

HEALTH PROFESSIONS APPEAL AND REVIEW BOARD

PRESENT:

Gerard Tillmann, Designated Vice-Chair, Presiding
Thomas Kelly, Vice Chair
Yasmeen Siddiqui, Board Member

Review held on October 24, 2019 at Toronto, Ontario

IN THE MATTER OF A COMPLAINT REVIEW UNDER SECTION 29(1) of the *Health Professions Procedural Code*, Schedule 2 to the *Regulated Health Professions Act, 1991*, Statutes of Ontario, 1991, c.18, as amended

B E T W E E N:

F.G., MD

Applicant

and

M.S., MD

Respondent

Appearances:

For the Applicant:
The Respondent

Peter Gouda, Counsel
M.S., MD

For the Respondent:
For the

Mark Lerner, Counsel

College of Physicians and Surgeons:

Sarah Obermeyer (by teleconference)

DECISION AND REASONS

I. DECISION

1. It is the decision of the Health Professions Appeal and Review Board to return the decision to the Inquiries, Complaints and Reports Committee of the College of Physicians and Surgeons of Ontario and to require it to conduct a further and adequate

investigation and thereafter to reconsider this matter and issue a further decision with reasons.

2. This decision arises from a request made to the Health Professions Appeal and Review Board (the Board) by F.G., MD (the Applicant) to review a decision of the Inquiries, Complaints and Reports Committee (the Committee) of the College of Physicians and Surgeons of Ontario (the College). The decision concerned a complaint regarding the conduct and actions of M.S., MD (the Respondent) in the treatment of the Applicant's mother (the patient).
3. The Committee investigated the complaint and decided to state its expectation that physicians communicate clearly with families about resuscitation and document any such discussions in the patient chart, and to take no further action.

II. BACKGROUND

4. The Applicant is a physician in Manitoba. He held power of attorney (POA) over the care of his mother, the patient of record. The Respondent provided care to the patient at the Victoria Hospital in London, Ontario, in May 2018.
5. In May of 2018 the patient was admitted to the intensive care unit (ICU) at the Victoria Hospital campus of the London Health Services Corporation (LHSC) (the hospital) for congestive heart failure.
6. On May 26, 2018, there was a phone call between the Respondent and the Applicant regarding the patient's status and continued care. There is a difference of opinion between the Applicant and the Respondent as to what was said during this telephone conversation about the patient's code status.
7. There was a further disagreement between the Applicant and the clinical team about the treatment plan, it being the position of the Applicant that he wanted the patient kept alive "at all costs". In July of 2018, the hospital decided to obtain a decision from the Consent

and Capacity Board given the impasse between the Applicant and the clinical team regarding the treatment plan.

The Complaint and the Response

8. Initially, the Applicant mistakenly complained that another physician was negligent in the care he provided to the patient from May 26 to May 28, 2018. Subsequently, he correctly identified the Respondent. The Applicant's specific concerns were that the Respondent:
 - changed the patient's resuscitation status without informing the Applicant; and
 - failed to provide a full resuscitation of the patient in a timely manner.

9. The Respondent provided a verbal response to the Applicant's complaint on August 1, 2018, which response included the following:
 - he spoke with the Applicant by telephone on May 26, 2018 and the Applicant agreed to no intubation;
 - the patient eventually required intubation and was intubated at the request of the Applicant;
 - subsequently a meeting was held and the disagreement regarding the intubation/treatment plan was brought up to the Applicant by another physician; the Applicant advised this other physician that he wanted his mother "kept alive at all costs" and if not then he [the Applicant] was "going to sue the hospital";
 - shortly thereafter the Applicant was informed that the hospital was going to the Consent and Capacity Board, at which time the Applicant responded that he would submit a complaint to the College; and
 - the Applicant's behaviour was "threatening, bullying and unprofessional" and that his [the Respondent's] main focus remained the care of the patient.

The Committee's Investigation

10. The Committee investigated the complaint.
11. The College's investigator spoke with the Applicant on July 30, 2018 and was advised that the Applicant had received a copy of the patient's chart as a result of the hospital opening a "consent and capacity hearing".
12. The College's investigator advised the Applicant that a consent was required for the release of the patient's medical records and that she would send the consent to the Applicant for him to sign.
13. The investigator did not send such a consent form to the Applicant.
14. The investigator spoke with the Applicant again on August 2, 2018, at which time the Applicant again advised the investigator that he had a copy of the patient's chart and asked the investigator if he should send this information to the College. The investigator asked the Applicant not to send any medical records to the College.
15. The investigator did not request or receive a response from the Respondent.
16. A request for the College Registrar to appoint one or more investigators pursuant to section 75(1)(c) of the *Health Professions Procedural Code* was made but on August 18, 2018, the Registrar declined to approve the same. The *Health Professions Procedural Code* (the *Code*) is Schedule 2 to the *Regulated Health Professions Act, 1991*.

The Committee's Decision

17. When the Committee met on September 5, 2018 it did not have the clinical record of the patient before it when it considered the complaint.

18. In its decision the Committee noted that it was unable to obtain consent for the release of the patient's personal health information. The Committee further noted that the College Registrar declined to appoint an investigator so the College was unable to obtain the clinical record or the Respondent's response to the complaint.
19. The Committee determined to state its expectations that physicians communicate clearly with families about resuscitation status and document any such discussions in the patient chart and decided to take no further action.
20. The Committee stated the following points in reaching its decision:
 - With regard to the Applicant's concern that the Respondent changed the patient's resuscitation status without consent, the Committee had no way to determine exactly what occurred in regard to decisions and discussions about the patient's status. Without information to assist the Committee in this regard, the Committee was not prepared to take action and simply stated its expectation that physicians communicate clearly with families about resuscitation status and document any such discussions in the patient's chart.
 - The patient's condition deteriorated and she was placed on bilevel positive airway pressure (BiPAP) therapy given the "no intubation" directive that the Respondent had written on the chart. As the patient went into respiratory failure, and at the direction of the Applicant, the patient's status was changed to full code and she was then intubated and ventilated. The Committee saw no basis for the Applicant's concern that the Respondent failed to provide full resuscitation of the patient in a timely manner.

III. REQUEST FOR REVIEW

21. In a letter dated December 17, 2018, the Applicant requested that the Board review the Committee's decision.

IV. POWERS OF THE BOARD

22. After conducting a review of a decision of the Committee, the Board may do one or more of the following:
- a) confirm all or part of the Committee's decision;
 - b) make recommendations to the Committee;
 - c) require the Committee to exercise any of its powers other than to request a Registrar's investigation.
23. The Board cannot recommend or require the Committee to do things outside its jurisdiction, such as make a finding of misconduct or incompetence against the member, or require the referral of allegations to the Discipline Committee that would not, if proved, constitute either professional misconduct or incompetence.

V. THE PARTIES' POSITIONS

24. At the Review, the Applicant, through his representative, took the following positions:
- The investigation was inadequate in that the Registrar declined to approve the appointment of investigators pursuant to section 75(1)(c) of the *Code*;
 - Because of this, the Committee did not have the essential information before it at the time it made its decision;
 - The Committee could have obtained the medical information of the patient and did not; and
 - The Committee's decision was unreasonable because it did not have the appropriate medical information.
25. At the Review, counsel for the Respondent took the following positions:

- The investigation was adequate. The request for a section 75 investigation was made while the patient was alive and thus was appropriate;
- The Committee was aware that the Applicant had the patient's health records and could have obtained these from the Applicant but did not do so;
- The Respondent saw and treated the patient during the time period in question and the patient had a complex condition;
- The Respondent proposed a treatment plan and consulted with the Applicant on May 26, 2018 regarding the same by telephone;
- The telephone conversation was recorded and was transcribed to the patient's chart;
- The "bedside nurse" was present during the telephone conversation;
- During the telephone conversation, the Respondent and the Applicant came to an agreement as to what the treatment plan was to be;
- The Respondent was advised by the College's investigator that a section 75 investigation was being requested and that he need not respond to the complaint until after the section 75 investigation was completed; and
- The decision was reasonable and was supported by the information in the Record.

VI. ANALYSIS AND REASONS

26. Pursuant to section 33(1) of the *Code*, the mandate of the Board in a complaint review is to consider either the adequacy of the Committee's investigation, the reasonableness of its decision, or both.
27. The Board has considered the submissions of the parties, examined the Record of Investigation (the Record), and reviewed the Committee's decision.
28. In conducting this complaint review, the Board assesses the adequacy of an investigation and reasonableness of a Committee decision in reference to its role and dispositions

available to it when investigating and then assessing a complaint filed about a member's conduct and actions.

29. In this regard, the Committee is to act in relation to the College's objectives under Section 3 of the *Code*, which objectives include, to maintain standards of practice to assure the quality of the practice of the profession, to maintain standards and promoting improvement among the members, and to serve and protect the public interest.
30. The Committee's mandate is to screen complaints about its members. The Committee considers the information it obtains to determine whether, in all of the circumstances, a referral of specified allegations of professional misconduct to the College's Discipline Committee is warranted or if some other remedial action should be taken. Dispositions available to the Committee upon considering a complaint include taking no action with regard to a member's practice, issuing a caution or directing other remedial measures intended to improve an aspect of a member's practice or referring specified allegations of professional misconduct or incompetence to the Discipline Committee, if the allegations are related to the complaint.

Adequacy of the Investigation

31. An adequate investigation does not need to be exhaustive. Rather, the Committee must seek to obtain the essential information relevant to making an informed decision regarding the issues raised in the complaint.
32. The Board finds that the Committee's investigation to be inadequate for the following reasons.
33. In a telephone conversation with the College's investigator on July 30, 2018:
 - the Applicant advised the investigator that he had obtained the patient's chart and was able to confirm that his complaint involved and was against the Respondent.

- the Applicant advised investigator that he, the Applicant, had received the patient's chart as a result of the hospital opening a "consent and capacity hearing"; and
 - the Applicant confirmed his concerns against the Respondent.
34. During this telephone interview with the Applicant, the College's investigator advised the Applicant that consent to release records was required and that such consent would be sent to the Applicant. During the review of this matter, the College's representative confirmed for the Board that such consent was never sent to the Applicant.
35. The College's investigator also spoke with the Respondent on July 30, 2018, to discuss the concerns received from the Applicant. During that telephone conversation:
- The College's investigator advised the Respondent that the original letter of complaint had named another physician and it had now been confirmed with the Applicant that the Respondent was the physician who contacted the Applicant on May 26 to discuss the patient's condition; the investigator also advised the Respondent as to the concerns of the Applicant regarding the care provided by the Respondent to the patient;
 - The Respondent provided information to the College's investigator regarding the care that he provided and that the hospital was currently involved in a "Consent and Capacity Hearing";
 - The Respondent further stated that a group of physicians had been involved in the patient's care and they had been made aware by the Applicant that he would be submitting a complaint about a physician but did not know what the complaint would involve; and
 - The Respondent stated that he did remember the telephone conversation with the Applicant on May 26 and that the telephone conversation had been documented in the patient's chart.

36. On August 1, 2018, the College's investigator wrote to the Respondent by e-mail advising him that the College had received a complaint from the Applicant and enclosed a copy of the complaint. In the letter, the investigator told the Respondent that the Applicant was not the patient and was unable to provide consent for the release of the patient's confidential medical information and that when the appropriate consent was received the investigator would request his written submissions. The investigator requested that the Respondent not provide any confidential medical information or records at this stage.
37. The College's investigator also spoke with the Respondent by telephone on August 1, 2018, for the purpose of discussing the direction of the Applicant's complaint. During that telephone conversation:
- the College's investigator noted that both the Applicant and the Respondent indicated that there was an ongoing Consent and Capacity hearing at the hospital;
 - the College's investigator would be requesting a section 75 (1)(c) Registrar's investigation pursuant to the *Code* or take no further action;
 - the Respondent provided his verbal response to the Applicant's complaint; and
 - the College's investigator advised the Respondent of the next steps, including that should the section 75 (1)(c) request be approved, the investigator would request the patient's records and the Respondent's response to the complaint in the absence of [the Applicant's] consent.
38. On August 2, 2018, the College's investigator spoke with the Applicant by telephone to provide the following further information on the complaint:
- because the Applicant and the Respondent had notified the investigator of the Consent and Capacity Board hearing, the investigator would submit a report to the Committee requesting authorization of a section 75(1)(c) investigation;
 - if this was approved it would give the investigator permission to proceed with the investigation in the absence of [the Applicant's] consent;

- if the investigation was approved and moved forward, the Applicant may not be privy to the patient's medical records which may include the Respondent's response; and
- the Committee could also deny the request for a section 75(1)(c) and take no further action.

The Applicant acknowledged his understanding of this.

39. During that telephone conversation on August 2, 2018, the Applicant advised the investigator that he had a copy of the patient's chart and asked the investigator if he could send this information to the College. The investigator recorded the following information with regard to the patient's chart in the memorandum for that phone call:
- [The Applicant] advised Investigator that he does have a copy of his mother's chart, and asked Investigator if he can send this information to the College. Investigator asked [the Applicant] not to send any medical records to the College at this time. [The Applicant] voiced his understanding.
40. As stated above, the section 75(1)(c) request for the appointment of one or more investigators was denied by the Registrar on August 18, 2018.
41. At the review of this matter, the College's representative advised the Board that:
- the investigator did not ever send a consent to the Applicant for the release of the patient's confidential medical information; and
 - the investigator knew that the Applicant had a copy of the patient's chart, told the Applicant not to send the patient's chart to the College and after the Registrar denied the section 75(1)(c) request did not request that the Applicant send the patient's chart to the College.
42. At the review of this matter, counsel for the Respondent advised the Board that:

- the telephone conversation of May 26, 2018, between the Respondent and the Applicant was recorded and was transcribed to the patient’s chart;
 - the “bedside nurse” was present during the telephone conversation; and
 - the Respondent was advised by the College’s investigator that a section 75 investigation was being requested and that he need not respond to the complaint.
43. The Board notes that in its decision, the Committee stated that:
- the Applicant was the attorney with power over the patient’s care;
 - it was unable to obtain consent for release of the patient’s personal health information and the Registrar declined to appoint an investigator pursuant to the section 75(1)(c) request.
44. The Board further notes that once the Applicant’s complaint had been confirmed to be against the Respondent, the College’s investigator never sent the appropriate consent to the Applicant for the release of the patient’s personal health information and further, that the College’s investigator knew that the Applicant had the patient’s chart and told the Applicant not to send the patient’s chart to the College. Once the Registrar declined to appoint any investigator(s) pursuant to the section 75(1)(c) request there was nothing to prevent the College’s investigator from sending the appropriate consent to the Applicant to be signed nor from requesting that the Applicant send the patient’s chart to the College.
45. Finally, the Board notes that the Respondent is a “health information custodian” as defined under Section 3 of the *Personal Health Information Protection Act*, 2004, S.O. 2004 (“the Act”) and that pursuant to Section 41(1)(a) of the Act “...a health information custodian may disclose the personal health information about an individual... for the purpose of a proceeding...in which the custodian ...is a party...if the information relates to or is a matter in issue in the proceeding...”. Accordingly, the Respondent could have disclosed the personal health information, which would have contained the patient’s chart, the transcribed telephone conversation and information regarding the “bedside

nurse” to the College. However, the Respondent did not disclose the personal health information of the patient to the College and the College did not request this from the Respondent.

46. In conducting its investigation, the Committee must seek to obtain the essential information relevant to making an informed decision regarding the issues raised in the complaint. The Board finds that the Committee did not do so and that had the Committee had the patient’s confidential health information, which would have included the patient’s chart, such information might reasonably be expected to have affected the Committee’s decision should the Committee have acquired it.
47. The Board therefore determines that the investigation in this matter is inadequate and returns the matter to the Committee for further investigation and a new decision with reasons.
48. The Board further recommends to the Committee that it provide both the Applicant and the Respondent the opportunity to provide additional documentation, including the patient’s chart, to make further submissions and to provide the Committee with the documentation referred to by the Respondent’s counsel and available pursuant to section 41(1)(a) of the *Personal Health Information Protection Act, 2004*, S.O. 2004

Reasonableness of the Decision

49. As the Board finds that the Committee’s investigation was inadequate, it would be premature in these circumstances to consider the reasonableness of the Committee’s decision at this time.

VII. DECISION

50. Pursuant to section 35(1) of the *Code*, the Board returns the decision to the Committee and requires it to conduct a further and adequate investigation and thereafter to reconsider this matter and to issue a further decision with reasons.

ISSUED June 16, 2020

Gerard Tillmann

Gerard Tillmann

Thomas Kelly

Thomas Kelly

Yasmeen Siddiqui

Yasmeen Siddiqui