

Citation: *R. v. Zink*, 2026 YKTC 23

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Docket: 22-00067
22-00067A
22-00067B
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Caldwell

REX

v.

BRIAN ZINK

Publication, broadcast or transmission of any information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Appearances:
Kathryn Laurie
Brian Zink
Kevin Drolet

Counsel for the Crown
Appearing on his own behalf
Appearing as *Amicus Curiae*

REASONS FOR JUDGMENT

[1] Mr. Brian Zink is charged with one count of sexual assault arising from a massage he performed in June 2021. Mr. Zink was a registered massage therapist with the College of Massage Therapists of British Columbia, now known as the College of Complementary Health Professionals of BC (“CCHPBC”). Mr. Zink’s license was suspended due to the alleged incident.

[2] Early on, I appointed *amicus*, Mr. Kevin Drolet. Mr. Drolet had acted as Mr. Zink's counsel at one stage however Mr. Zink had discharged Mr. Drolet as Mr. Zink decided that he wished to represent himself which is his right. The terms of the *amicus* appointment were very broad. Mr. Drolet conducted most of the witness examinations and made submissions though he was very respectful of Mr. Zink's self-represented status. I found Mr. Drolet's involvement as *amicus* both essential and extremely helpful. The charge is very serious, and the massage therapy context lends an added complexity to the allegations.

Overview of the Allegations

[3] J.B. attended the Whitehorse Massage Therapy Clinic on Sunday, June 6, 2021. J.B. had a pre-booked massage with Mr. Zink whom she had not met prior to that date. She booked the massage due to tension she was feeling in her shoulders, back, and neck. She alleges that Mr. Zink touched her inappropriately during the course of the massage.

[4] J.B. was very upset after the massage ended. She spoke with her husband and a few friends about what had occurred, including one friend who was an experienced massage therapist. These individuals shared her concerns about what had occurred during the massage.

[5] J.B. did not want to involve the police but instead decided to make a complaint to the CCHPBC with whom Mr. Zink was registered. The Yukon Territory does not have a governing body for massage therapists.

[6] Approximately one month after the massage, she was interviewed by an investigator with the CCHPBC. Eventually this complaint resulted in Mr. Zink's suspension.

[7] Whitehorse is a relatively small city thus it is not unusual for residents to cross paths in various contexts. Approximately one year later, J.B. saw an ad on Facebook suggesting that Mr. Zink was trying to find employment as both a musician and a massage therapist. A Facebook post was filed as evidence. That post came from an account labelled "Brian Zink" and noted in part, "mobile medicine man" and "I have over 10 years experience. Heated massage table. Crystals & sound therapy. Council with tarot. Comedic relief."

[8] J.B. testified that she was concerned that Mr. Zink was continuing to provide massages. She said that she also was concerned that other women might be victimized by Mr. Zink. She testified that this concern was her motivation for contacting the police and telling them of her experience in June 2021. I accept and find as a fact that it was this concern that led her to come forward to the police.

The Evidence at Trial

[9] I heard from four witnesses during this trial. J.B. testified to the events on June 6, 2021. Ms. Paula Jaspar, another registered massage therapist, was called by the Crown as an expert in both massage therapy practices and techniques, and in the professional standards and practices for obtaining patient consent. Ms. Amy Jacobsen, Mr. Zink's employer at the time, testified about the events that unfolded after June 6,

2021, with focus on her conversation with Mr. Zink a week after the event. Finally, Mr. Zink testified regarding the areas addressed by J.B., Ms. Jaspar, and Ms. Jacobsen.

J.B.'s Evidence

[10] J.B. testified that she booked an appointment online for a massage. Mr. Zink was the only therapist available. She prefers female therapists but has had massages from male providers in the past and will take that option if no female therapists are available.

[11] The clinic is located in a larger complex. The building was quiet, dark, and deserted as it was a Sunday and the other businesses were closed. She remembered seeing a maintenance man changing a light bulb in a hallway but that seemed to be the only other person on site.

[12] During her initial testimony and during her interview with the CCHPBC she did not speak of anything out of the ordinary during the initial stages of the appointment though, in her police interview one year later, she said that she immediately “got a weird vibe” from Mr. Zink. Under cross-examination, she explained that the “weird vibe” assessment arose in her mind as she thought back to his behaviour throughout her interactions with him.

[13] J.B. did, however, tell both the CCHPBC and the police of an initial practice of Mr. Zink’s which she found odd. He told her to sit on her hands so that he could see if her shoulders were off balance. She testified that she did not think anything of the

request at the time but later, as she thought back over the events of that day, she thought it was a strange request.

[14] J.B. told Mr. Zink that she was having issues with her shoulders, neck, and back. She agreed that Mr. Zink told her to let him know if his technique was “off”. In cross-examination she denied that they discussed Swedish massage and deep tissue massage, stating that she had just booked “a massage”.

[15] J.B. does not recall Mr. Zink raising the issue of her breathing, and how that might be contributing to her tension. Later in her evidence she said that Mr. Zink did discuss her breathing but she did not agree with his assessment. She denied that he told her he would need to work on her pectoral muscles.

[16] After the initial assessment, J.B. went into the treatment room alone and disrobed, leaving only her underpants on. This is her usual practice when obtaining a massage. She then lay face down with a sheet covering her. Mr. Zink entered shortly after she finished these preparations.

[17] J.B. said that he began with a light butterfly touch which she had not experienced from a therapist in the past. The sheet was pulled down as Mr. Zink massaged her back. She also testified that he massaged her armpit and her side. She said he massaged her breast tissue but, as her evidence unfolded and was elaborated upon during cross-examination, it was my understanding that Mr. Zink’s hands touched her breast tissue as her armpit was being massaged.

[18] J.B. also said that her arm was pulled very far back and she was concerned that her nipple area was becoming exposed as her back was arching. During that process, Mr. Zink also massaged her pectoral muscles.

[19] Later in the massage, Mr. Zink asked her to turn over so that she lay face up. He held up a sheet like a curtain so that his vision was blocked while she turned over. She did not find anything inappropriate in this part of the process and I am aware that this is a common manoeuvre when clients switch from face down to face up.

[20] Mr. Zink then covered her with the sheet again though it was just above her nipple area and she felt that it should have been lifted higher up on her body.

[21] J.B. testified that Mr. Zink began rubbing up and down over her belly which was a very vulnerable experience for her. At that point, she said that his hands rubbed over her breasts. In cross-examination, she agreed that she said Mr. Zink grazed her breasts over the sheet. She told her friend N. about the graze over her breasts when she called N. immediately after the massage, once she was in her car. She also agreed that she told the police that he slowly grazed over her breasts. Further on in her evidence, she disagreed with the term “grazing” and said that there was definite touch and contact with her breasts. She also agreed that she told the police that Mr. Zink “passed over” her breasts.

[22] J.B. also spoke of Mr. Zink’s hands rubbing along her sides up to her breasts. At one point, he rubbed between her breasts under the sheet. She also said that he pushed at her sides, pushing her breasts together. She agreed that her breasts fell to the side of her rib cage when she was lying face up but denied that her breasts would

move to the sides when lying face down. She testified that she totally froze at this point and was very frightened.

[23] Under cross-examination, J.B. agreed that her description to the CCHPBC would have been the most accurate description of what occurred as she gave her statement six weeks after the events when her memory was fresher than it was five years later in court. In her statement to the CCHPBC, she described Mr. Zink's hands being at the side of her breasts and that he pushed upward as if pushing her breasts together.

[24] She said that he was grunting, saying, "oh, yeah!" during parts of the massage. During cross-examination, she disagreed that the massage required a lot of physical effort on the part of Mr. Zink.

[25] At one point, Mr. Zink was massaging her neck area but it was extremely uncomfortable and J.B. felt as if she was being choked. She told him that this technique was causing her anxiety and he asked her, "why do you think that is? Maybe you are not speaking your truth" which she found to be a very odd comment. She said that she was sweating and shaking with fear. She made an excuse to use the washroom.

[26] Mr. Zink left the room while J.B. dressed to use the washroom. He told her which washroom to use due to the water temperature in that washroom but, thinking back, she thought that was odd and wondered if he was watching her. I inferred from her comment that she later became concerned that there could be cameras installed in the washroom.

[27] After J.B. left the washroom, she saw Mr. Zink at the front reception area, stretching and singing which she found disconcerting and unusual.

[28] She then returned to the massage room but decided to leave her pants on at this point. The massage continued, with a focus on her hands and wrists. She wanted to leave and not continue the massage but felt uncomfortable expressing this thought to Mr. Zink as she was also alone with him in the building.

[29] Finally, the massage ended and it came time to pay. J.B. told him that she had insurance, and he smirked, stating, “oh, lucky girl”. She felt that this was an unprofessional comment and that using the term “girl” was inappropriate.

[30] Four diagrams were entered into evidence. These diagrams were marked by J.B. during her interview with the CCHPBC. She shaded the areas touched during the massage, and she indicated the position of the sheet. The first diagram shows shading between, but not on, her breasts. She noted that the touching occurred under the sheet. The position of the sheet is just above her nipple area.

[31] The second diagram shows the entirety of her upper body shaded up to the line which indicates the top of the sheet. The notation reads, “shading indicates area touched (over the sheet)”.

[32] The third diagram indicates shading in front of her armpit, at the side of her breast area. The notation states, “shading indicates where I felt Brian Zink touch the sides of my breasts skin to skin. Felt as though they were being pushed together”.

[33] The final diagram shows shading on the entire front of her neck with the notation “shading indicates where I was massaged on the neck. Lots of emphasis near the centre”.

Ms. Paula Jasper’s Evidence

[34] Ms. Jasper provided two reports to the Court. The first report outlined the “reported facts” which summarized J.B.’s allegations. The report concluded with the statement, “Mr. Zink has failed to demonstrate patient-centred care, safety, ethical behaviour”.

[35] Mr. Drolet objected to the report on the basis that it was not framed as a response to a hypothetical scenario but instead was a commentary on Mr. Zink’s behaviour based upon the “facts” provided by J.B. and thus essentially was a finding by the expert on the issues before the Court. I agreed with Mr. Drolet.

[36] The case was adjourned to obtain an expert report framed as a response to a hypothetical but, perhaps unsurprisingly, the re-draft largely consisted of a simple change in terminology, replacing J.B.’s name with “the patient” and Mr. Zink’s name with “the massage therapist”, though the allegations were more detailed than in the initial report. The report predominately addressed the issue of consent and the re-negotiation of consent to treatment and touch.

Ms. Jacobsen's Evidence

[37] Ms. Jacobsen testified that she hired Mr. Zink in May 2021 and fired him one month later, after receiving J.B.'s complaint. Up until his firing, he worked five days a week for Ms. Jacobsen and saw, on average, four to five clients per day.

[38] Ms. Jacobsen spoke with Mr. Zink in the days following the complaint. She testified that he told her, "yeah, I probably shouldn't be touching people" or "I don't think I should be touching people". She found it concerning that he did not ask who had made the complaint nor did he express shock. She interpreted that as a sign that he knew who had lodged the complaint. She also testified that "he didn't even seem to care" that a complaint had been made.

Mr. Zink's Evidence

[39] Mr. Zink testified that he attended Vancouver Career College in Kelowna, British Columbia, to become a registered massage therapist. He began his training in 2012, when he was 17 years old, and he finished two years later. He was 26 or 27 years old when these allegations arose and had been practicing massage therapy daily for seven years.

[40] Mr. Zink has not had access to J.B.'s client file since he left Ms. Jacobsen's employ but he remembered treating J.B. and remembered that she presented with neck, shoulder, and back issues.

[41] Mr. Zink said that he tried to explain that he is a bit different than other massage therapists, centering a great deal on breathing as he finds that breathing correctly helps people calm themselves. He said that people should be breathing from the diaphragm but most people breath from secondary muscles such as the scalene muscles found at the side of the neck.

[42] Mr. Zink said that he always states, “if at any point you feel any discomfort, please let me know so that we can adjust the treatment, my pressure, my techniques, or even terminate the treatment”. Generally, he repeats this statement a couple of times at the outset. He said that allows him not to repeat a similar statement “every five minutes” and noted that most people just like to fall asleep on the massage table during treatment.

[43] Mr. Zink testified that he has an acquired brain injury (“ABI”) and that he often explains that to people as well “though most people don’t care”.

[44] Mr. Zink said he will explain why he uses certain techniques and that working around the neck area can cause anxiety as can poor breathing. He said that numbness and tingling also were presented as an issue and that breathing can assist with that issue.

[45] Mr. Zink’s assessment was “pretty simple” and he said “she seemed to just want to get going with the massage”. He did note that J.B. seemed to have trouble with breathing. Under cross-examination, he said he is very focused on breathwork and found J.B. to be very resistant to his techniques, though he did not understand the

source of the resistance. Mr. Zink also noted that J.B. tried to direct him where to put pressure but he tried to explain that various connected muscles needed to be worked on.

[46] J.B. was face down at the start and he placed his hand on her sacrum or sit bone, rocking back and forth, as he said people find that soothing and “it is like what you do with babies”. He rocked her body and explained the breathing, stating that he introduces movement “so they feel busy and entertained”.

[47] He then moved to a traction which involves putting his hand on the client’s sacrum and leaning in with his body weight, gaining distance between the sacrum and the ribs.

[48] Mr. Zink was conducting an assessment throughout the initial stages and then developed a subjective objective assessment plan (“SOAP”). “Subjective” refers to J.B.’s self-report; “objective” refers to what he saw; “assessment” is his conclusions; and the “plan” is the plan of action for the massage.

[49] Mr. Zink recalled that J.B. had very bad breathing, very laboured breathing, and she was trying to rush her words. Her breathing was very off, very irregular, and she had a limited range of motion.

[50] Mr. Zink noted that the CCHPBC asked him if he obtained consent and he said that he did that by telling her at the outset to let him know if she felt uncomfortable so that he could adjust or end the treatment. He said he explained that there were other muscles that could be worked on but noted that many people do not want work on the

front of their bodies, especially women dealing with male therapists. In his view, the profession “over explains” consent.

[51] Mr. Zink also acknowledged in cross-examination that it may be necessary to obtain further consent when he moves into a different area of the body, stating that he would “check in”. He maintained, under cross-examination, that he explained why he was touching J.B.’s chest. He said he asked at the outset of the massage if J.B. wanted him to fix the problem. He said J.B. never said “no” when he told her what he was going to treat so he interpreted that as consent.

[52] Mr. Zink noted in his testimony that every muscle has an opposite muscle to balance it, and he then proceeded to explain to the Court, at great length and in great detail, many of his techniques.

[53] The treatment began face down and then J.B. turned face up. He tucked the sheet under the armpits. He said he asks about a client’s comfort level with the placement of the drape.

[54] Mr. Zink worked on the pectoral major and pectoral minor muscles, noting that the pectoral major covers half of the upper torso. He explained that he was working on the pectoral muscles but did not provide too much detail as he noted that most people do not care too much about the educational component of massage therapy. He also explains that there are muscles below the breast areola and tissue.

[55] In cross-examination, Mr. Zink explained the sternum in greater detail. He said that it is a very hard bone with muscles attached. It is between the breasts but above

the nipple line. He said the tissue attached to the sternum can include breast tissue. He also described breast tissue as simply adipose tissue or fat around glands.

[56] He did recall J.B. speaking of discomfort and some numbness and tingling when he worked on her neck area but he attributed that to a common discomfort when work is done on the scalene muscles which are at the side of the neck. He told her to let him know if the discomfort continued, and he maintained that he reduced the pressure of his massage.

[57] Mr. Zink recalled J.B. wanting a bathroom break but then wishing the massage to continue. He added that he thought her bathroom break was unusually long but he attributed it to the movement of fluids that can occur during a massage.

[58] After the bathroom break, Mr. Zink did an arm pull which is a form of traction and he worked on many muscles. He massaged the pectoral muscles through the armpits. He said that involved pushing towards the collar bone through the armpit and applying pressure.

[59] Mr. Zink said he did not recall having contact with her breasts during this process but said that it was always possible that accidental contact occurred, and he noted that J.B. did not make any mention of that occurring.

[60] Mr. Zink denied telling Ms. Jacobsen that he “shouldn’t be touching people”, stating that he said “I should probably stop now”. He noted that he has had people “do weird things” on his massage table, and that he thought he should pivot and exit the

profession as his music work was increasing anyway. He felt he just should not touch anyone for his own safety and, as he put it, to preserve the integrity of the profession.

Assessment of the Evidence

[61] I found J.B. to be a credible witness and overall, I found her evidence reliable. I accept and find as a fact that J.B. was attempting to be as accurate as her memory would allow after a significant passage of time.

[62] This incident understandably impacted J.B. significantly and, not surprisingly, she has clearly thought about the incident repeatedly over the years. She also was formally interviewed at least twice, first by the CCHPBC and, roughly one year later, by the police. I find that with the passage of time there are certain nuances regarding the events that have become ingrained in J.B.'s memory that may not reflect how she felt or exactly what she experienced at the time of the incident. I find that the passage of time has resulted in J.B. attributing deeper significance to certain aspects of her interactions with Mr. Zink than she thought at the time such as the significance of his grunting noises and his suggestion that she use a particular washroom. Overall, however, I find that her rendition of the events has been consistent and reliable. My conclusion regarding overall reliability does not automatically lead to a finding that a sexual assault occurred.

[63] A great deal of the evidence in this case concerned aspects of the massage that were not themselves the subject of the allegations. For example, both J.B. and Mr. Zink spoke of Mr. Zink's grunting, or the audible noises that he made during the massage. Obviously it is not a criminal offence to grunt, though it may be unprofessional. It was helpful to hear this evidence, however, as it does provide context and also can help to

explain why certain conclusions were reached regarding what was occurring and Mr. Zink's intentions. It is important, however, not to lose sight of the fact that the issue before me is one of criminal liability and not whether Mr. Zink adhered to acceptable massage therapy standards. The latter issue is an issue for the CCHPBC, not for the Court.

[64] The specific sexual assault allegations involve three parts of the massage. Those parts were illustrated by J.B. in her drawings provided to the CCHPBC and entered as exhibits in this trial. Those three parts were:

- (1) Massaging the sternum bone between J.B.'s breasts;
- (2) Touching J.B.'s breasts over the sheet; and
- (3) Touching the sides of J.B.'s breasts near the area of her armpits.

[65] I find as a fact that Mr. Zink did massage the muscles attached to the sternum bone. I further find as a fact that Mr. Zink did make contact with the sides and tops of J.B.'s breasts as he drew his hands up from her diaphragm during his attempt to work on J.B.'s diaphragmatic breathing and as he massaged the muscles at her sides and in her armpit area.

[66] In fact, Mr. Zink acknowledged deliberately touching the sternum area of J.B.'s chest. He also acknowledged the possibility that he made contact with the sides of her breasts and with her breasts over the sheet though he testified that he did not recall such contact. His evidence was that any contact with her breasts either at their sides or

over the sheet was accidental. Accidental contact is not sufficient for a criminal conviction thus I will turn to an assessment of this issue.

[67] An assessment of whether the contact was intentional in this case involves assessing the evidence pursuant to the strictures of *R. v. W.D.*, [1991] 1 S.C.R. 742. Crucially, in this case, it also involves considering the evidence through the lens of Mr. Zink's particular cognitive and perceptual framework which became evident during the course of this trial.

[68] I make this observation while bearing in mind that the criminal standard of liability does not vary with an individual's subjective framework. That said, such a framework may be relevant to determining whether Mr. Zink possessed the requisite intention at the material time.

[69] Mr. Drolet, as *amicus*, assisted the Court by putting forth submissions for the Court to consider when assessing Mr. Zink's evidence. He bluntly stated, "let's address the elephant in the room". Mr. Drolet said that Mr. Zink has a "very, very different worldview". In my view, that statement was both a tactful and delicate way of summarizing Mr. Zink's presentation. Mr. Drolet added that Mr. Zink makes people feel uncomfortable. He said that people tell Mr. Zink that he is crazy which I infer to mean mentally ill.

[70] It is important to spend some time addressing Mr. Zink's manner of presentation as illustrated both during his testimony and throughout the entirety of this trial. Mr. Zink was before me for roughly five days. There was more interaction between us than is

the norm in most trials. This increased interaction was due to both Mr. Zink's self-represented status and his desire to interject frequent commentary.

[71] Much of the commentary related to Mr. Zink's "different worldview" as described by Mr. Drolet. Mr. Zink maintains that his actual name is Abra Pagani and that Brian Zink is a name that has been forced upon him. It is my understanding that it is his position that this name has been forced upon him by government authorities.

[72] Mr. Zink also is very fixed in his belief that he has been the subject of sex trafficking both in the past and currently. His descriptions of the mechanics of the trafficking are extreme and complex. Mr. Zink appeared quite anxious to focus my attention on this issue, particularly at the outset of the trial. From my perspective, these beliefs appear to be fixed delusions but I acknowledge that Mr. Zink firmly disagrees with that characterization. On this point, he and I will have to disagree. Regardless, this issue is not the subject matter before the Court.

[73] I appreciate that others with legal training reading this description might wonder if Mr. Zink is fit to stand trial. I am 100 percent certain that he is fit as that term is defined in the *Criminal Code*. Mr. Zink is an intelligent man who has a firm grasp on the role of the Court, the Crown, Mr. Drolet as *amicus*, and he understands the nature of the charge before the Court. He has a full understanding of the court processes.

[74] Of course, a different worldview as I have just described does not shed direct light on whether Mr. Zink's touching of J.B.'s breasts was accidental or intentional. The description does, however, assist in understanding the person before the Court. What also became apparent through the trial is that Mr. Zink's empathic and intuitive

bandwidth is highly compromised. I do not need expert evidence on this point; it is self-evident. It does not surprise me that he has had issues historically in his personal dealings with other individuals independent of any criminal court proceeding.

[75] As noted earlier, Mr. Zink maintains that he does not recall having contact with J.B.'s breasts either over the sheet or while massaging the muscles in and around her armpits; however, he did allow for the possibility of contact. His position is that any such contact was accidental.

[76] The provisions of *W.D.* require me to ask myself the following:

- (1) first, do I believe the evidence of the accused? If so, I must acquit;
- (2) secondly, if I do not believe the testimony of the accused but I am left in a reasonable doubt by it, I must acquit;
- (3) thirdly, even if I am not left in doubt by the evidence of the accused, I must ask myself whether, on the basis of the evidence that I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[77] At minimum, I am left in a reasonable doubt by Mr. Zink's testimony. Every case is unique and factual determinations turn on the nuances of the evidence in each case. In other cases, it would be impossible to find that such contact was accidental. In this case, however, I find it highly likely that Mr. Zink's contact with J.B.'s breasts was unintentional.

[78] I factor into this determination various aspects of both J.B.'s evidence and Mr. Zink's evidence. The contact over the sheet was a grazing albeit J.B. did describe it as slow. Speed, however, is subjective in this context and the issue of speed was first addressed during the police interview one year after the fact when the passage of time would have had some impact on memory. I do not conclude that this touch was deliberately lingering or slow. Instead, I find that Mr. Zink was moving his hands upward over J.B.'s diaphragm as he focused on her breathing which he viewed as fundamental to her physical tension issues. He should have been careful to ensure that he stopped his hands as soon as he reached the top of her diaphragm; however, I find as a fact that he did not exercise the necessary caution and his hands drifted upward.

[79] The contact with the sides of the breasts occurred when J.B.'s breasts would have been in the direct vicinity of her underarm area given that she was lying on her back. It would take great care not to have contact with breast tissue when massaging the armpit area and the adjoining muscles whether face up or face down. Again, I find that Mr. Zink did not exercise sufficient caution and he had incidental contact with J.B.'s breasts when massaging her armpit area.

[80] I also note that there were other behaviours by Mr. Zink that were totally appropriate. For example, no issue was taken with how he placed the sheet between his line of vision and J.B. when she turned from back to front.

[81] Further, I factor into my assessment Mr. Zink's own description of the nature of breasts. As he put it, they are just adipose, or fat, tissue around glands and they conceal muscles underneath. Mr. Zink's description was strikingly clinical though he is

clearly aware that massage therapists cannot intentionally massage the sexual parts of a client's body. To Mr. Zink, they appear to be just one of many body parts which undoubtedly impacted the degree of care that he exercised when massaging in their vicinity.

[82] I find that Mr. Zink was careless in his touch and that he should have exercised more caution. I do not find that this carelessness rose, however, to the level of recklessness that would lead to criminal liability.

[83] I turn next to Mr. Zink's massage of J.B.'s sternum. That area of the body, and the muscles above, is between the breast area in women. There is no evidence that Mr. Zink actually touched J.B.'s breasts when massaging the muscles above her sternum. Massaging or touching that part of the body could, however, constitute a sexual assault given its sensitive positioning.

[84] *R. v. Chase*, [1987] 2 S.C.R. 293, defines sexual assault as an assault committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test is an objective test. Sexual gratification need not be the purpose though that motive can be a factor in considering whether conduct is sexual.

[85] I find that the circumstances were not sexual when assessed objectively. This contact occurred during a therapeutic massage. Mr. Zink testified that massage therapists often treat muscles other than those directly associated with the client's complaint in order to achieve the desired therapeutic result. Further, Mr. Zink maintained that he did request consent to touch this area of the body and that he received consent. Applying *W.D.*, I cannot reject Mr. Zink's evidence on this point.

Consent

[86] Ms. Laurie argued that I could find that an assault occurred in this case even if that assault did not amount to a sexual assault. J.B. complained of tension in her neck, back, and shoulders. As I understand the argument, Ms. Laurie contends that any other parts of J.B.'s body that were touched without affirmative verbal consent throughout the massage constituted an assault.

[87] I do not make that finding for several reasons. First, Mr. Zink was adamant that he explained general consent at the outset of the massage, and I accept his evidence on this point. He said that he always says "if at any point you feel any discomfort, please let me know so that we can adjust the treatment, my pressure, my techniques, or even terminate the treatment". He explained that he deliberately makes this statement at the outset so that he does not need to constantly repeat it. He also explained that he tells them he will not talk to them constantly throughout the massage and, at a later point in his evidence, he noted that most people just want to be massaged and fall asleep during the massage. J.B. was prepared to proceed with the massage after this explanation was provided.

[88] Secondly, J.B. did not object to the massage except on one occasion when she spoke of the neck massage giving her anxiety. Noting her lack of objection is in no way meant to cast any sort of blame upon J.B. Her reasons for not speaking up were totally understandable. She was alone with a man that was making her increasingly uncomfortable and, as she put it, she just froze. Many if not most women would react in a similar fashion if they were experiencing similar discomfort.

[89] Many therapists, despite any lack of verbal articulation of discomfort, no doubt would have intuited that there was an issue with the massage. J.B. testified that she was tense and began to sweat. Mr. Zink testified that he noticed J.B. had “very bad” breathing, very laboured breathing, that her breathing was “off” and that she was trying to rush her words. Mr. Zink, however, seemed confused by her responses rather than sensing that there was an issue with his process. I attribute that confusion to his clear lack of emotional intuition or empathy and find that he simply did not realize that there was an issue that needed to be addressed.

[90] Thirdly, what Ms. Laurie is arguing would lead to massage therapists being found criminally liable whenever a part of the body is touched that is not the specific part that the client states is causing discomfort. In this case, that would mean that criminal liability would flow if any area was touched beyond the neck, shoulders, and back unless the therapist stops and obtains specific verbal consent as opposed to a generalized consent at the outset. In my view, this is casting the criminal net too widely. Mr. Zink appears to have excellent technical knowledge of the various muscles in the body and their interconnections. He described the muscles and the connections in great detail during his testimony. As he noted, each muscle has an opposite muscle to balance it. I have no reason to reject his evidence on this point. He also testified that he learned to keep SOAP notes in each case. He defined SOAP as “subjective objective assessment plan”. The “subjective” component is the client’s self-report but the “objective” component is the therapist’s own observations. It is the combination of the two, not the subjective component alone, which leads to the development of a plan.

[91] Clearly, blanket consent to touch at the outset does not sanction massaging intimate areas such as breasts or similarly intimate parts of the body. I do find, however, that the net is cast too widely if an individual were to complain about pain in the shoulder and the therapist is then criminally liable if the therapist touches the neck or the arm, for example. Further, I reiterate that it is not consent that led me to conclude that Mr. Zink's contact with J.B.'s breasts was not an assault; instead, it was my finding that the contact was accidental that led to this conclusion.

[92] I find as a fact that general consent to address J.B.'s neck, back, and shoulder tension was provided at the outset of the massage. I further find that Mr. Zink was trying to address this tension throughout the massage. Finally, I find that Mr. Zink did not realize that there was an issue with the massage though I also accept that J.B. did become uncomfortable as the massage proceeded.

[93] I now will turn to Ms. Jaspar's evidence. I qualified Ms. Jaspar as an expert in both massage therapy practices and techniques, and in professional standards and practices for obtaining consent. There is no question that Ms. Jaspar is well qualified in her field.

[94] The final report was fourteen pages in length. The first eight pages pertain to consent and consist largely of the very detailed consent provisions as outlined in the

CCHPBC's standards of practice. These provisions are helpful as they provide context but a failure to adhere to best practices as outlined by the CCHPBC does not equate to criminal liability.

[95] The final two and one-half pages of the report relate to Ms. Jaspar's opinion regarding the hypothetical, largely pertaining to the consent issue. There is limited discussion of technique nor was she asked in her testimony to address technique. As I already noted, Mr. Zink provided very detailed evidence regarding the reasons why he massaged various parts of J.B.'s body and why massaging various muscles aside from those in the back, neck, and shoulders still impacted those areas. He also explained his fixation on breathwork. I will not repeat all of those details; however, his descriptions made logical sense. Mr. Zink appears to have an excellent grasp of the technical aspects of massage therapy, and I accept, as a fact, that his intentions were therapeutic throughout the massage though he should have exercised more caution when practicing his techniques.

[96] Ms. Jaspar did not hear Mr. Zink's evidence nor was any of this evidence put to her.

[97] Finally, I turn to Ms. Jacobsen's evidence.

[98] Ms. Jacobsen was called as a witness to provide background regarding her clinic and Mr. Zink's employment. She was also called to give evidence about Mr. Zink's statements in his meeting with her a week after the massage.

[99] Ms. Jacobsen was very controlled and clear in her evidence however it was clear that this incident has had a profound effect upon her professionally and the effects continue to reverberate. I have great sympathy for Ms. Jacobsen. She did nothing inappropriate but it is clear that the mere fact of the complaint severely impacted her business and has prevented her from selling it. The collateral damage she has experienced is significant.

[100] Ms. Jacobsen testified that Mr. Zink did not ask who the complainant was which Ms. Jacobsen interpreted as demonstrating knowledge on Mr. Zink's part that he had acted inappropriately towards J.B. Not asking meant no reason to ask as he knew whom he had wronged.

[101] Further, she said that he stated, "yeah, I probably shouldn't be touching people" or "I don't think I should be touching people" which again she interpreted as an admission of guilt.

[102] Mr. Zink testified that he said "I probably should stop now", and he gave his reasons for making that statement.

[103] I do not know the precise words that Mr. Zink used and I make no finding on the specifics. I do find, however, that Mr. Zink made statements acknowledging that he should leave the profession.

[104] Mr. Drolet forcefully argued for the opportunity to make further submissions on the issue of consciousness of guilt. I find further submissions unnecessary as I am not convinced that guilt is the only inference to be drawn from Mr. Zink's comments. I also

do not conclude that his failure to ask about the identity of the complainant is an admission of guilt. I understand, however, why Ms. Jacobsen concluded that Mr. Zink's comments indicated guilt.

[105] The Court, however, must be careful not to bridge an inferential gap with a speculative conclusion, even if that conclusion is enticing, particularly when other interpretations are equally plausible. It is also crucial not to assume that individuals will all behave in the same fashion when confronted with allegations, especially individuals such as Mr. Zink who often does not respond according to the usual norms of social interaction.

[106] I accept Mr. Zink's evidence that he made statements to Ms. Jacobsen because he thought he should leave the profession, and leave for, as he put it, his own safety and the integrity of the profession. I interpret his explanation to mean that he did realize that he was not suited to the profession and that he should exit for his own well-being.

Final Comments

[107] J.B. initially made complaints to others who in turn made a complaint to the CCHPBC. There is no question that Mr. Zink's professional performance should have attracted the scrutiny of the CCHPBC. Further, I agree with Mr. Zink's self-assessment that this is not the correct profession for him for all of the reasons I have outlined. Lack of a finding of criminal liability does not change that conclusion. The intimacy of the massage process requires its practitioners to exhibit great empathy and intuition.

I do not know what steps, if any, the CCHPBC will take from this point moving forward but I am certain that the CCHPBC will exercise its appropriate due diligence.

Conclusion

[108] I find Mr. Zink not guilty of the charge.

CALDWELL T.C.J.