

The Most Significant Point in *Yazdanfar*?

by Richard Steinecke
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Every now and then there comes a case that has so many significant aspects to it one cannot determine which is the most important. The recent Ontario Divisional Court decision of *Yazdanfar v. College of Physicians and Surgeons of Ontario* is one such case. Dr. Yazdanfar appealed a discipline finding and order related to the tragic death of a real estate agent following liposuction treatment.

Use of Compelled Statements

Some would say that the most significant point was the determination that a compelled statement from the member during the investigation was admissible at a resulting discipline hearing. This determination means that a criminal law concept of the right to silence has no place in the professional regulation context. The enabling statute can require the member to cooperate during the investigation and have the answer used against him or her at discipline.

While the Divisional Court supported this interpretation, it said that less than that actually happened in this case. The transcript of the investigative interview was used to cross-examine the member and not to prove the allegations per se. In addition, while the member had a duty to answer questions during the investigation, her failure to answer some questions did not constitute a material part of the tribunal's reasons for its decision.

Constitutionality of the Advertising Restrictions

Others would say that the more significant point was the upholding of the constitutionality of the advertising provisions that formed part of the allegations against the member. The Court found that the regulator's prohibition of advertising that contains patient testimonials or superlatives is consistent with the *Canadian Charter of Rights and Freedoms*. Such advertising restrictions are necessary to ensure "a high degree of professionalism and the protection of the public from irresponsible and misleading advertising". Testimonials, in particular, are of concern because "the public is left with an unbalanced and biased assessment, as only favourable descriptions are included in such testimonials. The public does not know the circumstances or the reliability of this information." In assessing the constitutionality of the provisions the Court considered the following factors:

1. Advertising is commercial speech which is not entitled to the same high level of protection as political speech or self-expression.
2. The restrictions are only for members of a self-governing profession, each member of which joined "as a volunteer who has elected to accept the substantial privileges and significant responsibilities of being a member of a self-governing profession".
3. Patients and prospective patients are vulnerable.
4. The harm that is being addressed is not subject to scientific proof which means courts should show some deference to the regulatory choices made by the regulator.

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This decision may have the effect of reassuring regulators that the Courts are not in the process of prohibiting all restrictions on advertising by members of regulated professions.

Penalty

Yet others would focus on the way that the Court upheld the disciplinary sanction imposed on the member. The Court held that the sanction ordered, while severe, was reasonable in the circumstances. The sanction included a two-year suspension followed by significant terms, conditions and limitations on her ability to practise (e.g., only as a surgical assistant in a public hospital).

The Court supported the finding of the Discipline Committee that the member engaged in a pattern of conduct that placed her patients at risk, including continuing with high risk surgical procedures days after her patient had died. Of particular interest is that the Court also supported that Discipline Committee's consideration of her ongoing lack of insight and did not view that factor as punishing her for defending the allegations at discipline.

The Court rejected the argument that this order was unfair because it was tantamount to revoking her registration, a disposition the tribunal had rejected as inappropriate. The Court said:

The fact that it may be difficult or impossible for the appellant to obtain a position as a surgical assistant in a hospital setting does not change the fact that the Committee concluded that any other environment would not provide adequate protection to the public. This

conclusion was entirely reasonable given the myriad of evidence that was before it and upon which it based these conclusions.

Other Issues

The above issues only scratch the surface. The case also dealt with a number of other interesting questions including:

1. Can an investigator with special expertise in the area under investigation also act as an expert witness? Yes.
2. Can a party call another expert as a reply witness to address the information from a published article that the other party's expert has not read? Sometimes.
3. Is an advertisement false and misleading where it implies (but does not explicitly state) that a member performs a particular procedure when the member does not actually perform it? Yes.
4. Is it a defence that the regulator knew or should have known that the member was not practicing in accordance with the applicable standard of practice? While that was not the case here, the answer is generally no.
5. Can a tribunal ascertain that a competing standard of practice was not an "acceptable" standard in Ontario? Yes.

The Court, however, did not determine whether members can introduce favourable quality assurance information about themselves at discipline hearings.

The *Yazdanfar* case can be found at: <http://www.canlii.org>.