

DENTAL PRACTICE BOARD OF VICTORIA

RE: Dr Diarmuid Rogers

[2005] DPBV 10

PANEL:

Mr Victor Harcourt (Chair)
Dr Gerard Condon
Dr Mandy Leveratt

DATE OF HEARING: 24 October 2005

DATE OF DECISION: 24 October 2005

FINDINGS

The Panel, having considered the evidence and submissions placed before it, and taking into account the admissions, finds the following allegations in the Notice of Formal Hearing under section 45 of the *Dental Practice Act 1999* ("the Act") dated 25 August 2005 ("the Notice") to be established:

- 1 At all material times Dr Rogers was registered as a dental care provider in Victoria under the Act, having been registered as a dentist in Victoria under the Act (or its predecessor) since 12 January 1978.
- 2 Section 64(1) of the Act provides as follows:

"A person must not advertise a dental care provider's practice or dental care provider's services in a manner which - ...

(c) refers to, uses or quotes from testimonials or purported testimonials; ..."
- 3 Dr Rogers advertised his practice or services in Herald-Sun on Monday, 28 February 2005 ("the Advertisement").
- 4 The full page Advertisement appeared on one page, page 61 of the Herald-Sun, under the heading "Health and Vitality Advertising feature" and incorporated three sections:
 - 4.1 A large block advertisement on the bottom of the page;
 - 4.2 An advertising article entitled "Put a big smile on your dial"; and
 - 4.3 An advertising article entitled "Our Patti's all smiles".
- 5 The Advertisement read as a whole, and in particular the advertising article entitled "Our Patti's all smiles" refers to, uses and quotes from a testimonial, or purported testimonial, from Dr Rogers' patient, Ms Patti Newton.
- 6 In the circumstances, Dr Rogers breached the provisions of section 64(1)(c) of the Act.
- 7 Accordingly, Dr Rogers engaged in unprofessional conduct, as defined in section 3 of the Act, being of a serious nature.

DETERMINATION

Having considered the matter and having given due weight to the submissions placed before the Panel, the Panel considers it appropriate under section 47(2) of the Act to impose the following determinations:

- 1 Dr Rogers is cautioned against a repetition of his conduct in placing the Advertisement and failing to ensure that he is properly acquainted with the laws relevant to the advertising of his practice.
- 2 Dr Rogers is reprimanded for his failure to properly understand the limitations upon the advertisement of his practice when he plainly ought to have known, in the light of the legislation and the material published by the Board to assist dental care providers in this regard, and in ignorance of this knowledge placing an advertisement which referred to, used and quoted from a testimonial from his patient.

REASONS

- 1 On 24 October 2005, the Dental Practice Board of Victoria ("the Board") in a panel of three members ("the Panel") convened to conduct a formal hearing pursuant to the *Dental Practice Act 1999 (Vic)* ("the Act") into the conduct of the dental care provider, Dr Diarmuid Rogers. Dr Diarmuid Rogers was at all material times registered as a dental care provider.
- 2 On Monday, 28 February 2005 a full page advertisement for the practice or services of Dr Diarmuid Rogers appeared on page 61 of the Herald-Sun under the heading "Health and Vitality Advertising feature" which incorporated three sections. The first section was a large block advertisement on the bottom of the page. The second section was an advertising article entitled "Put a big smile on your dial". The third was entitled 'Our Patti's all smiles' and was accompanied by a photograph of well-known local television identities, Bert and Patti Newton, underneath it which read "So proud: Bert Newton loves Patti's new smile, which has given her a lot more confidence."
- 3 The advertising article was in the nature of an interview with Patti Newton and read as follows:

"With a broad smile and a spring in her step, Patti Newton says: 'I'm a happy, smiley sort of person, but I'm not really as confident as it might seem.'

'Now I feel so good. I can't stop smiling. And Bert (her husband) loves it,' says Patti, an engaging woman with a sunny personality who has charmed audiences everywhere.

The reason is not only her own warmth and spontaneity, it's her new smile. Some time ago Patti decided to undergo cosmetic treatment under dentist Dr Derry Rogers.

She is thrilled with the result.

'And I don't mind telling everyone, because it's really lifted my self confidence,' she said.

'Being open about it might encourage others.

'It's also my livelihood. When you're a singer, people look at you, and it's nice to have a great smile.

'I did a segment on *Good Morning Australia* about my new smile and people still come up to me in the street and say, "Can we have a look? Did it hurt?"

'Well I'm a real sook, but I can honestly say absolutely not.

'I was lying back in the chair watching a movie on TV and, before I knew it, it was all over.

'It's a creative process. Derry is a real artist. He's completely professional. He explains the whole process step by step and is very caring.

'And Derry knows exactly how to create your best look, the one that is right for you. That gummy, crowded look I had is gone.

'The whole procedure also gives you a healthy mouth, which is much easier to maintain long term.

'I would say to anyone, go and see Derry Rogers. With a lovely new smile you won't need that facelift.'

Rogers says: 'It was pleasure to be able to help Patti. It's surprising that during all her years as a television personality she felt self-conscious about smiling in front of the camera.

'Patti is a lovely lady and I'm glad she can now smile to her heart's content.'"

- 4 By an affidavit sworn 24 October 2005 and filed in the proceeding, Dr Rogers admitted the findings in paragraphs 1 to 7 inclusive except in relation to whether the unprofessional conduct was of a serious nature. It was submitted on behalf of Dr Rogers that while he had engaged in unprofessional conduct, it was not of a serious nature. A number of submissions were made in support of this contention.
- 5 The affidavit of Dr Rogers explained the background to the advertisement. It is relevant to allude to this background as it has been taken into account by the Panel particularly in relation to the determinations which have been made.
- 6 Bert and Patti Newton have been patients of Dr Rogers for many years. Dr Rogers occasionally charges them to cover costs but otherwise they are not charged for his services. The benefit to Dr Rogers was explained by him as follows:
- "They are high profile people and Patti has teeth that look great. As it is common knowledge that I am their dentist, it is a good source of referral work for my practice. Patti and Bert will basically help me out whenever they can. I have never paid them money to do any advertising for me."
- 7 A further benefit that Dr Rogers receives is the use of Patti Newton to provide publicity for his practice. This occurred in February 1997 and in early 2000 in the nature of an article in The Australian Women's Weekly and an advertising article.
- 8 On Thursday, 24 February 2005 Dr Rogers was contacted by his advertising agent who informed him about distress space available in the Herald-Sun. Dr Rogers gave him permission to prepare an advertisement for inclusion in the Herald-Sun. His advertising agent used the material relating to Patti Newton with his consent. Dr Rogers did not see a final proof of the Advertisement before publication. As it transpires, even if Dr Rogers had seen a final proof, he would not have, it would seem, prevented the publication of it because, by his own admission, he did not consider the advertising article to be a testimonial but nor did he know that a testimonial advertisement breached the Act.
- 9 At the time when the articles relating to Patti Newton were used in February 1997 and early 2000, there was no equivalent to section 64(1)(c) which would have prohibited the Advertisement published 28 February 2005.
- 10 It was conceded by Dr Rogers that he should have known about section 64(1)(c). Not only did the change in the legislation elude him in this regard, but he did not turn his attention to three separate publications of the Board intended to inform practitioners. These were a publication entitled "Advertising Dental Health Care Services" dated 27 September 2001 and updated 11 May 2004, an article in the Board's bulletin dated August 2002 and the publication of the material on the Board's website.
- 11 Had Dr Rogers read this material he would have been well aware of the prohibition upon the use of testimonials or purported testimonials. He would have also been aware of the Australian Competition and Consumer Commission's publication "Fair Treatment: Guide to the Trade Practices Act for the advertising or promotion of medical and health services". At page 23, the Guide says the following of testimonials:

“Testimonials can be an emotive and effective way of promoting medical and health services. They provide a real life example of possible outcomes from the treatment being considered.

“Testimonials are not misleading or deceptive when they are representations by genuine consumers who have received a particular service and are willing to testify to this experience. However, testimonials may mislead or deceive if the person providing the testimonial does not exist, did not have the advertised treatment, does not truthfully represent the outcomes of the treatment, or has been offered some inducement (eg. free treatment) to give the testimonial.

“Practitioners should also consider advising consumers that a testimonial can only represent the outcome of the treatment or procedure for that individual person. In medical and health services, there are many factors peculiar to an individual patient that will affect the ultimate outcome.

“There may be a need to place greater controls on the use of testimonials to reduce the risk of misrepresentation. For example, it is not unreasonable to expect that, subject to some safeguards, the person providing the testimonial can be, and is willing to be, contacted. Practitioners should be wary of using testimonials where this cannot be guaranteed.”

12 There is no suggestion in the present case that Ms Patti Newton was not a genuine consumer, that she did not exist and did not have the advertised treatment. What is however relevant is the fact that Ms Newton received free treatment and in return allowed her testimonial to be used. Further, the testimonial did not advise consumers that it represented the outcome of the treatment or procedure for that person and that there may be factors peculiar to other patients that would affect the ultimate outcome.

13 The Victorian government of course went one step further than the Guide and prohibited the use of testimonials by dental care providers. It did so with the enactment of the Act, distinguishing it from its predecessor which contained no such prohibition. The Act states that its main purposes, inter alia, are:

“(a) To provide for the registration of dental care providers and investigations into the professional conduct and fitness to practise of registered dental care providers; and

(b) To regulate the provision of dental care services; ...”
(section 1).

The functions of the Board established pursuant to the Act are broad and give effect to the main purposes of the Act (section 69). It is well accepted that the Board and indeed any Panel appointed under section 43 of the Act for a formal hearing, must have regard to the broad objectives of the Act which include the protection of the public. This is particularly pertinent to a formal hearing into the professional conduct of a registered dental care provider which inquires into whether the dental care provider has or has not engaged in unprofessional conduct either of a serious nature or not of a serious nature. Unprofessional conduct is defined in the Act and includes a contravention of a provision of the Act or the Regulations.

14 Consistent with the objective of protecting the public, the Act has made specific provision regarding the advertising of a dental care provider’s practice or services. Section 64(1) relevantly states:

- “(1) A person must not advertise a dental care provider’s practice or dental care provider’s services in a manner which -
- (a) is or is intended to be false, misleading or deceptive; or
 - (b) offers a discount, gift or other inducement to attract patients to a dental care provider or dental care provider’s practice unless the advertisement also sets out the terms and conditions of that offer; or
 - (c) refers to, uses or quotes from testimonials or purported testimonials; or
 - (d) creates an unreasonable expectation of beneficial treatment.

Penalty: 50 penalty units for a natural person or 100 penalty units for a body corporate.”

- 15 Parliament expressed its intention in enacting these particular provisions during the reading speeches and the Panel is entitled to have regard to these comments. During the second reading debate the Minister for Health noted that stringent advertising provisions were included in the Bill to further facilitate protection of the public (Hansard, Legislative Council, 13 May 1999 p 630). Mr Thwaites, for the Opposition, indicated Opposition support for a fairly stringent approach to advertising stating:

“Although it believes there needs to be competition and public information, that information has to be accurate. Just as we do not want snake oil salesmen in the medical area, we do not want them in the dental area, either; so it is important to have proper regulation.” (Hansard, Legislative Assembly, 12 May 1999 p 973).

In response, Mr Doyle, for the then Government stated as follows:

“The Government and the Opposition are in furious agreement about the purpose of that part of the Bill. The provisions concerning advertising do not come as a reaction to current affairs but from a considered view of what advertising should be. The Deputy Leader of the Opposition referred only to clause 64(1)(a), which concerns the principle of false, misleading or deceptive advertising. However, clause 64(1)(d) provides that it is an offence to advertise in a way that creates an unreasonable expectation of beneficial treatment.

“That offence will incur 50 penalty units for a natural person or 100 penalty units for a body corporate - - in other words, \$5,000.00 or \$10,000.00. Those penalties are hefty, but I hope the provision will give the Board maximum flexibility to pursue people to whom the Deputy Leader of the Opposition accurately referred to as the shonks in the profession.” (Hansard, Legislative Assembly, 12 May 1999 p 975).

- 16 These are matters which, in the Panel’s opinion, are relevant to be taken into account in determining whether the unprofessional conduct of Dr Rogers is of a serious nature or not of a serious nature. The Act does not like many other Victorian Acts governing the practice of health professionals define what is unprofessional conduct of a serious nature or not of a serious nature. It merely defines what is unprofessional conduct and leaves it to the Panel to consider whether it is of a serious nature or not.

- 17 The meaning of unprofessional conduct “of a serious nature” has been considered in a number of cases. These include Kellam J in *Parr v Nurses Board of Victoria* (1998) 16 VAR 118 and Ashley J in *Domburg v Nurses Board of Victoria* [2000] VSC 369. Kellam J, in *Parr v Nurses Board of Victoria*, stated that whether a nurse had engaged in unprofessional conduct of a serious nature must depend on the facts of the case and further said:

“16 ... The word ‘serious’ is defined in the Oxford Shorter Dictionary as being ‘dealing with or regarding a matter on its grave side, not jesting, trifling or playful; in earnest’, and further ‘weighty, important, grave; (of quantity or degree) considerable’, and ‘attended with danger, and giving cause for anxiety’. ...

“17 In my view the question of whether or not a nurse has engaged in unprofessional conduct of a serious nature must depend upon the facts of each case. Clearly such conduct would not be serious if it was trivial, or of momentary effect only at the time of the commission or omission by which the conduct was so defined. It must be a departure, in a substantial manner, from the standards which might be reasonably expected of a registered nurse. The departure from such standards must be blameworthy and deserving of more than passing censure. I note in this regard that the Act provides for informal hearings into complaints made about nurses ... In the course of the second reading speech on 17 November 1993 at p 1873 of Hansard, the Minister said:

‘Informal hearings will be held to hear minor matters. It is not necessary to have representation for those hearings. The hearings will save nurses from being put through the expense and trauma of obtaining representation for a formal hearing.’

“Accordingly it is clear from the structure of the Act that it was the intention of Parliament that ‘unprofessional conduct which is not of a serious nature’ amounted to such matters which were minor and appropriate to be dealt with by the informal hearing process contemplated by the Act and that the sanctions for such conduct amounted to no more than counselling, cautioning or reprimand.”

- 18 In *Domburg v Nurses Board of Victoria*, Ashley J suggested that Kellam J’s reference to a departure from standards which was professionally blameworthy in *Parr’s* case referred to conduct which was advertent rather than adventitious. In the context of the *Medical Practice Act* 1994, Morris J commented in the case of *Vissenga v Medical Practitioners Board of Victoria* [2004] VCAT 1044 at para 33

“I wish to revisit the words of paragraphs (a) and (b) of the definition of unprofessional conduct. In both of these paragraphs attention is directed at professional conduct which is of a lesser standard than that which might “reasonably” be expected of a registered medical practitioner by the public or by the peers of the practitioner. In my opinion, neither the public nor the peers of a medical practitioner expect perfection at all times. Human frailty visits every person, including those who are medical practitioners. Reasonable members of the public, and the reasonable peers of medical practitioners, understand this. Reasonable people are tolerant of occasional lapses, particularly if these lapses do not form a consistent

course of conduct or, if taken separately, are insufficiently serious to warrant intervention by those charged with acting on behalf of the State.”

19 Recently, Morris J in *Kozeniauskas v Dental Practice Board of Victoria* [2005] VCAT 1058 stated the following (paragraph 7):

“Clearly enough, the difference goes to the gravity of the conduct and must depend upon, not only the facts of the case, but also an assessment of the conduct in the context of the conduct of professional practice generally.”

20 Dr Rogers’ Advertisement contravened a provision of the Act. It is not a trivial contravention of the Act but one which has been elevated to the status of an offence subject to the imposition of a substantial penalty by the Magistrates’ Court. This can be properly distinguished from other sections of the Act which impose obligations upon a registered dental care provider but for which there is no offence committed if breached (see for example section 20). Parliament intended that this be so.

21 In these terms, the existence of a specific prohibition against the use of a testimonial must be grounds for characterising as blameworthy the use of a testimonial in an advertisement. The existence of potentially onerous consequences in the nature of a criminal offence and substantial fine suggest that a dental care provider in contravention should be subject to more than passing censure. What is significant in considering the testimonial used by Dr Rogers is that it came from a high profile person, namely Patti Newton. Patti Newton is well known and has been so for many years. Undoubtedly, Dr Rogers benefits from his association with Patti Newton because of the confidence which is placed in her by the public. The testimonial took advantage of this confidence. For this reason, one could consider the use of this testimonial to be rather more serious than that of a consumer not so well known.

22 The submissions on behalf of Dr Rogers sought to diminish the seriousness of the conduct of Dr Rogers in a number of ways. This included suggesting that the use of a testimonial was not of the same order of blameworthiness as say negligent treatment or false or misleading advertising. It was also suggested that there was no infringement of the protection of the public or indeed harm to the public because Patti Newton, as a person well known to the public, had in fact assisted it by informing of developments in dentistry. However, each of these submissions seeks to deny the fact that Parliament has stated quite clearly that it is necessary to protect the public by prohibiting the use of testimonials in the advertisements of dental care providers. It is not necessary for this Panel to inquire any further to ascertain whether in fact any one consumer had been “harmd” or that there was some order of priority amongst the contraventions set out in section 64.

23 Taking all of the above into account and in the circumstances, the Panel finds that Dr Rogers, in publishing the Advertisement, has engaged in unprofessional conduct which is of a serious nature. This reflects the significant departure from the expected standards of professional conduct by Dr Rogers, the seriousness of the advertising breaches reflected in the Act and the risks to the public in the use of testimonials in advertisements.

24 Having made the above findings, the Panel considered the range of determinations which it could make in respect of Dr Rogers. As has been reiterated in many decisions of this Board and in superior courts, it is well recognised that the function of this Board, and the Panel, is not to punish the dental care provider. It is rather to protect the public and the imposition of the determinations must take into account a range of factors.

25 The Panel took into account the fact that Dr Rogers has been in practice since 1978 and has not been the subject of any findings of unprofessional conduct. He approached this hearing by making fulsome admissions, displaying insight into the nature of his breach and providing his solemn undertaking, in his affidavit, that he would use his best endeavours to ensure that all of his advertising complies with the Act. Of course, while it might be said that Dr Rogers

is doing no more than agreeing to comply with the law which he is already obliged to do, what is of importance to this Panel, is his contrition and a positive approach to ensuring he complies with his obligations in the future.

- 26 It was submitted by counsel on behalf of Dr Rogers that he made the decision to use the testimonial, having previously used testimonials without complaint, at a time when he was put under some pressure to take advantage of an advertising benefit, and in ignorance of the legislation. Dr Rogers conceded he should have known his obligations but did not and advanced this excuse to avoid any suggestion that he used the testimonial intentionally and in flagrant breach of the legislation. The Panel was prepared to accept that Dr Rogers unintentionally engaged in a contravention of the Act although his conduct could be seen as in reckless disregard of his obligations.
- 27 Undoubtedly, the involvement of Dr Rogers in these proceedings and the advice he would have received from his legal representatives, would serve him well as a deterrent to future conduct and a more informed approach to advertising. It is therefore not considered appropriate that Dr Rogers be the subject of an order that he undertake counselling or education.
- 28 The Panel did however consider it appropriate that Dr Rogers be reprimanded for his conduct. It is no light matter to reprimand a professional by reason of their unprofessional conduct. It is not however acceptable to the Board that a dental care provider should act in a manner which is so clearly in contravention of the Act simply because she or he did not make a sufficient effort to understand their obligations in the Act, which has been explained by the Board in its publications. A caution was also considered appropriate to reinforce the message that Dr Rogers should not fall into error in this regard again and that he should be more careful with his advertisements and in particular in taking heed of his legal obligations.

DATED: 28 October 2005

Victor Harcourt
Chair