



# Best Practices for Massage Therapy Patient Consent and Waivers of Liability for Treatment During the COVID-19 Pandemic

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## Best Practices for Massage Therapy: Patient Consent and Waivers of Liability for Treatment During the COVID-19 Pandemic

### I. Introduction

With the re-opening of massage therapy practices during the ongoing COVID-19 pandemic, RMTs are facing new challenges with respect to ensuring informed patient consent for treatment as well as addressing the potential liability risks associated with COVID-19 transmission.

In order to address these new challenges, RMTs have been instructed by the CMTBC to update their standard practice for obtaining informed patient consent. We have provided the below comments in order to guide RMTs in adapting their practice to address the new risks posed by COVID-19, with respect to obtaining informed patient consent and addressing the liability risk associated with patient exposure by a treating RMT during this time.

We have also prepared a sample Waiver and Release of Liability relating to COVID-19 exposure during massage therapy treatment. As discussed in further detail below, these resources are intended to provide a point of reference only and do not constitute legal advice. Furthermore, the enclosed draft waiver has not been tested in a court of law and we make no representations regarding its potential enforceability in any particular circumstance. We strongly recommend that any RMT considering adopting a waiver of liability relating to COVID-19 seek out independent legal advice in order to confirm the wording and potential enforceability of the waiver in the specific circumstances of their practice.

### II. Patient Consent to Treatment

The risk posed by COVID-19 transmission necessitates that RMTs update their practices with respect to obtaining informed patient consent to treatment. This includes both verbal consent, as well as updating any written consent forms that may be in use by an RMT.

RMTs have an ongoing professional obligation to obtain informed patient consent prior to treatment, which includes providing an explanation of the potential risks associated with treatment. Given the risk posed by COVID-19, the CMTBC has set out their guidelines regarding additional informed patient consent that is required to meet professional standards for an RMT. They require that an RMT communicate with a patient prior to treatment in order to confirm as follows<sup>1</sup>:

- any massage therapy treatment involves some risk of COVID-19 transmission;
- the RMT is following a protocol to reduce or mitigate risk, but that risk cannot be reduced to zero;
- the patient consents to treatment despite some risk; and
- the RMT documents the patient's consent.

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<sup>1</sup>Interim Guidelines for Return to Practice, CTMBC, accessed May 25, 2020 <<https://cmtbc.ca/registrants/interim-guidelines-for-return-to-practice/>>

For RMTs who currently use a signed consent form for documenting patient consent to treatment, it is extremely important to keep in mind that having the patient sign a consent form is not enough on its own to establish informed consent. An RMT must engage in dialogue with the patient in order to ensure fully informed consent: provide the patient with an explanation for treatment, discuss the proposed treatment, and confirm the risk of treatment with the patient, including the risk of COVID-19 transmission. In addition, always ensure that you keep an open dialogue and encourage the patient to ask any questions or voice any concerns about the risk of COVID-19 transmission prior to treatment commencing. A written consent form itself is simply a document confirming that these explanations were given and agreed upon. If the explanations were not given, then the form has little value.

RMTs who currently use a patient consent form should consider adding a clause which clearly states, at a minimum, that the risk of COVID-19 transmission has been discussed with the patient, that the patient is aware that the risk cannot be eliminated, and that the patient consents to treatment despite some risk. An example clause could include:

*I confirm that my treating massage therapist has discussed with me the risks of COVID-19 transmission during massage therapy treatment, including the fact that COVID-19 is highly contagious and that it can be transmitted between persons even when they are not showing symptoms. I understand that the risk of transmission of COVID-19 cannot be entirely eliminated due to the nature of massage treatment. I consent to treatment with a full understanding and acceptance of the risks associated with COVID-19 transmission.*

For RMTs who do not wish to use a patient consent form, informed consent can be obtained verbally but must be documented in the patient file. It is extremely important to clearly and consistently document exactly what was discussed in terms of treatment plan, risks, and that consent was obtained. There should be a clear written record for each appointment with a patient confirming that informed consent was obtained on each occasion and exactly what was discussed.

### III. Waiver and Release of Liability

In addition to revising any written patient consent forms, RMTs may also consider creating a separate waiver or release with respect to potential COVID-19 transmission to a patient as a result of treatment. There is no legal requirement or CMTBC professional standard requiring an RMT to present a waiver to a patient prior to treatment. The decision to have a patient sign such a document would be an individual decision that might be made by an RMT depending on their own circumstances and preferences.

While the purpose of a patient consent form is to document that informed patient consent has been obtained, a waiver and release of liability is intended to help reduce the risk of potential legal action against an RMT if a patient is, or claims to have been, exposed to COVID-19 as a result of massage therapy treatment. These are therefore distinct documents with distinct purposes.

The recommended contents of a particular waiver may vary depending on the type of clinic, the steps taken to mitigate the risk of transmission, the typical patients, and other unique factors. Therefore, we strongly recommend that RMTs or clinics that are considering the use of a waiver obtain independent legal advice with respect to the proposed contents of any waivers or releases, in order to ensure that they understand the extent to which the wording of their particular waiver or release may or may not be enforceable at law.

As there have not yet been any legal cases involving the use of a waiver to release liability for risk of exposure to COVID-19, we cannot conclude with any certainty whether a waiver or release for potential liability from exposing a patient to COVID-19 would be enforceable. However, we would anticipate that general legal principles and the principals applied in cases involving waivers in other contexts would guide any such analysis.

In general, Canadian courts have found waivers to be enforceable, assuming that they have been properly and legally drafted, with some exceptions. Some exceptions which may make a waiver unenforceable include:

1. Where the person signing was misled as to what it was they were signing;
2. Where there is evidence of fraud or misrepresentation in relation to the document or circumstances of signing;
3. Where the person signing the waiver can establish that they did not intend to agree to the waiver of liability and that the party seeking to enforce the waiver failed to bring it to the attention of the signing party;
4. Where the parties were in such unequal positions of power at the time of signing that a Court finds the waiver to have been “unconscionable”.
5. Where a Court holds that the waiver itself is contrary to public policy, and refuses to uphold the waiver.

There are a number of best practices that RMTs should consider following in order to avoid the risk that a waiver may be found unenforceable. These include:

- Ensure that you are clear and forthright about what is contained in the waiver and its purpose, i.e. to release to RMT from potential liability in the case of a potential COVID-19 transmission to the patient.
- Ensure that the patient is given sufficient time and the opportunity to review the waiver in a private and comfortable setting. Do not rush the patient in the process of reviewing the waiver.
- Whenever possible, provide the patient with a copy of the waiver in advance of the appointment, and ask that they read it and feel free to raise any questions or concerns prior to attending for treatment.
- Whenever possible, RMTs who employ the use of a waiver should consider a policy of advising patients that they are free to cancel their appointment without charge if they are uncomfortable with the terms of the waiver, or if they become uncomfortable about signing the waiver at the time of treatment.
- The waiver should specify the date of treatment for which the release or waiver is being used, and if there are subsequent treatments, the patient’s signature should be obtained at the beginning of each in order to confirm the ongoing enforceability and agreement with the waiver or release.

Ultimately, even when best practices are followed, it is not possible to guarantee that a liability waiver will be upheld. In particular, there remains a risk that a Court may find a waiver unenforceable on public policy grounds. Nevertheless, the use of a liability waiver may help to reduce the overall risk of patient claims as well as ensuring that RMTs are having open and forthright conversations with patients about the realities of the risk surrounding massage treatment at this time.

We have provided a sample draft waiver, to serve as a point of reference for RMTs who are considering adopting a waiver in relation to the risk of patient exposure to COVID-19. However, as set out above, the contents of a waiver should be considered and drafted specifically depending on the differing circumstances of each practitioner or clinic. We therefore strongly recommend that any RMTs considering the use of a waiver in their practice obtain independent legal advice with respect to the proposed contents of any waivers or releases, in order to ensure that they understand the extent to which the wording of their particular waiver or release may or may not be enforceable at law.

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