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Examination of the Standard of Care for Professionals under the Civil Liability Act

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EXAMINATION OF THE STANDARD OF CARE FOR PROFESSIONALS UNDER THE *CIVIL LIABILITY ACT*

by Michael Eagle

DUTY OF CARE

1. Liability of Professionals for Negligent Acts – an historical perspective

The liability of professionals for negligent acts long precedes the landmark decision of *Donoghue v Stevenson*[1] which emblazoned the law of negligence with the concept of foreseeability. Early cases were founded on the equitable notion of a fiduciary relationship. In *Nocturn v Ashburton*,[2] a solicitor's client was able to recover the losses suffered as a result of a negligent misstatement, as although the client was unable to prove fraudulent intention, which was necessary to sustain an action of deceit, he was able to claim equitable relief and compensation on the basis of a breach of duty arising from the fiduciary relationship between a solicitor and client.

In *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[3] the House of Lords found the Plaintiff's banker liable for giving a negligent reference concerning one of its customers knowing that it would be relied on by the Plaintiff to his possible detriment. The bank was held to be liable for the consequent economic loss. Their Lordships held that liability for a negligent misrepresentation spoken or written is not dependent on contract or a fiduciary relationship. The law will imply a duty of care for a person seeking information from a person with a special skill and entrusts to that person the exercise of due care in exercising the skill so that reliance can be placed on the skill and judgment. In reaching its conclusion, the House of Lords did not rely on the principles laid down in *Donoghue v Stevenson*, as *Donoghue v Stevenson* related to negligent acts causing physical damage and therefore could not relate to negligence in words causing economic damage.

The logic of the distinction between physical acts or omissions and the utterance of words was called into question by Barwick CJ in *MLC v Evatt*.[4] In this case, the Plaintiff sought a declaration that he had a cause of action in respect of incorrect information and advice he had been given as to the security of his investments in a company which was a subsidiary of the Defendant companies. Unlike their Lordships in *Hedley Byrne*, the majority in *MLC v Evatt* (Barwick CJ, Kitto and Menzies JJ; Taylor and Owen JJ dissenting), found that the relationship was one which imposed upon the Defendants a duty of care in giving the advice to the Plaintiff which he alleged caused his loss. So long as there was a relationship of reliance then a duty of care arose without the need for persons being relied on having special skill or knowledge. In *Hedley Byrne*, some of their Lordships had emphasised the existence of a special duty in the

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[1] [1932] AC 562.
[2] [1914] AC 939.
[3] [1964] AC 465.
[4] (1968) 122 CLR 556 at 550.

case of persons exercising some professional skill or judgment while others of their Lordships extended it generally to all persons who made representations to an advisor when the advisor knew or ought to have known that the enquirer was relying on the advisor. While the majority in *MLC v Evatt* were of the view that the duty of care was established by *Hedley Byrne*, both Barwick CJ and Kitto J were of the view that the principles in *Donoghue v Stevenson* of neighbourhood, proximity and reasonable foreseeability applied.[5] On appeal to the Privy Council, the Judicial Committee (Lord Hodgson, Lord Guest and Lord Diplock; Lord Reid and Lord Morris dissenting) held that there was no cause of action as the Appellant's business did not include giving advice on investments and it did not claim to have the necessary skill and competence to give such advice or to exercise the necessary diligence to give reliable advice. Accordingly, its duty was merely to give an honest answer to the enquiry.[6]

Subsequent English decisions have tended towards the High Court position rather than the Privy Council's decision in *MLC v Evatt*. In *Spring v Guardian Assurance PLC*,[7] the House of Lords found that an employer was liable to an employee in negligence where a reference given by the former employee resulted in the employee suffering economic damage. Their Lordships held that it was an implied term of a contract that they would ensure that reasonable care was taken in compiling and giving the reference and that they were in breach of that implied term. No special skill was required to found the relationship although of course there was a past relationship of employer and employee.

The duty of care laid down by McNair J in *Bolam v Friern Hospital Management Committee*,[8] expressed the test as follows:

> *"Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of the Clapham Omnibus, but because he has not got this special skill. The test is the standard of the ordinary skills man exercising professing to have that special skill ... A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."*

In *Rogers v Whitaker*,[9] the High Court enunciated a very similar duty of care but declined to adopt the *Bolam* defence. Similar duties of care had come to be applied to other professionals as can be seen from the discussion above of *Nocturn*, *Hedley Byrne* and *MLC v Evatt*. The application of the *Bolam* test in cases involving other professionals such as architects, valuers, solicitors and others have led to some curious anomalies where it has been applied by English Courts.[10]

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[5] Barwick CJ at 556; Kitto J at 581-582.
[6] [1971] AC 793.
[7] [1995] 2 AC 296.
[8] [1957] 1 WLR 562 at 586.
[9] (1992) 175 CLR 479.
[10] See Jackson & Powell on Professional Negligence, 5th ed., London, Sweet & Maxwell, 2002 at pp.7, 289-293, 470-471 and 586-587.

In *McFarlane v Tayside Health Board*,[11] the House of Lords held that a mother may bring an action for the pain, suffering and inconvenience of pregnancy and childbirth as the foreseeable consequences of a negligent vasectomy operation. Their Lordships however rejected a claim for the parents for the costs of caring for and raring the child. Three years later in *Cattanach v Melchoir*, the High Court declined to follow the House of Lords decision in *McFarlane* and awarded the parents of a child conceived as the result of a negligent sterilisation operation, the costs of raring the child.[12]

Now that a modified Bolam test has been imposed on the law relating to the liability of professionals for negligent acts by virtue of s.5O of the *Civil Liability Act (NSW)* and its equivalents in other states, can guidance be obtained from the English decisions promulgating principles in relation to the *Bolam* test? On the one hand there has been considerable divergence of opinion between English and Australian judges over the decades, but on the other hand, there is a developed body of law relating to the test in the UK which is absent in Australia due to its exclusion by the High Court case in *Rogers v Whitaker*. A *Bolam* type defence has come to be applied to all professionals by s.5O of the *Civil Liability Act 2002*. Despite the anomalies arising from its application to professions other than medical practitioners there is neither rhyme nor reason why a *Bolam* defence should not apply in respect of other professionals.

One needs to examine prior and subsequent cases and guidelines laid down by the Ipp Committee to enhance one's understanding of the operation of s.5O and its counterparts in other states.

2. Cases on the Duty of Care prior to the enactment of s.5O

The standard of care promulgated in s.5O of the *Civil Liability Act 2002* is an amalgam of principles laid down in previous cases and recommendations of the Ipp Committee so an examination of the cases and the Ipp Committee's recommendations may give guidance to the interpretation of s.5O.

In *Bolam v Friern Hospital Management Committee*,[13] the Plaintiff brought an action for fractures he sustained to his pelvis when he went into convulsions following electro-convulsive therapy (ECT). The Plaintiff was suffering from a mental illness and had voluntarily admitted himself to the Friern Hospital for ECT treatment. The treatment is carried out by placing electrodes on each side of the head and allowing an electric current to pass through the brain. One of the results of the treatment is that it may precipitate violent convulsive movements in the form of a fit and muscular contractions and spasms. When the treatment was carried out in 1954, it was possible to eliminate convulsive movements by administering a relaxant drug. When relaxant drugs were not used there was also a practice among some psychiatrists to manually constrain the patient. Dr Allfrey carried out ECT "unmodified", that is, without relaxant drug or with physical restraints other than to support the Plaintiff's chin and hold his shoulders with nurses on either side of the couch to stop the Plaintiff from falling off. During the course of the treatment, the Plaintiff went into a violent

[11] (2000) 2 AC 59.
[12] (2003) 215 CLR 1; see also discussion below under "Warnings" and reference to legislation in NSW, SA and Qld overturning the decision.
[13] [1957] 1 WLR 582.

convulsion during which both his left and right acetabula sustained multiple fractures as a result of the ball of his femur (hip bone) being driven through the left and right acetabulum (cup of the pelvis to which the head of the hip bone fits and rotates in the manner of a ball and socket).

There was evidence by Dr Randall, a psychiatrist on behalf of the Plaintiff, that he would have administered relaxant drugs and an anaesthetic and that these should be used in ECT treatment. However, Dr Randall admitted that there was a large body of competent doctors who took a contrary view. The defence gave evidence of other methods used other than those proposed by Dr Randall. Some used restraining sheets, some relaxant drugs, some manual restraint but all agreed that there was a firm body of opinion which was opposed to the use of relaxant drugs as a matter of routine. There was a divergence of opinion whether or not the witness should have been given a warning as to the risk of fracture while the treatment was being carried out. The jury found a verdict for the Defendant.

During the course of directing the jury, Justice McNair gave directions to the jury which formed the basis of the *Bolam* test which was subsequently adopted in later English cases. Although the case did have some limited acceptance in earlier Australian cases, it was rejected in Australia as the accepted test in medical negligence cases.[14] His Lordship directed the jury that they had to make up their minds whether or not the Defendant was, *"doing something which no competent medical practitioner using due care would do".*[15] and whether the Defendants, *"in acting in the way they did, were acting in accordance with the practice of competent respected professional opinion."* His Lordship went on further to elaborate the content of the test as follows:

> *"I myself would prefer to put it this way, that he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. I do not think there is much difference in sense. It is just a different way of expressing the same thought. Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view. At the same time, that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion. ...*
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> *... it is not essential for you to decide which of two practices is the better practice, as long as you accept that what the defendants did was in accordance with a practice accepted by responsible persons; ... Finally, bear this in mind, that you are now considering whether it was negligent for certain action to be taken in August 1954, not in February 1957; and in one of the well-known cases on this topic it has been said you must not look with 1957 spectacles at what happened in 1954."*

Bolam provides a defence to a doctor who does what other responsible doctors would do even though other doctors, even the majority of doctors, would have done something different provided that the practice is not one that was obsolete and was being unreasonably continued.

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[14] *Rogers v Whitaker* (1992) 175 CLR 479.
[15] At p.593.

As regards warnings, *Bolam's case* held that the Plaintiff must prove firstly that it was incompetent for the doctor not to give the warning and secondly that if he did give the warning then the patient would not have gone ahead with the treatment.

In *Rogers v Whitaker*,[16] Dr Christopher Rogers, an ophthalmic surgeon, was consulted by Maree Whitaker. Dr Rogers had not warned Ms Whitaker that as a result of the proposed surgery on her right eye she might develop a condition known as sympathetic ophthalmia in her left eye. Ms Whitaker had been almost totally blind in her right eye since a penetrating injury to it when she was 9 years of age. Despite the injury she had a relatively normal life completing her schooling, entering the workforce, marrying and raising a family. There was no question that Dr Rogers had performed the operation with the required skill and care. The issue was whether or not he should have warned the Plaintiff of the potential to develop sympathetic ophthalmia which consequently resulted in her suffering almost total blindness. She was awarded $808,564.38 at trial which was upheld on appeal to the Court of Appeal. The High Court dismissing a further appeal by Dr Rogers discussed the *Bolam* principle and rejected its application in Australia.[17] Their Honours[18] outlined the position as follows:

> *"In Australia, it has been accepted that the standard of care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that special skill. But, that 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. Even in the sphere of diagnosis and treatment, the heartland of the skilled medical practitioner, the Bolam principle has not always been applied. Further, and more importantly, 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' ...*
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> *...*
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> *The duty of a medical practitioner to exercise reasonable care and skill in the provision of professional advice and treatment is a single comprehensive duty. However, the factors according to which a court determines whether a medical practitioner is in breach of the requisite standard of care will vary according to whether it is a case involving diagnosis, treatment or the provision of information or advice; the different cases raise varying difficulties which require consideration of different factors. Examination of the nature of a doctor-patient relationship compels this conclusion. There is a fundamental difference between, on the one hand, diagnosis and treatment and, on the other hand, the provision of advice or information to a patient. ... Whether a medical practitioner carries out a particular form of treatment in accordance with the appropriate standard of care is a question in the resolution of which*

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[16] (1992) 175 CLR 479.
[17] See Jackson & Powell, Ibid at p.869 where the learned authors proffer the view that a case with the same facts might now be decided in the same way in England.
[18] Per Mason CJ, Brennan, Dawson, Toohey and McHugh JJ at pp.487-488.

responsible professional opinion will have an influential, often a decisive, role to play; whether the patient has been given all the relevant information to choose between undergoing and not undergoing the treatment is a question of a different order. Generally speaking, it is not a question the answer to which depends upon medical standards or practices. Except in those cases where there is a particular danger that the provision of all relevant information will harm an unusually nervous, disturbed or volatile patient, no special medical skill is involved in disclosing the information, including the risks attending the proposed treatment. Rather, the skill is in communicating the relevant information to the patient in terms which are reasonably adequate for that purpose having regard to the patient's apprehended capacity to understand that information." [19]

Rogers v Whitaker decided that standard of care was not determined by whether or not there was a responsible body of opinion supporting the practice of the Defendant doctor. The Court would look at the various opinions in the case and would decide the appropriate standard of care. Effectively their Honours were saying that it was for the Court to decide the standard of medical care not the medical profession. That standard was the standard of an ordinary skilled person in the position of the doctor exercising and professing to have that special skill. There was a difference between giving treatment and advising. Where the case concerned advice, the test is whether or not the patient had been given all the relevant information so that the patient could choose between undergoing or not undergoing the treatment. The skill involved was not medical care but of communication adequate for the patient to understand. Accordingly, *Rogers v Whitaker* adopted a similar test as to the standard of care of skilled persons exercising that skill but declined to apply *Bolam* type defence or the principles in *Bolam* relating to warnings. Section 5P continues the *Rogers v Whitaker* approach to the failure to give a warning (see below).

Accordingly, under the *Bolam* principle, all the doctor had to show to escape liability was to call evidence that the practice he employed in giving the treatment or advice was agreed with by a responsible body of medical opinion skilled in the particular form of treatment or advice. The doctor is not negligent even if other doctors would take a contrary view so long as what the doctor does or advises is not contrary to what is really substantially the whole of medical opinion. In Australia, prior to the enactment of s.5O, an opinion that the Defendant doctor was doing what other responsible doctors would do was not conclusive although it would be taken into account together with other opinions. It was the Court who decided the appropriate standard of care after giving weight to the various opinions given in evidence. Warnings did not involve standards of medical care but rather skill in communicating. Warnings depended on what was necessary for the patient to make a choice in terms that the patient could understand.
Jackson & Powell on *Negligence* recognises three categories of case where the *Bolam* test will not apply.[20] The same categories were given judicial recognition in *Michael Hyde & Associates Ltd v J D Williams & Consent Orders Ltd.*[21]

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[19] pp.487-490.
[20] Jackson & Powell on Professional Negligence, 5th ed., 2002 London, Sweet & Maxwell at p.289.
[21] [2001] PNLR 233, CA (Professional Negligence Reports).

The first category is where there is no logical basis for the body of opinion upon which the Defendant relies. In *Bolitho*,[22] Lord Browne-Wilkinson formulated the exception as follows:

> *"These decisions demonstrate that in cases of diagnosis and treatment there are cases where, despite a body of professional opinion sanctioning the defendant's conduct, the defendant can properly be held liable for negligence (I am not here considering questions of disclosure of risk). In my judgment that is because, in some cases, it cannot be demonstrated to the judge's satisfaction that the body of opinion relied upon is reasonable or responsible. In the vast majority of cases the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of that opinion. In particular, where there are questions of assessment of the relative risks and benefits of adopting a particular medical practice, a reasonable view necessarily presupposes that the relative risks and benefits have been weighed by the experts in forming their opinions. But if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible.*
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> *I emphasise that in my view it will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable. The assessment of medical risks and benefits is a matter of clinical judgment which a judge would not normally be able to make without expert evidence. As the quotation from Lord Scarman makes clear, it would be wrong to allow such assessment to deteriorate into seeking to persuade the judge to prefer one of two views both of which are capable of being logically supported. It is only where a judge can be satisfied that the body of expert opinion cannot be logically supported at all that such opinion will not provide the bench mark by reference to which the defendant's conduct falls to be assessed."*

The second category is where the so-called expert opinion is really only an expression by a practitioner as to what he would have done in the circumstances and is not an expert opinion as to whether there was, *"some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage".*[23] In *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp*, proceedings were brought against a solicitor who had failed to register an option to purchase. It was found by Mr Justice Oliver that although the solicitor was not liable in contract due to the limited nature of his retainer, he was nonetheless liable in negligence in omitting to register the option before a third party acquired an adverse interest in the property. The solicitor was liable in accordance with the principles laid down in *Hedley Byrne*. The Victorian Full Court has also found solicitors liable not only in contract but also in negligence for their failure to bring proceedings pursuant to the *Wrongs Act 1958 (Vic)* within the required time limit.[24]

The third category comprises cases where expertise is not necessary to decide professional practice. In such cases no expert evidence will be required.

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[22] [1998] AC 232 HL.
[23] *Midland Bank Trust Co Ltd v Hett Stubs & Kemp* [1979] Ch 384 per Oliver J at 402.5.
[24] See *Macpherson & Keeley v Kevin J Prunty & Associates* [1983] 1 VR 573.

Jackson & Powell quotes the case of *Worboys v Acme Investments Ltd*,[25] where Lord Justice Sachs recognised there were cases where what occurs is so obvious no proof of general practice is required. In that case the omission by an architect of a staircase in a house was found to be so glaringly obvious that no expert opinion was required.

However, the Court of Appeal in *Gold v Haringey Health Authority*[26] overturned the decision of the trial judge that no evidence was necessary from an expert as to whether or not a warning should be given as to the failure rate of female sterilisation operations. The Court of Appeal found that evidence that a substantial body of responsible doctors would not give any such warning in 1979, was a defence under the principles in *Bolam*.

Jackson & Powell quote the case of *Mount Banking Corporation Ltd v Brian Cooper & Co*,[27] as authority for the proposition that where a valuer makes a material and negligent error in reaching his valuation, *Bolam* will afford a defence where the total valuation figure itself is not negligent. I have difficulty with extrapolating from *Bolam's case* how a negligent calculation is excused if the total valuation is correct. *Bolam's case* rather decides that although the conduct may be found to be negligent, the Defendant is not liable if a substantial body of respected practitioners would have done as the Defendant did. This is a different proposition from finding that there was no liability when the overall figure was substantially correct which to me appears to be finding in effect near enough is good enough, rather than a finding that a substantial respected body of medical practitioners would have done as the Defendant did. The decision is sound in logic without invoking the *Bolam* test as a prop. It is not necessary to find that the *Bolam* test applies if the valuation is within the range of a substantial number of valuers.

In *Michael Hyde & Associates Ltd v J D Williams & Co Ltd*,[28] the Respondent was a small mail order company selling clothes and had bought two cotton mills for conversion to use for storage. It employed the Appellant company of architects to design the works. Included in the design was the provision of a new heating system. The quotation for the heating system included a disclaimer in respect of discolouration. Both the Appellant and Respondent followed up the disclaimer and both were re-assured that the heating system had been used elsewhere without causing discolouration. The Respondent discussed it with the Appellant and it was decided to go ahead with the order for that type of heating. The Respondent's goods were subsequently damaged by way of discolouration and it brought an action against the Appellant. The trial judge dismissed the action on the basis that both parties had the same level of knowledge. There was a divergence of expert views on whether the Appellant's duty was to draw the risks to the Respondent's intention and whether to investigate the matter further. The trial judge had found that the question of breach of duty was not dependent on any peculiarities of architectural practice and the expert evidence was therefore irrelevant. The trial judge held that the Appellant had been in breach of duty in failing to investigate the matter of discolouration further. The Court of Appeal upheld the trial judge's finding on breach of duty but found for

[25] (1969) 210 EG 335, CA.
[26] [1988] 1 QB 481.
[27] [1992] 2 EGLR 142. (Estates Gazette Law Reports)
[28] [2001] PNLR 233.

the Appellant on causation.

Lord Justice Ward delivering the leading judgment of the Court of Appeal went through the judge's findings of facts as follows. Higginson was employed by British Gas from whom the proposed heating system was to purchased. The Appellant company (MHA) engaged Mr Warrington, a civil engineer, to be response for the project and the Respondent (JDW) also appointed an engineer, Mr Fowler, as its project manager. Mr Fowler had contacted Warrington about a disclaimer clause in the quotation from British Gas concerning discolouration following the use of its heater. Mr Fowler and Mr Warrington had discussed it with Mr Higginson and decided that it was not a problem. The trial judge found that both Mr Fowler and Mr Warrington had the same state of knowledge as to the risk of discolouration attached to the hearing system. Neither was aware of the phenomenon known as phenolic yellowing which in fact occurred but had knowledge that some previous discolouration of foam with primitive heaters had occurred so that British Gas was not prepared to remove their disclaimer in respect of discolouration. Both men, however, had confidence in Mr Higginson that the discolouration risk was not significant. The issue of negligence was whether or not Mr Warrington should have made further independent enquiries regarding discolouration. The parties' experts held opposing views as to whether or not it was MHA's duty to investigate the matter further. The trial judge found that MHA did in fact breach its duty by failing to investigate the matter of discolouration further (negligence) and had it done so, the problem would have been recognised avoiding the damage suffered by JDW (causation). Lord Ward held that *Bolam* applied to architects relying on *Nye Saunders & Partners v Alan E Bristo*,[29] and Lord Diplock's statement to that effect in *Saif Ali v Sydney Mitchell & Co*,[30] where Lord Diplock says:

> *"It seems to me that both tests are aspects of a single principle. The principle, broadly put, is that professional negligence means falling below a proper standard of competence (see Jackson & Powell, Professional Negligence, 4th ed., 1997, para 1-04). In most cases the Court will arrive, commonly with the help of evidence from the particular profession, at its own judgment of what that standard is. But in many (not all) cases where the profession itself embraces more than one tenable view of acceptable practice, competence will not be measurable by a single forensically determined standard; so that where there is more than one acceptable standard, competence has to be gauged by the lower or lowest of them.*
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> *In such cases it is the principle itself which requires the adoption of a Bolam-type test. To do otherwise would allow the law to dictate the pace and parameters of change in the professions of which lawyers may know little or nothing. But to extend the Bolam principle to all allegations of professional negligence would be to make the professions, to an extent large enough to accommodate much harm to the public, judges in their own cause.*
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> *It may not be feasible, and it would certainly be unwise, to try to draw a bright line between the two applications of the principle otherwise than case by case. Nye Saunders, despite the concession that it was governed by the Bolam test, was manifestly an exercise in standard-setting by the Court itself and should be so regarded. But in general it can be said that the Bolam test*

[29] (1987) 37 BLR 92.
[30] [1980] AC 198 at 220.

is typically appropriate where the neglect is said to lie in a conscious choice of available courses made by a trained professional, and that it is typically inappropriate where it is an oversight that the neglect is said to lie. This is not least because it is likely to be much easier to characterise the former than the latter as errors of judgment."

Lord Ward went on to outline the circumstances in which the *Bolam* test is not applicable as follows:

1. *One such qualifications is provided by Bolitho as quoted above, namely:*

   "But if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible."

2. *Another is referred to in Nye Saunders where Stephen Brown LJ held:*

   "[The judge] was entitled to take the view that the evidence of [the architect's experts] did not constitute evidence of a responsible body of architects accepting as a proper practice that no warning of inflation need be given when providing an estimate of the cost of proposed works. It seems to me that the learned judge had ample evidence before him which entitled him to find that there was a failure on the part of Mr Nye to draw the attention of the client to the fact that inflation was a factor which should be taken into account when considering the ultimate cost and that the failure constituted a breach of the Hedley Byrne type duty to the Defendant."

3. *The third qualification is expressed by Lloyd LJ in Gold v Haringey Health Authority [1988] 1 QB 481, 490:*

   "If the giving of contraceptive advice required no special skill, then I could see an argument that the Bolam test should not apply."

Lord Justice Ward then analysed the trial judge's judgment stating that he had correctly rejected the first exception that the opinion was logically flawed and the third opinion that the evidence amounted to no more than an expression of personal opinion and was correct in finding that the case fell within the third exception to the *Bolam* test that the issue of discolouration did not require any special architectural skill and he was therefore entitled to find that MHA was liable in negligence. However, there as no evidence to support the judge's finding which could only have been based on speculation that had further investigation been carried out then it would have uncovered an unacceptable risk of discolouration. The claim should have been dismissed on the causation issue.

Lord Sedley held that the *Bolam* test was not restricted to medical negligence cases[31] and cited the judgments of Lord Lloyd in *Gold v Haringey* held authority[32] and also Lord Diplock in *Saif Ali v Sydney Mitchell & Co.*[33] Lord Diplock said:

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[31] [2001] PNLL 233 at para 44.
[32] [1988] QB 481 at 489.
[33] [1980] AC 198 at 220.

"No matter what profession it may be, the common law does not impose on those who practice it any liability for damage resulting from what in the result turn out to have been errors of judgment, unless the error was such as no reasonably well-informed and competent member of that profession could have made."

In *Edward Wong Finance Company Ltd & Johnson Stokes v Master*,[34] the Plaintiffs agreed to loan a large sum of money at the purchases of part of a factory. The Defendant handed over the money to the vendor's solicitors on an undertaking that the vendor's solicitors would arrange for repayment of the existing mortgage on the property and would forward an assignment of the property from the vendor's to the purchasers within 10 days. Evidence was given that this was "Hong Kong style" completion which enabled transactions to be carried out far more quickly than in other places. There was evidence that the Law Society of Hong Kong had warned of the dangers of the "Hong Kong style completion" and issued precautions about the risks inherent in the practice. The trial judge held that the solicitors were negligent in participating in a Hong Kong style completion in light of the fact that the vendor's solicitor was a recently established one-man firm and large sums of money were involved. The Hong Kong Court of Appeal overturned the trial judge's decision and on appeal to the Privy Council, the Judicial Committee held that the solicitors were negligent. Although the Privy Council did not condemn the practice of "Hong Kong style completions", they held it was foreseeable that the practice might result in embezzlement. This was foreseeable particularly in the light of the problems foreseen by the Law Society that could have been readily avoided by only handing over the settlement monies on receipt of a discharge of the prior mortgage. The solicitors were liable even though they had complied with the practice normally taken by solicitors who participated in "Hong Kong style completions". A further illustration in relation to solicitors is given by Jackson & Powell, where evidence of two conflicting practices in *G&K Ladenbau v Crawley & De Reya*.[35] Although two conveyancing solicitors gave evidence on each side as to their practice in making common searches, Mocatta J held that the solicitors had been negligent.

3. The Test

In 2002, a panel was appointed by the Federal Government to examine the standard of care for doctors with a view to curbing the number of claims brought against the medical profession. The impetus behind the enactment of s.5O and other related sections was largely the insolvency of the NSW insurer, United Medical Protection, and difficulties being experienced by other insurers in the field.[36] On 2 July 2002, a panel was appointed which has been largely referred to as the Ipp Panel. The panel reviewed the law and came up with the following recommendation:

"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, unless the court considers that the opinion was irrational."

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[34] [1984] AC 296.
[35] (1978) 1 WLR 266.
[36] See "Professional Liability in Australia" 2nd ed, Walmsley, Abadee and Zipser, p.270.

The proposal was more reflective of *Bolam* but with the important caveat *"widely held by a significant number"*. The proposal also appears to have only related to doctors (practitioners) rather than all professionals as in s.5O.

The Ipp Committee gave the following explanation of their recommendation:

> *"In this formulation, the requirement that the opinion be 'widely held' is designed to prevent reliance being placed on localised practices that develop in isolation from the mainstream of professional activity. The requirement of 'a significant number' is designed to filter out idiosyncratic opinions. The requirement of 'respected practitioners' is designed to ensure that the opinion deserves to be treated as soundly based."*

The Test in New South Wales is set out in s.5O of the *Civil Liability Act 2002* for all actions brought after 6 December 2002:

> ***"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."*

The NSW legislation omits *"by a significant number"*. The Victorian legislation does not. The NSW legislation substitutes *"peer professional opinion"* with *"respected practitioners in the field"*. The Victorian legislation[37] equates *"peer professional opinion"* with *"a significant number of practitioners in the field"*. The consequences of the omission by the NSW legislative is that the practice should be widely accepted by peers but is open to the interpretation that the number of peers is not crucial. There is also a clearer dichotomy in the Victorian legislation between the standard of care (s.58) and the *Bolam* type defence (s.59). Although the dichotomy has been recognised in recent NSW decisions.[38]

The effect of the section is that the Plaintiff needs to call expert evidence to the effect that the Defendant's conduct fell short of accepted professional practice and the Defendant will call evidence that his conduct did accord with peer professional practice. The Court is to be guided by the expert evidence in deciding what was the peer professional practice rather than being presented

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[37] *Wrongs Act 1958*, s.59(1).

[38] *Dobler v Halverson* [2007] NSWCA 335 (26 November 2007) and *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC Young J in Eq (28 May 2008).

with a number of different opinions as to what was acceptable medical practice and then adjudicating on what is the appropriate standard of care. Effectively it is the profession who determines what is peer professional practice and not the Court. The point about the defence is that so long as the Defendant is acting in accordance with practice regarded as widely accepted by a significant number of peer professionals then the Defendant is not negligent even though other professionals would have acted in a different manner so long as that practice is not irrationally held.

It is a little misleading that the heading for s.5O is *"Standard of Care for Professionals"*, when in actuality it is a defence as it was under the principles laid down in *Bolam*. The purpose of the defence is to take away from judges the process of, *"invidious dissection of a professional's conduct by lawyers and judges with the benefit of hindsight and time for reflection"* (per McHugh J in *D'Orta-Ekenaike v Victoria Legal Aid & Anor.*[39] His Honour went on to observe that s.5O, *"it is intended to preclude judges and legal practitioners imposing their own views as to what is needed to be practiced in many professions."*[40] His Honour observed that this was particularly pertinent in the case of medical practice, *"where lawyers cannot be expected to appreciate the true reality of participation in that profession"*.[41]

In *Dobler v Halverson*,[42] Mr Justice Giles (with whom Ipp and Basten JJA agreed) dealt with the operation of s.5O of the *Civil Liability Act* in a medical negligence claim. The 18 year old Plaintiff had suffered hypoxic brain damage as a result of a cardiac arrest on 11 February 2001. Proceedings were brought on his behalf by his father as his tutor and proceedings were also brought for nervous shock to his father, mother and sister. It was alleged that the Defendant, the Plaintiff's general practitioner, had failed to refer the Plaintiff for ECG tests to detect a possible cardiac problem. There was conflict of evidence between the experts as to whether or not an ECG would have detected the problem. McClellan CJ at CL found in favour of the Plaintiff and his family. The Defendant appealed. Mr Justice McClellan had found that s.5O had operated as a defence. The Defendant / Appellant argued that the Plaintiff bore the onus proving that the provision of professional services by the Defendant was not widely accepted in Australia by peer professional opinion as competent professional practice.

The Court of Appeal held that s.5O was a defence. The decision does not quantify the measure of *"widely accepted"* specifically other than to say that the conflicting opinions of the Plaintiff's and the Defendant's expert may or may not indicate whether the views have *"some currency"*.[43] The Court does give some guidance as to the type of evidence which should be presented to the Court to establish or negate the Plaintiff's case.

In *Vella v Permanent Mortgages Pty Ltd*,[44] Mr Justice Young considered s.5O in relation to an application by a Plaintiff to restore title to his properties at Leppington and Mangrove Mountain unencumbered by mortgages. The

[39] (2005) 223 CLR 1 at p.62,189.
[40] (2005) 223 CLR 1 at p.62,189.
[41] (2005) 223 CLR 1 at p.62,189.
[42] [2007] NSWCA 335 (26 November 2007).
[43] At para 59.
[44] [2008] NSWSC 505, Young CJ in Eq (28 May 2008).

proceeds of the loans found their way into a joint bank account held by the Plaintiff and another person. The Defendant was the mortgagee who had paid out the monies. The Plaintiff alleged that he did not receive the monies and that loan agreements under which the monies were paid contained forgeries of the Plaintiff's signature. In reaching the decision that the Plaintiff had an unencumbered title, his Honour considered the *Consumer Credit Code*, the *Contracts Review Act* and the *Civil Liability Act*. His Honour examined a number of sections of the *Civil Liability Act* and concluded that the Act did not affect his decision. His Honour observed the comments of Mr Justice McHugh in *D'Orta-Ekenaike* and the Court of Appeal in *Dobler's case*. His Honour rejected the proposition that the applicable standard of care was defined by the circumstances to which s.5O applied unless the particular practice was irrational. His Honour held:

> *"With respect, I do not consider that states the law with complete accuracy. The Plaintiff still may present his or her case in exactly the same way as prior to s.5O. If there is no evidence called as to peer professional practice, then the Court decides the matter in the same way as it always has decided the matter. However, if evidence is called, as the Court of Appeal notes usually by the Defendant as to what is peer professional practice in Australia, then it may be that it is the profession that sets the standard."* [45]

4. Quantification of *"widely accepted"*

Section 5O of the *Civil Liability Amendment (Personal Responsibility) Act 2002* has been described as a modified *Bolam* principle. The main difference between the *Bolam* principle and the new legislation is the use of the words *"widely accepted"* in the legislation passed by the 6 States which have enacted legislation on the lines proposed by the Ipp Panel.[46]

Section 5O(1) requires that the peer professional practice be widely accepted in Australia. The words *"in Australia"* appears in the New South Wales, Victorian, South Australian and Tasmanian legislation, but not in the Queensland or West Australian legislation. It was not proposed in the recommendation of the Ipp Committee. It is clear from the explanation of the Ipp Committee that the words *"widely held"* were intended to prevent reliance on localised practices but by qualifying those words with the words *"in Australia"* the legislature protects Australian practitioners who have a practice which is different from that from overseas practitioners. I have not to date had a case where Australian practice differed significantly from English or US practice and in most cases Australian experts rely on US and UK texts in support of their opinions. The intention of the legislatures where the words *"in Australia"* appears is probably to eliminate overseas experts who are more likely to be critical of Australian medical practitioners than their Australian peers. The legislation, however, would not preclude the calling of an overseas expert on the issue of causation.

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[45] Query whether the distinction between the duty of care and a *Bolam* defence is generally practised in the UK. See Jackson & Powell, ibid at p.289, 8-145.

[46] The Ipp Panel recommended the following: *"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, unless the court considers that the opinion was irrational."*

Legislation adopted in New South Wales and the other states except Victoria and Queensland refrain from using the words *"by a significant number of respected practitioners in the field"*. Nonetheless the way in which the legislation is drafted suggests that one has to quantify what is widely accepted and it would appear that the exercise involves more than just eliminating localised practices and that in order to quantify, guidance can perhaps be had from the words *"a significant number"* which the explanation of the Ipp Committee states was designed to filter out idiosyncratic opinions. However, the explanations given by the Ipp Committee suggest it regarded *"widely accepted"* and a *"significant number"* as separate concepts (see p.6 above). It would appear that the words *"respected practitioners"* has been substituted for *"peer professional opinion as competent professional practice"*.

One then has to look at sub-sections (2), (3) and (4) to get further guidance. The opinion does not have to be universally accepted so that it is sufficient if a significant number of practitioners would have done what the Defendant would have done is enough to satisfy sub-section (1) which is drafted in the form of the defence (s.5O(4)). However, the opinion has to be rational (s.5O(2)) and it is open to the Court to prefer one or more of differing opinions widely accepted in Australia in deciding whether or not the Defendant was negligent (s.5O(3)). Sub-section (3) is open to a range of interpretations. On the one hand it could be argued that the Court has a discretion in accepting one medical opinion over another on the lines suggested in *Rogers v Whitaker*, *"The principal that, while evidence of accepted medical practice is a useful guide for the courts, it is for the courts to adjudicate on what is the appropriate standard of care"*.[47] It could also be argued that what sub-section (3) is intending to do is on the lines proposed in *Bolitho v City Hackney Health Authority*. Although the courts can reject a body of opinion which is not *"reasonable or responsible"*, it, *"will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable"*.[48] In further support of the last proposition it can be argued that when one reads sub-section (4) together with sub-section (3), it is clear that the legislature intended that a defendant doctor could rely on an opinion which was accepted by a significant number of other doctors, although most doctors would reject that opinion.

The use of the word "widely" implies that something more than a small minority of competent medical practitioners acting contrary to the great majority of competent medical practitioners is necessary. Evidence that most medical practitioners of the same expertise as the Defendant would not have done what he did, although a significant number of others would have, may suffice, but "widely" suggests that more than "a significant number" is necessary to satisfy s.5O, although it would satisfy the *Bolam* test of *"a practice accepted as proper by a responsible body of medical men skilled in that particular art"*.[49]

In *Dobler*, Mr Justice Giles indicated that where the Plaintiff and the Defendant call expert evidence as to whether or not the Defendant's conduct fell short of acceptable professional practice, the opposing expert evidence may or may not give an indication as to whether the opposing opinions have *"some currency"*.[50]

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[47] *Rogers v Whitaker* (1992) 175 CLR 479 at 487.8.
[48] (1998) AC 232 at 243 per Lord Browne-Wilkinson.
[49] 47 [1957] 1 WLR 582 at 593.
[50] At para 59.

His Honour in holding that s.5O provided a defence said:

> *"It's importance does not lie so much in questions of onus of proof as in who determines the standard of care. Commonly, as in the present case, there will be expert evidence called by the Plaintiff to the effect that the Defendant's conduct fell short of acceptable professional practice and expert evidence called by the Defendant that it did not; the expert evidence may or may not recognise that the opposing professional practice is one which has some currency. Apart from Section 5O the Court would determine the standard of care, guided by 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 5O 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."*

It would follow from his Honour's reasoning that the Court would not necessarily accept the defence even though there was a body of opinion that supported the Defendant's conduct if there is a dispute as to whether the Defendant's conduct is in accordance with competent professional practice. Like *Rogers v Whitaker*, the Court still has some discretion as to what peer professional practice is. That is different from the situation in *Rogers v Whitaker* where the Court determined the standard of care guided by expert opinion. The standard of care is that set by the professionals not by the Court. Presumably the number of doctors required to constitute "some doctors" will need to be decided according to the circumstances of each case. Presumably the number of doctors who practice in the area under consideration by the Court and the number who would have done as the Defendant did are relevant considerations as to what is *"widely accepted by peer professional opinion"*.

His Honour in rejecting the Appellant's submission that s.5O defined the content of the duty rather than merely providing a defence, set out the matrix of his reasoning as follows:[51]

> *"60. In this sense, s.5O provides a defence. The Plaintiff will usually call his expert evidence to the effect that the Defendant's conduct fell short of acceptable professional practice, and will invite the Court to determine the standard of care in accordance with that evidence. He will not be concerned to identify and negate a different professional practice favourable to the Defendant, and s.5O does not require that he do so. The Defendant has the interest in calling expert evidence to establish that he acted according to professional practice widely accepted by peer professional opinion, which if accepted will (subject to rationality) mean that he escapes liability.*
>
> *61. ... Section 5O may end up operating so as to determine the Defendant's standard of care, but the standard of care will be that determined by the Court with guidance from evidence of acceptable professional practice unless it is established (in practice, by the Defendant) that the Defendant acted according to professional practice*

[51] At paras 60 and 61.

widely accepted by (rational) peer professional opinion. To require the Plaintiff to establish the negative would significantly distort the language of s.5O(1), and would not be consistent with a reference in s.5O(2) to reliance on peer professional opinion for the purposes of the section – the Plaintiff does not rely on it in order to negate a liability in negligence."

The Court of Appeal found that the trial judge had approached breach of duty in accordance with the operation of s.5O as outlined. The trial judge had then correctly found that the Defendant's conduct fell short of the requisite standard of care. His Honour went on then to consider whether the Defendant was nonetheless not liable because his failure to obtain an ECG was acting in a manner widely accepted by peer professional opinion as competent professional practice. The trial judge correctly found that it was not.

In *Vella*, Young CJ in Equity considered the notion of *"widely accepted"*. His Honour was concerned with what was peer professional practice in Australia concerning *"monies mortgages"*. His Honour noted that though the Torrens System operated in Australia it was contained in a number of different state and territorial statutes which differed from each other in a number of respects. His Honour observed that it was, *"too restrictive a way of approaching s.5O to say that unless there is peer professional practice throughout the whole of Australia, the section cannot apply"*.[52] His Honour said:

"554. For instance, if one was working out the duty of care of a tender of a bowab tree which as far as I know only grows in the north-west of Australia, it surely could not have been the legislature's intention that s.5O would be completely inapplicable. Rather, it would accord with the intention of the legislature if one said that where one had an industry which was only practiced in part of Australia that that part was the Australian peer professional practice for the purpose of s.5O.

555. Likewise, if one has different though similar professions in different parts of Australia, it would seem to me that one does not dismissively say there is no Australian professional practice but one looks to see the professional practice that exists in the particular locality where the negligent act or omission took place. There may also be other problems where, for instance, things would be done different on King Island in Tasmania from Thursday Island in Queensland because one is cold wet and south and the other is monsoonal north.

556. Accordingly, I reject the submission that there is not in this case an Australia-wide practice."

5. Conclusions

If the professional is able to demonstrate that he / she acted in a manner that was widely accepted as competent by a significant number of peer professionals then he / she may escape liability unless it can be demonstrated that the peer professional opinion was irrational.

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[52] Para 553.

If there are differing opinions as to whether or not the doctor's treatment was widely accepted as competent, although "some doctors" would have done as the Defendant did, then the Court can rely on one or more or all of those differing opinions in deciding whether or not the professional acted negligently. Presumably what amounts to "widely accepted" will be decided according to the circumstances of each case but guiding principles as to what satisfies "widely accepted" have not yet been fully developed by the courts. The words "widely accepted" suggest a larger number than *"a practice accepted as proper by a responsible body of medical men skilled in that particular art"*,[53] so that the legislature intended to limit the *Bolam* test to exclude quirky practices of small minorities or particular localities. However, to date there is no authoritative judicial statement defining "widely accepted" although some guidance is to be found in Mr Justice Young's statements in *Vella*.

In the UK there are three recognised categories of case where the *Bolam* test will not be applied[54] and it may be argued in cases involving s.50 that these should be applied, although history has demonstrated that Australian judges do not necessarily follow their UK brethren.

FAILURE TO WARN

1. Common Law

There has traditionally been a divergence between the situation in the UK and in Australia. In *Bolam's case*, Mr Justice McNair instructed the jury that they could find that there was no need to warn the Plaintiff of the risk of treatment where there was expert opinion to the effect that it was not incompetent for the doctor not to give such a warning. Further, it was also necessary to demonstrate that had the warning been given then the Plaintiff would have acted on it.

In *Sidaway v Governors of Bethlem Royal Hospital*,[55] the House of Lords considered the applicability of the *Bolam* principle to the giving of negligent information or advice with respect to treatment. In that case, the Plaintiff underwent a spinal operation which had a 1% or 2% prospect of damaging the spinal column and nerve roots. The operation was competently performed but as a result she was paralysed and severely disabled. The House of Lords had to consider whether or not the *Bolam* test applied where the alleged negligence was failure to warn the patient of a risk inherent in the treatment proposed. Lord Scarman, dissenting, held that the patient had a right to make up his or her mind in the light of relevant information as to whether or not he or she should accept the treatment proposed by the doctor. His Lordship, however, dismissed the appeal on the basis that the Plaintiff had not established on the evidence that the risk of damage to the spinal cord was a material risk in the sense that it was so great that the doctor should have appreciated that it would be considered a significant factor by a prudent patient in the Appellant's situation in deciding whether or not to have the operation. The other members of the House of Lords found that in deciding what risks the existence of which a patient should be warned is as much an exercise of professional skill and judgment as any other

[53] [1957] 1 WLR 582 at 593.
[54] See discussion above of Powell & Jackson and *Michael Hyde & Associates v J D Williams & Co Ltd.*
[55] (1985) AC 871.

part of the doctor's duty of care to the patient and the *Bolam* test should be applied. The doctor's non-disclosure was in accordance with the practice accepted as proper by a responsible body of neurosurgical opinion giving the doctor a complete defence to the action against him by the Plaintiff for negligence in failing to warn her of the risks.

In *Rogers v Whitaker*, the High Court held that it is of paramount consideration that a person is entitled to make his own decisions about his life and that the *Bolam* principle should not be applied in relation to non-disclosure of risk and the provision of advice and information.[56]

In *F v R*, King CJ carefully considered what a responsible doctor should disclose to a patient. His Honour outlined 5 circumstances which should be taken into account, namely:

(i) The nature of the matter to be disclosed;

(ii) The nature of the treatment;

(iii) The desire of the patient for the information;

(iv) The temperament and health of the patient;

(v) The general surrounding circumstances such as emergency conditions, loss of opportunity, a detached reflection or calm counselling and the existence of alternative sources of advice.[57]

In *Chappel v Hart*,[58] the High Court considered the issue of causation in relation to the failure of a doctor to warn a patient that her voice could be severely impaired as a consequence of surgery to remove a pharyngeal pouch in her oesophagus. During the procedure there is a potential danger that the oesophagus can be perforated and become infected – a condition known as mediastinitis. Infection is caused by bacteria present in the oesophagus escaping through the perforation into the mediastinum which is part of the chest cavity. While Mrs Hart recovered from the perforated oesophagus and mediastinitis, the infection damaged the laryngeal nerve and led to a paralysis of the right vocal cord which affected the performance of her duties in a senior position in the NSW Department of School Education. She retired from the position on medical grounds shortly after the surgery. The surgery was elective and could have been performed at a later stage although it was eventually inevitable. The Plaintiff's case was that had she been warned about the possible consequences then should have delayed the surgery and would have engaged the most experienced surgeon, expert in performing such procedures. There was evidence that mediastinitis was not an inevitable result of the perforation of the oesophagus and there was only a random chance of bacteria being present in the oesophagus when the perforation occurs. There was further evidence that the chance of perforation occurring was related to the degree of skill of the doctor. Mrs Hart claimed that she had mentioned to Dr Chappel that following the operation she did not want to end up sounding like Neville Wran, a former NSW Premier.

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[56] Per Mason CJ, Brennan, Dawson, Toohey and McHugh JJ at 487-490.
[57] (1983) 33 SASR 189 at pp.192-193.
[58] (1998) 195 CLR 232.

The High Court (Gaudron, Gummow and Kirby JJ; McHugh and Hayne JJ dissenting) held firstly that the Defendant had failed to warn Mrs Hart of the "material risk" of sustaining injury to the laryngeal nerve and consequent risk of partial or total loss of her voice (per Gaudron J at 239; Gummow J at 254 and Kirby J at 276-277). Mr Justice Kirby further held that there was a legal requirement to warn patients about risks of medical procedures (at pp.271-272 and 276). Secondly, that if the operation was performed at a different time then the Plaintiff was unlikely to have sustained the injury that she did sustain as she would have had to have the surgery performed by a more expert surgeon and at a different time. Thirdly, the degree of risk of injury would have been less had the surgery been performed by a more skilled surgeon as there was evidence that there was less chance of perforation of the oesophagus if the operation was performed by a more expert surgeon (per Gaudron J at pp.239-241, Kirby J at 277-278). Fourthly, the chance of an infection occurring at a later occasion was substantially less as the infection from which the Plaintiff suffered occurs randomly and rarely (per Gaudron J at 242, Gummow J at 261, Kirby J at 267-278). Fifthly, that the Plaintiff's case was not loss of a chance as she had actually suffered physical injury (per Gaudron J at 238, McHugh J at 252-262, Kirby J at 278-279, and Hayne J at 288-289). Sixthly, that the Plaintiff's damages should not be reduced on the basis that had the Plaintiff been warned and elected to take surgery at a later date, then she might have suffered the same type of injury (per Gummow J at 242, 263, Kirby J at 278). Gaudron J put alternative formulations of the duty to warn. One alternative was the foreseeable risk of a loss of opportunity to have a more experienced surgeon suggesting a *Donoghue v Stevenson* element to the duty.

The High Court case of *Rosenberg v Percival*,[59] illustrates that the Plaintiff must establish that the failure to warn was causative of the injury complained of. In that case, the trial judge found that even had the Plaintiff been warned of the risk of the complication which occurred, then she nonetheless would have undertaken the operation. The case involved elective dental surgery, the consequence of which resulted in severe and permanent pain to the Plaintiff. The surgery had been performed competently but the surgeon had not warned the Plaintiff of the risk of the particular complication. The trial judge rejected the Plaintiff's evidence finding that even had she been advised of the risk of the complications she would still have undergone the surgery. The High Court held that the finding was open to the judge and that appellate courts should be loath to interfere with findings of trial judges who are in a better position to determine whether or not evidence of a Plaintiff should be accepted. During the course of his judgment, Mr Justice Gummow indicated that the failure to warn inquiry involved two distinct levels. At the first level, the injury which eventuated must be relevant to the material risk which the doctor has failed to give the warning. If the material risk of damage was to her laryngeal nerve through peroration of the oesophagus then if the injury was actually caused by mis-application of an anaesthetic, then the doctor is not liable. At the second level, there must be a causal connection between the failure to warn of the material risk and the occurrence of the injury. In such case, the failure to warn usually arises when the performance of the physical cause of the injury was not negligent,[60] but is a possible consequence of surgery.

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[59] [2001] 205 CLR 434.
[60] At p.460.

In *Cattanach v Melchoir*,[61] the High Court had to consider whether a doctor should be liable for the costs of rearing an unintended child born as the result of a negligent sterilisation operation. The Melchiors had married in 1984 and had two children in 1985 and 1988. In 1991, they had agreed not to have any further children at that stage being happy with the size of their family and being blessed with two healthy children. Mrs Melchior was then 39 and made the decision to have a tubal ligation rather than continue to take oral contraception. She consulted Dr Cattanach in 1992. She told Dr Cattanach that when she was 15 years of age her right ovary and right fallopian tube had been removed. Dr Cattanach accepted her history uncritically and only attached a clip to the left fallopian tube. In 1996, when Mrs Melchior was 44 years of age, she discovered she was pregnant and in 1997 gave birth to a son, Jordan. It transpired that her right fallopian tube had not been removed. Holmes J found that although the doctor was not negligent in failing to observe the existence of the right fallopian tube when he performed the tubal ligation on the left fallopian tube, he had too readily accepted the patient's assertion that her right fallopian tube had been removed, and he should have advised her to have investigations carried out to ascertain whether she still had a right fallopian tube. Furthermore, he should have warned her that if she was wrong about the removal of her right fallopian tube then she might conceive.

The Queensland Court of Appeal (by a majority) dismissed an appeal against the award of damages made by the trial judge to Mr and Mrs Melchior jointly in the sum of $105,249.33 for the costs of rearing Jordan. The quantum of the claim was not challenged in the High Court nor were the findings of negligence against Dr Cattanach and the second appellant, the State of Queensland, which was responsible for the hospital at which Dr Cattanach carried out the surgery. The basis of the appeal was that the claim for the costs of rearing the child did not give rise to a cause of action that sounded in damages on the grounds of public policy and on the ground that the claim was for pure economic loss.

The High Court found in favour of the Plaintiff holding that the doctor was liable for the costs of rearing the child resulting from his negligent advice and failure to warn. The High Court did not have to consider the Queensland legislation. The question of liability was a novel one and the High Court applied existing principles of negligence in deciding a *"wrongful birth"* was actionable. The majority (McHugh, Gummow, Kirby and Callinan JJ) rejected the arguments that no damages could be awarded on the grounds of public policy as the birth of a child is a blessing and also the argument that the claim was for pure economic loss. Justices McHugh and Gummow in a joint judgment indicated, *"the Appellants would be liable under ordinary principles for the foreseeable consequences of Dr Cattanach's negligence"* (at p.27, para 51). Their Honours then went on to reject the arguments concerning public policy and pure economic loss. Mr Justice Kirby was of the view that the Defendants were liable for, *"the reasonably foreseeable consequence of any proved negligence [which] obliges the inclusion in the recoverable damages of a sum for the costs of child-rearing"* (at p.66, para 176). Mr Justice Callinan appeared to avoid placing the parents' right to recovery on foreseeable consequences of the Defendant's negligent act and held that the parents were entitled to be compensated for the costs because of the Defendants' negligence and the arguments of public policy

[61] (2003) 215 CLR 1.

and pure economic loss should be rejected.

The NSW legislature reacted swiftly to the High Court decision in *Cattanach* and amending the *Civil Liability Act 2002 (NSW)* with the introduction of ss.70 and 71. The South Australian and Queensland legislatures followed suit. However, wrongful birth actions are still available in Victoria, Tasmania, Western Australia, the Australian Capital Territory and the Northern Territory.

In the jointly heard High Court cases of *Harriton v Stephens*, *Waller v James* and *Waller v Hoolahan*,[62] the High Court examined the right of a child to bring an action against doctors on the basis that the doctors failed to warn the mother during pregnancy that the child would suffer congenital disabilities and thereby give the mother the option of termination so that the child would not born with the severe disabilities affecting him or her for the rest of his or her life. The High Court rejected the claim on a number of bases. These included that it was the mother who was entitled to terminate her pregnancy and the doctor, even though he advised her of the condition, was not in a position to compel her to have an abortion which may or may not be in her interests. It was impossible to assess the nature of the damage caused as it was not possible to compare the non-existence of the child if the abortion had been performed and the life of the child afflicted with the disabilities. To accept the claim would be to devalue the life of a disabled person suggesting that person would be better off not having been born rather than living with disabilities. The function of damages was to put the person in the same position as he would have been if he had not suffered the affliction. It was impossible to calculate such damage as it would call for a comparison between a life with disabilities and a state of non-existence.

2. ***The Civil Liability Act***

Section 5P continues the Australian view that warnings should not be determined by the same rules determining the duty of care. Section 5P provides that s.5O does not apply to warnings. The section provides as follows:

> *"This Division does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information in respect of the risk of death of or injury to a person associated with the provision by a professional of a professional service."*

CAUSATION

1. Breach has caused the damage

Once it is established that the Defendant has breached a duty to the Plaintiff then it is also necessary to prove that it was the Defendant who caused the damage which the Plaintiff is complaining of. Generally, if it is established that the Plaintiff would not have sustained the damage complained of but for the negligence of the Defendant, causation will be established. However, "but for" test is not comprehensive and exclusive, and the question of what has caused the Plaintiff's damage is a question of fact to be decided by common sense in

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[62] (2006) 276 CLR 52.

the particular circumstances of each case.[63] Once physical injury is established, *"breach of duty is treated as materially causing or contributing to that injury unless there is 'sufficient reason to the contrary'."* [64] In *Chappel v Hart*,[65] Mr Justice McHugh made the following statement of the law on causation with respect to failure to warn, which is generally regarded as an accurate statement of the law although he dissented in that case:

> *"The foregoing observations lead me to the following conclusions concerning whether a causal connection exists between a defendant's failure to warn of a risk of injury and the subsequent suffering of injury by the plaintiff as a result of the risk eventuating:*
>
> *(1) a causal connection will exist between the failure and the injury if it is probable that the plaintiff would have acted on the warning and desisted from pursuing the type of activity or course of conduct involved;*
>
> *(2) no causal connection will exist if the plaintiff would have persisted with the same course of action in comparable circumstances even if a warning had been given;*
>
> *(3) no causal connection will exist if every alternative means of achieving the plaintiff's goal gave rise to an equal or greater probability of the same risk of injury and the plaintiff would probably have attempted to achieve that goal notwithstanding the warning;*
>
> *(4) no causal connection will exist where the plaintiff suffered injury at some other place or some other time unless the change of place or time increased the risk of injury;*
>
> *(5) no causal connection will exist if the eventuation of the risk is so statistically improbable as not to be fairly attributable to the defendant's omission;*
>
> *(6) the onus of proving that the failure to warn was causally connected with the plaintiff's harm lies on the plaintiff. However, once the plaintiff proves that the defendant breached a duty to warn of a risk and that the risk eventuated and caused harm to the plaintiff, the plaintiff has made out a prima facie case of causal connection. An evidentiary onus then rests on the defendant to point to other evidence suggesting that no causal connection exists. Examples of such evidence are: evidence which indicates that the plaintiff would not have acted on the warning because of lack of choice or personal inclination; evidence that no alternative course of action would have eliminated or reduced the risk of injury. Once the defendant points to such evidence, the onus lies on the plaintiff to prove that in all the circumstances a causal connection existed between the failure to warn and the injury suffered by the plaintiff."* [66]

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[63] See *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506, Cf Mason J; *Environment Agency v Emperor's Car Company (Abertillery) Ltd* [1999] 2 AC 22, Cf Lord Hoffman.

[64] *Chappel v Hart* (1998) 195 CLR 232 per Gaudron J at 239.

[65] (1998) 195 CLR 232 at 247-248.

[66] Further cases on causation: *Bennett v Minister of Community Welfare* (1992) 176 CLR 409; *Rosenberg v Percival* (2000) 205 CLR 434; *Harriton v Stephens* (2006) 276 CLR 52; *Ruffo v Hosking* [2004] NSWCA 391 and *Greg v Scott* [2005] 2 AC.

2. *Civil Liability Act*

Section 5D of the *Civil Liability Act* supplements rather than replaces the common law on causation and specially states that it has to be determined *"in accordance with established principles"*. Section 5D provides as follows:

> *"DIVISION 3 – CAUSATION*
>
> ***5D General principles***
>
> *(1) A determination that negligence caused particular harm comprises the following elements:*
>
> *(a) that the negligence was a necessary condition of the occurrence of the harm ("factual causation"), and*
>
> *(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ("scope of liability").*
>
> *(2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.*
>
> *(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:*
>
> *(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and*
>
> *(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.*
>
> *(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party."* [67]

COMMENCEMENT OF PROCEEDINGS – a medical negligence model

1. What to Do

(i) Get the clinical notes of the hospital and doctors concerned, and look through them to see if the allegations of the client concerned are supported. Check to see if the clinical notes are complete. Look for any indications that the notes have been altered.

(ii) Discuss the potential claim with a doctor in the appropriate discipline.

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[67] s.51 of the *Wrongs Act 1958 (Vic)*; s.11 of the *Civil Liability Act 2003 (Qld)*; s.34 of the *Civil Liability Act 1936 (SA)*; s.5C of the *Civil Liability Act 2002 (WA)*; s.13 of the *Civil Liability Act (Tas)*; s.45 of the *Civil Law (Wrongs) Act 2002 (ACT)*.

(iii) Obtain a Medicare history.

(iv) Arrange for a conference with a barrister who specialises in medical negligence to discuss and advise on future conduct.

(v) Obtain a report on liability and causation from an appropriate expert. NB s.5O, *Civil Liability Amendment (Personal Responsibility) Act 2002*. The report has to be from a peer professional, in other words, the report has to be from a doctor who has the same speciality as the doctor proposed to be sued proffering an opinion that the doctor who is proposed to be sued did not act in accordance with competent peer professional practice. If an orthopaedic surgeon is being sued, then you will need a report from an orthopaedic surgeon. If a general practitioner is being sued, then you need a report from a general practitioner as to whether the general practitioner proposing to be sued did or did not act in accordance with the competent professional practice of general practitioners.

(vi) If you act for the Defendant, then in all probability you will have little difficulty in finding an appropriate expert witness to defend your client. If you act for the Plaintiff, your greatest difficulty in prosecuting the medical negligence claim, in all probability, will be finding a doctor with the appropriate expertise willing to give an adverse opinion against a fellow practitioner.

2. Statement of Claim / Cross-Claim

Before any proceedings or cross-claim can be commenced it is necessary to have an expert report establishing breach of duty (Rule 31.36(1)(a)), the damage alleged (Rule 31.36(1)(b)) and causation (Rule 31.36(1)(c)):

"31.36 Service of experts' reports in professional negligence claims

(cf SCR Part 14C, rules 1 and 6; DCR Part 28, rule 9B)

(1) Unless the court orders otherwise, a person commencing a professional negligence claim (other than a claim against a legal practitioner) must file and serve, with the statement of claim commencing the professional negligence claim, an expert's report that includes an opinion supporting:

(a) the breach of duty of care, or contractual obligation, alleged against each person sued for professional negligence, and

(b) the general nature and extent of damage alleged (including death, injury or other loss or harm and prognosis, as the case may require), and

(c) the causal relationship alleged between such breach of duty or obligation and the damage alleged.

(2) In the case of a professional negligence claim against a legal practitioner, the court may order the plaintiff to file and serve an expert's report or experts' reports supporting the claim.

(3) If a party fails to comply with subrule (1) or (2), the court may by order made on the application of a party or of its own motion dismiss the whole or any part of the proceedings, as may be appropriate.

(4) In this rule:

***professional negligence** means a breach of duty of care or of a contractual obligation in the performance of professional work or in the provision of professional services by a medical practitioner, an allied health professional (such as dentist, chemist, physiotherapist), a hospital, a solicitor or a barrister.*

***professional negligence claim** means a claim for negligence, indemnity or contribution based on an assertion of professional negligence."*

3. Defences

Causation is generally the most difficult part of a medical negligence case to prove. There are a number of recurring defences used including:

(i) The patient would have ended up as he / she has whether negligent treatment was given or not (causation);

(ii) Medical knowledge at the time. Although we now know that lack of treatment would have resulted in the afflicted person's disabilities this was not known at the time of treatment (breach);

(iii) Treatment may not have improved the condition or may not have significantly improved it (causation);

(iv) Although the treatment should have been given, the necessity was not clear-cut given the symptoms and the treating doctor was entitled to take a *"wait and see approach"* rather than administer unnecessary treatment (breach);

(v) The patient's condition was caused by other factors and not the negligent condition (causation);

(vi) The patient's current condition is the result of hereditary factors and not the negligent treatment (causation).

CONCLUDING REMARKS

The law relating to persons professing to have a particular skill ("professionals") historically preceded the landmark decision in *Donoghue v Stevenson*[68] and initially the formulation of the law relating to professionals tended to evolve independently of *Donoghue v Stevenson* as exemplified by *Hedley Byrne* and the Privy Council decision in *MLC v Evatt*. With the passage of time the principle of the foreseeable consequences of negligent acts have merged in the context of the duty of care of persons exercising a particular skill, particularly in relation to the duties to warn or advise. Where a person possessing specialised knowledge or skill knows or ought to know that that knowledge or skill is being relied on he / she may be liable for the foreseeable detrimental consequences of giving negligent advice. Generally, professionals' duty of care have been formulated on what is to be expected of a person possessing that particular skill.

[68] [1932] AC 562.

Bolam was just one of many cases in the evolution of the duty of care of skilled persons professing exercise that skill that departed from previous decisions by providing a defence to doctors who although negligent were acting in accordance with a body of responsible medical practitioners practising that particular art. *Rogers v Whitaker* declined to give recognition to the *Bolam* test.

Section 5O of the *Civil Liability Act 2002* provides what has been referred to as a modified *Bolam* defence to professionals acting in accordance with widely accept peer professional practice. The defence operates in respect of all professionals and not just doctors, although the principles embodied in s.5O were developed in response to actions against medical practitioners and the law relating to other professionals has created some curious anomalies.

What is *"widely accepted"* has yet to be defined authoritatively by the courts. Where there is a conflict of opinions as to what is widely accepted peer professional practice, then the courts have a discretion to decide what is widely accepted peer professional practice.

The duty of care to advise or warn has been extended beyond those possessing a special skill or knowledge where the giver can foresee reliance on what is said by virtue of the relationship between the giver and receiver of the advice.

A curious consequence of s.5O is that professionals are afforded greater protection than an ordinary person held to be in a special relationship. If such person is not a "professional" then the defence afforded by s.5O is not open.

While s.5O reverted to a *Bolam* type defence, s.5P does not follow *Bolam* but rather preserves the law laid down in *Rogers v Whitaker* in relation to warnings. Accordingly, in cases involving failure to warn, the principles outlined in *Rogers v Whitaker* and *Chappel v Hart* will continue to apply.

Whether the case involves a s.5O defence or a s.5P failure to warn, causation will continue to be a significant hurdle in professional negligence cases, particularly those involving medical negligence.