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Lack of Remorse vs. Degree of Insight – Part 1

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Despite some strong pronouncements from the courts, ambiguity remains for disciplinary panels considering a lack of "remorse" by a registrant when imposing sanctions.

Part of the confusion likely results from importing criminal sentencing principles into the professional misconduct realm. Even the word "remorse" conjures up concepts of moral blameworthiness, rather than focussing on the public protection goals of the misconduct process. A more neutral term might be the absence of "acknowledgement".

The primary concern about imposing a harsher sanction on registrants who do not acknowledge the unprofessionalism of their conduct is that it undermines their right to have the regulator prove the allegations against them. Indeed, where the difference in sanction is significant for those who do not admit the allegations as compared to those who do, some registrants may feel pressured to admit to false allegations; *Quaidoo v Edmonton (Police Service)*, 2015 ABCA 381 (CanLII).

As a result, many courts have long stated that it is a reversible error of law for a hearing panel to treat a lack of acknowledgement by the registrant as an aggravating factor justifying a more serious sanction: *College of Physicians and Surgeons of Ontario v. Gillen*, 1993 CanLII 8641 (ON CA), *College of Physicians and Surgeons of Ontario v. Boodoosingh* (H.C.J.), 1990 CanLII 6686 (ON SC), affirmed 1993 CanLII 8655 (ON CA); *Kuny v College of Registered Nurses of Manitoba*, 2018 MBCA 21 (CanLII).

But what about registrants who recognize their error, acknowledge their conduct, and demonstrate an intention to alter their future behaviour? Courts agree that this should be considered when imposing sanction and have created a kind of legal distinction that can be difficult to follow. While a lack of acknowledgement is not an aggravating factor, sincere acknowledgement is a mitigating factor justifying a lesser sanction than would otherwise be appropriate. As worded in *Dr. Jha v. College of Physicians and Surgeons of Ontario*, 2022 ONSC 769 (CanLII):

> Although some might say that the distinction between the presence of an aggravating factor and the absence of a mitigating factor is a fine one, it is a distinction well recognized both in the professional discipline and in the criminal law context….

As a result, when looking at precedent cases, a registrant who has not acknowledged their unprofessional conduct is not similarly situated to a registrant who has: *Kitmitto v. Ontario (Securities Commission)*, 2024 ONSC 1412 (CanLII); *Wong v. Real Estate Council of British Columbia*, 2004 BCCA 120 (CanLII); *Moonshiram v. College of Immigration and Citizenship Consultants*, 2024 FC 1212 (CanLII).

It seems this distinction does not always apply. Certainly, where a registrant maintains a defence of having acted in good faith (e.g., maintaining the correctness of their exercise of judgment, say in the treatment of a patient, when the hearing panel finds that the approach was misguided), the lack of acknowledgement is fairly consistently not treated as an aggravating factor: *Breger v. Physicians (Professional Order of)*, 2019 QCTP 106 (CanLII). Similarly, maintaining throughout a discipline hearing a good faith refusal to cooperate in an investigation based on a honest misapprehension of the registrant's rights was not treated as an aggravating factor in *D'Mello v The Law Society of Upper Canada*, 2015 ONSC 5841 (CanLII).

However, there are several instances where courts condoned imposing a severe sanction based, at least in part, on a bad faith denial of the allegations: *Benhaim c. Médecins (Ordre professionnel des)*, 2019 QCTP 115 (CanLII); *Byrnes v Law Society of Upper Canada*, 2015 ONSC 2939 (CanLII); *Mailloux c. Médecins (Ordre professionnel des)*, 2013 QCTP 43 (CanLII), affirmed 2014 QCCS 1594 (CanLII), affirmed 2016 QCCA 62 (CanLII), leave to appeal refused 2016 CanLII 41049 (CSC).

Similarly, courts have sometimes tolerated the imposition of a more severe sanction where the registrant was found not to be credible when testifying: *Gibbon v. Justice of the Peace Review Council*, 2023 ONSC 5797 (CanLII); *Taylor v. College of Physicians and Surgeons of Ontario*, 2018 ONSC 4562 (CanLII).

Two additional critical points need to be made. First, courts have accepted that a lack of insight by the registrant is relevant to the sanction that should be imposed. Obviously, prioritizing remedial terms, conditions, and limitations over specific deterrence measures such as a longer suspension or revocation is justifiable where the registrant has insight into their conduct and how they need to conduct themselves in future.

However, is there a distinction between a lack of acknowledgement of the conduct and lack of insight on the part of the registrant? Several court decisions appear to find a difference even where the lack of insight is partially based on the registrant's denial of the allegations at the hearing: *Gibbon v. Justice of the Peace Review Council*, 2023 ONSC 5797 (CanLII); *Yazdanfar v. The College of Physicians and Surgeons*, 2013 ONSC 6420 (CanLII); *Peet v Law Society of Saskatchewan*, 2019 SKCA 49 (CanLII); *Abrametz v The Law Society of Saskatchewan*, 2018 SKCA 37 (CanLII).

Similarly, a failure to recognize the inappropriateness of the conduct is an indication of likelihood to reoffend unless a significant sanction is imposed. Thus, the registrant's attitude towards their conduct can sometimes be considered an aggravating factor, if framed as demonstrating an increased risk of recurrence. For example, in *Massiah v Justices of the Peace Review Council*, 2016 ONSC 6191 (CanLII), the Court said:

> … the 2012 Panel did not punish the applicant for contesting the

> allegations. Rather, having concluded that the misconduct had occurred, it found that the applicant did not have insight into his misconduct and, therefore, the 2012 Panel could not have any faith that the misconduct would not be repeated.

See also: *Terjanyan c. Lafleur*, 2019 QCCA 230 (CanLII); *Librandi c. Chartered Professional Accountants (Ordre des)*, 2023 QCTP 7 (CanLII); and *Karkar v. Professions Tribunal*, 2017 QCCS 4345 (CanLII), leave to appeal denied 2017 QCCA 1619 (CanLII).

Based on these decisions, a "nuanced" approach to lack of acknowledgement by a registrant might be summarized as follows:

1. A registrant's lack of acknowledgement cannot be treated as an aggravating factor on sanction.
2. However, it can be treated as the absence of a mitigating factor depriving the registrant of leniency that they might otherwise receive.
3. Some exceptions might be made where the registrant takes a bad faith approach to disputing the allegations.
4. A lack of insight can be viewed as relevant to the severity and nature of the sanction imposed even if it is based, in part, on the registrant's approach to the allegations.
5. A registrant's approach to the allegations might also be relevant to the likelihood of the registrant repeating the conduct which can reasonably affect the severity and nature of the sanction.

The approach by courts to a lack of acknowledgement has been technical, not entirely consistent, and is extremely difficult for discipline panels to apply.

Perhaps it is time to revisit the issue entirely. Rather than using a modified criminal sentencing approach, could a fresh professional regulation approach be developed?

In Part 2 we will look at a "degree of insight" approach to sanctioning registrants.

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