



BUDDLE FINDLAY

DECEMBER 2011

Legal update on Health Law.

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JUDGMENTS

MEANING OF "SERIOUS HARM" IN THE CONTEXT OF MENTAL DISORDER

The Mental Health Review Tribunal has recently set out four factors it considers helpful to have regard to when determining whether a person's abnormal state of mind gives rise to a serious danger to a person's own health and safety, or to the health and safety of others, namely: "*(i) What is the magnitude or gravity of the behaviour concerned? (ii) What is the likelihood of the behaviour occurring? (iii) What is the proximity or imminence of the behaviour, in other words, how soon or quickly might it occur? (iv) What is the frequency of the behaviours, that is to say how often might it occur*". The Tribunal noted that these factors must be considered collectively, and that the weight given to one may reduce the significance of another: "*For example, if the gravity of a behaviour is particularly high, less weight need be placed on issues of likelihood, proximity or frequency in order that a finding of serious danger is made*". In this case, the Tribunal considered that the factors which indicated a serious danger outweighed the contra-indicating factors, and concluded that the Applicant's abnormal state of mind gave rise to serious danger to the safety of others and that he was not fit to be released from compulsory status.

Applicant 11/040 [2011] NZMHRT 40.

COURT MODIFIES TENANCY AGREEMENT TO ENSURE THE PROVISION OF HEALTH SERVICES

A provider obtained personal orders under the Protection of Personal and Property Rights Act 1988 after a consumer's de facto partner refused entry into the property to provide services. To give effect to the orders, and to prevent inappropriate intervention from the de facto partner, the Family Court modified a tenancy agreement making the consumer a joint tenant of the home. On appeal, the High Court confirmed that an order modifying a tenancy agreement is within the Family Court's jurisdiction under the Act, provided that it is "*necessary or expedient to give effect, or better effect, to the personal order*"; the landlord is served and afforded the opportunity to be heard; and the tenancy order is the least restrictive available (for the consumer and others affected by the order). While the High Court noted that, in many cases, an order in the nature of an injunction against a sole tenant with whom a protected person is living would be enough to ensure the implementation of personal orders, in the circumstances of this case, the tenancy order was justified: "*It put beyond doubt the authority of [the protected person's] parents and CCS to deliver services to him at the property*".

JMG v CCS Disability Action (HC Wellington CIV 2011-485-834, 28 October 2011, Miller J).

GP ACCUSED OF FALSIFYING CLINICAL RECORDS TO FACE SECOND CRIMINAL TRIAL

The Court of Appeal has overturned the acquittal of a GP for perverting the course of justice. The GP allegedly falsified clinical records and then provided them to the Health and Disability Commissioner. The District Court acquitted the GP on the basis that inquiries undertaken by the Commissioner were "*outside the scope of the course of justice*". This decision was premised on the fact that the Commissioner's jurisdiction did not extend to enforcing or adjusting rights and liabilities. The Court of Appeal disagreed, finding that investigations will almost invariably precede court or tribunal proceedings and therefore an act which "*has a tendency to deflect*" investigations from continuing or proceedings being instituted, when done with the intention of achieving that result, is "*an act which tends to pervert the course of justice*". The GP now faces a new trial. ***R v Kong*** [2011] NZCA 537.

EXCESSIVE SCARRING NOT A TREATMENT INJURY

The appellant had a total knee replacement and after surgery suffered from extreme stiffness in the knee which was found to be caused by extensive scar tissue. The appellant sought cover for a treatment injury for the scarring. The evidence before the Court was that the surgery had no unusual aspects and that the degree of scarring was caused by the appellant's "*excessively exuberant scarring response*". Based on this evidence, the Court concluded that the scarring was not a treatment injury as it was caused by the appellant's underlying health condition of a "*physiological tendency to form excessive scarring*". The Court also concluded that the scarring had to be considered an "*ordinary consequence*" of the surgery when the appellant's underlying health condition was taken into account.

Neilson v ACC [2011] NZACC 248.

DELAY IN DIAGNOSIS NOT A TREATMENT INJURY WHERE END CONDITION INEVITABLE

The appellant was diagnosed with a kidney disorder but this diagnosis was not determined until she was suffering from end stage renal failure. The appellant sought cover for a treatment injury on the basis that her GP had delayed the diagnosis of her condition. The appellant claimed that the delay caused her condition to progress further and faster than would have been the case if it had been diagnosed earlier. Having reviewed the evidence, the District Court found as a matter of fact that there was a delay in diagnosis. However, relying on expert evidence, it concluded that the end stage renal failure was an "*inevitable consequence*" of the appellant's condition and that the delay "*does not bring about a new injury... there is simply acceleration of the inevitable*". The Court concluded that the delay in diagnosis did not cause the end stage renal failure and the appeal failed. ***ACC v Robertson*** [2011] NZACC 327.

UNSUCCESSFUL APPEAL BY UNREGISTERED CHIROPRACTOR

The High Court has dismissed an appeal by an unregistered chiropractor against his conviction and sentence under the Health Practitioners Competence Assurance Act 2003. The appellant alleged that he was inadequately represented and that his lawyer did not like him; that Ministry of Health officials had a vendetta against him; and that he suffered systemic persecution, including by the Police. The High Court found that there was no scope for challenge to the convictions and that the appellant was unable to point to any defence which might have been put forward by his lawyer but was not. The Judge noted the appellant had come before the Court 3 times to appeal convictions for practising as a chiropractor without being registered; that the matter "*has become an obsession for him*"; and found that "*if anything, [the sentencing Judge] was lenient*".

Dawson v Ministry of Health (HC Auckland CRI-2011-442-13, 19 October 2011, Brewer J).

UNSUCCESSFUL TENDER SEEKS REVIEW OF DHB'S RFP PROCESS

A DHB contracted a provider organisation to supply a variety of home and community-based services. When the DHB decided to restructure its arrangements it sought proposals for the supply of services through an RFP process and gave the provider over 3 months' notice that its contract would not be renewed. The provider's proposal was unsuccessful and it sought judicial review of the DHB's decisions in relation to the RFP. Pending the hearing, the provider sought orders prohibiting the DHB from taking steps in reliance on the RFP, or any contract executed in relation to the RFP, in order to preserve its position. The Court found that "*an order to that effect would require [the DHB] to breach the terms of contracts that it has entered into*" and "*there would need to be very compelling reasons*" before the Court would make such an order, particularly given that other contracting parties were not party to the proceeding. The Court found that the provider did not have a position to protect following expiry of its contract, and even if this was incorrect, the orders sought would not preserve the provider's position. The application was dismissed and costs were awarded to the DHB.

Healthcare of New Zealand Limited v Capital and Coast District Health Board (HC Wellington CIV-2011-485-1998, 26 October 2011, MacKenzie J).

DISCIPLINARY MATTERS

NURSE'S REAL ESTATE CONTRACT WITH PATIENT BREACHED PROFESSIONAL BOUNDARIES

A nurse has been found guilty of professional misconduct for entering into a real estate agency contract with an elderly neighbour to whom he was providing nursing care. The nurse accepted that his actions were unwise and stated that he had let his desire to protect her from unsolicited visits by real estate agents cloud his judgement. While the matter had been investigated by the Real Estate Institute, which concluded that there was no case to answer, the Tribunal noted that at the time the contract was signed the nurse was not just a real estate agent, he was also a contracted caregiver providing regular and significant care to his neighbour. The Tribunal concluded that there was a significant breach of professional boundaries, and that discipline was warranted. The nurse was censured, fined \$15,000, and had a number of conditions imposed on his practice. The nurse's application for name suppression was declined. **Mr Gwynn** (390/Nur10/167P).

PROSTHODONTIST DISCIPLINED FOLLOWING FRAUD CONVICTIONS

A specialist prosthodontist was convicted on 3 charges relating to the dishonest use of 132 invoices for his own financial gain. In finding that these convictions reflected adversely on his fitness to practise, the Tribunal noted that the offending was premeditated and deliberate, and that it occurred in the professional environment and was linked to his professional practice: "*It included forging a professional colleague's invoices... to the financial detriment of [the practitioner's] professional partner*". Having considered a number of aggravating and mitigating factors, including the fact that the practitioner had held a position of authority, responsibility, and trust at a University during the period of offending ("*Put shortly, he should have known better*"), the Tribunal suspended the practitioner's registration for 9 months, but suspended this suspension for a period of up to 24 months. It also imposed a number of conditions of a "*rehabilitative nature*" for a period of 3 years, including professional supervision, and a prohibition on owning or managing a practice or undertaking financial transactions directly with patients or where any external dental service was provided. The practitioner was also censured and ordered to pay costs totalling \$12,000. **Dr Payne** (405/Den11/184P)

NURSE'S REGISTRATION CANCELLED FOLLOWING CONVICTIONS FOR SEXUAL ASSAULT

A nurse convicted of sexually assaulting 3 patients while working as an ambulance officer has had his registration cancelled. A number of mitigating factors were considered by the Tribunal, including that he had initiated counselling over and above that directed by the Probation Service; he had been "*completely candid*" when first interviewed by the Police, and with his employer and the Nursing Council; the offending had occurred 12 years ago; good references had been supplied by persons aware of his offending; and he had a strong commitment to the profession. However, when balanced against the aggravating factors, including the seriousness and nature of the offending, the Tribunal concluded that the "*only responsible step it can take is to cancel [the nurse's] registration*". The Tribunal also censured the nurse and made a number of recommendations to the Nursing Council in the event that the nurse applied for re-registration. **Mr Henderson** (406/Nur11/186P).

SUSPENSION FOR MISAPPROPRIATION OF MEDICATION BY NURSE

A nurse has been found guilty of professional misconduct for ordering prescription medication for residents at a rest home when she knew or ought to have known that the medication was not being administered to the residents, and for misappropriating codeine phosphate tablets for her own use. One matter of particular concern to the Tribunal was that because the nurse had taken all of the codeine phosphate tablets from storage, there were none available should a resident have genuinely needed them. The Tribunal noted that the nurse had accepted her wrongdoing, had been proactive in facing up to her drug dependency, and had been "*appropriately apologetic*". The nurse was suspended for 2 years and must satisfy the Nursing Council that she has continued with the CADs programme and is able to perform the required functions of nursing before re-commencing practice. **Ms Bushell** (408/Nur11/185P).

NURSE'S FALSIFIED TIMESHEETS RESULTS IN SUSPENSION

A nurse has been found guilty of professional misconduct for falsifying timesheets and claiming allowances she was not entitled to. The Tribunal had no hesitation in finding that "*the established deceitful and dishonest conduct over a period of six months undoubtedly constitutes malpractice and the bringing of discredit to the nursing profession... Although it is surprising that the misconduct was not detected sooner (since some of the time claimed was for periods when [the nurse] was either taking annual leave or was on sick leave) any failure to detect on the part of others does not exonerate [the nurse] who must bear full responsibility in the professional sphere for the dishonest conduct involved*". The nurse was suspended for 9 months, censured, and had a number of conditions imposed which will apply following her return to practice. The Tribunal considered that the outcomes ordered would give the nurse "*a second chance*", and advised the nurse that she could not expect an outcome as supportive should any further matters come before the Tribunal. **Ms Fiu** (418/Nur11/188P).

DOCTOR SUSPENDED FOR PRACTISING WITHOUT APC AND BREACHING TRIBUNAL'S ORDERS

Following the orders made by the High Court in June 2011, a newly constituted Tribunal has re-heard and re-considered penalty and costs orders following a finding that a doctor undertook medical examinations and blood tests ("insurance medicals") at times when he did not hold a current practising certificate, in breach of conditions imposed on an interim certificate subsequently issued, and during a period of suspension ordered by the Tribunal. The Tribunal considered the fact that the doctor had "*to face the arduous process of a difficult hearing before the Tribunal twice*" as a mitigating factor, and found that "*given the complex background and the significant steps that have been undertaken to encourage [the doctor] to take a positive path to competency, the Tribunal must also consider the public interest in not ending the career of a practitioner who is capable of being properly rehabilitated*". The Tribunal suspended the practitioner's registration for 7 months, and imposed a number of conditions which will apply upon the practitioner's return to practice. **Dr Ranchhod** (410/Med10/161P).

EMPLOYMENT

CARE REQUIRED WHEN EXTENDING FIXED TERM CONTRACTS

A nurse working as a casual employee became full time employee on a fixed term contract to cover the role of another full time employee who had taken leave. When the second nurse did not return to work the DHB twice extended the period of the first nurse's fixed term contract. However, when extending the period for the second time the DHB did not fully comply with the requirements in section 66 of the Employment Relations Act 2000. Several months after the end of the second extended period, the DHB stated that the nurse had reverted to his casual status, and began to offer the nurse less frequent assignments. The nurse claimed he was unjustifiably dismissed. The Employment Court held that the nurse was no longer a casual employee when he became a full time employee on the first fixed term contract. The Court reaffirmed that the requirements set out in section 66 of the Act are more than a "*mere formality*", and found that non-compliance with these requirements meant that the nurse became a permanent employee from the end of the period of the second extension to the fixed term contract. The nurse was held to have been unjustifiably dismissed and was awarded 18 months lost wages and \$4,000 for lost expectations. ***Muldoon v Nelson Marlborough DHB*** [2011] NZEmpC 103.

RESPONSIBLE HEALTH AUTHORITIES

CONSULTATION ON A NEW DRAFT CODE OF CONDUCT FOR NURSES

The Nursing Council is consulting on a new draft Code of Conduct for nurses. The existing Code was developed in 1994, and there have been a number of changes to the legislative framework, society and the practice environment since that time. The Council has produced a background document which discusses some of these changes, and sets out how the new draft Code has been developed. A copy of the background document, the draft Code, and the consultation paper and feedback form are available [here](#). Feedback is due by **25 February 2012**.

DRAFT PROFESSIONAL BOUNDARIES GUIDELINE FOR NURSES

A new draft guideline on professional boundaries for nurses is available on the Nursing Council's website available [here](#). The consultation paper for the Nursing Council's current consultation on the new draft Code of Conduct for nurses notes that the Council intends to finalise the guideline on professional boundaries after the consultation on the Code of Conduct is complete.

DOCTORS AND FINANCIAL CONFLICTS OF INTEREST

Following a review of its existing standards relating to doctors and financial conflicts of interest, the Medical Council has identified some areas where it considers further advice, or more explicit advice, may be beneficial. The Council has published a consultation paper which outlines the findings of its review, identifies specific areas for reform, sets out a number of proposed amendments, and poses a number of questions. A copy of the consultation paper is available [here](#). Submissions close on **12 December 2011**.

MEDICAL COUNCIL PROPOSES A FRAMEWORK FOR THE REGULATION OF "SPECIAL INTERESTS"

The Medical Council is seeking feedback on how "special interests" within a "vocational scope of practice" should be regulated. The proposed framework consists of 3 different scenarios, with the level and type of regulation dependent on how closely the special interest is related to the doctor's vocational scope of practice. These scenarios are discussed in some detail in the Council's consultation paper, which is available [here](#). Feedback is due by **16 January 2012**.

CHIROPRACTIC BOARD ISSUES NEW GUIDELINE ON ADVERTISING

The Chiropractic Board has developed a guideline on advertising, which is designed to assist chiropractors in making decisions about advertising their professional services, and to form part of the framework that the Board will use when considering complaints about a chiropractor's advertising. A copy of the guideline is available [here](#).

NEW COMPETENCE STANDARD FOR PHARMACISTS

The Pharmacy Council has ratified a new Competence Standard incorporating cultural competence elements. The standard will be mandatory from 2012. For more information click [here](#).

LAW REFORM AND POLICY DEVELOPMENT

DISTRICT HEALTH BOARDS AND COMPLAINTS ABOUT MEDICAL PRACTITIONERS

In the 2010/2011 Annual Report, an Ombudsman has set out what he considers to be the appropriate conduct in cases where complaints are made to DHBs about medical practitioners. In particular, the Ombudsman confirms that DHBs are obliged to respond positively and helpfully to any member of the public drawing concerns about a medical practitioner to its attention. The Ombudsman advises that "*if the concerns do not relate to a matter for which the DHB has any responsibility, it should usually confine involvement to giving advice or information as to how the person raising the matter can proceed*". Where the matter is or appears to be of such a serious nature that it should be drawn to the attention of the proper authority, the Ombudsman advises that the DHB "*may go beyond a mere advice role and urge the person to do this*" and, if the person is not willing to raise it with the proper authority, the DHB may assume responsibility for doing so itself. Importantly, "*In any case in which DHB decides on its own responsibility to lay a complaint... it should satisfy itself first that it has good grounds for doing so. This will involve seeking an explanation from any person against whom an allegation is made, unless that would be impracticable or otherwise undesirable...*". The 2010/2011 Report of the Ombudsmen is available [here](#).

MEDICINES AMENDMENT BILL INTRODUCED

The Medicines Amendment Bill, which was introduced on 13 October 2011, seeks to address some of the "*problematic provisions*" of the Medicines Act 1981. In particular, it seeks to modernise the definitions of medicine, medical device, and therapeutic purpose to align the boundary between medicines and medical devices with international norms; align the prescribing framework for nurse practitioners and optometrists with medical practitioners, dentists, and midwives; establish a new category of delegated prescriber, whose members will be allowed to prescribe under an authorisation (a delegated prescribing order) issued by an authorised prescriber; and amend the approval processes for new medicines. A copy of the Bill is available [here](#).

HUMAN RIGHTS AMENDMENT BILL INTRODUCED

The Human Rights Amendment Bill, which was introduced on 13 October 2011, seeks to establish a full-time Disability Rights Commissioner within the Human Rights Commission, and seeks to make a number of changes to the role and structure of the Commission. A copy of the Bill is available [here](#).

SLEEPOVER WAGES (SETTLEMENT) ACT 2011 COMES INTO FORCE

The Sleepover Wages (Settlement) Act 2011 came into force on 18 October 2011. The Act gives effect to the settlement reached between the Crown and IDEA Services Limited, Timata Hou Limited and the Service and Food Workers Union. The Act also provides for a framework for the settlement of the "sleepovers" issue for other health and disability employers funded through Vote:Health and their employees and, potentially, for other sectors funded by the Crown. A copy of the Act is available [here](#).

DRAFT GUIDANCE FOR INTEGRATED PAEDIATRIC PALLIATIVE CARE SERVICES

The Ministry of Health has released draft guidance for Integrated Paediatric Palliative Care Services. The guidance arose out of a national review of paediatric sub-specialty programmes in 2010 which found that outside of the Auckland region, paediatric palliative care services are not fully coordinated or sufficiently specialised, and generally provide no access to specialist care. The draft guidance proposes a nationally led and coordinated service delivery system with the Starship Paediatric Palliative Care Team as the national specialist service. The draft also aims to enable local District Health Board development and ownership, with nurse coordinators and lead paediatricians from each DHB linking to the national specialist service. Consultation on the draft guidance closed on 28 November, but the draft is available for review [here](#).

HQSC RELEASES DRAFT POLICY AND GUIDANCE FOR REPORTABLE EVENTS

The Health Quality & Safety Commission have released an updated draft policy and guidance for reportable events. The policy is intended to be used as general guidance by both DHBs and by other public and private health and disability service providers. It is expected that provider's policies will reflect the national policy. Consultation on the policy closed on 18 November, but the draft policy is available for review online [here](#).

HUMAN RIGHTS COMMISSION PUBLISHES DRAFT PAPER ON ACCESSIBILITY ISSUES FOR DISABLED PEOPLE

The Human Rights Commission has published a draft discussion paper considering accessibility issues for disabled people. The paper focuses on three main areas of accessibility; the built environment, access to information and independent voting. After discussing the relevant international human rights, the paper then makes a number of recommendations to improve accessibility. Of particular note is a recommendation that "*the New Zealand Government Web Standards be made mandatory for all district health boards, territorial local authorities and Crown entities*". The Human Rights Commission is receiving feedback on the draft paper. The closing date for feedback is **30 March 2012**. For more information see [here](#).

INTERNATIONAL DEVELOPMENTS

REPORT ON GLOBAL COST OF HEALTH CARE FRAUD

United Kingdom accountancy firm PKF, and the Centre for Counter Fraud Studies at the University of Portsmouth have published a report outlining the financial cost of healthcare fraud. The report analysed data from six countries, including New Zealand, from the years 1998 to 2009. Overall, the report found that an average of 7.29% of healthcare expenditure is being lost to fraud and error each year, which on World Health Estimates of health care expenditure, equates to US\$415 billion globally. For more information and a copy of the report click [here](#).

AUSTRALIA INTRODUCES LEGISLATION FOR NATIONAL EHEALTH RECORDS SYSTEM

The Australian Minister for Health and Ageing has introduced new legislation into Parliament to commence the establishment of a national eHealth records system in Australia. Under the Personally Controlled Electronic Health Records Bill 2011, patients will be able to choose whether they opt into the eHealth record system and an independent Advisory Council will be set up to advise on operational and policy matters with the system. For more information click [here](#).

REPORT INTO END-OF-LIFE DECISION-MAKING IN CANADA

A report commissioned by Royal Society of Canada into end-of-life decision-making in Canada has recently been released. The report sets out a review of social attitudes and practices to end-of-life care, provides an overview of the legal status of all forms of assisted death in Canada, considers the ethics of assisted death, describes the regulation of assisted death in jurisdictions where this is permissible, and makes a number of recommendations with regard to the provision of palliative care in Canada as well as recommendations for reform. A copy of the report is available [here](#).

CONFERENCES AND SEMINARS

HEALTH SYSTEMS LAW INTENSIVE 2012

The University of Otago and Buddle Findlay are pleased to confirm that they will again be running the Health Systems Law Intensive in Wellington from 10 April – 13 April 2012 and, subject to interest, 27 August – 30 August 2012. This intensive will be taught by senior members of the Buddle Findlay health law team, in association with senior academics from the University of Otago Faculty of Law. The course is designed specifically for senior clinicians, board members, chief executives, and senior managers working in the New Zealand health sector. Enrolment is also open to post-graduate law students and practising lawyers with an interest in the field of health law. For further information, or to enrol, please contact judy.woolley@buddlefindlay.com.

AGED CARE WORKSHOP: PROTECTING PROVIDERS FROM LIABILITY

Buddle Findlay's health law team is pleased to invite you to an Aged Care Workshop on protecting providers from liability. This one day workshop will be held in Wellington on Thursday 16 February 2012 and in Auckland on Friday 17 February 2012. Topics to be covered include an overview of the legal context in which aged care services are provided, a closer look at admission agreements, managing complex residents, providing an appropriate standard of care, treating incompetent residents, liability for the actions of employed, contracted, and visiting health professionals, advance care planning, and Coroner's inquiries. For more information, or to enrol, please contact sabrina.meo@buddlefindlay.com.

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