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Health Insights

Is the 'irrational' exception feasible?

The concept of 'Competent Professional Practice' has been considered by Courts in a number of recent NSW cases determining medical negligence.

In a recent medical negligence case *South Western Sydney Local Health District v Gould* [2018] NSWCA 69 (**Gould**),[1] the NSW Court of Appeal (**NSWCA**) considered the interpretation of the statutory 'irrational' exception to the 'widely accepted practice' provision as it appears in Section 5O(2) of the *Civil Liability Act* 2002 (NSW) (**The Act**).

This discussion follows an earlier "Health Insights" article October 2018, on *Sparks v Hobson; Gray v Hobson* [2018] NSWCA 29 (**Sparks)** [2] concerning 'Competent Professional Practice' and peer professional opinion evidence in medical malpractice cases. In Sparks, the NSWCA confirmed that in order to rely on section 5O(1), the defendant must provide expert evidence to support that their actions, on the basis of an established practice, was 'widely accepted' as 'competent professional practice' in Australia, at the time of the alleged negligence.[3]

While **Gould** [4] is a NSW decision, its discussion of the legal issues has relevance to other states with a similar exception provision. While the wording varies from state to state, the term 'irrational' appears in the equivalent statutes in Tasmania, South Australia and Queensland [5] and provides judiciary with a potential means of dismissing peer professional opinion evidence as 'irrational'.

The facts

An eight year old boy, Robert Gould presented to Campbelltown Hospital after a slip and fall, with an open fracture to his left thumb. He was transferred to Liverpool Hospital (South West Sydney Local Health District) ("the hospital") arriving around 8pm. He had surgery the following morning. The treating doctors consulted the Clinical Guidelines for antibiotic administration[6] and accordingly, prescribed the two

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[1] *South Western Sydney Local Health District v Gould* [2018] NSWCA 69.
[2] *Sparks v Hobson; Gray v Hobson* [2018] NSWCA 29.
[3] In Sparks, the Appeal to the High Court of Australia was rejected, meaning the NSW Court of Appeal decision above n 2, stands.
[4] *Gould v South Western Sydney Local Health District* [2017] NSWDC 67.
[5] The *Civil Liability Act* 2002 in the states of Queensland s22; Western Australia s5PB; South Australia s41; and Tasmania s22; except Victoria, where the provision is s59 in the *Wrongs Act* 1958.
[6] The Evidence-based, *Therapeutic Guidelines Australia- Antibiotics* (2010), www.tga.gov.au.

recommended antibiotics, commensurate with the nature of the injury and clinical findings. He was discharged home, but gangrene developed, resulting in a two- stage surgical amputation of his left thumb.

Critically, the trial judge found that it was the failure to administer an additional antibiotic, gentamycin, that was found to have been a breach of duty, and to have caused the infection which led to the amputation of the left thumb. [7] The hospital was found negligent, due to the failure to use an appropriate antibiotic regime including a cephalosporin, flucloxacillin, plus gentamycin.

The primary judge rejected the peer professional opinions given by two medical practitioners called by the hospital, both of whom who had expressed support of the hospital's medical practitioners' choice of antibiotics for the boy, omitting gentamycin. His Honour considered both opinions to be 'irrational' within the meaning of section 5O(2) of the Act, and he did not accept that s5O(1) provided a defence for the hospital medical practitioners.

While the hospital accepted its role in the care, custody and management, it challenged the findings on appeal.

The Appeal

The leading judgment was written by Leeming JA, with Meagher JA and Basten JA agreeing. There was evidence that those for whom the hospital was responsible, had acted in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice. Unless the opinion could be rejected by the judge as 'irrational', the appellant did not incur liability pursuant to s5O of the Act. The Court of Appeal held that the reasoning process of the primary judge, in which the opinions of the defendant's experts were held to be irrational, could not be sustained, because to do so was procedurally unfair and the wrong legal test for s5O(2) had been applied.[8]

Leeming JA held that the peer professional opinions led by the appellant were not irrational and that the appellant's practice concurred with those opinions as competent professional practice. Consequently s5O(1) applied, providing a complete defence to the allegation that failure to administer gentamycin was a breach of duty.[9] The appeal was allowed.

As Basten JA noted, in relation to the peer professional opinion, it will only be possible to reject it if the court can, on the evidence, be satisfied that there is no rational basis for it. He went on to say that this may create an evidential burden on the plaintiff and that burden will not be satisfied by evidence merely justifying an alternative approach. The evidence in the present case went no further than that. Agreeing with Leeming JA, Basten JA opined the claim should be dismissed.[10]

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[7] *Gould v South Western Sydney Local Health District* [2017] NSWDC 67.
[8] Above n 1 at [68].
[9] Above n 1 at [39].
[10] Above n 1 at [6] - [7].

Procedurally Unfair

It was not open to the trial judge to make the findings under s5O(2), given that irrationality was not raised on the pleadings, was not mentioned during the trial by the parties, or put to the hospital's experts and more importantly, was not raised by the judge with the parties. The experts were not cross examined on irrationality or given any chance of commenting. It was wrong for the primary judge to reject the hospital's expert evidence as irrational when no complaint was made by the Plaintiff and no objection was given to the hospital or the experts that that might occur. According to the transcript, the primary judge did not advise that he might form that view.

Incorrect test

Even if a procedurally fair course had been adopted, the test of irrationality required by s5O(2) was not applied by the trial judge.

Basten JA and Leeming JA agreed that the trial judge had incorrectly treated the terms 'irrational' and 'unreasonable' as synonyms. In interpreting s5O(2), Basten JA and Leeming JA reiterated the task of the Court is to identify from text, context and purpose the particular meaning that the provision carries. [11] The trial judge had not attempted to identify context or purpose.

As Basten JA, noted, if the conduct is judged by reference to a standard widely accepted by the person's peers it will often not be possible to know why particular individuals accepted it and it does not matter. It will only be if the court can on the evidence be satisfied there is no rational basis for it, that it can be rejected.[12] Adherence to any of those bodies of peer professional opinion, so long as it is widely accepted in Australia, would render a professional defendant not liable.[13]

Leeming JA commented that 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 that 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. [14]

The factual evidence concerning antibiotic prophylaxis was considered uncontroversial, and therapeutic guidelines had been appropriately followed. The reasoning of the primary judge on s5O should be rejected.

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[11] Above n1 at [79].
[12] Above n 1 at [6].
[13] Above n 1 at [85].
[14] Above n 1 at [96].

Basten JA agreed with Leeming JA's conclusion that the boy's claim should have been dismissed by the primary judge under s5O. Leeming JA found that s5O was a complete answer to the allegation that failure to administer gentamycin was a breach of duty.[15]

Can Section 5O operate as a defence?

Following the decision in *Dobler v Halverson* (2007) 70 NSWLR 151, (**Dobler**)[16] s5O has been interpreted as a defence. A plaintiff must establish a breach of duty of care, for the purposes of s5B of the Act (in addition to other elements of negligence) and a professional defendant is then required to provide evidence that their conduct corresponded with competent professional practice at the time of the alleged negligence, in order to engage s5O.

Leeming JA reasoned that the proper interpretation of **Dobler**, was that if the defendant could establish the preconditions in s50, then it would have the effect of setting the standard of care. If the preconditions in s5O cannot be made out, then the "duty of care in preventing harm" provisions of ss5B and 5C of the Act would apply.

In **Sparks**, according to Basten JA, s5O will be engaged when there is evidence of a widely accepted professional practice supporting the defendant's conduct, but that the evidence when available will set the relevant standard, as there cannot be two legally supportable standards operating in one case.[17] So where there is such evidence, unless it can be rejected by the trial judge, it will fix the relevant standard.

A differently constituted NSWCA acknowledged in **Sparks** the 'divisive issue' of whether the reference to a 'practice' in establishing competent professional practice as provided by s5O(1) was a reference to a practice of the relevant profession, or more narrowly to a particular specific practice or method of providing the services. The former was favoured by the majority in **Sparks.**

Gould[18] involved the application of the "irrational" carve out for judges in relation to competent professional practice, as provided in the NSW, Queensland and Tasmanian Acts.

In the Western Australian Act,[19] the carve out wording is narrow, as it states if the practice was 'so unreasonable' that 'no reasonable health professional' in the same position, could have acted or omitted to do something in accordance with that practice. This construction makes the exception more difficult to make out. Conversely, in Victoria's legislation, the wording of 'unreasonable' (rather than irrational) is a broader construction, making it potentially easier for the Court to reject the peer opinion.

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[15] Above n1 at [39].
[16] *Dobler v Halverson* (2007) 70 NSWLR151; [2007] NSWCA 335.
[17] *Sparks v Hobson; Gray v Hobson* [2018] NSWCA 29 Basten JA, [24]
[18] Above n 1 at [114].
[19] *Civil Liability Act* 2002 (Qld) s5PB(4).

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This case has relevance for other health professionals registered by Australian Health Practitioner Regulatory Agency (AHPRA) for whom the Act applies. The key message of this analysis is that if you seek to rely on s5O, then it should form part of the defendant's pleadings. A peer expert opinion must be established by evidence in order to make out s5O, in line with **Sparks,** and the reliance by a plaintiff on a practice being "irrational" requires more than stating that the supporting opinion is unreasonable or disagreeable**.**

This article follows a previous Health Insights, from October 2018, on *Sparks v Hobson; Gray v Hobson* [2018] NSWCA 29 (**Sparks)** [20] concerning 'Competent Professional Practice' and peer professional opinion evidence in medical malpractice cases.*, written by Principal, Nevena Brown and Associate Anna Martin .*

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[20] *Sparks v Hobson; Gray v Hobson* [2018] NSWCA 29.