NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. Karin Elaine Kerfoot, this is notice that the Discipline Committee ordered that no person shall publish or broadcast any information of a personal nature that will identify patients or Dr. Kerfoot's family members, including telephone numbers, residential addresses, any personal financial records (including credit card records), vehicle registration information, patient charts, and intimate images, referred to orally or in the exhibits filed at the hearing.

The Committee also made an order under subsection 47(1) of the *Code*. to prohibit the publication, including broadcasting, of the name of the complainant or any information that could identify the complainant.

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.

Indexed as: Ontario (College of Physicians and Surgeons of Ontario) v. Kerfoot, 2020 ONCPSD 19

DISCIPLINE COMMITTEE
COLLEGEOF PHYSICIANS AND SURGEONS OF ONTARIO

IN THE MATTER OF a Hearing directed by
the Inquiries, Complaints and Reports Committee of the College of Physicians and Surgeons of Ontario
pursuant to Section 26(1) of the **Health Professions Procedural Code**
which is Schedule 2 to the ***Regulated Health Professions Act***, ***1991***,
S.O. 1991, c. 18, as amended

B E T W E E N:

COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

- and -

DR. KARIN ELAINE KERFOOT

PANEL MEMBERS:

DR. S. BODLEY (Chair)
MR. M. KANJI
DR. D. HELLYER
MR. J. P. MALETTE, Q.C.
DR. S. HUCKER

COUNSEL FOR THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO:

MS MORGANA KELLYTHORNE

COUNSEL FOR DR. KERFOOT:

MS DARA LAMBE
MS SONIA FABIANI

INDEPENDENT COUNSEL FOR THE DISCIPLINE COMMITTEE:

MR. JESSE HARPER

Hearing Date: January 27, 2020
Decision Date: January 27, 2020
Release of Reasons Date: April 20, 2020

PUBLICATION BAN

DECISION AND REASONS FOR DECISION

The Discipline Committee (the "Committee") of the College of Physicians and Surgeons of Ontario heard this matter at Toronto on January 27, 2020. During the hearing, the Committee made a finding that the member committed an act of professional misconduct. The matter of penalty was contested and the Committee, after deliberating on the issue of penalty, released a written order setting out its penalty and costs order with written reasons to follow. These are the reasons.

THE ALLEGATIONS

The Notice of Hearing alleged that Dr. Kerfoot 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 she 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 she 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.

THE FACTS

The parties filed a Statement of Uncontested Facts and Plea of No Contest as an exhibit at the hearing.

PART I – FACTS

BACKGROUND

1. Dr. Karin Elaine Kerfoot ("Dr. Kerfoot") is a 45-year old psychiatrist who received her certificate of registration authorizing independent practice from the College of Physicians and Surgeons of Ontario ("the College") in July 2011.

2. At the relevant time, Dr. Kerfoot practised psychiatry in London, Ontario at the London Health Sciences Centre, on both an in-patient and an out-patient basis.

3. Patient A was Dr. Kerfoot's patient at the London Health Sciences Centre between 2015 and 2016.

FACTS

Dr. Kerfoot's Treatment of the Patient

4. In 2015, Patient A attended the Emergency Department at the London Health Sciences Centre. Patient A was admitted voluntarily to the in-patient Adult Mental Health Care Program for just over six weeks. Dr. Kerfoot was his attending physician throughout his admission.

5. Patient A left the hospital, but presented at the Emergency Department the following day. Patient A remained on a Form 1 until he was discharged two days later from the Emergency Department by the psychiatry on-call emergency team, with communication to Dr. Kerfoot asking her to follow up with Patient A in the near future in the out-patient setting.

6. Dr. Kerfoot continued to act as Patient A's treating psychiatrist on an out-patient basis following this discharge.

7. Approximately seven months later, Patient A was re-admitted voluntarily to

London Health Sciences Centre's Adult Mental Health Care Centre after an Emergency Department attendance. Dr. Kerfoot continued as his attending psychiatrist throughout this admission, which lasted over a month.

8. Shortly after discharge, Patient A entered a twelve-week residential eating disorders treatment program, but was discharged during the second week, after he left the residence in breach of the rules. After his discharge from the program, Dr. Kerfoot continued to treat Patient A on an out-patient basis at the hospital.

9. Patient A was re-admitted voluntarily to London Health Sciences Centre's Adult Mental Health Care Centre in 2016 after attending at the Emergency Department. Dr. Kerfoot continued to be his attending psychiatrist. Patient A was discharged about a month and a half later, after concerns were raised about his conduct during the admission.

10. Patient A's medical record maintained by London Health Sciences Centre is attached at Tab 1 of the Statement of Uncontested Facts and Plea of No Contest.

11. The Ontario Health Insurance Plan ("OHIP") records of claims submitted in respect of care provided to Patient A by Dr. Kerfoot are attached at Tab 2 of the Statement of Uncontested Facts and Plea of No Contest.

Sexual Contact between Dr. Kerfoot and Patient A – 2015 to 2016

12. A few months after Patient A's hospital discharge referred to in paragraphs 5 and 6, above, Dr. Kerfoot and Patient A arranged to get together and go to a bar, which they did. Later that night, they went to a motel and had oral sex and sexual intercourse.

13. Dr. Kerfoot and Patient A continued to have sexual relations, including sexual intercourse, during the next 13 months. Throughout this period, Dr. Kerfoot was Patient A's treating psychiatrist.

14. During this time period, the relationship between Dr. Kerfoot and Patient A included sexual contact, including sexual intercourse, at the following locations:

(a) Dr. Kerfoot and Patient A attended a hotel. Attached at Tab 3 of the Statement of Uncontested Facts and Plea of No Contest are records from the hotel confirming that Karin Kerfoot paid for the room in cash.

(b) Dr. Kerfoot and Patient A travelled to Toronto. Attached at Tab 4 of the Statement of Uncontested Facts and Plea of No Contest are records from Via Rail confirming return train travel between London and Toronto on the relevant dates, in the names of Karin Kerfoot and Patient A. Attached at Tab 5 of the Statement of Uncontested Facts and Plea of No Contest is the logbook from the hotel in Toronto confirming that Dr. Kerfoot checked into the room, provided her telephone number and paid for the room with her MasterCard.

(c) Dr. Kerfoot and Patient A attended at a motel. Patient A also stayed at the same motel, with Dr. Kerfoot joining him there on approximately two occasions. Attached at Tab 6 of the Statement of Uncontested Facts and Plea of No Contest are records from the motel confirming the room bookings for those dates in Patient A's name.

(d) Dr. Kerfoot and Patient A attended a Provincial Park on two occasion between January 28 to 30, 2016, using the names of [X] and Karin Kerfoot when booking. Attached at Tab 7 of the Statement of Uncontested Facts and Plea of No Contest are records from Ontario Parks of the reservation, showing the associated vehicle licence. Attached at Tab 8 of the Statement of Uncontested Facts and Plea of No Contest is vehicle registration information showing that the vehicle licence associated with the reservation was registered to Dr. Kerfoot and a family member.

(e) Dr. Kerfoot and Patient A attended at a hotel. Attached at Tab 9 of the Statement of Uncontested Facts and Plea of No Contest are records from

the hotel, confirming their booking. The room is booked for "Karen Diamond" (a variation on Dr. Kerfoot's full name of Karin Elaine Dymond Kerfoot) and includes Dr. Kerfoot's home address.

(f) Dr. Kerfoot and Patient A attended at a hotel. Attached at Tab 10 of the Statement of Uncontested Facts and Plea of No Contest are records from the hotel, showing that the room was originally reserved in Patient A's name, then changed to that of Dr. Kerfoot on checking in.

15. Attached at Tab 11 of the Statement of Uncontested Facts and Plea of No Contest are Dr. Kerfoot's CIBC MasterCard records, which show that Dr. Kerfoot's credit card was used for:

- Pre-authorization for Dr. Kerfoot's and Patient A's hotel attendance on specific dates in 2015;
- Payment for Dr. Kerfoot's and Patient A's stay at a hotel on a specific date in 2015;
- Payment for the Parks Ontario booking related to Dr. Kerfoot's and Patient A's attendance at the Provincial Park;
- Payment for Dr. Kerfoot's and Patient A's hotel attendance on a specific date.

Electronic Communications between Dr. Kerfoot and Patient A

16. During the relevant times, Dr. Kerfoot's cell phone number was (226) 973-9074. During the relevant times, Patient A's cell phone number was (###) ###-####.

17. Attached at Tab 12 of the Statement of Uncontested Facts and Plea of No Contest are cell phone records for Dr. Kerfoot's cell phone number (registered to a family member) obtained from Rogers Communications. Attached at Tab 13 of the Statement of Uncontested Facts and Plea of No Contest is a summary of the records of contact between Dr. Kerfoot's cell phone number and Patient A's cell phone number, prepared by the College investigator.

18. Dr. Kerfoot and Patient A used the messaging app, “WhatsApp”, to communicate. Dr. Kerfoot was given the name “Clairesse S” by Patient A in his cell phone contacts. Attached at Tab 14 of the Statement of Uncontested Facts and Plea of No Contest is a screen shot of Patient A’s WhatsApp contacts, showing Dr. Kerfoot’s cell phone number with an image of Dr. Kerfoot, named as contact “Clairesse S”.

19. Attached at Tab 15 of the Statement of Uncontested Facts and Plea of No Contest is the “chat history” of messages exchanged between Dr. Kerfoot and Patient A using WhatsApp, for a period of just under a month in 2016. Patient A exported a text file to the College on August 30, 2016, containing these WhatsApp messages.

20. Patient A provided his memory cards and his cell phone to the College for forensic examination at the College’s request. Matthew Musters (“Mr. Musters”), a forensic examiner at Computer Forensics Inc., extracted a photograph of a business in Toronto from a memory card. The metadata for the image shows the time it was taken. The photograph is attached at Tab 16 of the Statement of Uncontested Facts and Plea of No Contest. Mr. Musters also extracted photographs of Dr. Kerfoot and Dr. Kerfoot’s garden, which are attached at Tab 17 of the Statement of Uncontested Facts and Plea of No Contest. Dr. Kerfoot sent these photographs to Patient A.

21. In the course of his forensic examination of Patient A’s cell phone, after Patient A provided it to the College in October 2016, Mr. Musters did not locate any written communications, including text (SMS) or WhatsApp messages, to or from Dr. Kerfoot. Any deleted written communications were no longer available for review or analysis.

22. Dr. Kerfoot advised the College during the investigation that she had deleted messages exchanged with Patient A from her cell phone before the investigation began. By letter faxed to Dr. Kerfoot’s counsel on February 15, 2018, attached at Tab 18 of the Statement of Uncontested Facts and Plea of No Contest, the College requested that Dr. Kerfoot provide her cell phone for a forensic examination that would include attempts to retrieve deleted messages. Dr. Kerfoot did not provide the College with her cell phone

but provided it to her counsel on March 5, 2018. Her counsel provided the cell phone to a computer forensic examiner, Steve Rogers of Digital Evidence Incorporated, on March 5, 2018, and requested that Mr. Rogers create an image of the phone capable of being forensically analysed, then return the phone to Dr. Kerfoot's counsel.

23. Forensic examination by Mr. Rogers of the image created of Dr. Kerfoot's cell phone determined that:

There were no messages still present on the cell phone from prior to March 5, 2018. All messages still present on the cell phone had been sent or received on March 5, 2018, with the exception of one unsent message (no recipient noted) from December 2015.

There were 23 messages on Dr. Kerfoot's phone (all from March 5, 2018), plus four deleted messages.

None of the messages on Dr. Kerfoot's cell phone were to or from Patient A.

There were 17,803 deleted messages that were no longer available for review or retrievable. It was not possible to determine when they were deleted.

Dr. Kerfoot's responses to Patient A's allegations

24. In the summer of 2016, Patient A met with hospital staff at London Health Sciences Centre to state that Dr. Kerfoot had engaged in a sexual relationship with him. Dr. Kerfoot denied Patient A's allegation to the hospital.

25. On August 4, 2016, Patient A contacted the College to report he had a sexual relationship with Dr. Kerfoot. Patient A made a formal complaint on August 24, 2016. In her response to Patient A's complaint on January 16, 2017, Dr. Kerfoot denied having had a sexual relationship with Patient A.

26. In August 2017, in the course of the College's investigation, the College investigator sent Dr. Kerfoot's counsel the fruits of his investigation to that date,

including the documents at Tabs 1 to 17 of the Statement of Uncontested Facts and Plea of No Contest. On September 15, 2017, Dr. Kerfoot admitted having had a sexual relationship with Patient A.

Summary

27. Dr. Kerfoot engaged in sexual abuse of and violated appropriate doctor-patient boundaries with Patient A.

28. Dr. Kerfoot was dishonest regarding her relationship with Patient A to the hospital and to the College.

RESPONSE TO THE ALLEGATIONS

Dr. Kerfoot did not contest the facts in paragraphs 1 to 28 of the Statement of Uncontested Facts and Plea of No Contest, or that those facts constitute professional misconduct. Dr. Kerfoot did not attend the hearing; the plea of no contest was entered by her counsel.

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.

FINDING

The Committee accepted as correct all of the facts set out in the Statement of Uncontested Facts and Plea of No Contest. Having regard to these facts, the Committee found that Dr. Kerfoot committed an act of professional misconduct under:

(i) clause 51(1)(b.l) of the Code in that she engaged in sexual abuse of a patient; and

(ii) paragraph 1(1)33 of O. Reg. 856/93, in that she 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.

PENALTY AND REASONS FOR PENALTY

ADDITIONAL EVIDENCE ON PENALTY

The parties agreed to the facts set out in an Agreed Statement of Facts Regarding Penalty which was filed as an exhibit and presented to the Committee, as follows:

1. Dr. Karin Elaine Kerfoot (“Dr. Kerfoot”) was suspended by the Inquiries, Complaints and Reports Committee (“ICRC”) on an interim basis pending the completion of its investigation and the conclusion of any resultant discipline referral, effective September 21, 2017. The order of the Inquiries, Complaints and Reports

Committee, dated September 19, 2017, is attached at Tab 1 to the Agreed Statement of Facts Regarding Penalty.

SUBMISSION ON PENALTY

Counsel for the College submitted that the appropriate penalty is revocation of Dr. Kerfoot's certificate of registration, effective immediately; a reprimand; that Dr. Kerfoot provide security for costs of therapy in the amount of $16,060; and that Dr. Kerfoot pay costs to the College of $10,370.

Counsel for Dr. Kerfoot submitted that the penalty order should consist of a reprimand and revocation of her certificate of registration, but submitted that revocation be effective September 21, 2017, being the date of her interim suspension by the ICRC. Counsel for Dr. Kerfoot also submitted that there should be no order for security for costs of therapy.

Dr. Kerfoot agreed to costs of the hearing in the amount sought by the College.

Penalty Principles

In considering an appropriate penalty order, the Committee needs to take into account the well-established principles that have been applied by the Courts and in previous Disciplinary proceedings. Paramount among these is protection of the public. The penalty should also serve as a specific deterrent to the member and a general deterrent to the profession. The penalty should express the profession's denunciation of the member's misconduct. It should endeavour to maintain the public's confidence in the integrity of the profession and in the College's ability to regulate the profession in the public interest. The penalty should also be proportionate to the misconduct and be reasonably consistent with previous disciplinary decisions in similar cases. When appropriate, the penalty should support the rehabilitation of the member.

The Committee must weigh these principles in the light of the specific facts and circumstances of the case, including both aggravating and mitigating factors, in order to arrive at a penalty which is just and appropriate.

Impact Statement

The Committee considered an impact statement from Patient A. Subsection 51(6) of the Code provides the following:

Statement re impact of sexual abuse

> (6) Before making an order under subsection (5), the panel shall consider any written statement that has been filed, and any oral statement that has been made to the panel, describing the impact of the sexual abuse on the patient.

Patient A attended the hearing to read his impact statement to the Committee. Patient A's statement outlines the significant emotional impact he suffered as a result of the abuse by Dr. Kerfoot. He feels he can no longer trust the psychiatric profession and his relationship with doctors is nonexistent. He has had to put his schooling on hold and his family life has become strained. He feels he has lost the will to want to live a happy and productive life.

Mandatory Revocation and Reprimand

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 patients, 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).

Given the finding of sexual abuse in this case, a reprimand is mandatory. Further, the nature of the sexual abuse by Dr. Kerfoot, including sexual intercourse, falls within the enumerated acts in section 51(5)(3). Accordingly, revocation of Dr. Kerfoot's certificate of registration is mandatory.

As set out above, counsel for the College asks that revocation be made effective immediately, while Dr. Kerfoot asks that the revocation be made effective September 21, 2017, being the date of her interim suspension by the ICRC.

Discretion to Order Retroactive Revocation

Counsel for the College noted that revocation is mandatory given the nature of the sexual abuse in this case and submitted that the Committee has no jurisdiction to backdate the revocation. Moreover, College counsel submitted that the legislation is explicit that the Committee cannot make an order until it has made a finding of

professional misconduct, so that backdating the revocation, and therefore the potential reinstatement reapplication date, would defeat the clear intention of the legislation.

Counsel for the College also referred the Committee to a decision of the Law Society of Upper Canada Hearing Panel in *Law Society of Upper Canada v. Oleg Oleksandro Kryvenko,* 2011 ONLSHP 17. The issue in that case was whether a suspension subsequent to a finding of professional misconduct should have been backdated to the date of an earlier, interim, suspension or whether credit for "time served" should have been granted. The Law Society Hearing Panel noted that Mr. Kryvenko's initial suspension was not a penalty imposed by a panel as a result of a finding of professional misconduct, and therefore did not affect the suspension ordered for professional misconduct. Likewise, in this case, Dr. Kerfoot's suspension by the ICRC was not a penalty imposed following a finding of professional misconduct.

As a preliminary matter, the Committee must consider whether it has the jurisdiction or discretion to order that the period of revocation commence on a date prior to the date of its finding that the member committed an act of professional misconduct by sexual abuse. In order to determine whether the Committee has the discretion to order revocation effective at a date prior to its finding, the panel considered whether the words of the *Regulated Health Professions Act*, the *Health Professions Procedural Code* or the *Statutory Powers and Procedures Act* grants it this power.

First, the Committee considered whether there is an express grant of power to order retroactive revocation in the empowering statutes. In doing so, it gave the words in the applicable statutes their ordinary meaning. Counsel for Dr. Kerfoot did not identify an express grant of power to order retroactive revocation. After reviewing the *Regulated Health Professions Act*, the *Health Professions Procedural Code* or the *Statutory Powers and Procedures Act,* the Committee finds that there is no express grant of power to backdate the revocation.

Second, having found that there is no express grant of power, the Committee considered whether the power to do so can be implied, as necessarily incidental to the Committee's powers. The doctrine of necessary implication provides the Committee with the power to do not only that which is expressly set out in the statute, but also anything that is practically necessary to accomplish the objects of the statutory regime. This requires the Committee to consider first, the objects, or purpose, of the statutory regime as a whole, and then determine whether the power to grant revocation at a date other than the date of its findings is necessarily implied in order to achieve those objects or purposes.

Regarding the purposes of the statutory regime, section 3(1) of the *Code* sets out the objects of the College:

> 3 (1) The College has the following objects:
>
> 1. To regulate the practice of the profession and to govern the members in accordance with the health profession Act, this Code and the *Regulated Health Professions Act, 1991* and the regulations and by-laws.
>
> 2. To develop, establish and maintain standards of qualification for persons to be issued certificates of registration.
>
> 3. To develop, establish and maintain programs and standards of practice to assure the quality of the practice of the profession.
>
> 4. To develop, establish and maintain standards of knowledge and skill and programs to promote continuing evaluation, competence and improvement among the members.
>
> 4.1 To develop, in collaboration and consultation with other Colleges, standards of knowledge, skill and judgment relating to the performance of

controlled acts common among health professions to enhance interprofessional collaboration, while respecting the unique character of individual health professions and their members.

5. To develop, establish and maintain standards of professional ethics for the members.

6. To develop, establish and maintain programs to assist individuals to exercise their rights under this Code and the *Regulated Health Professions Act, 1991*.

7. To administer the health profession Act, this Code and the *Regulated Health Professions Act, 1991* as it relates to the profession and to perform the other duties and exercise the other powers that are imposed or conferred on the College.

8. To promote and enhance relations between the College and its members, other health profession colleges, key stakeholders, and the public.

9. To promote inter-professional collaboration with other health profession colleges.

10. To develop, establish, and maintain standards and programs to promote the ability of members to respond to changes in practice environments, advances in technology and other emerging issues.

11. Any other objects relating to human health care that the Council considers desirable.

Section 3(2) of the *Code* sets out the duty of the College to serve and protect the public interest:

> (2) In carrying out its objects, the College has a duty to serve and protect the public interest.

Section 1.1 of the *Code* sets out the purpose of the sexual abuse provisions of the *Code*:

> 1.1 The purpose of the provisions of this Code with respect to sexual abuse of patients by members is to encourage the reporting of such abuse, to provide funding for therapy and counselling in connection with allegations of sexual abuse by members and, ultimately, to eradicate the sexual abuse of patients by members.

Taking into account the sections identified above, and the overall objects of the *Regulated Health Professions Act* and the *Health Professions Procedural Code*, one of the important objects of the statutory regime is clearly to protect members of the public from professional misconduct by College members, including in respect of matters of sexual abuse. The Committee finds that it does not have the power to order that the revocation mandated by section 51(5) of the Code be retroactive. Such power is not practically necessary to accomplish any of the objects of the statutory regime. Further, a finding of professional misconduct is necessary for the order for revocation, and no finding of professional misconduct had been made at the time of the ICRC suspension. Accordingly, the Committee ordered the revocation to take effect immediately upon its order dated January 27, 2020.

Posting of Security

Section 51(2) of the *Code* provides the Committee may make an order, if the act of professional misconduct was the sexual abuse of a patient, requiring the member to:

> 5.1 reimburse the College for funding provided for that patient under the program required under section 85.7; and
>
> 5.2 If the panel makes an order under paragraph 5.1, requiring the member to post security acceptable to the College to guarantee the payment of any amounts the member may be required to reimburse under the order under paragraph 5.1.

Section 85.7 of the *Code* sets out the eligibility of patients that were subject to sexual abuse by a member to seek funding for therapy and counselling. In order for a patient to receive funding, there is no obligation on the patient to testify or undergo a psychological or other assessment before receiving funding.

Both parties drew the Committee's attention to two relevant cases in respect of the posting of security for therapy costs, though the facts in those cases were not similar to the facts in Dr. Kerfoot's case.

In *Sliwin* v. *College of Physicians and Surgeons*, 2017 ONSC 1947 (2017), the complainant's evidence was that no exploitation occurred and the relationship was consensual. Based on the complainant's evidence, the Divisional Court found that an order that Dr. Sliwin provide security for costs for therapy was unreasonable in the circumstances of that case.

In *Ontario (College of Physicians and Surgeons of Ontario) v. Lee*, 2019 ONSC 4294, the Divisional Court reviewed the order of the Committee requiring Dr. Lee to post security for therapy for two patients: Patient A and Patient C:.In respect of Patient A, the Court reviewed Patient A's evidence and impact statement, in which she said she had been seriously impacted by Dr. Lee's misconduct, had difficulty trusting medical professionals and had severed her relationship with her family doctor as a result. The Court found that the finding that counseling should be made available to Patient A was reasonable given her evidence in the hearing and in the impact statement. In respect of

Patient C, the Court noted that the Disciple Committee ignored the evidence of Patient C that she was not bothered by any of Dr. Lee's conduct, and had expressed no need for or interest in therapy or counselling. The Court overturned the Discipline Committee's decision in respect of Patient C, on the basis that it is not grounded in any evidence, is speculative, and therefore is not within a range of reasonable outcomes.

Counsel for Dr. Kerfoot submitted that no order for security for therapy should be made because: (i) Patient A had not obtained therapy to date; (ii) there was no clear evidence that Patient A specifically intends to seek therapy in relation to the sexual abuse; and (iii) Dr. Kerfoot has not been practicing for some time and her inability to earn income should be taken into account.

Dr. Kerfoot's patient (Patient A) stated that he suffered great emotional impact over the incident with Dr. Kerfoot. He said that he no longer trusted psychiatrists and had no relationship with other doctors. He stated that she "took advantage of me in my fragile state and realized that I had feelings for her and preyed on my weakness." The impact on Patient A was clear. Dr. Kerfoot was seeing Patient A for pre-existing mental health issues, which shows that Patient A views therapy as a means to address mental health issues.

After considering the relevant principles from the *Sliwin* and *Lee* cases, the Committee determined that the evidence presented, including Patient A's witness impact statement, provided a sufficient basis for it to conclude that it would be a reasonable outcome for him to seek therapy for the sexual abuse. Accordingly, an order that Dr. Kerfoot post security pursuant to Section 51(2) of the *Code* was made.

Revocation of Dr. Kerfoot's certificate of registration, a reprimand, and posting of security for therapy satisfies the applicable penalty principles. In the Committee's view, even if revocation were not mandatory, the egregious nature of Dr. Kerfoot's misconduct would warrant revocation to ensure public protection and maintain confidence in the integrity of the profession and medical regulation in the public interest. The ordered

penalty is in accordance with the Committee's view of the aggravating and mitigating factors and the penalties ordered in prior cases, as further detailed below.

AGGRAVATING FACTORS

Aggravating factors are those that increase the seriousness or culpability for misconduct. There are a number of aggravating factors in Dr. Kerfoot's case. Dr. Kerfoot took advantage of a vulnerable patient for her own sexual gratification. She crossed boundaries and displayed a lack of appreciation of the power differential between doctor and patient. Further, this was not an isolated incident. Dr. Kerfoot's actions occurred over approximately one year, during which time Dr. Kerfoot was both treating the patient and engaging in sexual activity with the patient.

After about four months of contact as the patient's psychiatrist, Dr. Kerfoot and Patient A arranged to meet at a bar. They later proceeded to a motel where they engaged in oral sex and sexual intercourse.

Over the following year, Dr. Kerfoot's involvement included frequent meetings with Patient A, exchanges of intimate text messages and similar contacts, including sending Patient A sexually explicit photographs of herself. The multitude of boundary violations and conduct of a sexual nature with a vulnerable psychiatric patient is an aggravating factor in this case

Some of these contacts occurred while Patient A was an in-patient under Dr. Kerfoot's care. At times, issues relating to that care were mentioned during their otherwise intimate communications.

Patient A had presented with problems including an eating disorder, depression, and anxiety. Whatever their diagnoses, a psychiatric in-patient is vulnerable in a number of ways, and a power differential is implicit in the relationship between the patient and his or her psychiatrist.

The circumstances outlined above are very serious and are a significant aggravating factor. Dr. Kerfoot failed to maintain a healthy doctor-patient relationship by transgressing appropriate boundaries and not prioritising her patient's needs over her own.

MITIGATING FACTORS

Mitigating factors are factors that lessen the seriousness or culpability for misconduct. Little evidence was presented to the Committee to be considered in mitigation in this case. Dr. Kerfoot did plead no contest to the allegations, thereby permitting the College to avoid a lengthy contested hearing involving multiple witnesses, though not much of the necessary preparation due to the late resolution. The matter was initially scheduled for a two-week contested hearing, but was ultimately heard over one day. However, Dr. Kerfoot's plea of no contest meant that Patient A did not have to testify as a witness in the proceeding. This was a mitigating factor.

Prior Cases

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. The parties submitted prior cases to the Committee for consideration.

Counsel for the College brought to the Committee's attention a number of previous decisions. The Committee has summarized those cases that it found to be most comparable below:

In *Ontario (College of Physicians and Surgeons of Ontario) v. Gilbert*, 2019 ONCPSD 8, the facts were similar to those in the present case. Dr. Gilbert was a psychiatrist who was treating a patient with specific vulnerabilities. The patient had developed anxiety and depression after treatment for cancer and had a history that included suicidal ideation, anxiety, and panic attacks. He had received both inpatient and outpatient care.

Dr. Gilbert began breaching boundaries with the patient by sharing personal information of her own, spending time with the patient and his wife, and then with the patient alone. This escalated to a sexual relationship that was emotionally significant for the patient.

Dr. Gilbert made statements that were untrue about the timing of the commencement of the sexual relationship. In this case, Dr. Kerfoot initially lied about the inappropriate relationship with Patient A (denying that any sexual relation occurred), both to the hospital or to the College, until presented with the accumulated evidence, which she could no longer repudiate. This shows a lack of insight on the part of Dr. Kerfoot.

Dr. Gilbert pleaded no contest to sexual abuse and to disgraceful, dishonourable or unprofessional conduct, as did Dr. Kerfoot. The penalty included some the same components that the College seeks in the present case: revocation effective immediately, a reprimand, funding for counselling or therapy for the patient, and costs.

In discussing the nature of the misconduct, the Committee said in the *Gilbert* case: “As a psychiatrist, Dr. Gilbert should have been even more cognizant of the boundaries between doctor and patient, particularly given the vulnerabilities the patient may disclose to her in the course of the therapeutic relationship. Dr. Gilbert flagrantly violated her responsibilities as a doctor to do no harm and not to exploit the trust and dependence that develops in such circumstances. Dr. Gilbert abused patient A’s trust and her own power, in a most serious manner.”

Counsel for the College submitted that the same reasoning should apply to Dr. Kerfoot’s case. The Committee agrees. Dr. Kerfoot practiced as a psychiatrist and should therefore have been especially mindful of the boundaries between herself and her vulnerable patient, and she too violated her responsibilities.

In *Ontario (College of Physicians and Surgeons of Ontario) v. Manohar,* 2006 ONCPSD 23, a family physician was treating his patient subsequent to a motor-vehicle accident, including for depression. Treatment was eventually followed by sexual abuse. Dr. Manohar, like Dr. Kerfoot, also obstructed the College’s investigation and made untrue statements to the College.

In *Manohar,* the Committee noted that the sexual abuse of the patient had begun with significant, though less serious, boundary violations (drinks and socializing). In Dr. Kerfoot’s case, she and her patient arranged to meet and go for coffee together and it was that encounter that led to their first sexual encounter and then to their long-term affair. That progression should serve as another warning to all physicians about the importance of maintaining proper professional boundaries.

In the *Manohar* decision, it was clear that the sexual abuse had a very serious harmful effect on the complainant. The Committee concluded that funding for therapy was appropriate in those circumstances.

The *Ontario (College of Physicians and Surgeons of Ontario) v. Margaliot, 2016 ONCPSD 53* decision did not involve psychiatric care. Dr. Margaliot was a hand surgeon who operated on a patient in her 20s. The patient then contacted the doctor through social media and invited him out for coffee. There was then an escalation from sexually charged emails to a sexual affair. The Committee ordered the doctor's certificate of registration be revoked as well as funding for the patient's therapy as the sexual abuse had shaken her trust in physicians which "continues to affect her life to the present day."

In *Ontario (College of Physicians and Surgeons of Ontario) v. Sundaralingam*, 2019 ONCPSD 11, the physician, who practised internal medicine and oncology, diagnosed her patient with cancer and began sending him highly personal text messages and arranged to meet him. While treating the patient for cancer, Dr. Sundaralingam engaged in a sexual relationship with him. Revocation, a reprimand, funding for therapy and costs were ordered. There were clear similarities between elements of these cases and Dr. Kerfoot's case.

Counsel for Dr. Kerfoot drew the Committee's attention to two cases in support of the submission that the most severe penalties should only be imposed for the most serious transgressions and that despite the fact that the statute provides for mandatory revocation, the circumstances of this case warranted a less onerous penalty by effectively backdating the commencement of the revocation order. The Committee has already stated above its conclusion that it has no discretion to backdate its orders. In any event, the Committee did not find the authorities cited by Dr. Kerfoot's counsel supportive of her argument.

In *Ontario (College of Physicians and Surgeons of Ontario) v. Noriega,* 2015 ONCPSD 29, Dr. Noriega argued against revocation of his certificate of registration as a result of sexual abuse that occurred in the 1970s. In that case, the Committee commented that "the most severe penalties should be imposed for the most serious transgressions". It should be noted that the Committee did not state that the most severe penalties should

only be imposed for the most serious transgressions. In any event, the Committee finds that the sexual abuse by Dr. Kerfoot is a very serious transgression and one that would warrant revocation even if it were not mandatory.

In *College of Physicians and Surgeons of Ontario v. Peirovy,* 2018 ONCA 420, the Committee originally issued a 6-month suspension to Dr. Peirovy. On review, the Divisional Court found that that penalty was unreasonable. On appeal of that decision, the Court of Appeal (by a majority decision) indicated that “proportionality is also an important consideration”.

The Committee agrees that proportionality is an important penalty principle, but does not agree that proportionality should result in Dr. Kerfoot’s revocation being retroactive to the date of her interim suspension by the ICRC. As outlined above, revocation is mandatory in this case and the Committee does not have the discretion to order it retroactively. In any event, the Committee finds that revocation as of the date of its order is the appropriate penalty in this case and was not persuaded that there was any evidentiary basis to support departing from ordering revocation effective immediately even if it had the jurisdiction to do so.

CONCLUSION

The only real areas of dispute between the parties were whether Dr. Kerfoot should be ordered to pay for therapy or counselling for Patient A and whether revocation should be backdated to the date of the interim suspension.

As set out above, the Committee found that it did not have the power to order revocation retroactively, and made the order for revocation effective immediately upon issuing its order on January 27, 2020. Even if it had the power to order revocation retroactively, the Committee found that the penalty is in accordance with the Committee’s view of the aggravating and mitigating factors and the penalties ordered in

prior cases and would not have ordered the commencement of the revocation to be backdated.

With regard to posting security for therapy costs, the Committee determined that the evidence presented provided a sufficient basis for it to conclude that Patient A may obtain therapy for the sexual abuse. Accordingly, an order that Dr. Kerfoot post security pursuant to Section 51(2) of the *Code* was made.

The parties did not dispute that a reprimand was an appropriate term of any order. A reprimand is mandatory pursuant to section 51(5) of the *Code.*

The parties also did not dispute that Dr. Kerfoot should pay costs to the College in the amount of $10,370.00. The Committee found that this is an appropriate term of the order.

ORDER

The Committee stated its findings regarding professional misconduct in paragraph 1 of its written order of January 27, 2020. In that order, the Committee also ordered and directed on the matter of penalty and costs as follows:

2. The Discipline Committee directs the Registrar to revoke Dr. Kerfoot's certificate of registration effective immediately.

3. The Discipline Committee orders Dr. Kerfoot to attend before the panel to be reprimanded.

4. The Discipline Committee orders Dr. Kerfoot to 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 date of the Order in the amount of $16,060.00; and

5. The Discipline Committee orders Dr. Kerfoot to pay costs to the College in the amount of $10,370.00, within thirty (30) days of the date of [the] Order.