DECISION NO.  2012-HPA-0248(a)

In the matter of an application under section 50.6 of the Health Professions Act, R.S.B.C. 1996, c. 183, as amended, (the “Act”) for review of a complaint disposition made by an inquiry committee

BETWEEN: The Complainant

AND: The College of Physicians and Surgeons of BC

AND: A Physician

BEFORE: Victoria Kuhl, Panel Chair

DATE: Conducted by way of written submissions concluding on August 20, 2013

APPEARING: For the Complainant: Self-represented

For the College: Sarah Hellmann, Counsel

For the Registrant: Did not participate

I DECISION

[1] Upon reviewing the application of the Complainant under s. 50.6 of the Act and the disposition of the Inquiry Committee of the College, I confirm the decision of the Inquiry Committee.

II INTRODUCTION

[2] The application for review was submitted by the Complainant following his receipt of the disposition (Decision) letter of November 13, 2012 from the Inquiry Committee.

[3] The Complainant believes the Registrant was negligent in performing cataract surgery on his left eye and in the subsequent care he received following surgery. He had previously had successful cataract surgery on his right eye by a surgeon who is not
the Registrant. He believes that in the Registrant’s response letter to the College the Registrant fabricated information about the extent of care he gave the Complainant.

[4] The Complainant asked for compensation for damages due to loss of vision, pain and suffering, unable to work, loss of income and emotional distress.

[5] The Inquiry Committee’s investigation did not find the Registrant negligent in his care of the Complainant and dismissed the complaint with commentary and directions on the quality of the Registrant’s medical record keeping. They also advised the Complainant that the College has no jurisdiction and cannot act in the matter of the Complainant’s request for compensation for loss of vision, pain and suffering.

[6] The Registrant opted not to engage in the HPRB hearing review process. He did not respond to requests from both the College and the Review Board to take part either in mediation or in the written review.

III BACKGROUND

[7] The Complainant, who owns a construction company, stated he is now unable to work or drive his car due to loss of vision following complications of cataract surgery. Although his written submissions demonstrate English is not his first language they are concise and understandable. Language comprehension may however, have been a factor in his dealings with the Registrant.

[8] The details in the complaint outline the Complainant’s claim of negligence and lack of care by the Registrant. He states in his submission that he did not meet with the Registrant or receive all the care on the dates outlined in the Registrant’s letter and believes the Registrant’s response to his complaint was not correct.

[9] In his submissions, the Complainant also states the Registrant did not assume responsibility for his post-operative care when he referred him to other specialists.

[10] He states in his complaint that he was not made aware that there might be complications or loss of vision from the surgery. He did however sign the pre-operative consent form. He had had previous successful cataract surgery performed by another surgeon.

[11] The College’s disposition letter summarized the complaint by detailing each of the complaints and then analyzed each by referring to the Record to support the College’s conclusion that the Registrant had acted responsibly and was not negligent.

[12] The Registrant is a medical doctor, a specialist and surgeon in ophthalmology, a university teaching professor and the director of an outpatient clinic. Ophthalmology is the medical specialty focused on the anatomy, functions, diseases and treatment of eyes.
His letter of response to the complaint was very specific as to the dates he met with and treated the Complainant pre and postoperatively, and included the referrals he made to other specialists for additional expert opinions and treatment of the Complainant’s post surgery complications.

IV ISSUES

After considering the evidence and the submissions of the parties the Act specifies that I am to determine if there was an adequate investigation by the Inquiry Committee and whether the disposition (Decision) was reasonable.

V DISCUSSION AND ANALYSIS

A. Adequacy of the Investigation

My mandate in this written hearing is to proceed in accordance with the statutory requirements of the Act. My decision is based on the evidence in the Record and other admissible evidence.

A complaint of professional negligence and an accusation of fabrication of evidence are serious complaints. In this instance following surgery, the Complainant developed complications and a partial loss of vision. Obviously, this is a serious matter. A thorough investigation is critically important to all parties.

The Complainant has been consistent in stating that the dates he was seen by the Registrant were significantly less than those in the office medical records. I find this troubling. There was however no evidence from the Complainant that he was accompanied by someone else who could substantiate his claim or that he was elsewhere and could not or did not attend the Registrant’s office for the appointments listed by the Registrant.

Given no other corroborating evidence from the Complainant in support of his dispute on dates and the treatment received, the medical records in the Record therefore stand alone.

The Complainant supported his claim in part by stating that the Registrant shifted his responsibility for care by referring him to other specialists following surgery and by failing to see him during the Complainant’s time of “dire need”.

The complaint that the Registrant did not accept responsibility for his care by referring the Complainant to other physicians was dismissed by the College.

On the contrary it is apparent that engaging other qualified ophthalmologists to examine and make recommendations to the Registrant on how best to manage the complications indicates that the Registrant was responsible by seeking other possible avenues of expert advice and treatment.
[22] The letters of two of the referral physicians commended the Registrant on his care and noted that since the date of the surgery four months earlier there had been some improvement of the Complainant’s vision.

[23] The evidence of other medical professionals with expertise in the same area is the best evidence that a medical professional’s competence is satisfactory.

[24] The panel of the Inquiry Committee was comprised of 11 members of whom seven were medical doctors from a variety of medical specialties and four were public representatives appointed by the provincial government. It is my experience that shorthand notes such as these are used and understood by other physicians.

[25] Although the Inquiry Committee concluded that the Registrant’s medical records were “of poor quality” and not acceptable for medical legal use, I conclude that the panel was able to interpret the notes in order to adequately conduct their deliberations.

[26] I would have much preferred for the Complainant’s understanding and for reasons of accuracy and transparency of the investigation that the College had requested the Registrant’s notes be written in a manner which meets proper medical legal requirements and been re-submitted to the Panel. It is an issue worthy of consideration should similar circumstances present in future.

[27] The investigation consisted of a review of the responses and records received from the parties to the complaint, including the following which form part of the Record:

(a) the complaint letter and further submissions from the Complainant to the College;
(b) registrant’s letter of response to the complaint sent to the College;
(c) all medical records relating to care of the Complainant;
(d) letters from three physicians other than the Registrant who were involved in his post-operative care;
(e) minutes of the Inquiry Committee Panel; and
(f) draft letter from the Inquiry Committee with the disposition of the complaint.

[28] The Complainant accused the Registrant of fabrication and disagreed with the Registrant’s records on the dates he was seen and the treatment he received, but did not provide sufficient evidence to support his claim. His claims of negligence were not accepted by the College and the complications and partial loss of vision were deemed to be potential but regrettable outcomes of surgery. The College accepted the statements of the referral physicians in this regard.

[29] The Complainant did not raise any issue with regard to the investigation conducted by the Inquiry Committee. I am confident based on the steps taken by the Inquiry Committee on this matter that the investigation was adequate.
B. Reasonableness of the Decision

[30] The decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, provides the test of what constitutes a “reasonable disposition”. In Review Board Decision No. 2009-HPA-0001(a) to 0004(a) the panel quoted from paragraph [47] of the *Dunsmuir* decision and stated the following which I considered in determining the reasonableness of this disposition:

> A court conducting a review of reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility with the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[31] The Complainant stated that the Registrant did not explain the potential for complications and possible loss of vision. There was no indication in the Complainant’s submission that he could not read English or did not understand the explanation of potential surgical outcomes. He instead denied he had any explanation from the Registrant but signed the consent form which indicated he was informed.

[32] In cases where English is not the first language it is important that medical professionals ensure their patient has a sufficient understanding of English to comprehend their explanation of the medical procedure or have a translation prior to them signing the consent form.

[33] In my view the Complainant must also accept responsibility to ensure he or she can understand instructions. In this instance the Complainant’s daughter was present and spoke with medical staff on at least one occasion as noted in the Record. The Complainant’s letters and submissions that form part of the record were signed by the Complainant. They were easily understood.

[34] The Inquiry Committee explained in the Decision that the complications and the outcome the Complainant experienced in his cataract surgery are recognized as possible with this type of surgery. They stated that the Registrant managed them with frequent appointments and by referrals to other eye specialists and therefore they were not critical of the care provided by the Registrant.

[35] In considering this matter it is worth noting the following statement in the case of *Dr. Q v. College of Physicians and Surgeons of British Columbia* [2003] S.C.J. No. 16 (SCC):

> A factual determination of professional misconduct, unprofessional conduct or incompetence in the practice of medicine, requires proof on a balance of probabilities. Evidence must be clear, convincing and cogent to establish that it is more likely than not that the particular conduct or events at issue occurred.
In my view the evidence before the Inquiry Committee was clear, convincing and cogent and establishes that the decision, based as it was on an adequate investigation, was reasonable.

I find it troubling however that the Registrant chose not to engage in the process. He has additional responsibilities as a university medical teaching professor and the director of a medical clinic and therefore setting a higher standard is a reasonable expectation. In the absence of submissions from the Registrant he/she might also be at risk for potential misinterpretation of evidence in the record although I do not find that to be so in this case.

VI CONCLUSION

Applying the relevant standards of the Act to the Record, I find the Inquiry Committee’s investigation was adequate and the disposition of the investigation was reasonable.

In making these decisions I have considered all of the information and submissions whether or not specifically identified in this decision.

“Victoria Kuhl”

Victoria Kuhl, Panel Chair
Health Professions Review Board

December 13, 2013