

## **ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL**

**Citation:** *College of Physicians and Surgeons of Ontario v. Wardle*, 2022 ONPSDT 4

**Date:** February 3, 2022

**Tribunal File No.:** 21-021

### **BETWEEN:**

College of Physicians and Surgeons of Ontario

- and -

Dr. David Lee James Wardle

### **FINDING AND PENALTY REASONS**

**Heard:** December 13, 2021, by videoconference

### **Panel:**

Ms. Jennifer Scott (chair)

Mr. Jose Cordeiro

Dr. Stephen Hucker

Dr. Roy Kirkpatrick

Ms. Shannon Weber

### **Appearances:**

Ms. Emily Graham, for the College

Ms. Anne Tardif and Ms. Reem Zaia, for Dr. Wardle

### **RESTRICTION ON PUBLICATION**

The Tribunal ordered, under ss. 45-47 of the Health Professions Procedural Code, that no one may publish or broadcast the names or any information that would identify patients referred to during the Tribunal hearing or in any documents filed with the Tribunal. There may be significant fines for breaching this order.

## **Introduction**

- [1] Dr. Wardle is a plastic surgeon in Ontario. He obtained his independent practice certificate from the College in 1989 and practised medicine in California between 1992 and 2015.
- [2] The College of Physicians and Surgeons of Ontario referred allegations of misconduct to the Tribunal. The College alleged Dr. Wardle had engaged in sexual abuse of a patient and conduct that would reasonably be regarded as disgraceful, dishonourable or unprofessional.
- [3] During the hearing, the parties provided an agreed statement of facts on liability. Dr. Wardle admitted that he had engaged in disgraceful, dishonourable or unprofessional conduct. We accepted his admission and made that finding. The College withdrew the sexual abuse allegation.
- [4] Dr. Wardle and the College jointly submitted the penalty should be a five-month suspension, reprimand and terms on his certificate of registration. The parties also agreed that Dr. Wardle should be ordered to pay costs of the hearing to the College of \$6,000. We accepted the joint submission on penalty and costs at the hearing.
- [5] These are the reasons for our decision.

## **Misconduct**

### **Patient A**

- [6] Patient A was Dr. Wardle's patient in 2020. She saw Dr. Wardle for abdominoplasty, liposuction of her flanks, hips, bra rolls and thighs and correction of a diastasis recti.
- [7] On the day of her surgery, Dr. Wardle assessed Patient A pre-operatively and made surgical markings on her skin. Dr. Wardle failed to take sufficient care to maintain spatial boundaries with Patient A and grazed her left breast with his hand. While Patient A was on the operating table, Dr. Wardle repositioned her left breast to move an electrocardiogram lead. He did this without providing adequate warning or obtaining the patient's consent.

- [8] Patient A saw Dr. Wardle for four post-operative visits. On the fourth visit, without adequate warning or consent, Dr. Wardle lifted Patient A's shirt over her breasts and moved her right bra cup to expose her right breast for a few seconds. He did this on the assumption that he had also operated on Patient A's breasts. He had not. Dr. Wardle did not acknowledge or apologize for his mistake.
- [9] Patient A did not return to see Dr. Wardle and sought further post-operative care elsewhere.

#### Patient B

- [10] Patient B consulted with Dr. Wardle about facial cosmetic procedures as she had sustained severe injuries to her face.
- [11] At her initial consultation in 2019, Patient B made a joke that cosmetic surgery was a slippery slope and her next procedure might be for her breasts. In response to this comment, Dr. Wardle offered to examine Patient B's breasts, asked Patient B to take down the top of her dress and move her bra while he remained in the room and conducted a brief physical examination of Patient B's breasts and nipples to assess her suitability for breast surgery. He did this without providing an explanation or obtaining her consent.
- [12] Patient B saw Dr. Wardle again in 2020. During this appointment, Dr. Wardle failed to maintain appropriate spatial boundaries with Patient B. While examining her face his hand touched her legs while she was seated in front of him. Patient B did not return to see Dr. Wardle and sought further care for her injuries elsewhere.

#### **Finding**

- [13] We find Dr. Wardle has committed an act of professional misconduct in that he has engaged in conduct that is disgraceful, dishonourable or unprofessional.

#### **Penalty**

##### The Test on Joint Submissions

- [14] A joint submission on penalty will be rejected only where it is contrary to the public interest in a way that brings the administration of justice into disrepute: see *R. v.*

*Anthony-Cook*, 2016 SCC 43 at para. 34 and *Bradley v. Ontario College of Teachers*, 2021 ONSC 2303 at para. 9.

- [15] It is not our role on a joint submission to decide 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. In other words, it is not our role to decide the appropriateness or fitness of the penalty by applying the penalty principles in the first instance.
- [16] The question before the Tribunal is whether implementing the proposed penalty would be contrary to the public interest because it fails to protect the public and impairs the ability of the College, and the Tribunal as an entity within it, to regulate the profession of medicine and govern physicians.
- [17] In deciding whether the proposed penalty maintains public confidence in the College's ability to regulate the profession, the Tribunal must consider the penalty in the circumstances of the member, the circumstances of the member's misconduct and the range of penalties in the Tribunal's caselaw for similar misconduct.
- [18] If the proposed penalty violates the public interest, the administration of justice is brought into disrepute. In the professional regulation context, this means the proper functioning of the College's professional discipline system has broken down.

#### Application of the Test

- [19] The parties jointly propose the following penalty:
- a. reprimand of Dr. Wardle;
  - b. suspension of Dr. Wardle's certificate of registration for five months;
  - c. terms and conditions on Dr. Wardle's certification of registration:
    - i. compliance with the College Policy "Closing a Medical Practice";
    - ii. completion of the PROBE Ethics and Boundaries Program;
    - iii. completion of the SAEGIS Successful Patient Interactions course; and

d. \$6,000 in costs paid to the College.

[20] We turn now to the circumstances of Dr. Wardle and his current misconduct.

[21] Dr. Wardle has no disciplinary history with the College. In June 2021, the Inquiries, Complaints and Reports Committee considered an investigation into an allegation that Dr. Wardle committed a boundary violation with a patient during an assessment conducted by the College's Out-of-Hospital Premises Inspection Program (OHPIP). The OHPIP reported that during a procedural observation of facial cosmetic surgery on a female patient in August 2020, certain members of the assessment team observed Dr. Wardle place his left hand on the patient's upper chest and his right hand on her abdomen. The ICRC advised Dr. Wardle to weigh the risks of erroneous interpretation of touching patients against the sincere desire to touch for compassion/reassurance.

[22] We are deeply concerned about Dr. Wardle's current misconduct. He approached Patients A and B in a cavalier and insensitive manner and had little regard for their privacy and their dignity. He touched Patient A's breast inadvertently on one occasion, failed to obtain her consent on another and exposed her breast on a third occasion when he thought he had performed surgery on her breasts when he had not. He acted in a similar fashion when he examined Patient B's breasts to see if she was a candidate for breast surgery even though she had not sought this treatment from him. This conduct took place in 2019 and 2020, only a few years after he had returned to the practice of medicine in Ontario. We are also concerned about the number of incidents in a relatively short period of time.

[23] The caselaw relied upon by the parties supports the five-month suspension. While none of the cases have identical facts to the facts here, the length of suspensions where physicians have conducted breast exams without proper explanation and consent, and in some instances, without proper draping, is between two and four months. This is the range for conduct relating to one patient. We accept the length of suspension is longer for multiple patients and repeated incidents. See for example, *College of Physicians and Surgeons of Ontario v. Raja*, 2018 ONCPSD 22, *College of Physicians and Surgeons of Ontario v. Heymans*, 2018 ONCPSD 57 and *College of Physicians and Surgeons of Ontario v. Wilson*, 2016 ONCPSD 46.

[24] The public is protected by the suspension and the terms imposed on Dr. Wardle's certificate of registration requiring him to take the PROBE and SAEGIS courses. Dr. Wardle's need for education is supported by the findings of the ICRC. The proposed penalty affirms the ability of the College to regulate the profession as the five-month suspension is within the range of suspensions ordered by the Tribunal in previous cases. The reprimand by the Tribunal is a strong denunciation of Dr. Wardle's conduct. For these reasons, we find the proposed penalty does not bring the administration of justice into disrepute and we accept it.

### **Order**

[25] At the conclusion of the hearing, we ordered and directed:

- a. Dr. Wardle to attend before the panel to be reprimanded.
- b. The Registrar to suspend Dr. Wardle's certificate of registration for five months, effective immediately.
- c. The Registrar to place the following terms, conditions and limitations on Dr. Wardle's certificate of registration, effective immediately:
  - i. Dr. Wardle shall comply with the College Policy "Closing Medical Practice";
  - ii. Dr. Wardle will complete the PROBE Ethics and Boundaries Program within six months of the date of the order and provide proof of his completion within one month; and
  - iii. Dr. Wardle will complete the SAEGIS Successful Patient Interactions course or another course related to this topic acceptable to the College within six months of the date of the order and provide his certificate of attendance within one month of completion.
- d. Dr. Wardle pay costs to the College in the amount of \$6,000 by January 12, 2022.

[26] Dr. Wardle waived his right of appeal at the hearing and the panel delivered the reprimand.

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**The Tribunal delivered the following Reprimand**  
by videoconference on Monday, December 13, 2021.

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

Dr. Wardle,

The privilege of self-regulation comes with the burden of disciplining members of our profession whose conduct is deemed to be disgraceful, dishonourable or unprofessional. You have admitted to this conduct.

Your failure to obtain consent with two patients, to respect their dignity and to offer appropriate privacy, to recognize boundaries in your clinical encounters and (in one case) to even remember what surgery you had performed signals a lack of concern.

Furthermore, it demonstrates a serious lack of understanding of the inherent power imbalance in the physician/patient relationship. Your conduct with these patients caused them sufficient distress that they made formal College complaints.

With your admission of the facts and your liability you have spared these patients the trauma of reliving their experiences before the Tribunal. By agreeing to participate in educational endeavours addressing ethics, boundaries and patient interaction you are demonstrating a commitment to do better.

Your five-month suspension reflects the commitment of this panel to hold you accountable for these unacceptable actions and to demonstrate to the profession at large that such behaviour will not be tolerated.