44/84

SUPREME COURT OF VICTORIA

HELLIER v POULIER

O'Bryan J

7 May 1984

CRIMINAL LAW – MEDICAL PRACTITIONER – CLAIM FOR MEDICAL SERVICES – ITEM 51 – CLAIM FOR PROFESSIONAL ATTENDANCE – MEDICAL PRACTITIONER AND PATIENT NOT FACE-TO-FACE – WHETHER "PROFESSIONAL ATTENDANCE": *HEALTH INSURANCE ACT* 1973 (CWTH), SS3, 38, 10, 19, 129.

P. is a medical practitioner. In 1981 he attended a Home for Aged on a weekly basis. On some occasions, P. physically examined a patient and wrote prescriptions in respect of patients he did not see face-to-face. In relation to the latter patients, P. claimed from the Department of Health a "home visit item 51" in the sum of $13.10 each. Subsequently, P. was charged in that he falsely claimed these fees for professional attendances upon patients. The magistrate upheld a submission of "no case", holding the view that a professional attendance does not require the medical practitioner and patient to be in one another's presence. Upon orders nisi to review—

HELD: Orders absolute.
(1) The expenses incurred by the medical practitioner are in respect of professional attendances on patients at places other than consulting rooms, hospitals or nursing homes.

(2) In the context of the *Health Insurance Act* 1973 (Cwth), the meaning of the expression "professional attendance" involves the act or fact of the medical practitioner's attending upon the patient, that is, being in the presence of or meeting with the patient.

(3) Accordingly, the magistrate was in error in construing "professional attendance" as not requiring the medical practitioner and patient to be in one another's presence.

O'BRYAN J: *[After setting out the facts, the provisions of s129(1) of the* Health Insurance Act *(Cwth) and the grounds of the order nisi, His Honour continued]:* ... **[4]** These cases raise an important point of construction of the Act upon which there is no direct authority. Dr Sundberg of counsel for the applicant submitted that two features of the Act show that "professional attendance" carries the meaning contended for by the applicant. The first feature is s3(4) of the Act which states:

> **[5]** "Unless the contrary intention appears, a reference in this Act to a professional attendance or to an attendance is a reference to an attendance by a medical practitioner on a patient, including an attendance at the medical practitioner's rooms or surgery."

This direction governs the expression "professional attendance" when it is used in the Schedule because the regulations are part of the Act (s133). Dr Sundberg submits, therefore, that the notion that a "professional attendance" may be "at a place" rather than "on a person" is excluded by the plain meaning and obvious purpose of s3(4). This argument is supported, Dr Sundberg contends, if the expression "professional attention" which is defined in s3 of the Act is contrasted with "professional attendance". "Professional attention" means, *inter alia*: "medical or surgical treatment by or under the supervision of a medical practitioner". This definition means, I believe, that the physical presence together of the medical practitioner and a patient is not essential. The expression "professional attention" is used only in s3B(1)(b) of the Act, as far as my reading of the Act reveals, and in that context "professional attention" upon a patient may require no more supervision that that the medical practitioner directs his mind to the carrying on of the patient's treatment. However, it is worth observing that no schedule fee is prescribed in the Schedule for "professional attention" to a patient. Thus, it is contended by Dr Sundberg a distinction is drawn in the Act between "professional attention" by a medical practitioner applying his mind to a patient's treatment and "professional attendance" on a patient.

[6] The distinction between "professional attention" and "professional attendance" is further emphasized Dr Sundberg contends by the dictionary meaning of "attention" and "attendance".

"Attention" is defined firstly, in the *Oxford Dictionary* as: "The action fact or state of attending or giving heed; earnest direction of the mind consideration or regard; the mental faculty of attending" and secondly, in *The Macquarie Dictionary* as: "The act or faculty of attending; concentration of the mind upon an object; observant care". "Attendance" is defined firstly, in the *Oxford Dictionary* as: "The action or condition of attending; the action or fact of being present at a meeting or when summoned" and secondly, in *The Macquarie Dictionary* as: "The act of attending".

The meaning of the expression "professional attendance" in the Act may be determined as a matter of fact and not as a matter of law because the words are non-technical English words not used in an unusual sense. The proper construction of the statute is a matter of law. *Couzens v Brutus* [1972] UKHL 6; [1973] AC 854 at 861; [1972] 2 All ER 1297; [1972] 3 WLR 521; (1972) 136 JP 390; *Franceschini v M & MBW & James McGrath Foundation* ((1980) 57 LGRA 294; 1 PABR 279, Tadgell J, 21.7.80). Unless there is a relevant ambiguity or obscurity in adopting the plain meaning of the expression "professional attendance" in the statute and the regulations I see no reason to depart from the usual meaning. Section 3(4) does not show that the legislature intended the expression to carry an unusual meaning. Nor do I believe that the context requires that some special or particular meaning should be placed upon the expression.

[7] The second feature of the Act upon which Dr Sundberg relies is found in the Schedule. In Part I, items 3 to 35 concern "professional attendance" at consulting rooms for not more than five minutes, items 43 to 66 concern "professional attendance" at a place other than consulting rooms, hospital or nursing home of not more than five minutes, items 69 and 71 concern professional attendance at a hospital or nursing home "when only one patient is seen" and, items 72, 74 and 75 concern professional attendance at a hospital "on a patient" (using the language of s3(4)). Dr Sundberg submits, therefore, that in the context of s3(4) of the Act and the language used in item 51, the legislature clearly intended that the fact of being present with the patient at each "professional attendance" is an essential ingredient of a medical service for which a claim may be made in respect of item 51.

Mr Nettle of counsel submits that under some circumstances a medical service can be rendered notwithstanding that the medical practitioner and patient are not in one another's presence. One circumstance is when a medical practitioner is consulted per telephone, by a patient, another is when a medical practitioner is consulted by another medical practitioner on behalf of a patient and asked for an advisory opinion. When those circumstances occur Mr Nettle submits there is a "professional attendance". Dr Sundberg's answer is to submit correctly, I believe, that in those circumstances the "medical service" of attending or supervising the patient otherwise than by physical presence may be remunerated as a matter of private contract but is not compensable under the Act or the Schedule.

[8] Mr Nettle then relies upon six separate considerations to support his submission that a "professional attendance" may occur without the physical presence together of the medical practitioner and the patient. The first consideration is that the *Health Insurance Act* is remedial legislation which provides universal health cover. Consequently, Mr Nettle submits, any ambiguity in the language is to be resolved so as to give a meaning consistent with the evident purpose of the legislation: *Tickle Industries Pty Ltd v Hann* [1974] HCA 5; (1974) 130 CLR 321; 2 ALR 281; 48 ALJR 149. Mr Nettle argues that when a patient is provided a "medical service" by a medical practitioner without a personal attendance upon the patient as occurred in the present case the expression "medical attendance" in the Schedule should be construed liberally so as to provide a means of recompensing the patient for the service provided.

The assumption that the legislature intended to include claims for medical services performed on a patient otherwise than in the physical presence of the patient is not evident to my mind from a reading of the Act. The medical practitioner's entitlement to receive a fee for a service rendered to a patient without a personal attendance upon the patient depends upon the law of contract. The legislation prescribes the items for which a claim may be made from the Department and unless an ambiguity arises the plain meaning of words used must be given effect to. The plain meaning construction of "professional attendance" does not aid the respondent.

The second consideration is that the general scheme of the Act is to recompense eligible persons for all medical **[9]** expenses incurred in respect of medical services. Mr Nettle draws

attention to s10(1) of the Act which provides:

> "Where, on or after 1 November 1978, medical expenses are incurred by a person ... in respect of a professional service rendered in Australia to an eligible person a Commonwealth medical benefit calculated in accordance with sub-section (2) is payable, subject to and in accordance with this Act in respect of that professional service."

"Professional service" is defined to mean: "(a) a medical service, to which an item relates, being a service that is rendered by or on behalf of a medical practitioner (s3(1))". Medical service is not defined but the scope and ingredients of each claimable medical service is identifiable from the exhaustive list of items specified in the Schedule. It is worth observing that whilst writing a prescription is often associated with a medical service no item fee exists in the Schedule for merely writing a prescription. Consequently, for a "medical expense" to be payable in accordance with the Act not only is the practitioner required to perform a medical service to an eligible person but also the service must be one for which an item fee is payable. In my view, the scheme of the Act is not restricted if the construction proposed by Dr Sundberg is adopted as correct. The scheme does not commit the Department to pay a medical benefit for every medical expense incurred by a person; it is restricted to services "payable subject to and in accordance with the Act".

The third consideration is that the expression "professional attendance" should be given a meaning in the **[10]** context of legislation dealing with medical usage.

I have expressed the opinion that the expression should bear its usual meaning. The usual or accepted meaning of the expression in the context of the Act will reflect medical usage. However, merely because a medical practitioner must always apply his mind to the care of his patient whenever a medical service is performed it does not follow that "professional attendance" in the Act does not require physical presence together of patient and medical practitioner. A case relied upon by Mr Nettle, *Hare v Riley and AMP Society* [1974] VicRp 68; [1974] VR 577, was concerned with a claim for privilege in respect of medical documents and is distinguishable. It cannot be gainsaid that "a doctor may well be applying himself to the care of his patient in the latter's absence" (582) but the point at issue in *Hare's case* was the construction of certain words used in the *Evidence Act* in a very different context.

Mr Nettle submitted that Item 893 in the Schedule covers a situation of "professional attendance" without face to face consultation between medical practitioner and patient to illustrate an extended meaning of professional attendance in medical usage. However, this is not of much assistance to the respondent's argument because the item clearly contemplates that the medical practitioner will be in the presence of the interviewee in the course of the attendance.

The fourth consideration draws attention to distinctions made in the Act between "professional attendance", "consultation" and "medical examination". Mr Nettle submits that whereas a "consultation" includes a "professional attendance" a "professional attendance" contemplates more **[11]** than a "consultation". Mr Nettle relies upon items 3006 to 3033 in the Schedule where the legislature has included a consultation in an attendance at which a particular procedure is performed to draw the distinction. Further, Mr Nettle submits that in s19(1) of the Act a distinction is drawn between a "medical examination" and a "professional attendance". A medical examination, Mr Nettle contends, is only part of a professional attendance.

The matters to which Mr Nettle refers do not, in my opinion, create any ambiguity in the meaning of the expression "professional attendance", nor do they show the legislature intended that a Commonwealth medical benefit entitlement would arise in respect of a professional service otherwise than pursuant to a physical attendance on the patient. I agree with Mr Nettle that a "professional attendance" does not require a medical examination in every [case]. However, I believe that where a professional service is confined to a "consultation", the intention of the legislature is the medical practitioner must personally attend on the patient otherwise a Commonwealth medical benefit entitlement will not he payable.

The fifth consideration is that the expression "professional attendance" is used in the Act in a context which admits the construction relied upon by the respondent. This consideration has been absorbed, I believe, into the second and third considerations dealt with above.

The sixth consideration is that, if an ambiguity exists, the ambiguity should be resolved so as to avoid the strictness of the meaning contended for by the applicant. Mr Nettle relies strongly upon the recent decision of the **[12]** of the High Court – *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297; (1981) 35 ALR 151; (1981) 11 ATR 949; (1981) 55 ALJR 434 – and to passages in the judgment of the Chief Justice Sir Harry Gibbs at 304-5 and in the joint judgment of Mason and Wilson JJ at 320-1. In essence, their Honours decided that in a case of ambiguity the rule of construction requires the court to choose "that which will avoid what it considers to be inconvenience or injustice" (305) or "that which produces the fairer and more convenient operation so long as it conforms to the legislative intention" (321). On the other hand one must also heed the caution sounded by Stephen J at 310: "if literal meaning is to be departed from, it must be clear beyond question both that literal meaning does not give effect to the intention of the legislature and that some departure from literal meaning will fulfil that intent".

I am not persuaded that the usual meaning of the expression "professional attendance" was not intended by the legislature or that the adoption of the usual meaning will produce a result which is contrary to the policy of the Act. Section 10 is a key section to the meaning of "professional attendance". From there one proceeds firstly to the definition of "medical expenses" in s3(1): "medical expenses means an amount payable in respect of a professional service", and secondly, to the definition of "professional service" in s3(1): "a medical service to which an item relates being a service that is rendered by or on behalf of a medical practitioner".

The Schedule items in Part 1 are all concerned with a "professional attendance" which, by s3(4), means "an **[13]** attendance by a medical practitioner on a patient ... " Under the Act the Commonwealth has rendered itself liable to pay a proportion of the fee specified in the Schedule when a medical expense is incurred by a person in respect of a professional service to which an item relates. In the present case the medical expenses allegedly incurred by persons are in respect of professional attendances on a patient at a place other than consulting rooms, hospital or nursing home (item 51). The meaning of the expression "professional attendance" in the context of the Act involves the act or fact of the medical practitioner attending upon the patient, that is, being in the presence of or meeting with the patient. I am unable to find an ambiguity which calls for a departure from the literal meaning. The Act draws a clear distinction between attendance on a patient and attention to a patient, the latter only requiring concentration of the mind upon the patient's treatment.

In my opinion, the learned magistrate was in error in construing the expression "professional attendance" as not requiring the medical practitioner and patient to be in one another's presence. Accordingly, I would uphold both grounds of the orders nisi and make the ten orders nisi absolute with costs. The ten informations will be returned to the Magistrates' Court at Melbourne to be dealt with according to law.
