

## ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

**Citation:** *College of Physicians and Surgeons of Ontario v. Ali*, 2021 ONPSDT 49

**Date:** December 9, 2021

**Tribunal File No.:** 19-001-I

### **BETWEEN:**

College of Physicians and Surgeons of Ontario

- and -

Dr. Syed Nasir Ali

### **FINDING REASONS**

**Heard:** November 9-13, 2020, February 24-26, 2021, March 8, 9 and 12, 2021 and April 13 and 26, 2021, by videoconference

### **Panel:**

Dr. Paul Garfinkel (chair)  
Dr. Heather Badalato  
Dr. Philip Berger  
Mr. Jose Cordeiro  
Ms. Linda Robbins

### **Appearances:**

Ms. Kathleen Heap and Ms. Penelope Ng, for the College  
Mr. Wayne Brynaert, Ms. Anne Tardif and Mr. Daniel Chomski, for Dr. Ali  
Ms. Jennifer McAleer, Independent Legal Counsel

### **RESTRICTION ON PUBLICATION**

The Tribunal ordered, under ss. 45-47 of the Health Professions Procedural Code, that no one may publish or broadcast the names and any information that could disclose the identity of any patients or the complainant referred to during the Tribunal hearing or in any documents filed with the Tribunal. There may be significant fines for breaching this order.

## Introduction

- [1] The College alleges that Dr. Ali committed professional misconduct in two ways: first, by sexually assaulting the complainant, a colleague, in 1999, and second, by impeding or harming her career in the hospital where they both worked (the Hospital) in the years following and acting in a conflict of interest. Dr. Ali denies that the alleged assault took place, although he says he and the complainant had a sexual relationship in the early 1990s. The complainant denies that there was a consensual sexual relationship at any time. Dr. Ali also denies that he improperly interfered with the complainant's career.
  
- [2] Dr. Ali and the complainant were friends and colleagues in the Department of Medicine at the Hospital. The complainant alleged that Dr. Ali asked to see her with some urgency in June 1999. Because she was already at home, she asked him to come to her place, where Dr. Ali wanted her to complete a form for an insurance policy on his behalf. She alleges that after he arrived, he removed his clothes and assaulted her. She alleges that following the assault he engaged in unprofessional, harassing behaviour towards her by, among other things, excluding her from the call schedule and organizing other staff to be against her and by participating in decisions about her privileges in the hospital while he had a conflict of interest, having assaulted her.
  
- [3] The College alleges that these actions were professional misconduct under O. Reg. 856/93, because they were conduct unbecoming a physician (s. 1(1)(34)) and/or acts or omissions relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional. (s. 1(1)(33))
  
- [4] For the reasons set out below, we find that Dr. Ali committed an act of professional misconduct in that he engaged in conduct unbecoming a physician and conduct that members of the profession would find disgraceful, dishonourable or unprofessional in sexually assaulting the complainant on June 22, 1999.
  
- [5] We also find that Dr. Ali engaged in professional misconduct in that members of the profession would find it disgraceful, dishonourable or unprofessional that he participated in the evaluation of the complainant's privileges after he had sexually

assaulted her. His very presence at meetings at which the complainant's privileges were discussed was unprofessional.

### **Allegations**

[6] The College alleges that Dr. Ali engaged in professional misconduct on the basis that he engaged in:

- i. conduct unbecoming a physician; and/or
- ii. an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

[7] Dr. Ali denied the allegations in the Notice of Hearing.

### **Issues**

1. Did Dr. Ali sexually assault the complainant in 1999?
  2. Did Dr. Ali engage in professional misconduct in how he dealt with the complainant while Medical Director of the Hospital after the alleged assault?
- [8] The burden is on the College to prove the allegations on a balance of probabilities; that is, is it more likely than not that the allegations have been made out. The evidence must be clear, convincing and cogent in order to satisfy the balance of probabilities test. *F.H. v. McDougall*, 2008 SCC 53. There is no burden on Dr. Ali to disprove the allegations.

### **Prior Civil Decision**

[9] The complainant initiated a civil action against Dr. Ali and the Hospital administration. Against Dr Ali, she sought damages on the basis of physical and sexual assault. The complainant claimed against the Hospital administration for damages for inducing breach of contract, harassment, discrimination, breach of good-faith obligations and intentional interference with economic relations. On August 12, 2016, the Hospital administration and the plaintiff entered into a settlement, the terms of which are confidential. A civil trial was held over 12 days in October and November 2016. The trial dealt only with whether Dr. Ali sexually assaulted the complainant on June 22, 1999, and if so, the amount of damages.

[10] At the civil trial, Dr. Ali denied that he sexually assaulted the complainant on June 22, 1999, but refused to provide a DNA sample. He also alleged that the two had had a consensual sexual relationship in 1992-1993 and submitted that the timing and circumstances of the complainant's disclosure and decision to come forward with her allegation of sexual assault were an attempt to silence and prevent his involvement in Hospital proceedings involving the complainant's future at the Hospital. The complainant denied any prior consensual relationship and testified that she wanted Dr. Ali removed from the privilege dispute because she felt that the man who had sexually assaulted her continued to harass her in her place of work, and she wanted "it" to stop.

[11] The Honourable Justice Johanne Morissette of the Superior Court of Justice found that the complainant had proved on a balance of probabilities that the sexual assault occurred. Justice Morissette made the following findings and conclusions with respect to the alleged assault:

- The documentary evidence from hospital records regarding times from patient charts and staff meetings support both versions of events equally.
- The complainant's evidence of the assault was consistent over the 15 years and was corroborated by witnesses.
- The fact that the complainant did not provide much detail of the event to a friend does not alter that she told that friend within a short time that some kind of sexual assault occurred. Her evidence does not fit with the defence theory that the assault was fabricated after the complainant began having issues with her privileges.
- Dr. Ali claimed he went to the complainant's home to complete an urgent insurance form, but he admitted he never submitted it.
- Dr. Ali's late-surfacing contention of an affair and explanation for this late disclosure does not diminish the complainant's credibility about the sexual assault. Rather, it undermines Dr. Ali's credibility.
- In assessing all the witnesses' evidence, Dr. Ali's evidence, the DNA results and adverse inferences drawn by Dr. Ali's failure to exclude himself from a DNA match, the Court found the complainant's evidence which has been quite consistent on the details of the sexual assault rings more true.

[12] Justice Morissette made the following findings and conclusions with respect to the timing of the allegation and the hospital privileges dispute:

- There were issues with the complainant's privileges but they were not a result of Dr. Ali's involvement.
- She was away from [the City] often (due to travel to the US) which created consternation for the administration.
- Her not being placed on the on-call schedule (prepared by Dr. Ali) in 2000 did not have to do with workplace harassment.
  - She only raised this issue in April 2000.
  - The reasonable inference drawn is that she was content with not being on the schedule because she was maintaining her practice in the United States and uncertain about her future at the Hospital.
  - She had not expressed any interest in being promoted to active staff until September 2000.
  - A reasonable inference can be made that there was nothing unusual about Dr. Ali requesting the complainant's schedule and availability.
- The fact that the complainant had privilege issues at the Hospital does not, in and of itself, support a finding that she fabricated the sexual assault allegations in order to gain some leverage over Dr. Ali.
- The evidence demonstrates the complainant wanted Dr. Ali removed from any decision-making powers.
- The fact that she sought his removal from an authoritative position demonstrates her wish to have her aggressor removed from any position of power over her.
- The court was not persuaded that Dr. Ali was attempting to exercise control or power over the complainant through his position as Medical Director.
- The timing of the allegations is irrelevant to the question of whether a sexual assault in fact occurred or not.

[13] The College relies on Justice Morissette's April 5, 2017 decision and the Ontario Court of Appeal's August 7, 2018 dismissal of Dr. Ali's appeal on the assessment of damages for the following purposes:

- a) as evidence of the factual findings and conclusions reached by Justice Morissette; and
- b) to provide context for the hearing panel with respect to the history of the allegations and timing of the complainant's complaint to the College.

[14] *British Columbia (Attorney General) v. Malik*, 2011 SCC 18 is the leading case on the admissibility and use of findings from a civil trial. At paragraphs 7 and 46 of *Malik*, the Supreme Court of Canada ruled that a judgment in a prior civil case is admissible (if relevant) as evidence in subsequent proceedings provided (i) the parties are the same or were themselves participants in the prior proceedings on (ii) similar or related issues. The Supreme Court emphasized the public interest rationale for admitting prior decisions, including avoiding possible inconsistent results. The court found that the weight and significance to be given to the prior civil judgment will depend on the circumstances of each case. Further, the prejudiced party will have an opportunity to lead evidence to contradict prior findings or conclusions or lessen their weight.

[15] Another panel of this Tribunal dismissed a motion by Dr. Ali to exclude the prior decisions. The parties agree, based on that motion decision, that the prior decisions are admissible. They differ, however, with respect to the weight to be given to the factual findings and conclusions reached by Justice Morissette.

[16] The College took the position that significant probative weight ought to be accorded to many of Justice Morissette's factual findings given that Justice Morissette was deciding the same issue (whether Dr. Ali sexually assaulted the complainant on June 22, 1999), Dr. Ali was a party in the civil trial and Justice Morissette's decision was made on the same standard of proof (balance of probabilities). The College submits that Justice Morissette's findings are *prima facie* evidence of the facts and conclusions it seeks to have the Tribunal make in this case. The defence takes the position that it is up to the Tribunal to decide the weight given to the findings and conclusions. Dr. Ali submits that both sides have led evidence to contradict or explain some of the trial judge's findings and conclusions.

[17] Justice Morissette's findings and conclusions are not binding on us. We agree, however, that the court's findings must be weighed together with all of the other evidence. Where evidence before us was not led at the civil trial, we have

highlighted that evidence in our reasons and explained to what extent, if any, it impacted the weight given to Justice Morissette's findings.

### **Credibility and Reliability**

- [18] Credibility and reliability are two distinct concepts in considering the evidence of witnesses. Credibility relates to the honesty of a witness's evidence. Reliability has to do with the accuracy of a witness's evidence. A witness can be credible, yet unreliable. The fact that a witness believes what he or she is saying does not make the witness's account reliable. If a witness, however, is not credible on a point, then his or her evidence is necessarily unreliable on that point.
- [19] All, part or none of a witness's evidence can be accepted. That is, evidence may be reliable or credible on one point, while at the same time the same witness may be unreliable or not credible on another point.

### Special Considerations in Assessing Credibility and Reliability

#### *Demeanour*

- [20] Demeanour refers to the non-verbal cues given by a witness while testifying, including voice tone, facial expressions, body language and other cues such as the manner of testifying, and the witness's attitude while testifying. Demeanour can be a relevant factor in assessing credibility. However, demeanour alone is a notoriously unreliable predictor of the accuracy of the evidence of a witness: *Law Society of Upper Canada v. Neinstein*, 2010 ONCA 193 at para. 66.

#### *Sexual Misconduct Myths*

- [21] Sexual misconduct cases must be decided without resorting to stereotyped assumptions about how victims are expected to behave. Whether it is a delay in disclosing the misconduct or behaving in a way other than what the panel might expect or consider appropriate, the law is clear that no adverse inference should be drawn from a victim's response or reaction to sexual abuse. As stated in *R. v. D.D.*, 2000 SCC 43 at para. 65:

...there is no inviolable rule how people who are the victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many

and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case.

### *Inconsistencies*

- [22] One valuable means of assessing witness credibility is to examine the consistency between what the witness said at the hearing and what he or she has said on other occasions, whether or not under oath: *R. v. G. (M.)* (1994), 93 C.C.C. (3d) 347 (ON CA), at p. 354, leave to appeal to S.C.C. refused, [1994] S.C.C.A. No. 390.

Inconsistencies may emerge in a witness's testimony at trial, or between their trial testimony and statements previously given. Inconsistencies may also emerge from things said differently at different times, or from omitting to refer to certain events at one time while referring to them on other occasions. Inconsistencies vary in their nature and importance. Some concern material issues, others peripheral subjects. Where an inconsistency involves something material about which an honest witness is unlikely to be mistaken, the inconsistency may demonstrate a carelessness with the truth about which the trier of fact should be concerned: *R. v. G. (M.)* at p. 354.

## **Issue 1: Did Dr. Ali Sexually Assault the Complainant**

### Meeting and Early Relationship

- [23] The complainant and Dr. Ali's evidence on how they met was very similar. They met in 1991 after an exam in Toronto. She said he approached her to discuss the exam questions. They chatted for a bit and he said he had to walk to the subway. She offered him a ride. She described him as a little hesitant, but he accepted. Her husband was driving. They exchanged phone numbers. Dr. Ali said he was curious about her because they were both married to Caucasians and they had other similarities.
- [24] Dr. Ali said they had a conversation soon after that, and they discussed when they were going to take the second part of the exam. He said that one of the times she called he introduced her to his wife over the phone. He said initially the relationship focused on her residency and their careers but became more personal. She said they developed a friendship while both were married. She first met Dr. Ali's wife at their home when she was invited for a dinner sometime between 1991 and 1993.



[25] She said they would make jokes, were generally friendly and there was a sense of humour on both sides. One day they took their children to a park. She said that she thought at the time she was getting more attention from him than expected. He would phone her in the morning and she would get woken up after working late. She said that they would discuss casual “everyday things,” but admitted she felt he may have had romantic feelings for her. The complainant said Dr. Ali would ask her what her career plans were. The complainant said she always indicated she wanted to work in a smaller city in Ontario (the City).

#### Alleged Affair

[26] Dr. Ali said they saw each other several times in 1991. They went for walks and for something to eat and drink a few times that year. He said he met with the complainant with an old friend, two or three times. Dr. Ali testified that he and the complainant had a sexual relationship that started in February 1992 and ended in October or November of 1992.

[27] Dr. Ali testified that they ended up having a sexual encounter in February 1992 when his wife was on vacation with their son. Dr. Ali said he felt very guilty and remorseful following this. Dr. Ali and the complainant continued to talk and had sex again at her home. Overall, Dr. Ali said they had sex approximately 10-12 times. He said the last time they had sex was in late 1992.

[28] Dr. Ali testified that they had sex three or four times at her home in the study that was made up as a bedroom. There were several carpets in the room “basically thrown around.” He described the carpets as “Pakistani rugs” and stated that “there was nothing which stands out about them. I mean we all had those kind of rugs in our houses.” Some of the rugs were sitting around the sides of the room and some were spread on the floor. He testified that the bed was set up for guests and had “a lot of linen and so forth,” so they always ended up having sex on the carpet on the floor. He said that the complainant said they didn’t need to worry about her getting pregnant. Dr. Ali thought she was using contraception.

[29] The complainant denies that she and Dr. Ali ever had a consensual romantic or sexual relationship.

### Alleged Pregnancy and the Hospital Encounter

- [30] Dr. Ali said that the complainant called him in January 1993 and told him she was pregnant. Dr. Ali said that he thought she was taking precautions. Dr. Ali was happy to talk to her about it but said it was really problematic for him. He said he would respect whatever she decided and to let him know.
- [31] Dr. Ali said he was frightened about what the pregnancy would do to their lives, but the complainant didn't seem very concerned and seemed excited about it. Dr. Ali told her to let him know what she decided to do about the pregnancy. Dr. Ali testified that he did not hear back from the complainant until April or May of 1993 when she asked to come see him at a hospital in Toronto. They met around 2:00 pm in the hospital doctors' lounge and she was quite upset. Dr. Ali said she told him that she terminated the pregnancy because Dr. Ali did not care.
- [32] They moved to the call room and the complainant tried to discuss where their relationship was going in the future. Dr. Ali said he was on call and had to go; she pleaded with him not to leave and she started kissing him. They were touching each other sexually and Dr. Ali said he tried to become aroused but was not able to.
- [33] Dr. Ali said that he had to go and answer a hospital page, so they planned to talk later. The complainant left and returned to the hospital around 4:30 or 5:00 pm, when they went for a drive to a parkette to talk. Dr. Ali told her he didn't think their relationship could go anywhere but they could remain friends. She brought him back to the hospital and he picked up his car and went home.
- [34] According to Dr. Ali, this was the last romantic or sexual exchange he and the complainant had. Dr. Ali admitted he didn't mention the conversation about her terminating the pregnancy in the civil trial. This hearing is the first time Dr. Ali has testified that there was ever a pregnancy.
- [35] The complainant denies that she was ever pregnant other than with her daughter. As indicated above, she denies ever having consensual intercourse with Dr. Ali.

### Dr. Ali's Friend's Evidence

- [36] Dr. Ali's Friend is an orthopedic surgeon practising in Pakistan. In 1991 he completed a fellowship in Toronto. Dr. Ali's Friend said that he and Dr. Ali were "very close friends" in their college days and were in the same group in the same medical school. He stated that Dr. Ali lived in his house in London, UK for five or six months. Dr. Ali's Friend said that he and Dr. Ali got together for lunches in 1991 in Toronto.
- [37] Dr. Ali's Friend said he met the complainant when she and Dr. Ali came to his house in Toronto after which they all drove together to a local restaurant. Dr. Ali was driving with the complainant in the front seat and that they were "fairly close," "chuckling and laughing."
- [38] Dr. Ali's Friend gathered that Dr. Ali and the complainant were "having company together." This meant, according to Dr. Ali's Friend, that they were not like friends, "they knew each other very well" and it did not seem like they were in a "working relationship." Dr. Ali's Friend said that he observed "they touched each other," and "put a finger...or a hand, like on the shoulder." Dr. Ali's Friend said he observed finger touching and referred to "conjugal meetings" "like they knew each other very well."
- [39] When asked if he spoke with the complainant after the outing, Dr. Ali's Friend said he might have had a conversation with her once or twice on the telephone but was unsure. He said that he could not really remember. He testified that he may have spoken to her in 1994 when he was back in Toronto and that "she gave me a call." During the phone call with the complainant in the fall of 1994, she told him that she wanted to marry Dr. Ali. Dr. Ali's Friend said he was taken aback.
- [40] Some time after this conversation with the complainant, Dr. Ali's Friend spoke to Dr. Ali on the phone and thought Dr. Ali was being evasive. He had no further conversations with Dr. Ali about the complainant's phone call. When Dr. Ali's Friend was asked if he had spoken to Dr. Ali since the fall of 1994, Dr. Ali's Friend said he spoke to Dr. Ali a couple of times but could not remember when.
- [41] On cross-examination Dr. Ali's Friend stated that Dr. Ali is friends with his family. Dr. Ali's Friend explained that in August 2020 he first learned about the allegations

against Dr. Ali from his brother and then from newspaper reports. Asked if he was aware that an allegation of rape could have serious repercussions for a doctor, Dr. Ali's Friend answered that he "can't make a judgement," that he "can't comment on it but if you want me to comment, I think these are false allegations."

[42] Dr. Ali's Friend stated he was willingly testifying in these proceedings. When asked if he was doing it to support his old friend Dr. Ali, Dr. Ali's Friend answered that he is "not supporting anyone" and that he did not want to "say anything more which may jeopardize [the complainant] or Dr. Ali."

[43] Dr. Ali's Friend said that he had discussions with Dr. Ali since the fall of 1994 but could not remember how many times and explained that he never spoke about the complainant. He stated that the last time he spoke with Dr. Ali was "several months or years ago."

[44] Dr. Ali's Friend was surprised and shocked at the sexual assault allegation, gave his observations on Dr. Ali's relationships with women and found it incredible that the complainant would have driven Dr. Ali anywhere after the alleged assault. He further stated that "thinking of rape and Dr. Nasir doing that, it's impossible."

[45] Dr. Ali's Friend said he was not confused about meeting the complainant and that "I can't never forget." He stated that the complainant was wearing a crimson shirt. He said that due to a recent medical condition, he forgets recent events but not past events. The complainant called him during the time he was in Pakistan and that he does not remember the exact words but that the "events are definitely not forgotten." He later stated that he was in Toronto when the complainant called him.

[46] The complainant testified that she does not know Dr. Ali's Friend. She denied meeting a friend of Dr. Ali's in Toronto who was Pakistani and who was an orthopedic surgeon. She denied having dinner with Dr. Ali and Dr. Ali's Friend on Gerrard Street and she denied touching Dr. Ali in the car on the way to the restaurant. The complainant denied calling Dr. Ali's Friend in 1993. It was put to her that she told Dr. Ali's Friend on that call that she was pregnant with Dr. Ali's child, but we note that this was not Dr. Ali's Friend's evidence. He said nothing about the complainant disclosing she was pregnant.

- [47] Dr. Ali agreed that they were close friends at one point. Dr. Ali stated that at least twice, if not three times, in 1991 he and the complainant met with him. Dr. Ali testified that he, the complainant and his Friend may have had drinks on one occasion and had dinner once at a Gerrard Street restaurant that had Pakistani cooking.
- [48] Dr. Ali testified that his Friend called him in February 1993 and asked him about the complainant's alleged pregnancy, after which Dr. Ali said that he hung up the phone and has not spoken to his Friend since.
- [49] Dr. Ali said this hearing was the first time he had mentioned this Friend or any outings with the complainant and him. When asked why he had not mentioned this Friend during the civil proceedings, Dr. Ali advised that it was only after his Friend's brother came to him and reported that he had discussed the complainant's allegation with his Friend that Dr. Ali put his lawyers in touch with him.

#### The 1992 Insurance Form

- [50] Both Dr. Ali and the complainant testified about an insurance form that Dr. Ali asked the complainant to complete on his behalf on October 22, 1992. This form would have been completed during the time Dr. Ali alleges their sexual relationship was occurring.
- [51] The complainant testified that she had invited Dr. Ali and his wife over for dinner and he brought the insurance form with him on October 22, 1992. Dr. Ali had completed the form already, and the form required a physical exam. The complainant said she never examined Dr. Ali in any clinic or office. She denied taking his blood pressure. She said she signed the form in the presence of his wife and son, and her husband was also present at the dinner. The complainant said in her culture they usually eat later dinners and she was sure the gathering was in the evening. She said she wrote her home address on the form because that's where they were when she signed the form. The complainant agreed the signature on the form was in her handwriting and agreed that it appeared she signed the form at 10:00 am. She said Dr. Ali must have asked her to indicate that time instead of the actual time when she signed it at the dinner. She said that at the time it didn't make a difference to her what time was on the form, ethically or otherwise, and she was trying to accommodate a friend. The complainant denied that the form was filled out

at her Danforth office at 10:00 am on October 22, 1999. She also said it may have been a possibility she circled 'AM' instead of 'MD' beside her name.

- [52] Dr. Ali said that he had discussed with the complainant needing an insurance form completed on his behalf prior to October 22, 1992. The complainant asked him to let her know when he needed it done. Dr. Ali said he visited the complainant's clinic in the morning of October 22, 1992. He said he asked her to fill it out on his behalf because he didn't have a physician. Dr. Ali said the complainant checked his blood pressure and listened to his chest and lungs. Dr. Ali said no urinalysis was completed in the clinic.

#### 1994 Application and Locum

- [53] In late 1992, the complainant moved to the United States to pursue a fellowship in infectious diseases. Prior to her move to the US, the complainant only had a primary care licence and had been working in emergency rooms around Ontario, including at the Hospital. She said that after she moved to the US, she continued to keep in touch with Dr. Ali by phone and they remained friends.
- [54] Dr. Ali said he moved to the City in September 1993 because the Hospital was advertising for a cardiology position. Dr. Ali said that he and the complainant had a conversation after he moved to the City and she accused him of taking her position. The complainant agreed that she was upset by his move to the City because he knew she wanted to work at the Hospital and she felt Dr. Ali took her position.
- [55] He said he heard from her again in 1994; he said he thought she was going to be in the US for a while, but she called him from another town in Ontario where she had taken a locum. The complainant said she thinks they met a few more times in 1994 when she returned to the City and attended a dinner in 1994.
- [56] The complainant said Dr. Ali encouraged her to apply for an internist position at the Hospital in 1994. She said Dr. Ali submitted her application or she did to the chief of staff, and he (Dr. Ali) followed the application through the process. Dr. Ali testified that the complainant applied for a long-term position at the Hospital, which surprised him because he thought she wanted a short-term role. At the time, there was no permanent position available but she was able to get a locum towards the end of 1994. He agreed that he was involved with her application. He said that he

asked the medical staff office for an application, she filled it in and he took it and gave it to the medical staff office. The complainant testified that she “was very disappointed about being rejected” for the internist position.

#### 1998 Application to the Hospital

- [57] In 1998, the complainant applied successfully for an internist position at the Hospital. Dr. Ali said he didn’t know about the complainant’s 1998 application to the Hospital until it was forwarded along with the other applications. Dr. Ali was part of both the committee reviewing the applications and the interview panel. He participated in her interview. He testified that he did not disclose his previous sexual relationship with her because he did not see it as relevant or a conflict of interest because their relationship had ended. The complainant got the position. Dr. Ali wrote to the complainant on May 22, 1998, congratulating her and asking her about her availability for locum work in the summer when she had locum privileges. She claimed the interviewers were aware of, and flexible about, her intention to keep her US position. She said that the subject of her leaving the US was not discussed.
- [58] On October 29, 1998, she was granted associate staff privileges at the Hospital. She moved to the City on January 19, 1999, into a new home she purchased. The complainant said Dr. Ali visited her home in January 1999 after she moved. She said the only other time he was there was on the day of the alleged sexual assault.
- [59] The complainant reported that when she started as staff in January of 1999, there were no issues between her and Dr. Ali, and described him as supportive of several medical initiatives that she wanted to implement such as Troponin testing (for heart disease) and a stroke protocol. The complainant described herself and Dr. Ali as “good friends” from January to June 1999, and she denied any complaints or concerns with respect to her work between those dates. As will be described below, the complainant did have issues with outstanding charts and meeting attendance during this time period.

## The June 22, 1999 Insurance Form and the Alleged Sexual Assault

### *The Complainant's evidence*

- [60] The complainant alleges that Dr. Ali sexually assaulted her when he came to her home to ask her to fill out an insurance form on his behalf. The complainant testified that she was working at another clinic on June 22, 1999 and her secretary told her Dr. Ali had called. She added that he may have contacted her directly.
- [61] The complainant said she was reluctant to call him back because she was a little upset about "political things." Since he was the director, she decided to call him back. She believed this was a little after 5:00 pm. Dr. Ali said that he urgently needed to see her. She said she asked him why and he did not disclose the reason over the phone. She thought he arrived within 15 minutes, which was around 5:30 pm.
- [62] The complainant said Dr. Ali removed his shirt as soon as he arrived because he said he was hot. He presented an insurance form which was partially filled out in his handwriting. She denied doing any physical exam or having any medical equipment at her home to perform the physical exam required by the form. She said she signed and filled out the date and time on the form. She thought it was probably 5:30 pm or later despite having written 5:20 pm on the form. She said that the two sat on a sofa with a table in front of it that she used to complete the form.
- [63] After completing the form, Dr. Ali got up from the sofa to go to the washroom. She went to plug in the air conditioner and turned around to see Dr. Ali standing in the doorway naked. She tried to leave through the door, but he blocked it, and grabbed and tripped her by putting his leg behind her leg so she would fall. He caught her and lowered her to the ground. He then said "give me mouth" and put his penis in her face. She covered her face with both hands. Then he pulled down her pants, pushed up her legs and inserted his erect penis in her vagina. She screamed and pushed him away, and he rolled over to the right. She pulled her clothes on and left the room for the kitchen.
- [64] The complainant said that when she got up, Dr. Ali was masturbating just to the right of where she was, either on the rug or near the rug. Afterwards, Dr. Ali said



there was a patient at the Hospital who was asking to see her. When she asked him why she was not called directly, he did not answer.

- [65] Dr. Ali asked if she could give him a ride back to the Hospital and she did. She said the whole encounter from when he arrived to dropping him off at the Hospital took about 30 minutes. She then said that she returned home and tried to process the events. She said that she later remembered there was a patient she needed to see at the Hospital, so she changed and went to see the patient a few hours later. The complainant said that she didn't know what happened to the insurance form after Dr. Ali left her home. She thought Dr. Ali had the form rolled up in his hand and he was carrying it with him when she drove him to the Hospital that evening. She concluded it was never submitted because she did not receive any correspondence afterwards.

*Dr. Ali's evidence*

- [66] Dr. Ali said that he phoned the complainant the day before requesting to see her so she could fill out an insurance form for him on June 21, 1999. The complainant suggested he stop by her office the next day around 4:30 pm. She then called him the next day and asked him to come to her home instead. Dr. Ali said that the complainant went upstairs and came down with a small hand-held blood pressure machine and a stethoscope.
- [67] The complainant proceeded to do a physical exam because the form required one, which included checking his pulse, blood pressure and listening to his chest with a stethoscope to auscultate his heart and lungs.
- [68] Dr. Ali unbuttoned the first few buttons of his shirt. The complainant wanted to examine his abdomen. He said he was sitting and leaned back so she could examine it. He said she then put her hand on his crotch and said, "I want you now." Dr. Ali said, "I must leave," and grabbed his jacket to walk out.
- [69] Dr. Ali said he did not take the insurance form with him. Dr. Ali said he got the insurance form back on the morning of June 23, 1999. He went to the EKG department at the Hospital and in the tray where his EKGs would be placed he saw a sealed envelope in the complainant's writing with a sticky note that said "sorry."

[70] Dr. Ali did not send in the form. He did not see any reason to use this form for insurance purposes and was communicating with another insurance company about alternative options. He eventually decided he was not going to purchase the insurance and never submitted the form.

*The Complainant's Friend's evidence*

[71] The complainant met her Friend through the Hospital. They enjoyed each other's company and would go for coffee or dinner. The Complainant's Friend had known Dr. Ali, but only in a professional capacity.

[72] The complainant's Friend reported that either on the evening of the alleged assault, or the day after, she dropped by to visit and saw that the complainant was not herself. She asked if something was wrong. According to the complainant's Friend, the complainant disclosed an incident between her and Dr. Ali. The complainant said she was embarrassed and speaking about it was against her culture. After the complainant's Friend reassured the complainant that she could confide in her, the complainant told her that Dr. Ali had come to her house and wanted her to sign an insurance form. She also told her that she left the room for a bit, and when she returned Dr. Ali was naked.

[73] The complainant's Friend was not clear on details of her discussion with the complainant. She testified:

Q. Do you remember anything else about what she told you?

A. No, just that he was naked and... yes, to be honest with you, that is the only thing I can really remember to be honest.

[74] The complainant's Friend described the complainant to be broken up, upset and embarrassed while she told her about the incident.

[75] The complainant's Friend was asked if she recalled being interviewed by a lawyer acting for the complainant in March of 2001 about what the complainant had told her. She recalled the interview, but not the name of the lawyer or what she told the lawyer.

### *The Colleague's evidence*

- [76] The complainant's Colleague is now working at a private office; she worked at the Hospital in the Department of Internal Medicine from 1999 until the summer of 2001. The complainant was a colleague in the Department of Internal Medicine and they were friends. They would go for coffee or lunch and discuss cases and general events.
- [77] The Colleague testified that the complainant told her that Dr. Ali had come to her house and "acted inappropriately." The complainant told her there was semen left on the carpet. The Colleague could not remember the details of what the complainant had told her but testified, "I know that she felt she was assaulted." The Colleague testified that the complainant appeared distraught and upset and uncertain as to what she should do. The Colleague testified that she and the complainant discussed the incident several times. The Colleague could not recall when the complainant first mentioned the incident to her but believes she was first told about the incident in 2000.
- [78] The Colleague testified that the complainant wanted to have semen analyzed. The complainant and the Colleague made a plan to use Dr. Ali's coffee cup from a department meeting to obtain a DNA sample. The Colleague's role was to watch the cup through the meeting. Dr. Ali took some coffee and she watched him closely. They stayed after others left and the complainant took the cup. No one else had touched the cup or drunk from it; they put it in a bag to submit for analysis.

### *Catherine Patterson's evidence*

- [79] Ms. Patterson is a lawyer who, at the relevant time, was working at McCarthy Tétrault. The complainant had engaged the law firm in late 2000 to aid in obtaining full privileges at the Hospital. Ms. Patterson became involved in this case in February of 2001. She met the complainant in March of that year. At the time, the complainant told Ms. Patterson of the sexual assault.
- [80] About a week and a half after the complainant told Ms. Patterson about the sexual assault, Ms. Patterson went to the complainant's home with a colleague. Ms. Patterson felt the rug where the complainant thought Dr. Ali had ejaculated and

believed that part of the carpet had a different texture. Ms. Patterson recommended a lab, Maxxam, where the complainant could have the rug tested for DNA.

- [81] After receiving a report from Maxxam that there was sperm on the rug, Ms. Patterson suggested to the complainant that, if the complainant and a witness could obtain a coffee mug or water glass that belonged to Dr. Ali, they could take it to Maxxam to connect Dr. Ali with the DNA on the rug.
- [82] Ms. Patterson reported that the complainant did not initially tell her that penetration had occurred during the assault but did admit this after receiving the Maxxam report and learning there were female cells on the rug. The complainant explained she had withheld this information previously because she did not want it to get back to her husband and also said she was ashamed.

#### *DNA evidence*

- [83] As described above, it was Ms. Patterson who suggested that the complainant have the rug tested for DNA and called Maxxam Analytics to arrange the testing. After DNA analysis of the rug revealed the presence of male and female DNA, Ms. Patterson suggested to the complainant that she obtain a sample of Dr. Ali's saliva for comparison with the DNA on the rug. The complainant and the Colleague carried out the plan on May 4, 2001 as described earlier. The complainant submitted the cup to Maxxam for DNA analysis and comparison with the DNA on the rug.
- [84] The Maxxam report and witness Stephen Denison stated that the likelihood that a randomly selected person from the Caucasian population would share the same DNA as the source of the DNA on the cup and the rug would range from 1 in 1 trillion to 1 in 4.4 trillion. The likelihood that a randomly selected person from the Caucasian population would share the same DNA as the complainant is 1 in 320 quintillion. Mr. Denison's evidence was uncontested.

#### **Analysis**

- [85] Based on all of the evidence, including concerns regarding Dr. Ali's credibility, we conclude, on a balance of probabilities, that Dr. Ali assaulted the complainant as alleged.

### Disclosure by the Complainant

- [86] We considered carefully the evidence of the three witnesses that were called to recount what the complainant had told each about the assault.
- [87] Corroborative evidence refers to evidence that has the effect of adding strength or reinforcement from an independent source for the truth and accuracy of a witness's evidence. There is no legal requirement that an allegation of sexual assault must be corroborated by some evidence other than that of the complainant. As the Supreme Court said in *F.H. v. McDougall* at paras. 77-81, corroborative evidence is always helpful and does strengthen the evidence of the party relying on it, but it is not a legal requirement and may not be available, especially where the alleged incidents took place years earlier or in private.
- [88] Evidence that strengthens the belief in the veracity of a witness can be confirmatory even though it may not provide direct support for the allegation of misconduct: *R. v. Khela*, 2009 SCC 4 at paras. 40-43, 52. Moreover, confirmatory evidence must be directed to an important aspect of the witness's testimony and not to a peripheral or minor component of that evidence.
- [89] While the complainant and the three College witnesses provided information that was consistent with their earlier statements, prior consistent statements are generally inadmissible because they lack probative value, are often self-serving and are hearsay: *R. v. Stirling*, 2008 SCC 10 at para. 5; *R. v. Dinardo*, 2008 SCC 24 at para. 36.
- [90] Prior consistent statements are merely a repeat of evidence. Their lack of probative value stems from the fact that it is impermissible to assume that because a witness has made the same statement in the past, he or she is more likely to be telling the truth. In *R. v. Divitaris*, 2004 CanLII 9212 (ON CA) at para. 28, Feldman J.A. memorably expressed the rationale for the rule in this way: "A concocted statement, repeated on more than one occasion, remains concocted."
- [91] The only exception to this is when there is an allegation of recent fabrication, the prior inconsistent statement can then be admitted to rebut the allegation of recent fabrication, but it cannot be used to bolster the witness's credibility. Consistency in

one's account does not enhance one's credibility. Inconsistency may detract from one's credibility, but the reverse is not true.

[92] The complainant's Friend's evidence regarding the complainant's discussion and behaviour is significant because it occurred prior to the complainant feeling she was being harassed at the Hospital. The complainant's Friend appeared confident and non-defensive. The fact she had difficulty remembering the precise details of her conversation with the complainant is not surprising given the passage of time. Although a close friend of the complainant, she testified in a direct and factual manner. We find she was a reliable and credible witness and did not present as an advocate. The complainant disclosed the information to her the day after the assault, before the complainant stated that she felt she was being harassed. As such, it serves to refute the allegation that the complainant fabricated the story of the assault as a result of later difficulties she was having at the Hospital. As a record of a prior consistent statement made by the complainant, however, the statements made by the complainant to her Friend cannot be used to bolster the complainant's credibility as to whether the sexual assault occurred. In that sense, the complainant's Friend cannot corroborate the assault. Her evidence simply serves to refute the allegation of recent fabrication.

[93] We find that the Colleague was also a credible witness. She was vague on some details, but this was understandable given the passage of time. The Colleague was a close friend of the complainant. The Colleague testified that she and the complainant discussed the assault several times. She believed the first time was in 2000. She agreed that she knew about the assault in October 2000. The two discussed the assault, but only after the complainant was having problems with her Hospital privileges and the complainant believed Dr. Ali and several other members of the department were harassing her. The complainant's statements to the Colleague regarding the assault are prior consistent statements and cannot be relied upon to bolster the credibility of the complainant. Further, because the disclosure to the Colleague only occurred after the complainant ran into difficulties at the Hospital, they are also not admissible to refute the allegation that the complainant fabricated the assault as a result of those difficulties. This is in contrast to the complainant's Friend, who was told about the assault before any significant Hospital issues with the complainant came to light and before Dr. Ali's

alleged harassment of the complainant. We find, however, that the Colleague's testimony about obtaining DNA evidence was significant because she played a central role in obtaining Dr. Ali's DNA.

- [94] Ms. Patterson was a credible witness. She provided what appeared to be an honest and direct recitation of what the complainant told her, in a forthright manner. She, like the Colleague, however, was told about the assault after the complainant began having problems at the Hospital. In fact, Ms. Patterson's firm had been retained to act on the complainant's behalf with respect to her hospital privileges. Ms. Patterson's evidence with respect to what the complainant told her about the assault is a prior consistent statement and cannot be relied upon to bolster the credibility of the complainant. Further, the disclosure of the assault to Ms. Patterson occurred after the complainant encountered difficulties with the Hospital and therefore does not refute the allegation that the complainant fabricated the assault as a result of her difficulties at the Hospital. However, her evidence about the rug and the advice she gave the complainant about testing the semen was an important part of the narrative.

#### The DNA Evidence

- [95] We accept that the DNA on the cup matched the DNA on the rug and came from Dr. Ali. We also accept Mr. Denison's evidence that the female cells matched those of the complainant. The DNA evidence shows that Dr. Ali ejaculated on the carpet. It does not permit a direct understanding of when or how this occurred. The presence of semen on the rug is consistent with both the complainant's and Dr. Ali's (current) version of events.

#### Purchase of the Rug

- [96] The timing of the purchase of the rug is important because the complainant claimed that it was not in Ontario prior to 1999. Dr. Ali claims that his DNA was on the rug from the earlier affair in 1992 and therefore it had to have been purchased prior to 1992 and placed in her home in Toronto.
- [97] Justice Morissette noted in her reasons for judgment that the complainant was not challenged on her evidence that the rug was purchased in Islamabad in 1994 and

not brought to the City until 1999. She was challenged on that evidence in our proceeding.

[98] The complainant testified before us that she purchased the rug in Islamabad sometime in 1993 or 1994 when she returned to Pakistan to visit her parents. She brought it to the US and kept it at her home there. She said she brought it to Canada sometime in early 1999. She said she did not have any furniture when Dr. Ali visited her house in January 1999 and the rug was not there until later. She said the rug stayed in her home after the alleged assault.

[99] Dr. Ali's counsel put to her that the rug could not have been purchased in 1993 or 1994 because the complainant could not have been in Pakistan during that time due to her busy schedule. The complainant testified that she went to the US sometime in November 1992 and was there for most of 1993, except when she came back to Canada to see her daughter and her mother. She agreed that in 1993 she would have spent at least a week or two in her Toronto home. She said that in 1994, she did a locum in another town from February to November 1994 and did a locum at the Hospital for three weeks.

[100] It was put to the complainant that she purchased the rug when she went to Pakistan in the summer of 1992 for three months. She did not agree. The complainant insisted that it was very likely she purchased it in 1993 or 1994. She then said she must have bought it after that, it was a "busy time." She said it wasn't likely that she would have purchased a rug in the summer of 1992 when she was leaving for the US. She would not have added things to a house in Canada that she was going to pack or leave.

[101] The complainant said the rug may have been purchased later than 1994 and suggested it could have been in 1995 because she was in Canada for most of 1994. The complainant then reconsidered her testimony about the timing of the rug purchase unprompted and testified that she did go to Pakistan in 1993 to get her daughter (who had been living with her mother) and brought her back to the US before then moving her to Canada. She said she brought the rug to the US at that time.

[102] Defence counsel challenged that she did not go to Pakistan in 1993 or 1994; her mother brought her daughter to Ontario and she picked her up there. The



complainant answered, “my daughter wasn’t brought to Ontario at all.” The complainant said she had gone to Pakistan many times over the last few decades and would go two or three times per year at that time. The complainant said she thought she went to visit her daughter in Pakistan as well since her schooling was an issue and it would not be unusual for her to take a trip to Pakistan when her daughter wasn’t with her in Canada

[103] The complainant returned to the rug issue a third time unprompted, and said she wanted to make clear the rug never came to Canada until 1999. The complainant could not verify when she went to Pakistan, but stated she bought four rugs at the same time and one was a gift for her husband. She stated that it was not possible she bought him a gift, brought it to Canada, then to the US.

[104] In summary, according to the complainant, she bought the rug in Islamabad in 1993 or 1994. She later said it was possible that she purchased it in 1995 as a gift to her future husband, and brought it to her home in the US, where it remained until she moved it to her house in early 1999. She said that Dr. Ali never came into contact with the rug at any point other than June 22, 1999. He did not visit the complainant in the US, and he had only visited the complainant’s 1999 house on one other occasion when the complainant had just moved in and the house was unfurnished. The rug was not there at the time. She said the rug stayed in her home after the assault.

[105] We find that the complainant is not certain when she purchased the rug. Her evidence is that the rug may have been purchased in 1993, 1994 or 1995, not 1992 or earlier. We find that it is possible the complainant purchased this rug in 1993. It is not likely that the complainant went to Pakistan in 1994 because of her locum in another Ontario location and her locum at the Hospital. In any event, she remained adamant that the rug never came to Canada until 1999 when she purchased her home in Ontario. We note that the complainant was testifying to events that happened over 20 years ago, and it is understandable that she may have difficulty remembering the exact timing of the rug purchase.

[106] We do not need to decide exactly when the complainant obtained the rug. We find that she would not have bought it to bring to her home in Toronto when she knew that she would be moving. It is therefore more likely than not that whenever she

bought the rug, she took it directly to the US and did not bring it to Canada until she purchased her home in January 1999. We find, on a balance of probabilities, that the rug was not in the complainant's Toronto home at the time the affair allegedly happened in 1992-1993.

### The Alleged Affair

[107] Dr. Ali has testified three times under oath: in his examination for discovery for the civil trial in April 2004 (including follow-up answers to refusals), in the October 2016 civil trial and in the proceedings before us. For 12 years, Dr. Ali denied any prior sexual relationship with the complainant. He denied a sexual relationship during the April 2004 examination for discovery. Dr. Ali was asked in April 2004 during his examination for discovery if, prior to June 22, 1999, he was physically attracted to the complainant. His lawyer instructed him not to answer the question, but he was subsequently ordered by the court to respond. On August 19, 2005 he responded that, prior to June 22, 1999, he was not physically attracted to her.

[108] On the eve of trial in September 2016, he claimed for the first time that he and the complainant had a prior sexual relationship. In September 2016, Dr. Ali corrected answers given during his examination for discovery. He stated that they did have a sexual relationship prior to June 22, 1999, and changed his answer from "no" to "yes" that he was attracted to her prior to June 22, 1999. He also amended his statement of defence to allege that they had developed a close personal relationship after meeting in 1991.

[109] Dr. Ali had not previously come forward to disclose the alleged affair despite the civil trial being very close to proceeding on two previous dates. The civil trial was adjourned three weeks before it was scheduled to begin in April 2015 and six days before it was scheduled to begin in November 2015.

[110] It was put to Dr. Ali that the police informed him in February of 2006 that they had forensic DNA evidence, but he stated that he could not recall. He agreed that his counsel was provided with a copy of the DNA report in 2011. Dr. Ali was asked for his DNA at that time. Dr. Ali was asked three times for a DNA sample and refused each time. He also refused to provide a sample to the College for this proceeding.

[111] In the civil proceeding, Dr. Ali denied his semen could have been on the rug or any rug that resembles the rug in question. During the civil discoveries, Dr. Ali was asked if he ever had any association with a rug like the one in question, and he was specifically told the question was not limited to 1999. Dr. Ali responded, “no.”

[112] In her reasons for judgment, Justice Morissette noted that Dr. Ali denied ejaculating on the rug but refused to provide a DNA sample. She drew an adverse inference from his refusal. She also noted that he submitted only in closing submissions that the DNA on the rug could have been from a consensual sexual encounter in 1992 at the complainant's home in Toronto but he did not testify about this possibility during the trial.

[113] In these proceedings, Dr. Ali testified that he now has reason to believe it is his DNA on the rug and has a recollection of a similar rug in the complainant's home in 1992. This is why the affair is central to his defence. The affair would provide an alternative explanation for the presence of his semen on the rug.

[114] Dr. Ali stated in June 2016 that he revealed to all parties everything that happened in their relationship. Yet he never mentioned a pregnancy at the civil trial and that evidence is new to the current proceedings. In these proceedings, he said that their sexual relationship continued until the end of 1992, and the complainant told him in January 1993 that she was pregnant. He testified that he did not hear back from her until April or May 1993 and that she said that she terminated the pregnancy. He said they tried to have intercourse in the call room but he could not become aroused. Dr. Ali testified in the civil trial that he and the complainant had sexual intercourse in the call room in 1993 and did not mention the pregnancy. Yet before us he testified that their sexual relationship ended in late 1992 and they did not actually have intercourse that day in the call room.

[115] We find it very troubling that there was no prior reference to a pregnancy during the civil proceedings. Justice Morissette found that the fact that Dr. Ali failed to disclose the alleged affair until the eve of trial undermined his evidence. We agree and we make a similar finding about the failure to have previously alleged the report of a pregnancy. We also note the inconsistency in his evidence as to what happened in the call room in 1993 and we find that this further undermines his credibility.

[116] Dr. Ali relies on the evidence of his Friend to substantiate his allegation that he and the complainant had an affair. His Friend had trouble remembering many details about his interactions with the complainant, but this is not surprising given the passage of time. He was quite clear, however, that he remembers the three of them going to dinner together – he remembers where they sat in the car, that Dr. Ali and the complainant seemed quite familiar and that she was wearing a crimson blouse. He also believes they spoke on the phone once or twice and remembers the complainant telling him that she wanted to marry Dr. Ali. Dr. Ali's Friend sometimes went on tangents during his testimony and when pressed, made it clear that he did not believe the allegations against Dr. Ali to be true. His view that the complainant would not have driven Dr. Ali anywhere if the assault had happened as alleged unfortunately reflects a stereotypical view as to how victims of sexual assault behave.

[117] We believe Dr. Ali's Friend that the three of them had dinner together. We are not prepared to conclude, however, that the touching he reported observing between Dr. Ali and the complainant means that there was a sexual relationship, particularly since this dinner was alleged to have occurred in 1991, before Dr. Ali said the affair began. Although the complainant was adamant that she does not know him, we find that it is possible that the complainant simply does not recall this outing with a friend of Dr. Ali's many years ago. We do not believe, however, that the complainant subsequently called him to discuss Dr. Ali. Dr. Ali's Friend said that during the call the complainant claimed to want to marry Dr. Ali. Dr. Ali testified that his Friend called him and scolded him about getting the complainant pregnant. Dr. Ali's Friend did not testify that the complainant ever told him there was a sexual relationship or pregnancy. Dr. Ali and his Friend's accounts of this alleged call do not align. The complainant denies ever calling Dr. Ali's Friend. We find it hard to believe that the complainant would reach out to Dr. Ali's Friend by telephone, either after he had returned to Pakistan or while he was in Toronto, to discuss such a personal matter. On his own evidence, he had only met her in person once.

[118] Further, we find it difficult to believe that Dr. Ali would assist the complainant with applying for a position at the Hospital and securing a locum in 1994 if she had in fact expressed a desire to continue a relationship with him (he was married), aborted their child the previous year and called his Friend to plead her case. Dr. Ali

said that he was ashamed of the affair and scared of losing his marriage. He also said that he hung up on his Friend when he tried to discuss Dr. Ali's relationship with the complainant. Certainly, if all of this was true, one would not expect him to help her obtain a position at his hospital.

[119] Dr. Ali's initial denial during the civil proceedings of any prior sexual relationship with the complainant, his further initial denial that the semen on the rug was his and the fact that he never previously mentioned a pregnancy prior to these proceedings all undermine his credibility with respect to the alleged affair. Further, we find his evidence that he and the complainant chose to have sex on the floor on several occasions because the guest bed was made up to be a concocted explanation as to how his semen could have ended up on the rug. We prefer the evidence of the complainant and find that there was no prior affair.

[120] In making this finding, we also note that even if there had been a prior affair, this does not mean that the assault as alleged by the complainant did not occur. The complainant's denial of the prior relationship would be something we would have to consider in assessing her credibility but the existence of a prior sexual relationship would not be determinative of whether or not the alleged assault occurred.

#### The Complainant's Evidence

[121] Although we accept the complainant's evidence with respect to the assault, we note some inconsistencies in her evidence. For example, the complainant testified that she thought Dr. Ali had romantic feelings for her prior to June 22, 1999. However, at other times she flatly denied he had romantic interest in her. The complainant's evidence that there were no concerns at the Hospital between January and July 1999 is contradicted by her own evidence: for example, missing so many department meetings and not completing charts. This is described in greater detail below.

[122] At other times, the complainant seemed to exaggerate her evidence or suggest, without any reasonable basis, that documents had been altered. For example, her suggestion that the minutes of a meeting on June 4, 1999, had been altered strains credulity, as there is no evidence as to who altered the minutes or why or when they would have been altered. The complainant's testimony that she was rejected for a position in 1994 was an exaggeration. The Hospital was unable to offer her a

position because of staffing issues, unrelated to the complainant or her qualifications. The complainant questioned the authenticity of several documents. She alleged that the April 7, 2000 department meeting minutes must have been prepared by Dr. Ali, when according to documents they were prepared by the Chief of Medicine.

[123] The complainant disputed her own application for reappointment to the Hospital in 2000. She testified that the form must have been altered as she did not check the box for “continuing existing privileges.” The complainant insisted she requested “active privileges,” and the only accurate content on the application form was her signature.

[124] As will be discussed in greater detail in our analysis of the second, we find that the complainant had very little insight into her problems at the Hospital. This lack of insight coupled with the lens through which she interpreted all of her interactions at the Hospital after having been sexually assaulted by Dr. Ali, her supervisor, clouded her perception of events at the Hospital and led her to believe that Dr. Ali was engaged in a plan to harass and exclude her, aided by the support of others. As we will describe, we do not find this to be have been the case. We do not find, however, that her distrust and failure to accept that legitimate concerns were being raised at the Hospital undermines her credibility with respect to her report of the assault.

[125] The complainant did not report vaginal penetration until after trying unsuccessfully to ask Maxxam not to report the female DNA component in 2004. The complainant disclosed that there was penetration only after the Maxxam report found her epithelial cells mixed in with the sperm cells. According to a file note from Maxxam dated May 30, 2001, the complainant called and did not want the female profile reported. The writer said she would have to discuss it with her supervisor. On June 12, 2001, the complainant was informed Maxxam could not report the results of the male DNA only without mentioning the presence of the female DNA profile. The note stated the complainant seemed to understand the ethical implications of this and paid for the testing.

[126] The complainant was asked why she did not want the female DNA reported. She said it was because she already knew it was her DNA. She also said the test was

expensive and she didn't want to pay for information she already knew. She said she thought the test cost \$3,500, and she did not believe the female epithelial cells were relevant. The complainant agreed that she did not tell her Friend on June 23, 1999 that she was vaginally penetrated. The complainant said she didn't tell the Colleague or Ms. Patterson initially either.

[127] It was suggested to the complainant that she didn't tell Ms. Patterson about the penetration until after she had the Maxxam results. The complainant said she didn't remember when she told Ms. Patterson. Defence counsel suggested that the complainant only told her after she received the Maxxam report so her story would match with the Maxxam findings. The complainant did not accept this and said she would have told her anyway.

[128] We accept the complainant's explanation that she did not want to be charged extra for the female DNA analysis when she knew it was her DNA. Once the ethical concerns about not reporting this aspect of the analysis were explained, she seemed to understand and paid for the analysis. The complainant also explained that she did not tell anyone initially that she had been penetrated during the assault, because she did not want to talk about it. We accept that explanation and we do not find that it detracts from her credibility.

[129] The defence raised alleged inconsistencies between what the complainant reported to her psychiatrist and actual events. In February and April 2004, the complainant went to see a psychiatrist because of the distress produced by her perceived harassment and the earlier assault. The psychiatrist noted on April 24, 2004 that the complainant had been a victim of sexual assault by a colleague that had resulted in charges and that Dr. Ali had been placed in handcuffs. However, the complainant only spoke to police about the sexual assault in 2005. No charges were laid and Dr. Ali was not placed in handcuffs.

[130] The psychiatrist was not called to testify. The complainant did not remember telling the psychiatrist that her colleague had been charged, but she agreed that it would be unlikely for her psychiatrist to make up such a statement. She stated that if she made the statement to her psychiatrist she must have been told this by the police. She maintained that the police officer told her that Dr. Ali was asked to present to the police station, which he did with his lawyer, and that he had been handcuffed

and charged. She said she was never subsequently told that he had not been charged. It was then put to her that she had testified at the civil trial that she did not report the assault to the police until 2005. The complainant accepted her prior evidence and agreed that “it is very possible that I didn’t speak to [the female police officer] and I am mistaken. But all I was trying to explain is that the information had to come from somewhere.”

[131] There were other incidents in her testimony when the complainant’s evidence was inconsistent with the documentary records. For example, she testified that Dr. Ali must have directed her to circle “10:00 am” on the 1992 insurance form (although she had no memory of this) because her recollection is that this examination in fact took place in the evening. The complainant also said that Dr. Ali must have asked her to write down the time as 5:20 pm on the 1999 insurance form (although she has no memory of this) because she believes it was filled out earlier. We find that these inconsistencies are not material. The fact that her recollection does not accord with the times entered on these forms bears little relationship to whether or not she was assaulted by Dr. Ali.

[132] The complainant did not report the assault to police until 2005. She testified that her doing so was triggered by Dr. Ali’s examination for discovery in which he denied the assault and said she had made sexual advances to him. Dr. Ali claimed that her report to the police and the allegation of an assault was vindictive and intended to prevent his involvement with the Hospital proceedings. He states that, because he failed to support her in the dispute, she has waged a campaign of vengeance against him. We draw no adverse inference from the fact the complainant did not report the allegation to the police until 2005. There are many reasons why victims of sexual abuse fail to report assaults to the police or others. Her failure to report to incident to the police earlier does not adversely affect her credibility. Further, it may be that the complainant finally was pushed to the point where she did report to the police out of anger or frustration, but again this does not undermine the veracity of her account. She had previously disclosed an assault to her Friend the day after the event and she had alleged the assault when she initiated her civil lawsuit in 2001. As such, we reject the allegation that the complainant fabricated the assault or made the report to the police out of vengeance because Dr. Ali did not support her in her dispute with the Hospital.



## **Conclusions: Sexual Assault**

[133] We found the complainant to be credible and reliable with respect to the sexual assault. In contrast, we have significant concerns about Dr. Ali's credibility for all the reasons articulated above. Dr. Ali's evidence has changed many times since the complainant first came forward with her allegations. Dr. Ali said that he did not previously disclose an affair because he was ashamed and scared of losing his marriage. We do not accept this explanation as reasonable. The allegations were very serious. If Dr. Ali had an explanation for how his semen could have been found on the rug, one would have expected him to disclose that evidence earlier, instead of lying under oath (as he now says he did) on more than one occasion. To be clear, there has never been any burden on Dr. Ali to disprove the allegations, but the fact he said there was no prior affair, and then said there was; the fact he said the DNA was not his, but now admits that it is; and the fact that he never previously mentioned a pregnancy until these proceedings all significantly undermine his credibility. We reject Dr. Ali's submission that the complainant fabricated the assault in order to gain leverage in the dispute over her privileges. The complainant first reported that something improper had occurred with Dr. Ali the day after the assault. We find that there is no evidence that she had any reason to fabricate an assault at that time. As will be discussed below, she had encountered some complaints at the Hospital related to missing meetings, outstanding charts and clinical practice, but nothing to an extent which would provide any reasonable basis for fabricating an allegation of sexual assault at that time against Dr. Ali, her friend and colleague.

[134] For these reasons, we find the College has established on a balance of probabilities that Dr. Ali sexually assaulted the complainant on June 22, 1999. Justice Morissette found that a sexual assault occurred. We agree with her conclusion. We gave the findings in the civil trial significant weight, with the exception that we do not find that the complainant's disclosure (prior consistent statements) to the complainant's Friend, the Colleague or Catherine Patterson can be used to corroborate the assault for the reasons explained above. Further, we did not find that the new information provided in this hearing with respect to (i) the purchase of the rug; (ii) the alleged pregnancy; or (iii) the observations and communications with Dr. Ali's Friend warrant a different finding.

## **Issue 2: Did Dr. Ali Engage in Professional Misconduct Following the Assault?**

[135] The College alleges that after Dr. Ali sexually assaulted the complainant, he acted unprofessionally in his dealings with her at the Hospital, including by:

- a) refusing to include her on the on-call schedule at the Hospital despite her numerous requests, and despite that she was required to perform call as a member of the department with associate privileges.
- b) threatening a colleague who allowed the complainant to take her call for a weekend.
- c) participating in making the case against the complainant's privileges at the Hospital, despite his conflict of interest.

[136] It is inappropriate that Dr. Ali remained in a position of authority over the complainant following the sexual assault. The complainant had to face her abuser at her place of employment on a routine basis and, as the Medical Director, he held a significant amount of power over her. The complainant's evidence was, in effect, that following the assault, Dr. Ali used his position of power to marginalize and harass her, effectively forcing her out of the Hospital. For the reasons outlined below, we do not find this to be correct. We do not find that Dr. Ali used his position of power to improperly keep the complainant off the call schedule. Further, while Dr. Ali's call with the Colleague regarding the call schedule may not have been handled well, we do not find that this incident should result in a finding of professional misconduct against him. We do find, however, that the fact that Dr. Ali had sexually assaulted the complainant put him in a conflict of interest that he did not disclose to anyone, and he should not have played any role in discussions and decision-making regarding the complainant's privileges.

[137] We want to be clear that this was not a hearing into the complainant's professional conduct or clinical competencies. To the extent we make certain findings below with respect to her experience at the Hospital, we do so based only on the evidence before us and in the context of the allegations put forward by the College.

### Call schedules

[138] The College alleges that in making the hospital call schedules, Dr. Ali harassed the complainant by unfairly leaving her off the 2000 and the January to April 2001 call schedules. We do not agree.

#### *The 1999 schedule*

[139] The complainant commenced work on January 19, 1999. She testified that the issue of call was never raised during her interview and that Dr. Ali never communicated with her in writing about call. She stated that she received the 1999 call schedule in which she was included shortly after starting work.

[140] Dr. Ali testified that he prepared the 1999 call schedule after an October or November staff meeting to discuss call and then the schedule was approved at a December meeting. He said that the preparation included asking for any special requests such as being away for extended periods and that he obtained the complainant's availability prior to preparing the schedule.

#### *The 2000 schedule*

[141] The complainant was not included in the posted 2000 call schedule. The complainant testified that, when she returned from Pakistan in January 2000, she saw that the posted 2000 call schedule did not include her and asked Dr. Ali why. The complainant said that Dr. Ali told her that she was not on the call schedule because she had not told him when she wanted to be on call. She said that Dr. Ali could have reached her through her cell number or left a message at her office, and he did not communicate with her about the call schedule. She testified that she continued to ask Dr. Ali to put her on the schedule.

[142] Dr. Ali stated that he prepared the 2000 call schedule in the same way he did for 1999 and agreed that the complainant was not on the 2000 schedule. According to Dr. Ali, he talked to the complainant who told him that she was unsure of her future at the Hospital and that she was not keen on being assigned to call for the first six or seven months of 2000. Dr. Ali said that had the complainant told him about her availability, he could change the schedule through a "double swap." Dr. Ali did not document the conversation he had with the complainant about the 2000 call schedule. He denied that the complainant asked him to put her on the call schedule.

after she returned from Pakistan. Dr. Ali testified that the complainant made no requests to be on the call schedule in January, February or March of 2000.

[143] The April 7, 2000 Department of Medicine meeting minutes recorded that the complainant raised the fact of her not being on the call schedule and that she offered to make a new schedule, a proposal that was unacceptable to some internists. The minutes recorded that the schedule was circulated at the beginning of 2000 for member approval and that it went through changes to accommodate various members. The minutes of the meeting recorded that the complainant was advised to contact individual internists on call according to her availability.

[144] The complainant testified that during the meeting she was told that she could not be accommodated, which is inconsistent with the minutes of the meeting. She also testified that Dr. Ali shouted at her at the meeting. Dr. Ali reported that the complainant was told that she would be accommodated but that he never got a “straight answer” from the complainant about her availability.

[145] The complainant said that she assumed the Chief of Medicine prepared the minutes of the April 7, 2000 meeting but that Dr. Ali may have written them. She stated that what was written was “not always accurate” and that the “documentation was always very customized.” The complainant did not provide any other evidence to support her statement that the minutes were inaccurate.

[146] The complainant states that on April 19, 2000 she wrote to Dr. Ali with her availability for May and June 2000 and did so to “fulfill the agreement” with the Chief of Staff as described in his February 25, 2000 letter to her. The February 25 letter addresses the complainant’s schedule at the Hospital and her desire to only work at the Hospital three weeks out of every month. It makes no reference to the call schedule. The complainant said that she could not remember if Dr. Ali replied and that she had not been included on the call schedule by September 2000.

[147] Dr. Ali testified that the complainant did many of the calls on the dates she offered in her April 19, 2000 letter. When asked directly if it was correct that the complainant was never actually added to the call schedule, Dr. Ali testified that the complainant was added onto the system and the call schedule on the basis of her availability. He said that she was added as a result of conversations she had with physicians including those with whom she had been grouped in 1999. Dr. Ali

testified that although the complainant's name was not included as part of the posted 2000 call schedule, the complainant was part of a Wednesday grouping with two other doctors who were willing to give up their call to her. Her name was not included in the published list because they would not know that she would be available.

[148] On September 24, 2000, the complainant wrote to the Medical Advisory Committee (MAC) members and to the Board of Directors Chair and asked to be placed on the call schedule. The MAC is a committee of the Hospital that makes recommendations with respect to the granting and renewal of privileges. Dr. Ali was a member of the MAC.

[149] On October 13, 2000, the Colleague provided the complainant with the summary of a meeting that occurred after a Department of Internal Medicine meeting. The Colleague also testified as to what occurred at the meeting. Dr. Ali had asked staff who were on the call schedule to stay behind to discuss the call schedule and other things. At this second meeting, at which the complainant was not present, Dr. Ali mentioned that the complainant's privileges were being reassessed and the MAC had not approved upgrading the complainant's status to full active staff. He also stated that some negative feedback had been received about her performance. According to the Colleague, a few people at the meeting said they had no issues with the complainant and inquired about why her privileges were being discussed. The Colleague testified that this was the only meeting she had ever attended where a doctor's privileges were discussed. She thought this was inappropriate and gave the complainant a copy of her summary of the meeting.

[150] The complainant's lawyer at the time, Jane Ferguson, wrote a letter dated November 22, 2000 to the Chief of Staff requesting that the complainant be put on the call schedule.

#### *The 2001 schedule*

[151] The complainant was not included in the 2001 call schedule. Dr. Ali testified that the 2001 call schedule was prepared after the usual October or November discussion. He stated that the complainant was not included on the schedule because of an upcoming Hospital Board meeting at which her privileges would be discussed. He said the schedule was made for four months from January to April

2001 because of the Board meeting and the uncertainty of the complainant's future at the Hospital.

[152] The Colleague said that the complainant was "excited to take call." She testified that she received a phone call at home from Dr. Ali, in or about the second week of January 2001. Dr. Ali told the Colleague that he did not want the complainant to see any of his patients on weekends. When the Colleague asked why, Dr. Ali became angry and threatened to take her off the call schedule. The Colleague told the complainant about this incident and wrote to the Chief of Staff about it. In her letter of February 1, 2001 to the Chief of Staff, the Colleague stated that Dr. Ali had a conflict of interest on a personal level and should not be deciding whether the complainant should be on the call schedule. The Colleague testified that she thinks she knew about the assault at the time she wrote this letter. The Colleague stated that Dr. Ali subsequently apologized to her for the phone call.

[153] Dr. Ali testified that in 2001, he tried not to be away when the complainant was on call because of their strained relationship. When asked about his call to the Colleague in January 2001, Dr. Ali said he was a "little upset." He said that he later discussed the call with the Colleague over coffee and explained that he was not yelling at her, but rather had raised his voice because he was on a cellphone.

[154] On January 4 and April 11, 2001, the complainant's legal counsel wrote the Hospital counsel asking about the complainant being placed on the call schedule. The complainant was then added to the call schedule with her first call scheduled for May 5, 2001. The complainant stated that she was added to the call schedule "overnight" with no notice. In a letter from Dr. Ali to the Chief of Staff dated May 7, 2001, Dr. Ali acknowledges the complainant had only been provided with short notice and that alternative arrangements had been made in the result. The Chief of Staff wrote to the complainant on May 14, 2001, including a copy of Dr. Ali's letter of May 7 and advising the complainant that if she had a conflict with the call schedule she should discuss it with Dr. Ali or exchange call dates with another department member. The complainant testified with respect to these letters that she did not believe anything Dr. Ali said and that she did not "believe [the Chief of Staff] either."

[155] Dr. Ali testified that in 2000 and between January to April 2001 the complainant was accommodated whenever she wanted to take call. No other evidence was submitted to support Dr. Ali's statement. Dr. Ali denied that it was his decision not to put the complainant on the call schedule. He stated that it was a system decision and that he was "just the arms and legs." He said that if the complainant had given her availability she would have been added to the schedule.

### *Analysis*

[156] When testifying about the 1999 and 2000 call schedules, Dr. Ali said that in October of the year before the call schedule took effect, he asked physicians if they had any special requests such as being away for extended periods. He testified that he had asked the complainant about any special requests when he was preparing the 1999 and 2000 schedules. The complainant told him that she was unsure of her future at the Hospital and did not give a straight answer about her availability. We find that it would have been difficult to prepare the call schedule without asking physicians about their availability which according to Dr. Ali he did.

[157] According to the call schedules, both the 1999 and 2000 schedules were prepared in advance for the entire year and the 2001 call schedule was prepared for four months at a time. Under cross-examination, the complainant was taken to the transcript of an interview with a College investigator in which she stated the call schedule was prepared monthly. The complainant testified that when she told the investigator that the call schedule was made up monthly, she was not talking about the Hospital, but rather call schedules generally. She disagreed that the conversation, which included a specific reference to Dr. Ali, referred to the Hospital. We find the complainant's claim that she was talking generally does not accord with common sense and is not believable.

[158] Dr. Ali and the complainant gave divergent evidence as to whether and when the complainant asked to be put on the call schedule. The complainant produced written evidence of her "multiple" requests in 2000 to be on call in April 7, 2000 meeting minutes, her April 19, 2000 letter to Dr. Ali, her September 24, 2000 letter to the MAC and her legal counsel's November 22, 2000 letter.

[159] Her legal counsel made requests on January 24, April 11, 2001 and in an April 11, 2002 letter to the Chief of Medicine. No documentation was provided to support the

complainant's contention that she had asked about call earlier than April 2000. There was no explanation as to why the complainant did not write to Dr. Ali prior to April 2000 about the call schedule, especially given how important being on call was to her.

[160] Dr. Ali produced evidence that he asked the complainant about her availability to do some work including call coverage for the summer of 1998 in a letter dated May 22, 1998. The only other evidence produced about the complainant being advised how to secure calls is the April 7, 2000 meeting minutes and a May 14, 2001 letter from the Chief of Staff. The complainant acknowledged that physicians frequently exchanged call.

[161] Justice Morissette found that the complainant did not raise the issue of not being on call until April 2000. At this hearing, the complainant disputed this finding and testified she "raised it earlier than that," "much earlier than April" and that she raised it with Dr. Ali in January 2000. The complainant disagreed with Justice Morissette's "reasonable inference" that the complainant "was content" with not being on the call schedule because "she was uncertain about her future" at the Hospital. The complainant further stated that she made "multiple requests" to be on call in 2000.

[162] Given the evidence before us, including the findings of Justice Morissette, we find that the complainant was content not being on the call schedule prior to April 2000. We find that the complainant's comments about the April 7, 2000 meeting minutes being inaccurate and "customized" to be unreasonable and not supported by any evidence.

[163] We find Dr. Ali's explanation for how the call schedule was formulated to be believable and consistent for each year. Dr. Ali's lack of confidence in the complainant's availability is understandable given her absences, discussed below, and is a reasonable explanation for not placing her on the 2000 call schedule. Further, Dr. Ali's concern in the fall of 2000 about the uncertainty of the complainant's future at the Hospital is not unreasonable. Similarly, we find Dr. Ali's uncertainty about the future of the complainant's privilege status was a plausible reason for not placing her on the 2001 call schedule, but he produced no evidence to show that was his thinking at the time. Further, Dr. Ali's testimony that the



complainant was accommodated whenever she wanted to be on call is not supported by any documentation. We find that Dr. Ali was evasive in responding to questions as to whether the complainant was ever added to the 2000 call schedule, which diminishes our confidence in the truthfulness of that portion of his testimony. We note that he had no objections to her taking call for other physicians.

[164] In the absence of more definitive evidence and given our doubts about the credibility of the complainant on this issue, we find the College has not proven on a balance of probabilities the complainant requested to be on call from January to April 2000. Further, we find that although Dr. Ali was evasive about whether the complainant was actually added to the published call schedule, he did not prevent the complainant from taking call.

#### Alleged Threat to Colleague re Call Schedule

[165] As referred to above, the Colleague testified that she allowed the complainant to take her call for the second week of January 2001. Dr. Ali, who was upset about the arrangement, called the Colleague. The Colleague testified that when she questioned Dr. Ali he got angry and threatened to take the Colleague off the call schedule. The Colleague wrote a letter to the Chief of Staff about the incident.

[166] Dr. Ali agreed that he had called the Colleague as he did not want to leave his patient with the complainant over the weekend. He denied that he threatened to take the Colleague off the call schedule. He also denied that he was upset with the Colleague. He said that if he was loud on the phone it was because he was using a cell phone.

[167] The College asserts that the evidence of the Colleague corroborates the complainant's account of Dr. Ali behaving unprofessionally toward her and offers further evidence of unprofessional behaviour.

[168] We found the Colleague to be a very credible witness and we accept her account of the telephone call with Dr. Ali and their subsequent conversation about the incident. We do not find, however, that Dr. Ali's conduct amounts to professional misconduct. Dr. Ali may have used poor judgment in raising his voice and threatening to take the Colleague off call, but the two were able to discuss the matter afterwards and their conflict was resolved.

### The Complainant's Hospital Privileges

[169] The College asserts that when the complainant's privileges at the Hospital became an issue, Dr. Ali made representations to the MAC, presenting arguments against the complainant's privileges. The College asserts that he behaved unprofessionally in failing to excuse himself from doing so. It is clear that the complainant had issues that gave rise to legitimate concerns about her privileges. The complainant had difficulties with completing patient charts and with her attendance at the Hospital. We find, based on the record before us, that these problems were not created by Dr. Ali. We also find, however, that given the sexual assault, Dr. Ali had a conflict of interest and should have played no role in determining the complainant's privileges.

#### *Early Problems with Charts*

[170] The Chief of Staff sent a letter to the complainant, dated January 20, 1999, advising her that she had 34 incomplete charts which he requested that she complete by January 25, 1999. The complainant testified that these charts were from the locum she did for Dr. Ali in the summer of 1998. A locum physician would be expected to complete their charts before they left a locum. Locum physicians are mostly temporary physicians who may never return to the location in which they worked and therefore need to complete their charts before they depart. The complainant agreed that charts should be accurate and complete, with the time of entry recorded. She agreed that charting three weeks later was "far from ideal" and that for the safe delivery of care, physicians must document patient encounters as soon as possible.

[171] The complainant was taken to seven Hospital documents, dated from March 30, 1999 to November 8, 1999, each notifying her of between 48 and 217 incomplete charts including one with a warning that she would be suspended if her charts were not completed. The complainant denied that some of the patients with incomplete charts may have had their health compromised as a result.

[172] The April 7, 1999 Department of Medicine minutes noted that three internists, including the complainant, were responsible for more than 600 outstanding incomplete charts. The complainant agreed that this was an "astounding" number of incomplete charts and that she had a "shortcoming." She would not admit, however,

that it is not a good practice to leave necessary paperwork and charts incomplete before departing for three weeks, as she had done.

[173] With regard to the April 7, 1999 Department of Medicine meeting minutes heading "Suspension of Privileges," Dr. Ali explained that after a second notice was sent to a physician about incomplete chart records, their privileges were automatically suspended absent any discussion with anyone.

#### *Missed Department Meetings*

[174] Dr. Ali said that department meetings were held 10 times per year and served as a communication forum for decisions on changes, to hear how non-physicians were organizing themselves and to discuss their own issues including complaints. Dr. Ali testified that members were required to attend 70% of department meetings to be reappointed. The complainant agreed that meetings are a means of exchanging ideas and promoting efficiencies and that they are very useful to get people's opinions about hospital matters.

[175] The complainant confirmed that she did not attend Department of Medicine meetings in March, April and May 1999 and had not intended to attend the June 1999 meeting. The complainant said that she could not attend meetings because she had critically ill patients in hospital and acknowledged that she should have sent regrets for the meetings she missed. She denied that being the "new kid on the block" was a reason to attend the meetings.

[176] With respect to the June 1999 medical staff meeting, the complainant testified that Dr. Ali had asked her to attend despite the fact she was in the United States at the time. She stated that Dr. Ali was very manipulative and insisted that she attend. She stated that the reason he wanted her to attend was because he was supporting the Chief of Medicine's bid to retain his position and they needed votes. The complainant was upset that she flew to the City to attend the meeting and supported the Chief of Medicine, but at the meeting there was no vote as no one else wanted the position. She was also furious when she learned that another doctor who could not attend had sent in a ballot when Dr. Ali told her she could not do that. She returned to her work in the United States and then a few days later was back in the City.

[177] Dr. Ali said that he did not discuss the election for department chief held at the June 4, 1999 Department of Medicine staff meeting with the complainant but did tell her it was important to attend because she had missed quite a few meetings. This incident predated the assault.

[178] Under the title "Attendance: January-November 1999" of the complainant's February 15, 2000 reappointment application is a statement preceded by "Bylaw" that "Active/Associate Staff shall attend 70% of department meetings..." The complainant's application notes four of nine meetings attended.

[179] The complainant testified that she attended all Department of Medicine staff meetings for January to December 2000 except for January and February. The complainant said that she could not comment on the meaning of checkmarks beside certain members' names under the title "Present" in the minutes of the Department of Medicine staff meetings beginning on June 2, 2000 and continuing to December 2000. The complainant's name did not have a checkmark beside it for the meetings in June, September or December 2000. She stated that she does not know if she was present at the June meeting and cannot remember if she was present at the December meeting.

[180] Dr. Ali testified that for the April 7, 2000 Department of Medicine meeting, those who were present were listed in the minutes under the heading "Present" and those who were absent were not listed. According to Dr. Ali, beginning at the June 7 meeting all members who were present received a checkmark. Those who were absent received no checkmark and those who said that they were unable to attend were marked with an "R" for regrets. Dr. Ali testified that for the June 4, September 8 and December 1 meetings the complainant had no checkmark beside her name and therefore was not present. He confirmed that the complainant was not listed as present for the January 7 and February 4 meetings.

[181] According to her February 15, 2000 reappointment application, the complainant attended four of nine meetings between January and November 1999. While the complainant initially testified that she attended all Department of Medicine Staff meetings in 2000 except for January and February, on cross-examination she said that she did not know if she attended the June meeting and could not remember if

she was present at the December meeting. We find the complainant's testimony about her 2000 meeting attendance unreliable.

[182] We accept Dr. Ali's evidence that the checkmarks recorded in the minutes beside names as of the June 4, 2000 meeting indicated who was present for the meeting. We accept that this is a reasonable conclusion based on common sense. We find that the complainant missed five meetings in 2000.

[183] The complainant's reappointment application is unambiguous about the expectation of meeting attendance pursuant to the by-law. We find that to the extent Dr. Ali communicated with the complainant about her poor attendance at department meetings, such discussions were not unreasonable given his role and her attendance record.

### *Repeated Absences*

[184] The complainant testified that she had no obligations to the Hospital when she was not on call and that Dr. Ali was aware of her absences. Dr. Ali wrote to the complainant on July 8, 1999, requesting that the complainant let him know when she would be away and for what duration. He stated the purpose of the letter was for continuity of care and communication and to address incomplete charts for discharged patients. The complainant testified that was when she realized, "he was going to come after me" and "he was going to start something" because of his timing and his wording. On July 12, 1999, the complainant replied to Dr. Ali informing him that she would be away from July 16 to August 16, 1999, inclusive. Dr. Ali said that the complainant's July 12, 1999, letter was "what we wanted."

[185] On September 15, 1999, the complainant wrote the Chief of Medicine with a copy to Dr. Ali informing them that she would be away September 20 to October 27, 1999.

[186] On September 28, 1999, the MAC held a meeting. When the complainant started at the Hospital in January 1999 she was granted associate privileges. Dr. Ali testified that associate staff privileges were kind of probationary. During the September 28 meeting, the Credential Committee (a subcommittee of the MAC) passed a motion to change the status of some physicians from associate status to active status. Dr. Ali testified that the complainant was not recommended for active privileges

because concern was expressed that she had not been at the Hospital enough. The minutes of that meeting state that the Chief of Medicine and the Chief of Staff were going to discuss this matter with the complainant. Dr. Ali denied being implicated in this plan.

[187] The complainant's secretary wrote a letter to the Chief of Medicine dated sometime in November 1999, (appearing to have been faxed on November 16, 1999) and copied to Dr. Ali informing him of her planned absences from November 15, 1999 to January 12, 2000. Dr. Ali confirmed that he received both the September 15 and November 1999 letters about the complainant's planned absences.

[188] The complainant testified that the date on her application for reappointment dated February 15, 2000 was not in her handwriting, that the tick marks beside three lines were not her tick marks and that she may not have ticked "continuation of existing privileges." She said that she was seeking active privileges and that the form may have been altered by someone who did not want her to get privileges. The complainant did not provide any evidence to support her allegations.

[189] The complainant disagreed that her two-month absence would create even a bit of a burden and denied hearing anything in 1999 about her absences. Yet, on February 23, 2000, the complainant met with the Chief of Staff and the Chief of Medicine about her work at the Hospital. The Chief of Staff, in a letter to the complainant dated February 25, 2000, confirmed their agreement that the complainant would practise in the Hospital three weeks per month, provide coverage during her absence the fourth week, be away for a maximum of one week per month, provide her schedule in advance and that this arrangement would be trialed for six months with a reassessment.

[190] The complainant affirmed that she agreed to all the terms in the letter from the Chief of Staff and stated that it was an "unusual restriction." She further agreed that the Hospital was trying to accommodate her request to be away one week per month and said that one week was "not defining very well." She interpreted one week away as including two weekends off.

[191] The minutes of the February 29, 2000 MAC meeting referred to the arrangement reached between the complainant and the Hospital regarding her time away from

the Hospital (away the fourth week of every month) and noted that “this would be trialed for six months and the reassessed.”

### *Privileges*

[192] On September 20, 2000, the complainant wrote to the Hospital CEO requesting full privileges. She also wrote to the MAC on September 24, 2000 requesting active staff privileges.

[193] The September 25, 2000 MAC meeting minutes recorded that the Chief of Medicine “provided a chronological outline of [the complainant’s] time... and the resulting problems.” The minutes recorded that the Chief of Staff summarized the existing problems as “collegiality, on-call hand-off, quality of care and poor completion of health records.” The minutes also noted that both Dr. Ali and the Chief of Medicine indicated that the complainant was derelict in her duties to patients. A motion was passed at this meeting that the complainant’s privileges be discontinued. Dr. Ali said that he abstained from participating in the motion to discontinue the complainant’s privileges. The Chief of Staff communicated the MAC’s decision to the complainant in a letter dated October 2, 2000.

[194] Dr. Ali testified that in response to a request from the Chief of Staff, he wrote a letter dated October 13, 2000 to the Chief of Staff outlining that the complainant’s travel was causing a fair amount of disruption of care. In the letter he states, “I have no hesitation to conclude that in several instances the level of care offered to patients has been sub-optimum.”

[195] The complainant’s lawyer wrote a letter dated November 22, 2000 to the Chief of Staff advising him the complainant would be away from November 23, returning December 1, 2000, and again requesting to be placed on the call schedule, “while these matters are being resolved.” As discussed above, further letters were sent on January 4, 2001 and April 11, 2001 by the complainant’s lawyers requesting that she be added to the call schedule.

[196] On April 23, 2001, Dr. Ali wrote a letter to the Chief of Staff raising issues with certain clinical concerns regarding the complainant. His letter concludes, “I am afraid this is a pattern of practice that we have been looking into and being

distressed about which has caused so many problems over the last several months.”

[197] On May 9, 2001, a lawyer acting on behalf of the complainant wrote to Dr. Ali indicating he had been retained to represent the complainant with respect to the assault and raising the possibility of a lawsuit to seek damages for the assault.

[198] On June 11, 2001, there was a special MAC meeting to consider the reappointment of the complainant. The complainant and her lawyer attended and made submissions. This included the results of an independent review by another physician who found that the complainant had not fallen below the standard of care expected of an internist practising in Ontario. They also addressed six cases of concern noted by Dr. Ali and the Chief of Medicine. After they left, Dr. Ali presented a chronological review of the complainant’s appointment and provided a “rebuttal” with respect to the six cases at issue. In cross-examination, Dr. Ali denied he made a rebuttal and that the word was the minute writer’s word, not his. The Chief of Medicine also provided a short overview of events over the past year regarding the complainant.

[199] The MAC granted the complainant active staff privileges with a probationary period of six months on the conditions that she practise full-time in the City, not practise medicine elsewhere and practise in a collegial and professional manner.

[200] The complainant issued her statement of claim against Dr. Ali, the Chief of Medicine, the Chief of Staff and the Hospital on December 17, 2001.

[201] The MAC met on September 29, 2003, to discuss and consider the complainants reappointments for 2002 and 2003. The minutes of that meeting indicate that the complainant realized that she could not stay in the City but would not leave with a black mark on her record. The complainant advised that if she was restored her full privileges she would then resign. The MAC approved a motion granting the complainant active privileges for 2002 and 2003 on the condition she resign immediately as set out in her statement of intent to the MAC. This is what occurred.

### *Analysis*

[202] The complainant’s issue with incomplete charts predated the June 22, 1999 assault. We find no explanation for her failure to complete charts other than as she



put it, her own “shortcoming” which is unrelated to Dr. Ali and how he exercised his authority.

[203] The complainant believes that Dr. Ali’s July 8, 1999 letter requesting the dates of the complainant’s availability was a form of harassment following the June 22, 1999 assault. Nonetheless, we find that the alternative explanation that Dr. Ali required such information to prepare the call schedule to be more reasonable. He simply asked about her availability and used no language that could be considered harassing. We find that the complainant’s absences justified such a letter and though it coincided temporally with the assault, we do not find that it constituted harassment.

[204] The complainant denied that her two-month absence would create a burden but agreed that being away for four weeks is a burden to other primary care physicians. We find that the complainant’s inconsistency demonstrates some ambivalence and lack of understanding about the effect of her absences on the operations of the Hospital.

[205] The complainant agreed with Justice Morissette’s finding that she was away often but disagreed with Justice Morissette’s finding that “these absences created some consternation for the administration of the [Hospital].” She agreed with Justice Morissette that it is “imperative” for the Department to know of the absences and availability of members. She also agreed with Justice Morissette’s “reasonable inference” that there was “nothing unusual about Dr. Ali requesting the complainant’s schedule and availability.”

[206] The complainant gave four and five days’ notice, respectively, for her July and September 1999 absences. We infer from the November 1999 letter that it may have been faxed on November 16, 1999 which is the day after her absence began. Even had it been sent November 1, 1999, it would only have been 15 days’ notice. No testimony was given on how much notice was required for physicians planning to be absent. We find, based on common sense, that such short notice is woefully inadequate. It is unreasonable to expect hospitals that depend on physician availability to adequately plan with short notice absences. With respect to the length of her absences, and the agreement she had reached with the Hospital, a

week is seven days long. We do not accept that the complainant could believe that a week includes two weekends.

[207] We do not find it unreasonable that hospital administration would be concerned about a physician who was away as much as the complainant. We find that the complainant's absences were unusually long and by her own admission a burden to primary care physicians. We are not persuaded that Dr. Ali's conduct in relation to the complainant's absences was improper or designed to drive her from the Hospital.

[208] The complainant's privileges history involved many people besides Dr. Ali. Given her numerous professional problems unrelated to Dr. Ali such as her incomplete charts, absences and poor meeting attendance, we do not find that Dr. Ali used his authority to unfairly or improperly influence the outcome of the complainant's privileges application.

#### Patient Care

[209] The complainant said she "got into a couple of issues" including the use of a troponin test for diagnosing heart attacks and the use of a thrombolytic that breaks up blood clots in people having strokes. She testified that the latter caused "a little bit of an uproar" in the Emergency Department and she said that Dr. Ali supported her.

[210] The complainant was asked about a thoracentesis she performed, a procedure involving inserting a needle in the space between the lung and its lining. She confirmed that she did the thoracentesis at 1:00 or 2:00 in the morning. She said that she did it because it needed to be done and because she works 24 hours per day. The complainant did not explain whether the thoracentesis was needed on an urgent basis. She denied doing it because she had to catch a plane the next day.

[211] The complainant was also asked about another physician's patient the complainant noticed and treated in the Emergency Department for unstable ventricular tachycardia, an abnormal life-threatening heart rhythm. She prescribed the antibiotic Vancomycin for septic shock, a life-threatening infection, without first calling the other physician. The complainant said that she did not want to delay treatment by first calling him. The complainant testified that if antibiotics are not

given in the first hour, then septic shock kills rapidly. She called the other physician afterwards. According to the complainant, instead of thanking her he said not to dare ever give his patients Vancomycin.

[212] The complainant testified that sometime after June 22, 1999 she received a message through the Chief of Staff's office to attend a meeting at which only Dr. Ali appeared and that Dr. Ali screamed at her for taking a patient off an anti-platelet study. The complainant did not accept that it would have been prudent to talk to colleagues before taking such action. Dr. Ali testified that the complainant removed a patient from a clinical trial he led and the patient subsequently died, requiring him to talk to the complainant for study process purposes. According to Dr. Ali, the complainant came to their meeting very angry and so Dr. Ali called the department secretary to join them to take notes. According to the meeting notes, the meeting was halted after the complainant asked whether this was "special treatment for her ever since she has come..." Dr. Ali confirmed that the notes are an accurate reflection of his recollection of the meeting with the complainant. Dr. Ali's evidence on the need to follow a protocol for patients who have been enrolled in a study and who have died is reasonable. We do not find that Dr. Ali improperly singled out the complainant for an interview in relation to the study.

[213] Dr. Ali was copied on an electronic communication dated January 11, 2001 from the Manager of the Medicine Program to the Nursing Director of the Medicine Program, which described an incident about the complainant not responding to a call from staff and not coming in to see a very sick patient with congestive heart failure. Dr. Ali said that he had just a faint memory of the incident.

[214] Dr. Ali was asked about a letter he wrote about a patient incident dated April 23, 2001 to the Chief of Staff. Dr. Ali said he wrote the letter at the Chief of Staff's request. He denied criticizing the complainant and said that he was critical of the care she provided to that particular patient "which is a pattern." When asked if it was unusual that he put a note in the patient's chart about the nurses not being able to find the complainant for 90 minutes, Dr. Ali said that it was not inappropriate and that he was explaining the circumstances of his involvement so that he could not be said to be reviewing the complainant's charts. He clarified that the nursing staff told him about the 90-minute delay.

## *Analysis*

[215] It is not our task to determine whether or not the complainant failed to maintain the standard of practice of the profession. She is the complainant in this matter and she is not on trial. The only issue for us is whether or not Dr. Ali engaged in misconduct in his dealings with the complainant. We find that the fact that he sexually assaulted the complainant put him in a conflict of interest and he should not have participated in any discussions about her privileges.

## **Conclusion**

[216] Dr. Ali sexually assaulted the complainant. Following the assault, she had to return to a work environment in which he held power and authority over her professionally. She had difficulties at the Hospital, including the completion of patient records, extended absences, poor meeting attendance and at times (whether founded or not), concerns regarding collegiality and clinical practice. This brought her into conflict with Dr. Ali in his role as a Medical Director. Despite the fact it may very well have seemed to the complainant that Dr. Ali was continuing to persecute her following the assault, we are not persuaded that his conduct with respect to the call schedules constitutes conduct which members of the profession would find disgraceful, dishonourable or unprofessional, or conduct unbecoming. Certainly, however, we have great difficulty with the fact that following the assault, Dr. Ali maintained his position of authority over the complainant and participated in discussions regarding her privileges, going so far as to mount the response to her fight to maintain her privileges. It is not difficult to understand why the complainant would have felt marginalized and persecuted given the prominent role her abuser continued to hold over her at the Hospital and the position he ultimately took with respect to her privileges.

[217] The complainant believed that she was harassed by Dr. Ali after she was sexually assaulted, which accounted for the highly charged language she used to describe her view on her treatment by the Hospital and Dr. Ali. It is understandable that she would have perceived harassment by Dr. Ali after being a victim of sexual assault, especially given his position of power over her. However, she also did not seem to have insight into her own shortcomings and significant problems at the Hospital.

[218] Though it is understandable that the complainant believes Dr. Ali's July 8, 1999 letter was the opening salvo in the perceived harassment of her after the assault, we find that Dr. Ali's request was not unreasonable given his position as Medical Director.

[219] We understand that the complainant believes that Dr. Ali kept her off the call schedule as part of the perceived campaign to drive her out of the Hospital. Though we found Dr. Ali's evidence somewhat evasive about how the complainant was placed on call in 2000 and 2001, we find that he did not prevent her from taking call.

[220] We agree with Justice Morissette's statement in para. 73 of her reasons for judgment that "I am not persuaded that Dr. Ali was trying to exercise control or power over the complainant through his position as Medical Director." We are not satisfied that the College has proven its case that Dr. Ali intentionally tried to drive the complainant from the Hospital.

[221] We find Dr. Ali engaged in professional misconduct by sexually assaulting the complainant on June 22, 1999, in that he engaged in conduct that was disgraceful, dishonourable or unprofessional and in that he engaged in conduct unbecoming a physician. We further find that Dr. Ali engaged in disgraceful, dishonourable and unprofessional misconduct in participating in the complainant's privilege dispute when he had a conflict of interest arising from the fact he had sexually assaulted the complainant. We find his very presence during these discussions to have been unprofessional and it understandably would have been very distressing for the complainant.

[222] The Tribunal Office will schedule a penalty hearing.

**ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL**

**Citation:** *College of Physicians and Surgeons of Ontario v. Ali*, 2022 ONPSDT 19

**Date:** May 16, 2022

**Tribunal File No.:** 19-001-I

**BETWEEN:**

College of Physicians and Surgeons of Ontario

- and -

Dr. Syed Nasir Ali

**PENALTY REASONS**

**Heard:** March 11, 2022, by videoconference

**Panel:**

Dr. Paul Garfinkel (chair)

Dr. Heather Badalato

Dr. Philip Berger

Mr. Jose Cordeiro

Ms. Linda Robbins

**Appearances:**

Ms. Carolyn Silver, for the College

Ms. Anne Tardif and Mr. Daniel Chomski, for Dr. Ali

Ms. Jennifer McAleer, Independent Legal Counsel

**RESTRICTION ON PUBLICATION**

The Tribunal ordered, under ss. 45-47 of the Health Professions Procedural Code, that no one may publish or broadcast the names and any information that could disclose the identity of any patients or the complainant referred to during the Tribunal hearing or in any documents filed with the Tribunal. There may be significant fines for breaching this order.

## **Introduction**

- [1] The Ontario Physicians and Surgeons Discipline Tribunal delivered its written decision and reasons on finding in this matter on December 9, 2021. We found that Dr. Ali committed an act of professional misconduct in that he sexually assaulted a colleague in her home on June 22, 1999, and that this constituted conduct unbecoming a physician. Further, he later ignored a conflict of interest in participating in this colleague's privileges hearings at their hospital. In doing so, he engaged in conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable, or unprofessional. See *College of Physicians and Surgeons of Ontario v. Ali*, 2021 ONPSDT 49.
- [2] We heard evidence and submissions on penalty and costs on March 11, 2022 and reserved our decision.

## **EVIDENCE AND SUBMISSIONS ON PENALTY AND COSTS**

- [3] In arriving at our decision on penalty and costs, we considered the oral submissions and written materials filed by counsel for the College and by counsel for Dr. Ali. This included a review of cases that bore some similarity to the current one, both in criminal courts and tribunals.
- [4] The College proposed revocation of Dr. Ali's certificate of registration, payment of costs and a reprimand. The parties agreed on costs and the reprimand. The hearing, therefore, focused on whether Dr. Ali's certificate of registration should be revoked or suspended. Dr. Ali's counsel submitted a suspension of 10 months would be appropriate in all the circumstances.

## **DECISION ON PENALTY AND COSTS**

- [5] For the reasons that follow, we order that Dr. Ali's certificate of registration be revoked, and that Dr. Ali attend before the Tribunal to be reprimanded. We also order that Dr. Ali pay costs in the amount of \$124,440 (12 days of hearing at the daily rate of \$10,370).

## **REASONS FOR DECISION ON PENALTY**

- [6] The principles that guide the imposition of penalty in disciplinary proceedings are well established. The protection of the public is the paramount consideration. Other principles include maintenance of public confidence in the integrity of the profession and in the College's ability to govern the profession in the public interest. The College must denounce behaviour that is not in keeping with the qualities needed to practise medicine. Denunciation also involves considering the impact of the misconduct on the victim. Further principles that are considered are specific deterrence as it applies to the member, general deterrence as it applies to the membership as a whole and, where appropriate, rehabilitation of the member. The order should be in keeping with the severity of the misconduct.
- [7] In cases involving sexual misconduct, general deterrence, the maintenance of public confidence in the medical profession and its ability to regulate in the public interest are of heightened importance, though the Tribunal is aware that each of the penalty principles must be factored into our decision. This has been emphasized by the Discipline Committee in previous cases. (*College of Physicians and Surgeons of Ontario v. Minnes*, 2015 ONCPSD 3; *College of Physicians and Surgeons of Ontario v. Lee*, 2019 ONSC 4294)
- [8] As noted in *Minnes* at p. 7, "[t]he challenge for the Committee is to carefully consider all the facts and circumstances of the case and, by weighing the accepted principles of penalty in a fashion that considers the unique features of the case, to arrive at a fair and just decision."

### **Penalty Considerations Regarding Dr. Ali**

- [9] In considering the appropriate penalty, we considered the nature of the behaviour in question, aggravating and mitigating factors and then examined several similar cases.

#### **1. The Specific Misconduct**

- [10] In *College of Physicians and Surgeons of Ontario v. Peirovy*, 2018 ONCA 420, the Court of Appeal noted that a penalty must reflect the context in which the misconduct occurred. At the time of the assault the complainant was a junior medical colleague who had been Dr. Ali's friend for most of the previous decade.



She was new to the hospital having joined the department about six months earlier. She trusted him. Dr. Ali abused this trust.

- [11] In our findings on the allegations, we accepted the complainant's evidence about the sexual assault as credible and reliable. She testified that Dr. Ali had come to her home, took his clothes off, tripped her, attempted to force her to her to perform oral sex and vaginally penetrated her (*Ali*, above, at paras. 63 and 133). There is no question this was a violent act and abhorrent behaviour.
- [12] Dr. Ali's later behaviour at the hospital also compounded the complainant's distress. We found that his participation in her review of privileges was a clear conflict of interest (*Ali*, above, at para. 169). Her fears and mistrust could only have increased through her exposure to his role in her privileges case, given the recent assault. It is not difficult to understand why the complainant would have felt marginalized and persecuted given the prominent role her abuser continued to hold over her at the hospital (*Ali*, above, at para. 216).

## **2. Protection of the Public**

- [13] Sexual assault is an extremely serious crime. As Justice Peter Cory of the Supreme Court of Canada has noted, a sexual assault is "an assault upon human dignity and constitutes a denial of any concept of equality for women." (*R. v. Osolin*, 1993 CanLII 54 (SCC) at p. 669)
- [14] Sexual assault often causes extreme trauma. When the victim knows the offender, especially a person they believe should be trustworthy and safe, the sense of betrayal is a profound element of the harm and the trauma they experience.
- [15] In the current case, abuse of trust and authority and of power is central to the dynamic of abuse. It is imperative that this Tribunal denounce this serious misconduct in the strongest possible way and ensure the public is protected going forward.

### **Is Dr. Ali at risk to re-offend?**

- [16] This is difficult to assess since he has not admitted the behaviour and has not demonstrated any evidence of insight. Notably, he has practised medicine in his community for over 30 years and has not had another episode as far as is known.

There was no expert evidence on the risk of recidivism. Overall, we find Dr. Ali's risk for re-offending to be low.

[17] As stated in *College of Physicians and Surgeons of Ontario v. Markman*, 1999 ONCPSD 13 at p. 2, "[w]hen the profession speaks of 'protecting the public,' it usually does refer to patients. However, this does not exclude others, and certainly includes a physician's co-workers."

[18] The public must feel confident that no physician will ever misuse their position of trust and authority to take advantage of others in the way that Dr. Ali has done.

### **3. Denunciation of the Actions**

[19] The Tribunal must express the profession's abhorrence of the member's assault. The practice of medicine is a privilege, not a right. The profession must speak out strongly against doctors who abuse this privilege.

[20] The statement provided by the complainant emphasizes the long-standing and severe harm from this sexual assault. Portions of her statement emphasize this:

Dr. Ali's assault and subsequent actions devastated my life and my career...My emotional suffering was overwhelming and would scar me for life. I was unable to sleep; unable to eat; I suffered a deep depression and Post Traumatic Stress Disorder...I cried myself to sleep most nights...every day was a struggle. I lost confidence in male working relationships. I will bear these scars for the rest of my life.

### **4. Maintenance of Public Confidence in the Integrity of the Profession and in the College's Ability to Govern the Profession in the Public Interest**

[21] Public confidence is essential. In deciding penalties, the Tribunal bears an extraordinary responsibility to protect the public. The government and the public properly expect that the Tribunal will ensure public confidence in carrying out that responsibility.

[22] In *Johnston, Re*, 2001 CanLII 21505 (ON LST), a Law Society panel considered the appropriate penalty for a lawyer who engaged in sex with a minor sex worker. Its decision emphasizes that clients need to be able to trust their lawyers both as individuals and as members of the legal profession.

A suspension, even a lengthy suspension is an inappropriate and inadequate response...A suspension reflects neither the gravity of this misconduct nor the Law Society's rejection of the misconduct as behaviour suitable for lawyers. The public would not understand a suspension as a suitable response from the Law Society to this misconduct. The lawyer must be disbarred. (*Johnston* at para. 46)

[23] The Discipline Committee later adopted a similar line of reasoning in *Minnes*. Dr. Minnes had attempted to sexually assault a 17-year-old female counselor at a summer camp while he was the camp doctor. The panel ordered revocation, in particular given the abuse of power by a person in a position of trust and authority.

[24] Most important in a case like this, as stated by the English Court of Appeal in *Bolton v. Law Society*, [1994] 1 W.L.R. 512 at p. 7:

the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity, and trustworthiness...The reputation of the profession is more important than the fortunes of any individual member.

[25] We accept that behaviour such as Dr. Ali's has the potential to bring the reputation of the profession as a whole into disrepute. Revocation conveys to both the public and the profession that a person who exploits others for his own sexual gratification cannot remain a member of the profession. Other physicians must recognize how seriously the profession takes such abusive behaviour.

## **5. General Deterrence**

[26] Given the need to protect the public, the profession as a whole must recognize that sexual aggression will not be tolerated. A suspension will not accomplish this goal in these circumstances. Only revocation in this case can send that message.

## **6. Specific Deterrence**

[27] The College must ensure that Dr. Ali does not commit similar misconduct in the future. While this factor is relatively less important in this case as we find he is at low risk to re-offend, revocation ensures that he will not do so as a physician.

[28] An appropriate penalty must protect the public, denounce Dr. Ali's conduct, provide general and specific deterrence and maintain public confidence in the profession's ability to self-govern.

[29] Proportionality must emphasize the extreme nature of the misconduct. Dr. Ali committed an egregious act against a colleague. The event was horrific, as the victim stated and as noted previously, the assault was a huge life-altering event with consequences for her career and her personal life (for example, leaving the hospital and moving to a new community). The penalty must reflect this.

### **Aggravating Factors**

[30] There are several aggravating factors here that warrant a significant penalty.

1. Sexual misconduct is always reprehensible. Dr. Ali was invited into the complainant's home based on a trusting relationship. The violence involved (tripping the complainant, trying to force oral sex and vaginal penetration) constitutes an aggravating factor.
2. Dr. Ali's continued misconduct is an aggravating factor. After sexually assaulting the complainant, Dr. Ali continued to cause her harm and aggravated the distress of the sexual assault by remaining in a position of authority over her. He was active in her hospital privileges dispute. Moreover, he was the Medical Director of her department and was active in many policy issues and practical concerns that involved her. This forced the complainant to have to face her abuser at work regularly. The complainant felt marginalized and persecuted given the sense of power and authority Dr. Ali held over her.
3. Central to this case are the roles of trust and misuse of power. A position of trust existed before the assault, as did a power imbalance in the relationship between Dr. Ali and the complainant. He was a respected leader in the department and the hospital and had befriended her almost a decade earlier.

### **Mitigating Factors**

[31] Dr. Ali submits that the following are mitigating factors:

1. Dr. Ali had no prior complaints of misconduct in his years of independent practice.
2. Over 20 years have passed since the assault and the conflict of interest and there have been no further complaints of misconduct.

3. Dr Ali has already been penalized for this behaviour.

[32] Counsel for Dr. Ali argued that the passage of time could be considered a mitigating factor. However, the seriousness of the misconduct and the effects on the complainant are not diminished by the passage of time. Therefore, we gave the passage of time modest weight.

[33] The passage of time does not diminish the need for a denunciatory sentence given the seriousness of the crime: *R. v. J.S.S.*, 1995 CanLII 1076 (ON CA).

[34] In *R v. H.S.*, 2014 ONCA 323, the Court of Appeal considered a similar argument with respect to the passage of time. The Ontario Court of Appeal quoted with approval the decision of the Alberta Court of Appeal in *R. v. S.S.*, 1992 ABCA 352 at para. 14: “The only sentencing principles which may be affected by the lapse of time are those of individual deterrence and rehabilitation.” The court went on to state:

It will be noted, however, that if, despite having led an exemplary life, the offender lacks remorse, any potential discount must be less than it otherwise would have been. Indeed, in cases of this sort, of sexual abuse of children by parents, one might well ask whether one could ever have both remorse and lengthy suppression of the facts. (Emphasis in original at para. 14)

[35] In *College of Physicians and Surgeons of Ontario v. Taliano*, 2021 ONCPSD 17, the panel noted at para. 31: “In the absence of any evidence of remorse and given the very serious nature of our findings, we do not find the passage of time to be a serious mitigating factor.”

[36] In *College of Physicians and Surgeons of Ontario v. Marshall*, 2016 ONCPSD 31, the crime had taken place over 20 years earlier. While not a parent of the adolescent victim, Dr. Marshall was in a position of trust and authority and never acknowledged his abuse. The Committee concluded that “there should not be any credit given on penalty for the passage of time.” (*Marshall* at p. 23)

[37] The panel in *College of Physicians and Surgeons of Ontario v. Sazant*, 2009 ONCPSD 26 approached this issue in a similar fashion. It referenced an earlier court ruling (*R. v. J.R.*, [2003] O.J. No. 3458 (C.A.)) and said that “even though the offender posed little risk of reoffending, the passage of time does not diminish the

need for a denunciatory sentence given the seriousness of the crimes.” (*Sazant* at p. 8)

[38] Dr. Ali did not admit the allegations, nor did he plead no contest. He vehemently denied the allegations and testified there was a prior consensual sexual relationship. There is no evidence that Dr. Ali accepts responsibility for his misconduct or has demonstrated any insight into his conduct.

[39] While the absence of these elements is not an aggravating factor, they weigh against mitigation. As stated in *Marshall* at p. 28: “Dr. Marshall has never expressed remorse for his actions, nor does he appear to have any insight into his sexual misconduct with [the complainant]. Absence of remorse is not an aggravating factor, but it does weigh against any mitigation.”

[40] Dr. Ali has already suffered consequences for his misconduct. The civil trial resulted in his having to pay the complainant over \$680,000 in damages and costs, including a small amount for punitive damages. His misconduct has been the source of media attention nationally and in the small community in which he is engaged. His family life has also been severely impacted. Dr. Ali’s counsel asserted that Dr. Ali has already experienced significant punishment and that punishing him twice is not just. She emphasized that the monetary penalty amounts to the funds that would be lost during a very lengthy suspension.

[41] Caselaw is mixed on this issue. In *Markman*, where the member faced criminal consequences, the panel noted at p. 3:

the criminal courts have dealt with this matter, and Dr. Markman has been punished in the eyes of society. It for this reason, for example, that the Committee did not consider imposing a monetary fine or sanction where the sole purpose is punitive. This is highlighted simply to underline that the primary principles of sentencing here were to protect the public and to maintain the public’s and profession’s confidence in the profession.

[42] Also, in *College of Physicians and Surgeons of Ontario v. Nguyen*, 2002 ONCPSD 7, a six-month suspension “may well have been longer but for the criminal proceedings and the punishment Dr. Nguyen has already received.” (*Nguyen* at p. 5)

- [43] On the other hand, the panel in *Marshall* found that the consequences in other proceedings have little bearing on meeting the penalty principles at the Tribunal. Dr. Marshall had already been significantly punished for his behaviour - the court had imposed an eight-month jail sentence of which he served six months. While this could be viewed as a mitigating factor, the Committee placed little weight on it. "His criminal conviction and jail sentence have little bearing on his ability to serve patients' needs, especially in a pediatrics practice, in the future." (*Marshall* at p. 27)
- [44] We find that the civil penalty already experienced by Dr. Ali can be given only modest weight as a mitigating factor.

### **Comparison with Earlier Cases**

- [45] We are not bound by previous decisions of this Tribunal. The Tribunal recognises the principle that cases that are similar in nature should result in similar dispositions. However, each case is also unique, and an appropriate penalty must be crafted depending on the unique facts of each case.
- [46] The parties provided us with their submissions on several decisions. From those submissions and our own review of the cases we conclude that the facts support the penalty of revocation.
- [47] First, and most significant, none of the decisions cited to us involved a violent sexual assault involving vaginal penetration. This is an important distinction from the decisions in *College of Physicians and Surgeons of Ontario v. Ghaly*, 2021 ONCPSD 31, *College of Physicians and Surgeons of Ontario v. Lee*, 2020 ONCPSD 21, *College of Physicians and Surgeons of Ontario v. Yaghini*, 2017 ONCPSD 29 and *Peirovy* where lengthy suspensions were ordered. While the panel ordered a six-month suspension in *Nguyen*, which involved forced oral sex, unlike Dr. Ali, Dr. Nguyen admitted his misconduct and expressed remorse.
- [48] We acknowledge the complainant was not a patient or a minor as in *Minnes*, *Marshall* and *Peirovy*. She was, however, a colleague and Dr. Ali was in a position of power and authority in relation to her. In this respect, the decisions in *Markman*, *College of Physicians and Surgeons of Ontario v. Kernerman*, 2004 ONCPSD 14 and *College of Physicians and Surgeons of Ontario v. Schwarz*, 2019 ONCPSD 54, are most closely similar to the facts before us.

- [49] The fact that in 2017 the legislature chose to modify the statutory framework under which the Tribunal operates by making revocation mandatory for sexual abuse of a patient does not render decisions made under the previous regime unreasonable, nor does it mean that revocation is necessarily warranted in every case not involving patients.

#### **Where the Victim was a Minor but not a Patient**

- [50] In *Minnes*, there was a position of trust between an older camp doctor and the much younger female counselor. But there had been no pre-existing relationship and it involved a single incident (there were other recurring complaints of touching of female staff in a hospital where Dr. Minnes worked). Dr. Minnes never accepted responsibility for his behaviour in the camp incident. The penalty imposed was revocation. This was upheld by the Divisional Court.
- [51] Similarly, in *Marshall*, the member abused an adolescent male for over four years on many occasions. He served six months of an eight-month jail term. His certificate of registration was revoked. As in *Minnes*, the victim was not a patient and was a minor. Dr. Marshall also did not accept responsibility for his actions.

#### **Where the Victims Worked with the Physician**

- [52] In *Nguyen*, the physician forced oral sex on an employee. He received a conditional sentence in criminal court of 14 months, which was served in the community and with a curfew, followed by the maximum 36-month probation. The assault occurred toward the end of an 18-month consensual affair. This was an employer-employee relationship not involving medical care, except for on one occasion. The Committee found his behaviour was reprehensible and that a significant penalty was required. He admitted misconduct, expressed remorse and was given a six-month suspension.
- [53] In *Kernerman*, the physician was accused of behaving in an inappropriate or sexually aggressive manner by touching six female staff and visitors over four years in at least three hospitals where he worked. He had his privileges removed at each location. Dr. Kernerman accepted responsibility for his behaviour and accepted the revocation of his certificate of registration as the outcome. The revocation was based on the lengthy time frame of his actions, the number of sites



and the number of complaints, even though none of the complainants were his patients.

[54] In *Ghaly*, the physician used a cell phone to surreptitiously record a video of two clinic employees using a staff washroom. In a criminal trial for voyeurism, he pleaded guilty. He received a six-month conditional sentence and probation of 18 months in criminal court. He admitted his behaviour, accepted responsibility and was diligent in his treatment. His penalty was a 14-month suspension of his certificate of registration.

[55] In *Markman*, the physician sexually abused five hospital employees and a medical intern. The Committee emphasized the victims' trust and dependency. His certificate of registration was revoked.

### **Where Victims were Patients**

[56] In *Peirovy*, the physician was found to have engaged in professional misconduct involving the sexual abuse of four female patients and inappropriate conduct with a fifth. He had cupped the patients' breasts, touched their nipples, placed a stethoscope on their nipples and in one instance squeezed a patient's nipples. At the penalty phase of the hearing, the Committee heard that Dr. Peirovy was at low risk to re-offend, that he worked hard to understand his inappropriate behaviour and that he was sincere in his desire to prevent a reoccurrence. He was given a six-month suspension, among other things. Following a reversal by the Divisional Court, the Court of Appeal restored the Discipline Committee's original decision.

[57] In *Lee*, the physician engaged in sexual abuse of three patients, making sexual comments to two and sexually touching the third. At the initial penalty hearing in 2017, the Committee ordered revocation but in 2019 the Divisional Court allowed Dr. Lee's appeal as to penalty. The court found that the Committee had focused on the physician's misconduct and the need for specific deterrence but had failed to balance the evidence in respect of other penalty principles and did not consider whether penalties other than revocation might achieve the desired objectives. The Divisional Court returned the matter for rehearing. The Committee found that a 12-month suspension would have been proportionate and consistent with the prior caselaw.

- [58] *Yaghini* involved a physician who had engaged in sexual abuse of a minor female patient on two occasions by making inappropriate remarks and attempting to kiss her on the lips. He was felt to have gained some insight but had not yet come to terms fully with his actions. The Committee directed a nine-month suspension.

### **Where Victims were both Patients and Staff**

- [59] *Schwarz* involved a physician who had groped a female patient on two occasions, the second when she came to confront him about the first episode. In addition, Dr. Schwarz engaged in six separate incidents of inappropriate conduct toward three nurses between 2010 and 2012. This involved non-consensual sexualized touching, massage and comments. There was a lack of respect for the professional boundaries of women with whom Dr. Schwarz was in a position of power and authority. After the earlier behaviour toward the nurses was exposed, he had taken courses in boundaries and ethics. He was not considered to be appropriate for further rehabilitation and his certificate of registration was revoked.

### **Offences Occurring Outside the Clinical Setting**

- [60] Dr. Hyson (*College of Physicians and Surgeons of Ontario v. Hyson*, 2019 ONCPSD 10) was criminally convicted of an offence related to obtaining services from a sex worker. A joint submission for the revocation of the physician's certificate of registration was accepted. The Committee specifically referenced the minor's vulnerability.
- [61] Dr. Hwang (*College of Physicians and Surgeons of Ontario v. Hwang*, 2019 ONCPSD 33) was convicted of voyeurism related to surreptitiously recording his friends in their bedroom and bathroom. He also used this device to record a clinical encounter with a female patient, but the patient was off-camera. These were all done without consent. He pleaded guilty in criminal court and was given a six-month conditional sentence followed by two years' probation. At the College hearing, he pleaded no contest. His certificate of registration was revoked.
- [62] Similarly, in *College of Physicians and Surgeons of Ontario v. Johnston*, 2016 ONCPSD 45, Dr. Johnston entered a plea of no contest to an allegation of conduct unbecoming a physician by accessing and purchasing child pornography and surreptitiously recording two individuals who were not his patients in a public

bathroom. The Discipline Committee ordered the revocation of his certificate of registration and commented at p. 7: “There is an expectation of moral behaviour by persons granted the privilege to practise medicine.”

[63] At first glance, these cases have resulted in a whole range of penalties. But some factors are evident:

1. There may be facts and circumstances where a lengthy suspension (rather than revocation) may be the appropriate penalty for sexual misconduct - a lengthy suspension can be a serious penalty that serves the penalty principles.
2. Cases with multiple offences and/or victims have often resulted in more serious penalties.
3. Repetition of the behaviours, sometimes despite hospital warnings, can lead to more serious penalties.
4. Abusing a vulnerable person who is in a dependent and trusting position with the physician often results in a more severe penalty.
5. Admission of guilt, accepting responsibility and the possibility of rehabilitation are important. The role of insight and successful therapy can be relevant to penalty decisions.
6. The specific circumstances of the misconduct are important to the penalty – for example, misuse of power, the degree of violence and harm that has occurred.

[64] In the current case, the victim was not a patient or a minor, and the assault occurred on one occasion but was followed up by Dr. Ali’s misconduct in the hospital. The assault itself (this is the only example of those reviewed of forced vaginal penetration), in the victim’s own home, involving violence, manipulation and a strong element of abuse of power and trust all emphasize the need for a most severe penalty. Moreover, Dr. Ali never did accept responsibility or express remorse. This is not an aggravating factor but is important in considering his potential for rehabilitation and the principle of specific deterrence.

## **Conclusions**

[65] Prior cases can serve as a guide to penalty, but as noted all of the cases provided are quite different from Dr. Ali's case. Some of the cases resulting in revocation involved sexual abuse of patients and minors, voyeurism, soliciting sex from a minor or child pornography. Most others did not involve revocation.

[66] Given the severity of the assault and the follow-up behaviour (involving misconduct in the hospital), revocation is warranted and justified. The Tribunal must express its abhorrence of the behaviour, maintain public confidence in the regulator's ability to govern the profession in the public interest, protect the public and provide deterrence.

[67] Someone who has committed this violent assault should not be permitted to practise medicine.

## **ORDER**

[68] Therefore, we order and direct:

1. Dr. Ali to attend before the Tribunal to be reprimanded;
2. The Registrar to revoke Dr. Ali's certificate of registration, effective immediately;
3. Dr. Ali to pay to the College costs in the amount of \$124,440 within 90 days of the date of this Order.

**ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL**

**Tribunal File No.: 19-001-I**

**BETWEEN:**

College of Physicians and Surgeons of Ontario

- and -

Dr. Syed Nasir Ali

**The Tribunal delivered the following Reprimand**  
by videoconference on Tuesday, August 8, 2023.

**\*\*\*NOT AN OFFICIAL TRANSCRIPT\*\*\***

Today you appear before the panel, Dr. Ali, because we found that you committed professional misconduct by sexually assaulting your former friend and junior medical colleague in her own home. We found that this egregious misconduct was disgraceful, dishonourable and unprofessional and constituted conduct unbecoming a physician. Sexual assault is always reprehensible. In this case, you took advantage of your colleague's trust and leveraged the power imbalance that existed within your relationship to commit an extremely disturbing and atrocious act.

The Committee was also troubled that following the assault, you participated in this same colleague's privileges hearings at the hospital where you both worked. In doing so, you ignored an obvious conflict of interest. You exploited the power and authority you had over her professionally. You showed a blatant disregard of your former colleague's feelings and trauma. In doing so, you acted in a manner that was disgraceful, dishonourable and unprofessional.

Dr. Ali, your actions have understandably had a lasting impact on your former colleague's career and personal life. She moved to another community and left the hospital where you both worked to distance herself from you and these life-altering events.

Your actions illuminate your poor insight and lack of integrity. The sexual assault itself, involving violence and abuse of power, is not conducive to the privilege of practising medicine and warrants the most severe penalty. We can only hope that you look back on your heinous actions and are one day able to engage in some self-reflection.