. The statutory test, to be arrived at by examining the particular subject, scope and objects of the 1995 Act, was narrower. The statutory test required a connection which was close, direct, proximate and immediate. The vehicle did not strike the plaintiff, and it operated some distance away from where the plaintiff sustained injury. The chain of vibration from the forklift, through its wheels to the ramp, and thence to the landing, the container and the stacked boxes which fell onto the plaintiff, was too remote.

The relevance of the second reading speech

22 The Nominal Defendant's attempt, by close reference to the text of what the Attorney-General said in his second reading speech, to demonstrate that what happened was outside the definition of "injury" was of only limited success. That speech should not be employed beyond the function for which it was employed by this Court in *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd*, namely, to demonstrate that a purpose of the Act was to narrow the law as laid down in pre-1995 cases[15]. It is not a permissible use of the speech, for example, to say that, because it referred to crashes and collisions on the roads, and vehicles running out of control, the post-1995 definition of "injury" was limited to injuries caused in these ways, without paying regard to its precise terms. The speech criticised cases holding that the Act applied to injuries sustained during the loading and unloading of vehicles. The present appeal concerned the unloading of a container, and a non-stationary vehicle played a part in the injury; but the speech casts no direct light on the solution to the present problem. The same is true of the explanatory note on which the Nominal Defendant relied. The words of the statute, not non-statutory words seeking to explain them, have paramount significance.

Was there "fault of the owner or driver of a motor vehicle in the use or operation of the vehicle"?

23 In *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* the joint judgment in this Court pointed out the importance of legislative history in construing the amendments to the definition of "injury" in 1995. It said[16]:

---

15 (2005) 79 ALJR 1079 at 1093 [80]-[81], 1096 [101] per Gummow, Hayne and Heydon JJ; 215 ALR 385 at 403-404, 408.

16 (2005) 79 ALJR 1079 at 1093 [84]; 215 ALR 385 at 404.

> "The third party policy first required by s 10 of the *Motor Vehicles (Third Party Insurance) Act* 1942 (NSW) … 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'. 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'."

In 1988, the joint judgment continued, the "words 'arising out of' were banished from the legislation"[17]. The joint judgment then drew attention to the introduction, also in 1988, of s 69(1), which provides:

> "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."

In s 3(1) the word "injury" was defined as meaning "personal injury" and as including various matters now appearing in par (b) of the 1995 Act's definition. The joint judgment said: "It might have been thought that the new expression, 'in the use or operation', narrowed the scope of the legislation."[18] However, it pointed to a decision just before the 1995 Act which was more consonant with the language of the 1942 Act than the Act in its 1988 form. It then said that "the outcome in that case is illustrative of the situations to which the legislature gave further attention in the 1995 Act"[19].

24 Later, after referring to the broad approach to causation in s 82 of the *Trade Practices Act* 1974 (Cth), the joint judgment said[20]:

> "[T]he subject, scope and purpose of the 1995 Act, and the changes it made to [the Act], point in the other direction. The text of the new definition of 'injury' manifests that legislative policy of restricting

---

17 (2005) 79 ALJR 1079 at 1094 [86]; 215 ALR 385 at 405.

18 (2005) 79 ALJR 1079 at 1094 [86]; 215 ALR 385 at 405.

19 (2005) 79 ALJR 1079 at 1094 [86]; 215 ALR 385 at 405. The case in question, *NRMA Insurance Ltd v NSW Grain Corporation* (1995) 22 MVR 317, is discussed below.

20 (2005) 79 ALJR 1079 at 1096 [101]; 215 ALR 385 at 408.

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))."

25 In these ways the joint judgment stressed the narrowing effect of the new language employed to define "injury" in the 1995 Act.

26 On the facts of this case, the relevant respect in which the vehicle was being operated was that it was being driven[21]. The findings of the trial judge negate any fault on the part of the driver. Those findings were accepted by the Court of Appeal. A challenge in this Court must be rejected for reasons given later.

27 It is true that the occupier was at fault. The fault, however, lay not in the use or operation of the forklift truck, namely, the driving of it. The occupier itself was not driving, nor was the driver it employed driving in a negligent way. The occupier's fault lay in designing and implementing a system of work that involved driving the vehicle in the manner in which it was driven, rather than devising and providing a reasonably safe system of unloading the containers which would not cause vibrations likely to destabilise the boxes being unloaded.

28 Contrary to the submission of the occupier, it is not correct to say that Spigelman CJ's approach to the characterisation of "fault" in s 3(1) in *Zurich Australian Insurance Ltd v CSR Ltd*[22] was accepted as correct by this Court in *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd*[23]. There was approval in the joint judgment for another aspect of the Chief Justice's reasoning[24]. It is

---

21 *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 79 ALJR 1079 at 1094 [89]; 215 ALR 385 at 405.

22 (2001) 52 NSWLR 193 at 201 (Mason P and Handley JA concurring).

23 (2005) 79 ALJR 1079; 215 ALR 385.

24 The part of *Zurich Australian Insurance Ltd v CSR Ltd* (2001) 52 NSWLR 193 which was approved by *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 79 ALJR 1079 at 1094 [88]-[89]; 215 ALR 385 at 405 was the discussion of the "second submission" at 201, whereas the material relied on by the occupier was that relating to the "first submission" at 200-201.

not necessary to decide whether the passage relied on is correct, because even if it is, it does not destroy the Nominal Defendant's argument. The Nominal Defendant did not argue that, because the occupier was at fault in failing to devise a safe system of work, it could not be at fault in the use or operation, ie the driving, of the vehicle. The Nominal Defendant argued only that the occupier was at fault in the first way, but was not at fault in the second.

29 The flaw in the occupier's contention that the words before "if, and only if" are to be broadly construed, while any qualification on the breadth of the definition of "injury" as a whole is to be found in the causative considerations appearing after "if, and only if", is that the contention gives no weight to the word "in" in the expression "in the use or operation of the vehicle". As counsel for the occupier accepted, "in the use" here means with respect to, as a consequence of, or by reason of the use of the forklift truck in the circumstances. That in turn points to the need to examine fault in the actual use or operation of the forklift truck at the particular time and place of the injury, and excludes an inquiry that goes more widely to instances of fault in the planning which led to its deployment and which may have taken place at points of time and place remote from those of the injury.

30 The contention of the occupier that is under discussion was supported by recourse to a statement of Clarke JA that "use or operation" is not to be regarded in a narrow sense[25]; but the case in which it was made was seen in the joint judgment in this Court in *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd*[26] as an example of the authorities adopting an unduly wide construction of the legislation which it was the purpose of the 1995 Act to narrow. There is no reason to suppose that the narrowing effect of the 1995 Act was to be achieved only by the words after "if, and only if" to the exclusion of those before.

31 The question is one of characterisation. The approach adopted by the joint judgment in *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* to the construction of the definition of "injury" introduced by the 1995 Act suggests that the facts of this case are to be characterised as revealing no fault on the part of the owner or driver of the forklift truck in its use or operation. On that ground the appeal must be allowed.

---

25 *NRMA Insurance Ltd v NSW Grain Corporation* (1995) 22 MVR 317 at 321 (with Priestley JA and Powell JA concurring).

26 (2005) 79 ALJR 1079 at 1094 [86]; 215 ALR 385 at 405.

Was the injury caused by the fault of the owner?

32 Although it is not necessary to deal with this question, it is convenient, in the light of the arguments of the parties, to do so. Assuming, contrary to what has been said, there was fault of the owner or driver of the vehicle in its use or operation, the question is whether the injury was "caused" by that fault, within the meaning of that word as used both at the beginning of par (a) and just before sub-par (i). In *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd*, the joint judgment stated that the words "is caused" just before sub-par (i) were linked to a criterion that the injury be sustained as the consequence of the events listed in the sub-paragraphs[27]. Later, the joint judgment said[28]:

> "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. That construction is consistent with the subject, scope and purpose of the 1995 Act."

33 It is true that the Court of Appeal proceeded on a construction of the definition of "injury" from which this Court is differing. However, the conclusion of the Court of Appeal in this case that the causal connection was made out does not appear wrong. On the assumptions which must be made in order to pursue this causation inquiry, the forklift truck was not only the predominant cause, but in a sense the sole cause, of the plaintiff's injury. Its generation of vibrations was proximate and immediate in both time and space. The matter can be tested by examining the position which would have arisen if the occupier had devised a system of work using the forklift truck, but with a device which prevented vibration; and if one day its employee, the driver, had negligently removed that device, so that vibration took place and injured the plaintiff in the manner in which he actually was injured. In that event there would have been "fault of the … driver of a motor vehicle in the use or operation of the vehicle". And that fault could be said to have caused the injury during the driving of the vehicle. The removal of the anti-vibration device was a cause having a predominant, immediate and proximate character. That conclusion is not diluted or negated by the verbal device of describing what happened by

---

27 (2005) 79 ALJR 1079 at 1095 [94]; 215 ALR 385 at 406.

28 (2005) 79 ALJR 1079 at 1096 [102]; 215 ALR 385 at 408.

interposing as many objects as possible between the forklift truck and the boxes which fell on the plaintiff as transmitters of the vibration.

Notice of Contention

34 The occupier submitted that the conclusion of the Court of Appeal should be upheld on a ground it rejected – that the injury was caused by the fault of the driver. The submissions were made briefly and in writing, but not orally. They seek to overcome the concurrent findings of the courts below that the driver of the forklift truck was not negligent.

35 The occupier took this Court to no evidence about the driver, save for the unchallenged evidence of an expert that the shaking and swaying of the container, caused by vibration, which the plaintiff observed, should have been obvious to a qualified operator of a forklift with minimal experience. The occupier submitted that this established reasonable foreseeability.

36 Even if that is assumed, the occupier called no witnesses about the system of work. There was no explanation for its failure to do this. There was thus no evidence, if one is to examine the matter from the driver's point of view, as to the magnitude of the risk, the degree of probability of its occurrence, the difficulties that faced the driver in taking alleviating action, or any other conflicting responsibilities he had. Nor did the occupier advance submissions on these topics to this Court. In particular, the occupier did not explain why it was unreasonable for the driver to continue to do what he had been told by the occupier to do, particularly where it had not led to injury in the previous months. The submission underlying the Notice of Contention should be rejected.

Orders

37 The appeal should be allowed with costs and the orders of the Court of Appeal set aside. This will have the effect of restoring the trial judge's orders, including his costs orders.

38 The Nominal Defendant directed specific argument to one of the Court of Appeal's costs orders, Order 8, which was said to be wrong quite independently of what construction was given to the definition of "injury". The Court of Appeal ordered the Nominal Defendant to pay certain costs of the occupier in the District Court incurred since 31 May 2002 on the basis that the Nominal Defendant had failed to comply with s 45(1) of the Act, which creates a duty on an insurer to endeavour to resolve a claim as expeditiously as possible. Since s 45(1) would only apply to the Nominal Defendant if the insurer's policy responded to the claim against the occupier, the restoration of the trial judge's

order that it did not means that Order 8 can no longer stand. All the same, the Nominal Defendant invited this Court to deal with the merits of the Court of Appeal's reasoning on the point on the ground that the Nominal Defendant wanted it decided because "it is an important point for the operation of the Act". This invitation must, with regret, be declined: to respond to it would be to offer no more than advice on a hypothetical question, and to deal with the point fully would involve the resolution of disputed factual questions.

39 The Nominal Defendant's request for the order in par (a) of Order 3 was made only belatedly, and came to the attention of the occupier's advisers only the night before oral argument. The occupier, ie the first respondent, submitted that the issue raised should be remitted to the Court of Appeal, which would no doubt refer the matter to a single judge, an associate judge, or perhaps a registrar. The drawback to that approach is that it wastes costs and time. It seems preferable to make Order 3(a), but also to make the orders in the other paragraphs in Order 3.

40 The following orders should be made:

1. The appeal is allowed.

2. The orders of the Court of Appeal, Supreme Court of New South Wales, ordered on 23 August 2004 are set aside and in lieu thereof order that the appeal to that Court is dismissed.

3. (a) It is ordered that the first respondent repay the sum of $132,370.34 to the appellant plus interest calculated at $32.64 per day from 12 November 2004 until the date when this order takes effect.

   (b) The order in paragraph (a) is suspended for seven days.

   (c) In the event of the first respondent filing and serving written submissions within that period contending that the order in paragraph (a) is wrong:

      (i) it will remain suspended until further order; and

      (ii) the appellant is directed to file and serve written submissions in reply within a further seven days, and to apply within a further seven days to re-list the matter before a single Justice.

4. The first respondent is to pay the appellant's costs of the appeal to the Court of Appeal and of the proceedings in this Court.

41 KIRBY J. In *Insurance Commission (WA) v Container Handlers Pty Ltd*, I remarked that "each case of causation … depends on its own facts. Line-drawing is inescapable in the determination of issues of causation for legal purposes."[29] I added that the duty of courts, where such disputes arise under statutory policies of insurance, is to "approach the statutory language from the standpoint of achieving its purpose"[30]. Decisions based on such statutory language, as applied to particular facts, represent no more than "individual instances". They do not provide binding precedents to be used in resolving cases that involve different facts[31]. I predicted that borderline cases would continue to present. So it has proved. In little more than a year, this Court has had to consider *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd*[32] and now the present case.

42 The legislation in issue in this appeal, as in *Allianz*, is the *Motor Accidents Act* 1988 (NSW) ("the Act"). However, with new facts, the duty of the Court is to apply the legislation to the new circumstances according to its terms and so as to achieve its objects. It is not, as such, to apply judicial *dicta*, deployed in reasoning addressed to materially different evidence[33]. Still less is it a duty to give effect to ministerial speeches where the stated aspirations do not fully coincide with the statutory language[34]. To the extent of any difference, this Court's duty is only to the Act.

43 These observations must be stated at the outset because the decision and reasoning of this Court in *Allianz* does not require, or suggest, reversal of the judgment of the Court of Appeal of New South Wales upon the primary issue argued in this appeal. Although the Court of Appeal's decision in *Allianz*[35], subsequently overruled by this Court, was referred to in the reasoning of the Court of Appeal in this case[36], written before our decision in *Allianz* was known,

---

29 (2004) 218 CLR 89 at 127 [116] (footnote omitted).

30 (2004) 218 CLR 89 at 128 [118].

31 *Joslyn v Berryman* (2003) 214 CLR 552 at 584 [100], 602 [158].

32 (2005) 79 ALJR 1079; 215 ALR 385.

33 The Court's insistence on the primacy of the duty to applicable legislation appears in many recent cases. See, eg, *Weiss v The Queen* (2005) 80 ALJR 444 at 452 [31]; 223 ALR 662 at 671.

34 See below these reasons at [80]-[84].

35 (2003) 57 NSWLR 321.

36 *GLG Australia Pty Ltd v Nominal Defendant* (2004) 41 MVR 196 at 207 [55].

the significant factual distinctions between the two cases were emphasised. Correctly, *Allianz* was regarded as a distinguishable authority.

44 The accurate application of the legislation to the accepted facts of this case requires an outcome different from *Allianz*. The Court of Appeal's conclusion was right. The appeal against that conclusion fails. So do subsidiary challenges[37]. It follows that the appeal should be dismissed.

The facts

45 *Circumstances of the injury*: Mr Salim Tleyji ("the plaintiff") was injured on 24 August 1999 whilst in the employ of Ready Workforce Pty Ltd ("the employer"). The employer was a labour hire company which had provided the plaintiff to perform work in a warehouse of the first respondent, GLG Australia Pty Ltd ("GLG"). The plaintiff worked in GLG's premises, under its control and as directed by employees of GLG.

46 At the material time, the plaintiff was assisting in unloading a container of goods that had been deposited at the premises. Access to the container was gained by a ramp and landing that physically abutted the container. The plaintiff's work involved unloading boxes that were stored inside the container and placing them on a pallet positioned on the landing. A forklift truck, owned by GLG and driven by one of its employees, was required to ascend the ramp to the landing, collect loaded pallets and reverse down the ramp, depositing the pallets elsewhere in the premises.

47 As the forklift truck approached the ramp to ascend to the landing, its tines (or forks) would strike the ramp, causing the ramp, the landing and the container to vibrate. At the moment of his injury, the plaintiff was standing approximately one metre inside the container facing the forklift truck as it ascended the ramp. The motion of the forklift truck caused vibrations, dislodging a number of boxes that fell. They struck the plaintiff and caused him personal injury. It was for such injury that the plaintiff sued his employer and GLG in the District Court of New South Wales, claiming damages.

48 *Registration and insurance*: The forklift truck was a registered motor vehicle. It was insured in accordance with the Act. The insurance policy was issued by CIC Insurance Ltd ("CIC"). That policy obliged CIC to indemnify GLG, relevantly, "against liability in respect of … injury to a person caused by the fault of the owner or driver of the vehicle ... in the use or operation of the

---

37 The Nominal Defendant raised questions regarding costs and interest in its appeal. GLG, by notice of contention, raised an issue challenging concurrent findings concerning the fault of the driver.

vehicle in any part of the Commonwealth (whether or not on a road or road related area)"[38].

49 The parties agreed that the fact that the plaintiff's injury occurred otherwise than on a road or road related area and that the "vehicle" was a forklift truck operating wholly within GLG's premises were circumstances that were immaterial to any right that GLG had to indemnity. GLG had insured its vehicle. It was entitled to indemnity in the circumstances, to the full extent that the Act provided.

50 *The Nominal Defendant*: Between the date of the plaintiff's injury and the trial, CIC went into liquidation. Thereafter, as was also agreed, CIC's liabilities under the motor accident policy (if any) were to be borne by the Nominal Defendant referred to in the Act[39]. Although, at first, the Nominal Defendant rebuffed claims by GLG for indemnity under the statutory policy, eventually, on the eve of the trial, the Nominal Defendant applied to be, and was, joined as a party to the plaintiff's proceedings[40]. The purpose of this application was said to be to argue that, in the circumstances, there was no obligation under the policy to indemnify GLG.

51 The dispute thus emerging between GLG and the Nominal Defendant was relevant to the amount of damages (if any) that could be recovered by the plaintiff. If, as the Nominal Defendant submitted, the liability of GLG fell outside the Act, the plaintiff was entitled to recover damages calculated in accordance with the common law. If the Act applied, the plaintiff's damages were limited to those recoverable under the Act. The difference was agreed to be approximately $51,000.

The Nominal Defendant's arguments

52 Before the primary judge (Delaney DCJ) the Nominal Defendant submitted that the case was to be decided in accordance with the definition of "injury" set out in s 3(1) of the Act. The Nominal Defendant contested that there was any fault of the owner or driver of a motor vehicle in the use or operation of the vehicle. It denied that the injury to the plaintiff was a result of, and was caused during, the driving of the vehicle.

---

38 The Act, s 9(a), Sched 1, cl 1.

39 The Act, s 26. The Act makes provision for "insolvent insurers" (s 120) and for payments to be made out of the Nominal Defendant's Fund (s 125).

40 Pursuant to the Act, s 47A.

53 The Nominal Defendant submitted that there had been nothing unusual or negligent in the driving of the forklift truck and that it had been driven as intended and in a way no different from how it had been driven on countless prior occasions. Any relevant "fault" causing personal or bodily injury to the plaintiff was that of GLG as occupier of the premises where the plaintiff's injury occurred and as the primary organiser of the plaintiff's activities.

The legislation

54 As originally enacted in 1988, the Act contained a definition of "injury" in s 3(1) which was no more than descriptive of the kinds of harms or pathologies that attracted the operation of the Act. However, the *Motor Accidents Amendment Act* 1995 (NSW) amended the Act. In unusually imperative language, Parliament included amongst the objects of the Act (applicable at the time of the plaintiff's injury) a duty to acknowledge that[41]

> "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".

Furthermore, Parliament provided specifically that the Act was to be interpreted and applied by reference to its objects[42].

55 This was the context in which the new definition of "injury", critical for this appeal, was inserted in s 3(1) of the Act[43]. The 1995 amendments omitted the previous definition of "injury" in s 3(1) of the Act and enacted a substitute definition. Paragraph (b) of the substitute definition included the substance of the previous definition of the harms and pathologies covered. However, par (a) added limitations that became the focus of the dispute between the Nominal Defendant and GLG in these proceedings.

56 By virtue of the new definition of "injury", applicable at the time of the plaintiff's injury, the following relevant provision applied:

---

41 See the Act, s 2A(2)(a).

42 See the Act, s 2B(1).

43 *Motor Accidents Amendment Act* 1995 (NSW), s 3, Sched 1, cl 4.

"[I]njury:

(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 …"

Of the sub-paragraphs mentioned in the foregoing definition of "injury", only that contained in sub-par (i) was suggested to be relevant to GLG's entitlement to indemnity. The word "fault" is defined in s 3(1) of the Act to mean "negligence or any other tort".

57 Part 6 of the Act governs the award of damages for injuries falling within the operation of the Act. By s 69(1) of the Act, appearing in that Part, it is provided that the Part "applies to and in respect of an award of damages which relates to … 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". Thus, s 69(1) of the Act is, as McHugh J described it in *Allianz*[44], "the principal operative provision governing the award of damages under the Act" for which indemnity might be claimed under the statutory policy.

58 It follows that, by that provision, "injury", as defined above, is made a "key term" of the Act. The use of that word in the definition of "motor accident"[45], in the description of a "third-party policy"[46] and in s 69(1), indicates how the term is mirrored throughout the legislation, incorporating the provisions with their multiple requirements necessary at once to a plaintiff's recovery of damages and to the entitlement of the motor vehicle owner and driver to indemnity for the liability to pay such damages.

---

44 (2005) 79 ALJR 1079 at 1081 [8]; 215 ALR 385 at 387-388.

45 The Act, s 3(1).

46 The Act, s 9.

The decision of the primary judge

59 *Findings at trial*: By the time this appeal reached this Court, the only contesting parties were the Nominal Defendant and GLG. The employer and the plaintiff took no part in the appeal. Contingently, the plaintiff was affected by its outcome[47] but he left it to the Nominal Defendant to argue for the result most favourable to him. On this basis, it is unnecessary to record all of the findings made at trial. It is sufficient to note those relevant to the dispute between the Nominal Defendant and GLG.

60 The primary judge made findings that GLG "set up the system of work ... to permit the unloading of the container", directed the plaintiff "as to the work he was to perform" and provided the forklift truck to "go up the landing, collect the pallet, and reverse down the ramp"[48]. He found that the tines of the forklift truck would "strike the bottom of the ramp causing noise and vibration" and that this "was not the fault of the driver but of the system of work"[49]. He accepted that the vehicle "was not being driven at an excessive speed"[50]. Instead, it "was being driven as it always was and this always caused vibration on the ramp and into the container"[51].

61 The primary judge generally accepted the evidence of the plaintiff[52]. In the course of considering the liability of the Nominal Defendant, he cited, with apparent acceptance, the following evidence of the plaintiff[53]:

> "Q: You said … that each time the forklift drove up the ramp, there was a bang as it hit the ramp?
>
> A: Yeah.
>
> Q: There would be some vibration of the ramp and the container?

---

47 See above these reasons at [51].

48 *Tleyji v Ready Workforce Pty Ltd* unreported, District Court of New South Wales, 17 April 2003 (Delaney DCJ) at [9] ("reasons of the primary judge").

49 Reasons of the primary judge at [9].

50 Reasons of the primary judge at [9].

51 Reasons of the primary judge at [9].

52 Reasons of the primary judge at [6].

53 Reasons of the primary judge at [35].

A: Yeah.

Q: Sometimes the forklift … would go at speed and there would be a loud bang or a louder bang?

A: Yeah.

Q: There would be a greater vibration?

A: Yeah when it's coming up the ramp, and it did the vibration and when it hit at first."

62 The judge recorded the plaintiff's evidence as to the differential vibrations occasioned by the speed of the driving of the vehicle. However, he said that "[f]rom this evidence I conclude that more likely than not the accident was not caused by the manner of driving of the forklift driver but by the way the work was organised"[54]. He went on[55]:

> "It was argued that the bang or boomp was a negligent driving of the forklift but I do not agree. The vibration occurred as the forklift ascended the ramp. In my opinion, there was nothing which the driver did or omitted to do which contributed to the vibration. I reached that conclusion because on the day of the accident the plaintiff saw the forklift coming up the ramp, the forklift hit the ramp and there was a bang, the forklift then came up the ramp as he was watching it … The plaintiff was then hit on the back when the forklift had just about reached him when the box or boxes fell. He felt the box hit him just as the forklift was reaching the top of the ramp but the forklift was still moving. In my opinion this was not caused by the driving of the forklift in any negligent manner but the pursuit of the system of work which was implemented by [GLG]."

63 *Defect in analysis*: A defect in the foregoing analysis was identified by the Court of Appeal[56]. The primary judge approached the question that he had to answer on the basis of an apparent assumption that the liability of the Nominal Defendant depended on a choice between whether the plaintiff's injury was caused by fault in the driving of the forklift truck *or* in the system of work instituted by its owner. However, in presenting this choice[57]:

---

54 Reasons of the primary judge at [36].

55 Reasons of the primary judge at [37].

56 (2004) 41 MVR 196 at 204 [42].

57 (2004) 41 MVR 196 at 204 [42] per Hodgson JA.

> "the primary judge did not consider whether the case could fall within the policy and the Act on the basis that the failure of GLG to provide a safe system of work was, in the circumstances, fault of the owner of the forklift truck in the use or operation of that truck, and that the injury was a result of and caused during the driving of the vehicle."

64 Like the Court of Appeal, I consider that it is clear that "[t]he primary judge simply held that the injury was not caused by the driving of the motor vehicle in any negligent manner, and that the motor accident insurer was *accordingly* not liable"[58]. This defect of reasoning required the Court of Appeal to apply the Act to the facts as found or inferred and to complete the analysis which had failed at first instance. This the Court of Appeal proceeded to do.

The decision of the Court of Appeal

65 *The first decision*: The reasons of the Court of Appeal were given by Hodgson JA (Tobias and McColl JJA agreeing). Although accepting that, at trial, the plaintiff's allegations against GLG had rested on alternative contentions, namely that it was liable for the negligent driving of the forklift truck by its employee and that it was liable in the way in which the operation of the forklift truck had placed the plaintiff at high risk of injury[59], Hodgson JA dismissed as "fanciful" the challenge to the primary judge's finding as to the individual fault of the *driver*[60].

66 In this way, the case was confined in the Court of Appeal to the liability of GLG as the *owner* of the motor vehicle. The liability of the Nominal Defendant under the policy therefore depended upon whether the statutory policy responded to GLG's liability as *owner* for failing to institute a safe system of work, which ultimately represented "the whole basis of the primary judge's decision to award damages to the plaintiff"[61].

67 After describing and distinguishing past authority of the Court of Appeal, Hodgson JA came to the following conclusion[62]:

---

58 (2004) 41 MVR 196 at 204 [42] (emphasis added).

59 (2004) 41 MVR 196 at 201 [32].

60 (2004) 41 MVR 196 at 199 [20].

61 (2004) 41 MVR 196 at 206 [49].

62 (2004) 41 MVR 196 at 207 [54]-[55].

> "[T]he way the vehicle was used was a necessary and important element in the fault of the owner of the vehicle. The system of work was held to be unsafe because it was such that the container, in which boxes were stacked, was caused to vibrate; and it was the forklift truck itself that caused the vibration … Accordingly, there was in this case fault of the owner of the vehicle in the use or operation of the vehicle.
>
> ... Since it was the vibration of the container that caused the box to fall on the plaintiff, and since the vibration of the container was caused by the driving of the motor vehicle and occurred during the driving of the motor vehicle, there is no doubt that the requirements of subpara (i) [of par (a) of the definition of "injury" in s 3(1) of the Act] are satisfied, unless it can be said that the causal relationship is not close enough, for some reason. … [I]n the current case there is nothing … that could be considered as making it inappropriate to treat the injury as truly caused by the driving of the forklift truck. Accordingly, in this case the injury was a result of and caused during the driving of the vehicle."

68 *The second decision*: In consequence of a declaration that the Court of Appeal made that GLG was entitled to indemnity from the Nominal Defendant, it was necessary to vary the plaintiff's verdict and to recalculate the apportionment between GLG and the employer. GLG and the Nominal Defendant eventually agreed upon the appropriate orders that would follow from the decision of the Court of Appeal save as to two matters. The first was whether, in the appeal, under the statutory policy of insurance, GLG was entitled to indemnity in respect of its costs and hence to an order of the Court of Appeal providing for such costs. The second question was whether GLG was entitled to an order against the Nominal Defendant for interest, at the court rate, on judgment moneys that had earlier been paid to the plaintiff by GLG itself, for want of indemnity.

69 The Court of Appeal, in separately published reasons[63], dealt with each of these questions. Having regard to past authority in this Court[64], the Court of Appeal accepted that the liability of an insured to the insured's own lawyers, incurred in defending a claim for damages arising out of injury caused by the fault of the owner or driver in the use of a motor vehicle, was not within the words "liability in respect of" such injury in the policy and hence was outside the ordinary ambit of indemnity[65]. However, the Court of Appeal nevertheless

---

63 *GLG Australia Pty Ltd v Nominal Defendant (No 2)* (2004) 13 ANZ Insurance Cases ¶61-644.

64 *Commercial and General Insurance Co Ltd v Government Insurance Office (NSW)* (1973) 129 CLR 374. See also *Owen v State of New South Wales* (2004) 41 MVR 167.

65 (2004) 13 ANZ Insurance Cases ¶61-644 at 77,872 [13].

concluded that, in making its orders, it was empowered otherwise to award costs based on its assessment of the responsibility of the parties for costs incurred by the other parties[66]. On this footing, it concluded that once the Nominal Defendant had denied liability, GLG had no alternative but to defend itself. Accordingly, costs incurred after the refusal of indemnity were to be "fairly regarded as being due to the Nominal Defendant's incorrect denial of indemnity"[67].

70 Similar reasoning was invoked to sustain an order for the payment of interest on the sum which GLG had been obliged to pay to the plaintiff because of the Nominal Defendant's refusal of indemnity[68]. In the result, the Court of Appeal ordered the Nominal Defendant to pay interest on the judgment moneys that had been paid by GLG to the plaintiff for want of indemnity. It ordered the Nominal Defendant to pay GLG's costs of the District Court proceedings incurred after the refusal of indemnity and to indemnify GLG in respect of the costs order in favour of the plaintiff in those proceedings[69].

71 In this Court, in addition to challenging the substantive determination, upholding GLG's entitlement to indemnity under the statutory policy, the Nominal Defendant contested the lawfulness of the Court of Appeal's orders in respect of the costs and interest.

The issues

72 Three issues therefore arise in this appeal.

(1) *The negligence of the driver issue*: Did the Court of Appeal err, as GLG asserts by notice of contention, in failing to find that the driver of the forklift truck was also guilty of negligence, requiring consideration of GLG's entitlement to indemnity under the statutory policy upon that basis? Should this Court reopen the concurrent findings of fact of the primary judge and the Court of Appeal in this respect?

(2) *The indemnity issue*: Upon the basis of established fault in the owner of the forklift truck, GLG, was it entitled to indemnity under the statutory policy for which the Nominal Defendant was liable? In the facts found and inferences available to it, did the Court of Appeal err in concluding

---

66 (2004) 13 ANZ Insurance Cases ¶61-644 at 77,873 [14].

67 (2004) 13 ANZ Insurance Cases ¶61-644 at 77,874 [17].

68 (2004) 13 ANZ Insurance Cases ¶61-644 at 77,874 [21].

69 (2004) 13 ANZ Insurance Cases ¶61-644 at 77,874 [22].

that the statutory preconditions for indemnity were established? Was such a conclusion inconsistent with the holding or the reasoning expressed by this Court in *Allianz*?

(3) *The costs and interest issue*: Did the Court of Appeal err in disposing of the costs and interest claims of GLG in the manner that it did?

The driver's fault should not be reopened

73 Both the primary judge[70] and the Court of Appeal[71] found no individual negligence on the part of the driver in the way in which he drove GLG's forklift truck. They found that he drove the vehicle in a normal and regular way. Although his driving caused the tines of the vehicle to strike the ramp, occasioning vibrations, the responsibility for instituting a safe system of work to prevent the plaintiff from being injured as a result of such driving was that of GLG as owner of the vehicle. Although GLG was not the plaintiff's employer, there was no contest that it owed a duty to the plaintiff to institute a safe system in the work assigned to the plaintiff, specifically that which involved him working with the forklift truck[72].

74 The conclusions reached at trial and in the Court of Appeal on this point were clearly open. They rest upon concurrent findings of fact as to the conduct of the driver of the forklift truck. This Court will rarely disturb conclusions that depend upon such findings[73]. No sufficient reason has been shown why it should do so in this appeal. GLG's contention to the contrary should be rejected.

Motor vehicle insurance: owner's indemnity

75 *Multiple requirements of the Act*: In *Allianz*[74], by reference to the provisions of the Act applicable also in the present case, McHugh J helpfully listed the several requirements of the definition of "injury" in s 3(1) of the Act that must be satisfied, relevantly, for indemnity to be available under the

---

70 Reasons of the primary judge at [37].

71 (2004) 41 MVR 196 at 199 [20].

72 Cf *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 47-50 [66]-[72].

73 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 495-496 [114]; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 568-569 [52]-[53]; *Gattellaro v Westpac Banking Corporation* (2004) 78 ALJR 394 at 406 [78]-[79]; 204 ALR 258 at 274-275.

74 (2005) 79 ALJR 1079 at 1083 [16]; 215 ALR 385 at 389.

statutory policy. So far as applicable to the present case, those requirements are as follows:

> "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".

76 By reason of the findings of the primary judge, undisturbed on appeal, some of the foregoing requirements are not in dispute before this Court. Thus, it is accepted that there was "fault" in the defined sense, on the part of the owner of the vehicle, GLG, in implementing an unsafe system of work (requirement 1). Similarly, although the Nominal Defendant faintly argued to the contrary, it cannot really be disputed that the injury was caused "during" the use or operation of the vehicle, in the temporal sense (requirement 4). GLG's driver was actually manoeuvring the forklift truck, with the plaintiff watching him, when the injury happened to the plaintiff.

77 This analysis confines the questions to be answered to the "use or operation" question (requirement 2) and the other aspects of causation set out in the remaining requirements that are applicable (requirements 3 and 5). As the Act commands[75], and as *Allianz* explains[76], the requirements that follow from the definition of "injury" are to be construed accepting that the Act is a statute providing particular and limited insurance coverage for motor vehicles. The purpose of the legislation introducing limitations upon the types of "injury" covered by the Act (and hence indemnified by the statutory policy) was that of "reducing the ambit of coverage, and hence the amount of premiums"[77]. This was a deliberate purpose. Courts must give effect to, and not frustrate, the

---

75 See the Act, s 2A.

76 (2005) 79 ALJR 1079 at 1082 [13], 1087-1089 [46]-[55], 1093 [80], 1100 [127]; 215 ALR 385 at 389, 396-398, 403, 413-414.

77 *Container Handlers* (2004) 218 CLR 89 at 127 [115].

achievement of that purpose, whatever views they may hold about the wisdom of its policy[78].

78 Clearly, the Act is not designed to afford a "universal compensation scheme for all injuries sustained in connection with a motor vehicle"[79]. By inserting multiple references to the requirement of causation in the critical provision it must be accepted that "an approach that limits the scope of the Act is preferable to one that would extend its application"[80]. This is especially so when the case is one involving, in some way, the loading and unloading of a vehicle which is stationary at the time of such operations[81]. Under a predecessor to the Act, this Court had held in *Government Insurance Office of NSW v R J Green & Lloyd Pty Ltd*[82] that:

> "Any use that is not utterly foreign to its character as a motor vehicle is … 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."

79 Cases on the loading and unloading of stationary vehicles[83] and other activities involving such vehicles[84] occasioned protests from some commentators that such claims constituted an unfair burden on motorists whose premiums for third party insurance supplied the pool of funds from which such claims were to be discharged. It was such protests that led to the 1995 amendments to the Act and the enactment of the *Motor Accidents Compensation Act* 1999 (NSW) ("the MACA") and like legislation, designed to cut back the entitlement to recovery (and consequently to indemnity) for motor accidents.

---

78 Cf *Purvis v New South Wales* (2003) 217 CLR 92 at 103-104 [18]-[20].

79 *Allianz* (2005) 79 ALJR 1079 at 1089 [53]; 215 ALR 385 at 397.

80 *Allianz* (2005) 79 ALJR 1079 at 1089 [53]; 215 ALR 385 at 398.

81 *Allianz* (2005) 79 ALJR 1079 at 1088-1089 [52]; 215 ALR 385 at 397.

82 (1966) 114 CLR 437 at 446-447 per Windeyer J.

83 Such as *NRMA Insurance Ltd v NSW Grain Corporation* (1995) 22 MVR 317 and *Allianz* (2005) 79 ALJR 1079; 215 ALR 385.

84 *Mercantile Mutual Insurance (Aust) Ltd v Moulding* (1995) 22 MVR 325; cf *Container Handlers* (2004) 218 CLR 89 at 91 [1].

80 *The ministerial speech*: In deriving the meaning of "use or operation" of the vehicle in the context of the definition of "injury" in s 3(1) of the Act, and the ambit to be attributed to the other aspects of causation contained in the requirements of that definition, the Nominal Defendant placed much emphasis upon the speech of the Attorney-General, introducing the 1995 amendments. Relevantly, the Minister said[85]:

> "It has become critical to unambiguously impart the underlying aims and objectives of the Motor Accidents Act to the judiciary, lawyers and insurers. It is therefore proposed to introduce objects clauses covering the Act as a whole … as well as certain key provisions in the legislation. In addition, new provisions will provide that the Act is to be construed having regard to these clauses.
>
> 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.
>
> ... [T]he 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. … 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."

81 In *Allianz*, Callinan J quoted the foregoing passage[86] in support of his conclusion that the policy, issued under the Act, did not respond to the

---

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

86 (2005) 79 ALJR 1079 at 1100-1101 [128]; 215 ALR 385 at 414 referring also to the *Interpretation Act* 1987 (NSW), s 34 at 79 ALJR 1079 at 1102-1103 [136]; 215 ALR 385 at 416-417.

circumstances of that case. Moreover, the passage cited appears to have influenced his Honour's view that it was "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."[87] These added remarks were not reflected in the reasons of the other members of this Court in *Allianz*. With respect, I do not regard them as part of the binding rule of that decision. Nor do I regard the Attorney-General's speech as affording more than an illustration of the political context in which the 1995 amendments to the Act were enacted.

82 This Court has repeatedly insisted that the Second Reading and other speeches in Parliament may only be used to throw light on the meaning of legislative words, to the extent that such speeches are sustained by the legislative text as subsequently adopted[88]. It is in the nature of parliamentary speeches that they commonly lack the precision of statutory language. They can sometimes be motivated by forensic and political factors. They occasionally stray into hyperbole. The rule of law requires that this Court give effect to the purpose of Parliament expressed in the law made by or under an enactment[89]. It is not part of a court's function, as such, to give effect to parliamentary speeches, ministerial media releases or other informal statements unless, validly, they have the specific endorsement of a parliamentary enactment. Saying this is not to discourage the proper use of such materials. It is simply to insist on the primacy of the enacted law.

83 *Avoiding the unenacted*: When the Minister's words are scrutinised, there are important disparities between his stated purposes and the Bill in support of which he was speaking. Thus, whatever commonsense and community expectations may say in respect of the coverage of injuries "which arise from crashes and collisions on the roads", the definition of "injury" in the Act makes no reference to "crashes". Nor does it confine recovery to "crashes and collisions on the roads". Nor does it limit recovery to injuries "associated with use on the

---

87 (2005) 79 ALJR 1079 at 1096 [106]; 215 ALR 385 at 408.

88 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 169; *Leask v The Commonwealth* (1996) 187 CLR 579 at 634; *Byrnes v The Queen* (1999) 199 CLR 1 at 34 [80]; *Mann v Carnell* (1999) 201 CLR 1 at 45 [143]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 95 [132]; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 117 [261]; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 499 [55].

89 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459.

dedicated public road network". Nor does it exclude liability for vehicles "such as forklifts". Nor does the definition of "injury" exclude liability where there is some other "public liability" insurance, compulsory or otherwise. Nor does the definition contain a power or discretion in a court to assign liability to any relevant "public liability policies and not against the Nominal Defendant". If it had been the purpose of the New South Wales Parliament to introduce exclusions, qualifications, powers and discretions in terms of the language used by the Attorney-General in his speech, it was open to it to do so. However, the law as enacted is significantly different. It is that law which this Court must apply. If we do not, we undermine the parliamentary process, damage that institution, and shift power still further from Parliament to the executive and specifically officials who write Second Reading and like speeches, draft explanatory memoranda and prepare media releases. I would not do that.

84 It follows from this analysis that this Court should, in the orthodox way, whilst noting the Attorney-General's explanation of the general purposes of the 1995 amendments, turn to the words as enacted. The Court must give them meaning consistent with the legislative purpose as revealed by the enacted words, taking into account only such background material as is consistent with those words.

85 When this approach is adopted, it is worth repeating a remark of McHugh J in *Allianz*[90], also applicable to this case:

> "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."

86 The course mentioned by McHugh J could have been taken. But it was not. It would be quite wrong for this Court to repair that legislative omission. Particularly is this so because the Court is on notice that still further amendments to the Act were adopted by the MACA in 1999 and these too omitted to adopt an automatic or even discretionary exclusion of entitlements (and indemnity) under the Act, along the lines mentioned by the Minister. The fact that such straightforward solutions were available, but not adopted, highlights the duty of this Court to adhere to the statutory language[91].

---

90 (2005) 79 ALJR 1079 at 1081 [8]; 215 ALR 385 at 387.

91 *Ferdinands v Commissioner for Public Employment* [2006] HCA 5 at [73], [91]-[92].

87 It should be kept in mind that a decision as to the ambit of the definition of "injury" under the Act does not govern only cases where dual insurance exists or where some other defendant might be liable to the injured person. A decision in the present case will apply to other circumstances, including cases where an injured person would be left without recourse to insurance funds if the circumstances of his or her injury did not fall within the Act[92]. This consideration is not a reason for adopting a construction of the amended definition of "injury" in the Act in order to provide a deep pocketed defendant for injured plaintiffs, a notion to which Callinan J took exception in *Allianz*[93]. It is simply a reminder that the interpretation adopted has consequences for different cases that could result in a narrowing of the application of legislation whose overall purpose is beneficial and protective, although within the limits as expressed.

88 *Use or operation of the vehicle*: The primary thrust of the Nominal Defendant's arguments in this Court was that GLG's claim for indemnity failed at the threshold within the opening words of the definition of "injury" in s 3(1) of the Act. This was because, even if (on one view) the plaintiff's personal or bodily injury was caused by the "fault" of the owner of a motor vehicle, being the forklift truck, such "fault" lay *only* in the system of work which that owner had instituted. It did not exist "in the use or operation of the vehicle".

89 This argument must be rejected. Here, the "fault", as found, lay in the defective system of work that the owner of the vehicle had implemented. But that system of work did not exist in a vacuum. Necessarily, it had a factual content. It involved the failure of the owner, GLG, to consider, design and implement a system addressed to the particular problem presented by the tines of the forklift truck striking the ramp repeatedly, causing vibrations through the abutting metal of the platform and into the container and its contents.

90 As earlier cases have shown, in this Court and elsewhere, the word "use" has a wide meaning in this context. In *Dickinson v Motor Vehicle Insurance Trust*, this Court said that word in the *Motor Vehicle (Third Party Insurance) Act* 1943 (WA) extended "to everything that fairly falls within the conception of the use of a motor vehicle and may include a use which does not involve locomotion"[94]. The word has appeared in legislation of the present kind for over

---

92 *Container Handlers* (2004) 218 CLR 89 at 123-124 [102].

93 (2005) 79 ALJR 1079 at 1103 [136]; 215 ALR 385 at 417 referring to *Allianz* (2003) 57 NSWLR 321 at 323 [4] per Mason P.

94 (1987) 163 CLR 500 at 505. See also *Allianz* (2005) 79 ALJR 1079 at 1084 [28]; 215 ALR 385 at 391.

fifty years. Even if "use" were restricted to the driving or the manner of control of the motor vehicle (an interpretation narrower than that previously adopted) it would apply to the present case. Similarly, the "operation of the vehicle" was immediately relevant and causative, in the sense of affecting the working or running of the vehicle as such.

91 There was nothing stationary about the forklift truck in the present facts. An essential part of the complaint about the owner's system of work related to the locomotion of the vehicle as its parts struck the ramp. The fault of the owner, relevant to the cause of the plaintiff's injury, was in instituting and persisting with the use or operation of the forklift truck without precautions to prevent adverse and foreseeable consequences of the impact of the tines of the vehicle on the ramp.

92 A safe system of work in this case might have involved stabilising the ramp leading to the container so that the forklift truck could use or operate on the ramp, even striking it, without the risk of vibration. It might have involved disjoining the ramp and landing from the container so that the use and operation of the forklift truck would not transmit vibrations into the container. Or it might have involved using some other means of unloading the container in the circumstances of the danger presented by the use or operation of the forklift truck[95]. All of these ingredients in the defect of the owner's system of work involved the use or operation of the insured vehicle.

93 The Nominal Defendant's first argument envisaged a complaint about the system of work disjoined from the use or operation of the vehicle. However, that was not the way the case was presented at trial. Nor was it a sensible or practical hypothesis. The use and operation of the forklift without repeated impact, causing vibrations within the connected container, would have been safe and without "fault". The "fault" in the system of work employed was "fault of the owner … in the use or operation of the vehicle" as that vehicle was used and operated *in fact*. The first argument of the Nominal Defendant therefore fails.

94 *Result and cause*: This leaves the Nominal Defendant's second argument. The remaining words of the definition of "injury" in s 3(1) of the Act are couched in restrictive terms. Satisfaction of the opening provisions of the definition will not suffice to establish an entitlement (relevantly to indemnity under the statutory policy) unless the latter part of the definition is also found to apply. In this sense, the entirety of the definition must be read as a whole. It should not be split artificially into constituent parts[96].

---

95 (2004) 41 MVR 196 at 206-207 [53].

96 *R v Brown* [1996] AC 543 at 561 applied in *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 397.

95 Although the sub-paragraphs in par (a) of the definition of "injury" deal with particular varieties of "the use or operation of the vehicle", and although they are stated disjunctively, their purpose is clearly restrictive and cumulative. In effect, Parliament has said that, even if the injury was caused by the fault of the owner in the use or operation of the vehicle, that is not sufficient to give rise, relevantly, to indemnity under a statutory policy. It remains for the claimant, seeking indemnity, to bring the case within one of the particular aspects of the use or operation of the vehicle. The first three sub-categories plainly contemplate the movement of the vehicle. They require both a causal and temporal connection between such movement and the injury that is posited in terms by the opening words of the definition.

96 In the undisputed facts of the present case, the plaintiff's injury was certainly "caused during ... the driving of the vehicle". But this is also insufficient. There is a conjunctive requirement that the injury must also be "a result of" the driving of the vehicle. In the present case, there is no doubt that the injury was the result of the driving of the forklift truck in one sense because it was the impact of the tines on the ramp, during the very driving of the forklift truck, that directly caused the vibrations that dislodged the boxes that fell on the plaintiff, injuring him. The ultimate question thus emerging, as Hodgson JA recognised[97], was whether there was anything in the facts of the present case that would make it inappropriate to treat the injury as truly "a result of" and "caused during" the driving of the vehicle.

97 The Nominal Defendant presented two arguments on this question. The first involved the incantation of the *mantra* that the plaintiff's injury was "a result of" and was "caused during" the unsafe system of work which constituted the true "fault of the owner". As such, it had nothing to do with the "driving of the vehicle". I have already demonstrated why this overly simplistic, even ethereal, view of the evidence must be rejected. A system of work, safe or defective, does not exist disembodied from a wider appreciation of the facts. The present system of work involved the use or operation of a forklift truck which led directly and immediately to the dislodgment of boxes that injured the plaintiff. A safe system of work might still have involved the use or operation of such a vehicle but without the danger of the impact that the defective system of work involved.

98 A similar proposition, suggesting that reliance on an unsafe system of work as the "fault" of a vehicle owner necessarily excludes causation "in the use or operation of" the vehicle, was rejected by the New South Wales Court of

---

97 (2004) 41 MVR 196 at 207 [55]. See above these reasons at [67].

Appeal in *Zurich Australian Insurance Ltd v CSR Ltd*[98]. There, Spigelman CJ[99] said, correctly in my view[100]:

> "The … submission was, essentially, one of characterisation. The appellant submitted that the injury was not caused 'in the use and operation of' the [vehicle]. The injury was caused by an unsafe system of work or in the design of the [vehicle]. Nothing in the language used, or the scope, purpose or operation of the Act, suggests that a dual characterisation of 'fault' is impermissible. The definition applies so long as the fault may be characterised in the way set out within it. It matters not that some other characterisation may also be appropriate."

99 Like conclusions have been reached in other decisions of the Court of Appeal. Those decisions were affirmed in *Zurich*[101]. I consider that they too are rightly decided. The object and purpose of the narrowing of the definition of "injury" in s 3(1) of the Act was substantially to cut back claims under the Act (including to indemnity) in respect of stationary vehicles, most (but not all) instances of unloading and events having no real connection with the vehicle *as a vehicle*. The present was not such a case. The use and operation of the vehicle was directly connected with the cause and occasion of the injury to the plaintiff. Applying the language of the Act, the statutory policy had therefore to respond to a claim by the owner based on its fault, being the defective system of work that included the repeated use or operation of the vehicle, as such, in the manner described.

100 The Nominal Defendant's second argument was addressed to what was said to be the indirect character of the connection between the "use or operation of the vehicle", the "driving of the vehicle" and the plaintiff's injury. Thus, it was submitted that, properly analysed, the vehicle was only remotely connected with the cause of the injury so that the causation contemplated by the definition of "injury" in s 3(1) of the Act was not established. Nor, on this argument, would the injury be classified as "a result of" the driving of the vehicle. The Nominal Defendant pointed out that the impact of the tines of the vehicle happened to the ramp, not the plaintiff. This set in train an impact on the platform which, in turn,

---

98 (2001) 52 NSWLR 193.

99 With the concurrence of Mason P and Handley JA at 212 [102]-[103].

100 (2001) 52 NSWLR 193 at 201 [29].

101 (2001) 52 NSWLR 193 at 201 [30] affirming in this respect *NRMA Insurance* (1995) 22 MVR 317 esp at 319; *Balfour Beatty Power Constructions (Australia) Pty Ltd v Government Insurance Office of New South Wales* (1996) 24 MVR 162 at 163-164; *AMP General Insurance v Brett* (1998) 27 MVR 492 at 495.

caused vibration of the container. This had the consequence of the dislodgment of the boxes. Only as a result of such dislodgment and the falling of the boxes was the plaintiff injured. The Nominal Defendant suggested that the causal chain was too indirect or remote.

101 This argument should also be rejected. As a matter of fact, consistent with the evidence found by the primary judge, the impact of the tines on the ramp was the direct and immediate cause of the vibrations that resulted in the plaintiff's injury. The outcome of the impact was virtually instantaneous, once a condition of instability of the boxes in the container was reached. Factually, therefore, there is no indirectness.

102 In any case, there is nothing in the terms of the definition of "injury" in the Act that required the cause and result there mentioned to be "immediate" or "proximate". Thus, the Act does not contain a qualifying adjective or adverb such as "direct" or "directly", as included in the Western Australian legislation[102]. This Court is not warranted to add such a word to language which is already detailed, particular and strict.

103 In *Allianz*[103], McHugh J cautioned, correctly in my view, against the introduction of "metaphysical concepts such as 'proximate cause' or 'immediate cause'". He said that such expressions "should be avoided, because they provide little, if any, assistance in resolving questions of causation under this Act." Several cases show that particular statutory frameworks may require a finding that no causal connection exists for legal purposes although, in another legal context, a sufficient physical connection might sustain recovery by reference to the policy judgments implicit in the law[104]. It depends, in each case, upon the purpose of the statute, as derived from its language.

104 Here, the purpose was clearly to restrict claims for motor accidents and hence for indemnity under the statutory policy. There is no contest about this. But the extent of the restriction is not to be found in generalities such as those that assert that this is not "truly" a "motor vehicle case" or is "more properly" a case to which some other policy of insurance responds. Such self-answering statements offer no real explanation as to why any particular case should, or should not, fall within the ambit of the Act. Accepting that minds can differ in

---

102 See *Container Handlers* (2004) 218 CLR 89 at 102 [27], 118 [80], 124 [105], 129 [127], 134 [140].

103 (2005) 79 ALJR 1079 at 1089 [54]; 215 ALR 385 at 398.

104 (2005) 79 ALJR 1079 at 1089 [55]; 215 ALR 385 at 398.

the characterisation of facts and the drawing of boundaries, cases such as the present are not to be solved by over-simplifications or generalisations.

105 When the Act is applied to the facts as found in the present case, the Court of Appeal was correct to uphold the claim by GLG on the policy issued under the Act. No error has been shown in the reasoning of the Court of Appeal. Subject to what follows the judgment of the Court of Appeal should, to this extent, be affirmed.

106 *Consistency with Allianz*: Yet is this conclusion inconsistent with the approach adopted by this Court in *Allianz*? The Nominal Defendant submitted that it was. In my view, this submission should be rejected.

107 *Allianz* was a claim involving the unloading of containers from the back of a truck. In that case, the truck's own unloading mechanism had become inoperative. The employee was directed to unload the containers manually. The respondent conceded negligence in its system of work. This Court held that the plaintiff's "injury" was not "a result of" the use or operation of the vehicle[105] (as required by the Act).

108 As appears from this description, *Allianz* was a case concerned with a motor vehicle in a completely static condition. The vehicle was stationary. The injury was not "a result of" or "caused during" the driving of the vehicle. The claim pressed in that case relied on the residual instance in par (a)(iv) of the definition of "injury", referring to "such use or operation by a defect in the vehicle". The facts of *Allianz* are therefore quite different from the present facts. The very complaint that is made here concerns the use or operation of the motor vehicle as a moving object. The Court of Appeal was therefore right to distinguish *Allianz* and to treat the present case as governed by different considerations and different provisions in the statutory definition of "injury"[106]. This is not to say that an injury occasioned as a result of the use or operation of a stationary vehicle could never fall within the Act. The relevant point is that this was a basis for distinguishing *Allianz*.

109 Is there anything in the reasoning in *Allianz* that suggests an approach different from that which is required by the language of the Act, explained above? I think not. In the reasons of McHugh J in *Allianz*[107], his Honour drew to

---

105 See *Allianz* (2005) 79 ALJR 1079; 215 ALR 385.

106 (2004) 41 MVR 196 at 207 [55].

107 (2005) 79 ALJR 1079 at 1091 [64]; 215 ALR 385 at 400.

attention the distinction between the facts of that case and the earlier decision of the Court of Appeal in *Zurich*, mentioned above[108]. He said:

> "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, [the worker] was instructed to use the vehicle in a manner other than its intended use."

110 If this principle is applied here, the driver was clearly using the forklift truck as a motor vehicle for the purpose, and in the manner, for which it was intended. The facts are therefore not analogous to those in *Allianz*. It follows that upon no proper analysis does the legal rule established in *Allianz* determine the outcome of this appeal.

111 The joint reasons in *Allianz* also laid emphasis on the "vehicle … functioning in the ordinary way"[109]. Those reasons stress the legislative policy of restricting previous interpretations of motor vehicle insurance legislation[110]. So much may be accepted. However, there is nothing in the joint reasons in *Allianz* that suggests that the Court is to do anything but apply the Act, restricted as it may be, in accordance with its terms to the facts and circumstances of each case. Whilst the joint reasons in *Allianz* make reference to the Second Reading Speech of the Attorney-General[111], they do this solely for the purpose of deriving the conclusion that the 1995 amendments were intended "to limit the definition of injury by its cause and to narrow what the legislature considered the overbroad reading in the case law"[112]. In this appeal, that purpose is undisputed.

112 The Nominal Defendant placed particular emphasis upon the statement in the joint reasons in *Allianz*[113] to the effect that "notions of predominance and immediacy", as distinct from "more removed circumstances", must be established between, relevantly, the driving of the vehicle and the injuries. Although I reject this criterion[114], the present case qualifies. The actions of the forklift truck

---

108 These reasons at [98].

109 (2005) 79 ALJR 1079 at 1095 [95]; 215 ALR 385 at 406.

110 (2005) 79 ALJR 1079 at 1096 [101]; 215 ALR 385 at 408.

111 (2005) 79 ALJR 1079 at 1093 [81]; 215 ALR 385 at 403-404.

112 (2005) 79 ALJR 1079 at 1093 [80]; 215 ALR 385 at 403.

113 (2005) 79 ALJR 1079 at 1096 [102]; 215 ALR 385 at 408.

114 See above these reasons at [102]-[103].

constituted a predominant and immediate factor in the happening of the plaintiff's injury. This is demonstrated by the instantaneous link between the driving, the resulting impact on the ramp, and the fall of the boxes that immediately followed, injuring the plaintiff.

113 *Conclusion: Allianz is inapplicable*: With these considerations in mind, this Court in *Allianz* concluded that the statutory policy was inapplicable. But the present case involved entirely different facts. The policy responds to them. It follows that nothing in *Allianz*, either in its holding or in its approach, requires an outcome in the present appeal favourable to the Nominal Defendant. The arguments to the contrary should all be rejected.

114 An outcome favourable to GLG in the present case would mean a diminution in the plaintiff's recovery. However, in another case, the result could be the difference between recovery from the motor vehicle insurer and no recovery at all.

The orders as to costs and interest

115 *Procedures in the Court of Appeal*: There remains only the separate challenge by the Nominal Defendant to the orders made by the Court of Appeal in its second decision concerning the supplementary orders made in relation to costs and interest[115]. I must decide that challenge having regard to the rejection of the Nominal Defendant's arguments on the principal issue in the appeal. That was the foundation on which the Court of Appeal made the additional orders now impugned.

116 Obviously, the Court of Appeal was obliged to determine the Nominal Defendant's appeal by formulating orders and entering judgment on the entirety of the matters in contest between the parties. By the orders formulated in the first decision, the parties were directed to bring in agreed short minutes of order within seven days. In default of agreement as to the final orders, directions were given for the filing of supplementary submissions[116]. Written submissions were duly made to the Court of Appeal. They were placed before this Court.

117 After the submissions were received, Hodgson JA afforded the parties the opportunity to make still further submissions on whether a cross-claim should be permitted by GLG against the Nominal Defendant for the recovery of money in accordance with the *District Court Act* 1973 (NSW), s 83A. The Nominal Defendant objected to that course. GLG pressed the Court of Appeal to adopt it.

---

115 See above these reasons at [68]-[71].

116 (2004) 41 MVR 196 at 208 [58].

GLG submitted that the Court of Appeal had the power to grant leave to file a cross-claim pursuant to that Court's powers under the *Supreme Court Act* 1970 (NSW), s 75A(5) and (6). GLG also submitted the Nominal Defendant suffered no prejudice by leave being granted to file such a cross-claim since it would only formalise the real dispute between the parties, as it had emerged in the trial and on appeal. I am unconvinced that, in the substance of the matters litigated and in the procedures adopted by the Court of Appeal, any procedural unfairness or legal error arose in the course that the Court of Appeal adopted.

118 *Orders made within power*: Similarly, the conclusions arrived at by the Court of Appeal as to costs and as to interest were open to it. They arose within that Court's large statutory powers both to award costs, having regard to the responsibility of the parties for such costs, and to provide for an order for interest, as s 83A of the *District Court Act* permitted.

119 In each case, the obligations of the Nominal Defendant to pay costs and interest rest not, as such, on duties inherited from CIC as the statutory insurer of GLG under the Act but because the Nominal Defendant became a litigant successively before the District Court and the Court of Appeal. It was liable, as such, to orders made by the Court of Appeal within its powers, in disposing of an appeal, to deal with ancillary questions such as interest and costs. In the case of this Court, analogous questions have arisen in respect of the power to make orders in relation to costs. Such questions have been decided in ways similar to the approach taken by the Court of Appeal here[117]. Although the respective powers are not identical, the point of principle is the same.

120 No error has been shown in respect of the orders for costs or interest. So far as the merits of those orders were concerned, they were fully justified by the reasons given by Hodgson JA in the Court of Appeal.

Orders

121 The appeal should be dismissed with costs.

---

117 Cf *Re McJannet; Ex parte Australian Workers' Union of Employees (Q) [No 2]* (1997) 189 CLR 654 at 656-657; *De L v Director-General, NSW Department of Community Services [No 2]* (1997) 190 CLR 207 at 220-222; *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645 at 660 [41]-[44]; *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397 at 421 [63].

39.