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MALPRACTICE

Barristers' Immunity?

As lawyers across Canada await the next increase in their errors and ommissions insurance premiums, a few of us are relaxed and happy, secure in the knowledge that if we limit our practice to criminal law, taxation, wills and estates or matrimonial matters we won't be sued by our own clients.

According to insurance statistics you can find only a handful of such claims in the flood now pouring on the profession.

When we act as barristers rather than solicitors we enjoy the same immunity. Historically the barrister could not be used for error since he was unable to sue for his fee. When the professions were joined in Canada the tradition seemed to carry on although the basis for it in law had disappeared, and then about 10 years ago the House of Lords added to the fee rule the notion that the whole idea of suing a barrister was contrary to public policy. No need for a bullet proof vest under the barrister's robes.

In March 1979, the Supreme Court of Ontario in *Demarco* v. *Ungaro and Barycky* (as yet unreported) ruled against a motion to strike out of a client's Statement of Claim against his former barrister an allegation that he failed to lead evidence supporting the case which he knew to be available. The trial judge concluded it is not public policy to confer exclusively on "litigation lawyers" immunity from an action for negligence possessed by no other professional person.

Vests anyone?

— R. S. Huestis

This is the first of a series of articles on malpractice contributed by Mr. Huestis.

IN THIS ISSUE

Bain v. Fothergill: New Developments

The rule of *Bain* v. *Fothergill* (1874), L.R. 7 H.L. 158 limits damages in favor of a purchaser by reason of the vendor's inability (in the absence of fraud or bad faith) to give good title to property. The effect of the rule is to limit recovery to return of the deposit and solicitor's fees for title search and work incidental to the transaction. This is in contrast with the entitlement of a disappointed vendor who is able to recover damages against a defaulting purchaser for loss of his bargain and other damages consequent upon a breach of the agreement of sale.

This rule was first enunciated in *Flureau* v. *Thornhill* (1776), 2 W.Bl. 1078. It was predicated upon the difficulty of a person under the English system in ascertaining the true quality of property which he owned.

The rule has now been overturned with respect to Canada by the Supreme Court of Canada in *A.V.G. Management Science Ltd.* v. *Barwell Developments Ltd.* in a judgment pronounced December 21, 1978.

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Bain v. Fothergill *continued*

The Court reviewed the origin of the rule, the numerous exceptions to it and various cases explaining its application.

The Chief Justice who gave the decision of the Court stated as follows:

> "Even if the exceptions have not eaten deeply into the rule, it seems to me that its main rationale has disappeared in those jurisdictions which have a Torrens system, as for example, Alberta, Saskatchewan and Manitoba (under its *Real Property Act,* R.S.M. 1970, c.R30) and similarly, in British Columbia whose registration Act, the *Land Registry Act* approximates the Torrens system. The same can be said of Ontario in respect of those areas governed by the *Land Titles Act,* R.S.O. 1970, c.234. In all such jurisdictions and areas, where the title is that shown on an official registry, there can be no claim by a vendor of uncertainty of title or of the necessity to gather in deeds and documents through which he would seek to establish title."

He then stated:

> "In view of the foregoing, it would be my opinion, if it was necessary, in order to decide this case, to come to a conclusion on the matter, that the rule in *Bain* v. *Fothergill* should no longer be followed in respect of land transactions in those Provinces which have a Torrens system of title registration or a near similar system.
>
> "It seems to me that, in principle, a similar view should be taken in respect of land transactions governed by a registration of deeds and documents system such as exists in the Atlantic Provinces, in parts of Ontario and in parts of Manitoba. The Acts in the Atlantic Provinces require the keeping of public registers of deeds and documents (including plans) and provide, generally, for priority according to the order or time of registration: see *The Registry Act,* R.S.N.B. 1973, C. R-6; *The Registration of Deeds Act,* R.S.Nfld. 1970, c. 328; *The Registry Act,* R.S.N.S. 1967, c. 265; *The Registry Act,* R.S.P.E.I. 1974, c. R-11. The deeds and documents that are registered are not thereby invested with any greater legal force than they intrinsically possess; there is, in short, no public gurantee of title as under the Torrens system, but if they have intrinsic legal force their registration gives them priority over unregistered instruments, of which they had no notice. Registration is, of course, notice and hence the necessity for a search of the register and an examination of the intrinsic worth of the deeds and documents recorded thereon, involving a concern for the chain of title."

It would now appear to be the law that a disappointed purchaser can succeed in obtaining compensation from a vendor where the sale has fallen through because of the vendor's lack of good title.

— Charles W. MacIntosh

Family Court Jurisdiction

Section 3 of the Infants' Custody Act, R.S.N.S. 1967, c. 145, as amended, authorizes a judge, ancillary to custody proceedings, to order payment of maintenance by a parent. No procedure is provided by that statute for enforcement of such orders and, in 1976, McLellan, J.C.C. in *Perry* v. *Perry* (1978) 22 N.S.R. (2d) 622 held that the Family Court had no power under any other statute to enforce such orders. In the same year the Family Court Act was amended by adding section 8B. This section restored the power to commit to prison for default which the court previously possessed. Recently, in *LeBlanc* v. *LeBlanc* (F.C. No. 76-554, Feb. 22, 1979) Judge Bartlett held this section also applied to maintenance orders made under the Infants' Custody Act.

In *Ells* v. *Ells* (S.C.A. 00294, March 3, 1979) the Appeal Division considered the nature of the jurisdiction of the Family Court. The Court held that the Family Court's custody jurisdiction is derived *jointly* from the Infants' Custody Act and the Children's Services Act (Stats. N.S. 1976 c.8). Its jurisdiction is "one and indivisible" and when that jurisdiction is exercised the judge is acting not "under" either Act but is exercising powers derived from both statutes. The concept of "unity of jurisdiction" becomes an additional reason to sustain the exercise of the power to commit for default in payment of maintenance where the statute conferring jurisdiction to make a maintenance order does not expressly provide a process for enforcement.

In the *Ells* case the Appeal Division, on its own motion, raised the question whether the right of appeal directly to that Court from a decision of the Family Court under the Infants' Custody Act had been "replaced" by the appeal procedure to the County Court provided by the Children's Services Act. The Court, as its first reason for decision, held this to be the case. The same result had been reached in *Perry* Ss. 73-75 of the Children's Services Act was held to provide an "exclusive and exhaustive" appeal procedure. The unity of jurisdiction premise was also used to sustain the conclusion that a custody order was not made "under" the Infants' Custody Act, a necessary circumstance to permit an appeal under s.7(1) of the Infants' Custody Act. At the same time such order falls within the category of "any decision, judgment or order" of the Family Court permitting an appeal to the County Court under ss. 73-75 of the Children's Services Act.

— Arthur L. Foote

CASE COMMENTS

Counsel are requested to bring to the attention of the Editor any cases they become aware of which might be of interest to readers if a "Case Comment" were written about them. All suggestions are welcome.