

Podiatrist, Mr B

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

(Case 19HDC01659)



Health and Disability Commissioner
Te Tuhou Hauora, Hauātanga

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Executive summary

1. In 2019, a woman consulted a podiatrist for advice and treatment about a bunion deformity on her left foot. At the time of events, the podiatrist had restrictions on his practice that allowed him to perform podiatric surgery only under the supervision of a podiatric or orthopaedic surgeon, and required him to provide the Podiatrists Board of New Zealand with monthly reports of the surgery he performed.
2. In July 2019, the podiatrist performed a bunionectomy on the woman at his clinic, and this was unsupervised. The podiatrist provided the Podiatrists Board with an unsigned agreement of treatment that referred to the need for a supervisor to be present. However, the agreement of treatment form signed by the woman on the day of surgery excluded the reference to the requirement for supervision. In July 2019, the podiatrist submitted his monthly report to the Podiatrists Board, but this did not include the woman's surgery.
3. In this report, the Deputy Commissioner emphasises that maintenance of the safe practice of podiatrists within their scope of practice and professional standards is integral to consumers' trust and confidence in their health provider.

Findings

4. The Deputy Commissioner considered that by performing surgery without supervision, and by failing to report the surgery to the Podiatrists Board when these were both requirements of the conditions of his practice, the podiatrist failed to comply with the HPCAA, the Podiatry Standards, and the Ethical Code, and to demonstrate ethical behaviour. Accordingly, the Deputy Commissioner found that the podiatrist breached Right 4(2) of the Code.
5. The Deputy Commissioner was critical that the agreement of treatment form signed by the woman did not reference the podiatrist's supervision requirements.

Recommendations

6. The Deputy Commissioner recommended that the Podiatrists Board of New Zealand consider this complaint and whether further action is warranted.
7. The podiatrist was referred to the Director of Proceedings.

Complaint and investigation

8. The Health and Disability Commissioner (HDC) received a complaint from Mrs A about the services provided by a podiatrist, Mr B, at a podiatry clinic. The following issue was identified for investigation:
 - *Whether Mr B provided Mrs A with an appropriate standard of care in 2019.*

9. This report is the opinion of Deputy Commissioner Rose Wall, and is made in accordance with the power delegated to her by the Commissioner.

10. The parties directly involved in the investigation were:

Mrs A	Consumer/complainant
Mr B	Provider/podiatrist

11. Further information was received from:

Podiatrists Board of New Zealand	
Mr C	Supervisor/podiatrist

Information gathered during investigation

Background

12. This report discusses Mr B's compliance with the professional and ethical standards set by the Podiatrists Board of New Zealand when he provided services to Mrs A in 2019.

Mrs A

13. Mrs A, aged in her seventies, had a long history of pain from a bunion deformity on her left foot. In 2019, Mrs A developed considerable pain from the bunion and consulted podiatrist Mr B for advice and treatment.

Mr B

14. Mr B is the sole director of a clinic that provides podiatric services. Mr B registered with the Podiatrists Board of New Zealand (the Podiatrists Board) in 1996, and his scopes of practice are listed as "podiatrist" and "podiatric surgeon".

Conditions on practice

15. On 1 December 2017,¹ the Podiatrists Board issued Mr B with interim conditions on the scope of his practice of podiatric surgery, pursuant to section 69(2)(b) of the Health Practitioners Competence Assurance Act 2003 (the HPCAA). The conditions on the scope of his practice were in effect until 31 March 2020, and these included:

"(A) You are only permitted to perform podiatric surgery falling within the podiatric surgeon scope of practice under the supervision of:

- (i) A podiatrist registered in the podiatric surgeon scope of practice and holding a practising certificate in that scope; or
- (ii) An orthopaedic surgeon holding a current practising certificate; and

¹ Updated on 3 April 2019.

(B) You are to provide the Board with monthly reports listing each surgery undertaken within the Podiatric Surgeon Scope of practice, the supervisor present, and the anaesthetic administered (and where it was obtained from and who it was administered by)."

16. The Podiatrists Board's supervised practice plan was commenced on 7 December 2018, and records the supervision arrangements for Mr B by supervisor Mr C. The plan sets out the following for the supervisor's role and involvement when treatment is proposed:
- a) For initial consultations, Mr C is to attend either in person or via a live Skype session for any patient for whom surgery is recommended, before surgery is booked.
 - b) With regard to preoperative consultation: "The supervisor is to be physically present at a pre-operative consultation on the day of the surgery. If the supervisor has only attended the initial consultation by way of audio-visual link, the pre-operative consultation is to involve confirmation that the proposed surgery is appropriate and that informed consent has been obtained."
 - c) In surgery: "The supervisor is to be physically present while [Mr B] is operating on the patient."

First consultation — 18 February 2019

17. Mrs A first consulted Mr B on 18 February 2019. The clinical notes from this consultation document that Mrs A had had a bunion deformity on her left foot for over 15–20 years and had been experiencing pain from the bunion for several weeks. Mr B assessed Mrs A and noted that she presented with a sharp pain that was 8/10 on the pain scale. Mr B diagnosed Mrs A with a mild bunion deformity at the left big toe joint. It was recorded in the clinical notes that treatment options were discussed to "realign the left foot's big toe and remove any offending portion of tissue". Mr B advised HDC that he was aware that Mrs A had had a recent fracture of her wrist, and for this reason she did not wish to proceed with surgery at that time. Mr B recorded that he advised Mrs A to contact him if she wanted to proceed with treatment or to discuss the treatment options, and that he would be happy for her husband to attend, and "requested that the treatment be undertaken with the presence of [Mr C] under the conditions of [Mr B's Annual Practising Certificate]". It was recorded that Mrs A understood this request.

Booking for surgery

18. Mr B told HDC that Mrs A telephoned the clinic on 12 June 2019 to advise that she wished to proceed with the surgical treatment discussed at the initial consultation for her left toe. Mr B stated that he then telephoned Mrs A to discuss the surgery, and a booking for a preoperative appointment and a tentative date for surgery were made. Mr B said that he explained again to Mrs A "the requirement for a supervisor to be present for a further consultation and the surgery, as per the conditions of [his Annual Practising Certificate]".

Second consultation — 17 June 2019

19. Mrs A's next consultation with Mr B was on 17 June 2019. The clinical notes from this consultation document that Mr B's supervisor, Mr C, attended the consultation via Skype. Mr B recorded that the same findings from the initial consultation were made, and that explanations and postoperative expectations were discussed in full with Mrs A, and that Mr C agreed with the proposed treatment. A further X-ray was taken, and this reconfirmed the presence of a mild HAV² at the left 1st MPJ.³ Mr B recorded the treatment plan to perform a distal metaphyseal osteotomy⁴ (an Austin bunionectomy)⁵ utilising internal fixation, aimed at resolving the deformity. It was recorded that Mr C agreed with the indications of the treatment. Mr B told the Podiatrists Board that during this consultation, a surgery date of 1 July 2019 was confirmed with Mrs A and Mr C.
20. Mr B told HDC that arrangements had been made in advance for his supervisor, Mr C, to attend, and that Mrs A was notified of the requirement that a supervisor attend, and agreed to this. In contrast, Mrs A told the Podiatrists Board: "[Mr B] never told me he had to be supervised to operate. He asked if I minded having someone to observe the operation."
21. Mr C told HDC that it was Mr B's usual practice to inform patients during an initial consultation that because of the Podiatrists Board requirements, he was under supervision, and that supervision was necessary. With regard to the consultation on 17 June 2019, Mr C told HDC that although he cannot recall whether Mr B specifically explained to Mrs A his requirements for supervision, he would have checked that Mr B conveyed this information to Mrs A during the consultation.
22. Mr C told the Podiatrists Board that on the Friday prior to 1 July 2019, he telephoned Mr B to advise that he would not be available to supervise Mrs A's surgery on 1 July 2019 owing to health reasons.
23. Mr B told HDC:

"[R]ather than tell [Mrs A] that I could not complete the surgery unsupervised, I made the ill-conceived decision to proceed in [Mr C's] absence. I did this because I did not want to inconvenience [Mrs A] by requiring her to return on another day when the supervisor was available."

Surgery — 1 July 2019

24. On 1 July 2019, Mrs A signed an agreement and conditions of treatment form detailing the procedure, information provided about the procedure, and consent for treatment for toe/foot/ankle problems. The form does not state that Mr B required supervision when performing surgical procedures. Mr B provided the Podiatrists Board with another version

² Bunion.

³ Metatarsophalangeal joint (the link between the toe bones).

⁴ A technique for bunion correction and other toe deformities.

⁵ A procedure to correct a bunion deformity.

of the agreement, which states that Mr C had to be present in accordance with the requirements of his Annual Practising Certificate (APC). This form was not signed by Mrs A.

25. Mrs A stated that when she arrived for the procedure, she was told that Mr C would not be attending. Mrs A told HDC that she would not have proceeded with the surgery had Mr B told her that he was required to have a supervisor present when performing surgery.
26. Mrs A underwent an Austin bunionectomy and Aiken osteotomy⁶ on the left big toe, performed by Mr B.
27. Mr B stated that Mrs A tolerated the procedure well, the surgery was a success, and the pain and irritation in her left bunion resolved.

Further consultations

28. Mrs A consulted Mr B for follow-up appointments in July, August, and September 2019. On 13 August 2019, Mrs A reported to Mr B that she was experiencing pain and irritation in her left foot. Mr B arranged an X-ray on 3 September 2019. He stated that the X-ray did not reveal any bony abnormalities that could have been contributing to her pain. Mr B told HDC that he reassessed Mrs A's pain with a thorough examination, and provided clinical advice.
29. On 19 September 2019, Mr B referred Mrs A for an MRI owing to her ongoing pain. The MRI showed an "acute subchondral fracture⁷ involving the intermediate cuneiform [bone] at the left foot's cuneonavicular joint" as a possible cause of Mrs A's symptoms. Mr B told HDC that the surgical procedure he performed on Mrs A in July 2019 did not involve the area where Mrs A's fracture developed.

Information from the Podiatrists Board

30. Mr C told the Podiatrists Board:

"I did enquire with [Mr B] later in [July 2019] as to what happened with [Mrs A]. I think from memory he said that she had changed her mind. I certainly had NO indication from [Mr B] that he had operated on [Mrs A] without supervision."

31. The Podiatrists Board told HDC that Mr B's monthly report to the Board for July 2019 did not include Mrs A's surgery, and Mr B confirmed this to HDC.

Reduction in level of supervision

32. The Podiatrists Board provided HDC with copies of its correspondence to Mr B in relation to his required supervision and Mrs A's complaint. On 28 June 2019, the Podiatrists Board wrote to Mr B advising that it had decided to reduce the level of supervision required for lesser digital surgical procedures,⁸ nail surgeries, avulsions,⁹ and Winograd procedures.¹⁰

⁶ A procedure to correct a bunion deformity.

⁷ A type of stress fracture that occurs below the cartilage on the weight-bearing surface of a bone.

⁸ In relation to bony or soft tissues on the 2nd, 3rd, 4th, and 5th toes.

⁹ Caused when a joint capsule, ligament, tendon, or muscle is pulled from the bone.

It further advised that the highest level of supervision remained in place for all other procedures within the podiatric surgery scope. Mr B signed the revised supervision plan on 15 August 2019.

33. The Podiatrists Board wrote to Mr B again on 19 September 2019. The Board acknowledged that the 28 June 2019 letter that advised of the reduced supervision had been sent to Mr B before he performed the 1 July 2019 procedure on Mrs A. However, the Board also stated: “[R]emoval of a bunion is a surgery for which you are required to maintain Level 1 supervision.”

Further information

Mr B

34. Mr B told HDC:

“I was doing my best for [Mrs A] ... I particularly regret that I did not have a supervisor present when I undertook the surgery for [Mrs A] on 1st July 2019. This was [a] mistake, albeit one driven by what I considered to be in her best interests, at that time. That said, it will not happen again, and I unreservedly apologise for this.”

Mrs A

35. Mrs A told HDC that Mr B told her that within six weeks she would be able to return to playing golf. However, she said that she has continued to have issues since Mr B performed the procedure. Mrs A stated:

“I am still having trouble to this day [and] am living on [diclofenac] tablets¹¹ just to get me back to what I want to do. I found out he had to be supervised well after the operation ... I wish there was somewhere you find out about these things before you commit because at my age I will be forever coming right.”

The New Zealand College of Podiatric Surgeons (NZCPS)

36. Mr B advised HDC that since 29 November 2019 he has been a Fellow of The New Zealand College of Podiatric Surgeons. The NZCPS Fellowship training qualifies registered podiatric surgeons to practise advanced podiatric surgical procedures, including bunion surgery, under the Podiatrists Board registered scope of practice of a podiatric surgeon.

Responses to provisional opinion

37. Mrs A and Mr B were given the opportunity to respond to the relevant sections of the provisional opinion.
38. Mrs A made no comment on the “Information gathered” section of the provisional opinion. However, she told HDC that she was not happy with the care provided by Mr B and that she is saddened that he continues to provide services to the public.

¹⁰ A procedure to treat an ingrown toenail and to prevent this recurring.

¹¹ An anti-inflammatory medication.

39. Mr B stated: “I acknowledge that, in conducting the procedure on [Mrs A] in the absence of a supervisor, I was in breach of my supervision condition.” He told HDC that currently he is before a Professional Conduct Committee of the Podiatrists Board of New Zealand in relation to this matter. Mr B further stated that he recognises that his “conduct fell far short of what was expected of [him] as a registered podiatric surgeon”.

Relevant standards

40. The Podiatrists Board of New Zealand’s *Australia and New Zealand Podiatry Competency Standards (2015)* (the Podiatry Standards)¹² require that a podiatrist:
- “1.1 Operates within relevant legal and regulatory frameworks.
 - 1.3 Practices to the accepted standards and within the limitations of the individual and of the profession.
 - 1.5 Conducts self in a professional manner.
 - 1.6 Demonstrates ethical behaviour.”
41. The Podiatrists Board of New Zealand’s *Ethical Codes and Standards of Conduct* (February 2016) (the Ethical Code) includes the following:
- “2.1 Podiatrists must practi[s]e only in areas that they have a scope and are personally competent.”

Opinion: Mr B — breach

42. Under Right 4(2) of the Code of Health and Disability Services Consumers’ Rights (the Code), Mrs A had the right to have services provided that complied with professional and ethical standards. The Podiatrists Board’s *Ethical Codes and Standards of Conduct* states that podiatrists have a responsibility to apply the principles and intent of the Codes to their practice. It also states that a podiatrist must practise in accordance with acceptable professional standards and only in the areas in which they have scope and are personally competent. The maintenance of podiatrists practising safely and within their scope of practice and professional standards is integral to consumers having trust and confidence in their health provider. I consider that Mr B’s conduct, specifically in performing surgery on Mrs A without supervision, was non-compliant with his professional and ethical obligations.

¹² In 2019, the Australian and New Zealand Podiatry Accreditation Council (ANZPAC) was disestablished. In New Zealand the Podiatry Competency Standards are now administered and reviewed by the Podiatrists Board of New Zealand.

Professional and ethical standards

43. The Podiatry Standards require that a podiatrist “[o]perates within relevant legal and regulatory frameworks” and that “relevant legislation, standards and codes of conduct compliance occurs”.
44. The Ethical Codes provide that a podiatrist “must practi[s]e only in areas that they have a scope and are personally competent”.
45. Mr B had restrictions on his practice from 1 December 2017, pursuant to section 69(2)(b) of the HPCAA, to perform podiatric surgery only under supervision of a podiatric or orthopaedic surgeon, and to provide the Podiatrists Board monthly reports of the surgery performed. The role of the supervisor, Mr C, was set out in the Podiatrists Board’s supervised practice plan, which commenced on 7 December 2018. The plan stated that for an initial consultation, Mr C was to be present in person or via a live Skype, and that he was to be present physically for preoperative consultations and surgeries.
46. On 17 June 2019, Mrs A was reviewed by Mr B for a preoperative consultation, and his supervisor, Mr C, attended via Skype. It was noted that Mr C agreed with the proposed surgery to resolve Mrs A’s bunion, and that this was scheduled for 1 July 2019. Three days prior to the date of surgery, Mr C told Mr B that he would not be available to attend to supervise Mrs A’s surgery.
47. On 1 July 2019, Mr B performed a bunionectomy on Mrs A at his clinic, and this was unsupervised.
48. Mr B provided the Podiatrists Board with an unsigned agreement of treatment that referred to the need for Mr C to be present. However, the agreement of treatment form signed by Mrs A on the day of surgery excluded the reference to the requirement for supervision.
49. In July 2019, Mr B submitted his monthly report to the Podiatrists Board, but this did not include Mrs A’s surgery.
50. I note that Mr B has acknowledged that his decision to perform the surgery unsupervised was a “mistake” and “ill-conceived”. He stated that he acted in Mrs A’s best interests when he made the decision to perform the surgery without a supervisor present, rather than delay the surgery until his supervisor was available.
51. I do not accept that Mr B acted in Mrs A’s best interests when he performed surgery unsupervised, in contravention of the conditions on his practice. In doing so, he knowingly failed to comply with the conditions placed on his practice. As a consequence of his actions, Mrs A received surgery that was not supervised appropriately by a more senior clinician. This placed Mrs A’s safety at risk. I am highly critical that Mr B did not report this surgery to either the Podiatrists Board or his supervisor, and that the agreement of treatment form signed by Mrs A is different from the unsigned form that referred to the requirement for a supervisor to be present. I consider that Mr B’s conduct was unprofessional and dishonest.

52. By performing surgery without supervision and failing to report the surgery to the Podiatrists Board when these were both requirements of the conditions of his practice, Mr B clearly failed to comply with the HPCAA, the Podiatry Standards, and the Ethical Code, and to demonstrate ethical behaviour.
53. Accordingly, I find that Mr B failed to provide Mrs A with services in accordance with legal and professional standards and, as such, breached Right 4(2) of the Code.¹³

Consent — adverse comment

54. On 12 June 2019, Mr B telephoned Mrs A and had a discussion about a further consultation. The contemporaneous documentation states that Mr B explained to Mrs A that it was a condition of his APC that a supervisor was to be present for a further consultation and any surgical procedures. Mr C told HDC that it was Mr B's usual practice to inform patients that he was required by the Podiatrists Board to have a supervisor present during the consultation, and that as his supervisor he would have checked that the information was conveyed to Mrs A. In contrast, Mrs A stated that Mr B told her that Mr C was an observer, and not that supervision was required for Mr B to perform surgery.
55. Right 6(1) gives consumers the right to be fully informed and to receive "the information that a reasonable consumer, in that consumer's circumstances, would expect to receive".
56. In my view, a reasonable consumer in Mrs A's circumstances would expect to receive the information that it was a requirement of Mr B's APC that a supervisor be present during consultations and surgery. Mr B had a duty to advise Mrs A that he required supervision when delivering some aspects of care — in particular, the consultations and surgery he performed on Mrs A.
57. There is no evidence that Mr B had any further discussions with Mrs A about the conditions on his practice at either the preoperative assessment or on the day of the surgery. I also note that the agreement of treatment form signed by Mrs A did not refer to the requirement for supervision. In my view, this should have been documented, and I am critical that the signed agreement of treatment form did not reference Mr B's supervision requirements.
58. In light of the conflicting accounts, I am open to the possibility that Mr B did discuss with Mrs A the requirement for supervision in his practice, and I note that the contemporaneous records and his supervisor's comments support this. However, I note that Mrs A understood that Mr C was present in the role of an observer. I would remind Mr B that clear communication and accurate documentation are essential in an effective consent process.

¹³ Right 4(2) of the Code states: "Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards."

Recommendations

59. I recommend that the Podiatrists Board of New Zealand consider this complaint and whether further action is warranted, and report back to HDC on the outcome of the consideration.
 60. In accordance with the proposed recommendation in my provisional opinion, Mr B has provided a written letter of apology to Mrs A for his breach of the Code, and the apology has been forwarded to Mrs A.
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Follow-up actions

61. 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.
 62. A copy of this report with details identifying the parties removed will be sent to the Podiatrists Board of New Zealand, and it will be advised of Mr B's name.
 63. A copy of this report with details identifying the parties removed will be placed on the Health and Disability Commissioner website, www.hdc.org.nz, for educational purposes.
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Addendum

64. The Director decided not to take proceedings.