

OTLA Submission to College of Physicians and Surgeons of Ontario

Maintaining Appropriate Boundaries and Preventing Sexual Abuse

November 14, 2017

The Ontario Trial Lawyers Association (OTLA) welcomes the opportunity to comment on the College of Physicians and Surgeons of Ontario (CPSO) review of the current policy on “Maintaining Appropriate Boundaries and Preventing Sexual Abuse” (the “Policy”).

OTLA was formed in 1991 by lawyers acting for plaintiffs. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others, while at the same time advocating aggressively for safety initiatives.

Our mandate is to fearlessly champion, through the pursuit of the highest standards of advocacy, the cause of those who have suffered injury or injustice. Our commitment to the advancement of the civil justice system is unwavering.

Our organization has more than 1,500 members who are dedicated to the representation of wrongly injured plaintiffs across the province and country. OTLA is comprised of lawyers, law clerks, articling students and law students. OTLA frequently comments on legislative matters, and has appeared on numerous occasions as an intervener before the Court of Appeal for Ontario and the Supreme Court of Canada.

Background

Sexual relations between physicians and patients have long been considered to be unethical. Having been identified as a significant problem in 1991 following the release of several reports from its Task Force on patient sexual abuse, there grew the impetus for the CPSO to revise aspects of the Regulated Health Professionals Act, 1991 (RPHA) regarding expectations of a physician’s behaviour within the physician-patient relationship. The current Policy was approved by Council in 2008. While the current Policy is meant to help physicians understand and comply with their legal obligations, in its current form, OTLA is concerned that portions of the existing Policy fail to acknowledge many of the collateral issues related to dynamics of sexual abuse within imbalanced power relationships.

OTLA believes the Policy could, and should, go further to enhance accountability for such predatory behaviour, and to recognize the more nuanced or subjective aspects of sexual abuse within relationships of dependency, exploitation and trust.

The current Policy fails to best protect many of the patients or former-patients most at risk of being exploited sexually. As the CPSO undertakes this review of the existing Policy, OTLA takes the opportunity to provide recommendations for revisions in order to eliminate potentially troubling ambiguities that might compromise patient safety.

Incorporation of the following recommendations would help the existing Policy better align with many of the CPSOs other initiatives surrounding sexual assault – including its 2014 “Sexual Abuse Initiative,” and revisions to the relevant provisions in the Government’s Protecting Patients Act, 2017 (currently in force).

OTLA supports the CPSO's efforts to remind practitioners of the key role this Policy plays in safeguarding Ontarians' health and wellbeing.

Policy Feedback – Submission

The CPSO has requested suggestions for improvements or amendments to the current Policy under the following questions; OTLA provides its responses under each appropriate heading:

1. *Does the policy clearly articulate the physician’s legal and professional obligations with respect to boundaries and sexual abuse?*
 - a) With respect to “former patients” listed under section C (“Sexual Relationships after the Termination of the Physician-Patient Relationship”), the 1-year time period following the end of the patient-doctor relationship is too short to allow for the creation or existence of a safe relationship. This stipulated time-frame fails to consider the dynamic nature of the medical relationship and the longevity inherent within such relationships of dependency and trust. Part of the assessment for when a relationship may be considered appropriate should continue to include an analysis of whether or not there existed the provision of psychiatric, therapeutic or counseling services to the patient, as well as the relative positions of power and vulnerability. This should be a fact-specific evaluation predicated on thorough investigation, rather than a pre-determined time period. While a pre-set period provides clarity, it ignores patients’ inherent fragility and the extent of exploitation so often present in this type of abuse.

2. *Are there any issues not included in the current policy that should be addressed? If so, what are they?*
 - a) The current Policy discusses circumstances in which it is mandatory for a physician to report to the College possible sexual abuse of a patient based on reasonable grounds or suspicion. This is in alignment with the CPSO’s Policy on Mandatory and Permissive Reporting. However, neither the existing Policy on sexual abuse nor the policy on conditions for mandatory reporting discuss the requirement of mandatory reporting to the police based on allegations of (sexual) misconduct, abuse or impropriety. Once the CPSO becomes aware of a complaint of this nature, there should exist circumstances under which the College is required to request the patient sign a Consent for the police to be contacted. So long as the mandatory duty to report criminal acts of a sexual nature are adequately balanced with a patient’s right to confidentiality and privacy, the object of mandatory reporting may better act as a deterrent to physicians who violate the physical and bodily integrity of their patients.

 - b) Any physician who has been charged with sexual abuse and who has a criminal trial date pending, should have no right to an expedited disciplinary hearing simply because restrictive conditions have been placed on his or her practice. It is an entirely reasonable encumbrance upon a physician who has been charged with a sexual offence that s/he submit to such restrictions until the resolution of the criminal matter. Allowing for an expedited disciplinary hearing would require the complainant of sexual abuse to testify at

a disciplinary hearing prior to testifying at a criminal hearing. That sequence of testimony would negatively impact the prosecution's case against the physician and could be used as a strategy to undermine the credibility of the complainant. This could further jeopardize the complainant's right to a fair process by raising myth-based credibility issues, or having adverse inferences drawn from the outcome of the disciplinary hearing. Additionally, the complainant's right to equal access to justice as guaranteed under section 15 of the Canadian Charter of Rights and Freedoms could be breached.

- c) The CPSO should be required to notify a complainant of any/all prior complaints made as against the same doctor pertaining to sexual abuse, harassment or inappropriate boundaries. This may inform the complainant's decision whether or not to make a formal written report or complaint, and/or to notify the police and press charges. The Policy should clarify that mandatory notification is unaffected by whether a complaint is made to the College verbally or in writing – either form would trigger the recourse to be taken by the CPSO, and neither form should impact the perceived credibility of the complainant.
- d) If more than one complaint of sexual abuse/harassment or inappropriate boundaries is made against a physician, verbally or in writing, this should trigger an automatic investigation by the CPSO. This will signal the severity of the allegations, and will publicly demonstrate the CPSO's commitment to holding its members accountable.
- e) Under "Appendix A," point 7 to the current Policy, we propose that 'gender identity' be added.

3. *Are there other ways in which the policy could be improved?*

- a) In order to deter physicians from abusing their relative positions of power and authority in sexually assaultive ways, and in furtherance of a zero-tolerance policy for sexual abuse, there should be no allowable reinstatement if found guilty of sexual abuse by a disciplinary panel.¹
- b) When determining whether a physician-patient relationship exists, central to the analysis should be the subjective mindset of the patient. This mirrors current legislation and jurisprudence on sexual assault and consent in Canada, and serves to empower already-vulnerable patients.

¹ OTLA was curious to know how many physicians in these circumstances actually apply for reinstatement of their license after 5 years; if the vast minority, this does not necessarily need to be modified in the Policy. However, if the vast majority of those physicians found guilty of sexual abuse by a disciplinary panel do in fact re-apply, there should be greater efforts at deterrence including a zero-tolerance policy for reinstatement.

Conclusion

The protection of the public is best achieved by an open process. OTLA views the opportunity to review the existing policy on Maintaining Appropriate Boundaries and Preventing Sexual Abuse as a positive chance to further protect vulnerable Ontarians.

In order for the CPSO to stay true to its commitments to enhanced investigation and accountability in this realm, OTLA suggests incorporating the above-noted recommendations. These changes will better reflect the ways in which sexual abuse exploits power and vulnerability inherent in physician-patient relationships.

More disclosure around sexual abuse in this context will increase the public's confidence in the CPSO. As always, OTLA appreciates the opportunity to be involved in this process and if you have any questions or require clarification, please do not hesitate to contact us.