File # 20-CRV-0581

HEALTH PROFESSIONS APPEAL AND REVIEW BOARD

2022 CanLII 49966 (ON HPARB)

PRESENT:

Bonita Thornton, Designated Vice-Chair, Presiding
Valerie Samson, Board Member
Rob Steele, Board Member

Review held on March 10, 2022 in Ontario (by teleconference)

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:

SUZY CUI

Applicant

and

ARTHUR WILLIAM VANEK, MD

Respondent

Appearances:

The Applicant: Suzy Cui
The Respondent: Arthur William Vanek, MD

DECISION AND REASONS

I. DECISION

1. The Health Professions Appeal and Review Board confirms the decision of the Inquiries, Complaints and Reports Committee of the College of Physicians and Surgeons of Ontario to state its expectation that physicians ensure their communications are professional at all times, to comment on the importance of detailed documentation of discussions with

family and regarding critical care management and goals of care, to draw Arthur William Vanek, MD's attention to the section on documentation in the College policy, *Planning for and Providing Quality End-of-Life Care*, and to take no further action.

2022 CanLII 49966 (ON HPARB)

2. This decision arises from a request made to the Health Professions Appeal and Review Board (the Board) by Suzy Cui (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 care and conduct of Arthur William Vanek, MD (the Respondent). The Committee investigated the complaint and decided to state its expectation and comment, as set out above, and to take no further action.

II. BACKGROUND

3. The Applicant's mother was the late patient who was an 84-year-old resident of a chronic care facility.

4. The patient was referred to the Respondent at the St. Joseph's Health Centre (St. Joseph's) Ambulatory Care Clinic on August 3, 2018, with respect to a left upper lung nodule found on a computerized tomography (CT) scan of the chest. The Applicant accompanied the patient.

5. After evaluation, the Respondent felt that the nodule did not require further investigation but was concerned that what appeared to be scarring in the right upper lung on CT could also have been pulmonary tuberculosis (TB). The patient was known to have been treated for TB in the past. The Respondent obtained tracheal aspirates in the office through the patient's tracheostomy site and then performed an outpatient bronchoscopy.

6. The patient was later admitted to St. Joseph's on October 6, 2018 for septic shock and, after cardiac arrest, she was transferred to the Intensive Care Unit (ICU) on October 11, 2018. The Respondent assumed her care on October 21, 2018 after she was initially under the care of other physicians. Sadly, the patient passed away on October 26, 2018.

The Complaint and the Response

The Complaint

7. The Applicant is concerned on behalf of the late patient that the Respondent behaved in an unprofessional manner and provided inadequate care in the management of the patient's health condition when he:

    - spoke in a rude, insensitive and unprofessional manner when he asked the Applicant who brought the patient to the hospital (inferring that it was inappropriate to bring her to the ICU) and advised the Applicant that she was extending/prolonging the patient's death;
    - demonstrated an unwillingness to care for the patient by inappropriately asking the Applicant to give up the treatment for her mother as she was just extending/prolonging her death; and
    - inappropriately thought that the patient had TB.

8. In communications with the College, the Applicant provided additional context to her complaint, including the following. The Applicant confirmed that she had a teleconference meeting with patient relations at St. Joseph's about her concerns, however, she stated that patient relations recommended that she contact the College. With respect to the Applicant's complaint about the Respondent's comments, the Applicant indicated that she specifically did not appreciate the Respondent's comment about the coming death of her mother, as they already knew that and did not need people to keep telling them. With respect to her concern about the Respondent indicating the patient had TB, the Applicant stated that the Respondent could not even tell her which of the patient's lungs was impacted and, if the Respondent thought her mother had TB, the Applicant questioned why he had not made her stay in the hospital.

The Response

2022 CanLII 49966 (ON HPARB)

9. In a letter to the Committee, the Respondent addressed the complaint, summarized as follows:

- The Respondent provided clinical background about the patient, including that she had previously suffered a significant stroke, which left her in a minimally conscious state, and she subsequently resided in a chronic care hospital. The patient was diagnosed with bladder cancer in 2018, and diagnosis imaging studies had shown that the bladder cancer had spread outside of the bladder to abdominal and pelvic lymph nodes.

- The Respondent stated that his understanding of the patient's presentation at St Joseph's was related to septic shock, as a result of an infected nephrostomy tube, and that this was successfully treated, however, the patient unfortunately developed acute kidney injury. The Respondent stated he did not know the ultimate cause of the patient's death[1].

- It was the Respondent's understanding that the patient was admitted to the ICU and was mechanically ventilated, the attending ICU physician spoke with the Applicant and a decision was made to limit care as far as not providing cardiac resuscitation.

- The Respondent stated that after he took over the patient's care he sat down with the Applicant and, while he did not specifically recall details, he had an end-of-life discussion with the Applicant.

- The Respondent denied being rude and insensitive or unprofessional during his communications with the Applicant, and sincerely regretted that she found some of his statements uncomfortable or objectionable. The

[1] The Respondent did not have access to the patient's record from St. Joseph's when he provided his response.

2022 CanLII 49966 (ON HPARB)

Respondent added that he takes pride in this ability to communicate effectively when having end of life discussions.

- The Respondent stated that he was sure he would have asked the Applicant to re-think her approach about continuing futile life-sustaining treatments and was confident that he would have asked the Applicant to explain the rationale behind providing life-sustaining treatments, given her quality of life and the prognosis of her bladder cancer. In the past, he had commonly used the statement "we are not prolonging your loved one's life, we are prolonging their death" and indicated the statement to be somewhat effective in getting the substitute decision maker(s) to focus on the patient's quality of life rather than their own feelings of loss and sorrow. The Respondent indicated that during these discussions he advises substitute decision makers that their role is to act in the best interest of the patient and to help articulate the patient's wishes.

- In concluding, the Respondent stated that he was sincerely sorry if his communications had made the time more stressful or difficult in any way for the Applicant.

10. In addition, the Respondent discussed the details of his management of the patient's possible TB, indicated that a left upper lung nodule was found during the CT scan of the patient's chest and noted that he was concerned that the abnormality could represent active pulmonary TB, which is an occasional life-threatening condition and potentially contagious. The Respondent stated that he immediately obtained a specimen via tracheal sectioning to look for tuberculosis, and explained that because the patient had chronic tracheotomy, an out-patient bronchoscopy was ordered. With respect to the Applicant's specific concerns about TB, the Respondent stated that he was not confused about which side the lung lesions were present on, that TB is not always cured and a patient can be re-infected.

2022 CanLII 49966 (ON HPARB)

The Committee's Decision

11. The Committee investigated the complaint and decided to state its expectation that physicians ensure their communications are professional at all times, to comment on the importance of detailed documentation of discussions with family regarding critical care management and goals of care and to draw the Respondent's attention to the section on documentation in the College policy, *Planning for and Providing Quality End-of-Life Care* (the College Policy), and to take no further action.

2022 CanLII 49966 (ON HPARB)

III. REQUEST FOR REVIEW

12. In a letter dated October 19, 2020, the Applicant requested that the Board review the Committee's decision.

IV. POWERS OF THE BOARD

13. 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.

14. 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 specified allegations to the Discipline Committee that would not, if proved, constitute either professional misconduct or incompetence.

V. ANALYSIS AND REASONS

15. Pursuant to section 33(1) of the *Health Professions Procedural Code* (the *Code*), being Schedule 2 to the *Regulated Health Professions Act, 1991*, 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.

The Positions of the Parties

16. The Applicant provided the Board with written and oral submissions. The Applicant submitted that the investigation was inadequate because it was very one-sided and should be re-investigated. The Applicant noted that the Committee stated that it made its decision after a careful review of the relevant information and submitted that the only input that the Committee received from her was the original complaint form which contained limited information, and a few emails about consent, and that it was not proper for the Committee to make a decision while only seeing one side of the case.

17. With respect to consent for the release of the personal health information, the Applicant submitted that she provided the Committee with the appropriate documents; however, the medical records the Committee was able to obtain were not relevant because her complaint was about the lack of professionalism and the care provided.

18. With respect to the reasonableness of the decision, the Applicant submitted that the Committee was biased and did everything it could to "justify" the actions of the Respondent. The Applicant indicated that the Committee clearly did not understand the issue of how the end of life discussion was approached. The Applicant expressed her disappointment with the service provided by the hospital and, in particular, submitted that the Respondent had not treated the patient or herself with compassion and humanity and submitted that the Respondent was not dedicated. The Applicant submitted that the Respondent clearly demonstrated he was not willing to care for the patient and was only interested in how quickly they could dispose of her, and indicated that the Respondent

2022 CanLII 49966 (ON HPARB)

asked his staff why the patient had been brought in. The Applicant submitted that this conduct was not professional, considerate, and respectful.

19. With respect to the Respondent's diagnosis that the patient had TB, the Applicant submitted that the Respondent could not even answer a simple question as to which lung had TB, and the Respondent would not listen to the Applicant's information that the patient had TB over 60 years ago. The Applicant submitted that the Committee did not address these final two points which represented clear mistakes in the Respondent's care.

20. The Respondent made brief oral submissions to the Board and raised no issues with the adequacy of the investigation or with the decision. The Respondent expressed his condolences to the Applicant. The Respondent submitted that he saw the suffering the patient was experiencing, and he then had end-of-life discussions with the Applicant, which he submitted were respectful.

21. In response to submissions by the Respondent, the Applicant discussed the patient's illness and submitted that her mother was not suffering so much that she did not want to live and that her mind was still there. The Applicant emphasized that she had asked the Respondent to continue the patient's life sustaining treatment, but the Respondent was not respectful of her wishes.

22. The Board has considered the submissions of the parties, examined the Record of Investigation (the Record), and reviewed the Committee's decision.

Adequacy of the Investigation

23. 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.

24. The Committee obtained the following documents:

2022 CanLII 49966 (ON HPARB)

- the Applicant's complaint to the Committee;
- a memorandum of telephone conversations between the Committee investigator and the Applicant;
- additional communications between the Applicant and the Committee investigator;
- the Respondent's letter of response to the Committee;
- additional communications between the Respondent and the Committee investigator;
- the patient's medical records from St Joseph's;
- College policy: *Planning for and Providing Quality End-of-Life Care*; and
- the Respondent's College Physician Profile and prior decisions.

2022 CanLII 49966 (ON HPARB)

25. The Board finds that the Committee's investigation was adequate.

26. As noted above, the Applicant submitted that the investigation was inadequate and that the only input the Committee received from her was the original complaint form and a few emails about consent. The Applicant did not indicate what additional information she would have provided to the Committee or which documents she believed the Committee should have obtained.

27. The Board finds that the Committee's investigation was adequate. The Board observes that the Committee provided the parties with multiple opportunities to submit information and both parties did so. In addition to receiving the Applicant's original complaint, the Applicant provided additional information and context to her concerns in a phone call with the Committee investigator. The Committee also obtained the Respondent's letter addressing each of the concerns raised by the Applicant. The Committee included the College Policy as part of its considerations.

28. With respect to the patient's medical records, the Board notes that in its decision the Committee referred to not having consent for the release of the patient's personal health

information, because the patient did not leave a will and the status of her executor had not been formally determined. On April 20, 2020, the Committee requested that the College's Registrar authorize an investigation under section 75 (1) (c) of the *Code*. The Board observes the Committee was thereby able to obtain the patient's medical records from St. Joseph's.

2022 CanLII 49966 (ON HPARB)

29. The Board concludes that the Committee's investigation covered the events in question and that it obtained relevant information to make an informed decision regarding the issues raised in the complaint. There is no indication of further information that might reasonably be expected to have affected the decision, should the Committee have acquired it. Accordingly, the Board finds that the Committee's investigation was adequate.

Reasonableness of the Decision

30. In determining the reasonableness of the Committee's decision, the question for the Board is not whether it would arrive at the same decision as the Committee, rather, the Board considers the outcome of the Committee's decision in light of the underlying rationale for the decision, to ensure that the decision as a whole is transparent, intelligible and justified. That is, in considering whether a decision is reasonable, the Board is concerned with both the outcome of the decision and the reasoning process that led to that outcome. It considers whether the Committee based its decision on a chain of analysis that is coherent and rational and is justified in relation to the relevant facts and the laws applicable to the decision-making process.

31. The Committee considered the complaint under three areas of concern and the Board will address each in turn, as follows.

Concern that the Respondent spoke in a rude, insensitive and unprofessional manner when he asked the Applicant, who brought the patient to the hospital, (inferring that it was inappropriate to bring her to the ICU) and advised the Applicant that she was extending/prolonging the patient's death

32. In addressing this concern, the Committee reviewed the Respondent's description that while he did not specifically recall details, he had end-of-life discussions with the Applicant, as set out above. The Committee stated that it was satisfied such discussions were quite appropriate given the patient's very poor baseline functional status and extremely poor prognosis after her cardiac arrest and lack of recovery in the ICU.

33. The Committee also noted the Respondent denied being rude and insensitive or unprofessional during communications with the Applicant, and that he stated he sincerely regretted that she found some of his statements uncomfortable or objectionable. The Committee also considered the Respondent's statements: that he was sure he would have asked the Applicant to re-think her approach about continuing futile life-sustaining treatments; that in the past he had commonly said "we are not prolonging your loved one's life, we are prolonging their deaths" and that could be somewhat effective in getting the substitute decision maker(s) to focus on the patient's quality of life rather than their own feelings of loss and sorrow; and that during these discussions he advises substitute decision makers that their role is to act in the best interest of the patient and to help articulate the patient's wishes.

34. The Committee noted that its review was paper-based and it only had the parties' different recollections of their encounter to consider, and stated that it was difficult to know with certainty how the Respondent might have communicated at the time. The Committee stated its expects that all physicians always ensure their communications are professional, considerate and respectful.

35. The Board finds that the Committee's conclusion to state its expectation as indicated above and to take no further action on this aspect of the Applicant's complaint is reasonable.

36. With respect to the Applicant's concern that the Respondent spoke in a rude, insensitive and unprofessional manner, the Board notes that the Committee was faced with two

2022 CanLII 49966 (ON HPARB)

competing perspectives of the interaction between the Respondent and Applicant and was limited to a documentary review of the information. The Board observes that there was no information in the Record, or any other independent information advanced, which might have assisted the Committee in preferring one person's account to the other.

37. The Board finds that it was therefore reasonable for the Committee to take no action but to state it expects all physicians to always ensure that their communications are professional, considerate and respectful.

38. The Board also considered the concern that the Respondent was insensitive and advised the Applicant that she was extending and prolonging the patient's life. The Board notes that the Committee was satisfied that such discussions were appropriate, given the patient's very poor baseline functional status and poor prognosis. In the Board's view, the Committee, which included three physicians, had the expertise related to the expected standards of the profession to assess the Respondent's care and conduct. In addition, the Board observes that the Committee relied on the medical information in the Record when it considered the patient's poor prognosis.

39. The Board finds that the information in the Record supports the Committee's conclusion and finds that its decision to state its expectation as indicated above and to take no further action on this aspect of the complaint is reasonable.

Concern that the Respondent demonstrated an unwillingness to care for the patient by inappropriately asking the Applicant to give up the treatment for her mother as she was just extending/prolonging her death

40. The Committee stated that in the clinical circumstances it was important and appropriate to engage in end-of-life discussions about the patient.

41. The Committee observed that while there was one quite detailed note from the Respondent on October 23, 2018, about discussion he and the charge nurse had with the Applicant about resuscitation status, these discussions apparently happened on more than

2022 CanLII 49966 (ON HPARB)

one occasion. The Committee noted that the Respondent indicated in his response that there was only superficial documentation.

42. The Committee stated that it therefore took the opportunity to comment on the importance of detailed documentation of discussion with family regarding critical care management and goals of care. To that end, the Committee drew the Respondent's attention to the section on documentation in the College policy, *Planning for and Providing Quality End-of-Life Care* (the Policy).

43. The Board finds that the Committee's decision on this aspect of the complaint is reasonable. The Board notes that, as above, the Committee relied on its knowledge and expertise related to the expected standards of the profession to state that in the clinical circumstances it was important and appropriate to engage in end-of-life discussions about the patient. The Board observes that the Committee's conclusion is supported by the information in the Record, including at least one detailed note of a discussion about resuscitation status of the patient and the College policy on end of life-care.

44. The Board finds it was therefore reasonable for the Committee to comment on the importance of detailing discussions with family and finds that it was reasonable for the Committee to draw the Respondent's attention to documentation discussed in the College Policy.

Concern that the Respondent inappropriately thought that the patient had TB

45. The Committee noted that the patient had a previous history of TB and had lung findings which might have been indicative of active TB. The Committee stated that given this clinical background, it was appropriate for the Respondent to both obtain tracheal aspirates and a bronchoscopy to investigate further for a potentially serious, contagious and treatable disease.

2022 CanLII 49966 (ON HPARB)

46. The Board finds that the Committee's decision to take no action on this aspect of the complaint is reasonable. The Board notes that the Committee reviewed the information in the Record that set out the patient's clinical background and, relying on its expertise in the expected standards of the profession, decided the tests and investigations conducted by the Respondent were appropriate.

Conclusion

47. For the above reasons, the Board finds that the Committee's decision is reasonable.

48. The Board acknowledges that the Applicant remains dissatisfied with the Committee's decision and the care the patient received in the days leading to her death; however, the Board finds that the Committee conducted an adequate investigation and reached a reasonable decision. The Board finds that the Committee's decision is supported by the information in the Record and there is no support for the Applicant's concern that the Committee was biased. The Board finds that the Committee's decision demonstrates a coherent and rational connection between the relevant facts, the outcome of the decision and the reasoning process that led it to that outcome, and that its decision as a whole is transparent, intelligible, and justified.

49. The Board wishes to extend its condolences to the Applicant for her loss.

2022 CanLII 49966 (ON HPARB)

VI. DECISION

50. Pursuant to section 35(1) of the *Code*, the Board confirms the Committee's decision to state its expectation that physicians ensure their communications are professional at all times, to comment on the importance of detailed documentation of discussions with family regarding critical care management and goals of care, to draw the Respondent's attention to the section on documentation in the College Policy, and to take no further action.

ISSUED June 10, 2022

*Bonita Thornton*_____________
Bonita Thornton

*Valerie Samson*______________
Valerie Samson

*Rob Steele*__________________
Rob Steele

Cette décision est aussi disponible en français. Pour obtenir la version de la décision en français, veuillez contacter hparb@ontario.ca

2022 CanLII 49966 (ON HPARB)