

PROVINCE OF NOVA SCOTIA)
COUNTY OF HALIFAX)

IN THE MATTER OF:

The Medical Act, S.N.S. 1995-96, c.10, (formerly
the *Medical Act*, R.S.N.S. 1989,
c. 278)

- and -

IN THE MATTER OF:

A Complaint of the College of Physicians and
Surgeons of Nova Scotia against Dr. Pankaj M.
Dhawan, of Halifax, in the County of Halifax,
Province of Nova Scotia

DECISION

Counsel:

Marjorie A. Hickey
for the College of Physicians and Surgeons
of Nova Scotia

George M. Mitchell, Q.C.
Sandra O. Arab
for Dr. Pankaj M. Dhawan

Members of Hearing Committee:

Alan J. Stern, Q.C., Chair
Dr. John MacDonell
Dr. Saroj Kumar
Dr. William Lowe
Ms. Elizabeth Miller

Dates of Hearing:

November 12th, 13th, 14th, 18th, 19th,
20th, 21st and 22nd, 1996, February 3rd,
4th and 5th, 1997, April 29th and 30th,
1997, and May 1st, 1997

Date of Decision:

September 8, 1997

INTRODUCTION

The names of the Complainants and certain witnesses do not appear in this decision in accordance with the submissions of counsel and the views of the Panel.

On October 24, 1996, the College of Physicians and Surgeons of Nova Scotia gave an Amended Notice of Hearing to Dr. Pankaj M. Dhawan which stated that in consequence of complaints made against him, a hearing was to be held on the following charges against him.

THAT being registered under the Medical Act, R.S.N.S. 1989, c. 278 (now S.N.S., 1995-96, c. 10), and being a medical practitioner in the Province of Nova Scotia, it is alleged that during the time period from 1989 to January, 1995:

- (1) You conducted examinations of your patient or patients which were inappropriate, unprofessional and/or unnecessary;
- (2) During your appointments with your patient or patients you unnecessarily removed clothing and/or failed to respect the privacy of such patient or patients;
- (3) You made inappropriate comments and/or inquiries of a personal nature during your appointments with a patient or patients;

And that in relation to the above, you are alleged to be guilty of professional misconduct.

Particulars of the above allegations of misconduct are as follows:

- (1) You conducted examinations of your patient or patients which were inappropriate, unprofessional and/or unnecessary;
 - (a) In or about January, 1995, during your appointment with D.B., you did one or more of the following:
 - i) You unnecessarily conducted a breast examination;
 - ii) You conducted a breast examination without permission or explanation;

- iii) You conducted a breast examination while standing behind her;
 - iv) During the breast examination you suddenly and without notice or explanation "pricked" her nipples;
 - v) You wiped perspiration from the underside of her breasts with your finger and wiped it off on your coat;
 - vi) You pressed your body against her while examining her, which was inappropriate in the circumstances;
 - vii) You rested your chin on her shoulder while examining her;
 - viii) You unnecessarily and without explanation rubbed your hand over her abdomen down to the top of her pubic hair;
 - ix) While she was lying down with her upper body exposed, you rubbed your body against her side which was inappropriate in the circumstances;
 - x) You exhibited an unprofessional demeanour during the appointment, laughing and/or smiling inappropriately.
- (b) During the period from 1991 through 1994, during your appointments with S.S., you did one or more of the following:
- i) On a number of occasions you pressed her to remove her bra so you could give her a breast examination which was not necessary in the circumstances;
 - ii) During your last appointment in or about September, 1994, you unnecessarily conducted a breast examination;
 - iii) You held her body close to yours while examining her which was inappropriate in the circumstances;

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- iv) You used an inappropriate technique when conducting a hip examination;
 - v) You lifted her underwear and viewed her pubic area;
 - vi) When she reminded you that you were to examine her hip, you slapped her on the buttocks and indicated "OK";
 - vii) You exhibited an unprofessional demeanour during the appointments laughing and/or smiling inappropriately;
- (c) In or about November 1994 you unnecessarily conducted a breast examination of M.M.
- (d) During the period April through June 1993, during your appointments with A.K., you did one or more of the following:
 - i) You repeatedly and inappropriately slid her hospital gown off her *shoulders during an examination*; (amended October 29, 1996 - addition of italicized wording)
 - ii) You put your face close to her ear and pressed your body against her during an examination which was inappropriate in the circumstances;
 - iii) In June, 1993, without adequate or any explanation, you massaged her shoulders which was inappropriate in the circumstances;
 - iv) You exhibited an unprofessional demeanour during the appointments laughing and/or smiling inappropriately;
- (2) During your appointments with your patient or patients you unnecessarily removed clothing and/or failed to respect the privacy of such patient or patients;
 - (a) In or about January, 1995, during your appointment with D.B. you did one or more of the following:

- i) You asked her to remove all of her clothing although she had requested that she be permitted to wear her pantyhose as she was not wearing underwear;
 - ii) You entered the examination room before she was finished putting on the gown and assisted her in finding the strings;
 - iii) You provided inadequate draping, inappropriately exposing her body during the examination;
 - iv) You pulled her gown down to her waist without notice or permission;
 - v) You pulled her gown up from the bottom and rubbed your hand over the abdominal area down to the top of the pubic area without notice or explanation;
 - vi) You failed to respond appropriately to her apparent discomfort and embarrassment.
- (b) In or about April, 1994, during your appointment with T.S., you did one or more of the following:
- i) You removed her shirt without notice or permission;
 - ii) You pulled her bra straps down and off her arms without notice or permission;
 - iii) You did not provide her with a gown or adequate draping;
 - iv) You inappropriately exposed her body during the examination;
 - v) You failed to respond appropriately to her apparent discomfort and embarrassment.
- (c) During your last appointment with S.S. in September, 1994, you did one or more of the following:

- i) You unnecessarily assisted her in removing her shirt;
 - ii) You did not provide a gown or any other draping;
 - iii) You inappropriately exposed her body during the examination;
 - iv) You lifted her underwear and viewed her pubic area;
 - v) You failed to respond appropriately to her apparent discomfort and embarrassment.
- (d) In or about April 1993, during your appointment with A.K. you did one or more of the following:
 - i) You unnecessarily asked her to remove all of her clothing except her underpants;
 - ii) You entered the examination room without knocking, before she had finished putting on her gown;
 - iii) You told her it was not necessary to tie the gown as you would be untying it later;
 - iv) During the examination you repeatedly and unnecessarily lowered the gown off her shoulders;
 - v) You failed to respond appropriately to her apparent discomfort and embarrassment.
- (3) You made inappropriate comments and/or inquiries of a personal nature during your appointments with a patient or patients;
 - (a) In or about January, 1995, during your appointment with D.B. you made one or more of the following comments or inquiries which were inappropriate in the circumstances:
 - i) You questioned her about her sex life;

- ii) You commented on her looks.
- (b) In or about April 1994, during your appointment with T.S. you questioned her about her relationship with her husband which was inappropriate in the circumstances.
- (c) During the years 1991 through 1994 during your appointments with S.S. you made one or more of the following comments or inquiries which were inappropriate in the circumstances:
 - i) You questioned her about her sex life;
 - ii) You told her that you found her attractive;
 - iii) You made inappropriate comments about a skirt she was wearing;
 - iv) You discussed your financial status with her;
 - v) You discussed your relationship with your wife with her;
 - vi) You invited her to play tennis with you at a time when no one would be around;
 - vii) You suggested that she not tell her family physician of your invitation to play tennis;
 - viii) You asked her to call you about playing tennis and when she didn't do so, you called her at home.
- (d) During the period from April through June 1993, during your appointments with A.K. you made one or more of the following comments which were inappropriate in the circumstances:
 - i) You told her that she was attractive;
 - ii) You told her that she had nice legs;
 - iii) You commented on the smoothness of her skin;

- iv) In relation to the lawsuit arising from her motor vehicle accident, you suggested that you could make her wealthy if she co-operated with you;
 - v) You indicated that you would be working closely with her and appointments would be scheduled late in the afternoon so there would be no interruptions.
- (e) During the years 1989 through 1994, during your appointments with M.M. you questioned her on more than one occasion about her relationship with her husband, including their sexual relationship, which was inappropriate in the circumstances.

PRELIMINARY ISSUES

At the commencement of the hearing, counsel for the College made a motion to exclude the public from the hearing while the complainants were giving their evidence.

Subsection 62(2) of the *Medical Act*, S.N.S. 1995-96, c.10, reads in part:

- (2) The hearing committee may make an order that the public, in whole or in part, be excluded from a hearing or any part of it if the hearing committee is satisfied that

. . .

- (b) financial or personal or other matters may be disclosed at the hearing of such a nature that the desirability of avoiding public disclosure of those matters in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.

The allegations in this case relate, in part, to the manner in which the physician carried out physical examinations of his female patients.

Counsel for the College submitted that the complainants would have to give evidence of a very personal nature and that, in order for the Panel to hear the best possible evidence, it was desirable that all of the complainants feel comfortable in giving their evidence.

Counsel for Dr. Dhawan submitted that, while he was not opposed to a motion to close the entire hearing, it would be unfair to close just part of the hearing and open part of the hearing to the public.

Counsel for the College responded by submitting that section 62 of the *Medical Act* contemplated closing part of the hearing and that the public and other physicians in particular should, as a general rule, have access to the evidence at discipline hearings and they should also be able to hear arguments and submissions. Counsel referred to *Re: Ottawa Police Force and Lalonde* (1986), 57 O.R. (2d) 509 (Dist. Ct.) in which Hogg, D.C.J., stated at page 511:

I believe the right of the parties, there are two here, the public and the person charged, to a public and open hearing is a safeguard to a proper state of justice. While there may be cases that call for a closed hearing, the circumstances must be compelling to outweigh the desirability of an open hearing. Our courts have held that openness is the rule, covertness the exception. That while evidence may be painful or humiliating, it is tolerated because an open hearing is the best security for the proper administration of justice for achieving public confidence and respect and support.

In our view, compelling reasons were given to close the hearing while the complainants were giving their evidence. However, in the circumstances of this case, we decided that the public should have access to the remaining portions of the hearing.

Counsel for the College referred the Panel to section 64 of the *Medical Act*, which states:

64. A hearing committee shall on the request of a witness other than the member or associate member, whose testimony is in relation to allegations of misconduct of a sexual nature by a member or associate member involving the witness, make an order that no persons shall publish the identify of the witness or any information that could describe the identity of the witness.

A request was then made on behalf of the complainants that we order a publication ban with respect to their identities and we so ordered.

EVIDENCE - D.B.

D.B. was referred to Dr. Pankaj Dhawan by her family physician for an initial appointment in July, 1994. D.B. was unable to keep this appointment, and a subsequent appointment scheduled for October, 1994, and D.B. saw Dr. Dhawan for the first and only consultation at the Nova Scotia Rehabilitation Centre on January 9, 1995.

At the time of the assessment D.B. was 36 years old. She had been married for six years and has two daughters. Following high school, one part of D.B.'s further education involved training as a nursing assistant and she worked for a short time in this health profession.

In August, 1994, D.B. was injured in a motor vehicle accident and in December, 1994, she had another minor motor vehicle accident.

The referral made to Dr. Dhawan in July, 1994, related to pain that D.B. was experiencing in her right hand and the referral note made reference to the possibility of a carpal tunnel problem.

In December, 1994, D.B. was experiencing severe pain in her back and legs and as a result she was hospitalized. Her family doctor then booked the appointment of January 9, 1995.

D.B. described her visit with Dr. Dhawan and stated that she was called into his office where they talked. She told Dr. Dhawan about a trip she had taken and the pain she was experiencing in her back. She says that he asked whether there was any undue stress in her life, with particular reference to her sexual life, and she replied in the negative. She says that she described pain in her lower back, arm, shoulder, neck, face and chest. She described the

accident of August, 1994, when her parked vehicle was struck from behind. Following the accident she experienced a lot of neck pain, back pain and pain in one arm.

When questioned about her chief complaint when she saw Dr. Dhawan, D.B. said that the complaint at the time related to her back and a need to get a C.T. scan done. When referred to Dr. Dhawan's letter to the Provincial Medical Board dated April 7, 1995, (Exhibit #1, Tab 4, Page 5), D.B. denied that her chief presenting complaint was "... of right-sided chest and breast pain..." She indicated that the chest pain she was concerned with was in her upper chest just below her neck and that she had no complaint about breast pain. She said her main concern was that she had lost control of her legs while on the trip and she was experiencing back pain for which she was taking Demerol.

Following a discussion of up to 45 minutes, Dr. Dhawan asked D.B. to go into the examination room, remove all of her clothing and put on a Johnny shirt. When D.B. asked if she could keep her pantyhose on because she was not wearing any underwear, Dr. Dhawan told her that he wanted her to remove all of her clothing so he could feel her reflexes and sensations. D.B. states that she undressed and put on the Johnny shirt, but had not tied the top on yet when Dr. Dhawan entered the room without knocking or making any announcement. Dr. Dhawan gave her a second Johnny shirt which she put on over the other one.

The initial part of the examination was done while D.B. was standing. Her neck, shoulders and back were examined.

Dr. Dhawan then asked D.B. to get up on the examination table in a seated position and he stood behind her for the next part of the examination. She stated that they were very close and Dr. Dhawan rested his chin on her shoulder. She says he then pulled down her gown and took her arms out so that the gown was around her waist. She stated that he lifted her arms up in the air and used his hands to feel parts of her back and the sides of her breasts and that the palms of his hand hit her nipples during this process.

When asked about discussions and explanations during this part of the examination, D.B. said that the only discussion while her arms were up in the air related to chronic pain in her back.

Dr. Dhawan left the examination room for a minute and when he came back he asked D.B. to lie on the bed. D.B. said that Dr. Dhawan had pulled the gown up in front of her, but that he then pulled the gown down around her waist and stated that he was going to examine her breasts without giving any explanation. D.B. says that Dr. Dhawan did not ask for permission to examine her breasts and she did not say anything to him. He then proceeded with an examination of each breast. She says Dr. Dhawan was smiling and grinning at her while he was examining her breasts.

When the breast examination was concluded, according to D.B., Dr. Dhawan pulled the lower part of the gown up around her waist so that the full gown was all gathered around her waist area. She stated that he then examined her stomach down to her "vaginal hairline" and "he reaches up and he tweaks my nipples between his fingers and just about brought me off the table". D.B. described her reaction as follows at pages 130-31 of the transcript:

Q. You mentioned your vaginal hairline area. How far down in that area did he go with his hands?

A. Down around the sides, down around the sides of my legs, the crease of the legs.

Q. On the inner part of your legs?

A. Yes, and I mean I was red by that time from the neck up. And I was never feeling so uncomfortable and when he had pricked my nipples between his fingers and grinned at me and I'm sweating, I mean there's -- I'm just sweating. He takes his fingers and wipes the sweat from under my breast on his way out. And by this time I was not feeling too well.

... And I mean there was nothing there to cover me. I'm absolutely -- I mean there was no paper, no sheet, there was nothing and I mean absolutely nothing ... He moves down, he goes down to the bottom of the bed and he's lifting my legs up in the air to see if it hurt and my gown falls up. I'm totally exposed there.

Following the examination, there was a further discussion between D.B. and Dr. Dhawan and they walked to an EMG lab where D.B. was tested.

Following her visit to Dr. Dhawan, D.B. saw her family physician twice and explained what had happened. She was advised about the Provincial Medical Board and subsequently contacted the Board and provided two written statements in March, 1995, (Tabs 2 and 3 of Exhibit #1). D.B. stated that she had no knowledge of the other complainants and had never spoken to any of them.

Dr. Elliott Weiss was called by the College to give opinion evidence regarding the appropriateness of, or necessity for, examination techniques of a physician who practices physical medicine and rehabilitation. He stated that the terms "physiatry" and "physical medicine and rehabilitation" are used interchangeably but the term "physiatry" has not been accepted as an approved term in Canada.

Dr. Weiss, who practices in Moncton, New Brunswick, testified about the fibromyalgia and stated that it is a condition of chronic benign pain.

Dr. Weiss provided a report dated October 21, 1996 (Exhibit #2, Tab 7). In relation to D.B. he reviewed her two statements, Dr. Dhawan's file and a letter from Dr. Dhawan in response to the complaint. Dr. Weiss described several examination techniques or manoeuvres that physicians use during physical examinations.

When referred to the report made by Dr. Dhawan to D.B.'s family physician and the symptoms and chief complaint in the letter, Dr. Weiss stated that those complaints did not suggest to him that a breast examination should be conducted. He stated that the complaints were primarily related to low back pain and a pinched nerve in the lower back. Another complaint was numbness and tingling in the hand and the effects of the motor vehicle accident and Dr. Weiss stated that he would not be directing his clinical efforts into disorder of the breast. He further suggested that a specialist in physical medicine and rehabilitation would be primarily focusing toward neuro-muscular skeletal and soft tissue conditions and not disorders

of the breast. He acknowledged that he chooses not to do breast examinations as a regular part of his practice.

When referred to the examination from behind, as described by D.B., Dr. Weiss stated that it would not be necessary to touch the patient's breasts or nipples for this portion of the examination and there would be no reason for the doctor's chin to be on a patient's shoulder.

When questioned about the removal of pantyhose, Dr. Weiss made the following statement about the comfort of a patient at page 674 of the transcript:

But it's preferable that the patient feel comfortable as possible, because when a patient is visiting a physician there may be a fair amount of anxiety in the first place and I think it's important that we try and reassure them and allow them as much privacy as possible.

In his report Dr. Weiss made the following statement about draping when referring to the complaint of D.B.:

It is especially important to ensure the patient is appropriately draped and avoid exposing the genital and chest area unless it is appropriate for the examination. The manipulation of D.B.'s gown, based on her description, is not consistent with appropriate medical examination techniques.

Dr. Weiss was also asked about making inquiries of a personal nature and whether questions to D.B. about her sex life were appropriate. He indicated that he would feel uncomfortable using this line of questions with a patient such as D.B. and stated that in his practice, this line of questioning is rarely touched upon.

Dr. Dhawan provided detailed testimony in his defence. He stated that he received his initial medical training in India and he provided a Curriculum Vitae. Following receipt of an MBBS (Bachelor of Medicine and Bachelor of Surgery degree), he had a residence in general surgery. He then moved to Canada, had a four-year residence in physical medicine and rehabilitation and received the appropriate certification from the Royal College. He has

been licensed to practice in Canada since 1989. Dr. Dhawan has been primarily located at the Nova Scotia Rehabilitation Centre and has a regular clinic in Windsor, Nova Scotia. He provides extensive consulting services and has hospital teaching responsibilities. He holds several significant positions, including Chief of Physical Medicine and Rehabilitation Services at the Victoria General Hospital.

Dr. Dhawan stated that his office practice occupies the bulk of his time and is based on referrals from other doctors. He sees patients in his office and provides a consultation report and follow-up treatment as necessary.

The office premises of Dr. Dhawan within the Rehabilitation Centre consisted of a room for the secretary, Dr. Dhawan's own office and an examining room. The only office staff member prior to 1995 was his secretary. He subsequently recruited a female to assist him with the assessment of female patients in both of his offices.

Dr. Dhawan was referred to his chart for D.B. He recalled that he took her into his office and proceeded with his standard protocol questions. He recorded the responses as the patient was talking. The chief complaint of D.B., as he recorded his responses, was "right chest and breast pain, low back pain, left leg numb on Christmas, weakness, second MVA, right hand numb, weak ... no neck pain".

Dr. Dhawan referred to "global" or "classic" questions that are asked after a personal injury because sleep can get interrupted due to a number of factors, including pain. He asked D.B. how her work and daily life had been affected and if she had any stresses in her personal life and her marriage and she denied same. She stated that she was happily married. He then proceeded to ask about her past medical history.

Following the office interview, Dr. Dhawan asked D.B. to go into the examination room, remove all of her clothing and put on a Johnny shirt. He acknowledged that he told her to take off her pantyhose because he wanted to do a neurological examination of the legs, including sensations, in view of the left leg numbness.

Dr. Dhawan could not recall the exact details of opening the door, but he did recall providing a second gown and then proceeding with an examination.

Before providing his testimony with regard to D.B., Dr. Dhawan gave the Panel a demonstration of his examination techniques. He stated that these were the techniques he used in examining D.B.

Dr. Dhawan provided a detailed description of the examination he did from behind as D.B. was sitting on the examination bed. He provided diagrams which showed where he would palpate the side of the chest for tender points and trigger points, particularly in the latissimus dorsi muscle as well as the serratus anterior muscle. He stated that it was necessary to palpate that muscle through the side of the breast tissue. In the words of Dr. Dhawan at page 988 of the transcript:

I can't see how I can avoid touching her breast because the trigger point lies under the breast tissue on the outer aspect.

In response to a question about the next part of the examination, Dr. Dhawan stated at pages 989-990 of the transcript:

Okay, after listening to the chest I would come to the front at that point, listen to her heart and then I would ask her to be exposed to waist down with her shirt being down to the waist. This was to expose the chest and compare both breasts as well as look for any signs of any scarring, any puckering in the breast tissue, any evidence of any atrophy in the soft tissues and fat under the skin because of the injury to the chest. And then I would ask -- I did ask her to lie down on her back and proceeded with her breast examination. And before proceeding with her breast examination, I did tell her that I needed to do a breast exam and proceeded further, and she had consented to it. And there was nothing mentioned that she did not want a breast exam, she was not uncomfortable with it or an obvious discomfort shown.

Dr. Dhawan was asked why he thought it necessary to do a breast examination and he stated at pages 990-991 of the transcript:

For two or three reasons in this case. Firstly the patient had presented to me as chief complaint in her words of right-sided chest and breast pain, which is recorded in my handwritten as well as dictated reports.

Secondly, this was a case of personal injury. These symptoms originated according to her assist, from the car accident. I wanted to see whether any injury had occurred to her rib cage, injury had occurred to her soft tissue around the rib cage, any myofascial pain had occurred as a result of these soft tissue injuries. For that there was a pain to the side of the chest or the serratus anterior and the lats were examined ...

Dr. Dhawan agreed that he examined the nipples as a part of the breast examination. He stated that this is usually done at the end of the breast examination and that is what he did in this case.

Dr. Dhawan confirmed that he carried out an abdominal examination which was indicated to determine whether there was any intra-abdominal pathology which could have caused certain pain and numbness. He agreed that he could have provided better covering and stated the following at page 1012 of the transcript:

And I think given the situation that she wasn't wearing a panty and so on and the examination was fairly extensive, I can see why she would feel sensitive to that and uncomfortable. And I feel badly about that.

Dr. Judith Gold testified on behalf of Dr. Dhawan. The Panel agreed to accept Dr. Gold's qualifications to give an opinion as a psychiatrist, with respect to the general personality functioning of Dr. Dhawan, based on her examination of him.

Prior to conducting her assessment, Dr. Gold was provided with copies of letters from the complainants as well as the responses of Dr. Dhawan.

Dr. Gold reviewed the background of Dr. Dhawan, pointing out that he grew up in a culture in India that was different than Canadian culture. His medical training was received at a young age. Dr. Gold was looking for evidence of Dr. Dhawan's ability to interact with

other people in order to assess his awareness of how he reacted interpersonally, his degree of empathy for others and his sensitivity to his own behaviour.

Dr. Gold stated that her impression was that Dr. Dhawan had received very little education in the nuances of a physician/patient relationship in terms of communication. According to Dr. Gold, he was obviously very competently trained in his particular field. However in Dr. Gold's opinion, he had not received enough training in understanding a doctor/patient relationship and the nuances therein. This was not just through a lack of education or training, but also through a lack of cultural awareness of the particular emphasis placed today by many women on their interaction with male physicians in this country. In her report dated March 6, 1996, Dr. Gold concluded in part:

In my examination of Dr. Dhawan, I believe that he fits into the category of the poorly trained physician who is naive and who crosses boundaries, not through the intent of committing sexual abuse, but through his own lack of training and insensitivity to certain cultural mores.

Dr. Josephine Somerville also gave evidence on behalf of Dr. Dhawan. Dr. Somerville is a consultant in rehabilitative medicine at Sunnybrook Hospital in Toronto as well as the chief of rehabilitation at Riverdale Hospital. She also has a private practice in rehabilitation medicine. The Panel accepted her qualifications to provide expert evidence with respect to physical and rehabilitative medicine.

Prior to providing her report, Dr. Somerville reviewed the letters of complaint, the various responses, the charges and Dr. Dhawan's medical charts and consultation notes.

Dr. Somerville was asked if she could comment about the clinical ability of Dr. Dhawan. She stated that she felt that he was very thorough, that he takes an in-depth history, and that his examination is in great detail.

Dr. Somerville was asked about a diagnosis of fibromyalgia and she stated that the diagnosis is made from history taking and physical examination.

Dr. Somerville stated that taking a social history and a functional history is paramount with regard to fibromyalgia. She pointed out that stresses in the patient are often related to a patient's background, education, culture, social situation, work, marriage and family relationships.

In her report dated November 1, 1996, Dr. Somerville made the following comment with respect to D.B.:

The examination was a standard one and the breast examination was indicated. The differential diagnoses necessitated the investigation that was carried out.

EVIDENCE - T.S.

T.S. was referred to Dr. Dhawan by her family physician in 1993 because of problems with her wrists and hands. These problems resulted from the repetitive type of work T.S. did.

T.S. visited Dr. Dhawan on several occasions in 1993 and 1994. On all but the last visit T.S. was accompanied by her husband or her mother.

In April, 1994, T.S. said that she was alone with Dr. Dhawan for the first time. She stated that after she sat on the examination table, Dr. Dhawan asked her if there was a problem with her marriage or her relationship and that this would be a good time to tell him and they could deal with the situation if that was the stress she was under. She told Dr. Dhawan her marriage was fine and the stresses related to her work.

The physical examination commenced with Dr. Dhawan feeling pressure points in the neck of T.S. He then lifted her shirt up and took it off. He continued to press on the back of her shoulders and said that he could not feel through her bra strap. He pulled down her bra straps and her bra was off and not covering her even though the bra was connected by clasps

in the front. She says that she was not offered a robe or sheet or even told in advance that her bra would be removed. As the examination continued, Dr. Dhawan asked her to lift her arms in the air. She lifted one at a time and covered herself with the other arm. She says that she was very upset and nervous.

When questioned about previous examinations by Dr. Dhawan, T.S. stated that she had never been asked to remove any clothing on other visits.

T.S. saw Dr. Dhawan on one further occasion after the April visit. She returned to the office with her husband to have an EMG test done.

Dr. Dhawan reviewed his visits with T.S. and the physical problems he treated. He stated that she had done well with physiotherapy and medication. He was concerned about the repetitive nature of her work and suggested she should look for alternative lighter work.

Dr. Dhawan stated that the presenting complaints of T.S. on her April, 1994 visit included hand problems, muscular aches and pains in the elbow, back of the elbow and around the shoulders. These complaints had resulted from the return of T.S. to full-time work.

Dr. Dhawan described the examination he carried out and stated that there was no need to do a breast examination or to expose the breasts. In response to a question about the concerns raised by T.S. about the removal of her shirt and exposure of her body, Dr. Dhawan stated (at page 1043):

... I think that they're valid concerns. She required an exposure to -- of the muscles. The garment which she was wearing was quite occlusive in the sense that it was close to around the neck, with a round neck. It had multiple buttons and I wanted to visualize these muscles and palpate and see which areas are tender. For that, actually, I myself unfortunately took upon to lift her shirt to palpate first the back near the shoulder blade, and then it was raised up to palpate in the back muscles of the trapezius.

And then I could not see the scalene muscles at that time because her shirt was around the neck, so it was -- actually, the shirt was removed.

Dr. Dhawan described the removal of the bra as follows (at pages 1044-1046):

Yeah, it came off, and it was kept in the front. Okay? Her bra was not removed but the bra straps were lowered. That is my standard practice because ... to examine the muscles around the shoulders, I do not like the bra straps to be present. Even if the bra is on and if I'm examining somebody's shoulder, I would ask the person to put the Johnny shirt underneath their arm, take the bra straps clear off the arm so that the whole area is exposed, without actually exposing their breasts ...

And I do not recall, and I'll swear - I'm under oath -- that her bra -- breasts were exposed in any way ...

My recollection is that when I came out in the front to palpate this region, that's when I came out in the front to do the -- palpate the pec minor muscle. The rest was all done from behind. And when I came up to the front and palpated the region, she was instructed to cover her front with her shirt, and she was covering her front with a shirt and that was it.

When asked about the use of a Johnny shirt on this occasion, Dr. Dhawan responded as follows (pages 1051-1052):

Yes. I can't explain that. I -- usually I give a Johnny shirt when the clothing have to be removed. That's my standard practice and that's quite obvious from the testimony of other patients who have been here. And I don't know whether a Johnny shirt was not available on that day in that particular department, or I was rushed and I just palpated the tenderness. There was no indication of removing the bra or anything like that to expose her breasts, so I -- I think I should have offered her a Johnny shirt or gone out and found some piece of linen.

In her report dated November 1, 1996, Dr. Somerville made the following comment with respect to T.S.:

The examinations, investigation and treatment prescribed were appropriate for carpal tunnel syndrome. Dr Dhawan appears to have provided compassionate treatment and his care was comprehensive.

EVIDENCE - S.S.

S.S. was referred to Dr. Dhawan by an orthopaedic specialist in 1991. She was 17 and suffered from back, hip and leg problems. She was treated by Dr. Dhawan on four visits from December, 1991, until May, 1992. There were two more visits in 1993. During the course of the visits Dr. Dhawan discussed the patient's medical history, carried out physical examinations and gave injections on occasions.

Discussions between S.S. and Dr. Dhawan during 1993 included weight exercise and dieting, the possibility of fibromyalgia and progress in school. In addition Dr. Dhawan asked about stress in the life of S.S. and she provided information concerning issues in her life.

In July, 1994, S.S. saw Dr. Dhawan because of pain and discomfort in her hip and legs. S.S. stated that she came specifically for a hip injection. During the visit the discussion included the problem with the hip, weight gain and stress issues. S.S. described what she was wearing as a wrap-around skirt that was floor length. She says that when she had to move her skirt to the side to receive the hip injection, Dr. Dhawan "reached over and whispered into my ear that my skirt was convenient in more than one way".

The final visit of S.S. to Dr. Dhawan was in September, 1994. She was then 20 years old.

S.S. said that she had a late afternoon appointment and the secretary left upon her arrival.

In the course of the discussion, which S.S. said was about 45 minutes in length, Dr. Dhawan talked about his wife and family, expensive gifts he had purchased for her, how much money he made, his house, his teaching responsibilities and sports. Dr. Dhawan stated that he had a membership in a tennis club and S.S. was free to use it and that he would like to play tennis with her. He stated that she looked more mature than previously.

In the examination room no instructions were given to S.S. in contrast to previous visits. Dr. Dhawan told S.S. to sit on the table and he helped her to remove her shirt. Dr. Dhawan then told her to lay flat on her back and asked her to remove her bra which she did. No cover was provided and Dr. Dhawan proceeded with an examination of the chest area, including the breasts. Dr. Dhawan then indicated that he wanted to examine the abdominal and pelvic area and S.S. undid her pants to enable the examination to proceed. When the examination concluded S.S. stood up and she says that Dr. Dhawan smacked her on the buttocks.

Following the physical examination Dr. Dhawan asked S.S. to return to his office after he gave her a hip injection. S.S. described the initial part of the office conversation as follows (at page 527):

He leaned over, and he explained to me that it was a big step for him to ask me to play tennis and it was a -- it was a big step for him to talk to me the way he did and reveal that type of information, and he wanted to know if I was serious about playing tennis, and he proceeded to give me his private line and his pager number written on the back of one of the appointment cards.

... he wanted me to call him before the weekend. He said he was going away at some point, ... and I made an excuse not to phone him.

S.S. says that her understanding about the phone number was to help her get in touch with him so they could play tennis and make a time because Dr. Dhawan said that if she used the usual number to the office, his secretary would not let her through and he gave her his pager number.

S.S. says that Dr. Dhawan called her number the following week, but she stated that it was her sister and they did not speak or meet again.

Within a matter of a few days S.S. reported the events to her family physician. She stated that when she and Dr. Dhawan had discussed this family physician during the last

visit, he told her it wouldn't be good if S.S. mentioned to this doctor that she and Dr. Dhawan had extensive discussions and long talks.

Dr. Dhawan reviewed his history of dealing with the medical problems of S.S. He carried out history taking and examinations and provided detailed reports to the referring physician. By September, 1994, he had concluded that the hip problem was much improved and the main problem had resolved.

Dr. Dhawan described the initial discussion on the final visit and stated that they discussed her condition and the symptoms. He said when she asked him a question about leaving Canada, he stated he was happy here in all ways including financially. He says S.S. asked him about his wife and he told her about his wife's achievements and how proud he was of her. He denied that this discussion took place on the last visit but stated that the conversations about himself and his family had taken place over three or four years. He agreed that he asked which sports S.S. liked because of his concern that she do exercises and watch her weight.

Dr. Dhawan agreed that a discussion about tennis took place when S.S. asked him if he played. He told her where he played and that he lived close by. He said it was her idea for them to play tennis together and he told her he did not mean for them to play together and that she should play with her friends. In relation to the conversation about tennis, Dr. Dhawan says that he told S.S., "Please don't mention it to Dr. M. because that will make me look bad". He gave the following explanation about the conversation (at page 1172):

Because I -- obviously this lady had misunderstood the whole conversation. I had no intention whatsoever of playing tennis with her myself... And that is not an activity I engage in with patients, playing any form of sports, so I wanted to be absolutely sure to her, to discourage her that even the discussion is not welcome...

With regard to the physical examination Dr. Dhawan agreed that he did not offer a Johnny shirt to S.S. He recalled helping S.S. in removing her shirt. He said he asked her to

remove her bra and augment his examination of the front of the chest wall in order to see whether her ribcage was tender and whether the mild tenderness was coming from pectoral muscles or whether she was suffering from any breast pathology.

When asked about providing his telephone numbers to S.S., Dr. Dhawan stated it was not an unusual practice for him and he sometimes wanted patients to call his office either for a medication change or response to an injection. He says he wrote down two numbers on a piece of paper - his private line which rang on his secretary's desk and a direct dial number for his secretary. He stated that he used to give out his pager number and that he could have given it to S.S.

Dr. Dhawan agreed that following the Thursday appointment, he was back in his office on the following Monday and he called S.S. at home because she had left her prescription in the office. He left a message for S.S. to call him and there was never any further communication.

In her report dated November 1, 1996, Dr. Somerville made the following comment with respect to S.S.:

Dr. Dhawan's history taking was extremely thorough and his physical examination was performed in a professional manner. He arrived at a differential diagnosis which required the investigation he ordered. It was necessary for Dr. Dhawan to take the family and psycho-social history of Ms. S. Ideally a nurse could be in attendance if the physician required the removal of a bra as this may reassure the patient of professionalism. The investigation was appropriate and comprehensive.

EVIDENCE - M.M.

M.M., a registered nurse, was referred to Dr. Dhawan by her family physician in March, 1990. M.M. had a complaint of lower back pain which resulted from a work-related injury.

M.M. had a number of follow-up visits with Dr. Dhawan over a seven-month period. In the detailed reports to the referring physician, Dr. Dhawan described the ligament strain in the lower back region and stated that her myofascial pain syndrome was under reasonable control.

M.M. then returned to work. She suffered a further injury to her lower back from a motor vehicle accident in 1991 and required treatment over a period of three years.

In his report of November 19, 1991, Dr. Dhawan referred to M.M.'s history of fibromyalgia and stated that her fibromyalgic tender points were moderately tender.

M.M. stated that on each visit to Dr. Dhawan he questioned her about her marital relationship. She said she always answered that she had a good home life and there was no issue in this regard.

M.M. described the physical examinations by Dr. Dhawan on all visits, until the last one, by stating that she was always given a gown and appropriate privacy. She had removed her bra but did not attach any significance to the removal. Prior to November, 1994, M.M. did not have any breast examinations carried out by Dr. Dhawan.

M.M. had her last visit with Dr. Dhawan on November 22, 1994. She said that her back pain had improved but she was having increased difficulty sleeping and she discussed her medications with Dr. Dhawan. She also said she had noticed increased pain in certain pressure points in her neck and shoulders. When asked about any complaints of pain in the regions around the breast, M.M. said she did not have any such complaints and that her complaints to Dr. Dhawan concerned an increase in pain related to her neck and shoulders. She stated that the description of anterior chest pain and tenderness found in the pectoral regions, as later provided by Dr. Dhawan in his response to the Provincial Medical Board, was not accurate.

The physical examination on November 22, 1994, proceeded in the same manner as previous examinations. M.M. described the latter part of the examination as follows (page 447):

During the last part of the examination when I was laying on the stretcher to -- for the leg raises, which is a normal part of the exam, Dr. Dhawan made reference to the fact that I had fibrocystic disease, and he might as well check my breasts. At this point he raised the hem of my gown and proceeded to do a breast examination.

Although M.M. acknowledged that she had been diagnosed with fibrocystic disease many years previously, she stated she was shocked that the examination occurred right on the heels of Dr. Dhawan's comment. When asked why she was shocked, she said (page 448):

That it was even taking place. It was inappropriate. It was not something I was expecting or I -- I was just shocked.

In response to a question about the manner in which the examination was conducted, M.M. stated (page 449):

I really don't know because I froze. I just turned my head to the wall and waited for the examination to be over. I can't tell you how long it took. I can't tell you if it was a proper examination or what sequence.

M.M. said she reported the incident to her family doctor shortly after it happened and told him she would not return to see Dr. Dhawan under any circumstances. She did not contact the Provincial Medical Board at that time. In November, 1995, her doctor indicated that another one of his patients had a difficulty that had been followed up with the Provincial Medical Board. M.M. then contacted the Provincial Medical Board but never received any details about other complaints concerning Dr. Dhawan.

Dr. Dhawan confirmed that he did ask M.M. about stresses in her life, including marital relations. He did this on several occasions as part of his normal practice when he was concerned with whether or not his patient was suffering from stress.

With regard to her past medical history, Dr. Dhawan stated that M.M. did not give him her history of fibrocystic breasts because there was no reference to this condition in his charts and he wrote everything down.

Dr. Dhawan described his physical examination of M.M. on November 22, 1994, in detail, and he read from his letter of November 24th to the referring physician. He stated that she had severe fibromyalgic tenderness in all tender points including reference points which were not supposed to be tender in fibromyalgia. He said that, in view of her anterior chest pain, he palpated the pectoral muscles below the collarbone and those were tender as well. He stated that there were tender points behind the breast and at pages 1114-1115:

... there is no way I would be able to even reach those tender points without going through the breast tissue.

So at that point I instructed Ms. M. that I need to do -- carry out a breast examination in order to examine her chest wall completely, and she consented to it because I -- I don't know exactly how much -- I probably didn't step back and ask her to -- give her time to think it over that 'Do you want to have this done, or you would have somebody else do it?' But I mentioned that I needed to do a breast examination. She did not say no. And then we proceeded with a breast examination, and the breast examination was not done with the gown lifted up because I never do it that way. The gown was actually lowered, so there is a discrepancy there. The gown was lowered, arm eased off, and a breast examined one at a time. The other breast was kept covered with a sheet ...

And the primary purpose to do this breast examination was to examine whether the tenderness is coming from the superficial breast tissue or the underlying muscles. And in this case the breast tissue was tender as well, and she actually had distinct findings of fibrocystic disease, you know, the cystic feel to it. And I asked her, 'It appears that you may have fibrocystic breasts. Were you aware of that?' And she said, 'Yes.' And there is no way I would have known prior to doing this examination that she had fibrocystic breasts.

Dr. Dhawan stated he remembered the November, 1994, visit well and he had a good recollection of M.M. because he had seen her for years.

In her report dated November 1, 1996, Dr. Somerville made the following comment with respect to M.M.:

The differential diagnosis required an examination of all symptoms including that of the breast tissue. The examination described by M.M. is an inferior one and lesions could be missed.

EVIDENCE - A.K.

A.K. was involved in a motor vehicle accident in October, 1992. She was initially diagnosed with stiffness in her neck and left arm. She was in pain and developed severe headaches. She had problems sleeping and her doctor prescribed pain killers and anti-depressants.

A.K. was referred to Dr. Dhawan and had her first appointment on April 6, 1993.

A.K. described her initial discussion with Dr. Dhawan, with particular reference to the motor vehicle accident. They discussed her financial situation and whether there was going to be a Court case against the other driver. She answered in the affirmative and gave her lawyer's name to Dr. Dhawan. She told him she was divorced and had children and she was not living with anyone. With respect to her financial situation, she told him she had lost a good job and she had financial problems. She said the discussion then progressed as follows (page 331):

He said that he had a -- he worked with a lot of people that had had car accidents and he wrote reports up for their lawyers and that sort of thing, and that he could help me out and we would work very well together, and he couldn't make me rich, but he could make me a very wealthy woman and that -- if I co-operated with him and did what he wanted.

A.K. stated that she did not respond to these comments. She said she started getting very uncomfortable after ten minutes because he was overzealous. She stated Dr. Dhawan told her that she was a very attractive blonde and that she dressed very well.

Prior to the physical examination on this initial visit, Dr. Dhawan asked A.K. to go into the examination room, take off all her clothing except her panties and put on a hospital gown that was present. She said she tried to undress quickly and put on the gown but Dr. Dhawan came into the room before she tied up the gown, without knocking or providing any other warning.

A.K. described the examination as Dr. Dhawan stood behind her. She said he stood behind her with his chest pressing against her back and slowly slid her gown off her shoulders and she was trying to keep it up. He examined her neck, shoulders and back and explained the condition of fibromyalgia and that he was trying to find tender spots. She said he would lean forward and was breathing in her ear. During the examination, when A.K. was standing up, she had difficulty holding the gown up and said that Dr. Dhawan chuckled and thought it was funny. In response to a question from the Panel (page 414), A.K. said that during the course of the examination, Dr. Dhawan told her she had very soft skin and very nice legs. She had referred to these comments in her complaint dated May 26, 1995.

A.K. described a part of the discussion that followed the physical examination and stated at page 344 of the transcript:

He just reiterated that he felt we would work very well together and we would make a great team, that he looked forward if I co-operated and did what he wanted that he could, you know, make my life a lot better and he could, you know, make me wealthy, get rid of the financial problems.

A.K. returned to the Rehabilitation Centre for an EMG test on May 28, 1993. She said she did not expect Dr. Dhawan to be present. She went to the appropriate room and two other individuals were in the room. They contacted Dr. Dhawan and he came to the room

and gave the other two individuals part of A.K.'s personal history, including the fact that she had financial problems.

A.K. had her last appointment with Dr. Dhawan on June 22, 1993. She says that she was nervous and not very talkative, that Dr. Dhawan told her he had done all he could do for her and she should get back into the work force and start an aerobics' program.

A.K. sent a letter of complaint to the Medical Society on May 26, 1995, and the letter was forwarded to the Provincial Medical Board. In response to a question about the two-year delay in making the complaint, A.K. stated that she had tried to put it all behind her when it happened, but after she had seen another specialist and talked to her lawyer and her family, she decided to write the letter.

Dr. Dhawan was asked about comments he made to A.K. and he stated in part (at page 1070):

I think I may have commented that she has a muscular build. About the comment about her legs, I don't recall telling her that she has nice legs. That's totally inappropriate and I don't use those terms, but I may have said that she has good muscle build in her legs, she could exercise.

His recollection with regard to entering the examination room on April 6, 1993, was as follows (pages 1074-1075):

Well, as I mentioned, my standard practice is --- and you know, we are all creatures of habit -- 'Please go in, change into a gown. Call me when you're ready.' So people take -- either they call 'Doctor, I'm ready,' 'Come on in,' or they open the door, but sometimes they don't, and you wait and wait. And they're sitting on the plinth waiting, you know. Things don't get clear. And so I may have waited -- this happened, I think, in two instances. We talked about one yesterday. And it's possible that I must have waited five minutes or so and then no response. Then I must -- knocked and go in. I don't go in without knocking.

In response to a question from the Panel, Dr. Dhawan indicated that he had no specific recollection of this occasion but that he could only tell what he did in every case.

Dr. Dhawan commented on the discussion concerning the motor vehicle accident and working with A.K. and said he could have indicated that he would assist her. He stated that her suggestion that he indicated he could make her wealthy was preposterous and that he never used words like "I can make you rich" or "I can make you wealthy". He stated that this was none of his business and he didn't have any say in that matter.

In her report dated November 1, 1996, Dr. Somerville made the following comments and conclusions with respect to A.K.

Dr. Dhawan's functional inquiry was appropriate. The examination was a detailed one.

Following receipt of the evidence of Dr. Somerville on November 22, 1996, the hearing was adjourned until February 3, 1997. At the reconvening of the hearing, counsel for the College made a motion to re-open its case.

The Panel was advised by counsel for the College that, in mid January, 1997, a representative of the Nova Scotia Medical Society brought to the attention of the Complaints' Officer of the College that a complaint concerning Dr. Dhawan had been raised with the Medical Society in 1993. This matter had not been brought to the attention of the Provincial Medical Board or the College prior to 1997.

Evidence was received by the Panel from the Registrar for the College, Dr. Cameron Little, and the Complaints' Officer for the College, Ms. Deborah Sherren.

Ms. Dorothy Grant was called by counsel for Dr. Dhawan. She is the Co-ordinator of Patient-Physician Relations for the Nova Scotia Medical Society. She was asked

about the nature of the relationship between the College of Physicians and Surgeons of Nova Scotia and the Medical Society of Nova Scotia. She stated that there is an arm's-length relationship but that whenever she receives a complaint, she refers the individual to the College. She also mediates complaints when the person does not wish to make a formal complaint to the College.

Ms. Grant was asked about a telephone conversation she had with the Complaints' Officer of the College in January, 1997. During the course of the conversation the Complaints' Officer asked her if she was aware of other complaints against Dr. Dhawan, and she replied in the affirmative without providing details. She did give the Complaints' Officer the name of the doctor who had referred the patient with the complaint. Ms. Grant confirmed that she had not contacted the Provincial Medical Board or the College about the matter prior to 1997.

Following submissions by counsel the Panel reserved its decision and agreed that counsel would be permitted to make further submissions before the issue was decided.

The Panel noted that the application had been brought fairly late in the proceeding. Dr. Dhawan and his expert witnesses had already testified; however, a number of witnesses had yet to be called to testify on behalf of Dr. Dhawan.

We concluded that the evidence sought to be adduced was not available to the College prior to January, 1997. It could not have been obtained by the College with the exercise of reasonable diligence, prior to the commencement of the hearing, without violating the policies of the College in relation to contact with third parties, including the Nova Scotia Medical Society.

We took into account the possible prejudice to Dr. Dhawan that might result if the case of the College was re-opened and balanced that possibility against the desirability of having relevant evidence before the Panel.

In the circumstances of this case we decided to grant the application to re-open the case and the parties agreed that further witnesses would testify on behalf of Dr. Dhawan before the College proceeded with its further evidence.

Dr. Reginald Yabsley testified on behalf of Dr. Dhawan. The Panel accepted Dr. Yabsley's qualifications to give expert evidence as to the care and skill in the management of a practice and the examination of patients which should be expected of a careful and prudent physical medicine specialist with the same experience and standing as Dr. Dhawan.

Dr. Yabsley had been contacted by counsel for Dr. Dhawan in 1995. He was asked to do a review of Dr. Dhawan's office setup and procedures. This review included observation of Dr. Dhawan's practices while conducting physical examinations, his communication with his patients and his professionalism. Dr. Yabsley provided a report dated November 10, 1995.

Dr. Yabsley attended at Dr. Dhawan's clinic in Windsor and his office in Halifax. At these times Dr. Dhawan had a full-time assistant, namely, B.S. Dr. Yabsley stated that she facilitated patient processing, assisted patients to undress and dress and gave advice or information to patients about treatment or follow-up.

In his report, Dr. Yabsley stated that the office facilities of Dr. Dhawan were professional and appropriate. In all cases involving female patients, Dr. Dhawan was assisted commendably by B.S. Patients were not disturbed while they were dressing or undressing. With respect to the examination of patients, Dr. Yabsley found Dr. Dhawan's approach to carrying out physical examinations to be entirely professional and without innuendo or suggestion. He stated that he had no major criticisms of Dr. Dhawan, but that passive, timid or reticent patients were not afforded much opportunity to freely discuss their problems with him. He often interrupted them, spoke for them, and was quick and efficient almost to the point of being too much so.

Several character witnesses testified on behalf of Dr. Dhawan. They included seven female patients, two of whom were medical doctors. The patients, who said that they were aware of the charges against Dr. Dhawan, testified that he was honourable and they did not believe he would engage in sexually inappropriate behaviour toward his patients. They were impressed with his professionalism and the degree to which he showed concern in caring for his patients. They were satisfied with the privacy they were afforded by Dr. Dhawan during their physical examinations. They spoke of his excellent reputation as a physician and as a member of the community.

A religious leader of the Hindu community stated that he had known Dr. Dhawan and his family for 12 years and that Dr. Dhawan was honourable and of unquestioned integrity.

J.R. had been Dr. Dhawan's secretary since March, 1994. She books Dr. Dhawan's appointments, answers the telephone, types reports and letters and deals with Dr. Dhawan's charts. J.R. described Dr. Dhawan's usual weekly schedule and stated that Dr. Dhawan told some of his patients to call him concerning their medications. She also stated that Dr. Dhawan was kind and understanding and seemed to respect staff and patients.

Dr. Nishi Dhawan testified on behalf of her husband. She is engaged in the general practice of medicine. She stated that she deals with the business aspects of her husband's office, including payment of bills and hiring of staff.

Mrs. Dhawan was asked about the hiring of B.S. Mrs. Dhawan stated that it was evident that her husband needed some protection and that he feels more comfortable with his practice. Mrs. Dhawan indicated that she had taken several steps with regard to improving patient relations, including the design of a patient brochure and a form of consent for breast examinations.

B.S. was hired by Dr. Dhawan on June 5, 1995. She is a graduate of a school of Radiology Technology and worked for twenty years in the X-ray field. She was initially

employed by Dr. Dhawan for three days a week to be present when Dr. Dhawan saw female patients. She later agreed to work full time.

B.S. stated that she sat in the office with Dr. Dhawan during the history taking, took the female patients into the change room, assisted changing if required and remained in the examination room when Dr. Dhawan examined the patient. She then stayed with the patient and assisted with dressing. She also assists Dr. Dhawan in several other ways, including the organization of charts. B.S. stated that she had the impression that Dr. Dhawan's patients liked him and were very comfortable with him.

SIMILAR FACT EVIDENCE

The Panel requested submissions from counsel with respect to the appropriate procedure to follow in determining whether particular evidence should be admitted as similar fact evidence. This was the evidence the College sought to introduce when it requested a re-opening of the case.

The Panel considered whether it should review a summary of the essential facts or whether a *voir dire* should be held. Counsel agreed that the Panel had to determine whether the probative value of such evidence was sufficient to outweigh the potential prejudice to Dr. Dhawan by its reception. In *Bartashunas v. Psychology Examiners*, [1992] O.J. No. 1845 (Ont. Div. Ct.) (Digest) at (1992), 35 A.C.W.S. (3d) 624, the Court reviewed the decision of a discipline tribunal with respect to various evidentiary issues, including the question of the admissibility of similar fact evidence. The discipline panel heard the evidence being put forward as similar fact evidence before deciding that the evidence was admissible. The Court made the following statement with respect to the admission of similar fact evidence at page 8:

It is in our view clear that the admission of similar fact evidence involves an exercise of discretion by the tribunal which must initially determine between the probative value and prejudicial effect of the probate evidence. The tribunal in this case exercised its discretion upon the proper principles.

The Panel advised counsel on April 29, 1997, that a *voir dire* would proceed and subsequently the evidence of two witnesses was presented. At the conclusion of this evidence counsel for the College submitted that the evidence was relevant and of significant probative value with respect to the complaints of M.M. and S.S. After consideration of the submissions, the Panel ruled that:

- (a) With respect to the allegations related to M.M., the evidence of the two witnesses could be relevant but was not of any significant probative value. The Panel therefore ruled against the admissibility of this evidence in relation to M.M.
- (b) With respect to the allegations related to S.S. the evidence of the two witnesses is relevant in relation to particulars (3)(c)(i), (iv), (vi) and (vii), that such evidence has exceptional probative value in relation to these charges and that the probative value attached to this evidence outweighs the potential prejudicial effect to Dr. Dhawan.

The first witness called on the *voir dire* testified that she visited Dr. Dhawan at the Hants Community Hospital in April, 1993. During the course of this visit, Dr. Dhawan asked several questions and carried out a physical examination. Several questions related to her marriage. At the conclusion of the session, Dr. Dhawan suggested that she should receive further counselling from him in Halifax in order to deal with her marriage breakdown. Arrangements were subsequently made for the follow-up appointment in the next week.

This patient, L.C., stated that she attended the Rehabilitation Centre with a friend who remained seated outside of Dr. Dhawan's office. She stated that Dr. Dhawan told her he was disappointed that she had not come alone. He stated that from the first time he met her he knew there was something special between them. Dr. Dhawan talked about his personal life and asked several questions about the marriage and personal life of L.C. He asked her if she had had sex with anyone since the time of her separation. When she answered in the negative, he said that she should have sex, that like a car she needed a boost and that he was willing to take care of it before she left the office that day. He further stated that he and her general practitioner were good friends and that it was good to keep secrets sometimes. L.C. felt that Dr. Dhawan was getting flustered when she did not respond, and that he came close to her and

put his arm on her shoulders and asked her if she wanted to see him again before the next scheduled appointment. L.C. did not respond and left the office. She did not see Dr. Dhawan again. On cross examination, she stated that she had never had any reason not to trust a doctor until that point.

A few days later L.C. approached one of her family physicians, Dr. C., and told him part of what happened. L.C. later spoke to Dorothy Grant of the Nova Scotia Medical Society and related the entire matter to her.

Dr. C. confirmed his meeting with L.C. His notes (Exhibit #33) indicated that L.C. told him about the questions asked by Dr. Dhawan about her personal life and that he said such things as "can't you feel something between us". L.C. told Dr. C. that she had begun to feel uncomfortable in that Dr. Dhawan might have been making a pass at her. Dr. C. talked to L.C. about contacting Dorothy Grant.

Dr. K. testified on behalf of Dr. Dhawan. He also acted as a family physician for L.C. Dr. K. had referred L.C. to Dr. Dhawan because of her severe neck and back pain. L.C. talked to him about her problems with Dr. Dhawan. Dr. K. was concerned because he knew Dr. Dhawan well and advised L.C. about the Provincial Medical Board. He stated that he has referred hundreds of patients to Dr. Dhawan and continues to do so.

B.S. testified again and commented on the use of language by Dr. Dhawan and the fact that he speaks quickly and that sometimes patients do not understand him.

Dr. Dhawan did not testify again.

REBUTTAL

The College called E.R. as a rebuttal witness and submitted that such evidence could be introduced.

In answer to the objection of counsel for Dr. Dhawan, counsel for the College stated that the evidence sought to be introduced did not come to the knowledge of the College until February, 1997. Counsel for the College further submitted that there was a two-pronged approach to support the introduction of this evidence:

(1) In determining whether the facts sought to be introduced are the proper subject of rebuttal evidence, there is a general rule in civil cases that matters which might properly be considered to form part of the plaintiff's case in chief are to be excluded. The general rule in criminal cases was stated by Martin, J.A., in *R. v. Campbell* (1977), 38 C.C.C. (2d) 6 (Ont. C.A.) at page 26:

The general rule with respect to the order of proof is that the prosecution must introduce all of the evidence in its possession upon which it relies as probative of guilt, before closing its case.

In *The Law of Evidence in Canada* (Toronto: Butterworths 1992) at page 882, J. Sopinka, S.N. Lederman and A.W. Bryant refer to *R. v. Coombs* (1977); 35 C.C.C. (2d) 85 (B.C.C.A.) where Robertson, J.A., stated at page 92:

From these authorities and others I think that it is clear that the judge in each case has a discretion with regard to the admission of evidence in rebuttal and that in exercising his discretion he should not generally allow such evidence to be given when it has before or during the presentation of the Crown's case been both within the possession of the Crown and clearly relevant to the issue.

In discussing the application of the rule, the authors then make the following comment at page 883;

Now it is clear that the courts are willing to apply a somewhat more restrictive test which balances relevance and prejudice. The exercise of the discretion is very much a function of the issues and facts of the particular case. It is preferable, therefore, not to attempt to lay down precise rules with respect to its exercise. It will be exercised more sparingly in criminal cases because of the importance of avoiding prejudice to the accused. In civil cases the discretion is wider and should be exercised in light of the broad principles which are the basis for the restriction on reply evidence. These principles are designed to ensure that the defendant knows the case to be met and that the plaintiff not be permitted to split his or her case. The rationale for the latter principle is that trials should not be unduly prolonged by creating a need for surrebuttal. Within these broad parameters the trial judge has a discretion to permit reply evidence when it is the reasonable and proper course to follow.

- (2) Where character is in issue, the prosecution may call evidence to rebut evidence adduced by an accused. In *The Law of Evidence in Canada* supra the authors state at page 460:

Where the accused adduces evidence of his good reputation in the community, the Crown may call independent evidence of the same type, but to the opposite effect. Although this evidence, like the good character evidence introduced by the accused, goes to the issue of guilt or innocence, it can do no more than rebut the good character evidence. In other words, it neutralizes it. The policy behind allowing this evidence by the Crown is that the Crown should not be misled by being left with the impression that the accused enjoys a certain reputation, when, in fact he or she does not possess such a reputation at all. The evidence of bad character to rebut the accused's case cannot be used to show that the person was likely from his character to have committed the offence.

Counsel for the College referred the Panel to the following statements made by the courts.

In *Guay v. The Queen* (1978) 89 D.L.R. (3d) 532 (S.C.C.), Pigeon, J., stated at pages 542-543:

On the admissibility of similar fact evidence, I think it should be said that it is essentially in the discretion of the trial judge. In exercising this discretion, he must have regard to the general principles established by the cases. There is no clear list of the sort of cases where such evidence is admissible. It is, however,

well established that it may be admitted to rebut a defence of legitimate association for honest purposes, as well as to rebut evidence of good character.

In *R. v. Tierney* (1982) 70 C.C.C. (2d) 481 (Ont. C.A.), Zuber, J.A., stated at page 485:

It is now clear, however, that evidence of a specific instance may be admissible to rebut evidence of good character if it is not simply a specific instance but a specific act.

In discussing the probative value of a particular act, Zuber, J.A., then stated as follows at page 486:

If one act can be proved as probative of the happening of another on the ground that they are both part of a scheme, design or system, I think it equally valid to say that one act which is part of a distinctive pattern (albeit unplanned) is admissible as probative of the occurrence of another act which bears the hallmarks of that pattern.

In *Regina v. Johnston* (1992), 78 C.C.C. (3d) 309 (N.S.S.C. A.D.), Roscoe, J.A., applied *Guay v. The Queen* and considered *R. v. Tierney*, stating at page 316:

The trial judge correctly stated that not only had the accused placed her character in issue by presenting evidence of general reputation in the community, she had also asserted throughout her testimony that there were never any incidents of assaults or use of foul language by her toward any residents at any time.

She further stated at page 317:

"The decisions in *Guay*, *McNamara* and *Tierney* confirm that the admissibility of this type of evidence is essentially in the discretion of the trial judge.

We decided that we were not prepared to hear the proposed witnesses for the purpose of rebutting the evidence relating to Dr. Dhawan's use of his pager number. However,

we agreed to hold a *voir dire* in order to determine whether the evidence should be admitted to rebut the character evidence presented on behalf of Dr. Dhawan.

E.R. stated that she had worked in a restaurant business for several years. She was referred by her family physician to Dr. Dhawan in 1992 and saw him twice. In 1994 E.R. was referred to Dr. Dhawan again because of injuries suffered in a motor vehicle accident.

During the course of the office interviews in 1994 Dr. Dhawan asked E.R. about her marital status and living arrangements. He also asked if she had a boyfriend. Subsequently Dr. Dhawan made comments about her hair.

E.R. stated that in May, 1995, she was being examined from behind by Dr. Dhawan and he moved her neck around and put his lips on her lips. She said that she was shocked and got dressed and left.

Following the incident in the office, Dr. Dhawan came to E.R.'s place of employment and asked for her. During the course of their conversation, Dr. Dhawan stated that he wanted to get together with E.R. He wrote down his telephone number and told her that when she called, she should not state that she was a patient, rather she should say that she was a friend of the family and she would then be able to get through to him. E.R. identified Exhibit #39 which was the sheet of paper on which Dr. Dhawan wrote down his telephone number and pager number. Dr. Dhawan also wrote down his name in the way it was pronounced. Counsel for Dr. Dhawan acknowledged that the handwriting on this piece of paper was that of Dr. Dhawan.

E.R. said that she did not call the number, but that Dr. Dhawan came to her place of employment a second time and asked for her. He told her about coming back from a convention in Newfoundland. He wanted to know if he could get together with her and see her. She did not give a definite answer and did not call him.

In May 1996, Dr. Dhawan called E.R. at home and asked if they could get together. He made two more calls to E.R. on the same day. E.R. did not meet with Dr. Dhawan.

E.R. stated that she had read newspaper accounts about this hearing early in 1997 and had noted that several females had spoken on behalf of Dr. Dhawan at the hearing. She therefore decided that she should come forward. She had no knowledge of the details of the complaints against Dr. Dhawan.

A co-worker of E.R. testified that she recalled a visit of a gentleman to the restaurant and she identified a photograph of Dr. Dhawan. She stated that he came to the premises and asked to speak to E.R. but that he did not make any purchases.

Following the submissions of counsel the Panel decided to admit the rebuttal evidence.

FINDINGS - THE LAW

Burden of Proof

The parties agree that the College bears the onus of establishing each of the allegations asserted by it against Dr. Dhawan.

The standard of proof required to make a finding of professional misconduct was commented on by Glube, C.J.T.D., in *Qureshi v. Provincial Medical Board* (1983), 61 N.S.R. (2d) 280 (S.C.T.D.) affirmed at (1984), 63 N.S.R. (2d) 74 (S.C.A.D.) as follows at page 285:

The burden of proof in a case of this nature rests on the party or body alleging professional misconduct. This is a civil matter and it cannot be decided on a balance of probabilities or preponderance of evidence. Nor is the test that required in a criminal case of beyond a reasonable doubt. The burden approaches the latter and falls somewhere between the civil and criminal standard.

The standard most often referred to and followed in discipline matters is that stated by Grotsky, J., in *Stephen v. College of Physicians and Surgeons (Sask.)* (1991) 95 Sask. R. 176, (Q.B.) at page 186:

Findings of professional misconduct, in my respectful view, ought to be made when the proof of that misconduct is clear and convincing and is based on cogent evidence.

CREDIBILITY

In assessing the credibility of the witnesses, the Panel considered the opportunities for knowledge of each witness, their powers of observation, judgment and memory, the ability of the witnesses to describe clearly what he or she saw or heard, the demeanour of the witnesses and all of the surrounding circumstances.

FINDINGS - D.B.

In its submissions, the College withdrew the following particular allegations in relation to this patient: 1(a)(ix), 2(a)(i), 3(a)(ii).

Our findings with respect to each of the remaining allegations in relation to D.B. are as follows:

- (1) You conducted examinations of your patient or patients which were inappropriate, unprofessional and/or unnecessary.**

Particulars of Allegation (1):

(a)(i), (ii), (iii) and (iv):

We are of the view that a breast examination was necessary. Dr. Dhawan did not have the express permission of D.B. to conduct this examination, but we note that there was no objection. The breast examination was carried out while D.B. was lying down, although Dr.

Dhawan did touch her breasts inappropriately while he was doing the examination while standing behind her. We find that Dr. Dhawan pricked the nipples of D.B. suddenly and without notice or explanation.

(a)(v):

We accept the evidence of D.B. that Dr. Dhawan wiped perspiration from the underside of D.B.'s breasts with his finger and wiped it on his coat.

(a)(vi) and (vii):

We find that Dr. Dhawan did press his body against D.B. while examining her, but that this kind of examination required Dr. Dhawan to be very close to his patient. Dr. Dhawan rested his chin on the shoulder of D.B. while examining her and this was inappropriate.

(a)(viii):

We are satisfied that the examination of the abdomen area was necessary.

(a)(x):

We are not satisfied that the College proved that Dr. Dhawan's demeanour was unprofessional during the appointment.

- (2) During your appointments with your patient or patients, you unnecessarily removed clothing and/or failed to respect the privacy of such patient or patients.**

Particulars of Allegation (2):

(a) (ii), (iii), (iv) and (v):

We prefer the version of the facts stated by D.B. She had an excellent recollection of these events and was clear and concise in her explanation of what took place and the effect that the examination had on her.

We therefore find that Dr. Dhawan unnecessarily removed clothing and failed to respect the privacy of D.B. He entered the examining room before D.B. had finished putting on her gown, failed to provide adequate draping, pulled her gown down to her waist without notice or permission and pulled her gown up from the bottom and rubbed his hand over the abdominal area without notice or explanation.

We find that Dr. Dhawan displayed great insensitivity toward the reasonable privacy expectations of this patient.

(a)(vi):

The evidence did not establish that Dr. Dhawan was aware of the discomfort and embarrassment of D.B. He was not, therefore, in a position to respond when he was unaware of the problem.

3. **You made inappropriate comments and/or inquiries of a personal nature during your appointments with a patient or patients.**

Particulars of Allegation (3):

(a) (i):

We are not satisfied that Dr. Dhawan made any inappropriate inquiries of D.B. regarding her sex life.

PROFESSIONAL MISCONDUCT

The Panel made significant findings against Dr. Dhawan under Charges (1) and (2) and must decide whether the actions of Dr. Dhawan amount to professional misconduct.

The *Medical Act*, S.N.S. 1995-96, c.10, does not contain a definition for the term "professional misconduct". The determination of what constitutes "professional misconduct" is appropriately left to the determination of the peers of the professional. In *Dr. X v. College of*

Physicians and Surgeons of British Columbia, [1991] B.C.J. No. 2410 (C.A.), the following opinion is expressed at page 5:

The test of whether misconduct by a medical doctor is infamous or unprofessional is a determination that should be made by the doctor's professional brethren applying the standards and ethics of the profession ...

In *Roy v. Medical Board (Newfoundland)* (1994), 365 A.P.R. 160 (Nfld. T.D.), a single complainant alleged *inter alia*, that the breast examinations conducted by her doctor were inappropriate. Her evidence was that the examinations were inappropriately conducted from behind and lasted for an inordinate length of time. She also complained that she was not provided with adequate draping and that the doctor remained in the room while she changed her clothes, thereby denying her any privacy. The discipline committee found the doctor guilty of professional misconduct and the Court declined to interfere with this decision.

In *Re College of Physicians and Surgeons of Ontario and Lambert* (1992), 98 D.L.R. (4th) 639 (Ont. Div. Ct.), the physician was found to have made inappropriate remarks of a sexual nature to three separate female patients. Although the Committee found that the remarks were not intended to promote physical sexual activity with the patients, the remarks greatly upset the patients and brought disrepute to the profession. The finding of professional misconduct was not disturbed on appeal.

In our view, the findings made against Dr. Dhawan in relation to D.B. amount to professional misconduct. His insensitivity for the person and privacy of D.B. were unprofessional and unacceptable.

FINDINGS - T.S.

In its submission the College withdrew allegation 3(b) in relation to this patient.

Our findings with respect to each of the remaining allegations in relation to T.S. are as follows:

(2) During your appointments with your patient or patients, you unnecessarily removed clothing and/or failed to respect the privacy of such patient or patients.

Particulars of Allegation (2):

(b)(i), (ii), (iii), (iv):

We find that Dr. Dhawan removed the shirt of T.S. without notice or permission, that he pulled her bra straps down and off her arms without her permission, that he did not provide T.S. with a gown or adequate drapery and that he inappropriately exposed her body during the examination.

(b)(v):

Dr. Dhawan did not appear to be aware of the discomfort and embarrassment of this patient and was not, therefore, in a position to respond to her discomfort and embarrassment.

PROFESSIONAL MISCONDUCT - T.S.

We are of the view that Dr. Dhawan was very insensitive to the privacy concerns of this patient. He should have been more caring and aware of these concerns. He admitted that he did not use any draping for this examination. We cannot accept Dr. Dhawan's explanation for the lack of an appropriate covering for this patient and consider that this requirement should have been obvious to him.

We therefore find that Dr. Dhawan's conduct with respect to T.S. amounted to professional misconduct.

FINDINGS - S.S.

The College withdrew the following particular allegations in relation to this patient: 1(b)(i), (iii), (iv), (vii); 2(c)(v); 3(c)(i).

Our findings with respect to each of the remaining allegations in relation to S.S. are as follows:

- (1) You conducted examinations of your patient or patients which were inappropriate, unprofessional and/or unnecessary;

Particulars of Allegation (1):

(b)(ii):

We are unable to conclude whether or not the breast examination was necessary. We therefore find in favour of Dr. Dhawan with regard to this particular.

(b)(v):

The evidence on this particular was not compelling and we find in favour of Dr. Dhawan.

(b)(vi):

We find that Dr. Dhawan slapped S.S. on the buttocks and said "OK".

- (2) During your appointments with your patient or patients you unnecessarily removed clothing and/or failed to respect the privacy of such patient or patients.

Particulars of Allegation (2):

(c)(i), (ii) and (iii):

Dr. Dhawan agreed that he assisted S.S. in removing her shirt and that he did not provide a gown or other draping. We find that this assistance was unnecessary and the lack of draping was inappropriate. The body of S.S. should not have been exposed.

(c)(iv):

This is the same particular set out in 1(b)(v) and we find in favour of Dr. Dhawan.

- (3) You made inappropriate comments and/or inquiries of a personal nature during your appointments with a patient or patients.**

Particulars of Allegation (3):

(c)(ii), (iii), (iv), (v), (vi), (vii) and (viii):

S.S. and Dr. Dhawan did not agree on what was said by Dr. Dhawan in his office. The Panel carefully assessed the credibility of S.S. and Dr. Dhawan. We took into account the evidence of L.C. and E.R. because of the striking similarities of circumstances including the fact that each of these females had placed her confidence and trust in this doctor while alone with him in his office and examining room. These patients were in a vulnerable position and in each instance, he made inappropriate remarks of a personal nature and indicated that he was interested in a personal relationship with the patient.

We therefore accept the evidence of S.S. and find that Dr. Dhawan told S.S. that he found her to be attractive, that he made inappropriate comments about her skirt and discussed his financial status and his relationship with his wife during office visits. We further find that during the last visit in September, 1994, Dr. Dhawan invited S.S. to play tennis with him when no one would be around and he suggested that she not tell her family physician of his invitation to S.S. to play tennis. He asked S.S. to call him about playing tennis and when S.S. did not call

him about making arrangements for tennis, Dr. Dhawan called the home of S.S. and asked to speak to her.

We have therefore concluded that Dr. Dhawan was pursuing the possibility of a social relationship with S.S. and that his failure to respect the privacy of S.S. and his pursuit of a social relationship amounted to professional misconduct.

FINDINGS - M.M.

Our findings with respect to each of the allegations in relation to M.M. are as follows:

(1) You conducted examinations of your patient or patients which were inappropriate, unprofessional and/or unnecessary;

Particulars of Allegation (1):

(c):

We have carefully considered the evidence given by M.M. and Dr. Dhawan relating to the breast examination done by Dr. Dhawan in November, 1994, including all of the surrounding circumstances.

In our view the breast examination on this occasion was unnecessary and carried out in an unprofessional manner. We accept the evidence of M.M. concerning her presenting complaints and the fact that she had been treated for several years by another physician for the fibrocystic disease. If Dr. Dhawan thought it was necessary to carry out a breast examination, he should have carefully explained the reasons to this patient, who was a trained and experienced nurse. He did not provide proper opportunity to M.M. for her to consider whether or not she was prepared to have him carry out a breast examination.

We do express our view that it is essential that physicians perform breast examinations when they conclude that such examinations are clinically indicated. Screening breast exams play a very important role in the early detection of breast cancer. However, such examinations should only proceed with the informed consent of a patient.

We have therefore concluded that Dr. Dhawan's conduct in carrying out an examination of M.M.'s breasts on November 22, 1994, was inappropriate, unprofessional and unnecessary and amounted to professional misconduct.

(3) You made inappropriate comments and/or inquiries of a personal nature during your appointments with a patient or patients;

Particulars of Allegation (3):

(e):

We are not convinced that Dr. Dhawan made any inappropriate inquiries of M.M. regarding her relationship with her husband during his appointments with her.

FINDINGS - A.K.

In its submission the College withdrew the following allegations in relation to A.K.: 1(d)(iii); 2(d)(i), (iii) and (v); and 3(d)(v).

Our findings with respect to each of the remaining allegations in relation to A.K. are as follows:

(1) You conducted examinations of your patient or patients which were inappropriate, unprofessional and/or unnecessary;

Particulars of Allegation (1):(d)(i), (ii) and (iv):

We are not satisfied that Dr. Dhawan took any direct action to slide the gown off the shoulders of A.K. It was necessary for Dr. Dhawan to stand very close to A.K. when he was examining her from behind. We are not convinced that the demeanour of Dr. Dhawan during the visits of A.K. was unprofessional. We therefore dismiss this charge in relation to A.K.

(2) During your appointments with your patient or patients you unnecessarily removed clothing and/or failed to respect the privacy of such patient or patients;

Particulars of Allegation (2):(d)(ii):

Dr. Dhawan had no specific recollection about knocking before he came into the examination room. He said that his standard practice was to wait, knock and enter the room. A.K. had a very specific recollection of this event and we accept her evidence on this point.

(d)(iv):

This particular is the same as set out in (1)(d)(i) and we are not satisfied that Dr. Dhawan did anything inappropriate in this regard.

(3) You made inappropriate comments and/or inquiries of a personal nature during your appointments with a patient or patients;

Particulars of Allegation (3):(d)(i), (ii) and (iii):

We accept A.K.'s statements concerning the comments made by Dr. Dhawan during her visit on April 6, 1993. She had a clear recollection of what was said and the discomfort she felt as a result of these comments about her personal appearance.

(d)(iv):

We find that Dr. Dhawan did indicate to A.K. that he could assist her with respect to her financial situation and make her wealthy if she cooperated with him. In all of the circumstances we prefer the evidence provided by A.K. on this point to the evidence of Dr. Dhawan.

PROFESSIONAL MISCONDUCT - A.K.

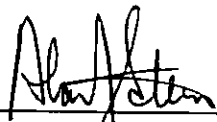
We find that the actions of Dr. Dhawan in relation to A.K. amount to professional misconduct.

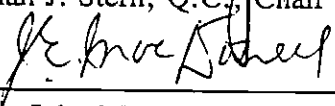
CONTINUING PUBLICATION BAN

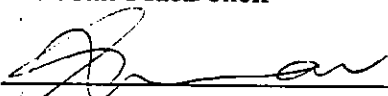
The Panel hereby orders that the publication ban with respect to the identities of the complainants and other patients of Dr. Dhawan shall remain in full force and effect. This publication ban includes the names of these individuals and any personal information which would identify any of them.

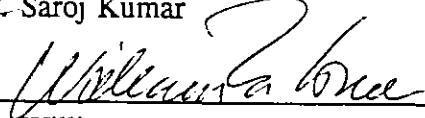
PENALTY

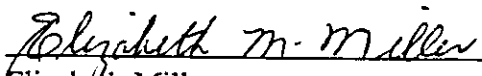
Arrangements will now be made to conclude this hearing with submissions as to penalty.


 Alan J. Stern, Q.C., Chair


 Dr. John MacDonell


 Dr. Saroj Kumar


 Dr. William Lowe


 Elizabeth Miller

PROVINCE OF NOVA SCOTIA)
COUNTY OF HALIFAX)

IN THE MATTER OF:

*The Medical Act, S.N.S. 1995-96, c.10, (formerly
the Medical Act, R.S.N.S. 1989,
c. 278)*

- and -

IN THE MATTER OF:

A Complaint of the College of Physicians and
Surgeons of Nova Scotia against Dr. Pankaj M.
Dhawan, of Halifax, in the County of Halifax,
Province of Nova Scotia

PENALTY DECISION

Counsel:

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of Nova Scotia

George M. Mitchell, Q.C.
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Members of Hearing Committee:

Alan J. Stern, Q.C., Chair
Dr. John MacDonell
Dr. Saroj Kumar
Dr. William Lowe
Ms. Elizabeth Miller

Dates of Penalty Hearing:

November 14 & 15, 1997

Date of Decision:

November 27, 1997

PENALTY DECISION

In its Decision dated September 8, 1997, this Panel made findings of professional misconduct against Dr. Dhawan with respect to all of the three charges against him. The particulars of the charges related to the complaints of five female patients and, notwithstanding the fact that several of the particulars were either withdrawn or found not to be proven, there were serious findings against Dr. Dhawan in relation to all five former patients.

The Penalty Hearing proceeded on November 14, 1997. At that time Counsel for the College introduced her associate, Mr. Raymond G. Adlington, and Counsel for Dr. Dhawan introduced Mr. Edward Greenspan, Q.C.

SUBMISSIONS ON BEHALF OF THE PARTIES

Counsel for the College referred the Panel to the penalty provisions of the new *Medical Act*, S.N.S. 1995-96, c.10. These provisions are as follows:

66(2) A hearing committee

- (e) shall determine whether the member or associate member is guilty of charges relating to a disciplinary matter, and
 - (i) where there is a guilty finding, may determine that
 - (A) the registration, license or specialist's license, or both, of the member or associate member be revoked, and that member or associate member's name be stricken from the registers in which it is entered,
 - (B) the license or specialist's license, or both, of the member or associate member be suspended;
 - (I) for a fixed period, or
 - (II) for an indefinite period until the occurrence of some specified future event or until compliance with the conditions prescribed by the Committee;

- (C) conditions, limitations or restrictions be imposed on the license or specialist's license, or both, of the member or associate member,
- (D) the member or associate member undergo such treatment or re-education as the Committee considers necessary;
- (E) such fine as the Committee considers appropriate to a maximum of \$15,000 be paid by the member or associate member to the College for the purpose of funding medical education and research as determined by the Council;
- (F) the member or associate member be reprimanded, and
- (G) such other disposition as it considers appropriate be imposed,...

(3) When making dispositions pursuant to clause (2)(e), the Committee may impose one or more of the penalties which are set out therein, or the Committee may make such other dispositions as it considers appropriate, in accordance with the objects of this *Act*.

67(1) When a hearing committee finds a member or associate member guilty of charges relating to a disciplinary matter, it may order that the member or associate member pay the costs of the Council, in whole or in part.

(2) When a member or associate member is ordered to pay costs pursuant to subsection (1), the Council may make it a condition of the registration or license of the member or associate member that such costs be paid forthwith, or at such time and on such terms as the Council may fix.

(3) For the purpose of this Section, "costs of the Council" include

- (a) expenses incurred by the College, the Council, the Investigation Committee and the Hearing Committee;
- (b) honoraria paid to members of the Investigation Committee and the Hearing Committee; and
- (c) solicitor and client costs and disbursements of the College relating to the investigation and hearing of the complaint.

The role of a Hearing Panel in determining penalty was described by the British Columbia Court of Appeal in *McKee v. College of Psychologists (British Columbia)*, [1994] 9 W.W.R. 374, as follows at page 376:

In cases of professional discipline there is an aspect of punishment to any penalty which may be imposed and in some ways the proceedings resemble sentencing in a criminal case. However where the legislature has entrusted the disciplinary process to a self-governing professional body, the legislative purpose is regulation of the profession in the public interest. The emphasis must clearly be upon the protection of the public interest, and to that end, an assessment of the degree of risk, if any, in permitting a practitioner to hold himself out as legally authorized to practice his profession. The steps necessary to protect the public, and the risks that an individual may represent if permitted to practice, are matters that the professional's peers are better able to assess than a person untrained in the particular professional art or science.

In reviewing sanctions to be applied by self-governing professions against its members, our Courts have provided guidance by referring to factors which may be considered by disciplinary tribunals.

Counsel for the College referred the Panel to *Jaswal v. Medical Board (Newfoundland)* (1996), 138 Nfld. & P.E.I.R. 181 (Nfld. T.D.), wherein Green, J., made the following statement at page 194:

A sentencer should not impose a sentence simply to coincide with what has actually happened; rather, the sentencer should be led to the proper penalty by the application of principles applicable to the case at hand. From the cases cited, the following is a non-exhaustive list of factors that ought to have been considered:

1. the nature and gravity of the proven allegations
2. the age and experience of the offending physician
3. the previous character of the physician and in particular the presence or absence of any prior complaints or convictions
4. the age and mental condition of the offended patient
5. the number of times the offence was proven to have occurred

6. the role of the physician in acknowledging what had occurred
7. whether the offending physician had already suffered other serious financial or other penalties as a result of the allegations having been made
8. the impact of the incident on the offended patient
9. the presence or absence of any mitigating circumstances
10. the need to promote specific and general deterrence and, thereby, to protect the public and ensure the safe and proper practice of medicine
11. the need to maintain the public's confidence in the integrity of the medical profession
12. the degree to which the offensive conduct that was found to have occurred was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct
13. the range of sentence in other similar cases.

Counsel for the College submitted that the findings of professional misconduct made against Dr. Dhawan were very serious and that the following sanctions are necessary to protect the public interest:

1. a period of suspension of 18 to 24 months; and
2. a condition of reinstatement requiring Dr. Dhawan to attend and complete a Professional Assessment Program given at the Abbott Northwestern Hospital in Minneapolis, Minnesota. The College would be provided with an Assessment Report and Dr. Dhawan would be required to comply with any recommendations in the Report; and
3. a condition of Dr. Dhawan's license to practice would require Dr. Dhawan to have a chaperone approved by the College in attendance during his examination of female patients.

The Panel was provided with a memorandum on costs which included items referred to in Section 67(3) of the *Act*, and the costs incurred by the College up to September

30, 1997, were \$174,857.19. The total costs by the conclusion of the matter are estimated to be in the range of \$200,000.00. The College submitted that two-thirds of this amount should be awarded against Dr. Dhawan.

Counsel for Dr. Dhawan strongly disagreed with the characterization of the findings by Counsel for the College. The Panel was urged to conclude that the offences committed by Dr. Dhawan were at the low end of the scale particularly when comparing these offences with the reported cases on sexual misconduct. Counsel for Dr. Dhawan submitted that an appropriate penalty for Dr. Dhawan would be a reprimand or short suspension.

Counsel for Dr. Dhawan questioned reasons for any requirement for Dr. Dhawan to have an assessment outside of the Province of Nova Scotia. The Panel was asked to consider having Dr. Dhawan assessed by a psychiatrist of his choosing, if any assessment was required at all.

The parties agreed that one condition on Dr. Dhawan's license should be a requirement for a chaperone to be present when Dr. Dhawan examines female patients.

With regard to costs, Counsel for Dr. Dhawan suggested that the amount proposed by Counsel for the College was excessive and unfair. In all of the circumstances, the possibility of ordering Dr. Dhawan to pay 20 to 25 percent of the incurred costs was raised.

The following observations were made by the Supreme Court of Canada in *Norberg v. Wynrib* (1992), 92 D.L.R.(4th) 449 at pages 491-492:

... A physician holds great power over the patient. The recent decision of the Ontario Court (General Division) in *College of Physicians and Surgeons of Ontario v. Gillen* (1990), 1 O.R.(3d) 710, contains a reminder that a patient's vulnerability may be as much physical as emotional, given the fact that a doctor (at p. 713) 'has the right to examine the patient in any state of dress or undress and to administer drugs to render the patient unconscious'. Visits to doctors occur in private: the door is closed; there is rarely a third party present; everything possible is done to encourage the patient to feel that the patient's privacy will be respected. This is essential to the meeting of the patient's medical

and emotional needs; the unfortunate concomitant is that it also creates the conditions under which the patient may be abused without fear of outside intervention. Whether physically vulnerable or not, however, the patient, by reason of lesser expertise, the 'submission' which is essential to the relationship, and sometimes, as in this case, by reason of the nature of the illness itself, is typically in a position of comparative powerlessness. The fact that society encourages us to trust our doctors, to believe that they will be persons worthy of our trust, cannot be ignored as a factor inducing a heightened degree of vulnerability; see Shirley Feldman-Summers, 'Sexual Contact in Fiduciary Relationships', in Glen O. Gabbard, ed., **Sexual Exploitation in Professional Relationships** (Washington, D.C.: American Psychiatric Press, 1989), at pp. 204-05. The recently issued **Final Report of the Task Force on Sexual Abuse of Patients** (Toronto, 1991), commissioned by the College of Physicians and Surgeons of Ontario, makes highly instructive reading in this regard. In the words of the Task Force, at p. 79:

Patients seek the help of doctors when they are vulnerable -- when the [sic] are sick, when they are needy, when they are uncertain about their physical or emotional health. The physician has the knowledge, the skills, and the expertise the patient needs to heal. The patient often suspends both judgment and personal power idealizing the doctor in order to feel secure. The physician, therefore, has more power than the patient, and this power can be used to invade sexual boundaries and to force sexual compliance. Physical force is not necessary.

This Panel has considered the submissions of Counsel, including the authorities provided to it. We have also considered all of the circumstances of this particular case and taken into account the appropriate factors which ought to be considered.

We reject the submission that the offences committed by Dr. Dhawan are at the low end of the scale of professional misconduct. Dr. Dhawan displayed a disregard for his patients and a lack of appreciation of boundary issues which must be considered by all physicians.

In this case five female patients placed their trust and confidence in Dr. Dhawan and were subjected to extremely inappropriate and unacceptable behaviour by him.

We have a concern that if the type of behaviour which has been described to us remains unchecked, female patients will be reluctant to undergo examinations by male doctors. Patients must be able to have confidence and trust in their physicians.

The Panel is not satisfied that the reasons for some of the behaviour of Dr. Dhawan are clear. We are of the view that by having an appropriate assessment carried out, both Dr. Dhawan and the College will receive a better understanding of the problems that led to this behaviour and if remedial measures are recommended, that the best interests of the public will be served by compliance with same.

We are persuaded that the assessment program offered by the Abbott Northwestern Hospital, which includes psychiatrists, psychologists, social workers, counsellors and case managers, will provide the kind of assessment that should be provided in this case and we are unaware of the availability of similar assessment programs in Canada.

We have therefore determined that:

(a) The license (including specialist's license) of Dr. Dhawan shall be suspended for six (6) months, commencing on January 1, 1998, and ending on June 30, 1998. The suspension shall continue after June 30, 1998, if Dr. Dhawan has not taken the assessment referred to below or if, in the opinion of the Registrar for the College, Dr. Dhawan has failed to follow recommendations made as a result of the assessment.

(b) Dr. Dhawan shall make arrangements through the College to be assessed at the Abbott Northwestern Hospital as soon as possible after January 1, 1998. In the event that the report from the Abbott Northwestern Hospital, which is to be provided to the College, contains recommendations for counselling or other treatment or remedial training or education, Dr. Dhawan shall follow all of the recommendations at the earliest possible time and reports of same shall be provided to the Registrar for the College.

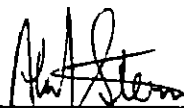
The costs associated with the assessment and compliance with any recommendations arising out of the assessment shall be borne by Dr. Dhawan.

(c) As a condition of Dr. Dhawan's license(s), he shall be required to have an appropriate female chaperone present during physical examinations of all of his female patients.

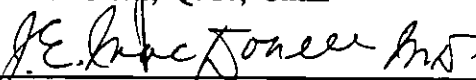
(d) Dr. Dhawan shall pay a portion of the costs of the Council of the College in the amount of Fifty Thousand Dollars (\$50,000.00) in accordance with the following schedule:

- (i) \$12,500.00 on or before January 31, 1998;
- (ii) \$12,500.00 on or before June 30, 1998;
- (iii) \$12,500.00 on or before June 30, 1999;
- (iv) the balance of \$12,500.00 on or before December 31, 1999.

As a condition of the continued registration and licensing of Dr. Dhawan, he must make payments in accordance with this schedule, failing which his registration or license may be further suspended by the Registrar until such time as the required payments have been made.



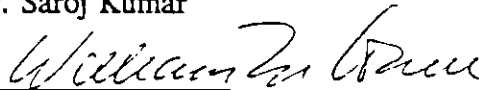
Alan J. Stern, Q.C., Chair



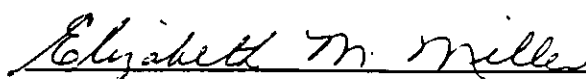
Dr. John MacDonell



Dr. Saroj Kumar



Dr. William Lowe



Elizabeth Miller