**DR. KWOK-HAY KWONG v. THE MEDICAL COUNCIL OF HONG KONG [2008] HKCA 23; [2008] 3 HKLRD 524; [2008] 1 HKC 338; CACV 373/2006 (24 January 2008)**

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| CACV 373/2006  IN THE HIGH COURT OF THE  HONG KONG SPECIAL ADMINISTRATIVE REGION  COURT OF APPEAL  CIVIL APPEAL NO. 373 OF 2006  (ON APPEAL FROM HCAL NO. 46 OF 2006)  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  BETWEEN   |  |  |  | | --- | --- | --- | |  | Dr. KWOK-HAY KWONG | Applicant | |  | and |  | |  | THE MEDICAL COUNCIL OF HONG KONG | Respondent |   \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Before : Hon Ma CJHC, Tang VP & Stock JA in Court  Dates of Hearing : 24 and 25 October 2007  Date of Handing Down Judgment : 24 January 2008  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  J U D G M E N T  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  **Hon Ma CJHC :**  1. The present appeal raises important issues for the medical profession in relation to practice promotion (that is, advertising). The Applicant, a medical practitioner (formerly the Assistant Medical Superintendent of the Hong Kong Sanatorium and Hospital and whose position mirrors that of the Hospital and many other doctors in Hong Kong), has sought in these judicial review proceedings to challenge certain restrictions contained in the Professional Code and Conduct for the Guidance of Registered Medical Practitioners, as updated from time to time, (“the Code”) as being contrary to the freedom of expression guaranteed under the Basic Law, the International Covenant on Civil and Political Rights (“the ICCPR”) and the Bill of Rights contained in the Hong Kong Bill of Rights Ordinance, [Cap. 383](http://www.hklii.hk/eng/hk/legis/ord/383). The freedom of expression includes as one of its facets the right to advertise.  2. For its part, the Respondent (the Medical Council) has maintained in the relevant decisions in these proceedings that the restrictions are consistent with the said constitutional right and are considered by a Medical Council (as the governing body for doctors) to be appropriate. This considered view, says the Respondent, ought to be given due respect by the courts. However, as will presently be seen, the Respondent has in this appeal somewhat retreated in its stance in at least one respect.  3. Both parties rely on the public interest to justify their positions. Essentially, while the Respondent recognizes that the public is entitled to be provided with relevant information about doctors to enable informed choices to be made by patients, it is anxious that practice promotion should not be permitted to reach a stage where commercialism takes over at the expense of public confidence and trust in the medical profession or, worse still, gives rise to the exploitation or manipulation of the sick and the vulnerable. For its part, the Applicant is not advocating a free for all in terms of practice promotion for doctors. Far from it, the intention is merely to provide the public in more media forms with the same information to which the public now has access and which is expressly permitted under the Code, and also to remove unreasonable restrictions on the freedom of speech. The basic legal issue for the court to resolve in these proceedings becomes whether the dividing line between what is acceptable and what is not (these being the restrictions maintained by the Respondent) is constitutionally justified.  4. Before going into the issues that still divide the parties, it is right to point out that the evidence before this court has changed substantially from the position that prevailed before Reyes J in the court below. The evidence on appeal, substantial in both content and volume, provides for the first time the thinking and reasoning behind the Respondent’s decision to maintain the restrictions. In an earlier judgment on 5 September 2007 (the Reasons for Judgment were handed down on 27 September 2007), this court had given leave to the Respondent to adduce this evidence for the purposes of the appeal.  **The Restrictions**  5. There are four restrictions under challenge in the present proceedings. All are found in the Code. These restrictions mark the four issues which divide the parties in this appeal.  The first restriction : the medium of information  6. In the course of counsel’s arguments, it became clear that this was the main issue on appeal. At present, certain basic information about doctors (name, address, qualifications, specialities, consultation hours, languages spoken and telephone and fax numbers) may be notified to the public on signboards or service information notices outside medical surgeries, stationery, telephone directories, doctor’s directories and medical practice websites. In the case of doctor’s directories, websites and service information notices, fee schedules are also permitted. This is the effect of paragraph 5 and Appendices E and F of the Code.  7. The Applicant’s complaint is that doctors are, however, forbidden from providing the same information to the public if such appears in newspapers, magazines or other print media. The only occasion permitted under the Code when doctors are able to advertise in newspapers (but not any other form of print media) is to announce the commencement of practice or changes in the conditions of practice (meaning changes in address, telephone number, partnership details etc.) Mr David Pannick QC (for the Applicant) has emphasized that the information which his client wishes to be able to advertise is information that is accurate and basic. There is no question or danger of any misleading or potentially misleading information being provided to the public; the Applicant seeks only to be able to provide to the public in newspapers, magazines and other printed media the same information as is currently available (and sanctioned by the Respondent to be made available) to the public.  8. It is important to bear in mind that this was the limit of the Applicant’s challenge on this ground. He does not in these proceedings seek to advance any argument to the effect that doctors should be allowed to promote themselves by providing material that is not accurate, basic or objectively verifiable.  The second restriction : the number of services  9. At present, doctors are permitted to inform the public (limited of course by the methods of doing so referred to above) of the medical services they provide in and out of their surgeries (or ‘offices’ as they are known in the Code) and the medical procedures and operations they perform. However, in relation to each of these aspects, a doctor is limited to a maximum of five items : - see paragraphs 5.2.3.5 (practice websites), 5.2.3.6 (service information notices), 5.2.3.7 (doctors directories) and Appendices E and F of the Code. In other words, a maximum of five items can be identified for each of the medical services provided in surgeries, medical services provided outside surgeries, and medical procedures and operations – a maximum, as the Respondent has reminded the court, of 15 items. The Applicant’s complaint is simply to question the restriction to five items for each of the three aspects : his case is that there is no logic or justification to restrict the numbers in this way.  The third restriction : educational vehicles  10. This issue involves the aspect of public health education, which it is accepted by both parties should be encouraged. Paragraphs 5.1 and 5.2 of the Code state : -   |  |  |  |  | | --- | --- | --- | --- | | “ | **5.** | **Books, lectures, mass media appearances, electronic publications** | | |  |  | 5.1 | Doctors in their capacity as registered medical practitioners may give public lectures, participate in radio or television programmes, or publish in print or electronically for the fulfilment of public health education. Doctors’ full names, identifiable photographs, together with the specialist title, qualifications, and appointments approved by the Council, may be used. However, doctors should ensure that reference is not made to the doctor’s experience, skills and reputation, or practice, in a manner which can be construed as promotional. | |  |  | 5.2. | Doctors should ensure the material in whatever form does not imply that he is especially recommended for patients to consult.” | |  | (emphasis added) | | |   11. The complaint was that the highlighted words of paragraph 5.1 rendered it virtually impossible for a doctor to reveal details of (in particular) his experience, skills, qualifications and reputation without falling foul of the prohibition on practice promotion in that paragraph. This is particularly so given the broad definition of “practice promotion” contained in section 5.2.2 of the Code (as updated in March 2006) : -   |  |  |  |  | | --- | --- | --- | --- | | “ | 5.2.2 | Practice promotion | | |  |  | 5.2.2.1 | Practice promotion means publicity for promoting the professional services of a doctor, his practice or his group, excluding communication with registered medical and dental practitioners, Chinese medicine practitioners, chiropractors, nurses, midwives, pharmacists, medical laboratory technologists, radiographers, physiotherapists, occupational therapists and optometrists. Practice promotion in this context will be interpreted by the Medical Council in its broadest sense, and includes any means by which a doctor or his practice is publicized, in Hong Kong or elsewhere, by himself or anybody acting on his behalf or with his forbearance (including the failure to take adequate steps to prevent such publicity in circumstances which would call for caution), which objectively speaking constitutes promotion of his professional services, irrespective of whether he actually benefits from such publicity.” |   12. This issue can in a sense be said to be academic in that it is clear from the Respondent’s evidence now before the court that the highlighted words will in due course be deleted. There appears to be an amendment that the Respondent has in mind. In the first affidavit of Dr David Fang (the Chairman of the Ethics Committee of the Respondent), it is said that as part of the Respondent’s continuing review process of the Code, it was proposed on 5 October 2005, (before the present judicial review proceedings were instituted), that the following amendments should replace the provisions set out above : -   |  |  |  |  | | --- | --- | --- | --- | | “ | 29. | The Council and the Ethics Committee are continually reviewing the Code to ensure that it maintains the standards and morals of the medical profession in a modern context. As part of this review process, on 5th October 2005 the Council approved the deletion of the last sentence of paragraph 5.1 of the Code and replaced it with the following which will become section 6.2 in an updated Code. The amendment has not come into effect because of the judicial review but the Council intends that it should come into effect as soon as the Judicial Review is finally deposed of :- | | |  |  | *‘* | *Doctors should take proper steps to ensure that the published or broadcasted materials, either by their contents or the manner they are referred to, do not give the impression that they are recommended to the audience for medical consultation. They should also ensure that the materials are not used directly or indirectly for the promotion of products or services of other persons or organizations.*’” |   The fourth restriction : individual responsibility for organization advertisting  13. This restriction is concerned with the relationship between doctors and organizations such as private hospitals. Paragraphs 14.1 and 14.1.1 of the Code read : -   |  |  |  |  |  | | --- | --- | --- | --- | --- | | “ | **14.** | **Relationship between doctors and organizations** | | | |  |  | 14.1 | Medical services are offered to the public not only by individual doctors but by a wide variety of organizations such as hospitals, screening centres, nursing homes, medical scheme administrators, insurance companies, healthy administration companies, managed care companies and counselling centres. Such organizations may be providing the medical service itself directly or through middlemen; or may be acting as an agent or a middleman itself. Some of them advertise their services to the public and the principles and rules set out in paragraph 4.2 above, concerning the advertising of medical practitioner services, apply also to such advertising. | | |  |  |  | 14.1.1 | Doctors who have any kind of financial or professional relationship with such an organization, or who use its facilities, bear responsibility to ensure the organization’s advertising conforms to the principles and rules set out in paragraph 4.2 above. This also applies to doctors who accept for examination or treatment patients referred by any such organization. All such doctors must therefore make it their responsibility to acquaint themselves with the nature and content of the organization’s advertising, and must exercise due diligence in an effort to ensure that it conforms with this guidance. Should any question be raised about a doctor’s conduct in this respect, it will not be sufficient for any explanation to be based on the doctor’s lack of awareness of the nature or content of the organization’s advertising, or lack of ability to exert any influence over it.” (emphasis added) |   14. The complaint is over the highlighted words of the final sentence of paragraph 14.1.1. Mr Pannick contends that as currently drafted, strict liability can arise : for example, where an organization (such as a private hospital) with whom a doctor has a financial or professional relationship, advertises in a way that does not conform with the Code, that doctor will be himself subject to charges of misconduct notwithstanding that he may have exercised due diligence and is unaware of the content of the relevant advertisement or is unable to exert any information over the organization. It is said that liability being strict, this is in the circumstances, completely unwarranted and unfair.  15. As will be seen later when I come to resolve each issue, this argument was all but conceded by Mr Michael Beloff QC (for the Respondent) and can, again, in a sense be deemed academic.  **The relevant decision of the Respondent**  16. The relevant decision of the Respondent was contained in a letter dated 27 January 2006 from the Respondent to the Applicant’s solicitors, in which the Respondent maintained that the restrictions were justified. This letter was the culmination of correspondence over the course of some four months between the Applicant (through his solicitors) and the Respondent over the question of restrictions on advertising. The Applicant had attempted to persuade the Respondent by enclosing extracts of an opinion from Queen’s Counsel as well as a Joint Submission of some 78 doctors. As stated earlier, the Applicant’s interests mirror those of the Hong Kong Sanatorium and Hospital; indeed, the correspondence from the solicitors representing the Applicant stated also that they were acting on behalf of the Hospital.  17. The Respondent is a statutory body established under the [Medical Registration Ordinance](http://www.hklii.hk/eng/hk/legis/ord/161), [Cap. 161](http://www.hklii.hk/eng/hk/legis/ord/161). In terms of its duties to supervise medical ethics and conduct, it is advised by an Ethics Committee. The provisions of [Part IIID](http://www.hklii.hk/eng/hk/legis/ord/161#p3d) of the [Medical Registration Ordinance](http://www.hklii.hk/eng/hk/legis/ord/161) deal with the functions of the Ethics Committee.  **Relevant legal principles**  18. At the risk of repetition, it is important to bear in mind the role of the court in judicial review proceedings when decisions are under challenge. The court does not function as an appellate body looking into the merits of a decision as such. There is therefore in general no question of the court agreeing or disagreeing with policy considerations or the principles under which a decision maker has acted. This general statement is, however, qualified by the limited role of the court in judicial review, for, within those parameters, it may sometimes be necessary to examine aspects of policy considerations or principles. The court’s role is limited to reviewing a decision by reference to only three aspects : - first, the legality of the decision, in other words whether the decision complies with the law; secondly, whether in arriving at the relevant decision, the decision maker has followed all due procedural requirements and has been fair; thirdly, whether the decision itself on the merits is rational or, as lawyers usually refer to it, whether the decision is *Wednesbury* unreasonable.  19. We are in this appeal only concerned with the first aspect, namely, whether the decision of the Respondent complies with the law. Here, the relevant law is, as stated earlier, the Basic Law, the ICCPR and the Bill of Rights. The challenge is of course a constitutional one based on the freedom of expression.  20. A constitutional challenge is no less a challenge based on illegality than, say, a challenge based on the misapplication by the decision maker of a statute. However, the approach of the court may be quite different. A challenge based on the decision maker having misapplied a statute may simply require the court to construe the relevant statute and then see whether the decision maker has got the law right. This will usually provide the answer to whether or not the decision maker has acted properly. A constitutional challenge is often more complicated for the court. Constitutionally guaranteed rights such as the freedom of expression are usually couched (deliberately) in wide terms. Even given the approach that such rights must be generously construed (and the freedom of expression is no exception : see *HKSAR v Ng Kung Siu* [(1999) 2 HKCFAR 442](http://www.hklii.hk/cgi-bin/LawCite?cit=%281999%29%202%20HKCFAR%20442), at 455H-I), the court still has nevertheless to construe the relevant right to see whether it is relevant to the decision or matter under review. However, where the right is construed to be applicable, this does not necessarily dispose of the question whether or not the decision maker has acted properly or in accordance with constitutionally accepted norms. In many instances where a constitutionally protected right is involved, a two-stage inquiry is therefore required, namely : -   |  |  |  | | --- | --- | --- | | “ | (1) | First, has a right protected by the Basic Law or the Bill of Rights (the ICCPR) been infringed? | |  | (2) | Second, if so, can such infringement be justified?” |   See : *Secretary for Justice v Yau Yuk Lung & Another* [[2006] 4 HKLRD 196](http://www.hklii.hk/cgi-bin/LawCite?cit=%5b2006%5d%204%20HKLRD%20196), at 208 B-C (paragraph 45); *Leung v Secretary for Justice* [[2006] 4 HKLRD 211](http://www.hklii.hk/cgi-bin/LawCite?cit=%5b2006%5d%204%20HKLRD%20211), at 234 G-H (paragraph 43).  In other words, although there may be an infringement of a constitutionally protected right, sufficient justification may be provided by the decision maker for the infringement. In the case of the right to equal treatment, the correct analysis may be that once justification is shown, there may not have been an infringement at all : - cf *Secretary for Justice v Yau Yuk Lung* [[2007] 3 HKLRD 903](http://www.hklii.hk/cgi-bin/LawCite?cit=%5b2007%5d%203%20HKLRD%20903), at 913J-914B (paragraph 22).  21. The question whether sufficient justification has been shown can be a complicated one. In the determination of the issue of justification, the court will of course have to look at the evidence adduced by the decision maker. Where a constitutionally guaranteed right has been shown to be relevant, the burden is on the decision maker to justify any restriction on that right. Here, the courts apply the proportionality test which was formulated in the following terms in the judgment of the Court of Final Appeal in *Leung Kwok Hung & Others v HKSAR* [(2005) 8 HKCFAR 229](http://www.hklii.hk/cgi-bin/LawCite?cit=%282005%29%208%20HKCFAR%20229), at 253I (paragraph 36) (a case dealing with the right of peaceful assembly) : -   |  |  |  | | --- | --- | --- | | “ | 36. | As the legitimate purposes that may be pursued by any restriction on the right of peaceful assembly have been constitutionally specified in Hong Kong, the proportionality test should be formulated in these terms: (1) the restriction must be rationally connected with one or more of the legitimate purposes; and (2) the means used to impair the right of peaceful assembly must be no more than is necessary to accomplish the legitimate purpose in question.” |   22. In the determination of the issue of justification, the court will, in practical terms, also have to accept the fact that proper respect must be accorded to the expertise of the decision maker. This is a manifestation of the limited role of the court in judicial review proceedings and acknowledges the pertinent fact that courts do not possess the necessary expertise or knowledge that the decision maker has. This approach is sometimes referred to as the margin of appreciation or deference that a court must allow to a decision maker when judicially reviewing decisions. It is an aspect that Mr Beloff very much relies on in the present case. He points out, rightly, that the courts have consistently recognized that medical regulatory bodies (such as the Respondent) are the best placed to determine the boundaries of medical professional conduct.  23. Many authorities in Hong Kong, from the United Kingdom and from the European Court of Human Rights, unnecessary to enumerate full, make out this principle. The following points, however, emerging from the judgment of Reyes J in the court below, have to be borne firmly in mind when considering arguments based on margin of appreciation : -   |  |  | | --- | --- | | (1) | While the starting point is that the court will of course give due deference to the views of the decision maker, it is the court that has the ultimate responsibility to determine whether constitutionally guaranteed rights have been infringed, grappling as it does with questions of proportionality. This is a matter of law and it is not for the decision maker to make this determination. | | (2) | Accordingly, the decision maker must provide cogent reasons to justify any interference with a constitutionally guaranteed right for the court to scrutinize. | | (3) | The burden is on the decision maker to justify; it is not for the applicant to prove that the restriction is not justifiable or proportionate. |   24. It follows from these points that given the burden on the decision maker, it becomes incumbent on it to provide the court and the Applicant with all relevant materials. I dealt with this aspect in the judgment of this court allowing the Respondent to adduce further evidence on appeal, see the Reasons for Judgment dated 27 September 2007 at paragraph 6 (the need to place “all the cards face upwards on the table”). Stock JA in his judgment in the same appeal put the matter, with respect, entirely correctly : -   |  |  |  | | --- | --- | --- | | “ | 18. | Where there is an infringement on the freedom of expression (or, for that matter, on any other fundamental freedom) but it is argued that the infringement is lawful, it is for the body imposing the restriction – in this case, the Council – to show a justifiable societal objective for the restriction, and that the restriction goes no further than is necessary to achieve that objective. It is difficult, if not impossible, to envisage an infringement that could be justified without a clearly explained rationale, even though the depth of the explanation required will vary according to the nature of the restriction and its context. But to state merely that the decision accords with the majority view of a professional body as revealed in a consultation exercise comes nowhere close to an acceptable rationale. And to say that the court should allow the Council a margin of appreciation is fine so far as it goes, but means nothing in a vacuum. One can only accord a degree of appreciation if one is told what it is one is being asked to appreciate.” |   25. Lastly, on the aspect of margin of appreciation, Mr Pannick drew our particular attention to *RJR-MacDonald Inc v AG of Canada* (1995) 27 DLR (4)1, a decision of the Supreme Court of Canada. There, the Supreme Court was concerned with the constitutionality of legislation which prohibited tobacco advertising (the Tobacco Products Control Act 1988). The point of emphasis was that even in an area where the courts could be expected to allow the legislature maximum leeway in terms of margin of appreciation, the court recongnized its constitutional duty. This appears in the judgment of McLachlin J (now Chief Justice) in two passages highlighted in the judgment of Reyes J, but which bear repetition : -   |  |  |  | | --- | --- | --- | | “ | [129] | The bottom line is this. While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning. The task is not easily discharged, and may require the courts to confront the tide of popular public opinion. But that has always been the price of maintaining constitutional rights. No matter how important Parliament’s goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail. | |  |  | ……. | |  | [136] | As with context, however, care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the Charter places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament’s choice falls within the limiting framework of the constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament’s view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.” |   26. In the present case, the court’s approach will require an examination of the ambit of the freedom of expression and also whether there has been a justifiable and proportionate infringement of that right. In the consideration of whether there has been an infringement, it will be necessary to evaluate the justification said to exist for the four restrictions referred to above.  27. The freedom of expression is constitutionally guaranteed by the Basic Law and is contained in the Bill of Rights : -   |  |  |  |  | | --- | --- | --- | --- | | **Basic Law** | | | | | “ | **Article 27** | | | |  | Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to from and join trade unions, and to strike.” | | | | **Bill of Rights** | | | | | “ | **Article 16** | | | |  | **Freedom of opinion and expression** | | | |  | (1) | Everyone shall have the right to hold opinions without interference. | | |  | (2) | Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. | | |  | (3) | The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary - | | |  |  | (a) | for respect of the rights or reputations of others; or | |  |  | (b) | for the protection of national security or of public order (ordre public), or of public health or morals.” |   This article is in the same terms as Article 19 of the ICCPR, as embraced by Article 39 of the Basic Law.  28. Unlike some other constitutionally guaranteed rights, Article 16 of the Bill of Rights actually sets out the scope of permissible restrictions on the right : see Article 16(3). We are in this appeal concerned with the aspect of public health.  29. The freedom of expression includes the right to advertise and this is so even where the intention is for personal financial gain : see the decision of the European Court of Human Rights in *Casado Coca v Spain* [(1994) 18 EHRR 1](http://www.hklii.hk/cgi-bin/LawCite?cit=%281994%29%2018%20EHRR%201), at 20 (paragraph 35), a decision concerning the rights of lawyers to advertise.  30. Developing this theme of personal financial gain, Mr Beloff emphasized at the outset of his submissions that where commercial gain was involved (and practice promotion was in reality for this purpose), less justification was required for restrictions than would otherwise be the case where more serious aspects of the freedom of expression were at stake. The right of free expression would in such cases be at the lower or even lowest end of the spectrum of this protected right. He relied on a passage in the speech of Lord Steyn in *R v Secretary of State for the Home Department ex p Simms* [[2000] 2 AC 115](http://www.hklii.hk/cgi-bin/LawCite?cit=%5b2000%5d%202%20AC%20115), at 126F-127A : -   |  |  | | --- | --- | | “ | Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J. (echoing John Stuart Mill), ‘the best test of truth is the power of the thought to get itself accepted in the competition of the market:’ *Abrams v. United States* [(1919) 250 U.S. 616](http://www.hklii.hk/cgi-bin/LawCite?cit=%281919%29%20250%20US%20616), 630, *per* Holmes J. (dissenting). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country: see *Stone, Seidman, Sunstein and Tushnet, Constitutional Law*, 3rd ed. (1996), pp. 1078-1086. It is this last interest which is engaged in the present case. The applicants argue that in their cases the criminal justice system has failed, and that they have been wrongly convicted. They seek with the assistance of journalists, who have the resources to do the necessary investigations, to make public the wrongs which they allegedly suffered. | |  | The value of free speech in a particular case must be measured in specifics. Not all types of speech have an equal value. For example, no prisoner would ever be permitted to have interviews with a journalist to publish pornographic material or to give vent to so-called hate speech.” |   31. For my part, I can accept this passage as a general proposition. There are, however, other factors to be considered in the present case other than just commercial gain for doctors. To start with, I would repeat the point that (certainly as far as the first restriction is concerned) all the Applicant seeks is to be able to provide the same objective, accurate and basic information in various printed media as is now permissible to be provided to the public under the existing rules.  32. Next, it is important also to recognize the following facets of advertising which I believe to be relevant considerations in the present case : -   |  |  | | --- | --- | | (1) | The public interest as far as advertising is concerned lies in the provision of relevant material to enable informed choices to be made. This was described in the decision of the US Supreme Court in *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Incoporated* [(1976) 425 US 748](http://www.hklii.hk/cgi-bin/LawCite?cit=%281976%29%20425%20US%20748), at 770 (footnote 24) as “the flow of truthful and legitimate commercial information”. In his judgment, Reyes J referred to a number of authorities that made out this basic proposition, among them, the decisions of the Supreme Court of Canada in *Rocket v Royal College of Dental Surgeons of Ontario* [[1990] 71 DLR (4th) 68](http://www.hklii.hk/cgi-bin/LawCite?cit=%5b1990%5d%2071%20DLR%20%284th%29%2068), at 79c and 81g and in *RJR MacDonald* at 80g; and of the European Court of Human Right in *Stambuck v Germany* [(2003) 37 EHRR 845](http://www.hklii.hk/cgi-bin/LawCite?cit=%282003%29%2037%20EHRR%20845), at 954 (paragraph 39). | | (2) | The provision of relevant material to enable informed choices to be made includes information about latest medical developments, services or treatments. *Stambuck* provides a good example of this. There, an ophthalmologist gave an interview to a journalist about an eye laser operation technique. He was fined in professional disciplinary proceedings as being in breach of the provisions against advertising. The European Court of Human Rights, however, held that this fine constituted a violation of the freedom of expression guaranteed under Article 10 of the European Convention on Human Rights (the equivalent to Article 16 of the Bill of Rights). The court referred to the provision of information to the public on a matter of general medical interest as being desirable : at 855 (paragraph 46). |   33. In contrast to these what may be called the advantages of advertising just highlighted, it is, however, also important to bear in mind the need to protect the public from the disadvantages of advertising. Misleading medical advertising must of course be guarded against. In *Rocket*, McLachlin J referred (at 81g) to the danger of “misleading the public or undercutting professionalism”. In *Stambuck*, the European Court of Human Rights said, “nevertheless, it [advertising] may sometimes be restricted, especially to prevent unfair competition and untruthful or misleading advertising”. There were references made in both cases to the need to limit commercialism to enable high standards of professionalism to be maintained.  34. The body that imposes restrictions (in our case the Respondent) must therefore carefully balance the interests of the person who seeks the right to exercise the freedom of expression (such as the Applicant) against other aspects of the public interest. Where the public interest is in favour of allowing advertising, the fact that the person who places the advertisement will incidentally benefit is no reason to justify restrictions. I should also add this. In the context of medical advertising, there is in addition the important consideration that the “public” which is exposed to advertising will include particularly vulnerable members of society, namely, the sick and infirm. The interests of these persons must be particularly borne in mind. The balancing exercise may not always be easy to perform, and in any given case, the scales may be tipped one way or the other by the importance of any factor in the circumstances.  35. Before applying the legal principles just stated to the particular four restrictions that have to be considered in the present case, I ought first to refer to relevant principles contained in the Code.  **Relevant principles contained in the Code**  36. The paramount theme in the Code is the public interest. The Introduction to the Code refers to the need to protect the public and to maintain public confidence in the medical profession. It can therefore be assumed (and there is no dispute about this) that the Code (and the application and enforcement of it by the Respondent) seeks to reflect what is seen to be in the public interest.  37. The provision of information to patients is recognized in the Code. In Part III of the updated Code, it is said that communication with patients is a basic responsibility of doctors. Section 5.1.1 states that good communication between doctors and patients, and also as between doctors, is fundamental to good patient care. This is developed in section 5.1.2 where emphasis is laid on the desirability of patients being able to make an informed choice : -   |  |  |  |  |  | | --- | --- | --- | --- | --- | | “ | **5.** | **Professional communication and information dissemination** | | | |  |  | 5.1 | The need for good communication and accessible information | | |  |  |  | 5.1.1 | … | |  |  |  | 5.1.2 | A key aspect of good communication in professional practice is to provide appropriate information to users of a doctor’s service and to enable those who need such information to have ready access to it. Patients need such information in order to make an informed choice of doctors and to make the best use of the services the doctor offers. Doctors, for their part, need information about the services of their professional colleagues. Doctors in particular need information about specialist services so that they may advise patients and refer them, where appropriate, for further investigations and/or treatment.” |   38. Of course, the Code also expressly warns against the dangers of misleading information. This is a point already made above, that in the context of health care, there are likely to be a large number of people who will be vulnerable to misleading information. Paragraphs 5.1.3 and 5.2.1 state : -   |  |  |  |  |  |  | | --- | --- | --- | --- | --- | --- | |  |  | “ | 5.1.3 | Persons seeking medical service for themselves or their families can nevertheless be particularly vulnerable to persuasive influence, and patients are entitled to protection from misleading advertisements. Practice promotion of doctors’ medical services as if the provision of medical care were no more than a commercial activity is likely both to undermine public trust in the medical profession and, over time, to diminish the standard of medical care. | | |  |  | 5.2 | Principles and rules of good communication and information dissemination | | | |  |  |  | 5.2.1 | Information refers to information of any form, computer-related information, internet modalities, telemedicine related items and any other form of electronic transmission. Any information provided by a doctor to the public or his patient :- | | |  |  |  |  | (a) | shall be legal, decent, honest, truthful, factual, accurate, and not exaggerated; and | |  |  |  |  | (b) | shall not claim superiority over or disparage other doctors or their work.” |   39. The reference in paragraph 5.1.3 to “commercial activity” is an important qualification to the right to provide information (and this will of course cover advertising) : the intention here is clearly that while good communication and the provision of information are to be encouraged, the more subjective features of advertising (or, as was described by Ralph Gibson LJ in *R v General Medical Council ex p Colman* [[1990] 1 All ER 489](http://www.hklii.hk/cgi-bin/LawCite?cit=%5b1990%5d%201%20All%20ER%20489), at 493f “laudatory material”) must be guarded against.  40. It can therefore be seen from those parts of paragraph 5 of the Code referred to above that within the confines of the provision of good communication and the provision of objectively verifiable information, practice promotion is, as a matter of principle, permitted for doctors. This is an important point to bear in mind in case it should be thought that the Respondent’s position proceeds on the premise that as a matter of principle, advertising ought not be permitted. As reflected in the Code, the medical profession, like certain other professions, have moved on from this stance, although I daresay it is one that is perhaps still held by some doctors.  41. The evidence filed by the Respondent confirms the above analysis. In his first affidavit, Dr Fang says this : -   |  |  |  | | --- | --- | --- | | “ | **Overall justifications** | | |  | 7. | The medical profession is distinguished from other professions because of the special moral duty with which it is invested by society. This special moral duty is the duty of care to save life and to relieve suffering. Because of this special duty of care, the medical profession has developed a code of ethics which emphasizes the priority of this moral ideal over and above considerations of personal freedom, interest and private gain of individual medical practitioners. The Code is developed with the objective to uphold this moral ideal in order to ensure public trust in the profession and to achieve the common good of public health in society. | |  | 8. | Placing constraints on advertising, medical marketing and practice promotion to limit commercialism and to prevent exploitation or manipulation of the sick and the vulnerable, is considered essential to upholding this moral principle. It is firmly believed that a robust professional culture, based on reasonable self-regulation to safeguard the public interest and the public trust, is far more effective for governing the practice of medicine than by the norms and rules of a trade or a commodity in open market competition.” |   42. For his part, the Applicant and those doctors of whom he is representative, agree with these statements. The difference between the Applicant and the Respondent in relation to the four restrictions is accordingly in reality fairly narrow. As I say, both sides rely on the public interest to justify their respective positions. In the application of the legal principles which are set out above, are the restrictions constitutionally justifiable?  **The first restriction**  43. As earlier stated, the Applicant seeks only to be able to provide to the public in newspapers, magazines and other print media the same accurate, basic and objectively verifiable information as doctors are now permitted under the Code to provide to the public on signboards and service information notices outside surgeries, stationery, telephone directories, doctors directories and websites.  44. The Applicant’s position is therefore ultimately a straightforward one. Given that the same information can (and I should say, is encouraged to) be conveyed to the public by other means, there is no reason or logic why the same information cannot be made available to the public by a wider means of circulation. If it is accepted that such information benefits the public by enabling informed choices to be made, then surely making the same information more accessible to more members of the public must be acceptable? Afterall, many people read newspapers or magazines, while fewer numbers may have access to telephone directories, doctors directories or computers. For example, it was at one stage suggested that doctors directories may be readily available to members of the public either in libraries or hospitals. Even if this were the case (and there is considerable doubt as to this: the evidence before us if anything showed the contrary), it simply cannot be said that the provision of information in newspapers, magazines and other printed media would not reach more members of the public.  45. For my part, I agree with these submissions, as did Reyes J in the court below.  46. Before us, the Respondent adduced further evidence to explain fully the reasons for maintaining this restriction. With respect, these reasons are simply insufficient to displace the force of the arguments going the other way : -   |  |  | | --- | --- | | (1) | By far the major concern of the Respondent is the danger of misleading advertisements being placed by doctors in newspapers, magazines and other printed media. As Dr Fang rightly points out, misleading advertisements, particularly in the context of the vulnerable and the infirm, may lead to danger to health and life. However, in my view, in the language of the proportionality test (see paragraph 21 above) the restriction is admittedly rationally connected to a legitimate purpose (in this case, the danger of misleading advertisements) but the means used (a total and absolute ban on all advertising, irrespective of whether the information provided is misleading or not) is much more than is necessary to achieve the legitimate purpose. A more prosaic way of putting it (though less precise) is that a sledgehammer has been used to crack a nut. | | (2) | One can think of a number of restrictions that can be imposed that can go some way in preventing misleading advertisements. The extent and justification for such restrictions must of course depend on the particular or potential problems of misleading advertisements by doctors (as to which there was no evidence before us). | | (3) | Then it is said that the Respondent simply does not have the resources to police or supervise every newspaper or magazine that may carry advertisements from doctors. Dr Fang points to the fact there are some 48 newspapers and 691 magazines in Hong Kong. By contrast, it is relatively easy for the Respondent and its staff to check the veracity and accuracy of entries in doctors directories. I do not regard this as a valid ground of objection at all. No evidence was adduced before us of the extent of the problem or potential problem nor of the financial resources of the Respondent. The court simply does not know whether the propensity of doctors is such that particularly careful vigilance is required. One is also left in the dark as to how the Respondent at present monitors the accuracy of signboards, websites, notices or telephone directories in which doctors’ advertisements may be found. Mr Beloff submits that the modes of dissemination of information at present permitted can be “properly and confidently policed”. One is tempted to remark that if this be the case, then the policing of newspapers and magazines would surely not add a significant burden to the Respondent’s responsibilities in this regard. | | (4) | In this context, Mr Beloff also submitted that whereas at present, the source of any misleading advertisements could quite easily be traced (say, in the case of doctors directories, enquiries could be directed at the relevant medical organization publishing such directory, where co-operation could be expected), the same could not be said as far as the publishers of newspapers or magazines were concerned. The difficulties of proving allegations of misconduct do not appear to me to be a valid reason to restrict the constitutional right. In any event, one would have to question the problem alleged here. Surely, one perhaps should be able to assume in most cases that the doctor whose services are advertised, was the person responsible for placing such advertisement in the first place, unless proven otherwise. | | (5) | Another facet of misleading advertising relied on by the Respondent was the possibility that medical information provided to the public, even though accurate, may sometimes not be readily understood by laymen, and therefore become in a sense misleading. Dr Fang stated in his affidavit that while assistance could be sought from medical organizations that published directories, this would not be possible in the case of newspapers or magazines. This is not a valid point. Quite apart from the complete lack of particularity as to the extent of this perceived problem and as to how assistance is in fact at present obtained in the case of medical directories (or for that matter, signboards, notices and telephone directories), I see no reason why members of the public cannot telephone the doctor who placed the advertisement (for his or her telephone number will be advertised) for any further clarification that may be required. | | (6) | It was also submitted that allowing doctors’ advertisements in newspapers and magazines may enable such advertisements to be juxtaposed with other advertisements for medical or other products that may mislead the public into thinking that the products were endorsed by the doctor in question. An example given was the placing of an oncologist’s advertisement next to one advertising a cure for cancer. I can understand the point being made, but an outright and total ban appears to me to be out of all proportion. No explanation was given as to why it was unacceptable, for example, for a requirement to be imposed on doctors wishing to advertise, to insist with publishers that their advertisements should not be placed in such a way that would be seen as unacceptable. Much the same argument applies to the concern that doctors’ advertisements may be found in publications that are totally inappropriate for such advertisements to appear in. | | (7) | Finally, Dr Fang observed that the purpose of dissemination of information was to enable patients to make an informed choice “when they required a doctor’s services, not to attract patients to a doctor when they do not need such a service”. There is admittedly a superficial attraction to this argument but on reflection, it bears scarce analysis. First, nothing in the Code makes this distinction. Secondly, persons who at present do not require immediate medical attention, may at some stage need such assistance or they may know of relatives or friends who do. Thirdly, there is no evidence to suggest that only persons in need of medical services read the information contained in the currently permitted modes of advertising. |   47. In the circumstances, the first restriction is in my judgment not constitutionally justifiable. There must be less intrusive means of dealing with the concerns of the Respondent other than a total ban. What those means might be, is a matter for the Respondent and not the courts.  48. Before leaving this issue, I would like to make the following final observations : -   |  |  | | --- | --- | | (1) | Like Reyes J, I have derived very little assistance from *R v General Medical Council ex p Colman* (see paragraph 39 above), a case referred to us by Mr Beloff. Ultimately, this case was relied on more for the decision on the facts (the Court of Appeal in England upheld the General Medical Council’s ban on advertising in newspapers by a doctor) than any proposition of law. Although there was some discussion on proportionality, the case was resolved largely on the basis of whether the General Medical Council’s decision was *Wednesbury* unreasonable. The only point of note, however, is the fact that the dispute was eventually compromised just before the European Court of Human Rights had to determine the question whether the restrictions in that case contravened Article 10 of the European Convention on Human Rights. It is also interesting to note that in the United Kingdom now, advertising by doctors in the printed press is permitted. | | (2) | Even though much emphasis was laid by Mr Beloff on the margin of appreciation that the court ought to allow the Respondent in relation to this restriction, it is clear on the materials now before the court that at one stage, the Respondent was itself seriously contemplating relaxing the restriction to enable advertisements to be made in newspapers, magazines and other print media. In October 2005, the Respondent issued a letter to all doctors in Hong Kong stating that the Ethics Committee was prepared to relax the restriction but sought the views of the profession. The rationale behind this was to encourage doctors to benefit from the Mainland and Hong Closer Economic Partnership Agreement (CEPA). This was rejected by the majority of doctors. However, the position of the Ethics Committee is not entrenched. Far from it. Dr Fang says this in his third Affidavit, “the Ethics Committee would continue to find more acceptable ways to relax the relevant restrictions in the Code, but deliberations have since been put on hold pending the outcome of the judicial review”. |   **The second restriction**  49. This restriction cannot, in my view, be justified. There is no sense or logic in a doctor being restricted to just five items when he or she can, legitimately and accurately, point to more. Mr Pannick must be right when he observes that such a restriction goes very much against one of the cornerstones of the Code : the desirability of good communication and the passage of information to patients to enable informed choices to be made. Dr Fang indicated that the information about the services or medical procedure operations a doctor could perform was not intended to be comprehensive, merely to give a “fair indication”. With respect, this is not a valid argument. It is difficult to see why the provision of comprehensive (and therefore fuller and more accurate) information should be regarded as less desirable than merely a “fair indication”.  50. In articulating the Respondent’s concerns, Mr Beloff referred again to the dangers of misleading information being provided to the public, as well as the difficulties that could arise when laymen may not understand medical terms or are confronted with what was called “information overload”. Connected to this point was the fear that the public may associate the quality or ability of any doctor with the number of services or operations or procedures advertised. These were similar concerns to those expressed in relation to the first restriction and can really be answered in much the same way. Inasmuch as the concerns are real concerns, the Respondent can impose conditions (particularly against the provision of misleading or inaccurate information) without having an arbitrary cut off point of five items. Furthermore, with regard to the use of medical terms that may be confusing, it should be noted that in the description of medical procedures and operations in medical directories, it is stated in the Code that the nomenclature for procedures and operations should follow as far as possible those adopted by the Colleges of the Hong Kong Academy of Medicine. The risk of confusion should therefore be minimized at least in this respect.  51. Finally, one might also add that even within the present limit of five items, this is not to say that the Respondent’s concerns will not materialize. The perceived problems, accordingly, do not really relate to the number of items that can be stated at all.  52. In the court below and before us, emphasis was given to the argument that somehow a line had to be drawn and it was the considered view that five items (or in total 15 items) was a reasonable limit to set, as was the limit of two A3 sheets of paper for medical information in service information notices. I respectfully adopt the reasoning of Reyes J contained in paragraphs 158 and 159 of his judgment : -   |  |  |  | | --- | --- | --- | | “ | 158. | …The question is why there should be any limit on the number of available services which a doctor can mention in a Service Information Notice at all. | |  | 159. | As far as I can see on the material before me, there is simply no good reason for interfering with the freedom of expression by imposing a limit of 5 items. …” |   **The third restriction**  53. The main objection here from the Applicant was that while on the one hand the Code recognized the benefits of promoting public health education for members of the public (as well as for fellow doctors), the restrictions contained in paragraphs 5.1 and 5.2 of the Code were such that a doctor would fall foul of the prohibition against advertising almost everytime he referred (even indirectly) to his personal experience, skills, qualifications or reputation. The definition of practice promotion in the Code and the wide meaning that the Respondent would give to it (see paragraph 5.2.2.1 of the Code – paragraph 11 above) strongly supported this fear. The risk of disciplinary proceedings in these circumstances had the effect that, according to the Applicant, many doctors were discouraged from activities that furthered public health education. This, in the end, would not be in the public interest. It constituted an unjustifiable restriction on the freedom of expression in that it would significantly, if not effectively, deprive the public or fellow doctors of the benefit of health education. Analyzed in this way, the complaint made here by the Applicant is not directed so much at the right to advertise but at the right to impart relevant information on matters of public interest.  54. There is much force in these arguments. I agree with the judge below that in order for the public (or fellow doctors) to attach any weight to what is being said about, say new medical developments or techniques, a reference to a doctor’s experience, skills, qualifications and reputation may well be essential. The fear of the Applicant is justified and arises from the true construction of those provisions of the Code I have highlighted.  55. In my judgment, this restriction is not justifiable. The effect of paragraphs 5.1 and 5.2 of the Code does put any doctor at risk of disciplinary proceedings on charges of unacceptable practice promotion whenever reference is made to his experience, skills, qualifications or reputation. I accept nevertheless the legitimacy of the Respondent’s concerns, namely, that the giving of lectures, participating in radio or TV programmes or publication of articles may sometimes merely be a transparent or shambolic cloak to disguise an ulterior motive (blatant advertising). However, the wording of paragraphs 5.1 and 5.2 goes too far and constitutes a disproportionate response.  56. I have found of assistance the case of *Stambuck* (see paragraph 32 above) where the European Court of Human Rights accepted that the interview given by the ophthalmologist which led to a newspaper article on a laser operation technique, did deal with a matter of public health education. The fact that the article also had the effect of giving publicity to the doctor was not sufficient to displace the legitimacy of the article. At paragraph 49, the court said : -   |  |  | | --- | --- | | “ | In the Court’s opinion, it is not possible to isolate the passage of the article concerning the applicant’s past success rate in applying this operation technique and the appearance of the accompanying photograph from the article as a whole in order to argue the necessity to take disciplinary action for a breach of professional duties. The article may well have had the effect of giving publicity to the applicant and his practice, but, having regard to the principal content of the article, this effect proved to be of a secondary nature.” |   57. Ultimately, the Respondent, I believe, also recognizes the difficulties identified by the Applicant. In Dr Fang’s first affidavit (which was not before Reyes J), he states that the Respondent now intends to amend paragraph 5.1 of the Code. Details of this proposed change have already been set out in paragraph 12 above.  58. This amendment has not yet come into effect and, although Mr Beloff invited us now to determine whether it would be acceptable from a constitutional point of view, I would decline to do so. It was not before the court below, it is not referred to in the Form 86A Application for Leave to Apply for Judicial Review and there is little evidence before us in relation to it. It is not even clear whether in the light of the judgment of this court the Respondent may wish to consider its position further.  **The fourth restriction**  59. I have already set out the gist of the Applicant’s complaints (see paragraph 14 above). Reyes J was of the view that the last sentence of paragraph 14.1.1 of the Code imposed a strict liability. The judge said this : -   |  |  |  | | --- | --- | --- | | “ | 173. | Mr. Pannick accepts that, if paragraph 14.1.1 ended with the sentence which Mr. Blanchflower has highlighted, Dr. Kwong would have no quarrel with paragraph 14.1.1. The difficulty (Mr. Pannick says) lies in the last sentence of paragraph 14.1.1. That imposes strict liability for the defaults of an organisation even where a doctor has taken all due diligence to ensure that the Code’s rules on advertising are followed by an organisation. | |  | 174. | Given the last sentence of paragraph 14.1.1, a doctor cannot say that, despite all reasonable care to keep himself informed of his organisation’s activities, the organisation suddenly put out an advertisement without reference to the doctor. That (according to paragraph 14.1.1) will be no defence. | |  | 175. | Nor can a doctor say that there is nothing more that he could have done to prevent the issue of by an organisation of non-conformist advertising. Paragraph 14.1.1 indicates that will not amount to a defence either. | |  | 176. | There is (Mr. Pannick submits) no justification for imposing such strict liability. If a doctor has done everything that can reasonably be done to prevent a contravention of the Code, what purpose could be served by making him strictly liable for what an organisation has nonetheless done? | |  | 177. | It seems to me that Mr. Blanchflower has no answer to Mr. Pannick’s point.” |   60. With respect, I agree with the judge’s analysis. The imposition of strict liability in these circumstances is another disproportionate response to dealing with unacceptable practice promotion.  61. Mr Beloff submitted that it was never the intention of the Respondent to impose strict liability. He suggested that the mandatory words “it will not be sufficient” in paragraph 14.1.1 really meant “it may not be sufficient…”. In a letter to the Applicant’s solicitors dated 21 March 2006, the Respondent stated, “Furthermore, it failed to recognize that paragraph 14.1.1 of the Code imposes on a doctor a responsibility to exercise due diligence to prevent, not a strict liability for, advertising by organizations with which he has a financial or professional relationship”.  62. With respect to these submissions, this stated position does not reflect the position hitherto adopted by the Respondent. That was certainly not the position advanced in the court below. The affidavit evidence now before the court is also unclear. In Dr Fang’s first affidavit, he states that, “The last sentence in paragraph 14.1.1 is necessary to prevent a doctor from simply relying on ignorance or lack of influence”. The perceived abuse consists of doctors shielding behind limited companies to benefit from uncontrolled advertising or from uncontrolled medical centres. One would have thought that suitable conditions could be drafted to deal with these problems without the imposition of strict liability even where due diligence has been exercised.  63. In view of the Respondent’s position as clarified by Mr Beloff, this issue is in a sense academic as it seems tolerably clear that the Respondent will have to re-examine the wording of paragraph 14.1.1.  **Conclusion**  64. For the above reasons, I would dismiss the appeal and make an order nisi that the Respondent (the appellant in this appeal) pay the costs of the Applicant in the appeal, such costs to be taxed if not agreed. I should perhaps just say that the genuineness of the concerns expressed by the Respondent have not been in dispute in these proceedings. Rather, it is the means by which these concerns are addressed in the Code that have been the focus of the opposition.  65. Finally, by way of postscript, we have, since the handing down of our Reasons of Judgment on 27 September 2007 been apprised of a number of matters in relation to the conduct of the case below by counsel formerly instructed by the Respondent. In case it be thought that any criticism of counsel appears in that judgment (whether express or implied), I should record that there is some disagreement as to exactly what transpired. Neither side has attached any significance to this aspect insofar as the outcome of the present appeal is concerned and I am therefore content to leave the matter there.  **Hon Tang VP :**  66. Freedom of expression protects the communicator as well as the recipient. We are not concerned with the dissemination of information which is in itself harmful. That being the case I would assume that:   |  |  | | --- | --- | | “ | … people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.” Blackmun J delivering the opinion of the U.S. Supreme Court in *Virginia State Board of Pharmacy et al. v Virginia Citizens’ Consumer Council et al.* [[1976] 425 U.S. 748](http://www.hklii.hk/cgi-bin/LawCite?cit=%5b1976%5d%20425%20US%20748) at 770. |   67. For this reason as well as the reasons given by the Chief Judge, I would dismiss the appeal.  **Hon Stock JA :**  68. The restrictions imposed by the Council upon the extent to which doctors may publish information about their medical practices constitute an infringement upon freedom of expression; a freedom that connotes the right to impart as well as to receive information. The fact of infringement is common ground. That being so, the questions are these:   |  |  | | --- | --- | | (1) | Do the restrictions pursue a legitimate societal objective? | | (2) | If so, are the restrictions rationally connected to that objective? | | (3) | If so, has the Council discharged the burden of showing that the restrictions go no further than is necessary to achieve that objective? |   69. The answer to the first question is clear. The aim of the restrictions is the protection of public health and the reputation of the profession. That is self-evidently a legitimate aim. It is clear also that the restrictions imposed are rationally connected to the legitimate aim thus identified. The sole question in the case is therefore the third.  70. What is or is not a proportionate restriction upon any fundamental right is always a matter of context. That is because the competing values and interests at stake in any one case will be different from those in another. The interests at stake in this case are profound, and require, in my opinion, a particularly sensitive approach, such that the courts should be slow before disturbing a mature judgment of those entrusted and equipped by experience to strike the balance. The interests of patients and potential patients are the overwhelming consideration. What we are concerned with, as indeed are the doctors, is the protection of the public in a realm in which that public is vulnerable. That is a fact that does not, in my judgment, change with the passage of time. It is the standing of the profession and the assumed expertise of each member that renders the patient or potential patient highly susceptible to persuasion; and in this regard, professionally correct in their approach that most medical practitioners no doubt are, it must be accepted that there may be some, a small minority no doubt, who may be tempted to push information about their services beyond accurate bounds. Doctors do not dispense standardized products but, rather, they ‘render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising’: *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council* [425 U.S. 748](http://www.hklii.hk/cgi-bin/LawCite?cit=425%20US%20748) (1976) at 773, n.25 and there is a duty upon, let alone a right in, the medical profession to guard against commercialisation and exploitation. If the profession did not itself do so, the State no doubt would. There is in other words a powerful interest ‘in restricting the advertising of health-care services to those which are truthful, informative and helpful to the potential consumer in making an intelligent decision’: *Talsky* 68 Ill. 2d at 585, referred to in *Desnick v The Department of Professional Regulation* [665 N.E. 2d 1346](http://www.hklii.hk/cgi-bin/LawCite?cit=665%20NE%202d%201346) in which, at 1356, was emphasized the fact that “the State has substantial interest in maintaining professional standards and preventing undue influence, overreaching and the invasion of its citizens’ privacy,” with the added reminder, citing *In re American Medical Association* [94 F.T.C. 701](http://www.hklii.hk/cgi-bin/LawCite?cit=94%20FTC%20701), 1034-35, that “Physicians … have an ethical duty to subordinate financial reward to social responsibility. A physician should not engage in practices for pecuniary gain that interfere with his medical judgment.”  71. With such considerations at play, restrictions on advertising by doctors will not be difficult to justify. But there is a countervailing consideration, with the same interests in view, namely, the right of members of the public to receive information with which to make an informed choice on a matter of such individual importance. The question then becomes one of balance: how to provide an informed choice whilst at the same time protecting the most vulnerable from influence that may be detrimental; detrimental where it is misleading, or lures the individual from a secure and competent existing relationship, or provides false hope, or confuses in its language or by competing claims, or because ‘the doctor most successful at achieving publicity may not be the most appropriate to consult’ (*R v General Medical Council ex parte Colman* [[1990] 1 All E R 489](http://www.hklii.hk/cgi-bin/LawCite?cit=%5b1990%5d%201%20All%20E%20R%20489) at 484) or because the advent of advertising itself may force others into what has been called (*Semler v Oregon State Board of Dental Examiners* [294 U.S. 608](http://www.hklii.hk/cgi-bin/LawCite?cit=294%20US%20608) (1935)) ‘unseemly rivalry which would enlarge the opportunities of the unscrupulous.’ Put thus, it is easy to understand why the courts tread carefully where regulatory judgments have been made by experts in a field outwith the court’s own expertise. Nonetheless the court’s function is to determine legality and whilst the profession’s evaluation as to where the proper balance lies will be accorded significant weight, the professional body is required to show that it has gone no further than is necessary to achieve the legitimate objective. That does not mean that it has to show that it has taken the *least* intrusive route but rather that it has chosen from a range of solutions which, whilst commensurate with the legitimate objective, infringes upon the right as little as is reasonably possible: *Attorney General of Hong Kong v Lee Kwong-kut* [[1993] A.C. 951](http://www.hklii.hk/cgi-bin/LawCite?cit=%5b1993%5d%20AC%20951) at 972.  72. It is in this respect that the appellant Council has, in my judgment, failed in this case: it has failed to demonstrate that the restrictions as they presently stand go no further than are reasonably necessary. The Council accepts that doctors may place notices in newspapers when they open or move their practices and that they may have websites and that the latter may contain information about the services they provide; but not that the same information may be provided in newspapers. I am not dismissive of the logic of the distinction drawn, namely, that there is a difference between a patient seeking information on the one hand and on the other a prospective patient having information thrust upon him. That said, the Council accepts – and it must be the case – that the individual is better served by having readily available the tools with which to make informed choices about his or her health care, and it is to that end that Doctors’ Directories are published and it is to that end that websites are available. But as matters presently stand, it is difficult to see that the Directories begin to serve that purpose. The sample Directory we have seen is not user-friendly. There is no index to it, divided, say, by category of health care; there is no indication which independent body might be approached for further information; and the question of where these directories are available in hard copy (as opposed to the internet, to which many will not have ready access) is entirely unclear on the evidence; nor is there any suggestion that publicity is given to their availability. On the evidence we have, the Directories, as presently distributed, available and composed seem to me to be an inadequate vehicle for providing the public with the tool for making an informed choice.  73. Moreover, I am far from convinced that the Council is itself convinced that the present restrictions go no further than are necessary. The history of the professional body’s consideration of the issue reveals that its Ethics Committee was at one stage in favour of allowing media advertising, suitably controlled. An opinion survey was conducted, the method for which was criticised by some within the Council but, nonetheless, as a result of the survey the Council determined in November 2005 not to pursue the proposal ‘for the time being and directed the Ethics Committee to further consider the matter.’ (Affirmation of Au Hing Yuen, 19 July 2006 para. 38). In his affidavit of 13 April 2007, Dr Fang refers to that decision and explains the position thus: “The Ethics Committee would continue to find more acceptable ways to relax the relevant restrictions in the Code, but deliberations have since been put on hold pending the outcome of the judicial review.” That is, as one would expect, a frank statement of the position, but that statement and the history of the matter suggests to me that the Council is at a half-way house in its consideration of where the proper balance can be struck.  74. It is perfectly clear that untruthful speech is not protected (*Virginia State Board of Pharmacy*, above, at 771-772) and the Council’s objective of safeguarding the public against misleading or confusing information is an objective that, in my estimation, is bound to receive judicial support. But what we have at this stage of the Council’s history of deliberations is insufficient to show that the restrictions are no broader than reasonably necessary to prevent the dangers that quite understandably agitate the Council’s mind. This is not to say that the Council has an all or nothing choice. It is to say rather that the Council should go back to the drawing board. Its concerns about policing, indirect promotion of other services or products, comprehensibility, accuracy, and frequency are suspectible to practical and reasonable solution; whether by way of a much more sophisticated and readily accessible form of directory system, or by permitting advertisements whilst limiting to particular publications where they may be placed, and regulating the size of them, their frequency, the language used, the method by which a reader may secure further and reliable information, a requirement to provide copies of advertisements to the Council: such are some of the tools available for striking a reasonable balance. That is not a balance that has presently been struck or, in my judgment, adequately addressed.  75. For these reasons, I agree that in relation to the first restriction (the medium of information), the appeal should be dismissed. I agree also for the reasons given by the Chief Judge that the other restrictions challenged cannot in their present form stand.  **Hon Ma CJHC :**  76. For the above reasons, the appeal is dismissed. There will also be an order nisi that the Respondent (the appellant in this appeal) pay the costs of the Applicant in the appeal, such costs to be taxed if not agreed.   |  |  |  | | --- | --- | --- | | (Geoffrey Ma) Chief Judge, High Court | (Robert Tang) Vice President | (Frank Stock) Justice of Appeal |   Mr David Pannick QC and Mr Alfred Fung, instructed by Messrs Johnson Stokes & Master for the Applicant  Mr Michael J Beloff QC and Mr Nicholas Cooney, instructed by Messrs Wilkinson & Grist for the Respondent |

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