

ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

Citation: *College of Physicians and Surgeons of Ontario v. Gerber*, 2023 ONPSDT 11

Date: April 18, 2023

Tribunal File No.: 20-002

BETWEEN:

College of Physicians and Surgeons of Ontario

- and -

Dr. David Gerber

FINDING AND PENALTY REASONS

Heard: March 8, 2023, by videoconference

Panel:

Ms. Sherry Liang (chair)

Ms. Lucy Becker

Dr. Paul Hendry

Mr. Rob Payne

Dr. James Watters

Appearances:

Ms. Carolyn Silver and Ms. Simmy Dhamrait-Sohi, for the College

Mr. Colin Johnston and Ms. Amanda Smallwood for Dr. Gerber

RESTRICTION ON PUBLICATION

Pursuant to Rule 2.2.2 of the Tribunal's Rules of Procedure, 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, unless the Tribunal orders otherwise.

The Tribunal orders that, at their request, there shall be no restriction on the publication or broadcast of the names of Ms. Elizabeth Adamou and Dr. Navi Dhanota.

Introduction

- [1] The College's Inquiries, Complaints and Reports Committee (ICRC) referred allegations Dr. Gerber committed misconduct to the Tribunal.
- [2] At the hearing, Dr. Gerber and the College provided a Statement of Facts and Plea of No Contest. The member does not contest that, based on those facts, he committed professional misconduct by engaging in disgraceful, dishonourable or unprofessional conduct. We found that the member committed professional misconduct and accepted the joint submission on penalty, ordering a reprimand and four-month suspension of the member's certificate of registration, with conditions. We also directed the member to pay costs to the College in the amount of \$6,000. These are the reasons for our findings.

Background

- [3] Dr. Gerber practises obstetrics and gynecology at a medical clinic. The allegations against Dr. Gerber involve his clinical encounters with ten patients, their complaints of lack of informed consent before intimate procedures and his failure to respond sensitively and adequately to their expressions of pain and discomfort during the procedures.
- [4] The clinic where Dr. Gerber practises is an out-of-hospital premises (OHP) subject to the College's Out-of-Hospital Premises Inspection Program (OHPIP). This program applies to settings outside a hospital that perform procedures involving the use of anaesthesia or sedation. Under Regulation 114/94 (the Regulation), made under the *Medicine Act, 1991*, SO 1991, c. 30, the College inspects out-of-hospital premises every five years. Until August 2021, Dr. Gerber was the Medical Director of the clinic, responsible for all duties of a Medical Director as set out in the OHPIP Program Standards.
- [5] The clinic is also a licensed Independent Health Facility under the *Independent Health Facilities Act*, RSO 1990, c. I.3 (IHFA). The College conducts assessments and inspections of such facilities under IHFA, at the request of the Ministry of Health and Long-Term Care (MOHLTC).
- [6] The allegations also involve Dr. Gerber's conduct in response to the College's efforts to conduct a regularly scheduled assessment of the ultrasound services

provided at the clinic, at the request of the MOHLTC, and his conduct in response to the College's five-year inspection assessment under the OHPIP.

Patient encounters

- [7] The ten patients saw Dr. Gerber at various times and for varying periods between 2003 and 2020. They came to his office for gynecological procedures such as a pap test, transvaginal ultrasound, biopsy, colposcopy, hysteroscopy, polyp resection and the taking of a cervix culture sample.
- [8] The parties agree that Dr. Gerber failed to sufficiently ensure that the patients fully understood the procedures he was about to perform and what they would involve. All but one of the patients expressed to the member that they were experiencing pain and discomfort during their procedures. Four patients complained of pain during transvaginal ultrasounds and others, during a cervical biopsy, pap test and HPV test, hysteroscopy and polyp resection, and molluscum extraction.
- [9] Dr. Gerber failed to demonstrate adequate sensitivity in response to the patients' expressions of pain. A number of patients found him dismissive of their concerns. Dr. Gerber was insensitive in his communications to one of the patients and made unprofessional and inappropriate comments to others, including about their appearance. In one instance, he made an unprofessional and inappropriate comment to a patient's husband about the patient's pain tolerance.
- [10] All of the patients were upset as a result of his conduct. Below, we set out some of the patients' own accounts of the impact of their experiences with Dr. Gerber on them.

Assessment under the IHFA

- [11] In April 2019, the Director of the Independent Health Facilities Program at the MOHLTC requested that the College conduct an assessment of the ultrasound services provided at Dr. Gerber's clinic. This was a regularly scheduled assessment of the facility. College staff advised Dr. Gerber of the assessment and requested that he complete a questionnaire and related documentation and return them to the College. Despite numerous repeated requests to the member, he did not respond, did not complete the pre-assessment materials and did not provide them to the College.

[12] As a result, the College's IHF program staff conducted an unannounced assessment and inspection, in October 2019.

Inspection assessment under the OHPIP program

[13] The College's Premises Inspection Committee (PIC) oversees the OHPIP. In June 2017, PIC staff wrote to Dr. Gerber to initiate a five-year premises inspection assessment as provided in the Regulation, requesting that he complete a pre-visit questionnaire and return it to the College, along with a copy of his Policies and Procedures Manual, by the following month. Dr. Gerber did not provide the requested materials to the College until about a year later in June 2018.

[14] College staff had significant difficulties communicating with Dr. Gerber and his premises to coordinate the assessment. They finally conducted the assessment in November 2019, two years after they initiated the process.

[15] Between November 2019 and September 2020, staff advised Dr. Gerber of outstanding deficiencies and the PIC issued decisions requiring Dr. Gerber to respond to and implement various conditions. Dr. Gerber repeatedly failed to adequately respond to the concerns of the College's OHPIP program in a timely manner and failed to adequately address and comply with conditions of PIC decisions.

[16] Between November 2019 and October 2020, Dr. Gerber was unprofessional and uncooperative during inspection assessments. In one instance, on September 18, 2020, a staff member arrived to conduct an unannounced inspection and he denied her entry to the office. When the same staff member returned on September 29, Dr. Gerber advised her that he was "very busy" that day and that she could remain on-site with restrictions, was not permitted to speak with any of his staff or patients and was not permitted in his operating or procedure rooms. The staff member could not complete the inspection assessment. On October 13, another staff member arrived to conduct an inspection and Dr. Gerber was dismissive and unprofessional in his communications with her, including asking her "why are you so angry" in front of all of his staff.

[17] On October 2, 2020, the PIC issued an outcome of "Fail" to the premises. The September 29 inspection revealed multiple new and recurring deficiencies from

previous assessments. The PIC also had serious concerns related to Dr. Gerber's lack of cooperation and conduct as Medical Director. It issued a "Fail" and directed the clinic to cancel/cease all further OHP procedures. On October 20, 2020, the Committee again issued an outcome of "Fail" to the premises, based on the re-inspection of October 13, 2020, which revealed new and unaddressed recurring deficiencies. The PIC was also dissatisfied with Dr. Gerber's dismissive demeanour during the assessment process. It noted that his lack of cooperation violated professional standards associated with the role of a Medical Director.

- [18] Following a re-inspection assessment on November 24, 2020, the PIC issued an outcome of "Pass with Conditions," permitting the clinic to become operational and resume out-of-hospital procedures. On February 9, 2021, College staff conducted a further on-site inspection, which revealed outstanding deficiencies. On March 9, 2021, the PIC, after reviewing the summary of the inspection, issued a "Pass with Conditions," finding that Dr. Gerber, as the Medical Director, was not fulfilling his responsibilities with due diligence. The PIC required that the clinic appoint a new Medical Director, acceptable to the College, to permit it to continue performing out-of-hospital procedures. Dr. Gerber is no longer the Medical Director of the clinic.

Finding on Liability

- [19] Under the Tribunal's Rules of Procedure, Dr. Gerber's plea of no contest means that he agrees that, for the purposes of this proceeding, the facts alleged in the Statement of Facts and Plea of No Contest are correct and constitute professional misconduct. Based on the uncontested facts, we find that Dr. Gerber committed professional misconduct. His conduct towards his patients, in a context where they were undergoing intimate and sensitive procedures and could be expected to feel exposed and vulnerable, was disgraceful, dishonourable or unprofessional. Furthermore, he demonstrated an indifference to their expressions of pain and discomfort which is not in keeping with the values of the profession.
- [20] Dr. Gerber's conduct towards College staff attempting to perform their duties under the OHPIP and IHF programs was also unprofessional. The welfare of patients who receive treatment at IHFs or who undergo procedures at out-of-hospital premises depends on the College's ability to ensure that the prescribed standards are met. His repeated lack of cooperation and disrespectful attitude towards staff involved in

the inspections and assessments is conduct that members of the profession would reasonably regard as disgraceful, dishonourable or unprofessional.

Penalty

The joint submission

[21] The parties made a joint submission on penalty, agreeing that the member should receive a reprimand and a four-month suspension of his certificate of registration. They also agree to placing the following condition on the member's certificate of registration effective the date of the hearing:

Dr. Gerber will participate in the PROBE Ethics & Boundaries Program offered by the Centre for Personalized Education for Professionals, by receiving a passing evaluation or grade, without condition or qualification. Dr. Gerber will complete the PROBE program within six (6) months of the date of this Order, and will provide proof to the College of his completion, including proof of registration and attendance and participant assessment reports, within one (1) month of completing it.

[22] The College and member also agree that the member should pay the College \$6,000 for costs of the hearing.

[23] In their Agreed Statement of Fact on Penalty (ASF), the parties state that since the patients' appointments, Dr. Gerber has taken steps to enhance his practice and the systems at his clinic, including undertaking coaching sessions aimed at improving his communications with patients. Since June 2020, he has provided a written information sheet to patients in advance of transvaginal ultrasounds. The clinic has decreased in-clinic patient volumes to permit additional time with each patient. In July 2020, Dr. Gerber instituted the practice of periodically surveying his patients on an anonymous basis about their experience. Attached to the ASF were copies of three survey forms, including one containing questions about transvaginal ultrasounds.

[24] The parties provided the panel with the ICRC's April 2018 disposition of a previous complaint against Dr. Gerber which involved similar facts to those before us. That patient complained, among other things, about failure to obtain informed consent, failure to address a complaint of pain during the procedure and a forceful transvaginal ultrasound. The ICRC's disposition also noted previous complaints

about Dr. Gerber's communications and painful examinations. It decided to caution Dr. Gerber.

The patient impact statements

- [25] The College filed three redacted patient statements in which these patients describe the impact on their lives from their encounters with Dr. Gerber. Patient B describes feeling physically ill whenever she is in a doctor's examination room and even more when she sees stirrups. Every visit to a doctor produces flashbacks to the day that led to her complaint against the member. She has lost her trust in doctors and now refuses to see any male doctors, even when they may help with a medical issue. Patient B states that she experiences insomnia and nightmares and has spent thousands of dollars on therapy.
- [26] Patient D states that her experience with Dr. Gerber has shattered her trust in the medical profession and that the impact of the trauma will be with her for the rest of her life.
- [27] Patient E also describes having nightmares and panic attacks after her experience. She states that she developed depression and has sought counselling and the care of a psychiatrist. Patient E describes how visits to gynecologists for ongoing issues re-triggers her trauma. She states that the loss of dignity and agency she experienced in Dr. Gerber's examination room doesn't abate. While she tries to put aside her embarrassment and shame aside, she has many days feeling lonely and isolated.

Penalty principles

- [28] In *College of Physicians and Surgeons of Ontario v. Fagbemigun*, 2022 ONPSDT 22 at paras. 12-18, the Tribunal stated that the most important goal of a penalty order is the protection of the public. This goal is furthered when a penalty discourages the member and other physicians from committing misconduct (specific and general deterrence), helps in rehabilitating the physician, ensures a safe return to practice where appropriate and expresses the Tribunal and the profession's disapproval of the misconduct. In determining the appropriate penalty, the Tribunal considers a number of factors, most commonly the seriousness of the misconduct,

any discipline history, the physician's actions since the misconduct and their personal circumstances.

- [29] *Fagbemigun* was a case where the College and the member disagreed on the appropriate penalty. In this case, we are presented with a joint submission. In *R. v. Anthony-Cook*, 2016 SCC 43, the Supreme Court of Canada reviewed the practice of joint submissions by Crown and defence counsel, stating that it is “an accepted and entirely desirable practice for Crown and defence counsel to agree to a joint submission on sentence in exchange for a plea of guilty” (para. 25). In the court’s opinion, agreements of this nature are “commonplace and vitally important to the well-being of our criminal justice system, as well as our justice system at large” (para. 25). Expanding on the benefits of joint submissions to the justice system, the court wrote, at para. 40:

In addition to the many benefits that joint submissions offer to participants in the criminal justice system, they play a vital role in contributing to the administration of justice at large. The prospect of a joint submission that carries with it a high degree of certainty encourages accused persons to enter a plea of guilty. And guilty pleas save the justice system precious time, resources, and expenses, which can be channeled into other matters. This is no small benefit. To the extent that they avoid trials, joint submissions on sentence permit our justice system to function more efficiently. Indeed, I would argue that they permit it to function. Without them, our justice system would be brought to its knees, and eventually collapse under its own weight.

- [30] For joint submissions and their benefits to the justice system to be possible, the parties must have a high degree of confidence that the decision maker will accept them. In the words of the court, a joint submission on penalty should be rejected only where the submission is “so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down” (para. 34).

- [31] In *Bradley v. Ontario College of Teachers*, 2021 ONSC 2303 at para. 9, the Divisional Court noted that, while decided in the criminal law context, *Anthony-Cook* has been applied by disciplinary bodies in Ontario, including those governing teachers (*Ontario College of Teachers v. Sadaka*, 2019 ONOCT 60), lawyers (*Law Society of Upper Canada v. Archambault*, 2017 ONLSTH 86), pharmacists (*Ontario*

College of Pharmacists v. Mikhael, 2017 ONCPDC 25), massage therapists (*College of Massage Therapists of Ontario v. Tang*, 2018 ONCMTO 26) and nurses (*College of Nurses of Ontario v. Lopes*, 2017 CanLII 50755 (ON CNO)). This Tribunal has adopted the *Anthony-Cook* test in many decisions, including *College of Physicians and Surgeons of Ontario v. Cameron*, 2018 ONCPSD 25. The court in *Bradley* concluded that *Anthony-Cook* applies to disciplinary bodies and that “[a]ny disciplinary body that rejects a joint submission on penalty must apply the public interest test and must show why the proposed penalty is so “unhinged” from the circumstances of the case that it must be rejected” (para. 14).

[32] Because we are presented with a joint submission, the question is whether the proposed penalty would lead reasonably informed persons to believe the proper functioning of the College’s professional discipline system has broken down. It is not our role on a joint submission to consider whether we agree with the proposed penalty or whether it is a penalty that we would order following a contested hearing and a finding of misconduct. The question is not whether the proposed penalty is the most appropriate fit, but rather, whether it is contrary to the public interest in a way that would bring the administration of justice into disrepute.

[33] This does not mean that the four penalty principles set out in *Fagbemigun* are irrelevant to our decision, but the panel’s application of these principles must be within the bounds of the *Anthony-Cook* test. Applying this test, we are satisfied that the proposed penalty is not contrary to the public interest.

[34] The College provided us with other cases in which the Tribunal considered similar misconduct, involving physicians who failed to adequately explain intimate procedures, were insensitive to patients’ discomfort or otherwise conducted themselves unprofessionally in a setting where patients were exposed and vulnerable. In those cases, the Tribunal was satisfied that the suspensions it ordered (between two and five months) served as general and specific deterrence, signalling to the member and the public at large that misconduct of that nature will not be tolerated.

[35] The proposed suspension is within the range of those imposed in the above cases. The misconduct before us is serious, involving multiple patients. Some patients have given us accounts of the enduring impact on their lives of their encounters

with Dr. Gerber. These events followed a caution in 2018 from the ICRC with respect to his communications and being sensitive to patient discomfort during examinations. The ICRC decisions are not a discipline history, nor is there proof of the underlying events (see *College of Physicians and Surgeons of Ontario v. Matheson*, 2022 ONPSDT 27 at para. 26). However, the misconduct is serious because Dr. Gerber committed it after he was cautioned about some of the same issues giving rise to the current proceedings. The misconduct is also serious because it includes Dr. Gerber's lack of cooperation with the College's inspections and assessments.

[36] Dr. Gerber has admitted to the misconduct. He has taken action since these events occurred, such as instituting a patient survey, creating a written information sheet on transvaginal ultrasounds and undertaking individual coaching sessions. The proposed penalty includes a condition on Dr. Gerber's certificate of registration requiring him to successfully complete a specified ethics and boundary program, which furthers the goal of rehabilitation. It also includes a public reprimand that serves as general and specific deterrence, in expressing the Tribunal's disapproval of the member's conduct. In delivering the reprimand in this case, the panel gave voice to some of the feelings expressed in the patient impact statements.

[37] Our task on a joint submission is not to determine whether the proposed penalty is the best fit, but whether it is contrary to the public interest. On the facts before us, the proposed penalty is not contrary to the public interest in a way that would bring the administration of justice into disrepute.

Order

[38] For the above reasons, we ordered:

- a. The member to appear before the panel to be reprimanded.
- b. the Registrar to suspend the member's certificate of registration for four months commencing April 8, 2023 at 12:01 a.m.
- c. the Registrar to place the following terms, conditions and limitations on the member's certificate of registration effective immediately:

- i. Dr. Gerber will participate in the PROBE Ethics & Boundaries Program offered by the Centre for Personalized Education for Professionals, by receiving a passing evaluation or grade, without condition or qualification. Dr. Gerber will complete the PROBE program within six (6) months of the date of this Order, and will provide proof to the College of his completion, including proof of registration and attendance and participant assessment reports, within one (1) month of completing it.
- d. the member to pay the College costs of \$6,000 by April 7, 2023.

ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

Tribunal File No.: 20-002

BETWEEN:

College of Physicians and Surgeons of Ontario

- and -

Dr. David Gerber

The Tribunal delivered the following Reprimand
by videoconference on Wednesday, March 8, 2023.

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

Dr. Gerber,

Today you appear before the panel because you engaged in disgraceful, dishonourable or unprofessional conduct with respect to ten patients.

As a gynecologist who performs sensitive procedures, you failed to ensure that patients sufficiently understood the procedures you were to perform and what they would involve. When patients expressed pain and discomfort, you failed to demonstrate adequate sensitivity to what they were experiencing and dismissed their concerns. In some instances, you also made patients uncomfortable by making inappropriate comments about their appearance while conducting sensitive procedures.

In every instance, patients who put their trust in you were upset by your conduct. Those who provided impact statements report enduring trauma following their clinical encounters with you. They describe suffering from nightmares, flashbacks, depression, panic attacks and ongoing mistrust of the medical profession.

We are deeply disturbed by your repeated misconduct which not only breached the trust these patients placed in you but eroded public confidence in the profession. The public expects and demands that physicians act with integrity and in their patients' best interests while providing the highest quality of health care possible.

To compound the seriousness of your misconduct, you also engaged in disgraceful, dishonourable or unprofessional conduct related to the College's Independent Health Facilities Program which is tasked to carry out quality assessments and inspections of these types of facilities. Your conduct in response to a scheduled assessment demonstrated a blatant disregard for the importance of this Program. You demonstrated similar disregard towards the College's inspections under the Out-of-Hospital Premises Inspection Program, refusing to cooperate with College staff and treating them with disrespect.

We find it fitting that the College required that you step down from your position of Medical Director at the health facility. We take some comfort that you have taken steps to enhance your practice and the systems at your clinic, particularly undertaking a series of one-on-one coaching sessions aimed at improving communication with and sensitivity when treating patients.

Dr. Gerber, this penalty reflects the seriousness of your professional misconduct. We strongly encourage you to reflect on your actions and their consequences and to commit yourself to upholding the highest standards of the profession. The public deserves no less.