File # 15-CRV-0169

HEALTH PROFESSIONS APPEAL AND REVIEW BOARD

PRESENT:

David Scrimshaw, Designated Vice-Chair, Presiding
Sonia Ouellet, Vice-Chair
Vanessa Gruben, Board Member

Review held on October 27, 2016 at Ottawa, 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:

D.F.

Applicant

and

C.V.W., MD

Respondent

Appearances:

The Applicant:	D.F.
For the Applicant:	Lee Mullowney, Counsel
Support persons for the Applicant:	C.F., J.F., D.F.
For the Respondent:	Brooke Smith, Counsel Michelle Cicchino, Articling Student
For the College of Physicians and Surgeons of Ontario:	Aviva Kornhauser, Joe Rudyk (by teleconference)

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 take no further action.

2. This decision arises from a request made to the Health Professions Appeal and Review Board (the Board) by D.F. (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 C.V.W., MD (the Respondent). The Committee investigated the complaint and decided to take no further action.

II. BACKGROUND

3. The Applicant's father (the patient) sustained severe injuries in a motor vehicle accident in late November 2010. His injuries included serious head and spinal cord injuries which impaired his cognitive functioning. He remained at The Ottawa Hospital from the date of his accident until early July 2012 when he was transferred to a hospital in Montreal, Quebec.

4. The Respondent, an internist, briefly treated the patient in December 2011 and was the most responsible physician for the patient's care from April 15 to July 4, 2012.

5. The Applicant was her father's power of attorney (POA) for personal care and his substitute decision-maker (SDM). She disagreed with the Respondent's proposed plan of treatment for her father, which included that no further interventions were to be taken to prolong life. The Respondent's proposed plan of treatment was based on advanced directives made by the patient before his accident which stated that he would want the

Applicant to carefully consider that it was his wish that he did not want his life to be prolonged if his clinical situation was without hope.

6. In June 2012, the Consent and Capacity Board (CCB) considered an application by the Respondent to determine whether or not the Applicant, as the patient's SDM, had complied with the principles for substitute decision-making set out in the *Health Care Consent Act*.[1]

7. In its decision of June 29, 2012, the CCB found that the patient was not capable with respect to treatment and that the Applicant had not complied with the principles of substitute decision-making. The CCB directed the Applicant to consent to the plan of treatment developed by the Respondent by July 6, 2012.

8. The Applicant transferred her father to the Jewish General Hospital in Montreal on July 4, 2012.

9. The Applicant's father died on July 11, 2012.

The Complaint and the Response

10. The Applicant complained about the Respondent in a complaint form the College received on April 19, 2013. The Committee restated the Applicant's complaint as being that she was concerned that the Respondent failed to adequately manage her late father's care at the Ottawa Hospital in that he:

- showed reckless disregard for human life and deliberately planned to terminate her father;
- misdiagnosed her father and assumed the responsibility of a specialist when he was not one; and

[1] SO 1996, c 2, Sch A.

- mistreated her father by changing treatment without consent and prescribing the wrong medications.

11. The Applicant raised further concerns in subsequent communication including that the Respondent:

- prescribed the wrong antibiotic in 2011 and yelled at her on the phone;
- put her father on alternate level of treatment;
- hid records and plans from her, did not discuss plan or communicate;
- prevented a second opinion;
- did not follow directions of the CCB, gave a misleading presentation to the CCB, and did not provide all documents to the CCB;
- withdrew care prior to the CCB decision;
- engaged in a conspiracy to kill her father and did this by withdrawing care and giving pain medications which made her father seem vegetative;
- should have treated pneumonia in her father; and
- should not have withdrawn her father's feeding tube because it was not "life sustaining" treatment.

12. In her correspondence, the Applicant also raised concerns about nurses, a security guard, social workers and decisions of the hospital regarding her father's care.

13. The Respondent replied to the Committee that at no time during the patient's care did he show reckless disregard for his life; deliberately plan to terminate his life; misdiagnose any of his conditions; assume the responsibility of a specialist he was not; mistreat him; or prescribe wrong medications. He stated that the most significant issue in the patient's care was the result of a document the hospital received that included the patient's advanced directive that he would not want any heroic measures performed if his clinical situation was without hope. He stated that he asked the CCB for an opinion regarding this issue because the Applicant maintained that her father should undergo full resuscitation if he were to deteriorate.

14. The Respondent also advised that the Committee could not and should not revisit factual findings and legal conclusions reached by the CCB and the Committee should review the CCB findings and determine the extent to which the Applicant's complaint overlaps with allegations she made to the CCB.

The Committee's Decision

15. The Committee investigated the complaint and decided to take no further action.

16. The Committee noted that when the Respondent took over the care of the patient, the patient had already been hospitalized for a year with severe brain and spinal injuries, was in his late 80s with a number of other health issues, and was quadriplegic, non-verbal and immobile for that time. The Committee further noted that the matter was referred to the CCB when there was a discrepancy between the care plan proposed by the medical team, the patient's prior signed and witnessed POA document and the substitute decision maker, the Applicant. The Committee stated this was a reasonable and appropriate way to resolve the dispute.

17. The Committee found there was no information in the medical records to support the Applicant's complaint and found no fault with the Respondent's conduct or actions. The Committee observed that the Applicant's concerns about non-physician health professionals and the general hospital care were outside its jurisdiction.

III. POWERS OF THE BOARD

18. 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.

19. 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.

IV. ANALYSIS AND REASONS

20. 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.

21. 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

22. 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.

23. The Committee obtained the following documents:

- the Applicant's initial complaint and subsequent correspondence with enclosures;
- the Respondent's response and subsequent correspondence;
- the patient's medical records;
- records of proceedings of the CCB;
- a letter from the Interim Chief Coroner for Ontario dated October 8, 2013; and
- CPSO Policy #4-05: *Consent to Medical Treatment*.

24. The Applicant submitted that the Committee had an incomplete medical chart for the patient in that there were about 8000 pages in total of her father's medical records and the Committee only had about 3000 pages in the Record. She stated that the Record did not contain the results of various lab tests and imagery as well as other records including information on medication prescriptions.

25. The Applicant also provided September 2016 letters from two physicians, an internist, Dr. J.W., and a neurologist, Dr. R.F. regarding whether the patient had been in a persistent vegetative state. The Applicant submitted that the investigation was inadequate because it did not include the complete medical chart and did not include the information from Dr. W. and Dr. F..

26. The Applicant further submitted that the investigation was inadequate because the Committee did not interview people who knew the patient to learn his wishes.

27. The Respondent submitted that the investigation was adequate because the Record included sufficient medical records for the Committee to decide on the issues raised in the complaint and the Committee was specifically qualified to consider the Respondent's diagnosis and treatment decisions without considering the reports of other physicians. The Respondent further noted that Dr. W. and Dr. F. are not licensed to practice medicine in Ontario and the Respondent submitted that there were significant weaknesses with both reports. The Respondent submitted that Dr. W.'s report included factual errors and that he stated, "It is very difficult to comment on the quality of care… given the lack of much of the medical record…" The Respondent further submitted that it was not clear which records Dr. F. relied on in his report.

28. The Board finds the Committee obtained the relevant medical records to address the issues raised in the complaint. The medical records covered the time periods relevant to the complaint and addressed testing and imaging that was performed as well as medications that were administered during the time that was relevant to the complaint.

Records covering other periods would have been of little relevance and would not have assisted the Committee.

29. The Board notes that the Committee has the discretion to obtain independent expertise to review and assess the Respondent's care of the patient and it could have sought the opinion of an independent opinion provider. In this case, the Internal Medicine Panel of the Committee assessed the complaint and applied its own expertise rather than consult an independent opinion provider. The Board finds the Committee held the necessary expertise to not require outside consultation. The Board notes that the Applicant could have submitted her medical reports at the time of the investigation, but she did not do so and that the reports provided an alternate opinion about the patient's state and not an assessment of the Respondent's care. The reports of Dr. W. and Dr. F. do not persuade the Board that the Committee's expertise was inappropriately applied.

30. The Board finds there was no need for the Committee to interview people who knew the patient to determine his wishes because the information would not have assisted the Committee. This information could have been presented to the CCB or sought by the CCB for its decision. It was not necessary that the Committee determine the patient's wishes in assessing the complaint. The Committee's assessment was limited to the information available to the Respondent's at the relevant time.

31. Accordingly, the Board finds the Committee's investigation to have been adequate.

Reasonableness of the Decision

32. In considering 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, but whether the Committee's decision can reasonably be supported by the information before it and can withstand a somewhat probing examination. In doing so, the Board considers whether the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law.

Policies and Legislation

33. The Applicant submitted that the Committee's decision was unreasonable because the Committee did not consider or explicitly address requirements of the College's *Practice Guide*, other College policies and the *Health Care Consent Act*.

34. Counsel for the Respondent submitted that the Committee did not fail to consider relevant policies and legislation and its decision is not unreasonable on that basis. Counsel further submitted that although the Applicant submitted that the Committee should have considered College Policy #1-06, *Decision-making for the End of Life*, she did not explain why this policy should have been considered and for its topics "Capacity and Informed Consent" and "Advance Directives", the policy refers the reader to College Policy #3-15, *Consent to Medical Treatment*, which was part of the Record.

35. In its decision, the Committee stated it had before it applicable legislation and regulations along with policies the College has developed. While the Committee did not specifically refer to the *Health Care Consent Act* or to policies mentioned by the Applicant, its decision reflected an understanding of the requirements of the legislation and College policies. It is not necessary for the Committee to refer to every document submitted to it or to every piece of legislation or policy that is relevant to its decision. The Applicant has not pointed to any policy or legislation that would change the Committee's decision. Therefore, the Board is not persuaded that the Committee's decision is unreasonable on the basis of this submission.

Reckless disregard for life, misdiagnosis, mistreatment, changed treatment without consent, and prescription of wrong medications

36. The Committee found that the Respondent did not show reckless disregard for human life or deliberately plan to terminate the patient. The Committee found that the proposed care plan that the Respondent presented to the CCB was accepted as being in the patient's best interests.

37. The Committee disagreed with the Applicant that the Respondent misdiagnosed the patient and assumed the responsibility of a specialist when he was not. The Committee noted that the patient was quadriplegic and nonverbal, that his best response seemed to have been to open and close his eyes and there was no ability to communicate beyond perhaps looking brighter when he saw a familiar face. The Committee determined that the ultimate diagnosis was clinical and not based on scans and was within the scope of practice of an internist such as the Respondent.

38. All of these findings were supported by information in the Record and grounded in the Committee's expertise. The Board notes the Record contains descriptions of the patient's cognitive and functional capacity and other medical information sufficient to allow the Committee's assessment of the Respondent's clinical diagnosis. Therefore the Board finds this aspect of the Committee's decision to be reasonable.

39. The Committee found there was no information in the medical records to support the Applicant's view that the Respondent mistreated the patient, changed treatment without consent or prescribed the wrong medications.

40. The Applicant pointed to a change in frequency of medical tests as being evidence that the Respondent changed the patient's treatment without consent and withdrew care before the CCB decision. The Committee noted that there is a difference between decreasing the frequency of laboratory tests and withdrawing care and that there is no benefit to repeating various tests two and three times a week on someone whose medical condition is stable. The Committee further noted that the Respondent continued to order monthly laboratory testing and that an antibiotic was ordered in June 2012 for possible pneumonia just before the patient's transfer to Montreal.

41. The Board finds the Committee's conclusion that there was no information in the medical records to support the view that the Respondent mistreated the patient, changed or withdrew treatment without consent or prescribed the wrong medications is reasonable.

The Committee's conclusion was based on the information in the Record and grounded in the Committee's expertise.

The Respondent's conduct related to the CCB proceeding

42. Regarding the complaint that the Respondent did not follow directions of the CCB, gave a misleading presentation to the CCB, and did not provide all documents to the CCB, the Committee stated that the appropriate venue to address these concerns would be to appeal the CCB decision. The Committee observed that the Applicant was given latitude in providing extra documents to the CCB and that she represented herself at the hearing but also had legal advice. The Committee noted that the CCB had an opportunity to address these concerns when they met and did not chastise the Respondent.

43. The Applicant submitted that it is not the CCB's role to investigate misconduct on the part of a physician; that role belongs to the Committee. The Applicant further submitted that while she did appeal the CCB's decision, the appeal was not determined on its merits, but instead it was determined to be moot following her father's death.

44. The Applicant further submitted that it was unreasonable for the Committee to conclude that the Respondent's actions in relation to the CCB were a "reasonable and appropriate way to resolve the dispute" because the Respondent had initiated the proceeding without first seeking her consent to the proposed plan of treatment, made defamatory statements about her in the plan of treatment and had falsely diagnosed the patient as being in a persistent vegetative state.

45. Counsel for the Respondent submitted that the Committee's decision was reasonable. Counsel submitted that the Applicant's objection that she had not been given an opportunity to consent to the plan before it was brought to the CCB was contradicted by the information in the Record and contrary to a finding of the CCB. Counsel further submitted that the concerns regarding the Respondent's conduct before the CCB are outside the Committee's jurisdiction and it would have been inappropriate for the Committee to act as an appellate body with respect to the determinations of the CCB.

46. The Board notes that the Record contains information that the Applicant was offered an opportunity to accept the proposed plan of treatment. A progress note dated April 17, 2012 states:

> [The Applicant] was called and informed of Consent and Capacity Board submission. POA given opportunity to change Resus orders to Cat 3 and process placement paper as per Para 4 of POA documents signed by patient. POA refused to provide consent therefore will proceed as per Patient Relation direction.

47. Furthermore, in the CCB Reasons for Decision dated June 29, 2012, the CCB noted that the Respondent had proposed a plan of treatment and the Applicant "has declined consent to this plan."

48. The Record clearly demonstrates that the Applicant opposed the plan of treatment in the CCB proceedings with detailed submissions and materials. This suggests to the Board that she was aware of the details of the plan before the CCB proceedings commenced. The Board finds it was reasonable for the Committee to make no finding that the Respondent improperly initiated the CCB proceedings based upon the information before it.

49. The Applicant's concern regarding the Respondent's conduct before the CCB included a concern that the proposed plan of treatment included an allegation of fraud against her. The plan of treatment submitted to the CCB contained a statement that the patient's power of attorney document had been recently acquired after contact from the Public Guardian and Trustee because the Applicant "is currently being investigated for fraud" by the patient's bank. In the CCB proceedings, the Applicant asked the Respondent about this statement and the Respondent confirmed that the statement reflected what he had been told but he did not know that it was true and he stated that it should be removed from the plan of treatment. However, the CCB received testimony from another hospital staff member that he had been contacted by a fraud investigator with the Public Guardian and Trustee of Ontario regarding the Applicant and the patient.

50. The CCB did not mention the statement regarding fraud in its decision. It focused mainly on the wishes of the patient as expressed in his power of attorney document and other evidence raised before it. The CCB accepted the patient had no cognitive function, could not communicate and could neither understand information regarding his treatment nor appreciate the reasonably foreseeable consequences of treatment decisions. The CCB accepted the Respondent's evidence that the patient was in a persistent vegetative state over the Applicant's evidence that he was not.

51. In this case, the Committee had the information that was before the CCB and similarly did not find it necessary to take action concerning the Respondent in respect of the allegations made about fraud. Regarding these statements in the plan of treatment, the testimony given to the CCB indicated that the Respondent had an honest belief in their contents and the staff member who initially shared the information had a credible explanation for what appears to be a misperception. Therefore the Board finds it was reasonable for the Committee to take no action concerning the Respondent on the concern regarding the fraud allegation. Regarding the Respondent's diagnosis of a persistent vegetative state, the Committee had access to the patient's medical records and the expertise to determine whether the Respondent made a diagnosis that was in accordance with the medical information in the Record. The Committee disagreed with the Applicant that the Respondent misdiagnosed the patient. Therefore, it was reasonable for the Committee to take no action regarding the concerns involving the Respondent's representations to the CCB.

Prescribed wrong antibiotic in 2011, yelled at the Applicant

52. The Committee found no information in the medical records to suggest that the Respondent prescribed the wrong medication to the patient in 2011. The Committee noted that the patient was prescribed Ancef in December 2011 and the Committee found no indication this medication was inappropriate for the patient. This decision is based on the information in the Record and grounded in the Committee's expertise. The Board finds the decision to be reasonable.

53. The Committee noted that the Respondent denied yelling at the Applicant and there was no information in the medical records to document such an occurrence. The Committee took no action on this issue. With no basis for the Committee to prefer the version of one party to the other, the Board finds this was a reasonable decision.

Put the patient on alternate level of treatment

54. The Committee took no action on the Applicant's allegation that the Respondent put the patient on alternate level of treatment. The Committee noted that "alternate level of treatment" did not mean a change in code status or palliative care, but that it designates a patient who is stable enough for transfer to another facility. The Committee noted that the transfer assessment signed by the physician assistant indicates the Applicant as POA was informed of the alternate level of treatment. The Board finds this decision of the Committee to be reasonable.

Hid records and plans from the Applicant, did not discuss plan or communicate

55. The Committee took no action on the Applicant's allegation that the Respondent hid records and plans from her, and did not discuss the plan of treatment or communicate with her. The Committee noted that the Record clearly documents issues between the Applicant and most staff at the hospital and that the hospital had a plan for the Applicant to obtain information and access the records and this plan came into effect before the Respondent became the most responsible physician. The Committee found that the Respondent was not the person who was supposed to be reviewing the chart with the Applicant and therefore this is a concern that the hospital may be better placed to address. In reviewing the Record, the Board finds that the information does not support the Applicant's allegation that the Respondent failed to discuss the plan or communicate with her. The Board finds this decision of the Committee to be reasonable.

Prevented second opinion

56. The Committee took no action on the Applicant's allegation that the Respondent prevented a second opinion from being carried out on her father. As part of her presentation to the CCB, the Applicant wanted a second opinion on her father's condition and the CCB directed that this be allowed. The Committee found it was not the Respondent's responsibility to arrange the second opinion. The Committee noted that the Applicant arranged for a retired cardiologist who is not licensed to practise medicine in Ontario attend at the hospital unannounced. He was not approved to examine the patient by the hospital. On another occasion, he visited the patient briefly. The Committee concluded the physician appeared to have been an inappropriate physician to provide an opinion in this case for many reasons. In reviewing the Record, in particular the series of events surrounding the physician visit arranged by the Applicant, the Board finds that the information does not support the Applicant's allegation that the Respondent prevented a second opinion from being carried out. The Board finds the decision of the Committee to take no action regarding this aspect of the complaint to be reasonable.

Engaged in a conspiracy to kill the patient by withdrawing care and giving pain medications which made him seem vegetative

57. The Committee took no action on the Applicant's concern that the Respondent engaged in a conspiracy to kill her father by withdrawing care and giving pain medications which made him seem vegetative. As noted above, the Committee found that the Respondent did not withdraw care to the patient. The Committee reviewed the medical records and raised no concerns that inappropriate medication was prescribed. The Committee found no information to support the Applicant's belief that there was a conspiracy to kill her father. The Committee noted that the patient was non-verbal and immobile for months. The Committee stated that the Respondent was doing exactly what he was supposed to do by filing an application with the CCB. In reviewing the Record and considering the Committee's reasons, the Board finds the Committee turned its minds to all aspects of the Applicant's allegations and considered the relevant information when rendering its

decision. The Board finds that the Record does not support the Applicant's allegation. The Board finds this aspect of the Committee's decision to be reasonable.

Should have treated pneumonia

58. The Committee took no action on the Applicant's allegation that the Respondent should have treated her father for pneumonia before he was transferred to Montreal. The Committee noted that that the patient appeared to have been given antibiotics before his transfer. The Board notes the medical records support the Committee's assessment of care and finds this aspect of the Committee's decision to be reasonable.

Feeding tube

59. The Committee took no action on the Applicant's allegation that the Respondent should not have withdrawn her father's feeding tube. The Committee found that this was part of the plan of treatment that was directed by the CCB and took no action on this aspect of the complaint. Determining the appropriateness of withdrawing the feeding tube within the context of the plan of treatment was within the Committee's medical expertise. The Board finds this aspect of the Committee's decision to be reasonable.

Conclusion

60. In conclusion, having considered the parties submissions and having reviewed the Record the Board finds the Committee's decision to be reasonable.

V. DECISION

61. Pursuant to section 35(1) of the *Code*, the Board confirms the Committee's decision to take no further action.

ISSUED March 7, 2017

David Scrimshaw

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David Scrimshaw

Sonia Ouellet

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Sonia Ouellet

Vanessa Gruben

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Vanessa Gruben