

## BRIEF NOTE

Recent Developments and Practical Tips for Lawyers

### ISSUE 9: SPRING/SUMMER 2008

#### INJURY DURING SURGERY DOES NOT NECESSARILY ARISE FROM NEGLIGENCE

By Stuart Kettle

In *Marko v Falk* [2008] NSWCA 293 the Court of Appeal revisited the issue of whether injury suffered by a patient during surgery necessarily bespeaks negligence. The Court considered the duty of care owed by a specialist upper gastrointestinal surgeon endoscopist, who perforated the plaintiff's duodenum when removing a sessile polyp piecemeal by cauterisation.

The Supreme Court trial judge found the surgeon was not negligent. On appeal, the plaintiff argued the surgeon had breached his duty of care by the manner in which he removed the polyp, firstly, on the basis that he could not see the far side of the polyp and, secondly, in reliance upon *res ipsa loquitur* by the fact of the perforation of the duodenum.

McColl JA delivered the primary judgment and reviewed *Rodgers v Whittaker* (1992) 175 CLR 479, in which the High Court considered the operation of the "*Bolam*" principle, formulated as a rule that a doctor is not negligent if the doctor acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice. The basis of the principle lay in the recognition that in matters involving medical expertise there is ample scope for genuine difference of opinion and negligence is not established merely because the practitioner's conclusion or procedure differs from that of other practitioners.

McColl JA rejected the proposition that a surgeon may be negligent absent support by way of medical opinion about the procedure in which the injury occurred – although the way must be left open to a plaintiff to persuade the Court that a certain practice does not ensure an adequate standard of care. On the evidence available, her Honour found that whatever risk flowed from not being able to see the other side of the polyp, it was obviated (based on the evidence) by testing its movement followed by its piecemeal removal.

The procedure required clinical judgement in an operational context and because the medical evidence was that perforation could have occurred without negligence, the Court did not accept the injury to the plaintiff bespoke negligence.

The case is a reminder that the Courts continue to accept that injury in the course of a medical procedure can occur without a breach of duty of care and that the Court cannot impose its view as to careful practice in the absence of supporting expert opinion evidence.

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**CONTRACT – DAMAGES – Anti-Shevill clauses: *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 82 ALJR 576; [2008] HCA 10**

The High Court in *Shevill v Builders Licensing Board* (1982) 149 CLR 620 recognised an important distinction between the consequences of termination of a contract at law and termination pursuant to a purely contractual right. In the case of termination solely on the basis of a contractual right, the terminating party's recoverable damage does not include loss flowing from the termination, because such loss is attributable to his act, not that of the party in breach. In contrast, a party who terminates at law (that is, for fundamental breach, breach of an essential terms or repudiation) is entitled to damages flowing from the termination of the contract.

Commercial lawyers have responded to that decision by including "anti-*Shevill*" clauses in leases and other contracts, whereby terms dealing with such matters as timely payment or rent are described as being essential.

The efficacy of such provisions was confirmed by the High Court in *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd*. Under contract law principles it is possible by express provision in the contract to make a term a condition, even if it would not be so in the absence of such express provision – not only in order to support a power to terminate the contract, but also to support a power to recover loss of bargain damages.

**By Edmund Finnane**

**REAL PROPERTY – TORRENS TITLE: *Black v Garnock* (2007) 230 CLR 438; [2007] HCA 31**

This High Court of Australia decision was handed down on 1 August 2007. The facts are well known.

The reasoning of the majority (Gummow, Hayne & Callinan JJ), who upheld the judgment creditors' appeal, prompted solicitors and conveyancers to advise their purchaser/clients, upon exchange of contracts of Real Property Act land, to lodge caveats on the titles pending completion.

The purpose of this contribution is to notice two arguments that were not addressed by members of the High Court but which, if correct, would buttress the minority decision of Gleeson CJ and Crennan J to dismiss the appeal by the judgment creditors.

First, the writ for levy of property was not capable of "binding" the land of the judgment debtor/vendor because, before the writ was

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delivered to the sheriff, beneficial ownership in the land had passed from the judgment debtor to the purchasers who, before delivery of the writ to the sheriff, were in possession of the land: see section 112(1) Civil Procedure Act, 2005 ("the Act").

Secondly, at the time the purchasers acquired beneficial ownership in the land and, thereby, an equity to obtain registration under the Real Property Act, 1900, ("RP Act") as registered proprietors of the fee simple, they did so in good faith and for valuable consideration and without notice of the delivery of the writ to the sheriff. See sections 106(2)(d) 112(2) the Act.

Gummow & Hayne JJ, in joint reasons and Callinan JJ, writing separately, had, as their "Iodestar" the truism, "title (only) by registration", under the RP Act.

Gleeson CJ and Crennan J recognised that there was no inequity in the Court of Appeal having facilitated the purchasers' settlement and no legal impediment to the orders of the Court of Appeal, thrown up by the RP Act or the Act.

**By John Graves SC**

**ANNOUNCEMENTS**

**Appointments**

**Michael Windsor** has been appointed Senior Counsel.

**New Members, Licensees and Readers**

Thirteen Wentworth Selborne welcomes **Andrew Reoch** who has joined the floor as a licensee.

**New Publications**

*Commercial Damages*, being the 2nd Edition of "Damages in a Commercial Context", by **Sydney Jacobs** has recently been released by Thomson / Lawbook Co. It is published in looseleaf format. The service is substantially revised and expanded from the first edition, and covers recent developments in such areas as proportionate liability, the role of intention in determining whether to award the costs of rectification, causation, remoteness, the retreat from gain based remedies, damages for vehicle damage, and Trade Practices Act damages.

*Pleading Precedents, 6<sup>th</sup> Edition*, will be published shortly by Thomson / Lawbook Co. The authors of this edition are **Joseph Azize, Peter El Khouri** and **Edmund Finnane**. The new authors have updated the precedents from the previous edition and they have expanded the book's commercial content, as well as addressing aspects of the Civil Liability Act 2002 (NSW). The book will include a CD-Rom containing the precedents.