BUDDLE FINDLAY

Legal update on health law - May 2014

Alastair Hercus, Peter Chemis, Hamish Kynaston, Alastair Sherriff, Natasha Wilson, Catherine Miller

1 May 2014

Father not an 'aggrieved person' under the HDC Act when harm sustained during the birth process

The High Court has found that the father of a child who suffered oxygen deprivation as a result of birth complications is not an aggrieved person under the Health and Disability Commissioner Act 1994 and cannot, therefore, bring a damages claim in his own right for a breach of the Code.

In 2009 the Court of Appeal held that only consumers with rights under the Code can be aggrieved persons under the HDC Act (and therefore bring a claim for damages before the Human Rights Review Tribunal), but suggested that there may be an exception relating to the position of fathers of babies in the course of pregnancy and the birth process. The position of fathers has now been directly considered, with the High Court concluding that the definition of an 'aggrieved person' does not extend beyond the primary consumer, persons who exercise consent rights for consumers, and the executors' of a primary consumer's estate. In reaching this conclusion, the Court noted that having an extended definition that included fathers of babies during the pregnancy and birth process would raise a number of questions and difficulties that could not have been intended by Parliament and "*there is nothing in the statutory aim of enhancing consumer rights which clearly requires such an expansion of the definition of aggrieved person*". *P v F* [2014] NZHC 456

High Court upholds decision to fluoridate and comments on the right to refuse medical treatment

The High Court has rejected a judicial review challenge to a District Council's decision to fluoridate a water supply. Among other things, the Court concluded that the addition of fluoride was not medical treatment for the purposes of section 11 of the New Zealand Bill of Rights Act 1990 and, even if it was, "*the objective of improving the dental health of New Zealanders, particularly children, is unarguably sufficiently important to justify curtailment of the right to refuse*".

Anti-fluoride group New Health New Zealand challenged a District Council's decision to fluoridate a water supply by way of judicial review. The challenge was brought on a number of grounds, including that the Council did not have a legal power to add fluoride and that the decision breached the fundamental right to refuse medical treatment. The High Court rejected all grounds of challenge, concluding (among other matters) that there is implied power to fluoridate in the Local Government Act 2002 and that fluoridation is not medical treatment for the purposes of the New Zealand Bill of Rights Act 1990: "*I am of the view that medical treatment is confined to direct interference with the body or state of mind of an individual and does not extend to public health interventions delivered to the inhabitants of a particular locality or the population at large*". New Health New Zealand has since confirmed that it will appeal the case. For further information see Buddle Findlay's legal update - Decision released on Council's power to fluoridate water. *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 395

High Court finds that 'suspended suspensions' are ultra vires

A Professional Conduct Committee of the Dental Council has successfully appealed against a 'suspended suspension' imposed by the Health Practitioners Disciplinary Tribunal, with the High Court finding that the Tribunal has no power to impose a penalty of 'suspended suspension'.

The Court noted that this finding was at odds with the approach taken by the Tribunal in a number of cases over a considerable period of time. It therefore set out the reasons for its finding in some detail, noting, among other things, that "*imposing penalties in the absence of clear statutory authority runs the risk of decisions that are arbitrary, inconsistent and unworkable*". Turning to the facts of the particular case, the Court found that it was not necessary to remit the matter back to the Tribunal to impose a different, additional penalty, as quashing the order of suspended suspension would make little material difference to the dentist's position:

"*If he breaches his conditions of practice (or the other orders made) he prima facie commits a disciplinary offence and can be charged again. An order of suspension "proper" can be considered by the Tribunal on its merits if and when that occurs*". The Court also noted that while the Tribunal was "*at pains to reiterate… that, in its view, an order of suspension was appropriate*", those statements were inconsistent with its willingness to suspend the suspension order:"*the public is either at risk or it is not*". Here, there was nothing in the circumstances of the dentist's case that suggested the existence of such a risk. *Professional Conduct Committee v Moon* [2014] NZHC 189

Nurse who inherited over $300,000 from neighbours cleared of professional misconduct

A Professional Conduct Committee charged a nurse with professional misconduct, alleging that she inappropriately and/or unethically accepted a substantial bequest from a couple to whom she provided nursing services, and that she provided those nursing services when she did not hold an annual practising certificate. The Health Practitioners Disciplinary Tribunal has dismissed the charges.

The key issue in this case was whether the nurse was providing nursing services to the couple. The Tribunal heard evidence that the nurse was a close friend of the couple. The couple sought her support as their health deteriorated, and arranged for her to live in the property next door to them. She provided regular assistance with personal cares, shopping, transport, and household jobs. She also assisted with matters directly related to health care, such as dressing changes, administration of enemas and bowel evacuations, and drug administration (including administration of subcutaneous morphine to the wife on the day that she died). The Tribunal analysed the examples of health care, and decided that in the circumstances such care could equally be provided by a caregiver or, in the case of administration of morphine, "*a surrogate family member giving caring assistance*". On balance, the Tribunal was satisfied that the nurse provided assistance to the couple in her capacity as a close friend and support person, and that she was not providing services that were in the "*exclusive province of a registered nurse*". *608/Nur13/262P*

Nurse suspended for shouting at and slapping patient

The Health Practitioners Disciplinary Tribunal has suspended a nurse for 12 months for shouting at and slapping a patient on two different occasions. The Tribunal noted that while shouting at a patient may not necessarily warrant disciplinary sanction, the combination of shouting and slapping on two different occasions amounted to serious misconduct worthy of suspension.

The nurse denied all charges and submitted that she had never assaulted the patient. However, after hearing from a number of witnesses, the Tribunal determined that the evidence was sufficient to conclude that the nurse had shouted at and slapped the patient, and concluded that this amounted to serious misconduct that brought discredit to the nursing profession: "*A nurse simply must not physically assault a patient. That applies no matter how frustrated the nurse may be by the patient's response to the care that is being given*". The nurse was censured, suspended for 12 months and conditions were placed on her return to practice. In a separate but related decision, the Employment Relations Authority upheld the DHB's decision to dismiss the nurse for serious misconduct. *576/Nur13/241P* and *Geevarghese v MidCentral District Health Board* [2013] NZERA Wellington 140

Doctor granted name suppression to protect others

A doctor has successfully appealed against a Health Practitioners Disciplinary Tribunal decision declining her permanent name suppression, with the High Court finding that the Tribunal failed to take account of whether naming the doctor would identify the patients, staff members and entities that had been granted name suppression.

The doctor had been disciplined for conduct relating to her prescribing and dispensing of misoprostol, a drug commonly used for medical abortions. The Tribunal made suppression orders in respect of the patients, and the other persons and entities involved, noting that there were compelling factors of privacy and confidentiality. However, it declined the doctor's application for name suppression noting that publication of the doctor's name was a proportionate response in light of the range of penalties imposed. That decision was overturned on appeal, with the High Court finding that "*this is one of those unusual cases where it is desirable that [the doctor's] name be suppressed permanently because of the compelling interests that the other suppression orders recognise, notwithstanding the interests that favour publication of her name*". *Dr N v Professional Conduct Committee* [2013] NZHC 3405

Interim relief support carer not a 'homeworker' engaged by Ministry of Health or DHB

The Employment Relations Authority has ruled that a support carer who provided interim relief to full-time unpaid caregivers who received the Carer Support Subsidy from the Ministry of Health was not a 'homeworker' within the meaning of the Employment Relations Act 2000.

The care worker argued that she was engaged by either the Ministry or the DHB as a homeworker (employee) and was therefore entitled to the protections set out in the Minimum Wages Act 1983, the Holidays Act 2003, and other relevant employment legislation. However, the Authority disagreed. It concluded that there was no evidence that the carer was employed, engaged or contracted by either the Ministry or the DHB when she provided relief support at the request of a full-time career. As such she was a non-professional carer who fell outside the definition of a 'homeworker' in the Act. The care worker has lodged an appeal against the Authority's determination in the Employment Court. *Lowe v Director-General of Health* [2014] NZERA Wellington 24

UK Supreme Court affirms rights of mentally incapacitated patients living in supervised care

In a case that confirms that "*human rights are for everyone*", the United Kingdom's Supreme Court has concluded that the supervised care arrangements put in place for three mentally incapable patients amounted to a deprivation of their liberty.

In this case, the Supreme Court was required to consider the criteria for determining whether the different living arrangements put in place for three mentally incapacitated patients amounted to a deprivation of their liberty (and therefore a possible breach of the patients' human rights). After discussing the historical and international case law, the Court stated that "*it is axiomatic that people with disabilities… have the same human rights as the rest of the human race*" and emphasised that the fact that a person's living arrangements may be comfortable and may make that person's life as enjoyable as possible made no difference: "*A gilded cage is still a cage*". The Court then analysed each of the patients' individual living arrangements and concluded that they had been deprived of their liberty. *P v Cheshire West and Cheshire Council and another* [2014] UKSC 19

Failing to tell patient about instrument left in tooth means no informed consent

A dentist who failed to tell his patient that a piece of instrument had been left in his tooth has been found in breach of the Code and referred to the Director of Proceedings. The dental practice was also criticised for not having any written policies for informed consent, and was found to be vicariously liable for the dentist's conduct.

A 16 year old patient attended his dentist for a root canal. During the procedure the dentist's instrument separated and a piece was left in the patient's tooth. The patient required re-treatment, but (even when asked why re-treatment was needed) the dentist did not disclose that a piece of instrument had been left in the patient's tooth. Interestingly, the Deputy Commissioner did not directly discuss the principle of open disclosure but did find that the lack of information about why re-treatment was needed meant the patient was unable to give effective informed consent in breach of Rights 6 and 7 of the Code. The dentist was also criticised for failing to provide the patient with information about all treatment options, with the Deputy Commissioner noting that it was not appropriate for dentists to prejudge a patient's ability to pay for different treatment options. The dental practice was found to be vicariously liable for the dentist's failures, particularly because the clinic did not have any written procedures for informed consent. 12HDC00437

Erectile dysfunction clinic reported to Director General of Health for wide ranging breaches of Code

After an investigation that highlighted a number of concerns, the Commissioner has reported an erectile dysfunction clinic to the Director General of Health. Among other things, the clinic was found in breach of Right 2 of the Code for exploiting and coercing a patient and in breach of Right 10(3) of the Code for failing to engage with the Commissioner's investigations.

A patient attended an erectile dysfunction clinic and was prescribed a range of medications. After suffering side effects and spending more than $2000, the patient complained to the Commissioner. Among other concerns, the Commissioner noted that the patient had tried to cancel his contract with the clinic but had been unable to do so. The Commissioner said "*it is unethical and unreasonable that a consumer cannot stop treatment and seek a refund if he or she is dissatisfied with the treatment being provided…*" and concluded that the clinic had coerced and exploited the patient in breach of Right 2 of the Code. The Commissioner also noted that the clinic had failed to respond to the patient's complaints or engage with the Commissioner's investigations, in breach of Right 10. The Commissioner commented that the clinic showed a "*worrying disregard of its responsibilities as a provider of health care services*" and reported the clinic to the Director General of Health. 12HDC01266

Breach of Code for failing to discuss the benefits of sharing information with GP

In a wide ranging investigation that identified a number of breaches, the Commissioner found an erectile dysfunction clinic in breach of Right 4(5) of the Code for failing to have a discussion with the patient about the benefits of sharing information with his GP.

A patient attended an erectile dysfunction clinic and was prescribed a range of medications. During this time the patient also visited his GP and was prescribed medications for a back injury and depression. The patient had a number of concerns about the clinic's services and the Commissioner investigated. Among other things, the Commissioner was concerned about the lack of communication with the patient's GP, commenting that "*consumers will often move from one part of the healthcare system to another, and back again… It is essential that, when this happens, providers take sufficient steps to ensure that the consumer receives a safe and seamless service…*". The Commissioner found that the clinic's failure to have a discussion with the patient about the benefits of sharing information with his GP led to a situation of potential harm and failed to ensure the continuity of services in breach of Right 4(5) of the Code. 12HDC01266. For more information about other findings in this case see above article.

DHB not liable for nurse's 'reprehensible and inexcusable' sexual exploitation

A mental health nurse who had a sexual relationship with a patient has been found in breach of Right 2 of the Code and referred to the Director of Proceedings. The DHB was not vicariously liable, as the Commissioner found that it was reasonable to expect the nurse would comply with his own professional obligations and the DHB had acted appropriately once the matter was identified.

The nurse entered into a sexual relationship with a patient less than six weeks after the patient's discharge from an inpatient mental health unit. As the relationship progressed, the nurse began suffering mental health difficulties and told the DHB he was feeling unsafe. Shortly afterwards, the relationship was reported and the DHB suspended the nurse. During the Commissioner's investigations the nurse explained that he was a new nurse and that he was unsure how the Nursing Council's Code of Conduct applied to ex-patients. He also submitted that his mental health difficulties were such that he had not acted with intent to sexually exploit the patient. In response, the Commissioner stated: "*I do not accept that [the nurse's] depression or personal stress, or his relative inexperience, mitigate his responsibility to maintain professional boundaries nor do they change my findings in relation to sexual exploitation…*". The Commissioner found that the DHB was not vicariously liable for the nurse's breaches of the Code, noting that the DHB's policies reiterated that staff had to maintain professional boundaries, and that it was reasonable to expect the nurse would comply with his own professional obligations in that regard. However, the Commissioner noted his concern that the DHB had not taken more formal steps when the nurse reported his own mental health difficulties. 12HDC00027

Adoption of another DHB's protocol in a different hospital has 'disastrous results'

A recent decision from the Commissioner serves as a "*salutary reminder to all DHBs that care needs to be taken when implementing new policies and procedures, to ensure that they are appropriate to the particular operating environment at that DHB*".

In this case, a patient presented to the emergency department of a secondary hospital following a stroke. After consulting with others, the junior doctor decided to start thrombolysis in reliance on a stroke management protocol that had been designed for use at a tertiary hospital. The protocol referred to administering "t-PA" but did not specify which medication. The junior doctor contacted senior clinicians at the tertiary hospital to clarify, but a result of a communication error, the junior doctor administered an incorrect medication. On investigation, the Commissioner found that the DHB responsible for the emergency department was in breach of the Right 4 of the Code, as it was inappropriate to have adopted the protocol without fully reviewing its applicability in its own hospital. The lack of information in the protocol had led to "*small holes in the provision of care – which lined up with disastrous results*". While the Commissioner commented upon the actions of clinical staff at both hospitals, the Commissioner concluded that the DHB "*bears ultimate responsibility in this case*". 11HDC01434

The importance of obtaining a full medical history

The Commissioner has found a GP in breach of the Code for failing to obtain a full medical history and failing to fully investigate potential diagnoses, noting that there was a missed opportunity to diagnose a subarachnoid haemorrhage that resulted in the patient's death.

A 48 year old patient was taken to an emergency clinic following a sudden onset headache. The assessing GP diagnosed a migraine and handed the patient over to the next GP on shift. The second GP monitored the patient's reaction to pain medication

and, after an improvement, sent the patient home. The next morning the patient collapsed. She was diagnosed with a subarachnoid haemorrhage and died a short time later. The Commissioner found that the assessing GP had breached Right 4 of the Code by failing to obtain and document a full history, specifically with regard to the patient's smoking history and alcohol consumption. The GP also failed to fully investigate the diagnosis by discussing the matter with the on-call registrar (despite a direction to do so in the clinic's policy). The Commissioner criticised the quality of the documentation by both GPs and emphasised the importance of recording when a note has been written retrospectively. The clinic was not found in breach as there were appropriate policies in place and the "*failures cannot be attributed to the system [the GP] was working in*". 12HDC00281

Nurses and rest-home fail to provide safe care and fail to communicate with patient's attorney

A recent decision from the Deputy Commissioner highlights the importance of completing full documentation and undertaking falls risk assessments for elderly patients. The decision also notes that health providers need to take steps to enquire into the status of a patient's enduring power of attorney and must communicate with the attorney and wider family as appropriate.

An 81 year old patient with dementia was admitted to a rest-home. During her admission she had three falls. Six days after the third fall, the rest-home realised the patient had a fractured hip. On investigation, the Commissioner found both the clinical nurse manager and the rest-home manager in breach of Right 4 of the Code for failing to ensure that care planning and falls risk assessments were completed and documented. The Deputy Commissioner also noted that while the rest-home staff knew that the patient had an enduring power of attorney, they had not sighted the documentation nor obtained sufficient information to ascertain the patient's true legal status (ie whether the enduring power of attorney had been activated). Furthermore, the staff had not communicated with the attorney or the patient's wider family about the falls. When considering the rest-home's liability, the Deputy Commissioner commented that although the policies were satisfactory, the rest-home had nonetheless breached the Code because it had not ensured that there was a "*staff culture of compliance*". The rest-home was found in breach of Right 4 and was referred to the Director of Proceedings. 11HDC00940

DHB criticised for failing to deal with concerns about a doctor's competence

In a case where an emergency doctor at a provincial hospital was found in breach of the Code for failing to recognise the severity of a patient's injuries, a DHB has also been found in breach for failing to respond sufficiently to known concerns about the doctor's competence.

A patient was admitted to ED after falling onto concrete. The ED doctor diagnosed contusion and cleared the patient for discharge. The patient was later diagnosed with rib-fractures, possible effusion at the left lung base and possible underlying lung consolidation. On investigation, the Commissioner found that the DHB had been aware of concerns about the doctor's competence and while the DHB had taken some action, the recommendations that had been made were not followed up. Accordingly, the Commissioner found that the DHB had breached the Code for failing to take adequate steps to ensure the doctor was competent: "*[h]ospitals must have in place an effective mechanism for identifying and dealing decisively with concerns about an employee… [a]lthough employees are entitled to be treated fairly, hospitals cannot allow patient safety to be jeopardised*". The doctor was also found in breach of the Code for various failures in her standard of care, and both the DHB and the doctor were criticised for poor documentation. 11HDC01077

Rest-home found in breach of Code but nurses not accountable because of difficult working environment

The Deputy Commissioner has concluded that a rest-home was in breach of the Code for widespread failures and deficiencies in the care provided to an elderly patient, but that it was not reasonable to hold individual nurses to account given their excessive workloads and a fragmented operating environment.

An elderly patient with complex medical needs was admitted to a rest-home where he suffered from a range of difficulties, including a number of falls, loss of body weight, development of pressure wounds and difficulties with his diabetes. The patient eventually developed necrotic wounds and died. The Deputy Commissioner concluded that there had been "*widespread failures*" in the care provided, and identified a number of difficulties in the rest-home environment, including excessive workloads and a fragmented clinical management system. Overall, the Deputy Commissioner concluded that the rest-home "*must take responsibility for the extent of such failures*" and found the rest-home had breached Right 4 of the Code. While the individual nurses involved were subject to adverse comment, the Commissioner found that the operating environment was such that it would not be reasonable to hold them responsible for the failures in care.**11HDC00686**

Vulnerable Children Bill reaches next stage

The Social Services Select Committee has issued its report on the Vulnerable Children Bill and the Bill has had its second reading.

Among other matters, the Committee recommended a number of minor changes to help clarify the scope of the new requirements for compulsory safety checks for all children's workers. In addition (following an instruction from Cabinet), the Committee has removed all the provisions relating to child harm prevention orders. The Bill had its second reading on 15 April 2014. For more information see here.

Law Commission recommends changes to restrictions on suicide reporting

The Law Commission has reviewed the law relating to the reporting of suicides, and found that the current provisions of the Coroners Act 2006 that restrict such reporting are not working well. As a result, the Commission has recommended statutory changes.

The Law Commission has recommended amendments to sections 71 to 73 of the Coroners Act. The suggested amendments would limit the reporting restrictions to the *method* of suicide and the fact that a death was a suicide, allow applications to the Chief Coroner or Deputy Chief Coroner for an exemption from the restrictions, and provide for the development (as well as implementation and evaluation) of standards for suicide reporting. The Law Commission's report was tabled in Parliament on 1 April 2014 and can be accessed here.

Consultation on advanced care planning advice

The National Ethics Advisory Committee sought feedback on its Draft Advice on Ethical Challenges in Advanced Care Planning. Once finalised, the advice aims to complement existing resources from the Ministry of Health and the National Advance Care Planning Cooperative and help to create a full package of information and advice within the New Zealand context.

Commerce Commission warns DHBs and pharmacies over "no discounting" clause

The Commerce Commissioner warned all DHBs and New Zealand pharmacies that the "no discounting" clauses in the 2012 Community Pharmacy Service Agreement were likely to breach section 27 of the Commerce Act 1986 (which prohibits contracts, arrangements or understandings from containing a provision that has the purpose, effect, or likely effect of substantially lessening competition in a market in New Zealand).

The Pharmacy Guild was also warned for its role in advocating for the inclusion of the clauses in the Agreement. In the media release, the Commission's Chairman, Dr Berry, noted that: "*Pharmacies and other health providers must also remember that they are in competition with each other despite the collegial nature of their professions. And professional associations, such as the Guild, are also subject to the Act and need to give attention to complying with the competition laws*". The clauses were removed from the Community Pharmacy Service Agreement at the start of 2013.

Competition and consumer law guidance for health sector

Buddle Findlay recently published a legal update regarding the Commerce Commission's focus on the health sector, and the importance of competition and consumer law in the sector. The update is available here.

Review of statement on doctors and advertising

The Medical Council is reviewing its statement on advertising and sought submissions on its consultation document.

Among other things, the consultation document included a proposal to restrict doctors from using 'sub-speciality' or 'special-interest' titles unless such a title has been conferred by the doctor's College. It also suggested deleting the current prohibition on the use of discount coupons and gift certificates, and replacing this with a statement outlining when the use of discount coupons and gift certificates is inappropriate. Submissions closed on 28 March 2014.

Memorandum of Understanding regarding patient safety in private hospitals

The Medical Council and the New Zealand Private Surgical Hospitals Association have entered into a Memorandum of Understanding (MoU), the primary purpose of which is to clarify and define the roles of participating private surgical hospitals and the Medical Council with respect to management of any competence, performance, conduct or health issues.

Examples of innovative IT in the health and disability sector

The Ministry of Health's IT Health Board has published a booklet which provides examples of information technology innovation and use within the health and disability sector, and how such innovation is contributing to better care for patients. A copy of the booklet is available here.

Updated Designated Auditing Agency Handbook

The Designated Auditing Agency Handbook, which sets out the Ministry of Health's requirements of designated audit agencies for auditing and gives audit guidance to health service providers, has been updated. The new version replaces all prior versions of the handbook, and can be accessed here.

Auckland

188 Quay Street
Auckland 1010

PO Box 1433
Auckland 1140
New Zealand

P: +64 9 358 2555
F: +64 9 358 2055

Wellington

Aon Centre
1 Willis Street
Wellington 6011

PO Box 2694
Wellington 6140
New Zealand

P: +64 4 499 4242
F: +64 4 499 4141

Christchurch

83 Victoria Street
Christchurch 8013

PO Box 322
Christchurch 8140
New Zealand

P: +64 3 379 1747
F: +64 3 379 5659