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Health Insights

Medical Board of Australia and Tan [2022] WASAT 57

Key takeaways

- A health professional will not have breached their duty of care or acted below a requisite standard if they acted in a manner that, at the time the service was provided, was widely accepted by peer professional opinion as competent professional practice.
- Courts and Tribunals will always be guided by expert opinion on what is considered to be the appropriate standard of care.
- A 'widely accepted' peer professional opinion does not need to be universally accepted.

Background

The Medical Board of Australia (**Board**) commenced disciplinary proceedings in the State Administrative Tribunal (**Tribunal**) against a specialist obstetrician and gynaecologist (**practitioner**). The practitioner practises principally in gynaecology and gynaecological oncology, and was alleged to have behaved in a way that constituted professional misconduct (alternatively, unprofessional conduct or unsatisfactory professional performance) in his management of six patients over a period between 2015 and 2017.

The Board's allegations related to the practitioner's performance of surgery and pre and post-surgical management of six patients which involved six surgeries. The allegations were divided into six "classes of conduct", being:

1. pre-operative decision-making (the rationale for performing surgery) in relation to three patients
2. obtaining informed consent from two patients
3. intra-operative decision-making in relation to the surgeries performed on two patients
4. the speed at which he performed three surgeries
5. post-operative conduct in relation to the surgeries on, and sequalae, of three patients, and
6. the adequacy of his notes and records made in relation to five patients.

The Board described the practitioner's conduct as raising issues of concern, not only about the management of each patient, considered in isolation, but as also 'revealing what are properly regarded as patterns of conduct' and therefore systemic issues in his practice.

The practitioner denied that his conduct had fallen below the requisite standard and argued that the evidence was incapable of supporting a finding of professional misconduct on the basis of 'systemic' inadequacies in his practice because:

1. the number of patients the subject of the application was small relative to the number of (and outcomes for) patients treated by the practitioner
2. in the relevant period the practitioner specialised in difficult and complex cases in which patients were 'generally faced with few options and hard choices'
3. the Board's allegations related to matters of professional judgment (rather than to matters of technical competency) in a complex field where there is a 'pronounced spectrum' of professional judgments which vary from conservative to aggressive, and
4. in the circumstances, the Tribunal would need to be persuaded that the expert opinion supportive of the more 'aggressive' approach of the practitioner is so far removed from an acceptable range of judgment as to represent professional misconduct.

Decision

Unsurprisingly, given the complex medical science involved, the matter turned heavily on the expert evidence.

The Tribunal noted that at an overarching level, the experts jointly opined that:

1. there are numerous risk factors that predict the likelihood of adverse patient outcomes - some are potentially modifiable, others are not
2. patient care occurs within a complex medical environment. Considering patient outcomes as a consequence of one individual factor – without appreciating the complex, multi-factorial system and relationships - is problematic, and
3. there are less defined standards for very complex cases, where the clinical reality is that there may be disagreement between senior surgeons about how a case should be managed. This may be influenced by training, philosophy, and how patient symptoms are weighed against oncological outcomes.

The experts called by the practitioner supported a more aggressive approach to surgery whereas the witnesses called by the Board were more conservative.

The Tribunal concluded that it could be not be satisfied that one or the other of those two approaches was so far removed from an acceptable range of judgment. The Tribunal specifically noted that although their views often differed, the experts themselves were mutually respectful of those differences.

It was found that, to the extent the allegations of professional conduct reflected an approach to complex cases which found support in widely (though not universally) accepted practice, such conduct could not be said to amount to conduct falling below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience.

The Tribunal ultimately found that aspects of the practitioner's notes and records in relation to three patients, and his conduct in obtaining consent for surgery for one patient, amounted to unsatisfactory professional performance but otherwise held that the Board had not proved the allegations against the practitioner.

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Implications

This case highlights the importance for practitioners working in a complex medical environment to create a fulsome record detailing their decision making in order to ensure that their clinical management is not called into question. This is of particular relevance in cases involving contested medical decision making.

In addition, this case is a reminder that a health professional will not have breached their duty of care or acted below a requisite standard if they acted in a manner that, at the time the service was provided, was widely accepted by peer professional opinion as competent professional practice. The law generally recognises that there may be differing professional opinions, and that a 'widely accepted' peer professional opinion does not need to be universally accepted. Courts and Tribunals will always be guided by expert opinion on what is considered to be the appropriate standard of care.

This article was written by Senior Associate, Will Goodheart. Please contact Will or Principal, Shannon Mony if you have any questions or would like more information.

Will Goodheart

Senior Associate

+61 8 6319 0472

wgoodheart@meridianlawyers.com.au

Shannon Mony

Principal

+61 8 6319 0475

smony@meridianlawyers.com.au