BUDDLEFINDLAY

Legal update on health law - December 2013

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6 December 2013

Continued pregnancy following misdiagnosis can constitute a personal injury

The Court of Appeal has made a provisional finding that a woman's continued pregnancy following the failure of health professionals to diagnose spina bifida, and "*the consequential inability of the mother to implement her choice to terminate the pregnancy*", may constitute a personal injury under the Accident Compensation Act 2001.

The Court followed Blanchard J's reasoning in *Allenby v H* (Supreme Court), in considering whether a continued pregnancy after misdiagnosis was a "personal injury" and a "treatment injury" under the Act. The Court was satisfied that the "*continuation of the pregnancy following the incorrect diagnosis and the consequential inability of the mother to implement her choice to terminate the pregnancy can constitute a physical injury suffered by the mother for the purpose of the definition of "personal injury*". The Court was satisfied that there was "treatment" for the purpose of the Act and that appellant would have terminated the pregnancy had there been a correct diagnosis. However, the Court did not have enough evidence to determine whether the appellant would have been able to obtain a termination. The Court referred the matter back to the District Court for consideration but stated that "if *the appellant is able to establish on the balance of probabilities that she would have been able to obtain a termination, she would be entitled to cover under the Act on the basis that she has suffered personal injury that is a treatment injury*". *C v Accident Compensation Corporation* [2013] NZCA 590

Registration cancelled for a "prolonged sequence of egregious professional breaches"

A psychiatrist who entered into a sexual relationship with a vulnerable patient, continued with the intimate and exploitative relationship after inadequately discharging her from his care, and interfered with the legal process by attempting to influence and procure the withdrawal of HDC complaints, has had his registration cancelled by the Health Practitioners Disciplinary Tribunal. The Tribunal noted that: "*this seriousness of the matter is such that penalties short of cancellation would not sufficiently address patient safety concerns*".

Given the conflicts in evidence, the Tribunal was required to assess issues of credibility. Following its review of the evidence, which included an intimate video recording, the Tribunal was satisfied that the complainant's account was "*entirely accurate in all its essential features*" and was "*driven to conclude that [the psychiatrist and his wife] have decided not to tell the truth in an attempt to avoid serious professional consequences*". In addition to ordering the cancellation of registration, the Tribunal censured the psychiatrist and ordered him to pay $73,000 in costs. The Tribunal supressed the names of the psychiatrist's children and the first name of his wife, noting that it was the psychiatrist's accountability that was the subject of the proceeding, and not his family. *Dr Maharajh* 571/Med13/243D and 581/Med13/243D (penalty).

Residential care provider unable to recover fees because of poor admission agreement and execution process

The High Court has found that a mother is not liable for the residential care fees for her intellectually disabled and terminally ill son, because she had signed the admission agreement with the mistaken belief that she was signing an admission form that, at most, would make her liable for a few personal items needed by her son.

The Court criticised the provider's admission agreement, noting that "*the agreement presented was entirely unsuitable in the case of a resident such as [her son]. Plainly he was not fit to sign on his own account. So that part was just left blank. [The mother], in what seems to have been a state of common confusion, signed on behalf of Radius. Then as attorney, when she was not... Then she signed as guarantor, when in my view it should have been made clear to her that she was really signing as principal obligee. Had that been done, the misunderstanding as to the extent of the guarantee would have been detected*". Furthermore, the execution process was "*an utter shambles*". Among other things, the admission agreement was presented to the mother by a receptionist as she was leaving to catch a plane, the document was incomplete (she was only provided the signature page, and not the rest of the agreement), and it was presented in an informal manner with a number of other minor administrative documents two months after her son's admission. The Court found that in

the unusual circumstances of this case, the mother has taken requisite care and dismissed Radius' claim for unpaid fees. *Radius Residential Care Limited v Krishna* [2013] NZHC 2886

Son's "flimsy" allegations of poor care result in indemnity costs award for rest home

The High Court has awarded a rest home indemnity costs against the son (and former executor) of a former client, finding that the son's claims that the rest home contributed to his father's death were unsubstantiated, inflammatory, and resulted in unnecessary cost for the rest home.

The Court found that the son's claims "*were based (initially) on speculation and (later) on relatively flimsy evidence*" and that the evidence "*went nowhere near creating a foundation for the serious allegation that the standard of the [rest home's] care had caused [his father's] death*". The Court also noted that the allegations made by the son were never relevant to the original application by the rest home to have him removed as executor of his father's estate on grounds of conflict of interest, but that "*the nature of [the allegation] necessarily required [the rest home] to respond and, in doing so, to incur costs far in excess of those that one would ordinarily expect to enforce a debt of just over $50,000*". *Bupa Care Services NZ Limited v Gillibrand* [2013] NZHC 3067

Ministry of Health must reconsider complaint regarding Casino's smoking lounge

The Cancer Society of New Zealand has successfully reviewed a decision by the Ministry of Health that smoking is permitted in Sky City's Diamond Lounge. The Court considered that the Ministry applied the incorrect test when finding that the Lounge was an "open area" under the Smoke-Free Environment Act 1990. The Ministry must now reconsider the Society's complaint in accordance with the provisions of the Act.

Under the Act, smoking is permitted in "open areas" of a casino. Whether a space is an "open" or "internal" area is defined by reference to the physical characteristics of the space, in particular whether or not is enclosed or substantially enclosed. The Ministry developed an "Open Areas Calculator" to assist its enforcement officers with determining whether an area was "substantially enclosed" or an "open area". This calculator was relied on by the enforcement officers who decided that the Diamond Lounge, developed by Sky City for use by patrons who smoke, was an "open area" under the Act. This was successfully challenged by the Cancer Society of New Zealand, with the Court finding that the Open Areas Calculator produced an inflexible standard which fettered the decision-making power under the Act and introduced air quality as a factor to be considered contrary to the clear scheme and purpose of the Act. The Court made a declaration to this effect, and directed reconsideration of the Society's complaint. Following this decision, Sky City has made the Diamond Lounge a non-smoking area. *Cancer Society of New Zealand Inc & Ors v Ministry of Health & Ors* [2013] NZHC 2538

Successful challenge in family caregivers case

The High Court has ordered the Ministry of Health to reconsider a mother's application for caregiver funding, following its findings that: the Human Rights Review Tribunal had no jurisdiction to suspend its declaration that the Ministry's family caregivers policy is unlawful; and Part 4A of the New Zealand Public Health and Disability Act 2000 does not apply to validate that policy.

The Ministry had *declined the mother's application for caregiver funding on the basis that as the Human Rights Review Tribunal's declaration of inconsistency had been temporarily suspended, the previous policy remained in force, and she was therefore not entitled to funding. In a lengthy decision, the High Court concluded that the Tribunal did not have jurisdiction to suspend its declaration, noting that: "the Tribunal does not have statutory authority to deem a policy it has found to be unlawful, lawful". The Court concluded that as the Tribunal's suspension order was void, the Ministry could not rely on the suspension to refuse the mother's application. The Court also rejected the Ministry's argument that the new Part 4A of the NZPHD Act effectively prohibits the Ministry from paying caregiver funding to the mother, finding that: "the unlawful policy is not a family care policy as defined in Part 4A of the NZPHDA. There is nothing in Part 4A which validates the policy the subject of the finding in Atkinson". The Court set aside the Tribunal's suspension order and directed the Ministry to re-consider the mother's application.* *Spencer v Attorney General* [2013] NZHC 2580

Communicating about communication

In a recent opinion, the Health and Disability Commissioner highlighted the importance of talking to residents and their families about their expectations with regards to communication stating that: "*There needs to be a shared understanding and agreement between the resident, his or her family, and the facility about the circumstances in which family will be*

contacted, and the reason for this".

In this case, an 87 year old woman was admitted to a rest home for respite care. During her stay, she had four falls, and did not receive her regular dose of lorazepam one weekend because her supply had been exhausted. Among other things, the Commissioner found that rest home's communication with the resident's family was inadequate, including with regards to her falls, medication management, and care plan. While noting that the family had no legal entitlement to information about the resident's wellbeing, unless the resident consented to her family receiving that information, the Commissioner found that the rest home "*should have discussed with [the resident] the extent to which she wanted her condition to be discussed with her family. That conversation should have been adequately recorded, to ensure that staff knew how much information about her health status should be discussed, and when the family should be contacted*". The Commissioner also found that the while the rest home had policies for care planning and medication administration, staff failed to comply with these policies consistently and the medication administration policy did not adequately provide for obtaining medications out of hours. The rest home was found in breach of Rights 4(1) and 4(5). *11HDC00812*

Insufficient communication about need to take trial dose of medication before discharge

The Health and Disability Commissioner has found a DHB in breach of the Code after a doctor failed to make it clear that his patient needed to take a trial dose of a medication before he was discharged. The Commissioner commented that the case demonstrated "*a failure to do the basics well*" and that "*poor communication led to this situation*".

A 74 year old patient with a history of asthma and chronic obstructive pulmonary disease was admitted to hospital with shortness of breath and an atrial flutter. A medical registrar prescribed sotalol as a prophylaxis but, because of potential side effects, the registrar had intended that the patient take a trial dose on the ward prior to his discharge. However, the registrar did not communicate this to the patient and the documented treatment plan was not explicit. The patient was discharged quickly (in part because a shuttle was arriving to take him home) and his sotalol prescription was instead faxed to his local pharmacy. The patient took the sotalol alone at home and suffered an adverse reaction requiring emergency treatment. While the Commissioner accepted that sotalol was an appropriate medication, the Commissioner criticised the doctor's failure to give clear instructions about the need for a trial dose. The Commissioner also criticised the doctor's failure to discuss the risks, benefits and need to take a trial dose with the patient, commenting that "*provision of this information would have enabled [the patient] to be a partner in his own treatment*". The DHB was found in breach of Rights 4 and 6 of the Code. *12HDC00599*

Inadequate training, disrespectful treatment and poor record keeping

In a case that demonstrates the importance of providing adequate training to community support workers, a residential care facility and two community support workers have been found in breach of the Code for various failures in their care of an adult resident with intellectual impairments.

The mother of a patient with intellectual disabilities complained about the care provided in a residential facility. The Commissioner's investigation highlighted a number of incidents of concern, including one occasion where a community support worker had forced the patient's hand towards his mouth and pulled him off his chair and taken him to his room as a form of behaviour management. While the Commissioner accepted that the support worker's training in managing challenging behaviours was inadequate, he concluded that the support worker's actions were inappropriate, disrespectful and breached Right 1 of the Code. The Commissioner also found that another support worker breached the Code for failing to document when they had not administered the patient's medication, and that care facility breached the Code for various organisational failures including, failing to ensure good record keeping and incident reporting, failing to provide adequate training to ensure a safe environment and failing to respond to and monitor concerns about medication management. *11HDC00712*

Law Commission seeks feedback on Burial and Cremation Issues Paper

The Law Commission has published an Issues Paper exploring the current legal framework for burial and cremation in New Zealand. Among other things, the paper suggests options for reforms in the law, including making changes to modernise the current burial and cemetery requirements, to regulate funeral service providers and crematoria and to establish a new statutory regime to assist individuals to make decisions about what happens to their body after death and to manage family disputes about burials. Submissions on the Issues Paper are due by Friday 20 December 2013.

Prescribing changes passed by Government

Changes to the Medicines Act 1981 were passed on 22 November 2013. Among other things, the changes extend the definition of "authorised prescribers" to include nurse practitioners and optometrists and enables them to prescribe all medicines appropriate to their scope of practice. The changes also include a new ability for the Minster of Health to authorise particular classes of registered health professionals to be "delegated prescribers". Delegated prescribers will be able to prescribe within limited parameters, under the direction of an authorised prescriber and in accordance with a delegated prescriber order. Further information is available here.

Further changes to the coronial system announced

Courts Minister, Chester Burrows, has announced that a Bill will be introduced in Parliament next year proposing a number of amendments to the Coroners Act 2006. Mr Burrows advises that the proposed amendments will make it easier for the public to find out how coroners are appointed and how possible conflicts of interest are managed, and will improve the way families are consulted if tissue samples need to be retained following a post-mortem examination. Once introduced, the Bill will go through a select committee process, including public submissions. Further information is available here.

Updated standard for doctors writing medical certificates

The Medical Council has released its updated statement on medical certification, which sets out the standards that doctors must follow when writing medical certificates. In the media release accompanying the updated standards, Medical Council chairperson, Dr John Adams noted that the writing of medical certificates can be a complicated part of medical practice as, in addition to their primary obligation to care for their patient, doctors also have responsibilities to a third party, such as an employer. More information, including a copy of the updated statement, is available here.

Funded Family Care Notice

The Minister of Health has issued the Funded Family Care Notice 2013, which sets out how eligible disabled adults can elect resident family members to be their paid carer. The Government has set aside $92 million over the next four years to pay for the support package, which came into effect on 1 October 2013. Further information, including a copy of the Notice and the operational policy is available here.

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