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Section 50 of the *Civil Liability Act 2002* – An Update

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Medical negligence claims often require a consideration of the question posed by s 5O of the *Civil Liability Act 2002* (NSW): *viz*. whether 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. The decision of the Court of Appeal in *Dean v Pope* [2022] NSWCA 260 is the latest addition to the relevant case law. Where are we now?

5O Standard of care for professionals

(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.

This Seminar addresses three matters

A. Briefly trace the events that led to the enactment of s 5O;

B. Examine the construction of s 5O by appellate authority; and

C. Consider last year's decision of the NSW Court of Appeal in *Dean v Pope* [2022] NSWCA 260.

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How did the section come to be

1. *Rogers v Whitaker* (1992) 175 CLR 479

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

> *… 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'.*

How did the section come to be

2. Judicial Concerns

Tame v New South Wales (2002) 211 CLR 317 at 354

> *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.*

How did the section come to be

3. Insurance Crisis
4. *Simpson v Diamond* [2001] NSWSC 925; *Diamond v Simpson (No1)* [2003] NSWCA 67
5. *Civil Liability Act 2002* (NSW) – May 2022
6. Ipp Report – July 2022

   The terms of reference 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.*

7. Section 5O – 6 December 2022

How has s 5O been construed

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.*

How has s 5O been construed

1. Who is a professional?

The opening words of s 5O(1):

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

Isaacs J observed in *Bradfield v Federal Commissioner of Taxation*, 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.*

How has s 5O been construed

2. Section 5O evidence establishes the standard of care

Dobler v Halverson

> *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****.*

> *… 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****. …*

How has s 5O been construed

3. Evidence of a practice

McKenna v Hunter & New England Local Health District; Simon v Hunter & New England Local Health District (2013) Aust Tort Reports 82-158; [2013] NSWCA 476

To establish a defence under s 5O a medical practitioner needs to demonstrate, first, that what he or she did conform 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."

How has s 5O been construed

3. Evidence of a practice

Sparks v Hobson [2018] NSWCA 29

Basten JA:

> *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.*

How has s 5O been construed

3. Evidence of a practice

Sparks v Hobson [2018] NSWCA 29

Macfarlan JA:

> *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.*

3. Evidence of a practice

Sparks v Hobson [2018] NSWCA 29

Simpson JA:

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* (at [355]);

b. she had followed and applied Justice Macfarlan's reasons in *Hobson* (a draft of which her Honour had read (at [247]) adopting the *McKenna* approach, for that reason (at [355]);

c. *"but for that constraint"*, she would have (ibid).

How has s 5O been construed

4. Irrationality

South Western Sydney Local Health District v Gould (2018) 97 NSWLR 513; [2018] NSWCA 69

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;

   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.

b. *Secondly*, the party alleging irrationality must raise it clearly.

c. *Thirdly*, the section's preconditions may be satisfied by evidence from persons other than medico – legal experts qualified for that purpose

d. *Fourthly*, ***Gould*** clarifies the meaning of the irrationality exception

How has s 5O been construed

4. Irrationality

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.*

How has s 5O been construed

Section 5O(2)

a. 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.

b. 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).

c. 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].

5. Pleading s 5O

Sydney South West Area Health Service v MD

> *… 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.*

How has s 5O been construed

6. Proving s 5O

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Reflection on *Sparks*

Simpson JA

Gett v Tabet [2009] NSWCA 76

[277] *The circumstances in which an intermediate appellate court regards itself as free to depart from its own previous decisions have been regarded in the past as a subject of practice and procedure for the court in question to determine for itself: Nguyen v Nguyen [1990] HCA 9; 169 CLR 245 at 268-269 where Dawson, Toohey and McHugh JJ said:*

> ***"The extent to which the Full Court of the Supreme Court of a State regards itself as free to depart from its own previous decisions must be a matter of practice for the court to determine for itself. ...***
>
> ***Where a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong..."***

Treatment of precedents in cases of statutory construction

Ward P

Babaniaris v Lutony Fashions Pty Ltd (1987) 163 CLR 1; [1987] HCA 19

> *… The fundamental responsibility of a court when it interprets a statute is to give effect to the legislative intention as it is expressed in the statute. If an appellate court, … , is convinced that a previous interpretation is plainly erroneous then it cannot allow previous error to stand in the way of declaring the true intent of the statute … It is no part of the Court's function to perpetuate error and to insist on an interpretation which, it is convinced does not give effect to the legislative intention … there is no support in principle or authority for the proposition that the court should persist with* ***a manifestly incorrect interpretation on the ground that it will cause injustice or inconvenience.***

Section 5O

Ward P

[233] *Had it been necessary to determine, I would have concluded that* McKenna *should not be understood as requiring in all cases that there be "a" specific practice such as might be set out in a manual or the like but that* ***what is required*** *(consistent with the intent of the legislature for the reinstatement following* Rogers v Whittaker *of a qualified "*Bolam*" rule)* ***is that one focuses on the conduct of the practitioner and determines whether that was in accordance with what, at the time of the conduct, was widely accepted by peer professional opinion to be competent professional practice, i.e., that it is not necessary to identify "a" practice as such, but there be identified a widely accepted*** *(as competent professional practice at the relevant time)* ***manner of acting*** *(and in that sense practice)* ***with which the practitioner complied at that time****. In other words, I would adopt the formulation by Simpson JA in* Sparks *as more correctly adhering to the text of s 5O. That accords with the wording of the section, i.e., one is ascertaining whether, at the time of the impugned conduct (this being the temporal requirement emphasised in* Sparks*) the manner in which the doctor acted was in accordance with what was widely accepted as competent professional practice. Much will turn on how the "manner of acting" or "practice" is framed in the relevant context.*

Section 5O

Brereton JA

[314] *In any event, whatever was the position under* Bolam*, in my opinion that is now clearly the case under s 5O.* ***The question posed by s 5O is whether "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". This requires identifying the manner in which the professional acted, and asking whether it was at the time widely accepted as competent professional practice. The "manner" refers to what the doctor did. The statute does not refer to "accepted practice". The absence of the indefinite article before competent professional practice tells against the reference being to a particular identifiable subsisting practice. So does the reference to "manner". In my opinion, professional practice in this context refers to the manner in which professionals practise their profession, not to a particular protocol, procedure or process.*** *"Competent professional practice" refers to what a significant body of competent professionals would have done. The past tense "was" is used, not to refer to a subsisting practice, but to highlight that the judgment is to be made as at the time of the relevant conduct, not with the benefit of hindsight in the light of more recent medical advances. If what the doctor did (that is, the manner in which he or she acted) accorded with what by the standards of the time a significant body of peer professionals would in the same circumstances have done, the requirement of the section is satisfied and the doctor was not negligent.*

Section 5O

Macfarlan JA

[256] ***The fundamental point that I sought to make in* McKenna *and* Sparks *however remains, namely, that s 5O cannot be satisfied by a defendant simply calling an expert to say that in unique circumstances with which the defendant was confronted, the expert would have acted in a similar fashion to the defendant and that he or she considers that other practitioners, or at least a substantial number of them, would have acted similarly.*** *Such a broad reading of s 5O(1) would result in the provision being enlivened by an expert's opinion on whether the defendant's manner of activity (or non-activity), hypothetically,* would *have been widely accepted, regardless of whether there* was *actually wide acceptance at the relevant time. If the legislature had intended this construction, it would have used the words "would have been" instead of "was". The better view is that the word "was" requires the acceptance to be pre-existing as opposed to merely hypothetical.*

Section 5O

White JA

[266] *I agree with Brereton JA for the reasons his Honour gives that,* ***having regard to the genesis of s 5O, the reference to its being established that the professional acted in a manner that "was" widely accepted in Australia by professional opinion as competent professional practice includes a reference to what a significant body of competent professionals "would have done"*** *(at [314]). I agree that the absence of an indefinite article before "competent professional practice" tells against the reference being to a particular identifiable subsisting practice (at [314]). I also agree with his Honour's observation that the reason for the use of the past tense "was" was to preclude the use of the benefit of hindsight (at [314]).*

Section 5O – Policy Consideration

Ward P

[236] *As to the purpose of the provision, in light of the recommendations of the Ipp Report (extracted above) I am not of the opinion that it was the intention of the legislature that s 5O operate in such circumscribed circumstances as would be the case if the* McKenna *interpretation of the provision is preferred.* ***There are compelling arguments of policy that would militate against the* McKenna *construction of the provision, namely: that the provision would have limited, if any, application to unusual factual circumstances; that it may have a chilling effect on the development of the profession, insofar as practitioners lack incentive to challenge established (but inadequate) practices; and it may encourage the practice of defensive (as opposed to patient-centric) medicine.***

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QUESTIONS?