benchtv
a benchmark production

Précis Paper

Duty of care in medical negligence: a consideration of Sparks v Hobson; Gray v Hobson [2018] NSWCA 29

A discussion of the recent medical negligence case of *Sparks v Hobson; Gray v Hobson* [2018] NSWCA 29, focusing on the duty of care owed by medical professionals, particularly in the context of ss 5O and 5I of the Civil Liability Act 2002 (NSW).

Discussion Includes

- The case at first instance in the Supreme Court of New South Wales: *Hobson v Northern Sydney Local Health District & Ors* [2017] NSWSC 589
- A closer look at the decision at first instance
- Appeal to the Court of Appeal of New South Wales: Appeal to the Court of Appeal of New South Wales: *Sparks v Hobson; Gray v Hobson* [2018] NSWCA 29
- *McKenna v Hunter & New England Local Health District; Simon v Hunter & New England Local Health District* (2013) Aust Torts Reports 82-158; [2013] NSWCA 476 and *Hunter and New England Local Health District v McKenna; Hunter and New England Local Health District v Simon* (2014) 253 CLR 270; [2014] HCA 44
- The decision in *Sparks v Hobson; Gray v Hobson* [2018] NSWCA 29 against the backdrop of *McKenna v Hunter & New England Local Health District*; *Simon v Hunter & New England Local Health District* (2013) Aust Torts Reports 82-158; [2013] NSWCA 476 and *Hunter and New England Local Health District v McKenna; Hunter and New England Local Health District v Simon* (2014) 253 CLR 270; [2014] HCA 44
- Evidence in medical negligence litigation
- Outcome of the special leave application: *Sparks v Hobson* [2018] HCATrans 191
- Current position
- A closer look at Basten JA's further analysis of s 5O
- Section 5I of the *Civil Liability Act 2002* (NSW)

- Concluding messages for practitioners

Précis Paper

Duty of care in medical negligence: a consideration of Sparks v Hobson; Gray v Hobson [2018] NSWCA 29

1. In this edition of BenchTV, Rohan de Meyrick (Barrister – Fourth Floor Selborne Chambers, Sydney) and Grant Watson (Partner – Grieve Watson Kelly Lawyers, Sydney) discuss the recent medical negligence case of *Sparks v Hobson; Gray v Hobson* [2018] NSWCA 29, focusing on the duty of care owed by medical professionals, particularly in the context of ss 5O and 5I of the *Civil Liability Act 2002* (NSW). Mr de Meyrick and Mr Watson both represented the plaintiff Mr Hobson, who suffered personal injury arising out of medical negligence. The litigation saw its way through the Supreme Court of New South Wales (*Hobson v Northern Sydney Local Health District & Ors* [2017] NSWSC 589), the Court of Appeal of New South Wales (*Sparks v Hobson; Gray v Hobson* [2018] NSWCA 29), and most recently, a special leave application to the High Court (*Sparks v Hobson* [2018] HCATrans 191).

<u>The case at first instance in the Supreme Court of New South Wales: *Hobson v Northern Sydney Local Health District & Ors* [2017] NSWSC 589</u>

2. The case was first heard before Harrison J in the Supreme Court. The facts are as follows. From childhood, the plaintiff Brendan Hobson suffered from a rare condition known as Noonan Syndrome, manifesting itself in severe scoliosis, which could cause restrictions of his lung capacity.

3. The surgery the case was concerned with, which occurred in November 2009, involved a correction of the scoliosis in order to open up the plaintiff's airways. The part of the surgery that was relevant for the case was the second part of a two-part procedure involving multiple spinal specialists. About three hours after the commencement of the second part of the surgery, the plaintiff suffered severe cardiovascular collapse, which ultimately caused damage to his spinal cord, resulting in paraplegia.

4. Various claims were made against the specialists involved in the procedure, some of which were resolved prior to the trial. The trial ran in respect of the alleged negligence of the lead orthopaedic surgeon, Dr Gray, and the anaesthetist, Dr Sparks, present in the procedure.

5. One of the issues at trial was to what extent the degree of urgency about the second part of the procedure requiring it to be brought forward, alleviated the medical professionals involved of the duty of reasonable care. One of the tensions was weighing, on the side of the defendants on the one hand, the urgency of the procedure in the context of the plaintiff's deteriorating condition in general, against the deteriorating condition of the plaintiff in the

surgical procedure itself, and deciding when the judgment call had to be made as to when the surgery ought to have been terminated as a result of the plaintiff's deteriorating condition.

6. At first instance, Harrison J found against both Dr Gray and Dr Sparks by holding that given the deteriorating parameters showing up on the plaintiff's monitoring, the procedure ought to have been terminated at an earlier stage. The duty of reasonable care owed by Dr Gary and Dr Sparks was not alleviated by the urgency surrounding the second part of the procedure. The clinical decisions made by these professionals still had to involve the weighing up of Mr Hobson's pre-surgical condition (which although perhaps heading towards extremist, was relatively stable in ICU) against a situation where, about an hour into the surgery, his vital signs were deteriorating well below the parameters they had been when he was in ICU. Harrison J found that the decision to terminate the surgery ought to have been made earlier than it had in fact been made, and that, as a result of that delay, the plaintiff suffered the adverse outcome he did.

A closer look at the decision at first instance

7. The plaintiff's arguments as to negligence did not all find favour with Harrison J. There was originally an allegation that the second stage of the surgery should not have commenced at all. This argument was ultimately abandoned when the evidence did not seem to support it. Further, about an hour into the operation, the spinal cord monitoring ceased to function because the plaintiff had to be paralysed with a drug called Vecuronium to assist with his difficult breathing. There was an allegation that it was negligent to continue without this spinal cord monitoring, but it was ultimately not pressed. The allegation of negligence which found favour with Harrison J was that it was negligent to continue the surgery during the last 40 minutes to 1 hour of the surgery, when the expert evidence suggested that the plaintiff "was heading for an impending crash".

8. In Harrison J's judgment, there is a reference to a phone call made by Dr Sparks, approximately 40 minutes before the surgery ended, to a senior colleague of his, a fellow anaesthetist, to discuss the plaintiff's predicament and Dr Sparks' inability to correct the downward spiral in the plaintiff's blood gas analysis metabolic state, despite him being apparently well-ventilated. The opinion of the fellow anaesthetist, which ultimately appeared to be correct, was that because the plaintiff was having surgery in the prone position, namely, face down, the particular type of table used had pads on it that were pressing upon his chest, causing cardiac compression. The conclusion of Dr Sparks' colleague, and ultimately the acceptance of the collective experts in the case, was that this cardiac compression meant that although the plaintiff was having oxygen pumped into his lungs, his organs were not getting perfused properly because that blood was not circulating. Although the surgery at that point was halted, the plaintiff turned onto his back, and colour immediately restored to

his face, unfortunately, the damage had been done, as the critical loss of blood supply to his spinal cord during a crucial period of time caused what was described as a spinal cord stroke, leaving the plaintiff with lifelong paraplegia.

9. Harrison J found that Dr Gray and Dr Sparks had breached their duty of care by failing to halt the surgery earlier, and awarded the plaintiff $3.8 million in damages, plus costs. Interestingly, Harrison J did not engage in any great detail with the issues that later became prominent in the case, those relating to ss 5O and 5I of the *Civil Liability Act 2002* (NSW) – perhaps because of the way the case had been run at trial, which largely focused on the facts, and common law issues of negligence.

10. Part of the reason why Harrison J concluded that it was inappropriate to continue the surgery at the time, was that in the face of the impending metabolic disaster to the plaintiff, the evidence suggested that there were many hours to go in the surgery, they were only a short way through the surgery at the time, and it was complex surgery requiring hardware to be put into the plaintiff's spine.

Appeal to the Court of Appeal of New South Wales: *Sparks v Hobson*; *Gray v Hobson* [2018] NSWCA 29

11. While they did not feature heavily at trial, ss 5O and 5I of the *Civil Liability Act 2002* (NSW) became the key battleground when Dr Gray and Dr Sparks appealed the verdicts against them by Harrison J to the Court of Appeal of New South Wales, although breach of the common law duty of care was also dealt with at some length.

12. Ultimately, Dr Gray was successful in his appeal, not by application of s 5O or s 5I of the Act, but rather because the Court of Appeal agreed with his submission that as the orthopaedic specialist, he was prima facie entitled to rely on Dr Sparks as anaesthetist to, as it were, keep the patient alive, and there was insufficient evidence to establish anything more than, at most, a suspicion (but certainly not provable fact) that he was cognisant as to what was going on when Dr Sparks was having such difficulty in doing this. As such, Dr Gray was successful in his appeal.

13. Dr Sparks' appeal was not successful, however, on a decision of 2:1. Perhaps the most pertinent issue in his appeal, and the subject of the subsequent special leave application to the High Court, was the Court of Appeal's analysis of s 5O, and to a lesser extent, s 5I of the Act. In this vein, one of the authorities that came under scrutiny by the Court of Appeal judges were the earlier Court of Appeal and High Court decisions of *McKenna v Hunter & New England Local Health District; Simon v Hunter & New England Local Health District* (2013) Aust Torts Reports 82-158; [2013] NSWCA 476 and *Hunter and New England Local Health District v*

McKenna; Hunter and New England Local Health District v Simon (2014) 253 CLR 270; [2014] HCA 44 respectively, in which Mr Watson represented the plaintiff, Mrs McKenna.

McKenna v Hunter & New England Local Health District; Simon v Hunter & New England Local Health District (2013) Aust Torts Reports 82-158; [2013] NSWCA 476 and *Hunter and New England Local Health District v McKenna; Hunter and New England Local Health District v Simon* (2014) 253 CLR 270; [2014] HCA 44

14. *McKenna v Hunter & New England Local Health District*; *Simon v Hunter & New England Local Health District* (2013) Aust Torts Reports 82-158; [2013] NSWCA 476 and *Hunter and New England Local Health District v McKenna; Hunter and New England Local Health District v Simon* (2014) 253 CLR 270; [2014] HCA 44 ("*McKenna*") was medical negligence litigation which, while perhaps not novel, involved a very unusual situation for which it would be difficult for there to be an already established medical practice.

15. The *McKenna* litigation involved a patient who had been scheduled under the *Mental Health Act 2007* (NSW) ("the *Mental Health Act*") for being a danger to himself or others. He was discharged the following morning without very much by way of treatment. Unfortunately, a man was killed by the wrongly discharged patient, and the plaintiffs in this case were the mother and sisters of the deceased. The Court of Appeal found that discharging the patient was a breach of the duty of care owed by the relevant health service.

16. Part of what the Court of Appeal had to grapple with was s 5O of the *Civil Liability Act 2002* (NSW) ("*Civil Liability Act*") as to whether or not the health service and psychiatrist involved had acted in a way that was widely accepted by peer professional opinion as competent professional practice. The way that McFarlane JA and Beazley P dealt with this question was to say that in order to address that test, it was not sufficient to simply call along some doctors to say that they and their colleagues would have acted in the same way. Rather, McFarlane JA in the lead judgment said that in order to address that test, it was necessary to establish a particular practice that was widely accepted, and that the psychiatrist in question had conformed to that practice. Now in the case of McKenna, and in any case involving the detention of a psychiatric patient under the *Mental Health Act*, there is unlikely to be an established practice for the large variety of circumstances that a psychiatrist might encounter. Therefore, the Court of Appeal in *McKenna* rejected a s 5O defence on the basis that there was no evidence of such a practice, and there was also a question as to whether there ever really could be such a practice.

17. A special leave application was made to the High Court, which granted special leave both on the question of breach, and in regard to the question of s 5O of the *Civil Liability Act*. Following the grant of special leave, there was a hearing only on the question of duty of care - because

the High Court found that the duty of care was inconsistent with the obligations under the *Mental Health Act*, it declined to deal with the other questions. The Court was careful to say that its judgment should not be read as deciding one way or the other on the other questions. The appeal was ultimately unsuccessful in the High Court on the ground that the Court found that the obligations of a psychiatrist under the *Mental Health Act* were inconsistent with the common law duty of care.

The decision in *Sparks v Hobson; Gray v Hobson* [2018] NSWCA 29 against the backdrop of *McKenna v Hunter & New England Local Health District; Simon v Hunter & New England Local Health District* (2013) Aust Torts Reports 82-158; [2013] NSWCA 476 and *Hunter and New England Local Health District v McKenna; Hunter and New England Local Health District v Simon* (2014) 253 CLR 270; [2014] HCA 44

18. *Sparks v Hobson; Gray v Hobson* [2018] NSWCA 29 ("*Hobson*") was decided in the context of the *McKenna* litigation looking like fairly established law on s 5O of the *Civil Liability Act*. Perhaps that explains why s 5O did not feature heavily in the arguments before Harrison J. According to *McKenna*, the position on s 5O is that it does not apply unless there is an established medical practice of some sort. Therefore, in a case like *Hobson*, concerning complex, if not unique, circumstances, it will be very difficult to argue that there is an established practice to deal with such novel circumstances. However, there was enough of a trace of s 5O evidence in the case for the argument to be raised on appeal, and the correctness of McFarlane JA and Beazley P's decision in *McKenna* and their approach to s 5O was challenged in the *Hobson* appeal.

19. Interestingly, and perhaps a definite note to the future that there is more to be decided on s 5O, each of the Justices of the Court of Appeal in *Hobson* came up with a different decision on s 5O. McFarlane JA followed the authority he was largely responsible for, namely, the Court of Appeal's decision in *McKenna*. One of the ways he rejected the s 5O claim brought by Dr Sparks was that there simply was not an established practice, given the unique circumstances of Mr Hobson's surgery. Simpson JA, in dissent, decided that because there had not been a specific challenge to the correctness of the *McKenna* decision, she felt compelled to follow it, but interestingly, said that, had she not felt compelled to follow *McKenna*, she would have preferred a broader interpretation of s 5O, one that did not require the establishment of a specific practice. Basten JA's decision was different again. His Honour gave a very erudite analysis of why *McKenna* in the Court of Appeal was no longer binding, and then indicated his preference for a broader interpretation of s 5O that was not limited to a specific practice. However, unlike Simpson JA, Basten JA did not seem to think that such an analysis would result in a reversal of the trial judge's decision in favour of Mr Hobson against Dr Sparks. Basten JA arrived at this conclusion by going through the evidence carefully and looking at whether such limited s 5O evidence as there was proferred in the

defendants' cases really in truth addressed the facts as found in terms of the precise particulars of negligence. Remembering that certain earlier arguments about negligence either were not pursued or did not find favour with the trial judge, but rather, the ultimate particular of negligence upon which the case was successful was continuing in the last half hour to forty minutes of the surgery, when all attempts to correct the continuing downwards spiral in the plaintiff's metabolic state had been exhausted and there were still many hours to go in the face of an impending crash. After considering the evidence, Basten JA said that there were a few recitations of the kind of words contemplated by s 50, but ultimately, they did not engage with that particular of negligence. This analysis assisted the success of the plaintiff, both in terms of breach and in terms of the s 50 question.

Evidence in medical negligence litigation

20. Evidence in medical negligence litigation can evolve over time. In *Hobson*, this evidence included several conclaves of experts, concurrent evidence of experts, and even some supplementary or last-minute reports coming from experts who wished to comment on things that had arisen as a result of the conclaves. It was therefore difficult for all concerned to keep up, as it were, in a complex case, with the refining of the expert opinions as time went on.

21. Interestingly, in *Hobson*, the plaintiff made a decision to not put before the pre-trial conclaves the question of s 50. The joint reports of the experts did not address the s 50 question, which is perhaps reflective of the fact that s 50 was not a major feature of the trial. Once the case reached appellate level, it was very hard for the doctors to argue that the court ought to consider s 50, in circumstances where that is not the way the case had been run, either in preparation for the trial or the trial itself.

Outcome of the special leave application: *Sparks v Hobson* [2018] HCATrans 191

22. The High Court ultimately refused to grant special leave to appeal on the basis that the case was not an appropriate vehicle for a proper analysis of the issues that had arisen, particularly in regard to s 50. However, it is fairly clear that if the right case were to come along, the High Court would be interested in s 50, and indeed, given what happened in the *Hobson* Court of Appeal decision, the Court of Appeal may also be interested in sitting a bench of five judges to deal with s 50 on a future appropriate occasion.

Current position

23. There seems to be a drift away from the *McKenna* approach favoured by McFarlane JA in *Hobson* and *McKenna*, of reading s 50 as requiring the identification of a particular practice,

to a broader reading of the section. Two of the three judges in *Hobson* favoured that approach, although because Simpson JA felt bound to follow *McKenna*, she did not ultimately find in that manner.

A closer look at Basten JA's further analysis of s 5O

24. Basten JA in *McKenna* explains the enactment of s 5O as partly having roots in the English case of *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, which established the principle that the standard of care would be fixed based on the practice of professionals ("the Bolam principle"). Prior to the enactment of s 5O in Australia, the law was different, being that it was ultimately a decision for the judge as to where to draw the line in terms of the appropriate standard of care of professionals. As a result of s 5O, the provision, when engaged, may have the effect of setting the standard of care not where the judge thinks it ought to be, but where professional practice indicates that it is. McFarlane JA's decision in *Hobson* contains a very good analysis of why the identification of a particular practice is needed for the section to be engaged. His Honour talks about the fact that s 5O is necessarily a retrospective analysis requiring proof of a particular state of affairs, or a particular state of knowledge or acceptance, that existed at the time the particular services were provided. The section talks about if it is established that professionals acted in a manner that, at the time the services were provided, was widely accepted in Australia by peer professional opinion as competent professional practice. It is difficult to establish this, and for s 5O to be properly engaged, if the services are novel, this being the point of the *McKenna* line of reasoning.

Section 5I of the *Civil Liability Act 2002* (NSW)

25. Section 5I of the *Civil Liability Act* was also raised as an appeal point in *Hobson*. At a superficial level, it does appear from the Court of Appeal judgment that the plaintiff succeeded 2:1 on s 5I. Mr de Meyrick's reading of the Court of Appeal's judgment concludes that s 5I perhaps was not as controversial as might appear at first blush. It is true that the minority decision of Simpson J found that s 5I was engaged here, but on a close reading of the decision, it seems that the only reason her Honour felt that s5I was engaged was because she had not found that any causally relevant negligence existed. As a result, she took the view that the harm must therefore have been the manifestation of an inherent risk. Significantly, Mr Watson notes that it is difficult to imagine a case that would be successful at common law but would then fail due to s 5I, as opposed to a case where if s 5I applied, it would not be successful at common law in the first place.

26. Basten and Simpson JJA in *Hobson* have made the following statements in relation to s 5I: "[Section 5I] should be understood as applying only when the exercise of skill or lack thereof

has no causal consequence in terms of the outcome" (per Basten JA, [49]) and "arguably, s 5I does little, if anything, more than restate that liability in negligence depends on a causal connection between the negligence alleged and the harm alleged to have been suffered" (per Simpson JA, [325]).

27. What then, if anything, does s 5I do? This is touched upon in *Hobson* in distinguishing the case of *Paul v Cooke* [2012] NSWSC 840, an example of the rare type of circumstance where s 5I would be engaged, namely, where there is no causally relevant negligence relied upon. However, except perhaps for this kind of peculiar situation, it seems that a proper analysis of s 5I gives it a rather limited role to play. Logically, if s 5I was given a more expansive interpretation than has been argued for in some cases (and unsuccessfully argued in *Hobson*), it could have a devastating effect on the law of torts, because almost all risks are inherent, if included in that risks that are more likely to occur due to negligence, and there could arise a situation where gross negligence which was causally relevant to the outcome was somehow protected from liability because there was some miniscule chance that that outcome could have happened in any case – for example, a drunk nerve surgeon causing damage in a routine procedure, to pick an extreme example. It is fairly transparent that this kind of expansive interpretation is not what s 5I is addressed at, and not what the Court of Appeal thinks it is addressed at either.

28. Ultimately, although s 5I did not feature in the arguments ventilated verbally at the special leave application, it was raised in the special leave written submissions. However, the controversial area of law, and still controversial after *Hobson*, is s 5O.

<u>Concluding messages for practitioners</u>

29. If involved in a medical negligence case, think carefully about s 5O and cover potentially both a particular practice, and a more broad view of s 5O, if getting evidence to that effect.

30. Similarly, practitioners need to make sure that evidence engages with the particular aspects of negligence that are being alleged by the plaintiff.

31. For a defendant, it is not enough to just have those words recited at the bottom of a medical report if the particular conduct that is criticised has not been specifically dealt with by that doctor.

32. A degree of urgency or a label of 'life saving' on surgery does not in some way scotch guard the process from retrospective analysis as to whether reasonable standards of care were adopted. There are many surgeries that people have done in hospital which to some degree are life-saving, in that the person has some condition, which, if left uncorrected, would

potentially result in their demise, and it cannot be the case that there is all care and no responsibility in these situations.

33. It is not enough to simply have a doctor recite the words of s 50 of the *Civil Liability Act*; one still must establish to the satisfaction of a judge that, in truth, they have identified widely accepted practice that accords with what the particular negligent conduct was. However, it can be difficult in medical negligence cases for a defendant to address the s 50 requirements where the plaintiff's case can evolve as more information becomes available, even at the trial itself. This is of course part and parcel of medical negligence litigation, as the plaintiff does not have all of the information from the outset, and sometimes not until the doctors are in the witness box.

BIOGRAPHY

Rohan de Meyrick

Barrister, Fourth Floor Selborne Chambers, Sydney

Rohan was called to the NSW Bar in 1991. With over 26 years' experience as a barrister, he has a wide range of expertise in civil litigation, especially in common law, commercial, and equity matters.

Grant Watson

Partner, Grieve Watson Kelly Lawyers, Sydney

Grant was admitted as a lawyer in 2006. He has extensive experience in all areas of injury compensation and insurance claims, including public liability, professional negligence, motor accidents, workers compensation, Comcare, TPD and income protection, and general litigation. Grant regularly appears in the Supreme Court, District Court, Workers Compensation Commission, and Administrative Appeals Tribunal.

BIBLIOGRAPHY

Focus Case

Sparks v Hobson; Gray v Hobson [2018] NSWCA 29

Benchmark Link

xxxx

Judgment Link

https://www.caselaw.nsw.gov.au/decision/5a9493d9e4b074a7c6e1ca3b

Cases

Hobson v Northern Sydney Local Health District & Ors [2017] NSWSC 589
Sparks v Hobson [2018] HCATrans 191
McKenna v Hunter & New England Local Health District; Simon v Hunter & New England Local Health District (2013) Aust Torts Reports 82-158; [2013] NSWCA 476
Hunter and New England Local Health District v McKenna; Hunter and New England Local Health District v Simon (2014) 253 CLR 270; [2014] HCA 44
Bolam v Friern Hospital Management Committee [1957] 1 WLR 582
Paul v Cooke [2012] NSWSC 840

Legislation

Civil Liability Act 2002 (NSW)
Mental Health Act 2007 (NSW)