Physiotherapist, Mr C

Physiotherapy Clinic

A Report by the

Deputy Health and Disability Commissioner

(Case 14HDC00338)

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Executive summary

Background

1. Over a five week period Ms B received physiotherapy treatment from Mr C for an injury obtained during a fitness class. Ms B attended nine physiotherapy appointments with Mr C. During that time, Mr C text messaged Ms B and discussed various personal matters with her.

2. On the ninth appointment, Mr C's notes record that Ms B was feeling much better, the injury had mostly settled, and she was ready to recommence fitness training in the New Year.

3. During that appointment, Mr C and Ms B engaged in a conversation about movies, during which Mr C stated that he had a "massive DVD collection" and offered to lend Ms B some movies. At 6.59pm, Mr C text messaged Ms B asking whether she liked action movies and stating that he would drop off a few movies. At around 7pm, Mr C arrived at Ms B's house and was showing her some DVDs when a pizza delivery arrived. Ms B invited Mr C to stay for dinner.

4. Ms B stated that during the course of the night she and Mr C had sexual intercourse more than once, and that they remained in the lounge until about 5am, at which time Mr C left.

5. The following day Mr C contacted Ms B repeatedly, and she told him that she did not want an ongoing relationship.

Findings

6. A professional relationship existed between Mr C and Ms B from the commencement of the physiotherapy sessions and continued to exist at the time of the sexual encounter following the ninth appointment.

7. Mr C did not maintain appropriate professional boundaries by discussing his personal circumstances with Ms B during her physiotherapy appointments, by communicating with Ms B by mobile phone outside of the professional relationship, and by engaging in sexual activity with Ms B during the night following the ninth appointment.

8. Mr C's conduct was clearly unethical, and his actions were a severe departure from accepted standards of professional behaviour. Accordingly, Mr C breached Right 4(2)[1] of the Code of Health and Disability Services Consumers' Rights.

9. Mr C will be referred to the Director of Proceedings for the purpose of deciding whether any proceedings should be taken.

10. The physiotherapy clinic (the Clinic) did not breach the Code.

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

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Complaint and investigation

11. On 10 March 2014 the Commissioner received a complaint from Mr A about the services provided to his daughter, Ms B, by a physiotherapist, Mr C. Ms B supports the complaint made by her father.

12. An investigation into the following issues was commenced on 15 May 2014:

- *Whether Mr C maintained appropriate professional boundaries with Ms B.*
- *Whether the Clinic provided services of an appropriate standard to Ms B.*

13. This report is the opinion of Deputy Commissioner Ms Theo Baker, and is made in accordance with the power delegated to her by the Commissioner.

14. The parties directly involved in the investigation were:

Mr A	Complainant
Ms B	Consumer
Mr C	Provider
Physiotherapy Clinic	Provider

15. Information was also reviewed from Ms B's flatmate.

Information gathered during investigation

Background

16. Mr C is the sole director of the Physiotherapy Clinic (the Clinic).

17. The Clinic's advertising material states that Mr C is a physiotherapist with qualifications in sports medicine and that he is a certified personal fitness trainer.

18. Ms B told HDC that she had known Mr C for a number of years because he attended the same church as she did, and was acquainted with her family. She had been friendly with one of his children and had been to Mr C's house when she was in her teens.

19. In 2013 Ms B's father, Mr A, commenced fitness training with Mr C. Shortly before these events Ms B also joined the fitness centre, as she had decided to commence training. Ms B said that she attended two classes per week, and Mr C always ran the classes.

20. Ms B said that, at that time, she was experiencing a number of personal issues. She said that it was a stressful time for her and that she would zone out. She told HDC that she would go to the fitness class and would be "really out of it", and that Mr C would pull her aside, ask her what was wrong, and try to give her advice and help her. She said that every time this happened Mr C would check "about what was going on and if

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I was OK". Ms B said that during those conversations she told Mr C a number of sensitive personal matters. In contrast, Mr C's lawyer stated:

> "[Mr C] was unaware […] that she was emotionally vulnerable. There was no such discussion or disclosures.
>
> To the contrary, it was he who was the emotionally vulnerable party at the time of the sexual encounter between the two."[2]

Treatment of injury

21. During a class, Ms B developed pain in her shoulders. Ms B consulted Mr C for physiotherapy treatment. It is recorded in the clinical notes that Ms B's injury occurred when she was doing a jumping pull-up, over-flexed on the down stroke and felt a sharp pain in both her shoulders.

22. Mr C stated: "[T]he management of [Ms B's] shoulder injury was as per protocol for a rotator cuff/shoulder injury." Mr C stated that the testing included "assessing range of motion, power throughout range, special tests, neurological tests, cervical and thoracic tests". Mr C said that the treatment provided consisted of soft tissue mobilisation, stretches, neural tension stretches,[3] manipulative therapy,[4] scapular setting[5] guidelines, and strength and training options.

23. Ms B attended nine physiotherapy appointments with Mr C for treatment of her shoulder injury over a five-week period.

24. During the period when she was attending the Clinic, Ms B stated that if she did not attend a class, Mr C would send her a text message or ring her to ask why she had not attended. Ms B told HDC: "[H]e knew there was lots of stuff going on […] he rang and just asked what is going on."

25. Mr C stated that he knew nothing of Ms B's personal circumstances, and told HDC that he "did not make enquiries of any type regarding [Ms B's] personal situation".

26. Ms B generally attended the physiotherapy appointments with her children. She stated that although they discussed personal information, she did not feel uncomfortable during the appointments, and thought she could trust Mr C. Ms B stated: "He was telling me about the stuff that was going on with him […] And I thought it was just kind of mutual and we were just talking about things." In contrast, Mr C told HDC that the "treatment of [Ms B] was standard, professional, and did not involve any reference to personal matters".

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[2] Mr C's lawyer told HDC that at that time, Mr C was under enormous personal and work stress.
[3] Neural stretching refers to stretching the structures of the nervous system. This is necessary in injuries where there is excess neural tension or restriction of movement of neural structures, commonly around the neck and shoulder girdle, or pelvic area.
[4] A physical treatment used to treat musculoskeletal pain and disability. It commonly includes kneading and manipulation of muscles and joints.
[5] Strengthening the muscles that support the shoulder blade.

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Ninth appointment

27. The final appointment Ms B attended with Mr C was an afternoon appointment. Ms B stated that, during the appointment, her children were drawing on her with pens. She also said that she and Mr C engaged in a conversation about movies, during which Mr C stated that he had a "massive DVD collection" and offered to lend her some movies.

28. The clinical notes record that Ms B was feeling much better, the injury had mostly settled, and she was ready to recommence fitness training in the New Year. There is no record that Mr C terminated the professional relationship at this consultation. In response to my provisional opinion, Ms B told HDC that she understood that her professional relationship with Mr C was ongoing after this appointment, and that Mr C remained her physiotherapist.

29. Mr C stated that treatment concluded that afternoon following the ninth appointment, and that Ms B was not rebooked. In response to my provisional opinion, Mr C's lawyer stated:

> "The vast majority of [Mr C's] clients are self-referred. Many clients do not have a personal doctor to whom a report would be provided. The discharge protocol can be a formal and fluid process depending on the nature of injury type. Patients drive discharges [as] much as physiotherapists. If an injury has been resolved and/or the physiotherapy treatment has taken its course, treatment can end and no rebooking made. That is not necessarily recorded in notes. In the case of [Ms B], the treatment had been completed, and that was reaffirmed, as you know, later. There was no confusion about any of this."

30. Mr C's lawyer also stated that the requirement set out in Physiotherapy New Zealand's Standards of Practice (see "Other relevant standards" section below) for discharging patients does not reflect the day-to-day practice of physiotherapists across the country.

Communications after the appointment

31. Mr C and Ms B exchanged 38 text messages that afternoon and evening. Ms B told HDC:

> "I can't remember who texted first, it was either me that texted saying, 'Oh thanks a lot, now I am covered in pen', or it was him that texted, 'That was really funny'. But then we were going back and forth a bit saying — it was more just we were getting smart to each other […] And that was when he said he could drop off some movies."

32. Ms B's mobile phone records indicate that the messages commenced at 4.01pm with Mr C texting: "That was really nice." At 4.50pm Mr C asked Ms B her address, and at 5.20pm Ms B provided it.

33. There were no text messages sent between 5.22pm and 6.58pm. The messages began again at 6.59pm with Mr C asking whether Ms B liked action movies. Ms B replied that she did.

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34. At 7.02pm, Mr C sent a text message to Ms B saying: "I am heading To lock gym ill drop a few off and c if we have same taste." Ms B replied: "K cool :)"

35. Ms B said that Mr C told her that he would be home by himself that week, so he would be able to drop off some movies to her. She said she thought he would drop off the movies and then leave.

Events at Ms B's house

36. Ms B's flatmate stated she was not at home that day but thought she would be returning to the house that evening. She ordered pizza by telephone for Ms B and the children while she was not at the house, and arranged for it to be delivered. Ms B's mobile phone records confirm that she and her flatmate texted about the pizza delivery.

37. Ms B stated that at around 7pm Mr C arrived at her house and was showing her some DVDs when a pizza delivery arrived. Ms B stated that she invited Mr C to stay for some pizza, as she thought it was rude to bring out food without offering some to him.

38. Ms B said she thought they would just have some pizza and then Mr C would go. Ms B told HDC that she felt safe because she thought her flatmate would be home soon. Ms B stated that she put on a DVD to play on her laptop while they were eating.

39. Ms B then put her children to bed and, when she returned, the movie was still playing. Mr C was sitting on the couch, and she also sat on the couch.

40. Ms B stated that during the course of the night they had sexual intercourse more than once. They remained in the lounge until about 5am, at which time Mr C left.

41. Ms B told HDC that Mr C asked her to go to his house that evening, and said he would give her a massage and make her dinner. She replied that she would not have a babysitter and could not do so. She said that Mr C suggested that she bring her children with her, and that she could set them up in another room. Ms B also said that Mr C told her that he wanted to take her to concerts and on a trip overseas.

42. Ms B told HDC that after Mr C left she went to bed, and later that morning Ms B's flatmate came home.

Mr C's account

43. Mr C's lawyer provided the following statement:

> "[Mr C] acknowledges that there was a sexual encounter between he and [Ms B] that evening [the day of the ninth appointment].
>
> He vehemently rejects her version of events as set out in the statement to the HDC investigator.
>
> There had been some discussion with [Ms B] earlier regarding DVDs, amongst a variety of other matters. He is an avid film buff and regularly loans DVDs to friends and associates. Intending to drop DVDs off, when arriving, he was invited

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in […] [Mr C] said he confirmed with [Ms B] that he was no longer seeing her in a professional capacity (which would have been obvious to her in any event). She confirmed that...”

44. In response to my provisional opinion, Ms B stated there was no conversation or comment about Mr C no longer seeing her in a professional capacity.

Further contact

45. Ms B stated that Mr C asked her to add Viber[6] to her phone because that could not be traced. Ms B said she added Viber and that Mr C tried to contact her frequently the next morning by way of Viber.[7]

46. At 9.54am Mr C sent a text message to Ms B stating: “Hey :) Powerade saved the day; I am a little tired got one hr sleep — dont forget Viber.” Ms B said she messaged Mr C via Viber saying that nothing was going to happen between them and that she did not want to have a relationship with him and she wanted him to stay away from her.

47. Ms B’s mobile phone records show that between 1.05pm and 3.10pm Mr C telephoned her eight times. Ms B told HDC that Mr C said that he thought they had a connection, and that they could make it work. She stated that he was talking about “sneaking around”, and she replied that she did not want to do that.

Other comment — Mr C

48. Mr C has provided three responses to the complaint through his lawyer. He was offered the opportunity to be interviewed but declined.

49. Mr C stated that during Ms B’s attendance at treatment sessions there was never any impropriety, unprofessionalism or interaction of a sexual nature.

50. Mr C further stated that he “rejects any assertion he did not maintain appropriate professional boundaries with his patient [Ms B], or that the Clinic did not provide services of an appropriate standard to its patient [Ms B]”. In a subsequent response, Mr C stated: “There was no ‘non-professional’ relationship during the course of treatment.”

51. Mr C submitted that he is a deeply committed and professional healthcare provider who is proud of and maintains the highest standards of professionalism in treating patients, and has done so over many years. He stated that “to others he may appear to be something of a ‘prude’: for example he does not ever engage in sexualised chitchat with male friends, let alone with a patient”.

52. Mr C rejected the allegations of unprofessional behaviour. He stated that the allegation that he was unprofessional in his treatment of Ms B is “deeply offensive, and wrong”.

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[6] Viber is a smartphone application that allows users to send free messages and make free calls to other Viber users.

[7] HDC does not have any information regarding the Viber communications, other than the information provided by Ms B.

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53. Mr C's lawyer stated that for a significant period of time prior to these events, Mr C had been under enormous stress and was depressed and emotionally fragile. He advised that Mr C was receiving "informal counselling". He did not elaborate on what was meant by that.

The Clinic's policies

54. Mr C provided the Clinic's policies and procedures including the "Code of Conduct" and "Code of Ethics and Policy on Professional Sexual Boundaries". The latter policy states: "Staff of [the Clinic] cannot enter into a sexual relationship with a client."

55. Mr C stated that he orientates all new physiotherapists taking up employment at the Clinic, which requires him to discuss and remind staff of the Physiotherapy Board of New Zealand and Physiotherapy New Zealand's publication, *The Aotearoa New Zealand Physiotherapy Code of Ethics and Professional Conduct* (see below), and The Physiotherapy New Zealand Position Statement, *Clear sexual boundaries in the patient/physiotherapist relationship* (see below).

Responses to my provisional opinion

56. Responses to my provisional opinion were received from Mr C and Ms B. Where relevant, comments have been inserted into the "information gathered" section.

Other relevant standards

57. Physiotherapy New Zealand's Standards of Practice (Physiotherapy Standards) provide (amongst other things):[8]

> "Effort has been made to ensure the criteria chosen and the guidance given remain in keeping with current best practice physiotherapy.
>
> …
>
> D. Discharge from Physiotherapy Services

	Criteria	**Guidance**
1	The patient is discharged or care is transferred from the physiotherapy service when agreed goals and relevant outcomes are achieved or the patient has the tools to be able to self-manage.	It is acknowledged some patients self discharge early.
2	The patient is involved with the arrangements for their transfer of care/discharge from	Health promotion and injury prevention education are core components of any physiotherapy

[8] Page 26.

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	physiotherapy.	discharge plan.
3	A treatment summary is sent to the referrer on completion of care and a copy offered to the patient.	A discharge or transfer letter should always be sent if the referral was from another health professional. Referrers should also receive summaries for those who self-discharge or fail to attend.
4	Appropriate treatment information is supplied to the patient's GP for those patients who self-refer to physiotherapy.	If the patient has self-referred, the physiotherapist should discuss with the patient in advance which other health professionals e.g. GP, will receive information. The patient has the right to refuse to allow such sharing of information, but the implications of such refusal should be discussed and clearly documented."

58. The Physiotherapy Board of New Zealand and Physiotherapy New Zealand's publication *The Aotearoa New Zealand Physiotherapy Code of Ethics and Professional Conduct* (October 2011) (Physiotherapy Code of Conduct) states (amongst other things):

"1. Physiotherapists respect patient/client and their whanau and families. The relationship between physiotherapists and their patient/client is one of trust and as such **physiotherapists must:**

1.1 Respect the dignity, privacy, bodily integrity, and mental wellbeing of patients/clients.

…

2. Physiotherapists act to promote the health and wellbeing of the patient/client, while acknowledging, respecting and facilitating patient/client autonomy. **Physiotherapists must**:

…

2.9 not exploit any patient/client whether physically, sexually, emotionally, or financially. Sexual contact of any kind with patients/clients is unacceptable.

2.10 establish and maintain appropriate professional boundaries with patients/clients and the whanau and families.

…

2.13 be alert to the needs and special concerns of vulnerable groups. Where patients/clients or others are subject to abuse, physiotherapists should consider their legal and ethical obligations.

…"

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59. The Physiotherapy New Zealand Position Statement *Clear sexual boundaries in the patient/physiotherapist relationship* (December 2012) provides (amongst other things):

"1. Physiotherapy New Zealand considers that a sexual relationship between a current patient and a physiotherapist is never acceptable, breaches professional boundaries and is unethical.

…

3. The abuse of professional boundaries is not restricted to sexual relationships but may include any conduct which crosses professional boundaries, or may be reasonably construed by the patient as having that purpose. Professional boundaries are defined as limits that protect the space between the professional's power and the client's vulnerability — they define the edges between a professional therapeutic relationship and a non-professional personal relationship between a physiotherapist and the person in their care.

Definition of a patient.

4. A person should be considered to be a current patient until that person ceases to receive professional advice, treatment or support from the physiotherapists. The point at which she/he ceases to be a patient will vary according to the:

- Nature of the professional consultation.
- Length of the patient/physiotherapist professional relationship.
- Reason for seeking professional treatment.
- Degree of dependency involved in the professional relationship.
- Degree of knowledge and personal disclosure that has occurred during the therapeutic relationship.

5. It is not possible to be definitive regarding these issues. Each situation will require careful judgment of the individual circumstances.

Professional sexual boundaries

6. Varying degrees of sexual harassment may occur which breach sexual boundaries. Such behaviour can be grouped into the following three categories:

- Sexual impropriety.
- Sexual transgression.
- Sexual violation.

7. **Sexual impropriety** means any behaviour such as gestures or expressions that are sexually demeaning to a patient, or which demonstrate a lack of respect for the patient's privacy, including but not exclusively:

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…

- Any conversation regarding the sexual problems, preferences or fantasies of the physiotherapist.

…

- Inappropriate use of text messaging or social media.

8. **Sexual transgression** includes any inappropriate touching of a patient that is of a sexual nature, short of sexual violation, including but not exclusively:

- Touching of breasts or genitals except for the purpose of physical examination or treatment.

…

- Inappropriate touching of other parts of the body that may be construed as sexual transgression.

- Proposing a sexual relationship to a patient.

9. **Sexual violation** means a physiotherapist/patient sexual activity whether or not initiated by the physiotherapist.

…

Signs that may indicate potential for breaking of sexual boundaries

10. Particular care must be taken to preserve the boundaries in the professional relationship which can be broken in an insidious way. Although the following actions are not necessarily transgressions, they are warning signals which should alert a physiotherapist that the boundaries are being blurred. They include:

- Extending or accepting personal social invitations.
- Sharing of information not needed for the professional relationship, e.g. cell phone numbers, access to personal face book pages.

…

- Confiding in a patient about the physiotherapist's personal problems.

11. Prohibited behaviour includes actions which inevitably break through professional boundaries. These include:

…

- The physiotherapist acting on feelings of sexual attractions towards a patient.

…"

60. The Position Statement defines a breach of professional boundaries as including any "verbal or physical behaviour of a sexual nature including both inappropriate text

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messages and/or use of social media, inappropriate physical contact e.g. patting, pinching, touching, sexual connection".

Opinion: Breach — Mr C

Introduction — professional boundaries

61. Professional boundaries are the foundation of patient–physiotherapist relationships. The Physiotherapy Code of Conduct states that particular care must be taken to preserve the boundaries in the professional relationship.

62. Although the Physiotherapy Code of Conduct states that "[p]hysiotherapists should avoid treating close family member[s]", there is no guidance on treating friends or acquaintances. I acknowledge that it is common practice for physiotherapists to treat friends and acquaintances.

63. Under Right 4(2) of the Code, Ms B had the right to have services provided that complied with professional, ethical, and other standards. In this case, the standards are clear: physiotherapists must not breach professional sexual boundaries with their patients. As the health professional, the onus was on Mr C to maintain professional boundaries and ethical standards.

Professional relationship

64. Ms B began seeing Mr C in his professional capacity as a physiotherapist. The ninth appointment was an afternoon appointment. Mr C's clinical notes record that Ms B was feeling much better, the injury had mostly settled, and she was ready to recommence fitness training in the New Year. Mr C stated that treatment concluded at that time, and that Ms B was not rebooked.

65. The Physiotherapy Standards provides the following information about when a patient is discharged from physiotherapy services:

    a) The patient is discharged or care is transferred from the physiotherapy service when agreed goals and relevant outcomes are achieved or the patient has the tools to be able to self-manage; and

    b) The patient is involved with the arrangements for his or her transfer of care/discharge from physiotherapy; and

    c) A treatment summary is sent to the referrer on completion of care and a copy offered to the patient; or

    d) Appropriate treatment information is supplied to the patient's general practitioner for those patients who self-refer to physiotherapy.

66. Mr C does not consider that the Physiotherapy Standards for discharging patients reflect the day-to-day practice of physiotherapists in this country. Mr C's lawyer stated:

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"The vast majority of [Mr C's] clients are self-referred. Many clients do not have a personal doctor to whom a report would be provided. The discharge protocol can be a formal and fluid process depending on the nature of injury type. Patients drive discharges [as] much as physiotherapists. If an injury has been resolved and/or the physiotherapy treatment has taken its course, treatment can end and no rebooking made. That is not necessarily recorded in notes."

67. The Physiotherapy Standards state: "Effort has been made to ensure the criteria chosen and the guidance given remain in keeping with current best practice physiotherapy." There is no record that Mr C terminated the professional relationship in accordance with the Physiotherapy Standards. In addition, Ms B understood that her professional relationship with Mr C was ongoing following the ninth appointment, and that Mr C remained her physiotherapist.

68. I accept that the steps set out in the Standards are not always followed, in particular, in cases of self-referral. However, I am satisfied that in the circumstances of the case, a professional relationship existed between Mr C and Ms B for approximately five weeks and continued to exist at the time of their sexual encounter.

Blurring professional boundaries

69. The Physiotherapy Code of Conduct states that sharing information that is not necessary for the professional relationship is a warning sign to a physiotherapist that the boundaries are being blurred.

70. I acknowledge that the very nature of physiotherapy treatment often allows for time during sessions for the patient and physiotherapist to communicate on an informal basis. I accept that physiotherapists will have informal conversations with patients, and that doing so will not necessarily breach professional boundaries. It is the level and degree of personal information shared that is relevant in deciding whether there has been a breach of professional boundaries. In my view, sharing highly personal and sensitive information with patients is inappropriate.

71. Ms B stated that she discussed with Mr C her distressing personal circumstances. Conversely, Mr C's lawyer stated that Mr C was unaware of those circumstances or that she was emotionally vulnerable. Mr C also said that he "did not make enquiries of any type regarding [Ms B's] personal situation".

72. Ms B stated that during her physiotherapy appointments, Mr C told her about his own personal circumstances such as the reasons why he left the church, and his family difficulties. She said that she thought it was mutual, and that they were just talking about things. Mr C told HDC that the "treatment of [Ms B] was standard, professional, and did not involve any reference to personal matters".

73. Due to the conflicting accounts, I am unable to make a finding as to exactly what personal information was shared between Ms B and Mr C during the physiotherapy sessions. However, due to the tone of the text messages immediately following Ms B's ninth physiotherapy session, and the temporal proximity between that physiotherapy session and their sexual encounter that evening, I consider it more

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likely than not that Ms B and Mr C shared some personal information with each other during the physiotherapy sessions.

74. During a physiotherapy appointment (the ninth appointment), Mr C and Ms B discussed their mutual interest in movies. Ms B stated that Mr C suggested that, as he was alone that week, he would be able to drop off some movies to her. Shortly after Ms B's ninth physiotherapy session, Mr C and Ms B exchanged 38 text messages.

75. Ms B's mobile phone records also show that she and Mr C were in contact with each other by text message and phone over the next two days.

76. Following the ninth appointment, at 7.02pm, Mr C sent a text message to Ms B saying: "I am heading To lock gym ill drop a few off and c if we have same taste." Ms B replied: "K cool :)" Ms B stated that at around 7pm Mr C arrived at her house and was showing her some DVDs when the pizza delivery arrived. Ms B stated that she invited Mr C to stay for some pizza, as she thought it was rude to bring out food without offering some to him.

77. Mr C stated that he often lends DVDs to friends and associates, and that evening he went to Ms B's home to drop off some DVDs. He said he intended to drop off the DVDs but was invited inside.

78. As discussed above, I find that Mr C discussed personal information with Ms B during the physiotherapy sessions, exchanged a significant number of text messages and phone calls with her outside of the professional relationship, and went to her home to deliver DVDs and stayed for pizza and a movie. Although each of the matters in isolation may not have been of major concern, cumulatively they point to a lack of maintenance of professional boundaries.

Sexual boundaries

79. Ms B stated that she had sexual intercourse with Mr C several times during that night, and that he remained at her house until around 5am. Mr C "acknowledges that there was a sexual encounter between he and [Ms B] on the evening [following the ninth appointment]".

80. Physiotherapy New Zealand's Position Statement defines sexual violation as physiotherapist/patient sexual activity whether or not it is initiated by the physiotherapist.[9] I consider that by engaging in sexual activity with Ms B, Mr C's behaviour amounted to a breach of sexual boundaries.

Conclusion

81. Mr C discussed personal information with Ms B during the physiotherapy sessions, and communicated with Ms B by mobile phone outside of the professional relationship. In addition, Mr C visited Ms B at her home and engaged in sexual activity with her. In my view, Mr C breached professional boundaries with Ms B, who was a current patient. I note for completeness that even if the professional relationship

[9] See The Physiotherapy New Zealand Position Statement, *Clear Sexual Boundaries in the Patient/Physiotherapy Relationship* (December 2012) above.

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between Mr C and Ms B had ended with the ninth appointment, I consider that Mr C's conduct was clearly unethical.

82. I consider that Mr C's actions were a severe departure from accepted standards of professional behaviour and, accordingly, Mr C breached Right 4(2) of the Code.

Opinion: No Breach — The Clinic

Vicarious liability

83. Under section 72(2) of the Health and Disability Commissioner Act 1994 (the Act), an employing authority may be vicariously liable for acts and omissions by an employee. As Mr C is an employee of the Clinic, consideration must be given as to whether it is vicariously liable for his breach of the Code.

84. 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 acts or omissions leading to an employee's breach of the Code. Mr C, as director of the Clinic, stated that the Clinic is an accredited clinic and has strict policies and procedures in place for all aspects of its operations. He provided copies of the Clinic's Code of Conduct, and its Code of Ethics and its policy on Professional Sexual Boundaries. He also provided a copy of Physiotherapy New Zealand's Position Statement.

85. In my view, the Clinic is not vicariously liable for Mr C's breaches of the Code, which were his individual professional failings.

Recommendations

86. I recommend that Mr C:

a) Provide a written apology to Ms B. The apology is to be sent to HDC within three weeks of the date of this report, for forwarding to Ms B.

b) Undertake further education and training on ethics and professional boundaries and report back to HDC with evidence that he has done so, within three months of the date of this report.

Follow-up actions

87. • Mr C will be referred to the Director of Proceedings in accordance with s45(2)(f) of the Health and Disability Commissioner Act 1994 for the purpose of deciding whether any proceedings should be taken.

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- A copy of this report, with details identifying the parties removed, will be sent to the Physiotherapy Board of New Zealand, and it will be advised of Mr C's name.

- A copy of this report, with details identifying the parties removed, will be sent to the District Health Board, and it will be advised of Mr C's name.

- A copy of this report, with details identifying the parties removed, will be sent to Physiotherapy New Zealand and placed on the Health and Disability Commissioner website, www.hdc.org.nz, for educational purposes.

Addendum

The Director filed a charge before the Health Practitioners Disciplinary Tribunal. Professional Misconduct was made out and Mr C was censured, required to pay a fine of $5,000 and conditions were placed on his practising certificate.

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