

RESTRICTION ON PUBLICATION - AMENDED

The Tribunal's order under ss. 45-47 of the Health Professions Procedural Code, as amended on February 1, 2022, provides that the complainant's name may be published but that publication of her medical and legal records remains prohibited. There may be significant fines for breaching this order.

Subsection 93(1) of the Code, which is concerned with failure to comply with these orders, reads:

Every person who contravenes an order made under ... section 45 or 47... is guilty of an offence and on conviction is liable,

(a) in the case of an individual to a fine of not more than \$25,000 for a first offence and not more than \$50,000 for a second or subsequent offence; or

(b) in the case of a corporation to a fine of not more than \$50,000 for a first offence and not more than \$200,000 for a second or subsequent offence.

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

Citation: *College of Physicians and Surgeons of Ontario v. Herman*, 2021 ONCPSD 6

Date: January 19, 2021

BETWEEN:

College of Physicians and Surgeons of Ontario

- and -

Dr. Leon Herman

ORDER AND REASONS

Panel: Mr. J. Paul Malette, Q.C. (chair)
Mr. Peter Pielsticker
Dr. Carole Clapperton
Dr. Pamela Chart
Dr. John Rapin

Heard: October 28, 2020

Appearances:

Ms. Carolyn Silver and Mr. Kirk Maijala, for the College
Mr. Robin McKechney and Ms. Jennifer McKendry, for Dr. Leon Herman
Ms. Rachel Laurion, Independent Legal Counsel to the Discipline Committee

Introduction

- [1] The Discipline Committee (the “Committee”) of the College of Physicians and Surgeons of Ontario (“the College”) heard this matter via videoconference on October 28, 2020. At the conclusion of the hearing, the Committee released its decision, stating its finding that the member committed an act of professional misconduct, and setting out its penalty and costs order, with written reasons to follow. A formal order was issued on October 29, 2020.

The Allegations

- [2] The Notice of Hearing alleged that Dr. Herman committed an act of professional misconduct:
1. under clause 51(1)(b.1) of the Health Professions Procedural Code which is schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 (the “Code”) in that he engaged in sexual abuse of a patient; and
 2. under paragraph 1(1)33 of Ontario Regulation 856/93 made under the *Medicine Act, 1991* (“O. Reg. 856/93”), in that he has engaged in an act or omission 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 Allegations

- [3] Dr. Herman entered a plea of no contest to the allegations set out in the Notice of Hearing.

Attendance at Hearing

- [4] Dr. Herman did not attend the hearing because he resides in Israel. Dr. Herman did not attend the hearing remotely because he lacked the technology to do so. Due to this unique fact-specific circumstance, the Committee allowed Dr. Herman’s counsel to act as Mr. Herman’s agent at the hearing.

The Facts

- [5] The following facts were set out in a Statement of Uncontested Facts and Plea of No Contest which was filed as an exhibit at the hearing:

Background

1 Dr. Leon Herman ("Dr. Herman") is a 74-year-old retired physician who lives in Israel. He received his certificate of independent practice from the College of Physicians and Surgeons of Ontario (the "College") on June 26, 1973. He graduated from medical school in 1972 and practiced medicine in Toronto until his retirement in April 2018. He has no prior discipline history.

Disgraceful, Dishonourable or Unprofessional Conduct and Sexual Abuse of Patient A

2. Patient A, a teenaged minor, was a family acquaintance of Dr. Herman and occasionally worked with him. In 1997, Dr. Herman saw Patient A at his office about a skin condition on her face, back, and chest. Dr. Herman offered to treat her free of charge with a chemical peel, and arranged for her to return to his office on the weekend, explaining that otherwise he would have to charge her for the treatment if it was performed by one of his staff.

3. Patient A attended at Dr. Herman's office. No one else was present at the office. Dr. Herman offered Patient A coffee. Dr. Herman took a bottle of alcohol out of his cabinet and added some to his and to Patient A's coffee. He made conversation with Patient A while she drank it.

4. Dr. Herman then instructed Patient A to go to the treatment room so he could begin the treatment. Dr. Herman instructed Patient A to lie on the examining table on her stomach. Patient A lay on the table, wearing only her tights and bra. Dr. Herman began applying a substance to Patient A's back and chest that he advised was to treat her skin condition. Dr. Herman unhooked and removed Patient A's bra. At some point, Dr. Herman instructed Patient A to turn over. While Patient A was on the table, Dr. Herman touched Patient A including on her buttocks, breasts, and hair in a manner that was not of a clinical nature or appropriate to the service provided. During the course of the treatment, Dr. Herman kissed Patient A on her forehead and told Patient A that she was beautiful.

5. At the end of the appointment, before she left the office, Dr. Herman gave Patient A \$100 in cash, which he told her to use toward new shoes or a drum kit.

Plea of No Contest

6. Dr. Herman does not contest the facts specified above, and does not contest that, based on these facts, he engaged in professional misconduct, in that he engaged in sexual abuse of a patient, under

clause 51(1)(b.1) of the *Code*, which is schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, and engaged in an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, under paragraph 1(1)33 of O. Reg 856/93.

Rule 3.02 – Plea of no contest

Rule 3.02 of the Rules of Procedure of the Discipline Committee regarding a plea of no contest states:

3.02(1) Where a member enters a plea of no contest to an allegation, the member consents to the following:

(a) that the Discipline Committee can accept as correct the facts alleged against the member on that allegation for the purposes of College proceedings only;

(b) that the Discipline Committee can accept that those facts constitute professional misconduct or incompetence or both for the purposes of College proceedings only; and

(c) that the Discipline Committee can dispose of the issue of what finding ought to be made without hearing evidence.

Findings

- [6] The Committee accepts as correct all the facts set out in the Statement of Uncontested Facts and Plea of No contest. Having regard to these facts, the Committee finds that Dr. Herman committed an act of professional misconduct, in that he engaged in sexual abuse of a patient, and engaged in an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

Submissions on Penalty

- [7] Counsel for the College and counsel for Dr. Herman made a joint submission as to an appropriate penalty and costs order. Counsel for the College and counsel for Dr. Herman both submitted that the appropriate penalty should consist of: the revocation of Dr. Herman's certificate of registration; a public reprimand; that Dr. Herman reimburse the College for funding provided to patients under the program

required under section 85.7 of the *Code* by posting an irrevocable letter of credit or other security acceptable to the College in the amount of \$16,060.00; and that Dr. Herman pay costs to the College at the tariff rate for a half-day hearing in the amount of \$6,000.00.

Reasons for Penalty

- [8] The Committee sets out its analysis by first considering the applicable law and the well recognized principles of penalty.

Orders relating to Sexual Abuse

- [9] Pursuant to section 51(5) of the *Code*, if the Committee finds that a member has committed an act of professional misconduct by sexually abusing a patient, the Committee shall do the following in addition to anything else the Committee may do under section 51(2):

1. Reprimand the member.
2. Suspend the member's certificate of registration if the sexual abuse does not consist of or include conduct listed in paragraph 3 and the panel has not otherwise made an order revoking the member's certificate of registration under subsection (2).
3. Revoke the member's certificate of registration if the sexual abuse consisted of, or included, any of the following:
 - i. Sexual intercourse.
 - ii. Genital to genital, genital to anal, oral to genital or oral to anal contact.
 - iii. Masturbation of the member by, or in the presence of, the patient.
 - iv. Masturbation of the patient by the member.
 - v. Encouraging the patient to masturbate in the presence of the member.
 - vi. Touching of a sexual nature of the patient's genitals, anus, breasts or buttocks.
 - vii. Other conduct of a sexual nature prescribed in regulations made pursuant to clause 43 (1)(u) of the Regulated Health Professions Act, 1991. 2017, c. 11, Sched. 5, s. 19 (3).

- [10] Where there is a finding of sexual abuse, a reprimand is mandatory. Where there are findings that the sexual abuse consisted of touching of a sexual nature of the

patient's genitals, anus, breasts or buttocks, the revocation of a certificate of registration is mandatory. In this case, the Committee found that Dr. Herman engaged in sexual abuse of a patient and that the sexual abuse consisted of, among other things, the touching of Patient A's buttocks and breasts. Pursuant to sections 51(5)(2) and 51(5)(3)(vi) of the Code, therefore, the Committee shall reprimand Dr. Herman and revoke Dr. Herman's certificate of registration.

Penalty Principles

- [11] When the parties have come to an agreement on penalty, a high threshold exists for the Committee to depart from the proposed joint submission on penalty. The Committee should accept a jointly proposed penalty unless accepting it would be contrary to the public interest or would bring the administration of justice into disrepute (*R. v. Anthony-Cook*, 2016 SCC 43).
- [12] The well-recognized principles of penalty are the: protection of the public; denunciation of the misconduct; and maintenance of the integrity of the profession and the public's confidence in the College's ability to regulate the profession in the public interest. The penalty should also serve as a specific deterrent to the member, and general deterrent to the profession. Further, it is essential that the penalty imposed is proportional to the misconduct, and where applicable, provides for the rehabilitation of the member.
- [13] In arriving at a decision on penalty, it is the Committee's task to weigh the penalty principles and to consider the specific facts and circumstances of the case.

Aggravating Factors

- [14] The Committee considered the egregious nature of the misconduct to be an aggravating factor. The Committee accepts that Patient A was exceptionally vulnerable. In particular, (a) she was a minor, as she was 17 years old; (b) she had occasionally worked with Dr. Herman at his office; and (c) she was a family acquaintance of Dr. Herman.

- [15] Another aggravating factor that the Committee finds is that Dr. Herman provided Patient A with alcohol, by adding it to her coffee. Not only was Patient A under the legal drinking age in Ontario, but the Committee is also especially concerned that the provision of alcohol to Patient A could have reasonably reduced her inhibitions and enhanced her vulnerability.
- [16] In the Committee's view, Dr. Herman's breach of Patient A's trust, and his disregard for the inherent power imbalance that exists in the physician-patient relationship, are significant aggravating factors. By offering to treat Patient A's severe skin condition for free on a weekend, Dr. Herman sought to entice Patient A to attend his office at a time during which he knew he would be alone with Patient A. He did so in violation of Patient A's trust, for his own sexual gratification, as Dr. Herman touched Patient A's breasts and buttocks, kissed her on her forehead, and told her she was beautiful. Dr. Herman's behaviour was intrusive and sexual in nature. The nature and circumstances of Dr. Herman's misconduct are repugnant and cannot be tolerated. Dr. Herman displayed one of the most egregious forms of professional misconduct and his actions support the most severe penalty.
- [17] Further, physicians must always act in their patients' best interests and Dr. Herman was aware, or ought to have been aware, of his professional obligations. Dr. Herman made the conscious choice to disregard his professional obligations and to subject Patient A to sexual abuse. The Committee finds that Dr. Herman's actions undermine the public's trust in physicians, whom they hold in high regard, and his actions cast a shadow on the entire profession. The Committee, therefore, finds that Dr. Herman's breaches of his responsibilities to the profession and to the public to be another aggravating factor.

Mitigating Factors

- [18] Dr. Herman has no prior history before the discipline committee and the Committee finds this to be a mitigating factor.

[19] The second mitigating factor that the Committee finds is that Dr. Herman's plea of no contest saved Patient A from testifying, and the College the time and expense of a contested hearing.

Prior Cases

[20] To assist the Committee in its deliberations, previous cases decided by the Discipline Committee of the College were presented by the parties. Although prior Committee decisions are not binding as precedent, the Committee has accepted as a principle of fairness that, generally, like cases should be treated alike.

[21] The Committee was provided with four prior cases in which a similar penalty, including revocation of the member's certificate of registration, was imposed. All four cases involved sexual transgressions. A brief summary of these cases follows.

1. *Ontario (College of Physicians and Surgeons of Ontario) v. Anastasio*, 2016 ONCPSD 47: Dr. Anastasio pleaded no contest to three allegations including sexual abuse and disgraceful, dishonourable or unprofessional conduct. The nature of the misconduct included the manipulation of a patient in order to have his patient attend at his office after hours, where he sexually abused her. As in the matter at hand, the patient was young and vulnerable. In 2012, Dr. Anastasio was sanctioned by the Discipline Committee because he was found to have engaged in disgraceful, dishonourable or unprofessional conduct for boundary violations and sexualized behavior. Dr. Anastasio resigned his membership with the College in 2016. The Committee ordered the immediate revocation of Dr. Anastasio's certificate of registration, a public reprimand, and reimbursement to the College's fund for patient therapy and counselling. Dr. Anastasio was also ordered to pay costs to the College.
2. *Ontario (College of Physicians and Surgeons of Ontario) v. Minnes*, 2015 ONCPSD 3: Dr. Minnes was found to have engaged in disgraceful, dishonourable or unprofessional conduct for, in part, engaging in the unwanted touching of female staff over a number of years, and for having engaged in overt and intrusive sexual behaviour with a 17 year old female camp counsellor. The Committee ordered the revocation of Dr. Minnes' certificate of registration, even though the 17 year old female camp counselor was not a patient. This was because of (among other things) Dr. Minnes' abuse of power and his violation of the trust of an adolescent. Dr. Minnes was also ordered to pay costs to the College.
3. *Ontario (College of Physicians and Surgeons of Ontario) v. Sanchez*, 2017 ONCPSD 26: Dr. Sanchez pleaded no contest to the allegation

that he had been found guilty of a criminal offence, which was relevant to his suitability to practice. Dr. Sanchez was criminally convicted of three counts of indecent assault with respect to two of his patients who were minors (Patients A and F), for sexual touching. The Committee accepted the parties' joint submission on penalty, which included the immediate revocation of Dr. Sanchez's certificate of registration and a public reprimand. Dr. Sanchez was also ordered to pay costs to the College.

4. *Ontario (College of Physicians and Surgeons of Ontario v. Morzaria*, 2017 ONCPSD 48: Dr. Morzaria pleaded no contest to the allegations that he engaged in sexual abuse of a patient and disgraceful, dishonourable or unprofessional conduct. Dr. Morzaria seduced Patient A with bribes of food and computer equipment. The sexual abuse, which began when his patient, Patient A, was 6 years old and continued until he was 12, occurred under the guise of medical visits. As in the matter at hand, Dr. Morzaria abused his position of trust to take advantage of a patient for his own sexual gratification. The Committee's order included the immediate revocation of Dr. Morzaria's certificate of registration, a reprimand, and reimbursement to the College's fund for patient therapy and counselling. Dr. Morzaria was also ordered to pay costs to the College.

Summary and Conclusion

- [22] In light of the case law and the factors set out above, the Committee accepts the penalty proposed by the parties. This severe sanction is not only fair and just, but also legally mandated, considering the nature and circumstances of the misconduct. Nothing short of revocation of Dr. Herman's certificate of registration with the College will ensure that: the public is protected, Dr. Herman's conduct is denounced, and the integrity of the profession is maintained. As detailed above, the revocation of Dr. Herman's certificate of registration with the College is mandatory in this case.
- [23] The reprimand (which is also mandatory) similarly satisfies the penalty principles.
- [24] The Committee also finds that it is appropriate for Dr. Herman to reimburse the College in the amount of \$16,060.00 for funding provided to patients for therapy and counselling under the program required under section 85.7 of the *Code* by posting an irrevocable letter of credit or other security approved by the College.

[25] The Committee further finds that it is appropriate for Dr. Herman to pay costs to the College in the amount of \$6,000.00. This amount is reasonable in the circumstances and has been the practice of the Discipline Committee for a half-day hearing.

Order

[26] The Committee stated its findings in paragraph 1 of its written order of October 29, 2020. In that order, the Committee ordered and directed on the matter of penalty and costs that:

2. The Registrar revoke Dr. Herman's certificate of registration effective immediately;
3. Dr. Herman appear before the panel to be reprimanded;
4. Dr. Herman reimburse the College for funding provided to patients under the program required under section 85.7 of the Code, by posting an irrevocable letter of credit or other security acceptable to the College, within thirty (30) days of [the October 29, 2020] order in the amount of \$16,060.00.
5. Dr. Herman pay costs to the College in the amount of \$6,000 within 30 days of the date of [the October 29, 2020] Order.

[27] At the conclusion of the hearing, Dr. Herman waived his right to an appeal under subsection 70(1) of the *Code* and the Committee administered the public reprimand via videoconference with directions that a written copy of the reprimand, which was provided to Dr. Herman's counsel on October 28, 2020, be forwarded to Dr. Herman.

TEXT of PUBLIC REPRIMAND
Delivered October 28, 2020
in the case of the
COLLEGE OF PHYSICIANS and SURGEONS of ONTARIO
and
LEON HERMAN

In the face of the uncontested facts, the panel finds your behaviour particularly egregious.

You orchestrated the events by bringing in Patient A, a minor, to your office on the weekend when no one else would be present. This you did under the guise of providing free treatment.

You were acquainted with Patient A's family. She was not only a patient but also an occasional employee. You were in a position of trust and authority. You breached this trust in an utterly odious and repulsive fashion. You did this for your personal sexual gratification.

With a plea of no contest, you have spared Patient A of the necessity of testifying, of reliving the contemptible acts you inflicted on her. However, a plea of no contest is not an expression of remorse. You have not expressed any remorse.

The practice of medicine is a privilege not a right. The revocation of your certificate to practice is entirely appropriate.

This is not an official transcript