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JUDGMENTS

Penalties imposed on pathology service providers for Commerce Act breach

A recent High Court case provides a sharp reminder that the Commerce Act applies to the health sector. The High Court has imposed penalties on 2 Waikato pathology service providers who admitted to entering into an agreement not to compete, pending a proposed merger, that had the purpose or likely effect of substantially lessening competition in the market for community pathology testing in the Waikato area. The Court accepted and imposed penalties of NZ\$100,000 in total, which had been agreed between the parties as being appropriate. The Commerce Commission asked the Court to note its position that defendants in future cases, including government entities such as DHBs, should not expect lenient penalties by reason of the relatively limited penalties in this case. **Commerce Commission v New Zealand Diagnostic Group, Hamilton Medical Laboratory Holdings and Pathology Associates** (19 July 2010, High Court, Auckland, Allan J)

Photophobia not a "physical injury" for ACC

A District Court has found that photophobia does not amount to a 'physical injury' for the purposes of the Accident Compensation Act. As it was accepted that the appellant's photophobia was caused by prescription benzodiazepines, the issue was whether the photophobia was a physical injury. The medical expert did not find any physical abnormality but stated that "*I suspect the physical injury causing the photophobia may well relate to the modulation of neurotransmitters...*". After reviewing the evidence, the Judge noted that a "suspicion" does not amount to proof on the balance of probabilities, but found that, in any event: "*the fact of modulation of neurotransmitters...does not amount to a physical injury*" and "*...where there may be a disordering of the nervous system, but not in a way that causes damage to that system, this does not amount to being a physical injury*". The appeal was dismissed. **Karmarkar v Accident Compensation Corporation** [2010] NZACC 76

DISCIPLINARY MATTERS

Enrolled nurse guilty of professional misconduct for assault

A nurse working at a forensic unit for the intellectually disabled has been found guilty of professional misconduct for kicking a patient in the chest. The nurse had pleaded guilty to a criminal charge of assault but was discharged without conviction. At the Tribunal hearing, the nurse claimed that he had acted in self defence (a defence under the Crimes Act 1961). The Tribunal concluded that it must "*consider the defence raised... and then place it in the professional discipline context*". After considering the evidence, the Tribunal found that there was no imminent risk of danger and that "*a reasonable nurse in [the nurse's] position would not have pre-emptively attacked [the patient] but if required would have joined... in a proper restraint*". The Tribunal concluded that "*[t]his was a grave assault on an intellectually disabled man*". In a separate decision on penalty, the Tribunal concluded that "*the only appropriate penalty*" was cancellation of registration. The enrolled nurse was also censured, ordered to pay NZ\$7,500 towards costs, and is required to satisfy an imposed condition before he may apply for re-registration. **Wayne John Reid** (HPDT, Wellington, 2010, 288 and [305/Nur09/136P](#))

Nurse not guilty of professional misconduct after physical altercation with patient

An acute mental health nurse was charged with professional misconduct after allegedly using inappropriate physical restraint and assaulting a patient. The nurse claimed that his attempt to restrain the patient with a "bear hug" was justified as he was acting to defend a female staff member, and that he punched the patient in self defence. The Tribunal found that the defence did not apply to the "bear hug" as there were several more suitable de-escalating options in the circumstances. However, "*although the incident was not well handled by [the nurse]*", the Tribunal concluded, "*by a narrow margin*", it did not warrant disciplinary sanction. With regards to the "jab" the Tribunal accepted that the nurse did not intend to hit the patient in the face, and found that "*this was not a situation where it was reasonable to expect [the nurse], in a cool and planned way to issue instructions and consider other alternatives... [the nurse] was in a crisis and it has not been established that it was unreasonable for him to act as he did*". The charge of professional misconduct was dismissed. **Anthony Bernard Shepherd** (HPDT, Whanganui, [2010, 299/Nur09/137P](#))

Nurse guilty of professional misconduct for multiple failures

A psychiatric district nurse has been found guilty of professional misconduct for multiple failures in his care of 2 patients. The Tribunal found a number of "significant" failures in the care provided by the nurse, including a failure to "assess risk at any time" for the 2 patients, a failure to communicate with members of the multi-disciplinary team, and inadequate patient follow up. The Tribunal found the nurse's care to be "simply substandard" and noted its opinion that the nurse "had a casual attitude to the mental health of [both patients] and appeared to assume that all would be right with them". The Tribunal concluded that the standard of care fell well below that to be expected of a registered nurse and cancelled the nurse's registration. The nurse was also censured, ordered to pay NZ\$30,000 costs, and the Tribunal imposed a number of conditions that the nurse must satisfy before he may apply for re-registration. Further, while sympathising with the emotional strain that this matter has placed on the nurse and his family, the Tribunal declined the nurse's application for permanent name suppression. **David Graeme Torrance** (HPDT, Auckland, 2010, [306/Nur09/138D](#))

Doctor's registration cancelled for overprescribing

A medical practitioner has been found guilty of professional misconduct for a range of charges relating to the over-prescribing of drugs of abuse, and importation and prescribing of drugs relating to sports and image enhancement. The Tribunal found that the prescribing practices were "very concerning", the risk of overdose or dependence posed a danger to the health and safety of his patients, and the risk that drugs may be diverted for illicit purposes posed a danger to the health and safety of the public. The Tribunal also found that the margin (between 177%-316%) charged by the practitioner was exploitative, and that a number of breaches of the Medicines Act had been established. The Tribunal concluded that "the only possible penalty which it could properly impose" was cancellation and noted that "whether or not there was motive of illegal purpose, the significant volume of prescribed drugs and the risk of diversion supports the penalty of cancellation". The Tribunal imposed a fine of NZ\$20,000 and costs totalling NZ\$66,000 to "make it crystal clear that the wide range of significant misconduct...should be denounced in the strongest possible terms". **Dr Johannes Ignatius Viljoen Wilson** (HPDT, Auckland, 2010, [314/Med10/145P](#))

EMPLOYMENT

Court of Appeal upholds decision on long-term bullying complaint

The Court of Appeal has upheld an Employment Court decision that a DHB breached its duty to provide a midwife with safe working conditions by failing to adequately address the midwife's bullying complaints, and that the DHB had affected her conditions of employment to her disadvantage. On appeal the DHB claimed that the Employment Court had erred because it had effectively held the DHB liable for its handling of 3 earlier complaints which were outside of the limitation period imposed by the Employment Relations Act. The Court of Appeal recognised that reference to the older complaints were problematic when viewed in isolation, but found that overall, the discussion of the past complaints was simply to support the need for a contextual view when investigating the fourth "in-time" complaint. The Court of Appeal also found that the Employment Court's ultimate conclusion, that the DHB has breached its duty to take all reasonable and practical steps to provide the midwife with safe working conditions, did not give rise to an error of law. **Waikato District Health Board v Clear** [2010] NZCA 305

Dismissal for nurse's serious misconduct upheld

The Employment Relations Authority has upheld the dismissal of a prison nurse for serious misconduct. The Authority was critical of the investigation carried out as not all relevant witnesses were interviewed and found that "a fair and reasonable employer would have given [the nurse] the benefit of the doubt on the allegation of failing to inform the medical professional of her temporarily withholding the prisoner's medication". However, the Authority concluded that other failings justified the dismissal. In particular, the Authority found that by not involving the prisoner in the decision to withhold his medication for alleged hoarding, and not checking his file, the nurse "made an important decision about his treatment without sufficient information". The nurse also failed to update the medical chart, failed to record what had happened on the medical administration sheet, failed to record and safely store the medication retrieved, and failed to advise other nursing staff in the correct manner. While "a more lenient employer may have chosen to deal with the failings in a different way", the Authority found that "it was open to Corrections to conclude that it could not have trust and confidence in her to continue in her role given her demonstrated failings". **Faapito v Chief Executive of the Department of Corrections** (23 June 2010, ERA, Auckland, Member Wood)

Junior doctors succeed in claim against DHB's decision to cut free drinks

The Employment Relations Authority has declared that a DHB's withdrawal of free drink entitlements for Resident Medical Officers (RMOs) without proper consultation breached the DHB's good faith obligations under the Employment Relations Act and under the National Multi-Employer Collective Agreement (MECA). The Authority found that the potential withdrawal of the RMOs' entitlement to one free packaged drink per meal was a fundamental change to the terms and conditions of their employment, that the DHB ought to have engaged with the RMOs on this matter, and that it was clear that the DHB intended to make the change whether the RMOs supported it or not. The Authority also found that the DHB did not provide the RMOs with material information that *"would have given a genuine window into the Board's thinking and would have enabled it to meaningfully participate in the consultation process"*. In addition to the declaration, the Authority ordered the DHB to forthwith engage with the RMOs in a process of informed and meaningful consultation in accordance with its legal obligations. **Taylor v Canterbury District Health Board** (29 June 2010, ERA, Christchurch, Member Crichton)

HEALTH AND DISABILITY COMMISSIONER

Insufficient follow-up advice

A patient presented to a medical centre complaining of post-coital bleeding and other issues. A series of tests was taken but a cervical smear was not. The patient was seen by a gynaecologist who conducted a physical examination, took a full history, but did not take a cervical smear or perform a colposcopy. Several months later the patient called the medical centre and requested a smear, but her request was declined. Four months later a smear was taken, which was abnormal, and the patient was subsequently diagnosed with stage 3B cervical cancer. The Commissioner found that, in most respects, the care provided by the GPs and the medical centre was appropriate, but was critical of the slight delay in the referral for a specialist opinion, the fact that the possibility of a Liquid Based Cytology was not discussed by either GP, a failure by one of the GPs to follow-up on a recommended smear, and a failure by the medical centre to elicit full information from the patient when she called requesting a smear. Overall, the standard of care was found to be *"consistent with expected standards"*. With regards to the care provided by the gynaecologist, the Commissioner found that while he was *"sure"* that he had told the patient to consult her GP if her symptoms persisted, *"in the absence of any documentation, I am not convinced that [the gynaecologist] gave follow-up advice to [the patient]"*. The Commissioner concluded that the gynaecologist breached Right 4(1) of the Code by his failure to provide specific follow-up advice to the patient and her GP. **08HDC07350** (15 March 2010)

Rest home referred to the Director of Proceedings

In 2 separate decisions involving the same rest home, rest home manager, and registered nurse, the Deputy Commissioner has found the staff and rest home in breach of the Code and, in both cases, found the breaches by the rest home warranted a referral to the Director of Proceedings. While recognising that the nurse was *"...very junior, with no experience in geriatric care... a heavy workload and little clinical support..."* and that *"the rest home's policies and procedures were often deficient and lacking in detail, providing her with little guidance or support"* the Deputy Commissioner found that she must take some responsibility for her actions and omissions, including the inadequate assessment, care planning and pain and medication management; inadequate communication with the patients' family and doctors; inadequate response to falls and patient deterioration; and inadequate documentation. Staff need to have clear guidance for assessing residents, planning their care and preventing and managing falls, and the Deputy Commissioner found that the rest home's policies and procedures were insufficient and superficial. The Deputy Commissioner also found that rest home failed to ensure that its employees had the experience and skills to perform safely. **09HDC00987** (31 March 2010) and **09HDC01050** (23 June 2010)

Inappropriate advice via text message and ill advised use of "no suicide" contracts

A counsellor has been found in breach of the Code for the care she provided to an 18 year old patient who subsequently committed suicide. Soon after the patient's sole session with the counsellor, the patient's condition deteriorated and he was treated by the mental health team and the Early Psychosis Intervention Team who recommended that he take medication. The patient was reluctant to take medication and contacted the counsellor by text message for advice. The counsellor's reply supported the patient's decision not to take medication, but only if he had excellent support. The Commissioner found that it was inappropriate for the counsellor to provide advice on medication, particularly by way of text message, and that *"[b]efore providing advice, [the counsellor] needed to have contacted the clinic, found out what the medication was, what care [the patient] was receiving, and explored [the patient's] rationale not taking his*

medication". The Commissioner found that the counsellor's use of the "no suicide" contract with the patient was ill advised and noted that "these contracts are controversial and their value is disputed. Great care is needed if they are even used at all". It was also found that the counsellor should have asked for the patient's consent to speak to his mother: "[i]n previous HDC cases involving suicide, lack of consultation with family members has consistently been identified as a missed opportunity to gather further important information to assist diagnosis and treatment". **09HDC01409** (24 May 2010)

RESPONSIBLE HEALTH AUTHORITIES

Review of the Chiropractic Board's Code of Ethics and Standards of Practice

The Chiropractic Board is undertaking its scheduled review of its Code of Ethics and Standards of Practice, which is available [here](#). Comments are due by **1 September 2010** and a further draft is to be circulated for consultation once these comments have been considered.

Consultation on CPD recertification programme for optometrists

Following its consultation last year on the recertification framework, the Optometrists and Dispensing Opticians Board is seeking feedback on its proposed changes to its revised draft CPD accreditation policy, and draft CPD recertification programme, for optometrists. Further information, including the consultation paper, is available [here](#) and consultation closes on **17 September 2010**.

Draft supervision policy for psychotherapists

The Psychotherapists Board has drafted a policy to clarify the Board's requirements and expectations relating to supervision and supervisors. The draft policy is available at [here](#) and feedback is due by **17 September 2010**.

LAW REFORM AND POLICY DEVELOPMENT

Extension of Pharmac's role into hospital medicines

Following a recommendation from the Ministerial Review Group, Health Minister Tony Ryall has announced that Pharmac's role will be extended to include hospital medicines. According to a Beehive press release, Pharmac will begin taking over procurement and management of all hospital medicines from DHBs. The release also stated that the Ministry of Health, in consultation with Pharmac and the new Shared Services Agency, will report back in 2 years time with a detailed plan setting out a carefully sequenced path for Pharmac to take over managing other medical devices. For more information see the [Beehive Press Release](#). The report discussing the outcomes of the consultation with the health sector on the proposal is also available at [here](#).

Submissions invited on nurse prescribing

Health Workforce New Zealand (HWNZ), in collaboration with the Nursing Innovations Team of the Ministry of Health and the Nursing Council of New Zealand, have published a discussion paper inviting submissions on whether registered nurses should be able to prescribe medicines for diabetes. The paper outlines the intention of HWNZ to develop "demonstration sites" where workforce innovations are trialled. The first of these sites is intended to involve diabetes nurse specialists (qualified in line with the Specialist Level of the National Diabetes Knowledge and Skills framework) prescribing diabetes medicines in partnership with medical practitioners. HWNZ proposes to make a regulation under the Medicines Act and is seeking submissions. Concurrently, the Nursing Council is also seeking submissions on the qualification and other knowledge requirements that the Council should specify for those prescribing at the proposed demonstration sites should the regulation proceed. Submissions are due **Friday 10 September 2010**. For more information see [here](#).

Conflicts of interest guidelines for DHBs

The Ministry of Health has published new guidelines to provide DHBs with assistance when faced with conflicts of interest issues. The guidelines are aimed at Board members and are intended to provide guidance in both identifying and managing conflicts of interest, with close regard to the New Zealand Public Health and Disability Act and the Crown Entities Act. The guidelines are available [here](#).

Updated National Credentialling Framework for health professionals

The Ministry of Health has published an updated National Credentialling Framework that applies to all health professionals working at a senior level where there are particular risks of serious harm or a lack of direct clinical oversight. The updated framework has a broader application than the first national credentialling document that focused on the credentialling of senior medical practitioners only. The updated framework includes discussion of the "7 principles of credentialling" that are to apply to all health professions in New Zealand and are to replace the "key concepts" of the previous framework. The updated framework also discusses the future directions for credentialling for nurses in New Zealand. More information is available on the [Ministry of Health website](#).

Possible inclusion of health workers in amendments to Sentencing Act

Following indications that the government will amend the Sentencing Act to make offending against Police and Corrections officers an aggravating factor for sentencing, Health Minister Tony Ryall has announced that he will request that the Minister of Justice consider extending the amendments to also include frontline health workers. The Minister of Health agreed to discuss the inclusion of health workers after being approached by a Chairman of a District Health Board who expressed growing concern about verbal and physical assaults on frontline health staff. For more information on the potential amendments to the Sentencing Act see the [Beehive Press Release](#).

Report on improving the health care of prisoners

A report from the National Health Committee has made a number of recommendations relating to the health care of prisoners. The report outlines the current institutional arrangements for health and disability provision to prisoners, and the concerns that have arisen. Among the recommendations aimed at improving health care for prisoners is a recommendation that the Ministry of Health consider transferring the responsibility for primary health care of prisoners to the health sector. For more information, including a copy of the report, see the [National Health Committee website](#).

Booklet on access to long-term residential care

The Ministry of Health has published a new booklet that summarises how older people can access long-term residential care under the Social Security Act 1964. The booklet discusses all aspects of long term residential care but particularly provides information on the financial means assessment and the residential care subsidies. More information is available on the [Ministry of Health website](#).

SEMINARS AND CONFERENCES

Mental Health Law Conference 2010

Buddle Findlay and the Australian and New Zealand Association of Psychiatry, Psychology and Law (ANZAPPL) are pleased to present the Mental Health Law Conference 2010. It is intended that the conference be used as a forum for inter-disciplinary discussion of key legal issues facing lawyers, clinicians and consumers working in mental health, with a view to continuing to improve the way in which mental health services are provided in New Zealand. The full day conference will be held on 18 October (Wellington), 4 November (Dunedin), 5 November (Christchurch), 11 November (Hamilton) and 12 November (Auckland). Places are limited. To register, or for further information, please contact iris.reuvecamp@buddlefindlay.com

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