

NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. Brian Cameron Gay, this is notice that the Discipline Committee ordered that no person shall publish or broadcast the identity of the patients or any information that could disclose the identity of the patients under subsection 45(3) of the *Health Professions Procedural Code* (the Code), which is Schedule 2 to the *Regulated Health Professions Act, 1991*.

Subsection 93 of the Code, which is concerned with failure to comply with these orders, reads:

93(1) Every person who contravenes an order made under section 45 or 47 is guilty of an offence and on conviction is liable to a fine of not more than \$10,000 for a first offence and not more than \$20,000 for a subsequent offence.

Indexed as: Gay (Re)

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

IN THE MATTER OF a Hearing directed
by the Complaints Committee of
the College of Physicians and Surgeons of Ontario
pursuant to Section 26(2) of the *Health Professional Procedural Code*,
being Schedule 2 to the *Regulated Health Professions Act*,
1991, S.O. 1991, c. 18, as amended.

B E T W E E N:

THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

- and -

DR. BRIAN CAMERON GAY

PANEL MEMBERS:

DR. R. MACKENZIE (CHAIR)
DR. P. CHART
D. MACKINNON
DR. M. GABEL
H. WALKER

Hearing Date: January 12, 2005
Decision/ Release Date: January 12, 2005

Publication Ban

DECISION AND REASONS FOR DECISION

The Discipline Committee of the College of Physicians and Surgeons of Ontario heard this matter at Toronto on January 12, 2005. At the conclusion of the hearing, the Committee stated its finding that the member committed professional misconduct, and delivered its penalty order with written reasons to follow.

PUBLICATION BAN

On January 12, 2005 the Discipline Committee made an order pursuant to subsection 45(3) of the Health Professions Procedural Code (the “Code”), which is Schedule 2 to the *Regulated Health Professions Act, 1991*, prohibiting the publication or broadcast of the name of the patients, or any information that could disclose the names or identities of such patients. Reasons for that Order have been released separately.

ALLEGATION

The Notice of Hearing alleged that Dr. Gay committed professional misconduct under paragraph 1(1)33 of Ontario Regulation 856/93 made under the *Medicine Act, 1991* (“O/Reg. 856/93”), in that he engaged in conduct or an act or acts relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

RESPONSE TO THE ALLEGATION

Dr. Gay admitted to the allegation as set out in the Notice of Hearing.

EVIDENCE

The following agreed Statement of Facts and Admission was filed as an Exhibit and presented to the Committee:

PART I – STATEMENT OF FACTS

1. Dr. Brian Cameron Gay is a general surgeon. He graduated from medical school (University of Ottawa) in 1951 and was granted an independent practice certificate in Ontario in 1958.
2. In March 1999, following an assessment, Dr. Gay signed an undertaking with the College of Physicians and Surgeons of Ontario (the “College”) agreeing to cease all primary care practice and restrict his practice to assisting at surgery, performing general surgical procedures in a hospital setting where patients have been referred to him and performing referred minor office surgical procedures where he is not the most responsible physician. A copy of his undertaking is attached as Tab 1 [to the Statement of Facts].
3. After signing the undertaking, in response to inquiries from the College, Dr. Gay confirmed in 2000, 2001 and 2002 that he was abiding by the terms of the undertaking and that his practice was restricted to surgery as defined in the undertaking. Attached at Tab 2 [to the Statement of Facts] are copies of Dr. Gay’s signed letters confirming that he was continuing to abide by the restrictions on his practice for the year 2000, 2001 and 2002.
4. In breach of his undertaking with the College, and contrary to the information he repeatedly provided to the College, Dr. Gay repeatedly provided primary care to patients and also carried out minor surgical procedures on patients for whom he was the primary care physician from 1999 until 2002. The reports of two experts retained by the College, one general practitioner and one surgeon, assessing a selection of Dr. Gay’s charts are attached [to the Statement of Facts] at Tabs 3 and 4 respectively. Both experts review the care provided and concludes that Dr. Gay was not practising within the restrictions set out in his undertaking with the College during the time period for which they reviewed the patient charts.

Dr. Gay's OHIP billing records from 1999-2002 are attached [to the Statement of Facts] at Tab 5.

5. According to information provided by Dr. Gay, by 2003 he had reduced his practice to three days a week, a schedule which he currently maintains. On one of these days he works at a Medical Clinic (a local walk-in clinic) where he performs minor surgeries. The clinic is responsible for booking patients and appointments are only made for patients who are referred by other physicians. Dr. Gay also works in his office two days each week, doing minor surgical procedures. Dr. Gay has now retired from hospital surgical practice, but continues to do surgical assists. While Dr. Gay accepts the findings in the expert reports regarding charts reviewed, his position is that his billing records do not accurately portray the extent of his primary care practice as he mistakenly used family practice billing codes in some cases where he provided minor surgical services.

PART II – ADMISSION

6. Dr. Gay admits that the conduct set out above constitutes professional misconduct under paragraph 1(1)33 of Ontario Regulation 856/93 made under the *Medicine Act, 1991*, in that he has engaged in conduct or an act or acts relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

FINDING

The Committee accepted as true all of the facts set out in the agreed Statement of Facts. Having regard to these facts and Dr. Gay's admission, the Committee found that Dr. Gay committed professional misconduct in that he engaged in conduct or an act or acts relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

In reaching its decision on the finding, the Committee had regard to the following:

- 1) Dr. Gay admitted to the misconduct;
- 2) evidence confirming the clear breach of the undertaking was outlined in both of the expert reports;
- 3) OHIP billings reflected a pattern consistent with the delivery of primary care;
- 4) the undertaking signed by Dr. Gay was clear in its directive and intent;
- 5) Dr. Gay was dishonest when he gave the College false assurances that he was compliant with the undertaking; and
- 6) Dr. Gay repeatedly and clearly exceeded the scope of practice that was open to him.

The Committee noted that Dr. Gay regularly and repeatedly rendered services of a primary care nature. These were not isolated events. Services provided included management of common medical conditions, i.e., migraine, bronchitis, elevated blood lipids, drug addiction and so forth. In addition, billing information includes numerous submissions for annual health examinations and preventive care. It was clear from the reports of the experts that Dr. Gay often did what was expedient or requested by patients regardless of whether this violated his scope of practice. This constitutes flagrant disregard for the undertaking that Dr. Gay gave to the College.

The Committee concluded that Dr. Gay could not have misunderstood the obligation he was under, nor does the Committee accept that he simply and mistakenly applied incorrect billing codes. The Committee concluded that Dr. Gay's actions were deliberate and serious.

This inexcusable conduct as detailed above was, in the Committee's view, more than sufficient and egregious to constitute professional misconduct as alleged in the Notice of Hearing.

DECISION AND REASONS AS TO PENALTY

Counsel for the College and counsel for Dr. Gay made a joint submission regarding penalty. The parties jointly proposed the disposition of these proceedings on the following terms:

- (a) Dr. Gay's certificate of registration be suspended for a period of two months effective February 1, 2005;
- (b) Dr. Gay's certificate of registration will be subject to the indefinite condition of ongoing monitoring, at his own expense, by a physician acceptable to the College, who will:
 - i) meet with Dr. Gay a minimum of once every two months to review and discuss his charts for the purpose of ensuring compliance with this order and his undertaking; and
 - ii) will report to the College a minimum of once every three months;
- (c) A College investigator or representative or the College-approved practice monitor will be entitled to inspect Dr. Gay's practice at any time without notice;
- (d) If the College receives information indicating that Dr. Gay has breached his undertaking with the College or the terms of the Committee's Order, the College will be entitled to immediately suspend his certificate of registration pending an investigation and a report to the Executive Committee; and
- (e) Dr. Gay will pay the College \$2,500.00 in costs.

Where there is a joint submission with respect to penalty, the Committee should not depart from the penalty proposed unless that penalty is so disproportionate to the underlying misconduct and circumstances as to be contrary to the administration of justice or would be such as to bring the administration of justice into disrepute. The Committee does have an important obligation to the public and the profession to consider the appropriateness of the jointly proposed penalty against this threshold.

In the present case, the majority of the Committee had regard to penalty principles of public protection, denunciation of the conduct, specific and general deterrence, and maintenance of the integrity of the profession and its governance process.

The majority of the Committee considered that the proven misconduct was sufficiently serious to support a significant penalty based upon the following considerations:

- The breach of an undertaking to the College constitutes a serious case of misconduct;
- The misconduct was deliberate, repeated, frequent and flagrant, and not a simple error in judgment;
- Dr. Gay was repeatedly dishonest and misleading in his assurances to the College that he was abiding by the undertaking he had signed; and
- Dr. Gay provided no justification for his behavior.

In order to fulfill the penalty objectives identified above, the majority of the Committee was of the view that a meaningful suspension was appropriate. Such a suspension is necessary in order to address specific and general deterrence, sending a clear message that such behavior will not be tolerated. The majority of the Committee was particularly concerned with Dr. Gay's attempt to mislead the College and his lack of honesty in dealing with the College. The majority of the Committee finds this behavior to be unethical, and to undermine the integrity of the profession and its process of governance.

The majority of the Committee considered Dr. Gay's admission of misconduct, his lengthy career and his lack of disciplinary history to be mitigating circumstances. However, Dr. Gay's admission of misconduct must be viewed in context – the evidence, including the expert evidence, was overwhelmingly against him.

Counsel also invited the Committee to consider as a mitigating circumstance the fact that neither of the expert reports identified any serious problems with Dr. Gay's care of patients. However, the Committee did not accept this submission given that neither

expert was asked to comment on the quality of care, nor any specific care-related issues. There was no evidence one way or the other to allow any conclusion to be drawn on the subject of the quality of care or possible harm to patients.

The majority of the Committee considered the proposed suspension of two months to be at the lower end of what might be appropriate, given the serious nature of the misconduct and all of the circumstances of the case. However, having regard to the legal principles applicable to a joint submission, the majority of the Committee concluded that the joint submission as to the length of suspension should be accepted by the Committee.

With respect to the jointly proposed conditions and ongoing indefinite monitoring, the majority of the Committee accepted these conditions as appropriate and indeed essential, given Dr. Gay's history of lack of compliance.

The joint submission as to penalty did not include a reprimand, which could have served as an additional specific deterrent given the nature and scope of the misconduct. Had the majority of the Committee been fashioning an independent remedy in this case, it would have directed a reprimand. However, the majority of the Committee concluded that the absence of a reprimand in the joint submission as to penalty should not lead the Committee to reject the joint submission.

In conclusion, the Committee, by majority, accepted the penalty as jointly proposed by counsel.

ORDER

Therefore, the Discipline Committee, by majority, ordered and directed that:

1. Dr. Brian Cameron Gay's certificate of registration be suspended for a period of two months commencing on February 1, 2005;
2. Dr. Brian Cameron Gay's certificate of registration will be subject to the indefinite condition of ongoing monitoring at his own expense, by a physician acceptable to the College, who will:

- i) meet with Dr. Brian Cameron Gay a minimum of once every two months to review and discuss his charts for the purpose of ensuring compliance with this order and his undertaking; and
 - ii) will report to the College a minimum of once every three months;
- 3. A College representative, including but not limited to Dr. Brian Cameron Gay's approved practice monitor, will be entitled to inspect his practice(s), office(s), and patient charts at any time without notice for the purposes of monitoring and enforcing compliance with the terms of this order and of his undertaking with the College;
- 4. If the College receives information indicating that Dr. Brian Cameron Gay has breached his undertaking with the College or the terms of this Order, the Registrar will be entitled to immediately suspend his certificate of registration pending an investigation and a report to the Executive Committee; and
- 5. Dr. Brian Cameron Gay shall pay the College \$2,500.00 in costs.

DR. R. MACKENZIE (CHAIR)

DR. M. GABEL

DR. P. CHART

DISSENTING DECISION AND REASONS FOR DECISION AS TO PENALTY

The minority of the Committee accepts and subscribes to the Decision and Reasons for Decision of the majority as to the finding of professional misconduct.

The minority has concluded, however, that we cannot accept the joint submission as to penalty, which the majority has adopted.

The minority has reviewed, in draft form, the reasons for decision of the majority of the Committee, which outline the circumstances of the case. While the majority accepts the joint submission respecting penalty, we noted the reasons that they have articulated in respect of the proposed penalty.

The minority has concluded that the jointly proposed penalty is unreasonable and disproportionate relative to the gravity of the underlying finding of misconduct. We have further concluded that such a lenient penalty would be contrary to the public interest and would bring the administration of justice into disrepute, were we to accept it.

The minority does not reach this conclusion lightly. We recognize that the proposed penalty was based on discussions between two adversarial parties, and we appreciate that both parties had regard to a broad range of factors, including perhaps some not known to the panel, in making the joint submission. However, based on the evidence before the panel, and the submissions and clarifications provided during the penalty phase of the hearing, we have concluded after careful consideration that the proposed penalty does not fall within the range of appropriate penalties for the misconduct as found.

There are several reasons for this. Foremost among them is the fact that Dr Gay had consciously assured the College in writing on at least three separate occasions that he was adhering to a signed undertaking to the College to cease primary care and restrict his practice significantly, when he was in fact violating the undertaking repeatedly, on a very regular basis. Second, we were persuaded, including by the expert reports, that Dr. Gay's violations of the undertaking were very serious indeed and could not have been accidental. The conduct and the breaches could only have been knowing and deliberate. Third, while the experts who reviewed Dr. Gay's practice patterns were not asked to

comment on the quality of care and possible harm to patients, we inferred that at the very least the risk of harm was present. While the reason for the undertaking was not disclosed to the Committee, the substance of the undertaking was directed at least in part at the protection of patients.

The minority also noted that no explanation was provided to the panel for Dr. Gay's admitted misconduct. We further noted that the original undertaking contained a provision clearly stating that breaches would lead to further disciplinary action. No person reading the undertaking could fail to conclude that the College would view breaches of it very seriously.

The joint submission as to penalty proposed that Dr. Gay's certificate of registration be suspended for a period of two months, and that Dr. Gay's practice would be monitored at Dr. Gay's expense by another physician. It also provides that a College monitor be entitled to inspect Dr. Gay's practice at any time, and that he pay \$2,500.00 to the College to help defray the costs of the hearing.

From one point of view, a suspension for two months, with the further conditions, could be seen to be significant due to the reputational and financial impact on the member, and we do not ignore this perspective. However, from our perspective, the jointly proposed penalty is simply inadequate to address deliberate, flagrant and repeatedly dishonest and unprofessional conduct. Dr. Gay solemnly undertook to the College in 1999 to restrict his practice. His billing records and the expert evidence make clear that he showed no respect for that undertaking, and repeatedly breached it. Moreover, he was dishonest in his annual responses to the College about his compliance with the undertaking.

An appropriate penalty order in this case should address the objectives of denunciation of the misconduct, specific and general deterrence, and the maintenance of the integrity of the profession and its self-governance process. In the view of the minority, an appropriate suspension in this case should have been in the order of six months, with the

additional conditions imposed. Moreover, a reprimand by the Committee should also have been directed. The minority would have so ordered.

H. WALKER

D. MACKINNON