SET 2 MAM, RM

NZ Private Hosps Assn v ACC 31.8.88

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 63/88

IN THE MATTER of the Accident Compensation Act 1982

BETWEEN THE NEW ZEALAND PRIVATE HOSPITALS ASSOCIATION INCORPORATED a duly incorporated society representing private hospitals in New Zealand and having its registered office at Federation House, Molesworth Street, Thorndon, Wellington

Appellant

AND THE ACCIDENT COMPENSATION CORPORATION a body corporate constituted under the Accident Compensation Act 1982

Respondent

Coram: Cooke P.
Richardson J.
McMullin J.
Somers J.
Casey J.

Hearing: 2 and 3 August 1988

Counsel: J.R. Wild for Appellant
J.O. Upton and J.C. Pike for Respondent

Judgment: 31 August 1988

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

This case was heard immediately after the Physiotherapists case. It raises very similar issues, the main difference being that in this there are some relevant Regulations. The judgments in the two cases should be read

together. We will not repeat anything we have said in that case except as far as it is unavoidable.

There are many private hospitals in New Zealand and many of them are members of the Association. For instance there is in evidence a list of 23 surgical hospitals, showing their room rates and theatre fees as at 31 March 1987. These vary widely, as no doubt do the facilities, services and equipment. To take double room rates as an illustration, the list shows at one end of the range Rawhiti with some beds at $190 a day and at the other Ranfurly with some at $71.75 a day. When asked during the argument whether the Corporation regarded the rates shown in the list as reasonable by New Zealand standards, counsel for the Corporation had to say that he did not know. That is because the Corporation has not approached the question of payment by it of hospital treatment costs on that basis.

Instead the Corporation has followed a system of paying what were formerly described as 'maximum' rates - for example, room rates of $151.79 per day for patients under the age of 65 (medical information bulletin 58, August 1987) - and are now described as 'normal' rates (medical information bulletin 62, January 1988). The latter bulletin says that in special circumstances, such as to achieve an earlier return to employment and cessation of earnings related compensation, a higher payment may be warranted. But the figures in the two bulletins are identical. They have

been arrived at by taking into account as a significant factor what the Corporation can afford to pay in the light of the funds available to it. For the reasons given in the Physiotherapists case this approach is invalid unless the Regulations applying to the present case justify a different result.

The history of the present case is that after the issue of bulletin 58 the Association brought proceedings seeking inter alia a declaration that the Corporation was in breach of its statutory duty to pay to persons covered by the Accident Compensation scheme the cost of treatment in a private hospital so far as that cost was reasonable by New Zealand standards. Those proceedings were disposed of by an order made by consent by Quilliam J. on 4 December 1987; there was a memorandum of agreed terms and counsel on both sides were heard. The consent order declared that the defendant's decision published in bulletin 58 setting the maximum amounts payable for private hospital treatment was ultra vires and unlawful; further that decision of the Corporation was set aside.

Thereafter the Corporation published bulletin 62, changing the maximum fees to normal fees, and the Association began fresh proceedings challenging this decision. The Association applied for an interim order restraining the Corporation from acting on the new bulletin. This application came before Quilliam J. and in a judgment

delivered on 9 March 1988 he expressed considerable doubt about whether the argument for the Corporation could be correct but ultimately declined the order sought, taking the view that on balance it was better to preserve the status quo in the meantime. He added that the substantive proceeding ought plainly to be heard as soon as possible. But the Association appealed to this Court from his refusal of interim relief. On the hearing of that appeal on 24 May 1988 the Court suggested that in all the circumstances, including the pendency of the appeal in the Physiotherapists case, consideration should be given to removal of the present case to this Court under s.64 of the Judicature Act 1908. On 25 July 1988 Jeffries J. made an order for removal by consent. It is thus that we have now heard the case. The interim appeal should now be formally dismissed.

Treatment of a person as a patient in a hospital as defined by s.88 of the Social Security Act 1964 is, by s.75(2)(a) of the Accident Compensation Act 1982, one of the kinds of treatment in New Zealand within the scope of the provisions for payment by the Corporation contained in that section. Section 75(1), like some of the other subsections, begins with the words 'Subject to any regulations made under this Act'. Section 120(1)(f) empowers the Governor-General by Order in Council to make regulations for -

> (f) Prescribing the circumstances in which, the extent to which, and the method by which the Corporation shall, in accordance with section 75 of

this Act, pay the cost of treatments and medical certificates in respect of which payments are to be made under that section, and may enter into arrangements and make contributions under that section; and prescribing persons to whom those payments may so be made:

The Regulations notified in the Gazette on 29 April 1983 may conveniently be reproduced in full:

1. Title and commencement - (1) These regulations may be cited as the Accident Compensation (Private Hospital Treatment) Regulations 1982.

(2) These regulations shall come into force on the day after the date of their notification in the Gazette.

2. Interpretation - In these regulations -
"The Act" means the Accident Compensation Act 1972:
"Corporation" means the Accident Compensation Corporation constituted under the Accident Compensation Act 1972:
"Private hospital" means a private hospital licensed under Part V of the Hospitals Act 1957:
"Treatment" includes hospitalisation and any medical, surgical, and anaesthetic charges associated therewith.

3. Payment of cost of treatment - (1) In any case where the Corporation is required to consider a claim for the reasonable cost of treatment of a person as a patient in a private hospital, the Corporation shall have particular regard to the availability of adequate public hospital facilities which could be used within a reasonable time without detriment to the injured person, and, subject to subclause (2) of this regulation, shall decline to meet all or any part of the cost of treatment where it is satisfied that such facilities exist in respect of the whole, or, as the case may be, a part of that treatment.

(2) Where in relation to any case, the Corporation, having regard to -
(a) The emphasis of the Act on the rehabilitation of the injured person:
(b) The overall economics in the administration of the Act and disbursement of public money:

(c) The economics of the particular case:
(d) Public interest, including the desirability of retaining and attracting adequate medical services in the area concerned:
(e) The emergency nature of any treatment required and the location of available facilities:
(f) The convenience of the injured person and his family:
(g) The opinion of the injured person's medical advisors:
(h) Any other factors relevant to the particular case, -

considers that it is equitable to do so, it may pay the whole or any part of the costs referred to in subclause (1) of this regulation.

P.G. MILLEN
Clerk of the Executive Council.

We note that the Regulations are somewhat similar to, although not identical with, a statement of policy in the Corporation's Accident Compensation Medical Handbook, which was considered by Davison C.J. in Attorney-General v. Accident Compensation Commission (High Court, Wellington, A.453/79; judgment 10 February 1982). At that stage there were no relevant regulations. The Chief Justice held that the policy was not valid under the Act alone. He made reference to the possible making of regulations but was of course not concerned with the interpretation of any regulations or the scope of the power to make regulations. His judgment contains nothing directed to the kind of issue about the amount of fees that arises in the present case, to which we now turn.

In his submissions as to the meaning of the Regulations counsel for the Corporation accepted that clause

3(1) should be read as a coherent whole rather than dealing with separate topics; but he contended that the words 'in relation to any case' at the beginning of clause 3(2) relate to every case where the Corporation is required to consider a claim for the reasonable cost of the treatment of a person as a patient in a private hospital. From this he went on to argue that in every such case the Corporation has a discretion and a flexibility in considering the claim and may pay the whole or so much of it as the Corporation sees fit. Among the factors which he contended that the Corporation could take into account is the 'funding position' of the scheme.

The argument is thus another way of putting the proposition that the Corporation may limit its liability to what it can afford to pay. In the Physiotherapists case we have explained that we cannot accept that proposition as being in accordance with s.75 of the parent Act. The question is whether it is nevertheless the true interpretation of the Regulations. If it is, the Association contends that the Regulations are ultra vires. Counsel were agreed, however, that the issue of vires be left over for argument if necessary at a future date.

In our opinion the interpretation put forward for the Association is the preferable and true interpretation of the Regulations. More than one possible interpretation was mentioned initially by Mr Wild in presenting his argument.

We are referring to the one to which he adhered after discussion with the bench. In short this is that the Regulations do not apply to treatment or parts of treatment for which no public hospital faciities are available; but, under the Regulations, for treatment or parts of treatment for which public hospital facilities are available the Corporation has a discretion to pay private hospital costs, and in the event of exercising the discretion must pay on the basis required by s.75 - that is to say, so far as it considers the cost reasonable for it to pay by New Zealand standards.

The reasons why we find that interpretation convincing are as follows. Looked at alone, clause 3(1) lays down a prohibitory rule: namely that if public hospital facilities could be used within a reasonable time without detriment to the injured person the Corporation shall decline to meet private hospital costs. This rule is not concerned at all with cases where public hospital facilities are not so available. If the injured person 'requires' treatment which can only be provided in a private hospital - 'requires' being the word used in s.75(1) - that treatment will fall without further qualification within the obligation to pay imposed by the section itself.

The prohibitory rule is subject, however, to subclause (2), which goes on to permit exceptions to it. Various factors to which the Corporation is to have regard

are listed. For example, rehabilitation is more than the avoidance of detriment. The Corporation could take the view, balancing all relevant factors, that a private hospital alternative had advantages for the rehabilitation of the injured person which justified its use even though public hospital facilities were available. As a hypothetical illustration, better physiotherapy might be available in the private hospital. Then the Corporation could pay for the treatment in the private hospital or for such part of it as the Corporation thought equitable. But any payment would have to be at rates reasonable by New Zealand standards.

The words at the end of clause 3(2) 'it may pay the whole or any part of the costs referred to in subclause (1) of this regulation' thus relate back to 'the whole, or , as the case may be, a part of that treatment' at the end of clause 3(1). The Regulations do not purport to alter the principle in the Act that any payment to be made by the Corporation must be an amount considered by it to be reasonable by New Zealand standards.

It is understandable that the Regulations should so provide. The Act is silent on the circumstances and the extent to which private hospital faciities may be used, at the expense of the Corporation, in preference to available public hospital facilities. Regulations to the effect just outlined fall naturally within the scope of the

regulation-making power in s.120(1)(f). No problem of validity arises - which would be far from the case if the Corporation's interpretation of the Regulations were correct.

Mr Upton stressed the inability of the Corporation, as he suggested it to be, to control whether an injured person goes into a more expensive private hospital rather than a less expensive one. We are not satisfied that any real difficulty need arise. The basic question in terms of the Act is what treatment the injured person 'requires'. The basis of what has to be paid for by the Corporation is the reasonable cost of that treatment. This would seem in principle to rule out extravagance at the cost of the Corporation. In any event if there is any difficulty in this respect it is one of administration, not of the interpretation of the Regulations.

Like the Physiotherapists case, this case does not call for a decision by this Court as to precisely how the Corporation should ascertain what costs or what range of costs are reasonable by New Zealand standards. As in that case, consultation with the providers of the services, through the respondent Association or otherwise, seems the obvious course. The fact is that the Corporation did not attempt to specify costs reasonable by New Zealand standards in bulletin 62. Nor do the Regulations purport to do so. We doubt whether regulations under s.120(1)(f) could validly

do so. What such regulations prescribe has to be 'in accordance with section 75 of this Act'. They cannot derogate from the Corporation's basic obligation under that section. Where regulations fixing rates or maximum amounts are authorised, s.120 expressly says so. See s.120(1)(a) and (h). But no concluded opinion is called for on that question and as the question of vires has not been argued we do no more than express a doubt.

For these reasons we declare that in acting under bulletin 62 the Corporation is in breach of its statutory duty to pay to persons who have cover under the Accident Compensation scheme the cost of required treatment so far as the Corporation considers the amount to be paid by it is reasonable by New Zealand standards. The bulletin is set aside. As agreed by counsel, leave is formally reserved to argue at a later date if necessary the question whether the Regulations or any part of them are ultra vires, and also the question whether individual decisions made pursuant to the bulletin should be set aside. To avoid any misunderstanding we repeat that, on the interpretation of the Regulations accepted in this judgment, there could be no doubt of their validity; an ultra vires question would only arise on a different interpretation or different regulations.

The Association is entitled to costs. Memoranda may be submitted if the parties are unable to agree on the amount.

RB Luster P.

Solicitors:
N.J. Mathers, Wellington, for Appellants
Chief Legal Adviser, Accident Compensation Corporation, Wellington, for Respondent