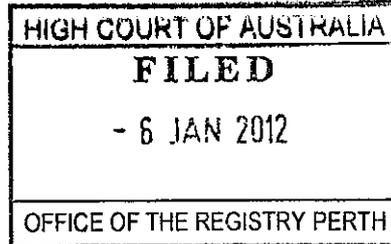


BETWEEN

and



NEWCREST MINING LIMITED

Appellant

MICHAEL EMERY THORNTON

Respondent

APPELLANT'S SUBMISSIONS

PART I: Internet publication

1 These submissions are in a form suitable for publication on the Internet.

PART II: Issues

2 Does the restriction in paragraph 7(1)(b) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 (WA)* ("the Act") that sums recoverable under judgments given in multiple actions by way of damages "...shall not in the aggregate exceed the amount of the damages awarded by the judgment first given..." apply only to damages awarded by a court following a judicial assessment, or does it also apply to a judgment entered by a court of record by the consent of the parties?

3 In answering the above question, an issue that arises is whether the decision of the New South Wales Court of Appeal in *Nau v Kemp & Associates* (2010) 77 NSWLR 687 on equivalent NSW legislation, which the Court below felt obliged to follow, is correct, particularly in circumstances where neither intermediate court considered the effect of the decision of this Court in *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53 and the injustice that would be engendered for a subsequently sued defendant in the position of the appellant by the effect of the newly created position on para 7(1)(b) of the Act combined with the existing position explained by this Court in relation to para 7(1)(c). That injustice is not only allowing the suit to proceed for the purposes of para 7(1)(b) despite the consent judgment and the appellant's inability to do anything about it as a stranger to the litigation, but also thereby placing that defendant in a position, because of the effect of para 7(1)(c), where it would be unable to seek contribution from the tortfeasor that had settled.

PART III: Section 78B of the *Judiciary Act* 1903 (Cth)

4 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act* 1903 (Cth) should be given with the conclusion that it is not necessary.

PART IV: Citations

5 The reasons for judgment of Deputy Registrar Hewitt are reported at (2009) 67 SR (WA) 63. The reasons for judgment of Mazza DCJ are not reported. The Internet citation is [2010] WADC 61. The reasons for judgment of the Court of Appeal of the Supreme Court of Western Australia are also not reported. The Internet citation is [2011] WASCA 92.

PART V: Facts

10 6 The respondent allegedly suffered injuries to his left leg in a workplace accident that occurred at the Telfer mine site. He was not employed by the appellant, but by Simon Engineering Pty Ltd (“**Simon Engineering**”). In 2004, the respondent issued a writ against Simon Engineering claiming damages for negligence and/or breach of statutory duty to compensate him for his injuries, which he suffered in the course of his employment. That action was settled, and a consent judgment for \$250,000 in addition to workers’ compensation payments and costs was entered on 31 May 2007: (CA [2]).

7 The consent judgment was, relevantly, in the following terms (CA [2]):

It is this day adjudged that judgment be ... entered for the Plaintiff against the Defendant for the sum of \$250,000 exclusive of weekly payments made to date ... plus legal costs ...

8 Simon Engineering satisfied the judgment: (CA [3]).

9 In the following year, the respondent issued a writ of summons against the appellant. The appellant was the owner and operator of the mine site. The respondent sought damages from the appellant for the same injury, based on an alleged failure to provide a reasonably safe worksite and because of the alleged failure by the site nurse employed by the appellant to treat the respondent’s injuries properly: (CA [4]).

10 If the appellant was liable, then the appellant and Simon Engineering were concurrent tortfeasors: (CA [4]).

11 In his filed particulars of damage, the respondent reduced the damages claimed against the appellant by \$250,000 on account of “settlement monies received”: (CA [5]).

12 On 11 May 2009, the applicant applied to Deputy Registrar Hewitt of the District Court of Western Australia for summary judgment pursuant to O 16 of the *Rules of the Supreme Court* 1971 (WA). The Deputy Registrar granted the application on the ground that the

respondent had already been compensated for his injury by the consent judgment with Simon Engineering and para 7(1)(b) of the Act precluded the recovery of further damages from the respondent: (CA [6]).

13 The respondent appealed to Mazza DCJ in the District Court of Western Australia against the order for summary judgment. That appeal proceeded by way of a hearing de novo: (CA [7]). Mazza DCJ dismissed the respondent's appeal on the basis that the "position was so clear" that the respondent's writ was frivolous or vexatious because para 7(1)(b) of the Act applied and any success on the writ would be of no value: (Mazza DCJ [35]-[36]).

14 The respondent's appeal to the Court of Appeal of the Supreme Court of Western
10 Australia was successful. That Court (Pullin and Murphy JJA, Murray J) decided to follow the decision of Court of Appeal of the Supreme Court of New South Wales in *Nau v Kemp*, despite disagreeing with aspects of the reasoning, on the basis that it was not plainly wrong when it decided that the equivalent NSW legislation did not treat consent judgments as "awarding damages by judgment": (CA [29]).

PART VI: Argument

15 It is well understood that the provisions of sub-section 7(1) of the Act and its equivalents, stemming as they do from sub-section 6(1) of the *Law Reform (Married Women and Tortfeasors) Act 1935* (UK), have not "...yielded any clear answer to those who have sought in its terms solutions of the not inconsiderable number of problems that arise from its
20 operation": *Bitumen & Oil Refineries (Aust) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200 at 211-212. The present issue stems from, with respect, a failure by the intermediate court in *Nau v Kemp* and in the present proceedings to appreciate the full context of the "hard" case that was presented by the problem before them of reconciling the existing interpretation of the other sub-paragraphs of the legislation with the immediate question presented cf *James Hardie* at 60-61 [11] per Gaudron and Gummow JJ.

16 Paragraph 7(1)(b) of the Act provides:

(1) Subject to Part 1F of the *Civil Liability Act 2002*, where damage is suffered by any person as the result of a tort –

...

30 (b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered ... 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: and in any of those actions, other

than that in which the judgment is first given, the plaintiff shall not be entitled to costs unless the Court is of the opinion that there was reasonable ground for bringing the action.

...

17 Sub-section 7(1) of the Act has relevantly identical analogues in New South Wales, Queensland and the Northern Territory, see *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), sub-s 5(1); *Law Reform Act 1995* (Qld), sec 6; *Law Reform (Miscellaneous Provisions) Act 1956* (NT), sec 12.

18 The narrow question upon which this case, and *Nau v Kemp*, turned was whether the
10 phrase "...damages awarded by the judgment first given..." in para 7(1)(b) is apt to include within its scope the entry of judgment by consent, or whether, for some reason, the legislative language compels the result that consent judgments should be treated differently than they would ordinarily be, and should stand outside the statute, deprived of their usual equivalent force and effect to a judgment entered after a judicial assessment of the merits.

19 In circumstances where the NSW Court of Appeal in *Nau v Kemp* accepted that the meaning of the NSW equivalent of para 7(1)(b) of the Act was ambiguous, there is no reason to deprive a consent judgment of the force and effect that it would normally enjoy, not only generally in the law, but specifically in relation to paras 7(1)(a) and 7(1)(c) of the same
20 legislation. To hold that the word "award" means "after a judicial determination on the merits" because such a construction, although not inevitable, would better promote the purposes of the legislation is not, with respect, sound.

20 The reasoning of the three judges in *Nau v Kemp* was lengthy and disparate, but the relevant present issue was only part of what was before them. Justice McColl had as the basis of her reasoning the view that the legislation should be construed so as not to discourage the settlement of actions and that a sum received by way of consent judgment might not reflect the full amount of the plaintiff's loss: 704-705 [75]-[79]. In reaching that decision, not only did her Honour (in common with all the judges) not consider the relevant effect of *James Hardie*, but she relied on the reasoning of this Court in *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635 on the deed of settlement aspect of that case to support her interpretation of para 5(1)(b),
30 notwithstanding the fact that the two issues in *Baxter* were clearly identified by this Court as being separate.

21 Justice Campbell accepted that the phrase "damages awarded by the judgment first given" was ambiguous but that he had a preference for the view that it required active judicial assessment from his reading of the dictionary definitions of "award", and his Honour was

assisted in reaching that conclusion by the policy consideration supposedly expressed in *Baxter v Obacelo* that a settlement may not reflect full compensation for the plaintiff and settlements should not be discouraged. However, had his Honour considered the consequences of *James Hardie* it would, it is suggested with respect, cast a different complexion on the purported injustice of discouraging settlements. Sackville AJA agreed with Campbell JA that the provision had the potential to cause hardship to the plaintiff if it applied to consent judgments.

22 All that this construction promotes is a multiplicity of actions, which the legislation should be reducing, and was an aim of this paragraph: *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635 at 651-652 [31]-[32] per Gleeson CJ and Callinan J. A plaintiff is, on the reasoning
10 applied in the Court below, free to adopt a scatter gun approach to litigation against potential concurrent tortfeasors, knowing full well that a consent judgment procured will be no bar to further pursuing others, and always seeking to improve their position with each defendant.

23 Moreover, as will be discussed below, the lack of appreciation for the injustice caused to the subsequent defendant caused the intermediate courts to view the issue through the prism only of potential injustice to plaintiffs, without a recognition of the real, concrete injustice that would be suffered by the unaware subsequent defendant by allowing this interpretation to prevail and act in concert with *James Hardie*.

24 Too much is made of the word “awarded” (and with an incorrect conclusion) without proper consideration being given to the pervasiveness with which consent judgments stand in
20 the same position as a judgment arising from judicial determination on the merits. The terms of the present consent judgment, that the matter has been “adjudged”, are no different than the consent judgment in *Chamberlain v Deputy Federal Commissioner of Taxation* (1988) 164 CLR 502. Equally, for the purposes of legislation, a person can be found to have been “held liable by a judgment” to a certain quantum on a consent judgment: *Aer Lingus plc v Gildacraft Ltd* [2006] 2 All ER 290 (EWCA). There is never a concern expressed that consent judgments entered by the Court speak of the matter having been “adjudged” or the person “held liable” even though there has not been a hearing. Further, there is no reason why a consent judgment should not be thought to have “awarded” damages. In the United States, consent judgments are commonly spoken of as “awarding” damages: see e.g. *Leventhal v American Discount Corporation* 11 Mass App Ct 959 (1981); *Kirkley v Jones* 250 Ga App 113 (2001). Further,
30 the Supreme Court of the United States, in construing the phrase “prevailing party” for the purposes of awarding costs to a litigant under legislation (displacing the normal American rule that each party pay its own costs) because someone has been successful in securing damages has seen no difference between a judicial determination on the merits or a settlement agreement

enforced through a consent decree: *Buckhannon Board & Care Home Inc v West Virginia Department of Health and Human Resources* 532 US 598 (2001). An arbitral “award” produced by consent has also been considered efficacious: *Haydock v Goodier* [1921] 2 KB 384.

25 Also, whilst the Court in *Nau v Kemp* did not appear to think that a consent judgment was a product of a “judicial decision” see e.g. 716 [132], this Court in *Amaca Pty Ltd v New South Wales* (2003) 199 ALR 596 at 600 [18]; 77 ALJR 1509 described a judicial determination in the context of the legislation as being by consent or otherwise. The intermediate courts dealing with the present issue did not consider that, but more importantly,
10 did not consider the relevance of the fact that a person in the position of the present appellant is ignorant of the proceedings and unable to avail themselves of a right to be heard in opposition to the entry of consent judgment. Indeed, in the present case, the consent judgement between the respondent and Simon Engineering was executed before the writ of summons against Simon Engineering was even filed. Therefore, a person in the position of the appellant would have no realistic hope of being heard in opposition to such a process.

26 The Second Reading Speech that introduced the NSW provision (Parliamentary Debates, Legislative Assembly, 20 March 1946, 2806 at 2808-2809) gave the reason for the introduction of the provision that it was a limitation on “the power that is given a plaintiff to sue a second defendant, where he has recovered judgment against the first”. The concern is not
20 with a court “awarding” the damages but to ensure that the previous position that obtained at common law with respect to joint tortfeasors was eradicated *viz* that even if a plaintiff did not recover judgment he or she would still be unable to pursue others. It is also worth remembering that the legislation removed a common law right in respect of *concurrent* tortfeasors (such as was alleged in the present case), where before its enactment an entry of judgment in an action against one concurrent tortfeasor was no bar to a plaintiff pursuing actions against other concurrent tortfeasors: *Bryanston Finance Ltd v de Vries* [1975] QB 703 at 730. The provision is certainly not beneficial in respect of the “rights” of plaintiffs pursuing concurrent tortfeasors.

27 There is also no reason why consent judgments should be recognised under para 7(1)(c)
30 but not under para 7(1)(b). The two paragraphs of the same sub-section should be construed harmoniously. Consent judgments have been held effective by this court to satisfy para (c) on both its first limb of “any tortfeasor liable”: *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 616-617 per Gummow J; and in respect of the second limb “tortfeasor who is, or would if sued have been, liable”: *James Hardie & Co Pty Ltd v Seltsam Pty Ltd*

(1998) 196 CLR 53 at [41] per Gaudron, Gummow and Callinan JJ. Likewise, consent judgments satisfy “liability” for the purposes of para (a).

28 The reasoning of the three members of the Court of Appeal of New South Wales in *Nau v Kemp* was disparate. As the Court below held at [25], one of its central planks lacked cogency, that an alternate construction would discourage settlement. Indeed, the focus should be on the very opposite, the discouraging of multiple actions to force settlements.

29 Once it is accepted that properly advised parties will not be discouraged from settling, it starkly brings into focus the real injustice created. The decision of this Court in *James Hardie* has the result that the appellant would never be able to pursue Simon Engineering for contribution. This applies in any case, even if the plaintiff has deteriorated between the first and second suit, increasing his or her damages, and in any contribution action the first defendant would have been held to have had greater responsibility for the damage to the plaintiff. The second defendant will never be justly compensated for the burden it may now have to bear, because it may never seek contribution from the first defendant. If the first defendant settled before the nature of the plaintiff’s injuries had been fully realised, or their scope properly understood, a subsequent defendant may bear an unjust burden by paying a wholly disproportionate amount of the plaintiff’s damages. Further, as mentioned above, a defendant in the position of the appellant had no opportunity to be heard or avoid the result as it was not on notice of the claim, let alone the consent judgment, against Simon Engineering.

30 30 This drastic consequence of depriving consent judgments of their usual operation defeats equality between debtors (where one debtor has the relevant knowledge and power) where, properly advised, there will be no injustice suffered by the relevant plaintiff.

31 It is of importance that the intermediate judgments overturned a practice in the District Courts of both jurisdictions where the judges of those Courts who are exposed on a daily basis to the nature of this type of legislation must have seen its purpose as being promoted by equivalent recognition being given to the entry of judgment by consent as to that of a judicial assessment of damages.

32 Indeed, there is dicta in England and Wales (not referred to in the intermediate courts) on the pre-amended and therefore analogous legislation in that jurisdiction that consent judgments will not preclude subsequent actions for contribution against concurrent tortfeasors: *Dutton v Bognor Regis UDC* [1972] 1 QB 373 at 399 per Sachs LJ. The same result is reached in the American States as a matter of policy (of course, in the absence of analogous legislation, but the policy point remains relevant) see e.g. *Michelucci v Bennett* 335 NYS 2d 967 (1972) (New York); *Blanchard v Wilt* 410 Pa 356 (1963) (Pennsylvania); *Henry Fuel Co v*

Whitebread 236 F 2d 742 (1956) (District of Columbia); *State Farm Mut Auto Ins Co v Continental Cas Co* 264 Wis 492 (1951) (Wisconsin).

33 That course of authority establishes that even if the unproven assertion that this position discourages early settlements is correct (which the appellant submits the Court below rightly disagreed with), that such vague assertions should not be valued above equality of debtors, with a subsequent defendant suffering the burden of facing the risk of disproportionate responsibility for the injury.

34 Indeed, the very present problem is that this position cannot pertain in the relevant States of this country because of the decision of this Court in *James Hardie*. In circumstances
10 where the third sub-paragraph of the legislation compels that result, it is unfair to promote a view of the second sub-paragraph that leaves a subsequent defendant in the position of the appellant exposed to such a dramatic risk, as a result of decisions made by the plaintiff and the original defendant/s without notice to the subsequent defendant, especially where giving consent judgments their usual effect creates no relevant injustice for the plaintiff.

PART VII: Legislation

Law Reform (Contributory Negligence & Tortfeasors' Contribution) Act 1947 (WA), sec 7

Civil Liability Act 2002 (WA), Part 1F

Law Reform (Miscellaneous Provisions) Act 1946 (NSW), sec 5

Law Reform Act 1995 (Qld), sec 6

20 *Law Reform (Miscellaneous Provisions) Act* 1956 (NT), sec 12

PART VIII: Orders sought

1. Appeal allowed with costs.
2. Set aside the orders of the Court of Appeal of the Supreme Court of Western Australia made on 12 April 2011 and, in their place, order that the appeal to that Court be dismissed with costs.

Dated 6 January 2012



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Western Australia

**Law Reform (Contributory
Negligence and Tortfeasors'
Contribution) Act 1947**

Reprint 3: The Act as at 3 June 2011

Part 3 — Contribution between tortfeasors

[Heading inserted by No. 19 of 2010 s. 46(3).]

7. Rules applicable if there are 2 or more tortfeasors

- (1) Subject to Part 1F of the *Civil Liability Act 2002*, where damage is suffered by any person as the result of a tort —
 - (a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage;
 - (b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent or child of that person, 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: and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action;
 - (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is or would if sued have been liable in respect of the same damage whether as a joint tortfeasor or otherwise but so that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability for which contribution is sought.
- (1A) A person shall be entitled to be indemnified within the meaning of subsection (1)(c) —
 - (a) if his complicity in the tort arose from fraud or misrepresentation practised on him by the person from

s. 7

- whom the indemnity is sought so that he honestly believed and had no reasonable cause to suspect the truth of the matters represented to him and would not have been liable in tort if such matters had been true;
- (b) where the act was not clearly illegal or tortious in itself and the person seeking indemnity had no knowledge when the tort was committed of the true legal character of the act;
- (c) where he is responsible on grounds of vicarious liability as for example in the case of master and servant or as a member of a partnership where the act was done without his connivance, knowledge or express authority.
- (1B) Except in the case of an indictable offence arising out of some negligent act or omission, no contribution may be claimed by a person who is responsible for damages in tort if in the circumstances of the case he is or might be found guilty of any indictable offence (including an indictable offence punishable on summary conviction).
- (2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.
- (3) For the purposes of this section —
- (a) the expressions *parent* and *child* have the same meanings respectively as they have for the purposes of the Fatal Accidents Act;
- (b) the reference in this section to the *judgment first given* shall, in a case where that judgment is reversed on appeal, be construed as a reference to the judgment first given which is not so reversed and, in a case where a

judgment is varied on appeal, be construed as a reference to that judgment as so varied.

[Section 7 amended by No. 58 of 2003 s. 14; No. 19 of 2010 s. 51.]



Western Australia

Civil Liability Act 2002

As at 01 Mar 2011

Version 03-g0-00

Extract from www.slp.wa.gov.au, see that website for further information

Part 1F — Proportionate liability

[Heading inserted by No. 58 of 2003 s. 9.]

5AI. Terms used

In this Part —

apportionable claim means —

- (a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care (but not including any claim arising out of personal injury); or
- (b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 2010* based on misleading or deceptive conduct;

concurrent wrongdoer, in relation to a claim, means a person who is one of 2 or more persons whose act or omission caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

[Section 5AI inserted by No. 58 of 2003 s. 9; amended by No. 43 of 2004 s. 6; No. 58 of 2010 s. 193.]

5AJ. Application of Part

- (1) For the purpose of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.
- (2) This Part does not apply —
 - (a) to a claim for damages of a class that is excluded from the operation of this Part by section 3A; or
 - (b) to the extent that its operation is excluded, modified or restricted in accordance with section 4A.

s. 5AJA

- (3) This Part applies only to causes of action that accrue after the commencement of the *Civil Liability Amendment Act 2003* section 9.
- (4) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

[Section 5AJ inserted by No. 58 of 2003 s. 9; amended by No. 43 of 2004 s. 7.]

5AJA. Certain concurrent wrongdoers not to have benefit of apportionment

- (1) Nothing in this Part operates to limit the liability of a concurrent wrongdoer (an *excluded concurrent wrongdoer*) in proceedings involving an apportionable claim if —
 - (a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim;
 - (b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim; or
 - (c) the civil liability of the concurrent wrongdoer was otherwise of a kind excluded from the operation of this Part by section 3A.
- (2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.
- (3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Part.

[Section 5AJA inserted by No. 43 of 2004 s. 8.]

5AK. Proportionate liability for apportionable claims

- (1) In any proceedings involving an apportionable claim —
 - (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss; and
 - (b) the court may give judgment against the defendant for not more than that amount.
- (2) If proceedings involve both an apportionable claim and a claim that is not an apportionable claim —
 - (a) liability for the apportionable claim is to be determined in accordance with the provisions of this Part; and
 - (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.
- (3) In apportioning responsibility between defendants in the proceedings —
 - (a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and
 - (b) the court is to have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.
- (4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.
- (5) A reference in this Part to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rules of court or otherwise.

[Section 5AK inserted by No. 58 of 2003 s. 9.]

s. 5AKA

5AKA. Duty of defendant to inform plaintiff about concurrent wrongdoers

- (1) If—
- (a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the *other person*) may be a concurrent wrongdoer in relation to the claim;
 - (b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about—
 - (i) the identity of the other person; and
 - (ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim;
- and
- (c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim,

the court hearing the proceedings may order that the defendant pay all or any of those costs to the plaintiff.

- (2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.

[Section 5AKA inserted by No. 43 of 2004 s. 9.]

5AL. Contribution not recoverable from defendant

- (1) A defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim—
- (a) cannot be required to contribute to the damages or contribution recovered from another concurrent wrongdoer in respect of an apportionable claim (whether or not the damages or contribution are recovered in the

same proceedings in which judgment is given against the defendant); and

- (b) cannot be required to indemnify any such wrongdoer.
- (2) Subsection (1) does not affect an agreement by a defendant to contribute to the damages recoverable from or to indemnify another concurrent wrongdoer in relation to an apportionable claim.

[Section 5AL inserted by No. 58 of 2003 s. 9; amended by No. 43 of 2004 s. 10.]

5AM. Subsequent actions

- (1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.
- (2) In any proceedings in respect of any action referred to in subsection (1) the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the damage or loss, would result in the plaintiff receiving compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff.

[Section 5AM inserted by No. 58 of 2003 s. 9.]

5AN. Joining non-party concurrent wrongdoers in the action

- (1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.
- (2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.

[Section 5AN inserted by No. 58 of 2003 s. 9.]

s. 5AO

5AO. Part does not prevent other liability or operation of other Act

Nothing in this Part —

- (a) prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable;
- (b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or
- (c) affects the operation of any Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.

[Section 5AO inserted by No. 58 of 2003 s. 9.]

Law Reform (Miscellaneous Provisions) Act 1946 No 33



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Currency of version

Current version for 19 May 2010 to date (accessed 6 January 2012 at 12:23).
Legislation on this site is usually updated within 3 working days after a change to the legislation.

Provisions in force

The provisions displayed in this version of the legislation have all commenced. See [Historical notes](#)

Responsible Minister

Attorney General

Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

File last modified 19 May 2010.

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- (b) in relation to proceedings in the Local Court in its exercise of jurisdiction under the *Civil Procedure Act 2005*, by the Governor.

Part 3 Contribution between tort-feasors

5 Proceedings against and contribution between joint and several tort-feasors

- (1) Where damage is suffered by any person as a result of a tort (whether a crime or not):
- (a) judgment recovered against any tort-feasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage,
 - (b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the spouse, brother, sister, half-brother, half-sister, parent or child, of that person, against tort-feasors liable in respect of the damage (whether as joint tort-feasors 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; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action,
 - (c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by that person in respect of the liability in respect of which the contribution is sought.
- (2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.
- (3) For the purposes of this section:
- (a) the expressions "parent" and "child" have the same meanings as they have for the purposes of the *Compensation to Relatives Act of 1897* as amended by subsequent Acts, and
 - (b) the reference in this section to "the judgment first given" shall, in a case where that judgment is reversed on appeal, be construed as a reference to the judgment first given which is not so reversed and, in a case where a judgment is varied on appeal, be construed as a reference to that judgment as so varied, and

- (c) the expression *spouse* of a person includes the de facto partner of a person at the time of his or her death.

Note. "De facto partner" is defined in section 21C of the Interpretation Act 1987.

- (3A) For the purposes of this section, where a person commits a tort and the Crown is vicariously liable under section 8 of the Law Reform (Vicarious Liability) Act 1983 in respect of that tort, the Crown and the person are joint tort-feasors.
- (4) Nothing in this section shall:
- (a) apply with respect to any tort committed before the commencement of this Part, or
 - (a1) apply so as to cause the Crown and a person in the service of the Crown to be joint tort-feasors with respect to a tort to which section 8 of the Law Reform (Vicarious Liability) Act 1983 applies committed before the day appointed and notified under section 2 (2) of the Law Reform (Vicarious Liability) Act 1983, or
 - (b) affect any criminal proceedings against any person in respect of any wrongful act, or
 - (c) render enforceable any agreement for indemnity which would not have been enforceable if this section had not been passed.
- (5) An amendment made to this section by the Miscellaneous Acts Amendment (Relationships) Act 2002 does not apply in respect of an action where the tort concerned occurred before the commencement of the amendment.

Part 4 Attachment of insurance moneys

6 Amount of liability to be charge on insurance moneys payable against that liability

- (1) If any person (hereinafter in this Part referred to as the insured) has, whether before or after the commencement of this Act, entered into a contract of insurance by which the person is indemnified against liability to pay any damages or compensation, the amount of the person's liability shall on the happening of the event giving rise to the claim for damages or compensation, and notwithstanding that the amount of such liability may not then have been determined, be a charge on all insurance moneys that are or may become payable in respect of that liability.
- (2) If, on the happening of the event giving rise to any claim for damages or compensation as aforesaid, the insured (being a corporation) is being wound up, or if any subsequent winding-up of the insured (being a corporation) is deemed to have commenced not later than the happening of that event, the provisions of subsection (1) shall apply notwithstanding the winding-up.
- (3) Every charge created by this section shall have priority over all other charges affecting the said insurance moneys, and where the same insurance moneys are subject to two or more charges by virtue of this Part those charges shall have priority between themselves in the order of the dates of



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Division 2 Proceedings against, and contribution between, tortfeasors

6 Proceedings against, and contribution between, joint and several tortfeasors

Where damage is suffered by any person as a result of a tort (whether a crime or not) the following apply—

- (a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage;
- (b) if more than 1 action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the spouse, parent, or child of that person, 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; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action;
- (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by the person in respect of the liability in respect of which the contribution is sought.

NORTHERN TERRITORY OF AUSTRALIA
LAW REFORM (MISCELLANEOUS PROVISIONS) ACT

As in force at 1 July 2010

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Part IV Proceedings against and contributions between tort-feasors

11 Interpretation

In this Part:

- (a) *parent* and *child* have the same meanings as they have in the *Compensation (Fatal Injuries) Ordinance*; and
- (b) the reference to "the judgment first given" shall, in a case where that judgment is reversed on appeal, be construed as a reference to the judgment first given which is not so reversed; and, in a case where a judgment is varied on appeal, be construed as a reference to that judgment as so varied.

12 Proceedings against and contribution between joint and several tort-feasors

- (1) This section applies where damage is suffered by a person as a result of a tort (whether a crime or not).
- (2) Judgment recovered against a tort-feasor liable in respect of the damage is not a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage.
- (3) If more than one action is brought in respect of the damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of a spouse, de facto partner, brother, sister, half-brother, half-sister, parent or child, of that person against tort-feasors liable in respect of the damage (whether as joint tort-feasors or otherwise):
 - (a) the sums recoverable under the judgments given in those actions by way of damages do not in the aggregate exceed the amount of the damages awarded by the judgment first given; and
 - (b) in any of those actions other than that in which judgment is first given, the plaintiff is not entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action.
- (4) A tort-feasor liable in respect of the damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise, but no person is entitled to recover contribution under this section from a person entitled to be indemnified by him in

respect of the liability in respect of which the contribution is sought.

- (5) Where the tort causing the damage was, or the torts causing the damage were, committed by a spouse or de facto partner of the person suffering the damage and some other person, that other person may recover contribution as mentioned in subsection (4) from a spouse or de facto partner, as if a spouse or de facto partner had been liable to the person suffering the damage.

13 Extent of contribution

In proceedings for contribution under section 12 the amount of the contribution recoverable from a person is such as is found by the court to be just and equitable, having regard to the extent of that person's responsibility for the damage, and the court has power to exempt a person from liability to make contribution, or to direct that the contribution to be recovered from a person shall amount to a complete indemnity.

14 Exemptions

Nothing in this Part:

- (a) applies with respect to a tort committed before the commencement of this Ordinance;
- (b) affects any criminal proceedings against a person in respect of a wrongful act; or
- (c) renders enforceable an agreement for indemnity which would not have been enforceable if this Part had not been enacted.

Part V Contributory negligence

15 Interpretation

- (1) In this Part:

court means, in relation to a claim, the court or arbitrator by or before whom the claim falls to be determined.

damage includes loss of life and personal injury.

dependant means a person for whose benefit an action could be brought under the *Compensation (Fatal Injuries) Ordinance*.

wrong means an act or omission that:

- (a) gives rise to a liability in the tort of negligence;