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Deference gives way to procedural fairness in PEI decision

Administrative lawyers and regulators should take note: in *Swart v. College of Physicians and Surgeons of Prince Edward Island* the Prince Edward Island Court of Appeal provided express guidance in the prosecution of complaints against doctors.

While focusing on the Prince Edward Island statutory regime, the Court's observations on natural justice and professional misconduct undoubtedly offer direction for lawyers and professional bodies across Canada.

In brief, Dr. Swart performed surgery on the complainant patient, who subsequently experienced pain. He treated the pain with analgesia and discharged the patient the following day. The complainant suffered a perforated intestine, which she attributed to Dr. Swart's surgery. She complained to the College of Physicians and Surgeons, alleging that Dr. Swart had both negligently performed the surgery and negligently failed to recognize the seriousness of her post-operative condition.

The complaint was referred to the Fitness to Practise Committee ("the Committee"), which made findings of professional misconduct and unfitness to practice and recommended certain penalties. Dr. Swart appealed to the Court of Appeal. The Court of Appeal quashed the findings of the Committee and the recommended penalties and held that no further action on the complaint should be taken by the College. In arriving at that conclusion, the Court found that the Committee had failed to adhere to the high standards of procedural fairness, which are necessary when a physician's livelihood and reputation hang in the balance, and that the findings of the Committee lacked any evidential basis.

Dr. Swart faced considerable hurdles in his appeal as section 34(7)(a) of the Prince Edward Island *Medical Act* confers significant latitude on the Committee, permitting it to devise procedural rules and "do all things necessary to provide a full and proper investigation." In addition, Canadian courts have long recognised professionals as uniquely-placed to evaluate the conduct of their peers. Decisions of this kind are generally entitled to significant deference.

In this case, however, the Court was very critical of the

Committee and the resulting decision. The Court found numerous breaches of procedural fairness. First, the Committee had arranged to interview the complainant at a scheduled time, in the presence of Dr. Swart and his counsel. Despite this, the Committee began the interview early before Dr. Swart had arrived. Second, the Committee used double hearsay evidence, without the knowledge of Dr. Swart, to arrive at its conclusions. Third, the Committee members also used their own expertise to identify "repeated errors", even though the expert evidence before the Committee could reasonably have evidenced only one breach of the standard of care.

Those flaws also contributed to the Committee's inadequate evidential analysis, which included a failure to explain how and why the Committee had made use of a history of previous complaints in arriving at its conclusions, and why it had preferred the evidence of one witness over that of another.

At best, the evidence had shown Dr. Swart to have made "a mistake." The Court emphasised that this was no basis for identifying professional misconduct, which connotes "moral turpitude, such as fraud, patient abuse, dereliction of duty, or...an arrogant or blatantly non-caring attitude toward a patient or patients." The findings were "not sustainable" as they were not supported in fact or law.

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