Setting Precedents: The Top Ten Cases You Need to Know About

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Top Ten Cases 2023

1. Temple v. Pennsylvania BPOA, Board of Veterinary Medicine, 285 A. 3d 342 (2022)
2. Suleman v. General Optical Council, [2023] EWHC 2110
3. Straw v. State of Indiana, 190 N.E.3d (2022)
4. Peterson v. College of Psychologists of Ontario, 2023 ONSC 4685
5. Lauzon v. Ontario (Justices of the Peace Review Council), 2023 ONCA 425
6. Welter v. Massachusetts Board of Registration in Medicine, 196 N.E.3d 312 (2022)
7. Burgener v. Law Society of Alberta, 2023 ABCA 227
8. Z, Re (Disclosure To Social Work England: Findings of Domestic Abuse), [2023] EWHC 447 (Fam)
9. Clawson v. Board of Registered Nursing, 287 Cal. Rptr. 3d 691 (2021)
10. Medical Board of Australia v. Conron (Review and Regulation), [2023] VCAT 15

Temple v. PA Board of Veterinary Medicine

- Examination during an emergency visit involving a dog exhibiting breathing problems
- Initial diagnosis canine flu; did not perform x-rays and blood tests
- Determined the procedures were not necessary; prescribed medication and took no further action

Temple v. PA Board of Veterinary Medicine

- Second emergency visit; x-rays performed revealing severe pleural effusion
- Condition worsened and ultimately pet had to be euthanized
- Show Cause Order- failure to conform to acceptable standards by:
  - Misdiagnosing condition
  - Not performing x-rays

Temple v. PA Board of Veterinary Medicine

- Department's Office of Hearing Examiners scheduled hearing
- Expert witness previously served on Board for eight years, including six years as Chair
- Expert witness opined failure to meet acceptable standard of care by not performing x-rays and blood tests
- Board: (i) reprimand, (ii) $1,000 civil penalty, and (iii) three hours of continuing education

Temple v. PA Board of Veterinary Medicine

- Temple's position on appeal
  - Expert's testimony created appearance of intermingling of prosecutorial and adjudicatory functions in violation of due process
  - Order to Show Cause did not include the failure to perform blood tests as a basis for discipline
  - Board's findings are not supported by substantial competent evidence
- Poll

Temple v. PA Board of Veterinary Medicine

- Roles divided among distinct organizations within Department creating walls of division eliminating the threat or appearance of bias
- Board's sole reasons for imposing discipline were failure to recommend x-rays and blood tests
  - Order to Show Cause did not put Temple on notice that his failure to recommend blood tests would be an issue
  - Remand for imposition of sanctions without considering failure to recommend blood tests

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Did the Department's use of a former Board chair as the expert witness and his testimony combine to create the appearance that the Board intermingled prosecutorial and adjudicatory functions?

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Suleman v. General Optical Council

- Appeal from decision of Fitness to Practice Committee of GOC
  - Appellant was registered student dispensing optician; worked at branch of chain called Specsavers
  - Management made complaint alleging appellant carried out restricted activities and gave false registration number to conceal that she was not yet fully qualified
  - Appellant was unrepresented (and for the most part not present)

Suleman v. General Optical Council

- During hearing (in the appellant's absence), one panel member disclosed that he was formerly director of Specsavers franchise for 25 years
  - Resigned when he retired 3 years prior to hearing; had not contact with anyone involved in matter
  - "Legal Advisor" to Panel stated that this was a "tenuous connection and I cannot see in any way, shape or form it would give rise to any potential conflict of interest"
- Committee found appellant's fitness to practise was impaired and name should be "erased" from the GOC's register; issue of bias was never raised with appellant
- Poll

Suleman v. General Optical Council

- On appeal, appellant focused on issue of bias - argued that panel member had a prejudicial interest that gave rise to bias
  - Also came to light that panel member was a locum dispensing optician at a number of Specsavers locations after retirement and *during hearing*
  - Appellant argued that there was ongoing business relationship at time of hearing which "automatically disqualified" panel member, whether or not there was reasonable apprehension of bias
  - Also argued that reputation of complainant was in issue and that panel member had personal interest in vindicating that reputation

Suleman v. General Optical Council

- Panel found historic relationship between panel member and complainant, which was both “substantial” and “long-lasting”
- Retirement from one branch prior to hearing might not have given rise “in the mind of the fair-minded and informed observer” to real possibility of bias, but relationship from locum work was more significant and ongoing (across several branches of complainant’s stores)
- Panel member was also deriving significant income from locum work as only source of work-derived income other than sitting on Committee

Suleman v. General Optical Council

- Appellant was alleged to have breached trust of colleagues and Specsavers, and undermined public confidence in both Specsavers and profession
  - Given the way complaint was framed, discipline findings could have an impact on the reputation of the chain
- Court found that panel member should have recused himself; matter was remitted to a differently constituted committee
- Fact that he was only one member of panel did not make a difference; "impossible to know how influential views of individual panel members' were"
- If one member is tainted by apparent bias, the Committee's decision will be vitiated

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Did the Panel Member's role as a former director of a Specsavers franchise raise a reasonable apprehension of bias against the appellant-employee?

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Straw v. State of Indiana

- Straw's license to practice law suspended for 180 days without automatic reinstatement by the Indiana Supreme Court Disciplinary Commission
- As a result, Straw's license to practice also suspended in four federal districts
- Straw filed an action alleging that the Commission had taken his property without just compensation

Straw v. State of Indiana

- Straw demanded five million dollars- one million for each suspended license- as a part of his inverse condemnation action
- Trial court found Straw failed to state a claim for inverse condemnation because Straw's license to practice law was not a property right, but rather a permit
- The practice of law is a privilege and once acquired continues during good behavior
- Poll

Straw v. State of Indiana

- Disagreed with finding that holder of a professional license has no property interest whatsoever
- Inverse condemnation requires: (i) a taking or damaging, (ii) of private property, (iii) for public use, (iv) without just compensation being paid, (v) by a government entity that has not instituted formal proceedings
- Claim not established solely by showing that a property interest is taken without payment- must be taken for State use

Straw v. State of Indiana

- Straw identified no State use or action to “transform private property into public property”
- Commission neither conscripted Straw’s labor without compensation nor appropriated intangible property interest for public use
- License suspended as a sanction for professional misconduct, not for a public use but to further public policy
- Straw did not state a claim for inverse condemnation

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Does that holder of a professional license have a property interest in the license?

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Peterson v. College of Psychologists of Ontario

- Applicant psychologist made numerous statements on social media and in public appearances (podcasts, etc.)
- College received complaints about statements being trans-phobic, sexist, racist and/or contrary to clinical understandings of mental health
- Screening committee determined some comments could be inuendo/parody; others were “demeaning, degrading and unprofessional“ and may cause harm

Peterson v. College of Psychologists of Ontario

- Psychologist proposed remediation through personal advisors; screening committee ordered coaching program
- Psychologist sought judicial review on the following basis:
  - Screening committee failed to appropriately balance right to freedom of expression with College's statutory objectives
  - Decision was not justified, transparent and intelligible
- Poll

Peterson v. College of Psychologists of Ontario

- Court upheld decision
  - Regulated professionals do not lose right to free expression, but regulators may moderate that expression
  - Statements risked harm by undermining public trust in profession and raised concerns re: ability to carry out professional responsibilities
  - Comments made “off duty“, but represented himself as psychologist; role lent credibility and increased public trust

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Can the regulator moderate "off duty" comments made by the psychologist in public

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Lauzon v. Ontario

- Justice of the Peace ("JP") wrote newspaper article criticizing bail court and Crown prosecutors
- Three Crowns complained to the JP Review Council
- Following a hearing, JP found to have engaged in judicial misconduct
  - Tone and language in article was inappropriate
  - Majority recommended removal from office / dissent recommended reprimand and 30-day suspension

Lauzon v. Ontario

- JP appealed hearing decision; Court allowed appeal in part
  - Upheld finding on the merits, but overturned sanction and imposed dissent
- Flawed reasoning included the following:
  - Improperly amplified the level of bias JP displayed towards Crowns
  - Failed to consider context of article and take a holistic approach to statements; not even-handed in assessment of evidence

Lauzon v. Ontario

- Reasons must take “fully contextual approach“, including consideration of effect of sanction, aggravating and mitigating factors, and precedent decisions
- Hearing committee correctly identified need to balance right to free expression against public interest
  - Failed to actually engage in that “robust proportionality review“
- Poll

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Is the Canadian approach to balanced / moderated free expression for regulated practitioners different than the approach in your jurisdiction?

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Welter v. MA Board of Registration in Medicine

- Founder and manager of New England Center for Hair Restoration
- Approached by Clark Tan regarding employment. Tan attended medical school in the Philippines, but was not licensed in any U.S. jurisdiction
- After consulting Massachusetts Medical Society, concluded he was permitted to delegate work to Tan as a nonlicensee
- Tan subsequently hired as nonprofessional assistant

Welter v. MA Board of Registration in Medicine

- Center's website included (i) statements indicating multiple doctors and surgeons worked there and (ii) references to "Dr. Welter" and "Dr. Tan" repeatedly in tandem
- Misrepresentations regarding Tan's status included on Center's consent form, Tan's business cards, and staff and patient interactions
- Board initiated action alleging false advertising and deceptive conduct enabling Tan to present himself as a licensed physician

Welter v. MA Board of Registration in Medicine

- Center's website deceptively implied that Tan was a licensed physician, violating the prohibition on advertising that is false, deceptive, or misleading
- Welter's conduct facilitated impression that Tan was a licensed physician, violating the prohibition on practicing medicine deceitfully, or engaging in conduct which has the capacity to deceive or defraud
- Indefinite suspension of Welter's license

Welter v. MA Board of Registration in Medicine

- Welter's position on appeal
  - The false advertising regulation required more than just a claim that is false, deceptive, or misleading. Must also consider the elements of common-law fraud: (i) knowledge and intent to deceive, (ii) materiality, and (iii) reliance to the other party's detriment
  - Suspension of his license without consideration of these additional elements violated his substantive due process right to practice
- Poll

Welter v. MA Board of Registration in Medicine

- Whether advertising is “deceptive or misleading” and conduct “has the capacity to deceive” does not depend on intent, knowledge, materiality, or reliance
- Board may place burden on physicians to ensure advertising is not only technically correct but also not deceptive or misleading
- Board may require physicians to conduct themselves in a manner that does not have the capacity to deceive or defraud

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Should the elements of common law fraud be considered in determining whether the offending advertisements were false, deceptive, or misleading?

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Burgener v. Law Society of Alberta

- Lawyer investigated for significant concerns including breach of confidence, conflict of interest, bribery, extortion, uttering false documents, breach of trust and counselling improper purpose
- Lengthy delay - investigation took 4~ years, hearing commenced 9~ years after complaint; lawyer had health issues in interim, including heart attack, which he attributed in part to ongoing proceedings
- Lawyer was unrepresented and informally raised concerns about delay – panel deferred issue but it was never formally addressed

Burgener v. Law Society of Alberta

- Panel found lawyer engaged in professional misconduct – disbarred
- Lawyer appealed to appeal panel and sought to introduce fresh evidence about delay
  - Request was denied, as was appeal
  - Appeal panel found that delay issue should have been raised at the hearing and it was too late to raise it now
- Lawyer appealed to the Court of Appeal – key issues were whether delay itself amounted to an abuse of process and whether the manner in which delay was addressed (or not addressed) raised fairness concerns

Burgener v. Law Society of Alberta

- Court found insufficient record to make a ruling on whether delay amounted to abuse of process – however, procedural unfairness in how issue was handled at the hearing
  - Clear there was significant delay; lawyer (and others) expressed concerns about impact on ability to participate; lawyer also regularly mentioned stress, impact on life/health
  - Although he was a lawyer, was still self-represented and facing serious allegations, with serious potential consequences including disbarment
  - Raised concerns about delay at outset of hearing; Chair told lawyer it would be addressed later, never told when/how that would occur
- Poll

Burgener v. Law Society of Alberta

- Incumbent on Panel to at least advise lawyer of process it proposed be followed
- Had this occurred, could have been addressed substantively and created record for appellate review
- Court stated that duty on hearing panel was not just to lawyer, but also to public who might lose confidence in regulation of procession

Burgener v. Law Society of Alberta

- Court ultimately not prepared to set aside findings – allegations were serious and had been established
  - New hearing, now 16 years after events, was not in the public interest; Court set aside all costs orders payable by lawyer during the process
- Decision may impose duty on hearing panels to raise delay issues on their own initiative, especially where registrant is unrepresented
- May also be relied on to argue that panels must assist unrepresented parties raising other issues at hearing so that they can be formally addressed

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Did the Panel have a public interest duty to assist the self-represented lawyer in raising his concerns about delay?

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Z, Re

- Family law proceeding between parents of child (“Z”); mother made allegations of domestic abuse against father, who was a social worker
  - Judge conducted fact-finding hearing and made findings of domestic abuse, including that father physically assaulted mother, fractured her right hand and was verbally and emotionally abusive
- Social Work England (“SWE”), regulator for social workers, commenced investigation into father’s fitness to practise after fact finding hearing

Z, Re

- SWE applied for transcript of fact-finding judgment, potentially relevant to investigation – judge refused application
  - Held that Z might be adversely affected by disclosure, may lead to father being suspended or losing job altogether; real risk that father would no longer be able to pay for additional support for Z
  - Also likely to increase animosity between parents, which was not in Z's welfare interests; need to maintain Z's confidentiality; in her best interests for disclosure to be kept to a minimum
  - Public interest in disclosure outweighed by serious harm likely to occur from disclosure, and SWE could conduct its investigation without disclosure of judgment

Z, Re

- Mother sought leave to appeal decision; granted on two grounds:
  - Judge failed to balance public interest in disclosure to SWE in order for it to conduct further risk assessment of father and ensure father did not pose risk to the public; and
  - Judge was wrong to find that SWE could conduct its own investigation without disclosure of fact-finding judgment
- Mother was represented by counsel on appeal, while father was unrepresented; SWE was invited to intervene
- Poll

Z, Re

- Appeal was allowed
- Court found judge failed to have regard to public interest in disclosing fact-finding judgment to SWE in circumstances where it is highly desirable for various agencies concerned with welfare of children and vulnerable adults to cooperate
- Judge also erred by not inviting SWE to provide submissions prior to making decision; while SWE could continue its investigation, it would have to rely on mother and father for information, which might have led them to be in contempt of court given publication ban

Z, Re

- Rather than remitting it back to the judge, decided judgment should be disclosed to SWE
- Acknowledged that may have negative impact on Z's welfare, but "financial concerns do not tip the balance towards a conclusion that Z would be adversely affected by disclosure in a serious way"
- It did, however, state that judgment would be redacted to remove material which might cause Z to be identified, including father's name
- SWE would also be prohibited from publishing any part of judgment on its website

Z, Re

- Court noted in *obiter* that disclosure to an employer should not be made for the following reasons:
  - Disclosure to regulatory body will trigger process with well-established protections for individual whose fitness to practise is under investigation; Court can be confident that disclosure will be safeguarded
  - Same protections are unlikely to be replicated for every employer
  - Additionally, disclosure to regulatory body will also impose obligation on individual to inform employer and will trigger investigation in which contact will be made very quickly with an employer – employers are likely to be informed as part of process which protects rights of those whose fitness to practise is under scrutiny

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Was Social Work England entitled to disclosure of the transcript of the fact-finding judgement?

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Clawson v. CA Board of Nursing

- Clawson was a registered nurse and a certified legal nurse consultant
- After the unexpected death of an owner of a licensed residential care facility for the elderly (RCFE), Clawson hired to assess each resident and recommend a new facility
- Clawson, assisted by the facility's Interim Administrator, performed assessment of an 83-year-old resident

Clawson v. CA Board of Nursing

- Completed a Resident Appraisal Form and a Needs and Services Plan using “RN” designation and certifying that skilled nursing care was not needed
- Caregivers from new facility found resident in significant pain and deteriorated physical condition. Resident subsequently died after several weeks in the hospital
- When interviewed by facility’s regulator, Clawson told investigator he performed a “head-to-toe” assessment with the Interim Administrator performing tasks at his direction

Clawson v. CA Board of Nursing

- During subsequent investigation by BON, Clawson denied performing the assessment stating the Interim Administrator was the one in charge; not acting as a nurse but rather only as a "scribe"
- Board- gross negligence in connection with appraisal
- Unprofessional conduct
  - Nursing functions in connection with the appraisal
  - Not being truthful with the BON investigator regarding the care provided

Clawson v. CA Board of Nursing

- Clawson's positions on appeal:
  - Performance of appraisal was not a nursing function
  - BON failed to assert that he violated relevant statutes or regulations
  - He was under no obligation to render nursing services to the resident because no nurse-patient relationship existed
  - The BON did not have the authority to discipline him for dishonesty during the investigation
- Poll

Clawson v. CA Board of Nursing

- Clawson engaged in a usual nursing function and the proper standard was applied
  - Examples of nursing function include: (i) signed both forms using his "RN" designation, (ii) described the resident using scientific and technical terms, and (iii) in performing the appraisal, Clawson observed the resident for symptoms and evaluated her condition
- Clawson disciplined for gross negligence and unprofessional conduct while engaged in nursing functions
- Clawson's dishonesty during the investigation constitutes unprofessional conduct

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Did Clawson's performance of the Resident Appraisal Form amount to a nursing function?

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Medical Board of Australia v. Conron

- Allegations made against 81-year-old general physician who had “difficulty adapting” to modern requirements
  - Struggled with digital record-keeping and keeping continuing education requirements up to date
  - Concerns raised by four physicians who worked at clinic
- Clinic management raised concerns with physician and Board; physician responded by bringing forward his retirement date and surrendering his registration
- Poll

Medical Board of Australia v. Conron

- Allegations related to self-treatment, treatment of family member, inadequate patient care and record-keeping
  - Treated family member for regular prescriptions (including psychotropic drugs) and chronic conditions, despite patient having GP
  - Erred by recommending against pregnant patient having whooping cough vaccine because had not kept pace with immunisation guidelines
  - Conceded to not being active enough in follow up on patient with deep vein thrombosis, who was subsequently admitted to intensive care
  - Prescribing permit had expired

Medical Board of Australia v. Conron

- Decision to retire demonstrated insight; reprimanded and issued cautionary words to profession as a whole:

> "It is an illustration of the difficulties which older medical practitioners can encounter in continuing to practise competently, and in continuously adapting and up-skilling in order to keep abreast with expected professional standards, regulatory requirements and changing technology. It highlights the need for such practitioners, and those around them, thoughtfully and insightfully, to consider the question of when to retire from active medical practice."

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Does the physician's inability to maintain technological currency impact his entitlement to continue to practise?

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