NEWCREST MINING LIMITED v. THORNTON (P59/2011)

Court appealed from:	Court of Appeal of the Supreme Court of Western Australia [2011] WASCA 92
Date of judgment:	12 April 2011
Date of grant of special leave:	9 December 2011

The respondent, who was employed by Simon Engineering Pty Ltd, was injured in an accident at the Telfer mine site. He issued a writ against his employer seeking damages for personal injury and the action was settled and a consent judgment for $250,000 was entered on 31 May 2007. In 2008, the respondent issued a writ of summons against the appellant, the owner and operator of the mine, seeking damages for the same injury. In his particulars of damage, the respondent reduced the damages claimed against the appellant by $250,000 on account of settlement moneys received.

On 11 May 2009 the appellant applied in the District Court for summary judgment against the respondent. The essence of the application was that the respondent had already been compensated for the injury that he suffered on 16 February 2004 and recovery of further damages was impossible having regard to s 7(1)(b) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA) ("the Act"). The deputy registrar granted summary judgment.

Mazza DCJ upheld the deputy registrar's decision and held that the respondent's claim against the appellant was with respect to the same damage the subject of the settled proceedings and by virtue of s 7(1)(b) of the Act he could not in the proceedings against the appellant recover damages which exceeded the amount of the damages he received in the action against his employer.

The Court of Appeal (Pullin & Murphy JJA & Murray J) gave a unanimous decision allowing the respondent's appeal. It noted that after Mazza DCJ handed down his decision, the New South Wales Court of Appeal gave its reasons in *Nau v Kemp & Associates* [2010] NSWCA 164. In that decision, the Court of Appeal held that, in relation to the New South Wales equivalent of s 7(1)(b) of the Act (s 5(1)(b) of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW)), the phrase "damages awarded . . . by judgment" referred to damages awarded by a court following a judicial assessment and not to a judgment entered by consent. The Court of Appeal noted that an intermediate appellate court should not depart from an interpretation placed on uniform national legislation by another intermediate appellate court unless convinced that the interpretation was plainly wrong. The Court noted that whilst the legislation was not uniform, identical provisions applied in Western Australia, New South Wales, Queensland and the Northern Territory. Their Honours concluded that the appellant had not been able to demonstrate that the decision in *Nau v Kemp* was plainly wrong. The construction urged by the appellant would have the effect that where a plaintiff who settled against one tortfeasor for less than the full loss and agreed to a consent judgment for the settlement sum would be shut out from pursuing their full loss, whereas a plaintiff in the same circumstance, but who did not agree to a consent judgment, would not be shut out.

The grounds of appeal include:

- The Court below erred in holding that Mazza DCJ had erred when he dismissed the appeal from Deputy Registrar Hewitt who had granted the [appellant]'s application for summary judgment pursuant to o 16 of the *Rules of the Supreme Court* 1971 (WA).

- The Court below erred in holding that s 7(1)(b) of the Act applied only to damages awarded by a court following a judicial assessment and not to a judgment entered by the consent of the parties.