

AUSTRALIAN INSURANCE LAW ASSOCIATION
(WESTERN AUSTRALIAN BRANCH)

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THORNTON V NEWCREST MINING

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Issue

- 1 If a plaintiff obtains a consent judgment against a defendant and the judgment is paid in full can the plaintiff bring a second action to try to recover more damages from another alleged tortfeasor, or is the plaintiff restricted to bringing one and only one action? The answer, provided by the decision of the Court of Appeal in *Thornton v Newcrest Mining Pty Ltd* [2011] WASCA 92 (delivered 12 April 2011), is that the plaintiff can bring more than one action.

s.7(1)(b) *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act*

- 2 Proportionate liability does not apply to personal injury claims. A plaintiff can recover the full amount of damages from one tortfeasor. It is not a defence that the injury was contributed to by the negligence of another party.
- 3 A plaintiff is not precluded from bringing more than one action, but a series of actions might have no practical value if s7(1)(b) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) applies. Section 7(1)(b) provides that

where damage is suffered by a plaintiff as the result of a tort if more than one action is brought in respect of that damage by the plaintiff against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given.

History of Thornton case

- 4 In February 2004, at the Telfer Mine in the Great Sandy Desert, Michael Thornton was injured in a work accident. He allegedly slipped in mud caused by running water and twisted his left knee.
- 5 In 2007 he sued his employer Simon Engineering Pty Ltd for damages for negligence. His claim was settled. On 31 May 2007 a consent judgment in his favour was entered against the employer. Newcrest Mining Pty Ltd, the owner and operator of the mine site, was not a party to that action. The judgment sum was made up of workers' compensation already paid and an additional sum of \$250,000. It was later paid in full.
- 6 More than a year after the settlement, on 23 June 2008, Thornton commenced a second action for damages for the same injury from the same incident. The second action was brought against Newcrest Mining. After it had entered an appearance in the action Newcrest Mining applied for summary judgment.
- 7 The question for the Court was whether s7(1)(b) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) precluded the plaintiff from proceeding with the second claim. The answer of the District Court was a clear "yes". The summary judgment application was allowed by a Deputy Registrar, and affirmed on 30 April 2010 by (as he then was) His Honour Judge Mazza of the District Court. The second action was dismissed.

- 8 Mr Thornton launched an appeal to the Court of Appeal, which ultimately succeeded. The decision of the District Court was overturned. The Court of Appeal ordered that the summary judgment application be dismissed.
- 9 On appeal Newcrest Mining submitted, unsuccessfully, that it was the intention of Parliament in enacting s7(1)(b) to prevent a claim such as Mr Thornton's claim unless the first judgment was unsatisfied. The difficulty for Newcrest Mining was that about two and a half months after the judgment of His Honour Judge Mazza the New South Wales' Court of Appeal delivered judgment in a case called *Nau v Kemp & Associates* [2010] NSWCA 164; [2010] Aust Torts Reports 82-064. The New South Wales decision favoured Mr Thornton's position.

Application of s7(1)(b)

- 10 Section 7(1)(b) applies if four elements are satisfied:
- 10.1 Damage was suffered by the plaintiff as the result of a tort;
 - 10.2 More than one action has been brought in respect of that damage by or on behalf of the plaintiff against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise);
 - 10.3 A sum was recoverable under the first judgment by way of damages;
 - 10.4 An amount of damages was awarded by the first judgment.
- 11 If those elements are satisfied then the sums recoverable under the judgments given in the actions are not allowed to exceed in the aggregate the amount of the damages awarded by the first judgment. Accordingly if the first judgment has been satisfied no further judgment can be obtained.
- 12 The appeal by Mr Thornton proceeded on the basis that the only element in issue was whether, in the first action, an amount of damages was awarded by the first judgment. The judgment did not follow a trial and an assessment by the trial Judge. It was a consent judgment that gave effect to a settlement.

Nau v Kemp & Associates

- 13 In *Nau v Kemp & Associates* the New South Wales' Court of Appeal held that under the equivalent legislation in New South Wales' (s5(1)(b) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW)) damages ordered to be paid under a judgment entered by consent are not 'awarded' and that that the term 'damages awarded' applied only to a case where the court had assessed the quantum of those damages and not to a judgment entered by consent order: [28], [75], [101], [110] per McColl JA, [204]-[230] per Campbell JA and [258]-[269] per Sackville AJA. This outcome was reached primarily by reliance upon dictionary definitions of the word 'award'.
- 14 In *Thornton*, on appeal, Newcrest Mining acknowledged the requirement that intermediate appellate courts and trial judges in Australia should not depart from decisions of intermediate appellate courts in another jurisdiction on the interpretation of uniform national legislation unless they are convinced that the interpretation is plainly wrong: *Australian Securities Commission v Marlborough Gold Mines Ltd* [1993] HCA 15; (1993) 177 CLR 485; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 ; (2007) 230 CLR 89, at [135]; *Waller v Waller* [2009] WASCA 61 [40].
- 15 However Newcrest Mining argued that the decision in *Nau v Kemp & Associates* should not be followed and applied in Western Australia because:
- 15.1 It was not a decision on uniform national legislation;
 - 15.2 There were considerations relevant to Western Australia that enabled the case to be distinguished; or
 - 15.3 It was wrong.
- 16 The Court of Appeal in *Thornton* delivered a joint judgment. They acknowledged that Section 7(1)(b) was identical to provisions in only three other States in Australia. Despite that acknowledgement they held, at [16]:

“Thus although the legislation under consideration here is not uniform throughout the nation, the fact that it is the same in four Australian jurisdictions warrants similar treatment in those jurisdictions. As a result, this court should follow the ratio in *Nau v Kemp* unless it is plainly wrong.”

- 17 The appeal was therefore treated as one that sought to establish that *Nau v Kemp* was ‘plainly wrong’. The issue was whether a judgment by consent ‘awarded’ damages.

Was *Nau v Kemp* wrong?

- 18 In *Thornton* the argument that *Nau v Kemp* should not be followed was put on three grounds:

18.1 The judges in *Nau v Kemp* did not examine the relevant rules of Court to see whether they threw any light on the nature of a judgment by consent. In Western Australia a judgment by consent has the same force and validity as if it had been made after a hearing by the Court: RSC O43 r.16(3);

18.2 The decision found no support in the *UK Law Revision Committee Third Interim Report*; that led to English legislation that was the precursor to the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) and the *Law Reform (Contributory Negligence and Tortfeasors’ Contribution) Act 1947* (WA);

18.3 The Court of Appeal in *Nau v Kemp* relied on dictionary definitions, but dictionary definitions supported the conclusion that a consent judgment ‘awarded’ damages because they were bestowed by judicial decree.

- 19 The Court of Appeal in *Thornton* said that the “submissions [for Newcrest Mining] rehearsed arguments which were unsuccessfully advanced by the respondent in *Nau v Kemp*, and which were rejected by the court of appeal in that case.”: [27]. They were clearly not a rehearsal. A “rehearsal” occurs before, and not after, the main event. The Court appears to have meant to say the arguments in *Nau v Kemp* were repeated in *Thornton*.

- 20 In its reasons for decision the Court did not expressly address the second submission. It addressed and rejected the first submission and third submission. It also said that a further submission was made which it rejected.

Equating a judgment by consent with one following a hearing

- 21 As to the first submission, that a judgment by consent has the same force and validity as a judgment after a hearing, the Court said, at [28]:

“That was an argument presented by the respondent in *Nau v Kemp*. Campbell JA correctly said that while that was 'undoubtedly correct', it did not answer the question of whether a consent judgment was one by which damages were 'awarded' [206]. The respondent's argument does not establish that the decision was plainly wrong.”

Dictionary definitions

- 22 *Nau v Kemp & Associates* two appeal Judges, Campbell JA and Sackville JA, based their judgments on dictionary definitions of the word ‘award’.
- 23 Those definitions however included the Macquarie Dictionary’s ‘to bestow by judicial decree’: [209]-[210] per Campbell JA. That definition was, Newcrest Mining submitted, sufficient to extend the phrase ‘damages awarded’ to damages ordered to be paid by judgment entered pursuant to a consent order.
- 24 The Court of Appeal in *Thornton* put Newcrest Mining’s submissions in these terms, at [28]:

[That] the express statement by Sackville AJA [261] and the implicit conclusion of McColl JA [103] and [104] and Campbell JA [207]-[210], that the language in s5(1)(b) (s7(1)(b) of the Act) is ambiguous, is wrong. The respondent submitted that just because the word 'award' has different meanings, this did not make the word 'award' ambiguous, as the members of the court held in *Nau v Kemp*. The appellant argued that the different dictionary meanings would apply depending upon the particular circumstances. Thus it was argued that if a consent judgment is entered then the judgment will award, that is, 'bestow' damages by 'judicial decree' (see Macquarie Dictionary definition 2), and when judgment is entered following a trial then judgment will award, that is, 'adjudge to be due' (Macquarie Dictionary definition 1) such damages.

- 25 The Court’s response to the submission, as summarised by the Court, at [28] was:

“The respondent's contention that a consent judgment will award, that is, 'bestow' damages will not always be correct. An example will suffice to illustrate this. It is

not uncommon for a defendant, confident that it can successfully defend the plaintiff's claim, to settle, not because it fears being found liable, but because it apprehends that if it fights the case to victory it will incur substantial costs to achieve success, only to find that the costs cannot be recovered from the impecunious plaintiff. It is not uncommon for defendants, in those circumstances, to offer to settle for a sum equivalent to a fraction of the costs it knows it will incur if it participates in the trial; or the defendant may simply agree to pay the plaintiff's costs up to that date. Settlement whereby the defendant pays a sum to dispose of the litigation and agrees to a consent judgment calculated in such fashion will not, in ordinary language, be an agreement to a judgment which 'bestows' damages. To decide whether the consent judgment 'bestowed' damages or not would therefore involve an inquiry. There is nothing in the section which suggests that the court should be required to embark on an inquiry into what was the purpose of the agreement which led to the consent judgment."

- 26 There may well be cases where a judgment does not "bestow" damages. In *Thornton* however that was not an issue. It is reasonable to conclude, without any difficult inquiry, that a substantial sum paid to settle a claim for damages for an injury is "damages".

Law Revision Committee report

- 27 The second submission by Newcrest Mining, that the decision found no support in the *UK Law Revision Committee Third Interim Report*, was not expressly addressed by the Court of Appeal in *Thornton*. The Court however stated that Campbell JA in *Nau v Kemp* reviewed the historical background to the New South Wales provision but was not greatly assisted by extrinsic materials including the report of the Law Revision Committee.

Further submissions

- 28 The Court of Appeal in *Thornton* also attributed to Newcrest Mining an argument that that if the word 'judgment' in s7(1)(a) refers to a consent judgment then it must have the same meaning in s7(1)(b). The Court concluded that this argument did not demonstrate that *Nau v Kemp* was plainly wrong: [28].

Conclusion

29 The decision of the Court of Appeal in *Thornton* permits a plaintiff, in theory, to pursue a damages claim in stages by a series of successive actions against a number of defendants. This will likely prove to be of practical significance in workplace injury cases where plaintiffs often sue employer, contractor and builder or principal.

30 The case did not decide whether:

30.1 The plaintiff will recover additional damages in a later action, or recover damages at all;

30.2 Satisfaction of a judgment obtained by consent renders the defendant immune from proceedings for contribution by the defendant in the second action.

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