

Indexed as: Fernandez(Re)

**THE DISCIPLINE COMMITTEE OF THE COLLEGE
OF PHYSICIANS AND SURGEONS OF ONTARIO**

IN THE MATTER OF a Hearing directed
by the Executive Committee and the Complaints Committee of the
College of Physicians and Surgeons of Ontario,
pursuant to Section 58(2) and 59(6)
of the **Health Professions Procedural Code**,
being Schedule 2 to the
Regulated Health Professions Act, 1991,
S.O. 1991, c.18, as amended

BETWEEN:

THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

- and -

DR. ALCANTRO BARTHOLOMEU ALBINO FERNANDEZ

PANEL MEMBERS: DR. J. THOMPSON (Chair)
DR. M. GOODMAN
DR. P. WATSON
F. HOSHIZAKI
J. FINLAYSON

HEARING DATE: JULY 24, 1996

DECISION/RELEASED DATE:

JULY 24, 1996

DECISION AND REASONS FOR DECISION

This matter came on for hearing at the College of Physicians and Surgeons of Ontario at Toronto, Ontario, on July 24, 1996.

At that time, the Committee heard argument for production of certain medical and psychiatric records of three complainants. The Committee subsequently reviewed a number of records in light of the criteria set forth by the Supreme Court in *R. v. O'Connor*, and ordered certain portions of these to be released to counsel.

The matter then resumed at the College of Physicians and Surgeons of Ontario on December 9, 1996.

The Allegations

The allegations to which Dr. Fernandez intended to plead guilty concerned to female patients and may be summarized as follows:

- (a) two allegations of misconduct in a professional respect which is professional misconduct under s. 34(3) of the *Medical Act*, R.S.O. 1970, c. 268, as amended;
- (b) two allegations of conduct unbecoming a medical practitioner which is professional misconduct under s. 34(3) of the *Medical Act*;
- (c) and three allegations of having engaged in conduct relevant to the practice of medicine that would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, which is professional misconduct under the Regulations made under the *Health Disciplines Act*.

The Plea

Dr. Fernandez, through his counsel, entered a plea of guilty to the above enumerated allegations.

PUBLICATION BAN

The Committee ordered, under section 45(3) of the *Health Professions Procedural Code*, that neither the names of the complainants, nor the information by which they might be identified, be published or broadcast.

AGREED STATEMENT OF FACTS

An Agreed Statement of Facts was entered as evidence. It provided as follows:

ZOE:

1. ZOE became a patient of Dr. Fernandez in or about 1975 or 1976. ZOE saw Dr. Fernandez at his office. She remained under his care when she went to University XGM and began to see a physician at the University Health Centre.
2. During the course of her care, ZOE requested birth control pills from Dr. Fernandez because she intended to be sexually active.
3. Dr. Fernandez asked ZOE whether or not she was having a normal orgasm. Dr. Fernandez now understands that this question went beyond what was appropriate in the circumstances.
4. Thereafter, Dr. Fernandez conducted a consensual medical examination of ZOE during the course of which his hand came in contact with her clitoris.

5. Dr. Fernandez saw ZOE on other occasions and from time to time pelvic examinations were conducted with ZOE's consent. During those examinations, his hand came in contact with her clitoris.
6. ZOE stopped seeing Dr. Fernandez when she began to attend University XGM.
7. It is admitted that Dr. Fernandez, in his dealings with ZOE did engage in (i) misconduct in a professional respect; and (ii) conduct unbecoming a medical practitioner each of which are professional misconduct pursuant to s. 34(3) of the *Medical Act*, R.S.O. 1970, c. 268, as amended.
8. It is further admitted that Dr. Fernandez, in his dealings with ZOE, Dr. Fernandez did engage in conduct relevant to the practice of medicine that, having regard to all of the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional which is professional misconduct pursuant to paragraph 31 of s. 26 of Regulation 577/75 made under Part III (Medicine) of the *Health Disciplines Act*, 1974 and s. 60(3)(c) of the said Act, as amended.

FQG

9. FQG was a patient of Dr. Fernandez for 14 years.
10. FQG was seen frequently over the years for various medical conditions including a number of conditions which warranted the performance of vaginal examinations.
11. During the course of his care and treatment of her, Dr. Fernandez and FQG had discussions concerning sexuality in which they discussed, *inter alia*, masturbation, orgasms and sexual positions. Dr. Fernandez now understands that these discussions went beyond what was appropriate in the circumstances.

12. Dr. Fernandez performed a consensual medical examination. Dr. Fernandez failed to explain the purpose of his examination as he ought to have. During the course of this examination his hand came in contact with her clitoris.

13. It is admitted that Dr. Fernandez, in his dealings with FQG, did engage in (i) misconduct in a professional respect; and (ii) conduct unbecoming a medical practitioner each of which are professional misconduct pursuant to s. 34(3) of the *Medical Act*, R.S.O. 1970, c. 268, as amended.

14. It is admitted that Dr. Fernandez, in his dealings with FQG, did engage in conduct relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional which is professional misconduct pursuant to paragraph 31 of s. 26 of Regulation 577/75 made under Part III (Medicine) of the *Health Disciplines Act*, 1974, and s. 60(3) of the said Act, as amended.

15. It is admitted that Dr. Fernandez in his dealings with FQG, did engage in conduct relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, which is professional misconduct under paragraph 32, s. 27 of Regulation 448 made under Part III (Medicine) of the *Health Disciplines Act*, as amended.

Finding

Based on the contents of the Agreed Statement of Facts, the Committee found Dr. Fernandez guilty of professional misconduct under section 34(3) of the *Medical Act*, R.S.O. 1970, c. 268, as amended, and under paragraph 31 of section 26 of Regulation 577/75 and paragraph 32 of section 27 of Regulation 448, made under Part III (Medicine) of the *Health Disciplines Act*, 1974, and section 60(3)(c) of the said Act, as amended.

Submissions Regarding Penalty

The College and the defence had agreed upon a joint submission as to penalty, which was the basis upon which the physician entered his guilty plea.

Counsel for the College sought a recorded reprimand, a six-month suspension and a \$5000 fine. Defence counsel conceded that the penalty was appropriate.

The Committee received in evidence a written statement from one of the complainants describing the consequences, for her, of Dr. Fernandez's conduct.

Counsel for the physician entered a book of some 52 letters attesting to Dr. Fernandez's character. He also provided the Committee with a letter from a forensic psychiatrist indicating that, on the basis of four hours of interviews, he was unable to detect any evidence of improper ethical behaviour, impulsive behaviour, or indication of mental illness associated with aberrant behaviour. He also indicated that his client denied the allegations, but conceded that his words or actions could have been misconstrued or misinterpreted.

Finally, the Committee heard from six witnesses -- a school teacher, an administrator, a police sergeant, two physicians and a nun -- who have known Dr. Fernandez either as

patients or as colleagues. All spoke highly of his competence and his caring, and of his involvement in his church and the community.

Penalty and Reasons for Penalty

The Agreed Statement of Facts refers to Dr. Fernandez making enquiries (which he now realizes were inappropriate) regarding the sexual behaviour of two patients, at the time in their mid to late teenage years. It also refers to his hand coming **A**n contact[@] with the clitoris of each of these patients when he, from time to time, carried out pelvic examinations.

One of Dr. Fernandez's victims, in writing of her experience, describes the **A**ngulfing shame[@] she felt for a number of years, and her reluctance to come forward because of **A**ne shame I might bring on myself, my parents and siblings if I made my experience public.[@] She also described how she has been affected by the protracted investigation, by delays in the discipline hearing, by the various motions. She adds, **A**oday I am a mature woman, and completely free of guilt over what occurred in the offices of Dr. Fernandez so long ago. And yet, the shame is still overwhelming... I guess it's true that the victim of misconduct will always be a victim.[@]

The Committee was not helped by the 52 letters attesting to Dr. Fernandez's good character or the testimony of the six witnesses it heard on the same subject. This is because it was cognizant of the principle articulated in *R. v Profit* by Mr. Justice Sopinka:

A. sexual misconduct occurs in private and in most cases will not be reflected in the reputation in the community of the accused for morality.[@]

Regina v. Profit (1993), 11 O.R. (3d) 98, at 804 (Supreme Court).

College counsel argued that the good reputation enjoyed by most physicians facilitates this type of breach of trust and makes such breaches the more damaging -- to the patient and to the profession. The Committee agrees.

The Committee notes that it has been provided with no evidence of similar misconduct over the ten to twenty years since the events in question. This, and the forensic psychiatric evidence, provides some reassurance that Dr. Fernandez will not re-offend.

The Committee views the proposed penalty as significant.

The effect on Dr. Fernandez's reputation within his profession, his community and his church will be substantial. The fine, the maximum permitted, will be added to the loss of income consequent upon the six-month suspension.

The Committee, in imposing this penalty, wishes to denounce in no uncertain terms the behaviour of which Dr. Fernandez has pleaded guilty. It intends to convey to the profession the view the College has of such conduct. It hopes to make clear to the community in general, as well as the community in which Dr. Fernandez lives, the College's position. By so doing, it believes the likelihood that such conduct on the part of Dr. Fernandez, or any other physician, will be substantially diminished.

Penalty

1. Dr. Fernandez receives a recorded reprimand.
2. Dr. Fernandez's Certificate of Registration be suspended for a period of six (6) months. The period of suspension shall commence on a date which shall be fixed by the Registrar, who shall take this action with sixty (60) days of the date on which this Decision becomes final. In any event, the term of this suspension

shall commence not more than 180 days after the date on which this Decision becomes final.

3. Dr. Fernandez pay a fine of \$5000 within sixty (60) days of the date on which this Decision becomes final.

Dr. Fernandez having signed a waiver of appeal to the Divisional Court, the reprimand was administered by the Committee.