

Reference No. HRRT 026/2012

UNDER SECTION 50 OF THE HEALTH AND
DISABILITY COMMISSIONER ACT 1994

BETWEEN DIRECTOR OF PROCEEDINGS

PLAINTIFF

AND RUTH NELSON

DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson
Ms K Anderson, Member
Ms WV Gilchrist, Member

REPRESENTATION:

Mr A Martin, Director of Proceedings, Plaintiff and Ms H Cook
Mr AC Beck for defendant

DATE OF HEARING: 26, 27, 28, 29 and 30 August 2013

DATE OF DECISION: 30 October 2013

DECISION OF TRIBUNAL

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Introduction

[1] Mrs Nelson is an iridologist and natural health practitioner of more than 35 years experience. Her practice is situated at Te Horo. In the 17 month period from February 2008 to June 2009 she treated a tumour on the head of Mrs YM Maine. When on 22 June 2009 Mrs Maine was admitted to hospital the tumour was diagnosed as cancerous. It had destroyed a large area of scalp and underlying skull down to the pulsating dura. Mrs Maine underwent surgery on 27 July 2009 but eight months later the cancer recurred and she died from the disease on 25 June 2010.

[2] In these proceedings the Director alleges that, as a health care provider, Mrs Nelson breached numerous provisions of the Code of Health and Disability Services Consumers' Rights (the Code of Rights). The primary issue in these proceedings is whether the Director has satisfied the Tribunal, to the civil standard, that the alleged breaches of the Code of Rights as particularised in the statement of claim have been established on the evidence.

[3] Mrs Maine passed away before these proceedings were commenced and the Tribunal has had to reach a decision without the benefit of hearing from her. This has led to the admission of an unusual amount of hearsay evidence and Mr Beck, on more than one occasion, has expressed concern at the potential prejudice to Mrs Nelson by reason of her not having opportunity to challenge her principal accuser. In particular, the Tribunal has been reminded of the dangers of admitting into evidence two items broadcast by TV3 and TVNZ respectively in which Mrs Maine was interviewed prior to her death. In both interviews Mrs Maine gave an untested account of her perception of her relationship with Mrs Nelson and an equally untested account of what Mrs Nelson allegedly said to her about the treatment. As will be seen we have taken Mr Beck's submissions into account when arriving at our factual findings.

[4] While the witnesses for the Director and for Mrs Nelson are agreed on limited issues, they gave strikingly different accounts regarding almost every aspect of Mrs Maine's interactions with Mrs Nelson.

CHRONOLOGY

[5] To assist navigation of these differences a chronology follows. We have endeavoured, as far as possible, to provide a neutral narrative.

Chronology

1970	Mrs Maine found with a lesion or cyst the size of a large pea on her head. GP consulted. He diagnosed the lesion as a harmless sebaceous cyst.
1990	Mrs Maine consults a different GP. The cyst was now 2 cm x 2 cm. The GP suggests removal of the cyst. Mrs Maine declines as she is looking after a disabled daughter.
2001	Mrs Maine begins to experience sinus and middle ear problems. Consults her GP six times for assistance. Mrs Maine also sees two specialists. She then seeks iridology treatment from Mrs Nelson for her sinus and middle ear problems.
2001-2008	Mrs Maine sees Mrs Nelson every three months for iridology treatment.

- 2006-2007 The cyst changes shape and nature and grows in size. It stings in the wind. Mrs Maine treats it herself with Comveta honey.
- 2008 Mrs Carla Taylor (daughter) measures the cyst. It is now 8 cm wide and showing signs of infection. Mrs Taylor suggests that Mrs Maine see a doctor. Mrs Maine defers in favour of keeping a pre-arranged iridology appointment with Mrs Nelson.
- February 2008 Mrs Maine shows Mrs Nelson the cyst. Mrs Nelson agrees to clean it for three months.
- March 2008 Mrs Nelson cleans and dresses the cyst every two to three days. Signs of improvement.
- April 2008 Treatment frequency increases to daily.
- May 2008 To be closer in proximity to Mrs Nelson Mrs Maine moves to a beach house in Otaki which she rents. Treatment continues two times per day.
- December 2008 Mrs Nelson and Mrs Maine travel together to Christchurch.
- April 2009 Mrs Nelson travels to Tauranga to spend Easter with her family. Mrs Maine also travels to Tauranga. Mrs Nelson continues to treat Mrs Maine at Tauranga over Easter.
- 22 June 2009 Mrs Taylor takes Mrs Maine to hospital.

[6] With this chronology in mind a summary follows of the main points made by the Director's witnesses.

THE EVIDENCE FOR THE DIRECTOR

[7] The Director's witnesses were Mrs Carla Taylor and Mrs Julieta Williams, daughters of Mrs Maine, Professor Swee Tan, the surgeon who performed palliative surgery on Mrs Maine after she stopped seeing Mrs Nelson and Mr P Cottingham, a natural health practitioner who the Tribunal was asked to accept as an expert witness. It is not practical to recite the evidence of these witnesses at length. A summary only will be given.

The evidence of Mrs Carla Taylor

[8] From an early age Mrs Taylor can remember a cyst being present on her mother's head. Her mother (who lived in Fielding) would occasionally see Dr Gillingham, then a GP in Marton. On these occasions he would scrape out the cyst but told Mrs Maine that while the cyst was benign, one day she should have it taken off. In the early 1990s Mrs Maine changed her GP and began seeing Dr Stewart in Fielding. She showed Dr Stewart the cyst which by then had grown to a raised lump, approximately 2 cm in diameter by 2cm high. Mrs Taylor was told by her mother that Dr Stewart was not prepared to scrape out the cyst. He said that it was a harmless sebaceous cyst but could turn cancerous if left. He recommended that Mrs Maine have the cyst removed. In 2001 Mrs Maine developed sinus and middle ear problems. Mrs Taylor was aware that her mother had seen Dr Stewart about these problems and had also seen a specialist but the sinus middle ear problems persisted.

[9] A family friend recommended that Mrs Maine see Mrs Nelson in case iridology could assist with her sinus and middle ear problems. The appointments with Mrs Nelson began in 2001. It was Mrs Taylor's impression that her mother's sessions would begin with the iridology and then proceed into more of a social visit where her mother and Mrs Nelson would sit and chat. Her mother told her that she liked to book longer appointments as she felt she got more out of the treatment session because Ruth knew her better and as a result was able to provide more specific treatment. Her mother would see Mrs Nelson once every three months for the next few years until 2008. Mrs Maine kept the cyst covered by styling her hair, in a comb over fashion, over the top of it. Later it was concealed by hairpieces.

[10] In about September or October 2006 Mrs Maine showed Mrs Taylor the cyst on her head and said that she had been having problems with it. In particular it stung in the wind. Mrs Taylor was also shown the Comvita honey ointment that her mother was applying to the lesion. Mrs Taylor told her mother that she had to see a doctor. Mrs Taylor noticed that the opening in the centre of the cyst had grown and it was looking unpleasant.

[11] Mrs Taylor also said that at this time she herself was consulting Mrs Nelson. She and her mother would usually make consecutive appointments on the same day so they could travel together from Fielding to Te Horo. She says that in 2006 she was present on an occasion when she could see her mother showing the cyst to Mrs Nelson. Mrs Maine told Mrs Nelson that Dr Stewart had said that it could turn cancerous. Mrs Nelson replied that the cyst should be left alone and that as Dr Stewart had said, it was a harmless sebaceous cyst. She advised Mrs Maine against having surgery.

[12] Mrs Maine showed Mrs Taylor the cyst again at around Easter 2007. The cyst had changed in that it was no longer raised but was flat and some 3 to 4 cm in diameter. It appeared as though the cyst had ruptured. There was no skin inside and what appeared to be decaying flesh was around the outside. At the time Mrs Maine was still using Comvita ointment on the cyst and would cover it with a gauze patch. She continued to style her hair over the cyst so that it was not visible to other people. Mrs Taylor again told her mother that she should see a doctor about it.

[13] When in January 2008 Mrs Maine again showed her daughter the cyst Mrs Taylor measured it with a ruler and found it to be 8 cm in diameter. It had become infected, smelt pungent and "looked disgusting". Mrs Taylor told her mother that she (Mrs Taylor) was making an appointment for Mrs Maine to see Mrs Taylor's doctor, (Dr Baldwin). Mrs Maine agreed to this arrangement. She did not want to see her own doctor because she felt embarrassed that she had left the cyst without treatment for so long. The appointment with Dr Baldwin was made for 12 February 2008.

[14] However, Mrs Maine wanted to discuss the cyst with Mrs Nelson before seeing Dr Baldwin. She already had a regular three month appointment booked with Mrs Nelson. That appointment fell in the same week as the appointment Mrs Taylor had made with Dr Baldwin. Mrs Maine was hopeful that Mrs Nelson could offer a remedy that would mean she did not have to see any doctor. Mrs Taylor explained that her mother was fearful that if she consulted a doctor she would be referred for treatment involving skin grafts, radiation therapy or surgery under an anaesthetic. These treatments were longstanding fears of hers.

[15] During the trip from Fielding to Te Horo for the three month appointment with Mrs Nelson, Mrs Taylor and her mother discussed the fact that neither really thought that Mrs Nelson would be able to treat the cyst. They both thought that Mrs Nelson would take

one look at it and send Mrs Maine straight to the doctor. However, Mrs Maine still held out hope.

[16] At the appointment Mrs Taylor could witness events because she was either in the consultation room or just outside in the waiting room with the adjoining door open. Mrs Maine showed the cyst to Mrs Nelson. Mrs Nelson was appalled and chastised Mrs Maine for not having sought treatment from her earlier. Mrs Maine said that she was worried because her GP had said it may become cancerous and she was afraid of having cancer. When she asked whether the cyst was cancer, Mrs Nelson replied “No it’s what your GP said, a cyst”.

[17] Mrs Nelson went on to say that one option for treating the cyst, indeed the most effective option, would be to pour a high concentrate of peroxide into it. She said this would fix the cyst in one clear hit. She explained that the treatment may be very painful and that Mrs Maine would need family members to hold her down while Mrs Nelson poured on the peroxide. She said that Mrs Maine may black out from the pain but when she came around the peroxide would have killed the cyst. Mrs Maine declined the peroxide treatment because she was afraid of the pain it would cause. Mrs Nelson said that if Mrs Maine did not want to take the peroxide option then Mrs Nelson could treat the cyst but it would take longer. She said she could heal the cyst within three months.

[18] Mrs Nelson asked Mrs Maine to promise that she would not go to her GP for the next three months while Mrs Nelson treated the cyst. Mrs Maine agreed. She did, however, ask whether Mrs Nelson could work alongside a doctor in order to treat the cyst. She also asked if Mrs Nelson thought it a good idea that Mrs Maine keep her appointment with Dr Baldwin so she could ask him to prescribe antibiotics for the infection but not refer her to anyone else so that Mrs Nelson could continue treating her as well. Mrs Nelson replied “No – they won’t do that, they will want you to go to the hospital”. Mrs Maine asked Mrs Nelson if she knew of any doctors who would be willing to work alongside her in this way. Mrs Nelson said that she did not. Mrs Maine believed that Mrs Nelson could heal the cyst and thought treatment with Mrs Nelson would be a less painful option than receiving hospital treatment.

[19] That day Mrs Nelson applied Malcolm Harker kumarahou ointment to the cyst. She first cleaned the cyst using cotton buds. She pulled out what appeared to be tissue and pus from the cyst and then applied the dressing and covered it. This treatment was very painful for Mrs Maine.

[20] At the end of this session Mrs Nelson said that she would treat the cyst over the course of the next three months. She said she would need two to three weeks to heal the infection and after that she would start the treatment for the cyst. She did not reveal what treatment of the cyst would involve.

[21] Every two to three days from mid February until late March 2008 Mrs Taylor and her mother travelled to Te Horo for the cyst to be treated by Mrs Nelson at her rooms. Mrs Taylor was present for each treatment, sometimes in the room and other times in the waiting room. She watched as Mrs Nelson scraped and picked out the tissue from underneath the skin around the edges of the cyst. She would use tweezers and cotton buds to do this. The cyst would bleed a lot during this time and Mrs Nelson would end up with wads of bloodied cotton balls. She would then apply natural remedies, creams and balms to the cyst and she would dress it for Mrs Maine. During those first three weeks of treatment the infection appeared to clear up.

[22] In April 2008 Mrs Taylor asked Mrs Nelson when she thought the cyst would start to show signs of beginning to heal. Mrs Nelson said that the reason she was not getting as much success as she would like was that she was only seeing Mrs Maine every two to three days. She said that if she could see Mrs Maine every day then she could heal the cyst. So Mrs Taylor and her mother began to travel to Te Horo every day except Sundays.

[23] Mrs Taylor said that her mother became “very” emotionally dependent on Mrs Nelson. She seemed to stubbornly believe everything Mrs Nelson was saying and treated it as gospel. She thought that her mother and Mrs Nelson began to become close friends, largely because of the amount of time Mrs Nelson was spending treating her mother’s scalp.

[24] By May 2008 daily travel to Te Horo had become difficult because the vibrations in the car were painful for Mrs Maine. It was also tiring and time consuming. Mrs Taylor and her mother decided that they would rent a house in Otaki so that Mrs Nelson could carry out the treatments every day. Mrs Maine took over the rent of a bach in Otaki on the first of May 2008.

[25] Payment for the treatment of the cyst was a vague agreement. Mrs Nelson would not be pinned down on how much she expected to be paid. She would say “Just pay whatever you can and that will be fine”. Mrs Maine had been paying about \$30 per treatment for the iridology before the cyst treatment started and continued to pay at that rate until March 2008. When Mrs Maine began receiving daily treatments she began to pay for those treatments at the rate of \$50 for every two to three treatments. On average she would pay Mrs Nelson about \$100 every five days.

[26] In the period from May 2008 Mrs Nelson treated the cyst every day, twice a day. She would arrive before 6am so that she could be back at her rooms to see her first client at 8am. She would then return to Mrs Maine’s home late in the evening. After the treatment she would stay on and have a cup of tea and she and Mrs Maine would chat. Often she would not leave Mrs Maine’s home until the early hours of the morning.

[27] During this time Mrs Taylor thought that the cyst seemed to be getting worse. She told her mother that it was getting bigger but Mrs Nelson was saying that it was getting smaller and that it was healing. She would say that there was new skin around the edge of the cyst indicating that it was healing. As far as Mrs Taylor could tell her mother firmly believed that she was receiving appropriate treatment and that she just needed to wait and trust in Mrs Nelson and the different herbal remedies that she was administering.

[28] Mrs Maine was taking a lot of pain medication at this time. Mrs Taylor alleges that Mrs Nelson recommended that her mother take codeine and in fact gave Mrs Maine codeine which had been prescribed for Mrs Nelson herself after a fall in which she had broken her leg. Mrs Taylor further alleges that Mrs Nelson gave her mother antibiotics which had been prescribed for Mrs Nelson’s grandson and pain killers prescribed for her daughter. Mrs Taylor was also giving her mother antibiotics she had obtained for a sinus infection. It is also alleged by Mrs Taylor that Mrs Nelson gave to her mother a bottle of “unusual” antibiotics that she said she had obtained from “a doctor friend” who worked at a hospital in Wellington. The antibiotics were specific to skin lesion infections and were usually only available to in-patients at a hospital. Mrs Taylor claims to have been present each time Mrs Nelson gave her mother these bottles of drugs.

[29] Mrs Maine “always” had the idea that she would end up with cancer. She was petrified of what the treatment for cancer might be and of chemotherapy. It was her

biggest fear. Whenever she asked Mrs Nelson whether the cyst was cancer Mrs Nelson would say that it was not, that it was what her (Mrs Maine's) doctor had said, namely a cyst. At this time Mrs Maine and her daughter were both asking Mrs Nelson about when she thought the cyst would be healed. Mrs Nelson kept saying that she would need a few months and that it should be gone by August.

[30] When August 2008 arrived Mrs Taylor was sceptical that the treatment was working and asked Mrs Nelson about the possibility of Mrs Maine seeing a doctor or going to hospital. Mrs Nelson allegedly said that Mrs Maine could go to hospital if she wanted to but she would probably end up with a worse infection and the doctors probably would not treat it or would give her radiation therapy. Mrs Nelson said that the treatment was working and that Mrs Maine just needed to have faith in her.

[31] Mrs Maine had a lot of faith in Mrs Nelson and would defend her if Mrs Taylor or her sister ever suggested that the treatment was not working or that Mrs Maine should see a doctor. Mrs Taylor described her mother as very stubborn and wholeheartedly convinced that Mrs Nelson could heal the cyst.

[32] In December 2008 Mrs Nelson began to give Mrs Maine treatments which Mrs Nelson had previously mentioned she used to treat cancer patients. In particular Mrs Maine was given peroxide which she was told to drink at the rate of 20 drops per day diluted in a glass of water.

[33] One day early in January 2009 Mrs Maine was feeling particularly unwell and showed Mrs Taylor the cyst. Mrs Taylor could not believe how much it had grown and how infected it had become. She physically tried to drag her mother out to the car and told her that she was taking her to see a doctor. Her mother was terrified of going to the doctor and lay on the floor curled in a fetal position. She could not be reasoned with. Mrs Nelson arrived a short time later and told Mrs Maine that she could go to hospital if that was what she wanted to do but they would probably not treat the cyst anyway. She also said that they would probably give Mrs Maine radiation or chemotherapy and it probably wouldn't work. She said the hospital would be shocked to see it and that if Mrs Maine just had faith in Mrs Nelson, she (Mrs Nelson) could heal the cyst. In her written brief of evidence Mrs Taylor said at para 59:

59 Mum was terrified of going to the hospital and when I tried to convince Mum to go to the hospital in front of Ruth, Ruth would back Mum up and tell one of her stories about how the doctors had not been able to treat one of her other clients. I said to Ruth that the cyst had got bigger. At that stage you could see the cyst pulsating. Ruth said that skulls are flexible, like a baby's fontanel. I tried to explain to Mum that that was incorrect but Ruth convinced Mum in front of me that the cyst was getting better.

60 Mum asked Ruth again if she thought she should go to a doctor and ask for antibiotics to treat the infection so that Ruth could continue to treat the wound. Ruth told Mum not to do this. She said that the doctors wouldn't work alongside Ruth and wouldn't treat the infection, they would just send Mum to hospital.

[34] When in March 2009 Mrs Maine began talking more frequently with Mrs Nelson and Mrs Taylor about the possibility of going to hospital the response of Mrs Nelson was always negative, saying that the reason the treatment was not working was that Mrs Maine did not have enough faith in Mrs Nelson. Asked many times if the cyst was cancer, Mrs Nelson said that the cyst was not cancer. Knowing that Mrs Maine was terrified of having radiation therapy, Mrs Nelson also said that the radiation probably wouldn't work and that that would be what the hospital would give to Mrs Maine.

[35] Also in March 2009 Mrs Nelson began talking about going to see her son in Tauranga over Easter. However, to continue treating Mrs Maine, Mrs Nelson said she would have to stay in Otaki. Mrs Nelson also appeared to become “increasingly manipulative” of Mrs Maine, telling her that it was Mrs Maine’s fault that the treatment was not working. Mrs Taylor says that her mother felt that because Mrs Nelson had given up so much time and seemed to care so much, she owed it to Mrs Nelson to see the treatment through. Mrs Nelson suggested that the only way she could go to see her family in Tauranga would be if Mrs Maine went as well. Mrs Maine agreed to this and so Mrs Taylor arranged a family trip to visit her brother and his family in Tauranga over Easter. The logistics were challenging because travel was painful to Mrs Maine. Originally it had been planned that Mrs Nelson would travel in the same vehicle as Mrs Taylor but Mrs Nelson’s daughters intervened and booked her a bus ticket instead.

[36] Over the Easter period Mrs Nelson continued to provide treatment to Mrs Maine at a motel Mrs Taylor had booked in Tauranga.

[37] In April 2009 Mrs Taylor managed to convince her mother to speak with a close family friend, Norma, about seeking medical treatment for the cyst. Mrs Taylor took photographs of the cyst to show Norma. It had grown to about 15 cm in diameter. After the visit Mrs Maine told Mrs Taylor that Norma had said “you will go when you are ready”.

[38] Mrs Maine began discussing more often the possibility of going to hospital. Eventually, in mid June 2009 she contacted Mrs Taylor and asked that she be taken to hospital immediately.

[39] On 22 June 2009 Mrs Taylor uplifted her mother moments after Mrs Nelson had replaced the dressing on Mrs Maine’s head. On being told that Mrs Maine was being taken to hospital that day, Mrs Nelson said to Mrs Maine “If only you had a little more faith in trusting me”. Another comment was “If only we’d been able to get you to a hypnotherapist to deal with the pain”.

[40] On 22 June 2009 Mrs Taylor took Mrs Maine to hospital. The next day she was formally diagnosed with cancer of the scalp and on 27 July 2009 underwent extensive surgery but died eleven months later on 25 June 2010.

[41] Shortly before she died Mrs Maine was interviewed by TV3 and TVNZ about the treatment she had received from Mrs Nelson. In her brief of evidence Mrs Taylor said:

91 ... Mum accepted the role she had played in getting to this point. She didn’t totally blame Ruth. She did own her part. But Mum blamed Ruth for the comments that Ruth made that it wasn’t cancer and for Ruth putting the onus back on Mum by saying that it was Mum’s lack of faith and adherence to Ruth’s proposed treatments that prevented her from becoming well. Throughout treatment, Ruth became a friend of Mum’s, and a friend of the family. We trusted her. We trusted her stories. Mum desperately wanted to believe that Ruth could heal her and Ruth encouraged that belief.

[42] In addition to the items broadcast on television, the Tribunal received in evidence an undated, unsworn and unsigned “statement” by Mrs Maine. It was attached to the HDC Complaint Form lodged by Mrs Taylor on 16 August 2010. It was not written by Mrs Maine because at the time she was too unwell and could no longer write. The statement had been dictated to a friend at about the same time as the two television interviews.

The evidence of Mrs Julieta Williams

[43] Mrs Williams confirmed that her mother had had a cyst on her head for a very large number of years. In Ms Williams' childhood she recalls the cyst being a raised, shiny lump on her mother's head which her mother usually covered with her hair. In early 2007 she noticed her mother dabbing the cyst with tissues and understood that it was getting worse and that her mother was looking into getting treatment for it.

[44] From what her mother reported to her, Mrs Williams said that Mrs Nelson had led her mother to believe that she (Mrs Nelson) could tell the difference between a cancerous cyst and a non-cancerous cyst. She also understood from what Mrs Nelson and Mrs Maine told her, that Mrs Nelson did not think it was cancer and that she would let Mrs Maine know if that changed so that Mrs Maine could re-consider her treatment options.

[45] The first time Mrs Williams met Mrs Nelson was in June or July 2008 when Mrs Williams and her family were visiting Mrs Maine at Otaki during the school holidays. She saw Mrs Nelson clean and dress the cyst but she did not see the cyst itself as her mother was embarrassed about the situation and did not want to show the cyst to Mrs Williams. Whenever Mrs Williams asked her mother questions about the cyst she (Mrs Maine) was vague and would not discuss it.

[46] When Mrs Williams asked Mrs Nelson about the possibility of her (Mrs Nelson) working alongside a doctor, Mrs Nelson said that she could do things that the medical profession could not. Asked about Mrs Maine visiting a doctor, Mrs Nelson said that Mrs Maine could see a doctor but that she would be doing so at her own risk. Mrs Williams was of the view that Mrs Nelson seemed to scare Mrs Maine into not seeing a doctor by saying words to the effect that she would probably get an infection and that the cyst would not be treated, implying surgery would be her only option. Mrs Williams said that Mrs Nelson gave Mrs Maine hope that the cyst was not cancer by consistently reassuring Mrs Maine that it was just a cyst. Mrs Maine was looking for someone to believe in and Mrs Nelson was there.

[47] In December 2008 Mrs Maine and Mrs Nelson visited Mrs Williams and her family who were then living in Christchurch. Mrs Nelson continued to treat the cyst during the visit. Mrs Williams could not see the cyst from where she was sitting and did not go over to have a look.

[48] Early in the new year of 2009 Mrs Williams visited her mother in Otaki and saw that the bandages on her head covered a larger area. While she could not see the cyst, she was worried that the cyst did not seem to have improved. She could see blood sometimes drip into her mother's eyes towards the end of the day when the cyst was in need of dressing. Her mother did not look at all well.

[49] Mrs Williams spoke to Mrs Nelson in front of Mrs Maine. She says that Mrs Nelson said that new skin was growing around the cyst and that "it would get worse before it got better". She said that her mother could go to hospital if she wanted to but if she wasn't sick before she went in she would definitely come out sick from all the bugs that were at hospital. She said that Mrs Maine just had to trust her to heal the cyst. She actively discouraged medical intervention.

[50] The next time Mrs Williams saw her mother was after she (Mrs Maine) had been admitted to hospital in June 2009.

The evidence of Professor Swee Tan

[51] Professor Tan is a Consultant Plastic Surgeon with a subspecialty interest in head and neck cancer resection and reconstructive surgery. He said that at the time of her admission Mrs Maine had a 15 x 20 cm ulcerated, fungating tumour over the left side of her head, with destruction of a large area of scalp and underlying skull down to the pulsating dura. The wound was infected. Blood tests at that time showed that there was profound anaemia due to chronic blood loss and a low white cell count, confirming infection. Biopsies showed poorly differentiated squamous cell carcinoma.

[52] Mrs Maine underwent surgery on 27 July 2009. The operation involved wide local excision of the tumour, including the involved scalp and the underlying skull, the eye socket bone, dura and part of the temporalis muscle (the muscle on the side of the head). Reconstruction of the large resection defect included dural repair with a dura substitute, split rib grafts using two of her ribs to span the bony defect and soft tissue cover using a large muscle flap taken from her back, covered with a split thickness skin graft taken from her thigh. The operation took over seven hours.

[53] Mrs Maine was discharged from hospital on 7 August 2009. She experienced markedly improved quality of life once she had recovered from her treatment. Unfortunately, eight months following the surgery and radiotherapy a MRI scan showed recurrence of the cancer in the skull base. She also developed spread of the cancer to her right groin. Although she underwent ten treatments of palliative radiotherapy to her head and treatments to the cancer in her right groin she died from the disease on 25 June 2010.

[54] In the opinion of Professor Tan, when Mrs Maine was admitted to hospital there was very little chance of cure. If the original lesion (reported to be 2 cm in size) had been managed in a timely and appropriate way, the treatment that could have been offered to Mrs Maine would have been simple, with low morbidity and a high likelihood of a cure. For a 2 cm lesion the chance of death is approximately 1% if a timely diagnosis is given. Once a lesion reaches 8 cm, the chance of a cure is 60%, cure being defined as disease free in the next five years. While an 8 cm lesion would have gone through the skull necessitating surgery plus radiotherapy, the treatment would have been less radical and the operation simpler and the chance of cure much better.

[55] Because of the delayed presentation, Mrs Maine required radical surgery and radiation therapy with a remote chance of cure. The radical surgery was associated with pain, scarring and significant risk of serious complications such as stroke and failure of the muscle flap.

The evidence of Phillip Neil Cottingham

[56] Mr Cottingham was put forward by the Director as an expert witness on the standards which unregistered health care providers such as Mrs Nelson would be expected to observe. Mr Cottingham is a registered Naturopath who has been practising naturopathy for 31 years. He holds a Diploma in Naturopathy and also holds qualifications in Homeopathy and Massage. He also holds qualifications in Health Science namely a BHSc. and a Graduate Diploma in herbal medicine and a Post-Graduate Diploma in Health Science. He has previously held office as President of the South Pacific Association of Natural Therapists (now Naturopaths of New Zealand Inc) and is a life member. He is also a member of the New Zealand Association of Medical Herbalists (NZAMH). He is the founder and the principal of Wellpark College of Natural

Therapies, an institution that delivers 11 qualifications in natural therapies, including an undergraduate degree in naturopathy.

[57] Mr Cottingham was asked to assess the treatment Mrs Nelson provided to Mrs Maine largely on the assumption that the facts were as asserted by Mrs Taylor and Mrs Williams. In making that assessment he was asked to ensure that he did not assess Mrs Nelson on the basis of qualifications, skills and knowledge which she does not possess. He observed, however, that there are standards of practice that can be regarded as so fundamental to sound natural health practise that these minimum standards should apply whatever the practitioner's qualifications, skills and knowledge. In providing his opinion he drew on the standards of practice he teaches and which he considers to be generally accepted standards for practitioners of various natural health modalities. He addressed the standard of care under three headings:

[57.1] The decision to treat the cyst.

[57.2] Patient management, including referral to other health professionals.

[57.3] Documentation.

[58] As to the decision to treat the cyst, Mr Cottingham was of the opinion that whether one accepts Mrs Maine's version of events or Mrs Nelson's version of events, it seems clear that Mrs Nelson embarked upon treating a large lesion on Mrs Maine's head. In his opinion Mrs Nelson should simply not have touched it. She was wrong to have begun treating the lesion without a diagnosis. The appearance of the lesion should have been sufficiently concerning for Mrs Nelson to decline to treat it. It should have been very obvious to any person in Mrs Nelson's situation that she should not have been interfering with or attempting to treat the lesion. Mrs Nelson did not require training or qualifications in order to understand the limitations of her own expertise. In his opinion, it was simply a matter of common sense that she should not have been attempting to treat the lesion and it was not reasonable practice for her to attempt to do so. Mrs Maine should have been referred for appropriate diagnosis and advice from a doctor. Mrs Nelson embarked on her own treatment without knowing what she was treating. It should have been obvious to her that one possibility was that she was dealing with a cancer. Diagnosing or treating a cancer was plainly beyond her expertise.

[59] While it was his opinion that Mrs Nelson should not have even begun to treat the lesion, Mr Cottingham added that there were subsequently numerous occasions when she should have stopped treating Mrs Maine and refused to continue any treatment. For example, by the end of April 2008 the regular treatments had not produced any improvement. In his opinion any natural health practitioner has a duty to his or her patient to stop treatment if that treatment is not only doing no good, but the condition of the patient is deteriorating. The comfort and welfare of the patient must always have priority. Closely linked with this obligation is the practitioner's obligation to recognise the limitations of their knowledge and skills and to refer to another health professional.

[60] There were a number of alarms making it clear to any practitioner that referral was the appropriate action. So, for example if the lesion was so severe that wind caused it to sting, referral was essential at that point. Second, seeing the dura pulsate would indicate blood vessels were near the surface of the lesion. A third alarm was the seeping of pus from the cyst. This would automatically indicate infection (or possibly cancer).

[61] Addressing patient management, Mr Cottingham made two points:

[61.1] Mrs Nelson was faced with a clinical situation where she just had to say “No, I cannot help you any more”.

[61.2] In the opinion of Mr Cottingham, Mrs Nelson’s relationship with Mrs Maine became blurred so that the relationship itself became unhealthy for Mrs Maine. He points to the trip taken by Mrs Nelson and Mrs Maine to Christchurch and to Tauranga and the alleged provision by Mrs Nelson of her own personal prescription medications to Mrs Maine. In his view professional boundaries were not maintained. Such boundaries would also preclude “socialising” with a client for several hours. Mrs Maine appeared to have become very dependent and Mrs Nelson for ongoing treatment and as the health practitioner, it was Mrs Nelson’s responsibility for ensuring that appropriate professional boundaries were maintained. It was similarly Mrs Nelson’s responsibility to end the therapeutic relationship.

[62] The conclusion reached by Mr Cottingham was expressed in the following terms:

124 In summary, Ms Nelson has chosen to offer services to the public in the field of natural health. There are expected standards of any practitioner. Minimum standards that all students of natural medicine are taught include safety and ethical standards. When I refer here to “safety and ethical standards” I am not talking about knowledge or skill standards, I am speaking of the minimum basic standards for someone who is holding themselves out to the public as being able to help them. These standards are applicable to Ms Nelson even though she was unqualified and unregistered. To a large extent these standards are a matter of common sense. From the evidence I have cited, it would seem that Ms Nelson failed to do so in a number of ways. The main areas where this appears to have occurred are: a failure to recognise the seriousness of the situation and to refuse to treat, based on that recognition; continuation of treatment without referral despite an obvious worsening of the condition; a “blurring” of the patient-practitioner relationship boundaries.

The Director’s case – overview

[63] In his statement of claim dated 1 November 2012 the Director alleges no fewer than eight breaches of the Code of Rights:

[63.1] Right 4(1) – failure to provide services to Mrs Maine with reasonable care and skill.

[63.2] Right 4(2) – failure to provide services to Mrs Maine that complied with legal, professional, ethical and other relevant standards.

[63.3] Right 4(3) – failure to provide services in a manner consistent with Mrs Maine’s needs.

[63.4] Right 4(4) – failure to provide services in a manner that minimised the potential harm to, and optimised the quality of the life of, Mrs Maine.

[63.5] Right 4(5) – failure to co-operate with other providers to ensure quality and continuity of services.

[63.6] Right 6(1) – failure to provide information that a reasonable consumer, in Mrs Maine’s circumstances, would expect to receive.

[63.7] Right 6(2) – failure to provide Mrs Maine with information that a reasonable consumer in her circumstances would need to make an informed choice or to give informed consent to the ongoing treatment of her scalp.

[63.8] Right 7(1) – failure to obtain Mrs Maine’s informed consent to the ongoing treatment of her scalp.

[64] By way of relief the Director seeks:

[64.1] A declaration that Mrs Nelson breached the Code of Rights.

[64.2] Pecuniary loss in the sum of \$9,670.

[64.3] Loss of the benefit of medical intervention at an earlier stage in the sum of \$20,000.

[64.4] Damages for humiliation, loss of dignity and injury to feelings in the sum of \$20,000.

[64.5] Punitive damages of \$10,000.

[64.6] An order that Mrs Nelson pay the Director’s costs.

[65] In his opening submissions the Director said that put simply, what Mrs Nelson allegedly did wrong can be summarised in the following points:

[65.1] By her actions in treating Mrs Maine, and through the words she spoke, Mrs Nelson misrepresented the therapeutic efficacy of the treatment she could provide. She offered false hope.

[65.2] She misled Mrs Maine about the treatment a doctor or a hospital could provide. She disparaged alternatives to her own services and she played on Mrs Maine’s fears.

[65.3] She provided treatment when doing so was clearly well beyond her expertise and was inappropriate given Mrs Maine’s very visible and alarming presentation. In other words, she did not provide services with reasonable care and skill.

[66] We will return to the Director’s case later after setting out our findings of fact. Not all of the Director’s allegations will remain relevant in the light of those findings.

THE EVIDENCE FOR MRS NELSON

[67] Mrs Nelson gave evidence on her own behalf and also called her youngest daughter, Ms Megan Nelson-Latu. Her eldest daughter was unable to give evidence as she was incapacitated by illness. Mrs Nelson also called two clients, Mr Leslie Kentfield and Mr Kevin Pragnell. Finally, evidence was given by Dr Phillipa Malpas, a senior lecturer in clinical medical ethics at the University of Auckland, who gave expert evidence on the ethics of the situation faced by Mrs Nelson.

[68] The evidence presented by Mrs Nelson and her witnesses was significantly different to that presented on behalf of the Director and Mr Beck has reminded the Tribunal that Mrs Nelson is the only person who was present at all the critical times. Mrs Nelson’s case is that:

[68.1] From the outset, she was reluctant to have anything to do with Mrs Maine’s head. She told Mrs Maine that this was not the sort of treatment she offered and that Mrs Maine should be in hospital.

[68.2] She agreed to help Mrs Maine by cleaning her head for a limited period of time because Mrs Maine begged her to.

[68.3] She was misled by Mrs Maine into believing that she (Mrs Maine) had recently consulted a doctor about the lesion and that it had been diagnosed as a harmless cyst. She repeatedly advised Mrs Maine to seek appropriate treatment, but Mrs Maine refused to do so.

[68.4] She did not charge Mrs Maine anything for cleaning her head, and received no payment from Mrs Maine (for whom she was doing a favour) other than an occasional contribution towards petrol.

[68.5] In the circumstances there was no breach of the Code of Rights.

[68.6] Should the Tribunal find there to have been any breach of the Code of Rights, the remedies sought by the Director are not appropriate in the circumstances.

The evidence of Mrs Nelson

[69] Mrs Nelson has qualifications in iridology and natural health. She regards herself as a natural health therapist. She explained that natural health therapy encourages people to take responsibility for their own health and doing something about it. Iridology involves looking at a person's eyes and making recommendations for action. She has been an iridologist for about 35 years and has always had a very good reputation. Mrs Nelson says that she works alongside medical professions, has had dozens of clients who have had surgery, chemotherapy and radiation treatment and she has never stopped or tried to stop anyone from having conventional medical treatment. She always works with the wishes of her clients, even if she does not personally agree. She believes that the choice is and always should be that of the patient.

[70] Mrs Maine first came to see Mrs Nelson as an iridologist in 2001 in relation to her sinus and middle ear problems. An iridology session usually lasts approximately one hour and Mrs Maine paid \$10 for these sessions.

[71] Mrs Nelson thereafter saw Mrs Maine at irregular intervals, at most once every three months. In 2006 she saw her only once. These appointments had nothing to do with her cyst. Subsequent to 2006 Mrs Carla Taylor also began seeing Mrs Nelson as an iridologist. Often appointments were made on the basis that Mrs Taylor's consultation would follow that of her mother so that they could travel to and from Te Horo together.

[72] Early in 2008 Mrs Maine showed Mrs Nelson the cyst for the first time. Her daughter, Mrs Taylor, was not with her on that occasion. By reference to her diary Mrs Nelson says that the date was Tuesday 19 February 2008. Mrs Maine asked Mrs Nelson to treat her head. Mrs Nelson refused, saying that the hole in her head was disgusting and told her that she should be in hospital as she needed surgery and plastic surgery. The lesion was weeping and smelly.

[73] Mrs Nelson went on to say that she told Mrs Maine that what was being asked of her (Mrs Nelson) was not what she did and that it was way out of her league. Mrs Maine begged her to do it. She told Mrs Nelson that the doctors had diagnosed it as a sebaceous cyst. When Mrs Nelson told her that she (Mrs Nelson) thought it would have to be cut out at a hospital, Mrs Maine said that she did not like doctors and that she wasn't going back there. She begged Mrs Nelson again and again and eventually Mrs

Nelson agreed to treat her head for three months on the understanding that, if it hadn't improved, Mrs Maine would go to hospital.

[74] Mrs Nelson also told Mrs Maine that she would need plastic surgery and that the plastic surgery unit at Hutt Hospital was renowned. She told Mrs Maine that her (Mrs Nelson's) granddaughter had been treated there for a cleft palate, and that the care was excellent.

[75] The entry made by Mrs Nelson in her diary for 19 February 2008 was as follows:

Maureen Maine – wants me 2 do head. Shocking mess. Must be mad. Needs 2 go 2 hospital. Won't go. Threatens suicide. Says doctor cut it out. Left it like it is. Hard 2 believe. What's wrong with family. Why me. Find it hard to think that she's come from Doctor and hospital with head in this state – size of saucer. Says she's not a liar. Can't leave it in this state. Not my job.

[76] Initially Mrs Nelson used Malcolm Harker cream containing kumarahou and other herbs frequently used on growths. But after three to four applications Mrs Maine found that it was stinging and use of the cream was stopped. Mrs Nelson thereafter cleaned the lesion with colloidal silver and calendula.

[77] Initially Mrs Maine was driving every day from her home in Fielding to Te Horo so that Mrs Nelson could treat her head. She then moved to a motel in Waikanae. When this became too costly she rented accommodation in Otaki.

[78] The three months came and went with Mrs Nelson treating the cyst almost daily. Some new skin grew around the edge but the cyst always grew underneath it. Mrs Maine became angry and asked why it kept growing back. Mrs Nelson told her that that was what cysts did.

[79] When Mrs Maine mentioned that she had a holiday home up north for which she had been offered a million dollars, Mrs Nelson asked why she did not sell it and spend the money on a top specialist to treat her head. Mrs Maine replied that Mrs Nelson was going to fix her head.

[80] When in late 2008 Mrs Nelson's daughters and grandchildren won a trip for her with Air New Zealand Mrs Nelson told Mrs Maine that she would be going away. Mrs Maine said that Mrs Nelson could not do this to her and would be abandoning her (Mrs Maine) just as Mrs Maine's own family had. Mrs Nelson replied that she was exhausted, visiting Mrs Maine seven days a week and not getting home until after 2.30am. Mrs Maine suggested that they could travel together to Christchurch and stay with Mrs Maine's daughter, Julieta Williams.

[81] Mrs Nelson had thought that her absence from Otaki would be an opportunity for Mrs Maine to seek hospital treatment and discussed this with Mrs Maine. Again Mrs Maine refused. Much to the dismay of Mrs Nelson's family, Mrs Nelson then agreed to allow Mrs Maine to travel with her to Christchurch. Mrs Nelson was hoping that Mrs Williams would be open to persuading her mother to go to hospital.

[82] While they were in Christchurch Mrs Nelson encouraged Mrs Maine to go for a walk in a park. When two joggers passed by Mrs Maine observed that one looked like the doctor who had treated her head. Mrs Nelson told her to call out to him so that she could arrange to see him again. Mrs Maine refused, saying he would now be in his nineties so the passerby could not be him. Mrs Maine expressed disbelief that he could be so old but Mrs Maine told her that it had been 20 years since she saw him. Mrs Nelson was very angry to hear this as she had been led to believe that the medical treatment Mrs Maine had received for the cyst had been very recent and asked Mrs

Maine how she could expect Mrs Nelson to fix the cyst after 20 years. She told Mrs Maine that she was going home and that Mrs Maine could do what she liked. Mrs Maine cried, begged, pleaded and threatened suicide. Because Mrs Nelson was unable to change her travel bookings she could not leave Christchurch immediately as intended and accordingly continued to treat Mrs Maine's scalp for the rest of the stay.

[83] When Mrs Maine told Mrs Nelson that her father had prophesised that she would die in hospital before she was 65 years old, Mrs Nelson replied that no matter what, Mrs Maine would have to have all of the cyst cut out from her head, have radiation treatment and bone and skin grafts.

[84] At Easter time Mrs Nelson always visits her son and daughter in law in Tauranga. However, because of having to treat Mrs Maine she had not visited in 2008. At Easter 2009 Mrs Nelson thought that she would escape from Mrs Maine for a short period, particularly as she had not been able to get to Tauranga the previous year. When Mrs Nelson told Mrs Maine that she would be away during Easter Mrs Maine was "incredibly angry" and told Mrs Nelson that she was abandoning her and that she (Mrs Maine) was coming with her. Mrs Nelson told her that this was not possible as she would be staying with family and there would be no room for Mrs Maine. Furthermore, it would not be possible for her to dress her head at their house and she was going to spend time with her grandchildren. She told Mrs Maine that she could either get her daughter Carla Taylor to dress the cyst or she could go to hospital.

[85] Normally Mrs Nelson drives to Tauranga but on this occasion decided to travel by bus so that there would be no opportunity for Mrs Maine to demand that she travel to Tauranga with her. Mrs Nelson made the booking in person and says Mrs Taylor is mistaken in asserting that it was Mrs Nelson's daughters who purchased the ticket.

[86] After arriving at her son's home in Tauranga Mrs Nelson was shocked when Mrs Maine telephoned to say that she was staying in a motel just down the road from where Mrs Nelson was and that Mrs Nelson would now be able to dress her head. Apparently Mrs Taylor had looked up the address of Mrs Nelson's son on the internet.

[87] Mrs Nelson cannot understand why, if Mrs Maine's family were (as claimed) so desperate to get their mother away from Mrs Nelson and for her to go to hospital, that they would drive her all the way to Tauranga to follow Mrs Nelson when she was hoping to get away for five days. There had been plenty of time to get Mrs Maine to hospital.

[88] When Mrs Maine's family learnt that Mrs Nelson would not be returning to Otaki by bus but would be driving her granddaughter's car, Mrs Nelson was asked to take Mrs Maine with her so that Mrs Maine's family could continue on their holiday.

[89] Mrs Nelson is of the opinion that the only reason why Mrs Maine finally went to hospital was because Mrs Nelson's daughter (Megan) contracted pneumonia and Mrs Nelson was required to help out, particularly with looking after the grandchildren. When Mrs Nelson told Mrs Maine that she would not be able to do her head in the morning as she (Mrs Nelson) would be looking after her grandchildren, Mrs Maine was angry again and suggested that Mrs Nelson's son in law drive the three grandchildren down to Otaki at 4.30am in the morning and leave them with Mrs Nelson's other daughter. Mrs Nelson refused to make such arrangements. Shortly after this Mrs Maine decided to go to hospital.

[90] When Mrs Nelson was told by Mrs Maine that she was going to go to hospital Mrs Nelson had said "Good, that's where you should be". Mrs Maine thanked Mrs Nelson for

being a good friend. When Mrs Nelson got home she wept because she was so relieved for both Mrs Maine and for herself.

[91] Mrs Nelson said that she did not charge Mrs Maine anything for the care she took of her head. She acknowledges, however, that she received an occasional contribution for petrol. This did not cover the costs Mrs Nelson incurred travelling to see Mrs Maine twice a day. In fact Mrs Nelson found it difficult to meet her own daily living expenses because she was spending so much time and money helping Mrs Maine.

[92] As to the allegation that she discouraged Mrs Maine from seeking conventional medical treatment, Mrs Nelson said that her own family uses both conventional and herbal medicine. Her grandchildren have been hospitalised, as have both her daughters. She says that she would be the first person to acknowledge that there are cases where hospitalisation is the only sensible course to follow. She knew that this was what Mrs Maine required and told her so. It was Mrs Maine who refused to accept hospitalisation and begged Mrs Nelson to carry on treating her.

[93] In response to the evidence given by Mrs Carla Taylor Mrs Nelson said:

[93.1] It is not correct that Mrs Taylor was always present when Mrs Nelson saw Mrs Maine at her consulting rooms and she did not leave the door open during consultations, because other clients were often present. The only way any one could hear what was being said would be if they eavesdropped at the door.

[93.2] At no time did Mrs Nelson tell Mrs Maine that she should not worry about the growth on her head. From the time Mrs Nelson first saw it she told Mrs Maine that it needed treatment that Mrs Nelson could not provide.

[93.3] Mrs Taylor did not attend the appointment with her mother on 19 February 2008 when Mrs Maine showed Mrs Nelson the cyst for the first time. Mrs Nelson can point to her 2008 diary which shows that two days later, on 21 February 2008 she has recorded appointments for both Mrs Maine and for Mrs Taylor.

[93.4] Mrs Nelson did not tell Mrs Maine that she should have showed her the growth ages ago. Mrs Nelson wishes Mrs Maine had never shown it to her at all.

[93.5] Mrs Maine told Mrs Nelson at the 19 February 2008 appointment that she (Mrs Maine) had recently seen her GP and the hospital, that they had cut the cyst out and that it now needed time to heal. Mrs Maine told Mrs Nelson that the doctor had told her it was a sebaceous cyst. She never mentioned that she (Mrs Maine) had been advised that it might become cancerous. With the state it was in Mrs Nelson expected that the doctor and hospital would have done a biopsy. It was only much later during the Christchurch visit that Mrs Nelson learnt that the last consultation with the doctor about the cyst had been 20 years earlier.

[93.6] Mrs Nelson did not tell Mrs Maine that peroxide would cure the cyst. Furthermore, she never said that she could heal it. Mrs Nelson suggested that Mrs Maine use some of the money from the beach home she had up north to get the best specialist in the world to treat the lesion. Mrs Nelson also told Mrs Maine how good the plastic surgery unit at Hutt Hospital was but Mrs Maine was not interested even when Mrs Nelson told her about Mrs Nelson's granddaughter who had had operations for her cleft palate at Hutt Hospital and how kind and dedicated the staff were. Mrs Nelson's daughter (Megan Nelson-Latu) had

offered to take Mrs Maine to the hospital (as had Mrs Nelson on many occasions). All these offers had been refused by Mrs Maine.

[93.7] Mrs Nelson did not ask Mrs Maine to promise that she would not see her doctor for three months. What Mrs Nelson said was that she would try and help for a three month period and Mrs Maine would then *have* to go a doctor. Mrs Nelson has never and would never ask any client to promise not to see their doctor so that she (Mrs Nelson) could treat them.

[93.8] Mrs Maine refused to allow anyone else to see her head.

[93.9] At the appointment on 19 February 2008 Mrs Maine did not ask Mrs Nelson whether she would work alongside a doctor to treat the cyst. Nor did Mrs Maine ask Mrs Nelson if she (Mrs Nelson) thought that she should keep an appointment with her GP to ask him to prescribe antibiotics for the infection. There was no conversation at which Mrs Taylor was present. Mrs Maine did not want Mrs Taylor to know anything because Mrs Maine believed that Mrs Taylor was not interested in a mother with a hole in her head. Mrs Nelson was never asked if she would work alongside a doctor. Mrs Maine would not go to a doctor.

[93.10] Mrs Taylor was never present when Mrs Nelson cleaned Mrs Maine's head. Mrs Maine would not allow anyone in the room when the growth was being treated. The wound was at all other times covered by hairpieces which Mrs Maine had acquired.

[93.11] Mrs Nelson did not suggest that Mrs Maine needed more regular treatment. Mrs Nelson did not want to give the treatment at all. It was Mrs Maine who wanted Mrs Nelson to come daily because Mrs Nelson refused to go to Fielding where Mrs Maine then lived.

[93.12] Mrs Nelson and Mrs Maine did become friendly but Mrs Nelson said that she would not say they were close friends. She certainly did not regard herself as a family member. Mrs Nelson felt sorry for Mrs Maine and all the things she told her about her life.

[93.13] Mrs Nelson never charged Mrs Maine for treating her head. Mrs Nelson said that she never complained about client payment because there is a tin for donations and people either do or do not donate. As long as she manages to pay the rent for her premises at Te Horo and receives something towards the power bill in winter, she is happy. Money is not her God and she has never charged anyone voluntarily or otherwise who has cancer. She believes they have enough to pay buying the things they need and if she can, as with Mrs Maine, she buys herbal treatments at cost to save them money. The most Mrs Maine ever paid for her previous iridology appointments was \$10 and nothing from when Mrs Nelson started doing her head.

[93.14] Mrs Nelson did not know what pain medication Mrs Maine was taking and would certainly never recommend taking the amounts which, according to the account given by Mrs Taylor, Mrs Maine is said to have taken. Mrs Nelson has never trained or has claimed to be trained as a nurse. She has only ever been interested in natural medicine and iridology.

[93.15] Mrs Nelson never asked any member of her family to give medications prescribed for themselves or their children for use either by Mrs Nelson or for giving to others.

[93.16] As to the claim that Mrs Nelson had obtained antibiotics from “a doctor friend”, Mrs Nelson says that she does not know of any doctor who would put him or herself at risk by supplying prescription medication or otherwise in the manner alleged by Mrs Taylor. Nor does Mrs Nelson know of a hospital where it would be possible for drugs to be taken and given to someone without having to be accounted for.

[93.17] Mrs Maine told Mrs Nelson that both Mrs Taylor and Mrs Maine’s son had been giving her antibiotics and anti-inflammatories that they had purchased on the internet or obtained via their doctor. Mrs Nelson had told Mrs Maine to stop using these medications.

[93.18] Mrs Nelson never discussed Mrs Maine’s condition with Mrs Taylor other than the one time after which Mrs Maine forbade Mrs Nelson from discussing her health with any member of her family or with anyone else.

[93.19] Mrs Nelson told Mrs Maine from the beginning that the hospital would use radiation to kill the cyst. It was obvious to anyone who cared that that was what they would do. Mrs Maine simply refused to listen. Bullying her to try and get her to a doctor would not work, she would flatly refuse and get angry and upset.

[93.20] Mrs Nelson never told Mrs Maine not to go to a doctor.

[93.21] Mrs Maine would agree with Mrs Nelson one day and say she would go to a hospital but by the next day she would have changed her mind.

[93.22] Mrs Nelson was not negative. She has never said to a client that they are to have “faith in me”.

[93.23] Mrs Nelson at no stage told Mrs Maine that the lesion was not cancer. At the beginning, after being told by Mrs Maine that she had seen a doctor and been to hospital, Mrs Nelson said that if Mrs Maine’s doctor diagnosed a sebaceous cyst, then one would have to agree with him, but Mrs Nelson told Mrs Maine that it was diseased, it was disgusting and that she needed to be in hospital. Mrs Nelson was very angry after the revelation in the park in Christchurch that Mrs Maine had had the cyst for over 20 years.

[93.24] Mrs Nelson told Mrs Maine she would need chemotherapy and radiation as well as surgery. Mrs Maine was an educated person, as was her family, yet Mrs Maine elected to do nothing. Mrs Nelson is sad, extremely sad that Mrs Maine died but does not feel guilty as she did her best for her.

[94] In response to the evidence given by Julieta Williams, Mrs Nelson stated:

[94.1] Mrs Williams was not in the room when Mrs Maine’s head was dressed because Mrs Maine would never let anyone else be in the room when the dressing was changed. Mrs Maine would not let anyone else see the cyst.

[94.2] Mrs Williams never asked Mrs Nelson questions about the cyst. At no stage did Mrs Nelson talk to Mrs Williams about offering a cure for cancer. Mrs

Nelson did not discuss Mrs Maine's treatment with Mrs Williams and did not tell Mrs Maine that it was healing.

[94.3] Not one member of Mrs Maine's family other than Mrs Taylor (once at her own appointment) ever mentioned to Mrs Nelson anything about Mrs Maine going to hospital or the doctor. Mrs Nelson would have jumped at a discussion. She had 18 months of no life with her family or with herself.

The evidence of Megan Nelson-Latu

[95] Mrs Nelson-Latu is a secondary school teacher who presently lives in Levin but teaches at a school in Otaki. She has never met Mrs Carla Taylor or Mrs Julieta Williams. She did meet, on a number of occasions with Mrs Maine, but never with Mrs Maine's husband, Brian Maine, even though he was living with Mrs Maine full time at the Otaki house.

[96] Mrs Nelson-Latu described in her evidence the health problems experienced both by her youngest daughter and by her eldest son. Both have required constant medical intervention and have been hospitalised at Hutt Hospital and at Palmerston North Hospital. The relevance of this information will appear shortly.

[97] Mrs Nelson-Latu described her mother as a person who cares for others more than she does for herself. She will never walk away from a person in need or who she feels needs help. This is often at her expense – emotionally, physically and financially.

[98] Her mother has never charged a client more than \$20 for a consultation, regardless of their ability to pay. More often than not, she will not take money from people and just asks them to leave the money in a donation tin she keeps on her bench. She often takes vegetables instead of money from clients who are not able to pay but who grow their own in their gardens. She lives a frugal life and struggles to survive financially. Her house is in desperate need of major work and she purchases second hand items over new. In recent years her health has also declined significantly and she has gone from being a fit and active person to a shadow of her former self. The stress of the present case has also caused a significant decline in her mother's health and ability to survive.

[99] In late February 2008 when her mother visited the family in Levin she told Megan of a client she had seen a few days beforehand who had a large growth on her head and which was an absolute mess. She said that the client had told her she had been to a doctor and to hospital, that they had cut the growth out and then told her that that was all they could do. Mrs Nelson said that she was disgusted but had agreed to try and clean the wound. She said the client refused to go back to the doctor or hospital as they had already sent her away. She did not tell Megan the name of the client but said that she lived in Fielding and had wanted Mrs Nelson to travel there every day to clean her head but that Mrs Nelson had refused. She said that the woman had said her daughter would drive her down to Otaki so Mrs Nelson had seen her there for a few weeks.

[100] After a period of time Mrs Nelson told her daughter that the client wanted her to do her head on a daily basis. The client's daughter was sick of driving her up and down every few days so they had hired a motel unit in Waikanae. Mrs Nelson would travel to the motel to do her head or they would visit Mrs Nelson. Megan reported that her mother was already becoming frustrated. She said to Megan that despite telling the client that she needed to be in hospital or to see a doctor, she had refused and said that she would rather die.

[101] In late March Megan was informed by her mother that the client had decided that she wanted to rent a house in Otaki so that it would be easier for her to receive treatment.

[102] Megan did not meet Mrs Maine until June 2008 when Mrs Nelson, her daughters and some family friends were going to see a movie in Otaki. Mrs Maine had heard from Mrs Nelson of the plan and had asked if she could come. Megan noticed that Mrs Maine looked completely normal and there was no obvious evidence of the cyst on her head. Upon meeting Megan, Mrs Maine told her (Megan) how lucky she was to have a mother like Mrs Nelson and how lucky Mrs Nelson was to have children “like us” who would be seen in public with her. She told Megan that her children would not be seen dead in public with her because they were ashamed and embarrassed by her and the hole in her head.

[103] Following on from the movie night Megan met and spoke with Mrs Maine on a number of occasions. On three occasions Megan took her grocery shopping at the local supermarket in Otaki after Megan had finished work. Megan used these trips as an opportunity to talk to Mrs Maine about going to hospital or the doctor. She spoke to Mrs Maine at length about Hutt Hospital and how fantastic they were, using her daughter’s experience as an example. She also spoke to her about her son and his health issues and said that sometimes the hospital and doctor were the answer.

[104] Despite Megan talking to Mrs Maine, Mrs Maine flatly refused to go to hospital or a doctor. She told Megan that she had already been there and done that and was not going again.

[105] Mrs Maine also chose to go to other Nelson family outings such as an art show where Megan’s children and her sister’s children had work on display.

[106] Mrs Nelson was continuing to see Mrs Maine on a daily basis. Megan noticed her mother becoming increasingly fatigued and exhausted and would often express her frustration at the fact that despite her best efforts to convince her, Mrs Maine would not go to hospital and flatly refused to seek conventional treatment. Mrs Nelson would often arrive at her daughter’s home in tears of frustration.

[107] In July 2008 Megan was experiencing problems with her 16 year old step daughter and Mrs Nelson was staying with Megan in Levin to provide support. It was at this time that Mrs Maine began making phone calls to Megan demanding to know where Mrs Nelson was. The account given by Megan was in the following terms:

Despite knowing what was happening at my house Maureen [Mrs Maine] showed absolutely no care or regard. She would ring at all hours of the night with no consideration of the fact that I had three young children and a husband who had to get up for work at 4.30am. Her phone calls would come at various times – midnight, 1am, 3.00am demanding to know where Mum was. I would tell her that I was not my mother’s keeper and that she should be in a hospital. She would then say that she would rather commit suicide or die than be in hospital. It got to the point that we would disconnect our phone at night. As a result of the stress I became run down and ill with the flu constantly over the month of August. I could not understand why her family or husband who lived with her every day would not do something for her.

[108] Also in July Mrs Nelson was offered a hip replacement necessitated by a fall while gathering grapefruit. The offer was turned down. One of the reasons was that Mrs Maine would constantly tell Mrs Nelson that she would be abandoning her if she tried to do anything or go anywhere. Megan Nelson-Latu said her mother caved in under the emotional pressure she was under.

[109] In September 2008 Megan collapsed and was taken to hospital where she was diagnosed with pneumonia. She was given IV antibiotics and fluids and was sent home late that evening with strong antibiotics and pain killers. She was discharged because at that time swine flu was rampant and the hospital was of the view that if Megan contracted swine flu while ill with pneumonia, she would most likely die. Mrs Nelson had picked up the grandchildren from school and stayed with them at Megan's home in Levin. Mrs Maine telephoned and demanded to know where Mrs Nelson was. Megan's husband, who answered the phone, hung up on her and disconnected the telephone. For the next four weeks while Megan was off work with pneumonia, Mrs Nelson would go and do Mrs Maine's head early in the morning. She would then drive to Levin and pick up Megan's children to take them to school as Megan's husband had to be at work and they could not afford for both to be off work without pay.

[110] In October 2008 Megan and her sister entered Mrs Nelson in a competition to win flights for two to anywhere in New Zealand. They were desperate to get Mrs Nelson away from Mrs Maine as they were concerned for their mother's health and well being and the emotional pressure that Mrs Maine was placing on their mother.

[111] As soon as Mrs Nelson won the prize, Mrs Maine began telling her that she (Mrs Nelson) could not abandon her and leave her because if she did there would be no one to take care of her. Mrs Maine telephoned Megan and told her that Megan had to tell her mother not to go away. Megan replied that Mrs Maine should be in hospital. Eventually Mrs Nelson caved in to the pressure which Megan described as emotional blackmail.

[112] On 26 December 2008 Megan picked up her mother and then drove to Mrs Maine's house before going to the airport. Megan again used this opportunity to speak to Mrs Maine about going to hospital. She repeated what she had said previously to her about the fantastic plastics unit at Hutt Hospital and that she would get excellent treatment there. Again Mrs Maine was not interested and refused to engage in conversation about going to a doctor or to a hospital. Megan dropped both women off at the airport extremely frustrated and concerned for her mother.

[113] In 2009 Megan noticed that her mother was getting little sleep and was emotionally, physically and financially drained from constantly seeing Mrs Maine twice a day. Mrs Maine contributed nothing financially and it was costing Mrs Nelson a large sum in petrol driving back and forth to her house.

[114] As Easter approached Mrs Nelson told Mrs Maine that she would be going to Tauranga to see her son. Normally Mrs Nelson would drive to Tauranga but with the pressure she was being placed under by Mrs Maine she was considering not going. Finally, Megan and her sister convinced their mother to go. Mrs Nelson then booked a seat on a bus so that Mrs Maine could not demand that she be taken by Mrs Nelson in her car. Megan learnt with amazement that Mrs Maine and her daughter had followed Mrs Nelson to Tauranga and booked a motel nearby so that Mrs Nelson could keep dressing Mrs Maine's head.

[115] Once back from Tauranga Mrs Nelson again continued to see Mrs Maine twice daily. Megan observed that her mother was a shadow of her former self and had gone from being energetic and full of life to barely alive. Mrs Maine nevertheless continued to place demands on her.

[116] In June 2009 Megan once again became ill and was showing the same symptoms as when she had collapsed in 2008. Once again she was placed on strong antibiotics

and pain killers but was not sent to hospital because of the high risk of her contracting swine flu or other infections. It was decided she was better off at home in isolation.

[117] Mrs Nelson decided that she would travel to Levin every morning to take the children to school as Megan's husband could not afford time off work. This meant that Mrs Maine could have her head dressed only at night. Mrs Maine argued with Mrs Nelson asking why Megan's husband could not look after the children given that Mrs Maine needed Mrs Nelson. It was explained to Mrs Maine that Megan's husband had to be at work before 6am and there was no alternative bearing in mind that the children were aged 2.5, 8 and 10 years of age at the time.

[118] It was shortly after this that Mrs Maine decided to go to hospital. Megan can still remember her mother arriving at Megan's home and breaking down in "absolute sheer relief that it was finally over". Megan believes that had she not become ill again her mother would now be dead. The emotional and physical toll from looking after Mrs Maine was immense and continued to be a major source of stress.

[119] In response to the evidence given by Mrs Taylor, Megan said:

[119.1] Mrs Taylor alleges that Mrs Nelson gave to Mrs Maine medication prescribed either for Mrs Nelson or for one of her daughters. She also alleges that medication prescribed for Megan's nephew in December 2007 (well before Mrs Nelson treated Mrs Maine for her head) was given to Mrs Maine. Megan says these allegations are completely false. She said:

The statements allude to our family accessing medication from our GP under false pretences in order that Mrs Maine could benefit from them. As a mother of four children, I do not take my children to the doctor unless necessary, nor do I take myself unless necessary. I am offended that anyone would think that I would gain medication for anyone other than who it is prescribed for.

[119.2] It is the evidence of Megan that she would never give medicines intended for her children or herself to anyone else, including her mother. Nor would her mother ever ask.

[119.3] In relation to Mrs Taylor's allegation that Mrs Nelson gave to Mrs Maine antibiotics she had received from a "doctor friend", Megan gave evidence that to her knowledge there are very strict practices around medications in hospitals. Having observed this process many times it was not feasible that a doctor could take bottles of drugs without them being accounted for in some way. The processes of medication being checked and double checked as well as signed off and regularly counted (which Megan has observed while her daughter has been an inpatient at both Palmerston and Hutt Hospitals) would make it impossible for a doctor to randomly take drugs to give them to someone else.

[119.4] As to the claim that Mrs Nelson told Mrs Maine to "have faith in me", Megan says that her mother would never make a statement such as this as it would be in complete opposition to her beliefs and values.

[119.5] Megan knows from firsthand knowledge that her mother has and does refer people to their doctor if necessary. She has also treated people working alongside their doctors and hospital specialist. Her mother has also spent a lot of time in various hospitals visiting clients and supporting their families in decision-making processes and to provide hope when they have been told there is nothing left that the doctors can do.

The evidence of Mr Leslie Kentfield and Mr Kevin Pragnell

[120] Mr Kentfield has known Mrs Nelson in her professional capacity for the best part of 20 years and has always found her to be a person of the very highest morality and integrity. In his experience Mrs Nelson would never suggest or insist that clients not seek conventional medical treatments; quite the reverse in his case. Both Mr Kentfield and his daughter were urged by Mrs Nelson to seek medical treatment and in each case it was found that medical treatment was required. In his daughter's case she was showing signs of a pre-diabetic condition. In his own case, after approaching his doctor on the urging of Mrs Nelson, he was sent for an emergency angiogram at the Wellington Hospital Cardiac Unit. The results showed that he had an eighty to ninety percent stenosis in his left descending pulmonary artery and about an eighty percent stenosis in the circumflex. He believes that had it not been for Mrs Nelson telling him to see his doctor so urgently, he would be dead by now.

[121] Mr Pragnell and his wife have been consulting Mrs Nelson in her professional capacity for the past ten years. Mr Pragnell has found Mrs Nelson to be a person who has great concern for the physical well being of her patients. At one particular point Mrs Nelson recommended that he get to a hospital as soon as possible. He took this advice and upon examination at Accident and Emergency was told that if he did not have urgent surgery he would die. He believes that if Mrs Nelson had not insisted on him seeing the hospital emergency department he would not be alive today.

The evidence of Dr Phillipa Malpas

[122] Dr Phillipa Malpas is a senior lecturer in clinical medical ethics at the University of Auckland. She received a Diploma in Professional Ethics, MA (1st class honours) and PhD from the University of Auckland, all within the discipline of Philosophy (Medical Ethics). She works and teaches in the field of Clinical Medical Ethics and is involved in research that explores the ethical dimension of decision-making at the end of life. She teaches medical students in the area of clinical ethics. She has been teaching in the Medical Programme for the past 10 years.

[123] Dr Malpas was asked to comment on the ethical dimension of the present proceedings, specifically her view on the ethical conduct of Mrs Nelson in her dealings with Mrs Maine over the 18 month period from February 2008 to mid 2009. After noting that the parties hold wildly divergent views, Dr Malpas stated that her report on the conduct of Mrs Nelson was based on an assumption that the factual position is as correctly stated by Mrs Nelson. In particular, on first being made aware of the cyst on Mrs Maine's head, Mrs Nelson told Mrs Maine that she refused to treat it and that Mrs Maine should be in hospital. Furthermore she told Mrs Maine that this was not something she did and that it was way out of her league. Mrs Nelson actively encouraged Mrs Maine to seek conventional medical treatment, as did her daughter Megan. However Mrs Maine replied that she did not like doctors and wasn't going back to hospital. On the basis of her begging Mrs Nelson, Mrs Nelson agreed to treat her for three months on the condition that if things did not improve, Mrs Maine would go to hospital.

[124] Addressing first the question of respect for patient autonomy and truthfulness, Dr Malpas was of the view that Mrs Maine was adequately informed about what Mrs Nelson believed ought to happen in the circumstances (that Mrs Maine should go to hospital). Mrs Maine chose to ignore the advice of Mrs Nelson. Mrs Nelson, in turn, believed that the choice is and always should be that of the patient. In the view of Dr Malpas, this suggested that Mrs Nelson put the decision and interests of Mrs Maine at the forefront of

her decision-making. Dr Malpas said it was also appropriate to note that a competent patient is permitted to make decisions about his or her health care, even if those decisions are not in the patient's best medical interests and where such decisions may be disputed by health practitioners. While it could be argued that Mrs Nelson did not inform Mrs Maine adequately for Mrs Maine to make an informed decision about seeking conventional medical care, in fact Mrs Nelson did tell Mrs Maine that she believed she ought to go to hospital. Mrs Nelson spoke honestly and truthfully to Mrs Maine in her capacity as a natural health practitioner.

[125] On the question whether a duty of care was demonstrated, the fact that Mrs Maine showed the cyst to Mrs Nelson suggested that Mrs Maine placed significant trust in Mrs Nelson and in the relationship they had. The fact that Mrs Maine was driven from Fielding to Otaki regularly for Mrs Nelson's services, travelled to Tauranga and Christchurch and moved house to be physically closer to Mrs Nelson, suggests that Mrs Maine trusted Mrs Nelson profoundly. This is also evidenced by the fact that Mrs Maine did not show her head to anyone else and in fact suggested that Mrs Maine's family did not want to be seen in public with her.

[126] Given Mrs Maine's adamant refusal to countenance hospital, and the existing relationship between Mrs Nelson and Mrs Maine, Dr Malpas was of the view that it was likely that Mrs Nelson believed she had a strong duty of care towards Mrs Maine that obliged her to treat her despite her unease in doing so. Dr Malpas cautioned that it was easy to be critical when one sees things solely from the perspective of hindsight. Given Mrs Maine's fear of abandonment (something mentioned by Mrs Nelson repeatedly in her evidence), it seemed plausible that Mrs Nelson may have believed she had a demanding obligation to treat Mrs Maine. It was equally clear from the conduct of Mrs Nelson that she did not abandon Mrs Maine, and in fact went to extreme lengths to support her (visiting her every day and sometimes twice a day, providing supplies at wholesale price and driving to Mrs Maine's house without financial recompense).

[127] On the question of financial exploitation or coercion, Dr Malpas was of the view that there was no reason to suspect that Mrs Nelson continued to treat Mrs Maine because she viewed her as a source of money. In fact it appears that Mrs Maine did not pay Mrs Nelson for her services past the first few times. Dr Malpas concluded that there was no suggestion of financial exploitation or coercion.

[128] On the question of manipulation of the relationship, Dr Malpas concluded from the evidence given by Mrs Nelson and her daughter Megan Nelson-Latu that it would appear that Mrs Maine had a difficult relationship with her family and did not place much trust in conventional medicine. These factors contributed to a view that suggested that Mrs Maine had challenging relationships with others and may have manipulated Mrs Nelson with her threat of suicide (during the Christchurch trip) and her repeated threats of being abandoned.

[129] Addressing the issue of compassion and empathy, Dr Malpas noted that appended to the report of the Deputy Health and Disability Commissioner dated 29 June 2012 was a report from ethicist Professor Grant Gillett of the University of Otago. He had noted that "any health care practitioner ought to recognise the limits of their own expertise and to recognise a case which is beyond his or her ability to treat according to the regimes of care falling within his or her own competence". In the opinion of Dr Malpas Mrs Nelson did recognise the limits of her ability to treat Mrs Maine. She made this clear to Mrs Maine when the cyst was revealed to her and throughout subsequent meetings when she expressed her view that Mrs Maine ought to go to hospital.

[130] The relationship that developed between Mrs Nelson and Mrs Maine was, however, not appropriate or healthy for either party and this was clearly evidenced by the deterioration in the health and mental status of Mrs Nelson and in the health of Mrs Maine. However, Dr Malpas was of the opinion that Mrs Nelson was committed and well-meaning in her treatment of Mrs Maine, despite the tragedy of the outcome.

[131] Although the inappropriateness of the relationship showed that the professional boundary between Mrs Nelson and Mrs Maine had been violated, Dr Malpas did not believe that the relationship had a strong power imbalance between the two women from the time when Mrs Maine's head cyst was revealed to Mrs Nelson and treatment commenced. To criticise Mrs Nelson for failing to extricate herself from the relationship and to judge her morally blameworthy would ignore the reality of a complex situation in which Mrs Maine had a fear of abandonment and of hospitals. Dr Malpas believed that this would be to judge Mrs Nelson too harshly. In her opinion Mrs Nelson is a compassionate and well intentioned person who acted with integrity and empathy; but who also became deeply enmeshed in a relationship that moved from one between a professional and patient, to one that lacked professional oversight and insight.

[132] In conclusion, Dr Malpas said that she was in agreement with Professor Gillett that if Mrs Nelson's statement is taken as correct:

... then she does not appear to have violated any ethical standards except, perhaps, to have been too accommodating to a patient's wishes in a highly unusual situation.

Mrs Nelson's case – overview

[133] As earlier mentioned, the evidence presented by Mrs Nelson and her witnesses is significantly different to that presented on behalf of the Director.

[134] In essence, her case is that there have been no breaches of the Code of Rights and when considering compliance with the Code of Rights it is important to keep context firmly in mind:

[134.1] Mrs Nelson is not a medical practitioner or a registered health practitioner. It is not appropriate to assess what she did against the standards that would apply to a health practitioner regulated by a profession.

[134.2] The defendant is an iridologist but was not providing iridology services to Mrs Maine at the relevant time. She was helping her out as a favour.

[134.3] Mrs Maine's role in events cannot be pushed to one side. She was an educated woman who was primarily responsible for her own health decisions.

[134.4] She was also a woman with a morbid fear of hospitals and medical procedures. She chose to avoid them. It would not be right to make Mrs Nelson responsible for Mrs Maine's own failures.

DISCUSSION

BURDEN OF PROOF AND STANDARD OF PROOF

[135] In proceedings brought by the Director of Proceedings under the Health and Disability Commissioner Act 1994 (HDC Act), s 50 the Tribunal has jurisdiction to grant a remedy under ss 54 and 57 of that Act only if it is satisfied on the balance of probabilities that any action of the defendant is in breach of the Code of Rights. See s 54(1).

54 Powers of Human Rights Review Tribunal

- (1) If, in any proceedings under section 50 or section 51, the Tribunal is satisfied on the balance of probabilities that any action of the defendant is in breach of the Code, it may grant 1 or more of the following remedies:
- (a) a declaration that the action of the defendant is in breach of the Code;
 - (b) an order restraining the defendant from continuing or repeating the breach, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the breach, or conduct of any similar kind specified in the order;
 - (c) damages in accordance with section 57;
 - (d) an order that the defendant perform any acts specified in the order with a view to redressing any loss or damage suffered by the aggrieved person as a result of the breach;
 - (e) such other relief as the Tribunal thinks fit.

[136] This provision places the burden of proof on the Director.

[137] The prescribed standard of proof (balance of probabilities) means that the occurrence of the fact in issue must be proved to have been more probable than not. The decision-maker must be satisfied that the occurrence of the fact in question was more likely than not. As Elias CJ stated in *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [26]:

In civil cases, and in most other non-criminal proceedings unless a different standard is prescribed or applied, the trier of fact must be satisfied on the balance of probabilities. In that case, he must be convinced by the evidence that the fact in issue is more likely than not.

[138] As to when proof is made out, Elias CJ at [28] said:

Proof is made out whenever a decision maker is carried beyond indecision to the point of acceptance either that a fact is more probable than not (if the standard is on the balance of probabilities) or that he has no reasonable doubt about it (if the standard is proof beyond reasonable doubt).

[139] While the civil standard of proof applies in proceedings under ss 50 and 51 of the HDC Act, such proceedings are not civil proceedings in the sense of a claim between litigants similarly situated and "... in respect of whom the risk of error in outcome can be regarded with relative equanimity", as Elias CJ put it in *Z v Dental Complaints Assessment Committee* at [50]. Rather they are proceedings brought with a view to establishing a breach of a statutory code of consumer rights and the obtaining of remedies of far reaching and potentially serious proportions such as a declaration of breach, a restraining order, specific performance and finally, damages, including punitive damages. Given the serious nature of the potential sanctions "stronger evidence" is required as explained by McGrath J when giving the reasons for himself, Blanchard and Tipping JJ in *Z v Dental Complaints Assessment Committee* at [102]:

[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. Balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet this standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[140] This understanding of the civil standard has previously been applied by the Tribunal. See *Director of Proceedings v Emms* [2013] NZHRRT 5 (25 February 2013) at [45]:

[45] In making our findings of fact and in determining whether the Director has established the breaches of the Code as alleged in the amended statement of claim we have applied the civil standard of proof (balance of probabilities) as explained by Blanchard, Tipping and McGrath JJ in *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [101] to [107]. Given the serious nature of the allegations, made against Mr Emms and the equally serious consequences of upholding the Director's complaints we have required a high degree of cogency before accepting any of the evidence called by the Director.

[141] Accordingly, given the serious nature of the allegations made against Mrs Nelson and the equally serious consequences of upholding the Director's complaints, we have required a high degree of cogency before accepting any of the evidence called by the Director.

[142] We turn now to the evidence and in particular the factual conflicts.

ASSESSMENT OF THE EVIDENCE

[143] There are significant conflicts in the evidence given by the parties.

[144] Mrs Maine not being able to give evidence, the primary witness for the Director concerning the relationship between Mrs Maine and Mrs Nelson was Mrs Maine's daughter, Mrs Carla Taylor. This is not to discount the evidence given by the eldest daughter, Julieta Williams, but based as she was at the time in Christchurch, her evidence addressed a more narrow range of events.

Conflicts – overview

[145] We do not intend listing exhaustively all of the conflicts of evidence between Mr Maine's daughters on the one hand and Mrs Nelson and her daughter, Megan Nelson-Latu on the other. The primary conflict centres on what Mrs Maine told Mrs Nelson about the cyst and what Mrs Nelson, in turn, said she could do by way of treatment. Allied to this is whether Mrs Nelson discouraged Mrs Maine from seeking conventional medical treatment:

[145.1] Mrs Taylor said that she was present, or within hearing, when in appropriately 2006 her mother talked to Mrs Nelson about the cyst and showed it to her. Her mother sought Mrs Nelson's advice and was told not to worry about it. Mrs Nelson says Mrs Maine did not show her the cyst until early 2008.

[145.2] Mrs Taylor says that in early 2008, having made an appointment for her mother to see Dr Baldwin, she and her mother saw Mrs Nelson a few days before the scheduled appointment and she (Mrs Taylor) was either in the consulting room or within earshot when her mother showed the cyst to Mrs Nelson who said she could heal it within three months. She made Mrs Maine promise that she would not go to her GP for the next three months while Mrs Nelson treated the cyst. Mrs Nelson thereafter continued to discourage Mrs Maine from seeking conventional medical assistance, including obtaining antibiotics. Mrs Nelson suggested pouring high concentrate peroxide on the cyst. On the other hand Mrs Nelson says that she was not shown the cyst until a consultation on 19 February 2008. Mrs Taylor was not present at that consultation. When Mrs Maine asked her (Mrs Nelson) to treat the cyst, Mrs Nelson refused and told her she should be in hospital as she needed surgery. She told Mrs Maine that treating the cyst was not what she did and it was way out of her league. However, Mrs Maine begged her to do it and told Mrs Nelson that doctors had diagnosed it as a sebaceous cyst. She never mentioned that she had been told that it might become

cancerous. Mrs Nelson reluctantly agreed to treat the cyst for three months but if it had not improved, Mrs Maine would have to go to hospital.

[145.3] Mrs Taylor says that while payment for the treatment of the cyst was “a vague agreement”, when receiving daily treatments from Mrs Nelson Mrs Maine was paying \$50 for every two to three treatments. On average her mother paid Mrs Nelson about \$100 every five days. Mrs Nelson, on the other hand, says she never charged Mrs Maine for the treatments and apart from occasional contributions for petrol, received no money.

[145.4] Mrs Taylor says that Mrs Nelson recommended that Mrs Maine take large doses of pain medication and also told her mother that she (Mrs Nelson) had trained as a nurse. Mrs Nelson recommended codeine which was sourced from medication prescribed for Mrs Nelson personally following a fall. In addition Mrs Nelson gave Mrs Maine antibiotics which had been prescribed for Mrs Nelson’s grandson as well as painkillers which had been prescribed for her daughter, Megan Nelson-Latu. Antibiotics were also provided by Mrs Nelson from a “doctor friend” who worked in a hospital in Wellington. Both Mrs Nelson and her daughter Megan emphatically reject these allegations.

[145.5] Mrs Taylor and Mrs Williams say that whenever they or Mrs Maine asked Mrs Nelson about the possibility of Mrs Maine seeing a doctor or going to hospital, Mrs Nelson would be disparaging of conventional medicine and discourage Mrs Maine by saying words to the effect that Mrs Maine could go to hospital if she wanted but she would probably end up with a worse infection and the doctors probably would not treat the cyst or give Mrs Maine radiation therapy, which was one of Mrs Maine’s morbid fears. Mrs Nelson says the opposite was the case. She repeatedly urged Mrs Maine to see a doctor and to seek treatment at a hospital, but Mrs Maine flatly refused. Mrs Nelson also says that it is entirely wrong for her to be characterised as hostile to conventional medical treatment and has called as witnesses two clients who independently attest to this fact. In addition Megan Nelson-Latu has given evidence that, drawing on her personal experience with excellent treatment at Hutt and Palmerston North hospitals regarding her daughter and son, she personally encouraged Mrs Maine to seek medical treatment but faced only negativity from Mrs Maine.

[145.6] Mrs Taylor says that by Easter 2009 Mrs Nelson was “increasingly manipulative”, telling Mrs Maine that it was Mrs Maine’s fault that the treatment was not working and in this context Mrs Maine felt that she “owed it to [Mrs Nelson] to see the treatment through”. Mrs Maine accordingly agreed to the suggestion by Mrs Nelson that she (Mrs Maine) go to Tauranga as it was the only way that Mrs Nelson could see her family there. Mrs Nelson says that she went to Tauranga partly to get away from Mrs Maine and partly to encourage Mrs Maine to go to hospital. She was in disbelief when she learnt that Mrs Maine had followed her to Tauranga, thus forcing her to continue with the daily treatment of her scalp.

[145.7] It was suggested by the Director when cross-examining Mrs Nelson that her diary entries had been recently fabricated in order to give spurious credibility to her evidence. Mrs Nelson strongly rejected the allegation and her daughter gave a clear description of the circumstances in which the diaries had been found.

[146] The foregoing list is by no means an exhaustive account of the conflicts of evidence. It does, however, demonstrate the fundamental issues in dispute.

Conflicts – assessment

[147] The challenges posed by the conflicts are compounded by the substantial hearsay content of the evidence given by Mrs Taylor and her sister as to what their mother told them. As Mr Beck submits, there is real difficulty in establishing the truth without being able to take evidence from Mrs Maine herself.

[148] It is also difficult to separate what is hearsay from what has been reconstructed. The reconstruction point is significant. It is understandable that Mrs Taylor and Mrs Williams should be concerned that their mother died of cancer largely because she delayed seeking treatment. While Mrs Maine apparently accepted some responsibility for this state of affairs, a strong element of blame-shifting emerged in the evidence of Mrs Taylor. We cite by way of example the concluding paragraph of Mrs Taylor's brief of evidence:

91 Before she died, Mum and I were interviewed by ONE News and 60 Minutes about the care that Mum had received from Ruth. Mum accepted the role she had played in getting to this point. She didn't totally blame Ruth. She did own her part. But Mum blamed Ruth for the comments that Ruth made that it wasn't cancer and for Ruth putting the onus back on Mum by saying that it was Mum's lack of faith and adherence to Ruth's proposed treatments that prevented her from becoming well. Throughout treatment, Ruth became a friend of Mum's, and a friend of the family. We trusted her. We trusted her stories. Mum desperately wanted to believe that Ruth could heal her and Ruth encouraged that belief.

[149] We have other reservations about Mrs Taylor's evidence:

[149.1] We found her too ready to claim that she was present at most significant events, too definite in her recall of events and conversations which took place as far back as 2006 and reluctant to concede that she might be mistaken or wrong.

[149.2] She asserted that the taking of her mother to Tauranga at Easter in 2009 was the result of Mrs Nelson "putting forward an element of martyrdom" by saying that her daughters were pressing her to take a break. We can see no element of "martyrdom". Mrs Nelson had by then been dressing the cyst twice a day for 12 months and had been observed by her daughter, Megan Nelson-Latu, to be emotionally, physically and financially drained from constantly seeing Mrs Maine. This has the ring of truth. So desperate was Mrs Nelson to get away that she booked a seat on a bus so that Mrs Maine could not insist on being driven by her to Tauranga. Mrs Maine begged Mrs Nelson not to abandon her as had her family. To characterise these circumstances as containing an element of martyrdom is to betray a one-sided perception of events which is not supported by the evidence.

[149.3] Neither in the evidence of Mrs Taylor nor in the evidence of her sister was there any concession towards Mrs Nelson or acknowledgement of the unreasonable demands which Mrs Maine made of her and of her family, particularly her daughter Megan Nelson-Latu. We refer to her beggings, pleadings, threats of suicide, the ringing of Megan's home in the early hours of the morning wanting to know where Mrs Nelson was and her indifference to Mrs Nelson's own health. Instead, the account given by Mrs Taylor and by Mrs Williams consistently and uniformly painted Mrs Nelson as a manipulative if not egotistical individual who vainly persisted in "curing" a cancer and thereby caused Mrs Maine great pain and suffering. In our view it was Mrs Nelson who was

being manipulated by a determined and forceful Mrs Maine who was preoccupied with morbid fears about her health and medical treatment. Regrettably the account given by Mrs Taylor and her sister was presented in simplistic black and white terms when the circumstances were more complex than acknowledged.

[149.4] It may well be that both Mrs Taylor and Mrs Williams were misled by their mother as to what she had said to Mrs Nelson and what Mrs Nelson, in turn, had said to her. There may well have been an element of self-exculpation on the part of Mrs Maine when describing the situation to her daughters as well as a shifting of blame from Mrs Maine to Mrs Nelson for not taking the course urged on her by Mrs Nelson and by Megan Nelson-Latu, namely to go to hospital immediately. But without Mrs Maine as a witness these points cannot be tested.

[150] That is why the Tribunal must be cautious in accepting the substantially hearsay elements of the evidence given by Mrs Taylor and Mrs Williams. This does not mean that their evidence was given with intent to deceive. It does mean that we have not been carried to the point of acceptance that the facts as asserted by the Director are more probable than not. Given the serious nature of the allegations made against Mrs Nelson and the equally serious consequences of upholding the Director's complaint we have required a high degree of cogency before accepting any of the evidence called by the Director.

[151] On the other hand, we found the evidence of Mrs Nelson and of her daughter, Megan Nelson-Latu, to be sincere and honest. Their evidence was without embellishment and compelling. We have no reason to doubt their truthfulness. Their evidence was not weakened by the Director's cross-examination. Indeed there was an element of desperation in that cross-examination when it was suggested, without any evidentiary foundation, that, for example, Mrs Nelson had fabricated her diary entries and that Mrs Nelson had taken Mrs Maine to Christchurch to prevent Mrs Maine seeing a doctor during Mrs Nelson's temporary absence from Otaki. That is, that she was keeping Mrs Maine close so that Mrs Nelson could control her. Not only was there no evidence to support this suggestion, it failed to take into account that Mrs Nelson and Mrs Maine stayed with Mrs Maine's daughter, Mrs Julieta Williams. This was a most unlikely venue for Mrs Nelson to have chosen to keep control over Mrs Maine. It also failed to take into account Mrs Maine's strong, if not dominating personality.

Conflicts – findings

[152] Standing back and looking at the Director's evidence as a whole we are far from being persuaded to accept that the facts are as asserted by his witnesses. We do not accept that it is more probable than not that events unfolded as narrated by Mrs Taylor and Mrs Williams. For the reasons given we prefer the evidence of Mrs Nelson and of her daughter Megan and will accordingly approach all issues of fact on the basis that those issues are to be determined by reference to their evidence. We have not overlooked the evidence of Professor Tan. But he speaks to different issues, not to the relationship between Mrs Maine, Mrs Nelson and their respective families. His evidence is of little assistance in resolving the fundamental conflicts of evidence earlier described.

[153] In view of the very serious allegations made against Mrs Nelson we make it clear that as a consequence of our findings we specifically reject as not proved the following allegations made by the Director:

[153.1] That Mrs Nelson claimed that she could cure cancer.

[153.2] That Mrs Nelson claimed that the most effective option was to pour a high concentrate of peroxide on to the cyst.

[153.3] That Mrs Nelson claimed she could heal the cyst.

[153.4] That Mrs Nelson required Mrs Maine to promise that she (Mrs Maine) would not go to her GP while Mrs Nelson was treating the cyst.

[153.5] That Mrs Nelson made disparaging remarks about conventional medicine and discouraged Mrs Maine from seeing a doctor or going to hospital.

[153.6] That Mrs Nelson provided Mrs Maine with painkillers and antibiotics.

[153.7] That Mrs Nelson received money for treating the cyst apart from a small sum for petrol.

[153.8] That Mrs Nelson fabricated the entries in her diary.

[153.9] That Mrs Nelson manipulated Mrs Maine or exploited her for gain.

[153.10] That Mrs Nelson told Mrs Maine that the treatment was not working because Mrs Maine did not have sufficient faith in Mrs Nelson.

[153.11] That Mrs Nelson has a “sustained lack of insight” and that this has “implications for public safety”.

[154] What we do find is that Mrs Nelson erred in failing to refuse to have anything to do with Mrs Maine’s cyst from the time it was first shown to her on 19 February 2008. This was not some small, if not trifling physical manifestation on Mrs Maine’s scalp which could be managed without conventional medical intervention. It was a large lesion on the scalp, then 8 cm in diameter, soon to almost double in size to 15 cm. The hair and skin were missing and its appearance, in Mrs Nelson’s own words, was disgusting and it was “weeping and smelly”. Her reaction was to tell Mrs Maine that “it was disgusting and that she needed surgery and plastic surgery” for what she described as “the hole in [Mrs Maine’s] head”. The circumstances were so extreme that anyone, whether a natural health practitioner or a registered medical practitioner would have immediately recognised the need for urgent admission to hospital.

[155] That Mrs Nelson nevertheless agreed to treat (and then continued to treat) the lesion notwithstanding her better judgment was the outcome of two factors:

[155.1] First, Mrs Nelson’s caring and compassionate nature.

[155.2] Second, Mrs Maine’s dominating and manipulative personality which enabled her to take advantage of Mrs Nelson’s good nature.

[156] Mrs Nelson said that in all her experience she had never before encountered a person like Mrs Maine and was ill-prepared for a situation which, in hindsight, she should never have become involved in. Her predicament has been aptly described by Professor Gillett in his “Remarks in amplification of ethical opinions” which he provided to the Health and Disability Commissioner:

I offer these remarks not on the basis of my expertise in ethics but as a clinical provider with considerable experience in dealing with patients who have distressing and serious clinical conditions requiring surgery to the head and/or the brain. These remarks are therefore to be regarded as informal observations only and not within my scope of agreed and acknowledged expertise.

Patients such as [Mrs Maine] are not common but, if I have formed a correct opinion on the basis of the evidence given to me, they pose particular problems for health care practitioners. [Mrs Maine] seems to me to have been an anxious and dependent person prone to minimising or denying her health care problems out of an almost morbid fear of what they may portend. She seems to have been overly willing to accept reassurance even in the face of seemingly compelling evidence that it was misplaced. She seems to be the kind of person who draws others into close and emotionally demanding relationships and then to place great dependence on those others to the point where they come to realise that they have taken on a burden that is not lightly to be set aside and will prove very costly. Unfortunately committed and well-meaning practitioners are most often those who are badly affected by such relationships and the experiences that result, particularly when they do not exert the kind of hard-headed attention to evidence that for many is a *sine qua non* of professional life.

[157] To explain our adverse finding against Mrs Nelson we turn now to the Code of Rights and Mrs Nelson's obligation under that Code.

THE CODE OF RIGHTS AND ALTERNATIVE HEALTH CARE PROVIDERS

[158] The Code of Health and Disability Services Consumers' Rights confers a number of legal rights on all consumers of health and disability services in New Zealand and places corresponding obligations on providers of those services. The provisions of the Code of Rights relevant to the present case follow:

1 Consumers have rights and providers have duties

- (1) Every consumer has the rights in this Code.
- (2) Every provider is subject to the duties in this Code.
- (3) Every provider must take action to—
 - (a) inform consumers of their rights; and
 - (b) enable consumers to exercise their rights.

2 Rights of consumers and duties of providers

The rights of consumers and the duties of providers under this Code are as follows:

...

Right 4

Right to services of an appropriate standard

- (1) Every consumer has the right to have services provided with reasonable care and skill.
- (2) Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards.
- (3) Every consumer has the right to have services provided in a manner consistent with his or her needs.
- (4) Every consumer has the right to have services provided in a manner that minimises the potential harm to, and optimises the quality of life of, that consumer.
- (5) Every consumer has the right to co-operation among providers to ensure quality and continuity of services.

...

Right 6

Right to be fully informed

- (1) Every consumer has the right to the information that a reasonable consumer, in that consumer's circumstances, would expect to receive, including—
 - (a) an explanation of his or her condition; and
 - (b) an explanation of the options available, including an assessment of the expected risks, side effects, benefits, and costs of each option; and
 - (c) advice of the estimated time within which the services will be provided; and
 - (d) notification of any proposed participation in teaching or research, including whether the research requires and has received ethical approval; and
 - (e) any other information required by legal, professional, ethical, and other relevant standards; and
 - (f) the results of tests; and
 - (g) the results of procedures.

- (2) Before making a choice or giving consent, every consumer has the right to the information that a reasonable consumer, in that consumer's circumstances, needs to make an informed choice or give informed consent.
- (3) Every consumer has the right to honest and accurate answers to questions relating to services, including questions about—
 - (a) the identity and qualifications of the provider; and
 - (b) the recommendation of the provider; and
 - (c) how to obtain an opinion from another provider; and
 - (d) the results of research.
- (4) Every consumer has the right to receive, on request, a written summary of information provided.

Right 7

Right to make an informed choice and give informed consent

- (1) Services may be provided to a consumer only if that consumer makes an informed choice and gives informed consent, except where any enactment, or the common law, or any other provision of this Code provides otherwise.
- (2) Every consumer must be presumed competent to make an informed choice and give informed consent, unless there are reasonable grounds for believing that the consumer is not competent.
- ...
- (7) Every consumer has the right to refuse services and to withdraw consent to services.
- ...

[159] The duties of a provider under the Code of Rights are not absolute. A provider will not be in breach of the Code if the provider can prove that he or she took “reasonable actions” in the circumstances to give effect to the rights and to comply with the duties in the Code of Rights. See cl 3:

3 Provider compliance

- (1) A provider is not in breach of this Code if the provider has taken reasonable actions in the circumstances to give effect to the rights, and comply with the duties, in this Code.
- (2) The onus is on the provider to prove that it took reasonable actions.
- (3) For the purposes of this clause, **the circumstances** means all the relevant circumstances, including the consumer's clinical circumstances and the provider's resource constraints.

[160] The Code of Rights applies to all health care providers. See the definition in cl 4:

provider means a health care provider or a disability services provider

[161] The term “health care provider” is defined in the HDC Act, s 3. It includes not only any health practitioner as defined in s 5(1) of the Health Practitioners Competence Assurance Act 2003, but also:

- (k) any other person who provides, or holds himself or herself or itself out as providing, health services to the public or to any section of the public, whether or not any charge is made for those services.

[162] Health services, in turn, are defined in s 2(1) of the HDCA as following:

health services—

- (a) means—
 - (i) services to promote health:
 - (ii) services to protect health:
 - (iii) services to prevent disease or ill health:
 - (iv) treatment services:
 - (v) nursing services:
 - (vi) rehabilitative services:
 - (vii) diagnostic services; and
- (b) includes—

- (i) psychotherapy and counselling services:
- (ii) contraception services and advice:
- (iii) fertility services:
- (iv) sterilisation services

[163] The Code of Rights accordingly applies to a wide range of practitioners of complementary and alternative medicine. Mrs Nelson does not dispute that at the relevant time she was a health care provider who was providing health services to Mrs Maine but submits:

[163.1] The treatment she gave for the cyst on Mrs Maine's head was given as a friend, not as a health care provider.

[163.2] In the alternative, she did not breach any relevant legal standard applicable to a natural health practitioner in her situation.

Capacity in which treatment given

[164] We have accepted Mrs Nelson's evidence that when she was shown the cyst for the first time she refused to treat it and told Mrs Maine that she should be in hospital. However, after Mrs Maine begged her she agreed to treat Mrs Maine's head for three months on the understanding that if the cyst had not improved, Mrs Maine would go to hospital.

[165] The three months came and went and the treatments increased in frequency from every two to three days to twice daily. The cyst increased in size from 8 cm to 15 cm. By any standard it was large. The pulsating dura could be seen as the hair, skin and bone had fallen away.

[166] Treatment involved the removal of dead skin with tweezers, the application of calendula oil, colloidal silver and the deployment of a dressing.

[167] The objective evidence is that when Mrs Nelson was consulted about the cyst she was in a professional relationship with Mrs Maine and was consulted in her capacity as iridologist and natural health practitioner. It was her judgment and expertise as such practitioner which was brought to bear when Mrs Maine asked for and Mrs Nelson agreed to provide treatment for the cyst. Such remained the position for the entire 18 month period notwithstanding Mrs Nelson's subjective view that she was, in the end, doing Mrs Maine a personal favour of substantial proportions. She may well have believed that she was providing assistance as a friend but that does not alter the fact that she embarked upon the course of treatment as a natural health practitioner, not as (say) a helpful neighbour from across the road.

[168] We accordingly reject the submission that the treatment was given as a friend, not as a health care provider.

[169] We turn now to the required standard of care.

THE REQUIRED STANDARD OF CARE

Preliminary

[170] Two preliminary points must be made:

[170.1] The Director properly conceded that this case is not a contest between so-called alternative or complementary therapies and so-called conventional or

mainstream medicine. The Tribunal is not called on to determine whether there is any scientific basis for Mrs Nelson's practise of iridology.

[170.2] The fact that a health care provider chooses to operate outside generally accepted fields of knowledge does not mean he or she is operating illegally. Nor does it mean he or she operates beyond human rights scrutiny or that he or she can cause harm with impunity. All health care providers are bound by the common legal standards in the Code of Rights when providing services to health and disability consumers.

Identifying the standard

[171] All health care providers are legally required to perform their professional duties to the standard of reasonable care and skill. See Joanna Manning "The Required Standard of Care for Treatment" in Skegg and Paterson (eds) *Medical Law in New Zealand* (Brookers, Wellington, 2006) at [3.1]. This is a duty imposed by the common law. It is now a duty also imposed by Right 4 of the Code of Rights. As Ms Manning points out at op cit [3.2.2], the heading to Right 4 of the Code of Rights refers to a "Right to services of an appropriate standard". This is to be understood as defining the legal standard to which services being provided to health and disability consumers should conform, rather than creating a right of access to such services:

Right 4(1) thus encapsulates the common law standard of care in negligence. In determining whether there has been a breach of right 4(1), the Health and Disability Commissioner and the Human Rights Review Tribunal will apply relevant principles of the common law of negligence.

[172] It was common ground at the hearing that the required standard of reasonable care and skill is that of the reasonably careful practitioner of the relevant profession of complementary medicine. The practitioner is entitled to be judged against that standard, as testified to by comparable fellow practitioners, not that of the reasonably careful practitioner in an equivalent position in orthodox medicine. A consequence of this principle is that a court or decision-maker is unlikely to accept evidence from a doctor, for example, for the purposes of establishing the appropriate standard of care of a natural health practitioner. See Manning at op cit [3.4.5].

[173] Ms Manning notes that two qualifications to this principle may be necessary:

[173.1] As in the case of practitioners of conventional medicine, those who practise complementary and alternative medicine cannot dictate to the court or other decision-maker the standard by which they are to be judged. The decision-maker retains the right to reject expert evidence of a particular accepted practice as not "reasonable". See Manning op cit [3.4.5] and Paterson and Skegg "The Code of Patients' Rights" in Skegg and Paterson (eds) *Medical Law in New Zealand* at [2.6.3] and also Manning "Determining Breach of the Standard of Care" in Skegg and Paterson (eds) *Medical Law in New Zealand* at [4.3.6].

[173.2] The standard of care applicable to a practitioner of natural health or of complementary medicine practising in a western country might have to take into account the fact that the practitioner is practising alongside a system of orthodox medicine. More particularly, in the case of New Zealand the natural health practitioner is required by law to observe the same Code of Rights as registered medical practitioners. The definitions of "provider" and of "services" are of the broadest kind. Ms Manning suggests:

There is perhaps a growing possibility of a scientifically unsound professional practice being found “unreasonable” or “incapable of withstanding logical analysis”, and a practitioner negligent for persisting in its use.

[174] The proposition that the reasonableness of standards is ultimately for the Tribunal to determine and that it is open to the Tribunal to set a standard higher than that recognised by current practice finds support from *B v Medical Council* [2005] 3 NZLR 810n (Elias J) at 811, a disciplinary case but we see no reason why the principle should not be the same given the Tribunal’s standard-setting function under the HDC Act:

The structure of the disciplinary processes set up by the Act, which rely in large part upon judgment by a practitioner’s peers, emphasises that the best guide to what is acceptable professional conduct is the standards applied by competent, ethical, and responsible practitioners. But the inclusion of lay representatives in the disciplinary process and the right of appeal to this Court indicates that usual professional practice, while significant, may not always be determinative: the reasonableness of the standards applied must ultimately be for the Court to determine, taking into account all the circumstances including not only usual practice but also patient interests and community expectations, including the expectation that professional standards are not to be permitted to lag. The disciplinary process in part is one of setting standards.

[175] The purpose of the HDC Act is to promote and protect the rights of health consumers and disability services consumers (HDC Act, s 6). To that end every health consumer or disability services consumer in New Zealand has rights under the Code of Rights and every health care provider or disability services provider is subject to the duties in the Code. Given the pivotal role which the Code plays in the setting of standards for the protection of health consumers and disability services consumers in New Zealand, those standards cannot be set so low as to result in a form of consumer protection which is largely illusory. To paraphrase the observation made by Elias J in *B v Medical Council*, patient and community interests and expectations may be particularly important in determining whether a practitioner has provided services with reasonable care and skill. Professional standards are not to be permitted to lag.

Whether other approaches helpful

[176] Firmly grounded as it is in the language of Right 4(1) and in common law principle, a duty to provide services framed in terms of reasonable care and skill is unquestionably preferable to a standard framed around notions of “common sense” and “welfare” as possibly suggested by Mr Cottingham. We are also left uneasy by the fact that Mr Cottingham disapproved of health care providers who work outside of a regulated system, whether of a mandatory or of a voluntary nature. He also found it difficult to answer questions relating to standards applicable to such non-regulated providers, saying he had never practised outside a framework and that the issue was “almost outside [his] field”.

[177] Mr Cottingham also put forward as “useful guides to generally accepted standards for all natural health practitioners” the Code of Ethics for the New Zealand Association of Medical Herbalists and the Code of Ethics of Naturopaths of New Zealand Inc. It is to be noted, however, that neither code makes reference to a duty to exercise reasonable care and skill. This highlights the need, in the “unregulated” environment, to focus on the text, object and purpose of the particular right in the Code of Rights before turning to codes of ethics drawn from other environments, be they regulated by statute or by voluntary registration.

Six general principles of health care

[178] Helpful as Mr Cottingham's evidence was, for the present case we propose adopting the more succinctly framed six general principles of health care identified by Professor Gillett in his report to the Health and Disability Commissioner and which were agreed to by Dr Malpas. These are, as stated, general principles and do not replace the Code of Rights, particularly the right to have services provided with reasonable care and skill. The principles do, however, assist in addressing the issues raised by the present case:

[178.1] That any person purporting to be a health care practitioner ought to recognise the limits of their own expertise and to recognise a case which is beyond his or her ability to treat according to the regimens of care falling within his or her own competence.

[178.2] That any person whose patient outstrips the ability of the practitioner to provide adequate treatment within his or her own scope of practice should be encouraged to seek another opinion or referred for such an opinion (depending on the standing of the practitioner).

[178.3] That it is generally not acceptable for a practitioner to abandon a patient when he or she is the patient's main contact with the health care system.

[178.4] That a practitioner cannot compel a person to attend another practitioner and that attending an alternative provider or complying with a recommendation to seek alternative treatment is always a decision by the patient.

[178.5] That the duty of care of any practitioner includes doing the best he or she can to facilitate appropriate care for the patient's condition but that a patient of sound mind remains the arbiter of what health care choices he or she will make and what constitute his or her best interests even where that seems to run counter to what a competent practitioner would advise.

[178.6] Where a practitioner and a patient are in a close relationship which is causing a distortion of normal patterns of care the practitioner ought, as far as possible, to involve a colleague with the expertise to offer independent and appropriate advice on the patient's problem.

[179] We turn now to the breaches alleged in the statement of claim dated 1 November 2012 and our findings thereon.

THE BREACHES ALLEGED IN THE STATEMENT OF CLAIM – FINDINGS

First breach – Right 4(1)

[180] It is alleged that Mrs Nelson breached Right 4(1) of the Code of Rights by failing to provide services to Mrs Maine with reasonable care and skill. The particulars alleged are:

- (a) The defendant commenced and/or continued treatment of the scalp lesion when the needs of the aggrieved person were beyond the defendant's expertise; and/or
- (b) The defendant failed to set and/or maintain appropriate professional boundaries with her client; and/or
- (c) The defendant discouraged the aggrieved person from seeking medical treatment which delayed appropriate medical treatment and/or put the aggrieved person at significant risk of life-threatening complications such as meningial infection and profuse haemorrhage; and/or

- (d) The defendant encouraged the aggrieved person's fears of medical treatment by reference to:
- (i) failures of doctors in other cases;
 - (ii) the risk of infection at hospital;
 - (iii) the possibility that the medical practitioners and/or hospital staff would be shocked by the "cyst";
 - (iv) the possibility that the hospital staff would be unable and/or unwilling to treat the scalp lesion;
 - (v) the possibility that the aggrieved person would have to undergo radiation therapy.

[181] Addressing first particular (a), we have accepted Mrs Nelson's evidence that when on 19 February 2008 Mrs Maine showed the cyst to her for the first time and asked her to treat it, Mrs Nelson refused, telling Mrs Maine that she should be in hospital, that it was disgusting and that she needed surgery. She told Mrs Maine "that this was not what I did, and that it was way out of my league". Had Mrs Nelson flatly refused to treat the scalp lesion because it was beyond her expertise, there would have been no breach of the Code of Rights. The error made by Mrs Nelson was that on being begged by Mrs Maine, she agreed to treat the lesion for three months on the understanding that, if it hadn't improved, Mrs Maine would go to hospital. The further error made by Mrs Nelson was to continue to treat the lesion after the three month period expired without Mrs Maine admitting herself to hospital.

[182] Having decided to assist, the treatment provided by Mrs Nelson involved physical engagement with a large lesion through the use of tweezers to remove dead skin and the application of herbal remedies followed by a dressing. When the treatment began the lesion was already substantial in size, being 8 cm wide and infected. Over the intervening months it almost doubled in size notwithstanding an increase in the frequency of treatments. The hair, skin and bone were missing and the pulsating dura could be seen.

[183] Mr Beck submitted that Mrs Nelson was not "treating" the lesion in the way that word is ordinarily understood. But in our view the description we have given meets the definition of a "health care procedure" as defined in s 2(1) of the HDC Act. It is a broad definition and includes the provision of health services. At the very least Mrs Nelson was endeavouring to keep the lesion clear of infection until Mrs Maine admitted herself to hospital. On the facts such endeavours come within the s 2(1) definition in that Mrs Nelson was providing services to promote health, to protect health and to prevent disease or ill-health.

[184] As to whether the standard of care was observed the facts are clear and no sophisticated analysis is required. On Mrs Nelson's own admission she accepts that treatment of the scalp lesion was beyond her expertise. By commencing and continuing treatment of the lesion she was not exercising reasonable care and skill, that is, exercising the standard of reasonable care and skill of the reasonably careful natural health practitioner of complementary medicine. Such practitioner would have refused to apply any treatment to the lesion. The evidence of Mr Cottingham was to the same effect. The fact that Mrs Nelson was acting out of kindness and compassion is no defence though it is relevant to the issue of remedy. See s 54(4) of the HDC Act. Nor on these facts does cl 3 of the Schedule (reasonable actions in the circumstances) have application.

[185] We accordingly find that the evidence establishes, to the civil standard as earlier explained, a breach of Right 4(1) as particularised in allegation (a) above.

[186] As to the allegation that there was an absence of reasonable care and skill by reason of Mrs Nelson failing to set and maintain appropriate professional boundaries, we

accept the submission by Mr Beck that on the facts, such failure is not a matter that goes to the provision of services with reasonable care and skill and we accordingly find that the allegation in particular (b) has not been established in the context of Right 4(1). We return to the issue of professional boundaries shortly in the context of Right 4(2).

[187] In relation to particulars (c) and (d), we have already found that Mrs Nelson did not discourage Mrs Maine from seeking medical treatment nor did she encourage Mrs Maine's fears of medical treatment.

[188] We accordingly find that Mrs Nelson has not committed the acts pleaded in particulars (b), (c) and (d).

Second breach – Right 4(2)

[189] It is alleged that Mrs Nelson breached Right 4(2) of the Code of Rights by failing to provide services to Mrs Maine that complied with legal, professional, ethical, and other relevant standards. The particulars alleged are:

- (a) The defendant commenced and/or continued treatment of the scalp lesion when the needs of the aggrieved person were beyond the defendant's expertise; and/or
- (b) The defendant failed to set and/or maintain appropriate professional boundaries with her client; and/or
- (c) The defendant discouraged the aggrieved person from seeking medical treatment which delayed appropriate medical treatment and/or put the aggrieved person at significant risk of life-threatening complications such as meningeal infection and profuse haemorrhage.

[190] As to particular (a), the Director's case is, in effect, that by treating the scalp lesion Mrs Nelson failed to provide services with reasonable care and skill. This is but a repetition of the breach of Right 4(1) and we decline to make a needless duplicate finding that the Director has established a breach of Right 4(2) because he has established a breach of Right 4(1).

[191] As to particular (b), because the Director alleges a failure to maintain professional standards it is for him to establish that the maintenance of professional boundaries is a necessary as opposed to a desirable component of the legal, professional, ethical and other relevant standards applicable to a natural health practitioner such as Mrs Nelson and that there has been a breach of those standards.

[192] The Director relies on the evidence of Mr Cottingham. For his part, Mr Cottingham rather assumed, without much by way of elaboration, that the maintenance of professional boundaries is included in the standards Mrs Nelson was expected to observe. Neither the standard nor its content were elaborated upon to any meaningful degree, or at least not to the point where the Tribunal felt assisted by the evidence.

[193] Furthermore, Mr Cottingham relied heavily on the following to justify his conclusion that the relevant standard had been breached:

[193.1] Mrs Nelson and Mrs Maine "took [trips] together to Christchurch and to Tauranga in the context of other family commitments". As to this, the trip to Christchurch was not a social occasion. Mrs Nelson's daughters entered the Air New Zealand competition in the hope of providing Mrs Nelson with a welcome break from Mrs Maine. The trip to Tauranga was also conceived of as an opportunity for Mrs Nelson to get away from Mrs Maine. Each break was hijacked by Mrs Maine in one way or another. There was little that Mrs Nelson could do, for example, when Mrs Maine announced her unwelcome arrival in Tauranga.

[193.2] Mr Cottingham referred to allegations that Mrs Nelson provided Mrs Maine with Mrs Nelson's personal prescription medications. We have found that there is no basis for this allegation.

[193.3] Mr Cottingham asserted that Mrs Nelson socialised with Mrs Maine "for several hours". That is hardly a fair description of what happened. When Mrs Maine was seeing Mrs Nelson for iridology sessions Mrs Maine booked longer appointments because she felt she got more out of the treatment session because Mrs Nelson "chatted" with her and therefore came to know her better and as a result was able to provide more specific treatment. We suspect that "getting to know the client better" is not an unusual practice in the alternative health field and Mr Cottingham gave no evidence as to how professional boundaries are to be approached in such context. Personal contact of the kind in question may be more attractive to some consumers than the apocryphal fifteen minute appointment with a registered medical practitioner who simply issues a new prescription. When at a later time Mrs Nelson was treating Mrs Maine twice a day there is no evidence of socialising in the morning and it cannot realistically be suggested that the treatment sessions which commenced late in the evening were followed by "socialising". Mrs Nelson was by then exhausted.

[193.4] Mr Cottingham also referred to "the appearance of [financial] exploitation of a patient ... in a vulnerable situation". We have found, however, that Mrs Nelson did not receive any significant income from Mrs Maine in the relevant period. There was no exploitation.

[193.5] Mr Cottingham also said that it was Mrs Nelson's responsibility to end the therapeutic relationship because with the passage of time it became clear the treatment was not effective. As against this the general principles of health care identified by Professor Gillett are that it is generally not acceptable for a practitioner to abandon the patient when she is the patient's main contact with the health care system, that a practitioner cannot compel a person to attend another practitioner and that a patient of sound mind remains the arbiter of his or her own health care choices. There may have been no easy answer but we did not find in Mr Cottingham's evidence much of substance to identify just when and where Mrs Nelson allegedly fell short of the proposed standard.

[194] The overarching point is that the findings of fact we have made undermine virtually all of the assumptions made by Mr Cottingham when making his assessment.

[195] We do not see the duty to maintain appropriate professional boundaries as imposing an absolute obligation of invariable content. The context of the particular case will largely dictate the content of the duty. In the present case we believe that Dr Malpas had a better appreciation of the complexities brought about by the combination of a highly unusual set of circumstances, a difficult client and a caring provider. Hindsight alone cannot drive the assessment whether professional boundaries were maintained. For these reasons we prefer the opinion of Dr Malpas that, given the complex circumstances in which Mrs Nelson found herself, one must not judge her too harshly:

22 Although the inappropriateness of the relationship does clearly show that the professional boundary between Mrs Nelson and Mrs Maine was violated, I don't believe that the relationship had a strong power imbalance between the two women from the time in which Mrs Maine's head cyst was revealed to Mrs Nelson and treatment commenced. To criticise Mrs Nelson for failing to extricate herself from the relationship and judge her morally blameworthy, is to ignore the reality of a complex situation: I believe it is to judge Mrs Nelson too harshly. From the evidence I have read, I believe Mrs Nelson to be a

compassionate and well intentioned person who acted with integrity and empathy; but who also became deeply enmeshed in a relationship that moved from one between a professional and patient, to one that lacked professional oversight and insight.

- 23 I am in agreement with Professor Grant Gillett that if we take Mrs Nelson's statement as correct "*in she does not appear to have violated any ethical standards except, perhaps to have been too accommodating to a patient's wishes in a highly unusual situation*".

[196] In view of our reservations concerning Mr Cottingham's evidence and further given our acceptance of the evidence given by Dr Malpas we find that the Director has not established that there was a failure to set and maintain professional boundaries as alleged in particular (b).

[197] As to particular (c), we have found that Mrs Nelson did not discourage Mrs Maine from seeking medical treatment.

Third breach – Right 4(3)

[198] It is alleged that Mrs Nelson breached Right 4(3) of the Code of Rights by failing to provide services in a manner consistent with Mrs Maine's needs. The particulars alleged are:

- (a) When it was clear that the aggrieved person required medical treatment, the defendant commenced and/or continued to treat the aggrieved person's scalp lesion when doing so was:
 - (i) beyond the defendant's expertise; and/or
 - (ii) ineffective.
- (b) The defendant discouraged the aggrieved person from seeking medical treatment which delayed medical intervention and/or put the aggrieved person at significant risk of life-threatening complications such as meningeal infection and profuse haemorrhage.

[199] It is to be observed that the allegation in particular (a) is virtually identical to the allegation made in respect of Right 4(1) and Right 4(2). Mr Beck submits that this is indicative of a rather unfocussed approach and we are inclined to agree. It also gives the unfortunate appearance of "overcharging" particularly when, as here, it is difficult to see what the alleged breach of Right 4(3) adds to the breach of Right 4(1) beyond the obvious, namely that the right of a consumer to have services provided in a manner consistent with his or her needs necessarily implies the provision of services with reasonable care and skill. In these circumstances we see little point in duplicating the finding we have made in relation to Right 4(1).

[200] In any event, on the present facts we do not consider a breach of Right 4(3) as alleged in particular (a) has been established. Our reasons follow.

[201] First, three observations are to be made about Right 4(3):

[201.1] The focus of the right is on the "manner" in which the services are provided.

[201.2] The right is couched in unhelpfully broad language and there is ambiguity in the phrase "his or her needs". It is said this cannot be equated with what the consumer "wants". See Manning op cit [2.6.3]. Yet the needs of the consumer may require a holistic approach. For example, Mrs Nelson was meeting also Mrs Maine's emotional and psychological need for support and was providing an environment in which Mrs Maine could eventually come to the realisation that she had to go to hospital.

[201.3] Compliance requires only that the provider take “reasonable actions in the circumstances” to give effect to the right. See cl 3 of the Schedule.

[202] For Mrs Nelson it is submitted:

[202.1] There is no suggestion that she adopted an inappropriate manner of providing services and the allegation of breach of this right appears to be inapposite. It is notable that the Commissioner did not find a breach of this right.

[202.2] Mrs Nelson was not purporting to treat the lesion. She was cleaning the wound as a palliative exercise. She knew that hospital treatment was required and repeatedly encouraged Mrs Maine to seek treatment.

[202.3] On the other hand, Mrs Nelson provided considerable support to Mrs Maine, which she clearly found very helpful. To all practical intents Mrs Nelson was meeting the needs of her client.

[203] We agree with the submissions for Mrs Nelson.

[204] The Director’s case is, in effect, that Mrs Nelson failed to provide appropriate treatment. She should not have treated the lesion at all as it was “out of her league”.

[205] The awkwardness inherent in deploying Right 4(3) stems from the Director’s endeavour to apply not only Right 4(1) to the absence of reasonable care and skill but also Rights 4(2) and 4(3). We are not persuaded that on the present facts Right 4(3) is the proper vehicle for the “inappropriate treatment” argument. That argument more properly belongs to Right 4(1) and we have found that Mrs Nelson failed to provide services with reasonable care and skill.

[206] In summary the conclusion we have reached is twofold:

[206.1] The allegation made in particular (a) does not, on the facts, sit appropriately under Right 4(3).

[206.2] In any event, we are not persuaded that, on the balance of probabilities, it is more likely than not that Mrs Nelson failed to provide her services to Mrs Maine in a manner consistent with the needs of Mrs Maine.

[207] As to the allegation in particular (b), we have already found that Mrs Nelson did not discourage Mrs Maine from seeking medical treatment. To the contrary, Mrs Nelson consistently urged Mrs Maine to see a doctor or to go to a hospital. The delay in medical intervention and the consequent risk of life-threatening complications was entirely the responsibility of Mrs Maine.

Fourth breach – Right 4(4)

[208] It is alleged that Mrs Nelson breached Right 4(4) of the Code of Rights by failing to provide services in a manner that minimised the potential harm to, and optimised the quality of the life of, the aggrieved person. The particulars alleged are:

- (a) The defendant allowed a relationship of dependence to develop between the defendant and the aggrieved person which compounded the aggrieved person’s reluctance to seek appropriate medical intervention; and/or
- (b) The defendant discouraged the aggrieved person from seeking medical treatment which delayed appropriate medical treatment and/or put the aggrieved person at significant risk of life-threatening complications such as meningial infection and profuse haemorrhage.

[209] The Director's case must fail. The facts as we have found them show that Mrs Maine manipulated the relationship between herself and Mrs Nelson and frequently engaged in emotional blackmail, threatening suicide if Mrs Nelson "abandoned" her. It was not Mrs Nelson who encouraged the dependence to develop. She provided help to someone she saw as being in need and Mrs Maine took advantage of that. Mrs Maine's reluctance to seek appropriate medical intervention was not something Mrs Nelson ever contributed to. On the contrary, she constantly urged Mrs Maine to seek such intervention.

[210] As to particular (b) we have already made clear our reasons for finding that this allegation has not been established.

Fifth breach – Right 4(5)

[211] It is alleged that Mrs Nelson breached Right 4(5) of the Code of Rights by failing to cooperate with other providers to ensure quality and continuity of services. By way of particulars it is alleged:

- (a) The defendant did not refer the aggrieved person to another provider when the aggrieved person's treatment needs were beyond the defendant's expertise.

[212] On the findings of fact explained earlier, Mrs Nelson made the limits to her expertise clear to Mrs Maine and repeatedly urged Mrs Maine to seek assistance from a medical practitioner and from a hospital. Mrs Maine refused. In these circumstances there has been no breach of Right 4(5) of the Code or Rights.

Sixth breach – Right 6(1)

[213] It is alleged that Mrs Nelson breached Right 6(1) of the Code of Rights by failing to provide information that a reasonable consumer, in the aggrieved person's circumstances, would expect to receive. The particulars alleged are:

- (a) The defendant failed to provide the aggrieved person with an adequate explanation of the treatment options available (including but not limited to the option of receiving medical treatment from a general practitioner or hospital); and/or
- (b) The defendant misled the aggrieved person, and/or the aggrieved person's family, to believe that her condition was improving as a result of the defendant's treatment when in fact the scalp lesion was growing; and/or
- (c) The defendant failed to inform the aggrieved person that the scalp lesion was growing and her condition worsening.
- (d) The defendant encouraged the aggrieved person's fears of medical treatment by reference to:
 - (i) failures of doctors in other cases;
 - (ii) the risk of infection at hospital;
 - (iii) the possibility that the medical practitioners and/or hospital staff would be shocked by the "cyst";
 - (iv) the possibility that the hospital staff would be unable and/or unwilling to treat the scalp lesion;
 - (v) the possibility that the aggrieved person would have to undergo radiation therapy.

[214] On the findings we have made none of the allegations set out in the particulars have been established to the required standard of proof.

[215] Furthermore, as Mr Beck submitted, the question here is what a reasonable consumer could expect to receive from a natural health practitioner who had agreed to help by cleaning a lesion. It is not what could be expected from a registered medical practitioner. The advice given by Mrs Nelson was that dealing with the lesion itself was beyond her scope and that medical attention was needed. That is all that could

reasonably be expected in the circumstances. Mrs Nelson accordingly complied with the Code of Rights in this respect.

Seventh breach – Right 6(2)

[216] It is alleged that Mrs Nelson breached Right 6(2) of the Code of Rights in that she did not provide Mrs Maine with information that a reasonable consumer in her circumstances would need to make an informed choice or give informed consent to the ongoing treatment of her scalp. The particulars pleaded are:

- (a) The defendant failed to provide the aggrieved person with an adequate explanation of the treatment options available (including but not limited to the option of receiving medical treatment from a general practitioner or hospital); and/or
- (b) The defendant misled the aggrieved person, and/or the aggrieved person's family, to believe that her condition was improving as a result of the defendant's treatment when in fact the scalp lesion was growing; and/or
- (c) The defendant failed to inform the aggrieved person that the scalp lesion was growing and her condition worsening.
- (d) The defendant encouraged the aggrieved person's fears of medical treatment by reference to:
 - (i) failures of doctors in other cases;
 - (ii) the risk of infection at hospital;
 - (iii) the possibility that the medical practitioners and/or hospital staff would be shocked by the "cyst";
 - (iv) the possibility that the hospital staff would be unable and/or unwilling to treat the scalp lesion;
 - (v) the possibility that the aggrieved person would have to undergo radiation therapy.

[217] On the facts we have found none of the allegations set out in the particulars have been established to the required standard of proof.

Eighth breach – Right 7(1)

[218] It is alleged that Mrs Nelson breached Right 7(1) of the Code of Rights by failing to obtain Mrs Maine's informed consent to the ongoing treatment of Mrs Maine's scalp. The particular alleged is as follows:

- (a) By failing to provide the information (including but not limited to information about the nature of the aggrieved person's condition and the available treatment options) that was necessary for the aggrieved person to give informed consent to the treatment, the defendant failed to obtain the aggrieved person's informed consent.

[219] On the findings we have made Mrs Maine plainly consented to the treatment, knowing that this was outside Mrs Nelson's expertise and knowing that she (Mrs Maine) should be in hospital or at least consulting a registered medical practitioner. In fact she unreasonably demanded treatment from Mrs Nelson to the extent that she persuaded Mrs Nelson to take her (Mrs Maine) to Christchurch and later pursued an unwilling Mrs Nelson to Tauranga to ensure that there was no interruption to the treatment. At all times Mrs Maine knew that Mrs Nelson was neither a medical practitioner nor a nurse and was not qualified to treat the lesion. We accept that Mrs Nelson told Mrs Maine that it was beyond Mrs Nelson's expertise to treat the lesion yet Mrs Maine continued to require cleaning of the lesion in that knowledge. There can be no question of not obtaining informed consent for the treatment. That treatment was provided with the full consent of Mrs Maine and Right 7(2) presumed her competent to make an informed choice and to give informed consent. Mrs Nelson was required to respect her autonomy even though it was plain to all around Mrs Maine that she was making a choice which was not in her best interests. It follows that there was no breach of Right 7(1).

SUMMARY OF FINDINGS

[220] Of the eight breaches of the Code of Rights alleged by the Director we have found only one has been established, namely a breach of Right 4(1). Mrs Nelson did not comply with her duty to provide services to Mrs Maine with reasonable care and skill. Her failure lay in refusing to have anything to do with Mrs Maine's cyst from the time it was first shown to her on 19 February 2008. That failure was not the result of indifference, carelessness or negligence. We accept Mrs Nelson's evidence that this occurred, ironically, because Mrs Nelson acted compassionately and with good intention towards a stubborn, difficult and manipulative individual.

REMEDIES

[221] In his statement of claim the Director seeks the following remedies under the HDC Act:

[221.1] A declaration that the actions of Mrs Nelson breached the Code of Rights (s 54(1)(a)).

[221.2] Damages for pecuniary loss; loss of benefit, humiliation, loss of dignity and injury to feelings and finally, punitive damages (s 57(1)(b), (c) and (d)).

[221.3] Costs (s 54(2)).

[221.4] Such further relief as the Tribunal thinks fit (s 54(1)(e)).

A DECLARATION

[222] We address first the question of a declaration. In the analogous jurisdiction under s 85(1)(a) of the Privacy Act 1993 it was held in *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 (Kós J, SL Ineson and PJ Davies) at [107] and [108] that while the grant of a declaration is discretionary, the grant of such declaratory relief should not ordinarily be denied and there is a "very high threshold for exception". On the facts we see nothing to justify the withholding from the Director of a formal declaration that Mrs Nelson has breached the Code in the single respect identified above.

[223] We now address the question of damages.

DAMAGES

[224] The Tribunal is empowered by s 54(1)(c) of the HDC Act to grant a remedy in the form of damages. The categories of damages permitted by the Act are stipulated in s 57. That section relevantly provides:

57 Damages

(1) Subject to section 52(2), in any proceedings under section 50 or section 51, the Tribunal may award damages against the defendant for a breach of any of the provisions of the Code in respect of any 1 or more of the following:

- (a) pecuniary loss suffered as a result of, and expenses reasonably incurred by the aggrieved person for the purpose of, the transaction or activity out of which the breach arose;
- (b) loss of any benefit, whether or not of a monetary kind, which the aggrieved person might reasonably have been expected to obtain but for the breach;
- (c) humiliation, loss of dignity, and injury to the feelings of the aggrieved person;
- (d) any action of the defendant that was in flagrant disregard of the rights of the aggrieved person.

(2) Subject to subsections (3) to (5), the Commissioner shall pay damages recovered by the Director of Proceedings under this section to the aggrieved person on whose behalf the proceedings were brought.

(3) ...

[225] The Director seeks the following damages:

[225.1] \$9,650 for pecuniary loss (s 57(1)(a)).

[225.2] \$20,000 for loss of the benefit of medical intervention at an earlier stage (s 57(1)(b)).

[225.3] \$20,000 for humiliation, loss of dignity and injury to feelings of the aggrieved person (s 57(1)(c)).

[225.4] \$10,000 punitive damages for flagrant disregard of the rights of the aggrieved person (s 57(1)(d)).

[226] With one exception there was no challenge by Mrs Nelson to the Tribunal's jurisdiction to award damages notwithstanding the death of Mrs Maine. The concession was properly made in light of *Marks v Director of Health and Disability Proceedings* [2009] NZCA 151, [2009] 3 NZLR 108 at [65]. The exception relates to punitive damages under s 57(1)(d). The Tribunal has been referred to s 3(2) of the Law Reform Act 1936 which provides that exemplary damages are not recoverable for the benefit of the estate of any person. The application of this provision was left open in *Marks* at [67]. In this decision we are not required to address the issue because, it will be seen, we find that no action of Mrs Nelson was in flagrant disregard of the rights of Mrs Maine and therefore s 57(1)(d) of the HDC Act has no application in any event.

Pecuniary loss

[227] We do not address this head of damages because pecuniary loss has not been established to the civil standard as earlier explained. In particular, we have accepted Mrs Nelson's evidence that she did not receive payment for the treatment of the lesion on Mrs Maine's head other than a small contribution for petrol.

Loss of benefit of medical intervention at an earlier stage

[228] The responsibility for not seeking medical intervention at an earlier stage was entirely that of Mrs Maine. She adamantly refused to see a doctor or to go to a hospital notwithstanding the repeated urgings by Mrs Nelson and her daughter, Megan Nelson-Latu. She also refused the repeated urgings of her own daughter, Mrs Carla Taylor. The causation requirement has not been established. It cannot be assumed that if Mrs Nelson had done nothing Mrs Maine would have gone to hospital. There is no basis for an award for loss of the benefit of medical intervention at an earlier stage.

Humiliation, loss of dignity and injury to feelings

[229] The Director has not established to the civil standard that Mrs Maine suffered humiliation, loss of dignity or injury to feelings. Mrs Maine did not claim such emotional harm in either of the television items and given the findings of fact we have made, there is no basis on which such emotional harm can be inferred.

[230] We would in any event regard the awarding of such damages as inappropriate given that Mrs Nelson, out of kindness and compassion, drove herself to the point of exhaustion and was the victim of emotional blackmail and manipulation. In the words of

Professor Gillett, she took on a burden that she found could not be lightly set aside and it proved very costly. As Dr Malpas said, Mrs Nelson found herself in a complex situation and one must not judge her too harshly. Mrs Nelson is a compassionate and well-intentioned person who acted with integrity and empathy.

Punitive damages

[231] On the findings we have made there was no flagrant disregard by Mrs Nelson of the rights of Mrs Maine. To the contrary, Mrs Nelson went to extreme lengths to meet Mrs Maine's obsessive demands in a humane and compassionate manner. By putting Mrs Maine's interests before those of her own, Mrs Nelson suffered emotionally, physically and financially.

[232] It follows that we decline to award damages of any kind against Mrs Nelson.

COSTS

[233] The Director seeks costs. Because Mrs Nelson is in receipt of legal aid, s 45 of the Legal Services Act 2011 applies:

45 Liability of aided person for costs

(1) If an aided person receives legal aid for civil proceedings, that person's liability under an order for costs made against him or her with respect to the proceedings must not exceed an amount (if any) that is reasonable for the aided person to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.

(2) No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.

(3) In determining whether there are exceptional circumstances under subsection (2), the court may take account of, but is not limited to, the following conduct by the aided person:

(a) any conduct that causes the other party to incur unnecessary cost:

(b) any failure to comply with the procedural rules and orders of the court:

(c) any misleading or deceitful conduct:

(d) any unreasonable pursuit of 1 or more issues on which the aided person fails:

(e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution:

(f) any other conduct that abuses the processes of the court.

(4) Any order for costs made against the aided person must specify the amount that the person would have been ordered to pay if this section had not affected that person's liability.

(5) If, because of this section, no order for costs is made against the aided person, an order may be made specifying what order for costs would have been made against that person with respect to the proceedings if this section had not affected that person's liability.

(6) If an order for costs is made against a next friend or guardian *ad litem* of an aided person who is a minor or is mentally disordered, then—

(a) that next friend or guardian *ad litem* has the benefit of this section; and

(b) the means of the next friend or guardian *ad litem* are taken as being the means of the aided person.

[234] There is no evidence that Mrs Nelson engaged in conduct of the kind described in s 45(3) once these proceedings were instituted by the Director. Nor have any other matters been put before us that would allow a finding of exceptional circumstances. If anything, the Director's case has to a substantial degree been unsuccessful and to the extent that he has succeeded, it has been because of the frank evidence that has been given by Mrs Nelson.

[235] For these reasons no order for costs is made against Mrs Nelson.

FORMAL ORDERS

[236] For the foregoing reasons the decision of the Tribunal is that:

[236.1] A declaration is made under s 54(1)(a) of the Health and Disability Commissioner Act 1994 that the actions of Mrs Nelson were in breach of the Code of Health and Disability Consumers' Rights in the following respect:

[236.1.1] Breach of Right 4(1) by failing to provide services to Mrs Maine with reasonable care and skill in that Mrs Nelson commenced and/or continued treatment of the scalp lesion when the needs of Mrs Maine were beyond Mrs Nelson's expertise.

[236.2] The application by the Director for damages under s 57 of the Health and Disability Commissioner Act 1994 is dismissed.

[236.3] The application by the Director under s 54(2) of the Health and Disability Commissioner Act 1994 that Mrs Nelson pay the Director's costs is dismissed.

[237] We direct that Exhibits 7, 8 and 9 be returned to the Director immediately as they contain organic material which could in time degrade. Their continued retention by the Tribunal is unnecessary given that photographs of the Exhibits are included in the Agreed Bundle of Documents.

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Mr RPG Haines QC
Chairperson

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Ms K Anderson
Member

.....
Ms WV Gilchrist
Member