

Health Insights

Listen to the experts: *Chatoor v Health Care Complaints Commission of NSW* [2020] NSWCA 111

The NSW Court of Appeal (“NSWCA”) recently overturned a decision of the NSW Civil and Administrative Tribunal (“the Tribunal”) in relation to two complaints concerning Dr Roger Chatoor (a cardiologist). Dr Chatoor appealed the Tribunal’s findings of unsatisfactory professional conduct on the primary basis that it had failed to correctly apply the relevant statutory test and to have proper regard to the expert evidence. The NSWCA’s decision to allow the appeal provides a reminder of the relevant considerations when it comes to using expert evidence to determine whether the conduct of a health practitioner meets the test for ‘unsatisfactory professional conduct’ under the National Law.

The factual circumstances underlying the complaints are set out in the NSWCA’s judgment which can be [read here](#). In brief, the Health Care Complaints Commission (the “HCCC”) alleged that Dr Chatoor was guilty of unsatisfactory professional conduct because he had:

- (1) Inserted a permanent pacemaker for Patient A without sufficient clinical indication; and
- (2) Approved the transfer of Patient A from Gosford Private Hospital to Dubbo Private Hospital following the insertion of a dual chamber pacemaker in circumstances where there was no definite arrangement for another appropriately qualified specialist to review her before her planned discharge on 17 May 2014.

The test for determining whether conduct meets the definition of ‘unsatisfactory professional conduct’ is set out in section 139B(1)(a) of the National Law:

Conduct that demonstrates the knowledge, skill or judgment possessed, or care exercised, by the practitioner in the practice of the practitioner’s profession is significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience.

The Tribunal found, in respect of each complaint, that Dr Chatoor had engaged in unsatisfactory professional conduct as defined in section 139B(1)(a) of the National Law, and determined to sanction him based on the collective findings with a reprimand and conditions on his registration.

The Tribunal’s decision turned heavily on the large amount of expert and technical evidence tendered before it, which was proffered by five separate experts, and with reference to the American and European guidelines relating to the implantation of cardiac pacemakers. It was the Tribunal’s consideration of the

expert evidence, and application of the statutory test for unsatisfactory professional conduct, that Dr Chatoor grounded the core of his appeal.

The NSWCA set out the essence of the lengthy expert evidence in its judgment. In relation to allegation (1), several of the experts said they would not have chosen to insert a permanent pacemaker in the circumstances themselves, but that it was “not unreasonable” to do so, or that it “could be justified”. Others described Dr Chatoor’s decision to implant a permanent pacemaker as a “value judgment”, “a judgment call” and “controversial” but that it was not outside the bounds of what was reasonable given the patient’s presentation. When considering the guidelines, it was noted that the American guidelines stated that “pacing is not usually indicated...” in Patient A’s circumstances, while the European guidelines said that pacing where there are no symptoms is “controversial”.

However, despite these nuances, the Tribunal’s conclusory remarks about the expert evidence were definitive and without qualification. It stated that “all the experts agreed that they would not have inserted a pacemaker in Patient A based on her clinical presentation at the time”, and that based on the references to the European and American guidelines, “inserting a pacemaker in Patient A fell significantly below the standard expected of a practitioner of an equivalent level of training or experience.”

The NSWCA held that the guidelines were not expressed in such strong terms as to found the Tribunal’s decision that Dr Chatoor had acted in a manner “significantly below” the standard to be reasonably expected and that the Tribunal’s summary of the expert opinions was materially deficient. It held that only one expert strongly condemned the conduct described in the first allegation - a “far cry” from the Tribunal’s stated conclusion, which seemed to imply that all those experts who would not themselves have implanted the pacemaker also considered Dr Chatoor’s conduct to have been unreasonable and therefore significantly below the relevant standard.

The NSWCA acknowledged that the Tribunal was entitled to depart from the expert opinions, and instead to take into account the professional expertise and experience of the medical professionals sitting on the Tribunal. However, “it needed to state why it thought it appropriate to depart from the expert evidence if it decided to do so. It did not state this. Instead it proceeded on the erroneous basis that the expert evidence supported its decision.”

In light of the finding that neither the expert evidence, nor the overseas guidelines supported the first allegation against Dr Chatoor, the NSWCA held that it ought to be rejected. Conversely, it found that the expert evidence did in fact support a finding against Dr Chatoor in respect of the second allegation, and that it was open to the Tribunal to conclude that Dr Chatoor’s conduct constituted unsatisfactory professional conduct on that count.

The question then arose as to how the Tribunal’s orders referable to the first allegation ought to be set aside, while maintaining a sanction against Dr Chatoor in respect of the second allegation, given that the original orders were made referable to both complaints.

The NSWCA determined that the conditions on Dr Chatoor’s registration ought to be removed entirely because their content indicated that they were imposed as a result of the finding that the first allegation was established. The reprimand similarly ought to be removed in so far as it related to establishing the first

allegation. However, in so far as the reprimand related to the conduct described in the second allegation alone, the NSWCA held that it should also be set aside, and reduced to the lesser sanction of a caution.

Dr Chatoor's appeal is interesting, in so far as demonstrates that evidence that an expert would not have adopted a particular approach himself or herself, does not necessarily mean that the taking of that same approach by another practitioner will render the conduct 'unsatisfactory professional conduct' under section 139B of the National Law. If the same expert also considers that the conduct could possibly be justified in some circumstances, it may yet be feasible to make the case that it falls within the spectrum of reasonableness expected of a practitioner of an equivalent level of training or experience.

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