



**NEW ZEALAND HEALTH
PRACTITIONERS
DISCIPLINARY TRIBUNAL**

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BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

HPDT NO **1104/Phys20/471P and 1104/Phys20/472P**

UNDER the Health Practitioners Competence Assurance
Act 2003 (the Act)

IN THE MATTER of a disciplinary charge laid against a health
practitioner under Part 4 of the Act.

BETWEEN **A PROFESSIONAL CONDUCT COMMITTEE**
appointed by the Physiotherapy Board of New
Zealand, pursuant to s71 of the Act
Applicant

AND **TAHNA KIM PEARCE and ALLAN DAVID PEARCE**
both of Auckland, registered physiotherapists
Practitioners

HEARING held by Audio Visual Link on 16 June 2020

TRIBUNAL Ms M Dew QC (Chair), Ms D McKinnon, Prof D Reid, Mr J
Salesa, Ms S Stewart (Members)
Ms K Davies (Executive Officer)

APPEARANCES Dr J Coates and Ms C Deans for the PCC
Mr M Tolich for the Practitioners

DECISION OF THE TRIBUNAL

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Introduction

[1] On 14 February 2020, the Professional Conduct Committee (the PCC) of the Physiotherapy Board of New Zealand (the Board) laid separate charges of professional misconduct against Mr and Mrs Pearce, both registered physiotherapists of Auckland. The charges relate to treatments claimed from the Accident Compensation Corporation (ACC), for treatments provided to each other and other family members between December 2014 and January 2017.

[2] The parties agreed that the charges may be heard together and by way of an Audio-Visual Hearing. The Tribunal agreed that this was appropriate given the charges were not contested by the practitioners.

[3] The hearing proceeded by way of an Agreed Summary of Facts for each practitioner dated 22 April 2020 and an Agreed Bundle of Documents. The practitioners admitted the charges and that the conduct amounted to professional misconduct. However, it remains for the Tribunal to determine whether the Charges are established, and if so what, if any, penalty should apply.

The Charges

[4] The particulars of the charges laid against each practitioner under the Health Practitioners Assurance Act (the Act) are set out in full below.

Mrs Tahna Kim Pearce

“Pursuant to section 81(2) of the Act, the Professional Conduct Committee lays a charge that Mrs Pearce, when practising as a physiotherapist, conducted herself in an inappropriate and/or unprofessional manner and/or contrary to her professional obligations relating to treatments funded by third parties, as follows:

- (a) *Between on or about 12 January 2015 and 19 January 2017, Mrs Pearce claimed payment from the Accident Compensation Corporation (ACC) for 195 treatments provided to someone with whom she had a close, personal relationship, namely her partner/husband Allan David Pearce, totalling \$12,743.60.*
- (b) *On or about 18 August 2015 and 21 August 2015, Mrs Pearce claimed payment from ACC for two treatments provided to someone with whom she had a close, personal relationship, namely her [] Mr M, totalling \$130.54.*
- (c) *Between on or about 11 November 2015 and 26 November 2016, Mrs Pearce claimed payment from ACC for 34 treatments provided to someone with whom she had a close, personal relationship, namely her [] Ms T, totalling \$2,219.18.*
- (d) *Between on or about 31 January 2015 and 2 December 2016, Mrs Pearce claimed payment from ACC for 27 treatments provided to someone with whom she had a close, personal relationship, namely her [] Mr N, totalling \$1,1763.74.*
- (e) *Between on or about 30 May 2016 and 18 October 2016, Mrs Pearce claimed payment from ACC for 23 treatments provided to someone with whom she had a close, personal relationship, namely her [] Ms A, totalling \$1,501.21.*
- (f) *The conduct alleged above either separately or cumulatively amounts to professional misconduct pursuant to section s100(1)(a) and/or 100(1)(b) of the Act in that it amounts to malpractice or negligence and/or has brought or was likely to bring discredit to the profession.”*

Mr Alan David Pearce

“Pursuant to section 81(2) of the Act, the Professional Conduct Committee lays a charge that Mr Pearce, when practising as a physiotherapist, conducted himself in an inappropriate

and/or unprofessional manner and/or contrary to his professional obligations relating to treatments funded by third parties, as follows:

1. *Between on or about 2 January 2015 and 6 January 2017, Mr Pearce claimed payment from Accident Compensation Corporation (ACC) for 77 treatments provided to someone with whom he had a close, personal relationship, namely his partner/wife Tahna Kim Pearce (nee Sissing), totalling \$5,030.14.*
2. *Between on or about 16 December 2014 and 11 August 2016, Mr Pearce claimed payment from ACC for 27 treatments provided to someone with whom he had a close, personal relationship, namely his [] Mr M, totalling \$1,729.66.*
3. *Between on or about 22 December 2014 and 5 February 2016, Mr Pearce claimed payment from ACC for 7 treatments provided to someone with whom he had a close, personal relationship, namely his [] Ms T, totalling \$456.89.*
4. *Between 22 December 2014 and 5 January 2017, Mr Pearce claimed payment from ACC for 12 treatments provided to someone with whom he had a close, personal relationship, namely his [] Mr N, totalling \$784.69.*
5. *Between 16 December 2014 and 9 February 2016, Mr Pearce claimed payment from ACC for 14 treatments provided to someone with whom he had a close, personal relationship, namely his [] Ms A, totalling \$913.78.*

The conduct alleged above either separately or cumulatively amounts to professional misconduct pursuant to section s100(1)(a) and/or 100(1)(b) of the Act in that it amounts to malpractice or negligence and/or has brought or was likely to bring discredit to the profession.”

Factual background

[5] The factual background has been taken from the Agreed Summary of Facts for both practitioners.

[6] Mr Pearce holds a Bachelor of Health Science (Physiotherapy) from Auckland University of Technology (AUT) (2012) and a post-graduate Diploma Health Science (Musculoskeletal Physiotherapy) (2015). He was first registered with the Physiotherapy Board under the general scope of practice in January 2012. Mr Pearce has a current Annual Practising Certificate (APC), which will expire on 31 March 2021.

[7] Between 2012 and 2015 Mr Pearce worked as a physiotherapist for [], a physiotherapy practice operating in Auckland. In May 2012, Mr Pearce established Dynamic Physio Ltd and he was the original director and shareholder. Mr Pearce continues to be a shareholder and the managing director of Dynamic Physio Ltd.

[8] Mrs Pearce was first registered as a physiotherapist with the Physiotherapy Board on 18 January 2013. She holds a Bachelor of Health Science (Physiotherapy) from Auckland University of Technology (AUT) (2012). She does not currently hold an annual practising certificate (APC) and her last APC expired on 31 March 2018.

[9] Between February 2013 and August 2014, Mrs Pearce was employed as a physiotherapist at [], a physiotherapist practice operating in Auckland. Between July 2014 and August 2017, Mrs Pearce worked as a physiotherapist at Dynamic Physio Ltd.

[10] Mrs Pearce started working in the practice when she was Mr Pearce's partner and later as his wife. In 2013, Mrs Pearce began living with Mr Pearce. In February 2016, they were married.

[11] Mrs Pearce became a director of Dynamic Physio Ltd on 1 October 2013 and she was appointed as a shareholder on 21 September 2014. In August 2017, she became the Practice Manager. Although Mrs Pearce does not hold a current APC, she continues to be a registered physiotherapist and a director and shareholder of Dynamic Physio Ltd.

[12] Mr Pearce has been registered as an ACC provider under the Accident Compensation (Liability to Pay or Contribute to Cost of Treatment) Regulations 2003 since 8 February 2012.

[13] On 2 March 2013, Mrs Pearce was also registered as an ACC provider under the Accident Compensation (Liability to Pay or Contribute to Cost of Treatment) Regulations 2003.

[14] As a registered physiotherapist and ACC provider, they were both subject to expectations, responsibilities and obligations including but not limited to those set out in:

- (a) the ACC Treatment Provider Handbook (ACC Handbook) (2011, 2015 and 2016);
- (b) Code of Ethics and Professional Conduct (Code of Ethics) (2011);
- (c) the Joint Physiotherapy New Zealand / Physiotherapy Board Position Statement regarding Treatment of Whanau and Family Members and Self Treatment (Board's Position Statement) (December 2012);
- (d) the Physiotherapy New Zealand Workplace Guidance for Employers and New Graduates (Workplace Guidance for Employers) (2010); and
- (e) the Physiotherapy Practice Thresholds in Australia and Aotearoa New Zealand (Practice Thresholds) (1 May 2015).

[15] The ACC Handbook sets out ACC's policy on *'Treating yourself or your family'* (2015/2016) which provides:

"ACC agrees with the Medical Council of New Zealand, which states that "other than in exceptional circumstances you shouldn't provide medical care to yourself or anyone with whom you have a close personal relationship". ACC considers this to be relevant to all types of treatment provider and includes the treatment of work colleagues."

We generally consider it unacceptable and unethical for providers to claim payments from ACC for treating those who are close to them. In these cases we'll only consider paying for treatment in exceptional circumstances.

Exceptional circumstances includes:

- i. Acute treatment provided in an emergency situation where, in your reasonable judgement, the need for treatment is urgent given the likely clinical effect on the person of any delay in treatment.*
- ii. Situations in rural areas where there is no other appropriately qualified treatment provider available to give the required treatment.*

We're unable to fund:

- iii. Treatment provided in non-emergency situation*
- iv. Emergency treatment that would ordinarily be provided by a family member who isn't a provider."*

[16] ACC's policy aligns with the Physiotherapy Board of New Zealand Position Statement ¹ which provides:

"Providing treatment for close family members does not constitute good clinical practice. The potential problems associated with caring for close family members include the possibility that the physiotherapist lacks objectivity, and the presence of family dynamics that may make it difficult for the patient/client to change providers.

Some exceptions exist, including: in emergency situations where the patient/client will suffer further harm if care is not provided; or in rural settings where no other suitably qualified provider is available. If funding in these situations is to be sought from a third party, then care must be taken to meet particular criteria regarding verification, documentation and care plans.

¹ Physiotherapy Board's Position Statement on the Treatment of Whanau and Family Members and Self Treatment, December 2012.

i. *The potential problems inherent in treating themselves or whanau and family members include:*

- *The physiotherapist's professional judgment may be impaired due to the personal nature of the relationship and can impact on diagnosis and treatment*
- *The power dynamics present in a whanau and family might make it difficult for the patient to choose an alternative provider and/or make a complaint.*

Consequently, it is not good clinical practice for physiotherapists to treat themselves or their close whanau and family members unless there is no other available and appropriately qualified physiotherapist.

Physiotherapists should exercise great discretion in carrying out any such treatment(s)."

[17] Relevantly, the Code of Ethics states that physiotherapists:

- (a) Must be responsible stewards of health care resources (principle 4.3);
- (b) Must act with honesty and integrity in all professional activities (including when interacting with: funders, employers, employees and insurers) (principle 6.3);
- (c) Should avoid treating family members (principle 10.6).

[18] On 2 June 2017, the Board received a notification from ACC raising concerns that Mr and Mrs Pearce had provided physiotherapy treatment to close family members in circumstances where there was no evidence that the treatments were required for exceptional circumstances. The notification attached a list of the treatments that they had sought funding for from ACC, which showed those treatments set out in their respective charges before this Tribunal.

[19] As confirmed by the Agreed Summary of Facts:

- (a) Mr Pearce acknowledges and accepts his [] are people with whom he had a close, personal relationship with at the time that he provided them with physiotherapy treatment.
- (b) Mrs Pearce acknowledges and accepts her [] are people with whom she had a close, personal relationship with at the time she provided them with physiotherapy treatment.
- (c) They both acknowledge and accept they provided physiotherapy treatments to these parties as charged in non-emergency situations and where there were no exceptional circumstances;
- (d) They both acknowledge and accept they benefited financially from the physiotherapy treatments provided by claiming funding for the treatments from ACC. All monies claimed have been repaid to ACC;
- (e) They both acknowledge and accept they did not provide explicit advice to these relatives (named in the charged) as part of the consent process of the issues associated with treatment of family and they did not seek a suitable alternative provider to take over management of their treatment as soon as practicable;
- (f) They both acknowledge and accept by providing treatment to people with whom they had a close, personal relationship where there were no exceptional circumstances, they conducted themselves inappropriately and contrary to good clinical practice, and in a manner that breached their professional obligations as set out above, and in particular, they did not comply with the ACC Handbook, the Position Statement, and the Code of Ethics;

- (g) They both acknowledge and accept the conduct, as described above, amounts to professional misconduct in that it is malpractice, and has brought discredit to the profession and warrants disciplinary sanction.

Relevant law

[20] The charges of professional misconduct are laid under section 100(1)(a) and/or section 100(1)(b) of the Act. The relevant provisions of s100 are as follows:

“100 Grounds on which health practitioner may be disciplined

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

[21] There is a well-established two stage test for determining professional misconduct in this jurisdiction.² The two steps are:

- (a) First, did the proven conduct fall short of the conduct expected of a reasonably competent health practitioner operating in that vocational area? This requires an objective analysis of whether the practitioner’s acts or omissions can reasonably be regarded by the Tribunal as constituting malpractice, negligence or otherwise bringing, or likely to bring, discredit on the profession; and

² *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA), as applied in *Johns v Director of Proceedings* [2017] NZHC 2843.

- (b) Secondly, if so, whether the departure from acceptable standards has been significant enough to warrant a disciplinary sanction for the purposes of protection of the public and/or maintaining professional standards?

[22] The burden of proof is on the PCC. The PCC must produce evidence that establishes the facts on which the Charge is based to the appropriate civil standard of proof.

[23] The standard of proof is the civil standard of proof; that is proof which satisfies the Tribunal that on the balance of probabilities the particulars of the Charge are more likely than not. The Tribunal must apply a degree of flexibility to the balance of probabilities considering the seriousness of the allegation, and the gravity of the consequences flowing from a particular finding.³

[24] There are three relevant and recent cases all heard within the last two years which deal with professional misconduct by physiotherapists in similar ACC claim circumstances where they have claimed treatments for family members.⁴

[25] *Stiven* is the most recent case in which the Tribunal found that Mr Stiven claimed payment from ACC for 15 treatments that he provided to someone with whom he had a close personal relationship. There were no exceptional circumstances to justify doing so, and Mr Stiven accepted that his conduct was contrary to his professional obligations. The Tribunal found that Mr Stiven's conduct amounted to both negligence and conduct that was likely to bring discredit to the profession. The Tribunal relevantly stated that: "It is important for the protection of the public and the maintenance of professional standards that physiotherapists do not treat their own family members ... and to charge ACC for these treatments."⁵

[26] In the Tribunal decision of *Evans*⁶ the physiotherapy practitioner was found guilty of professional misconduct amounting to malpractice, negligence and conduct likely to bring discredit to the profession. This finding was made in circumstances where Mr Evans had: on approximately 251 times invoiced ACC for more than 12 hours of treatment services in one

³ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC) at [112].

⁴ *Stiven* 1066/Phys19/450P, *Evans* 1039/Phys18/433P; *Nonoa* 1013/Phys18/427P.

⁵ 1066/Phys19/140P at [36].

day, including on 10 occasions when he had invoiced for over 24 hours on one day; claimed for two treatments provided on the same day; and provided ACC funded treatment to family members.

[27] In *Nonoa*,⁷ another relatively recent physiotherapist case, the Tribunal found that Mr Nonoa was in breach of ethical and professional standards which related to his honesty and integrity in his dealings with ACC. The practitioner's conduct included invoicing services to ACC under another provider's name when the services were not provided by either practitioner, as well as invoicing ACC for treatment provided to family members when there were no exceptional circumstances and without independent verification.

[28] Counsel for the PCC also drew the Tribunal's attention to the case of *Kenny*.⁸ This case involved a chiropractor convicted of dishonest use of a document with intention to obtain a pecuniary advantage from ACC. The relevance of this case was the Tribunal's statement that:

"The offending involved his privilege of trust from the ACC entitling him to payment when the necessary forms were completed by him. The ACC scheme operates on a trust-based system and could not function effectively unless health practitioners who are entitled to claim monies did so in a way and on occasions when they are entitled to do so. The system would likely grind to a halt unless the ACC could trust practitioners to act in the correct manner and claim monies only where entitled. These were public funds that were involved."

[29] The present case of Mr and Mrs Pearce is now the fourth set of charges relating to improper ACC claiming in the physiotherapy profession. This is no doubt an unwelcome trend for the profession and will hopefully mark a material change in awareness and practice. It is acknowledged that Mr and Mrs Pearce's conduct relates to the 2014 to 2017 period, prior to this recent run of cases which started in 2018.

Consideration of Charges

⁶ 1039/Phys18/433P.

⁷ 1013/Phys18/427P.

⁸ 990/Chiro18/421P at [20].

[30] The Tribunal is satisfied that the separate Charges against both Mr and Mrs Pearce have been established.

[31] The practitioners have admitted the charges as laid against them. The Agreed Bundle of Documents produces the key relevant documents which confirm the ACC treatments provided to the family members over the period of the charge. The family members involved also confirmed in separate emails to the PCC during the course of its investigation, that they had been the subject of the treatments.

[32] There is no evidence by either practitioner that the treatments were provided under exceptional circumstances or in any emergency situations.

[33] In summary, Mr Pearce's established misconduct is extensive and included :

- (a) 77 treatments provided to his wife over the course of 2 years between January 2015 and January 2017;
- (b) 27 treatments provided to his [Mr M] over the period December 2014 to August 2016;
- (c) 7 treatments provided to his [Ms T] of the period December 2014 to February 2016;
- (d) 12 treatments provided to his [Mr N] over the period December 2014 to January 2017;
- (e) 14 treatments provided to his [Ms A] in law over the period December 2014 to February 2016.

[34] The total financial benefit to Mr Pearce over this period, of just over two years, was \$8,915.16. While this has since been repaid, the financial benefit was reasonably significant at the time.

[35] Mrs Pearce's established conduct, in summary form, also highlights the extent of her conduct over a two year period:

- (a) 195 treatments of her husband;
- (b) 2 treatments of her [Mr M];
- (c) 34 treatments of her [Ms T];
- (d) 27 treatments of her [Mr N];
- (e) 23 treatments of her [Ms A].

[36] The total financial benefit to Mrs Pearce was \$18,358.27. Again, this money has also since been repaid to ACC.

[37] The Tribunal is satisfied that for each practitioner this conduct represents a significant departure from acceptable standards for a health practitioner and warrant a finding of professional misconduct. Importantly, the Tribunal notes that both Mr and Mrs Pearce accepted that:⁹

- (a) There is no justification or exceptional circumstances in treating family which is *"in contravention of ACC's fundings policy"*.
- (b) They did not maintain appropriate professional boundaries when treating family members.
- (c) They did not provide explicit advice to family members as part of the consent process of the issues associated with the treatment of family including conflict of interest, recognising the complex factors including prior dynamics and the potential imposition of their personal views that may have impacted on the treatment of the family members.

⁹ Document 5 Submissions of counsel for Tahna Kim Pearce and Allan David Pearce for hearing on 16 June 2020 dated 10 June 2020 at [21.10] – [21.13].

- (d) They accepted that they did not seek independent verification of their assessments, diagnosis and management plans or make a referral to the patient's GP or to a specialist for verification. Neither considered an alternative provider to take over the management as soon as practical of family members' conditions.

[38] On this basis, the Tribunal was also satisfied the second step of the test for professional misconduct is established in that their conduct was negligent, and constituted malpractice, and was likely to bring discredit to the profession.

[39] The Particulars of each of the Charges 1 to 5, as against Mr Pearce are each established, both separately and cumulatively, as professional misconduct under section 100(1)(a) and 100(1)(b) of the Act as malpractice and negligence and conduct likely to bring discredit to the profession.

[40] The Particulars of each of the Charges 1, 3, 4 and 5, as against Mrs Pearce are established, both separately and cumulatively, as malpractice and negligence and conduct likely to bring discredit to the profession. In relation to Particular 2, this more minor breach on only two occasions relating to treatment of her [Mr M] is only established on a cumulative basis.

[41] It is important for the protection of the public and the maintenance of professional standards that physiotherapists do not treat their own family members, nor allow employees to treat them and to charge ACC for these treatments.

[42] It was submitted for the practitioners that they did not receive adequate training in ethics involving ACC and family member treatment whilst they were studying at University. The Tribunal does not accept that this is likely given the nature of the training in ethics and the clear statements of boundaries around treatment of family members that have been in place well before 2012.

[43] In any event, the Tribunal does not accept that is an excuse for the conduct. The current Physiotherapy Code of Conduct and Standards are clear about the boundaries around such treatment and that treatment of family members is to be avoided except in

exceptional circumstances. In addition, both Mr and Mrs Pearce are now experienced and otherwise competent practitioners under an on-going obligation to familiarise themselves with their ethical, clinical and ACC obligations.

[44] The Tribunal has been concerned to note that this is the fourth disciplinary case in three years in which physiotherapists have been found to have treated close family members and improperly charged ACC for these treatments. The Tribunal has denounced this conduct as professional misconduct to ensure that a clear message is sent to other registered physiotherapists that this is unacceptable practice, it is both a breach of professional obligations owed to the patient and to ACC.

Penalty

[45] Given that the Tribunal is satisfied the Charges are established, it must go on to consider the appropriate penalty under section 101 of the Act. The penalties may include:

- (a) Cancellation of the practitioner's registration;
- (b) Suspension of registration for a period not exceeding 3 years;
- (c) Censure;
- (d) An order that the practitioner may only practice with conditions imposed on employment or supervision or otherwise;
- (e) A fine of up to \$30,000; and
- (f) An order as to costs of the Tribunal and/or the PCC to be met in part or in whole by the practitioner.

[46] The Tribunal accepts as the appropriate sentencing principles those contained in *Roberts v Professional Conduct Committee*,¹⁰ where Collins J identified the following eight

¹⁰ [2012] NZHC 3354 at [44]-[51].

factors as relevant whenever the Tribunal is determining an appropriate penalty. In particular, the Tribunal is bound to consider what penalty:

- (a) most appropriately protects the public and deters others;
- (b) facilitates the Tribunal's important role in setting professional standards;
- (c) punishes the practitioner;
- (d) allows for the rehabilitation of the health practitioner;
- (e) promotes consistency with penalties in similar cases;
- (f) reflects the seriousness of the misconduct;
- (g) is the least restrictive penalty appropriate in the circumstances; and
- (h) looked at overall, is the penalty "fair, reasonable and proportionate in the circumstances."

[47] Counsel for the PCC submits that the subject matter of the Charges against Mr Pearce and Mrs Pearce are substantially the same and so the penalty to be imposed ought to be similar. In both cases the PCC seeks a censure, conditions on the scope of scope of practice, a fine, and at least a 50% contribution to the PCC's prosecution and investigation costs and the Tribunal's hearing costs.

[48] However, it is noted by the PCC that Mrs Pearce claimed more ACC treatments and the sums involved were larger as a result. The fine sought by the PCC was for \$5,000 in respect of Mrs Pearce and \$4,000 in respect of Mr Pearce, to reflect this variance in their offending.

[49] The conditions proposed by the PCC, in relation to both practitioners, are that:

- (a) For a period of 18 months they must practice under the supervision of a Board-approved supervisor at their own cost. The supervision will have a

focus on ethics and professional obligations relating to third-party funding. The supervisor will report back to the Board on their progress, with the first report due after one month and then every 3 months thereafter. The supervision will otherwise take place as directed by the Board.

- (b) Mrs Pearce and Mrs Pearce must participate, at their own cost, in an education course, approved by the Registrar of the Board, with a focus on ethics and professional obligations.

[50] The PCC acknowledged that Mrs Pearce does not currently hold an APC, therefore the conditions should start immediately with effect from the date on which she commences practice again, following the date of the Tribunal's written decision.

[51] The practitioners accept that a censure is appropriate, together with a fine of \$2,500 each. They also accept the conditions proposed by the PCC, but noting that the lengthy period of supervision is not required. Mr Pearce submits that he has made changes to the way in which his practice is conducted and that an 18 month period would be extremely burdensome with a period of 6 months being more appropriate.

[52] For both Mr and Mrs Pearce, it is submitted that because of their financial position, they cannot afford to pay the 50% costs sought but that they could pay jointly 15% of the actual and reasonable costs of the PCC and Tribunal.

Comparable cases on penalty

[53] The PCC referred the Tribunal to the recent physiotherapy practitioner cases *Stiven*, *Evans*, and *Nonoa* cases, to demonstrate the range of penalties which have been imposed on a practitioner in similar circumstances.¹¹ Counsel for Mr and Mrs Pearce submitted that the *Stiven* decision was the most relevant in this case.

[54] In *Evans*, the Tribunal ordered censure, suspension for two months, conditions and a fine of \$5,000. Mr Evans was also required to contribute 30% of the total costs of the

¹¹ *Evans* 1039/Phys 18/433P, *Nonoa* 1013/Phys18/427P, *Stiven* 1066/Phys19/450P.

Tribunal and the PCC. In that case, the Tribunal noted the importance of deterrence and sending a strong message to health practitioners that the system cannot be manipulated.

[55] In *Nonoa*, the Tribunal censured and fined Mr Nonoa \$5,000, had conditions imposed on his practice for 2 years, and ordered to pay a contribution of 15% of costs.

[56] The Tribunal notes that the conduct in both the *Evans* and *Nonoa* cases was more serious than in the present case, in that there were more occasions on which the conduct occurred, and in *Nonoa*, the ACC claims and family treatment occurred over an 11 year period.

[57] In *Stiven*, the practitioner was censured, fined \$2,500 and subjected to a condition that he be supervised for a period of 12 months and ordered to pay 30% of costs. *Stiven* involved a much smaller number of treatments, over a similar, two year period than in the present case.

Aggravating and mitigating factors

[58] In considering the appropriate penalty, the Tribunal is also required to consider the aggravating and mitigating factors in Mr and Mrs Pearce's case. The Tribunal considers the following aggravating factors relevant in this case:

- (a) Mr and Mrs Pearce's conduct occurred over more than 2 years, on 281 occasions by Mrs Pearce, and 137 occasions by Mr Pearce, and in relation to multiple patients.
- (b) The amount of money claimed by Mr and Mrs Pearce for treatment provided to each other and to Mr Pearce's family members was significant.
- (c) As the owners and operators of Dynamic Physio, and as employers of other staff who worked there, Mr and Mrs Pearce ought to have been very well aware of their professional and ethical obligations, especially with respect to claiming from ACC, which is a significant part of physiotherapy practice.

- (d) Mr and Mrs Pearce both completed the course on Professional Practice and Ethics as part of their degree at AUT.
- (e) Mr and Mrs Pearce's conduct involves care of patient issues in that they did not provide explicit advice to each other or Mr Pearce's family members as part of the consent process of the issues associated with treating family members (as described in the Board's Position Statement). In addition, they did not find a suitable alternative physiotherapist to take over the treatment they provided to each other and to Mr Pearce's family members.
- (f) Mr and Mrs Pearce abused their positions of trust as treatment providers registered with ACC by claiming for treatment to which they were not entitled.

[59] However, there are also material mitigating factors in this case, which the Tribunal must also take into account:

- (a) This is their first appearance before the Tribunal for disciplinary matters, and Mr and Mrs Pearce have cooperated with the PCC and the Tribunal throughout this process.
- (b) Mr and Mrs Pearce have repaid the full amount that was claimed from ACC for the treatment provided to each other and to Mr Pearce's family.
- (c) Mr and Mrs Pearce have also taken proactive steps to ensure that they do not continue to treat people with whom they have a close, personal relationship, including by updating the Dynamic Physio Clinic Policy and Procedure Manual to record this.
- (d) Mr and Mrs Pearce have shown a good degree of insight into their conduct and it appears to the Tribunal that this is not likely to reoccur in their practice.
- (e) The practitioners presented to the Tribunal a number of character references supporting their contributions as practitioners and as members of their

community. The Tribunal has given these some weight, though not as much as if they had been addressed to the Tribunal directly.

Finding on penalty

[60] The Tribunal has considered the relevant sentencing principles, aggravating and mitigating factors and the comparative cases. We are satisfied that the appropriate and proportionate penalty in this case, is for Orders under s101 of the Act as follows:

- (a) censure of both practitioners;
- (b) a fine of \$3,500 to be paid by each of the practitioners, being a total of \$7,000 in fines; and
- (c) Mr Pearce: The practitioner will be subject to the following two conditions on his practice:
 - i. A condition that for a period of 9 months following the date of this decision, Mr Pearce must only practice in accordance with the following condition; that he practice under the supervision of a Board-approved supervisor at his own cost. The supervision will have a focus on ethics and professional obligations relating to third-party funding. The supervisor will report back to the Board on their progress, with the first report due after one month and then every 3 months thereafter. The supervision will otherwise take place as directed by the Board.
 - ii. Within 3 months of the date of this decision Mr Pearce must participate, at his own cost, in an education course, approved by the Registrar of the Board, with a focus on ethics and professional obligations.
- (d) Mrs Pearce: In the event, that she recommences practice, she will also be subject to the same conditions at her own cost:

- i. the same supervision condition as Mr Pearce for a period of 9 months from the date she recommences in practice; and
- ii. will be required to undertake a course in ethics and professional obligations within 3 months of recommencing practice, as approved by the Registrar of the Board.

[61] The Tribunal considers this penalty fairly reflects the sentencing principles and ensures that Mr and Mrs Pearce are dealt with in a comparable manner having regard to previous cases. Mr and Mrs Pearce's offending is sufficiently serious that it warrants sanction and to ensure that the practitioners are able to demonstrate a permanent change in practice we consider the supervision for a reasonable period is necessary. Given the overlapping nature of the family treatments, we do not consider there is sufficient cause to differentiate between Mr and Mrs Pearce in setting the level of fines.

[62] The Tribunal also considers it important that the penalty imposed continues to send a clear message to physiotherapy practitioners and other health professionals that practitioners must comply with their obligations regarding the provision of treatment to family members and that they must not claim ACC funding for treatment provided to those with whom they have a close personal relationship.

Costs

[63] The PCC seeks a 50% contribution to the costs of the PCC and the Tribunal.

[64] Under s101(f) of the Act, the Tribunal may order the practitioner to pay part of all of the costs and expenses of and incidental to the PCC investigation and this prosecution, so far as they relate to the subject matter of the charge. There is no GST awarded on costs in the Tribunal, as is the case in costs before the courts.¹²

[65] Costs in any health professional disciplinary proceeding involve a judgement as to the proportion of the costs which should properly be borne by the profession as a whole (being responsible for maintaining standards and disciplining its own profession) and the

proportion which should be borne by the guilty practitioner who has caused the costs to be incurred.

[66] In this jurisdiction, it has long been established that in considering the appropriate quantum of costs, the Tribunal must consider the need for the practitioner to make a proper contribution towards the costs. In doing so, the Tribunal takes 50% of the total reasonable costs as a starting point, in accordance with the dicta in *Cooray v Preliminary Proceedings Committee*.¹³ This percentage may increase or decreased depending on the individual case.

[67] The PCC presented its costs incurred separately in respect of both Mr and Mrs Pearce and these are set out below.

Mrs Pearce costs incurred

PCC investigation	\$27,016.71
PCC prosecution (50%)	\$14,691.50
Total	\$41,708.21

Mr Pearce, costs incurred

PCC investigation	\$37,525.59
PCC prosecution (50%)	\$14,691.50
Total	\$52,217.09

[68] The Tribunal estimated costs presented at the AVL hearing, for both Mr and Mrs Pearce's combined hearing are **\$14,799.60**.

[69] In support of submissions in relation to their financial position, Mr and Mrs Pearce submitted Dynamic Physio Limited's Profit and Loss Statement from April 2019 to March 2020. Mr and Mrs Pearce's salaries for the same period were also provided, which are noted as modest. None of the material in relation to their financial position was presented as sworn evidence.

[70] It is generally the case that if the Tribunal is being invited by the practitioner to order something substantially less than 50% based on the practitioner's financial means, it is

¹² *NZ Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282.

¹³ HC Wellington, AP 23/94, Doogue J, 14 September 1995.

appropriate for the practitioner to file sufficient affidavit evidence with supporting statements of accounts attached, to enable the Tribunal to make some assessment of means.

[71] While the Tribunal does not consider it necessary to require such an affidavit in every case, Mr and Mrs Pearce were given the opportunity to give sworn evidence as to their financial position and declined to do so. In the circumstances, the Tribunal has not been able to give sufficient weight to the limited financial information put before the Tribunal to be satisfied that a substantial discount is warranted.

[72] The Tribunal recognises the cooperation Mr and Mrs Pearce gave to the PCC and this Tribunal prior to and during this hearing and considers that the practitioners are entitled to some discount for that. As a result, the Tribunal considers the appropriate order against each practitioner is that they meet 35% of the costs of the PCC and Tribunal, the sums of which are set out in the orders of the Tribunal on the final page of this decision.

Name Suppression matters

[73] Mr and Mrs Pearce did not make any application for permanent name suppression, so the interim suppression orders made in relation to each of them is now lifted upon publication of this decision.

[74] The practitioners did seek a permanent suppression orders under s95 of the Act, in respect of the names and identifying features of the close family members (who were also patients) as named in the Charges. This was not opposed by the PCC.

[75] The Tribunal therefore grants this application and makes the suppression order in respect of the names and any identifying particulars of Mr Pearce's family members named in the Charges, including their relationship to Mr and Mrs Pearce. This order will not in any way limit publication of the names of both practitioners.

[76] Permanent suppression orders are also made in relation to the financial and income statements for the practitioners and the names of the other physiotherapy clinics, not owned by the practitioners, where they have been identified in the evidence.

Orders of the Tribunal

Mr Pearce

[77] The charge of professional misconduct under section 100(1)(a) and (b) of the Act is established in respect of the practitioner Mr Allan David Pearce.

[78] The penalty orders made under s101 of the Act against Mr Pearce by this Tribunal are as follows:

- (a) Censure;
- (b) A fine is to be paid by the practitioner of \$3,500;
- (c) Conditions to be imposed on Mr Pearce's practice as follows:
 - i. For a period of 9 months he must practice under the supervision of a Board-approved supervisor at his own cost. The supervision will have a focus on ethics and professional obligations relating to third-party funding. The supervisor will report back to the Board on their progress, with the first report due after one month and then every 3 months thereafter. The supervision will otherwise take place as directed by the Board.
 - ii. Within 3 months of the date of this decision, Mr Pearce must participate, at his own cost, in an education course, approved by the Registrar of the Board, with a focus on ethics and professional obligations.
- (d) Costs to be paid by Mr Pearce of 35% of the total costs being the following sums payable:
 - i. To the PCC \$18, 275.98, in respect of its costs;

- ii. To the Tribunal \$2,589.93, in respect of a half share of the total costs of the Tribunal.

Mrs Pearce

[79] The charge of professional misconduct under section 100(1)(a) and (b) of the Act is established in respect of the practitioner Mrs Tahna Kim Pearce.

[80] The penalty orders made under s101 of the Act against Mrs Pearce by this Tribunal are as follows:

- (a) Censure;
- (b) A fine is to be paid by the practitioner of \$3,500;
- (c) In the event, that Mrs Pearce recommences practice, conditions to be imposed on her practice as follows:
 - i. For a period of 9 months she must practice under the supervision of a Board-approved supervisor at her own cost. The supervision will have a focus on ethics and professional obligations relating to third-party funding. The supervisor will report back to the Board on their progress, with the first report due after one month and then every 3 months thereafter. The supervision will otherwise take place as directed by the Board.
 - ii. Within 3 months of the date of recommencing in practice, Mrs Pearce must participate, at her own cost, in an education course, approved by the Registrar of the Board, with a focus on ethics and professional obligations.
- (d) Costs to be paid by Mrs Pearce of 35% of the total costs being the following sums payable:

- i. To the PCC \$14,597.87, in respect of its costs;
- ii. To the Tribunal \$2,589.93, in respect of a half share of the total costs of the Tribunal.

[81] Pursuant to s 157 of the Act the Tribunal directs the Executive Officer:

- (a) To publish this decision and a summary on the Tribunal’s website, subject to the suppression orders made above at paragraphs [75] and [76] of this decision.
- (b) To request the Physiotherapy Board to publish either a summary of, or a reference to, the Tribunal’s decision in its professional publications to members, in either case including a reference to the Tribunal’s website so as to enable interested parties to access the decision.

DATED at Auckland this 14th day of August 2020

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Maria Dew QC
Chair
Health Practitioners Disciplinary Tribunal