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Lack of Remorse vs. Degree of Insight – Part 2

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In Part 1 of this article, we examined how Canadian courts have approached a registrant's lack of remorse for (or "acknowledgement" of) allegations when imposing disciplinary sanctions. We posited that the approach has been technical, inconsistent, and difficult to apply. In this article we propose that a "degree of insight" approach can sidestep the issue and bring a principled approach to discipline panels crafting suitable sanctions for professional misconduct. We believe the kernel of this modified approach is already found in some of the existing case law.

A recent decision in the United Kingdom indicates that a different approach to sanctioning "unfitness to practise" is developing there. In *Higgins v General Medical Council* [2024] EWHC 1906 (Admin) findings of sexual harassment (mostly verbal rather than physical) of junior colleagues were made against a physician. The physician vigorously disputed the allegations. When almost all the allegations were found to have been established, the physician asserted that they had gained insight through the process and from the remedial and therapeutic steps they had already undertaken. Despite this assertion, the tribunal revoked the physician's registration and he appealed both the findings and the sanction.

The Court upheld the decision and in doing so the Court acknowledged that the physician should not be punished for defending themselves. However, the Court discussed, at length, the issue of how disciplinary panels should apply the concept of insight.

First, the Court noted that the regulator had established detailed guidelines on how insight should affect sanction. In particular, the guidelines were described by the Court as follows:

> The Tribunal is to consider and balance any mitigating and aggravating factors (paras 24 – 60). The Guidance states the following in relation to insight:

> "45. Expressing insight involves demonstrating reflection and remediation.
>
> 46. A doctor is likely to have insight if they:
>
> a. accept they should have behaved differently (showing empathy and understanding)
> b. take timely steps to remediate (see paragraphs 31 – 33) and apologise at an early stage before the hearing
> c. demonstrate the timely development of insight during the investigation and hearing."
>
> Paragraph 31 says that "Remediation is where a doctor addresses concerns about their knowledge, skills, conduct or behaviour" and goes on to describe the forms that it can take. Lack of insight is identified as an aggravating factor at para 51, the Guidance then continues:
>
> "52. A doctor is likely to lack insight if they:
>
> a. refuse to apologise or accept their mistakes
> b. promise to remediate, but fail to take appropriate steps, or only do so when prompted immediately before or during the hearing
> c. do not demonstrate timely development of insight
> d. fail to tell the truth during the hearing…"

For our purposes, the particularly noteworthy aspects of the guidelines are that:

1. a lack of insight can be an aggravating factor on sanction and
2. a lack of insight can be based, at least in part, on the registrant's approach to the allegations before, during, and after the hearing. The tribunal was entitled to take the registrant's denials and other statements into account when assessing insight.

The Court also accepted the regulator's submission that there are degrees of insight. One level is an intellectual acceptance of the rules and their rationale. A higher level of insight involves a physician applying the relevant rules to their conduct. This includes accepting that they did not conform to the rules, why they did not do so, and what would be necessary to prevent future breaches. Insight exists on a continuum.

The Court indicated that the physician's continuing denial on appeal of many of the factual allegations and the conclusions drawn from them demonstrated an ongoing lack of significant insight. The Court did not see this conclusion as being unfair to the physician's ability to defend themselves.

The Court also saw the lack of insight as relevant to the physician's likelihood of repeating the conduct.

Perhaps it is also time, in Canada, to limit the principle of not treating a lack of remorse as an aggravating factor and instead limit it to the recognition that registrants should not be punished for disputing the allegations. The focus can then turn to the degree of insight of the registrant. Regulators should then be able to use all relevant information before it to assess the degree of insight of the registrant in designing a sanction that protects the public, facilitates the rehabilitation of the registrant, and preserves public confidence.

To facilitate a clearer approach to imposing sanctions, discipline panels and courts should focus on the degree of insight of the registrant.

This approach is not entirely foreign to Canadian courts. Recalling *Massiah v Justices of the Peace Review Council*, 2016

ONSC 6191 (CanLII), the Court's statement is consistent with that of the UK Court in *Higgins*. The Ontario 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.

A principled analysis of the degree of insight requires consideration of how the registrant has discerned the issues before, during and after the hearing. Surely this can be done without creating the impression that the registrant is being "punished" for disputing the allegations or the panel venturing into a dizzying and technical debate about aggravating and mitigating factors. For all these reasons, we propose that regulators begin assessing a registrant's degree of insight when considering what sanction is appropriate in the professional regulation context.

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