

IN THE MATTER OF THE COLLEGE OF
DENTAL SURGEONS OF BRITISH COLUMBIA
AND DR. DEREK DUVALL

PENALTY DECISION

Dr. A. Steinbart (Chair)
Ms. Leona Ashcroft
Dr. J. Gercsak

Hearing Date: October 15, 2012, Vancouver, B.C.

Counsel for the CDSBC: Ms. Jean Whittow, Q.C.
Counsel for the Discipline Panel: Ms. Catharine Herb-Kelly, Q.C.

Introduction

The Panel released its decision in this matter on August 21, 2012. The hearing was reconvened in Vancouver on October 15, 2012, to address penalty. The respondent did not attend. Counsel for the CDSBC advised that he had been notified of the date. The hearing proceeded in his absence.

Statutory Framework

The penalties that may be imposed by the Panel are set out in section 39(2) of the *Health Professions Act (HPA)*:

39 (2) If a determination is made under subsection (1), the discipline committee may, by order, do one or more of the following:

- (a) reprimand the respondent;*
- (b) impose limits or conditions on the respondent's practice of the designated health profession;*
- (c) suspend the respondent's registration;*

- (d) subject to the bylaws, impose limits or conditions on the management of the respondent's practice during the suspension;*
- (e) cancel the respondent's registration;*
- (f) fine the respondent in an amount not exceeding the maximum fine established under section 19 (1) (w).*

Sections 39(5) and 39(7) authorize the Panel to make an order for costs up to a maximum amount of 50% of legal expenses and disbursements in accordance with the tariff in Schedule G of the bylaws.

The College's Position

The College has asked the Panel to impose the following penalties:

- (a) cancellation of Dr. Duvall's registration (s. 39(2)(e)),
- (b) an order for costs payable to the College in the amount of \$95,000.00, within one year from the date of the Panel's order (s. 39(5)),
- (c) a direction that Dr. Duvall will not be eligible to apply for reinstatement of registration until he has:
 - (i) paid any costs awarded against him;
 - (ii) successfully completed all years of a general dentistry program listed in Schedule "A" of the bylaws or an equivalent general dentistry program, and
 - (iii) successfully completed the National Dental Examining Board examinations (s. 39(8)(a) and (b)).

Analysis

In reaching its conclusion as to an appropriate disposition, the Panel carefully considered the factors, including possible mitigating factors, set out in *Regulation of Professions in Canada*, by James Casey, at Chapter 14, pages 14-5 to 14-7.

In summary, in its August 21st decision, the Panel concluded that Dr. Duvall practiced incompetent general dentistry in respect of services provided to twenty-two patients over a three year period. In some cases, the patients received more than one kind of treatment that was considered to be sub-standard dentistry. His deficient practices were pervasive, covering a broad range of routine dentistry, including diagnosis, development and delivery of treatment plans regarding the provision of crowns, restorations, bridges, dentures, root canals, implants and veneers.

In addition to its conclusions regarding incompetent practice, the Panel found that Dr. Duvall committed professional misconduct by refusing to provide emergency service to a patient he had just treated who returned to his clinic experiencing significant pain, by hugging a patient aged 7 1/2 years, and inviting her mother and grandmother to sit on his lap. He further breached the terms of an agreement (AUSPA) he had reached with the CDSBC imposing conditions on his registration. These findings, and in particular his breach of the AUSPA raise a concern about whether he is governable.

Dr. Duvall provided responses to each of the complaints. In some instances his responses indicated that he did not understand the practice issues raised or know how to address them. He did not admit to any of the errors. On many occasions his replies were non-responsive. None of the responses indicated that he accepted the problems identified in his practice, or that he was prepared to do anything about them. His responses revealed an alarming lack of insight for a dentist with so many years of experience.

The evidence revealed that many of Dr. Duvall's patients were put to considerable expense and inconvenience and that many suffered from short or long term pain and discomfort as a result of his substandard practice.

The following are some examples of the more egregious cases.

One mother and her pre-teenage daughter were advised to extract four of the daughter's baby teeth to make room for adult teeth. The risk of such removal is permanent collapse

of the patient's facial profile if the space is left untreated. The evidence before the panel was that the child's facial profile was "*somewhat dished in*" following Dr. Duvall's extraction of the teeth, which were, in fact, adult teeth.

In another example, Dr. Duvall placed an implant post which protruded into the patient's sinus cavity. The sinus cavity is an unsterile environment. Bacteria may enter the implant site and cause infection, when a post protrudes into the cavity. He told the patient that the post had not penetrated the cavity. The following winter she suffered from several episodes of severe flu and cold, and increasing pain at the implant site until another dentist referred her to a specialist who treated the problem.

In one case, Dr. Duvall placed two fillings on a patient's teeth without removing all of the decay. This patient went to work in the bush and had to be airlifted out for emergency treatment when the pain caused by the faulty work became severe.

On another occasion, Dr. Duvall removed eleven teeth from a patient's mouth without taking radiographs showing the anatomical structure of the teeth to be extracted. In other words, he removed the teeth without having all the necessary information.

Dr. Duvall's history as a dentist is also noteworthy. He has been a practitioner for a long time. He was first registered in British Columbia in 1973. In 1992 he registered in Alberta and then returned to BC in 2001. He had a prior history of complaints in British Columbia and some difficulty in Alberta, although the Panel was not provided with any detail about this history. When he applied for reinstatement in this province, the CDSBC negotiated an agreement (AUSPA) with him, the terms of which were designed, among other things, to ensure that he would practice safely and that the CDSBC could monitor him.

The Panel found that Dr. Duvall failed to comply with several important terms of AUSPA on several occasions and that this failure was a violation of the trust the CDSBC placed in him. As a result, the CDSBC was unable to fully monitor his practice.

The Panel is of the view that the incompetence exhibited by Dr. Duvall in this case is very serious. The number of errors is alarming, covering many areas of general practice. The Panel is convinced that he can not practice safely at this time. The issue is whether cancellation of his registration is required.

The Panel is mindful of the statement in *Green V. College of Physicians and Surgeons (Sask)* (1986) 51 Sask. Rpts. 241 at paragraphs 45 and 46 regarding the impact of cancellation of a person's registration:

There is no doubt that the loss of one's professional standing is one of the severest penalties that can be assessed against a medical doctor. This is why so many safeguards have been established by the legislators to protect an irritating nonconformist from an indignant establishment-oriented segment of the profession.....The [dental] profession has been granted a status which gives the public the right to expect that it will take the necessary measures to assure that reasonable skills will be exhibited by a [dentist] who is held out by the profession through the College as possessing the ability to practise [dentistry]. If proceedings such as this produce evidence over a broad range of patients of an absence of these skills, then the factor of penalty becomes subordinated to the more significant issue of public interest.

The Panel has considered whether there are other options apart from cancellation of registration, such as suspension for a period of time, a requirement to take some remedial programs, supervised practice or some combination of these.

The Alberta Court of Appeal in *Re Trace and Council of the Institute of Chartered Accountants et al* 54 DLR (4th) 82 considered whether supervision was appropriate in the case of an incompetent accountant:

...On appeal, his counsel suggested mandatory education and continued practice under some kind of supervision....Supervision would be unworkable, it would

supply little training to Mr. Trace, and would either be total or partial. If supervision were partial, it would be incomplete, reducing without eliminating the inadequate work he puts before the public. The institute heard a submission that undertakings not to practise at all proved hard to police; in my view an undertaking to limit his practice would be still harder to police. If supervision were total, it would be uneconomical and would rob Mr. Trace's professional accreditation of any meaning. (p.88)

The nature of Dr. Duvall's incompetence and his lack of meaningful responses to the complaints suggests that he can not practice safely and that the public will be endangered if he does so. His remarkable lack of knowledge in several areas of routine general dentistry taking into account his many years of experience suggests that his registration must be cancelled and he must re-qualify before he could be considered for reinstatement by the Registration Committee

Further, the approach taken in *Trace* is applicable to Dr. Duvall's situation. Supervised practice with restrictions, and/or a requirement to remediate while practicing are not viable options given the extent of his practice deficiencies and non compliance with the AUSPA. The Panel is not satisfied that Dr. Duvall could be properly monitored or that his practice deficiencies could be rectified if he is permitted to practice with conditions.

The only way the CDSBC could be satisfied that his practice deficiencies have been corrected is by requiring Dr. Duvall to re-qualify as a general practitioner of dentistry by successfully completing all years of a listed program in Schedule "A" of the bylaws, or its equivalent, and successful completion of the National Dentistry Examination.

The College seeks an award of costs in the amount of \$95,000.00. Section 39(5) permits the Panel to order that Dr. Duvall pay these costs. There is no reason not to make such an order, especially in view of the complexity of the case, the length of time it took to complete, and the expenses the CDSBC was put to. Dr. Duvall was absent for most of the hearing.

Section 39(7) of the *HPA* and Bylaw 10.08(2) set out the manner in which recoverable costs are calculated. The Panel is satisfied that the amount claimed by the College accords with the legislation and takes into account a fair reduction given that the Panel dismissed some of the charges in the Citation.

The Panel orders that the amount of \$95,000.00 be paid by Dr. Duvall to the CDSBC no later than December 31, 2013.

Section 39(8)(a) of the *HPA* authorizes the Panel to impose conditions which must be fulfilled before Dr. Duvall will be eligible to apply for reinstatement of registration in the CDSBC. The College has asked the Panel to direct that he will not be eligible to reapply for reinstatement until he has paid the costs and completed re-education and passed the examination as set out above.

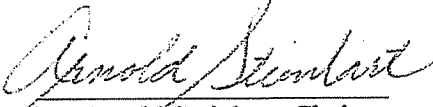
The Panel is of the view that Dr. Duvall must satisfy the costs order and successfully complete a program in dentistry and the examination as described before he can apply for reinstatement. This is essential in order for the Registration Committee to be confident that he is competent and can safely practice dentistry.

In summary, the Panel orders the following:

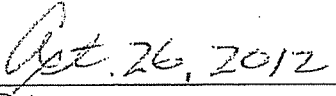
- (a) Dr. Duvall's registration in the CDSBC is cancelled, effective immediately;
- (b) Dr. Duvall must pay costs to the CDSBC in the amount of \$95,000.00, no later than December 31, 2013;
- (c) Dr. Duvall must
 - (i) successfully complete all years of a general dentistry program listed in Schedule "A" of the bylaws or equivalent general dentistry program, and
 - (ii) successfully complete the National Dental Examining Board examinations (s. 39(8)(a) and (b)).

- (d) Dr. Duvall must comply with the requirements in (b) and (c) before he may apply for reinstatement of his registration in the CDSBC.

By the Discipline Committee



Dr. Arnold Steinbart, Chair



Date

Leona Ashcroft

Date

Dr. John Gercsak

Date

- (d) Dr. Duvall must comply with the requirements in (b) and (c) before he may apply for reinstatement of his registration in the CDSBC.

By the Discipline Committee

Dr. Arnold Steinbart, Chair

Date

Leona G. Ashcroft

Leona Ashcroft

October 25, 2012

Date

Dr. John Geresak

Date

- (d) Dr. Duvall must comply with the requirements in (b) and (c) before he may apply for reinstatement of his registration in the CDSBC.

By the Discipline Committee

Dr. Arnold Steinbart, Chair

Date

Leona Ashcroft

Date



Dr. John Gerscak

OCTOBER 25, 2012
Date