COURT FILE NO.: 464/99
DATE: 20020130

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

THEN, CARNWATH & CAMERON JJ.

B E T W E E N:	
DR. JOZEF KROP	*Matthew Wilton* and *Marilyn Samuels*, for the Appellant
Appellant	
- and -	
DISCIPLINE COMMITTEE OF THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO	*Shaun Nakatsuru*, for the Respondent
Respondent	
	HEARD: December 3 & 4, 2001

THE COURT:

[1] In December of 1998, the Discipline Committee of the College of Physicians and Surgeons of Ontario found Dr. Jozef Krop guilty of professional misconduct in that he failed to maintain the standard of practice of the profession while caring for six named patients. Dr. Krop's appeal of the Discipline Committee's decision raises the following issues:

1. Was the investigation of Dr. Krop's practice under s. 64 of the *Health Disciplines Act* improper?

2. Did the Discipline Committee err in assuming jurisdiction?

3. Was Dr. Krop prosecuted for an improper purpose?

4. Did the Discipline Committee use an appropriate test for the standard of practice?

5. Did the members of the Discipline Committee create a reasonable apprehension of bias?

6. Was the prosecution an abuse of process?

BACKGROUND

[2] Dr. Krop registered with the College in 1976 as a General Practitioner. He practices what he describes as environmental medicine which regards food allergy as the most overlooked cause of chronic symptoms in North America. He sees six hundred to six hundred and fifty patients a year in a specially-designed, environmentally-safe office in Mississauga, Ontario. The expert witnesses called on his behalf described him as one of the premier practitioners of environmental medicine in Canada to whom other environmental medicine physicians would send their problem patients. Before seeing Dr. Krop, a patient would receive a statement of his office policies, a questionnaire, a list of charges and "an informed consent form". In the consent form, the patient acknowledged that Dr. Krop's testing procedures were not generally employed by the majority of physicians, none of the tests have been scientifically proven to be reliable and that the patient released the doctor from all claims or damages arising from or related to the tests and treatment as prescribed by the doctor.

[3] As a result of correspondence from various sources, the College Deputy Registrar, Dr. John Carlisle, wrote to Dr. Krop in January of 1989 saying that the Registrar had directed him to write in respect of "a number of concerns expressed regarding your practice, both by patients and colleagues during the last several months". Dr. Carlisle posed a number of specific questions concerning Dr. Krop's practice. The letter made it clear to Dr. Krop that his responses would assist the Registrar in determining whether an investigation under s. 64 of the *Health Disciplines Act* was required.

[4] Dr. Krop, who was then represented by counsel, responded with a nine-page letter in May of 1989, which attempted to answer the concerns raised by Dr. Carlisle. He included his C.V., a position paper of the Canadian Society for Environmental Medicine, and various scientific articles and bibliographies purporting to confirm the validity of environmental medicine treatment modalities.

[5] Dr. Carlisle then prepared a memorandum in September of 1989 which was given to the Executive Committee of the College to support his recommendation that the Registrar make a s. 64 Order to investigate Dr. Krop. Section 64 provides that where the Registrar believes on reasonable and probable grounds that a member has committed an act of professional misconduct, the Registrar may, with the approval of the Executive Committee, appoint one or more persons to make an investigation to ascertain whether such act has occurred. The person appointed to make the investigation may inquire into and examine the practice of a doctor and may, at any reasonable time, enter the business premises of the doctor and examine books, records and documents relevant to the investigation. The person so appointed has the powers of

a commission under Part II of the *Public Inquiries Act*. The section further provides that no one shall obstruct an investigator, or withhold or conceal information relevant to the investigation. In October of 1989, the Executive Committee approved the Registrar's proposal to start a s. 64 investigation of Dr. Krop's practice.

[6] Nothing was done until January, 1991 when the College appointed a medical inspector to carry out the investigation. Dr. Krop objected to this physician and to a subsequent physician; in July, 1991 the College appointed a Dr. MacFadden to be the inspector. Dr. MacFadden visited Dr. Krop's office on October 15, 1991 and made a random seizure of 29 patient charts. Six patients were ultimately chosen for consideration by the Discipline Committee.

[7] In January of 1993, Mr. R. Steinecke, counsel for the College, wrote Dr. MacFadden telling him that he, Mr. Steinecke, was appointed by the College to prepare the allegations and prosecute them before the Discipline Committee. Subsequently, in February and May of 1993, both Dr. MacFadden and Ms. Leah Tunney continued their investigation of Dr. Krop in meetings held with him. In July of 1993, Mr. Steinecke wrote to Ms. Tunney saying that, as matters stood at that point, Dr. Krop should not be referred to a Discipline hearing.

[8] In July of 1993, the College wrote Dr. Krop's counsel saying that his matter would be considered by the Executive Committee in the following month and promising further correspondence. Dr. MacFadden was replaced by a Dr. Binkley, who submitted an expert report to the Executive Committee in May of 1994. In June of 1994, Ms. Tunney told Dr. Krop that the Executive Committee had directed that specified allegations of professional misconduct be drafted for referral to a panel of the Discipline Committee. Dr. Krop was told that a formal notice of the Discipline Committee hearing would follow. A notice of hearing dated July 22, 1994, told Dr. Krop the Executive Committee had directed that specified allegations be referred to the Discipline Committee.

THE DECISION OF THE DISCIPLINE COMMITTEE

[9] The hearing before the Discipline Committee started on May 11, 1995 and ended on April 28, 1998, almost three years later. The hearing consumed thirty-seven days. The Committee re-convened on June 21 and 22, 1999 to hear evidence and submissions regarding penalty. On August 30, 1999, the Committee ordered Dr. Krop be reprimanded and that his certificate of registration be subject to conditions of practice.

[10] The College called three medical expert witnesses, two of them Associate Professors of Medicine at the University of Toronto, both attached to teaching hospitals and the third, a professor at Case Western Reserve School of Medicine, attached to the Henry Ford Hospital in Detroit. In addition to his own evidence, Dr. Krop called nine medical witnesses, qualified to give expert testimony, two from Canada and seven from the United States.

[11] The Committee found the College experts to be even-handed while testifying on the scientific validity of Dr. Krop's approach to caring for the six patients. The Committee concluded that because of their special knowledge in the field of allergies and immunology, they were qualified to testify whether Dr. Krop met the standard of practice.

[12] The Committee found the testimony of the experts testifying on Dr. Krop's behalf to be of variable usefulness. The Committee found they frequently differed in their application of the diagnostic and therapeutic methods that were the focus of the hearing and, in several key areas, their practices differed significantly from Dr. Krop.

[13] The Committee then reviewed in abundant detail Dr. Krop's methodology, including the use of the Vega machine for electro-diagnostic testing, "provocation/neutralization" testing for food and chemical sensitivity, "serial dilution and-point titration", "Candida Hypersensitivity Syndrome", rotary diets, sauna therapy for chemical detoxification, "vaccine therapy", intravenous vitamin therapy, and hair analysis. For each of these categories, the Committee reviewed in detail the evidence of all the witnesses called, as their evidence related to the category in question. The Committee found that in all categories, with the exception of "serial dilution and-point titration", Dr. Krop failed to maintain the standard of practice in employing the techniques in those categories. The Committee also reviewed the informed consent form prepared by Dr. Krop and concluded that the six patients in question could not have given truly informed consent to Dr. Krop's testing and treatment.

[14] The Committee concluded its decision by emphasizing that the focus of the hearing was the practice of Dr. Krop as it related to his management of the six patients whose charts were entered in evidence. The Committee found the experts called by the College reviewed each of the diagnostic and therapeutic modalities espoused by Dr. Krop in the light of their experience, and in the light of their review of the scientific literature. All three condemned their use. The Committee accepted the evidence of the College experts in preference to that of the experts called by the defence. The Committee found the defence experts' evidence was not worthy of equal weight in that it lacked the authority of acceptable scientific evidence.

WAS THE INVESTIGATION OF DR. KROP'S PRACTICE UNDER S. 64 OF THE *HEALTH DISCIPLINES ACT* IMPROPER?

[15] In oral submissions, counsel for Dr. Krop submitted the s. 64 investigation was flawed, since no specific act of professional misconduct or incompetence was alleged.

[16] Section 64(1) of the *Act*:

> Where the Registrar believes on reasonable and probable grounds that a member has committed an act of professional misconduct or incompetence, the Registrar may, with the approval of the Executive Committee, by order appoint one or more persons to make an investigation to ascertain whether such act has occurred, and the person appointed shall report the result of his investigation to the Registrar.

The order to investigate Dr. Krop uses the wording of the statute and directs that his practice be investigated to see if he "committed an act of professional misconduct or incompetence". Counsel submits a specific act or acts must be spelled out to avoid "fishing expeditions". We disagree.

[17] Section 64(1) contemplates "an act" of professional misconduct or incompetence; the Registrar orders an investigator to ascertain whether "such act" has occurred. Where there are a number of acts, it is neither unfair nor unreasonable to direct an investigation of the member's practice as opposed to itemizing each act. It is an administrative, not a criminal, process. While the ultimate consequences of the discipline process may be serious, this stage is only the initiation of an investigation, not a prosecution. The order is addressed to the investigator, not Dr. Krop and focuses on the gathering of information. The Notice of Hearing particularized the charges against Dr. Krop and constituted the commencement of the prosecution. Dr. Krop suffered no prejudice because of the failure to itemize each act in the Order appointing inspectors.

[18] Dr. Krop alleges the s. 64 investigation was improperly used as a tool to obtain information from him after his matter was referred to the Discipline Committee. He says he volunteered information to Dr. MacFadden which he was not required to provide, because once a matter is referred to the Discipline Committee, the only disclosure obligation on a physician is to produce any expert's report ten days before a hearing.

[19] His submission on this point is based on an erroneous understanding of when his matter was referred to the Discipline Committee. Later in these reasons, it will be made clear that the matter went to the Discipline Committee in June of 1994, and not in January of 1993, as Dr. Krop alleged. Therefore, when Dr. MacFadden interviewed Dr. Krop during his s. 64 investigation, Dr. Krop was obliged to cooperate as the section required him to do. There is no merit in the allegation that, somehow, Dr. Krop was intentionally misled by the College and its agents to disclose information he was not required to disclose.

DID THE DISCIPLINE COMMITTEE ERR IN ASSUMING JURISDICTION?

[20] Section 37(1) of the *Health Professions Procedural Code* provides as follows:

> The Executive Committee may refer a specified allegation of a member's professional misconduct or incompetence to the Discipline Committee.

During the proceedings, Dr. Krop twice sought disclosure of the evidence the Executive Committee relied on before referring the specific allegations to the Discipline Committee. He also sought to stay the proceeding on the basis that there was no proof the referral had taken place. The Discipline Committee refused to order the College to disclose any documentation leading to the referral. We find the Committee was correct in doing so. The fairness of the investigation and the merits of the referral are matters for judicial review.

[21] The Discipline Committee takes its jurisdiction from the notice of hearing served on Dr. Krop. The Notice of Hearing begins by reciting that the Executive Committee of the College of Physicians and Surgeons of Ontario, pursuant to s. 36 of the *Health Professions Procedural Code*, has directed "that the following matters regarding the actions of Dr. Josef Krop be referred to the Discipline Committee of the College". The recitals continue to allege that Dr. Krop failed to maintain the standard of practice of the profession in the management, treatment and care of certain listed patients and that that failure fell within the definition of professional misconduct.

There then follows the particulars of the allegations with respect to each patient, the allegations for each patient being as few as seven and as many as fifteen. Counsel for Dr. Krop submits that a health professional has an absolute right to require the prosecution to prove the Discipline Committee has jurisdiction by producing evidence that the Executive Committee has referred specified allegations. He cites as authority for the proposition *Kupeyan v. Royal College of Dental Surgeons of Ontario* (1982), 37 O.R. (2d) 737 (Ont. Div. Ct.), p. 746-747. In *Kupeyan*, all that was referred was a request to the Discipline Committee "to inquire into the actions and conduct of the following:". Not surprisingly, the Divisional Court found no specified allegations. Such is not the case in the matter before us where the six patients are named and the allegations with respect to the standard of care are detailed.

[22] As part of Dr. Krop's submissions on lack of jurisdiction, there is an allegation in his factum that the Executive Committee referred the matter to the Discipline Committee not in June of 1994, but rather in January of 1993. As a result of this submission, counsel for the College sought to introduce fresh evidence before us as to when the referral took place. This was evidence counsel for the College refused to provide to Dr. Krop during the hearing, a decision which was endorsed by the Discipline Committee. Although the evidence sought to be introduced failed to meet the test for admission of fresh evidence on the usual grounds, we admitted it under the exception that the interests of justice required it. There was clearly no doubt when the Executive Committee referred the matter to the Discipline Committee – it was in June of 1994. There is, therefore, no merit in the submission that, somehow, the Executive Committee made the referral before June of 1994. We find no merit in the submission that the Executive Committee failed to specify the allegations in the Notice of Hearing.

WAS DR. KROP PROSECUTED FOR AN IMPROPER PURPOSE?

[23] Counsel for Dr. Krop submits that the decision of the Discipline Committee is flawed because of the attitude brought to the investigation of Dr. Krop's practice by Dr. Carlisle. Indeed, in a response written by Dr. Carlisle to a physician who had expressed concerns about Dr. Krop's methods of treatment, Dr. Carlisle made several negative statements concerning Dr. Krop. Dr. Carlisle prepared a memorandum to the Registrar, Dr. Dixon, which was given to the Executive Committee to support his recommendation that the Registrar make a s. 64 Order to investigate Dr. Krop. The memorandum concluded "This will be a costly and lengthy process that may be the only way of finally, once and for all, dealing with these clinical ecologists". Moreover, in his testimony at the hearing, Dr. Carlisle admitted that he had determined at the outset of the College investigation that Dr. Krop's treatments were "unorthodox", "magical", "questionable", and "useless".

[24] These comments reveal that Dr. Carlisle was highly skeptical of Dr. Krop's treatment modalities which no doubt explains why he recommended a s. 64 investigation. However, it must be remembered that Dr. Carlisle was merely the initiator of an investigative process that was followed by a s. 64 investigation, which, in turn, was considered by the Executive Committee, which, in turn, referred the matter to the Discipline Committee. This is not evidence that the Executive Committee acted for an improper purpose. Indeed, the conclusion of Dr.

Carlisle's memo to Dr. Dixon reads: "Of course, whether to try to do anything about this at all will be for the Executive Committee to decide."

[25] In regulating the medical profession, the College has a duty to protect the public from treatments that fall below the standard of practice. We find the investigation of Dr. Krop was commenced for this purpose. The College has considerable discretion in how it investigates a medical practice. Dr. Carlisle's participation in the process ended with his recommendation to the Executive Committee that a s. 64 investigation take place. We find no evidence that Dr. Carlisle's initial views of Dr. Krop's practice in any way influenced the decision of the Executive Committee.

DID THE DISCIPLINE COMMITTEE USE AN APPROPRIATE TEST FOR THE STANDARD OF PRACTICE?

[26] The appellant submits that Dr. Krop cannot be found to have breached the standards of practice if there exists a responsible and competent body of professional opinion that supports his treatments. We agree.

[27] This Court has described the test in *Brett v. Board of Directors of Physiotherapy* (1991), 77 D.L.R. (4th) 144 (Div. Ct.), at pp. 152-3:

> In my view, when a professional disciplinary body is passing judgment on whether a member of the profession has failed while performing his professional work, to maintain the standard of the profession, the member cannot be found guilty on the basis that the vast majority of the profession feel the conduct or judgment or member was wrong, if there also exists a responsible and competent body of professional opinion that supports this conduct or judgment. It is not sufficient for a conviction that the Disciplinary Panel prefer the opinion of the vast majority over that of the smaller though equally competent and responsible body of opinion that supports the member in his conduct or judgment.

[28] Dr. Krop does not argue that the Discipline Committee was unaware of the proper test. Rather, he argues the Discipline Committee erred in modifying the proper test by requiring Dr. Krop to do more than lead evidence of a responsible and competent body of professional opinion supporting his treatments. He submits the Discipline Committee unfairly required him to prove the scientific validity of all his treatments to a standard impossible to meet. We respectfully disagree. In our view, the Committee correctly applied the appropriate test. On the issue of whether there was a "responsible and competent" body of professional opinion supporting his conduct, the Committee made the following finding:

> First, the Committee wishes to emphasize that the focus of this hearing was the practice of Dr. Krop as it related to his management of the six patients whose charts were not entered in evidence. "Environmental Medicine" was not the issue being deliberated. Indeed, in the course of the hearing it became apparent that Dr. Krop's methods differ significantly from the majority of the

> practitioners tendered by the defence as knowledgeable in environmental medicine.

[29] The Discipline Committee found, after an extensive review of the evidence, that in his specific treatment of the six patients in issue, Dr. Krop employed diagnostic methods and treatment techniques of environmental practitioners in a manner significantly different from that of the witnesses called on his behalf. (See: Reasons for Judgment, pp. 7-17, 21-23, 25-28, 31-51 and 59-62). The Discipline Committee was entitled to accept the evidence of the College's experts that Dr. Krop's diagnostic and treatment techniques fell below the standard of practice since the evidence called by Dr. Krop failed to meet the test in *Brett, supra.*

[30] The most striking example is the unique and pivotal role the Vega machine played in the doctor's practice as compared to the practices of his witnesses. The Committee found:

> The central role of Vega testing in Dr. Krop's practice appears to be unusual. He used the Vega apparatus to screen for a broad range of sensitivities (as the only method of evaluation in at least one patient), as an integral part of the provocation/neutralization procedure in a number of patients, and as a means of adjusting previously prescribed treatment sera. Only Dr. Remington, an outspoken advocate of the approach, who relies on Vega to the exclusion of serial end-point titration and provocation/neutralization, placed a similar emphasis on this method of testing.

[31] In addition to the finding that Dr. Krop's methods were not uniformly supported by his own witnesses, it was also open to the Discipline Committee to find that those methods, generally supported by his witnesses, lacked scientific validity. The appellant objects to the adoption by the Committee of Dr. Anderson's criteria characterizing a scientifically valid study (Exhibit #29). In determining whether there was in existence a "responsible and competent body of professional opinion" to support the appellant's treatments, the Discipline Committee was entitled to consider whether that opinion was supported by scientifically valid studies. The Committee is entitled to use its expertise to determine what criteria to employ in assessing the scientific validity of the studies adduced. We agree with the respondent that this Court should give a degree of deference to the expertise of the Discipline Committee in adopting a criteria for "scientific validity". (See: *Re Reddall and the College of Nurses* (1983), 42 O.R. (2d) 412 at 416-17 (Ont. C.A.); *Golomb and College of Physicians and Surgeons of Ontario* (1976), 68 D.L.R. (3d) 25 at 45 (Div. Ct.); *College of Physicians and Surgeons of Ontario v. K.* (1987), 59 O.R. (2d) 1 at pp. 19-20 (C.A.).

[32] We find no error in the test employed by the Discipline Committee. The Committee was entitled to find that Dr. Krop's methods differed significantly from those witnesses called on his behalf. The Committee was also entitled to find that the diagnostic and therapeutic modalities he employed lacked scientific validity in determining whether his treatments failed to maintain the standard of practice, as the College witnesses maintained. We give no effect to this ground of appeal.

DID THE MEMBERS OF THE DISCIPLINE COMMITTEE CREATE A REASONABLE APPREHENSION OF BIAS?

[33] Bias is alleged on the part of the Discipline Committee in three areas. The duty to act fairly includes the duty to provide procedural fairness to the parties. To ensure fairness, the conduct of members of administrative tribunals has been measured against the standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of the adjudicator. *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* (1992), 4 Admin. L.R. (2d) 121 (S.C.C.) at p. 133.

[34] The first submission with respect to bias relates to the chair of the Discipline Committee, Dr. J. Thompson. Dr. Thompson is the author of a text on arthritis. In that text, he discussed a number of alternative medicine remedies, including Homeopathy, which the appellant submits is similar to environmental medicine. When discussing diet and arthritis, Dr. Thompson indicated that "probably a very few have food allergies that cause symptoms". The applicant submits that Dr. Thompson appears to be skeptical of the idea that a considerable segment of the population have symptoms due to food allergies, a central tenet of Environmental Medicine. However, the passage quoted is immediately followed in the text by the following:

> In other instances, a vegetarian-type diet may modestly improve the signs and symptoms of inflammation. But medical research continues in this area. I don't think we've heard the last word on dietary manipulation.

At the outset of the penalty hearing, Dr. Krop raised an objection to Dr. Thompson on the basis of a reasonable apprehension of bias. The Committee did not err in dismissing the objection. Dr. Thompson's comments dealt with the treatment of arthritis by alternative medicine; as a physician he is entitled to have views and opinions in his area of expertise. We find his comments could not raise reasonable apprehension of bias on the part of a reasonably informed bystander.

[35] The appellant submits the Discipline Committee created a reasonable apprehension of bias by its conduct during the hearing. The appellant complains that the chair, Dr. Thompson, and another Committee member, Dr. Rao, cross-examined several of the College witnesses in a manner which appeared designed to assist the College and cross-examine the defence witnesses in a manner which also appeared designed to assist the College. The appellant notes approximately one hundred and ninety-four questions asked by Dr. Thompson and two hundred and twenty-five questions asked by Dr. Rao, the majority of these questions being directed towards the defence expert witnesses. We reject this submission that the questioning by Drs. Thompson and Rao demonstrated a hostile attitude or that the questions were so extensive as to give the appearance of the doctors taking on a prosecutorial role, as was the case in *Golomb v. College of Physicians and Surgeons of Ontario* (1976), 68 D.L.R. (3d) 25 (Ont. Div. Ct.). We have reviewed the questions asked by the doctors of various witnesses and find they were designed to give every opportunity to the witnesses to comment on treatment modalities which,

at first blush, appeared to the questioners to be of dubious value. The witnesses were challenged in order to provide them with an opportunity to put their best foot forward.

[36] The final submission with reference to bias is that Dr. Thompson forced the defence to call the Deputy Registrar, Dr. Carlisle, out of order and to sit late and start early in order to convenience Dr. Carlisle. We find no merit in this submission. The hearing took place over a considerable length of time and accommodations were made to both the College and to Dr. Krop during the course of the proceedings.

[37] The appellant's submissions with respect to bias are based on isolated incidents that took place through thirty-seven days of hearing. We recognize that the Committee members were not legally trained. We conclude that on a consideration of the hearing as a whole, that an informed person, viewing the matter realistically and practically, having thought the matter through, would conclude that the Discipline Committee would decide the matter fairly.

WAS THE PROSECUTION AN ABUSE OF PROCESS?

[38] The appellant submitted several instances of alleged impropriety on the part of the College to amount to an abuse of process, as follows:

(a) The College's prosecution of Dr. Krop for the improper purpose of sending a message to Environmental Medicine Physicians;

(b) Dr. Carlisle's bias;

(c) The failure of Dr. Carlisle and Dr. Dixon to read materials requested from Dr. Krop;

(d) The 67 month delay from the commencement of the investigation to the issuance of the Notice of Hearing;

(e) The deliberate failure to notify Dr. Krop of the referral to the Discipline Committee, for a period from January, 1993 to July, 1994, which destroyed his right to remain silent;

(f) The College's changing experts at the last minute;

(g) The College ignoring its own legal opinion that there was no likelihood of success in a prosecution against Dr. Krop; and

(h) The College changing lawyers.

[39] Subparagraphs (a), (b) and (c) have been dealt with earlier in these reasons and form no basis for a finding of abuse of process. Subparagraph (d), the delay argument, was abandoned by counsel on the appeal. Subparagraph (e) is inaccurate since the referral to the Discipline Committee did not take place in January, 1993, but in June, 1994. Subparagraphs (f) and (h) do

not provide a basis for a finding of abuse of process. Subparagraph (g) is inaccurate; Mr. Steinecke's opinion that there was no likelihood of success was followed by further investigation by the College which led to the Notice of Hearing.

We find no abuse of process.

[40] For the above reasons, the appeal is dismissed, including the judicial review that may be contemplated within it.

[41] The parties have thirty days from the date of issue of these reasons to make written submissions as to costs.

THEN J.

CARNWATH J.

CAMERON J.

Released: 20020130