

Consent judgments allow plaintiffs another bite of the cherry

Newcrest Mining Ltd v Thornton [2012] HCA 60

Insurance Update

The High Court recently held by a majority of 3 – 2, that the restriction under section 7(1)(b) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) ("the Act") on the sum recoverable by a plaintiff who obtains multiple judgments in respect of the same damage, as a result of a tort, does not extend to consent judgments.

The legislation:

Section 7(1) of the Act deals with a plaintiff's right to pursue multiple tortfeasors for the same damage.

Section 7(1)(b) of the Act provides a restriction on the sum recoverable by a plaintiff who obtains multiple judgments in respect the same damage suffered by the plaintiff.

Specifically, the High Court considered whether the restriction in s.7(1)(b) that:

the amount recoverable by the plaintiff under the multiple judgments given must not exceed the "*amount of the damages awarded by the judgment first given*"

applied only to damages awarded by a Court following a judicial determination (i.e. judgment following a trial) or also applied to a judgment entered by the consent of the parties (i.e. a consent judgment).

Facts of the case:

In February 2004, the plaintiff was injured while working at the Telfer mine site in WA and sought workers' compensation payments from his employer.



In 2007, the plaintiff and the employer's insurer agreed to settle the plaintiff's claim, including any common law claim against the employer. However, at that stage, no common law proceedings had been commenced.

In order to give effect to the settlement, proceedings were commenced in the District Court and the employer consented to judgment being entered against it.

The terms of the settlement contained no admission of liability in respect of any cause of action. The consent judgment for \$250,000 (plus costs and disbursements) was sealed on 31 May 2007.

On 23 June 2008, the plaintiff issued a writ against the operator of the mine site in respect of the injuries arising out of the same incident. The plaintiff's particulars of damages sought damages of \$1,989,746, with a reduction for the settlement moneys received, leaving a total outstanding claim of \$1,739,746.

On 11 May 2009, the operator filed a chamber summons for summary judgment seeking to invoke s.7(1)(b) on the basis that the consent judgment prevented the plaintiff from recovering damages in excess of the amount of the consent judgment.

The decision:

Although the Court recognised that a consent judgment had the same legal effect as if it had been made after a hearing by judge, the Court held that a consent judgment did not impute any finding by the Court as to the determination of liability.

Therefore, the amount specified in the consent judgment did not constitute "*damages awarded by the judgment*".

In reaching the decision, the Court closely examined the meaning of the word "*award*" and also considered the recent decision of the New South Wales Court of Appeal¹ which determined that "*a judgment first given*" must be one given after a judicial determination on the merits.

The Court also considered the legislative purpose of s.7(1)(b), being to avoid multiple actions draining the resources of the Court and the possibility that the plaintiff may recover more than the actual loss or damage suffered.

The Court considered that consent judgments did not contravene that purpose on the basis that:

- even without s.7(1)(b), a plaintiff that instituted multiple actions would be at risk of adverse costs orders for successive actions;
- a consent order was likely to be the product of a compromise and therefore, less than the full amount of the plaintiff's loss; and



- ordinarily, a consent judgment made little demand on the resources of the Court as the parties settled the dispute without instituting or completing a trial.

Implications of the decision:

As a result of the decision, when a plaintiff settles a claim against one tortfeasor, whether that be effected by a consent judgment or otherwise, the plaintiff is not prevented from pursuing damages greater than the amount of the settlement from another tortfeasor.

The decision breaks down the artificial distinction between a settlement “out of Court” and a settlement finalised by way of monetary judgment being recorded in the plaintiff’s favour.

A consent judgment is often used as means to resolve a personal injury claim against an employer, as the judgment operates to immediately cease the plaintiff’s entitlements for workers’ compensation payments and there is no need to finalise the settlement of the workers’ compensation claim at WorkCover WA.

In circumstances where a personal injury claim is settled by way of a consent judgment against a tortfeasor (being the tortfeasor principally responsible for the damage suffered) for less than its full liability to the plaintiff, an injustice may arise for another tortfeasor (being less responsible than the first tortfeasor), who as a result of the consent judgment would be prevented from seeking recovery from that first tortfeasor.

However, that injustice would also arise if the claim was settled against the first tortfeasor with the action being dismissed by consent.

For claims (other than personal injury claims) which are apportionable under s.5AK of the *Civil Liability Act 2002* (WA), the same injustice would not arise, as the concurrent wrongdoer would only be liable to the extent of its responsibility for the plaintiff’s damage (as opposed to being jointly and severally liable – as is the case in personal injury claims).

- Nau v Kemp & Associates Pty Ltd* (2010) 77 NSWLR 687. The WA Court of Appeal followed that NSW decision pursuant to the principle in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 on the basis that an intermediate appellate court should not depart from an interpretation placed on uniform

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