DR. CHAU KWOK ON GORDON AND OTHERS v. THE MEDICAL COUNCIL OF HONG KONG [2011] HKCA 44; CACV 63/2006 (8 March 2011)

CACV 63/2006

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 63 OF 2006

(ON APPEAL FROM THE ORDER OF THE MEDICAL COUNCIL

OF HONG KONG MADE ON 12TH JANUARY 2006)

BETWEEN

Dr. CHAU Kwok On Gordon Dr. KWOK Sek Keung Dr. MACROBERT Iain J. Dr. NG Wing Ho Dr. SHUM Wai Kiu	Appellants
and	
The Medical Council of Hong Kong	Respondent

Before: Hon Tang Ag CJHC, Yeung JA and A Cheung J in Court

Date of Hearing: 18 January 2011

Date of Judgment: 8 March 2011

JUDGMENT

Hon Tang Ag CJHC (giving the judgment of the Court):

1. As a result of an article published in the February 2003 issue of the "Life Style Plus", a magazine published exclusively for the residents of properties managed by Cheung Kong Holdings Co Ltd, the Medical Council held an inquiry against the Appellants (together with a Dr Leung, who was acquitted), in respect of the following charges:

"That in respect of an article entitled 'New Technology in PRK –Eye Institute of Hong Kong (激光矯視新技術 香港眼科中心)' in Issue 38 of the magazine 'Life Style Plus' published in February 2003, you, being a registered medical practitioner -

(i) failed to ensure that reference is not made to your experience, skills and reputation, or practice, in a manner which can be construed as promotional, contrary to paragraph 5.1 of the Professional Code and Conduct for the Guidance of Registered Medical Practitioners (the 'Professional Code');

(ii) failed to ensure that the content of the said article does not imply that you are especially recommended for patients to consult, contrary to paragraph 5.2 of the Professional Code;

(iii) sanctioned, acquiesced in or failed to take adequate steps to prevent the publication of the said article which constitutes practice promotion exceeding the extent permitted by paragraph 4.2.3 of the Professional Code, contrary to paragraph 4.2.2.2 of the Professional Code;

and in relation to the facts alleged, both individually and cumulatively, you have been guilty of misconduct in a professional respect."

2. The relevant Professional Code and Conduct for the Guidance of Registered Medical Practitioners was the version which was revised in November 2000 (the "2000 Code").

3. The original article is in Chinese. The parties have relied on an English translation. The article essentially introduced the Eye Institute in Hong Kong, which was described as "a fully equipped specialized centre in Central", by the fact that it used "LADARVision4000", described as "the most advanced equipment of its kind in the world, for conducting surgery on its patients". It also described, how the Laser-Assisted In Situ Keratomileusis (LASIK) procedure worked in principle, and explained why LADARVision4000 outperformed its competitors because of its "most sophisticated and accurate tracking system" that it was "far more superior than the conventional Generation IV platforms" which:

"… can usually only capture 160 eyeball movements per second whereas the laser radar tracking technique of the former can track 4,000 such movements per second, a much faster and more accurate tracking capability."

4. Another advantage of LADARVision4000 was said to be that:

"… its laser pulses measure only 0.85 mm and are much finer than the Generation IV ones. Finer

pulses produce better vaporization and reshaping of the cornea, thus resulting in lesser glare".

5. The Article included an interview with the Appellants as well as a brief CV of each of them.

6. In an undated decision, the Medical Council found the Appellants guilty as charged. On 12 January 2006, the Medical Council ordered that each of them:

"… be served with a warning letter having been found guilty of misconduct in a professional respect as a result of contravention of paragraphs 5.1, 5.2, and 4.2.2.2 of the Professional Code and Conduct for the Guidance of Registered Medical Practitioners ('the said Order'), …"

7. This is the Appellants' appeal in which they are represented by Mr Huggins, SC. The hearing of the appeal has been delayed to await the decision of the Court of Final Appeal in another case concerning the role of the Legal Adviser to the Medical Council in an inquiry.

8. In order to understand these charges, the following paragraphs of the 2000 Code are to be noted:

"4.2.2 Practice promotion

4.2.2.1 Practice promotion means the promotion of a doctor, his work, his practice or his group, by himself or others, and includes the provision of information, advertising and publicising to both the public and patients. Self advertisement, canvassing or publicity to enhance or promote a professional reputation for the purpose of attracting patients would constitute professional misconduct.

4.2.2.2 Practice promotion by individual practitioners, or by anybody acting on their behalf or with their forbearance, on people who are not their patients is not permitted except to the extent permitted by paragraph 4.2.3.

4.2.3. Dissemination of information about professional services to the public

A doctor, whether in private or public service, may provide information about his professional services to the public only in the following ways:-

E.g., on signs, signboards, stationery, announced by media of commencement and altered conditions of practice, telephone directories, internet homepages, etc."

"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."

The First Charge

9. The first charge alleged certain conduct contrary to para. 5.1 of the Code. The conduct being failure to 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."

10. It is necessary to note the context in which an offence contrary to para. 5.1 could be committed. Para. 5.1 permitted doctors in their capacity as registered medical practitioners to:

"… give public lectures, participate in radio or television programmes, or publish in print or electronically for the fulfilment of public health education. …" (public health education)

11. As we understand the charge, it alleged that whilst engaged in public health activities, the Appellants had failed to ensure that reference was not made to their experience etc.

12. Mr Cooney SC, for the Medical Council has sought to argue that the Appellants were not engaged in public health education.

13. He submitted that the Article had nothing to do with public health education but was a blatant advertisement on the part of the Appellants. That was not the case of the Secretary to the Medical Council below. Nor had the Council so held. The reference to para. 5.01 of the Code would have been grossly misleading if the allegation was that the Article had nothing to do with public health education. We will not allow such a serious allegation to be made on appeal. Fair play and justice require that the appellants should have been given an opportunity to deal with the allegation.

14. We would consider the first charge on the basis that the Appellants were engaged in public health education.

15. Before the Medical Council, the Appellants contended that all the charges were unconstitutional because the relevant provisions in the 2000 Code contravened the freedom of speech and of expression guaranteed under the Basic Law and the Hong Kong Bill of Rights Ordinance. That submission was rejected by the Council.

16. However, the decision of the Medical Council predated the decision of this Court in *Dr Kwong Kwok Hay v The Medical Council of Hong Kong* [2008] 1 HKC 338.

17. *Dr Kwong Kwok Hay* was concerned with the 2006 version of the Code ("2006 Code"). There, this Court (Ma CJHC, as he then was, Tang VP and Stock JA) was concerned with four

restrictions, only two of which are relevant to the instant appeal. The first relevant restriction (restriction 1 in that case) related to section 5.2.3 of the 2006 Code, which can be regarded, for the present purposes, as the same as, paragraph 4 of the 2000 Code. The other restriction (restriction 3) concerned paragraphs 5.1 and 5.2 of the 2006 Code which are identical to paragraphs 5.1 and 5.2 of the 2000 Code.

18. Restriction 3 in *Dr Kwong Kwok Hay* is relevant to the first charge. There Dr Kwong's point was that in the course of public health education 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. He complained that the effect of paragraphs 5.1 and 5.2 of the 2006 Code (which as noted are the same as paragraphs 5.1 and 5.2 of 2000 Code) put a doctor at risk of disciplinary proceedings on charges of unacceptable practice promotion whenever reference is made to a doctor's experience, skills, qualifications or reputation. Thus, although the Medical Council had legitimate concerns that the giving of lectures, participating in radio or TV programmes or publication of articles should not be a transparent or shambolic cloak to disguise an ulterior motive (blatant advertising), the wording of paragraphs 5.1 and 5.2 went too far and constituted a disproportionate response.

19. This is what Ma CJHC (as he then was) said:

"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 every time 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.'"

20. It was not the complaint below that the Article was merely "a transparent or shambolic cloak to disguise an ulterior motive (blatant advertising)". Nor had the Medical Council so found. Mr Cooney submitted that the Medical Council feared that if this appeal should succeed, it would be thought that blatant advertisement was acceptable. Such fear is unfounded. In a case of blatant advertising and of the charge was properly framed and proved, I see no reason why a conviction should not follow. Mr Huggins submitted that although the Article might have had the effect of giving publicity to the appellants and their practices, that was merely incidental. We contend ourselves by stating that it had not been alleged nor proved that the so-called practice promotion was not incidental. And insofar as the appellants were convicted on a view of para. 5.1 of the Code which has been held to be unconstitutional by *Dr Kwong Kwok Hay*, the appeal against the first charge must be allowed.

21. Mr Cooney also expressed the view that the Medical Council feared that insofar as some of the contents in article may be inaccurate or misleading, a decision in favour of the Appellants may be taken as condonation of inaccurate or misleading information in (any) publication. The fear is baseless. Again we have to point out that, here any reading of the charges (not just charge 1) is sufficient to show that the Appellants were not charged with being parties to any misleading or inaccurate statements.

Second charge

22. So far as the second charge is concerned, it concerned para. 5.2 of the 2000 Code. The question is whether the content of the article implied that any of the Appellants is "especially recommended" for patients to consult.

23. In answer to requests for further and better particulars of charge 2, the Secretary to the Medical Council answered on 30 April 2004 as follows:

“(a) It will be the Secretary's contention that the article, viewed as a whole, implies that the six doctors named in the article are especially recommended for patients to consult. The following features in particular are supportive of the contention:

(i) The opening paragraph gives the impression that other than hospitals the EIHK is the only place to receive LASIK surgery. It does not say whether patients could receive the same treatment at other clinics or institutes.

(ii) The article emphasises features unique to EIHK, which would give the impression that it is 'superior' to other clinics or institutes, e.g.

- EIHK is the only institution of its kind in Hong Kong in which the doctors have themselves received LASIK;

- All the four private doctors who have received LASIK chose to have the surgery at EIHK;

- Dr Macrobert is the first ophthalmologist having simultaneous PRK for both eyes as well as the first in his profession taking LASIK;

- Dr Chau and Dr Kwok are respectively the first and second LASIK surgeons receiving LASIK;

- The doctors at EIHK will follow up on every patient personally, thus providing greater assurance;

(iii) The article says that the equipment used in EIHK, LADARvision4000, is 'the most advanced equipment of its kind in the world', and that its tracker is ‘far more superior than the conventional Generation IV platforms used by other centres’.

(iv) The article describes the other features of EIHK which would sound appealing to patients, without saying whether other clinics also have such features:

- EIHK is fully equipped (設備完善);

- The doctors build up friend-like mutual trust with their patients;

- EIHK doctors are confident (充滿信心) about LASIK surgery;

- EIHK doctors follow-up each patient personally;

- EIHK doctors will offer expert advice to patients who are not suitable for LASIK;

- EIHK runs regular talks and sharing sessions

(b) By virtue of the fact that the article gives such implications, the doctors have failed to ensure that the content of the article does not imply that the doctors are especially recommended for

patients to consult."

24. The Medical Council had not dealt with the charges separately. Paragraph 7 of the decision is the basis of the convictions. It reads:

"7. Giving a natural and ordinary interpretation to the article, we are satisfied that the article is promotional of the practice of each Defendant in contravention of the provisions of the Code on practice promotion set out in paragraphs 4 and 5. In fact all the Defendants themselves agreed. We will not go into the details of how the article is promotional, suffice it for us to say that there are obvious claims of superiority in respect of both the equipment of the Institute and the expertise of the Defendants."

25. We do not believe the claims of superiority in respect of the equipment lies at the heart of the conviction under charge 2. The Council has not spelt out what they regarded as:

"… the obvious claims of superiority in respect of … the expertise of the Defendants."

26. Once again, in relation to the 2nd charge, we must proceed on the basis that the Article was for public health education. To that extent, the decision in *Dr Kwong Kwok Hay* also covers this charge since the matters relied on could be regarded as implying that "the appellants are especially recommended for patients to consult" that are incidental to public health education. Again, we make the point that it was neither alleged, nor found, that it was otherwise. Like charge 1, they were convicted on a view of para. 5.2 held to be unconstitutional in *Dr Kwong Kwok Hay*.

The 3rd charge

27. The third charge is that the Article constituted practice promotion exceeding the extent permitted by paragraph 4.2.3, contrary to para. 4.2.2.2 of the 2000 Code. The further and better particulars supplied on 30 April 2004 made clear what was the basis of this charge:

"(b) As paragraph 4.2.2.2 of the Professional Code provides that practice promotion is not permitted except to the extent allowed by paragraph 4.2.3, it will be the contention of the Secretary that the publication of the article, which is not a way of providing information to the public allowed under paragraph 4.2.3, constitutes unprofessional conduct."

28. It will be recalled that para. 4.2.3 only permitted practice promotion on signs, signboards etc. See para. 8 above.

29. The other restriction in *Dr Kwong Kwok Hay* is relevant to this charge. There Dr Kwong wanted 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 were then permitted under the 2006 Code to provide to the public on signboards and service information notices outside medical surgeries, stationery, telephone directories, doctor's directories and medical practice websites. However, he was unable to do so because of the equivalent of para. 4.2.2.2 and 4.2.3 of

the 2000 Code.

30. In that respect at paragraph 47, Ma CJHC said:

"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."

31. When the Article was published, there was nothing other than a total ban, and it was that which the Appellants were found guilty of.

32. The Appellants were not charged with failing to correct inaccurate factual statements in either the draft or in the published version of the Article. Nor was there a charge of "allowing factually incorrect statement to be made or to remain uncorrected", but only of failing to ensure that statements were made about their experience, skills and reputation or practice in a way other than those permitted by para. 4.2.3 of the 2000 Code. In other words, the appellants were again convicted on a basis which has been found to be unconstitutional in *Dr Kwong Kwok Hay*.

33. For the above reasons, we would allow the appeal and make an order nisi that the Medical Council pays the costs of the appeal to be taxed unless agreed.

(Robert Tang)	(Wally Yeung)	(Andrew Cheung)
Ag Chief Judge, High Court	Justice of Appeal	Judge of the Court of First Instance

Mr. Adrian Huggins, SC instructed by Messrs Mayer Brown JSM for the Appellants

Mr. Nicholas Cooney, SC instructed by Department of Justice for the Medical Council of Hong Kong