Section 5O CLA and Competent Professional Practice

following *Gould*[1]

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"One matter of longstanding concern, particularly in cases involving medical negligence, has been the preparedness of some judges and juries to find negligence in defiance of the balance of professional opinion, by favouring minority opinions and even 'junk science'."

The Hon JJ Spigelman AC, Chief Justice of NSW, Spencer Mason Trust Lecture, Auckland 27 May 2003

INTRODUCTION

1. Section 5O of the ***Civil Liability Act 2002*** (NSW) (the **Act**) may be seen as the legislature's attempt to address the "longstanding concern" identified by Spigelman CJ in his Auckland lecture delivered 16 years ago.

2. The section provides:

> **5O Standard of care for professionals**[2]
>
> (1) A person practising a profession (**a professional**) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.
>
> (2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.
>
> (3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.
>
> (4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

[1] *South Western Sydney Local Health District v Gould* [2018] NSWCA 69
[2] Section 5P of the Act provides that s.5O does not apply to any duty of care to warn of the risk of injury or death

3. This paper attempts three tasks, *viz* to:

- briefly trace the events that led to the enactment of s.5O, insofar as that history might bear upon its proper construction;
- examine its construction by recent appellate authority, with particular emphasis on last year's decision of the NSW Court of Appeal in ***Gould***; and
- provide some suggestions for litigators about the proper way to plead the defence and the form that evidence directed to making out the section should take.

WHY THE SECTION?

4. The concern referred to by the then Chief Justice arose in the context of evolving jurisprudence that saw professionals in a variety of fields held liable in negligence, notwithstanding evidence from professional peers supportive of the impugned conduct.

5. The greater intrusion of the law of negligence into professionals' lives reflected wider developments in personal injury litigation over the years following Lord Atkins' famous speech in *Donoghue v Stevenson* in 1932.

6. It is not the intention here to exhaustively review those developments[3]. However, at least six features were central to the law reform push that saw s.5O enacted:

- ***Rogers v Whitaker***

7. First, in 1992, in *Rogers v Whitaker*[4], the High Court of Australia held that under the Australian common law, it was a matter for a court to determine whether a defendant sued in his or her capacity as a professional person was in breach of the requisite standard of care, namely

> ... *that of the ordinary skilled person exercising and professing to have that special skill.*[5]

8. The High Court departed from English law, rejecting the *Bolam* principle, which held that a doctor was not guilty of negligence if he or she had acted in accordance with a practice accepted as proper by a "reasonable body of medical men skilled in that particular art".[6] In the House of Lords, Lord Scarman[7] had described the *Bolam* principle as

> *… a rule that a doctor is not negligent if he acts in accordance with a practice accepted at*

[3] The developments, including the jurisprudence and its import, are well covered in Villa *Annotated Civil Liability Act 2002 (NSW)* 3rd Ed Thomson Reuters
[4] [1992] HCA 58; (1992) 175 CLR 479
[5] Ibid, at 473
[6] per McNair J in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, at 587
[7] in *Sidaway v Governors of Bethlem Royal Hospital* (1985) AC 871

> *the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice. In short, the law imposes the duty of care: but the standard of care is a matter of medical judgment.*

9. In *Rogers v Whitaker*, the plurality of the High Court[8] rejected this rule, noting that in relation to the standard of care:

> *In Australia, it has been accepted that the standard of care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that special skill… But, that standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession …*

10. As to peer professional opinion, the plurality observed[9]:

> *… particularly in the field of non-disclosure of risk and the provision of advice and information, the Bolam principle has been discarded, and, instead, the courts have adopted… the principle that, while evidence of acceptable medical practice is a useful guide for the courts, it is for the courts to adjudicate on what is the appropriate standard of care after giving weight to 'the paramount consideration that a person is entitled to make decisions about his own life'.*

11. Thus, *Rogers v Whitaker* established that evidence of peer professional opinion as to the applicable standard of care was not determinative, but merely a "useful guide" for the courts.

- **Judicial concerns**

12. Secondly, by the late 1990s, a number of appellate judges had, in judgments and in extra - judicial statements, expressed concern, and a measure of exasperation, about what were perceived to be the implications of the growing reach of negligence law into aspects of human activity. An exemplar is the observation of the Chief Justice of NSW in an address to the Judicial Conference of Australia in 2002 provocatively titled *Negligence: the last outpost of the Welfare State:*

> *Over a few decades - roughly from the sixties to the nineties - the circumstances in which negligence would be found to have occurred and the scope of damages recoverable if such a finding were made, appeared to expand considerably. Professor Atiyah referred to this long term historical trend as "stretching the law". There may be an equivalent parallel trend, perhaps of even greater practical significance, of "stretching the facts".*

[8] at 487 per Mason CJ, Brennan, Dawson, Toohey and McHugh JJ (footnotes omitted)
[9] ibid

13. To similar effect was McHugh J's statement in *Tame v New South Wales*[10]:

> *I think that the time has come when this court should retrace its steps so that the law of negligence accords with what people really do, or can be expected to do, in real life situations. Negligence law will fall — perhaps it already has fallen — into public disrepute if it produces results that ordinary members of the public regard as unreasonable. Lord Reid himself once said "[t]he common law ought never to produce a wholly unreasonable result". And probably only some plaintiffs and their lawyers would now assert that the law of negligence in its present state does not produce unreasonable results.*

- **The 'insurance crisis'**

14. Thirdly, the 2001 collapse of HIH Insurance, a major Australian provider of professional negligence and public liability insurance, brought new focus upon what had been a sustained public campaign by medicos protesting a so-called "insurance crisis", an unsustainable increase in professional indemnity insurance premiums attributed to medical malpractice suits.

15. The President of the Australian Medical Association told a seminar in Sydney in February 2000[11]:

> *Tort law reform is a crucial issue for the ... Australian medical profession, and it would not be an overstatement to say that the situation has reached boiling point. Over the past eighteen months there has been a growing chorus of calls for the [Australian Medical Association] to work with government to do something to address the blow-out in medical indemnity premiums. This was brought to a head late last year with a call from the Victorian Medical Indemnity Protection Society demanding a full year's subscription from all members. ... We have reached a situation where clinicians in a number of fields are obliged to carry an unrealistic premium burden. This cannot be sustained on a long term basis. ... The effects are already being felt. Anecdotally, we are aware that many obstetricians are leaving obstetrics. One of the first group to "down tools" is the rural GP obstetricians. These rural services are not easy to replace, and communities in rural areas are already frustrated and angry about their declining health services. ... If we look at the trends in the United States, it is clear that the writing is on the wall for us here in Australia. ... [T]he American experience is a prediction of things to come in Australia and we would do well to take note.*

- ***Simpson v Diamond***

16. Fourthly, in 2001, a judge of the NSW Supreme Court awarded $14.2 million damages to a plaintiff born with cerebral palsy as a result of the admitted negligence of her mother's

[10] (2002) 211 CLR 317 at 354 [101]

[11] K Phelps, "Tort Law Reform", unpublished address to a seminar, Sydney, 12 February 2000, as reported in the text of an address by The Hon Justice Michael Kirby AC CMG, opening a conference at the Royal College of Physicians, London on 11 September 2000, titled "Medical malpractice - an international perspective of tort system reforms".

obstetrician.[12] The judgment received considerable media coverage at the time, much of it directed to its implications for obstetricians' insurance premiums.

- ***Civil Liability Act enacted***

17. Fifthly, in May 2002 the *Civil Liability Act* became law in NSW. In its original form, the provisions of the Act were directed to limiting the quantum of damages that could be awarded in personal injury cases. Neither section 5O, nor any equivalent, featured then.

- **Ipp Report**

18. Lastly, in July 2002 the Federal Government, supported by all State and Territory Governments, convened a review of the law of negligence, including the law relating to the standard of care required of professionals, by a panel that became known as the Ipp Committee.

19. The terms of reference[13] required that the Committee:

> *develop and evaluate options for a requirement that the standard of care in professional negligence matters (**including** medical negligence) accords with the generally accepted practice of the relevant profession at the time of the negligent act or omission.*

20. The relevant recommendation of the Committee[14], however, referred only to medical professionals, propounding what the Committee described as a "modified version" of the *Bolam* principle:

> *In the Proposed Act, the test for determining the standard of care in cases in which a medical practitioner is alleged to have been negligent in providing treatment to a patient should be:*
>
> > *A medical practitioner is not negligent if the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the field, unless the court considers that the opinion was irrational.*

21. The foregoing might provide some historical context for the introduction in late 2002, via amendments to the Act, of the 'competent professional practice' defence embodied in s.5O. As is canvassed below, and notwithstanding the Ipp Committee's recommendation, the provision is of wider application than alleged medical malpractice.

[12] *Simpson v Diamond* [2001] NSWSC 925; on appeal the judgment was reduced to approx $11m: *Diamond v Simpson (No 1)* [2003] NSWCA 67.
[13] [3(d)] of the Terms of Reference – emphasis added
[14] The Hon David Ipp AO & ors, Review of the Law of Negligence – Final Report (September 2002), Recommendation 3, at [3.5]

SECTION 5O ENACTED

22. Although the Ipp Committee's recommendation in its Final Report pertained solely to medical practitioners, when the NSW Government moved to amend the Act, it adopted the wider wording seen in s.5O.

23. Hansard records that in the second reading speech supporting the amending legislation[15] on 23 October 2002, the Premier said of the professional negligence provision (emphasis added):

> *The bill also creates an additional defence to alleged professional negligence if the professional acted in a manner that was widely accepted in Australia by pure* [sic – 'peer'] *professional opinion as competent professional practice. This reflects the Ipp report. A court will still be able to find that peer opinion was irrational, where warranted. Irrationality is not the same as unreasonableness. We are making it much harder for the court to disregard experts in the field.*
>
> *We have ensured, however, that there is no change to any common law duty of a professional to advise, inform or warn about the risks of personal injury in the provision of the services. Obviously, the most important application for this carve-out will be for medical practitioners. The carve-out is quite reasonable because patients—and clients of other professionals, where relevant—need to have enough information about the risk of personal injury to decide whether to proceed to obtain the service. The common law rule in the case of Rogers v Whittaker* [sic] *will, therefore, continue to apply in relation to any duty to warn in such situations. …*

24. With that history, s.5O commenced with effect from 6 December 2002. It remains unamended. The jurisprudence about the section that has built up in the 15 years since is considered next.

HOW HAS SECTION 5O BEEN CONSTRUED?

25. Section 5O sits in Part 1A, Division 6 of the Act. Its proper construction requires consideration of other provisions in that Part.

26. Section 5A makes plain the wide reach of the provisions in that Part. It provides:

> *This Part applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.*

[15] Civil Liability Amendment (Personal Responsibility) Bill, 23 October 2002

'harm' and **'negligence'** are defined in s.5:

> ***harm*** *means harm of any kind, including the following:*
>
> *(a) personal injury or death,*
>
> *(b) damage to property,*
>
> *(c) economic loss.*
>
> ***negligence*** *means failure to exercise reasonable care and skill.*

Section 5O not confined to common law claims in tort

27. Section 5A, when read with the definitions, has the result that the provisions of Part 1A, including s.5O, will apply to any claim for economic loss alleged to result from a failure to exercise reasonable care and skill, whether brought in tort, or contract, under statute or otherwise.

28. As was observed in *Paul v Cooke*[16] s.5A confirms that 'negligence' where used in Part 1A is not a reference to the tort of negligence, but to a category of conduct which may be an element in a cause of action brought in tort, or contract, under statute or otherwise.

29. It follows that s.5O can apply to a claim alleging breach of a contractually assumed duty of care, such as was considered by McDougall J in *Thiess Pty Ltd and John Holland Pty Ltd v Parsons Brinckerhoff Australia Pty Ltd & Ors*[17], where the defendant geotechnical engineer pleaded the defence in answer to an allegation that it breached, *inter alia*, a contractual promise to

> *exercise all the skill, care and diligence of a professional Consultant experienced in providing the Services and must carry out all responsibilities in a thorough, skilful and professional manner.*

30. The defence was rejected on evidentiary grounds, but Justice McDougall observed that the section's application where contractually-imposed duties of care and skill are alleged requires consideration of the specific subject matter of the professional's retainer:

> *[485] In my view, the question raised by s 5O cannot be considered in a vacuum. It can only be considered, and the widely accepted peer professional opinion can only be assessed, by reference to the specific obligations that the professional undertakes pursuant to the contract of retainer. I accept that there will be circumstances where the s 5O question arises otherwise than in the context of a contract of retainer, but since I am dealing with a very specific contract for very clearly defined services, the more general situation of obligations imposed by the common law may be put to one side.*

[16] (2013) 85 NSWLR 167, at [40] per Leeming JA
[17] [2016] NSWSC 173

> *[486] It is easy to see how s 5O operates where the professional undertakes no more than the usual and proper obligation to exercise due care and skill in the performance of duties of design, inspection, supervision, or whatever else is the subject of the particular retainer. In the present case, the obligations that [the geotechnical engineer] undertook were very carefully designed to reflect the particular demands of this complex project. It may be that peer professional opinion could be relevant in the context with which I am concerned. …*

Who is a professional?

31. The opening words of s.5O(1):

> *A person practising a profession (**a professional**) …*

beg the question: what constitutes a 'profession' for the purpose of determining who is a 'professional'?

32. As one commentator has observed[18], the reference to a person "practising a profession" would appear to exclude those performing a trade, but no authority appears to have considered the question in the immediate context.

33. It seems plain enough that those who practise in what have traditionally been regarded as the professions (medical, legal, engineering, architecture, surveying, quantity surveying / estimating / cost planning, programming, accounting / auditing, finance, teaching etc) will be regarded as professionals for the purpose of the section. Common to most professions are minimum educational or other qualifications (typically university – conferred degrees or equivalent qualifications from recognised educational institutions) and, perhaps, the existence of an association or other collegiate bodies of members.

34. Whether those whose activities fall outside the traditionally recognised categories of professions should be held to have the protection of the section is unclear.[19] However, as Isaacs J observed in *Bradfield v Federal Commissioner of Taxation*[20], the term "professional"

> *… is not one which is rigid or static in its signification; it is undoubtedly progressive with the general progress of the community.*

[18] Villa *Annotated Civil Liability Act 2002 (NSW)* 3rd Ed Thomson Reuters, at [1A.5O.050]
[19] The issue is canvassed in Prestia v Aknar (1996) 40 NSWLR 165
[20] (1924) 34 CLR 1, at 7

Section 5O evidence establishes the standard of care

35. In *Dobler v Halverson*[21], Giles JA (with whom Ipp and Basten JJA agreed) saw s.5O as working an important change to the situation under the common law as it was pronounced in *Rogers v Whitaker* (emphasis added):

> *[59] … Section 5O … was intended to introduce a modified Bolam principle. Its importance does not lie so much in questions of onus of proof as in* ***who determines the standard of care****. … Section 5O has the effect that, if the defendant's conduct accorded with professional practice regarded as acceptable by some (more fully, if he "acted in a manner that … was widely accepted … by peer professional opinion as competent professional practice"),* ***then subject to rationality that professional practice sets the standard of care****.*

36. That s.5O dictates a departure from the common law principle that judges determine the standard of care was reiterated two paragraphs later in *Dobler* (emphasis added):

> *[61] … the standard of care will be that determined by the Court with guidance from evidence of acceptable professional practice* ***unless it is established (in practice, by the defendant) that the defendant acted according to professional practice widely accepted by (rational) peer professional opinion****. …*

37. The President of the NSW Court of Appeal, writing two years after, and approving, *Dobler*, saw s.5O as transformative[22]:

> *It transforms what would otherwise be relevant evidence as to negligence to be weighed by a judge in the familiar calculus into evidence that may be determinative of the appeal.*

38. This, with respect, must be correct. The assessment of the conduct of a defendant professional cannot occur in the context of s.5B of the Act without reference to s.50. Section 5B, subject to causation, determines liability in negligence. Section 5O qualifies the operation of s.5B, **in cases to which s.5O applies**, by determining the standard of care.

39. There are provisions in the Act which operate as a defence to 'civil liability' and are thus invoked after a finding of negligence. Section 43A is an example. The application of that section involves a 'two-stepped approach', requiring a plaintiff to make out negligence and then satisfy a further, not inconsistent, statutory test. However, that construction cannot be accommodated where s.5O applies. Applying such a two-stepped approach to ss.5B and 5O would require separate, but potentially inconsistent, findings of negligence: first, an assessment under s.5B (applying *Rogers v Whitaker*); secondly, an assessment under s.5O (applying its terms).

[21] (2007) 70 NSWLR 151
[22] *Sydney South West Area Health Service v MD* [2009] NSWCA 343; (2009) 260 ALR 702, per Allsop P, at [51]

40. It follows that, where a professional adduces evidence that satisfies the court that he or she acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice, then, subject to the court not finding the opinion irrational, that practice establishes the standard of care, conformity with which by the defendant will mean he or she "does not incur a liability in negligence". That should be so even in cases where the judge is of the opinion that a different or higher standard, not met, should obtain.

Evidence of 'a practice'?

41. In ***McKenna v Hunter & New England Local Health District; Simon v Hunter & New England Local Health District***[23] Justice Macfarlan of the NSW Court of Appeal held[24] that:

> *"To establish a defence under s 5O a medical practitioner needs to demonstrate, first, that what he or she did conformed with a practice that was in existence at the time the medical service was provided and, secondly, to establish that that* practice *was widely, although not necessarily universally, accepted by peer professional opinion as competent professional* practice.*"*

42. The majority overturned the trial judge's finding and held that s.5O was not made out, because the defendant's employed psychiatrist had not shown that his decision to discharge the psychiatriac patient into the care of the patient's friend (who was later killed by the patient on the journey home) was one taken pursuant to a practice. Justice Macfarlan summarised the reasoning thus[25]:

> *"… In summary, the section is directed to something, namely a practice, that was in existence at the relevant time, here July 2004. Whilst at that time there were no doubt many practices in the medical profession concerning the manner in which operations were performed, the types of treatments that were administered, the circumstances in which tests were ordered, the circumstances in which warnings were given and other matters, the evidence here did not identify any such practice that was relevant in the present case. In light of the wide variety of circumstances bearing upon the decision to discharge [the patient], it would have been surprising if it had done so. It is unlikely, to say the least, that there would have occurred in or before 2004 a number of situations in which there were sufficient features in common with the present case to enable it to be said that there was a practice concerning how such a situation was to be dealt with by a competent medical practitioner."*

43. That reasoning was, with other aspects of the decision in *McKenna*, challenged by the defendant in an appeal to the High Court. The appeal was upheld, but on the ground that no duty was owed, and the High Court found it unnecessary to deal with the other appeal grounds, including the s.5O challenge.[26]

[23] (2013) Aust Tort Reports 82-158; [2013] NSWCA 476 (Beazley P agreeing; Garling J dissenting)
[24] at [160] – emphasis in original
[25] at [165]
[26] *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270; [2014] HCA 44

44. The "practice point" raised in *McKenna* is considered below (at [59] - [71]), in light of its very recent (and differing) treatment by the NSW Court of Appeal in *Sparks v Hobson*, a decision that arguably throws a different light on much of the foregoing analysis.

SPARKS v HOBSON

45. In March 2018, the Court of Appeal delivered judgment in *Sparks v Hobson*[27] in which a surgeon (Dr Gray) and an anaesthetist (Dr Sparks) appealed from the trial judge's findings of intra-operative negligence in their management of a surgical patient, Mr Hobson. Dr Gray's appeal was unanimously upheld; by a 2:1 majority (Basten and Macfarlan JJA; Simpson JA dissenting) Dr Sparks' appeal was dismissed[28].

46. The facts in *Hobson* are complex. Relevantly, however, the plaintiff suffered a spinal cord stroke in the course of surgery that was undertaken in circumstances where those involved reasonably believed that, without surgery, he would likely die. The plaintiff suffered from a genetic disorder that caused his spine to compress his chest, and intensivists in ICU found they could not adequately ventilate him. The surgery was undertaken in an attempt to correct the spinal condition to allow his lungs to get oxygen.

47. The trial judge's sole finding of breach against the defendants was, in effect, that having regard to what was found to be deteriorating metabolic factors, the exercise of reasonable care should have seen the operation terminated earlier than occurred.[29]

48. Dr Sparks relied on, *inter alia*, s.5O, contending that in continuing the surgery (beyond the point the plaintiff alleged he should have) he acted in a manner that was widely accepted by peer professional opinion in Australia at the time to be competent professional practice.

49. Relevantly to the case against Dr Sparks, both he and Dr Gray called supportive expert evidence from anaesthetists, Drs Manasiev and Forrest. The trial judge referred to that evidence, noted that the evidence in the plaintiff's case was "completely silent" in response, and observed[30]:

> *… I have not been able to locate any evidence upon which Mr Hobson proposed to rely from a suitably qualified medical expert that suggested that Dr Manasiev or Dr Forrest should not be accepted. Nowhere in the submissions made on Mr Hobson's behalf is the issue of s 5O even referred to or discussed. Written submissions provided by Dr Gray and Dr Sparks both elaborated upon s 5O, reliance upon which each doctor specifically pleaded. Mr Woods of counsel for Dr Gray also made a brief oral reference to the provision.*

50. However, the trial judge rejected the defence[31]:

[27] Dr Sparks' application for special leave to appeal from the NSW Court of Appeal's decision was refused 14 Sept 2018
[28] ***Sparks v Hobson; Gray v Hobson*** [2018] NSWCA 29
[29] ***Hobson v Northern Sydney Local Health District*** [2017] NSWSC 589, at [260]
[30] at [257]
[31] at [259]

> *As I have previously observed, Dr Manasiev considered that Dr Sparks and Dr Gray were warranted in not halting the surgery before they did and would be considered by widely accepted Australian peer professional opinion to have conformed to competent medical practice by doing so. For the reasons I have given concerning the defendants' negligence, I reject that view.*

51. Dr Sparks challenged the s.5O finding on appeal, submitting, *inter alia*, that the reasoning process could not be reconciled with the passages from *Dobler* extracted, and the analysis set out, at [35] - [40] above. As is considered further below, Basten JA agreed that the s.5O issue was not correctly disposed of at trial[32], albeit finding, on other bases, that Dr Sparks had not made good the section. Justice Macfarlan, and her Honour Justice Simpson (who would have allowed the appeal on other grounds), rejected Dr Sparks' s.5O challenge, but did so on bases different to each other, and to that advanced by Justice Basten. The different approaches are considered next[33].

Basten JA's judgment in *Hobson*

52. Justice Basten observed[34] of s.5O that it

> *… envisages a conflict in the evidence as to whether the defendant's conduct was accepted by his or her peers as "competent professional practice." In order to establish negligence, there will usually need to be expert evidence called by the plaintiff to the effect that the defendant failed to exercise reasonable care and skill in providing a relevant service. Under the general law, the defendant would seek to challenge that evidence by calling expert opinion to a contrary effect. For the plaintiff to succeed, the court would need to be satisfied on the probabilities that the appropriate standard was that for which the plaintiff's experts contended. That position has been varied by s 5O(1); although expressed in the passive voice ("if it is established that …"), it has been broadly accepted that the section provides a defence.*

53. His Honour next observed that the characterisation of the section as providing a *defence* is problematic, because it wrongly implies that the plaintiff must first establish breach, at which point the professional is burdened with making out the terms of s.5O[35]:

> *Despite the common acceptance of the provision as a "defence", that characterisation gives rise to difficulty. To be a defence carries the implication that the plaintiff must establish breach according to the general requirements of s 5B of the Civil Liability Act, following which the practitioner bears the burden of establishing that his or her conduct amounted to "competent professional practice" in the terms of s 5O(1). The heading of the section ("Standard of care for professionals") indicates its purpose. Although the heading is not part of the Act, it may be taken into account as extrinsic material in construing the provision, in accordance with s 34(1) of the Interpretation Act. In any event, it is tolerably clear that the provision sets a standard. However, if the standard is met, it follows that the conduct was not negligent.*

[32] [2018] NSWCA 29, at [74]
[33] The Court of Appeal reasoning is lengthy, and it is not the intention of this paper to exhaustively examine the judgments, which, with respect, repay reading in their entirety.
[34] at [16] (footnotes omitted, as in all extracts)
[35] at [17]

54. Then, in analysis that mirrored that with which he had concurred in *Dobler*, his Honour wrote:

> *Accordingly, once s 5O is invoked, arguably the general exercise required by s 5B becomes otiose. There can only be one standard against which to judge the conduct of a professional defendant, although that standard may depend upon the resolution of conflicting evidence called by the plaintiff and the defendant. It is only if one takes the plaintiff's evidence in isolation that a two-stage process, involving the assessment of the plaintiff's claim followed by assessment of an affirmative defence, will arise. However, in a practical sense, that is not how the dispute should be determined. Rather, a judgment will be given based on all of the evidence. Nor is the exercise helpfully clarified by speaking of shifting burdens of proof. The question for the trial judge is ultimately whether the plaintiff has established that the conduct of the defendant failed to comply with the relevant standard of care. This approach is consistent with Dobler and is not to say that a plaintiff must seek out and negative opinions inconsistent with those of the experts on whom he or she relies. Beyond that proposition, Dobler did not turn upon the onus of proof.*

55. After reviewing some of the history[36] leading to the section's enactment, canvassed at [7] - [23] above, his Honour revisited[37] an important passage in *Dobler*:

> *In Dobler, Giles JA stated:*
>
> > *"Section 5O may end up operating so as to determine the defendant's standard of care, but the standard of care will be that determined by the court with guidance from evidence of acceptable professional practice unless it is established (in practice, by the defendant) that the defendant acted according to professional practice widely accepted by (rational) peer professional opinion."*
>
> *Ipp JA and I agreed. <u>On reflection, this passage may be open to misunderstanding. It is true that s 5O will not be engaged unless there is evidence of a widely accepted professional practice supporting the defendant's conduct, but where there is such evidence, unless it can be rejected by the trial judge, it will fix the relevant standard; there cannot be two legally supportable standards operating in the one case</u>.*

56. Referring to that analysis, his Honour later wrote[38]:

> *For reasons set out above, the proper course in a case where s 5O has been pleaded and has been the subject of evidence is to determine first the standard of care to be applied, before assessing the alleged negligence against that standard.*

57. It is submitted that this clarification supports the reasoning in [35] – [40] above to the effect that s.5O evidence, if accepted, establishes the standard of care, and leaves no room for the different test, under s.5B, applying *Rogers v Whitaker*.

58. Basten JA closely reviewed the evidence bearing upon the issue[39], and, in a passage that is instructive as to how such evidence should be presented, concluded[40]:

[36] at [19] – [23]
[37] at [24] (emphasis added)
[38] at [69]
[39] commencing at [74], last sentence; [76] – [87]
[40] at [88], emphasis added

In summary, the evidence relied upon by Dr Sparks fell short of establishing a standard, widely accepted in Australia, of competent professional practice. A bald statement by a practitioner, however well qualified, without reference to the specific factors giving rise to a claim of negligence may well not persuade the court that there is a relevant standard identified in the evidence. Further, a bald claim that the practice is "widely accepted" as falling within the scope of competent professional practice may not be accepted by the court as evidence of that fact. To persuade the court that the terms of the section have been satisfied one would generally expect evidence which stated the basis of the standard. Further, the evidence is more likely to be persuasive if it seeks to grapple with possible conflicting views in a reasoned manner.

Basten JA in *Hobson* rejects *McKenna* re: "a practice"

59. In the course of rejecting the s.5O defence, Justice Basten considered, and declined to follow[41], Justice Macfarlan's reasoning in *McKenna* as to the need to identify "a practice" that is discussed in [41] – [44] above. After expressing uncertainty about how that reasoning will operate in particular cases, his Honour wrote:

> *31 … there is a risk in reformulating the statutory language. To speak of "a practice" adopted by a group of professional persons suggests a regular course of conduct adopted in particular circumstances. By contrast, the phrase "competent professional practice" is apt to cover the whole gamut of professional services provided by the practitioner, whether or not the particular circumstances have arisen sufficiently often to result in an established practice. For example, although opinions may differ as to the conclusion to be drawn, there is no grammatical or semantic difficulty in describing an argument run by counsel in a novel case as demonstrating competent or incompetent professional practice. The same judgment may be offered about the failure of counsel to call a defendant in a criminal trial, where no settled practice exists. Where an acquittal depends on establishing an affirmative defence and there is no other evidence to support the defence, it may be described as incompetent professional practice not to call the defendant who could have given such evidence. Where an opinion is given and challenged, it will be supported (or attacked) not by reference to some established practice, but by reference to how an assessment of the circumstances (which may be unique) would be undertaken by a knowledgeable and experienced practitioner.*
>
> *32 There are other reasons for thinking that the reference to "competent professional practice" does not require evidence of "a practice". First, it is the "manner" in which the defendant acted which must be the focus of the opinion. Secondly, if it were necessary to establish a practice, one might expect subs (3) to refer to "opinions … concerning that practice", rather than "opinions … concerning a matter".*
>
> *33 To take an example closer to the present case (but still hypothetical) an anaesthetist might allow an operation to proceed on the basis that two indicators remained within acceptable limits but a third indicator did not. An expert might express an opinion that such conduct was not competent practice, not because he or she had experienced the same circumstance in the past, or had read about it in a textbook, but because basic principles of human physiology led to that conclusion.*

[41] his Honour held that the court was not bound, as a matter of precedent, to follow the majority's s.5O reasoning in *McKenna* in circumstances where the Court of Appeal's decision had been overruled, albeit on different grounds, by the High Court: [35] – [40].

> *34 Accordingly, although the language used in McKenna may well sufficiently describe many circumstances in which s 5O is invoked, I would not understand it as a general proposition as to the constraints imposed by s 5O(1).*

Macfarlan JA's judgment in *Hobson*

60. Justice Macfarlan commenced his analysis by reference to his earlier decision in *McKenna*. His Honour rejected Dr Sparks' (and Dr Gray's) challenge to the correctness of that decision[42] giving as one of his reasons:

> *Section 5O uses the past tense ("at the relevant time … was widely accepted") to refer to the relevant peer professional opinion. Thus, the opinion about the manner in which the defendant acted must have existed, and been widely accepted, at the time the conduct occurred. It is not enough that experts called to give evidence consider that the conduct was reasonable and that it would have been so regarded by other professionals if they had been asked about it at the time of the conduct.*

61. His Honour then extracted [165] from his judgment in *McKenna* (reproduced at [42] above), to the effect that, whereas many aspects of a medico's professional life will involve the following of clearly discernible practices (eg. how operations are performed, treatments administered etc), the facts in *McKenna* did not allow such a "practice" to be identified. His Honour saw Dr Sparks' situation similarly[43]:

> *These observations are applicable to the present case, which does not relate (at least so far as the issues of negligence on appeal are concerned) to any particular point of medical practice, such as the use of a particular drug, surgical technique or item of surgical equipment.*

62. His Honour identified three factual features of the plaintiff's condition and the circumstances of the surgery, referred to evidence from witnesses as to the unusual nature of the operation, and observed that events during the surgery "rendered the situation even more unusual"[44].

63. His Honour concluded his s.5O reasoning by quoting from two passages of expert evidence on which the appellants relied (that of Dr Forrest and Dr Manasiev), saying of it respectively:

> *221 It is apparent from the manner in which this evidence was expressed that Dr Forrest was saying, in effect, that in his view the appellants acted reasonably and that he considered that a wide range of his professional peers would be likely to take the same view. He did not point to an established practice, and opine that it was followed in the present case. Indeed, it is probable that he could not have expressed such an opinion because, as in* McKenna *(see [165] quoted above at [213]), it is unlikely that "there would have occurred … a number of situations in which there were sufficient features in common with the present case to enable it*

[42] at [210]
[43] at [214]
[44] at [215] – [218]

> *to be said that there was a practice concerning how such a situation was to be dealt with by a competent medical practitioner".*
>
> …
>
> *223 My comments concerning Dr Forrest's evidence on this topic are equally applicable to that of Dr Manasiev. Whilst Dr Manasiev gave reasons as to why he thought that the conduct was reasonable, he did not point to any particular practice. Expert evidence that says no more than that the expert considers the defendant to have acted reasonably, and in a way that would be widely regarded as acceptable, is insufficient to establish the existence of a "practice" for the purpose of s 5 O. Accordingly, as the primary judge held, s 5 O does not exempt Dr Sparks from liability for his negligence.*

64. Thus, Macfarlan JA rejected the s.5O defence on the same basis as informed his Honour's reasons in *McKenna*, a basis that Basten JA declined to follow (and of which, as will be seen, Simpson JA was similarly dubious). Regrettably, Macfarlan JA's reasons in *Hobson* do not deal with Basten JA's criticisms of the 'practice point' (extracted at [59] above).

65. It is submitted, with respect, that Basten JA's criticisms were well founded, and that the terms of s.5O do not expressly require, nor should they be construed as requiring, that the professional demonstrate that the manner in which he or she acted was undertaken pursuant to an established "practice" in that regard. That position finds support in the dissenting decision of her Honour Justice Simpson in *Sparks*, considered next.

Simpson JA's judgment in *Hobson*

66. Although in the minority in Dr Sparks' appeal, Simpson JA concurred with Justice Macfarlan in rejecting the s.5O ground, and did so on the basis that his Honour identified, i.e. that there was no established "practice" at play here.

67. *However*, in concurring with Macfarlan JA on the point, her Honour explained that:

a. she regarded the court as bound by the majority decision in *McKenna*[45];

b. she had followed and applied Justice Macfarlan's reasons in *Hobson* (a draft of which her Honour had read[46]) adopting the *McKenna* approach, for that reason[47];

c. *"but for that constraint"*, she would have[48]

[45] at [335]
[46] see [247]
[47] at [335]
[48] ibid

> *… considered that the language of s 5 O makes it plain that "competent professional [here, medical] practice" is intended to denote "the practice of a profession [here, medicine]", and not a specific practice or method of providing the professional services in question. That construction is supported by the absence of the indefinite article in conjunction with "professional practice", and the use instead of the adjective "competent", which to my mind signifies professional practice in a general sense, rather than an identifiable, specific, and discrete aspect of the profession or method of providing the professional service.*

d. the *McKenna* construction of s.5O has the result that the section[49]

> *… can apply only in limited circumstances, where the defendant can, or seeks to, identify a discrete practice to which he or she conformed. It necessarily excludes unusual factual circumstances, such as occurred in McKenna, and such as occurred in the present case. It does not appear to me that s 5 O was intended to have such limited application. However, as I have said, I consider myself constrained to follow and apply that decision.*

It is submitted, with respect, that the difficulties with the *McKenna* approach that her Honour identified do exist, and point against the need to identify "a practice".

68. Regrettably, her Honour's reasons for regarding herself as bound to follow *McKenna* do not refer to or otherwise engage with the different conclusion about that issue that was reached by Justice Basten. It is plain from her Honour's judgment that, but for her conclusion that *McKenna* was binding precedent (a conclusion opposite to that reached by Justice Basten[50]), she would not have followed Macfarlan JA's approach. Indeed, her Honour stated that she would have upheld the s.5O appeal (emphasis added):

> *344 Were the construction of s 5 O that I prefer to prevail, I would uphold these grounds of appeal. Drs Manasiev and Forrest were unequivocal in their evidence that Dr Sparks acted in a manner that at the time was widely accepted in Australia by peer professional opinion as competent professional practice. No countervailing evidence was given on behalf of the respondent. Indeed, it is difficult to see how Dr Westbrook (the respondent's only expert anaesthetist witness) could comment on peer professional opinion in Australia. He practises in the United Kingdom, and gave evidence from London. There was no evidence that he has any Australian experience.*
>
> *345 Whether Dr Sparks acted in accordance with widely accepted peer professional practice is a question of fact; it is not a question of the kind referred to in Rogers v Whitaker and Rosenberg v Percival, involving determination of whether a medical practitioner failed to conform to standards of the ordinary skilled medical practitioner (in this case, practising as an anaesthetist). Under s 5 O, the task of the court is not to evaluate the merits of the competing views (if there is evidence of competing views) but to determine whether, as a factual matter, the service*

[49] at [336] – emphasis added
[50] *Sparks v Hobson,* at [35] – [40]

had the acceptance of peer opinion, even if other peer opinion was different.

> *346 However, adopting as I consider I must, the McKenna construction of s 5 O, and since, principally because the circumstances of this case were highly unusual, it was not possible for Dr Sparks to identify "a practice" to which he conformed, the s 5 O defence must fail. That is notwithstanding that the overwhelming medical evidence was that his conduct was in accordance with what was widely accepted in Australia as "competent professional practice".*

69. With respect, the underlined words posit the proper approach to the application of evidence directed to s.5O. That is, the proper enquiry is whether the 's.5O evidence' establishes supportive peer opinion, widely held, and such evidence is not displaced by evidence that others among the professional's peers hold a different opinion.

Is *McKenna* binding?

70. There remains the question whether the present state of the law requires that the professional identify "a practice", as Macfarlan JA (Beazley P agreeing) held in *McKenna*, in circumstances where two judges of a later appellate court expressly doubted its correctness, one of whom declined to follow it and provided cogent reasons why it was not binding.

71. It is submitted that, for the reasons given by Basten JA in *Hobson* at [35] – [40], *McKenna* is not binding authority on the proper construction of s.5O, albeit that what it says as to the scope and operation of the section is not to be disregarded. Indeed, arguably the fact that such disparate views were expressed in *Hobson* as to both the correctness of the *McKenna* reasoning, and as to whether it is binding, renders both issues ripe for further consideration by the NSW Court of Appeal, if not by the High Court.

Guidance from *Hobson*?

72. With respect, the different approaches taken by the three judges in *Hobson* renders it difficult to discern settled themes that might inform practitioners (and trial judges) in future cases. However, the judgments, taken together with earlier decisions to which they refer, and with the subsequent decision of a differently constituted Court of Appeal in ***Gould***[51] provide guidance to the profession as to the proper approach to pleading, and proving, the defence, and these are considered at 92ff below.

73. ***Gould*** is important not only because it is the most recent word from the Court of Appeal on the proper construction of the section, including as to how it sits with s.5B of the Act, but also because of its treatment of the *irrationality* exception in subs.(2), an issue that received scant treatment prior to ***Gould***. The irrationality exception, and ***Gould's*** treatment of it, is considered next.

[51] Basten, Meagher and Leeming JJA

GOULD

74. In ***Gould***, the appellant local health district responsible for Liverpool Hospital in Sydney appealed from a finding by the trial judge that it had negligently failed to treat the open fracture of the infant plaintiff's left thumb with a specific antibiotic, gentamicin, leading to infection and the subsequent need for amputation.

75. In finding that causative breach, the trial judge rejected as 'irrational', within the meaning of s.5O(2), expert evidence of peer professional opinion adduced by the defendant to the effect that the antibiotic regime that was administered by the hospital accorded with competent professional practice.

76. That '*irrational'* expert evidence drew in part upon Australian - published therapeutic guidelines that did not recommend gentamycin be administered in *any circumstance*, including in the treatment of open compound fractures of the type the plaintiff suffered. Indeed, the antibiotic regime that was administered by the hospital (initially flucloxacillin followed by cephazolin) was consistent with the advice given by the guidelines.

77. The Court of Appeal unanimously allowed the hospital's appeal, holding[52] that the evidence that those for whom the appellant was responsible acted in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice should have been accepted, and that the trial judge erred in holding that such opinion was irrational.

78. Arguably, at least four significant matters should be taken from ***Gould***:

    a. *First*, its affirmation of the approach taken in *Dobler* and *Sparks* to the effect that:

        i. s.5O alters the standard of care against which the breach of duty is to be assessed[53]

        ii. so that, if the preconditions to s.5O (namely, that the defendant was "practising a profession" and was doing so "in a manner that ... was widely accepted in Australia by peer professional opinion as competent professional practice") are made out, then the section applies and the s.5O evidence establishes the standard of care against which the defendant's conduct is to be assessed[54].

    b. *Secondly*, the party alleging irrationality must raise it clearly. As the Court of Appeal observed[55], the proposition that the peer professional opinion relied on by the hospital in ***Gould*** was irrational was not raised on the pleadings, nor even

[52] per Basten JA, at [1], [7]; Meagher JA at [8], Leeming JA at [130]
[53] see per Leeming JA, at [119] (Basten and Meagher JJA agreeing, at [2] and [8] respectively)
[54] per Leeming JA at [123] – [129] (Basten and Meagher JJA agreeing, at [2] and [8] respectively)
[55] At [69] – [73]

mentioned at the trial, still less argued by the parties. The concept emerged for the first time in the first instance judgment. In such circumstances, the rejection of the defendant's expert evidence on that ground was procedurally unfair.

c. *Thirdly*, the section's preconditions may be satisfied by evidence from persons other than medico – legal experts qualified for that purpose: so, in *Gould*, the treating surgeon Dr Scott gave evidence that in his experience, the antibiotic regime administered to the plaintiff was standard, and accorded with the practice he had seen and followed in no fewer than eight other NSW hospitals at which he had worked. Leeming JA observed of this evidence[56] that it was entirely factual and went squarely to the ubiquity of the practice and whether it was irrational. His Honour held that the evidence was wrongly ignored by the primary judge, and should have been regarded as reinforcing the conclusion that not administering gentamicin was a practice which was widespread in Australia.

d. *Fourthly*, ***Gould*** clarifies the meaning of the irrationality exception, demonstrating why it will be only in the most exceptional of cases that widely held peer professional opinion would be irrational[57].

79. No more need be said here about the first three matters. What follows focuses on the fourth, the meaning of the irrationality exception.

'IRRATIONALITY'

80. Subsection 5O(2) of the Act provides:

> (2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.

81. As at least one commentator[58] has observed, one of the difficulties that the Ipp Committee saw with the law as it was before s.5O was that insufficient guidance was provided as to what might justify a court declining to defer to medical opinion in relation to the prevailing standard of care. Thus, the Committee devised the "irrationality" test. Of it, the Committee said[59]:

> *Under the recommended rule, it is for the court to decide whether treatment is irrational. It would be rare indeed to identify instances of treatment that is both irrational and in accordance with an opinion widely held by a significant number of respected practitioners in the field. Such a rare instance is the finding of the court in Hucks v Cole.*

[56] at [111]
[57] per Leeming JA at [96] (Basten and Meagher JJA agreeing, at [2] and [8] respectively)
[58] Villa *Annotated Civil Liability Act 2002 (NSW)* 3rd ed at [1A.5O.070]
[59] Final Report at [3.19]

In *Hucks v Cole*[60] the English Court of Appeal rejected evidence of a body of opinion supportive of the defendant doctor's failure to administer penicillin to a patient when he knew her presenting condition to be capable of leading to fever. Sachs LJ held[61]:

> *When the evidence shows a lacuna in professional practice exists by which risks of grave danger are knowingly taken, then, however small the risks, the courts must anxiously examine that lacuna – particularly if the risks can be easily and inexpensively avoided. If the court finds, on an analysis of the reasons given for not taking those precautions that, in the light of current professional knowledge, there is no proper basis for the lacuna, and that it is definitely not reasonable that those risks should have been taken, its function is to state that fact and where necessary to state that it constitutes negligence ….*

82. In promoting the 'irrationality' proviso, the Ipp Committee[62] drew upon the decision of the House of Lords in *Bolitho v City & Hackney Health Authority*[63]. In *Bolitho*, a hospital doctor was held to have breached her duty of care by failing to attend a critically ill child when called by nurses. It was alleged that the child's life could have been saved had the doctor attended and intubated the child. Ultimately, the plaintiff lost because she did not establish causation. However, on the question of the expert evidence supportive of the medico's position, Lord Browne-Wilkinson said:

> *But if ... it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable and responsible.*

Irrationality – before *Gould*

83. The term "irrational" is not defined in the Act. Before ***Gould***, the term received little judicial consideration in the context of s.5O. Basten JA in *Hobson*[64], like the Ipp Committee before him, saw a difficulty with the notion that any opinion that enjoyed peer support could be construed as 'irrational':

> *There remains a question as to the extent to which the trial judge has a discretion to reject evidence of a widely accepted professional practice. The judge may dismiss "peer professional opinion" as "irrational", in accordance with subs 5O(2). By contrast, the older cases, while tending to use transferred epithets, refer to opinions of responsible and competent practitioners in the field. It may be that the reference in s 5O to "peer professional opinion" is to be so understood. <u>But then it is difficult to understand how an irrational opinion could qualify as a relevant peer opinion</u>.*
>
> *More importantly, the provision raises the possibility of a negative inference, namely that the court may not reject an opinion even though satisfied that it is unreasonable (though*

[60] (1993) 4 Med LR 393
[61] at 397
[62] Final Report at [3.18]
[63] [1998] AC 232
[64] at [25] – [26] (evidence added)

> *not irrational), or otherwise not one the court would itself adopt. Such a general negative inference should not be inferred; there will be other questions which will arise.*

84. It will be recalled that in *Hobson*, Basten JA[65], in holding that the expert evidence relied upon by Dr Sparks fell short of establishing a standard, widely accepted in Australia, of competent professional practice, said of that evidence:

> *That is not to say that any of the evidence was "irrational". Rather, the test of irrationality applies to the opinion as to competent professional practice. The Court must always be satisfied as to two antecedent questions, namely that the opinion addresses the conduct as found at the trial and that the evidence supports the view that the expressed opinion was, at the time of the conduct, "widely accepted in Australia".*

Irrationality as construed in *Gould*

85. Leeming JA analysed the meaning of the irrationality exception in part by identifying the flaws in the approach taken by the trial judge. So, for example, his Honour identified three elements in the trial judge's approach, each of which he found were flawed:

> *(1) First, the primary judge followed an approach he had previously taken in Hope v Hunter and New England Area Health Service [2009] NSWDC 307 at [174]. In the earlier decision, his Honour said that "irrational" did not mean "without reasons", but rather referred to "reasons that are illogical, unreasonable or based on irrelevant considerations". His Honour gave no explanation for that construction. Likewise, his Honour gave no explanation in the present judgment for applying the same test.*
>
> *(2) Secondly, his Honour added, at [620], that he regarded the term as being used "in the non-pejorative sense". What his Honour intended to convey by that is not clear, although this may explain the readiness with which the primary judge was able to be satisfied of irrationality sufficient to engage s 5O(2).*
>
> *(3) Thirdly, his Honour then proceeded to give dictionary definitions of "unreasonableness", namely, as meaning "without sound or logical reasons, or not endowed or guided by reason": at [621].*

86. As to the last matter, Leeming JA cited three High Court decisions pointing up the dangers of resort to dictionary definitions as a substitute for applying the principles of statutory construction[66], and observed[67] that:

> *… even in cases where a dictionary might assist at the outset, the court's task is not accomplished by surveying the range of meanings found in a dictionary and choosing that which seems most apt.*

[65] at [89]
[66] at [77] – [81]
[67] at [81]

87. Next, Leeming JA observed that, in any event, the trial judge did not rely on dictionary definitions of "irrational", but rather, and impermissibly, those of a different word: "*unreasonable*"[68]. Of this, his Honour said:

> *The court's task of ascertaining the legal meaning of statutory language is not accomplished by choosing one possible meaning from a dictionary definition of what is said to be a synonym of the statutory text. Indeed, in many contexts the words are not true synonyms, notwithstanding their cognate etymologies.*

88. His Honour observed that the primary judge failed to conform to the accepted approach to statutory construction which requires regard to be had to the text, together with the legislative context and purpose. After emphasising that the question of *context* falls to be considered first[69], his Honour reviewed the historical matters leading up to the section's enactment (including the matters referred to in [81] and [82] above)[70], before concluding[71]:

> *Text, context and purpose all support the conclusion that it is a seriously pejorative and exceptional thing to find that a professional person has expressed an opinion that is "irrational", and even more exceptional if the opinion be widely held. To consider a body of opinion to be "irrational" is a stronger conclusion than merely disagreeing with it, or preferring a competing body of peer professional opinion*

His Honour noted[72] that the Ipp Panel described the circumstances in which the exception might be available in language such as "rare indeed", a chance which was "very small indeed", a "rare instance" and "very exceptional cases".

89. His Honour further held[73] that an absence of reasoning, whilst potentially exposing the evidence to rejection for failure to comply with the exception to the opinion rule in s79 of the *Evidence Act 1995* (NSW), was no basis for concluding it was irrational. His Honour gave this telling example:

> *Competent professional practice to administer lime juice to treat and to ward off scurvy amongst sailors preceded by many decades any understanding of the role of vitamins in human health. The fact that the reasons given in the late 18th and 19th centuries for the practice were wrong, or non-existent, did not make the practice irrational. (It was known to work.)*

As to this point, referring to the evidence of one of the experts relied on by the defendant, his Honour said[74]:

[68] at [82]
[69] at [83]
[70] at [89] – [96]
[71] at [96]
[72] at [92]
[73] at [88]
[74] at [102]

> *It is true that in many respects Dr Haertsch did not articulate the reasoning process leading to the conclusions tersely expressed in his two page letter and supplementary report. But it does not follow that those conclusions were irrational; it merely follows that it would have been open to the plaintiff to object to its tender. It was wrong for the primary judge to have rejected unobjected to opinion evidence, applying the principles governing admissibility, in the guise of applying s 5O(2).*

90. Lastly, Leeming JA observed[75] that preference for the evidence of the plaintiff's expert, expressed by the primary judge to be based "on grounds of rationality", was quite different to a finding that the defendant's expert's evidence was irrational, and:

> *To the extent it amounted merely to the preferring the views of one witness over another, it is inconsistent with s 5O(3) and (4).*

Conclusion: peer professional opinion will rarely be irrational

91. In addition to the four matters that it is submitted in paragraph 78 above ought be taken from *Gould,* it is clear that a finding of irrationality in respect of peer professional opinion will very rarely be open. Indeed, it is difficult to conceive of an opinion as to a practice that professional peers would regard as competent, yet the courts strike down as irrational.

PLEADING SECTION 5O

92. A defendant wishing to invoke s.5O in defence should plead it. In *Sydney South West Area Health Service v MD*[76] Hodgson JA (Allsop P and Sackville AJA agreeing) wrote:

> *[23] In my opinion, s 5O does contemplate proof of material facts which, if established, would negative a finding of negligence which otherwise might be available; so in my opinion the material facts contemplated by s 5O should be pleaded in a defence, even if specific reference to s 5O is not mandatory. However I would say that specific reference to s 5O would be desirable.*

93. Allsop P added:

> *[51] … s 5O does need to be pleaded. It is not just a matter of evidence. It transfers, to a degree, the onus of proof. It transforms what would otherwise be relevant evidence as to negligence to be weighed by a judge in the familiar calculus into evidence that may be determinative of the appeal. It also may raise, in other cases, although it did not here, issues as to schools of medical practice, the geographical or other areas in which those schools might obtain and other matters requiring specificity and particularisation. In my view, for the reasons Hodgson JA has given and for the reasons in Dobler … as well, it is a matter that needs to be pleaded. There is also the question of the surprise rule and precise terms of the relevant rule [UCPR] r 14.14.*

[75] at [97]
[76] [2009] NSWCA 343; (2009) 260 ALR 702

94. In the early days of the section's operation, and to a lesser extent still today, defences blandly pleaded that "the defendant relies on s.5O …", or restated the terms of the section, without more. It is now plain that such an approach is not acceptable.

95. The nature and content of the pleading obligation are, with respect, well captured in these observations of his Honour Justice Garling of the New South Wales Supreme Court[77]:

> *In my opinion, it is insufficient to plead, without more, that the defendant acted in a way, which complied with widely accepted professional practice. In other words, merely restating the words of the section is inadequate. What is required, when pleading a s 5O defence, is a sufficient articulation of the defendant's manner of practice in the particular case, and an articulation of the competent professional practice being relied upon.*
>
> *If the negligent conduct is said to have been constituted by an omission, commonly in the medical sphere, an omission to undertake an identified test, eg a biopsy, or a colonoscopy, then the defendant, in such a case, if seeking to rely on s 5O, may need to plead, albeit concisely, and prove, what the context for the consultation was, what opinion the defendant formed, perhaps the differential diagnosis which was reached, and that the test which is alleged ought to have been carried out, was unnecessary, or inappropriate, or too risky as the case may be. Only then will the defence have been engaged in a way which enables the necessary evidence to be obtained and led at the trial, rulings as to admissibility to be made, and the matters in issue identified for any joint conclave of experts.*

96. Further, as the extract from the judgment of McDougall J in *Thiess John Holland* discussed at [30] above shows, many professionals, particularly building and engineering consultants, will typically provide their professional services pursuant to consultancy agreements that impose very specific obligations and define a very specific scope of work, typically via a schedule of services. A properly pleaded defence invoking s.5O would, where relevant to understanding why the professional "*acted in a manner* [now impugned by the plaintiff]", plead that context, particularly where the plaintiff alleges an omission to do something that the defendant wishes to show was not required by, or was inconsistent with, the contractual scope or obligations.

97. For more abundant caution, and for so long as uncertainty remains about the *McKenna* question (i.e. whether the defendant professional must identify "a practice") the pleading should, if at all possible, set out the material facts that go to that issue. So, until the McKenna question is settled, it may be prudent to put such matters in the alternative, by introductory words to the following effect:

> *"Further, and in the alternative, if, which is denied, section 5O requires that the defendant establish that he acted pursuant to a practice that was in existence at the relevant time, then the defendant:*
>
> *(i) says that the manner in which he acted accorded with a practice in existence at that time; and*

[77] writing extra – judicially: *Civil Liability Act 2002 – Burdens for a Defendant,* a paper delivered to the NSW Bar Association Personal Injury Conference, 15 March 2014, at [45] and [46] (emphasis added)

(ii) relies upon the following facts as establishing that practice:

(a) …"

98. For litigators, a beneficial by-product of pleading out the material facts on which the defendant proposes to rely for the s.5O defence is that the intellectual discipline required to do so focuses attention on what will be the substance of the argument, and indeed, the evidence that might be required to prove it. That will rarely be the case with a pleading that simply contends that the defendant relies on s.5O, assuming such a pleading would survive strikeout were the point taken.

PROVING THE SECTION

99. Assessing the proper form that 's.5O evidence' should take is not easy, not least because the task does not lend itself to adopting an even remotely formulaic approach. Indeed, in *Hobson*, Basten JA regarded the evidence adduced in Dr Sparks' case as insufficient to make out the defence, **whereas** Simpson JA would have upheld the defence on that evidence, but for her Honour's position that *McKenna* was binding.

100. Plainly, reasonable minds may differ about what constitutes sufficient evidence, but one thing is clear: it is not sufficient for experts to simply express the bald conclusion that "the defendant professional acted in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice", at least not unaccompanied by a clearly exposed reasoning process.

101. In *Hobson*, Justice Basten[78], citing *Qidwai v Brown* [1984] 1 NSWLR 100 at 102 (regarding misconduct of a medical practitioner in a professional respect) queried the number of experts necessary to satisfy a court that a given opinion is "widely accepted":

> *… there will be a question as to whether the evidence of one or two experts can satisfactorily establish opinions which are "widely accepted" in circumstances where such a view is contradicted by other evidence. No doubt evidence of "general professional opinion", in addition to the personal opinion of the expert, is admissible in such circumstances.*

His Honour next[79] identified how the evidentiary requirements will vary, depending on the circumstances of the case:

> *… it will be a matter for the court to assess the significance of particular evidence. Evidence may be at a greater or lesser level of generality. At a high level of generality it may readily be accepted that an opinion is widely held amongst peers of the practitioner. However, the standard so identified may not assist greatly in resolving the particular case. On the other hand, the more particular the opinion, based on the specific circumstances of*

[78] at [27]
[79] at [28]

> *the case, the more difficult it may be to establish an opinion which can be described as "widely accepted" among fellow practitioners. Accordingly, whether or not evidence of medical opinion is properly described as conclusive in a particular case will depend upon a range of factors and not merely the fact that it can properly be described as not irrational.*

102. It is advisable, when preparing 's5O evidence', to critically examine whether it establishes that the peer opinion relied upon not only actually exists, but that it was, at the relevant time, widely held in Australia. The defendant in his or her own evidence, and any expert on whose evidence the defendant relies, may need to demonstrate such matters by reference to his or her exposure to and observations of current practices and thinking in the given field. The evidence may need to provide a narrative account of the witness's experience that, it is asserted, has provided the relevant exposure and, in the case of expert evidence, equips the expert to express opinions as to widely held opinion. Evidence of contributions to and attendances at conferences and symposiums, access to peer reviewed writings, participation in advisory committees, and any other activities that expose the witness to the thinking and modes of practising of professional colleagues should, where possible, be adduced, and preferably supplement more 'direct' evidence of peer professional opinion such as might, for example, be drawn from peer reviewed journal articles and other publications.

103. It would also be prudent to heed the advice of Justice Garling in the passage extracted at [95] above, and repeated here (emphasis added):

> *If the negligent conduct is said to have been constituted by an omission, commonly in the medical sphere, an omission to undertake an identified test, eg a biopsy, or a colonoscopy, then the defendant, in such a case, if seeking to rely on s 5O, may need to … prove, what the context for the consultation was, what opinion the defendant formed, perhaps the differential diagnosis which was reached, and that the test which is alleged ought to have been carried out, was unnecessary, or inappropriate, or too risky as the case may be.*

104. Ultimately, as Justice Basten observed in *Hobson*[80], "one cannot seek to identify a standard of competent professional practice in the abstract; the standard must relate to the specific ways in which negligence is alleged". Thus, 's.5O evidence' should be directed to the plaintiff's case, by focusing on the criticisms of the manner in which the defendant acted. As Justice Basten observed in *Hobson*[81]:

> *A bald statement by a practitioner, however well qualified, without reference to the specific factors giving rise to a claim of negligence may well not persuade the court that there is a relevant standard identified in the evidence. Further, a bald claim that the practice is "widely accepted" as falling within the scope of competent professional practice may not be accepted by the court as evidence of that fact. To persuade the court that the terms of the section have been satisfied one would generally expect evidence which stated the basis of the standard. Further, the evidence is more likely to be persuasive if it seeks to grapple with possible conflicting views in a reasoned manner.*

[80] at [75]
[81] at [88]

CONCLUSION

105. Not all of the uncertainty about the proper construction of s.5O that remained after the decision in *Sparks v Hobson* has been resolved by the decision in *Gould*, and regrettably, the correctness of the 'practice point' first raised in *McKenna* remains unclear, but *Gould* sheds more light on how to plead and prove the section, and demonstrates why the 'irrationality' exception will rarely be engaged.

106. It is suggested that, until the law is more settled, the prudent course, where the evidence permits, is to plead the existence of "a practice" (per *McKenna*) and adduce such evidence as is available to establish the basis on which it is contended that the defendant's manner of acting accorded with that which was widely accepted in Australia at the time by peer professional opinion as competent professional practice.

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