

Determining the standard of care in professional negligence cases

Dobler v Halverson

By Bill Madden and Tina Cockburn

The recent unanimous decision of the NSW Court of Appeal in *Dobler v Kenneth Halverson and Ors; Dobler v Kurt Halverson (by his tutor)*¹ concerned a claim brought against a general practitioner after a young man suffered cardiac arrest and hypoxic brain damage. This decision has clarified the effect of the legislative provisions concerning the standard of care in professional negligence cases, and suggests the following framework for analysis in such cases:

1. Apply the common law test in *Rogers v Whitaker*.²
2. Determine whether the defendant has established the statutory defence in s5O *Civil Liability Act 2002* (NSW) and its equivalent provisions³ (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).
3. If the statutory defence is available, determine whether the defence should fail by reference to the irrationality (or similar) exception available in s5O(2).

THE COMMON LAW TEST

The common law test to determine the standard of care of a professional is set out in *Rogers v Whitaker*. In that case, the High Court held that, in cases involving the giving of advice or information, professional standards are not conclusive of the standard of care for professionals; this determination is a matter for the court. The majority said:

‘... the standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade’, but rather, ‘particularly in the field of non-disclosure of risk and the provision of advice and information, the *Bolam* principle has been discarded and instead, the courts have adopted ... the principle that, while evidence of acceptable medical practice is a useful guide for the courts, it is for the courts to adjudicate on what is the appropriate standard of care after giving weight to “the paramount consideration that a person is entitled to make his own decisions about his life” ...’⁴

THE CIVIL LIABILITY ACT DEFENCE

Most Australian jurisdictions enacted legislation following a recommendation from the *Review of the Law of Negligence*⁵ that ‘a medical practitioner is not negligent if the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the field’.⁶ For example, s5O *Civil Liability Act 2002* (NSW) provides:

‘5O Standard of care for professionals

- (1) A person practising a profession (“a professional”) does not incur a liability in negligence arising from the provision of a professional service 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.
- (2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.
- (3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.
- (4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.’⁷

In *Dobler v Halverson*, the court was asked to determine the effect of s5O(1). The defendant submitted that s5O set the standard of care for professional negligence cases, and that to establish negligence the plaintiff had to prove that the provision of professional services by the defendant was not widely accepted in Australia by peer professional opinion as competent professional practice.⁸ The plaintiff submitted that s5O is a defence and that the standard of care is determined according to *Rogers v Whitaker*; therefore, if a defendant is found negligent under this standard, liability can be avoided if s/he establishes that they acted in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice.⁹

The trial judge, McClelland J, agreed with the plaintiff's submission that the section operated as a defence.¹⁰ This finding was upheld by the Court of Appeal. Giles JA said:¹¹ 'Apart from s50 the Court would determine the standard of care, guided by the evidence of acceptable professional practice. It would not be obliged to hold against the plaintiff if the defendant's conduct accorded with professional practice regarded as acceptable by some although not by others. Section 50 has the effect that, if the defendant's conduct accorded with professional practice regarded as acceptable by some (more fully, if he "acted in a manner that ... was widely accepted ... by peer professional opinion as competent professional practice"), then subject to rationality that professional practice sets the standard of care ... In this sense, s50 provides a defence.'¹²

In *Dobler v Halverson*, Giles JA described the trial judge's analysis as follows:

'He held that the appellant "fell short of the requisite standard of care" ... He then considered whether the appellant nonetheless was not liable because it was established that when he failed to obtain an ECG he acted in a manner widely accepted by peer professional opinion as competent professional practice, and found that it was not (at [187]-[188]).'¹³

THE IRRATIONALITY EXCEPTION

In most jurisdictions, the civil liability legislation contains an exception to the statutory defence, most often framed as an exception for irrationality. For example, s50(2) of the *Civil Liability Act 2002* (NSW) provides that:

'... peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.'¹⁴

Although this exception has yet to be judicially considered, in *Halverson v Dobler*, the trial judge said:

'Although it is unnecessary to make a finding of irrationality, Dr Chambers' evidence is significant. In my opinion, s50 cannot relieve Dr Dobler from liability.'¹⁵

The irrationality exception may apply in cases where a risk of causing grave danger is taken, even though the risk could easily and inexpensively have been avoided.¹⁶ ■

Notes: **1** [2007] NSWCA 335, Giles JA (Ipp JA and Basten JA agreeing), delivered 26 November 2007 (*Dobler v Halverson*). The appeal was from the NSW Supreme Court decision of McClelland CJ (Common Law) in *Halverson & Ors v Dobler; Halverson (by his tutor) v Dobler* [2006] NSWSC 1307. **2** [1992] HCA 58; (1992) 175 CLR 479 (*Rogers v Whitaker*). **3** See Queensland: s22 *Civil Liability Act 2003* (Qld); South Australia: s41 *Civil Liability Act 1936* (SA); Tasmania s22 *Civil Liability Act 2002* (Tas); Victoria: s59 *Wrongs Act 1958* (Vic); Western Australia: s5PB *Civil Liability Act 2002* (WA); Australian Capital Territory: *Civil Law (Wrongs) Act 2002* (ACT) (no equivalent section); Northern Territory: *Personal Injuries (Liabilities and Damages) Act 2003* (NT) (no equivalent section). **4** At 487 per Mason CJ, Dawson, Brennan, Toohey and McHugh JJ. See also *Naxadis v Western General Hospital* (1999) 197 CLR 269 at 275-6 per Gaudron J; *Rosenberg v Percival* (2001) 205 CLR 434 at 439 per Gleeson J. **5** <http://revofneg.treasury.gov.au/content/review2.asp>. **6** Recommendation 3. **7** For comparative

legislation, see note 3 above. **8** See *Halverson & Ors v Dobler; Halverson (by his tutor) v Dobler* [2006] NSWSC 1307 (*Halverson v Dobler*) at [180]. **9** *Halverson v Dobler*; at [180]. **10** *Halverson v Dobler* at [182]; see also *Walker v Sydney West Area Health Service* [2007] NSWSC 526 at [167]. **11** *Dobler v Halverson* at [59] - [61] (Ipp JA and Basten JA agreeing). **12** Giles JA supported this construction in para 3.22 of the *Review of the Law of Negligence* and in *Hansard* (23 October 2002, p5765): see [63]. **13** At [64]. **14** For comparative legislation, see Australian Capital Territory: s42, *Civil Law (Wrongs) Act 2002* (ACT) (no equivalent section); Northern Territory: *Personal Injuries (Liabilities and Damages) Act 2003* (NT) (no equivalent section); Queensland: s22, *Civil Liability Act 2003* (Qld). South Australia: s41, *Civil Liability Act 1936* (SA); Tasmania s22 *Civil Liability Act 2002* (Tas); Victoria s59 *Wrongs Act 1958* (Vic); Western Australia s5PB *Civil Liability Act 2002* (WA). **15** *Halverson v Dobler* at [190]. **16** In the *Review of the Law of Negligence Report*, the case of *Hucks v Cole* [1993] 4 Med LR 393 was cited as an example of the irrationality exception: see [3.19]; [3.8].

Bill Madden is the National Practice Group Leader – Medical Negligence at Slater & Gordon Lawyers.

EMAIL w.madden@slatergordon.com.au

Tina Cockburn is a senior lecturer at the Faculty of Law, Queensland University of Technology EMAIL t.cockburn@qut.edu.au

IT'S ALL ABOUT MONEY!®



FLINT FORENSICS PTY LTD

ABN 65 103 438 277

Forensic Accounting Services

- litigation support
- assessment of economic loss
- expert witness
- financial & other investigations
- income protection risk management
- business valuations

When *it's all about money*®,
Flint Forensics Pty Ltd is the impartial
and independent specialist
for personal and commercial
litigation support.



Chartered
Accountants

DX 11319 Hurstville NSW
action@flintforensics.com.au
www.flintforensics.com.au



ACFE

Association of Certified Fraud Examiners

Fax 02 9584 1475

Tel 02 9584 1474