General Practitioner / Health Service

Opinion - Case 98HDC20422

Complaint

The Commissioner received a complaint from the Police following a statement of indecent assault made by the consumer, Mr A against the provider, Dr B. The complaint has been summarised as follows:

- *On Thursday 8 October 1998 the provider, Dr B, performed an inappropriate examination on the consumer, Mr A.*
- *During the examination the provider, Dr B placed his right hand on the shaft of the consumer's, Mr A's penis which he lifted and had a 'bit of a look'. Mr A, felt as if Dr B, was trying to arouse him, whilst trying to look professional. Mr A froze and wondered what was happening and what sort of viral infection required the doctor to check his penis.*

Investigation Process

The Commissioner received the complaint from the Police on 15 December 1998 and an investigation was commenced on 23 December 1998. Information was obtained from the following:

Consumer, Mr A
Provider / General Practitioner, Dr B
Executive Officer of the Employing Authority, Mr C
Consulting Psychologist, Mr D

The consumer's, Mr A's, clinical records were obtained from his general practitioner and the Health Service. The Commissioner obtained independent advice from a general practitioner.

Names have been removed to protect privacy. Identifying letters are assigned in alphabetical order and bear no relationship to the person's actual name.

General Practitioner / Health Service

Opinion – Case 98HDC20422, continued

Information Gathered During Investigation

On 8 October 1998 Mr A went to the Health Service complaining of light-headedness, nausea and vomiting. He was seen by Dr B, a general practitioner working as a locum for the Health Service.

After taking a brief history from Mr A, Dr B asked Mr A to remove his shirt. Dr B listened to Mr A's chest with a stethoscope. He advised Mr A that his chest seemed fine but that he would like to check Mr A's glands. Dr B then asked Mr A to climb onto the examination table, remove his shoes and pull his shorts and underwear down. Mr A pulled down his shorts and underpants to his knees and lay on his back covering himself with the sheet provided. Dr B pulled a curtain around the cubicle and stood outside while Mr A was getting undressed.

Mr A advised the Commissioner that Dr B re-entered the cubicle, lifted the sheet and pulled it down to Mr A's mid-thigh. Dr B then proceeded to examine Mr A for enlarged glands in his neck, his chest, abdomen, upper thighs and down the side of his legs. Mr A advised the Commissioner that Dr B:

> "*then moved his right hand down and placed it on the shaft of my penis and lifted my penis and had a bit of a look. I felt as if he was trying to arouse me, but still trying to look professional. He then moved his left hand to the base of the shaft of my penis and placed the left thumb on to my testicle and scrotum. He then started to move his thumb around as if to look for some lump or growth on the testicles. This went on for about 20 seconds*."

Mr A informed the Commissioner that Dr B explained what he was doing, apart from a brief period of time while examining Mr A's penis. Dr B did not wear examination gloves during the examination.

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General Practitioner / Health Service

Opinion – Case 98HDC20422, continued

Information Gathered During Investigation *continued*

Dr B advised the Commissioner that:

> "*We normally examine the genitals of the male whenever the male abdomen is examined. The reason for this is that sometimes the cause of abdominal symptoms such as pain may come from the genitals, so if the genitals are not examined the cause of the pain will not be discovered. In some cases failing to find the cause of abdominal symptoms in this way might lead to a harmful outcome, such as loss of a testis following the condition of testicular torsion. Therefore it is not good practice to omit examination of the male genitals when the abdomen is examined, and for this reason the male genitals are routinely examined each time the abdomen is examined, as part of good medical practice.*"

Dr B further advised the Commissioner:

> "*It is normal medical practice not to use gloves during routine abdominal examination, except during examination of the anus/rectum. My normal practice is in line with this*."

On completion of the examination, Dr B advised Mr A that he had a viral infection that was likely to last 24 hours and gave him medication for his nausea. Mr A thanked Dr B and left. In the clinical notes Dr B wrote:

> "*Faint and vomiting this morning, nauseated. Playing rugby one week ago; subsequent injury two days ago. Left lower anterior chest injury, no medications. Diagnosis: likely gastroenteritis. Advice. Dispensed antinaus*."

In the notes there was a small drawing of an abdomen and male genitals.

Mr A was unhappy about the way he was examined by Dr B. After attending a lecture on sexual abuse, Mr A decided to lodge a complaint about Dr B's examination. Mr A also went to the Police Station and filed a complaint of indecent assault against Dr B.

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General Practitioner / Health Service

Opinion – Case 98HDC20422, continued

Information Gathered During Investigation *continued*

On 21 October 1998 Mr A went to the Health Service and was interviewed by the Health Service's nurse. The nurse stated to the Medical Director of the Health Service that Mr A had tears in his eyes when describing what had occurred two weeks earlier. The nurse arranged for Mr A to see the doctor at 6.30pm that day.

The Medical Director of the Health service gave Mr A two standard pamphlets from the Medical Council entitled "*Trust in Your Doctor / Patient Relationship*" and "*Patient Information About Professional Sexual Boundaries*". The Medical Director agreed to contact the Medical Council on Mr A's behalf the following day in order to clarify the procedure he should follow. On his way home Mr A went to see his general practitioner, and discussed the incident with Dr B. The general practitioner advised Mr A to contact the Health and Disability Commissioner.

The Medical Director of the Health Service duly contacted the Medical Council the following day and advised Mr A to lodge a complaint with the Council. The Medical Director also forwarded a report to the employing authority advising it of Mr A's complaint.

Several days after making his statement to the Police, Mr A was contacted by phone by Victim Support, a voluntary sexual abuse support group. The caller from Victim Support gave Mr A the name and contact details of a consulting psychologist, Mr D.

On 27 October 1998 Mr A contacted the consulting psychologist, Mr D, who referred him back to the Medical Director of the Health Service. The Medical Director completed an Accident Rehabilitation and Compensation Insurance Corporation (ACC) "*Claim for Medical Treatment*" form and referred Mr A back to Mr D for counselling. The referral instruction was "*sensitive claim*".

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General Practitioner / Health Service

Opinion – Case 98HDC20422, continued

Information Gathered During Investigation *continued*

Mr C, the Executive Officer of the Employing Authority, advised:

> "*The Medical Director of the Health service arranged for the complainant to see an external counsellor who would be able to assist the complainant come to terms with the matter, help him to pursue his complaint and provide the appropriate support. The possibility of this support being provided by the counselling staff of the Health Service was canvassed, but the complainant felt more comfortable with external support. The Medical Director completed an ACC claim. As the complaint indicated his intention to pursue his claim through the external counsellor it was inappropriate for the Employing Authority to take any further action on this matter. … The Health Service would have taken matters further were it not for the views expressed by the complainant. In the event the Health Service accepted the complainant's decision to handle the incident through an external counsellor ….*"

On 29 October 1998 Mr A was assessed by Mr D, who stated that he presented with high anxiety, some depression, insomnia, lack of motivation, difficulty with short-term memory and concentration. Mr D initiated a treatment plan and prepared a report for ACC which included the statement made by Mr A to the Police.

On 3 November 1998 Mr A made a second visit to Mr D. Using an Impact Evidence Scale, Mr D noted that Mr A was exhibiting a moderate degree of post-traumatic stress.

On 13 November 1998 Mr A phoned Mr D and requested a covering letter with regards to the possibility of his performance in the approaching examinations being affected by the events of 8 October 1998. In his letter Mr D wrote: "*It is my opinion that Mr A has been severely impaired in his preparation for exams. Impairment is as a direct result of the incident which occurred on October* [8]."

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General Practitioner / Health Service

Opinion – Case 98HDC20422, continued

Information Gathered During Investigation *continued*

Mr A advised the Commissioner that he suffered depression following the incident with Dr B and attributed it to the consultation. He said the consultation with Dr B took place a few weeks before his examinations. Although he passed the examinations, Mr A said his performance and motivation suffered as a result of the incident.

On 8 February 1999 ACC advised Mr D that it had declined the claim for cover of Mr A's condition on the grounds of insufficient evidence. The letter from ACC stated:

> "*ACC has declined the claim for cover as there is not enough information to accept the claim. If it is not clear that the general practitioner had an indecent intention or that the examination went beyond what was required. This information would need to be supplied to the ACC within 3 months of the date of this letter to enable the declined decision to be reviewed.*"

Mr D advised the Commissioner that he was surprised that ACC declined the claim on the grounds of insufficient information as his report was accompanied by Mr A's statement to the Police. Mr D said he did not pursue the matter further with ACC because Mr A did not return to see him for further sessions. Mr D said he was not fully compensated by ACC for the two sessions he had with Mr A. The balance was not paid by Mr A.

Mr A said he did not return to Mr D primarily because of his financial situation and his inability to pay for the therapy after his claim was declined by ACC. Because he did not want his parents to know of the incident and that he was having counselling, Mr A said he was not in a position to ask them for financial assistance. As ACC was in possession of the statement he made the Police, Mr A said he did not know what else to do other than to lodge a complaint with the Health and Disability Commissioner. He said he "*overlooked*" the three-month time limit allowed for the review of a declined claim.

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General Practitioner / Health Service

Opinion – Case 98HDC20422, continued

Information Gathered During Investigation *continued*

Mr A advised the Commissioner that apart from the two sessions he had with Mr D, he had no further counselling sessions with anyone. When asked how he was coping with his situation, Mr A said "*by avoidance*", by involving himself in various activities. Mr A said he did not ask for the investigation to draw attention to himself. He said a letter of apology from Dr B and the provision of counselling would suffice for him. Mr A was not seeking financial compensation.

Mr C, the Executive Officer of the Employing Authority, advised the Commissioner that the Health Service's relationship with Dr B dated back to 1985. Mr C said that prior to the October 1998 complaint, Dr B had a good record as a general practitioner with the Health Service. He said "*there had been no concerns about the services provided by* [Dr B]*, nor his relationship with patients so far as I have been able to determine*".

At the time of the alleged incident Dr B was employed by the Health Service on a locum basis for 12 four-hour sessions between 18 March 1998 and 15 October 1998. He was contracted during this period because of an acute shortage of medical staff. On the expiry of his contract, and with the staff shortage resolved, Dr B left the Service. Mr C advised the Commissioner that the Health Service "*determined not to employ* [Dr B] *in its health service while this matter was resolved*".

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General Practitioner / Health Service

Opinion – Case 98HDC20422, continued

Independent Advice to Commissioner

The following advice was provided by an independent general practitioner:

Appropriateness of genital examination

> "[Dr B] *comments that the genitals were examined on the basis of abdominal symptoms sometimes arising in this area. The abdominal symptoms in this instance would be vomiting. Accordingly, this could be simply considered a very thorough examination.*"

Patient consent

> "*It is clear from the notes that* [Dr B] *did not have explicit consent of the patient to examine the genitals. Implied consent can be derived from the request to remove one's clothing, and the opportunity for the patient to question this, however, fully and frank autonomous decision making was not made available to this patient.*"

Should Dr B have had another person present whilst performing such an examination?

> "*No. Whilst a chaperone may be an ideal goal, it is my opinion that in this situation it is not routinely accepted as the default, and that a male-male examination of this type would not routinely require a chaperone.*"

Are there any other issues that arise from Dr B's response?

> "[Dr B] *comments that he only wears gloves for internal examinations. It would however be considered routine practice when examining the male genitals to also wear gloves*."

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General Practitioner / Health Service

Opinion – Case 98HDC20422, continued

Response to Provisional Opinion

Dr B responded to the Commissioner's provisional opinion as follows:

"*I repeatedly stated in correspondence with and during questioning by your Office that I had no recollection of this particular case. In that this weakens my ability to comment on the particulars of the case I believe this might be fair to mention. I note that according to this document the patient made a complaint 'after attending a lecture on sexual abuse'. Thus the patient made a complaint only after being lectured for an hour about why and how to make complaints about doctors, perhaps by the Commissioner at the time, who is on the public record as stating her dislike of general practitioners, and implied that she intended to use the powers of her public office against them. No further mention is made in the discussion or conclusion of this report of this point, a fact which is perhaps surprising. It would seem that a complaint which requires official facilitation and in fact active encouragement to elicit is perhaps of somewhat different inherent strength from one which is spontaneous. No doubt more denunciations of doctors could be obtained, for example, by advertising on television, but surely the circumstances by which complaints are elicited reflect on their significance. The report mentions little to indicate dissatisfaction by the patient with the consultation before he was lectured about making complaints. On page seven it is reported that the Employing Authority agreed 'not to employ Dr B … while this matter was resolved.' This seems to me an extraordinary injustice. There is a phrase in common usage about people being 'innocent until proved guilty': in this case however summary punishment seems to have occurred the victim even being notified of it. Is any complaint to be regarded as a reason to deprive someone of their livelihood indefinitely? It is difficult to imagine that society could function if anyone subject to a complaint were immediately and indefinitely deprived of their living. On the other hand, if only certain groups of people or certain types of complaint can be used in this way, then such people clearly have lesser rights under the law and such types of complaints have special status. It may be that doctors are general practitioners as a group are holders of such lesser rights*

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General Practitioner / Health Service

Opinion – Case 98HDC20422/VC, continued

Response to Provisional Opinion *continued*

under the law; this would seem unjust. I feel that in this (unjust deprivation of livelihood) I have been trampled and if I do have any legal rights in this I reserve the intention to claim damages.

The comments of the medical informant to the Commission are noted. [The commissioner's independent advisor] *appears to be able to give opinions on a case without seeing the patient himself, perhaps a hazardous practice. He states that the examination in question could 'simply be considered a very thorough examination'. In a patient with recent (rugby) injuries followed by 'faint and vomiting this morning, nauseated' (p. 8) the indications to examine the abdomen seem clear enough. I therefore object to the term 'very thorough examination' and its use again on page 11 and 'thorough examination' also on p.11. It is not my practice to make 'very thorough' examinations in any instance – every examination is carried out with care, even and equally the palpation of the radial pulse or inspection of the nail beds of the fingers. Examination of the abdomen in an individual with gastrointestinal symptoms (not 'abdominal symptoms' as* [the advisor] *writes) is carried out in the course of the practice of medicine and I have difficult imagining a case in which examination of the abdomen is more clearly indicated.*

[The advisor] *further states* '[Dr B] *comments that he only wears gloves for internal examinations'. I did not state this and have no idea where* [the advisor] *takes this from. Further* [the advisor] *gives an opinion about 'routine medical practice'. I previously asked for* [the advisor's] *experience and qualifications but have not been allowed this information. I was told only that* [the advisor's] *name was provided by the RNZCGP and not whether he has actually practised medicine in New Zealand. To be able to describe the usual medical practice in New Zealand with authority would seem to require an extraordinary and encyclopaedic knowledge of practice. I do not know whether this is claimed in* [the advisor's] *case on the basis of widespread consultation with colleagues, great clinical experience or attendance at consensus conferences. In the absence of some or all of these I think his casually expressed opinion should be given no special significance.*

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General Practitioner / Health Service

Opinion – Case 98HDC20422/VC, continued

Response to Provisional Opinion

For the record my practice in the matter of wearing gloves during abdominal examination (including in the male examination of the groins and genitals) is on a case by case basis. Thus in the presence of skin sepsis, or in a case of suspected sexually transmitted disease, for anal or rectal examination etc. etc. I wear gloves, there being gloves available and it is not being an emergency etc. etc. On the other hand for routine abdominal examination including brief examination of the groins and male scrotum as part of the abdominal examination among other parts of normal abdominal examination such as inspection of contour and respiratory movement, palpation for tenderness, organomegaly and abnormal masses and evaluation of hepatic edge, I would not normally wear gloves, the reasons being that this impedes the amount of information gained from palpation (for example making difficult the palpation of the hernial orifices) and would make a common procedure significantly slower and slightly more expensive. Therefore the bald statement that it is 'routine practice' to wear gloves when examining the male genitals is a sweeping generalisation of doubtful relevance to the practicalities of particular cases. Further, a 'routine practice' does not of itself set a criterion with which every instance of a practice must comply, and thus even if a practice were identifiable as 'routine', that fact in itself provides no guidance on the interpretation of correct practice in a particular case.

On the matter of the form of consent for examination there is little I can usefully say as it falls under the rubric of 'one person's word against that of another' (in this case that of one individual whose experience is one or a few); the opinion of the Commission can therefore only be based on its own preconceptions.

All in all I would ask that you look into your personal conscience and consider carefully whether your Office is a neutral forum, or has acted as a political vehicle for the expression of popular antagonism towards one profession, by picking on individual doctors who are, due to the 'shaming' nature of the accusations, in a weak position to defend themselves."

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General Practitioner / Health Service

Opinion – Case 98HDC20422/VC, continued

Additional Independent Advice to Commissioner

As a result of Dr B's response to the Commissioner's provisional opinion, the Commissioner canvassed the views of two other independent general practitioners, as to whether the wearing of gloves when examining male genitals was considered routine among the profession. Both practitioners did not consider it routine, although they acknowledged a growing trend among younger practitioners to wear gloves when conducting this type of examination.

One practitioner advised that he would expect the wearing of gloves for examination of male genitals to be accepted as routine practice in the not too distant future, but to refer to the practice as routine currently would not be correct. The use of gloves is for hygiene purposes, and may provide patients with an additional sense of comfort about the appropriateness of such an examination.

Code of Health and Disability Services Consumers' Rights

The following Rights in the Code of Health and Disability Services Consumers' Rights are applicable to this complaint:

RIGHT 4
Right to Services of an Appropriate Standard

2) Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards.

RIGHT 6
Right to be Fully Informed

1) Every consumer has the right to the information that a reasonable consumer, in that consumer's circumstances, would expect to receive ….

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General Practitioner / Health Service

Opinion – Case 98HDC20422, continued

Opinion: Breach the provider, Dr B *continued*

Right 6(1)

Dr B obtained consent for examination of Mr A's glands. While Mr A initially felt comfortable with the examination of his glands, Mr A did not expect - and was not told - that an examination of his glands would include an examination of his genitals.

When Dr B began to examine Mr A's genitals, Mr A became uncomfortable. Mr A was traumatised by the examination and subsequently sought counselling. While Dr B is adamant that there was no sexual impropriety, he failed to explain the extent of his intended examination. It is natural for a patient to be embarrassed and uncertain about an examination of the genitals. This is more likely if the patient is young and has had no previous contact with the examining doctor. In such circumstances, a patient presenting with symptoms of light-headedness, nausea and vomiting, and who has been told to disrobe for an examination of his glands, would expect to be told why an examination of the genitals is to be undertaken.

Dr B did not give an adequate explanation before he examined Mr A's genitals. A desire to be thorough did not justify the failure to ensure that Mr A was fully informed about, and consented to, an examination of his genitals. In these circumstances, Dr B breached Right 6(1) of the Code.

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General Practitioner / Health Service

Opinion – Case 98HDC20422, continued

Opinion: No Breach the provider, Dr B

Right 4(1)

My advisor informs me that Dr B's examination may have been appropriate as a very thorough examination on the basis of Mr A's abdominal symptoms, specifically his vomiting. Dr B pointed out that in some circumstances failing to find the cause of abdominal pains, by examination of the genitals, may lead to a harmful outcome, such as loss of a testis following testicular torsion.

I accept that Dr B's thorough examination was consistent with the exercise of reasonable care and skill by a general practitioner, and did not breach Right 4(1) of the Code.

Right 4(2)

While examining Mr A's genitals, Dr B did not wear examination gloves. My advisor informed me that wearing gloves when examining the male genitals is considered routine practice. Dr B disputed the advice I received. In canvassing the views of other general practitioners, I obtained additional advice which supports Dr B's view that the wearing of gloves, during such examinations, is not currently considered routine practice.

In my opinion Dr B's failure to wear gloves did not amount to a breach of current professional standards, and therefore did not breach Right 4(2) of the Code.

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General Practitioner / Health Service

Opinion – Case 98HDC20422, continued

Health Service *Vicarious liability*

Employers are vicariously liable under section 72(2) of the Health and Disability Commissioner Act 1994 for ensuring that employees comply with the Code of Health and Disability Services Consumers' Rights. Under section 72(5) it is a defence for an employing authority to prove that it took such steps as were reasonably practicable to prevent the employee from doing or omitting to do the thing that breached the Code.

Dr B was employed by the Health Service on a temporary contract, which concluded soon after the alleged incident, and prior to Mr A notifying the Health Service of his complaint. No previous concerns had been communicated to the Health Service about Dr B. Dr B had a good record as a general practitioner with the Health Service.

When made aware of the alleged impropriety by Dr B, the Medical Director of the Health Service consulted with the Medical Council of New Zealand and gave Mr A copies of the two standard Medical Council pamphlets. The Medical Director made Mr A aware of the Council's policy and of his right to lodge a complaint with the Council.

The Medical Director completed a report and filed it with the Health Service's Employing Authority. Mr A was offered counselling through the Health Service but after indicating he felt more comfortable with external support, he was referred to a private psychologist.

The Health Service has not employed Dr B while Mr A's complaint has been under investigation.

In these circumstances the Health Service took such steps as was reasonably practicable to prevent the likelihood of inappropriate physical examination of patients at its service. The Health Service has acted responsibly and sensitively in relation to Mr A's concerns about Dr B. Accordingly, in my opinion the Health Service is not vicariously liable for Dr B's breach of Right 6(1) of the Code.

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General Practitioner / Health Service

Opinion – Case 98HDC20422, continued

Actions

I recommend that Dr B take the following actions:

- Apologises in writing to Mr A for his failure to give an adequate explanation before he undertook the genital examination. This apology should be sent to the Commissioner and be forwarded to Mr A.

- Reviews his practice in light of this report.

Other Actions

- A copy of this opinion will be sent to the Medical Council of New Zealand.

- An anonymised copy of this opinion will be sent to the Royal New Zealand College of General Practitioners for educational purposes.

Other Comments

I am informed that there is a growing trend to wear gloves as a matter of routine practice for an examination of the male genitals. Such a practice is consistent with good hygiene. In addition, a patient's perception of the appropriateness of an examination may turn on seemingly minor factors such as whether or not gloves are worn. I endorse the use of gloves as sensible routine practice.

I note Dr B's concern that Mr A's complaint may have been prompted by his attendance at a lecture on sexual abuse. Mr A's motivation for making the complaint is not relevant to the matter on which I have formed an opinion that Dr B breached the Code, i.e. the adequacy of the information given prior to the examination.

I am mystified by Dr B's suggestion that the complaint was elicited by the former Commissioner. I note that the complaint was forwarded to the Health and Disability Commissioner by the Police.

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