

**DISCIPLINE COMMITTEE  
OF THE COLLEGE OF NURSES OF ONTARIO**

<b>PANEL:</b>	Deanne Barber, RPN	Chairperson
	Kendra O’Bryan, RPN	Member
	Fay Cole	Public Member
	Michael Ternovan	Public Member

<b>BETWEEN:</b>	)	
	)	
COLLEGE OF NURSES OF ONTARIO	)	<u>MARIE HENEIN</u> for
	)	College of Nurses of Ontario
- and -	)	
	)	<u>TERRY HAWTIN</u> for
[Member]	)	[Member]
	)	
	)	
	)	<u>CHRIS WIRTH and PAUL LEVAY,</u>
	)	Independent Legal Counsel
	)	
	)	
	)	Heard: January 18, 19, 2005

**DECISION AND REASONS**

This matter came on for hearing before a panel of the Discipline Committee on January 18 & 19, 2005 at the College of Nurses of Ontario (“the College”) at Toronto.

**The Allegations**

The allegations against [ ] (“the Member”) as stated in the Notice of Hearing dated September 20, 2004, are as follows:

1. You have committed an act or acts of professional misconduct as provided by subsection 51(1)(c) of the *Health Professions Procedural Code* of the *Nursing Act, 1991, S.O. 1991, c. 32*, as amended, and defined in subsection 1(1) of the *Ontario Regulation 799/93*, in that on or about February 24, 2002, while working as a [ ] Nurse at [the facility], you contravened a standard of practice of the profession or failed to meet the standard of practice of the profession with respect to your care, treatment and communication with the client, [ ] in that you:

- 1) verbally insulted and demeaned the client; and/or

- 2) physically assaulted the client.
2. You have committed an act or acts of professional misconduct as provided by subsection 51(1)(c) of the *Health Professions Procedural Code of the Nursing Act, 1991, S.O. 1991, c. 32*, as amended, and defined in subsection 1(7) of the *Ontario Regulation 799/93*, in that on or February 24, 2002, while working as a [ ] Nurse at [the facility], you abused the client, [ ] verbally, physically and/or emotionally in that you:
  - 1) verbally insulted and demeaned the client; and/or
  - 2) physically assaulted the client.
3. You have committed an act or acts of professional misconduct as provided by subsection 51(1)(c) of the *Health Professions Procedural Code of the Nursing Act, 1991, c. 32*, as amended, and defined in subsection 1(37) of the *Ontario Regulation 799/93*, in that that on or about February 24, 2002, while working as a [ ] Nurse at [the facility], you engaged in conduct or performed an act, relevant to the practice of nursing, that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional as follows:
  - 1) verbally insulted and demeaned the client, [ ]; and/or
  - 2) physically assaulted the client, [ ].

### **Member's Plea**

The Member denied the allegations set out in the Notice of Hearing.

### **Overview**

The Member was working as a [ ] Nurse at [the facility]. She was accused by [Nurse A] of verbal and physical abuse of a client on February 24, 2002.

### **The Evidence**

Counsel for the College presented a Book of Documents which was entered as Exhibit A.

Counsel for the College called three witnesses.

[Witness A ] - Director of Care at [the facility]

[Witness B ] - Administrator at [the facility]

The above two witnesses testified regarding the physical layout of the area where the incident occurred as well as their investigation of the alleged incident.

[Witness C]

[Witness C's ] testimony was with regard to witnessing the incident involving the Member and a resident on February 24, 2002.

During cross-examination, counsel for the Member made reference to the witness's handwritten statement which she had given to her employer regarding the incident.

The witness became visibly upset and acknowledged that her written statement may contain errors for which she apologized.

After a lengthy cross-examination, a short recess was called. On resumption, counsel for the College advised the panel that [Witness C] was unwilling and unable to continue further with her testimony. College counsel requested that the case be dismissed due to this fact and the following reasons:

- Evidence on cross-examination was inconsistent with [Witness C's] statement to the College of Nurses on March 15, 2002.
- The witness wavered as to the time that the incident occurred, giving three different times.
- The sequence of her original observations was inconsistent.
- The witness testified that she was alone with the Member when she observed the incident, and was very sure that no one else was in the area. However, College counsel had another witness who would testify that she was in the area at the time.
- During cross-examination a possible motive was uncovered which College counsel had never heard before. College counsel stated that when they interviewed [Witness C], she had not disclosed the incident which came out under cross-examination.
- College counsel was unable to meet the Bernstein test of clear, cogent and convincing evidence.

## **Decision**

The panel deliberated and consulted with Independent Legal Counsel who advised the panel in the presence of Counsel.

Having considered the submissions made by counsel for the College, the panel decided that the case should be dismissed.

A publication ban was granted for the evidence so that [Witness C's] personal circumstances are not to be made public.

## **Reasons for Decision**

The College is unable to meet the onus of proving the allegations in accordance with the standard of proof as set out in *Re: Bernstein and College of Physicians and Surgeons of*

*Ontario* (1977) 15 O.R. (2d) 477, that being a balance of probabilities with the qualification that the proof must be clear and convincing and based upon cogent evidence.

I, Deanne Barber, RPN, sign this decision and reasons for the decision as Chairperson of this Discipline panel and on behalf of the members of the Discipline panel as listed below:

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Chairperson

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Date

Panel Members:

Kendra O'Bryan, RPN  
Fay Cole, Public Member  
Michael Ternovan, Public Member

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<b>BETWEEN:</b>	)	
	)	<u>MARIE HENEIN</u> for
COLLEGE OF NURSES OF ONTARIO	)	College of Nurses of Ontario
	)	
- and -	)	<u>TERRY HAWTIN</u> for
	)	[Member]
[Member]	)	
	)	
	)	
	)	<u>CHRIS WIRTH,</u>
	)	Independent Legal Counsel
	)	

**DECISION AND REASONS REGARDING COSTS**

**Summary of Submissions**

Counsel for the Member has requested costs in a letter dated January 30, 2005. In the letter he states that [the Member] is entitled to be paid the costs that [the Member] incurred defending [ ] against a false and malicious accusation which was without a reliable foundation. Counsel for the Member stated that the allegation was never properly or fully investigated by the College investigators, and the witness for the College [Witness C] was neither credible nor reliable.

Counsel for the Member stated that the basis for this request is that the prosecution of the Member was unwarranted.

Counsel for the College responded that the position of the College of Nurses that the Member has failed to adduce absolutely any evidence that would support an order of costs as against the College. The following submissions were made in support of this position:

- Costs against the College may be awarded only if the commencement of the proceedings against a Member was unwarranted (section 53 of the Health Professions Procedural Code).

- Commencement of the proceedings was warranted and based on the evidence of two eyewitnesses.
- The College's decision to call no further evidence arose solely as a result of information learned during the course of cross-examination of [Witness C].
- The College's decision not to seek a finding of professional misconduct resulted solely from information learned at the hearing during the course of cross-examination. It is the obligation of the College to conduct a fair prosecution.
- At no time did the College submit that the commencement of the proceedings was unwarranted.
- The College does not concede that [Witness C] made a false and malicious allegation against the Member.
- Due to the difficulties in the memory of [Witness C] as revealed in cross-examination and her unwillingness to continue with her testimony, the hearing could not proceed.
- The College requested the allegations against the Member be dismissed because evidence revealed during the course of the hearing could not meet the standard of clear, cogent and convincing evidence.

On March 18, 2005 a letter sent from the College to both counsel requested further submissions, if any, be received by April 7, 2005. No further submissions were received.

### **Decision**

The panel finds that the commencement of the proceedings was warranted and the request for costs is denied.

### **Reasons for Decision**

The panel reviewed the documents and submissions by both counsel in its totality and finds that there is no evidence that the proceedings against the Member were commenced by the Executive Committee without reasonable justification.

The mandate of the College of Nurses is protection of the public. The panel finds that the referral of this matter to Discipline was in furtherance of this mandate and was not without foundation. On the other hand, there is an absence of evidence of false and malicious accusations.

The allegations against the Member were dismissed as a result of [Witness C] having difficulty with her memory during cross-examination and her unwillingness to proceed further. The request to dismiss the allegations resulted from this development. College counsel rightly

requested dismissal because the legal standard of clear cogent and convincing evidence could not be met. Dismissal did not result from the unwarranted commencement of the proceedings.

The panel having determined that the commencement of the proceedings was warranted, has no jurisdiction to award costs under section 53 of the Code.

I, Deanne Barber, RPN, sign this decision and reasons, for the decision as Chairperson of this Discipline panel and on behalf of the members of the Discipline panel listed below:

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Chairperson

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Date

Panel Members:

Kendra O'Bryan  
Fay Cole, Public Member  
Michael Ternovan, Public Member