

Massage Therapist, Mr B

**A Report by the
Health and Disability Commissioner**

(Case 19HDC00788)



Health and Disability Commissioner
Te Toihou Hauora, Hauātanga

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Executive summary

1. This report highlights the importance of obtaining informed consent for massage treatment to sensitive areas. A massage therapist provided massage therapy to a woman's breasts without first clearly ensuring that the woman consented to this treatment.

Findings

2. The massage therapist failed to communicate adequately with the woman prior to the massage. He did not specifically mention his intention to massage her breasts and abdomen. A client cannot give consent without first being adequately informed as to the proposed massage sites. It is not sufficient to assume that a client has given informed consent because the client does not object to specific actions. The massage therapist failed to inform the woman adequately and, accordingly, breached Right 6(1) of the Code.¹ It follows that the woman was not able to give informed consent and, accordingly, the massage therapist also breached Right 7(1) of the Code.²
3. The massage did not meet accepted standards. It was inappropriate for the massage therapist to massage the woman's breasts and nipples, and unacceptable to expose her breasts and abdomen without warning her that this was his intention and obtaining her prior consent. The massage therapist also failed to communicate adequately throughout the massage. Accordingly, he did not meet professional and ethical standards and breached Right 4(2) of the Code.³

Recommendations

4. The Commissioner recommended that the massage therapist apologise to the woman; receive mentoring for a period of 18 months; receive observational supervision for informed consent; review his draping principles and procedures; attend training on effective communication; attend training on massage of sensitive or erogenous zones; and develop a process for informing clients of other persons present in his home (where his massage clinic is located).
5. The Commissioner recommended that Massage New Zealand consider a requirement that supervision and monitoring of all professional members take place as a condition of ongoing membership, including regular refresher training of informed consent for members.

¹ Right 6(1) states: "Every consumer has the right to the information that a reasonable consumer, in that consumer's circumstances, would expect to receive ..."

² Right 7(1) states: "Services may be provided to a consumer only if that consumer makes an informed choice and gives informed consent ..."

³ Right 4(2) states: "Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards."

Complaint and investigation

6. The Commissioner received a complaint from Ms A about the services provided to her by a massage therapist, Mr B. The following issue was identified for investigation:
 - *Whether Mr B provided Ms A with an appropriate standard of care in 2019.*
 7. The following parties were directly involved in the investigation:

Ms A	Consumer/complainant
Mr B	Provider/massage therapist
 8. Independent expert advice was obtained from a massage therapist, Barry Vautier (Appendix A).
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Information gathered during investigation

Introduction

9. At 5pm on 2 May 2019, Mr B, a registered massage therapist, provided Ms A with a 90-minute relaxation massage at his clinic, which he operates from his home. This was the first occasion on which Mr B had provided a massage for Ms A.
10. Mr B stated that he graduated from the New Zealand College of Massage (NZCM). He said that he is registered with Massage New Zealand.
11. Massage New Zealand is a self-regulating voluntary membership association that promotes the massage profession by requiring members to achieve educational competency and clear standards of client care, practice, and ethics, and meet ongoing requirements to maintain membership.

Massage on 2 May 2019

12. Mr B stated that he asks clients to complete a “Client Intake Form” at their first visit, and an update form on subsequent visits.
13. The Client Intake Form completed by Ms A on 2 May 2019 contains a list of conditions from which the client may suffer. The only condition noted by Ms A was that previously she had had a prolapsed disc S1–L5.
14. Mr B completed a “Relaxation Massage Record” that states that Ms A’s goals, expectations, and history for the session were “[R]↑⁴”. Under “dislikes/special requirements” the form states, “none”. Under “Session plan”, the form states, “Full body

⁴ Increased relaxation.

massage”, and is signed by Ms A. The form refers to massage of Ms A’s glutes, legs and feet, chest/abs, arms and face.

15. Ms A told HDC: “At the start of the massage I was asked if there are any parts of my body that I do not like being massaged. I replied no.” She said that from the question she assumed she was being asked about areas such as her head, hands, or feet. She stated that Mr B told her that he planned to conduct the massage as follows:

“He explained he would get me to lie on my front, would start with my upper body and include a head massage then move to my glutes, legs and feet before asking me to turn over. He stated he would then massage my legs and arms and finish with a face/scalp massage. I told him that sounded fine.”

16. Mr B told HDC that Ms A signed the Relaxation Massage Record and did not indicate any areas of her body that should not be massaged. He stated that once the Client Intake Form had been completed by Ms A, he confirmed that she was there for a 90-minute full body massage, and when he asked, “Are there any areas you would not like massaged?” she said no. Mr B claimed that he described in detail the planned massage, including saying, “Now obviously the chest and abdomen/tummy are sensitive for some people, especially women, some like it massaged and some don’t — Is that something you would like to include?” He said that Ms A responded in the affirmative, and when he asked whether she was comfortable with her chest uncovered or would prefer him to use a towel, she said something like, “No, that’s fine.”
17. Mr B told HDC that he accepts that his having asked Ms A whether she wanted her chest area to be left uncovered or preferred to use a towel did not necessarily correlate to obtaining consent to massage her breast area. He said that he was trying to be discreet, as he felt that as a male, to ask whether she wanted breast work would have come across as “creepy” and inappropriate, and may have caused offence.
18. Mr B said he advised Ms A that she could stop him at any time during the massage if she was uncomfortable. He stated that at that point, he told Ms A that he would leave the room to allow her to get ready, and demonstrated that she should place herself prone on the table with her face in the head cradle and cover herself with the sheet provided. He then left the room and waited until she indicated that she was ready for him to re-enter.
19. In contrast, Ms A stated:

“I do not accept that [Mr B] had fully informed me regarding the areas of the massage I was going to receive. He never mentioned my chest area; had he done so I would have made it clear that was NOT an area I wanted massage done [emphasis in original].”
20. Ms A also said that it is not true that Mr B asked her whether she was comfortable with her chest being uncovered or whether she preferred it to be covered by a towel.

Persons in house

21. Mr B stated that his wife was present in the house for the duration of the massage, and another family member was likely to have been present in their room downstairs, although he is unsure whether they were there or not.
22. With regard to whether there were other people present in the house at the time of the massage, Ms A stated that she distinctly remembers thinking how unprofessional it was for Mr B to leave the massage room just after the massage had started to go to answer the front door. She said that Mr B returned and explained that no one was at home, and he had arranged for a sale or exchange that he had expected to occur earlier.

Massage

23. Ms A stated that the massage while she lay on her front was “ok”, although there were a few times when she thought that Mr B’s hands were extremely close to her vagina, but he never touched it. She said that Mr B massaged her buttocks, without lowering her underpants, as he moved her underpants to the side to expose the buttock. She stated that when she was asked to turn onto her back, Mr B used the sheet that she was under as a drape to protect her privacy. She said that he massaged her legs and again got very close to her vagina but did not touch it, and he then moved to her arms and upper chest. She stated that Mr B moved the sheet so that he could massage her upper chest. Ms A stated:

“I had my eyes closed and felt as though the sheet was very close to exposing my nipples but couldn’t be sure. I was uncomfortable but trusted that [MR B] wouldn’t be exposing me. After he massaged both my arms, with no warning, [MR B] removed the sheet exposing my breasts and stomach and tucked [it] down the front of the top of my underwear and proceeded to massage my stomach and then massage my breasts including my nipples [capitalisation in original].”

24. Ms A stated that before moving towards her upper torso and head, Mr B again massaged her breasts, including her nipples. She said that she was frozen with disgust, fear, anxiety, and anger, but felt too exposed to speak up. She stated that she felt uneasy because she was aware that she was possibly alone with him in his house.
25. Mr B stated:

“Generally speaking, clients who come for relaxation massage do not want the Massage Therapist talking throughout the massage. They want to relax and some go to sleep, so I try to interrupt the relaxation process as little as possible. I check in with each client including as with [Ms A], at least 4–5 times during the session.”

26. Mr B said that Ms A confirmed that she was comfortable each time she was asked, including at the end, and gave him no cause to believe that she was not happy with the massage. In response to the provisional opinion, Ms A stated:

“[Mr B] asked me for feedback at the start of the massage regarding pressure applied and comfort with the booster under my ankles, at that point I was happy so I replied

positively. [Mr B] did not ask me for feedback on the massage once he got me to turn on my back, nor did he ask me at the end.”

Complaint and apology

27. Mr B left the room to wash up while Ms A dressed. Ms A stated that once she was dressed she felt less vulnerable, and when Mr B returned to the room she confronted him immediately. She said that she told him that she was not happy with him touching her breasts, and felt that it was very inappropriate. She said he replied that he had checked with her at the start of the massage and she had told him that she did not mind her body being massaged, and he felt that he had her permission to do so. Ms A stated that she told him that she did not give him permission to massage her breasts, and that if he had made it clear that he intended to do so, she would have told him no.
28. Ms A said that Mr B then challenged her and told her that she should have spoken up while he was doing it if she did not want it, and she responded that she had not expected him to do that, and when he did so she was in shock.
29. Mr B agreed that Ms A told him that she was not happy that he had massaged her chest, specifically her breasts, and that he should have made sure that it was what she had wanted. He said he told her that he did do so, and she disagreed.
30. Mr B later sent Ms A the following text message:

“I would like to sincerely apologise again for the misunderstanding tonight. Please understand I did not intend to upset you and it upsets me to think that I did, as I try very hard to please my clients. It’s difficult to make it right I guess but I hope you will give me the opportunity. I would like to offer your money back on the voucher, and/or another massage of any duration if you would like it, with better understanding of your wishes of course. Please let me know, or if there is anything else I can do. Kind regards, [Mr B].”

31. Ms A said that she did not reply to the text message.

Further information — Ms A

32. Ms A said that she has been left feeling very upset, angry, and violated. She stated that as a male massage therapist intending to touch a new female client’s breasts and nipples, Mr B should have been absolutely clear about his intentions and not let her assume that he was going to follow normal ethical practices. She stated that Mr B’s explanation was that he did not tell her that he intended to massage her breast area because he was trying to be discreet, and thought that mentioning breasts would have come across as “creepy” and may have caused offence. Ms A said that Mr B did not try to be discreet, and in her view he purposefully did not talk to her about breast work because he knew it would be creepy and inappropriate.

Further information — Mr B

33. Mr B subsequently reiterated to HDC that he described the proposed massage, including the chest and abs. He stated:

“In regard to the nipple area, these were not ‘targeted’ as such. I have never engaged in ‘nipple massage’. I do accept however, that I could have taken greater care to avoid contact whilst performing strokes to the chest area.”

34. Mr B said that his rationale for massaging Ms A’s chest area was to provide a more comprehensive full body massage and relaxation experience. He stated:

“My thinking was simply that if a client wanted the chest area massaged then they would ask to include it, if not, they would say no, as they do for any other part of the body.”

35. Mr B said that he is very attuned to the non-verbal cues from clients, and responds to them while massaging, checking in verbally as required. He stated that he did not observe any obvious non-verbal cues while he was carrying out Ms A’s massage. Mr B also told HDC that he may have misheard Ms A.

36. Mr B stated that he deeply regrets this incident and sincerely trusts that it can be put right. He said that he has made a number of changes to prevent a reoccurrence, including the following:

- He has changed the form he uses to a more detailed Relaxation Massage form.
- With reference to the tick boxes on the reverse of the form, he now verbally highlights with each client prior to their massage that they should advise him if they feel uncomfortable at any time.
- He has added wording to the Customer Intake form to the effect that if the chest or groin area is to be the subject of massage, it will be noted specifically and initialled by the client to indicate their agreement.
- He has added wording to the original confirmation and reminder emails, saying that clients who require sensitive therapeutic work may bring a chaperone if they wish.
- He uses a draping method that he was taught by NZCM during his training, to ensure that sensitive areas are wrapped in sheeting and secure from accidental touch or slipping.
- He no longer offers relaxation massage for the chest and abdominal area.
- He has asked a former NZCM tutor to be his mentor.

Response to provisional opinion

37. Ms A was given the opportunity to comment on the “information gathered during investigation”. Ms A’s comments have been incorporated into the report above.

38. Mr B was given the opportunity to comment on the provisional opinion. Mr B stated:

"I have read the opinion carefully and reluctantly have to agree that I have breached the Code of Health and Disability [Services] Consumers' Rights.

...

I have now learnt that, that creates the risk of miscommunication with the unfortunate and deeply regrettable situation that [Ms A] found herself in.

I in no way intended for [Ms A] to feel uncomfortable and had no intention of targeting any area of her body without her full and informed consent.

I must agree that due to errors on my part, [Ms A] was needlessly subjected to the trauma she described in her complaint. Due to the risk and actual misunderstanding as to the nature and processes involved in the massage, I failed to gain [Ms A's] informed consent. I deeply regret the situation that my error placed [Ms A] in and I have no hesitation in offering a full apology to her.

I realise that ... my reliance on my subjective assessment as to my clients understanding of what I am communicating is problematic and that largely as a result of that I made incorrect assumptions and inadvertently missed key matters that would have ensured that I had obtained full and informed consent both prior to and during the massage.

I have read your recommendations and welcome them as sensible suggestions that better enable myself as a practitioner to communicate matters clearly and effectively to clients in a way that makes certain that informed consent to what is to occur is properly communicated and obtained."

39. Mr B reiterated to HDC the changes he has made to his practice, which are outlined above.

Relevant standards

40. Massage New Zealand Standards of Practice state:

"All registered MNZ therapists abide by these standards as well as the Code of Ethics which is required to be displayed at all clinic spaces where a registered therapist works."

41. The Massage New Zealand Code of Practice states:

"Obtain clients' informed consent before commencing treatment

...

use appropriate draping to preserve the dignity and modesty of the client

...

inform client during session on what treatment will be provided and continue to monitor and update where required.”

42. The Massage New Zealand Code of Ethics states:

“— Provide draping and explanations sufficient to meet the client’s needs for comfort and privacy.

...

— Ensure informed client consent has been obtained prior to massage.

...

— Maintain open communication throughout the massage session ensuring ongoing informed client consent, explaining rationale for proposed Massage.

...

Practitioners will not:

— Engage in sexual conduct with a client.

— Be affiliated with, or employed by, any therapeutic massage business that utilises any form of sexual suggestiveness or explicit sexuality in its advertising or promotion of services, or in the actual practice of its services.”

Opinion: Mr B — breach

Introduction

43. On 2 May 2019, Ms A attended Mr B’s clinic in his home for a 90-minute relaxation “Full body massage”. Ms A stated that Mr B did not fully inform her regarding the areas of her body the massage would involve. She said that he never mentioned her chest area, and that had he done so, she would have made it clear that it was not an area she wanted to be massaged.

44. Mr B claimed that his standard practice once the client has completed the Client Intake Form is to ask whether there are any areas the client would not like to have massaged and then describe the massage. He said that he referred to the chest and abdomen/tummy, and that Ms A indicated that she wished to have those areas massaged. He stated that he asked whether she was comfortable with her chest uncovered or would prefer him to use a towel, and she said something like, “No, that’s fine.” Even if, as Mr B asserts, he referred to the chest, that is insufficient to inform his client of an intention to massage her breasts and nipples. In my view, a reasonable person in Ms A’s position would expect to be

informed explicitly that the intention was to massage her breasts, as reference to the chest could be taken to refer to the upper chest area.

45. My expert advisor, massage therapist Mr Barry Vautier, stated that it is not clear on the Client Intake Form whether consent has been given for specific body areas to be massaged. Mr Vautier notes that Mr B seems to have assumed that as Ms A consented to a full body relaxation massage, that included consent to massage of her abdomen and breasts. I agree with Mr Vautier's advice that "[t]his lack of informed consent would be regarded by peers as a breach of ethical standards and a lapse in good practice".

Communication during massage

46. Ms A stated that the massage of her back and legs while she lay on her front was "ok". She said that when she turned over onto her back, Mr B massaged her legs and then moved to her arms and upper chest. In order to massage her upper chest, he moved the sheet down and then after having massaged both arms, with no warning he removed the sheet exposing her breasts and stomach, and tucked the top of the sheet into the top of her underwear and proceeded to massage her stomach, breasts, and nipples.

47. Mr B stated:

"Generally speaking, clients who come for relaxation massage do not want the Massage Therapist talking throughout the massage. They want to relax and some go to sleep, so I try to interrupt the relaxation process as little as possible. I check in with each client including as with [Ms A], at least 4–5 times during the session."

48. Mr B claimed that Ms A gave no indication that she was uncomfortable during the massage. In response to the provisional opinion, Ms A stated that Mr B did not ask her for feedback during the massage once she had turned onto her back, nor did he ask her at the end.

49. Mr Vautier advised that from the evidence of both parties, during the massage Mr B failed to confer adequately about what he intended to do. Mr Vautier noted that there appeared to be no informed consent or warning that Mr B was going to massage the vulnerable area of the breasts. Mr Vautier also noted that massaging the stomach is an area of sensitivity for many people, and great care needs to be taken to obtain informed consent and get adequate feedback during the application of the strokes. He stated:

"Although [Mr B] claims that having a relaxation massage might infer less communication, it's still vitally important to confer when changing depth, location and style of stroke to establish client comfort and safety. It seems he failed to do this adequately."

50. Mr B told HDC that he may have misunderstood Ms A.

Standard of massage

51. Both parties agree that Mr B massaged Ms A's breasts and, at least, touched her nipples. Ms A stated that after pulling down the sheet and exposing her stomach and breasts, Mr B massaged her stomach and then her breasts, including her nipples. She said that before moving towards her upper torso and head, Mr B again massaged her breasts, including her nipples. She said that she was frozen with disgust, fear, anxiety, and anger, but felt too exposed to speak up.
52. Mr B said that the nipple area was not "targeted" but he accepted that he could have taken greater care to avoid contact whilst performing strokes to the chest area. He stated that the rationale for massaging the chest area was to provide a more comprehensive "full body massage" and relaxation experience. He said that if the client did not want the chest area to be massaged, they would say no. He stated that he now understands that "unintentional brushing of the nipples" during a massage session left Ms A feeling vulnerable, and he apologised for this.
53. Mr Vautier advised:

"Whether consent is given or not, the nipples would not be considered a massage site by [Mr B's] peers and would be viewed as a serious breach of the MNZ Code of Ethics."

54. Mr Vautier said that nipples should never be massaged, as these are considered erogenous zones and sexual in nature. He also stated that fully exposing a female's breasts and abdomen without her consent would be considered unacceptable behaviour by Mr B's peers.

Conclusion

55. Mr B failed to communicate adequately with Ms A prior to the massage. He did not specifically mention his intention to massage her breasts and abdomen. A client cannot give consent without first being adequately informed as to the proposed massage sites. It is not sufficient to assume that a client has given informed consent because the client does not object to specific actions. Mr B failed to inform Ms A adequately and, accordingly, breached Right 6(1) of the Code. It follows that Ms A was not able to give informed consent and, accordingly, Mr B also breached Right 7(1) of the Code.
56. Mr B's massage of Ms A did not meet accepted standards. It was inappropriate to massage her breasts and nipples, and unacceptable to expose her breasts and abdomen without warning her that this was his intention and obtaining her prior consent. Mr B also failed to communicate adequately throughout the massage. Accordingly, Mr B did not meet professional and ethical standards and breached Right 4(2) of the Code.

Other comment — premises

57. Mr B operates his clinic from his home. He stated that his wife was present in the house for the duration of the massage, and possibly another family member was also present. In contrast, Ms A stated that Mr B left the massage room just after the massage began, to

answer the front door. She said that when he returned, he explained that no one was at home to answer the door, and he had to excuse himself from the massage to do so. She said that from that point on she was aware that she was at the address alone.

58. Mr Vautier advised that the MNZ Code of Ethics is not specific about informing a client whether another person is present in the building or property. He stated:

“As an act of professionalism this would fall under the concept of politeness and be considered situational. Given the nature of [Mr B’s] practice being in a private home it may be considered professional to inform the client whether other people are in the building, where they are and whether the client has consented to this. The client’s sense of safety is paramount.”

59. I agree. Given that the nature of massage involves the client being placed in a vulnerable situation, including frequently removing their clothing, if the client is to be alone in the property with the massage therapist, the client should be advised of that before removing any clothing, and preferably before attending the appointment. If the client agrees to continue with the massage in such circumstances and the massage therapist is aware that he may need to answer the door or interrupt the massage in any way, the client should be informed of this possibility prior to the massage commencing.

Recommendations

60. I recommend that Mr B provide Ms A with a written apology for his breaches of the Code. The apology is to be sent to HDC within three weeks of the date of issue of this report, for forwarding.
61. I recommend that for a period of 18 months from the date of this report, Mr B receive mentoring from a member of Massage New Zealand, and that the mentor report to Massage New Zealand on the content and outcomes from the mentoring.
62. I recommend that within three months of the date of this report, Mr B arrange for his mentor to review his documentation practices, including the Intake Form, and provide a report to HDC on the outcome of the review.
63. I recommend that within three months of the date of this report, Mr B arrange for a member of Massage New Zealand to provide observational supervision and mentoring relating to informed consent throughout a massage, including a relaxation massage, with the consent of the client.
64. I recommend that within three months of the date of this report, Mr B review his draping principles and procedures with a mentor from Massage New Zealand, and report back to HDC on the outcome of the review.

65. I recommend that within three months of the date of this report, Mr B:
 - a) Arrange training in effective communication and language skills.
 - b) Obtain further training on massage of sensitive and/or erogenous zones.
 - c) Develop a process for informing clients whether or not other people are in the building, and provide that process to clients prior to massages taking place.
 66. I recommend that Massage New Zealand consider a requirement that supervision and monitoring of all professional members take place as a condition of ongoing membership, including regular refresher training of informed consent for members.
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Follow-up actions

67. Mr B will be referred to the Director of Proceedings in accordance with section 45(2)(f) of the Health and Disability Commissioner Act 1994 for the purpose of deciding whether any proceedings should be taken.
 68. A copy of this report with details identifying the parties removed, except the expert who advised on this case, will be sent to Massage New Zealand, and it will be advised of Mr B's name in covering correspondence.
 69. A copy of this report with details identifying the parties removed, except the expert who advised on this case, will be placed on the Health and Disability Commissioner website, www.hdc.org.nz, for educational purposes.
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Addendum

70. Following negotiations with the provider, the Director of Proceedings decided to issue proceedings in the Human Rights Review Tribunal by consent. The Tribunal issued a declaration that Mr B breached Rights 4(2), 6(1) and 7(1) of the Code in respect of his care of Ms A.

Appendix A: Independent advice to the Commissioner

The following expert advice was obtained from Mr Barry Vautier:

“10th November 2019

...

Advice for the Health & Disability Commissioner

Complaint: [Mr B]

HDC reference: C19HDC00788

...

I have compiled the following advice on professional standards and/or accepted practices in relation to whether the care provided to [Ms A] by [Mr B] was reasonable in the circumstances.

I have drawn on the standards of the massage industry in New Zealand. These standards are set out in the New Zealand Qualifications Authority (NZQA) for certificate, diploma and degree levels of training, and in massage schools training documentation.

The massage scope of practice at the certificate/diploma level of training is the application of relaxation massage to healthy individuals. Practitioners are not expected to treat soft tissue dysfunction and pathologies. [Mr B holds qualifications from the New Zealand College of Massage and is a registered massage therapist with Massage New Zealand.]

The scope of practice of the degree level of training is for practitioners to assess and treat soft tissue dysfunction within their specific scope of practice.

As requested I have commented on the following questions.

1. Whether the massage as described by [Ms A] was within acceptable standards.
2. Whether the massage of the breasts and nipples is an acceptable part of a full body massage.
3. Whether it is usual practice for a massage therapist to get specific consent in advance to touch a female client's breasts and nipples.
4. Whether the process for covering [Ms A] was within acceptable practice.
5. Whether a massage therapist should inform the client whether there are other people in the property at the time of the massage.
6. Any other matters in this case that I consider warrant comment.

For each question above I have given advice on:

- a. What is the standard of care/accepted practice?

- b. If there has been a departure from the standard of care or accepted practice, and how significant a departure do I consider this to be?
- c. How would it be viewed by your peers?
- d. Recommendations for improvements that may prevent a similar occurrence in future.

For each of these considerations I have drawn on the following five areas of industry standards of practice along with the Massage New Zealand (MNZ) *code of ethics and standards of practice*.

(see attached appendix)

- i. Initial assessment and history taking for new and returning clients.
- ii. Information and consent processes adopted for new and returning clients.
- iii. Draping of clients.
- iv. Documentation of treatment sessions.
- v. Other points for consideration

Comment:

Q.1. Was the massage as described by [Ms A] within acceptable standards?

i. Initial assessment and history taking for new clients.

- a. Standard of care/accepted practice.

There is some written evidence as provided by [Mr B] and [Ms A] that he:

- Gathered information (record take and intake forms) and screened the client for suitability for treatment.
- Obtained treatment goals in conjunction with the client.
- Checked for any existing medical conditions/injuries/current medical treatment/medication.
- Checked for any previous or current treatment/diagnosis.
- Established client's current medication and determined safety for treatment.
- Checked for contraindications and thus modifications to safely perform the treatment.

It's not clear if [Mr B]:

- Established with the client body areas not to be touched. (This seems to be the main area of disagreement between the two parties.)
- Explained his scope of practice and clarified the expectations of the treatment.
- Assessed for any loss of movement/function.

- Considered the severity and duration of any condition — Are there any effects of these now that need to be considered for the treatment.
- Checked any other previous treatment obtained in particular related to this condition.

b. Departure from care is that it's not clear on the intake form [Mr B] uses about consent for body areas to be massaged or not. There may have been verbal consent and instructions given but these are not recorded. This is a contentious issue as there is a difference of opinion as to whether adequate verbal consent was established for body areas that were not to be touched. [Mr B] seemed to assume that as she had consented to a full body relaxation massage that it would include massage of the abdomen and breasts. The big departure from care is this assumption and lack of informed consent with his client by clarifying what she wanted massaged or not.

c. This lack of informed consent would be regarded by peers as a breach of ethical standards and a lapse in good practice.

d. **Recommendation.** That [Mr B] receives mentoring from a member of Massage New Zealand around clearly recording on his intake form what areas should be massaged or not, even if the massage is a 'relaxation massage'.

ii. Information and consent processes adopted for clients.

a. Standard of care/accepted practice.

There is some evidence that [Mr B]:

- Clearly introduced himself.
- Explained clearly to the client the cost and duration of the treatment, this scope of practice when booking the client and prior to the massage once goals were set.
- Explained to [Ms A] the protocol around the practitioner leaving the room for the client to undress.
- Explained to [Ms A] about the protocol of leaving her to get dressed in privacy, and knocking on the door before re-entering the treatment room.

It's not clear if [Mr B]:

- Established client based goals for this session including areas to be treated, pressure, duration, based on the location of soft tissue pain or discomfort.
- Conferred with client around the type of treatment they want and sets a goal for the treatment including areas to be treated; depth, speed, duration and possible outcome.
- Explained to the client what to expect from the treatment. (There are differing views on this from each party.)

- Whether he gave clear instructions as to what clothing to remove as necessary for the treatment. Whether he got informed consent from the client about clothing removal.
- Whether [Ms A] was advised to leave her underwear ON ('knickers', briefs, underpants, jock straps). (The reason for this is to ensure a client's dignity, provide a foundation to tuck draping into, and to help protect the client and practitioner against possible allegations of sexual misconduct. 'Bra's' may be removed/unfastened with the client's consent. It seems she did have 'briefs' on as he tucked draping into her underwear as stated by both parties.
- During the treatment whether she was consulted around pressure for any changes of stroke, depth, speed or location on the body to ensure their safety and treatment needs are met. The practitioner should establish a feedback system where the client is in control over the pressure, speed and type of treatment given. Regularly conferring with the client during the treatment around depth (pressure), speed, and comfort gives confidence and a sense of safety for the client. Explanations should be given to the client about what to expect next in the treatment, as the practitioner moves from one area of the body to another. The client should be made aware of what strokes are being performed and why. Explanations should be given to the client if there is a variation to the goals of the treatment and obtaining consent to vary them. For example extending the treatment beyond or shorter than the agreed time.

b. Departure from care was of a serious nature in the area of information and consent. Apart from the above misunderstanding about gaining informed consent, [Mr B] failed, from the evidence supplied by both parties, to confer adequately during the massage with [Ms A] about what he intended to do. She stated in her evidence that *'After he massaged both my arms, with no warning, [Mr B] removed the sheet exposing my breasts and stomach ... and proceeded to massage my stomach and then my breasts including my nipples.'* She went on to say she *'... felt extremely vulnerable and sick to my stomach'*. And that she was *'... frozen with disgust/fear/anxiety/anger but was too exposed to speak up'*.

This is a serious departure from standard practice for several reasons:

- There appears to have been no informed consent and warning that he was going to massage this vulnerable area of the breasts.
- Massage of the breasts is unusual to give to a client for a full body massage especially for a male treating a female and especially without consent.
- Massage of the nipples in particular would be considered by the therapeutic massage industry as engaging in sexual misconduct with a client and is considered like the genitals a no-touch area of the body.
- Massaging the stomach is also an area of sensitivity for many people and great care needs to be taken to obtain informed consent and get adequate feedback during the application of strokes.

- [Mr B] seems to have failed to maintain open communication throughout the massage and ensure ongoing informed consent. This is a stated requirement and breach of the MNZ code of ethics.
 - [Mr B] also failed to explain rationale for massaging the breasts which also contravenes the MNZ code of ethics.
 - Although he claims that having a relaxation massage might infer less communication, it's still vitally important to confer when changing depth, location and style of stroke to establish client comfort and safety. It seems he failed to do this adequately.
- c. The above informed consent failures would be seen as a major departure of care by peers in the therapeutic massage industry.
- d. **Recommendation:** That [Mr B] gets mentoring and supervision with a mentor from MNZ and maybe receives counselling for his disrespect for the profession and clients.

iii. Draping of clients.

- a. Standard of care/accepted practice.

It's not clear if [Mr B]:

- Gave clear instructions about positioning, cushioning and meeting the client's needs for privacy and comfort in prone, supine or side lying.
 - Gave clear explanations and instructions about draping to ensure that private areas of the body were securely covered for their dignity.
 - Whether [Ms A's] comfort was considered with bolsters/pillows as necessary.
 - If repositioning (e.g. from prone to supine) the client was done with clear instructions on safety, with guidance during the maneuver, and adhering to draping considerations such that the client's unclothed body parts (eg chest) were not exposed to the practitioner.
- b. Departure from care was of concern when draping [Ms A] as [Mr B] exposed her breasts and stomach without consent. Usually breasts are not massaged, however underlying the breasts are the pectoral muscles which are frequently addressed by massage therapists. This requires secure draping and typically only the upper pectoral muscles are massaged. Again informed consent would have addressed this issue if [Mr B] was intending to massage these muscles.

Draping should be done with client dignity and privacy and should adhere to the following four main principles:

- 1) Provide warmth to the client
- 2) Provide dignity to the client
- 3) Define the area being massaged. (The rest of the body should be covered.)

4) Treatment should not be performed under draping or clothing.

c. This lack of draping principles is in breach of MNZ code of ethics and standards of practice.

d. **Recommendation:** That [Mr B] reviews draping practices with a mentor from MNZ.

iv. Documentation of treatment sessions.

a. Standard of care/accepted practice.

According to the intake form [Mr B] seemed to:

- Cover previous and existing medical conditions/injuries
- Establish what medication if any the client is currently taking to assess safety of treatment in order to apply modifications or establish contraindications to the treatment.
- Record strokes/techniques applied.
- Areas (muscles) of the client's body treated
- Client's body reactions and feedback of the treatment.

It's not clear from the intake form if [Mr B]:

- Established clear treatment goals with the client even if it were for a relaxation massage.
- Covered any presenting loss of movement/function.
- Noted palpation findings both before and at the end of the treatment.
- Considered previous or current treatment/diagnosis.
- Adequately covered any contraindications to the treatment and/or modifications to safely perform the treatment. A historical prolapse disc at S1–L5 was noted but it's not recorded when this occurred and if there were any modifications required for the massage. He noted the '*client reported a sore back post massage and suggested it was from lying flat*'. Which also may have been a product of [Ms A] having the historical prolapsed disc.

b. Departure from care in this area was not clearly documenting client body areas not to be touched/massaged, and documenting possible contraindications from a previous lower back injury of a slipped disc.

c. This lack of documentation principles is in breach of MNZ code of ethics and standards of practice and thus looked on unfavorably by his peers.

d. **Recommendation:** That [Mr B] reviews documentation practices with a mentor from MNZ. He claims to have changed his intake form but this needs verification by a massage peer or mentor.

v. Other points for consideration:

a. Standard of care/accepted practice.

It's unknown if [Mr B] demonstrated the following:

- Professional presentation: Self hygiene principles apply. Clothing should be appropriate. Clean short fingernails. Body odours and breath unobtrusive.

Also in question is [Mr B's] ability to:

- Be effective with communication and language skills.
- Apply language supportive to the client and the profession including:
 - Clear verbal instructions throughout the treatment.
 - Check that a client understands the instructions.
 - Check for client comfort throughout the treatment.
 - Respond to the client's verbal and non-verbal feedback — Considering changes of skin temperature, colour, body tension, relaxation, body movements, breathing patterns, facial responses, and general body language.

[Mr B] is a member of Massage New Zealand and thus belongs to a professional massage association.

It's unknown if he:

- Displays a Code of Ethics at his clinic based on the profession he belongs to as required by MNZ.
- Has a complaints procedure displayed in a visible place and pointed out to clients.
- Has a referral network for sending clients on to who are outside their scope of practice.
- Considers professional environmental practices: Including adequate temperature, ventilation, lighting, safe and hygienic equipment — massage table, bolsters, pillows, creams/waxes/oils.

b. Of concern with [Mr B's] departure from care was his inability to respond to the client's verbal and non-verbal feedback. He seemed unaware of her shock of having her breasts, nipples and abdomen exposed and massaged, and may be missing non-verbal cues from his clients.

c. His peers would find this behaviour unacceptable.

d. **Recommendation:** That [Mr B] gets some training in effective communication and language skills. This could potentially be with a mentor from MNZ or preferably with a counselling professional in his community.

Q.2. Was the massage of the breasts and nipples an acceptable part of a full body massage?

a. The standard of care in the MNZ code of ethics is not specific around massaging breasts as a part of a full body massage. Some clients may be comfortable with having their breasts massaged especially if there is some clear clinical reason such as breast tenderness or for lymphatic drainage. Men are usually comfortable with having their chests (breasts) exposed and massaged. Whatever the gender, specific informed consent should be obtained prior to massaging the breasts. It's important to confer with the client during a breast massage to ensure client comfort and dignity. The only other reason to massage the chest area is to address specific muscles underlying the breasts such as pectoralis major. This can be performed with good draping so as not to expose the breasts.

The nipples are generally considered an erogenous zone and like the genitals should not be massaged. This applies to all genders.

b. In the case of [Mr B] massaging [Ms A's] breasts and nipples there is a serious breach of care and accepted practice because of a lack in clearly obtaining informed consent prior to the massage and conferring with the client during the massage. There is difference of opinion between the two parties as to whether [Ms A] had given consent to massage her breasts and abdomen.

c. Whether consent is given or not, the nipples would not be considered a massage site by his peers and would be viewed as a serious breach of the MNZ code of ethics.

d. **Recommendation:** That [Mr B] does not consider massaging a person's breasts without clear prior consent (which is also documented). If he is to massage the chest area he should confer clearly with his clients during the massage to ensure comfort and safety. I recommend [Mr B] gets additional mentoring. He should never massage nipples as these are considered erogenous zones and sexual in nature.

Q.3. Is it usual practice for a massage therapist to get specific consent in advance to touch a female client's breasts and nipples?

As per previous discussion it is considered usual practice for a massage therapist to get specific prior informed consent to touch breasts whether this is during the interview process or if it arises in the course of the massage session as a change of intended plan.

Q.4. Was the process for covering [Ms A] an acceptable practice.

a. As discussed in draping principles above at Q.1. iii., the standard of practice is clear around draping.

b. The draping as applied to covering [Ms A] for massaging breasts and abdomen was unacceptable according to the evidence given by [Ms A]. Good draping principles would mean tucking the draping around a client's trunk when massaging the upper

chest area and only exposing the upper chest and not the nipples when required to massage the upper pectoral muscles. The stomach would normally be covered at this point. If the stomach is massaged the breasts should be covered and the draping tucked either under the client's arms or under both the arms and trunk, and only the abdominal area exposed for massage. The exception to this is with men who by consent may be comfortable with exposing both the abdominal and chest area simultaneously. Some females may be comfortable with exposing both areas of the breasts and abdomen at the same time but this requires very clear consent and is generally not advisable for a male treating a female due to the possibility of sexual connotations.

c. Fully exposing a female's breasts and abdomen without clear consent would be considered unacceptable behaviour by [Mr B's] peers.

d. **Recommendation:** That [Mr B] gets additional mentoring with a MNZ mentor around draping principles and procedures.

Q.5. Whether a massage therapist should inform the client whether there are other people in the property at the time of the massage.

a. Standard of care/accepted practice in the MNZ code of ethics is not specific about informing a client as to whether another person is in the same building or property. As an act of professionalism this would fall under the concept of politeness and be considered situational. Given the nature of [Mr B's] practice being in a private home it may be considered professional to inform the client whether other people are in the building, where they are and whether the client has consented to this. The client's sense of safety is paramount.

d. **Recommendation:** [Mr B] would be advised to let clients know if other people are in the building. If he is alone and needs to answer the door the client should be informed of this possibility prior to the massage.

Q.6. Any other matters in this case that I consider warrant comment.

[Mr B] states '*I absolutely reject the accusation that I have behaved unprofessionally in any way*' but has also stated that he failed his client by virtue of apologizing to her for his lapses. The statements of complaints by [Ms A] are compelling and point to a major oversight of clear communication and care of her. There is also a disconnect in awareness in that he believes he gave her a great massage which [Ms A] strongly refutes. There seems to be an element of denial that he has failed his client, and that is of great concern. True remorse seems to be lacking.

To his credit [Mr B] seems to have implemented some changes to his practice as a result of this event which indicates he has responded to the need for professional development. In general [Mr B] has many professional standards in place for his practice by having an intake form, interviewing his clients and meeting most standards of practice and care for his clients. It would seem he made incorrect assumptions and

thus missed some key elements of obtaining informed consent both prior and during the massage. The concern is not just for [Ms A's] experience but also with other clients. Thus I make the following recommendations requiring attention.

Summary of recommendations.

That [Mr B]:

- Receives mentoring from a member of Massage New Zealand around clearly recording on his intake form what areas should be massaged or not, even if the massage is a 'relaxation massage'.
- Reviews documentation practices with a mentor from MNZ. He claims to have changed his intake form but this needs verification by a massage peer or mentor.
- Receives observational supervision and mentoring from a member of Massage New Zealand around the need for informed consent throughout a massage even if it is a 'relaxation massage'.
- Reviews draping principles and procedures with a mentor from MNZ.
- Gets some training in effective communication and language skills. This could potentially be with a mentor from MNZ or with a counselling professional in his community. And maybe receives counselling for his disrespect for the profession and clients.
- Does not consider massaging a person's breasts without clear prior consent (which is also documented) and that he gets additional mentoring with a MNZ mentor. He should never massage nipples as these are considered erogenous zones and sexual in nature.
- Be advised to let clients know if other people are in the building. If he is alone and needs to answer the door the client should be informed of this possibility prior to the massage.

Other recommendations:

- Massage New Zealand executive and massage training establishments in New Zealand be informed of this breach of the MNZ code of ethics so that increased emphasis can be put on informed consent training.
- Massage New Zealand may consider some sort of censure of [Mr B] for breaching their code of ethics.
- Massage New Zealand should seriously consider obligatory supervision and mentoring of all professional members as a condition of ongoing membership. This currently happens voluntarily and randomly. MNZ has list of current volunteer mentors.

Yours sincerely

Barry Vautier"

The following further expert advice was obtained from Mr Vautier:

“In response to your email dated 13th December 2019

My advice on whether [Mr B’s] letter dated 11th December 2019, has changed my advice in any way ...

My advice was to cover all bases of the expectations and professional guidelines of a practising massage therapist in New Zealand. Some of the advice was of a general nature of the standards of practice. The main focus was on the complainant’s claimed view on what happened with regard to massaging her breasts and nipples.

My original advice is unchanged and I have presented a fair summary of recommendations for [Mr B].

...

I accept how upsetting it is for [Mr B] to have a complaint of this nature. I appreciate and commend the lengths he seems to have made to improve his practice and obtain mentoring and advice with an experienced member of Massage New Zealand.

Although he has stated in writing he has made these changes and sought advice, HDC may want to see evidence of this in their consideration of mitigation and expression of remorse by [Mr B] ... and evidence from his mentor of what has been discussed and when.

It would be a shame for [Mr B] to lose his practice over this incident and the advice I have given is intended for him to be mindful of the possible misunderstandings that may arise from massaging women’s breasts. He has stated in writing that he is not massaging woman’s breasts anymore.

This case illustrates the great importance of informed consent when providing a health service like massage. [Mr B] seems to have fallen short in this instance. The complainant [Ms A] may consider an apology in person as [Mr B] has indicated he is happy to do this with a mediator.

Yours sincerely

Barry Vautier”