QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Health Ombudsman v Raynor* [2021] QCAT 25
PARTIES:	**DIRECTOR OF PROCEEDINGS ON BEHALF OF THE HEALTH OMBUDSMAN** (applicant) **v** **BRANDON RAYNOR** (respondent)
APPLICATION NO/S:	OCR091-19
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	12 February 2021
HEARING DATE:	3 December 2020
HEARD AT:	Brisbane
DECISION OF:	Judicial Member D J McGill SC

ORDERS:

1. **Pursuant to the Act s 113(1), the Tribunal decides that, because of his conduct and performance, the respondent poses a serious risk to persons.**
2. **Pursuant to the Act s 73(2)(a)(ii) the Tribunal sets aside the interim prohibition order made by the respondent on 26 October 2017, as confirmed with amendments by the Tribunal on 4 June 2019.**
3. **Pursuant to the Act s 113(4)(a) the Tribunal prohibits the respondent from:**
   - **(a) Providing any health service involving the manipulation of the cervical spine of any person, whether paid or unpaid.**
   - **(b) Teaching, demonstrating or promoting the provision of any health service involving the manipulation of the cervical spine of any person, whether paid or unpaid.**
   - **(c) Providing to any person training, instruction or education in the provision of any health service involving the manipulation of the cervical spine of any person, whether paid or unpaid.**
4. **Pursuant to the Act s 113(4)(b) the provision of any health service by the respondent is subject to the compliance by the respondent with the**

restrictions set out in Annexure A of these Reasons.

CATCHWORDS: PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – OTHER HEALTH CARE PROFESSIONALS – application for a prohibition order against the respondent – where the respondent is a health service provider under s 8 of the *Health Ombudsman Act* 2013 (Qld) – whether the respondent's technique of manipulation of the cervical spine causes a serious risk – where the likelihood of risk is rare but potential consequences are very serious

Health Ombudsman Act 2013 (Qld) ss 4, 4A, 8, 68, 113.
Health Practitioner Regulation National Law (Queensland) s 123.

Health Ombudsman v MacBean [2019] QCAT 300.
Health Ombudsman v Wallace [2020] QCAT 286.
Raynor v Health Ombudsman [2019] QCAT 139.

APPEARANCES & REPRESENTATION:

Applicant: C Templeton instructed by the Office of the Health Ombudsman

Respondent: Self-represented

REASONS FOR DECISION

[1] This is an application for a prohibition order against the respondent under the *Health Ombudsman Act* 2013 (Qld) ("the Act") s 113(4). That provision has now been repealed, but under the transitional provisions remains in force for the purposes of this application: the Act, s 320G(2). The respondent provides massage services, and, formerly at least, some therapy involving manipulation of the neck. He is not registered as a health practitioner, and as a result the Tribunal is not required to sit with assessors. He was not at a material time a student in a relevant approved programme of study or clinical training. He is a health service provider within the terms of the Act s 8.

[2] On 26 October 2017 the applicant made an interim prohibition order against the respondent under the Act s 68(1), which provided that:

(a) The respondent must not provide, or promote himself as providing, any health service involving manipulation of the cervical spine, paid or otherwise;

(b) The respondent must not provide any training, demonstration, education or instruction on manipulation of the cervical spine; and

(c) The respondent must not publish or make available any documents demonstrating manipulation of the cervical spine.

[3] The respondent applied to the Tribunal to review that decision. The Tribunal, constituted by the Deputy President, amended the interim prohibition order, including by amending its definition of "manipulation of the cervical spine," but otherwise confirmed the order.[1] That amendment was in response to evidence that the technique of the respondent, as displayed in a number of videos available on websites operated by him, involved high amplitude thrust, so that what he did was not "manipulation of the cervical spine" as defined in the *Health Practitioner Regulation National Law (Queensland)* ("National Law") s 123, because that definition included that the process used low amplitude thrust.

[4] This application is based heavily on videos which the respondent has published on websites demonstrating his technique. A number of these were exhibited to affidavits before the Tribunal, and one was played during the hearing. It showed a man lying on a table with his head supported by the respondent, who was moving the head around, in a way which suggested that the man is quite relaxed. In the process the head was moved so that it was closer to the left shoulder, and appeared to be tilted forward somewhat, and turned to the man's left, apparently as far as it would normally go, and then the respondent twisted the head so that it rotated further to the left. This occurred a number of times in the video played to the Tribunal. It looked disconcerting, but the man in the video showed no ill effects.

[5] The applicant relied on the evidence of Mr Purcell, a musculoskeletal physiotherapist, who holds degrees of B Sc in physiotherapy and Master of Physiotherapy, and in 2007 was recognised by the Australian College of Physiotherapists as a Specialist Musculoskeletal Physiotherapist. Since 2002 he has lectured and tutored in physiotherapy, and conducted a private practice. He provided a report on the actions of the respondent visible in the videos, which was in evidence.[2] He said there that the risks associated with the manipulation of the cervical spine rarely arise, but can be catastrophic.

[6] This is mainly because of the presence in close proximity to each side of the cervical spine of a vertebral artery, which is placed in a compromised position by such manipulation, because of the rotational forces applied. This exposes the patient to the risk of a tear occurring in the wall of the artery, which if it occurs can lead to the patient suffering a stroke, or even to death. As well, if the patient is suffering from some pre-existing weakness of the spine, such as osteoporosis or recent trauma, there is a risk of fracture. Such a condition may not be obvious on examination; there are no symptoms of osteoporosis until a fracture occurs. As well, there is a risk of damage to intervertebral discs in the spine, or to soft tissues.

[7] He referred to the definition of manipulation of the cervical spine in the National Law s 123(2), and said that the technique demonstrated by the respondent in the various videos he had seen involved high amplitude thrust. That took his technique outside that definition, but that was more dangerous that a manipulation of the cervical spine which was within the definition, because there was a greater risk of complications from it. He said in oral evidence that, if he saw students using that technique, he would correct them. He said he had seen the fourteen videos exhibited to the affidavit of Mr Sandeman, an investigator with the applicant,[3] and the six

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1 *Raynor v Health Ombudsman* [2019] QCAT 139.

2 Affidavit of Purcell filed 19 December 2019 Exhibit SDP2.

3 Mr Sandeman was also called, and cross-examined about an error in transcription of the interview with the respondent in evidence. I do not regard that as of any significance.

videos exhibited to the affidavit of Ms Snaith, of the Office of the applicant, and said that in each of them there was manipulation of the cervical spine using the same technique, with high amplitude thrust. Mr Purcell said that he did not regard the technique used by the respondent as safe.

[8] Under cross-examination he conceded that, in an earlier report, he had said that what the respondent was doing fell within the definition in the National Law s 123(2), when in fact it did not. That is a factor which reflects on the weight of his evidence, but in circumstances where there is no expert evidence to the contrary, and where the detail of his evidence was not effectively challenged in cross-examination, this is not of great significance. Otherwise Mr Purcell was not shaken in cross-examination. He rejected the notion that the risks of the procedure were mitigated by massage. In submissions the respondent characterised Mr Purcell as a competitor, but I do not regard him as a competitor in any meaningful sense, and do not regard this as relevant.

[9] The respondent called no expert evidence. He said that he had been trained in various forms of traditional healing, including massage, and that he had originally been taught to manipulate cervical spines by a chiropractor, although he had developed his technique further, based on various forms of traditional therapy, and that he now regarded it as a distinctive technique, which he taught. Essentially his case was that he had been manipulating spines in this way for a long time, and no one he had treated in this way had ever had any adverse events. Nor had any of his students had problems with their patients.

[10] The respondent claimed in submissions that he worked within the normal anatomical range of movement and not beyond it. The effect of the evidence of Mr Purcell was to the contrary, that the technique he saw on the videos he examined fell within the definition used in the interim prohibition order as amended by the Tribunal, which incorporated that the movement be "beyond a person's normal anatomical range of movement." For what it is worth, that was my impression from the video played during the hearing, and I prefer the evidence of Mr Purcell on this.

[11] The respondent relied on statements obtained from two individuals whose necks he had manipulated in this way, who both spoke positively of the treatment he had provided and how helpful it had been. He also provided a large number of testimonials from those who had been treated, or who had studied the courses he provided, and who also spoke positively about him. Statements were provided from a massage therapist in Canada and one in the United Kingdom, who said they had been trained by the respondent, and in the latter case had been applying his technique for years. They both said they regarded the process as safe and effective. In essence, the respondent's case was that, if what he was doing posed a risk to the safety of the public, the risk would have materialised by now, and it has not.

[12] There is force in that argument, although it must be acknowledged that Mr Purcell did say that complications from manipulation of the cervical spine are rare. The respondent did not challenge his evidence that the complications, if they arise, can be very serious. He tendered two graphs which appeared to have been extracted from journal articles, and which purported to show that adverse events from cervical spine manipulations were largely associated with manipulation by chiropractors, and

the number of such events from "physical therapists", naturopaths or non-clinicians was much lower.[4]

[13] There are two difficulties with this material, even accepting it at face value. The first is that it refers to the *number* of adverse events for categories of practitioner, not the *rate* of adverse events. Chiropractors may produce the bulk of such events because they perform the bulk of manipulations. What matters is the risk of something going wrong on a particular occasion with a particular therapist, and these graphs throw no light on that. The other difficulty is that, if this material did show that chiropractors were the problem, it does not help the respondent because he originally learnt spinal manipulation from a chiropractor.[5] One thing it does do, however, is provide confirmation of the applicant's evidence that there can be adverse events from a spinal manipulation. Some confirmation of that is also provided by another document filed by the respondent, which states that the risk of vascular accident from cervical spine manipulation is not negligible.[6]

[14] The respondent submitted that the effect of the prohibition order would be to violate his human right to expression.[7] So far as the order prevents him from teaching and advocating for his technique, I expect that is correct, but that human right is subject to the operation of other valid laws, such as the provisions of the Act. He also advanced an argument criticising the operation of the relevant legislation, at least so far as it had an effect of confining certain manipulation therapies to certain registered health practitioners. That is not a matter on which the Tribunal has any authority to pronounce. The Tribunal takes the applicable legislation as it is, and applies it according to its terms. Much of the respondent's material is directed to criticism of the regulatory system, and what he claims is the unfairness of its being used against him in this way, when he has never done anyone any harm.

Legislation

[15] The Act s 113 provided relevantly that:

> (1) QCAT must decide if, because of the health practitioner's health, conduct or performance, the practitioner poses a serious risk to persons.
>
> ….
>
> (4) If QCAT decides the practitioner poses a serious risk to persons, it may make an order (a ***prohibition order***) –
>
> (a) prohibiting the practitioner, either permanently or for a stated period, from providing any health service or a stated health service; or
>
> (b) imposing stated restrictions on the provision of any health service, or a stated health service, by the practitioner.

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4 A table from an article in the May 2012 Journal of Manual and Manipulative Therapy showed 93 adverse events from chiropractors, 5 from physical therapists, 9 from non-clinicians and 1 from a naturopath. A figure published by the American Physical Therapy Association indicated that the average of four studies showed that 68% of complications from thrust joint manipulation were from chiropractors, 11% from physical therapists, and 21% from other practitioners.

5 Affidavit of respondent sworn 20 July 2018 para 7, and stated at the hearing.

6 Course notes from Dave Taylor's Cervical Manipulation Course undertaken in London, Exhibit C to respondent's response to the amended referral, p 12.

7 He also relied on the *Human Rights Act* 2019 (Qld) s 35, but that section has no application, as these are not criminal proceedings.

[16] In *Health Ombudsman v Wallace* [2020] QCAT 286 at [10], I said of s 113:

> The approach to this provision was considered by the Deputy President of the Tribunal in *Health Ombudsman v MacBean* [2019] QCAT 300. His Honour said that, in assessing whether a respondent posed a serious risk to persons, it was helpful to consider the nature of the risk, the likelihood of its eventuating and the seriousness of the consequences if the risk did eventuate: [14]. His Honour noted that the term "serious risk" was not defined in the *Health Ombudsman Act* 2013, in the National Law, or in the *Acts Interpretation Act* 1954, and said it takes its ordinary meaning. He quoted the definition of "serious" in the Macquarie Dictionary: "of grave aspect; weighty or important; giving cause for apprehension; critical; to be considered as an extreme example of its kind." In my opinion, it follows that it is not sufficient for there to be some risk, it must be a risk which fairly merits the description "serious risk".

[17] I noted at [9] that Subsection (2) provided examples of conduct which may be regarded as posing a serious risk to persons, one of which was "practising the practitioner's profession unsafely": s 113(2)(a). I also noted that when exercising its powers under the Act, the Tribunal has as its main consideration the health and safety of the public: s 4(2), s 4A. At [14] I went on to note that s 113 looked to the future, and that it was necessary for the material to provide a rational basis for any conclusion arrived at, and not to extend to mere speculation.

[18] The facts in *Wallace* were different from the present, since they involved the provision by a health service provider of sedatives to a demented resident in an aged care facility, and in *MacBean* involved sexual offences against patients, as was the case in two other decisions I mentioned in *Wallace* at [11]. I was not referred to an earlier decision of a Tribunal where the facts were similar to the present case.

[19] In terms of the three step process set out in *MacBean*, I have already discussed the evidence as to the nature of the risk. This is that forceful rotation of the neck risks compromising one of the vertebral arteries, and risks a fracture if the neck is already in a fragile condition for some reason. As to the second step, the evidence of Mr Purcell is that the likelihood of its eventuating is low, since he described such complications as rare, although he did say that he regarded the technique used by the respondent as more dangerous than that used by physiotherapists, which suggests that it would not be as low using the respondent's technique. On the other hand, the respondent said that the risk had never eventuated with any of his patients. His material discussed above does show that risks do eventuate from manipulation of the neck, but do not throw any light on the rate at which they occur, and hence on the likelihood of the risk eventuating.

[20] As to the third step, the unchallenged evidence was that the consequences if the risk did eventuate were very serious, extending to the possibility of death. Any interference to the blood supply to a brain is likely to be serious, and any fracture in the cervical spine is also going to be serious. In the circumstances there is no difficulty in concluding that the consequences of the risk eventuating are quite serious. The difficulty in the present case is the lack of clear evidence which relates specifically to the likelihood of the risks eventuating, but I do not consider that this means that a finding of serious risk cannot be made.

[21] The three factors in *MacBean* are considerations, not elements of a serious risk that must be satisfied, and I consider that it is possible to find that the actions of a practitioner can pose a serious risk to persons even if the likelihood of the risk

eventuating is low. What matters is whether, bearing in mind those factors, and taking into account their strengths and weaknesses, it is appropriate in the light of all the evidence to find that there is a serious risk to persons.

[22] There is a further aspect to the risks associated with what the respondent is doing, relating to the propagation of his techniques, particularly by way of the videos posted online. The applicant submitted that persons without qualifications, or even experience as massage therapists, could use the videos to observe and copy the process, without even the safeguards which the respondent provides by way of training, and prior massage, and without any preliminary investigation to detect any conditions which could make the process more dangerous.[8] These precautions are not illustrated in the videos, and (except in one case) there is no indication that the techniques should not be copied by anyone viewing the video.[9] In that way, it was submitted that the respondent's activities were even more dangerous to the public.

[23] In this case there is relatively little evidence, particularly independent expert evidence, but such as there is supports the applicant's submissions, and overall, in view of the potential serious consequences of something going wrong when this process is followed, I find that the respondent's technique of manipulation of the cervical spine does pose a serious risk to persons. Given the possible serious consequences, it is reasonable to characterise the risk as serious.

[24] The next issue is whether it is appropriate to make any and what order under s 113(4). The fact that there is a serious risk to persons does not necessarily mean that such an order will be made. There are various therapies which pose serious risks to patients, but the risk is justified by the potential benefit of the therapy, and the serious consequences of not applying it. Radiation therapy for cancer comes to mind. That however is not the situation here. The respondent's manipulation technique was not the subject of any independent expert evidence supporting the existence of benefit to the recipient. The respondent explained the benefit as allowing tension which had built up within the body to escape through the neck, and justified his position by reference to his study of various traditional and alternative therapies over the years. The fact that he can produce many testimonials from satisfied customers does not demonstrate that the benefit claimed for this process has any physiological validity. I am not persuaded that his neck manipulation therapy produces any real benefit which justifies the risks to which he exposes his patients.

[25] Accordingly it is appropriate to make a prohibition order under s 113 of the Act. The definition in the National Law s 123 must be avoided, and I am also concerned by the attitude displayed by the respondent at the hearing, which makes me suspect that he will be attempting to avoid any prohibition by changing his technique to fall outside the terms of any order. When asked during submissions to give me a description of his technique, he did not do so, and suggested that it was really impossible to describe. I am not confident that he has been complying with the interim order currently in place, as varied by the Deputy President. Accordingly, I have modified the draft restrictions proposed by the applicant, in an attempt to simplify, and clarify, the terms of the order.

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8 In submissions the respondent said that he had 58,200 subscribers to his YouTube channel, and had logged over 30 million views. If so, a large number of people have been exposed to this material.

9 The respondent said that he did investigate the patients and take histories before treatment, and there is no evidence to contradict that.

[26] Accordingly the decision of the Tribunal is as follows:

1. Pursuant to the Act s 113(1), the Tribunal decides that, because of his conduct and performance, the respondent poses a serious risk to persons.

2. Pursuant to the Act s 73(2)(a)(ii) the Tribunal sets aside the interim prohibition order made by the respondent on 26 October 2017, as confirmed with amendments by the Tribunal on 4 June 2019.

3. Pursuant to the Act s 113(4)(a) the Tribunal prohibits the respondent from:

   (a) Providing any health service involving the manipulation of the cervical spine of any person, whether paid or unpaid.

   (b) Teaching, demonstrating or promoting the provision of any health service involving the manipulation of the cervical spine of any person, whether paid or unpaid.

   (c) Providing to any person training, instruction or education in the provision of any health service involving the manipulation of the cervical spine of any person, whether paid or unpaid.

4. Pursuant to the Act s 113(4)(b) the provision of any health service by the respondent is subject to the compliance by the respondent with the restrictions set out in Annexure A of these Reasons.

Annexure A

1. Within five business days of the commencement of these restrictions, or within two business days of commencing in any new place of practice, the respondent must notify all employers and places where the respondent provides a health service as to the existence of the prohibitions and restrictions imposed on the respondent's right to practice and provide them with a copy of this order.

2. Within five business days of the commencement of these restrictions, the respondent must provide written authorisation to the Office of the Health Ombudsman (by completing the Authority to Access Information Form) to:

   (a) inspect, take or copy patient clinical records, log books and/or appointment diaries for any patient at such reasonable time or times as the Health Ombudsman shall determine for the purpose of monitoring compliance with the prohibitions and restrictions imposed on the respondent's right to practice.

   (b) exchange information with the respondent's employers and places of practice.

3. Within five business days of the commencement of these restrictions, the respondent must provide written authorisation to the Office of the Health Ombudsman (by completing the Authority to Release Information Form) to obtain the release of information relating to his professional practice from private health insurers.

4. Within five business days of changing residential address or practice address, the respondent must provide written notification to the Office of the Health Ombudsman of that change, and provide new contact details.

5. These restrictions apply to the respondent until he obtains registration as a health practitioner in one of the following health professions, under the *Health Practitioner Regulation National Law* (Queensland):

   (a) Chiropractic;

   (b) Medical;

   (c) Osteopathy; or

   (d) Physiotherapy.

Definitions

For the purposes of this order:

Employer means an entity that –

(a) employs the respondent to provide health services; or

(b) engages the respondent to provide health services under a contract for services; or

(c) operates a facility at which the respondent provides health services.

The term also includes co-owners, co-directors, contractors of service, owners or operators of medical practices, hospitals or other facilities where the respondent provides a health service, even if there is no contractual relationship between the owner or operator and the respondent.

Manipulation of the cervical spine means rotating forcefully the cervical spine at or beyond a person's normal anatomical range of active movement.

Practice means working in any role, whether remunerated or not, in which the respondent uses his skills and knowledge in a health care industry, whether required to be registered as a health practitioner or not. It is not restricted to the provision of direct clinical care and includes using the skill and knowledge of an unregistered practitioner in a direct non-clinical relationship with a patient, working in management, administration, education, research, advisory, regulatory or policy development roles, and any other role that impacts on the safe, effective delivery of services in the health care industry.