What is Competent Professional Practice – *Sparks v Hobson; Gray v Hobson [2018] NSWCA 29*

by Zara Officer, Special Counsel

The recent decision of the NSW Supreme Court, Court of Appeal in *Sparks v Hobson; Gray v Hobson [2018] NSWCA 29* raises a number of issues relating to the interpretation of the provisions of the *Civil Liability Act 2002 (NSW)* as they relate to medical negligence cases. Uncertainty is introduced by the differing judgments of the three Court of Appeal justices who decided this case, and it is currently the subject of a special leave application in the High Court.

The case provides an example of where unchallenged supportive peer professional evidence did not protect one of the defendants, a specialist anaesthetist, from a finding of breach of duty.

Relevant provisions

Under s 5O of the *Civil Liability Act* 2002 (NSW) (the **Act**) a professional will not be liable "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". This section is widely applied as a defence available to a professional who is defending a negligence claim. In medical negligence cases, both parties call expert evidence to attempt to demonstrate that what the defendant did either fell short of, or did not fall short of, acceptable professional practice.[28]

Under s 5I of the Act, "a person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk". Inherent risk is "something occurring that cannot be avoided by the exercise of reasonable care and skill".

Both of these sections were relevant to the findings in Mr Hobson's case.

The facts

Mr Hobson was born with Noonan Syndrome, a feature of which was a serious curvature of his spine resulting in reduced chest cavity, particularly on the left side. Mr Hobson suffered increasing breathlessness and a pattern of restrictive airways disease.

Corrective surgery involved a two stage operation intending to relieve the pressure on the chest cavity by strengthening the spine. The first stage was completed uneventfully. The second stage was scheduled for 10 days later, but because pneumonia developed in Mr Hobson's left lung it was performed urgently 4 days after the first surgery, in life saving circumstances.

The second surgery required Mr Hobson to be placed face down whilst screws were inserted into his spine. This position created further pressure on his chest, increasing restrictions on his breathing, and the procedure was terminated early. Mr Hobson was left a paraplegic due to a severe ischemic collapse in his spinal column during the operation. The operation was, at a later time, completed successfully but Mr Hobson did not recover the use of his lower limbs.

The trial judge found that the operation should have been stopped 15 minutes earlier than it was, and he found both the anaesthetist, Dr Sparks and the surgeon, Dr Gray liable. On appeal, Dr Gray, the surgeon, was unanimously found not liable, but breach of duty was established in relation to the anaesthetist Dr Sparks by a majority of 2:1.

The judgments

Based on different reasoning, Justices Macfarlan and Basten considered Dr Sparks' decision to allow the operation to continue for so long was a breach of his duty of care to Mr Hobson. Justice Simpson did not conclude that the evidence established that the failure by Dr Sparks to terminate the operation earlier amounted to a departure from the standard of reasonable care and skill required of a specialist anaesthetist.

Justice Basten:

- considered the continuation of the operation involved a failure to exercise reasonable care and skill by Dr Sparks, who was responsible, amongst other matters, for monitoring blood pressure, oxygen and CO_2 levels in the blood. Therefore he found a breach of duty by Dr Sparks;
- concluded that the expert evidence, while it supported Dr Sparks, did not squarely address what became the critical issue, which was whether the failure to terminate the operation at an earlier point satisfied the test of whether Dr Sparks acted in a manner widely accepted in Australia as competent professional practice;
- interpreted s 5O as relevant to establishing the standard of care relevant to assessing breach of duty, rather than a defence to be addressed after findings were made in the plaintiffs case;
- rejected the suggestion that the defence in s 5O of the *Civil Liability Act* only applies where the defendant can identify a regular course of conduct adopted in particular circumstances; and
- did not consider s 5I of the Act relevant to inherent risk applied in the circumstances.

[28] *Dobler v Halverson* (2007) 70 NSWLR 151.

Justice Macfarlan:

- considered that in order to establish that a practitioner has acted in accordance with the professional standard, they must demonstrate that they conformed with "a practice" in the sense of a pattern of response by medical practitioners to a clinical scenario, as opposed simply to a widespread view among peers that what the defendant did in the circumstances constituted competent professional practice;[29]
- did not consider it was sufficient that the experts called to give evidence agreed that the conduct was reasonable, and that it would have been regarded as reasonable by other professionals if they had been asked about it at the time of the conduct. Because the experts did not point to an established practice that was followed by Dr Sparks in the circumstances of Mr Hobson's operation, Dr Sparks was unable to rely on the defence in s 5O of the *Civil Liability Act*; and
- did not think s 5I of the Act on inherent risk applied in the circumstances.

Justice Simpson:

- felt constrained by precedent to adopt the approach of Macfarlan JA because of the decision in the *McKenna v Hunter & New England Local Health District. [2013] NSWCA 476* case. However, Simpson JA did not agree with a construction of s 5O as applying only in limited circumstances where a defendant identifies a discrete practice to which he or she conforms. She noted that this necessarily excludes unusual factual circumstances and she did not consider that s 5O was intended to have such limited application. Reluctantly Simpson JA considered Dr Sparks failed to establish a defence based on s 5O because he could not identify a practice to which he conformed, notwithstanding that the expert witnesses agreed that Dr Sparks acted reasonably in the actions he took during the operation, and they considered professional peers would likely have taken the same view;
- nevertheless found in favour of Dr Sparks under s 5I of the Act on the basis that Mr Hobson's injuries were the materialisation of an inherent risk that could not be avoided by the exercise of reasonable care and skill; and
- found that Dr Sparks did not fail to exercise reasonable care and skill, so there was no breach of duty. The overwhelming medical evidence was that Dr Sparks conduct was in accordance with what was widely accepted in Australia as competent professional practice. She noted the only way the court could reach a conclusion about whether Dr Sparks met the standard of the ordinary skilled anaesthetist is when the court is informed by the evidence of witnesses with appropriate expertise.

Comment

It is hoped that the High Court will grant special leave to Dr Sparks to conduct an appeal so that the interpretation of s 5O can be clarified. The difficulty with the need to establish a "practice" as suggested by Macfarlan JA is that in an unusual case such as this one, there may be no relevant practice in existence that the defendant doctor can identify.

This article has not focussed on s 5I, but the case raises questions of when the materialisation of an inherent risk provision in the Act will be applied in medical negligence cases.

The case draws attention to the differing approaches to the application of s 5O, both as a defence, with the onus of proof lying on the defendant, and its central role in the primary finding on liability as to what standard of care is to be applied when assessing the alleged negligence, with the onus of proof lying also on the plaintiff.

The judgments in Mr Hobson's case appear irreconcilable and have created uncertainties which only the High Court can resolve. ■

[29] In this Macfarlan JA followed his earlier approach in *McKenna v Hunter & New England Local Health District* [2013] NSWCA 476. Basten JA did not consider the McKenna case was binding as it had been overturned by the High Court (although not on the issue of the s 5O defence).