

Pursuing Proportionality

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Before we begin...

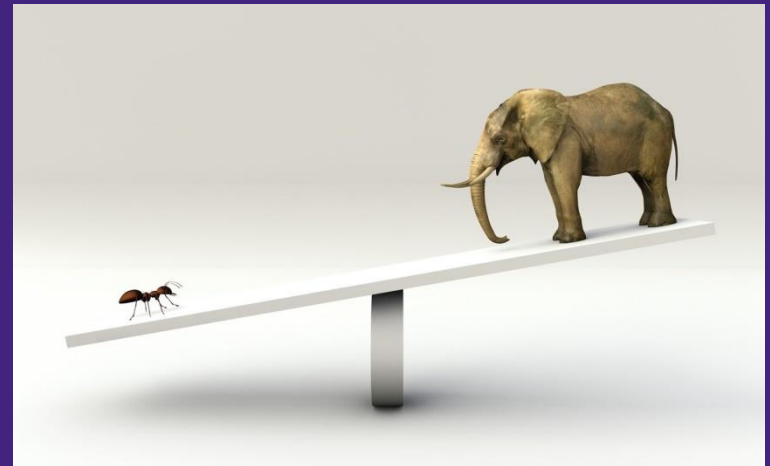
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Right Touch Regulation

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- Proportionality is a fundamental principle of Right Touch Regulation
- What does it mean?
 - Regulators should only intervene when necessary
 - Remedies should be appropriate to the risk posed
 - Where risk is low, the extent of regulatory intervention used to minimize the harm and manage future risk is also low



Where does it matter?

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- Rule-making generally
- Complaints and reports
- Discipline
- Interim orders
- Entry-to-practise



Right Touch Regulation

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Aligning notifications management and outcomes to risk



(“Right-touch regulation in practice”, Professional Standards Authority for Health and Social Care, Published September 2018)

Perspective is everything



Perspective of Independent Reviewers

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- Harry Cayton criticized CDSBC for confusing standards/guidelines and lack of a systemic program for considering new topics or revising existing documents
 - He couldn't tell which guidance was mandatory – “standards, guidelines, information sheets, policies, practice guidelines”
 - Some standards had no mandatory language
 - Some guidelines had mandatory language
- Difficult for practitioner to know what they must do and even less clear to clients what they can expect

PSA BC Dentists Report

- Cayton commented on the number of practitioners continuing to receive complaints after they had agreed to remedial action by consent – he says this suggests that original decision by screening committee was not appropriate
- A decision in favour of further remedial action (for subsequent complaints) in his view is not appropriate

Predicting Behaviour

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- Research from Australia assessing factors that predict recidivism
- AHPRA Research Unit
- “Identification of practitioner at high risk of complaints to health profession regulators”
- Watch for October Grey Areas

Risk Assessment

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- Cayton said risk assessment tool was welcome and important but must take into account wider range of matters and be focused on immediate risk of harm from practitioner continuing to practise
- But how do we reconcile this with court guidance, particularly the law forming around interim orders?

Proportionality from Court Perspective

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Peet v Law Society of Saskatchewan,
2014 SKCA 109

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- Peet guilty of conduct unbecoming for failing to serve clients in conscientious, diligent and efficient manner, and for failing to reply promptly to Law Society
- Had 6 prior discipline hearings
- In recent previous matter for similar conduct he got 3 month suspension and \$7500 fine; that penalty was imposed around the time he finally complied with Law Society request in current matter
- In current matter he got 6 month suspension, \$40,000 fine

Peet v LSC

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- Argued that principle of progressive discipline meant that since previous penalty was imposed after behaviour in this case, it should not be seen as prior discipline sanction (b/c he had no chance to correct his behaviour)
- Progressive discipline is founded on idea that penalties should escalate from milder to more serious sanctions – learning from mistakes is critical rationale for principle
- He argued he should get same penalty and fine as last time

Peet v LSC

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- Court disagreed; progressive discipline not a mathematical exercise; may have lesser role where very serious misconduct
- Principles of mitigation (for admitting the conduct) have less weight in professional misconduct matters than criminal matters because another party affected by conduct (reputation of profession)
- Proportionality:
 - Professional discipline differs from criminal law
 - Insight and failure to remediate are important factors in increasing penalty

CPSO v Peirovy, 2018 ONCA 420

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- Found guilty of sexual abuse of 4 patients by touching their breasts without consent or medical indication
- CPSO sought revocation; DC ordered 6 month suspension and conditions
- Regulator appealed
- Divisional Court would have returned matter back to DC for more serious sanction; said relying on range of ‘unfit penalties’ in previous cases did not justify a penalty that no longer reflected societal values
- Court of Appeal said Div. Court erred by failing to give adequate deference to specialized knowledge of DC

Peirovy

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- CA said DC correctly applied established principles of penalty
- DC acknowledged it was not bound by previous decisions; used them to establish defensible range
- CA said Div. Court should not have substituted its own opinion for that of expert panel charged with the duty of determining appropriate penalty
- Div. Court has neither mandate nor the evidentiary basis to change the penalty range for an entire category of behaviour

Peirovy

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- DC in best position to assess whether deviation from range required
- Legislature responsible for framework under which DC operates
- Application of framework in hands of DC and deference owed to way in which it discharges its duties – retroactive changes to the law are irrelevant; Dr. P had to be adjudicated based on the law in force at the time
- Proportionality:
 - Case is really about court deference
 - DC can increase penalties over time but must explain why
 - Lack of explanation will be fatal

Doyle v CPSO, 2019 ONSC 3905

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- Psychiatrist seeing Patient A for anger and depression
- During sessions he became very casual, using profanities and showing her apps on his phone, etc
- She admitted having feelings for him (had history of sexual boundary issues with previous psychiatrist; Doyle aware of this)
- He said her feelings weren't appropriate; asked her to book a follow-up appointment with his secretary then abruptly terminated physician-patient relationship w/o making arrangements for her medications or assisting to find another psychiatrist
- She became suicidal and was hospitalized

Doyle

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- Doyle had prior history of failing to maintain boundaries
- He pled guilty this time
- DC revoked Dr. Doyle, reprimand and \$16,500 costs
- Said he had numerous chances for remediation with many years of psychotherapy, supervision, monitoring and practice restrictions; found he lacked insight and put patients at serious risk by demonstrating a clear lack of judgment
- He appealed; said revocation disproportionate
- Said DC failed to consider that he was good prospect for rehabilitation and failed to consider counseling and courses he had taken

Doyle

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- Court dismissed his appeal
- Revocation not reserved for worst of the worst cases or offenders
- Available when facts justify it in order to protect public where no lesser punishment will adequately do so
- Lack of insight is a critical issue when it comes to remediation
- Was given numerous chances to remediate
- Proportionality guidance
 - Professional discipline differs from criminal law
 - Lack of insight is crucial
 - History of failed remediation important (compare to Cayton commentary)

Interim Orders

Rohringer v RCDSO, 2017 ONSC 6656

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- Interim suspension based on police reports of indecent exposure in front of minors
- Some employees identified other concerns (inappropriate comments, possible inappropriate touching)
- ICRC believed his conduct met test for interim suspension

Rohringer

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“The police reports document that Dr. Rohringer admitted to acts of indecent exposure in front of minors on more than one instance. In addition, based on the information contained in the interview, the panel is concerned that Dr. Rohringer crosses or violates boundaries of a sexual nature in his practice through inappropriate comments, jokes and possibly inappropriate touching. The panel believes that Dr. Rohringer’s conduct demonstrates a lack of control and/or judgment as to what constitutes appropriate behaviour, which puts his patients at risk of exposure to boundary violations of a sexual nature and/or sexual abuse. [Emphasis added]

Rohringer

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- Divisional Court overturned order
- Factors that led to Court finding suspension disproportionate:
 - Unblemished 32-year professional record
 - “Risk of harm” is not the test—test is whether conduct exposes or is likely to expose patients to harm or injury
 - Lesser restrictions could have been imposed
 - No reasons for decision

Kumar v CPSA, 2019 ABQB 514

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- Member charged with sexual assault and sexual interference of a minor
- Member agreed to work with a chaperone present
- Shortly after media began to report on the matter, Member voluntarily resigned from his clinic and the hospital and sought a new position (chaperone was still present)
- College sought suspension because information suggested Member left his practice abruptly and was not forthright with respect to the charges

Kumar

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- Divisional Court stayed interim suspension
- Court looked at seriousness of issue, the harm to the Member and balance of convenience
- Court held that balance of convenience favoured the Member

Kumar

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- Court found that complete restriction unnecessary
 - Further conditions would be unfair and not necessary to protect public
 - Current conditions allow College to fulfill its obligations to issue notices to specific parties
 - Member put up notice in office notifying public of requirement for chaperone

Kumar

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- Factors that led to court finding suspension disproportionate:
 - Conduct at issue not involving patients
 - Lesser remedies would still be transparent to public
 - Cooperation from member

Proportionality from Public Perspective

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Strom v Saskatchewan Registered Nurses' Association,
2018 SKQB 110

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- Strom, an RN, posted negative comments on her Facebook page regarding nursing care her grandparents received at long-term care facility
- Comments included:
 - “My Grandfather spent a week in ‘palliative care’ before he died ... it is evident that Not Everyone is ‘up to speed’ on how to approach end of life care.”
 - “[A] caution to anyone that has loved ones at the facility mentioned above: keep an eye on things and report anything you Do Not Like! That’s the only way to get some things to change.”
 - “As an RN and avid health care advocate myself, I just HAVE to speak up!”

Strom

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- In 2016, DC of SRNA found her guilty of professional misconduct, ordered a reprimand, placed conditions on her practice, fine of \$1,000 and costs of \$25,000

Strom

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- Huge outcry from public that felt prosecution of Strom reflected misguided choice of regulatory priorities
- Go Fund Me page covered her fine and costs



Strom

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- She appealed the discipline decision arguing:
 - Her off-duty conduct is not subject to discipline
 - Infringement of *Charter* right to freedom of expression was unreasonable
 - Costs award unreasonable
- Court found that she was acting as RN and her actions are subject to discipline
- Decision, including costs, was within the range of possible, acceptable outcomes

Strom

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- Strom has appealed to Court of Appeal
- Intervenor status was granted to the Canadian Constitution Foundation, the BC Civil Liberties Union and the Saskatchewan Union of Nurses
- Appeal proceeding in September 2019

Strom

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- Factors that led to criticism that penalty was disproportionate:
 - Relative mildness of her comments (compared to rest of world)
 - Ubiquity of use of social media to complain about service
 - Current societal emphasis on right to “free speech”
 - Conduct did not affect patients
 - Emphasis by regulator on reputation of profession

GMC v Bawa-Garba, [2018] EWHC 76

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- Dr. Bawa-Garba faced criminal and regulatory proceedings respecting treatment of a six-year old boy
- In 2011, the boy, who had Down syndrome and a heart condition, was admitted to Dr. Bawa-Garba's unit
- Dr. Bawa-Garba was a junior doctor but the most senior treating doctor present that day
- Unit was understaffed and she was covering the work of two doctors
- A series of errors by Dr. Bawa-Garba led to the boy's death

GMC v Bawa-Garba

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- In 2015, Bawa-Garba was convicted of manslaughter by gross negligence and sentenced to two-year suspended sentence
- The MPTS prosecuted her based on the 2015 criminal finding and imposed a one-year suspension
- The General Medical Council appealed that decision to the Divisional Court, which then revoked her
- In 2018, she appealed that decision, arguing that the outcome disregarded “systemic failings”
- Court of Appeal overturned Divisional Court decision and restored one-year suspension originally imposed by MPTS

GMC v Bawa-Garba

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- Outcry from physicians and public who felt she was treated unfairly
- Resulted in Williams Report which recommended
 - Removing right of GMC to appeal MTPS decisions (PSA should still retain that right)
 - Equality and diversity training for fitness to practise panel members
 - Equality and diversity standards for professional regulators
 - Reflective (QA) material should not be used in fitness to practise

GMC v Bawa-Garba

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- Factors that contributed to criticism that revocation was disproportionate:
 - Systemic issues that impacted the care
 - Junior physician
 - Woman of colour
 - Appropriateness of criminal charges in the first place in relation to what was clearly not intentional harm

CVO v Rekhi, 2016

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- St. Catharines vet pleaded guilty to professional misconduct
- Staff had taken, and published online, a video of him striking and choking animals
- Criminal animal cruelty charges against him were dropped
- Had completed two programs on animal restraint by the time of the discipline hearing
- Penalty: 10 month suspension with 4 months remitted if successfully completes mentorship sessions re: animal restraint and behaviour modification techniques; TCL imposing 3 unannounced inspections each year for 2 years, reprimand, costs of \$10,000

Rekhi

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- Factors that contributed to perception that penalty disproportionate:
 - Animal cruelty charges against him were dropped with little explanation
 - Existence of video of the conduct
 - Lobbying efforts of animal rights activists
 - View by some that animal abuse warrants revocation (i.e., that it is equated to sexual abuse in human health context)

Proportionality from Legislature's Perspective

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- Toronto Star articles on “secret cautions” – media pressure led to Minister of Health requiring health colleges to publish remedial screening committee sanctions and ultimately led to changes to public register section of RHPA
- Sexual abuse - mandatory penalties



Proportionality from Legislature's Perspective

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- Legislature is responsible; makes it easier for regulator to avoid criticism
- Cautionary tales from US entry-to-practise
 - examples of specific lists of criminal convictions that prevent licensure – disproportionate impact due to bias in policing

Proportionality from Member Perspective

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- Member facing discipline
 - Generally finds sanction punitive
- Membership as a whole – usually depends on the nature of the case
 - Social media use
 - Sexual abuse



Entry to Practise

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- HPARB and License Appeal Tribunal guidance regarding registration cases and proportionality
- To warrant refusal, criminal history will either need to be systemic and recent; if isolated incident then extremely serious or directly related to patient care
- Dishonesty in regulation process can justify refusal but it must be clear dishonesty demonstrate intention to mislead and not confusion about questions
- Graduation from “diploma mill” not enough; clear evidence that a program is not legitimate is needed

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