

- (1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF THE AGGRIEVED PERSON**
- (2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL**

IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2013] NZHRRT 5

Reference No. HRRT 017/2011

UNDER SECTION 50 OF THE HEALTH AND DISABILITY COMMISSIONER ACT 1994

BETWEEN DIRECTOR OF PROCEEDINGS

PLAINTIFF

AND ROBERT EMMS

DEFENDANT

AT NELSON

BEFORE:

Mr RPG Haines QC, Chairperson

Ms WV Gilchrist, Member

Ms ST Scott, Member

REPRESENTATION:

Mr A Martin, Director of Proceedings, Plaintiff and Ms H Cook

Mr SJ Zindel and Ms J Herd for Defendant

DATE OF HEARING: 14 and 15 November 2011

DATE OF DECISION: 25 February 2013

DECISION OF TRIBUNAL

Introduction

[1] Mr Emms is a self-employed Shiatsu practitioner. Shiatsu is a therapy in which the client remains fully clothed. It is alleged that following a Shiatsu therapy session (about

which neither the aggrieved person nor the Director of Proceedings (the Director) makes complaint), the aggrieved person, being still in need of pain relief, was offered a non-Shiatsu massage by Mr Emms. It is said (inter alia) that in the course of this non-Shiatsu massage Mr Emms required the aggrieved person to undress, touched her breasts and buttocks without her informed consent and commented inappropriately on her breasts. Mr Emms' defence is that following the Shiatsu therapy session the aggrieved person left his premises and did not return. There was no non-Shiatsu massage therapy and the events alleged by the aggrieved person did not happen.

[2] The primary issue in these proceedings is credibility and whether the Director has satisfied the Tribunal, to the civil standard, that the various breaches of the Code of Health and Disability Services Consumers' Rights (the Code) alleged in the amended statement of claim have been made out.

Non-publication orders

[3] On the application of the Director, and without opposition by Mr Emms, the Chairperson by *Minute* dated 1 September 2011 made an order pursuant to ss 95 and 107 of the Human Rights Act 1993 that publication of the name or any details leading to the identification of the aggrieved person be prohibited pending further order of the Tribunal. These provisions of Part 4 of the Human Rights Act apply to proceedings under the Health and Disability Commissioner Act 1994 (the HDC Act) by virtue of s 58 of the latter Act.

[4] At the commencement of the hearing on 14 November 2011, with the consent of Mr Emms, the Tribunal made final the Chairperson's interim order.

[5] Without opposition from the Director, an interim order was made by the Tribunal prohibiting publication of the name of Mr Emms and of any details which might identify him. That non-publication order was to continue in force until the delivery by the Tribunal of its final decision. Whether the non-publication order is to continue is addressed at the conclusion of this decision.

The parties

[6] These proceedings have been brought by the Director pursuant to s 50 of the HDC Act. The remedies sought in the amended statement of claim are a declaration that the actions of Mr Emms breached the Code, damages of \$50,000 for humiliation, loss of dignity and injury to the feelings of the aggrieved person and damages of \$30,000 for acting in flagrant disregard of the rights of the aggrieved person. It is to be noted that while any damages recovered by the Director must be paid to the aggrieved person, it is the Director, not the aggrieved person, who articulates the claim, nominates the damages sought and has the responsibility to establish the claim. The aggrieved person has no control over the quantum of damages sought nor does she determine the amount to be awarded by the Tribunal should it be satisfied that it is appropriate for an award of damages to be made. See further s 57(2) of the HDC Act.

[7] Following a fall on 3 November 2009 the aggrieved person found herself in a great deal of pain and by 5 November 2009 was struggling to stay at work. Later that day she had acupuncture therapy but the pain in her back was not relieved. On the evening of 6 November 2009 she went to talk with friends at a pub and was there referred to Mr Emms whom she had met at that pub on previous occasions and knew that he was a Shiatsu practitioner. She approached him at the pub, told him of the intense pain in her

back and arranged an appointment for 10.30am on the following day, Saturday 7 November 2009.

[8] Mr Emms has been one hundred percent visually impaired since an incident in November 1988. He says that adjusting to being blind has required determination and a positive outlook. In 1995 he took up Seido Karate. It was a turning point in his life and his attitude to being blind as it taught him to have a positive, honest and sincere way of approaching life.

[9] After completing a three year course, Mr Emms on 3 August 2004 graduated from the Shiatsu College of Aotearoa with a Diploma of Shiatsu scoring a 93% average over the years he studied, in both theory and practice. He believes he is the first blind person to gain such diploma.

[10] As part of his training he became familiar with the code of ethics and practice of Shiatsu and told the Tribunal he maintains that code in his sessions.

What is Shiatsu

[11] The definition of Shiatsu, as given by the Shiatsu Practitioners Association of Aotearoa (New Zealand) Ltd, is as follows:

What is Shiatsu?

Shiatsu is based upon the oriental medical understanding that our physiological and psychological structures are supported and affected by meridians. Meridians are channels of living magnetic energy and a Shiatsu practitioner will work with both the meridians and associated acupressure points during a session.

It is a fully clothed therapy and takes place on a traditional style futon, usually lasting 40 minutes to one hour. Shiatsu involves elements of oriental diagnosis, abdominal massage, pressure application to various parts of the body using fingers, thumbs, knees and elbows, and gentle stretches and joint articulation. Practitioners may recommend specific lifestyle and diet changes, or exercises to assist in the healing process.

What does Shiatsu feel like?

...

Each Shiatsu caters directly to your specific needs at the time. There is no pre-prescribed routine for a certain condition, although appropriate points may be employed to benefit your specific symptoms. Several sessions may be recommended. Some clients decide to make Shiatsu a regular part of their life because they experience the benefit of the self-care time, in which to switch off and just be.

The benefits of Shiatsu

Shiatsu is a safe therapy and helpful for pure relaxation and stress reduction, supporting pregnancy, prevention and maintenance, back pain, RSI, sciatica, headaches, migraines, neck stiffness, joint pain and reduced mobility, menstrual problems, digestive problems, asthmatic symptoms, sports injuries, depression, anxiety.

...

Mr Emms' practice

[12] Mr Emms lives in a Housing New Zealand property and receives a disability allowance through Work and Income New Zealand. His financial circumstances are best

described as poor. He has no savings and no assets. His household possessions are minimal.

[13] He practises Shiatsu from home but has not been providing Shiatsu services regularly since graduating with his diploma in 2004. He was not advertising his services in 2009. He told the Tribunal that he mainly practises with about five regular clients he has been treating for some time. Three of those clients are women. He has never (until the present matter) received a complaint about the way he practises Shiatsu.

[14] At the beginning of a typical session he talks to a new client about current conditions and medications they have been on, whether there is anything that may prevent them from receiving treatment (eg pregnancy), and their medical, treatment and injury history. If the client has not had Shiatsu treatment before, he explains that it is a clothes on massage of the pressure points, like acupuncture but without needles.

[15] Either at the time of taking the client's history or at the end of the session (or both) Mr Emms types his client notes into a Voice Note machine. Entries are made by conventional qwerty keyboard. On playback a robotic voice reads out the notes which have been made.

[16] Because of his visual impairment Mr Emms has a chain on his entry door and the chain is usually engaged as he cannot see when a person enters his home. The noise of the chain alerts him to the arrival of a visitor, tradesman or client. During the Shiatsu therapy sessions the chain is engaged to ensure the client's privacy.

Saturday 7 November 2009 – the Shiatsu therapy

[17] Because the accounts given by the aggrieved person and by Mr Emms of the Shiatsu therapy session are largely in accord (the few differences in their accounts are not materially relevant), it is not necessary for a detailed account to be given.

[18] As arranged, the aggrieved person arrived at Mr Emms' home at about 10.30am on Saturday 7 November 2009. Mr Emms said that after engaging the chain on the front door he first spoke to the aggrieved person about her treatment history, current medication and current pain. He made notes on his Voice Note machine both at this time and at the conclusion of the session.

[19] The account given by the aggrieved person is that after being greeted by Mr Emms in a professional manner, some quiet music was put on and she was asked to lie face down, fully clothed on a mattress on the lounge floor. Mr Emms told her he could feel straight away that her hips were out of alignment and had been for years and that that was causing her back pain. The description given by the aggrieved person continued:

[13] After asking me to roll on to my back, Rob bent my leg and very gently rocked it up and down. He then straightened the leg out to see if it was the same length as the other leg. This took time as he said the hip had been out for so long it may take another session to get it right. However he said I would be pain free when I left.

[14] The treatment was performed gently. Rob moved and rocked my arms and legs. When I was lying on my back, Rob talked a lot about breathing properly. Rob then asked for my permission to put his hand on my bare stomach to feel my breathing. I said that was ok. I was still fully clothed. Rob then asked me to put my hand in the middle of my chest. Rob seemed to use my upright hand as a guide to finding my sternum without touching my breasts. I thought, due to his blindness, this was a good technique.

[15] Rob had his fingers on my sternum and his hand on my stomach. He told me I had a problem with breathing correctly. Rob said to breathe from my belly. I said it may be because I

get anxiety, but the medication I was taking had helped with that. Rob said my inability to breathe correctly had caused the anxiety.

[16] I also told Rob during the massage that I had a stressful job and so I would have to watch my alcohol intake, and I talked about my abdominal surgery and back injury.

[17] I didn't really go in with any expectations of what a Shiatsu massage would be like. At no time during the Shiatsu massage did I think Rob was unprofessional. I found I could trust him.

[18] After he had finished he told me we had gone over time. I offered him another \$20. Rob said I didn't need to give him money but he did accept it.

[19] I have never had shiatsu before and had nothing to compare it to. I was still sore but Rob said that would pass. I felt hopeful that I was going to be out of pain.

[20] Rob offered me a drink of water and said that it was important to drink water after Shiatsu. Rob had a drink from a clear rigger containing what looked like beer. I asked him if it was beer. Rob said it was and that it was good for him.

[21] We walked to the door and when outside I asked if I could give him a hug. I asked to hug him because I felt really grateful that the pain seemed to have reduced. Rob said "I see you waited till we got outside, that's good" and gave me a hug. I said goodbye and left about 11:15am.

[20] Mr Emms disputes that he put his hand on the aggrieved person's bare stomach. He says he put his hand on top of her hand on her stomach. This is a technique which his tutor helped him establish when he obtained his diploma. He denies that he had a drink of beer after the session and says that he would not have had any alcohol while he was with a client. In addition he would not have been drinking on a Saturday morning. He does say:

[30] During the session the AP told me that she was an alcoholic and that she was trying to control her drinking by not drinking until a certain time of day but no drinking of alcohol occurred.

[31] Once the treatment was complete, I told the AP to wait and see how she felt before I would recommend further treatment of any kind.

[32] After the session, I walked the AP to the door. I did not accompany the AP outside. I do not recall the AP asking me for a hug, or hugging her at all. I do not hug anyone. Since I went blind I have been very uncomfortable with hugging.

Saturday 7 November 2009 – the non-Shiatsu massage therapy

[21] The aggrieved person says that on returning to her vehicle she found she was again in agonising pain and was unable to get into the vehicle. In tears she returned to Mr Emms' home at about 11:20am or 11:25am. Mr Emms then gave her massage therapy. It was in this context that the alleged breaches of the Code occurred. Mr Emms says that the aggrieved person did not return to his home and he never massaged her. We begin with the account given by the aggrieved person.

The evidence of the aggrieved person

[22] The aggrieved person says that:

[23] Rob opened the door and I said I was in really bad pain again. Rob said the next client had cancelled so I could have the next session. Rob said because I had paid him extra money it would cover the cost of the massage which he thought I would now need. He said it was good that I had come back straight away. Again, I didn't have any expectations about what the second massage would involve, but I understood it would not be Shiatsu because what Rob was offering me was a different kind of massage to relieve the pain. When I have had

massages that were not Shiatsu in the past, these have been focussed on the area requiring treatment. Towels or a sheet are used to cover up the parts of you that aren't being massaged.

[24] ...

[25] Rob followed me to the mattress on the floor. He said the massage would relieve the spasm which was probably due to my hips still being out of line.

[26] I laid face down on the mattress. He gave my back a rub with my shirt on. Rob asked me to take off my shirt. I took off my shirt. After a few minutes he said "and the bra has to go" and he undid it. I was surprised and shocked at how quickly and directly he undid my bra. I was surprised that he hadn't asked my permission first. I was also surprised how quickly he had taken it off, given his blindness. At no stage did he tell me that he would be asking me to take my clothes off.

[27] Rob said that he needed to get some oil and went to the kitchen. He put some music on, it was a lot louder than in the first massage. On the way back to the mattress he locked the door. He came back with a bottle of cooking oil.

[28] He massaged my back with the oil and got lower towards my jeans. He said "lose the pants". At this point I felt uncomfortable but as he was blind I thought it would be okay. When I say "okay", I mean that I felt more comfortable than I might otherwise have felt about whether he might be a risk to me, and also because I thought he would not be able to see me without my pants on.

[29] I started to take off my jeans lying down and Rob quickly stripped them off me. He then said "and those can go too" and stripped off my underpants. I was now completely naked. Rob did not use towels or anything else to cover me.

[30] I felt uncomfortable and froze. Again I was shocked how easily and quickly he had removed my clothing. I was now feeling scared and trapped.

[31] Rob continued to massage my back then buttocks and legs. He sang along loudly to the music. I apologised for taking up his time. The reason I said this is that by this time I was really quite freaked out and was just trying to bring the situation to an end. He said he could think of worse things than massaging me. He said he hadn't massaged for years and thought he would get back into it.

[32] Rob kept massaging very firmly down both sides of my hips with his fingers underneath me. I felt very uneasy as I felt his fingers were trying to get close to my pubic area. I felt helpless.

[33] Rob told me three times that he could check my hips better if I rolled over. Each time he said this I didn't say anything or move. He said we were nearly finished and asked me to roll over so he could check my hips. As he had said he was nearly finished I rolled over, as this seemed the quickest way to get out of there.

[34] Rob checked my hips and then very quickly put both his hands on my breasts and rubbed them. As I pushed his hands away Rob said "nice tits". I said that wasn't on. Rob said "you don't want them to be the only things not massaged do you?"

[35] I got up and dressed. While I was doing this Rob went to the kitchen which is in the same room. I didn't feel immobilised now but stunned at what he had just done.

[36] Rob handed me a glass of water, which I didn't drink, then asked if I would like a beer with him. I said no and left.

[37] I got into my car and was immediately in pain again. I felt shocked by what had happened, ashamed, dirty and very sad. I felt I had been taken advantage of. I felt he had used his blindness to gain my trust.

[38] I drove to City Care after hours surgery and made an appointment for 2pm to try and find out why I was in so much pain. It was now 1pm. I was unaware I had been at Rob's house from 10:30 to 12:45.

[39] I arrived home at 1:15pm. I felt angry. I rang Rob and told him I thought he had been really unprofessional. Rob said he could hear me breathing rapidly and said to slow down and breathe better. I told him that I was in a lot of pain and felt he had taken advantage of my vulnerability. At no time did Rob apologise. He did say it was a joke and that he wouldn't do that with me again. I hung up.

[40] At 2pm I went to see a duty doctor at City Care, which is an after-hours medical service. The doctor prescribed some very strong painkillers.

[41] On Monday 9 November I went to my own GP. The injury took about nine weeks to come right.

The evidence of Mr Emms

[23] As mentioned, Mr Emms says that the aggrieved person left after the Shiatsu therapy session and did not at any time return to his home. The events as described by the aggrieved person simply did not occur. However, he acknowledges that about two hours after the aggrieved person left his home, he received a phone call from her on his home telephone asking him whether he would like to meet her at the pub for a drink. He declined her offer. This was the last that he heard of the aggrieved person until about a year later he received notice that proceedings had been filed against him. He says that the account given by the aggrieved person of the non-Shiatsu massage is a fabrication on her part. He does not know why she would want to make something up like this and believes she has some mental health issues.

Subsequent events

[24] The Tribunal has not been provided with details of the interaction between Mr Emms and the Office of the Health and Disability Commissioner. Mr Emms says that he has been made aware that the Office was trying to get in touch with him “quite a bit” after the initial complaint. He was having difficulty with his telephones. One was disconnected and one was not working reliably:

[39] I recall first being notified of the complaint by letter. There were then several phone calls from a man named Mark Smith at the Health and Disability Commission. I admit that I was quite uncooperative at first. This was because I was angry that this complaint had even been made as I had done nothing wrong. Injustice makes me very upset, and I believe this whole inquiry is a great injustice. I feel like I have been hit by some kind of gold digger (despite my absence of money; I am on legal aid for this case).

[25] By letter dated 2 February 2010 he wrote to the Office of the Commissioner:

I am returning the letter you mailed me regarding this client. The statements made in it were completely false. During one and only Shiatsu treatment this client will ever receive from me I followed all the traditional methods of Shiatsu.

This client stated during the Shiatsu that she was experimenting with not taking her prescribed medication for mental illness. This client also stated she is experimenting with control drinking during set hrs 2 manage alcoholism. From your letter enclosed her experiment must be considered a total failure.

[26] Mr Emms said that the letter was written by a friend who at the same time was helping him with his shopping and parts of the letter are not accurate. Because of his disability he did not realise this at the time the letter was sent.

[27] On 22 March 2011 Mr Emms met with the Director at Mr Emms' home in Nelson. The Director raised with Mr Emms the question of the notes taken on the Voice Note machine. Mr Emms said in his evidence that he played to the Director the notes relating to the aggrieved person. Because the Director seemed (to Mr Emms) unable to understand the notes as read out by the robotic voice, Mr Emms repeated the voice notes and a note or record was made either by the Director or by his assistant, Ms Tina Liu. Later, on coming across the aggrieved person's file when looking for other records, he became so angry at the false allegations made by her and by the fact that a substantial sum of money was being sought from him, that he deleted the file. He now regrets having done so.

[28] During the hearing it was suggested by the Director when cross-examining Mr Emms that he (Mr Emms) had never kept clinical notes and that none had been produced at the meeting on 22 March 2011. In this context it is to be noted that the Director had earlier provided to the Tribunal and to counsel for Mr Emms a signed brief of evidence by Ms Liu giving her account of what transpired at the meeting. But in the

end, the Director did not call Ms Liu to give evidence notwithstanding Mr Emms' insistence that he had indeed kept clinical notes.

[29] In closing submissions the Director contended that an adverse inference could be drawn from the failure by Mr Emms to produce his clinical notes when requested by the HDC investigator.

[30] As to this, the only evidence we have of what took place at the meeting on 22 March 2011 is the uncontradicted evidence of Mr Emms that he did produce the Voice Note machine to the Director and played it back to him. His evidence in this regard was corroborated by Mr C Benson who attended the meeting as support person. He told the Tribunal that the machine was played in the presence of the Director. It would appear that either the Director or Ms Liu made a note of what was provided by Mr Emms at the meeting from the Voice Note machine because both the Director and Mr Zindel put questions to witnesses quoting from such notes. The notes themselves were not produced as evidence. In the result the account given by Mr Emms was not challenged by any probative evidence and we approach the case on the footing that clinical notes were taken by Mr Emms on Saturday 7 November 2009, that those notes were made available (in voice form) to the Director on 22 March 2011 and that they were subsequently destroyed by Mr Emms.

Other evidence called by Mr Emms

[31] In addition to calling Mr Benson, Mr Emms called two female clients who attested to receiving Shiatsu treatments from Mr Emms. They said that they had always found him to be professional during their treatments, their clothing had always remained on and as women, they had felt comfortable with Mr Emms providing Shiatsu treatments. A third client who was unable to attend the hearing said much the same in her unsworn brief of evidence. Mr Benson, who has also received Shiatsu therapy from Mr Emms, similarly deposed that the treatments he had received have always been provided by Mr Emms professionally and ethically. While the Director opposed the admission of this evidence he accepted that it could be admitted by the Tribunal under ss 105 and 106 of the Human Rights Act 1993.

Credibility assessment

[32] The primary issue before the Tribunal is a stark one. Did the aggrieved person return to Mr Emms' home on the Saturday morning for non-Shiatsu massage therapy and did events then unfold in the manner described in her evidence? If not, the Director's case fails in its entirety. If events did unfold as alleged by the aggrieved person, the Director's case is largely established. In this sense the credibility determination is the key to the outcome of this case.

[33] Two primary challenges to the credibility of the aggrieved person were made by Mr Emms either in his evidence or in cross-examination.

[34] First, that the aggrieved person suffers from an anxiety disorder and has imagined the second episode, that she is making Mr Emms the scapegoat for things that have gone wrong in her life, including his failure to take away her back pain. As to this, the aggrieved person acknowledged early in her evidence in chief that she suffers from an anxiety disorder and has made no attempt to conceal it or to minimise the nature of the disability. Her attitude to it is one of positivity and acceptance, not one of bitterness and blame. There is no foundation at all for the "scapegoating" suggestion. Nor is there any discernible reason for her to invent the second episode.

[35] Second, that she has been motivated to make false accusations in the hope of personal gain in the form of damages. As to this, we accept her evidence that when she spoke to a HDC advocate she was correctly told that only in rare cases would the Director take proceedings before this Tribunal seeking damages on behalf of an aggrieved person. It is also to be noted that, as earlier mentioned, it is the Director who decides whether damages are to be sought and the quantum of the claim. In addition, she had seen Mr Emms' home and knew of his disability. It would have been patently obvious to her that he had no money and no means of accumulating savings of any significance. The suggestion that she is a "gold digger" is entirely baseless. In our view she was genuine, sincere and credible when she stated in her evidence that her motivation in bringing and pursuing the complaint was to ensure that what she had experienced did not happen to anyone else. Her cooperation with the Director and her participation in these proceedings as a witness has been a substantial challenge given her anxiety disorder. We are of the view that she would not have subjected herself to a high degree of stress to pursue a monetary claim against a man who has no money and no assets. We accept that her motivation throughout has been the protection of others.

[36] We address now our view of Mr Emms as a witness. We acknowledge that he has been consistent in denying wrongdoing and comes across as credible in his knowledge of Shiatsu in which he has been trained and in which he accepts that he must work under the Shiatsu Practitioners Association Code of Conduct and Ethics. Other clients speak of his ability and professionalism. Overall, we have been deeply impressed by what Mr Emms has achieved in spite of his disability. Also in favour of Mr Emms is our finding that, contrary to the Director's assertions, he did keep clinical notes in respect of the aggrieved person and made those notes available to the Director at the meeting on 22 March 2011. This is consistent with the concession always made by the aggrieved person, namely that the Shiatsu session was properly and professionally conducted. But nothing we have accepted is necessarily inconsistent with events having unfolded as alleged by the aggrieved person during the subsequent massage session.

[37] While we take into account all the factors which are in favour of Mr Emms it must be remembered that the issue is whether the wrongdoing occurred in relation to the aggrieved person. There is no requirement that wrongdoing be established in relation to other clients as well.

[38] We put aside entirely the allegation that Mr Emms was drinking beer on the Saturday morning. It is not a matter central to the credibility issues and is not a matter pleaded by the Director in terms of the alleged breaches of the Code. It is matter in respect of which we can reach no conclusion. In legal terms the Director has not satisfied us that alcohol was consumed or offered for consumption. There are much more significant matters bearing on the credibility determination. It is to these we now turn.

[39] Integral to the evidence of Mr Emms is his acknowledgement that two hours after the aggrieved person left she telephoned to ask whether he would like to meet her for a drink at the pub. As the Shiatsu session ended at approximately 11:15am the phone call, on the account given by Mr Emms, would have been received by him between 1:15 and 1:30pm on the Saturday afternoon. Here the accounts given by Mr Emms and by the aggrieved person converge. She agrees she telephoned him at about 1:15pm but says that it was to tell him that he had acted unprofessionally, that she was in a lot of pain and felt that he had taken advantage of her vulnerability. She said at no time did Mr Emms apologise but he did say that it was a joke and that he wouldn't "do that with me again". The aggrieved person hung up.

[40] The documentary evidence provides strong support for the account given by the aggrieved person that she was at Mr Emms' home from 10:30am to 12:45pm (the combined time taken for the Shiatsu session and the non-Shiatsu massage) and that because she was still in so much pain she immediately drove to an after hours medical surgery and made an appointment for 2pm to have her back pain attended to by a registered medical practitioner. The evidence in Exhibits 1 to 5 establishes:

[40.1] An appointment was made with Nelson Region After Hours and Duty Doctor Ltd for 01:50pm on Saturday 7 November 2009.

[40.2] Consultation with the medical practitioner is recorded as occurring at 2:45pm. The delay is consistent with the evidence of the aggrieved person that she had to wait to see the doctor and that while waiting had lain on the floor of the clinic because of the acute pain.

[40.3] The doctor prescribed medication for the pain.

[40.4] Payment of the doctor's fee was made by way of an EFTPOS transaction documented as occurring at 2:45pm on 7 November 2009.

[40.5] Two days later, on 9 November 2009, the aggrieved person consulted her GP at which time a different pain killer was prescribed for her ongoing pain.

[41] The question we must address is whether the aggrieved person, undoubtedly in acute pain and who had just made an appointment to see an afterhours medical practitioner, telephoned Mr Emms at about 1:15pm to invite him to have a drink at the pub or whether she rang to complain of his unprofessional conduct and her belief that he had taken advantage of her vulnerability.

[42] In our view the fact that the aggrieved person saw an after hours medical practitioner on the Saturday afternoon for pain relief is consistent with her evidence that after the Shiatsu session she was in so much pain she immediately returned to Mr Emms' house and was given a massage for pain relief. Furthermore, it is improbable that a person about to see a registered medical practitioner for acute back pain and who had difficulty even getting into her motor vehicle would telephone Mr Emms to invite him to drinks at the pub. This provides strong support for a finding that the purpose of the telephone call was to complain to Mr Emms of his unprofessional conduct and such complaint would only have been necessary if the non-Shiatsu massage session had taken place and that Mr Emms had behaved unprofessionally during that session.

[43] We found the aggrieved person to be a sincere and honest witness. Nothing was withheld by her when giving evidence, including a potentially embarrassing medical history. She impressed as a person doing her conscientious best to give a fair, balanced and accurate account of her dealings with Mr Emms and of her visit to his home. She fairly conceded that the Shiatsu therapy had been professionally conducted and that she had no complaint in that regard. Her account of the non-Shiatsu massage was unembellished, clear and compelling.

Conclusion on credibility

[44] Having seen and heard the aggrieved person give evidence our clear conclusion is that it is the aggrieved person who has given truthful evidence and that it is Mr Emms who is in denial over the massage session. We are satisfied on the balance of probabilities that the account given by the aggrieved person of the non-Shiatsu massage is a truthful one and that the massage session happened as described by her.

Conclusion on the facts

[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.

[46] It follows from our credibility determination that we find established to the civil standard (as explained) the following allegations pleaded in the amended statement of claim dated 16 September 2011, namely that Mr Emms:

[46.1] Failed to provide the aggrieved person with privacy for disrobing.

[46.2] Failed to drape her during the non-Shiatsu massage.

[46.3] Touched her breasts and buttocks without her informed consent.

[46.4] Commented inappropriately on her breasts.

[46.5] Responded flippantly to, and made light of, the aggrieved person's objection to his behaviour.

[46.6] Failed to provide the aggrieved person with sufficient information to allow her to make an informed choice or to give informed consent to the non-Shiatsu massage and the touching of her breasts and buttocks.

[46.7] Performed a non-Shiatsu massage on the aggrieved person without first obtaining her informed consent and touched her breasts and buttocks without first obtaining her informed consent.

[47] We find not established the allegations that Mr Emms failed to take an adequate clinical history and failed to ensure that the care provided to the aggrieved person was appropriately documented.

[48] These findings must now be assessed against the Code.

CODE OF HEALTH AND DISABILITY SERVICES CONSUMERS' RIGHTS

Introduction

[49] The Code of Health and Disability Services Consumers' Rights (the Code) is scheduled to the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 and as noted in *Brookers Human Rights Law* at HDC 3.01, 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. We reproduce only those provisions of the Code relevant to the present case:

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 2

Right to freedom from discrimination, coercion, harassment, and exploitation

Every consumer has the right to be free from discrimination, coercion, harassment, and sexual, financial, or other exploitation.

...

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

...

- (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.

...

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.

...

[50] The Code extends to any person or organisation providing, or holding themselves out as providing, a health service to the public or a section of the public whether or not that health service is paid for.

[51] In opening his case the Director made the point that there is a public interest in proceedings such as the present so that professional standards are maintained and accountability for unregistered health providers such as massage therapists is provided.

[52] In *Brookers Human Rights Law* at HDC 3.02 the Health and Disability Commissioner is reported as saying:

The definitions of health care procedure and health care provider, under the Health and Disability Commissioner Act 1994, are broad enough to cover every iridologist, primal therapist and faith healer who holds herself out as providing services to promote health.

[53] The Commentary in the text then continues:

The Commissioner clarified that in assessing the adequacy of the treatment given by these types of providers, the Commissioner seeks independent expert advice usually from a recognised practitioner in that field.

[54] In the present case the Director has called two such independent witnesses. The first was Mr MJ Christini, a Shiatsu therapist who has been practising and teaching Shiatsu in New Zealand and Australia for the past twelve years. Because his qualifications, experience and expertise were not challenged by Mr Zindel we record only briefly those parts of his evidence which are relevant given the findings of fact we have made:

[54.1] It would be inconsistent with standard practice for a practitioner representing him or herself as a Shiatsu therapist to provide a solely therapeutic, non-Shiatsu massage such as the second massage provided by Mr Emms.

[54.2] The Shiatsu Practitioner's Association of Aotearoa New Zealand (SPAA) is the body that oversees the practice and teaching of Shiatsu in New Zealand. SPAA sets the diploma standards and holds the register of Shiatsu practitioners.

[54.3] SPAA is affiliated under the Natural Therapies Board of the New Zealand Charter of Health Practitioners. It is governed by its Code of Conduct and Ethics (1994), the purpose of which is to provide a common standard for all ordinary members and practitioners and teachers to follow. This has the advantage of giving confidence to the public by enabling them to know the ethical standards of the SPAA.

[54.4] While membership is encouraged, there is no requirement to belong for someone to practise Shiatsu. There are approximately 25 practitioners and six student members throughout New Zealand registered with the SPAA.

[54.5] Mr Emms is not and has never been a registered member of the SPAA. However, as he completed his training at a school that is accredited by SPAA he would have been made aware of the Code of Conduct and Ethics as part of his training.

[54.6] The SPAA Code of Conduct and Ethics states that when a member of the public asks for treatment the practitioner shall ensure that the client understands the nature of the treatment that will be given. Such an explanation could have made the aggrieved person aware that she would be required to remove all of her clothing and allowed her the right to reject the proposed therapy at the outset. This reinforces the opinion given by Mr Christini that the massage was inappropriate and in opposition to Shiatsu practice.

[54.7] The SPAA Code of Conduct and Ethics states that members of the SPAA shall maintain the highest standards of professional conduct and promote the art and science of Shiatsu bodywork. In his opinion the actions of Mr Emms in the second session, as described by the aggrieved person constitute "the most severe of deviations from professional conduct and appropriate care. Such action in a therapeutic setting is a grave violation of the trust and respect required in the patient/therapist relationship."

[54.8] The Code of Conduct and Ethics expressly stipulates that SPAA members will in no way institute any kind of sexual advance while acting in the capacity of a Shiatsu practitioner.

[55] The second expert witness called by the Director was Ms PA Charlton, a trained and qualified remedial massage therapist with Massage New Zealand and has a degree in Physical Education (Otago University) and a Diploma in Therapeutic Massage

(NZATMP). Again, because her qualifications, experience and expertise were not challenged we intend to note only the essential aspects of her evidence:

[55.1] Massage New Zealand is a self-regulatory association for massage therapists and is the only professional body that solely represents massage therapists in New Zealand.

[55.2] The practise of massage in New Zealand is unregulated which means anyone can offer massage services with or without training. However, Massage New Zealand does provide a Code of Ethics and scope of practice which is recognised by the profession. The scope of practice is slightly different for a Remedial Massage Therapist than a Certified Massage Therapist. A Remedial Massage Therapist must complete a diploma in massage (or higher – degree) and thus the scope of treatment is slightly broader to include treatment for pain and injury than for a Certified Massage Therapist who has only done a certificate in massage therapy. A Certified Massage Therapist should not treat a client for pain, but can provide general relaxation/health massage.

[55.3] Massage New Zealand has a Code of Ethics which relevantly provides that practitioners will:

[55.3.1] Serve the best interests of their clients and provide best practice quality of service.

[55.3.2] Provide draping and explanation sufficient to meet the client's needs for comfort and privacy.

[55.3.3] Respect the client's boundaries with regard to privacy, disclosure, emotional expression and beliefs.

[55.3.4] Will not endanger the physical, mental and emotional health, well-being, safety of a client.

[55.3.5] Not engage in sexual conduct with a client.

[55.4] Massage therapists, as workers in the health sector, are also bound by the Code of Health and Disability Services Consumers' Rights. This Code is covered in the curricula for certificate, diploma and degree levels of massage training in New Zealand and as such is recognised by the massage profession as a standard of practice.

[55.5] The failure by Mr Emms to obtain the informed consent of the aggrieved person to his removal of her clothing and the touching of her buttocks, pelvic region and breasts represented a severe departure from accepted standards.

[55.6] By not providing draping or a sufficient explanation for why he needed the aggrieved person to turn over when she was unwilling to, Mr Emms' behaviour was inconsistent with the MNZ Code of Ethics and his behaviour would be seen by the massage profession as totally unacceptable behaviour. The credibility of the massage profession relies on protecting the client's modesty at all times by keeping the client covered and well draped. If it was necessary to expose the buttocks or breast tissue the practitioner would expose only the tissue to the extent necessary and would inform the client of the rationale behind doing so and obtain their consent.

[55.7] While Mr Emms may have felt draping was unnecessary due to his blindness, nevertheless Ms Charlton would expect standard practice would still be to explain to the client that draping was necessary to maintain professional standards and client comfort. The failure to provide draping and to obtain the aggrieved person's informed consent to being exposed was a severe departure from accepted professional standards of practice.

[55.8] When the aggrieved person told Mr Emms that she felt he had taken advantage of her vulnerability the reply by Mr Emms that it was a joke was inconsistent with the MNZ Code of Ethics requirement that the client's boundaries with regard to privacy, disclosure, emotional expression and beliefs be respected and would be seen by the massage profession as unacceptable behaviour.

[55.9] It is her professional opinion that the conduct of Mr Emms in the massage session would be viewed by his peers with total disapproval.

[56] Given the evidence of Mr Christini and Ms Charlton there can be no doubt that the conduct of Mr Emms during the massage session was completely unacceptable viewed against the separate codes of ethics applicable to Shiatsu and massage practitioners.

THE BREACHES ALLEGED IN THE AMENDED STATEMENT OF CLAIM – FINDINGS

[57] We now set out the breaches alleged in the amended statement of claim dated 16 September 2011 and our findings thereon.

Right 2 – right to freedom from exploitation

[58] The first breach alleged relates to Right 2 – the right to freedom from exploitation:

5.1 The defendant has breached Right 2 of the Code by harassing and/or sexually exploiting the aggrieved person in that he:

- (a) failed to provide her with privacy for disrobing;
- (b) failed to drape her during the non-Shiatsu massage;
- (c) touched her breasts and buttocks without her informed consent;
- (d) commented inappropriately on her breasts;
- (e) responded flippantly to, and made light of, the aggrieved person's objection to his behaviour.

[59] We have already found that Mr Emms committed the acts pleaded in paras (a) to (e) inclusive.

[60] As to whether the facts establish "harassing and/or sexually exploiting" the aggrieved person, we note that the term "exploitation" is defined in clause 4 of the Code in the following terms:

exploitation includes any abuse of a position of trust, breach of a fiduciary duty, or exercise of undue influence.

[61] We are of the view that the facts proved by the Director establish exploitation as defined. The aggrieved person consulted Mr Emms in the hope of alleviating acute back pain. It is common ground that the Shiatsu treatment was conducted properly and professionally. On returning to her vehicle and finding that her pain was still intense, the aggrieved person immediately returned to Mr Emms and trusted him to carry out a massage for pain relief. As the massage session progressed the trust the aggrieved person had placed in Mr Emms was abused as every item of clothing was removed and as every improper touching took place. The aggrieved person was only in the position of

lying partially undressed and then naked on the mattress because she had initially put her faith in Mr Emms. We are in no doubt at all that the allegation of sexual exploitation has been made out and that Right 2 of the Code has been breached as alleged.

[62] In these circumstances it is not necessary that we make a finding on the allegation that the aggrieved person was harassed by Mr Emms. We can indicate, however, that we would not be inclined to find the allegation established. The term “harass”, while not defined in the Act or Code would ordinarily (but not necessarily) connote an element of repetition. Here the actions of Mr Emms took place within the space of an hour and in a single session of massage. We do not, however, need to reach any firm conclusion given our finding that sexual exploitation has been established.

Right 4(1) – appropriate standard of care

[63] The second breach alleged relates to Right 4(1) – the right to an appropriate standard of care. The allegation is that:

6.1 The defendant breached Right 4(1) of the Code by failing to provide services to the aggrieved person with reasonable care and skill in that he:

- (a) failed to provide her with privacy for disrobing;
- (b) failed to drape her during the non-Shiatsu massage;
- (c) touched her breasts and buttocks without her informed consent;
- (d) failed to take an adequate clinical history; and
- (e) failed to ensure that the care provided to the aggrieved person was appropriately documented.

[64] We have already found that Mr Emms committed the acts pleaded in paras (a) to (c) but not those pleaded in paras (d) and (e).

[65] On those facts which we have found in the Director’s favour we conclude that Mr Emms failed to provide services to the aggrieved person with reasonable care and skill and that Right 4(1) has been breached as alleged in the respects pleaded in paras (a) to (c).

Right 4(2) – services that comply with ethical and other relevant standards

[66] The third breach alleged relates to Right 4(2) – the right to services that comply with ethical and other relevant standards. The allegation is that:

7.1 The defendant breached Right 4(2) of the Code by failing to provide services that complied with ethical and other relevant standards in that he:

- (a) failed to provide her with privacy for disrobing;
- (b) failed to drape her during the non-Shiatsu massage;
- (c) touched her breasts and buttocks without her informed consent;
- (d) commented inappropriately on her breasts;
- (e) responded flippantly to, and made light of, the aggrieved person’s objection to his behaviour.
- (f) failed to take an adequate clinical history; and
- (g) failed to ensure that the care provided to the aggrieved person was appropriately documented.

[67] As already stated, we have found that Mr Emms committed the acts pleaded in paras (a) to (e) but not those pleaded in paras (f) and (g).

[68] On those facts which we have found in the Director's favour we conclude that the aggrieved person was not treated with respect, nor was her privacy respected. In terms of the Shiatsu Practitioners Association Code of Conduct and Ethics, Mr Emms failed to maintain the highest standards of professional conduct in the manner pleaded in paras (a) to (e).

[69] In terms of the Code of Ethics of Massage New Zealand, Mr Emms failed to serve the best interests of the aggrieved person and he failed to provide best practice quality of service in the manner pleaded in paras (a) to (e).

[70] We accordingly conclude that Mr Emms failed to provide services that complied with ethical and other relevant standards and that Right 4(2) has been breached as alleged in the respects pleaded in paras (a) to (e), but not in respect of paras (f) and (g).

Right 6(2) – information to make an informed choice

[71] The fourth breach alleged relates to Right 6(2) – the right to information that a reasonable consumer needs to make an informed choice. The allegation is that:

8.1 The defendant breached Right 6(2) of the Code in that the defendant did not provide the aggrieved person with information (including but not limited to information about his own qualifications and experience and the massage he intended to perform) that a reasonable consumer in her circumstances would need to make an informed choice or give informed consent to the:

- (a) non-Shiatsu massage; and/or
- (b) touching of her breasts; and/or
- (c) touching of her buttocks.

[72] The term “informed consent” is defined in s 2(1) of the HDC Act as follows:

informed consent, in relation to a health consumer on or in respect of whom there is carried out any health care procedure, means consent to that procedure where that consent—
(a) is freely given, by the health consumer or, where applicable, by any person who is entitled to consent on that health consumer's behalf; and
(b) is obtained in accordance with such requirements as are prescribed by the Code

[73] The Director has drawn attention to the fact that informed consent has been described by the Health Practitioners Disciplinary Tribunal as “a corner stone of the practise of medicine”. See *Stubbs* 271/Med09/113D (21 December 2009) at para [292]. The Director submits that although Mr Emms is not a medical practitioner, he is a health care provider and the same importance attaches to informed consent. We agree. The Director also correctly submits that the concept of informed consent is based on the patient's right to self-determination and we accede to the Director's request that we underline the importance of informed consent in situations such as massage sessions where consumers must be allowed to make properly informed decisions about the treatment they agree to undergo.

[74] It will be clear from the findings we have made that the aggrieved person, having just undergone a Shiatsu therapy while fully clothed would reasonably expect, in advance of the massage session, to be told what the massage would

entail, particularly that her clothing would be removed by Mr Emms and that he would touch her breasts and her buttocks.

[75] We accordingly conclude that Mr Emms failed to provide the aggrieved person with the information required by Right 6(2) as alleged.

Right 7(1) – informed consent

[76] The fifth and final breach alleged relates to Right 7(2) – the right to make an informed choice and to give informed consent. The allegation is that:

- 9.1 The defendant breached Right 7(1) of the Code in that he:
- (a) performed a non-Shiatsu massage on the aggrieved person without first obtaining her informed consent; and/or
 - (b) touched the aggrieved person's breasts without first obtaining her informed consent; and/or
 - (c) touched the aggrieved person's buttocks without first obtaining her informed consent.

[77] Again, it would be clear from our findings that Mr Emms did not obtain the informed consent of the aggrieved person to the non-Shiatsu massage, to the touching of her breasts and of her buttocks.

[78] We accordingly conclude that Mr Emms provided services to the aggrieved person without first obtaining her informed consent as pleaded in paras (a) to (c).

[79] We intend now addressing the issue of damages, but before doing so must dispose of the submission by Mr Emms that compensatory damages are barred by the Accident Compensation Act 2001 (ACC Act).

THE ACCIDENT COMPENSATION ACT 2001

[80] Section 57(1)(c) of the HDC Act allows the Tribunal to award damages for "humiliation, loss of dignity and injury to the feelings of the aggrieved person".

[81] For Mr Emms it is submitted that to the degree that such humiliation, loss of dignity and injury to feelings are a mental injury suffered in the circumstances described in Schedule 3 of the ACC Act (which includes indecent assault), the award of damages is barred by s 317(1) of the ACC Act:

317 Proceedings for personal injury

(1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of—

- (a) personal injury covered by this Act; or
 - (b) personal injury covered by the former Acts.
- (2) ...

[82] The term "personal injury" is defined by s 26(1) of the ACC Act as meaning:

26 Personal injury

- (1) *Personal injury* means—
- (a) ...
 - (b) ...
 - (c) ...

- (d) mental injury suffered by a person in the circumstances described in section 21; or
- (da) ...
- (e)

[83] The term “mental injury” is defined by s 27 as follows:

Mental injury

Mental injury means a clinically significant behavioural, cognitive, or psychological dysfunction.

[84] As noted in *Marks v Director of Health and Disability Proceedings* [2009] NZCA 151, [2009] 3 NZLR 108 at [41], under s 52(2) of the HDC Act, if a person has suffered personal injury covered by the ACC Act, no damages arising directly or indirectly out of that personal injury may be claimed by or on behalf of that person apart from “punitive damages” in terms of s 57(1)(d) of the HDC Act:

(2) If any person has suffered personal injury (within the meaning of the Accident Compensation Act 2001) covered by that Act, no damages (other than punitive damages in accordance with section 57(1)(d)) arising directly or indirectly out of that personal injury—

(a) may be sought by or on behalf of that person in any proceedings under section 50 or section 51:

(b) may be awarded to or for the benefit of that person in any such proceedings.

[85] The flaw in the argument for Mr Emms is that no mental injury on the part of the aggrieved person has been established. In addition “humiliation, loss of dignity and injury to feeling” cannot be equated with “clinically significant behaviour, cognitive, or psychological dysfunction”. See further *Director of Proceedings v O’Neil* [2001] NZAR 59, (2000) 6 HRNZ 311 (Gendall J and L Dyal) at [26]. Not only is there a complete absence of evidence of such clinically significant dysfunction, the aggrieved person was not cross-examined on the point. There is therefore no evidential basis for the case argued under s 317(1) of the ACC Act.

REMEDIES

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

[86.1] A declaration that the actions of Mr Emms breached the Code (s 54(1)(a)).

[86.2] Compensatory and punitive damages (s 57(1)(c) and s 57(1)(d)).

[86.3] Costs.

[86.4] Such further relief as the Tribunal thinks fit.

[87] We bear in mind the following points:

[87.1] As a general matter, under s 57 damages may be awarded only if the Director establishes that losses in the categories specified in s 57 were caused by the defendant’s breach of the Code.

[87.2] Section 54(4) of the HDC Act provides that it shall not be a defence to proceedings under s 50 of the Act that the breach was unintentional or

without negligence on the part of the defendant, but the Tribunal shall take the conduct of the defendant into account in deciding what, if any, remedy to grant.

[87.3] On the facts there is no arguable case that the breaches were unintentional or without negligence.

A declaration

[88] 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 that could possibly justify the withholding from the Director of a formal declaration that Mr Emms has breached the Code in the various respects identified above.

[89] We address now the question of damages.

DAMAGES

[90] The Tribunal is empowered by s 54(1)(c) to grant a remedy in the form of damages in accordance with s 57 of the HDC Act. Section 57 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) ...

[91] The Director seeks damages only in terms of s 57(1)(c) (\$50,000) and (d) (\$30,000). The effect of s 57(2) is that while the damages are payable to the Director, it is his responsibility to pay to the aggrieved person any damages recovered.

Damages – humiliation, loss of dignity and injury to feelings

[92] The evidence of the aggrieved person was that on returning to her vehicle after the non-Shiatsu massage session she felt shocked by what had happened, ashamed, dirty and very sad. She felt she had been taken advantage of. As to longer term consequences, she now feels unsure socially and distrustful of

people in general. Because the experience affected her performance at work she has received counselling.

[93] We accept that the aggrieved person has suffered humiliation, loss of dignity and injury to feelings and that in fixing compensatory damages under s 57(1)(c) it is necessary to look at “the totality of the injury and the emotional state” of the aggrieved person. See *Director of Proceedings v O’Neil* at [31]. The Director seeks \$50,000. The issue for determination is whether, on the facts, compensation of this magnitude should be awarded.

[94] Quantum is very much a discretionary exercise for the Tribunal and the very nature of the heads of damages means there is a substantial subjective element to their assessment. The circumstances of humiliation, loss of dignity and injury to feelings are fact specific.

[95] The Director helpfully drew attention to recent and not so recent awards.

[96] The most recent decision was *Director of Proceedings v Nikau* [2010] NZHRRT 26 (14 December 2010) in which a service provider in a position of trust accepted money and gifts in excess of \$50,000 from a client who had a long history of mental health issues and who had been treated for depressive and bipolar affective disorders. For a time she had been hospitalised. As a consequence of the actions of the service provider the complainant had increased her use of acute respite services and there had been more frequent medical reviews with a need for increased support and monitoring. There had been four episodes of admission to the Acute Respite Department. She had found the entire experience stressful and distressing, required frequent reassurance, felt insecure, was financially compromised and relied on government benefits. The Tribunal awarded damages of \$30,000 under s 57(1)(c). We are of the view that even allowing for an uplift for inflation, the \$50,000 sought by the Director in the present case compares unfavourably with the award in *Nikau*.

[97] The next most recent decision is *Director of Proceedings v O’Malley* [2009] NZHRRT 2 (2 February 2009) in which Mr O’Malley was a caregiver of a young man with significant disabilities. Mr O’Malley encouraged the complainant (a young man) to engage in sexualised acts and procured a young female friend of the complainant to perform oral sex on him while the complainant was watching. Mr O’Malley also encouraged the complainant to participate with him in games of a sexual nature, to watch pornography with him and talked about sex and women with the complainant in an inappropriate and derogatory way. The Tribunal described the effect on the complainant in the following terms:

The evidence of a general regression in [the complainant's] behaviour after his contact with Mr O’Malley, including his increased depression and attempted suicide, indicates that a reasonably substantial award is appropriate. There is no doubt that [the complainant] was amongst the most vulnerable of people. One significant result of the events was that his first attempt at independent living failed in the most regrettable of circumstances.

[98] An award under s 57(1)(c) of \$20,000 was made to the complainant. Again we observe that the emotional harm suffered by the young man in that case was far more serious than that suffered by the aggrieved person in the present case.

Even allowing for an uplift we find the amount now sought by the Director well out of step with this previous award.

[99] In *Director of Health v Peters* [2006] NZHRRT 36 (25 September 2006) Mr Peters was a counsellor who had an intimate and sexual relationship with a complainant who had a past history of sexual abuse. She said that as a consequence of the actions of Mr Peters she had suffered further emotional harm, including humiliation, depression and an exacerbation of her predisposition towards inflicting injuries upon herself. The Director sought \$50,000 under s 57(1)(c). The Tribunal awarded \$15,000. It observed at [96]:

It hardly needs be said that any award of damages under s 57 must depend on the circumstances of the case at hand, and in particular it must reflect the evidence that has been adduced as to the harm for which compensation is being assessed. Reference to earlier cases provides perspective, and it is helpful in that way, but it does not replace the need to deal with each case on its facts.

[100] In making its assessment the Tribunal referred to the award of s 57(1)(c) damages in *Director of Proceedings v A* [2003] NZHRRT 35 and the decision on remedies in that case being *Director of Proceedings v A* [2004] NZHRRT 51 (22 November 2004). Damages of \$6,500 were awarded under s 57(1)(c) where an acupuncturist and practitioner of traditional Chinese medicine breached Rights 1(2), 4(2), 6(2) and 7(1) of the Code by:

[100.1] Failing to take reasonable steps to ensure that the complainant was aware that it was unnecessary for her to remove her bra for the purpose of the treatment;

[100.2] Failing to ensure that the complainant's breasts were covered while he was working on her chest (and in failing to allow her an opportunity to cover herself when the towels that were covering her breasts slipped);

[100.3] Failing to obtain the complainant's informed consent to treatment.

[101] The Tribunal in *Peters* also made reference to an award of \$5,000 for the humiliation felt by a woman whose genitalia were improperly touched by an acupuncturist during treatment. See *Director of Health v DG (Fan)* HRRT Decision 3/05, 25 February 2005.

[102] There is force to the submission by the Director that *Peters*, *Director of Proceedings v A* and *Director of Health v DG (Fan)* are now a little dated. Nevertheless, even allowing for awards to be regularly updated, the comparison between these awards and the \$50,000 sought by the Director is unfavourable.

[103] We have not found helpful the three cases cited by the Director and drawn from the sexual harassment jurisdiction of the Tribunal under the Human Rights Act 1993. The sample is very small and the contexts are not easily or directly comparable.

[104] Returning to the facts, we remind ourselves that awards under s 57(1)(c) are compensatory. Their purpose is not to punish or to convey disapproval. Nor can the award become a form of compensation for anything else that might have

gone wrong in the particular complainant's life. It remains the fact that, as observed by the Tribunal in *Peters* at [99], that few awards have been made under s 57(1)(c) and the guidance provided by past awards is limited.

[105] In our view the humiliation, loss of dignity and injury to the feelings of the aggrieved person in the present case falls well below that of the complainants in *Nikau* and *O'Malley*. On the other hand the 2004 award of \$6,500 in *Director of Proceedings v A* is now dated. At the very least it ought to be increased by allowing simple interest at approximately five percent per annum. However, the assessment of damages for emotional harm is not capable of precise mathematical calculation.

[106] In the present case it was clear on hearing the aggrieved person that she remains today a person who feels humiliated and with injured feelings. Her experience on Saturday 7 November 2009 has not been a transitory one. While her anxiety disorder is not the responsibility of Mr Emms, he must nevertheless take his clients as he finds them. Any humiliation, loss of dignity or injury to feeling is measured by the individual characteristics of the individual. A hypothetical, well-balanced and robust individual is not entered into the equation.

[107] In these circumstances we determine that an award of \$15,000 is appropriate under s 57(1)(c).

Damages – flagrant disregard of rights

[108] Damages under s 57(1)(d) of the HDC Act are awarded for any action of the defendant that was in flagrant disregard of the rights of the aggrieved person. The Director seeks \$30,000.

[109] While s 57(1)(d) does not specifically refer to “punitive” damages, it is clear that it does relate to punitive damages. See *Director of Proceedings v O'Neil* at [37]. As noted by the High Court in that case at [38], punitive damages are awarded to punish a wrongdoer. Such damages are by way of exemplary punishment, not compensation. We have found particularly helpful the following observations made by that Court on punitive damages:

[109.1] There has to be flagrant disregard or abuse of rights of another. “Flagrant” is a strong word. It connotes “outrageous” behaviour or “glaring, notorious or scandalous” acts or omissions. See [39].

[109.2] Jurisdiction to award punitive damages arises only if the statutory test in s 57(1)(d) is met. See [40].

[109.3] Quantum is very much a discretionary exercise for the Tribunal. See [40].

[109.4] Moderation is required and attempts to use punitive damages to compensate is to be resisted. See [40].

[109.5] Awards should be reserved for truly outrageous conduct which cannot be punished in any other way. See [40].

[110] Given that the statutory test is “flagrant disregard of the rights of the aggrieved person”, there is no need for us to consider *Couch v Attorney-General (No. 2) (on appeal from Hobson v Attorney-General)* [2010] NZSC 27, [2010] 3 NZLR 149 where the award of exemplary damages in tort was considered along with the question whether outrageousness as the governing test lacks objective content.

[111] We are of the view that the actions of Mr Emms, while serious, do not fall into the category envisaged by the strong words “flagrant disregard”. Flagrancy, in the sense intended by the statute, is not present on the facts. Caution must be exercised to ensure that every serious breach of the Code is not for that reason alone stigmatised as outrageous or flagrant.

[112] In making this assessment we have taken into account the fact that we have declined the application by Mr Emms for permanent name suppression for reasons which we explain shortly. In a small community like Nelson and in a small professional community of between 25 and 40 Shiatsu practitioners in New Zealand, publication of his name will result in acute embarrassment with almost inevitable professional and commercial consequences. Nevertheless there is a public interest in identifying Mr Emms so as to reduce the risk of repetition. The adverse consequences which will flow from name publication are factors which the Tribunal can properly take into account. See *Director of Proceedings v O’Neil* at [40] and [41].

[113] For these reasons we decline to make any award of punitive damages under s 57(1)(d) of the HDC Act.

[114] We turn now to the application by Mr Emms for a final order suppressing his name and identity.

WHETHER NAME SUPPRESSION FOR MR EMMS

[115] As mentioned, at the commencement of the hearing on 14 November 2011 the Tribunal made an interim order suppressing the identity of Mr Emms. At the conclusion of the hearing Mr Emms sought a final order on the following grounds:

[115.1] The allegations made by the aggrieved person are embarrassing, will attract media attention and, whether or not proven, to an enhanced civil standard, will be damaging to Mr Emms’ reputation and livelihood.

[115.2] Mr Emms’ occupation and his blindness are unusual and publication of either or both (when there are apparently only 40 practitioners nationally) will lead to the identification of Mr Emms.

[115.3] The letter dated 28 February 2011 from the Health and Disability Commissioner indicates that the Commissioner has deferred publicly naming Mr Emms until after the Director of Proceedings process is complete.

[116] The Director opposes the application on the following grounds:

[116.1] To protect public safety the public has a legitimate interest in knowing who Mr Emms is.

[116.2] Suppressing Mr Emms' name could unfairly impugn or lead to suspicion of other Shiatsu practitioners.

[116.3] It is important that the processes of the Tribunal are seen to be transparent and as taking place in public, especially where (as in this case) the proceedings are concerned with the accountability of maintaining professional standards for health service providers.

Discussion

[117] The granting of name suppression is a discretionary matter for the court or tribunal: *R v Liddell* [1995] 1 NZLR 538 (CA). The starting point when considering suppression orders is the presumption of open judicial proceedings, freedom of speech (as allowed by s 14 of the New Zealand Bill of Rights Act 1990) and the right of the media to report. However, in *Liddell* it was recognised at 547 that the jurisdiction to suppress identity can properly be exercised where the damage caused by publicity would plainly outweigh any genuine public interest. The decision in *Lewis v Wilson & Horton* [2000] 3 NZLR 546 (CA) underlines that in determining whether non-publication orders should be granted, the court or tribunal must identify and weigh the interests of both the public and the individual seeking publication.

[118] In his submissions the Director drew attention to *S v Wellington District Law Society* [2001] NZAR 465 (Tompkins, Salmon and Paterson JJ) and the discussion at 469 to 470 of the principles to be applied when suppression orders are sought by law practitioners. Those principles have subsequently been applied in the medical disciplinary context. See *F v Medical Practitioners Disciplinary Tribunal* HC Auckland AP21-SW01, 5 December 2001, Laurenson J at [90] and [121]. It was submitted the same principles apply in contexts such as the present. The principles are:

[118.1] The public interest referred to is the interest of the public, including members of the profession, who have a right to know about proceedings affecting a practitioner. The interests of any person, includes the interests of the practitioner being disciplined.

[118.2] The proceedings before a disciplinary tribunal are not criminal proceedings. Nor are they punitive. Their purpose is to protect the public and the profession.

[118.3] In considering the public interest the tribunal is required to consider the extent to which publication of the proceedings would provide some degree of protection to the public or the profession. It is the public interest in that sense that must be weighed against the interests of other persons, including the appellant, when exercising the discretion whether or not to prohibit publication.

[118.4] The exercise of the discretion should not be fettered by laying down any code or criteria, other than the general approach dictated by the statute.

[118.5] The issue will generally be determined by considering whether the presumption in favour of publication, in all the circumstances of the case, is outweighed by the interests of the appellant or the public interest.

[118.6] Often the answer to that question will be to consider if the interests of the public, including the profession, will be adequately protected if a suppression order is made. In many cases the issue is whether or not the balance is in favour of protecting the public by means of publication, as against the interests of the appellant in carrying on his profession uninhibited by any adverse publicity.

[119] We agree that these principles do have application in cases such as the present.

[120] Having seen and heard Mr Emms we have considerable sympathy for him. To an astonishing degree he has overcome his disability and the witnesses called by him all attest to his professionalism in practising Shiatsu. The aggrieved person similarly agrees that her Shiatsu session was professionally conducted. Publication of his name together with our findings will undoubtedly cause him humiliation and shame. Our sense is that because of his disability Mr Emms will find this additional burden difficult to shoulder. It is highly likely that, leaving aside his current but small client base, it will take several years for his Shiatsu practice to recover from adverse publicity.

[121] As against this we have found that the non-Shiatsu massage session involved serious breaches of the Code. The sexual exploitation of the aggrieved person requires the Tribunal to give substantial weight to the interests of the public. We find that those interests prevail over the interests of Mr Emms. As Baragwanath J noted in the nursing context, there is public interest in the accountability of the practitioner, so that as a practical matter, the practitioner's interest is likely in many cases to be limited: *Director of Proceedings v Nursing Council of New Zealand* [1999] 3 NZLR 360 at 382-383. This judgment emphasises the need for the decision-maker to take into account the importance of the transparency of and resulting confidence in the complaint process, the safety of the public and the need to educate and inform the public including other health care providers.

[122] These factors decisively require publication of our findings along with the identity of Mr Emms. We have also taken into account, but not given the same weight to, the possibility that suppression of Mr Emms' name could unfairly impugn or lead to suspicion about other Shiatsu practitioners.

[123] We see no inconsistency between declining Mr Emms' suppression application and making a permanent non-publication order in relation to the aggrieved person. It is difficult to see what public interest there is in identifying the aggrieved person. That order in no way impacts upon the public interest in knowing what has happened. On the contrary there is the practical consideration that publication of personal details of a complainant, particularly where allegations of a sexual nature are involved, is bound to be a deterrent to the making of complaints and the bringing of proceedings by persons who might otherwise have a justifiable grievance. If resort to the Tribunal is likely to carry with it the embarrassment of public disclosure of private and intimate information

the consequences will dissuade complainants who have need to access the Tribunal. See further the analogous decision of the Tribunal in *BNK v Trainor* [2004] NZHRRT 18 (17 May 2004) at [46] and [47].

[124] The application by Mr Emms for an order suppressing his name and identifying details is declined.

COSTS

[125] The Director seeks costs. Because Mr Emms 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.

[126] There is no evidence that Mr Emms 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. He has always denied the allegations made against him and in our view was fully entitled to defend these proceedings, particularly given the potentially severe consequences of any adverse finding. The fact that he was initially uncooperative during the investigation stage is not an exceptional circumstance nor is the fact that he was ultimately unsuccessful (except to a limited degree) in defending these proceedings.

[127] For these reasons no order for costs is made against Mr Emms.

FORMAL ORDERS

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

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

[128.1.1] Breach of Right 2 by sexually exploiting the aggrieved person in that he:

- (a) failed to provide her with privacy for disrobing;
- (b) failed to drape her during the non-Shiatsu massage;
- (c) touched her breasts and buttocks without her informed consent;
- (d) commented inappropriately on her breasts;
- (e) responded flippantly to, and made light of, the aggrieved person's objection to his behaviour.

[128.1.2] Breach of Right 4(1) by failing to provide services to the aggrieved person with reasonable care and skill in that he:

- (a) failed to provide her with privacy for disrobing;
- (b) failed to drape her during the non-Shiatsu massage;
- (c) touched her breasts and buttocks without her informed consent;

[128.1.3] Breach of Right 4(2) by failing to provide services that complied with ethical and other relevant standards in that he:

- (a) failed to provide her with privacy for disrobing;
- (b) failed to drape her during the non-Shiatsu massage;
- (c) touched her breasts and buttocks without her informed consent;
- (d) commented inappropriately on her breasts;
- (e) responded flippantly to, and made light of, the aggrieved person's objection to his behaviour.

[128.1.4] Breach of Right 6(2) by not providing the aggrieved person with information (including but not limited to information about his own qualifications and experience and the massage he intended to perform) that a reasonable consumer in her circumstances would need to make an informed choice or give informed consent to the:

- (a) non-Shiatsu massage; and/or
- (b) touching of her breasts; and/or
- (c) touching of her buttocks.

[128.1.5] Breach of Right 7(1) in that he:

- (a) performed a non-Shiatsu massage on the aggrieved person without first obtaining her informed consent; and/or
- (b) touched the aggrieved person's breasts without first obtaining her informed consent; and/or
- (c) touched the aggrieved person's buttocks without first obtaining her informed consent.

[128.2] Damages of \$15,000 are awarded against Mr Emms under ss 54(1)(c) and 57(1)(c) of the Health and Disability Commissioner Act 1994 for humiliation, loss of dignity and injury to feelings of the aggrieved person.

[128.3] The application by the Director for damages of \$30,000 under ss 54(1)(c) and 57(1)(d) of the Health and Disability Commissioner Act 1994 for flagrant disregard of the rights of the aggrieved person is dismissed.

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

[128.5] The application by Mr Emms for a non-publication order as to his identity is dismissed.

[128.6] The Tribunal confirms the order prohibiting publication of the name, address and any other details which might lead to the identification of the aggrieved person. There is to be no search of the Tribunal file without leave of the Tribunal or of the Chairperson.

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Mr RPG Haines QC
Chairperson

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Ms WV Gilchrist
Member

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Ms ST Scott
Member