HIGH COURT OF AUSTRALIA

FRENCH CJ,
HEYDON, CRENNAN, KIEFEL AND BELL JJ

NEWCREST MINING LIMITED APPELLANT

AND

MICHAEL EMERY THORNTON RESPONDENT

Newcrest Mining Limited v Thornton
[2012] HCA 60
13 December 2012
P59/2011

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Western Australia

Representation

B W Walker QC with P Kulevski for the appellant (instructed by DLA Piper Australia)

B L Nugawela with B W Ashdown for the respondent (instructed by Chapmans)

CATCHWORDS

Newcrest Mining Limited v Thornton

Negligence – Damages – Statutory limit on recoverability of damages – Section 7(1)(b) of *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA) provides that person bringing more than one action in respect of damage suffered as the result of a tort cannot recover more than "the amount of the damages awarded by the judgment first given" – Settlement of claim against concurrent tortfeasor given effect by consent judgment – Subsequent claim brought against different concurrent tortfeasor – Whether statutory limitation on recoverability of damages applied to subsequent claim.

Words and phrases – "award", "consent judgment", "damages awarded by the judgment first given".

Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 (WA), s 7(1)(b).

FRENCH CJ.

Introduction

1 A person who has suffered damage as the result of a tort or torts and brings separate actions against tortfeasors liable in respect of the damage cannot recover more than "the amount of the damages awarded by the judgment first given". That is the substance of s 7(1)(b) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA) ("the WA Act"). It is a limit upon the recoverability of damages[1] that has been part of the law of Western Australia since 1947. Similar provisions are found in New South Wales, Queensland and the Northern Territory[2]. They were all modelled on s 6(1)(b) of the *Law Reform (Married Women and Tortfeasors) Act* 1935 (UK) ("the 1935 UK Act").

2 The question in this case is whether the limit applies when the "judgment first given" is a consent judgment in proceedings in tort and/or contract where the proceedings have been commenced and the consent to judgment filed solely to give effect to an agreement to settle the claim. The answer in this case is no. The appeal by Newcrest Mining Ltd against the decision of the Court of Appeal of Western Australia which so found should be dismissed.

Statutory framework – the section

3 Section 7 of the WA 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—
>
> (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;
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> (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

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1 *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635 at 651 [29] per Gleeson CJ and Callinan J; [2001] HCA 66.

2 *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW), s 5(1)(b); *Law Reform Act* 1995 (Q), s 6(b); *Law Reform (Miscellaneous Provisions) Act* (NT), s 12(3)(b).

> 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 grounds 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."

Factual and procedural background

4 In February 2004 the respondent, who was employed as a rigger at the Telfer mine site in Western Australia, slipped in mud and injured his knee. He claimed workers' compensation payments and common law damages from his employer at the mine site, Simon Engineering (Australia) Pty Ltd ("Simon Engineering").

5 Eventually the respondent and Simon Engineering's insurer, Allianz Australia Insurance Ltd ("Allianz") agreed to settle his claims. The terms of the settlement, set out in a letter dated 17 May 2007 from the solicitors for Allianz to the respondent's solicitor, included the following:

> "2. By consent between the parties, judgment for [the respondent] against [Simon Engineering] in the sum of $250,000.00, in addition to all payments that have been made to date pursuant to the *Workers' Compensation and Injury Management Act* 1981 ...
>
> 3. [Allianz] will make a contribution towards [the respondent's] legal costs in the sum of $10,000.00 and will pay the disbursements in the sum of $1,804.00.
>
> 4. Settlement is to be effected by way of Consent to Judgment filed and sealed at the District Court."

Enclosed with the letter was a writ of summons to be issued out of the District Court of Western Australia and a form of consent to judgment in the proceedings which were to be commenced by that writ. The terms of settlement contained no admission of liability in respect of any cause of action.

6 The writ was issued out of the District Court in the name of the respondent as plaintiff against Simon Engineering as defendant. The indorsement of claim on the writ stated:

> "The Plaintiff claims against the Defendant damages in respect of all personal injuries suffered by him arising out of or in the course of his employment with the Defendant on or around 16 February 2004 and in respect of all subsequent aggravations and/or recurrences of whatsoever nature, which injuries, aggravations and/or recurrences were caused by the negligence and/or breach of statutory duty and/or breach of contract of the Defendant."

No statement of claim was filed.

7 Contemporaneously with the issue of the writ, the consent to judgment was filed in the proceedings which it commenced. The consent to judgment was in the following terms:

> "WE THE PARTIES to this action consent to judgment being entered for the Plaintiff against the Defendant for the sum of $250,000.00, exclusive of weekly payments made to date pursuant to the *Workers' Compensation & Injury Management Act* 1981, plus legal costs in the sum of $11,804.00 inclusive of disbursements."

It was signed by the solicitors for the respondent and for Simon Engineering. Simon Engineering at that time was subject to a Deed of Company Arrangement.

8 The consent to judgment was subsequently endorsed with a statement signed by the Registrar of the District Court:

> "Order that judgment be entered accordingly",

followed by the words:

> "JUDGMENT
>
> Dated the 31 day of May 2007.
>
> Pursuant to the aforesaid order of the Registrar IT IS THIS DAY ADJUDGED that judgment being entered for the Plaintiff against the Defendant for the sum of $250,000.00 exclusive of weekly payments made to date pursuant to the *Workers' Compensation & Injury Management Act* 1981, plus legal costs in the sum of $11,804.00 inclusive of disbursements."

9 On 23 June 2008, the respondent issued a writ against the appellant and others in respect of his injuries arising out of the same incident in respect of

which he had sued Simon Engineering. The appellant had been operating the Telfer mine site. In a statement of claim filed with the writ, the respondent alleged that the appellant was negligent for failure, inter alia, to provide a safe work place and was in breach of a statutory duty said to be owed pursuant to s 9(1) of the *Mines Safety and Inspection Act* 1994 (WA). As is apparent, the appellant was sued as a "several concurrent tortfeasor"[3] with Simon Engineering albeit Simon Engineering was also sued in tort and/or contract. The appellant's alleged liability arose out of a cause of action distinct from those which the respondent had asserted against Simon Engineering. The particulars of damages claimed against the appellant and the other defendants in the proceedings amounted to $1,989,746.00. A credit was given for the settlement monies received from Simon Engineering leaving a total outstanding claim of $1,739,746.00. The particulars were filed on 31 March 2009.

10 On 11 May 2009, the appellant filed a chamber summons for summary judgment. The appellant invoked s 7(1)(b) of the WA Act. In a supporting affidavit sworn by its solicitor, the appellant referred to the consent judgment entered on 31 May 2007 against Simon Engineering and the satisfaction of that judgment by Simon Engineering's insurer. On 25 August 2009, a Deputy Registrar of the District Court ordered that the respondent's action against the appellant be dismissed with costs.

11 The respondent appealed to a judge of the District Court (Mazza DCJ) who ordered that the appeal from the Deputy Registrar's decision be dismissed with costs. The respondent then appealed to the Court of Appeal of Western Australia. That Court allowed the appeal, quashed the order of the District Court dismissing the appeal from the decision of the Deputy Registrar, and dismissed the appellant's application for summary judgment in the District Court. The appellant was ordered to pay the respondent's costs of the summary judgment application, the appeal to the District Court and the appeal to the Court of Appeal.

12 On 9 December 2011 this Court (Crennan and Kiefel JJ) granted special leave to the appellant to appeal from the judgment of the Court of Appeal.

The decision of the Court of Appeal

13 Two months after Mazza DCJ delivered his judgment in the District Court dismissing the respondent's appeal from the decision of the Deputy Registrar[4],

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3 A term which describes "independent tortfeasors whose acts concur to produce a single damage": Glanville Williams, *Joint Torts and Contributory Negligence*, (1951) at 16.

4 *Thornton v Newcrest Mining Ltd* [2010] WADC 61.

the Court of Appeal of New South Wales delivered judgment in *Nau v Kemp & Associates Pty Ltd*[5]. The Court of Appeal of New South Wales held that the term "damages awarded by [a] judgment" in s 5(1)(b) of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) ("the NSW Act"), relevantly identical to s 7(1)(b) of the WA Act, did not extend to a judgment entered by consent of the parties. The Court of Appeal of Western Australia followed the decision in *Nau v Kemp* on the basis that it was not "plainly wrong". In so doing, the Court of Appeal of Western Australia acted in accordance with what was said in this Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[6].

Consent judgments under the District Court Rules

14 The District Court Rules 2005 ("DCR"), which are made under the *District Court of Western Australia Act* 1969 (WA), provide that the Rules of the Supreme Court 1971 ("RSC") apply to and in respect of any case in the District Court[7].

15 Order 42 of the RSC provides for entry of judgment to be made in a book to be kept by the Principal Registrar at the Central Office[8]. There is a specific requirement that in any case in which a defendant "has appeared by a solicitor, no order for entering judgment shall be made by consent unless the consent of the defendant is given by his solicitor or agent"[9]. Where a defendant is self-represented no such order shall be made unless the defendant appears before a judge and gives his consent in person or unless his written consent is attested by a solicitor acting on his behalf[10]. Those rules are calculated to ensure that an informed consent is given by the defendant. They do not require any assessment by the court of the merits of the compromise underlying the order.

16 Order 43 provides for drawing up judgments and orders. Order 43 r 16 deals with consent orders. It provides that "[t]he parties to proceedings or their practitioners may file a written consent to the making of an order in those proceedings"[11]. The Registrar may "settle, sign and seal the order without any

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5 (2010) 77 NSWLR 687.

6 (2007) 230 CLR 89; [2007] HCA 22.

7 DCR, r 6(1).

8 RSC, O 42 r 1(1).

9 RSC, O 42 r 7.

10 RSC, O 42 r 8.

11 RSC, O 43 r 16(1).

other application being made in any case in which in his opinion the Court would make such an order upon consent of the parties"[12]. Alternatively, the Registrar may bring the matter before the court which, without any other application, may "direct the registrar to settle, sign, and seal the order"[13]. Order 43 r 16(3) provides:

> "The order shall state that it is made by consent and shall be of the same force and validity as if it had been made after a hearing by the Court."

17 A consent order of the kind made in this case can properly be described as an order which expresses an agreement in a more formal way than usual. It may be set aside on any ground which could invalidate the agreement[14]. It is, nevertheless, an order. However, when a consent order in favour of a plaintiff gives effect to an agreement which does not involve any admission of liability in respect of any cause of action asserted by the plaintiff, it cannot be taken as reflecting an admission of liability or as a determination of liability by the court. In this case, the consent order was an order for the payment of a money sum. Order 43 r 16(3) gives the same legal effect to such an order as an order made after a hearing in the court. That does not impute any finding to the court. In this case, the causes of action asserted in the indorsement of claim on the writ were cumulatively, and alternatively, negligence, breach of statutory duty and breach of contract. It cannot be known whether underlying the terms of settlement was an unexpressed concession as to liability in respect of any of the causes of action. That gives rise to the question whether, for the purposes of s 7(1)(b) of the WA Act, it can be said, and if so on what basis, that the consent judgment was a judgment given in an action against a tortfeasor liable in respect of the damage suffered by the respondent. The answer is in the negative. Nor can it be said that the money sums specified in the consent judgment constituted "damages awarded by the judgment" within the meaning of s 7(1)(b) of the WA Act. The latter answer is fatal to this appeal. That answer flows from the construction of s 7(1)(b) in the light of its legislative history.

Legislative history of s 7(1)(b)

18 At common law a judgment in an action against one of several joint tortfeasors was a bar to an action against the others for the same cause whether or

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12 RSC, O 43 r 16(2).

13 RSC, O 43 r 16(2).

14 *Harvey v Phillips* (1956) 95 CLR 235 at 244; [1956] HCA 27 quoting *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273 at 280 per Lindley LJ.

not the judgment was satisfied. The rule, which dates back to the beginning of the 17th century[15], was explained by Parke B in *King v Hoare*[16]:

> "[t]he judgment of a court of record changes the nature of that cause of action, and prevents it being the subject of another suit, and the cause of action, being single, cannot afterwards be divided into two".

The rule was also said to be directed against the mischief of a plaintiff who had obtained judgment against one of several joint tortfeasors thereafter bringing a multiplicity of actions against the others in respect of the same tort[17]. It was nevertheless "highly technical" and was confined to cases in which there was only one cause of action[18].

19 An unintended by-product of the common law rule, as explained by the Privy Council in *Wah Tat Bank Ltd v Chan*[19], was that[20]:

> "it prevented a plaintiff who had brought only one action against a number of joint tortfeasors from recovering final judgment, even by consent or default, against any of them without barring his right to judgment against the others".

To avoid that difficulty, settlements were given effect by a "Tomlin Order"[21] which would record the agreement of the parties in a schedule to a stay order

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15 The first reported case in which the rule was established was *Broome v Wooton* (1605) Yelv 67 [80 ER 47] cited in Glanville Williams, *Joint Torts and Contributory Negligence*, (1951) at 35-36.

16 (1844) 13 M&W 494 at 504 [153 ER 206 at 210].

17 *Brinsmead v Harrison* (1872) LR 7 CP 547 at 551 per Kelly CB, 553 per Blackburn J, Mellor J, Cleasby B and Lush J agreeing at 554.

18 *Gouldrei, Foucard & Son v Sinclair and Russian Chamber of Commerce in London* [1918] 1 KB 180 at 186 per Pickford LJ, 189 per Bankes LJ and 192 per Sargant LJ who stigmatised the rule as "highly technical" and said it should not be extended to a case involving separate causes of action.

19 [1975] AC 507.

20 [1975] AC 507 at 516.

21 Named for Tomlin J who drafted Practice Directions for such orders following his decision in *Dashwood v Dashwood* [1927] WN 276 that an agreement set out in a schedule to a consent order staying an action on the terms of the agreement was not

(Footnote continues on next page)

rather than in the terms of a consent judgment. The common law rule, it seems, was seen as applying to consent and default judgments as well as to judgments entered after trial.

20 The enactment of s 6 of the 1935 UK Act, upon which s 7 of the WA Act is modelled, followed recommendations made in the Third Interim Report of the Law Revision Committee of Great Britain published in 1934. The Report responded to a reference relating to denial of contribution between tortfeasors and the rule in *Merryweather v Nixan*[22]. However, the Committee also decided to deal with the rule that a joint tort merged in a judgment obtained against one tortfeasor, regardless of its satisfaction, with a resulting bar to recovery against other joint tortfeasors[23]. The Committee recommended, inter alia, that[24]:

> "[a] judgment recovered against one or more persons in respect of an actionable wrong committed jointly shall not, while unsatisfied, be a bar to an action against any others liable jointly in respect of the same wrong. Provided that the Plaintiff shall not be entitled to levy execution for, or to be paid, a sum exceeding, in the aggregate, the amount of the first judgment obtained against any of the persons so liable, nor to recover the costs of any subsequent action, unless the Judge before whom it is tried is of opinion that there was reasonable ground for bringing it."

The proviso in the recommendation was limited in its application to joint tortfeasors. Its implementation in s 6(1)(b) of the UK Act and s 7(1)(b) of the WA Act extended to several concurrent tortfeasors.

21 The object of the 1935 UK Act, as described by Professor Glanville Williams, was "to prevent injustice to a plaintiff who finds that the tortfeasor whom he has chosen to sue is insolvent"[25]. Relevantly to s 6(1)(b), however, he observed[26]:

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supportive of a motion for committal for contempt for non-compliance with the agreement.

22 (1799) 8 TR 186 [101 ER 1337].

23 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 611 per Gummow J; [1996] HCA 38.

24 Law Revision Committee, *Third Interim Report*, (1934) Cmd 4637 at 8.

25 Glanville Williams, *Joint Torts and Contributory Negligence*, (1951) at 39.

26 Glanville Williams, *Joint Torts and Contributory Negligence*, (1951) at 39.

> "It is no part of the policy of the Act that a plaintiff who has sued one tortfeasor, and who is dissatisfied with the assessment of his damages by the court, should be allowed to sue the other tortfeasor in the hope of obtaining a greater bite from the cherry. Accordingly it is expressly provided in s 6(1)(b) ... that the plaintiff cannot in any event recover more than the sum awarded by the judgment in the first action".

22 The limit on recoverability imposed by s 6(1)(b) was described by Professor Glanville Williams as a curtailment of the common law rights of plaintiffs. He said[27]:

> "At common law judgment against one several concurrent tortfeasor did not bar an action against another, and in the second action the plaintiff might obtain a larger judgment than in the first. In such a case the plaintiff could presumably have required payment of the whole of the second judgment if the first were unsatisfied, or, if the first were satisfied, of the amount by which the second exceeded the first. Now, by the Act, the second judgment cannot effectively be for more than the first."

The character of the limit on recoverability as a curtailment of common law rights indicates that s 7(1)(b) should not be construed so as to involve a greater incursion on such rights than is clearly mandated by the text. It is necessary now to refer more directly to the constructional question.

The construction of s 7(1)(b)

23 The limit on recoverability of tortious damages created by s 7(1)(b) is imposed when the following conditions are satisfied:

- a person has suffered damage as the result of a tort;
- more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered;
- the actions are brought against persons liable in respect of the damage (whether as joint tortfeasors or otherwise);
- an amount of damages is awarded by the judgment first given in one of those actions.

The limit imposed when those conditions are met is that the sum recoverable under any subsequent judgments given in the other actions, shall not in the

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27 Glanville Williams, *Joint Torts and Contributory Negligence*, (1951) at 39.

aggregate exceed the amount of the damages awarded by the judgment first given.

24 It follows from the text of s 7(1)(b) that the person against whom damages are awarded by the judgment first given must be a tortfeasor liable in respect of the damage suffered by the plaintiff. That requirement raises the question: what is necessary to establish that the person against whom the first judgment is awarded is in that category? What is necessary to establish that condition has some bearing on the collocation "damages awarded by the judgment first given". It was that collocation which was the focus of constructional debate in this appeal. None of the authorities cited by the parties directly resolved that debate. *Baxter v Obacelo Pty Ltd*[28], which involved a consideration of s 5(1)(b) of the NSW Act by this Court, concerned an action brought against a solicitor and his employee for professional negligence. The Court held that a settlement reached and a consent judgment entered against one of the co-defendants did not attract the application of s 5(1)(b) of the NSW Act so as to preclude recovery against the other. That was because, as the Court held, the words of s 5(1)(b) "should be given their ordinary meaning, as applying to cases where there is more than one action, that is to say, more than one proceeding"[29]. That case therefore has no direct bearing upon the constructional issue thrown up in this appeal.

25 There have been a number of decisions in this and other jurisdictions concerning the conditions necessary to establish an entitlement in one person to recover contribution from another pursuant to s 7(1)(c) of the WA Act and its equivalents elsewhere. The course of that authority in Australia is at least of analogical significance when it comes to construing s 7(1)(b) although it is necessary to bear in mind the different purposes of pars (b) and (c).

26 *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport*[30] concerned the entitlement to contribution conferred under s 5(1)(c) of the NSW Act upon "any tort-feasor liable" in respect of damage suffered by a person as a result of the tort. The criterion of liability was found to be satisfied by a verdict and judgment after trial, which it was held could be pleaded in contribution proceedings against a concurrent tortfeasor. The Court said that the term "liable" where it first occurs in s 5(1)(c) "should be held at least to include ascertainment by judgment"[31]. The Court went on to observe

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28 (2001) 205 CLR 635.

29 (2001) 205 CLR 635 at 652 [34] per Gleeson CJ and Callinan J, Gummow and Hayne JJ agreeing at 657 [52], 668 [87] per Kirby J.

30 (1955) 92 CLR 200; [1955] HCA 1.

31 (1955) 92 CLR 200 at 212.

that it might be desirable to allow the plaintiff to amend the declaration sought in its pleading "to make it clear that the recovery pleaded was for tort"[32]. The Court left open the possibility that liability for the purposes of s 5(1)(c) could be established by arbitral award or by agreement amounting to accord and satisfaction, or agreement amounting to accord executory, followed by satisfaction.

27 As subsequent dicta in this Court have made clear, the precondition of liability necessary to enliven the entitlement to contribution under s 7(1)(c) and its equivalents can be established by other than a final judgment following a contested hearing. In *Thompson v Australian Capital Television Pty Ltd*[33], Gummow J observed that the phrase "any other tort-feasor … liable" appearing in s 11(4) of the *Law Reform (Miscellaneous Provisions) Act* 1955 (ACT)[34]:

> "includes a party whose liability has been ascertained upon a settlement whether or not reflected in a consent judgment, and ... this is so whether or not in reaching the settlement the party now seeking contribution admitted liability".

His Honour, however, added the important caution, reflecting what Lord Denning MR said in *Stott v West Yorkshire Car Co*[35]:

> "Nevertheless, the party seeking contribution after such a settlement must be prepared in that proceeding to establish that, if the claim had been fought out, that party would have been held responsible in law and liable to pay in whole or in part for the damage referred to in s 11(4)."

That approach had been followed in respect of Australian legislation and in New Zealand in *Baylis v Waugh*[36]. It has also been applied in the Court of Appeal of Northern Ireland in *James P Corry & Co Ltd v Clarke*[37]. In *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd*[38], which was another case concerned with contribution

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32 (1955) 92 CLR 200 at 212.

33 (1996) 186 CLR 574.

34 (1996) 186 CLR 574 at 616.

35 [1971] 2 QB 651 at 657.

36 [1962] NZLR 44.

37 [1967] NILR 62 at 71 per Lord MacDermott LCJ, Curran LJ agreeing at 71, 79 per McVeigh LJ.

38 (1998) 196 CLR 53; [1998] HCA 78.

proceedings under s 5(1)(c) of the NSW Act, Gaudron and Gummow JJ said that[39]:

> "The reference to the right of a tortfeasor who is 'liable in respect of ... damage' to recover contribution is, as Windeyer J put it, 'to a person whose liability as a tortfeasor has been ascertained, ordinarily by judgment, perhaps in some cases in some other way'."

28 Each of the authorities mentioned was concerned with the equivalent of s 7(1)(c) and the conditions necessary to establish one person's liability for a tort which is necessary to enliven that person's entitlement to contribution from a joint or concurrent tortfeasor. None of the authorities support the proposition that liability as a tortfeasor in such cases is established simply by a consent judgment or agreement without some basis from which it may be ascertained that the liability imposed relates to a tort.

29 The character of the "judgment first given" referred to in s 7(1)(b) as a judgment against a tortfeasor liable in respect of the damage suffered by the plaintiff will not be established merely by a consent judgment reflecting an agreement to settle proceedings. Consistently with that approach, the term "damages awarded by the judgment" in s 7(1)(b) requires some connection between the debt created by the consent judgment and a tortious liability on the part of the defendant. The limit upon recoverability imposed by s 7(1)(b) is not enlivened by an agreement to make a payment in settlement of an action, even agreement involving an admission of liability[40]. It is therefore difficult to see how a consent judgment which merely gives effect to the agreement can, without more, amount to an award of damages for the purposes of s 7(1)(b). There is nothing in the procedure adopted by the Registrar of the District Court following lodgment of the consent order that requires that any consideration be given to the basis of the liability underpinning the order.

30 Section 7(1)(b) is directed to successive actions in which a plaintiff, discontented with the outcome in the first action, seeks another bite of the cherry. A consent judgment which gives effect to an agreement between the parties, a

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39 (1998) 196 CLR 53 at 65 [25] citing *Brambles Construction Pty Ltd v Helmers* (1966) 144 CLR 213 at 221; [1966] HCA 3.

40 The question whether a payment in settlement of a plaintiff's claim against one tortfeasor can be pleaded as a defence by a concurrent tortfeasor on the basis that there has been full satisfaction and that the plaintiff has been fully compensated is a distinct question outside the framework of s 7(1)(b) – see generally *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635 at 658-663 [56]-[68] per Gummow and Hayne JJ and their Honours' consideration of *Jameson v Central Electricity Generating Board* [2000] 1 AC 455.

fortiori an agreement which does not identify tort as the basis for liability, does not cross over into the area of policy concern to which s 7(1)(b) is directed. Absent a clear textual indication, it should not be so construed. As indicated earlier, s 7(1)(b) infringes the common law rights of a plaintiff to recover successively against several concurrent tortfeasors[41]. That infringement should not be broadly construed beyond what the text of s 7(1)(b) requires and beyond what is necessary to deal with the mischief to which it is directed.

31 In my opinion the Court of Appeal was correct to allow the appeal against the decision of the District Court.

Conclusion

32 The appeal should be dismissed with costs.

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41 It is not suggested that such common law rights extend to a right to recover against concurrent tortfeasors an aggregate amount exceeding full compensation for the damage suffered by the plaintiff.

33 HEYDON J. The background and the relevant legislation are set out in other judgments. This appeal concerns the construction of the words "the damages awarded by the judgment first given" in s 7(1)(b) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA) ("the Act")[42]. The appeal should be dismissed. The respondent's construction of s 7(1)(b) is correct. The quoted words do not encompass damages that a tortfeasor must pay to an injured person under a settlement which is reflected in a "consent judgment". Payment of those damages affects the quantum which the injured person may recover from other tortfeasors in later litigation, as the respondent concedes here, but it does not affect the right to bring the litigation.

34 That is so for the following reasons.

Reasons why the respondent's construction is correct

35 *Definition of "judgment first given".* First, the definition of "judgment first given" in s 7(3)(b) of the Act supports the respondent's construction of s 7(1)(b). It is:

> "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." (emphasis in original)

A consent judgment is incapable of being reversed or varied on appeal, save in exceptional circumstances. In *Nau v Kemp & Associates Pty Ltd*, McColl JA gave examples of these exceptional circumstances from the law of New South Wales. As her Honour said[43]: "the limited circumstances in which such a power might be exercised supports the proposition that 'a judgment first given' in s [7(1)(b)] must be one given after a judicial determination on the merits." Hence damages dealt with in a consent judgment are not damages *awarded* by a judgment.

36 *Dictionary meanings.* Secondly, the respondent's construction of s 7(1)(b) is consistent with ordinary English usage. The relevant meanings in *The Macquarie Dictionary* for "award" as a verb are[44]:

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42 For the whole text of s 7(1) see below at [54].

43 (2010) 77 NSWLR 687 at 696 [29].

44 *The Macquarie Dictionary*, Federation ed (2001), vol 1 at 125.

> "1. to adjudge to be due or merited; assign or bestow: *to award prizes*. 2. to bestow by judicial decree; assign or appoint by deliberate judgment, as in arbitration." (emphasis in original)

The idea of "adjudging" something as due or merited implies that a person or body will carry out the adjudging, and, after a process of analysing relevant considerations, will decide what should be awarded. It is an idea which excludes merely approving an amount of damages agreed between the tortfeasor and the injured person. That same idea is inherent in bestowing by judicial decree, or in assigning or appointing by deliberate judgment.

37 It has been said of the second meaning – "to bestow by judicial decree" – that it "is consistent with the meaning extending to a judicial decree that is the result of the consent of the parties"[45]. I respectfully disagree. To speak of money being bestowed by judicial decree implies that the maker of that decree is doing the bestowing. Makers of judicial decrees do not act arbitrarily. They act after an exercise of judicial reasoning only. Where a consent judgment bestows money it is the party with the money who bestows it, not the court.

38 Of the first meaning, which is exemplified by the expression "to award prizes", Campbell JA has said[46]:

> "Though one might say that the dignitary who hands out the prizes on a school's speech day, but has made no decision about who will receive the prizes, is 'awarding' them, that is a fairly stretched use, it would be more natural to say that he or she was 'presenting' them."

However, it would be natural to say that those who decided who would receive the prizes were "awarding" them. That ordinary meaning is inconsistent with the idea that the expression "damages awarded by the judgment first given" includes damages received by way of a consent judgment.

39 The relevant meanings in *The Macquarie Dictionary* for "award" as a noun are[47]:

> "4. *Law* a. the decision of arbitrators on points submitted to them. b. a decision after consideration; a judicial sentence. 5. Also, **industrial award**. a. the decision of an arbitrator regulating the future conduct of

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45 *Nau v Kemp & Associates Pty Ltd* (2010) 77 NSWLR 687 at 734 [210] per Campbell JA.

46 *Nau v Kemp & Associates Pty Ltd* (2010) 77 NSWLR 687 at 734-735 [210].

47 *The Macquarie Dictionary*, Federation ed (2001), vol 1 at 125.

> parties to an industrial dispute. b. the document embodying the findings of an arbitrator or industrial tribunal. c. what is awarded in terms of money, working conditions, etc, in such a document. See **consent award**." (emphasis in original)

The idea of an award being the result of a judicial decision-making process, not of the agreement of the parties, is also inherent in these meanings. It is true that the definition of "consent award" is[48]:

> "an award made by an industrial tribunal where the parties have already reached agreement on the terms of a settlement but want it to have the force of an arbitrated award and hence submit it to a tribunal for ratification."

But a "consent judgment" is only exceptionally submitted to a tribunal for ratification. For example, a "consent judgment" is submitted for ratification where infants or disabled people will be bound by it, but not generally. And the specific and specialised meaning of "consent award" does not necessarily extend to the more general expression "damages award by a judgment".

40 In *The Oxford English Dictionary*, the relevant meanings of the verb "to award" a thing are[49]:

> "1. To examine a matter and adjudicate upon its merits; to decide, determine, after consideration or deliberation.
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> …
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> 2. To determine upon and appoint by judicial sentence.
>
> …
>
> 3. To grant or assign (*to* a person) by judicial or deliberate decision; to adjudge." (emphasis in original)

Each of these meanings excludes consent judgments entered to reflect a prior agreement between litigants.

41 *Irrelevance of multiplicity problems.* Thirdly, so far as the mischief that s 7(1)(b) deals with includes the need to discourage litigants seeking damages for a particular injury in more than one trial, that mischief does not arise where the

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48 *The Macquarie Dictionary*, Federation ed (2001), vol 1 at 413.

49 *The Oxford English Dictionary*, 2nd ed (1989), vol I at 829.

parties settle a dispute without instituting or completing a trial and have their settlement recorded as a consent judgment.

The appellant's arguments against the respondent's construction of s 7(1)(b)

42 It is now necessary to deal with various arguments advanced by the appellant against the respondent's construction of s 7(1)(b).

43 *Construing s 7(1) "harmoniously"?* First, the appellant argued that in s 7(1)(c) the words "who is or would if sued have been liable" did not include a defendant who had obtained a consent judgment in its favour[50]. The appellant also argued that in s 7(1)(a) the words "any tortfeasor liable" included a defendant liable on a consent judgment. The appellant then argued that the three paragraphs of s 7(1) "should be construed harmoniously". The submission depended on a general assumption that a given expression bears the same meaning in each of the three paragraphs in s 7(1). That assumption is false.

44 Lord Reid demonstrated its falsity in *George Wimpey & Co Ltd v British Overseas Airways Corporation*[51]:

> "There are two points in subsection (1)(*a*) which should, I think, be noted. In the first place, the word 'liable' occurs twice and in each case it is clear that it must mean held liable. And secondly, in the phrase 'who would if sued have been liable as a joint tortfeasor' it appears to me that 'if sued' most probably means if he had been sued together with the tortfeasor first mentioned, because a person cannot properly be said to be held liable 'as a joint tortfeasor' if he is sued alone. If that is right, not only must the words 'if sued' here have a temporal connotation but they must refer to the time when the other tortfeasor was sued. But that conclusion depends on an assumption that the language of the provision is used accurately, and looking to the defective drafting of other parts of the subsection it would, I think, be unsafe to rely on any inference from the form of drafting of subsection (1)(*a*). With regard to subsection (1)(*b*) I need only observe that the word 'liable' is there used in a context where it cannot possibly mean held liable. The context is 'if more than one action is brought … against tortfeasors liable in respect of the damage,' and liable there can only mean against whom there is a cause of action. So on any construction of the subsection the word 'liable' must be held to have quite different meanings in different places in the subsection. I am not prepared in this case to base my decision on any inference from similarities of

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50 *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53; [1998] HCA 78.

51 [1955] AC 169 at 188-189.

> expression in either subsection (1)(*a*) or subsection (1)(*b*)." (emphasis in original)

That view was approved by the Privy Council (Lord Wilberforce, Viscount Dilhorne, Lord Kilbrandon and Lord Salmon) in *Wah Tat Bank Ltd v Chan*[52].

45 Further, each paragraph in s 7(1) relates to a different problem. Assume that before s 7(1) was enacted a plaintiff suffered damage as the result of a tort, and there are three persons who could be sued as joint tortfeasors[53]. If the plaintiff sued the first tortfeasor to judgment for damages but that tortfeasor did not satisfy the judgment, it was not open to the plaintiff to sue either the second or the third tortfeasor for the balance: *Brinsmead v Harrison*[54]. In the words of Lord Reid[55]: "if judgment was recovered against one joint tortfeasor that judgment was a bar to any action against another joint tortfeasor even although no sum had been or could be recovered under that judgment." And if the first tortfeasor satisfied the judgment, it was not open to that tortfeasor to get contribution from the second or the third: *Merryweather v Nixan*[56]. The impact of s 7(1) on this position was as follows. The mischief dealt with in s 7(1)(a) was the common law prohibition stated in *Brinsmead v Harrison* against a plaintiff who had recovered against one joint tortfeasor from recovering against another. Section 7(1)(a) improved the position of plaintiffs by abolishing that common law prohibition. The mischief dealt with in s 7(1)(c) was the rule in *Merryweather v Nixan*, which did not affect plaintiffs but tortfeasors. Section 7(1)(c) dealt with that mischief by abolishing the rule. Those changes to the common law position left the risk that plaintiffs, freed from the ban that *Brinsmead v Harrison* imposed on any action against joint tortfeasors after one tortfeasor had been sued to judgment, would abuse that new found freedom by pursuing a multiplicity of actions. But the solution achieved in s 7(1)(b) applied to both joint tortfeasors and several tortfeasors. Section 7(1)(b) does not *prevent* a multiplicity of actions. Rather, it *tends to discourage* them by limiting a plaintiff who commences a second action to the damages award that plaintiff received in the first. As the Privy Council said in *Wah Tat Bank Ltd v Chan*,

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52 [1975] AC 507 at 517.

53 For the distinction between joint and several tortfeasors, see below at [72].

54 (1872) LR 7 CP 547.

55 *George Wimpey & Co Ltd v British Overseas Airways Corporation* [1955] AC 169 at 188.

56 (1799) 8 TR 186 [101 ER 1337].

s 7(1)(b) "is clearly devised merely to discourage the multiplicity of actions which the old rule [in *Brinsmead v Harrison*] was designed to prevent."[57]

46 Where an injured person persuades a tortfeasor to agree to a consent judgment, the fact that s 7(1)(c) enables that tortfeasor to obtain contribution from others does not mandate the conclusion that s 7(1)(b), in discouraging a multiplicity of actions, should be construed as applying to damages obtainable under consent judgments. And where an injured person persuades a tortfeasor to agree to a consent judgment, the fact that s 7(1)(a) enables the plaintiff to sue another tortfeasor does not mandate that conclusion either.

47 *"Adjudged".* The appellant's second argument relied on the following words of the consent judgment: "IT IS THIS DAY ADJUDGED" that there be judgment in the sum of $250,000 plus costs. But those words obscure the reality. In reality that sum had not been adjudged. What had actually happened was that the parties had fixed the figure by agreement. The court had played no adjudicative role at all.

48 *The equivalence of consent and non-consent judgments.* Thirdly, the appellant submitted that not enough consideration had been "given to the pervasiveness with which consent judgments stand in the same position as a judgment arising from judicial determination on the merits." To speak of "pervasiveness" is to exaggerate. In some respects, consent judgments operate like judgments arising from judicial determination on the merits. They can be enforced. They are final. The doctrine of res judicata applies. The appellant submitted that the respondent's construction of the Act deprived "a consent judgment of the force and effect that it would normally enjoy". That is not so. In every respect, a consent judgment has full force and effect. The only issue is whether the damages a consent judgment deals with are damages "awarded".

49 *Linguistic usage in the United States.* Fourthly, the appellant submitted that in the United States "consent judgments are commonly spoken of as 'awarding' damages". That is far from conclusive. The appellant pointed to no common usage of that kind in Australia.

50 *Linguistic usage in this Court.* Fifthly, the appellant relied on this Court's use of the expression "judicial determination (whether by consent or otherwise)"

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57 [1975] AC 507 at 518 per Lord Salmon (Lord Wilberforce, Viscount Dilhorne and Lord Kilbrandon concurring); cf *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 458 per Gibbs CJ ("designed to prevent a multiplicity of actions"); [1985] HCA 12.

in *Amaca Pty Ltd v New South Wales*[58]. That was a passing reference. It was not directed to the point presently in controversy.

51 *The risk of plaintiff abuse.* Sixthly, the appellant submitted that on the respondent's construction of the Act, a plaintiff is "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." What is postulated is highly unrealistic. Even without s 7(1)(b), a plaintiff who behaved in the manner postulated would be at risk of adverse costs orders as each new action succeeded its predecessors. Even if the plaintiff received favourable costs orders, they would not provide full compensation for the plaintiff's own legal costs. And even if the postulation had any realism, the propositions asserted are not correct. On the respondent's construction of s 7(1)(b), a consent judgment against one defendant will leave the plaintiff free to pursue other defendants. But once a judgment other than a consent judgment is obtained against a defendant, the plaintiff will be unable to obtain a greater quantum of damages from any other defendant. Thus plaintiffs will not be able progressively "to improve their positions".

52 *Injustice?* Finally, the appellant seemed to find some injustice in the respondent's construction of s 7(1)(b). That construction would allow a person in the respondent's position to institute proceedings if that person had not obtained damages under a consent judgment compensating fully for damage suffered. If there were serious injustices flowing from the respondent's construction of the Act, that would be a ground for questioning and perhaps rejecting it. But the appellant did not satisfactorily demonstrate any injustice of that kind.

Orders

53 The appeal should be dismissed with costs.

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58 (2003) 77 ALJR 1509 at 1512 [18]; 199 ALR 596 at 600; [2003] HCA 44.

54 CRENNAN AND KIEFEL JJ. This appeal concerns an issue of construction of s 7(1) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA) ("the WA Act"). Section 7 is headed "Rules applicable if there are 2 or more tortfeasors", and sub-s (1) relevantly provides:

> "[W]here damage is suffered by any person as the result of a tort —
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> (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 ... 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."

55 In relation to damage suffered by a person as the result of a tort, s 7(1)(a) abolishes a plea in bar[59] based on the common law defence of "release by judgment"[60], s 7(1)(b) deters separate and successive actions against two or more

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59 *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* ("*James Hardie v Seltsam*") (1998) 196 CLR 53 at 58 [2] per Gaudron and Gummow JJ; [1998] HCA 78.

60 See Great Britain, Law Commission, *Law of Contract – Report on Contribution*, Law Com No 79, (1977) at 11 [34].

tortfeasors who cause the same damage, and s 7(1)(c) creates a right and remedy of contribution between tortfeasors which did not exist at common law[61].

56 The question in this appeal is whether the restriction in s 7(1)(b) of the WA Act – that sums recoverable under judgments given in multiple actions for damages "shall not in the aggregate exceed the amount of the damages awarded by the judgment first given" – applies only to damages awarded by a court following a judicial assessment, or whether the restriction also applies to a judgment entered by the consent of the parties in a superior court of record.

57 Provisions substantially identical to s 7(1) of the WA Act exist in the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) ("the NSW Act") (s 5(1)), the *Law Reform Act* 1995 (Q) (s 6), and the *Law Reform (Miscellaneous Provisions) Act* (NT) (s 12). As long ago as 1955, such provisions were described by this Court as representing "a piece of law reform which seems itself to call somewhat urgently for reform."[62]

The proceedings

58 In 2004, the respondent, Mr Michael Thornton, was injured in an accident which occurred in the course of his employment on a mine site owned and operated by the appellant, Newcrest Mining Limited. At the time of the accident, the respondent was employed by Simon Engineering (Australia) Pty Ltd ("Simon Engineering"). The respondent claimed workers' compensation payments in relation to his injury, and also claimed damages from Simon Engineering for negligence and breach of statutory duty. In 2007, the respondent reached a settlement agreement with Simon Engineering in relation to his claim. At that stage, the respondent had not yet commenced court proceedings.

59 On 11 May 2007, in order to give effect to the settlement agreement, the respondent commenced proceedings against Simon Engineering in the District Court of Western Australia, and Simon Engineering consented to judgment being entered against it. On 31 May 2007, a consent judgment was entered in the District Court in the following terms:

> "Pursuant to the aforesaid order of the Registrar IT IS THIS DAY ADJUDGED that judgment [be] entered for [the respondent] against [Simon Engineering] for the sum of $250,000.00 exclusive of weekly

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61 *James Hardie v Seltsam* (1998) 196 CLR 53 at 58 [2] per Gaudron and Gummow JJ.

62 *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200 at 211; [1955] HCA 1.

payments made to date pursuant to the *Workers' Compensation & Injury Management Act* 1981, plus legal costs in the sum of $11,804.00 inclusive of disbursements."

60 Simon Engineering satisfied this judgment and made no claim for contribution against the appellant. Subsequently, in June 2008, the respondent commenced proceedings in the District Court against the appellant, claiming damages for negligence and breach of statutory duty in relation to the same injury.

61 In the particulars of damages claimed in his proceedings against the appellant, the respondent reduced his damages by an amount described as "settlement monies received".

Decisions below

62 On 11 May 2009, the appellant applied for summary judgment against the respondent pursuant to O 16 r 1(1) of the Rules of the Supreme Court 1971 (WA). On 28 August 2009, a Deputy Registrar of the District Court (Deputy Registrar Hewitt) ruled in favour of the appellant on the basis that s 7(1)(b) of the WA Act prevented the respondent from recovering further damages from the appellant in relation to his injury.

63 A single judge of the District Court (Mazza DCJ) heard the respondent's appeal by way of a hearing *de novo*. His Honour dismissed the appeal.

64 Just over two months after Mazza DCJ handed down his decision, the Court of Appeal of the Supreme Court of New South Wales (McColl and Campbell JJA and Sackville AJA) ("the NSW Court of Appeal") published its reasons for decision in *Nau v Kemp & Associates Pty Ltd*[63], which dealt with a similar issue arising under s 5(1)(b) of the NSW Act (which, as mentioned above, is substantially identical to s 7(1)(b) of the WA Act).

65 The plaintiff in *Nau v Kemp* had brought two actions claiming damages from concurrent tortfeasors. One of the actions was settled and, pursuant to the settlement, a consent judgment for $220,000 was entered in favour of the plaintiff. Following that settlement, the defendant in the other action successfully applied to have the action summarily dismissed.

66 The NSW Court of Appeal unanimously upheld the plaintiff's appeal from that decision. Their Honours found in favour of the plaintiff on the basis that the expression "damages awarded by the judgment first given" in s 5(1)(b) of the

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63 ("*Nau v Kemp*") (2010) 77 NSWLR 687.

NSW Act referred to damages awarded by a court after a judicial determination on the merits, and did not apply to an earlier consent judgment entered in favour of the plaintiff[64].

67 In considering the text of s 5(1)(b), the members of the NSW Court of Appeal concentrated on the meaning of the word "awarded" occurring in the expression "damages awarded by the judgment first given". Various meanings of the word "awarded" were considered to support the proposition that the expression could only mean damages awarded by a court following a judicial assessment of the quantum of those damages[65]. Acknowledging that a judgment by consent, as part of a settlement, might not be a judgment for the full loss suffered by the plaintiff, all members of the NSW Court of Appeal considered that a provision limiting recovery in a subsequent action against a concurrent tortfeasor could work unjustly if the damages first awarded did not cover the full amount of a plaintiff's loss[66].

68 In considering the respondent's appeal from the decision of Mazza DCJ, the Court of Appeal of the Supreme Court of Western Australia (Pullin and Murphy JJA and Murray J) ("the WA Court of Appeal") complied with the direction given by the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[67] that an intermediate appellate court should not depart from an interpretation placed on uniform national legislation by another Australian intermediate appellate court unless convinced that interpretation is plainly wrong[68]. Although the WA Court of Appeal noted that s 7(1)(b) of the WA Act was not uniform throughout Australia, it regarded the fact that identical provisions existed in four Australian jurisdictions (including New South Wales) as warranting a similar approach in those four jurisdictions[69].

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64 *Nau v Kemp* (2010) 77 NSWLR 687 at 709 [100], 711 [109] per McColl JA, 739 [230] per Campbell JA, 747 [269] per Sackville AJA.

65 *Nau v Kemp* (2010) 77 NSWLR 687 at 695 [28] per McColl JA, 734-735 [206]-[211] per Campbell JA, 745-746 [259]-[266] per Sackville AJA.

66 *Nau v Kemp* (2010) 77 NSWLR 687 at 704-705 [75]-[79] per McColl JA, 739 [229] per Campbell JA, 747 [268] per Sackville AJA.

67 (2007) 230 CLR 89; [2007] HCA 22.

68 *Thornton v Newcrest Mining Ltd* [2011] WASCA 92 at [15].

69 *Thornton v Newcrest Mining Ltd* [2011] WASCA 92 at [16].

69 The WA Court of Appeal criticised one aspect of the reasoning in *Nau v Kemp* – the suggestion by McColl JA and Campbell JA that applying s 5(1)(b) of the NSW Act to judgments entered by consent might discourage the settlement of litigation[70]. However, the members of the WA Court of Appeal otherwise unanimously endorsed the reasoning in *Nau v Kemp* because they considered that the construction of s 5(1)(b) of the NSW Act preferred by the NSW Court of Appeal ensured equality between plaintiffs. On the construction of s 7(1)(b) of the WA Act adopted by the WA Court of Appeal, a plaintiff who settles against one tortfeasor for less than the full loss suffered and agrees to a consent judgment against that tortfeasor will not be barred from subsequently pursuing the balance of his or her full loss against a concurrent tortfeasor. This was said to put that plaintiff in the same position as a plaintiff who settles against a tortfeasor for less than his or her full loss but does not agree to a consent judgment, and who is therefore free to pursue recovery of his or her full loss against a concurrent tortfeasor[71].

Section 7(1)

70 The Court's task on this appeal is to construe a provision in a statute, not to develop the common law. Application of the canons of statutory construction will involve the identification of the purpose of a statute, or a provision, which purpose may be stated expressly or inferred from the terms of the statute or provision, and may be elucidated by appropriate reference to extrinsic materials[72]. Historical considerations or extrinsic materials should not displace the clear meaning of statutory text, the language of which is the surest guide to what is called, metaphorically, the "intention" of the legislature[73]. However, the meaning of a provision may require consideration of the context, which can

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70 See *Nau v Kemp* (2010) 77 NSWLR 687 at 710 [103]-[104] per McColl JA, 738 [227] per Campbell JA; *Thornton v Newcrest Mining Ltd* [2011] WASCA 92 at [24]-[25].

71 *Thornton v Newcrest Mining Ltd* [2011] WASCA 92 at [23].

72 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 592 [44] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 10.

73 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 41; *Zheng v Cai* (2009) 239 CLR 446 at 455-456 [28]; [2009] HCA 52.

include the history and evident policy of a provision[74], particularly where a statute alters the common law.

71 Section 7(1) of the WA Act, like equivalent provisions in other Australian jurisdictions, has its origins in s 6(1) of the *Law Reform (Married Women and Tortfeasors) Act* 1935 (UK) ("the 1935 UK Act"). Section 6(1) of the 1935 UK Act altered certain common law rules in respect of proceedings against, and contribution between, two or more tortfeasors. It was introduced following recommendations made by the Law Revision Committee in its *Third Interim Report*, presented in 1934 ("the Report")[75].

72 As will be explained in more detail later, the focus of the Report was on the prevailing legal doctrine that there be no contribution between joint tortfeasors[76]. Where damage is caused as the result of torts committed by two or more tortfeasors, the tortfeasors may be either joint tortfeasors or several (in the sense of "separate" or "independent") tortfeasors. Three relevant categories are commonly identified[77]:

(a) joint tortfeasors (being two or more persons responsible for the same wrongful act which causes single damage to the plaintiff);

(b) several tortfeasors (being two or more persons responsible for different wrongful acts) whose separate wrongful acts combine to cause the same damage to the plaintiff; and

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74 See *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; *Zheng v Cai* (2009) 239 CLR 446 at 455-456 [28]. See also *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 per Dixon CJ; [1955] HCA 27; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28.

75 Great Britain, Law Revision Committee, *Third Interim Report*, (1934) Cmd 4637.

76 See *Merryweather v Nixan* (1799) 8 TR 186 [101 ER 1337]; Great Britain, Law Revision Committee, *Third Interim Report*, (1934) at 3 [1]-[2].

77 See Glanville Williams, *Joint Torts and Contributory Negligence*, (1951) at 1; Balkin and Davis, *Law of Torts*, 4th ed (2009) at 815-817; *Clerk & Lindsell on Torts*, 20th ed (2010) at 273-280. See also *Baxter v Obacelo Pty Ltd* ("*Baxter v Obacelo*") (2001) 205 CLR 635 at 646-647 [18] per Gleeson CJ and Callinan J; [2001] HCA 66.

(c) several tortfeasors whose separate wrongful acts cause different damage to the plaintiff.

73 As Gleeson CJ and Callinan J observed in *Baxter v Obacelo*[78], Glanville Williams used the term "concurrent tortfeasors" as a generic term to describe both the first and second of these categories[79]. In this judgment, the term "several concurrent tortfeasors" will be used to refer to the second category.

74 It is not in contention that, if the appellant were liable to the respondent, the appellant and Simon Engineering would be several concurrent tortfeasors.

75 The third category may be put to one side for the purposes of this appeal[80].

The common law background to the Report

76 The common law background addressed in the Report and relevant to s 6(1) of the 1935 UK Act was explained by Gleeson CJ and Callinan J (with whom Gummow and Hayne JJ agreed) in *Baxter v Obacelo*[81]:

> "At common law, the liability of joint tortfeasors was joint and several. A plaintiff could sue joint tortfeasors separately, in independent actions, for the full amount of the loss. Or the plaintiff could sue all the

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78 (2001) 205 CLR 635 at 646 [18].

79 As to which, see Glanville Williams, *Joint Torts and Contributory Negligence*, (1951) at 1. Cf *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 580-581; [1996] HCA 38, where Brennan CJ, Dawson and Toohey JJ used the expression "several tortfeasors" to refer to what Glanville Williams would describe as "several concurrent tortfeasors".

80 Section 7(1)(a) of the WA Act, with which s 7(1)(b) must be construed, is a provision concerning "the same damage" in respect of which a joint tortfeasor "would, if sued, have been liable". Notwithstanding the express reference to a joint tortfeasor in s 7(1)(a), s 7(1)(b) applies in all circumstances where there is "more than one action ... brought in respect of that damage" (that is, "the same damage" referred to in s 7(1)(a)) and where those actions are brought "against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise)".

81 (2001) 205 CLR 635 at 647-648 [19]-[21], [23] per Gleeson CJ and Callinan J, 657 [51]-[52] per Gummow and Hayne JJ.

joint tortfeasors in the same action[82]. Several concurrent tortfeasors, on the other hand, could not be joined as defendants in the one action. That was because they were severally liable 'on separate causes of action'[83]. The difference between action and cause of action was significant. A person suffering injury as a result of the wrongdoing of joint tortfeasors had only one cause of action[84]. Some consequences of this will be considered below. Such a person might bring one action (ie proceeding), or more than one action. In the case of several concurrent tortfeasors, there was a separate cause of action against each, and if a plaintiff desired to sue more than one, it was necessary to commence separate actions.

One corollary of the principle that a plaintiff had only one cause of action against a number of joint tortfeasors was that, where an action was brought against two or more joint tortfeasors, only one judgment for one sum of damages could be given in favour of the plaintiff[85]. In *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd*[86] this Court had to consider the effect upon that rule of s 5 of the [NSW Act] in a case where one of two joint tortfeasors was liable for exemplary damages, but the other was not so liable.

Another corollary, sometimes referred to as the rule in *Brinsmead v Harrison*[87], was that the single cause of action resulting from the joint commission of a tort merged in the first judgment which the plaintiff obtained in respect of it. A plaintiff who recovered action against any one joint tortfeasor was 'barred from subsequently recovering judgment against any other joint tortfeasor responsible for that tort whether in an action commenced before, at the same time as, or after the action in which a final judgment had already been recovered'[88]. The Privy Council, in

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82 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 603-604 per Gummow J; *Bryanston Finance Ltd v de Vries* [1975] QB 703 at 730 per Lord Diplock.

83 *Sadler v Great Western Railway Co* [1896] AC 450 at 454 per Lord Halsbury LC.

84 *Wah Tat Bank Ltd v Chan* [1975] AC 507 at 515.

85 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 454 per Gibbs CJ; [1985] HCA 12.

86 (1985) 155 CLR 448.

87 (1872) LR 7 CP 547.

88 *Wah Tat Bank Ltd v Chan* [1975] AC 507 at 515.

Wah Tat Bank Ltd v Chan[89] described this common law rule as 'highly technical and unsatisfactory' and cited, as its only possible justification, what was said about it by Blackburn J in *Brinsmead v Harrison*[90]:

> 'Is it for the general interest that, having once established and made certain his right by having obtained a judgment against one of several joint wrongdoers, a plaintiff should be allowed to bring a multiplicity of actions in respect of the same wrong? I apprehend it is not; and that, having established his right against one, the recovery in that action is a bar to any further proceedings against the others.'
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> ...
>
> One technique that was adopted to circumvent the rule in *Brinsmead v Harrison* was the Tomlin form of order by which a settlement agreement was made and recorded without entry of judgment. As the Privy Council observed in *Wah Tat Bank*, this was not a complete solution to the inconvenience and injustice caused by the common law rule. The rule was considered in England by the Law Revision Committee[91] which recommended legislation which took effect as s 6(1) of the [1935 UK Act]."

The Report and s 6(1) of the 1935 UK Act

77 A brief consideration of the Report and the 1935 UK Act assists the present task of construction of s 7(1)(b) of the WA Act.

78 In 1934, the Committee was asked to consider a number of legal doctrines which might require revision, including the doctrine that there be no contribution between joint tortfeasors[92], which had been the subject of criticism[93]. The

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89 [1975] AC 507 at 515-516.

90 (1872) LR 7 CP 547 at 553.

91 Great Britain, Law Revision Committee, *Third Interim Report*, (1934). For a discussion of the Report and legislation, see *James Hardie v Seltsam* (1998) 196 CLR 53.

92 See *Merryweather v Nixan* (1799) 8 TR 186 [101 ER 1337]; Great Britain, Law Revision Committee, *Third Interim Report*, (1934) at 3 [1]-[2].

93 See *Palmer v Wick and Pulteneytown Steam Shipping Co Ltd* [1894] AC 318 at 324 per Lord Herschell LC.

Committee recommended that, when two persons each contribute to the same damage suffered by a plaintiff, the one who pays more than his share should be entitled to recover contribution from the other[94]. The Committee further considered that the right should be conferred on several concurrent tortfeasors as well as joint tortfeasors[95]. That recommendation took effect as s 6(1)(c) of the 1935 UK Act[96].

79 It was in the context of its recommendations on contribution that the Committee considered it desirable to alter the rule in *Brinsmead v Harrison*[97], described above, which had the effect that "the tort is merged in the judgment even though there is no satisfaction"[98]. The Committee recommended that[99]:

> "A judgment recovered against one or more persons in respect of an actionable wrong committed jointly shall not, while unsatisfied, be a bar to an action against any others liable jointly in respect of the same wrong. Provided that the Plaintiff shall not be entitled to levy execution for, or to be paid, a sum exceeding, in the aggregate, the amount of the first judgment obtained against any of the persons so liable, nor to recover the costs of any subsequent action, unless the Judge before whom it is tried is of opinion that there was reasonable ground for bringing it."

80 This recommendation took effect as s 6(1)(b) of the 1935 UK Act[100].

81 The rationales for the rule in *Brinsmead v Harrison* were that it "prevented multiplicity of actions and that a second jury might award different damages from the first"[101]. This was the context in which the Committee suggested that the rule be altered only in respect of unsatisfied judgments – that

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94 Great Britain, Law Revision Committee, *Third Interim Report*, (1934) at 4-6 [4]-[7].

95 Great Britain, Law Revision Committee, *Third Interim Report*, (1934) at 5-6 [7].

96 Section 6(1)(c) was in substantially identical terms to s 7(1)(c) of the WA Act.

97 (1872) LR 7 CP 547.

98 Great Britain, Law Revision Committee, *Third Interim Report*, (1934) at 7 [11].

99 Great Britain, Law Revision Committee, *Third Interim Report*, (1934) at 8.

100 Section 6(1)(b) was in substantially identical terms to s 7(1)(b) of the WA Act.

101 Great Britain, Law Revision Committee, *Third Interim Report*, (1934) at 7 [11].

is, judgments in respect of which execution had wholly or partly failed[102]. The Committee also noted, by reference to *The Koursk*[103], that the rule in *Brinsmead v Harrison* did not apply to several concurrent tortfeasors[104].

82 Before going further, something should be said about the use of the terms "satisfied" and "unsatisfied". In circumstances where a writ of execution which issues on behalf of a successful plaintiff results in less than full recovery of the amount of loss or damage awarded by a judgment, the judgment is readily described as "unsatisfied". A plaintiff can compromise or settle a claim for loss or damage and agree to entry of a judgment by consent for a lesser amount than that claimed, or that which might have been awarded after a trial. Such a judgment may subsequently be "satisfied", as was the consent judgment at issue in this appeal. However, a plaintiff who has settled for such a lesser amount can be said not to have received "full satisfaction" in respect of the loss or damage claimed. This distinction is important: the Committee's recommendation provided for judgments which were unsatisfied, but not for plaintiffs who did not receive full satisfaction.

83 When the Committee's recommendations were given effect in s 6(1) of the 1935 UK Act, s 6(1)(b) deterred separate or successive proceedings against both joint tortfeasors and several concurrent tortfeasors. It did so not by barring such proceedings, but by providing that sums recoverable in them should not in the aggregate exceed the amount of damages awarded by the judgment first given, and that the plaintiff should not ordinarily be entitled to costs in any but the first proceeding. These two deterrents were described in a subsequent report as "the sanction in damages" and "the sanction in costs"[105].

84 In its terms, s 6(1)(b) proceeded on the assumption that the judgment first given would be a judgment in respect of an actionable wrong for a sum representing the amount of the loss or damage suffered by the plaintiff, reflecting the Committee's suggestion that such legislation cover unsatisfied judgments only. It did not deal with the circumstance that a plaintiff might not recover the full amount of his or her loss or damage under a judgment first given where that judgment was entered by consent as the result of a settlement or compromise.

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102 See Great Britain, Law Revision Committee, *Third Interim Report*, (1934) at 7-8 [11].

103 [1924] P 140.

104 Great Britain, Law Revision Committee, *Third Interim Report*, (1934) at 8 [11].

105 Great Britain, Law Commission, *Law of Contract – Report on Contribution*, (1977) at 12 [37].

Construction of s 7(1)(b)

85 Provisions identical to s 7(1) of the WA Act have been criticised since the remark made by this Court in *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport*[106], quoted above.

86 In *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd*[107], Gibbs CJ described s 5(1)(b) of the NSW Act as being "elliptical and somewhat obscure"[108]. In approaching the issue of construction presented in *James Hardie v Seltsam*[109], Gaudron and Gummow JJ said that s 5(1) of the NSW Act[110]:

> "ha[d] become notorious for the conceptual and practical difficulties it engenders ... Further, judicial decisions calculated to remove one anomaly by an apparent beneficent construction of the legislation have given rise to other anomalies."

Their Honours went on[111]:

> "Judicial interpretative techniques may come close to leaching the existing statutory text and structure of their content and, whilst answering that apparently hard case then before the court, unwittingly lay the ground for other hard cases.
>
> The present statute represents an attempt to adjust the tripartite rights and interests of P, D1 and D2. Any regime of this nature is at greater risk of generating anomalies where all those liable to suit are not sued at the same time and in the one proceeding."

87 The appellant contends, as it did before the WA Court of Appeal, that *Nau v Kemp*[112] was wrongly decided by the NSW Court of Appeal. It submits that,

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106 (1955) 92 CLR 200 at 211.

107 (1985) 155 CLR 448.

108 (1985) 155 CLR 448 at 458.

109 (1998) 196 CLR 53.

110 (1998) 196 CLR 53 at 59 [7].

111 (1998) 196 CLR 53 at 60-61 [11]-[12].

112 (2010) 77 NSWLR 687.

like s 5(1)(b) of the NSW Act, s 7(1)(b) of the WA Act was intended to avoid multiplicity of suits. The appellant's main argument is that, even if the expression "damages awarded by the judgment first given" in s 7(1)(b) could be said to be elliptical or ambiguous, that circumstance does not compel the result that judgments entered by consent should be treated differently from judgments resulting from a judicial determination on the merits.

88 The respondent seeks to uphold the reasoning of the WA Court of Appeal. He urges that the text of s 7(1)(b) should not be displaced by historical considerations or extrinsic materials, and submits that the evident intention of s 7(1)(b) is to prevent plaintiffs from recovering more than their actual loss. As to the text, the respondent concedes that, when the word "damages" first appears in s 7(1)(b), it refers to damages however arrived at, including by a consent judgment following settlement. However, the respondent contends that, when the word "damages" appears the second time in s 7(1)(b), it must be confined to damages arrived at by judicial determination on the merits, as the word "awarded" qualifies "damages", or else it is otiose.

89 The respondent concedes that a judgment entered by consent gives rise to a *res judicata*. The terms "it is this day adjudged", which appear in the consent judgment at issue in this appeal, are identical to those used in *Chamberlain v Deputy Commissioner of Taxation*[113], in which a judgment entered by consent was held to be no less binding than a judgment given on, or as a result of, a trial on the merits. The respondent did not contest that a judgment entered by consent was capable of falling within s 7(1)(a) of the WA Act. Judgments entered by consent have also been held to satisfy the requirements of ss 5(1)(c) and 5(2) of the NSW Act[114].

90 The appellant's main argument must be accepted. The legislative purpose of s 7(1)(b) is to avoid multiplicity of suits and the possibility that a plaintiff may recover more than the actual loss or damage suffered. This is confirmed not only by the language of the provision, particularly the "sanction in damages", but also by its relationship with s 7(1)(a), and by the evident policy considerations behind ss 7(1)(a) and 7(1)(b).

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113 (1988) 164 CLR 502; [1988] HCA 21.

114 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 616 per Gummow J; *James Hardie v Seltsam* (1998) 196 CLR 53 at 69 [41] per Gaudron and Gummow JJ, 96-97 [124]-[127] per Callinan J. See also *Amaca Pty Ltd v New South Wales* (2003) 77 ALJR 1509 at 1512 [18]; 199 ALR 596 at 600-601; [2003] HCA 44.

91 The appellant correctly submits that an error may occur in the construction of s 7(1)(b) if too much emphasis is laid on the word "awarded" as it occurs in the phrase "damages awarded by the judgment first given". Dictionary definitions of the verb "to award" can be expected to include the wide notion, "to adjudicate" between several competitors, or tenderers, for a prize or a contract[115]. However, that wide meaning is not necessarily apt as a qualifier of the word "judgment", encompassing as it does in its ordinary and natural meaning judgments entered by consent and judgments resulting from a trial on the merits, the salient common feature being the finality of a judgment obtained either way. Further, while the term "award of damages" has been used to describe a judicial assessment of the whole of a plaintiff's loss[116], the expression is not confined to that circumstance.

92 The respondent submits that this Court should read the words "the judgment first given" occurring in s 7(1)(b) to mean "the judgment first given on, or resulting from, a trial on the merits". This is an invitation to the Court to construe the language of s 7(1)(b) so as to allow a person in the respondent's position to sue in separate and successive actions if that person has not been awarded the full amount of his or her loss or damage under a judgment entered by consent in the first action.

93 In construing a statute, the purpose of which is relatively clear, it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose[117]. To the extent that the respondent's submission highlights an aspect of s 7(1)(b) which may give rise to possible injustice, it has some force. This is particularly so given that, at common law, a plaintiff was not permitted to join several concurrent tortfeasors in the one action. However, the respondent's submission fails to read s 7(1)(b) as a whole, in the context of s 7(1). Like s 6(1)(b) of the 1935 UK Act, s 7(1)(b) proceeds on the basis that the judgment first given is a judgment in respect of the full amount of a plaintiff's loss or damage. There is no provision for the possibility that a judgment first given may not be such a judgment. No exception to the "sanction in damages" is made for a plaintiff who has achieved only partial satisfaction in the first action as a result of a judgment entered by consent. The

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115 See, for example, *The Oxford English Dictionary*, 2nd ed (1989), vol 1 at 829, "award"; *Black's Law Dictionary*, 9th ed (2009) at 157, "award".

116 See *Baxter v Obacelo* (2001) 205 CLR 635 at 656 [47] per Gleeson CJ and Callinan J.

117 See *Australian Education Union v Department of Education and Children's Services* (2012) 86 ALJR 217 at 224 [28] per French CJ, Hayne, Kiefel and Bell JJ; 285 ALR 27 at 35; [2012] HCA 3.

relatively clear purpose of deterring a multiplicity of suits has been effected without provision for, or recognition of, the need for separate and successive suits in these circumstances. While the respondent is correct in submitting that s 7(1)(b) operates to prevent a plaintiff recovering more than the actual loss or damage suffered, s 7(1)(b) achieves that result by proceeding on the basis described above.

94 Imputing a statutory purpose to the legislature by reading language more narrowly than it might ordinarily be read may assist in the resolution of an anomaly occasioning apparent injustice to an individual only to leave unremedied, or to cause inadvertently, other injustice or hard cases[118]. For example, a plaintiff may be obliged, or have good reason, to sue first a tortfeasor in respect of whom the amount of damages recoverable is limited, where the amount recoverable from another tortfeasor is not so limited[119]. Separate or successive actions may follow from proportionate liability legislation enacted in Australia[120], or be appropriate for some other reason. If s 7(1)(b) has the potential to cause injustice in that circumstance, the injustice does not depend on distinguishing between a judgment entered by consent and a judgment given on, or resulting from, a trial on the merits.

95 In a subsequent report which preceded the enactment in the United Kingdom of the *Civil Liability (Contribution) Act* 1978 (UK), the Law Commission recognised that the limit set by s 6(1)(b) of the 1935 UK Act on the sum recoverable by execution in separate or successive actions could cause injustice[121]. The Law Commission recommended that the "sanction in costs" be retained to deter unnecessary proliferation of actions but that the "sanction in damages" be abolished because of the possible injustice which it might cause[122].

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118 *James Hardie v Seltsam* (1998) 196 CLR 53 at 59-61 [7], [11] per Gaudron and Gummow JJ.

119 See Great Britain, Law Commission, *Law of Contract – Report on Contribution*, (1977) at 12-13 [40].

120 See, for example, the *Civil Liability Act* 2002 (NSW) and the *Civil Liability Act* 2002 (WA).

121 Great Britain, Law Commission, *Law of Contract – Report on Contribution*, (1977) at 12-13 [40]-[41].

122 Great Britain, Law Commission, *Law of Contract – Report on Contribution*, (1977) at 11-13 [36]-[41], 23 [81(c)].

96 Notwithstanding criticism of the clarity of s 7(1)(b), the text of the provision, and its relationship to s 7(1)(a), make relatively clear its purpose of deterring separate and successive actions where two or more tortfeasors have caused the same damage to the plaintiff. In *Nau v Kemp*, the NSW Court of Appeal was right to observe that the application of s 5(1)(b) of the NSW Act was capable of causing injustice in circumstances where a plaintiff had not been awarded the full amount of his or her loss or damage under a judgment first given[123]. However, that Court erred in rewriting s 5(1)(b) to give effect to what it saw as a desirable additional purpose, namely excepting from the operation of s 5(1)(b) a plaintiff in whose favour a judgment first given had been entered by consent.

97 While it may be contended that s 7(1)(b) might give rise to injustice in limited circumstances while it subsists, it is possible for persons in the respondent's position to take steps (discussed in *Baxter v Obacelo*[124]) to avoid the application of s 7(1)(b) to them, which do not appear to have been taken by the respondent in this case.

98 Where s 7(1)(b) does not apply because several concurrent tortfeasors are sued in the one action, it would be anomalous if the consequences of a settlement with one tortfeasor should turn on the differences between a consent order and a Tomlin order[125]. However, where several concurrent tortfeasors are not sued in the one action, and s 7(1)(b) operates to deter a separate or successive action by depriving it of practical utility, a plaintiff who agrees to a settlement in the first action without reserving, if appropriate, rights to recoup full loss or damage imperils his or her own interests.

Conclusion

99 In all the circumstances, it is for the legislature of Western Australia to consider what anomalies flow from s 7(1)(b) of the WA Act and to decide upon the necessity for any amendment.

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123 *Nau v Kemp* (2010) 77 NSWLR 687 at 704-705 [75]-[79] per McColl JA, 739 [229] per Campbell JA, 745-746 [259]-[266] per Sackville AJA.

124 (2001) 205 CLR 635 at 648-649 [23], 654-656 [42]-[46], 657 [49] per Gleeson CJ and Callinan J.

125 See *Baxter v Obacelo* (2001) 205 CLR 635 at 648-649 [23], 654-656 [42]-[46] per Gleeson CJ and Callinan J.

Orders

100 The following orders should be made:

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.

101 BELL J. Where a person suffers damage as the result of a tort and the person brings more than one action in respect of that damage, s 7(1)(b) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA) ("the WA Act") restricts recovery in the successive actions of amounts that exceed the "damages awarded by the judgment first given". The question raised by the appeal is whether, when a plaintiff settles the first action and effect is given to the settlement by the entry of a consent judgment for a money sum, that amount is correctly characterised as "damages *awarded* by the judgment".

102 The respondent, Mr Thornton, claims that an injury he suffered while working at a mine site ("the accident") owned and operated by the appellant, Newcrest Mining Limited ("Newcrest"), was occasioned by the separate and independent acts of negligence of his employer, Simon Engineering Pty Ltd ("Simon Engineering"), and Newcrest. He claims that Simon Engineering and Newcrest are concurrent tortfeasors severally liable for the whole of the damage that he suffered in the accident[126].

103 Mr Thornton agreed to settle any common law claim in tort against Simon Engineering for the sum of $250,000. Agreement in this respect was reached at an informal conference held on 11 May 2007. On or about 29 May 2007, in order to give effect to the settlement, proceedings were commenced on Mr Thornton's behalf against Simon Engineering by filing in the Registry of the District Court of Western Australia a writ indorsed with a claim for damages arising from the accident. On 31 May 2007, a minute consenting to the entry of consent judgment in the amount of $250,000 was filed in the proceeding. Judgment was entered for Mr Thornton in this sum on the same day. The judgment sum was paid to Mr Thornton on 6 June 2007.

104 On 23 June 2008, Mr Thornton commenced proceedings in the District Court of Western Australia against Newcrest claiming damages for the injuries that he suffered in the accident, which he alleged were caused by Newcrest's negligent failure to provide a safe site. In the document particularising his damages[127], Mr Thornton acknowledged the receipt of $250,000 "settlement monies" in reduction of his claim against Newcrest.

105 Newcrest moved for the summary dismissal of Mr Thornton's claim in reliance on s 7(1)(b) of the WA Act, which provides that:

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126 See *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635 at 646-647 [18]-[19] per Gleeson CJ and Callinan J; [2001] HCA 66; Glanville Williams, *Joint Torts and Contributory Negligence*, (1951) at 49-50.

127 Filed pursuant to District Court Rules 2005 (WA), r 45C(3).

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

106 Deputy Registrar Hewitt allowed Newcrest's application and dismissed the proceedings. He held that Mr Thornton was precluded by s 7(1)(b) from recovering damages exceeding the judgment sum in the action against Simon Engineering.

107 An appeal by way of hearing de novo from the Deputy Registrar's orders was dismissed by Mazza DCJ[128]. In the proceedings before Mazza DCJ, Mr Thornton gave evidence that he had not decided to elect to pursue a common law claim against Simon Engineering at the time the latter's workers' compensation insurer raised the possibility of settlement of any such claim with him. He said that he either had applied, or was intending "to apply to Workcover to try and overcome the 30% degree of disability threshold."[129] He said that his weekly workers' compensation payments were "running out" and that he decided to settle for an amount that was less than his loss and to pursue other defendants for the balance[130].

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128 *Thornton v Newcrest Mining Ltd* [2010] WADC 61.

129 *Thornton v Newcrest Mining Ltd* [2010] WADC 61 at [18]. The reference to 30% is to the threshold degree of disability that a plaintiff is required to establish in order to bring a common law claim in negligence against the plaintiff's employer under s 93E(3) of the *Workers' Compensation and Injury Management Act* 1981 (WA).

130 *Thornton v Newcrest Mining Ltd* [2010] WADC 61 at [18].

108 Mazza DCJ did not determine whether the amount of $250,000 was, as Mr Thornton asserts, less than the amount of loss and damage caused by the accident. His Honour observed that Mr Thornton had sued Simon Engineering for damages arising out of injuries sustained in the accident and that he had received $250,000 in satisfaction of that claim[131]. The claim against Newcrest was for the same damage that was the subject of the proceedings against Simon Engineering and it followed that Mr Thornton was precluded from recovery of any further sum by s 7(1)(b) of the WA Act[132].

109 The Court of Appeal of Western Australia, in a unanimous judgment, set aside Mazza DCJ's order and substituted an order dismissing Newcrest's application for summary judgment. The Court of Appeal followed the decision of the New South Wales Court of Appeal in *Nau v Kemp & Associates Pty Ltd*[133], which was handed down two months after Mazza DCJ's decision. In *Nau v Kemp*, each member of the New South Wales Court of Appeal, in separate judgments, held that the words "damages awarded by the judgment" mean damages awarded by a court following a judicial assessment because the most common meaning of "award" when used as a verb conveys a process of deliberation on the part of the person or body doing the awarding[134]. The Western Australian Court of Appeal endorsed the reasoning of the New South Wales Court of Appeal and identified a further reason for concluding that a consent judgment does not "award" damages: in some circumstances a consent judgment may be for a money sum that does not include any component by way of damages[135].

110 Newcrest appeals by special leave granted on 9 December 2011. On the hearing of the special leave application, Newcrest submitted that the intermediate courts of appeal had overlooked the decision in *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd*[136] and "the anomalous and apparently unjust preclusion of contribution possibilities" which a construction that excluded consent judgments from the limitation under par (b) was apt to produce.

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131 *Thornton v Newcrest Mining Ltd* [2010] WADC 61 at [33].

132 *Thornton v Newcrest Mining Ltd* [2010] WADC 61 at [35].

133 (2010) 77 NSWLR 687, interpreting s 5(1)(b) of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW).

134 (2010) 77 NSWLR 687 at 695 [27]-[28] per McColl JA, 734-735 [207]-[210] per Campbell JA, 745 [259]-[262] per Sackville AJA.

135 *Thornton v Newcrest Mining Ltd* [2011] WASCA 92 at [28(a)].

136 (1998) 196 CLR 53; [1998] HCA 78.

111 On the hearing of the appeal, Newcrest abandoned the submission that the construction adopted by the courts below resulted in any unjust preclusion of contribution rights. Newcrest challenged the construction of the provision on two grounds. First, it submitted that the phrase "damages awarded by the judgment" is ambiguous and that "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 legislation." Allied to this was an assertion that the intermediate courts of appeal had given too much emphasis to the word "awarded".

112 Newcrest's second submission was that the construction adopted below promotes a multiplicity of actions.

113 To the extent that Newcrest's first submission complains that the Court of Appeal's construction deprives consent judgments of force and effect, it is misconceived. It is not in question that the judgment entered in the action against Simon Engineering has full effect as between the parties bound by it[137]. As explained, in question is whether the amount for which Mr Thornton and Simon Engineering agreed to settle the claim against the latter is correctly characterised as "damages *awarded* by the judgment".

114 In *Nau v Kemp*, Campbell JA and Sackville AJA set out the dictionary meanings of the word "award" when used as a verb[138]. It is sufficient to note that its genesis is given in the *Shorter Oxford English Dictionary on Historical Principles* as "Decide or determine (something, *that, to do*)"[139] and that the first meaning given in the *Macquarie Dictionary* is "to adjudge to be due or merited; assign or bestow: *to award prizes.*"[140] The Courts of Appeal of New South Wales and Western Australia were right to consider that the more natural meaning of the expression "damages awarded by the judgment" is damages that are the product of judicial adjudication. Newcrest's submission that the intermediate courts of appeal gave too much emphasis to the verb "awarded" is an invitation to read par (b) as if it provided that the sums recoverable in succeeding actions "shall not exceed the judgment first given" or perhaps "the

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137 *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 508 per Deane, Toohey and Gaudron JJ; [1988] HCA 21; *Shaw v Hertfordshire County Council* [1899] 2 QB 282.

138 (2010) 77 NSWLR 687 at 734 [207]-[209] per Campbell JA, 745 [259]-[260] per Sackville AJA.

139 6th ed (2007), vol 1 at 162, "award", sense 1.

140 5th ed (2009) at 110.

judgment sum first given"[141]. It can hardly be an error for the courts of appeal to endeavour to give meaning to each word in the phrase[142]. Moreover, as McColl JA observed in *Nau v Kemp*, the definition of "judgment first given" in s 5(3)(b) of the equivalent New South Wales statute (which is identical to s 7(3)(b) of the WA Act) is more apt to a judgment on the merits than to one entered by consent[143].

115 Newcrest submitted that contextual and policy considerations favour the construction for which it contended. Some reference should be made to matters of history before returning to these submissions.

116 Section 7(1) of the WA Act is based on s 6(1) of the *Law Reform (Married Women and Tortfeasors) Act* 1935 (UK) ("the UK Act"), which was enacted following the report of the Law Revision Committee ("the Committee")[144]. The Committee had been asked to report on the rule that there could be no contribution between tortfeasors. The rule, traced to Lord Kenyon's statements in *Merryweather v Nixan*[145], had attracted trenchant criticism[146]. The Committee recommended that the "rule should be altered as speedily as possible."[147] The Committee considered that a right of contribution should be given not only to joint tortfeasors but also where the damage caused to the

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141 *Civil Judgments Enforcement Act* 2004 (WA), s 3, defines "judgment sum" to mean the "amount of money ordered to be paid under a monetary judgment, whether or not the money is or includes costs or pre-judgment interest".

142 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28.

143 (2010) 77 NSWLR 687 at 696 [29]. Section 5(3)(b) of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) provides that:

> "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".

144 Law Revision Committee, *Third Interim Report*, (1934) Cmd 4637.

145 (1799) 8 TR 186 [101 ER 1337].

146 *Palmer v Wick and Pulteneytown Steam Shipping Co* [1894] AC 318 at 324 per Lord Herschell LC.

147 Law Revision Committee, *Third Interim Report*, (1934) Cmd 4637 at 5 [7].

plaintiff was occasioned by the separate wrongful acts of several persons[148] ("several concurrent tortfeasors"). The Committee went beyond the question of contribution and made recommendations with respect to the alteration of another rule of the common law which was considered to work injustice to plaintiffs[149]. This was the rule in *Brinsmead v Harrison*[150]. It was a rule which was the product of the idea that the cause of action in the case of a *joint* tort was one and indivisible. It followed that the cause of action merged in the judgment against a joint tortfeasor, precluding recovery from any other joint tortfeasor. This was so even when the judgment remained unsatisfied. The Committee said of the rule[151]:

> "[Its] merits … were stated by the Exchequer Chamber, in [*Brinsmead v Harrison*], to be that it prevented multiplicity of actions and that a second jury might award different damages from the first. It is submitted that the rule might be altered in respect of an unsatisfied judgment only, with the provision that a plaintiff should not be entitled to obtain by execution, in the aggregate, more than the amount awarded in the first judgment."

117 The Committee's Recommendation (I) was in these terms[152]:

> "A judgment recovered against one or more persons in respect of an actionable wrong committed *jointly* shall not, while unsatisfied, be a bar to an action against any others liable *jointly* in respect of the same wrong. Provided that the Plaintiff shall not be entitled to levy execution for, or to be paid, a sum exceeding, in the aggregate, the amount of the first judgment obtained against any of the persons so liable, nor to recover the costs of any subsequent action, unless the Judge before whom it is tried is of opinion that there was reasonable ground for bringing it." (emphasis added)

118 Paragraphs (a) and (b) of s 6(1) of the UK Act can be seen to reflect aspects of Recommendation (I):

> "(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

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148 Law Revision Committee, *Third Interim Report*, (1934) Cmd 4637 at 5 [7].

149 *Wah Tat Bank Ltd v Chan* [1975] AC 507 at 516.

150 (1872) LR 7 CP 547.

151 Law Revision Committee, *Third Interim Report*, (1934) Cmd 4637 at 7-8 [11].

152 Law Revision Committee, *Third Interim Report*, (1934) Cmd 4637 at 8.

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 wife, husband, 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".

119 Paragraph (a) abolished the rule in *Brinsmead v Harrison.* By necessary implication, abolition of the rule did away with the underlying doctrine of the unitary cause of action in the case of joint tort liability. The allied rule that the release of one joint tortfeasor operated to release all joint tortfeasors was also swept away by the enactment in Australian jurisdictions of tortfeasor legislation modelled on s 6(1) of the UK Act[153]. In the result, the release and the entry of consent judgment against one joint tortfeasor in an action against two or more tortfeasors does not preclude recovery of the balance of the plaintiff's loss from the remaining defendant joint tortfeasor[154].

120 Paragraph (b) was said by the Privy Council to have been devised "merely to discourage the multiplicity of actions which the old rule was designed to prevent."[155] The "old rule" is the rule in *Brinsmead v Harrison*, which was concerned with the liability of joint tortfeasors. The Committee's Recommendation (I), which addressed the rule, was confined to the liability of joint tortfeasors. However, as the words in parentheses make clear, par (b) as enacted was not so confined. The restriction on the recovery of amounts exceeding the "damages awarded by the judgment first given" applies whether liability is as a joint or several concurrent tortfeasor.

121 At common law there does not appear to have been a bar to recovery of the full quantum of a plaintiff's loss in successive actions brought against several

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153 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 584 per Brennan CJ, Dawson and Toohey JJ, 591 per Gaudron J, 613-615 per Gummow J; [1996] HCA 38.

154 *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635.

155 *Wah Tat Bank Ltd v Chan* [1975] AC 507 at 518.

concurrent tortfeasors. In *The Koursk*[156], the owners of a vessel that was sunk as the result of the negligent navigation of the *Clan Chisholm* and the *Koursk* recovered an amount less than the amount of their loss in an action against the owners of the *Clan Chisholm*. This did not preclude recovery of the balance in an action brought against the owners of the *Koursk*[157].

122 The second reading speech for the UK Act[158] gives no explanation for the choice to depart from the Committee's recommendation and to restrict the rights of plaintiffs in favour of several concurrent tortfeasors by making recovery against the latter subject to the limitation of par (b). The second reading speech for the WA Act[159] is also silent on the matter. What is the object of the restriction imposed by par (b)? It is not clear that it was to prevent double satisfaction. The "universal rule" against permitting a plaintiff to recoup more than his or her loss is of long standing[160]. Well before the enactment of s 6(1) of the UK Act, English courts had no difficulty in preventing a plaintiff from recovering more than the amount of his or her loss. The history is traced in *Baxter v Obacelo Pty Ltd*[161]. The legislative objects of par (b) may be discerned as the two purposes which were said to justify the rule in *Brinsmead v Harrison*: discouraging a multiplicity of actions[162] and avoiding a second jury awarding damages in an amount that differed from the amount awarded by the jury in the first action[163]. The first-mentioned purpose was said by Kelly CB to be to prevent unprincipled attorneys from accumulating "a vast amount of useless costs" by the bringing of successive actions[164]. It is a concern that is reflected in

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156 [1924] P 140.

157 [1924] P 140 at 152 per Bankes LJ, 158 per Scrutton LJ, 162-163 per Sargant LJ.

158 United Kingdom, House of Commons Debates, 8 July 1935, vol 304, cc117-126.

159 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 25 September 1947 at 949-951.

160 *Morris v Robinson* (1824) 3 B & C 196 [107 ER 706]; *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635 at 659 [57] per Gummow and Hayne JJ.

161 (2001) 205 CLR 635 at 657-663 [53]-[68]. See also *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 at 522.

162 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 457-458 per Gibbs CJ; [1985] HCA 12; *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635 at 651 [29] per Gleeson CJ and Callinan J.

163 Law Revision Committee, *Third Interim Report*, (1934) Cmd 4637 at 7 [11].

164 *Brinsmead v Harrison* (1872) LR 7 CP 547 at 551.

the costs restriction contained in par (b). More generally, the two purposes are complementary. Damages awarded by a jury (more commonly now by a judge) are for the full amount of the plaintiff's loss (subject to any reduction to take account of contributory negligence). That it is desirable that the resources of the court should be taken up only once with making that assessment and undesirable that a jury (or judge) should arrive at different assessments is evident. These are considerations which apply to the award of damages following trial. By contrast, judgment entered by consent is likely to be the product of compromise and is likely to be for an amount less than the full amount of the plaintiff's loss. In most cases, the entry of consent judgment will make little demand on the resources of the court.

123 Newcrest submitted that the harmonious construction of s 7(1) favours the "recognition" of consent judgments in par (b) conformably with their recognition in pars (a) and (c). Paragraph (a), it will be recalled, removes the bar in the case of successive actions against joint tortfeasors. Paragraph (c) confers a right of contribution between tortfeasors. The reference to the "recognition" of consent judgments in par (c) is to the decision in *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd*, in which it was held that a defendant who has obtained a consent judgment in its favour is not a person "who is or would if sued have been liable" for the purposes of contribution under par (c)[165]. As Lord Reid explained in *George Wimpey & Co Ltd v British Overseas Airways Corporation*, the drafting of sub-s (1) does not lend itself to an interpretation that draws on claimed textual similarities between each paragraph[166]. Moreover, each paragraph deals with a different subject matter. There is no reason in logic or policy why the removal of the bar, or the non-amenability of a person to contribution following the entry of judgment in his or her favour following trial or by consent, should favour construing the expression "damages awarded by the judgment" to mean damages awarded by judgment whether entered following trial or by consent.

124 Newcrest's second submission was that the construction adopted by the courts of appeal is an invitation to a plaintiff 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." Gleeson CJ and Callinan J observed in *Baxter v Obacelo Pty Ltd* that, where a plaintiff has suffered loss or damage caused by the conduct of a number of tortfeasors, the claims "may be pursued in one or a number of actions" and "[t]he timing and form of the proceedings may be affected by a variety of circumstances"[167].

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165 (1998) 196 CLR 53.

166 [1955] AC 169 at 188-189.

167 (2001) 205 CLR 635 at 653 [38].

Those circumstances may include that a plaintiff is unaware of the identity of a tortfeasor at the time the choice is made to settle with another. Why should the provision be construed so that a consent judgment against one tortfeasor for an amount less than the full amount of the loss bars recovery of the balance from another tortfeasor? The mischief which s 7(1)(b) was intended to remedy − a multiplicity of actions draining the resources of the court, generating unnecessary costs and giving rise to differing assessments − has force when applied to damages awarded by judge or jury but has none when applied to a judgment entered by consent to give effect to the parties' agreement.

125 Newcrest pointed out that Mr Thornton could have protected his position by settling with Simon Engineering on terms that did not involve the entry of consent judgment. So much may be accepted, but it is a submission that accords primacy to technicality over substance. Before the enactment of s 7(1) of the WA Act, an astute plaintiff seeking to protect his or her position could avoid the bar by various stratagems: the stay of proceedings on terms or, where proceedings had not been commenced, an agreement containing a covenant not to sue. There were unsatisfactory features associated with the former[168] and the latter was apt to give rise to litigation over the characterisation of the agreement[169]. The Court of Appeal was right to disavow a construction that produces the arbitrary result that the plaintiff whose settlement is effected by entry of consent judgment is shut out, while another plaintiff similarly circumstanced whose settlement is given effect without entry of judgment retains the right to recover the balance of his or her loss from a tortfeasor liable for that loss.

126 Section 6(1) of the UK Act and its counterparts have been the subject of judicial criticism and calls for legislative reform[170]. In *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd*, Gaudron and Gummow JJ warned against the use of interpretive techniques that "leach" the text in answering the apparently hard case

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168 *Wah Tat Bank Ltd v Chan* [1975] AC 507 at 516.

169 *Duck v Mayeu* [1892] 2 QB 511; *Cutler v McPhail* [1962] 2 QB 292; *Bryanston Finance Ltd v de Vries* [1975] QB 703 at 723 per Lord Denning MR, 732 per Lord Diplock; *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 582 per Brennan CJ, Dawson and Toohey JJ.

170 *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200 at 207, 211-212; [1955] HCA 1; *Brambles Constructions Pty Ltd v Helmers* (1966) 114 CLR 213 at 217 per Barwick CJ; [1966] HCA 3; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 458 per Gibbs CJ; *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635 at 663 [71]-[72] per Kirby J.

before the court and thereby "unwittingly lay the ground for other hard cases."[171] No question of "leaching" the text is raised by this appeal. Newcrest did not submit that the courts below were wrong to conclude that the more natural interpretation of the phrase "damages awarded by the judgment" is that the aggregate limit is that which is fixed by judicial assessment of the plaintiff's damages. Newcrest's submission was that the statutory language is capable of bearing the meaning that the aggregate limit is fixed by the judgment sum, whether entered following judicial assessment or by consent following the parties' agreement. It is a construction that gives no work to the words "damages awarded by" and which operates to further confine the right which at common law a plaintiff possessed to recoup the full amount of his or her loss against several concurrent tortfeasors. The Court of Appeal was right to eschew a construction that has that effect[172]. It was right to conclude that a judgment for a money sum entered by consent gives legal effect to the parties' agreement but does not *award* damages.

127 The appeal should be dismissed with costs.

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171 (1998) 196 CLR 53 at 60-61 [11].

172 *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J; [1908] HCA 63; *Baker v Campbell* (1983) 153 CLR 52 at 123 per Dawson J; [1983] HCA 39; *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 635-636; [1990] HCA 28.