

ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

Citation: *College of Physicians and Surgeons of Ontario v. Kao*, 2023 ONPSDT 23

Date: October 23, 2023

Tribunal File No.: 23-005

BETWEEN:

College of Physicians and Surgeons of Ontario

- and -

Dr. John Te Shao Kao

FINDING AND PENALTY REASONS

Heard: September 19, 2023, by videoconference

Panel:

Ms. Shayne Kert, chair

Mr. Jose Cordeiro

Dr. Roy Kirkpatrick

Mr. Paul Malette

Dr. Susanna Yanivker

Appearances:

Ms. Emily Graham, for the College

Mr. Adam Patenaude, for Dr. Kao

RESTRICTION ON PUBLICATION

Pursuant to Rule 2.2.2 of the OPSDT Rules of Procedure and ss. 45-47 of the Health Professions Procedural Code, no one shall publish or broadcast the names of patients or any information that could identify patients or disclose patients' personal health information or health records referred to at a hearing or in any documents filed with the Tribunal. There may be significant fines for breaching this restriction.

Introduction

[1] Dr. John Kao is a plastic surgeon who practices in Markham, Ontario. He received his certificate of independent practice from the College in 1993. He has both a hospital practice involving non-cosmetic plastic surgery consults, and a practice at a private cosmetic surgery facility. He has no discipline history.

[2] Between 2007 and 2020, Dr. Kao provided medical care and treatment to a family member, Individual X. This conduct contravened College policy and advice to the profession regarding treatment of a family member or a person close to the physician.

[3] At the hearing, Dr. Kao admitted, and we found, that based on the agreed facts he committed professional misconduct. The parties made a joint submission that the penalty should be a reprimand and a five-month suspension of his certificate of registration, with conditions.

[4] Our role in assessing a joint penalty submission is limited. Unless the panel finds that imposing the proposed penalty would bring the system of physician professional regulation into disrepute, the joint submission should be accepted. Applying that test, we accepted the joint submission at the hearing. We also ordered costs to be paid to the College of \$6,000, as agreed by the parties. These are our reasons.

The Misconduct

The Agreed Facts

[5] Dr. Kao's patient chart for Individual X sets out that between 2007 and 2020, Dr. Kao provided Individual X with various treatments and care, including: administering recurring episodic facial cosmetic injections such as Botox and dermal fillers; performing a fat grafting procedure on one occasion; performing a minimally-invasive procedure on one occasion with a device that uses radio-frequency energy; writing two prescriptions for antivirals; and making five requisitions for diagnostic imaging and three referrals to specialists. The results of the imaging and two of the specialist referrals were reported back to Dr. Kao.

[6] Most of the care that Dr. Kao provided to Individual X did not constitute insured services. Dr. Kao did not bill either OHIP or Individual X for the care and treatment that he provided.

Finding of Professional Misconduct

[7] The agreed facts support a finding that Dr. Kao breached his professional obligations as alleged. To ensure that a physician's ability to maintain the necessary amount of emotional and clinical objectivity is not compromised (thereby potentially impacting the quality of care), College policy prohibits physicians from providing treatment to family members, except for treatment of a minor condition or in emergency situations, and only when another qualified health care professional is not readily available.

[8] Pursuant to the policy, physicians are also prevented from providing recurring episodic treatment to family members. Where additional or ongoing care is necessary, physicians must transfer care of the family member to another qualified healthcare professional as soon as practical. The policy also applies to referrals, as the steps involved in identifying a clinical indication for a referral (i.e. taking a medical history, conducting an appropriate examination and/or arranging investigations) would exceed the scope of care that the policy permits physicians to undertake in relation to family members.

[9] In treating Individual X (a person who was a family member during the relevant time) outside the limited circumstances permitted by the College policy, and by providing some ongoing treatment and/or care to them and referring them to other specialists, Dr. Kao breached that policy. In doing so, he engaged in conduct that would reasonably be regarded by members of the profession as disgraceful, dishonourable or unprofessional.

Penalty and Costs

[10] As this was a joint submission on penalty, the "undeniably high threshold" of the public interest test established by the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43, applies: *Bradley v. Ontario College of Teachers*, 2021 ONSC 2303; *Ontario College of Teachers v. Merolle*, 2023 ONSC 3453.

[11] The public interest test requires that a joint submission be accepted unless "the proposed penalty is so 'unhinged' from the circumstances of the case that it must be rejected": *Bradley* at para. 14; *Anthony-Cook* at para. 34. In the context of this Tribunal, a joint submission will only be contrary to the public interest if it is "so markedly out of line with expectations of reasonable persons aware of the circumstances of the case that

they would view it as a break down in the proper functioning” of the College’s professional discipline process: *Anthony-Cook* at para. 33; *College of Physicians and Surgeons of Ontario v. Bahrgard Nikoo*, 2022 ONPSDT 15 at para. 34. Put simply, “[t]here must be something completely unacceptable, unusual or unconscionable about [a joint submission] to reject it”: *Matheson*, above at para. 17.

[12] We are satisfied that, in the circumstances, the proposed resolution is: i) not contrary to the public interest; and ii) achieves the relevant penalty goals in this case. This is so for several reasons.

[13] First, the reasoning underlying the College policy is clear. When treating any patient, a physician must exercise good professional judgement. However, a physician’s ability to maintain the necessary amount of emotional and clinical objectivity required for professional judgement can be compromised when treating themselves, family members or persons close to them. Physicians may then have difficulty meeting the standard of care, and the individual may not receive the best quality treatment.

[14] While there is no indication that any of the treatment that Dr. Kao provided to Individual X fell below the requisite standard of care, his failure to maintain the strict professional boundaries outlined in the College policy is nonetheless concerning. In violation of the policy, Dr. Kao provided treatment and care outside the permitted scope to a family member over a 13-year period. This was not merely a momentary lapse of judgement or an inadvertent misunderstanding of the College policy in an emergency situation, but a course of conduct that continued intermittently for many years.

[15] Second, the jurisprudence provided to us indicates that the proposed penalty is in line with the range of penalties in cases involving broadly similar misconduct – physicians providing treatment and/or care for themselves, family members or other close individuals. The penalties imposed have included a reprimand with suspensions ranging from four to six months: *College of Physicians and Surgeons of Ontario v. Irvine*, 2011 ONCPSD 39; *College of Physicians and Surgeons of Ontario v. Vasovich*, 2015 ONCPSD 32; *College of Physicians and Surgeons of Ontario v. Guirguis*, 2018 ONCPSD 47; *College of Physicians and Surgeons of Ontario v. Raddatz*, 2020 ONCPSD 27; and *College of Physicians and Surgeons of Ontario v. Adams*, 2021 ONCPSD 11.

[16] Each case, of course, turns on its own facts. Dr. Kao has practised in his field for over 30 years and has no discipline history. The letters of support provided by a number of his colleagues (many of whom have known and/or worked with him for decades) describe Dr. Kao as a competent and caring physician, who treats his patients with kindness and compassion. None of the misconduct in issue involved any of his arms-length patients. Dr. Kao accepted responsibility and admitted his misconduct, obviating the necessity of a contested hearing.

[17] Third, the goals of public protection and specific deterrence have, to a significant extent, already been achieved. We accept that, as submitted by counsel, the discipline process has had a positive effect on Dr. Kao and it is unlikely that he will repeat the misconduct in future. There is also a focus on rehabilitation through education, as Dr. Kao will be required to engage in and complete the PROBE ethics and boundaries program.

[18] Finally, the proposed penalty addresses the goal of general deterrence by reinforcing that the College takes such misconduct seriously. Specifically, it reminds other members of the medical profession of the importance of maintaining boundaries that are fundamental to a proper and effective physician-patient relationship, including those that involve family members, and that the College will take steps to address the misconduct where they fail to do so.

[19] Balancing the relevant facts and caselaw, we find that the proposed penalty is appropriate and not contrary to the stringent public interest test. The costs proposed are also reasonable and in accordance with the Tribunal tariff.

Order

[20] At the conclusion of the hearing, we ordered:

- a. Dr. Kao to attend before the panel to be reprimanded;
- b. The Registrar to suspend Dr. Kao's certificate of registration for five months commencing September 26, 2023 at 12:01 a.m.;
- c. The Registrar to place terms, conditions and limitations on Dr. Kao's certificate of registration requiring that he participate in and complete the PROBE Ethics & Boundaries program within six months of the Order, or if the program is

not available within that timeframe at the earliest available opportunity, and that he provide proof of completion within one month of completing the program.

d. Dr. Kao pay the College costs in the amount of \$6,000 by October 19, 2023.

ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

Tribunal File No.: 23-005

BETWEEN:

College of Physicians and Surgeons of Ontario

- and -

John Te Shao Kao

**The Tribunal delivered the following Reprimand
by videoconference on Tuesday, September 19, 2023.**

*****NOT AN OFFICIAL TRANSCRIPT*****

REPRIMAND - Dr. John Te Shao Kao

Dr. Kao, you are appearing before us having engaged in conduct that was disgraceful, dishonourable or unprofessional. We are particularly concerned that this finding arises from a series of poor choices on your part.

You showed a lack of judgement when you chose to provide ongoing medical treatment and care to a family member for conditions that were not minor or urgent. This conduct continued over a number of years, suggesting more than momentary inattention or an inadvertent misunderstanding of College policies. In providing treatment to a family member you disregarded the boundaries that are fundamental to a proper and effective doctor patient relationship, and potentially compromised the quality of that person's care. Whenever a physician treats someone with whom the physician has a personal relationship, there is a risk that the personal relationship will affect the physician's ability to provide good quality care.

Physicians enjoy considerable autonomy in practicing their profession. In return, physicians accept the responsibility to respect the public trust and to act ethically in their patients' best interest.

The supporting letters filed on your behalf describe a caring, diligent, and competent physician. Because of your serious and unacceptable conduct, your patients will be deprived of your services for the period of your suspension.

We hope that you have learned from this experience and expect that on completing your suspension, and the educational requirement set out in today's order, you will be diligent in complying with your professional obligations in the future.

That concludes the reprimand.