Re Khan and College of Physicians and Surgeons of Ontario; Discipline Committee of College of Physicians and Surgeons of Ontario, Intervener

76 C.C.C. (3d) 10

Ontario Court of Appeal
Court File No. 870/89
Dubin C.J.O., Osborne and Doherty JJ.A.

AUGUST 21, 1992

Professions — Physicians and surgeons — Discipline — Hearing by discipline committee — Counsel to committee assisting with reasons for decision to find physician guilty of professional misconduct — No evidence counsel gave legal advice — Committee responsible for authorship — No procedural error — Health Disciplines Act, R.S.O. 1990, c. H.4, s. 12(3).

Administrative law — Boards and tribunals — Evidence — Hearsay — Discipline committee hearing charge of professional misconduct admitting evidence of three-and a half-year-old girl — Also admitting evidence of mother as to statement by child shortly after alleged event — Revoking physician's licence — Hearsay statement admissible if reasonably necessary and some indicia of reliability — Lack of detailed memory at trial and leading questions used to draw out evidence making statement reasonably necessary.

Evidence -- Hearsay -- Exceptions

Evidence — Hearsay — Exceptions — Statement by child concerning sexual assault — Discipline committee hearing charge of professional misconduct admitting evidence of child three and a half at time of event but eight at time of hearing — Also admitting evidence of mother as to what child said shortly after alleged event — Revoking physician's licence — Hearsay statement admissible if reasonably necessary and some indicia of reliability — Lack of detailed memory at trial and leading questions used to draw out evidence making statement reasonably necessary.

Evidence -- Witnesses -- Expert witnesses giving evidence at discipline hearing

Evidence — Witnesses — Expert witnesses giving evidence at discipline hearing — Opinion that child victim of sexual abuse — Opinion admissible — Evidence of basis for opinion including child's statement admissible.

The respondent physician had been found guilty of professional misconduct in molesting a three- and a half-year-old girl. His licence to practise had been revoked. The discipline committee had admitted the child's evidence as to what had taken place as well as her mother's evidence as to the child's statement shortly after the event. They also heard the evidence of several experts who gave their opinion that the child had been sexually abused. The Divisional Court ruled that the evidence of the mother as to what the child had said about the episode should only have been admitted if the child's evidence had been excluded. The ***[page11]*** court also held that the experts, in giving the opinion that the child had been sexually abused, had answered the question that was for the tribunal and that one expert had been allowed improperly to give the basis for her opinion which included the child's statement. Finally, the court found that counsel for the committee had been involved to an unacceptable degree in the preparation of the committee's decision. They ordered a rehearing. The college and the discipline committee appealed to the Court of Appeal. The respondent had since been convicted of sexual assault and had disappeared.

Held, the appeal should be allowed.

The discipline committee had correctly admitted the evidence of both the child and the mother. The hearsay statement of a child is admissible if reasonably necessary and if indicia of reliability are present. In a case where the child testifies, reasonable necessity refers to the need to obtain an accurate and frank rendition of the child's version of events pertaining to the alleged assault. A child's oral evidence usually has to be heard before it can be determined whether the out-of-court statement is reasonably necessary. The statement had been found sufficiently reliable by the Supreme Court of Canada in the criminal proceedings. The length of time between the event and the testimony (four and one-half years) went a long way to establish necessity. Added to this was the lack of detailed memory at the later time and the suggestive questions used when her testimony was being extracted.

The evidence of the experts was admissible as was the evidence of one of them as to the basis for her opinion notwithstanding that this included the child's statement since the statement was admissible and in any event was not being offered through the expert as evidence of the truth of the matter contained in the statement. A trial judge has the discretion, however, where it is feasible, to require the expert evidence to be introduced in less conclusory form.

There was no evidence that counsel for the committee had given legal advice to the committee contrary to s. 12(3) of the Health Disciplines Act, R.S.O. 1990, c. H.4. His participation in the drafting of the reasons did not influence the decision for which the committee was responsible.

R. v. Khan (1988), 42 C.C.C. (3d) 197, 64 C.R. (3d) 281, 5 W.C.B. (2d) 54; affd 59 C.C.C. (3d) 92, [1990] 2 S.C.R. 531, 79 C.R. (3d) 1, 41 O.A.C. 353, 113 N.R. 53, 11 W.C.B. (2d) 10;

Ratten v. The Queen, [1972] A.C. 378, [1971] 3 All E.R. 801; Ares v. Venner (1970), 14 D.L.R. (3d) 4, [1970] S.C.R. 608, 12 C.R.N.S. 349, 73 W.W.R. 347 apld;

R. v. Collins (1991), 9 C.R. (4th) 377, 14 W.C.B. (2d) 371; R. v. R.(S.) (1992), 73 C.C.C. (3d) 225, 8 O.R. (3d) 679, 16 W.C.B. (2d) 266 distd;

Cases referred to:

R. v. Laramee (1991), 65 C.C.C. (3d) 465, 6 C.R. (4th) 277, 3 W.A.C. 238, 73 Man. R. (2d) 238, 13 W.C.B. (2d) 412; R. v. P.(J.) (1992), 74 C.C.C. (3d) 276, 13 C.R. (4th) 79, 16 W.C.B. (2d) 88; R. v. S.(K.O.) (1991), 63 C.C.C. (3d) 91, 4 C.R. (4th) 37, 12 W.C.B. (2d) 300; Child and Family Services of Winnipeg West v. G. (N.J.) (1990), 69 Man. R. (2d) 43, 24 A.C.W.S. (3d) 961; R. v. F.(G.) (1991), 10 C.R. (4th) 93, 14 W.C.B. (2d) 528; R. v. Moore (1990), 63 C.C.C. (3d) 85, 12 W.C.B. (2d) 140; R. v. Levogiannis (1990), 62 C.C.C. (3d) 59, 2 C.R. (4th) 355, 1 O.R. (3d) 351, 43 O.A.C. 161, 11 W.C.B. (2d) 556; leave to appeal to S.C.C. granted 73 C.C.C. (3d) vi; R. v. Miller (1991), 68 C.C.C. (3d) 517, 9 C.R. (4th) 347, 5 O.R. (3d) 678, 50 O.A.C. 282, 14 W.C.B. (2d) 366; R. v. Abbey (1982), 138 D.L.R. (3d) 202, 68 C.C.C. (2d) 394, [1982] 2 S.C.R. 24, 29 C.R. (3d) 193, [1983] 1 W.W.R. 251, 39

B.C.L.R. 201, 43 N.R. 30, 8 W.C.B. 81; R. v. Lavallee (1990), 55 C.C.C. (3d) 97, [1990] 1 S.C.R. 852, 76 C.R. (3d) 329, [1990] 4 W.W.R. 1, 67 Man. R. (2d) 1, 108 N.R. 321, 10 W.C.B. (2d) 101; R. v. Manahan (1990), 61 C.C.C. (3d) 139, 110 A.R. 390, 11 W.C.B. (2d) 171; R. v. Beliveau (1986), 30 C.C.C. (3d) 193, 17 W.C.B. 323; R. v. Graat (1982), 144 D.L.R. (3d) 267, 2 C.C.C. (3d) 365, [1982] 2 S.C.R. 819, 31 C.R. (3d) 289, 18 M.V.R. 287, 45 N.R. 451, 9 W.C.B. 21; R. v. Kelly (1990), 59 C.C.C. (3d) 497, 80 C.R. (3d) 185, 4 C.R.R. (2d) 157, 41 O.A.C. 32, 11 W.C.B. (2d) 193; R. v. Millar (1989), 49 C.C.C. (3d) 193, 71 C.R. (3d) 78, 33 O.A.C. 165, 8 W.C.B. (2d) 441; R. v. R.(S.) (1992), 73 C.C.C. (3d) 225, 8 O.R. (3d) 679, 16 W.C.B. (2d) 266; R. v. B.(G.) (1988), 65 Sask. R. 134, 4 W.C.B. (2d) 280; affd 56 C.C.C. (3d) 200, [1990] 2 S.C.R. 30, 77 C.R. (3d) 347, 111 N.R. 31, 10 W.C.B. (2d) 204; R. v. J.(F.E.) (1989), 53 C.C.C. (3d) 64, 74 C.R. (3d) 269, 36 O.A.C. 348, 9 W.C.B. (2d) 210; R. v. Taylor (1986), 31 C.C.C. (3d) 1, 55 C.R. (3d) 321, 57 O.R. (2d) 737, 1 W.C.B. (2d) 137; R. v. Beland (1987), 43 D.L.R. (4th) 641, 36 C.C.C. (3d) 481, [1987] 2 S.C.R. 398, 60 C.R. (3d) 1, 79 N.R. 263, 3 W.C.B. (2d) 69; R. v. C.(R.A.) (1990), 57 C.C.C. (3d) 522, 78 C.R. (3d) 390, 10 W.C.B. (2d) 280; R. v. Mohan (1992), 71 C.C.C. (3d) 321, 8 O.R. (3d) 173, 16 W.C.B. (2d) 33; R. v. Swietlinski (1978), 94 D.L.R. (3d) 218, 44 C.C.C. (2d) 267, 5 C.R. (3d) 324, 22 O.R. (2d) 604, 3 W.C.B. 31; affd 117 D.L.R. (3d) 285, 55 C.C.C. (2d) 481, [1980] 2 S.C.R. 956, 18 C.R. (3d) 231, 34 N.R. 569, 5 W.C.B. 291; Del Core v. Ontario College of Pharmacists (1985), 19 D.L.R. (4th) 68, 15 Admin. L.R. 227, 51 O.R. (2d) 1, 10 O.A.C. 57, 31 A.C.W.S. (2d) 411; leave to appeal to S.C.C. refused [1986] 1 S.C.R. viii, 57 O.R. (2d) 296n, 70 N.R. 82n; Spring v. Law Society of Upper Canada (1988), 50 D.L.R. (4th) 523, 64 O.R. (2d) 719, 11 A.C.W.S. (3d) 291, 5 W.C.B. (2d) 157; Consolidated-Bathurst Packaging Ltd. v. I.W.A., Local 2-69 (1990), 68 D.L.R. (4th) 524, [1990] 1 S.C.R. 282, 42 Admin. L.R. 1, 90 C.L.L.C. 14,007, 38 O.A.C. 321, 105 N.R. 161, 73 O.R. (2d) 676n; Tremblay v. Quebec (Commission des affaires sociales), [1992] 1 S.C.R. 952, 136 N.R. 5, 32 A.C.W.S. (3d) 3; Re Sawyer and Ontario Racing Com'n (1979), 99 D.L.R. (3d) 561, 24 O.R. (2d) 673; Re Emerson and Law Society of Upper Canada (1983), 5 D.L.R. (4th) 294, 41 C.P.C. 7, 44 O.R. (2d) 729

Statutes referred to:

Child and Family Services Act, R.S.O. 1990, c. C.11 Courts of Justice Act, R.S.O. 1990, c. C.43, s. 134(6) Criminal Code, R.S.C. 1985, c. C-46, ss. 486(2.1) [enacted R.S.C. 1985, c. 19 (3rd Supp.), s. 14] 686(1)(b)(iii), 715.1 [enacted R.S.C. 1985, c. 19 (3rd Supp.), s. 16] Health Disciplines Act, R.S.O. 1990, c. H.4, ss. 8, 12, 58(3), 61(2) [all repealed 1991, vol. 2, c. 18, s. 47(1) (not yet in force)]

Appeal from a judgment of the Divisional Court of the Ontario Court of Justice, 76 D.L.R. (4th) 179, 48 Admin. L.R. 118, 43 O.A.C. 130, 24 A.C.W.S. (3d) 707, allowing an appeal from the decision of the Discipline Committee of the College of Physicians and Surgeons of Ontario that the respondent was guilty of professional misconduct, and revoking his licence.

Joyce Harris and Kim M. Beatty, for appellant.

Claude R. Thomson, Q.C., and Andrew J. Heal, for appellant, intervener.

Ian G. Scott, Q.C., and Martin J. Doane, appearing as amici curiae.

The judgment of the court was delivered by

Doherty J.A.:

I. History of the matter

This appeal is from the order of the Divisional Court quashing a finding of professional misconduct made against Dr. Khan and directing a new hearing. The issues raised on this appeal can only be developed after a review of the chronology of the proceedings taken against Dr. Khan, and a summary of the evidence.

The events which underlie this appeal gave rise to a criminal charge of sexual assault against Dr. Khan, and an allegation of professional misconduct brought against him by the College of Physicians and Surgeons of Ontario ("the College"). In both proceedings it was alleged that Dr. Khan sexually assaulted his patient, T.O. T. was three and one-half years old at the time.

The criminal trial proceeded first and Dr. Khan was acquitted. The Crown appealed and this court quashed the acquittal and ordered a new trial: 42 C.C.C. (3d) 197, 64 C.R. (3d) 281, 5 W.C.B. (2d) 54. The Supreme Court of Canada affirmed the order of this court: 59 C.C.C. (3d) 92, [1990] 2 S.C.R. 531, 79 C.R. (3d) 1. Dr. Khan was subsequently retried and convicted. He absconded after conviction, but before sentence.

The proceedings before the Discipline Committee of the College of Physicians and Surgeons of Ontario ("the Committee") proceeded in July and August of 1989, after this court had ordered a new trial on the criminal charges, but before the Supreme Court of Canada had affirmed that

order. After a lengthy hearing, Dr. Khan was found guilty of professional misconduct and the Committee revoked his licence to practise medicine.

Dr. Khan appealed the finding of professional misconduct to the Divisional Court. The majority (J. Holland J. dissenting) allowed the appeal, set aside the decision of the Committee and ordered a rehearing before a different panel of the Committee. This court granted leave to appeal from thatjudgment.

II. The parties to this appeal

In this court, the College and the Committee appeared as appellants. The latter had been given intervener's status in the Divisional Court. Dr. Khan, the respondent, was not represented and did not attend the hearing of this appeal. The court was satisfied that he was unlawfully at large and that it was appropri- ***[page14]*** ate to proceed in his absence and without representation on his behalf. Mr. Ian G. Scott, Q.C., was appointed amicus curiae and asked to respond to the ground of appeal raised by the Committee. He and his associate, Mr. Doane, provided very valuable oral and written submissions.

III. The facts

Two different versions of the relevant events emerged in the evidence before the Committee, one proffered by T. and her mother, the other by Dr. Khan. The Committee accepted the evidence of T. and her mother and rejected that given by Dr. Khan.

Dr. Khan was Ms. O.'s doctor and had been T.'s doctor from birth. Ms. O. continued to see Dr. Khan even after she moved away from Toronto. On March 25, 1985, Ms. O. and T. drove to Ms. O.'s brother's home in Toronto. Ms. O. had made an appointment with Dr. Khan for herself and T. for the afternoon of March 26th.

T. and her mother arrived at Dr. Khan's office in the early afternoon of March 26, 1985. He ushered them into his office. Dr. Khan took T. and her mother into a nearby examining-room where he examined T. and gave her a needle. Ms. O. then took T. back into Dr. Khan's office and left her there while she went back to the examining-room with Dr. Khan to prepare for her pelvic examination. Dr. Khan gave Ms. O. a hospital gown to put on and returned to his office where T. was alone waiting for her mother. Dr. Khan closed the examining-room door when he left Ms. O. While waiting for Dr. Khan to return, Ms. O. heard a drawer open in Dr. Khan's office and she heard some tissue being pulled from a box.

About ten minutes later Dr. Khan returned to the examining-room and began the pelvic examination. Ms. O. heard a gagging sound coming from Dr. Khan's office. She started to get up to go to see if there was anything wrong with her daughter but Dr. Khan assured her that T. was alright. Dr. Khan completed his examination of Ms. O. and they returned to his office. When Ms. O. went into Dr. Khan's office, she saw T. sitting in a chair and picking at the sleeve of her jogging suit. Ms. O. observed a stain on the sleeve. The jogging suit was clean when T. put it on shortly before going to Dr. Khan's office.

After T. and her mother left Dr. Khan's office they stopped briefly at a drugstore before returning to their truck. Ms. O. testified that T. and she had a discussion in the truck on their way back to her brother's home.

I asked her, I said, "You were speaking to Dr. Khan, were you?" She said, "Yes." I said, "What did he say?" She said, "He asked me if I wanted a candy." ***[page15]*** Then her lip curled up in the left corner and she said, "Do you know what?" I said "What?" I had never seen that look on her face before.

She said, "He stuck his birdie in my mouth. He shook it and peed in my mouth." I said, "Are you lying?" She said, "No", so I let it go at that.

Ms. O. testified that the word "birdie" was a family term for penis.

Ms. O. drove directly to her brother's home and told her brother and sister-in- law what T. had said. Shortly afterwards, in the absence of Ms. O., T. repeated the same statement to the sister-in-law. Later that day the police were called and T. was interviewed by Constable Gyde and Ms. Shedletsky, a social worker.

Very early the next day the police met with Dr. Khan and executed a search warrant at his office. The officers also confronted Dr. Khan with the allegations made by T. Dr. Khan denied them and agreed to supply a sample of his saliva. He also offered to provide a blood sample.

Forensic examination identified semen and saliva traces in the stain found on T.'s sleeve. Those traces could not be forensically matched to any individual. The totality of the evidence strongly suggested that the staining had occurred while T. was in Dr. Khan's office and her mother was in the examining-room. Dr. Khan's records indicated that no medical procedures requiring a semen sample had been performed by him on the day T. visited his office.

T., who was almost eight years old at the time of the discipline hearing, testified. The nature of her evidence is central to one of the grounds of appeal, so I must set out a lengthy extract from her examination-in-chief:

Q. Do you remember coming to Toronto to see Dr. Khan?

A. No.

Q. Do you remember staying at your Auntie Joann's and Uncle Jim's before you went to the doctor's office with your mum the last time you saw him?

A. No.

Q. Your mum has told us the last time you saw him she had an appointment and you had an appointment at the same time. Do you remember going to Dr. Khan's office with your mum?

A. No, I didn't.

Q. Now your mum has told us that at one point she was out of the room and you were in the room with Dr. Khan alone. Do you remember something unusual happening the last time you saw Dr. Khan when you were alone in the room with him?

A. Yes. ***[page16]*** Q. What do you remember happened when you were alone with Dr. Khan the last time?

A. He told me to close my eyes and open my mouth.

Q. And what happened then?

A. He put his penis in it.

Q. Did anything come out of his penis?

A. I don't know.

Q. Are you absolutely sure he put his penis in your mouth?

A. Yes.

Q. Do you remember anything else about what happened between you and Dr. Khan when you were alone? For example, do you remember anything to do with a Kleenex?

A. No.

Q. Do you remember seeing Dr. Khan's penis?

A. No.

Q. Did you have your eyes closed?

A. Yes.

Q. Now T. it is okay if you tell us you opened your eyes, even though he told you you should not because remember you have to tell the truth. Listen hard to this question: Even though Dr. Khan told you to shut your eyes, did you peak [sic]?

A. Yes.

Q. When you peaked [sic] what did you see?

A. Dr. Khan's penis.

Q. Can you tell us anything about what you saw, what that penis looked like?

A. No.

Q. Were you sure it was a penis?

A. Yes.

Q. How could you be sure? Had you seen a penis before?

A. No.

Q. How did you know it was a penis?

A. Because I saw legs.

Q. Did you see Dr. Khan's legs?

A. Yes.

Q. When you say "legs" do you mean bare legs?

A. Yes.

Q. Did Dr. Khan take downhis pants or move his pants in some way or was he not wearing pants?

A. He was wearing pants.

Q. What did he do with his pants?

A. He undid them and he dropped them.

Q. Do you remember whether you tasted anything? ***[page17]*** A. No.

Q. Do you remember whether you thought that Dr. Khan was peeing in your mouth?

A. No.

Q. Do you remember how you felt when that happened to you?

A. No.

Q. Do you remember whether you told your mum what had happened?

A. No.

Q. And that happened a long time ago, T. Have you and your mum talked a lot about it between then and now?

A. No.

Q. Do you remember that you went back to your Auntie Joann's and eventually some people came and talked to you from the Police Department and from the Children's Aid?

A. No.

Q. I am going to ask you if you remember the name of a policeman who came to see you.

A. Brian Gyde?

Q. Yes, that's the name. Do you remember the social worker that came to see you with Brian?

A. Shirley.

Q. Do you remember that Shirley brought some things with her?

A. Yes.

Q. What did she bring?

A. Dolls.

Q. Do you remember you and Shirley played with the dolls?

A. Yes.

Q. Do you remember that?

A. Hardly.

T. also indicated that Ms. Shedletsky had tried to help her recall what had happened in Dr. Khan's office but that she had helped only "a little bit". Finally, T. said that it was difficult for her to testify about the incident.

In addition to the evidence outlined above, there was evidence that T.'s behaviour changed markedly following her visit with Dr. Khan, and that T. had no prior exposure to the kind of explicit sexual conduct she described Dr. Khan as having engaged in with her.

The College also tendered two witnesses who were accepted as experts in the investigation, verification and treatment of the sexual abuse of children. Both expressed the opinion that T. had been the victim of sexual abuse.

[page18] The defence case before the Committee included the evidence of Dr. Khan, psychiatric evidence, and character evidence. I do not propose to review that evidence in detail. The Committee rejected Dr. Khan's denial, and found the remaining evidence called on his behalf of limited value.

IV. The issues raised on this appeal

The reasons of the Divisional Court are reported at 76 D.L.R. (4th) 179, 48 Admin. L.R. 118, 43 O.A.C. 130, and I will not review them in detail. The majority found seven errors in the discipline proceedings:

(i) The evidence of the sister-in-law concerning comments made to her by Ms. O. was inadmissible hearsay.

(ii) The evidence of the investigating officer as to statements made to him by Ms. O. and her sister-in-law, including comments which had been made to them by T., was inadmissible hearsay.

(iii) The evidence of what T. said to her mother in the truck about 20 minutes after the alleged assault by Dr. Khan was inadmissible hearsay.

(iv) The evidence of the sister-in-law as to statements made to her by T. was inadmissible hearsay.

(v) Ms. Shedletsky's evidence of things said to her by T. and the playing of a tape-recording of an interview between T. and Ms. Shedletsky was inadmissible hearsay.

(vi) The evidence of the two experts to the effect that T. had been sexually abused was evidence going to the ultimate issue to be determined by the Committee and was beyond the proper scope of expert evidence.

(vii) The Committee failed to give proper consideration to the evidence of good character called on behalf of Dr. Khan.

In addition to these errors, the majority held that counsel for the Committee'sinvolvement in the preparation of the reasons of the Committee was improper and amounted to the giving of legal advice in contravention of s. 12(3) of the Health Disciplines Act, R.S.O. 1980, c. 196 (now R.S.O. 1990, c. H.4, s. 12(3)).

The majority concluded that the improper admission of hearsay evidence, combined with counsel's improper participation in the preparation of the reasons necessitated a new hearing.

In this court the appellants accept that the Committee erred in admitting the sister-in-law's evidence of statements made to her by Ms. O. and the investigating officer's evidence of statements made ***[page19]*** to him by Ms. O. and the sister-in-law. I agree with those concessions and will consider the effect of those errors at the end of these reasons. The appellants also do not

challenge the conclusion of the majority in the Divisional Court that the Committee failed to give proper consideration to the character evidence called on behalf of Dr. Khan. As this conclusion played no part in the majority's determination that a new hearing was required, I will not address the issue.

The College submits that the Divisional Court erred in holding that:

(i) T.'s statements to her mother and the sister-in-law shortly after the visit to Dr. Khan's office were inadmissible hearsay.

(ii) Ms. Shedletsky could not testify as to statements made to her by Ms. O. and T. where those statements were part of the material she relied on in formulating her opinion as to whether T. had been sexually assaulted.

(iii) The experts had gone beyond the scope of permissible expert evidence by opining on the ultimate issue to be decided by the tribunal.

Mr. Thomson, counsel for the Committee, raised one ground of appeal. He argued that the majority of the Divisional Court erred in both its characterization of the role played by the Committee's counsel (who was not Mr. Thomson) in the preparation of the reasons of the Committee, and in its interpretation of s. 12(3) of the Health Disciplines Act. Mr. Scott, as amicus curiae, agreed with this contention, although he advanced somewhat different arguments than those made by Mr. Thomson.

I will now consider the grounds of appeal raised by the College.

A. Did the Committee err in admitting Ms. O.'s evidence as to statement made to her by T.?

The content of T.'s statement to her mother very shortly after they left Dr. Khan's office is set out above. It is a graphic and powerful description of a most serious sexual assault. At Dr. Khan's first criminal trial the statement was excluded. The trial judge also held that T. was not competent to testify. On appeal, this court held that the statement was admissible under the spontaneous utterance exception to the hearsay rule. In so holding, the court adapted the exception enunciated in Ratten v. The Queen, [1972] A.C. 378, [1971] 3 All E.R. 801 (P.C.), to the particular circumstances presented where a very young child complains of sexual misconduct by an adult. That exception did not turn on T.'s availability as a witness. The statement was admissible whether or not T. testified. This court went on, however, to hold that the trial ***[page20]*** judge had applied the wrong test in concluding that T. was not a competent witness.

As indicated above, the discipline hearing took place after this court's decision in Khan. At that hearing, counsel for Dr. Khan maintained his objection to the admissibility of T.'s statement to her mother, but acknowledged that the Committee was bound by the decision of this court. The Committee admitted the statement.

Before the appeal from the Committee's decision reached the Divisional Court, the Supreme Court of Canada rendered its decision on the appeal by Dr. Khan from the order of this court

setting aside his acquittal. That court unanimously upheld the admissibility of T.'s statement but did so on a different basis than had been enunciated by this court.

McLachlin J., speaking for the court, rejected the spontaneous utterance rationale for receiving the evidence and undertook a first principles examination of the issue. She observed that the hearsay rule was, in the main, judge-made law. In her view, the strictures of the traditional application of the rule required some modification where children made allegations of abuse. To effect that modification, she looked to the principles set down in Ares v. Venner (1970), 14 D.L.R. (3d) 4, [1970] S.C.R. 608, 12 C.R.N.S. 349. McLachlin J. held that evidence of out-of-court statements made by children alleging sexual abuse could be admitted where the admission of those statements was reasonably necessary, and the evidence bore sufficient indicia of reliability. She went on to hold that the statement made by T. to her mother was necessary because T. had been heldincompetent to testify, and the surrounding circumstances supplied the requisite degree of reliability.

The approach to admissibility pronounced by McLachlin J. clearly placed the admissibility of out-of-court statements made by children who were alleged to have been abused in the discretion of the trial judge (or equivalent tribunal) and recognized that the ruling in any given case would depend on the exact facts of that case.

In the Divisional Court, O'Driscoll J., for the majority, held that as T. had testified before the Committee, the necessity requirement described by McLachlin J. could not be met and the evidence should have been excluded. He said, at p. 188:

T. did testify before the Discipline Committee; the pre-condition of "necessity" was absent and, therefore, the out-of-court statement by T. to her mother did not qualify as an exception to the rule against hearsay. In other words, the out-of-court statement of the child may be admissible if it satisfies the pre-conditions of necessity and reliability; it is admitted in substitution for but not in addition to the viva voce evidence of the child.

Before us, counsel for the respondent College submitted that becauseT., in her evidence before the Discipline Committee, could not recall anything about ***[page21]*** "ejaculation", it was "necessary" to allow the mother to give the hearsay statement as truth of the facts contained therein...

Whatever may be the outside limit of the meaning of "necessity", in my view, it does not include shoring up and/or filling in aspects of the evidence of T.

Although Khan was a criminal case, I agree with the majority of the Divisional Court that the principles set down in Khan govern the admissibility of T.'s out-of-court statements in the discipline proceedings. The civil rules of evidence are made applicable to those proceedings by s.12(6) of the Health Disciplines Act. As there is no statutory civil rule governing the admissibility of the statement, the common law rules apply. The reliance in Khan on Ares v. Venner, supra, a civil case, indicates that the necessity and reliability criteria identified in Khan have equal applicability whether the child's out-of-court statement is tendered in a civil or criminal proceeding. That is not to say that the determination of whether those criteria have been

met will be the same regardless of the nature of the proceedings, but only that both factors will have to be addressed in both types of cases.

I also need not consider the admissibility of such statements in cases which are neither criminal nor civil, or which may be subject to specific statutory provisions (e.g., Child and Family Services Act, R.S.O. 1990, c. C.11).

The admissibility of T.'s statement to her mother reduces itself to a single question -- Does the fact that T. testified render the evidence of what she said to her mother inadmissible?

The majority of the Divisional Court was of the opinion that it did. Support for that position can be found in the case law subsequent to Khan : R. v. Laramee (1991), 65 C.C.C. (3d) 465, 6 C.R. (4th) 277, 3 W.A.C. 238 (Man. C.A.), per Twaddle J.A. (concurring in the result and O'Sullivan J.A. agreeing) at pp. 486-7; R. v. P.(J.), a judgment of the Quebec Court of Appeal released March 13, 1992, per Tyndale J.A. dissenting at p. 7 [since reported 74 C.C.C. (3d) 276 at pp. 279-80, 13 C.R. (4th) 79, 16 W.C.B. (2d) 88] (the majority not addressing the issue), on appeal to the Supreme Court of Canada; R. v. S.(K.O.) (1991), 63 C.C.C. (3d) 91 at p. 93, 4 C.R. (4th) 37, 12 W.C.B. (2d) 300 (B.C.S.C.); Child and Family Services of Winnipeg West v. G.(N.J.) (1990), 69 Man. R. (2d) 43 at pp. 45-6, 24 A.C.W.S. (3d) 961 (Q.B.).

Two trial judges have, however, relied on Khan to admit an out-of-court statement where the maker of the statement testified. In one case, the trial judge held that while the child testified she was, because of her emotional condition, unable to narrate her version of the relevant evidence: R. v. F.(G.) (1991), 10 C.R. (4th) 93, 14 W.C.B. (2d) 528 (Ont. Ct. (Gen. Div.)). In the other case, the trial judge admitted the out-of-court statement based on expert ***[page22]*** evidence that the witness, who was the accused and an adult, was mentally incapable of recounting the relevant events in the witness-stand: R. v. Moore (1990), 63 C.C.C. (3d) 85, 12 W.C.B. (2d) 140 (Ont. Ct. (Gen. Div.)).

The same trial judge who admitted the statement in Moore refused to admit T.'s statement to her mother on Dr. Khan's retrial. I have considered the transcript of that ruling. The trial judge did not hold that the out-of-court statement was excluded merely because T. had testified, but rather rejected the Crown's argument that the absence of certain details in T.'s evidence establishedthe need to admit her out-of-court statement.

9 C.R. (4th) 377, 14 W.C.B. (2d) 371. At trial the child testified that the accused had touched her vagina. She made the same assertion in a statement to her mother. The trial judge admitted the statement as proof of the truth of its contents relying on the Supreme Court of Canada judgment in Khan.

This court held that the statement was not admissible to prove the truth of its contents, stating, at p. 379:

We do not think that this evidence can be used for anything but the limited purpose of refuting the concoction suggested in cross-examination. It cannot be used in any way for proof of its

contents or to confirm the testimony of the child. It does not meet the test laid down in Khan, particularly, that of necessity. The child gave the evidence independently.

In my opinion, Collins does not preclude the admissibility of a child's out-of- court statements in all cases where the child testifies. It does no more than hold that in the particular case the nature of the child's evidence rendered it unnecessary to admit her out-of-court statement to her mother.

In addition to the cases referred to above, several commentators have interpreted, and consequently criticized, Khan as precluding the admission of both the child's testimony and her out-of-court statement: Ontario Law Reform Commission: Report on Child Witnesses (1991), at p. 60; Ronda Bessner, "Khan: Important Strides made by the Supreme Court Respecting Children's Evidence" (1990), 79 C.R. (3d) 15 at pp. 19-20; Mary Misener, "Children's Hearsay Evidence in Child Sexual Abuse Prosecutions: A Proposal for Reform" (1991), 33 C.L.Q. 364 at p. 376.

With respect to the contrary view, I do not read Khan as demanding an either/or approach to the admissibility of a child's out-of-court statement where the child is available to testify. In so concluding, I rely on three passages from Khan. At the end of her reasons McLachlin J. observes, at p. 106: ***[page23]*** Having said this, I note that it may not be necessary to enter the statement on a new

trial, if the child's viva voce evidence can be received as suggested in the first part of my reasons.

(Emphasis added.)

Earlier, in the course of referring to the need to safeguard the interests of the accused when considering the admissibility of the child's out-of-court statement, McLachlin J. said, at p. 105:

While there may be cases where, as a condition of admission, the trial judge thinks it possible and fair in all of the circumstances to permit cross- examination of the child as a condition of the reception of the hearsay statement, in most cases the concerns of the accused as to credibility will remain to be addressed by submissions as to the weight to be accorded to the evidence, and submissions as to the quality of the corroborating evidence.

(Emphasis added.)

These two passages contemplate situations where the child will testify and the out-of-court statement will still be admitted.

The third relevant passage appears at p. 106:

This does not make out-of-court statements by children generally admissible; in particular the requirement of necessity will probably mean that in most cases children will still be called to give viva voce evidence.

(Emphasis added.)

This passage holds that the child's viva voce evidence will "probably" render it unnecessary to receive the out-of-court statement in "most" cases. It must follow that in some cases it will still be necessary to admit the statement even where the child testifies.

A rule which would automatically exclude the out-of-court statement where the child testifies is inconsistent with Ares v. Venner, supra, the authority relied on in Khan. In that case, the nurses who made the out-of-court statements were available as witnesses, although they were not called by either party. There is no suggestion in Ares v. Venner that had those individuals been called, the out-of-court statements would have been rendered inadmissible. Quite the contrary, the availability of the nurses was seen as enhancing the reliability of their out-of-court statements and supporting their admission: Ares v. Venner, supra, at p. 16.

Finally, a rule of automatic exclusion in cases where the child testifies would undermine the flexible case-by-case approach adopted in Khan, thereby detracting from the avowed goal of avoiding strict and prefabricated exclusionary rules in cases involving allegations of sexual abuse against young children. This goal has been recognized not only by the courts in their application of the common law rules of evidence, but also by Parliament through the recent enactment of special statutory provisions ***[page24]*** dealing with the admissibility of the evidence of young complainants in cases involving allegations of sexual abuse: see Criminal Code, R.S.C. 1990, c. C-46, ss. 715.1 and 486(2.1).

In my view, Khan holds that where a party seeks to introduce an out-of-court statement made by a child and referrable to alleged abuse of that child, the party must establish that the reception of the statement is necessary and that the statement is reliable. The fact that the child testifies will be relevant to, but not determinative of, the admissibility of the out-of-court statement.

Where the child testifies, the reliability of the out-of-court statement will, in most cases, be enhanced. Many statutory provisions in American jurisdictions governing the admissibility of out-of-court statements made by children in sexual abuse cases provide that where the child testifies, the statement can be admitted without corroboration, but where the child does not testify, corroboration is a condition precedent to admissibility. It is said that where the child testifies, the reliability of the out-of-court statement is enhanced by the opposing party's ability to cross-examine the child, and the tribunal's opportunity to see and hear the child: Frissell and Bukelic, "Application of the Hearsay Exceptions and Constitutional Challenges to the Admission of a Child's Out-of-court Statements in the Prosecution of Child Sexual Abuse Cases in North Dakota", 66 N. Dakota L. Rev. 599 at p. 614; Graham, "Admissibility of Hearsay Statements in Child Sexual Abuse Prosecutions" (1989), 25 Crim. L. Bul. 473 at pp. 481-5; Misener, "Children's Hearsay Evidence in Sexual Abuse Prosecutions: A Proposal for Reform", supra, at pp. 381-4.

The fact that the child testifies will clearly impact on the necessity of receiving his or her out-of-court statement. Necessity cannot, however, be equated with unavailability. In Khan, McLachlin J. instructs us that necessary means "reasonably necessary" (at p. 104). In the context of cases involving an alleged sexual assault on a child, reasonable necessity refers to the need to have the

child's version of events pertaining to the alleged assault before the tribunal charged with the responsibility of determining whether the assault occurred. In my view, if that tribunal is satisfied that despite the viva voce evidence of the child, it is still "reasonably necessary" to admit the out-of-court statement in order to obtain an accurate and frank rendition of the child's version of the relevant events, then the necessity criterion set down in Khan is satisfied: see Anne McGillivray, " R. v. Laramee : Forgetting Children, Forgetting Truth" (1991), 6 C.R. (4th) 325 at pp. 335-41.

The assessment of "reasonable necessity" by reference to the quality of the potential viva voce evidence available from the makers of the out-of-court statements is evident in Ares v. Venner, ***[page25]*** supra. The admissibility of the nurses' notes was premised on the conclusion that viva voce evidence based on a recollection of distant and often routine events would inevitably be less complete and less accurate than out-of-court statements referrable to those events, made by independent persons in the course of their duties, and at or near the time of the events. The admissibility of the out-of-court statements in Ares v. Venner did not require proof that the makers of those statements, who were available to testify, had no recollection of the events referred to in those statements. It was assumed that their recollection would be such as to necessitate the receiving of out-of-court statements.

In the case of children, it is not assumed that the viva voce evidence would provide an inadequate substitute for the out-of-court statement. However, where that inadequacy is demonstrated in a particular case, I see no qualitative difference between the necessity recognized in Ares v. Venner and the need to receive a child's out-of-court statement.

My interpretation of reasonable necessity finds support in s. 486(2.1) of the Criminal Code. That section provides that in certain cases (including allegations of sexual assault) where the complainant is under 18 years of age, the presiding judge may allow the complainant to testify "outside the court room or behind a screen or other device", if the judge is of the opinion that those measures are needed "to obtain a full and candid account of the acts complained of from the complainant".

In R. v. Levogiannis (1990), 62 C.C.C. (3d) 59 at p. 86, 2 C.R. (4th) 355, 1 O.R. (3d) 351 (C.A.), leave to appeal to the Supreme Court of Canada granted July 2, 1992 [73 C.C.C. (3d) vi] this court acknowledged that the prevalence of sexual misconduct against children in contemporary society and the need to accommodate young witnesses so as to obtain a full and candid account of the events in issue, presented pressing and substantial concerns to the community. Those same concerns drove the judgment in Khan and should be reflected in the application of that judgment in subsequent cases. The adoption of a necessity standard like that found in s. 486(2.1) when assessing the admissibility of out-of-court statements made by child complainants in sexual assault cases serves the concerns identified by Parliament and Khan and promotes the effective and just assessment of allegations of sexual misconduct against children.

The determination whether the admission of the child's out-of-court statement is necessary where the child testifies must be an ad hoc one. It would be unwise and probably impossible to attempt to provide an exhaustive list of all of the factors which could be ***[page26]*** relevant to that determination. This case suggests that the following factors will be relevant:

(1) The age of the child at the time of the alleged event and at the time he or she testifies.

(2) The manner in which the child gives his or her evidence, including the extent to which it is necessary to resort to leading questions to elicit answers from the child.

(3) The demeanour of the child when he or she testifies.

(4) The substanceof the child's testimony, particularly as it reflects on the coherence and completeness of the child's description of the events in question.

(5) Any professed inability by the child to recall all or part of the relevant events.

(6) Any evidence of matters which occurred between the event and the time of the child's testimony which may reflect on the child's ability to provide an independent and accurate account of the events in issue.

(7) Any expert evidence relevant to the child's ability at the time he or she is required to give evidence to comprehend, recall or narrate the events in issue.

It must be stressed that the admissibility of the out-of-court statement will not generally turn on any single factor. For example, Moldaver J. was correct, in the retrial of Dr. Khan, in rejecting the submission that the absence of a certain detail in the child's testimony required the admission of the statement which made reference to the detail. It was but one factor to be considered in determining admissibility. However, in the case of very young children, the age of the child at the time the event occurred may alone establish the reasonable necessity of admitting the out-of-court statement: e.g., see R. v. P.(J.), supra, per Mailhot J.A. (for the majority), where the out-of-court statement of a two-and a half-year-old child was admitted.

I also stress that even if the admission of the out-of-court statement is found to be reasonably necessary, it will be admitted only if it is also found to be sufficiently reliable.

It follows from my approach that where a party seeks to introduce both the viva voce evidence of the child and an out-of-court statement by that child, the tribunal will, in most cases, have to hear the evidence of the child before it can determine whether it is reasonably necessary to admit the evidence of the out-of-court statement.

In this case, because of the Committee's reliance on this court's judgment in Khan, the statement was admitted before T. testified ***[page27]*** and no assessment of the necessity to receive the statement, or of its reliability, was made by the Committee. Usually, where necessity and reliability have not been addressed in the trial tribunal, this court will be required to remit the case to that tribunal. However, I am of the opinion that in this case those issues can be addressed now.

Firstly, the judgment of the Supreme Court of Canada establishes that T.'s statement is sufficiently reliable to merit its admission. Nothing in the record before the Committee detracts

from the basis on which the Supreme Court of Canada held the statement to be sufficiently reliable. T.'s availability for cross-examination enhanced the statement's reliability.

Secondly, the age of T. at the time of the event in question (three and one- half) and the lengthy passage of time between the event and her testimony (over four years) go a long way towards meeting the reasonable necessity requirement. Whatever a child's abilities to accurately perceive, recall and recount past events may be (and recent studies suggest they have been under-estimated (see Ontario Law Reform Commission: Report on Child Witnesses, supra, c. 1)), that ability must suffer where the events occurred four and one-half years earlier when the child was only three and a half years old. This is especially so where the child has been questioned by various persons concerning those events in the intervening years.

A review of T.'s evidence quoted extensively earlier in these reasons, supports the conclusion that T. was unable to give anything approaching a full description of the events surrounding the alleged assault. She recalled the central fact, that is, that Dr. Khan inserted his penis in her mouth, but she could not recall the details of that event or the surrounding events.

T.'s inability to recall details beyond the central event some four and one- half years later was described by two experts called by the College as consistent with the expected limitations of a young child's ability to remember and articulate prior traumatic events. The literature lends support to this contention: see Yun, "A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases" (1983), 83 Columbia L. Rev. 1745 at pp. 1750-1; Scottish Law Reform Commission, Report on The Evidence of Children and Other Potentially Vulnerable Witnesses" (1990), at p. 2.

T.'s evidence was also extracted by way of highly suggestive questions put by counsel for the College. In so describing the questions, I intend no criticism of counsel. The need to resort to such questioning, however, reflects on T.'s ability to give her own full and frank description of the relevant events.

[page28] Considering T.'s age at the time of the alleged assault, the passage of time between the assault and her testimony, the nature of her testimony, and the expert evidence referable to her ability to narrate the events in Dr. Khan's office, I am satisfied that, when T. testified, she could not provide a full and candid account of the events which occurred in Dr. Khan's office. Consequently, it was reasonably necessary to admit her out-of-court statement to her mother.

The out-of-court statement made by T. to her mother was reliable and its admission was reasonably necessary. The Committee did not err in admitting the statement for the truth of its contents.

Before leaving this issue, I should stress that these reasons are concerned with the introduction by the "prosecution" of out-of-court statements by children. Where the "accused seeks to tender such evidence, additional considerations may have to be addressed: see R. v. Miller (1991), 68 C.C.C. (3d) 517 at pp. 531-5, 9 C.R. (4th) 347, 5 O.R. (3d) 678 (C.A.).

B. Did the Committee err in admitting the sister-in-law's evidence as to the statement made to her by T.?

The sister-in-law testified that shortly after Ms. O. and T. arrived at her home, she spoke to T. alone and T. repeated, with some slight differences, the statement she had made to her mother after they left Dr. Khan's office. The Committee admitted the sister-in-law's evidence relying on the principles set down by this court in Khan.

As observed above, those principles no longer govern. The admissibility of the sister-in-law's evidence as to the statement made to her by T. must be resolved by a consideration of the dual criteria of necessity and reliability.

The statement to the sister-in-law was essentially a repetition of the statement T. had made to her mother. As I have held that the statement to Ms. O. was admissible, it was not reasonably necessary to admit the statement of the sister-in-law in order to place a full and frank version of T.'s recollection of events before the tribunal. Ms. O.'s evidence accomplished that purpose. As the statement made to the sister-in-law fails the necessity test, it should not have been received. I need not address the reliability of that evidence.

I will consider the effect of this error at the conclusion of these reasons.

[page29] C. Did the tribunal err in permitting Ms. Shedletsky to testify as to statements made to her by Ms. O. and T.?

Ms. Shedletsky was employed by the Children's Aid Society of Metropolitan Toronto. She and Constable Gyde interviewed Ms. O. and T. on March 26, 1985. The interview with T. was tape-recorded.

The College presented Ms. Shedletsky as an expert competent to give evidence concerning "the investigation of child sexual abuse cases and the determination of whether sexual abuse occurred". The Committee, over counsel for Dr. Khan's objection, held that Ms. Shedletsky was qualified to give expert evidence in those areas. The Divisional Court accepted this conclusion and Ms. Shedletsky's competence to give expert evidence was not in dispute on this appeal.

After the Committee held that Ms. Shedletsky could give expert evidence, she was questioned as to the basis for her opinions. She identified several sources of information she had relied on in arriving at her opinion. These included her interview with Ms. O. and the taped interview with T.

The Committee then heard lengthy argument as to the admissibility of the tape- recording of the interview with T. It does not appear that counsel for Dr. Khan took exception to the admissibility of Ms. O's statements to Ms. Shedletsky. After the argument was completed, counsel for the Committee advised the Committee that the evidence could be received on the following basis:

> [E]xpert witnesses giving their opinions are entitled in law to state what the basis is of their opinions, and that that evidence which would otherwise be hearsay is admissible not to prove that what was heard was true but to form the basis for their opinion.

The Committee held:

We will also permit the witness to be questioned as to the basis for her opinion. It is agreed that the statements of the child to her may be used in coming to her opinion, but that they are not to be admitted into evidence to establish that the child's statements are true.

In making its ruling, the Committee referred only to the child's statements in describing the limited value of the evidence to be tendered through Ms. Shedletsky. This is not surprising, since counsel for Dr. Khan's objections were directed specifically at that evidence.

In its reasons for the finding of professional misconduct, the Committee again alluded to the limited purpose for which the interview with T. by Ms. Shedletsky was admitted.

[page30] After the Committee's ruling, Ms. Shedletsky testified as to the statements made to her by Ms. O. and the tape of her interview with T. was played for the Committee.

Ms. O.'s statement to Ms. Shedletsky was consistent with her viva voce evidence and included reference to the statement made by T. to Ms. O. after leaving Dr. Khan's office. Ms. Shedletsky's evidence of what Ms. O. said to her did not add to the substance of the evidence already before the Committee.

In the course of the taped interview, T. spoke of many things. She was asked about her visit to Dr. Khan's office. Using anatomical dolls, she described how Dr. Khan showed her his "birdie", put it in her mouth and shook it. She said that when Dr. Khan did so, "something came out" and went into her mouth. She described the substance as orange and black in colour and at one point identified it as blood. T. also said that after Dr. Khan shook his "birdie" he used a piece of toilet paper to wipe the substance off T.

The content of the taped interview with T. was consistent with her statement to her mother after leaving Dr. Khan's office and with her testimony, although it was certainly much more detailed than the latter. Her taped interview also contained a reference to Dr. Khan using a piece of toilet paper to clean up the substance. This detail was not given in her statement or in her viva voce evidence.

The majority in the Divisional Court held that Ms. O.'s statement to Ms. Shedletsky and the tape of T.'s interview with Ms. Shedletsky were hearsay and should have been excluded.

With respect, the majority erred in so holding. An expert witness who is competent to give an opinion which is relevant to a fact in issue is entitled to testify as to the information relied on in arriving at that opinion. That evidence is admissible to establish the basis for, and consequently the value of, the opinion advanced by the expert. It is not admissible for the truth of the contents of the material relied on by the expert: R. v. Abbey (1982), 138 D.L.R. (3d) 202 at pp. 217-20, 68 C.C.C. (2d) 394, [1982] 2 S.C.R. 24; R. v. Lavallee (1990), 55 C.C.C. (3d) 97, [1990] 1 S.C.R. 852, 76 C.R. (3d) 329, per Wilson J. (majority) at p. 127, per Sopinka J. (concurring) at pp. 131-2. This rule has been applied in cases of child abuse to permit an expert to testify as to statements made to the expert by the child: R. v. Manahan (1990), 61 C.C.C. (3d) 139 at p. 143,

110 A.R. 390, 11 W.C.B. (2d) 171 (C.A.); R. v. Beliveau (1986), 30 C.C.C. (3d) 193, 17 W.C.B. 323 (B.C.C.A.).

These authorities demonstrate that the Committee properly permitted Ms. Shedletsky to testify as to the basis of her opinion. Furthermore, the Committee directed itself on two occasions that the statements made by T. to Ms. Shedletsky could not be used to ***[page31]*** prove their contents. I am satisfied that the Committee properly received and considered that evidence.

The Committee did not expressly instruct itself as to the limited use of Ms. O.'s statement to Ms. Shedletsky. I am not satisfied that its failure to do so constituted error. Counsel for the Committee properly advised the Committee of the limited use of all of the information relied on by Ms. Shedletsky. I am confident that the Committee applied that limitation to the statement of Ms. O. In any event, there was nothing of significance in Ms. O.'s statements to Ms. Shedletsky that was not the subject of proper proof through other evidence, particularly the evidence of Ms. O. In so far as Ms. O.'s statements were concerned there was no danger that the trier of fact could reach into the background evidence provided by the expert for the proof of facts which were not otherwise the subject of admissible evidence.

While an expert may indicate the basis for her opinion, the tribunal controls the extent to which the expert places the substance of that material before the tribunal. In some cases, for the purposes of examination-in-chief at least, the foundation for the expert's opinion may be adequately laid without reference to the actual content of out-of-court statements made to the expert. In other cases it will be necessary to admit some, or perhaps all of that content in order to lay the foundation for the expert's opinion. In each case, the tribunal will consider the relevance of the content to the formation of the expert's opinion, as well as the potential prejudice to the opposing party by the admission of the out-of-court statements, in deciding whether to permit the expert to testify as to the content of those out-of-court statements.

In this case, the Committee was not asked to exercise the discretion referred to above. In the absence of any such submission, I am not prepared to hold that the Committee erred in permitting Ms. Shedletsky to relate the contents of those statements.

D. Did the expert evidence go beyond permissible limits?

Both Ms. Shedletsky and Dr. Marcellina Mian testified that in their opinion T. had been sexually abused. O'Driscoll J., for the majority in the Divisional Court, held that neither should have been allowed to give that opinion because it went to the very issue to be decided by the Committee.

This ground of appeal renews the well-known "ultimate issue" debate. Authority certainly exists which denies the admissibility of expert evidence going to the very factual issue to be decided by the trier of fact. However, the weight of more recent authority is to the contrary and does not preclude such opinion evidence: R. v. Graat ***[page32]*** (1982), 144 D.L.R. (3d) 267 at p. 281, 2 C.C.C. (3d) 365, [1982] 2 S.C.R. 819; affirming 116 D.L.R. (3d) 143 at p. 157, 55 C.C.C. (2d) 429, 30 O.R. (2d) 247 (C.A.); R. v. Kelly (1990), 59 C.C.C. (3d) 497 at p. 504, 80 C.R. (3d) 185, 4 C.R.R. (2d) 157 (Ont. C.A.); R. v. Millar (1989), 49 C.C.C. (3d) 193 at pp. 218-20, 71 C.R. (3d) 78, 33 O.A.C. 165 (C.A.); Sopinka, Lederman and Bryant, Law of Evidence in Canada

(1992), pp. 540-3; Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (1982), at pp. 102-4.

I do not regard the recent pronouncement of this court in R. v. R.(S.), released June 1, 1992 [since reported 73 C.C.C. (3d) 225, 8 O.R. (3d) 679, 16 W.C.B. (2d) 266] at p. 11 [pp. 231-2 C.C.C.] as contrary to this recent authority. There the court held that an expert could not put forward the opinion that a child had been sexually abused based on that expert's assessment of the child's veracity. It is well established that experts, save in very exceptional cases, may not offer an opinion as to the veracity of any witness: R. v. B.(G.) (1988), 65 Sask. R. 134, 4 W.C.B. (2d) 280, per Wakeling J.A. at pp. 148-50; approved 56 C.C.C. (3d) 200 at p. 220, [1990] 2 S.C.R. 30, 77 C.R. (3d) 347; R. v. J.(F.E.) (1989), 53 C.C.C. (3d) 64 at p. 72, 74 C.R. (3d) 269, 36 O.A.C. 348 (C.A.). As I understand the reasons in R. v. R.(S.), supra, the court held that as the witness could not offer an opinion as to the veracity of the child, he equally could not suggest the factual conclusion which flowed from that opinion, that is, that the child had been sexually assaulted.

I distinguish the situation found in R. v. R.(S.) from the present one in that the witnesses who were held qualified to do so expressed an opinion as to what factual inferences or conclusions should be drawn from the evidence concerning the behaviour and symptomatology of T. after her visit to Dr. Khan's office. That kind of expert evidence is admissible even though it indirectly enhances the credibility of the child's evidence: R. v. Taylor (1986), 31 C.C.C. (3d) 1, 55 C.R. (3d) 321, 57 O.R. (2d) 737 (C.A.); R. v. B.(G.), supra; R. v. Millar, supra.

The role of the expert witness is central to any decision concerning the admissibility of a particular opinion proffered by the expert. That role was described by McIntyre J. for the majority in R. v. Beland (1987), 43 D.L.R. (4th) 641 at pp. 653-4, 36 C.C.C. (3d) 481 at pp. 493-4, [1987] 2 S.C.R. 398:

> The function of the expert witness is to provide for the jury or other trier of fact an expert's opinion as to the significance of, or the inference which may be drawn from, proved facts in a field in which the expert witness possesses special knowledge and experience going beyond that of the trier of fact.
>
> ***[page33]*** The expert is permitted to testify where he or she has the necessary expertise and the evidence would assist the trier of fact. To automatically exclude the expert's evidence that a certain factual inference should be drawn because that fact is at the core of the dispute before the court excludes the potentially most probative part of the expert's evidence.

It is also illogical to accept on one hand (as all recent authorities do) that a properly qualified expert, who has the necessary fact base, may offer the opinion that certain conducts and symptoms are consistent with sexual abuse of the child, but to hold on the other hand that the expert cannot testify as to the degree of consistency evident from that conduct and those symptoms. Once it is acknowledged that there are those whose skilled training and experience warrant the acceptance of their opinion as to whether certain facts or symptoms suggest sexual abuse, it inevitably follows that those witnesses may attach whatever degree of certainty to that opinion they deem appropriate.

An expert witness may offer the opinion that certain facts or symptoms are consistent with sexual abuse but not inconsistent with other explanations, or he may testify that in their opinion the facts and symptoms are consistent only with prior sexual abuse. If the witness testifies in the latter way, he is, in fact, saying that in his opinion the child was sexually abused. Regardless of the degree of certainty which is attached to the opinion, the opinion goes to the same factual issue and no distinction for the purposes of admissibility can be made. The force of the opinion alone cannot demand exclusion.

In my view, if the evidence of the expert witness is otherwise admissible, the fact that the opinion offered suggests the factual inference which should be drawn on the very factual issue in dispute does not necessitate the exclusion of that evidence.

I readily acknowledge the potential danger of expert evidence going to the ultimate issue, particularly in cases involving allegations of sexual abuse against children: R. v. J.(F.E.), supra; R. v. C.(R.A.) (1990), 57 C.C.C. (3d) 522 at p. 530, 78 C.R. (3d) 390, 10 W.C.B. (2d) 280; R. v. R.(S.), supra, at p. 9 [p. 231 C.C.C.]. Faced with the often intractable problem of trying to decide who is telling the truth in cases of alleged child abuse, the trier of fact may seek refuge in the apparent security and objectivity of the expert's opinion evidence. At the same time the value and need for such evidence is strong in cases of childsexual abuse: R. v. Mohan (1992), 71 C.C.C. (3d) 321 at pp. 327-8, 8 O.R. (3d) 173, 16 W.C.B. (2d) 33 (C.A.).

[page34] The protection against this danger lies not in a rule of automatic exclusion but in the recognition of the trial judge's discretion to control the format in which the evidence is given. This discretion is recognized in both R. v. Kelly, supra, and R. v. Millar, supra. In Millar, after holding that a properly qualified expert with an adequate appreciation of the relevant facts could offer the opinion that a child had been physically abused, Morden A.C.J.0. went on to say, at p. 220:

This kind of evidence cannot be objected to on the ground alone that it contains an opinion on the very point or issue that the jury had to decide: [citations omitted]. I say "on this ground alone" because there may be other bases for exclusion of this evidence -- such as, for example, that it is given in such a form that it does not really help the jury or carries the danger of unfair prejudice...

I do not think that there is a problem respecting the admissibility of the evidence of Drs. Carpenter and MacDonald. The factual premises with respect to which they expressed theiropinions that child abuse was "suggested" or was "generally accepted as a possibility" were clear and not in dispute. While their opinions bore directly on an issue the jury had to decide their scope was well defined with respect to the use the jury could make of them. I should mention that, while I do not think that opinion evidence which includes the term "child abuse" is inadmissible, I do think that it lies within the discretion of a trial judge to rule that the evidence be given in a less emotional but just as accurate form -- in terms of intentional force rather than "child abuse"...

Morden A.C.J.O. then considered the admissibility of the evidence of certain expert witnesses who had offered definitive opinions that the child had been physically abused. He said, at p. 220:

There is more difficulty with respect to the evidence of the other medical witnesses who gave positive opinions with respect to the existence of child abuse. No doubt evidence to the effect "this was, in my opinion, a case of child abuse" carries with it the serious risk of the jury's foregoing an independent analysis of the facts and bowing too readily to the expert opinion: [citation omitted]. In line with the opinion I expressed at the end of the preceding paragraph, I think that a trial judge has a discretion, where opinion evidence can be given just as accurately in less conclusory terms (e.g., in terms of the degree of likelihood of the injuries being caused in a particular manner), to exclude the conclusory statement. This can be a difficult matter because clearly the trial judge has no power to intrude into the substance of the opinion given so as to affect its honesty or accuracy.

Subject to the discretion referred to in Millar, an expert may advance an opinion in a conclusory form as did Ms. Shedletsky and Dr. Mian. It must be remembered that experts are subject to cross-examination. One must rely on that process to reveal the extent to which an opinion advanced during examination-in-chief is overstated or unwarranted. In this case, Ms. Shedletsky was not cross- ***[page35]*** examined and the cross-examination of Dr. Mian did not seek to qualify or attack the conclusory nature of her opinion.

As the Committee was not asked to exercise its discretion and require the experts to frame their opinion in less conclusory terms, it would be inappropriate to consider whetherthat discretion should have been exercised.

There is a further difficulty with the format used to elicit the opinion of Dr. Mian. Dr. Mian based her opinion entirely on her review of parts of the record of the discipline proceedings. Some of the facts revealed by that record were in dispute. In such situations, the expert's opinion should normally be elicited by way of a hypothetical question which incorporates all of the facts forming the basis for the expert's opinion: R. v. Kelly, supra, at p. 504; R. v. Swietlinski (1978), 94 D.L.R. (3d) 218 at p. 252, 44 C.C.C. (2d) 267 at pp. 301-2, 5 C.R. (3d) 324 (Ont. C.A.); affirmed without reference to this point, 117 D.L.R. (3d) 285, 55 C.C.C. (2d) 481, [1980] 2 S.C.R. 956. The hypothetical question technique was not used in this case. It should have been. Without a properly framed hypothetical question, Dr. Mian's opinion was premised on her unarticulated assessment of the reliability of various parts of the record she had considered.

Counsel for Dr. Khan did not object to the failure to put a proper hypothetical question to Dr. Mian. Although it would have been preferable had the proper question been put, I would not, in these circumstances, hold that the Committee erred in permitting counsel for the College to elicit Dr. Mian's opinion without a properly framed hypothetical question.

The expert evidence, including the opinion that T. was sexually abused, was admissible.

I will now address the ground of appeal raised by the Committee.

E. Did counsel's involvement in the preparation of the Committee's reasons contravene the Health Disciplines Act or the principles of natural justice?

(i) Background

The Committee is entitled to the legal assistance of its own counsel during the hearing. It received such assistance in this case and there is no suggestion that counsel's conduct during the actual hearing was improper. It is also not suggested that counsel played any role in the Committee's deliberation or its decisions to find Dr. Khan guilty of professional misconduct and revoke his licence.

The Committee did not give any reasons for its decision at the time it was announced to the parties. Reasons were released about ***[page36]*** three months later. It is counsel's involvement in the preparation of those reasons which is in issue.

After the Committee had released the reasons, counsel for Dr. Khan inquired of counsel for the Committee as to his involvement in the preparation of the reasons. Counsel replied, in part:

> [W]e provide no legal advice to the Committee in their preparation of written reasons for their decision. The Committee understands that they are obligated to provide the reasons for their decision. The written Decision and Reasons for Decision is in every case drafted in the first instance by the Chairman of the panel or a member of the panel designated by the Chairman for that purpose. In the ordinary course we are provided with a copy of the draft, review it with the Chairman and assist the Chairman to express the reasons of the Committee. The draft Decision and Reasons for Decision in this case went through this process, and through subsequent review and revision by members of the Committee in conference, and was ultimately approved and signed by each Committee member.
>
> In the Khan case, as in all others, the Decision and Reasons for Decision are those of the Committee. We are satisfied that the journalistic and administrative assistance that we provide in the above respect is not "legal advice" within the meaning of Section 12(3) of the Act. Our role here is to assist the Committee to express their decision and their reasons for that decision.

Counsel for Dr. Khan subsequently requested access to the drafts referred to in the above-quoted letter. The Committee declined to produce them.

In the Divisional Court, counsel for Dr. Khan did not challenge the description provided in counsel's letter to him. Nor did he seek production of any drafts of the reasons of the Committee. This appeal must proceed on the basis that the counsel's letter provides an accurate and complete description of the reason-writing process. That process had three distinct phases. First, a member of the Committee prepared a draft. That draft was then reviewed and revised by counsel for the Committee, in consultation with the chairman. This second draft then went back to the entire Committee for review, revision and eventual release. Counsel for the Committee was not involved in this final revision of the reasons. The final draft was approved and signed by each member of the Committee.

(ii) Section 12(3) of the Health Disciplines Act

The majority in the Divisional Court held that s. 12(3) of the Health Disciplines Act precluded the kind of assistance given by counsel during the drafting process. Section 12(3) provides:

12(3) Members of a discipline committee holding a hearing shall not have taken part before the hearing in any investigation of the subject-matter of the hearing other than as a member of the Council considering the referral of the matter to the discipline committee or at a previous hearing of the committee, and shall not communicate directly or indirectly in relation to the subject-matter of the hearing with any person or with any party or his representative ***[page37]*** except upon notice to and opportunity for all parties to participate, but the committee may seek legal advice from an adviser independent from the parties and in such case the nature of the advice should be made known to the parties in order that they may make submissions as to the law.

Rosenberg J., for the majority, held that counsel's advice to the Committee must have amounted to legal advice. He wrote at p. 200:

Without suggesting that the letter is not a straightforward attempt to give the court the facts, it is difficult to see how a lawyer trained as he is and whose role is counsel for the committee can distinguish between changes that are made for journalisticand administrative reasons and those that are made for legal reasons. If a sentence is left out, does it change the meaning of what is being said and might it not affect the court's view of the reasons? Lawyers are not retained for their journalistic or administrative abilities and it is unlikely that a lawyer with the best of intentions can confine his advice to be only of journalistic and administrative assistance.

Before turning to the nature of the advice supplied by counsel, the scope of s. 12(3) of the Health Disciplines Act must be addressed. Mr. Scott argued that the section had no application beyond the hearing stage of the discipline process. I agree. This is apparent from a consideration of s. 12 as a whole, and the language of s. 12(3).

Section 12(1) designates the parties to the hearing; s. 12(2) refers to the disclosure of material to be relied on at the hearing; s. 12(4) is concerned with public access to the hearing; s. 12(5) and (6) deal with the rules of evidence and the recording of proceedings during the hearing; s. 12(7) sets out the nature of the participation in the hearing required before a committee member can take part in the decision-making process; and s. 12(8) deals with the return of materials used during the hearing. The context provided by the other parts of s. 12 strongly suggests that the hearing is the focal point of s. 12 and that the section is directed only to that part of the discipline process.

The language of s. 12(3) confirms this assessment by its opening reference to "members of a discipline committee holding a hearing". The terms of s. 12(3) address the requirements of a fair hearing. They speak to bias, the right to know the case made by the other party, and the right to present one's own case. Section 12(3), like the rest of s. 12, refers to the hearing stage of the proceedings. The legal advice refers to advice given during the hearing by counsel for the Committee.

In my view, the hearing phase of the discipline process encompasses the taking of evidence, the hearing of argument and the rendering of the decision required by s. 61(2) of the Health Disciplines Act. It does not include the preparation of reasons for that decision. The Health Disciplines Act distinguishes between ***[page38]*** decisions and reasons for those decisions (e.g., ss. 58(3) and 8). It does not require that the Committee provide reasons for its findings of

professional misconduct. The hearing stage of the discipline process was over when the Committee announced its decision and imposed a penalty. Nothing done by counsel for the Committee after that point could contravene s. 12(3).

Even if s. 12(3) of the Health Disciplines Act reached beyond the hearing stage to the writing of the reasons for the decision, the section was not contravened in this case. Counsel for the Committee specifically disavowed providing any legal advice to the Committee during the writing of the reasons. His assertion was not challenged.

I cannot accept the view that any advice given by counsel for the Committee which affects the substance of the Committee's reasons amounts to legal advice. It is the nature of the advice, not its effect on the final product, which must be considered. The phrase "legal advice" in s. 12(3) must refer to advice on matters of law. Advice intended to improve the quality of the Committee's reasons by, for example, deleting erroneous references to the evidence or adding additional relevant references to the evidence, is not advice on a matter of law but is rather advice as to how the Committee should frame its reasons in support of its decision. If the Committee accepts such advice, it may improve the quality of the reasons ultimately provided by the Committee and render the decision of the Committee less susceptible to reversal on appeal. This does not, however, transform advice as to the content and formulation of reasons into advice on a matter of law.

Even if s. 12(3) of the Health Disciplines Act applied after the hearing was completed, Dr. Khan had the burden of showing that counsel for the Committee provided "legal advice" to the Committee during the drafting process. On this record, there is no evidence to support that contention.

(iii) The propriety of counsel's involvement in the drafting process apart from s. 12(3) of the Health Disciplines Act

Apart from any specific statutory requirement, the involvement of counsel in the preparation of the reasons for the Committee's decision may raise questions as to the fairness and integrity of the proceedings before the Committee. Mr. Thomson, for the Committee, and Mr. Scott as amicus curiae, addressed these broader concerns. Both argued that the Committee was entitled to the assistance of counsel in the preparation of their reasons. At the same time, both recognized that there were limitations on the extent and nature of the assistance which counsel could provide. They submitted that the involvement of counsel for the Committee ***[page39]*** in the drafting process fell well within the bounds of permissible assistance and did not impair either the fairness or integrity of the discipline process.

I accept both of the underlying principles put forward by Mr. Thomson and Mr. Scott. The reasons for a decision made by the Committee must be those of the Committee: Del Core v. Ontario College of Pharmacists (1985), 19 D.L.R. (4th) 68 at p. 74, 51 O.R. (2d) 1, 10 O.A.C. 57 (C.A.); leave to appeal to the Supreme Court of Canada refused, [1986] 1 S.C.R. viii, 57 O.R. (2d) 296n, 70 N.R. 82n. The rationale underlying this principle is self-evident. In discipline proceedings the parties are entitled to know, and if so inclined challenge on appeal, the Committee's decision. Someone else's explanation for or rationalization of that decision is no

substitute for the Committee's reasons. Without the reasons of the Committee, a party cannot know why the decision was made, or who made the decision. The right of appeal also becomes illusory.

The Committee's ultimate responsibility for the authorship of the reasons is not inconsistent with the Committee availing itself of counsel's assistance during the drafting process. It is well-established that a tribunal such as the Committee may look to outside sources for assistance in the preparation of its reasons: Spring v. Law Society of Upper Canada (1988), 50 D.L.R. (4th) 523, 64 O.R. (2d) 719, 11 A.C.W.S. (3d) 291 (Div. Ct.); Macaulay, Practice and Procedure Before Administrative Tribunals (1988), at pp. 22-10 to 22-10.21. That assistance should not be discouraged or deprecated. In Consolidated- Bathurst Packaging Ltd. v. I.W.A., Local 2-69 (1990), 68 D.L.R. (4th) 524 at p. 557, [1990] 1 S.C.R. 282, 38 O.A.C. 321, Gonthier J., for the majority, observed that tribunals must marry their use of "outside" assistance with procedural fairness:

The rules of natural justice should not discourage administrative bodies from taking advantage of the accumulated experience of its members. On the contrary, the rules of natural justice should in their application reconcile the characteristics and exigencies of decision-making by specialized tribunals with the procedural rights of theparties.

That same reconciliation must be achieved during the drafting of reasons. The ultimate aim of the drafting process is a set of reasons which accurately and fully reflects the thought processes of the Committee. To the extent that consultation with counsel promotes that aim, it is to be encouraged. The debate must fix, not on the Committee's entitlement to assistance in the drafting of reasons, but on the acceptable limits of that assistance.

The line between permissible assistance and that which is forbidden must be drawn by regard to the effect of counsel's involvement in the drafting process, on the fairness of the ***[page40]*** proceedings and the integrity of the overall discipline process. Without attempting an exhaustive description of these concepts, fairness includes considerations of bias, real or apprehended, independence, and each party's right to know the case made against them and to present their own case. Integrity concerns encompass those fairness concerns but include the broader need to ensure that the body charged with the responsibility of making the particular decision in fact makes that decision after a proper consideration of the merits. If the reasons presented for the decision are not those of the decision-maker, or do not appear to be so, it raises real concerns about the validity of the decision and the genuineness of the entire inquiry.

There is no single formula or procedure referable to the drafting process that can be uniformly applied across the very broad spectrum of decision-making, when determining whether the involvement of the non-decision-maker in the drafting process compromised the fairness of the proceedings or the integrity of the process. The nature of the proceedings, the issues raised in those proceedings, the composition of the tribunal, the terms of the enabling legislation, the support structure available to the tribunal, the tribunal's workload, and other factors will impact on the assessment of the propriety of procedures used in the preparation of reasons. Certainly, the judicial paradigm of reason-writing cannot be imposed on all boards and tribunals: Consolidated-Bathurst Packaging Ltd. v. I.W.A., supra, at pp. 554-5.

It must also be recognized that the volume and complexity of modern decision- making all but necessitates resort to "outside" sources during the drafting process. Contemporary reason-writing is very much a consultive process during which the writer of the reasons resorts to many sources, including persons not charged with the responsibility of deciding the matter, in formulating his or her reasons. It is inevitable that the author of the reasons will be influenced by some of these sources. To hold that any "outside" influence vitiates the validity of the proceedings or the decision reached is to insist on a degree of isolation which is not only totally unrealistic but also destructive of effective reason-writing.

In deciding whether the involvement of counsel in the drafting of the reasons operated unfairly against Dr. Khan or appeared to do so, I take the words of Gonthier J. in Tremblay v. Quebec (Commission des affaires sociales), a decision of the Supreme Court of Canada released April 16, 1992 [since reported [1992] 1 S.C.R. 952, 136 N.R. 5, 32 A.C.W.S. (3d) 3] at pp. 18-19 [p. 971 S.C.R.] as an appropriate starting place:

A consultation process by plenary meeting designed to promote adjudicative coherence may thus prove acceptable and even desirable for a body like the ***[page41]*** Commission, provided this process does not involve an interference with the freedom of decision makers to decide according to their consciences and opinions. The process must also, even if it does not interfere with the actual freedom of the decision makers, not be designed so as to create an appearance of bias or lack of independence.

(Emphasis added.) Where counsel is connected with one of the parties to the hearing an appearance of bias will result if that counsel participates in the drafting process: Re Sawyer and Ontario Racing Com'n (1979), 99 D.L.R. (3d) 561 at pp. 564-5, 24 O.R. (2d) 673 (C.A.); Re Emerson and Law Society of Upper Canada (1983), 5 D.L.R. (4th) 294 at p. 324, 41 C.P.C. 7, 44 O.R. (2d) 729 (Div. Ct.). Also where the decision-maker is compelled to consult with others, who are not charged with the responsibility of deciding the case, the appearance of independence may be lost: Tremblay v. Quebec (Commission des affaires sociales), supra, at pp. 19-21 [pp. 971-3 S.C.R.]. No doubt other factors could affect the independence or impartiality of the tribunal or the appearance of independence and impartiality.

Nothing in this record suggests that counsel's involvement in the writing of the reasons compromised the independence or impartiality of the Committee. Counsel for the Committee was the servant of the Committee and was totally independent from the College or Dr. Khan. His involvement in the writing of the reasons was not mandatory, and was entirely under the control of the Committee. Counsel's assistance could not have had any coercive effect on the Committee.

I am also satisfied that counsel's involvement in the drafting process did not undermine Dr. Khan's ability to know the case made against him or to present his own case. There is no evidence that counsel assumed the role of an advocate, advancing one position over another during the drafting process, or that he presented any new facts, arguments or legal issues for the Committee's consideration during the drafting process. He merely assisted in the preparation of an intermediate draft. The reasons released by the Committee reflect the evidence heard, the arguments made, and the legal advice given at the hearing. On this record, it would be sheer speculation to hold that during the drafting stage, counsel led the Committee outside of the

confines of the evidence heard, the arguments made and the legal advice given at the hearing, so as to deny Dr. Khan a fairhearing and a proper adjudication.

In my opinion, no legitimate concerns as to the fairness of the proceedings arise from counsel's very limited involvement in the reason-writing process.

[page42] I am also persuaded that counsel's involvement in the drafting process did not impair the integrity of the discipline proceedings. The drafting process followed by the Committee maintained the responsibility of authorship with the Committee and avoided any inference that counsel had co- opted or had delegated to him the reason-writing function. In that regard, the following features of the process are significant, although none are determinative:

(i) A Committee member prepared the first draft of the reasons.

(ii) Counsel, with the chairman of the Committee, revised and clarified the first draft but did not write independently of that draft.

(iii) The Committee met to consider and revise the draft as amended by counsel and the chairman; counsel played no role in this review and revision.

(iv) The final product which emerged from the drafting process was signed by each member of the Committee.

In referring to these factors, I do not suggest that the presence or absence of any one of these features will be determinative when addressing the effect of the drafting process on the integrity of the discipline process. The entire process must be considered. Nor do I suggest that the procedure followed here sets either a maximum standard for the involvement of counsel in the drafting of reasons, or that it is the only appropriate procedure. I am, however, satisfied that this procedure, considered as a whole, effectively counteracts any legitimate concerns as to the authorship of the reasons.

V. Did the errors result in some substantial wrong or miscarriage of justice?

The Committee erred in permitting:

(i) the sister-in-law to testify as to statements made to her by Ms. O.;

(ii) the investigating officer to testify as to statements made to him by Ms. O. and the sister-in-law; and

(iii) the sister-in-law to testify as to statements made to her by T.

Section 134(6) of the Courts of Justice Act, R.S.O. 1990, c. C.43, provides:

134(6) A court to which an appeal is taken shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred.

This section is very similar to s. 686(1)(b)(iii) of the Criminal Code and I will assume that it refers to the same test for harmless error as does the Criminal Code provision.

[page43] In this case the errors related to the improper admission of evidence. That evidence served to repeat evidence which I have held was properly admissible, but did not introduce new incriminatory evidence into the proceedings. Such repetition is, however, potentially prejudicial when it serves to enhance the reliability of the properly admitted evidence. That potential existed in this case.

In my view, however, the probative value of the properly admitted evidence overcomes any possibility that the Committee could have reached a contrary conclusion had it not heard the inadmissible evidence. The uncontested circumstantial and forensic evidence all but established that T.'s shirt was stained with semen during the short period she was in Dr. Khan's office without her mother. No innocent explanation for the stain was evident from the evidence. T.'s statement to her mother, even without the improper repetition was powerful and reliable evidence. The expert testimony which was based largely on unchallenged facts (e.g., the changes in T.'s behaviour after the visit to Dr. Khan) added further strength to the case.

Put simply, there was a very strong case against Dr. Khan. I am entirely satisfied that had the Committee not heard the inadmissible evidence, it would necessarily have reached the same result.

VI. Conclusion

The appeal should be allowed and the Committee's finding of professional misconduct and the revocation of Dr. Khan's licence should be restored. Appeal allowed.