IN THE MATTER OF THE MEDICAL PROFESSION ACT, 1981, R.S.S. 1980-81, C. M-10.1, AND

DR. AMJAD ALI, OF THE CITY OF REGINA, IN THE PROVINCE OF SASKATCHEWAN

HEARING OF THE DISCIPLINARY HEARING COMMITTEE OF THE COLLEGE OF PHYSICIANS AND SURGEONS OF SASKATCHEWAN

Dates of Hearing:	January 12, 2012
Hearing Location:	Saskatoon, Saskatchewan
Date of Receipt of Final Written Submissions:	January 23, 2012
Date of Decision:	March 12, 2012

Before: Daniel Shapiro, Q.C., C. Arb., Chair
Dr. Lalita Malhotra
Dr. Keith Ogle
Dr. James Stempien

Counsel: Bryan Salte, Q.C., for the College of Physicians and Surgeons
David Thera, Q.C., for Dr. Amjad Ali

DECISION

A. BACKGROUND

[1] The Council for the College of Physicians and Surgeons of Saskatchewan ("the College") has directed that the Discipline Hearing Committee hear and determine the following disciplinary charge against Dr. Amjad Ali:

> 1. You Dr. Amjad Ali are guilty of unbecoming, improper, unprofessional, or discreditable conduct contrary to the provisions of Section 46(o) and/or section 46(p) of **The Medical Profession Act, 1981** s.s. 1980-81 c. M-10.1, and/or bylaw 8.1(b)(vi) of the bylaws of the College of Physicians and Surgeons.
>
> The evidence that will be lead in support of this charge will include some or all of the following:
> (a) On or about the 20th day of January, 2010 J.T. attended at your clinic;
> (b) You prepared a record in relation to J.T.;
> (c) The record contained an entry "O/E Temp 37.5";
> (d) The entry "O/E Temp 37.5" was not an accurate reflection of the examination and treatment that you provided;
> (e) The record contained an entry "This patient's mother is very abusive and used racist remarks to me";
> (f) The entry "This patient's mother is very abusive and used racist remarks to me" was not truthful;

(g) The record contained an entry "She called me a money hungry coloured, who don't deserve to be in this country";
(h) The entry "She called me a money hungry coloured, who don't deserve to be in this country" was not truthful.

B. RELEVANT STATUTORY PROVISIONS AND BYLAWS

[2] The most directly relevant sections of the *Medical Profession Act, 1981* ("the Act') provide:

> 46. Without in any way restricting the generality of "unbecoming, improper, unprofessional or discreditable conduct", a person whose name is entered on the register... is guilty of unbecoming, improper, unprofessional or discreditable conduct where he: ...
>
> (o) ***does*** or fails to do ***any act*** or thing ***where the discipline hearing committee considers that action or failure to be unbecoming, improper, unprofessional or discreditable***;
>
> (p) ***does*** or fails to do ***any act*** or thing ***where the Council has, by bylaw, defined that act*** or failure ***to be unbecoming, improper, unprofessional or discreditable***.
>
> 69.1 In any proceeding before ... the discipline hearing committee... ***the protection of the public and safe and proper practice shall take priority over the rehabilitation, treatment and welfare of a person registered under this Act.***
>
> [emphasis added throughout]

[3] Section 6(2)(m) of the Act authorizes Council to enact bylaws that define professional misconduct.

[4] The following sub-sections of **Bylaw** 51(2) enacted by Council pursuant to Section 6(2)(m) of the Act are relevant:

> **8.1 Bylaws Defining Unbecoming, Improper, Unprofessional or Discreditable Conduct**
> ...
> (b) The following acts or failures are defined to be unbecoming, improper, unprofessional or discreditable conduct for the purpose of Section 46 (p) of the Act. The enumeration of this conduct does not limit the ability of Discipline Hearing Committees to determine that conduct of a physician is unbecoming, improper, unprofessional or discreditable pursuant to Section 46(o):
> ...

> (vi) Falsifying a record in respect of the examination or treatment of a patient.
> ...

C. BURDEN OF PROOF

[5] Both counsel agree and it is beyond dispute that the burden of proof in disciplinary proceedings such as these lies squarely upon the College.

D. STANDARD OF PROOF

[6] The standard of proof required in order to establish a charge under the Act is not the criminal standard of proof beyond a reasonable doubt but is rather the civil standard based on a balance of probabilities, as set out in *Green v. The College of Physicians of Surgeons of Saskatchewan* (1987) 51 Sask. R. 241 (Sask. C.A.) at 246. What is unprofessional conduct is left to the standards of the medical profession to determine[1] and a committee is entitled to utilize its medical knowledge and expertise. [2]

[7] Counsel for Dr. Ali urges us to accept the following judicial statements as being authoritative as to the standard of proof required in such cases:

> *Camgoz v. College of Physicians and Surgeons* (1989) 74 Sask. R. 73 (Sask. C.A.) at para. 2:
>
> 1) The onus or burden of proof lies upon the College to establish the allegations by a fair and reasonable preponderance of credible testimony.
> 2) This being a civil proceeding, this Tribunal, in assessing the evidence and in deciding the issues is to act on a balance of probabilities.
> 3) In view of the nature of the allegation, that is to say the allegation of crime and the seriousness of the potential repercussions to the medical career of Dr. Camgoz, the standard or proof to be applied is the highest possible standard in a civil case but is not beyond a reasonable doubt.
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> *Huerto v. College of Physicians and Surgeons* (1999) 178 Sask. R. 52 (Sask. Q.B.) at para. 36:
>
> > .... it is clear that the burden of proof with respect to the charges against Dr. Huerto rests on the College. While the standard of proof is the civil standard of proof on a balance of probabilities, the courts have consistently held that, in light of the severe consequences of a finding of professional conduct and the attendant penalties, the degree of proof required is the highest possible standard of probability, or clear and convincing proof, based on cogent evidence.

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[1] *Green, supra*, at 246.

[2] *Huerto v. College of Physicians and Surgeons of Saskatchewan*, [2004] S.J. No. 550 (Q.B., Smith J.)

[8] The issue of the appropriate interpretation to be applied to the phrase "balance of probabilities" within the context of civil proceedings generally has now been conclusively established by the Supreme Court of Canada in ***F.H. v. McDougall*** 2008 SCC 53, in which the court rejected the argument that there is more than one civil standard of proof:

> [40] ... I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof...
>
> [43] An intermediate standard of proof presents practical problems. As expressed by Rothstein et al, at pp. 466-67:
>
> > As well, suggesting that the standard of proof is "higher" than the "mere balance of probabilities" inevitably leads one to inquire: what percentage of probability must be met? This is unhelpful because while the concept of "51 percent probability," or "more likely than not" can be understood by decision-makers, the concept of 60 percent or 70 percent probability cannot.
>
> [44] Put another way, it would seem incongruous for a judge to conclude that it was more likely than not that an event occurred, but not sufficiently likely to some unspecified standard and therefore that it did not occur. As Lord Hoffmann explained in In re B at para. 2:
>
> > If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one.
> >
> > The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened.
> >
> > In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.
>
> [45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

> [46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.
>
> [47] Finally there may be cases in which there is an inherent improbability that an event occurred. Inherent improbability will always depend upon the circumstances. As Baroness Hale stated in In re B, at para. 72:
>
> > Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.
>
> [48] Some alleged events may be highly improbable. Others less so. There can be no rule as to when and to what extent inherent improbability must be taken into account by a trial judge. As Lord Hoffmann observed at para. 15 of In re B:
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> > Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities. It will be for the trial judge to decide to what extent, if any, the circumstances suggest that an allegation is inherently improbable and where appropriate, that may be taken into account in the assessment of whether the evidence establishes that it is more likely than not that the event occurred. However, there can be no rule of law imposing such a formula.
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> (5) Conclusion on Standard of Proof
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> [49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[9] The rationale in ***McDougall*** was adopted as applying to a disciplinary hearing in the following cases:

> *Osif v. College of Physicians and Surgeons of Nova Scotia*, [2009] N.S.J. No. 111 (Q.B)
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> *Rassouli-Rashti v. College of Physicians and Surgeons of Ontario*, [2009] O.J. No. 4762 (Div. Ct)

Newton v. Criminal Trial Lawyers Association, 2008 ABCA 404

Moll v. College of Alberta Psychologists, [2011] A.J. No. 369 (C.A.)

Walsh v. Council for Licenses Practical Nurses [2010] N.J. No. 61 (N & L C.A.).

[10] In a recent discipline hearing before the College's Discipline Hearing Committee (Re: Dr. Tshabalala), the committee accepted that the principles set out in *McDougall* apply to College Disciplinary hearings.

[11] In short, while there was undoubtedly at one point some divergence in judicial opinion as to the standard of proof required in such matters, the Committee accepts the recent judicial pronouncement in *McDougall*, rather than *Camgoz* and *Huerto*, as being authoritative on the matter of the standard of proof applicable to disciplinary charges pertaining to physicians in Saskatchewan.

E. THE EVIDENCE

[12] There were three witnesses called in total, including Ms. T (adult), J.T. (child) and Dr. Ali.

(a) Testimony of Ms. T (adult)

[13] Ms. T, age 46, a single parent of four children, is employed as a payroll consultant with a Regina electrical construction company. As of January 20, 2010, her daughter, J.T., then age 8, had been having trouble urinating for several days. Ms. T drove her daughter to two medical clinics (both of which had lengthy waiting lists for walk-in patients) before attending at the Northgate Medi-Clinic, Regina, where she was told there would be a 45-minute wait to see the doctor. The wait turned out to be longer before Dr. Ali was able to see them.

[14] In the examining room, Dr. Ali asked Ms. T what he could do for her. Ms. T explained that J.T. was having difficulty urinating. Dr. Ali asked her how old her daughter was and, without looking at her daughter, who was seated on the examination table, wrote out and handed Ms. T a prescription. Ms. T glanced at her mobile phone and saw that three minutes had expired since Dr. Ali walked in. (The attendance started at 6:15 p.m. and ended at 6:18 p.m.) She was upset and told Dr. Ali (she acknowledged that she did raise her voice) she would not take the prescription as Dr. Ali had not examined or even looked at her daughter. She called her daughter to her side at which point Dr. Ali just started yelling and asked her if she was a doctor. She replied "no." She backed out of the examining room while Dr. Ali yelled at her down the hallway, words to the effect that J.T. had a bladder infection and calling Ms. T a "crazy lady." The clinic was busy that day. All the chairs in the waiting area were filled and everyone could hear them. Other patients were staring at them. Dr. Ali told her to get out of his place and never come back. Her daughter was hysterical, crying and shaking. Ms. T was flabbergasted and just wanted to get her daughter out of there, so she left. It took her 20 to 30 minutes after this

incident to convince her daughter to go and see another doctor that day, to get properly tested. None of her children had been fearful of doctors before this. Her daughter was tested at another clinic, at which time it was determined that she was suffering from a urinary tract infection (UTI). Antibiotics were prescribed and the infection resolved quickly.

[15] Eventually, Ms. T filed a complaint with the College regarding Dr. Ali's treatment of her daughter, the fact that he had not looked at or acknowledged her daughter yet wrote a prescription in less than 3 minutes, as well as his verbal abuse, screaming and conduct. She received a letter from the College dated March 29, 2010, which contained Dr. Ali's explanation of how he treated her daughter. This explanation upset and shook her, in particular: (a) that Dr. Ali claimed to have taken her daughter's temperature; (b) that Dr. Ali described her daughter as "distressed" – her daughter had in fact not been distressed in any way until Dr. Ali started yelling at them; and (c) that Dr. Ali attributed racial epithets to her. On April 21, 2010, she went to Dr. Ali's office to request a copy of the chart. She was told they could not locate it. She returned the next day, at which time the chart was provided to her, upon her payment of $25.

[16] Responding to questions about the alleged racist language, Ms. T testified that the word "coloured" is American slang, that she did not speak, nor was she raised that way. She did not and does not believe such things and did not raise her children to hold such beliefs. She was deeply troubled in having to defend herself against the allegation she was a racist. She teaches her children to treat people fairly, "the way that you would want to be treated", equally, regardless of skin colour. She had come from a relationship with an alcoholic, with yelling, sarcasm and similar remarks. She found it very upsetting for such language to come from a doctor. She has dealt with physicians from diverse origins, both for her own medical care and that of her family. Her only concern is whether physicians are qualified and doing their job.

[17] In cross-examination, Ms. T acknowledged that the clinical notes of the doctor they went to after leaving Dr. Ali's office recorded her daughter's age at 9 - in fact she was only 8, but always wanted to be older. A diagnosis of UTI was made by the other physician after a urine test. (Dr. Ali also diagnosed a UTI or bladder infection and had yelled to this effect down the hallway.) Her daughter did not have a fever. The second doctor did take her daughter's temperature, which was normal.

[18] When asked to describe what happened in those 3 minutes, Ms. T adamantly denied suggestions that: (a) Dr. Ali asked any further questions beyond how old J.T. was, including whether her daughter had a fever or whether she had this condition previously (though she agreed that she probably gave him some more information); and (b) Dr. Ali either looked at or touched her daughter's cheek or forehead at any time during these three minutes. He had been facing the wall while writing the prescription and simply turned and handed Ms. T a prescription at 6:18 pm. She acknowledges that when they first arrived at Dr. Ali's clinic, she reported to the front desk and they gathered some information from her, including that J.T. was allergic to Erythromycin. She acknowledged that they had been to two clinics before arriving at Dr. Ali's clinic, where

they sat in the waiting room for a period of time before being shown to an examination room, only to wait again for quite a long time. While in the waiting room she had gone to the front desk to ask if they had misplaced the chart, which sometimes happens. She was told they would be next. She sat down for about another 30 minutes. Ms. T did not dispute that in total, they had waited for 1.5 hours in the waiting room before being taken to the examination room, from where she saw Dr. Ali walking in the hallway and said, "I thought we were supposed to be next". He advised that he saw patients in the order he is told. One of his staff did come by the room and Ms. T asked the staff member if they were next, which the staff member answered in the affirmative. She denied that she was somewhat upset about the waiting, before Dr. Ali came into the examination room. After being turned away from two previous clinics, she knew they were going to be in for a long day. Fifteen or 5 minutes after waiting that long would not have made a difference. Her daughter was a little hungry and it had been a long day, but they were not upset. Ms. T was not angry with Dr. Ali until he started yelling at her and asking her to leave. She does not scream when she gets upset, especially with her children present. Instead, if she gets really upset she gets quiet. She denied saying or even thinking that Dr. Ali was "money-hungry" at that time. None of those comments attributed to her by Dr. Ali were correct - they simply never happened. She kept repeating, "You didn't look at my daughter." She acknowledged that in her letter to the College of February 20, 2010, she wrote: "When you walk into this man's clinic you are a dollar sign and nothing more." However, she states that she got the information that led to this statement from checking "Rate My Doctor.com" around the time she sent her letter. She acknowledged that she did not think Dr. Ali should be paid for this attendance and that she wrote to the MCIB to this effect. However, she adamantly denied saying anything to that effect on January 10, 2010. Her impression was that he did not deserve to be practicing medicine if he treated every patient the same way he treated them, calling her a "crazy lady", yelling at her from down the hall and not caring that an 8-year-old child was crying and seriously upset.

[19] On re-examination, Ms. T testified that she wrote to the College on February 20, 2010. By that time, the information from Rate My Doctor.com had influenced her conclusion in her letter that Dr. Ali's patients were a dollar sign and nothing more. She went to get the records on April 21 and 22, 2010, right after she received his response.

(b) J.T.

[20] J.T. was asked a number of questions pursuant to the provisions of section 12 of *The Evidence Act*, pertaining to the evidence of vulnerable persons, which caused me to rule that J.T., age 10, understood the nature of an oath and was able to communicate the evidence. J.T. was not present in the hearing room while her mother testified.

[21] J.T. testified that as she "was having trouble peeing," she attended at Dr. Ali's office with her mother when she was eight. They had waited a couple of hours before seeing Dr. Ali. When he did see them, Dr. Ali never looked at her or touched her. He did not say anything to her, nor she to him. She has been to doctors' offices where she had her temperature taken whereby something was put in her mouth or ear, but that did not happen with Dr. Ali. He only asked her mother what was wrong with her before handing

her mother a prescription. Her mother told Dr. Ali she would not take the prescription. That was all her mother said. Dr. Ali started yelling at her mother, calling her a "crazy lady" and telling her to get out of his place. J.T. ran out of the room when "they were yelling" – by which she meant that her mom was just raising her voice a little bit but Dr. Ali was raising his voice a lot. Her mother did not say anything about Dr. Ali's race or colour or anything like that. Her mother taught her to respect and be kind to people of all colours and that "they are just like us, just with a different skin tone." J.T. was scared by Dr. Ali's conduct. *I felt like I was going to puke.*

[22] In cross-examination, J.T. denied rehearsing her testimony. The only material she read was a paragraph she wrote herself. She met once with the lawyer for the College, with her mother present. She did discuss this a little with her mother, but her mother did not tell her what to say. She did not remember whether she saw Dr. Ali on a school day or weekend, what else she did that day, what Dr. Ali was wearing or much about what he looked like. Dr. Ali was sitting. J.T. sat on the "bed" (examining table), with her mother nearby. Dr. Ali looked at her mother when he questioned her. The only question Dr. Ali asked her mother was what was wrong with J.T. J.T. was adamant that Dr. Ali did not look at her or touch her on the forehead, cheek or elsewhere. He did not ask her mother if she had a fever. (She did not have a fever.) She was adamant that her mother was not angry due to waiting for so long. J.T. went to the reception area and did not hear everything that was said between her mother and Dr. Ali.

[23] J.T. agreed that she saw a doctor later that day, but thought it was a male doctor. She is not sure if the second doctor asked if she had a fever, but the doctor did take her temperature by putting something in her ear or mouth. The second doctor gave her a prescription and she got better.

[24] On questioning from the committee, J.T. said that a female employee of the Northgate Medi-Clinic showed her and her mother into the examining room and asked her to sit on the table, but the employee did not take her temperature.

(c) Dr. Amjad Ali

[25] Dr. Ali grew up in Toronto, where he did his undergraduate work, started his M.D. at Louisiana State Medical Centre and completed it in Washington, D.C. Dr. Ali has practiced at the Northgate Medi-Clinic in Regina for about 6 years. Generally there are two doctors at the clinic, but on January 20, 2010 he was the only one there. They have about 9 staff. He chose a walk-in practice because he is interested in seeing sick people – versus other clinics that accept appointments for patients who mainly come in for prescriptions. The clinic is open from 9-9, 7 days a week. They see 100-130 patients per day on average.

[26] Dr. Ali testified that it is possible that Ms. T and J.T. waited 2.5 hours in total to see him on January 20, 2010. He did not recognize Ms. T when he saw her at the hearing, but thought he recognized J.T. His office staff completed part of the front page of the chart, showing "Allergies (Erythromycin)." In what appears to be Dr. Ali's writing,

this form also states, "Medication: TMP/SMX[3] 50 mg/ml, tsp. bid[4] (twice daily)[5] x 3 days" and "Medical: Cystitis").

[27] As Dr. Ali walked into the examining room, J.T. was seated on the examining table to his left, with her mother standing beside her. As he walked in the door he faced them, introduced himself and asked, "How can I help you today?" He then sat at his pull-out table (to his right as he walked in), as this is where he does his writing. Ms. T told him that J.T. had pain on urination. He asked for how long and she told him for 3 days. He asked if she had a fever and was told, "no." He briefly put his hand on J.T's cheek and could tell that her temperature was not elevated. He did not use a thermometer. Ms. T said nothing about fever, night sweats or pain, which would be important to know about as "these bugs can crawl up into the kidneys." Ordinarily, he would have requested a urine sample. However, while Dr. Ali did not explain how he remembered this, he testified that the urinalysis machine at the clinic was not working that day and he did not want to send the child to another lab or delay her treatment, as she was in pain. He figured that she had a UTI. After he prescribed medication, Ms. T said, "How could you write a prescription when you didn't even examine my daughter?" He told her this was untrue, that he had just touched her face. He said he was not going to examine her, in part because she was in pain. Ms. T was very upset and started saying things that were inappropriate, referring to him as a "money hungry- coloured" who "should get out of this country." He told her, "Okay ma'am, I am not going to entertain this, I'm going to leave" and he went to another examining room, leaving the child and her mother standing right there. He thought if he said anything to her he would get into trouble, so he backed away.

[28] The parties tendered an agreement and admission of the following facts and document into evidence, without further proof:[6]

1. On March 10, 2010, the College received a letter from Ms. T, mother of J.T., expressing concerns about the care Dr. Ali provided to J.T.
2. Dr. Ali responded to the complaint by letter dated March 29, 2010.
3. The College obtained an order from the provincial court authorizing seizure of J.T.'s patient chart from Dr. Ali's clinic.
4. The College seized the single page entry for Dr. Ali's treatment of J.T. from Dr. Ali's clinic. A copy of the seized document is attached (appended as Schedule "A" to this decision). Three different inks were used in that document. The portion ... highlighted in green was written in one ink, the portion ... highlighted in orange was written in a second ink and the portion... highlighted in yellow was written in a third ink.

[3] Abbreviation for an antibiotic.
[4] Twice daily.
[5] The total daily volume prescribed is normally calculated based on the patient's weight and current treatment dosing guidelines.
[6] Exhibit C-2, copy attached as Schedule "A" to this Decision.

[29] Dr. Ali testified that he completed part of this clinical note (a separate page from the chart cover sheet) while in the examining room, as identified in yellow. Usually he works until midnight completing charts and he may have completed the rest of it that evening. It is possible that 3 pens were used on this chart. Sometimes he gets called away while making notes, for example in an emergency situation. He thought it was appropriate to note the most explicit comments attributed to Ms. T. in the margin in order to remind himself and his colleagues to stay away from confrontations with Ms. T if she and her child returned. When was asked why he wrote "temp 37.5" on the chart, he replied:

> "... I put my hand on her cheek very briefly, but what I really should have written here --- and that was written, I think, when – just before I left the room or probably after. I should have written normal temperature, that's what I had in my head to write, but I wrote 37.5. But 37.5 is really a normal temperature, right? That would indicate that I took a thermometer, but I did not take a thermometer to this child."

[30] In the following question, when asked whether he wrote the "temp 37.5" while in the examining room or later, he replied that he did not quite remember exactly when he wrote it.

[31] In cross-examination, Dr. Ali testified that it was possible that the entirety of the notes in Exhibit C-2 were written on the same day. It was also possible that, since he was working at least 12 hours and up to 16 hours a day, if he was tired he might have done the notes the following day. He denied that he records 37.5 for all of his patients when he has not taken their temperature. When asked why he used that specific number on that occasion, he testified:

> It just came to me that way, and I'm not --- I'm sorry, but I indicated also that what I meant to write there was a normal temperature.

[32] Dr. Ali acknowledged that in his March 29, 2010 response letter to the College. He stated, "I checked her temperature which was 37.5 degrees Celsius."[7] Dr. Ali's explanation of this was as follows:

> "Well, it's two months later, sir, and I – I remember using my – that there is really not the way it should be written."

And later:

> "... I didn't use a thermometer. I put my hand – my hands on her cheek. It's very brief, but I figured it was -- this was a normal temperature, and the mom corroborated that with me, so I wrote it that way. And, yes, I should never have done it that way; I should have said, normal temperature.

[33] Dr. Ali explained that the portions highlighted in green were written at a different time, in order to alert himself and others at his clinic to avoid further confrontations and

[7] The letter itself was not tendered into evidence.

also to improve waiting times. He asserted that, despite the angry comments that he attributed to Ms. T, he just calmly and quietly left the examining room after Ms. T started getting angry. He denied calling her a "crazy lady" or yelling at her, and stated that he just went to see his next patient.

> "... let's be fair to the lady, okay? I don't think she was - - , she was upset with me, she was upset with the clinic, she was upset with the time she has to spend doing all this stuff, so that was quite understandable because we see it all the time. There is no reason for me to raise my voice to her, and I don't think she was raising her voice with me. I think she had stated quite clear to me that I did not — I didn't examine her daughter, and, as a result of that, she is not going to cooperate with me. So I understand that, and I say, okay, fine, you have a right to do whatever you want to do and I'm going to leave; that's it. This is a free country."

[34] Dr. Ali testified that although he came from Toronto and is as Canadian as anyone else, he had learned to back away from confrontations due to his East Indian ancestry, and it was even worse in the south of the United States. He learned not to get people mad and to just leave.

[35] Dr. Ali acknowledged that he told the Preliminary Inquiry Committee (PIC) that he deliberately put the margin comments in different coloured ink in order to highlight to himself and future colleagues what Ms. T said to him. There were at least two pens used but he did not deny that there could have been a third (as was determined by the ink specialist). At the time he only had a black and white photocopy of the chart such that one could not observe any difference in colour between the various pens used. The original was in the possession of the ink specialist. He explained to the PIC that he thought he had used blue ink for the margin notes but was wrong and he agreed at his hearing that he used a black ink pen for all notations. He also acknowledged that it was after he had full opportunity to get legal advice and prepare for the PIC that he still gave wrong information to the PIC. He did not think the report from the ink specialist had arrived by the time of the PIC interview. At his hearing, he agreed that he could not see a difference between the colour of the ink highlighted in yellow and the ink highlighted in green – both are black. He thought he had two pens in his pocket, one blue, one black, and that he pulled out the blue pen to write those margin notes, but it was possible he was mistaken in that regard.

[36] In response to a question from the committee, Dr. Ali stated that all notes were written "maybe within a day or two." He was asked why the subjective comments were noted in two different places, part in the margin and part in the chart record portion. He answered that the margin note reflects what Ms. T said to him and he mistakenly thought it was in blue ink when he spoke to the PIC. The green portions were written with the same pen but not necessarily at the same time.

F. ANALYSIS

1. Introduction

[37] At the outset, we agree completely with the position put forward by counsel for Dr. Ali that the charge against Dr. Ali does not concern any of the following:

a. The length of the waiting time on the day in question;
b. The length of the examination;
c. The accuracy of Dr. Ali's diagnosis;
d. The nature of the treatment prescribed;
e. The confrontation between Dr. Ali and Ms. T.

[38] We also agree that the only issue disclosed by the charge is whether the chart entries in question accurately reflect what happened that day. Dr. Ali urges us to conclude that to the extent that the chart reflects Dr. Ali's perception of events, if his perception was accurate, he cannot be convicted. We will address this assertion later.

2. The Definition of "Unprofessional Conduct"

[39] A number of acts and omissions are specifically defined as "unprofessional conduct" in the Act or Bylaws. While the Hearing Committee has some discretion to determine what conduct meets the definition of "unbecoming, improper, unprofessional or discreditable" conduct, there are boundaries on the exercise of that discretion. James Casey, in *The Regulation of Professions in Canada*, sets out the test as follows:

> The central issue regarding discipline, of course, is whether the professional has been guilty of the type of conduct which the specific statute in question provides is deserving of sanction. There are two lines of cases with respect to who should be considered the notional "Judge" of such conduct. The first line of cases suggests that it should be considered whether the conduct is improper according to "the common judgment of men", whereas the second line of cases suggests that the conduct should be measured by the judgment of the individual's fellow professionals of good repute and competency. It is now generally accepted that the latter test is to be utilized. Assuming that the specific statute in question prohibits conduct which is "improper in a professional respect", then the proper test may be stated as follows:

> If it is shewn that a member of the college, in the pursuit of his profession, has done something with respect to it which would be reasonably regarded as improper by his professional brethren, of good repute and competency, then it is open to the board of directors of the college to decide that he has been guilty of 'improper conduct in professional respect.'

> The Ontario Divisional Court declared a regulation invalid which made it an act of "professional misconduct" for physicians to charge their patients an annual fee for uninsured services. The Court held that the definition of "professional misconduct" should not be distorted to accomplish purposes outside the purpose of the legislation under which the regulation was made.

3. Decisions of Ontario Discipline Hearings Regarding falsification of records

[40] The College's position is that the record was altered by Dr. Ali in response to the complaint that was filed by Ms. T about one month after her interaction with Dr. Ali. Dr. Ali's motive in altering the record was to deflect attention away from himself and to attempt to make the complainant to the College less credible. In support of its position that Dr. Ali ought to be found guilty on this charge as well, the College relies on the following decisions of the Ontario Discipline Committee:

Dr. Fiorillo

The physician was found to have altered several progress notes relating to treatment of a cancer patient, presumably in an attempt to influence allegations of substandard care. The Committee concluded:

> Dr. Fiorillo's dishonest conduct expresses disregard for one of the core values of the profession. This was aggravated by the fact that: (a) the dishonesty was repeated and sustained; (b) Dr. Fiorillo admitted to altering the patient's chart only after the College had obtained a forensic report; (c) Dr. Fiorillo admitted to the misconduct only on the eve of the hearing, after the College's investigative and legal personnel had spent considerable time, energy and financial resources on the matter, and (d) any chart falsification exposes patients to potential harm.

Dr. Metcalfe

Dr. Metcalfe was found guilty of unprofessional conduct for having altered patient records to support a claim that he provided services to him. He had created at least 28 completely fictitious chart entries. The Committee noted:

> There were aggravating factors which were of grave concern to the panel. Dr. Metcalfe had not only broken trust with his colleagues, who counted on him to bear equal responsibility for the clinical care of several thousand patients, but, most importantly he had deceived the patients who trusted him with their medical care. The public has a right to expect that their physicians will protect the integrity of their medical records which ought to reflect accurately the facts related to their healthcare. Although apparently no harm befell any patient as a consequence of Dr. Metcalfe's fabricated clinical findings and non-existent patient visits, this repeated falsification of records exposed many patients to potential harm. Safe and appropriate treatment depends on an accurate account of past clinical history. The penalty will serve to assure the public that such willful tampering with medical records will be dealt with severely.

Dr. Cauchi

Information on the chart was altered, relating to the patient's history, informed consent discussions and treatment dates. The purpose was to minimize potential liability in potential civil action based on a poor result from cosmetic surgery, or would provide support to his position in response to the patient's complaint to the College. The Committee found him guilty of unprofessional conduct and concluded:

> The committee determined that the dating of entries at the time of the event occurred, rather than at the time at which the entries were made, did indeed represent falsification in that there was misrepresentation with the intention of minimizing liability in potential legal actions. The misrepresentation was, therefore, self-serving. Furthermore, in the case of the supplementary comment on the consent document, it was likely to lead to misrepresentation in any account of the discussion that took place...

Allegation No. 2, relating to the falsification of a record relating to his practice, was proved. The Committee also concluded that the act of falsification of a record would reasonably be regarded by members as unprofessional and that allegation No. 3 was, therefore, proved.

Dr. Sidhu

The Discipline committee concluded that Dr. Sidhu had engaged in a sexual relationship with a patient and then made "wholesale revisions" to the patient's chart in order to support his contention that the patient had been the one committing a boundary violation. The Committee commented:

> It was also very clear to the Committee that Dr. Sidhu falsified his clinical records in order to provide a revisionist history of his therapeutic relationship with the complainant. When faced with her allegations, he

> attempted to put a spin on her clinical interactions with him that would support his position that she was the one who was violating clinical boundaries, not he. At the very least, the Committee is of the opinion that this represents very strong circumstantial evidence to support Dr. Sidhu's guilt.
>
> Dr. Sidhu maintains that the "correction" of dates in the clinical record from 1999 to 1998 was simply to address an innocent error in his initial creation of the notes. Although we are all likely guilty of mistakenly writing the previous year's date on the checks that we write in January, the idea of erroneously writing the date for the <u>following</u> year on multiple occasions strikes the Committee as totally incredible. Coupled with the uncontested expert report of the document examiner...., the Committee was therefore satisfied that Dr. Sidhu made wholesale revisions to his medical record in order to manufacture a defence for the allegations set out against him. He then compounded this dishonesty by lying under oath about these revisions. The Committee was particularly appalled at his continuing denial of this falsification when caught out in his own evidence.

[41] Counsel for Dr. Ali contends that the above Ontario cases are of no assistance on the issue of the comments attributed to Ms. T by Dr. Ali, as each of those cases was based on alteration of the patient record which directly related to the patient's examination or treatment. In his submission, none of the precedents support the type of chart entries that Dr. Ali made in respect of Ms. T as amounting to unprofessional conduct.

4. Credibility and Reliability

[42] In considering whether or not the College has met the burden upon it as identified in *McDougall, supra*, to provide sufficiently clear, convincing and cogent evidence to satisfy the balance of probabilities test, we are to review the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[43] As a starting point in our assessment of the credibility and reliability of the witnesses' evidence, we have considered the comments of O'Halloran, J, in the oft-quoted case of *Faryna v. Chorney*, [1952] 2 D.L.R. 354 (B.C.C.A.), at pp. 356-7:

> If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and cf. *Raymond v. Bosanquet* (1919), 50 D.L.R. 560 at p. 556, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295. A witness by his manner may create a very unfavourable

> impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. ... the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say, "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
>
> The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion.

[44] In proceedings under the *Medical Profession Act, 1981*, as in every civil proceeding, it is necessary to assess both the credibility and the reliability of each witness. The distinction between those two concepts was set out in *R. v. S. (W.)* (1994), 90 C.C.C. (3d) 242 (Ont. C.A.), leave to appeal to S.C.C. refused 93 C.C.C. (3rd) vi, at p. 250:

> We all know from our personal experiences as trial lawyers and judges that honest witnesses, whether they are adults or children, may convince themselves that inaccurate versions of a given event are correct and they can be very persuasive. The issue, however, is not the sincerity of the witness but the reliability of the witness' testimony. Demeanour alone should not suffice to found a conviction where there are significant inconsistencies and conflicting evidence on the record.

[45] In evaluating the conflicting evidence provided on behalf of the College and Dr. Ali, we have to consider whether that evidence is both credible and reliable. By "credible" we mean: was the witness honestly trying to tell the truth? By "reliable" we mean: is the witness able to give accurate testimony? Some factors we may look at, to determine whether we can rely on a witness' testimony, include:

- its consistency over time—does the story change significantly between tellings;
- its consistency with other known facts; and
- whether the story told by the claimant makes sense in the context of what a reasonable and informed person would recognize as likely, in that place and in those conditions.

[46] We will consider these factors in relation to the testimony of all of the witnesses. This case involves purely factual issues. Either as Dr. Ali testified, he touched the cheek of the child, ascertained from this that the temperature was normal, then had Ms. T become verbally abusive and use racist language, while he walked calmly away from them and later recorded these events, in which case there is no case. Or, his evidence that he was calm and quiet is completely implausible. The evidence of both Ms. T and J.T. was that Dr. Ali was yelling, that he was verbally abusive, that he was screaming at the patient's mother, calling her a "crazy lady" and that this so upset the child that she wanted to puke. If we accept the evidence of Ms. T and J.T., then Dr. Ali's evidence cannot be true. There is no possibility of mistake here. One side or the other has fabricated a story. Either Ms. T and J.T. have fabricated a story blaming Dr. Ali for this and perhaps covering up racial remarks for some unknown reason or Dr. Ali has fabricated a story to provide himself a defense.

5. Charge of falsification of record in respect of temperature

[47] The specifics underlying the charge against Dr. Ali in this respect read as follows:

(a) On or about the 20th day of January, 2010 J.T. attended at your clinic;
(b) You prepared a record in relation to J.T.;
(c) The record contained an entry "O/E Temp 37.5";
(d) The entry "O/E Temp 37.5" was not an accurate reflection of the examination and treatment that you provided;

[48] Dr. Ali submits that the chart regarding J.T's treatment and diagnosis was reasonably accurate, including that the complaint was burning on urination, her temperature was normal (37.5 C), Dr. Ali's diagnosis was cystitis and he accurately recorded the prescription he recommended. Apart from the notation regarding temperature, we agree wth this submission. Indeed, the only basis for complaint insofar as Dr. Ali's chart relates speficially to J.T. is on the issue of temperature.

[49] The factual issue to be decided on this point is whether Dr. Ali did in fact take the claimant's temperature, and if so, whether he accurately recorded what he observed. A corollary to this factual issue is when Dr. Ali made this chart entry. Although it is not necessarily inappropriate to make chart entries after the event, when that is done, one would expect a physician to specifically record the date of the late entry and provide an explanation for this. Is it more probable that Dr. Ali did what he said he did? Or is it more probable that events occurred as described by Ms. T and J.T.?

[50] Having had an opportunity to carefully listen to and observe Ms. T and J.T., the Committee found them both to generally be very credible and straightforward witnesses. When they did not know the answer to a question, they said so. Both of them fairly acknowledged that Ms. T raised her voice with Dr. Ali, although Dr. Ali testified that she did not. Ms. T. testified that she asserted to Dr. Ali, "You never looked at my daughter." Why would she have uttered such a statement if he had touched her? Dr. Ali's testimony

somewhat supports the fact that Ms. T made this accusation immediately, although he described it by saying that she said, "You never examined my daughter." These versions of events are completely incongruous. The evidence points most clearly to the conclusion that Dr. Ali simply did not touch the child.

[51] It is true that there was some fuzziness in J.T's testimony surrounding the peripheral details, including whether it was a weekday or weekend, what else she had done that day, what Dr. Ali was wearing and the gender of the second physician she saw that day. Such discrepancies are understandable given her age, the discomfort was undoubtedly experiencing having been ill for three days, the passage of time since the event and the fact that, regardless of whose voice or voices were raised, she was undoubtedly traumatized by what happened at Dr. Ali's clinic between her mother and the doctor. However, it is noteworthy that she was clear and unwavering insofar as the core of her testimony is concerned.

[52] It is reasonable to conclude that, having gone through a considerable ordeal first getting to Dr. Ali's clinic and then waiting at his clinic for him, both witnesses called by the College would be particularly apt to remember with vivid clarity the limited events that transpired within such a brief attendance, which we accept was in the area of about 3 minutes in total. Neither stands to profit or gain by exaggerating, misrepresenting or lying about what occurred. Both were adamant that Dr. Ali did not even look at J.T., much less touch her cheek. Patients, including young patients and their parents, who are concerned about a medical problem, have every reason to hang on their physician's every word and gesture. J.T. testified that Dr. Ali never looked at or touched her. For a young child, being touched by a stranger and doctor, or receiving a strange doctor's attention, would be memorable. The incident happened in a three-minute period. There were few events to recall or confuse. If Dr. Ali touched the child, it is probable that the child would have remembered and noted this. The child did remember being touched by the other doctor, although not much of the details. Ms. T said that Dr. Ali entered the room, without looking at the child, asked a question about what was wrong with the child, then "faced the wall" (opposite the child) while writing the prescription, turning and handing it to Ms. T. This is consistent with Dr. Ali's testimony. The child was also believable because she said that she was sitting on the examining table, her mother stood and the doctor sat down. Dr. Ali testified that he backed away, leaving the scene first. Ms. T testified that she backed out of the examining room, with the child, while Dr. Ali was still inside; she was in the hallway when Dr. Ali was yelling. The child testified that she and her mother left first; the child left for the lobby, Dr. Ali still yelling. We believe the child, who said that she left while they were still yelling. This corroborates her mother's testimony, hence Dr. Ali's explanation is inconsistent with the other two. On balance, it is more probable that Ms. T and J.T. left first, than that Dr. Ali did. It seems highly unlikely that the child would run to the reception area to avoid the yelling if Dr. Ali had already left to see another patient.

[53] Dr. Ali's evidence is, however, by contrast, highly problematic. First, given that he was the only physician on duty at the clinic on a day when he worked not less than 12 and perhaps as many as 16 hours, seeing between 100 and 130 patients, it is simply not

believable that he would have a specific memory of touching this child on her cheek. Second, his evidence is that he entered, asked Ms. T how he could help and then sat down. He then had the conversation with the mother during which he asserts that he touched the child's cheek. If Dr. Ali was sitting down, when and how did he touch the child? Did he reach for the child from the sitting position? Did he sit down and then get up and touch the child and then sit down again and write the prescription? Dr. Ali's evidence on this point is not consistent with a reasonable explanation.

[54] The fact is that unlike the rest of the paragraph in which the notation appears, the temperature portion is entirely clear and legible. It is also in a different style of handwriting. The neatness and clarity of the notation regarding temperature, as compared to the notations that clearly were made at the time of the attendance raise alarms. One would have expected that if they were written more or less contemporaneously, they would have more or less the same degree of clarity and legibility and be of similar style. The readily apparent differences give the impression of a record that was added to at a later time for a specific purpose. These facts support the conclusion that the notation was not written contemporaneously with the interaction and that instead, it was added later. In our view, the preponderance of credible evidence points to the conclusion that it was added much later.

[55] Unlike Ms. T and J.T., Dr. Ali did, at least from his perspective at the time, have something substantial to gain by misstating what had occurred. The temperature entry indeed represented a falsification of the record, in that there was a misrepresentation with the intention of minimizing liability in respect of a complaint to the College that, at the outset, Dr. Ali understood to relate ***both*** to quality of care and conduct. Even if one accepted Dr. Ali's evidence that he touched J.T.'s cheek, which we do not, his notation of "O/E temp 37.5" would not have accurately captured what he said occurred and would still amount to a falsification as it purported to represent an examination that did not in fact occur.

[56] Dr. Ali's various explanations of when he made this notation are inconsistent and frankly, neither coherent nor credible. The same must be said for his explanation as to what he intended to convey in making this notation. Would it not be reasonable to write "37.5" had a thermometer been used and "normal" if he had used his hand to check temperature?

[57] Further, although Dr. Ali is not charged with providing false information to the PIC, it is difficult to avoid the observation that he appears to have aggravated his original falsification and in the process shed further light on the intentions behind it, by formally repeating the false representation that he had taken the patient's temperature, after having had the opportunity for input and advice from legal counsel. This falsification was also consistent with a concerted attempt to put a revisionist history on Dr. Ali's interaction with the patient and her mother. Coupled with this, suggesting to the College that J.T. was "distressed" was at best misleading, as the testimony is overwhelming that, until the confrontation between Dr. Ali and Ms. T, J.T. was not in the slightest distressed. Dr. Ali's tactics with the PIC appear to have been calculated to fertilize and water the seeds

of doubt that Dr. Ali had previously planted relative to the credibility of any testimony that may ultimately be provided by J.T.

[58] To the extent that there is a discrepancy between the testimony of Ms. T and J.T. on one hand and Dr. Ali on the other, (in relation to both temperature and conduct), we prefer that of Ms. T and J.T.

[59] Since Dr. Ali acknowledged at his hearing that he did not take J.T.'s temperature using a thermometer, the only other conceivable support for his notation would be that at the very least he touched J.T. in order to feel whether her temperature was elevated. The notation does not purport to reflect what Ms. T told him. To the contrary, it purports to reflect what he observed, indeed appears under the caption "Procedure notes and Initials" and is prefaced with "O/E" ("on examination"). We accept the testimony of J.T. and Ms. T and find as a matter of fact that Dr. Ali clearly had no physical contact with J.T. And, given the admitted lack of use of a thermometer, there was thus no other possible way for Dr. Ali to have determined J.T's temperature.

[60] We also have no hesitation concluding that Dr. Ali did not add the temperature notation either at the time of his attendance on J.T., or within days after that. Instead, we find that the preponderance of credible and reliable evidence points inescapably to the conclusion that Dr. Ali added this notation after he was advised of the complaint by the College, to try to support his position that he provided some examination.

[61] We have no hesitation finding Dr. Ali guilty of having "falsified a record in respect of an examination or treatment of a patient" within the meaning of Bylaw 8.1(b) (vi), which, by definition, is deemed to unbecoming, improper, unprofessional or discreditable conduct, within the meaning of Section 46 (p) of the Act.

Charge of falsification of record in respect of statements attributed to Ms. T

[62] The specifics underlying the charge against Dr. Ali in this respect read:

> (e) The record contained an entry "This patient's mother is very abusive and used racist remarks to me";
> (f) The entry "This patient's mother is very abusive and used racist remarks to me" was not truthful;
> (g) The record contained an entry "She called me a money hungry coloured, who don't deserve to be in this country";
> (h) The entry "She called me a money hungry coloured, who don't deserve to be in this country" was not truthful.

[63] Unlike the chart entry in respect of temperature, is not clear that the comments attributed to Ms. T amount to a "record in respect of an examination or treatment of a patient." It is not entirely obvious to us that Bylaw 8.1(b) (vi) has application here.[8] Thus,

[8] It is perhaps arguable that the notations in respect of what was alleged to have been said by Ms. T were intended to have an impact on the assessment of the quality of care provided to J.T.

we agree with counsel for Dr. Ali that this charge, if it is to be supported at all, needs to be supported on the basis of the "catch-all" prohibition against "unbecoming, improper, unprofessional or discreditable" conduct, under s. 46(o) of the Act.

[64] We do not, however, agree that the principles established in the Ontario hearings in Fiorillo, Metcalfe, Cauchi and Sidhu are to be interpreted as narrowly as counsel for Dr. Ali suggests, namely that their rationale must be limited to those cases in which the falsification relates only to treatment and examination of patients. In our respectful view, notations on a patient chart that falsely impugn the integrity or character of someone other than the patient, but who would clearly be a key witness in proceedings related to the quality of care provided to that patient, would clearly fall within the rationale of the Ontario cases.

[65] If Ms. T said what was attributed to her, then it is perhaps arguable that Dr. Ali did nothing ***legally*** wrong, for the purposes of the charge before us, by recording such remarks.[9]

[66] If Ms. T did not say those things to Dr. Ali, in our view it would clearly by unprofessional for Dr. Ali to have recorded those items in his chart. After all, if a patient referred to her physician in those racist terms, that would certainly raise some questions about the credibility of her assertions and suggest possible motives for misrepresenting what had occurred. We know that the bylaws define "falsification" as "unprofessional conduct." However, given the parameters of the specific bylaw provision in question, we are of the view that we are dealing with the general provisions of the Act, which do not specifically define unprofessional conduct. That said, we are fully satisfied that accusing a patient of being a racist and of making racist remarks when the patient has done no such thing, particularly if such accusations were made with a view to protecting the physician's position, certainly is not consistent with the standards of the medical profession and by itself, if proven, would amount to unprofessional conduct.

[67] While it may be tempting to conclude that the fact that Dr. Ali falsified the record in respect of J.T.'s temperature in and of itself casts doubt on the veracity of Dr. Ali's testimony with respect to the alleged conduct of Ms. T, we must instead assess the second charge against Dr. Ali on its own merits.

[68] We accept that Ms. T was concerned and upset about Dr. Ali's cursory attendance and lack of physical examination of her daughter. However, we do not see any basis upon which to conclude that it is probable or likely that her conduct transgressed the bounds of appropriate patient advocacy into the realm of verbal and racist abuse. To the contrary, there are many signs pointing towards Dr. Ali seeking to put a self-serving spin

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[9] It is beyond the scope of our inquiry to determine whether, from a ***medical*** perspective, physicians ought to avoid subjective commentary in a patient's chart notes unless such commentary bears directly upon current and future management decisions and is clearly identified as opinion rather than implied fact. Nor need we determine whether such comments have a proper place in a medical record under any circumstances, given the potentially prejudicial influence of such comments on any future caregiver that may read the chart.

on their interactions to seek to support his position that Ms. T was the one who was guilty of inappropriate conduct.

[69] Again, Dr. Ali's notations with respect to alleged racist and abusive conduct by Ms. T are neat and clearly written, and stand in stark contrast to the portions of the notes that were clearly made contemporaneously with the attendance. One would have expected greater similarity in style and clarity had such comments been written contemporaneously with events. We conclude that these chart entries were made a significant time after the fact, after Ms. T's complaint to the College was brought to Dr. Ali's attention.

[70] Dr. Ali testified to the effect that his background leads him to retreat from verbal abuse.

[71] Ms. T's testimony that she taught and practiced racial tolerance and respect, in her life generally and specifically in her interaction with health professionals, was not shaken in any way on cross-examination.

[72] There is little to justify accepting the word of Dr. Ali versus the word of Ms. T. on this point, except that, unlike Dr. Ali, Ms. T had nothing to gain by being untruthful. We place less reliance on the corroboration of J.T. in this regard.

[73] Ms. T's testified that based on her background in terms of inter-personal relationships, her method of coping with verbal or other abuse was one of retreat, rather than aggressive escalation, as was attributed to her by Dr. Ali. At the same time, she may have been more aggressive than she let on, being her third visit to a doctor's office that day, that she had to wait much longer than was expected, that the child was hungry because it was a long day and she had not eaten. She had been left in the examining room and that she asked the doctor in the hallway whether she was next. She also refused the prescription. She probably yelled a little. While perhaps not aggressive, it is reasonable to conclude that Ms. T was somewhat agitated.

[74] The sequence of events as set out in the child's evidence is noteworthy for the fact that the child recounted yelling on her mother's part, which lends further support for the truthfulness of the testimony. The child also remembered that Dr. Ali called her mother "a crazy woman." It is reasonable to conclude that the child was upset after witnessing a yelling man, and not before seeing the doctor. The mother's behaviour in backing away seems consistent with dealing with a drunk and verbally abusive spouse. When considering who most likely backed away during the yelling: the mother and child or the doctor, common sense suggests that it is more likely that it was the mother and child.

[75] Dr. Ali's initial explanation to the PIC of having deliberately written the margin notations, although nearly contemporaneous with the incident, in a different ink, was proven to have been incorrect, although he did not have the original chart with him, as it was then in the hands of an "ink expert." Clearly, the margin notes were written in the same colour ink. More to the point, the assertion that this was done in order to alert

himself or his colleagues of Ms. T's abusive conduct in the event that she and her daughter returned to the clinic, does not withstand serious scrutiny. Given the circumstances of this incident, including Dr. Ali's undisputed knowledge of Ms. T's clear dissatisfaction over his brief attendance, to the point of going to yet another physician after all they had been through that day, particularly when considered in the context of his allegations of racist comments that he attributed to her, why would any reasonable person think there was a legitimate risk of her ever returning to the clinic? Dr. Ali's initial conduct was also aggravated by representing to the PIC that two different coloured inks were used for the specific purpose he identified is now admittedly incorrect.

[76] To the naked eye, one cannot differentiate any of the ink that was used here. It was only on forensic analysis that one can actually know that three different inks were used.

[77] Dr. Ali's reliance on alleged racial epithets that were part of the highly unfortunate and disturbing attitudes he experienced in the southern United States represents terminology that would be unlikely for any present-day Canadian to use, even one with racist tendencies. The likelihood of a mother, in the presence of her daughter, (delete "who has taught her daughter to respect everyone, regardless of skin colour, in the presence of her daughter using racial epithets at all, is simply very low. The likelihood of her then") utilizing the language suggested by Dr. Ali is very low. Indeed, Dr. Ali's particular choice of language casts significant doubt on his testimony that such comments originated from Ms. T and instead, points to the conclusion that they originated solely from Dr. Ali, as part of his attempt to discredit Ms. T. The inconsistent and improbable explanations provided by Dr. Ali make it impossible to place any reliance on his testimony in this respect.

[78] Had the chart entry been limited to allegations of verbal abuse by Ms. T, such allegations would have contained a subjective element, and could perhaps lend support to an argument that the entry legitimately represented Dr. Ali's perception of the interaction. Given that Ms. T acknowledged raising her voice, a "perception" defense may well have had merit on those facts. However, those are not the facts before us. What was recorded here went far beyond the subjective reporting of Dr. Ali's "perceptions" of what occurred.

[79] It is simply more believable that Dr. Ali was offended by what he perceived as Ms. T's challenge to his diagnosis and professional methods, and that as a result he lashed out at her. When he became aware of her complaint, he then sought to justify his conduct and enhance his own position in respect of any College proceedings, by casting aspersions on Ms. T's credibility, integrity and motives.

[80] Upon careful consideration of all of the surrounding circumstances, we have no hesitation finding Dr. Ali guilty of falsifying this record, which, although perhaps not directly related to his examination or treatment of the patient, nevertheless clearly amounted to improper, unprofessional or discreditable conduct, within the meaning of Section 46 (o) of the Act.

Dated this 12th day of March, 2012.

Daniel Shapiro, Q.C., C. Arb.,
Chair, Discipline Hearing Committee

Dr. Lalita Malhotra

Dr. Keith Ogle

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