

Giving Good Reasons for Credibility Findings

by Richard Steinecke
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The Jian Ghomeshi trial has generated significant discussions about the investigation, prosecution and defence of sexual assault charges. Sexual abuse cases before regulators also typically involve pure credibility issues. Analyzing credibility issues and giving persuasive reasons for those findings is one of the most challenging tasks for courts and tribunals. That task may have gotten a lot harder as a result of the Ontario Divisional Court decision of *Stefanov v College of Massage Therapists of Ontario*, 2016 ONSC 848.

In that case a complaint was made against Mr. Stefanov by a patient that Mr. Stefanov had failed to properly drape her and had touched her sexually. Mr. Stefanov denied the allegations which were then sent to discipline to be determined. The discipline panel concluded that most, but not all, of the allegations had been proved. Mr. Stefanov appealed the findings. In an unusual decision in the current era of deference to tribunal findings of fact, the Divisional Court reversed the credibility findings of the discipline panel on the basis that the panel's reasons were so flawed that it produced an unreasonable result.

The Court described the burden of proof in a manner that is reminiscent of the now disregarded case of *Re Bernstein and College of Physicians and Surgeons of Ontario* (1977), 15 O.R. (2d) 447 (Div. Ct.). In fact the *Bernstein* case was cited by the Court. The Court suggested that because the Stefanov case involved sexual abuse and given the significant consequences

that would flow from any finding, the panel was required to act with care and caution in assessing and weighing all of the evidence. The Court in *Stefanov* seemed to be trying to reinstate the "sliding scale" burden of proof that was so firmly rejected by the Supreme Court of Canada in *F.H. v. McDougall*, [2008] 3 S.C.R. 41.

In a close scrutiny of the evidence, the Divisional Court expressed the following concerns:

1. The Court was of the view that some inconsistencies in the patient's various statements (e.g., about whether her buttocks were exposed) were either not recognized or not explained by the hearing panel. At a minimum the Court said the panel should have explained why the patient's evidence was still more credible than Mr. Stefanov's evidence given that his evidence was consistent.
2. The Court was concerned that the patient had a poor recollection about many of the collateral circumstances such as the set-up of the treatment room, whether music was playing, whether the lights were dim, whether the duvet (or just the sheets) was used to cover her, whether pillows were placed under her legs, etc. The Court did not accept that panel's comments that many clients do not pay attention to these details in the absence of evidence on the point.
3. The Court thought that the hearing panel should explain why the patient's testimony was viewed as credible when it had rejected certain of her evidence; this analysis would help the reader ascertain why the patient's evidence should be viewed as credible in the remaining areas.

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4. The Court discounted the hearing panel's conclusion that the patient was credible in part because of her education in psychology and in part because of the absence of motive in making up her allegations. At a minimum, the Court said those points should have been explained.
5. The hearing panel was suspicious of Mr. Stefanov's evidence because it was detailed. Mr. Stefanov gave an explanation as to why he had a thorough recollection of the events, namely that he was confronted with the allegations by his manager the day after the incident and recorded his recollections on that same day. This basis for finding Mr. Stefanov's evidence to be less credible was illogical in the view of the Court.
6. The Court was also troubled that the patient and Mr. Stefanov were not given equal consideration. The hearing panel gave some leeway to the evidence of the patient because of the stress and emotion she was feeling through the experience. The Court held that Mr. Stefanov, on the other hand, was not given any credit for the surprise and shock he experienced when being confronted by his manager with the concerns. Similarly, both the patient and Mr. Stefanov provided more details in the second statements they provided, yet the Court found that only Mr. Stefanov was criticized for that.
7. The Court was also uneasy about the panel's reliance on Mr. Stefanov's admittedly unusual clinical terminology (e.g., asking whether the patient felt "secure" rather than "comfortable") in light of the fact that English was clearly not his first language.
8. The Court went even further and was critical of the hearing panel for not giving Mr. Stefanov an opportunity to explain his use of language.
9. The Court was concerned that undue reliance could have been placed on the patient's after-the-fact conduct (i.e., reporting the matter immediately afterwards to a friend and to the manager of the facility). Relying on a criminal case, the Court said that such conduct can only be relied upon as circumstantial evidence where there was no other explanation for the conduct. In this case, the patient's upset state immediately afterwards could be attributable to an honest misperception, the Court said.
10. Ultimately, the Court was troubled about whether the hearing panel had considered whether the testimony of the patient could be honest but unreliable (i.e., mistaken).

Few lay hearing panels could have met the expectations of the Divisional Court here. If this decision stands, hearing panels will require extensive training in assessing credibility in these sorts of cases. Even if the decision remains in place, it is too early to tell whether this case represents a swing of the judicial pendulum towards more intense scrutiny of regulatory decisions or whether this is a simply a "one-off" decision. The *Stefanov* decision can be found on www.canlii.org.

In any event, the ten points noted by the Court above can still act as guidance to hearing panels on how to draft reasons in credibility cases.