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Back from the future: Horri v CPSO affirms the need for consistency in professional discipline penalties

In *Horri* v *The College of Physicians and Surgeons*, the Divisional Court reaffirms the importance of consistency and justification when a professional regulator sanctions one of its members. Penalties for misconduct should fall within the range established by previous case law, and regulators should exercise caution before departing from precedent on the basis of "changing social values."

Dr. Mehdi Horri is a family physician who treated Patient A for depression, anxiety and sleep difficulties. He had a total of twelve treatment sessions with the patient over six months. During this time, Patient A disclosed deeply personal information to Dr. Horri.

Two weeks after the end of treatment, Dr. Horri and Patient A commenced a sexual relationship that lasted approximately three years. A report was subsequently made to the College.

Dr. Horri did not dispute that his conduct amounted to professional misconduct, and the Discipline Committee found him guilty of an act or omission that would reasonably be regarded my members as disgraceful, dishonourable or unprofessional.[1] As the intimate relationship commenced after the end of Dr. Horri's professional relationship with Patient A, there was no finding of sexual abuse.[2]

At his penalty hearing, Dr. Horri apologized to the complainant and acknowledged his responsibility as a physician. He had undertaken a two-day course on professional boundaries, and he testified that he was now more aware of the power differential in his relationship with patients. When asked if he would ever engage in an intimate relationship with a former patient again, Dr. Horri testified, *"absolutely not. I would not enter a relationship with any patient of any duration of any kind."* A forensic psychiatrist also testified for Dr. Horri. It was his opinion that Dr. Horri had achieved insight and would not repeat his behaviour in the future.

The prosecution adduced no evidence at the penalty hearing, other than filing a copy of the College's policy statement on

physician-patient boundaries. Patient A was also permitted to read a victim impact statement.

The prosecution and defence took very different positions regarding the appropriate penalty in this case. Counsel for Dr. Horri suggested a five-month suspension of his certificate of registration, arguing that this would be consistent with previous decisions of the Discipline Committee in analogous cases. College counsel sought revocation of Dr. Horri's license. Among other things, the prosecution suggested that the Discipline Committee's previous case law should be discounted in light of changing social values.[3]

In the result, the Discipline Committee accepted the College's submission and directed the Registrar to revoke Dr. Horri's certificate of registration. While acknowledging that this penalty fell *"outside the range of the typical penalties imposed in past cases,"* the Discipline Committee justified its departure from the historical range as necessary to *"reflect and protect"* changing social values.

The Committee also justified its departure from precedent on the basis that it was necessary to protect the public. In so doing, it rejected the evidence of Dr. Horri's psychiatric expert. The Committee arrived at its own view of Dr. Horri's risk, stating as follows:

> In order to ensure protection of the public, … a much more in-depth psychiatric assessment should be conducted. Dr. Horri demonstrated no understanding of why he engaged in such sexual behavior and his own personal vulnerabilities were not addressed. His understanding of his professional responsibilities was lacking. There was no explanation of why he allowed the relationship to persist for years and there was no mention of what factors might trigger such situations in the future.

On appeal, the Divisional Court overturned this decision, concluding that:

- the Committee unreasonably departed from its prior penalty decisions in revoking Dr. Horri's license; and
- the Committee's finding on the issue of risk was not supported by clear, convincing and cogent evidence.

Departure from the range of penalties imposed in prior cases

The Discipline Committee's chosen penalty in this case – revocation – greatly exceeded the range established in the Committee's prior cases. Citing the *"well settled"* importance of

consistency in sentencing, the Court found that the Discipline Committee had provided *"no justification"* to support this departure from prior case law. While acknowledging that regulators *"may take into account changing social values in imposing penalty,"* the Court emphasized that penalty decisions must *"provide a line of analysis that could reasonably lead from the evidence to the conclusion."* Consistency in sentencing is as important in professional regulation as it is in criminal law, and a clear rationale must be offered where a professional regulator seeks to impose a penalty that markedly departs from prior cases. Failure to adequately consider previous penalty decisions may give rise to wide variation in the sanctions imposed on professionals in similar cases. This causes *"not simply unfairness but injustice."*[4]

The Court held that the Discipline Committee had failed to adhere to these principles in Dr. Horri's case, stating as follows:

> The Committee acknowledged that it was venturing outside of the range of penalty, but offered no insight into how this case compared to those with similar facts and lesser penalties. The cases that were considered by the Committee were more serious than this one, involving repeat offenders and more aggravated offences. A range of penalty is never carved in stone, but departures should be rooted, if not in precedent, then in principle.

Ongoing risk must be proven on the basis of clear, convincing, and cogent evidence

Horri also reaffirms the prosecution's burden to prove its case at the penalty stage of proceedings on a basis that is *"clear and convincing and based upon cogent evidence."* The Court found that the evidence in Dr. Horri's case failed to meet this threshold.

The prosecution had not adduced any evidence that Dr. Horri posed an ongoing risk to the public. The only evidence before the Discipline Committee on this issue was the supportive opinion of Dr. Horri's psychiatric expert, as well as that of Dr. Horri himself. In assessing the supportive testimony of Dr. Horri and his expert, the Discipline Committee was naturally entitled to accept some, all, or none of the defence's evidence. However, *"[r]ejection of evidence does not amount to positive proof of an opposing fact."* Merely rejecting the opinion of Dr. Horri's expert that he was a low risk of re-offending did not entitle the Discipline Committee to infer that Dr. Horri was a risk. That positive conclusion could be drawn only on the basis of clear, convincing and cogent evidence. In the absence of such evidence, it was unreasonable for the Discipline Committee to cite "public protection" concerns as the basis for

revoking Dr. Horri's license.

Conclusion

Horri reaffirms the importance of consistency and justification in professional regulation. Defence counsel should continue to insist that like cases must be treated alike. "Changing social values" do not provide regulators with license to disregard previous decisions in the absence of transparent and principled reasons for doing so.

Horri also serves as a reminder that factual findings at the penalty phase of a discipline proceeding must be justified on the basis of evidence. As always, it is the prosecution's onus to prove its case on the basis of a record that is "clear, convincing and cogent."

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[1] Ontario Regulation 856/93, para 1(1) 33

[2] Given recent amendments to the *Regulated Health Professions Act* expanding the definition of "patient" to include "an individual who was a member's patient within one year… from the date on which the individual ceased to be the member's patient," the result would likely be different today. See Health Professions Procedural Code, s.1(6)(a)

[3] 2017 ONCPSD 12 (CanLII) at 17

[4] *Ibid* para. 69, citing *Stevens v. the Law Society of Upper Canada*, 1979 CanLII 1739 (ON SC)