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September 3, 2020

No Notice, No Dice: Divisional Court Reiterates Need for Proper Notice of Case Against

A recent Divisional Court case involving the College of Physicians and Surgeons of Ontario reaffirms the importance of ensuring that findings of professional misconduct by the College's Discipline Committee fairly arise from the allegations contained in the College's Notice of Hearing.

In *Shamess v College of Physicians and Surgeons of Ontario*, the Divisional Court found that the Discipline Committee erred by making a finding of professional misconduct against Dr. Shamess based on issues not raised in the Notice of Hearing and not pursued by the College at the Discipline Hearing.

Dr. Shamess' practice focused mainly on chronic pain and sports injuries, and he utilized hands-on manual therapy techniques to treat patients suffering from chronic musculoskeletal pain.

In its Notice of Hearing, the College alleged that Dr. Shamess committed an act of professional misconduct by engaging in sexual abuse of patients, and had engaged in conduct reasonably regarded as disgraceful, dishonourable or unprofessional. The Notice of Hearing was based on allegations that Dr. Shamess engaged in inappropriate sexual and physical contact with a patient and that he made inappropriate comments to the patient.

At the conclusion of the Hearing, the Discipline Committee found that the allegations were not proven. It found that Dr. Shamess' testimony was generally clear and consistent; that his recollections regarding the patients were consistent with the information in their medical charts; that he admitted to things he could not recall; and that he did not resort to self-serving rationalizations. The Discipline Committee also found that the complainants' evidence was generally not credible.

Despite those findings, the Discipline Committee nonetheless found Dr. Shamess guilty of professional misconduct because he had a "professional obligation to conduct this examination in a way that was more respectful of [the patient's] privacy". The Discipline Committee imposed a reprimand and ordered Dr. Shamess to pay costs of \$5,090.

On appeal to the Divisional Court, Dr. Shamess argued that the

Discipline Committee lacked jurisdiction to make its decision, because the case theory it relied on to find him guilty of professional misconduct did not arise from any of the allegations set out in the College's Notice of Hearing.

Dr. Shames also argued that the decision was procedurally unfair because he did not have notice of this case theory, or the allegations underpinning it, and therefore did not have the opportunity to address it at the Discipline Hearing.

Counsel for the College agreed with Dr. Shames. So did the Court.

The Court concluded that it was not open to the Discipline Committee to make the finding of professional misconduct against Dr. Shames based on the patient's privacy concerns when this was not an issue raised in the Notice of Hearing or pursued by the College at the hearing.

Referring to its earlier decision of *Ontario (College of Physicians and Surgeons of Ontario) v Kunyetz*, the Court explained that:

It was unreasonable and procedurally unfair for the Discipline Committee to make a finding of professional misconduct based on allegations that were not included in the Notice of Hearing and a theory of liability not pursued by the College at the hearing.

The Divisional Court's decision in *Shames* follows a long line of decisions supporting the proposition that a College's Discipline Committee is confined to matters included in the Notice of Hearing, and cannot find its member to have engaged in conduct that was not alleged.

The Notice of Hearing, and more specifically the allegations contained within it, are vital to ensuring that the member has notice of the case against them and can adequately respond to those allegations at the Hearing.