ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES) OR IDENTIFYING PARTICULARS OF RESPONDENT UNTIL THE FINAL DISPOSITION OF APPEAL

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2017-419-369

[2018] NZHC 2531

UNDER	The Health Practitioners Competence Assurance Act 2003
IN THE MATTER	An appeal to the High Court pursuant to section 106(3) of the Health Practitioners Competence Assurance Act 2003
BETWEEN	PROFESSIONAL CONDUCT COMMITTEE OF THE PHYSIOTHERAPY BOARD Appellant
AND	R Respondent

Hearing: 5 June 2018

Appearances: J Coates and C Deans for the PCC
D McGill and B Zagni for the Respondent

Judgment: 27 September 2018

JUDGMENT OF POWELL J

This judgment was delivered by me on 27 September at 3.30 pm pursuant to R 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors/Counsel:
Claro, Wellington
Duncan Cotterill, Auckland

[1] The appellant, the Professional Conduct Committee of the Physiotherapy Board ("PCC") has appealed a decision of the Health Practitioners Disciplinary Tribunal ("the Tribunal") dated 2 November 2017 ("the liability decision").[1] The PCC laid a charge of professional misconduct against the respondent. The Tribunal found that while the respondent had breached his professional obligations:[2]

> … the [respondent's] misconduct is not sufficiently serious that having regard to [the Tribunal's] responsibilities to the public and profession it is necessary … to impose a disciplinary sanction.

[2] The PCC argues it is not clear from the liability decision whether the Tribunal in fact made a finding of misconduct but elected not to impose a penalty or if it did not formally find the charge proved because it was not sufficiently serious. In any event the PCC argues that when the evidence adduced before the Tribunal is considered in its entirety the inescapable conclusion is that not only did the respondent breach his professional obligations to both the public and the profession, but those breaches were sufficiently serious to require disciplinary sanction under s 101 of the Health Practitioners Competence Assurance Act 2003 ("the Act"). In contrast the respondent argues that all relevant matters were appropriately considered and addressed by the Tribunal.

[3] There is no dispute that this appeal is by way of rehearing. This means that I am required to make my own assessment of the merits of the case with the consequence that if I reach a different conclusion to that reached by the Tribunal, then the decision of the Tribunal is wrong.[3]

[4] Following the liability decision the Tribunal declined to order permanent name suppression for the respondent ("the name suppression decision").[4] The respondent has appealed this decision and it was heard in conjunction with the appeal against the

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1 *Professional Conduct Committee of the Physiotherapy Board v R* Health and Practitioners Disciplinary Tribunal 930/HP17/392P, 2 November 2017 [Liability Decision].

2 At [28].

3 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5] and [16] and *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

4 *Professional Conduct Committee of the Physiotherapy Board v R* Health and Practitioners Disciplinary Tribunal 945/PHYS17/392P, 25 January 2018 [Name Suppression Decision].

liability decision. Because however the considerations relevant to the determination of name suppression stand to be affected by the conclusions reached on the liability decision, consideration of the name suppression appeal must necessarily await the outcome of the appeal against the liability decision.

Legal Principles

[5] There is no dispute on the relevant legal principles with regard to the basis upon which a physiotherapist like the respondent may be disciplined.

[6] Section 100 of the Act relevantly provides:

> **100 Grounds on which health practitioner may be disciplined**
>
> (1) The Tribunal may make any 1 or more of the orders authorised by section 101 if, after conducting a hearing on a charge laid under section 91 against a health practitioner, it makes 1 or more findings that—
>
> (a) the practitioner has been guilty of professional misconduct because of any act or omission that, in the judgment of the Tribunal, amounts to malpractice or negligence in relation to the scope of practice in respect of which the practitioner was registered at the time that the conduct occurred; or
>
> (b) the practitioner has been guilty of professional misconduct because of any act or omission that, in the judgment of the Tribunal, has brought or was likely to bring discredit to the profession that the health practitioner practised at the time that the conduct occurred …

[7] The test required to apply those provisions is well established and was recently restated by Gendall J in *Cole v Professional Conduct Committee of the Nursing Council of New Zealand:*[5]

> [T]he Tribunal was required … to adopt a two-step inquiry to determine whether the charge of professional misconduct had been made out:[6]
>
> (a) The first step required an objective analysis of whether or not the practitioner's conduct could be reasonably regarded as comprising malpractice, negligence or having brought discredit to the nursing profession; and

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5 *Cole v Professional Conduct Committee of the Nursing Council of New Zealand* [2017] NZHC 1178 at [37].

6 *G v Director of Proceedings* HC Auckland CIV-2009-404-951, 5 March 2010 at [32].

(b) The second step required the Tribunal to be satisfied that the practitioner's conduct warrants a disciplinary sanction for the purposes of protecting the public and/ or maintaining professional standards.

[8] In this case there is no dispute that the first part of the test has been satisfied. The respondent does not dispute the conclusion of the Tribunal in the liability decision to this effect. However as Mr Coates for the PCC submitted the Tribunal was not explicit as to whether the respondent's conduct amounted to malpractice, negligence or whether he brought discredit to the physiotherapy profession. These concepts were also discussed in *Cole*. With regard to the concepts of malpractice and negligence Gendall J noted:[7]

> Section 100(1)(a) of the Act, in describing the first ground for professional misconduct, refers to "any act or omission that, in the judgment of the Tribunal, amounts to malpractice or negligence…" The courts have referred to the definition of "malpractice" as it is defined in the Collins English Dictionary (2nd ed) as:
>
> > immoral, illegal or unethical conduct or neglect of professional duties.
>
> Similarly, in the Concise Oxford English Dictionary (Eleventh edition 2004) "malpractice" is defined as:
>
> > improper, illegal or negligent professional behaviour.
>
> And, a finding of "negligence" requires the Tribunal to determine:
>
> > Whether or not, in the Tribunal's judgment, the practitioner's act or omissions fall below the standards reasonably expected of a health practitioner in the circumstances of the person appearing before the Tribunal. Whether or not there has been a breach of the appropriate standard is measured against the standard of a reasonable body of the practitioner's peers.

[9] The leading statement with regard to bringing the profession into disrepute is the statement of Warwick Gendall J in *Collie v Nursing Council of New Zealand*, cited in *Cole*, where His Honour stated:[8]

> To discredit is to bring harm to the repute or reputation of the profession. The standard must be an objective standard for the question to be asked by the Council being whether reasonable members of the public, informed and with knowledge of all the factual circumstances could reasonably conclude that the reputation and good standing of the nursing profession was lowered by the behaviour of the nurse concerned.

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7 At [41] and [42] (footnotes omitted).

8 *Collie v Nursing Council of New Zealand* [2001] NZAR 74 (HC) at [28].

[10] As indicated, the primary area of contention in the present appeal lies with the second part of the test, as to whether the Tribunal should have determined that a disciplinary sanction be imposed on the respondent. Both counsel acknowledged that unless the second part of the test is established a charge of professional misconduct is not made out. As Courtney J held in *Martin v Director of Proceedings*:[9]

> [I]t cannot be that every departure from accepted professional standards or every unwise or immoral act by a health professional in his or her personal life should amount to professional misconduct for the purpose of s 100(1). The principal purpose of the Act is to protect the health and safety of members of the public. That purpose does not require a disciplinary response to the minor human errors that inevitably occur in professional practice nor the human transgressions that health professionals might commit in their personal lives. The need for a threshold to distinguish between this type of conduct and conduct that warrants a disciplinary response therefore exists under the current scheme as much as it did under the previous schemes.

[11] Simon France J made similar comments in *Vatsyayann v Professional Conduct Committee,* finding the breach must be of sufficient significance to merit recording a finding of professional misconduct against the practitioner.[10]

The liability decision

[12] The liability decision arose out of a relationship between the respondent and the complainant that began in December 2015 and ended in February 2016. After providing treatment to the complainant's daughter in November and December 2015, the respondent commenced treating the complainant for a haematoma on her calf. The first treatment on 16 December, the same day as the complainant's daughter's final treatment, and was followed by two further treatments on 29 and 31 December 2015. Although the complainant had no further treatment following 31 December, they remained in contact for over a month.

[13] Their contact ended in mid-February 2016 and following a complaint made in July 2016 an investigation took place. The respondent was charged with professional misconduct for behaving inappropriately towards, and/or entering into an

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9 *Martin v Director of Proceedings* [2010] NZAR 333 (HC) at [23].

10 *Vatsyayann v Professional Conduct Committee* HC Wellington CIV-2009-485-259, 14 August 2009, at [8].

inappropriate relationship with, the complainant, who was a patient and/or former patient and who was the mother of a former patient, by:

(a) on 29 December 2015, after providing the complainant with physiotherapy services, telephoning her and inviting her out for coffee;

(b) on 31 December 2015, when she was attending for physiotherapy treatment, telling the complainant that she was "in for a treat", and giving her a full body massage when she had attended for treatment for a calf injury;

(c) on 31 December 2015, after providing her with physiotherapy services, having the complainant over to his house at his invitation;

(d) between, in or around, January and February 2016, having the complainant over to his house on two occasions;

(e) hugging the complainant;

(f) in or around January 2016, kissing the complainant; and

(g) between 29 December 2015 and 21 February 2016, engaging in inappropriate and/or sexual conversations by text with the complainant.

[14] In the liability decision the Tribunal confirmed there was little dispute over the particulars of what had occurred. The respondent primarily challenged the events of 31 December 2015. He disputed whether he had said that the complainant was "in for a treat" or whether he simply told her he would "treat her back". The respondent accepted that he had provided massage treatment to the complainant up to the complainant's shoulder blade despite the clinical records completed by the respondent recording only that he was providing treatment in respect of her calf knee area, but he disputed this amounted to a "full body massage".

[15] The respondent also questioned whether the complainant had visited his house after the treatment on 31 December 2015. He was somewhat equivocal in both his

brief of evidence and during cross-examination, stating he did not believe that had been the case but could not "be absolutely sure from two years ago". The respondent believed the first time he and the complainant had met outside the physiotherapy clinic was in fact the next day on 1 January 2016 at a café, an event the complainant also accepted had occurred, and which was supported by text records. Overall the respondent accepted that in addition to meeting the complainant at a café he had met with her at his home on three other occasions in January and February 2016.

[16] Although the liability decision detailed the evidence of both the complainant and respondent, the Tribunal did not make any final determination on the factual matters in dispute. Instead the Tribunal commented:[11]

> If it were necessary for the Tribunal to resolve these differences of evidence, we would be inclined to prefer the [respondent's] evidence. That is not to say that we think that [the complainant] was attempting to mislead us in any way. It is simply that, judge on the *Rabih* factors, to which both counsel referred in submissions, our assessment is that the [respondent's] evidence was more reliable. It is unnecessary for us to say anything more than that however, because, in the end, it does not appear to the Tribunal to be necessary definitively to address all of those points of difference. For a start, all are matters in respect of which a witness revisiting events two years later may make an honest mistake. Moreover, the [respondent] accepts that actively seeking to develop a personal relationship with a patient or someone who has recently ceased to be a patient was, at the very least, unwise.

[17] Having set out the legal principles including the two-stage test, the Tribunal reached its conclusion on the respondent's liability in the following terms:[12]

> In the Tribunal's judgement, there is no doubt that the [respondent] in this case has breached those obligations. He and [the complainant] were in a conventional professional relationship. He treated her on three occasions between the 16th and 31st of December 2015. Prior to that, he had come into contact with her in his professional capacity when he was treating her daughter. This is an aspect of the case which we regard as important because it meant that the professional relationship, on any view, commenced even before he assumed responsibility for [the complainant] herself as a patient. Against that background, for a practitioner actively to seek and embark upon a social relationship of the type involved in this case, was plainly a breach of his professional responsibilities.
>
> Having said that, the [respondent's] conduct, and the relationship which appears to have developed between him and [the complainant], lacked any of the unsavoury characteristics that typify the cases in which physiotherapists

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11 *Liability Decision*, above n 1, at [20].
12 At [25] – [28].

and other comparable professional groups have been found guilty of misconduct in such circumstances:

- The [respondent] and [complainant] were both mature adults of a similar age;

- Whilst it is fair to say that the [respondent] was probably the initiator of the extra professional relationship, there is no sense in which he was acting in a predatory way so far as the Tribunal is able to ascertain;

- All of the evidence points to a relationship of equals. Certainly [complainant]was not backward in coming forward in making it clear what she expected of their relationship;

- The exchanges between the parties, which, as such exchanges invariably do in print, appear rather puerile on occasions, and include some suggestive banter, were not bullying or unpleasant in any way;

- To the extent that there were suggestive exchanges, these appear to have been reciprocated;

- Any power imbalance, which must be assumed having regard to the pre-existing professional relationship, does not reverberate in the subsequent dealings between the parties. On the few occasions when [complainant] obviously thought the [respondent] was over-stepping the mark, she told him so in no uncertain terms, and he responded meekly.

All in all, the Tribunal's perception is that, until February 2016, when [the complainant] decided to end the friendship, and did so, this appears to have been a friendship of equals, which both parties welcomed and enjoyed. Indeed, [the complainant] said as much in evidence.

In those circumstances, the conclusion that the Tribunal has reached is that this is a case in which the PCC has been able to establish misconduct in the form of a breach of the relevant professional rules and in terms of section 100(1)(a) and section 100(1)(b), but the [respondent's] misconduct is not sufficiently serious that, having regard to our responsibilities to the public and profession, it is necessary for us to impose a disciplinary sanction.

The name suppression decision

[18] In seeking name suppression one of the grounds advanced by the respondent was that he had not been found guilty of professional misconduct. As a result in the name suppression decision the Tribunal made a number of comments as to what had been decided in the liability decision. In particular the Tribunal confirmed "to the extent that the [PCC] had established the charge of misconduct, the [respondent's]

conduct was not sufficiently serious to justify the imposition of a penalty, or, in other words, did not meet the threshold for the imposition of a penalty."[13]

[19] Responding to the submission that suppression should be granted because the respondent had been found not guilty of misconduct, the Tribunal observed:[14]

> The first ground rather misstates the position. The Tribunal concluded that the PCC had made out the charge, but concluded that the practitioner's misconduct was not sufficiently serious to justify the imposition of a professional disciplinary penalty.

[20] In consequence the Tribunal went on to state:[15]

> … we do not think that this is a case in which the PCC should be regarded as having failed to make out the charge. The contest between the parties as to the factual situation was around the margins. The Tribunal concluded that the PCC had established that the Practitioner had breached his professional obligations, and, to that extent, could be said to be guilty of misconduct largely on the basis of uncontested facts. The real issue in the case was the seriousness of that misconduct, the Tribunal concluding that it was insufficiently seriousness to justify the imposition of a penalty. In short we do not think that whether the PCC was successful in establishing misconduct or not is an especially important consideration in this case.

The respondent's position

[21] Mr McGill acknowledged the language used by the Tribunal in its name suppression decision was somewhat confusing but submitted it did not affect the nature of the liability decision which must stand on its own. In Mr McGill's submission it was clear that the effect of the liability decision was that a charge of professional misconduct had not been established as the Tribunal "did not find the two stage test for addressing professional misconduct was made out, and accordingly did not sanction [the respondent]".

[22] Mr McGill further submitted the Tribunal's decision was correct, in particular that the Tribunal had carefully considered the evidence before it in applying the threshold test to the point it could conclude that although the respondent was in breach of his professional obligations, the charge was not sufficiently serious so as to require

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13 *Name Suppression Decision*, above n 4, at [1].
14 At [13].
15 At [16].

a disciplinary sanction. That led to the Tribunal's conclusion the charge was not made out.

Discussion and Analysis

[23] I begin my analysis by noting once again that all parties are agreed that the first part of the liability test was satisfied; the respondent had breached his professional obligations. Although the Tribunal did not state whether malpractice, negligence and/or bringing the physiotherapy profession into disrepute had specifically been established, the fact the Tribunal considered it was not necessary to resolve the evidential matters in dispute would suggest that all three were present. Such a conclusion is consistent with my own consideration of the evidence in accordance with the tests set out earlier. In particular the respondent in his evidence was quite frank in accepting that he did not fully understand as he should have his professional obligations with regard to social contact with the complainant in a manner that would clearly meet the definitions of malpractice and negligence, and that by falling short of those standards he brought the physiotherapy profession into disrepute.

Did the Tribunal find a charge of professional misconduct was established?

[24] The first issue this Court is required to determine is the effect of the Tribunal's decision as to whether a charge of professional misconduct was found to be established or not, having regard to the two stage test and the Tribunal's findings in both the liability and name suppression decisions. As both counsel submitted, the comments in the name suppression decision in particular are confusing and tend to suggest the Tribunal considered it had made a finding of professional misconduct but exercised a residual discretion not to impose a penalty under s 101. As Mr McGill submitted however, the name suppression decision cannot alter what was in fact determined in the liability decision. While less than clear, I note that the Tribunal did set out the correct two stage test at [20] of the liability decision and subsequent paragraphs reveal the second part of the test was the focus of the Tribunal's deliberations. I am therefore satisfied the Tribunal did reach a conclusion that a charge of professional misconduct against the respondent was not established because the second part of the test was not satisfied.

Did the Tribunal correctly conduct the second stage analysis?

[25] The primary issue is therefore whether the Tribunal was correct in concluding that the second part of the test had not been established; that the respondent's misconduct was not sufficiently serious for a disciplinary sanction to be imposed.

[26] As the relationship was not ultimately sexual there can be no doubt the respondent's conduct was not absolutely prescribed by the relevant professional rules applicable in this case: the Aotearoa New Zealand Physiotherapy Code of Ethics and Professional Conduct ("Code of Ethics") and the Physiotherapy New Zealand "Position Statement: Clear Sexual Boundaries in the Patient-Physiotherapist Relationship" ("Position Statement").

[27] Apart from specific guidance on sexual relationships, the Code of Ethics contains only broad guidance including that a physiotherapist must:

> 1.2 behave in a respectful manner towards their patient/clients as well as their whanau and family.
>
> …
>
> 2.5 clearly inform patients/clients of the purpose and nature of physiotherapy intervention to enable all patients/clients to make an informed choice.
>
> …
>
> 2.9 not exploit any patient/client whether physically, sexually, emotionally, or financially. Sexual contact of any kind with patients/clients is unacceptable.
>
> 2.10 establish and maintain appropriate professional boundaries with patients/clients and their whanau and families.
>
> …
>
> 4.5 feel free to refuse to treat a patient/client if they have good reason for doing so, and should inform the patient/client of alternative options of care, and where appropriate refer to another practitioner.
>
> …
>
> 10.2 take particular care to uphold the values within this code when using electronic communication and social networking sites.

[28] Likewise in the position statement, relationships other than sexual ones can result in the breach of professional boundaries:

> 3. **The abuse of professional boundaries is not restricted to sexual relationships but may include any conduct which crosses professional boundaries or may be reasonably construed by the patient as having that purpose …**
>
> …
>
> 10. Particular care must be taken to preserve the boundaries in the professional relationship which can be broken in an insidious way. Although the following actions are not necessarily transgressions, they are warning signals which should alert a physiotherapist that the boundaries being being blurred. They include:
>
> - Extending or accepting personal social invitations …
>
> - Sharing of information not needed for the professional relationship e.g. cell phone numbers, access to personal Facebook pages
>
> …
>
> - Giving inappropriate special status to the patient e.g. appointments at odd hours especially when other staff are unlikely to be present
>
> - Stating an attraction to the patient
>
> - Confiding in a patient about the physiotherapist's personal problems
>
> …
>
> 11. Prohibited behaviour includes actions which inevitably break through professional boundaries. These include:
>
> - The physiotherapist acting on feelings of sexual attraction towards a patient
>
> …
>
> If you recognize your own behaviour in any of the above point or you feel attracted to a patient, ask for help and advice from a respected peer who can help you to decide the appropriate and ethical course of action. It may be appropriate to organize the transfer of the patients care to another physiotherapist.
>
> [Emphasis added]

[29] With particular reference to these considerations, as Mr Coates has submitted, there were a number of serious features of the respondent's conduct, the majority of which were not discussed by the Tribunal in its liability decision:

(a) The respondent developed a personal/emotional connection with the complainant while he was treating her daughter over a period of several weeks while the complainant was present. The three treatments provided by the respondent to the complainant must be seen in this wider context; it was in the course of this broader professional relationship that a range of sensitive information was initially exchanged.

(b) Instead of the respondent discussing his growing feelings towards the complainant with a colleague or supervisor he obtained the complainant's contact details from the clinic records following her treatment on 29 December, and then rang her from his personal mobile. Whether or not this call was to provide information relating to her daughter's treatment, he went on to initiate social contact with the complainant, and the provision of his mobile number facilitated the beginning of ongoing phone and text communications between the two, including between the treatment on 29 December and the complainant's third and final treatment on 31 December.

(c) At the 31 December appointment the respondent provided the complainant with "massage treatment" up to at least the level of the complainant's shoulder blades, treatment which required her to partially undress. While the Tribunal concluded the treatment itself was not inappropriate the complainant's medical records completed by the respondent recorded only that the complainant had received treatment to her calf/knee area. The massage treatment was not mentioned at all.

(d) Whether or not social contact between the respondent and complainant took place at the respondent's house immediately after the 31 December treatment, the respondent and the complainant met the day

after the second treatment on 1 January after a further exchange of texts and phone calls on the evening of 31 December and the morning of 1 January.

(e) Until the relationship ended on 16 February, the respondent acknowledged he met the complainant on a total of four occasions, and that the relationship included hugging, romantic kissing on one occasion, and inappropriate texting.

(f) The respondent initially accepted the complainant's decision to end the relationship, but he subsequently texted the complainant to advise:

> Your [sic] a dick you should have just told me to back off. It's been a long time since I had a decent female to chat and spend time with. Now I feel like a knob and totally did not mean to ruin anything.

(g) The respondent sent Facebook friend requests on two occasions after the relationship had ended.

[30] In concluding that the threshold for imposing disciplinary sanctions under s 101 of the Act had been met (see [17] above), the Tribunal did not address the concerns raised by this conduct. While nothing turns on the difference in age (the complainant was in fact 10 years older than the respondent), as Mr Coates has submitted the Tribunal's comments that: the relationship lacked "unsavoury characteristics", with the respondent not acting in a "predatory way"; it was a "relationship of equals"; the text exchanges were "not bullying or unpleasant in any way" and were "reciprocated"; and "any power imbalance … does not reverberate in the subsequent exchanges between the parties" are difficult to understand having regard to the evidence and in particular the key aspects summarised above. As Mr Coates observed in the context of a professional medical relationship, the starting point is that a professional boundary is required because the patient relationship is not inherently one of equality. This is, as noted, spelt out in both the Code of Ethics and Position Statement applicable to all physiotherapists. Those documents make it clear that reciprocation is not generally a bar to a finding of professional misconduct nor are questions of consent generally relevant to liability (although they may be in the determination of an appropriate

penalty). Likewise predatory behaviour, bullying or unpleasantness are not required for the threshold test to be met. Instead the behaviour detailed in [29] above, while clearly substantially less serious than behaviour considered in the range of cases referred to by counsel,[16] nonetheless raises serious issues, involving as it does social conduct commencing in the course of the physiotherapist/patient relationship and continuing for some two months thereafter. While it involved limited physical contact, the contact was aggravated by the respondent's lack of awareness of his professional obligations in initiating the relationship, as well as the shortcomings in his record keeping of the treatment provided. Furthermore the relationship included substantial use of inappropriate texting in a context where the respondent had obtained significant sensitive information from and about the complainant in the course of the professional relationship, and which gave him the opportunity to undertake the relationship.

[31] In these circumstances I am satisfied the respondent's conduct was sufficiently serious to warrant disciplinary sanctions or penalties. It is after all a threshold rather than a substantive hurdle, and it is not necessary to show that the respondent's conduct was as serious as that of others that have received penalties. I note in particular that in addition to protecting the public and punishing the practitioner, a penalty can provide clarity to the profession and assist the practitioner through the imposition of conditions on practice. Taking these matters together, I conclude that contrary to the liability decision the second part of the test for liability, the threshold requirement, was indeed satisfied. As a result the appeal in respect of the liability decision must be allowed.

Decision

[32] The appeal is allowed. The respondent is found guilty of a charge of professional misconduct.

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16 *Director of Proceedings v Allen* Health Practitioners Disciplinary Tribunal 27/OT05/14D, 23 December 2005; *Cole v Professional Conduct Committee of the Nursing Council of New Zealand*, above n 5; *Professional Conduct Committee of the Psychologists Board of New Zealand v Schubert* Health Practitioners Disciplinary Tribunal 671/Psy14/288P, 23 December 2014; *Professional Conduct Committee of the Physiotherapy Board v Singleton* Health Practitioners Disciplinary Tribunal 373PHYS10/158P, 16 May 2011.

[33] I discussed with the parties at the hearing how penalty should be addressed in the event of reaching this outcome, given no hearing on penalty proceeded in the Tribunal and the Tribunal that heard the charge can no longer be reconstituted. It was agreed it would be appropriate for this Court to undertake the hearing as to penalty. The Registry is accordingly directed to convene a telephone conference within three weeks of the date of this judgment in order to determine arrangements for that penalty hearing to take place.

[34] Given the outcome of the appeal on the liability decision the considerations relevant to the determination of the appeal on the name suppression decision have changed. In the circumstances the name suppression appeal is adjourned until the penalty hearing has taken place. In the meantime the interim name suppression orders are to remain in force, and costs arising from the present appeal are reserved.

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Powell J