

Opinion – Case 97HDC7669/JW

Complaint

Mrs A complained to the Accident Rehabilitation and Compensation Insurance Corporation (ACC) about treatment she received from Dr C, General Practitioner, at a private medical clinic in a city. ACC forwarded the complaint to the Medical Council of New Zealand, which in accordance with the Health and Disability Commissioner Act 1994, referred the complaint to the Commissioner.

- *On 17 November 1996 Mrs A went to the private medical clinic to have a free mole check.*
- *She was seen by Dr C who while checking the mole on her neck noticed that Mrs A also had a neck problem.*
- *Dr C advised that as he specialised in neck and back manipulation, he could treat her for her neck problem.*
- *Dr C manipulated Mrs A's neck, back and hips.*
- *Immediately after the treatment Mrs A experienced spots in front of her eyes and felt dizzy.*
- *Subsequent to the treatment, Mrs A suffered pain in her neck, lower back and hip, and shooting pains from her groin to knees in both legs.*

ACC accepted Mrs A's claim for cover on the grounds that medical misadventure resulting from medical error had occurred.

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Investigation The Commissioner received the complaint on 25 July 1997 and an investigation was commenced. Information was obtained from:

Mrs A	The consumer
Mr A	The consumer's husband
Dr C	General Practitioner/Provider
Ms D	Practice Manager, Private Medical Clinic
Ms E	Nurse, Private Medical Clinic
Ms F	Nurse, Private Medical Clinic
Dr G	Physical and Manipulative Medicine Specialist
Dr H	Consumer's regular GP

The Commissioner obtained and viewed Mrs A's relevant medical records and documentation from ACC.

The Commissioner obtained advice from a general practitioner.

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Outcome of Investigation

On 17 November 1996, Mrs A consulted Dr C at a Private Medical Clinic in the city, for a free mole check. She was to have a mole on her neck checked for a possible melanoma. When she lifted her hair for Dr C to inspect the mole he asked her to stand up, as he believed something was wrong with her neck. Dr C advised the Commissioner that it was clear to him that Mrs A suffered neck problems due to “marked muscle spasm and localised muscular tenderness”.

Mrs A told Dr C she had injured her back about three years earlier and that on occasions she suffered extreme headaches. Dr C advised Mrs A that he specialised in neck and back manipulation and that he could treat her neck. Mrs A reported that she asked Dr C if he was qualified to do manipulation and that Dr C told her that he and a Dr G, a Physical and Manipulative Medicine Specialist, were the only two doctors in New Zealand who were qualified to do this type of treatment. Dr C advised the Commissioner that *...this only refers to the suggestion that if the problem were to recur as these problems are apt to do, only he and myself were the known proponents of prolotherapy in this country. This approach is known and well documented in literature and on the internet to be the most effective approach known to the management of such problems.*

Mrs A told Dr C that she wished to speak with her husband about the proposed treatment, and went out to her husband who was waiting in the car. Having discussed the offer for treatment, Mr and Mrs A came into the clinic together and went straight into the doctor's room. Dr C then joined them. Dr C briefly explained to them both what he was going to do, that Mrs A “would no longer suffer from pain in [her] neck, back and groin” and commented to the effect that he “could not make it worse”. Mrs A reports that she was told by Dr C that by following a few simple rules she could ensure the pain would not return. The decision to have treatment did not occur until after the joint consultation at which time Mr and Mrs A decided it was “a good idea”.

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Outcome of Investigation *continued*

Dr C advised the Commissioner that he told Mrs A to discuss his offer of manipulation with her husband and that as this was not treatment which fell within the usual practice of the Clinic, specific request for the manipulation would need to be made on the relevant form. He showed her to the desk and went on to see other patients. In his letter to ACC, which was forwarded to the Commissioner, Dr C said that *a few minutes later... the front desk staff advised me that [Mrs A] and her husband were requesting treatment for her back and neck as offered and had stated their request specifically on the form as had been discussed ...* Ms F, a nurse at the clinic, told the Commissioner that when Mrs A returned to the clinic with her husband, they did not stop at the reception desk on their way in to sign a request for treatment. Ms F advised that she was standing at the desk at the time and had no direct contact with Mr and Mrs A.

Dr C's letter to ACC further states: *I then sat down with Mr and Mrs A and discussed fully the basis of the problem and the mechanism of approach to treatment until I was quite sure they both understood and were wanting to proceed. Dr C informed the Commissioner that: ... I was thorough in my explanation to the couple together, did comment that these pains should settle with treatment, but never said that they would not return. What practitioner of my experience would make such a ridiculous [sic] claim, and then proceed to give advice as to who they could receive advice from given the pains were in fact to return?*

Dr C then carried out the manipulation. Immediately following the manipulation Mrs A experienced spots in front of her eyes and felt dizzy. Dr C advised the Commissioner as follows: *At the end of the procedure, [Mrs A] did mention a light-headedness, but this passed, and she was reassured that this is common on manipulation of the neck, and particularly if this has been performed for the first time.*

On leaving the clinic Dr C asked Mrs A to sign her consent for the procedure he had undertaken. Mrs A asked Dr C to write down what he had done to her back. Dr C did this after Mrs A had written on the Clinic record: "I requested Dr C fix my back by manipulation" followed by her signature.

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**Outcome of
Investigation**
continued

At the end of the second night following treatment, Mrs A experienced “a lot of pain” in her neck, lower back, hips and shooting pain from her groin to her knee in both legs. She visited her own GP, Dr H, who prescribed Surgam and Norflex for severe muscle spasms and sent her for x-rays. Dr H explained to Mrs A that her limited hip movement was due to her having deep hip sockets. As at July 1998, Mrs A was still experiencing occasional pain and discomfort.

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**The Code of
Health and
Disability
Services
Consumers'
Rights**

RIGHT 4

Right to Services of an Appropriate Standard

- 1) *Every consumer has the right to have services provided with reasonable care and skill.*
- 2) *Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards.*
- 3) *Every consumer has the right to have services provided in a manner consistent with his or her needs.*
- 4) *Every consumer has the right to have services provided in a manner that minimises the potential harm to, and optimises the quality of life of, that consumer.*
- 5) *Every consumer has the right to co-operation among providers to ensure quality and continuity of services.*

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, including -*
 - a) *An explanation of his or her condition; and*
 - b) *An explanation of the options available, including an assessment of the expected risks, side effects, benefits, and costs of each option;*

RIGHT 7

Right to Make an Informed Choice and Give Informed Consent

- 1) *Services may be provided to a consumer only if that consumer makes an informed choice and gives informed consent, except where any enactment, or the common law, or any other provision of this Code provides otherwise.*
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**Opinion:
Breach**

Right 4(2)

In my opinion the service provided to Mrs A did not comply with professional standards. In forming this opinion I have taken into account the view of the general practitioner, who advised the Commissioner that *...it was quite inappropriate for [Dr C] to provide anything other than a free mole check which is the purpose for which [Mrs A] attended the clinic... the diagnosis of [Mrs A's] problem was clearly not simple and to manipulate the neck and back of a patient who has come to you for something quite different, without giving them time to think about and digest the pros and cons of such a procedure, is not good medical practice.*

I note that the New Zealand Medical Association's Code of Ethics states amongst the "responsibilities to the patient" the following:

11. Recommend only those diagnostic procedures which seem necessary to assist in the care of the patient and only that therapy which seems necessary for the well-being of the patient. Exchange such information with patients as is necessary for them to make informed choices where alternatives exist.

In my opinion Dr C should not have performed manipulation on a patient who had never before consulted him, and who consulted him solely for a free mole check.

If Dr C believed it was necessary to advise Mrs A in respect of a neck problem which he identified as a coincidence of checking a mole on her neck, he was, in my view, bound to do no more in the first instance than recommend and discuss possibilities for treatment, which may have included manipulation. It was inappropriate to provide that treatment without allowing Mrs A more time to consider her options.

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**Opinion:
Breach
continued**

In his responses to the Commissioner and to ACC Dr C recommended that Mrs A consult Dr G for follow-up treatment. It is my view that if Dr C felt strongly that it was in Mrs A's interests to be treated by Dr G, this recommendation on its own would have been more appropriate than treating Mrs A himself. This course of action would have allowed Mr and Mrs A more time to consider the proposed treatment, and significantly, would have provided Dr C with an opportunity to contact Mrs A's own GP and discuss his clinical findings and opinion/referral.

Right 4(4)

In my opinion, Dr C failed to provide services to Mrs A in a manner which minimised potential harm. The general practitioner advising the Commissioner noted that ... *there may have been neurological contraindications to [Mrs A] having neck manipulation which [Dr C] would not know about because he did not have any further advice provided to him [from Mrs A's usual GP].* As I have noted above, it would have been appropriate for Dr C to provide Mrs A with information about her options for treatment, allow her to take more time to discuss these options with her own GP, and provide her with a referral to another provider. Failing to do this meant that Mrs A was placed at risk because Dr C did not have all relevant information available to him to assess Mrs A's condition. I note that registered Chiropractors and Physiotherapists who specialise in manipulation operate under Codes of Practice where treatment is not commenced without undertaking appropriate consumer history. In specific examples this includes taking x-rays, and Dr C gave no information nor did he record background to indicate a full clinical history had been undertaken. In my opinion discussing and relying on the patient's history, in the absence of other clinical opinion and background information, was insufficient and did not minimise potential harm.

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Opinion:
Breach
continued

Right 4(5)

In my opinion Dr C's failure to contact Mrs A's GP, Dr H, was a breach of Right 4(5) of the Code of Rights. Dr C was obliged to communicate with Dr H to access relevant information about Mrs A's condition and history in relation to her neck pain.

The general practitioner advising the Commissioner noted ... *if [Dr C] was sufficiently concerned about [Mrs A's] back that he felt treatment was warranted on that particular day, at the very least he should have rung her usual GP and discussed the situation with him or her prior to initiating treatment. That way he would have had access to and known about x-rays, blood tests, etc. that she might have had regarding her back.*

Dr C did not contact Dr H either before or after the treatment took place. It is not acceptable for Dr C to have provided a service to Mrs A without being properly informed of the background to her condition. In my opinion proceeding with treatment in the absence of any consultation and discussion of relevant x-rays or clinical notes with Mrs A's regular providers constituted inappropriate patient management.

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Opinion:
Breach
continued

Right 6(1)(b)

In my opinion Mrs A was not provided with an appropriate explanation of the expected risks and side effects of the proposed manipulation, nor was she advised of the options.

Dr C has advised that he told Mrs A that “recurrence was a distinct possibility”. Mrs A reports that she was told by Dr C that with manipulation the pain would go and by following a few simple rules she could ensure the pain would not return. Dr C did not advise Mrs A of the risks. In his response to my provisional opinion, Dr C advised “*Here you are overlooking the fact that this was, in fact, a situation where [Mrs A] did more poorly than expected, and unfortunately, these things happen at times, and I certainly hope my every occasion of unexpected difficulty does not have the opportunity to be judged by yourself!! I would strongly suggest that this event coming on 24 hours or so after the manipulation was a viral myalgia, being an event occasionally occurring, and marked by a gradual plethora of musculo-skeletal pain coming on for no good reason, feeling uncommonly like the original, but far worse, and attended by a distinct feeling of tiredness, sometimes an unwellness, and occasionally even brief upper respiratory tract symptoms. This lasts 10 days almost to the hour so to speak, and settles to a point slightly worse than the symptoms were before they started, and is helped by almost nothing except Voltaren by suppository and heat. Massage and physiotherapy only make it worse, and it curiously tends to affect multiple areas of the spine, and be more common in those recently over-straining themselves, or having had formal manipulation. It is my opinion that this is what occurred to this woman, and a very nasty condition it is. Irrespective of that fact, there are useful treatments for this problem, which either [Dr G] or myself at least would have been able to offer.*”

While there is a difference in accounts from Dr C and Mr and Mrs A regarding the information about manipulation provided by Dr C, in my opinion Dr C failed to provide sufficient information to fully inform Mrs A to the extent that she was able to make an informed choice to have the treatment. Additionally Dr C did not advise her of the various options available which included consulting her own GP, x-rays, blood tests or consulting another health practitioner with formal qualifications in manipulation, eg a chiropractor, osteopath or physiotherapist.

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Opinion:
Breach
continued

Right 7(1)

A key element of the informed consent process in terms of the Code of Rights is the provision of full information to consumers so as to enable them to make an informed choice. For the reasons stated above in relation to Right 6(1)(b), it is my opinion that with the limited information provided to her by Dr C, Mrs A was unable to make an informed choice and give informed consent. Accordingly it is my opinion that there has been a breach of Right 7(1).

I have considered the information provided to me in respect of the “consent” signed by Mrs A at Dr C’s request. There is clearly a difference in views as to whether the consent form was signed before or after the treatment took place.

Having balanced all the information I have received on this matter, it is my opinion that the consent was signed after treatment was provided, as Mr and Mrs A were leaving the clinic. Mrs A wrote: *“I requested Dr C fix my back by manipulation.”* This also indicates consent occurred after treatment. Following this record of consent Dr C has made notes which serve to confirm Mrs A’s statements, backed up by her husband and the nurse.

I note that there is no legal requirement that written consent be obtained for the procedure which was performed by Dr C and this requirement appeared to be one imposed by Dr C as a matter of his own personal clinical practice. In my opinion, the signing of the form after treatment was inappropriate and is reflective of poor patient management and record keeping practices on Dr C’s part.

I am also concerned by the fact that Mrs A asked Dr C to write down what he had done to her, after he had treated her. Clearly, she remained uncertain about what results she could expect from the procedure she had just undergone. It would have been appropriate for Dr C to provide a written summary of the information he had discussed with Mr and Mrs A, allowing them time to reflect upon it, before any decision to have the treatment was made.

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**Opinion:
Breach
*continued***

I am satisfied that Mrs A discussed the manipulation procedure with her husband and with Dr C and, on the limited information provided to her, considered manipulation to be “a good idea” and therefore consented to it. However, I have formed the opinion that such consent was not based on all the information that a reasonable consumer, in Mrs A’s circumstances, would expect to receive, and accordingly was not “informed consent” as is required by Right 7(1) of the Code.

Actions

I recommend that Dr C undertake the following:

- Provides a written apology to Mrs A. In addition, Dr C is to refund the money paid to Mrs A for the consultation on 17 November 1996. This apology and refund will be sent to the Commissioner, who will forward them on to Mrs A.
- Ensures that in future consultations his consumer records clearly document symptoms advised by the consumer, advice given, including options, risks and costs as well as recording the consumer’s decision.
- Ceases spinal manipulation unless he has first consulted with the consumer’s general practitioner, advised the consumer of various options and obtained x-rays of the spine.
- Reviews his procedures for obtaining consent from patients and in particular, where as a matter of practice he requires a written, signed consent form from his patients, ensures proper systems are in place which enable him to obtain written consent prior to the procedure being performed and documents the information provided to the patient upon which the consent was obtained. Dr C is to confirm that he has reviewed such procedures.
- Reads the Code of Health and Disability Services Consumers’ Rights and views the video to ensure he understands his obligations under the Code.

A copy of this opinion will be forwarded to the Medical Council of New Zealand and a copy, with identifying features removed, will be sent to *GP Weekly* and *NZ Doctor* for publication, so that practitioners are informed and educated about appropriate standards and practice, and the application of the Code of Health and Disability Services Consumers’ Rights.

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Actions

I have decided to refer this matter to the Director of Proceedings for the purpose of deciding whether any action should be taken in accordance with section 45(f) of the Health and Disability Commissioner Act 1994.
