

COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA

IN THE MATTER OF
A HEARING UNDER THE *HEALTH PROFESSIONS ACT*,
R.S.A. 2000, c. C-7

AND IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF DR. JOANNE SUK-WAH TSE

**DECISION OF THE HEARING TRIBUNAL OF
THE COLLEGE OF PHYSICIANS
& SURGEONS OF ALBERTA**

I. INTRODUCTION

The Hearing Tribunal held a hearing into the conduct of Dr. Joanne Suk-Wah Tse on June 13, 2018. The members of the Hearing Tribunal were:

Dr. Colm MacCarthy, Chair
Dr. Robin Cox
Dr. Hugh Campbell, Public Member

Ms. Katrina Haymond acted as independent legal counsel for the Hearing Tribunal.

In attendance at the hearing was Mr. Craig Boyer, legal counsel for the Complaints Director of the College of Physicians & Surgeons of Alberta (the “College”).

Dr. Tse was not present at the hearing. However, she was represented by Mr. Webster Macdonald, legal counsel. There were no objections by Mr. Boyer or Mr. Macdonald to proceeding with the hearing in Dr. Tse’s absence.

There were no objections to the composition of the Hearing Tribunal or the jurisdiction of the Hearing Tribunal to proceed with a hearing.

II. ALLEGATION

There were originally two allegations in the Notice of Hearing. However, Mr. Boyer indicated at the outset of the hearing that the Complaints Director was withdrawing the first allegation. The only allegation considered by the Hearing Tribunal was set out in the Notice of Hearing, dated February 21, 2018, which was as follows:

You did inappropriately commence a defamation legal action against S.T. and K.W.¹ on October 7, 2017 based on the complaint made by S.T. to the College of Physicians & Surgeons of Alberta (the “College”) regarding a medical appointment with you on August 10, 2015, the confidentiality of patient records, the timeliness on follow-up of lab test results and your discharge of S.T. and K.W. as your patients, which resulted in the College’s investigation, file number 150410.1.1.

At the outset of the hearing, the parties indicated that they were able to proceed with the hearing by way of an Agreed Statement of Facts and an agreed Exhibit Book. The parties also indicated that Dr. Tse was prepared to admit the allegation.

III. PRELIMINARY MATTERS

There were no preliminary matters presented by the parties.

¹ The Notice of Hearing, Agreed Statement of Facts and Agreed Exhibits referred to S.T. and K.W. by their full names. For the purposes of this decision, the Hearing Tribunal has referred to them using initials.

IV. EVIDENCE

The hearing proceeded based on Agreed Exhibits and an Agreed Statement of Facts, and no witnesses were called to testify.

The parties entered an Exhibit Book by agreement (Exhibit 1) which contained the following items:

- Item 1: Notice of Hearing, dated February 21, 2018
- Item 2: Letter from Dr. Tse to K.W., dated August 14, 2015
- Item 3: Letter of Complaint from S.T. to the College, dated August 26, 2015
- Item 4: Investigation Report, dated May 4, 2016 for file 150410.1.1
- Item 5: Investigation Report, dated October 19, 2016 for file 160311.1.1
- Item 6: Investigation Report, dated November 16, 2016, for file 150455.1.1
- Item 7: Letter from Dr. Caffaro to S.T., dated May 12, 2016
- Item 8: Memo by Dr. Caffaro, dated September 21, 2017
- Item 9: Undertaking of Dr. Tse, dated October 19, 2017
- Item 10: Terms of Resolution between Dr. Tse and the Complaints Director, dated October 27, 2017
- Item 11: Statement of Claim filed October 4, 2017
- Item 12: Statement of Defence filed January 29, 2018
- Item 13: Letter from Dr. Caffaro to S.T., dated November 2, 2017
- Item 14: Letter from Dr. Caffaro to Dr. Tse, dated November 2, 2017
- Item 15: Letter from Dr. Caffaro to Mr. W. Macdonald, dated November 1, 2017

The parties entered the following additional exhibits by agreement:

- Exhibit 2: Agreed Statement of Facts
- Exhibit 3: Excerpt from Code of Ethics (Administration of Practice)
- Exhibit 4: CMA Code of Ethics
- Exhibit 5: *Messenger* Article, dated June 2016
- Exhibit 6: Admission and Joint Submission Agreement

V. SUBMISSIONS

Mr. Boyer made brief opening submissions on behalf of the Complaints Director. Mr. Boyer explained that S.T. and Alberta Health had both made complaints to the College regarding Dr. Tse. The complaints both alleged concerns regarding the manner in which Dr. Tse was storing patient records. There was a third complaint initiated by the Complaints Director pursuant to s. 56 of the *Health Professions Act* (“HPA”) after the College was unable to obtain the patient record in connection with the complaint submitted by S.T.

Mr. Macdonald was subsequently retained on behalf of Dr. Tse in relation to all three complaints. The parties subsequently resolved the complaints pursuant to an agreement in accordance with s. 55(2)(a.1) of the HPA, which was signed by Dr. Tse on October 25, 2017 (“the Agreement”).

After the Agreement was signed, the College became aware that Dr. Tse had filed a Statement of Claim on October 4, 2017, in which she named S.T. and S.T.’s mother, K.W. as Defendants. The Statement of Claim made a number of allegations against S.T. and K.W., including that the letter of complaint they submitted to the College, dated August 26, 2015, was defamatory. She also

alleged that S.T. made defamatory statements when she was interviewed by the College's Investigation and Resolution Advisor. The Statement of Claim was served on S.T. and K.W. after the parties entered into the Agreement.

Mr. Boyer explained that there are certain defences to a defamation claim, including truth. However, other defences include qualified privilege, which means that the person is complaining to the right person and the statements are made in good faith, and absolute privilege, which applies to all statements made in a judicial or quasi-judicial process.

Mr. Boyer indicated that he and Mr. Macdonald were in agreement that the statements made by S.T. to the college were truthful, and she believed them to be true and she made them in good faith. Therefore, whether or not the statements were protected by absolute or qualified privilege was academic.

Mr. Boyer referred to a previous article in the *Messenger* by Dr. Theman, where a physician sought to take legal action against a witness who had been involved in an investigation. Mr. Boyer submitted that such actions can have a chilling effect on the College's ability to engage in self-regulation, since witnesses and complainants will not want to come forward if they may be subject to legal action as a result of their participation in the proceedings.

Mr. Macdonald also made submissions on Dr. Tse's behalf. Mr. Macdonald explained that Dr. Tse acknowledges that it was inappropriate for her to file the Statement of Claim against S.T. arising from the submission of S.T.'s complaint to the College and the statements S.T. made to the Investigation and Resolution Advisor during the investigation. Mr. Macdonald indicated that although it was unclear whether these statements were protected by absolute or qualified privilege, but regardless Dr. Tse acknowledged, for the purposes of the hearing, that it was inappropriate to file the Statement of Claim with respect to statements made by S.T. in her complaint and in the investigative interview.

Mr. Macdonald explained that K.W. had been a patient of Dr. Tse's for 19 years. On August 10, 2015, K.W. had an appointment with Dr. Tse and very shortly after that, on August 14, 2015, Dr. Tse wrote to the patient terminating the relationship. Following the termination of the physician-patient relationship, the complaint was filed to the College. Although the complaint was resolved, Dr. Tse was agitated and believed she had been defamed, and then issued a Statement of Claim.

Mr. Macdonald indicated that the Hearing Tribunal did not have to spend time considering whether S.T.'s statements were protected by absolute or qualified privilege, since Dr. Tse was admitting that in all of the circumstances of this case, her conduct was inappropriate.

The Hearing Tribunal asked the parties to clarify the status of the civil proceedings, and whether the Statement of Claim had been amended. Mr. Macdonald confirmed that it was still extant, and clarified that the Statement of Claim also included allegations about statements that were made in the community about Dr. Tse (and not to the College). Statements made in the community were not part of the allegation and there was no admission that the civil claim was improper with respect to those statements.

VI. FINDINGS

After hearing from the parties and reviewing the evidence compiled in the Exhibit Book and the Agreed Statement of Facts, the Hearing Tribunal felt there was sufficient evidence to support Dr. Tse's admission in relation to the allegation, and determined that the conduct constitutes "unprofessional conduct" in accordance with s. 1(1)(pp) of the *Health Professions Act* ("HPA").

The evidence before the Hearing Tribunal, which included the Agreed Statement of Facts and the material in the agreed Exhibit Book, confirmed that S.T. made a complaint against Dr. Tse on August 26, 2015. S.T. alleged that her mother, K.W. had an appointment scheduled with Dr. Tse on August 10, 2015 at 3:00 p.m., but was not seen by Dr. Tse until 11:15 p.m. that evening. K.W. advised Dr. Tse that she had been waiting for over 7 hours, and was tired and hungry. Dr. Tse apologized and proceeded to treat her.

Following the appointment, K.W. was surprised to receive a letter from Dr. Tse, on August 18, 2015, alleging that K.W.'s demeanor demonstrated a lack of appreciation for Dr. Tse, and that K.W.'s demeanor on August 10, 2015 had strained their relationship, such that she was terminating the physician-patient relationship. The complaint alleged that Dr. Tse's office then called their house on August 19, 2015, to cancel the appointment with K.W. that was scheduled for August 25, 2015. On that date, S.T. was also advised that Dr. Tse would no longer be treating her. In addition, the complaint alleged that Dr. Tse kept patient files under the bed of each waiting room.

The Complaints Director initiated an investigation into S.T.'s complaint, and requested a copy of K.W.'s patient file. The file was not provided and a further complaint was initiated by the Complaints Director in accordance with s. 56 of the HPA regarding the failure to respond to the request for the patient record.

In addition, a separate complaint was filed by Alberta Health in relation to Dr. Tse's storage of patient files.

All three of these issues were resolved pursuant to the Agreement entered into between the Complaints Director and Dr. Tse, signed by Dr. Tse on October 25, 2017.

Prior to signing the Agreement, a Statement of Claim was filed on behalf of Dr. Tse in which S.T. was named as one of the Defendants. The Statement of Claim alleged that the statements made by S.T. in her complaint to the College were defamatory, and that she also made defamatory statements when she was interviewed in connection with her complaint. The Statement of Claim was served on K.W. and S.T. on November 1, 2017, after the Agreement was signed by Dr. Tse.

According to the Agreed Statement of Facts, S.T. and K.W. would have objected to the proposed Agreement if they knew that Dr. Tse was intending to commence legal action against them.

Based on the evidence submitted by the parties by agreement, including Dr. Tse's admission, the Hearing Tribunal finds that the allegation in the Notice of Hearing is factually proven. Moreover, the Hearing Tribunal finds that the conduct constitutes "unprofessional conduct" as defined in s. 1(1)(pp) of the HPA.

The Hearing Tribunal agrees that the statements made by S.T. in her complaint to the College and during the course of the interview were protected by privilege. Accordingly, it was inappropriate for Dr. Tse to take legal action against S.T. arising from her communications with the College.

Moreover, Dr. Tse's actions in doing so have the potential to harm the integrity of the profession, and constitute a breach of the CMA Code of Ethics ("the Code") that applies to all regulated members. In particular, s. 46 of the Code requires regulated members to recognize that self-regulation is a privilege and that each physician has a responsibility to merit this privilege. Taking legal action against a complainant in relation to statements made to the College associated with the complaint is inappropriate, and inconsistent with the privilege of self-regulation.

Moreover, Dr. Tse's actions are of significant concern to the Hearing Tribunal, given that they have the potential to create a chilling effect on complainants (or witnesses) who may fear they will be subject to legal action as a result of making a complaint or participating in an investigation. Self-regulation is premised on the ability of complainants to bring forward concerns about regulated members, so that these concerns can be investigated. The College cannot tolerate retribution against complainants or witnesses, given the potential impact that such retribution may have on the College's ability to protect members of the public from unskilled practice or unethical conduct.

In the circumstances, the Hearing Tribunal accepts Dr. Tse's admission and finds that the allegation is proven, and the conduct in issue constitutes "unprofessional conduct" as defined in the HPA.

VII. ORDERS AND REASONS

The parties entered an Admission and Joint Submission Agreement as an exhibit. The parties jointly submitted that Dr. Tse should receive a two-week suspension of her practice permit, and that Dr. Tse should be responsible for the costs of the investigation and the hearing.

Mr. Boyer made submissions on behalf of the College. He provided a written brief summarizing the law relating to joint submissions on sanctions in a professional discipline proceeding, including the requirement to defer to a joint submission unless it would bring the administration of justice into disrepute.

He also reviewed the relevant factors set out in *Jaswal v. Newfoundland Medical Board*, [1996] N.J. No. 50. Mr. Boyer noted that a suspension was warranted and necessary in this case, in light of the nature of the conduct and the need for general deterrence. He indicated that Dr. Tse's cooperation and the fact that she had no prior discipline history were mitigating factors that must be taken into account, and that had it not been for Dr. Tse's cooperation, the Complaints Director may have sought a lengthier period of suspension.

Mr. Macdonald concurred with Mr. Boyer's submissions, and emphasized the Supreme Court of Canada's decision in *R. v. Anthony-Cook*, which indicates that a joint submission on sanction should not be rejected unless it would bring the administration of justice into disrepute or would otherwise be contrary to the public interest. Mr. Macdonald indicated that parties must have a high degree of confidence that joint submissions will be accepted.

Mr. Macdonald also indicated that Dr. Tse has been practicing for over 20 years, and has a clean record. He indicated that Dr. Tse is a doctor who is very concerned about her patients, and she has cooperated fully during the hearing. The penalty is not insignificant, since it involves a suspension, which is serious. Moreover, Mr. Macdonald indicated that the costs of the investigation and hearing will be substantial.

After both parties made submissions, the Hearing Tribunal asked the parties several questions of clarification. First, the Hearing Tribunal questioned why the penalties that were jointly proposed did not require Dr. Tse to cease the conduct that was found to be inappropriate. In addition, the Hearing Tribunal expressed concern that even though there had been an admission, the Statement of Claim had not been amended, so in effect, the conduct that was problematic was continuing.

In response to these concerns, Mr. Boyer indicated that the Hearing Tribunal may not have the legal authority to make an order pursuant to s. 82 of the HPA requiring Dr. Tse to amend those aspects of the Statement of Claim that the Hearing Tribunal found had been improperly brought. Nevertheless, Mr. Boyer indicated that there would be an expectation that she would respect the finding and admission and would amend her pleadings. If she chose to disregard the Hearing Tribunal's decision and continue with those aspects of the civil claim, the Complaints Director could make a further complaint under s. 56 of the HPA against her.

Mr. Macdonald indicated that although the Statement of Claim had not been amended, and he could not confirm that it would be, he would give his undertaking to discuss these issues with Dr. Tse.

The Hearing Tribunal carefully considered the evidence in the Exhibit Book and the Agreed Statement of Facts, and submissions on behalf of both parties with respect to sanction. The Hearing Tribunal also considered the factors in *Jaswal*, including the seriousness of the conduct, and Dr. Tse's cooperation and her admission of unprofessional conduct.

The Hearing Tribunal finds that the conduct is serious, and agrees that a period of suspension is warranted. Members of the profession must understand that it is inappropriate to engage in any conduct that has the effect of discouraging complainants (or witnesses) from initiating complaints against members. This is the case even if the complaint later turns out to be unfounded. If patients cannot bring forward their concerns utilizing the process established in the HPA, it has the potential to severely undermine the College's ability to protect the public. Moreover, initiating a civil claim against a complainant in these circumstances is particularly serious, given the public nature of a civil claim, and the resources required to defend it.

While the Hearing Tribunal agreed that a period of suspension was warranted, the Tribunal had reservations with respect to the Joint Submission Agreement. Mr. Macdonald advised the Hearing Tribunal that the Statement of Claim had not been amended, and he could not provide any assurances that Dr. Tse would be amending the Statement of Claim. The Hearing Tribunal was concerned that Dr. Tse's conduct was ongoing, and that the orders that were jointly proposed did not provide any assurance that the offending portions of the Statement of Claim would be withdrawn.

Notwithstanding these concerns, the Hearing Tribunal accepted the Joint Submission Agreement. The Hearing Tribunal agrees that there are strong public policy reasons why a Hearing Tribunal should exercise deference when presented with a joint submission on sanction. Despite the concerns set out above, the Hearing Tribunal found that the Joint Submission was not clearly and manifestly unjust or contrary to the public interest, and would not bring the administration of justice into disrepute.

Moreover, the Hearing Tribunal accepts Mr. Boyer's submissions that if Dr. Tse were to continue those aspects of the civil claim involving the statements that S.T. made to the College with respect to her complaint, the continuation of the lawsuit could potentially be the subject of a new

complaint, initiated pursuant to s. 56 of the HPA. However, the Hearing Tribunal assumes that such an action will not be necessary and that Dr. Tse will take appropriate steps on a voluntary basis to address this matter.

Accordingly, the Hearing Tribunal accepted the Joint Submission, and hereby makes the following orders pursuant to section 82 of the HPA:

1. Dr. Tse shall receive a two-week suspension of her practice permit; and
2. Dr. Tse shall be responsible for the costs of the investigation and the hearing before the Hearing Tribunal.

Signed on behalf of the Hearing Tribunal by
the Chair



Dated: July 6, 2018

Dr. Colm MacCarthy