37/93

SUPREME COURT OF VICTORIA

REDPATH v FORBES & ANOR

Beach J

15 March 1993

CIVIL PROCEEDINGS – CLAIM FOR SERVICES RENDERED – REMEDIAL MASSAGE TREATMENT – REFERRED BY PSYCHIATRIST – WHETHER PHYSIOTHERAPEUTIC SERVICES – WHETHER CLAIM FOR FEES PRECLUDED BY ACT – WHETHER WORK-RELATED INJURY – APPLICATION FOR COMPENSATION SETTLED – WHETHER COMMISSION LIABLE – "IS LIABLE" – WHETHER CLAIM FOR FEES PRECLUDED BY ACT: *PHYSIOTHERAPISTS ACT* 1978, S11; *ACCIDENT COMPENSATION ACT* 1985, S99(10).

1. Where a person was referred by a psychiatrist to a registered nursing sister for remedial massage treatment, the treatment did not properly fall into the category of physiotherapeutic services. In view of this and the nature of the referral, the nursing sister was not precluded by s11 of the *Physiotherapists Act* 1978 from recovering her fees for the services rendered.

2. Where, following the settlement of a claim the Accident Compensation Commission became no longer liable to pay for remedial massage services, and there was no evidence that the treatment was given for a work-related injury, a magistrate was not in error in determining the claim for fees despite the provisions of s99(10) of the *Accident Compensation Act* 1985.
***Cleveland v Goold & Porter Pty Ltd* [1962] VicRp 1; (1962) VR 2, distinguished.**

BEACH J: [1] The respondent to this appeal is a registered nursing sister who provides, amongst other things, remedial massage services to patients referred to her by medical practitioners. The appellant was referred to her by a psychiatrist for remedial massage treatment in respect of a stress-related condition from which the appellant was then suffering. The respondent provided services of that nature to the appellant between January 1989 and October 1990. The total of the respondent's fees in respect of the services was $4,268. Of that sum, $400 was paid directly by the appellant to the respondent. In due course, the appellant made application to the Accident Compensation Commission seeking payment of the balance of the account.

The evidence before me indicates that the appellant did not persist with that application, being advised, apparently by her legal advisers, that the risks of the application failing, presumably on the ground that the treatment was not in respect of a work-related injury, were so high as not to justify prosecuting the application. When the appellant's application came on for hearing before the Tribunal, in consideration of the Commission paying the applicant's costs the application was withdrawn. When that occurred, the respondent herself made application under the *Accident Compensation Act* for payment of the balance of her outstanding fees. Liability was denied by the Accident Compensation Commission again on the basis that the treatment was not in respect of a work-related injury and the respondent was forced to take the matter to the WorkCare Appeal Board. In due course, the Board found in favour of the respondent, determining **[2]** that the full sum of the respondent's account should be paid by the insurer. Thereupon, the Commission appealed to the Accident Compensation Tribunal.

When the matter came before the tribunal, the appeal was settled on the basis of the Commission paying to the respondent one half of the total then outstanding, that one half being the sum of $1,934. In due course, the respondent sued the appellant in the Magistrates' Court at Ballarat seeking to recover the balance then outstanding. In the notice of defence to claim, the appellant relied upon a number of grounds in opposition to the respondent's claim, including allegations that the fees charged by the respondent weren't properly and reasonably incurred and that the respondent had already recovered reasonable remuneration for the services she had provided to the appellant. However, at the hearing of the proceeding before the magistrate, only two grounds of defence were relied upon. The first ground was that the Magistrates' Court had no jurisdiction to entertain the matter by virtue of the provisions of section 99(10) of the *Accident Compensation Act* 1985, which reads:

> "No action, suit or other proceeding against a worker or the legal personal representative of the worker or a dependant of a worker for the payment or recovery of any costs which the Commission, a self insurer or an employer is liable to pay under this section shall be entertained by any Court".

The second ground of defence relied upon was that the respondent was not entitled to recover her fees by reason of the provisions of section 11(1) of the *Physiotherapists Act* 1978, which reads:

> "Subject to sub-section (2), a person who is not registered under this Act is not entitled to recover in any court any fee or charge for the performance of physiotherapy or for any advice **[3]** relating to physiotherapy".

It was not disputed before the Magistrates' Court that the respondent is not licensed under the Act. No evidence was called before the Magistrate at the hearing of the respondent's claim. That appears from paragraph 8 of the affidavit of Douglas William Parker, sworn 23 November 1992, which reads;

> "Ultimately, the case proceeded before His Worship solely on submissions from the Bar table and no evidence was called. I advised His Worship that it had been agreed by counsel that there were only two issues for the court to determine. The quantum had been agreed in the sum of $1,934, and the defendant agreed that the work had been done in good faith and for a fair price. The two remaining issues which needed to be determined were as follows:–
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> 1. Whether the Magistrates' Court had jurisdiction to hear the plaintiff's action or whether, due to the provisions of the *Accident Compensation Act* 1985, it had no jurisdiction to hear the matter; and
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> 2. If the court had jurisdiction, was a defence open to the defendant due to the provisions of the *Physiotherapists Act* 1978".

The magistrate, having heard submissions by counsel for the parties in relation to the matter, found in favour of the respondent on both grounds and entered judgment in her favour in respect of the sum of $1,934, together with $48.96 interest and costs of $1,353. The appellant now appeals to this court on a number of grounds, but when they are boiled down, they really come to two in number, namely, that the magistrate had no jurisdiction to hear the complaint by virtue of the provisions of sub-section 99(10) and, further, that the respondent was precluded from recovering her fees by virtue of the provisions of section 11(1).

In my opinion, there was no evidence before the **[4]** magistrate to the effect that the services performed by the respondent were physiotherapy services. The services consisted of remedial massage treatment, and in my opinion they do not properly fall into the category of physiotherapeutic services. I consider that when one is talking of physiotherapy, one is talking of the treatment of injuries, bodily disease or disabilities by means of physical remedies. Here, the treatment was not in respect of any physical injuries suffered by the appellant; it was in respect of stress-related symptoms from which she was suffering.

In any event, I consider it was open to the magistrate to find, as he in fact did, that the respondent was performing the services under the instructions of the psychiatrist who had referred the appellant to the respondent, and, in that situation, was able to take advantage of the provisions of sub-section 2(b) of section 11 of the *Physiotherapists Act*. Insofar as that aspect of the appeal is concerned, I can find no error on the part of the magistrate and those grounds must fail. During the course of the hearing before me today, there has been a deal of discussion as to the actual agreement which was entered into by the parties relating to the problems suffered by the appellant and in respect of which the respondent gave her treatment. The respondent agrees that it was conceded on her behalf that the appellant had suffered a physical injury, a work-related physical injury in 1987. She also agrees it was conceded on her behalf that the therapy treatment she administered to the appellant fell within the definition of "medical services" in section 5(1) of the *Accident Compensation Act*: however, the respondent denies the **[5]** assertion that she agreed that the therapeutical massage treatment she gave the appellant was, at least in part, referable to the 1987 injury.

If there was no agreement in relation to the issue whether the treatment was in respect of a work-related injury, then to avail herself of the provisions of sub-section (10), the appellant

would have to adduce evidence to that effect. That, of course, was not done. What was said by counsel on behalf of the appellant was that if one had regard to the content of paragraphs 19, 22 and 28 of the Parker's affidavit, the clear inference to be drawn from those paragraphs is that there was such an agreement between the parties.

I am not satisfied that that was the case; certainly not on the material before me. It would seem to me, having regard to the dealings between the parties as outlined during the course of submissions and as set out in the various affidavits, that one of the very things in dispute in this whole matter was the question as to whether the complaint suffered by the appellant in respect of which she received the treatment, was a work-related injury. In the absence of evidence to that effect, the grounds relating to sub-section 99(1) must also fail. But let me assume for the moment that there was that concession in relation to the matter. When the case came before the magistrate, the fact is that there was then no liability on the Commission because its liability had been finally determined as between the Commission and the appellant when the appellant withdrew her application to the Tribunal and as between the Commission and the respondent when the Commission's appeal **[6]** to the tribunal was settled. That put an end to any liability the Commission then had in respect of the treatment given to the appellant by the respondent.

It was argued by counsel for the appellant based on a passage in the judgment of Mr Justice Sholl in *Cleveland v Goold and Porter Pty Ltd* [1962] VicRp 1; (1962) VR 2 at p17 that that was not so; that the words "is liable" in sub-section 99(10) of the Act are the equivalent of "has become liable" as his Honour so held in that case. The facts in *Cleveland's case* were quite different from the facts in the present case. There, the court was dealing with the provisions of section 26(10) of the *Workers Compensation Act* 1958. In that case, there had been no settlement between the injured worker or the hospital rendering the services and the employer in respect of those services. There was still a liability upon the employer in respect of the services in question. That is not the situation in the present case. Following settlement, the Commission's appeal to the tribunal, there is no longer any liability attaching to the Commission in respect of the services provided by the respondent.

In my opinion, the appellant's appeal to this court must fail. The order of the court is that the appeal be dismissed with costs to be taxed and paid by the appellant.

APPEARANCES: For the appellant/defendant Redpath: Mr J Noonan, counsel. Ronald Gaines & Co, solicitors. For the respondent/plaintiff (Forbes): Mrs JE Forbes (in person).
