

BRIEF NOTE

Recent Developments and Practical Tips for Lawyers

ISSUE 13: AUTUMN 2010

LOSS OF A CHANCE

By Michael Windsor SC

In *Tabet v Gett* [2010] HCA 12 the High Court considered whether the common law of Australia should recognise the 'loss of a chance' of a better outcome where breach of duty had been found.

Reema Tabet ("the appellant") was six years old when she was admitted to hospital on 11 January 1991 with symptoms of vomiting and headaches. She had recently suffered chicken pox. On 13 January 1991 the appellant was observed to be staring and unresponsive. A CT scan taken on 14 January 1991 revealed that the appellant had a large brain tumour. The trial judge (Studdert J) was persuaded that Dr Gett, a specialist paediatrician, was negligent in failing to have a CT scan performed on 13 January 1991. The trial judge found that the appellant suffered irreversible brain damage by reason of the delay but was not satisfied, on the balance of probabilities, that if the CT scan had been undertaken on 13 January such brain damage as occurred on 14 January would have been avoided. More importantly for the purposes of the appeal, the trial judge found that earlier detection of the tumour would have had some beneficial effect and assessed the "chance of a better outcome of avoiding the brain damage that occurred on 14 January 1991" [i.e. avoiding the damage referable to the deterioration on 14 January 1999] at 40%.

The NSW Court of Appeal set aside the judgment for the appellant and entered judgment for Dr Gett. The appellant appealed to the High Court.

In a unanimous decision the High Court dismissed the appeal.

The common law of Australia does not entertain an action for recovery when the damage, for which compensation is awarded consequent upon breach of duty, is characterised as the loss of a chance of a better outcome in this type of case. The common law requires that the plaintiff in personal injury litigation prove that a defendant's negligence was more probably than not a cause of the plaintiff's damage.

The High Court's decision does not necessarily lead to a conclusion that, as a general proposition, the chance of obtaining a benefit or avoiding a harm can never be regarded as giving rise to a maintainable personal injury negligence claim.

Clerk: Paul Walker

**Barristers
(alphabetically):**

Jennifer Beck
Sean Bogan
Andrew Bouris
Tom Brennan
Kim Burke
Therese Cataranziti
Despina Christofis
Gary Doherty
Jason Downing

Edmund Finnane
Simon Gregory
Adrian Gruzman
Philip Hallen SC
Rhonda Henderson
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Matthew Hutchings
Sydney Jacobs
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Craig Wilson
Michael Windsor SC
Christopher Wood
Steven Woods

CONSTITUTIONAL LAW – JURISDICTIONAL ERROR: *Kirk v Industrial Relations Commission* [2010] HCA 1

This recent High Court decision is the most significant in a trilogy of High Court cases that have used the constitution to maintain the integrity of State Supreme Courts against legislative inroads.

Until *Kirk* it was accepted that the State had the ability to restrict review for jurisdictional error. This is no longer the case. A privative provision in State legislation, which attempts to limit the authority of the Supreme Court to confine inferior courts within the limits of their jurisdiction by granting relief on the ground of jurisdictional error, is beyond the powers of the State legislature.

This does not mean that all privative provisions will be invalid. Rather, the observations the Court made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts confirm the distinction between jurisdictional and non-jurisdictional error. It is this distinction which defines the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power.

By Jennifer Beck

SUCCESSION – INTESTACY: *Succession Amendment (Intestacy) Act 2009*

The *Succession Amendment (Intestacy) Act 2009* commenced on 1 March 2010 and applies to estates of intestates who die on or after that date. The provisions are ss101 – 140 Succession Act 2006. Important changes are:

- The distinction between brothers and sisters of the half or whole blood is abolished.
- De facto spouses must have been in a defacto relationship for a continuous period of 2 years or have a child together, before they are equated to a spouse.
- The court may make a Distribution Order where the intestate is survived by a spouse and one or more domestic partners.
- First cousins may take on intestacy.
- The Court can order the estate of an indigenous person to be distributed to the exclusion of the Act.

By Ramena Kako

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CONTRACT – ORAL AGREEMENT CONTEMPLATING DEED – SETTLEMENT OF PROCEEDINGS BY COUNSEL: *Humphris-Clark v Lazaridis* [2010] NSWSC 318

This decision involved the application of the principles discussed in *Masters v Cameron* (1954) 91 CLR 353 in a situation where court proceedings are settled orally by counsel, in contemplation of a more formal agreement.

The proceedings were a claim for medical negligence in the District Court. The plaintiff and defendant, through their counsel, reached agreement to settle the day before the hearing, on the basis of a verdict being entered for the defendant and a payment of \$5,000 being made under a separate Deed of Release to be entered between the parties. The plaintiff then refused to sign the Deed of Release and Consent Judgment. The defendant sought specific performance.

Bergin CJ in Eq found that the parties intended to be immediately bound to the performance of the terms agreed (including entering into the Deed) at the time the agreement to settle was entered into between counsel. Her Honour rejected the argument that it was a mere agreement to agree at some later time. Accordingly, her Honour made declarations to the effect that the parties had finally settled the matter and ordered that the settlement be specifically performed.

By Jason Downing

PRACTICE POINTS Pleadings

A statement of claim will often refer to documents such as contracts and then describe the effect of provisions that are material to proceedings. It is common, but not permissible, for a defendant to plead in response, merely, that the defendant "will rely on the terms of the agreement for their full force and effect". As Brereton J said in *Hill End Gold Ltd v First Tiffany Resource Corp* [2008] NSWSC 1412, this approach "leaves entirely open whether the defendant accepts that the document has the effect pleaded by the plaintiff, or attributes some and if so which other relevant effect to it". See also *TCS ACES Pty Ltd v Mikohn Gaming Australasia Pty Ltd* [2007] NSWSC 1139, and the discussion in *Ritchies Uniform Civil Procedure NSW* at [14.9.5], both of which are referred to in *Hill End Gold*.

By Edmund Finnane

ANNOUNCEMENTS

New Readers

Thirteenth Floor Wentworth Selborne Chambers welcomes **Sean Bogan**, **Therese Catanzariti** and **Richard Lee** who have joined the floor as readers.