

Encouraging Complaint Procedures in Professional Regulation

By Alice Woolley

Cases Considered:

[*Acupuncture Committee v. Wanglin*](#), 2009 ABCA 166

Oversight of health professionals in Alberta occurs through a modified form of self-regulation under the authority of the *Health Disciplines Act*, R.S.A. 2000, c. H-2. Section 9(1) of the Act provides for the establishment of committees to govern each health discipline, and subsections (3) and (4) provide that a majority of the members of each committee shall either be engaged or registered in that discipline (whichever applies). Regulatory oversight of those committees is then provided by the Health Disciplines Board.

Committees formed for the purpose of professional regulation face a common issue in relation to the discovery of professional misconduct. Committees generally rely on public complaints, or on information brought by others within the health discipline, to initiate the exercise of regulatory authority. However, there is a potentially poor correlation between incidents of misconduct and complaints. Others practicing within the professional activity are not necessarily motivated to bring forward complaints about their peers; indeed, feelings of sympathy, norms against “telling tales” and collegiality in general tend to inhibit the likelihood of peer complaints. Further, because regulatory bodies generally do not have compensatory jurisdiction, the motivation for the public to make complaints is somewhat limited. Also, the public does not always have sufficient information to distinguish between matters which are properly the subject of regulatory sanction, and those which are not, which can undermine the frequency and utility of public complaints. Thus, in order to allow professional regulation to operate effectively, it is very important that there be a regulatory process that facilitates, and certainly which does not discourage, complaints.

It is in light of this that the significance of the decision of the Alberta Court of Appeal in *Acupuncture Committee v. Wanglin* needs to be understood. Both the majority and concurring judgments help encourage a regulatory atmosphere which is facilitative of complaints. Specifically, they remove one significant disincentive from peer complaints, namely, the otherwise real possibility that the complainant might herself be subject to professional discipline if the complaint proves to be unfounded.

The facts of the case are somewhat odd. According to the facts found by the Committee, Dr. Wanglin, an acupuncturist, told two professional colleagues, Dr. Chu and Dr. Strong, that she had been sexually assaulted and harassed by “Dr. A.” She was urged by Dr. Chu and Dr. Strong to report the incidents to the College where they were said to have occurred. She told Dr. Chu that she had done so. However, Dr. Wanglin and Dr. A both later testified that no sexual assault or harassment had occurred.

Dr. Wanglin also told Dr. Chu and Dr. Strong that “Dr. B” was involved in selling, or offering for sale, the contents of a professional examination. On the advice of Dr. Chu she brought this complaint to the Registrar. Dr. Wanglin’s position was that she was told of Dr. B’s actions by Dr. Chu, and reported the information on his instructions. The Committee preferred the testimony of Dr. Chu in this respect.

The Committee found that Dr. Wanglin had made false accusations against a colleague and that this constituted a violation of s. 41(1)(a) and (c) of the *Health Disciplines Act*. Those provisions define professional misconduct as conduct which is “detrimental to the best interests of the public” or which “displays a lack of knowledge, skill or judgment in the practice of the designated health discipline.” This decision was overturned on review by the Health Discipline Board; the overturning of the decision was upheld by the Court of Appeal.

The majority of the Court of Appeal (per Justice Marina Paperny; Justice Frans Slatter concurring) held that the Board’s decision overturning the Committee was reasonable. The Board had held that the Committee erred in disciplining Dr. Wanglin solely on the basis that the accusations were found to be false. In order to warrant a finding of professional misconduct, the Board held, the allegations must not only be false, there must also be some reason to believe that the allegations were “dishonest or malicious.” The Court held that this was reasonable:

While false and unsubstantiated allegations can have an adverse effect on the public interest and amount to professional misconduct, the mere finding of an allegation having been made against a fellow member does not necessarily amount to professional misconduct. Relevant considerations include the intention of the person making the allegation, the nature of the allegation, the person or body to whom the allegation is made, the outcome of any investigation, and the surrounding circumstances. The Committee here failed to consider the context of the allegations (para. 26).

In his concurring reasons Justice Peter Martin was satisfied that the Committee’s decision included by necessary implication a determination that Dr. Wanglin’s actions were dishonest and malicious. He held, however, that this was still insufficient to reverse the Board’s decision. In his view, while the making of false allegations may be detrimental to the interests of the profession, the *Health Disciplines Act* only permits consideration of the interests of the public. The Committee “left unexplained how Dr. Wanglin’s false stories were detrimental to the best interests of the public” (para. 47). Further, however reprehensible those allegations may have been, they did not reflect on her judgment in the practice of acupuncture. As a consequence,

there was no basis in the Committee's decision to support disciplining Dr. Wanglin under s. 41(1) of the *Health Disciplines Act*.

When read together these judgments suggest two things. First, a simple finding that an allegation of misconduct is false does not itself constitute a basis for a finding of misconduct against the person making the allegation. Second, any finding of professional misconduct must be connected to the legislative authority given for sanctioning such misconduct. Here, the Committee was under an express obligation to demonstrate how the false allegation would injure the public interest. There was no necessary connection between them.

As a result, this decision gives some reason for a professional who is considering bringing an allegation of misconduct against her peer to feel comfortable that, even if the allegation is not believed, she herself is not in danger of being found guilty of professional misconduct. This helpfully removes one potential disincentive for peer complaints and, given the structure of professional regulation, is to be applauded.