FILE: 1998/99-08

UNIVERSITY OF TORONTO
UNIVERSITY TRIBUNAL
TRIBUNAL APPEALS BOARD

Members of the Panel:

Anthony Keith, Q.C., Associate Chair

Professor Lorraine Weinrib, Faculty of Law

Professor Arthur Ripstein, Department of Philosophy

Sally Safa - student, Faculty of Dentistry

IN THE MATTER of the University of Toronto Act, 1971 S.O. 1971, c. 56, as amended;

AND IN THE MATTER of the University of Toronto Code of Behaviour on Academic Matters;

AND IN THE MATTER of disciplinary charges against Mr. K.

BETWEEN:

Mr. K.

(Appellant)

And

THE GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO

(Respondent)

Eric P. Polten, for the Appellant

Linda R. Rothstein, for the University of Toronto

Appeal heard February 2, 1999

REASONS FOR DECISION

FACTS

On October 21, 1991, the Appellant filled out an Application for Admission to an Ontario Medical School, using a prescribed form bearing reference number M-435-610. In his answers to the questions posed in the form he sought admission to the first year class at one of the Faculties of Medicine at the University of Ottawa, University of Toronto or the University of Western Ontario. To the printed question, "If you are reapplying to any of the Ontario Medical Schools indicate under school name the year in which you previously applied", he made no reply.

The printed instructions accompanying the Application for Admission required that a complete statement of post-secondary studies be included and certified transcripts of all courses taken attached. The academic record attached to the Appellant's application showed the successful completion of five (5) first year courses at York University, all described as introductory or fundamental, and current enrolment in nine (9) other courses. The grade point average for the completed courses was stated as 3.96 (the highest possible score being 4.0).

A biographic sketch required as part of the application was completed by Mr. K. . In it he described his entry into Grade 13 in September, 1982, being forced to start work by reason of the state of his family's finances in September, 1983, working for a number of years, and at last applying for admission to York University in October, 1989 for the first year undergraduate class commencing September, 1990. He recorded his starting first year studies in science at York at that time on a full tuition scholarship, and his return for second year on a renewed entrance scholarship in September, 1991.

The biographic sketch was supplemented by a letter addressed to the "respected members of the selection committee". It reinforces, in specific terms, his portrayal of himself as a brilliant undergraduate student who had been forced to delay his post-secondary studies for several years by

reason of family financial circumstances, who had selflessly disregarded his parents' protests that he continue with his studies, who had sacrificed his interests to those of his family, and who now at last had the opportunity, for the first time, of pursuing his life-long dream of becoming a doctor.

This application form and attachments (marked as Exhibit 5 at the trial) were duly forwarded to the Ontario Medical School Application Service ("OMSAS'). In due course Mr. K. was notified by the Admissions Office of the Faculty of Medicine, University of Toronto, that he had been chosen to advance to the next stage of the admission process, namely a personal interview. A substantially complete transcript of his interview was filed at trial (Ex. 12), and a tape recording from which the transcript was made was played to the jury. The transcript discloses that Mr. K. specifically confirmed to his interviewers that this was his first application for admission to any medical school, that he really had no knowledge, or very little, about the University of Toronto and that if his application was unsuccessful he probably would complete his undergraduate degree and then reapply.

In the result, Mr. K. was admitted to the first year medical class at the University of Toronto commencing in September, 1992.

What the Admissions Office and the interviewers did not learn from Mr. K 's 1991 application dossier was that this was, in fact, at least the third application for admission to medical school by the Appellant. Immediately following completion of high school in 1983, he had been admitted to the University of Toronto where he studied for seven (7) consecutive years (including a number of summer courses), obtaining first a three year degree and then a four year degree in Science, followed by a period of graduate study in Physiology. These details are contained in his second medical school application form dated October 25, 1989 (Ex. 5) which in turn refers to the first application submitted in the year 1986. The evidence at trial indicates that the grade point average of 2.70 disclosed by him in the 1989 application would have been considerably below the threshold for admission in that year.

The true facts were discovered entirely by accident, by which time the Appellant had essentially completed his first year of studies in the Faculty of Medicine. A decision was taken to lay a charge against him under the Code of Academic Behaviour then in force ("the 1991 Code") with respect to the alleged concealment in his Application for Admission of his work at the University of Toronto from 1984 to 1990 and the grade point average which this had produced. A second charge under the 1991 Code was subsequently laid with respect to the alleged falsification of information at the time of the admission interview.

These charges were heard by the Trial Division of the Tribunal in March, 1994. The jury convicted on both charges and recommended Mr. K. 's expulsion from the University. His appeal to the Tribunal Appeals Board was dismissed. However an application for Judicial Review to the Divisional Court of the Ontario Court of Justice was successful and resulted in the matter being remitted back to the Tribunal for disposition. The Court ruled that there was unfairness to the Appellant in the manner in which certain legal questions were treated by the Chair in her charge to the jury.

In the meantime a new Code of Behaviour on Academic Matters ("the 1995 Code") had come into force. However, in accordance with the decision of the Divisional Court, the University determined that it would retry the Appellant on the same charges under the 1991 Code which were before the original jury (Ex. 2).

For the first time , objection was now taken on behalf of Mr. K. on a number of grounds relating to the jurisdiction of the University to deal with him in general, and the specific jurisdiction of the Tribunal in particular. In due course two further hearings took place:

(a) as to matters pertaining to the jurisdiction of the University and the Tribunal, heard by the designated Chair sitting without a jury; and

(b) a second trial before the same Chair and a jury, empanelled in accordance with the

1991 Code.

The Appellant's objections on jurisdictional grounds were rejected with written reasons dated October 14, 1997. The second trial proceeded on July 13, 14, 15 and 29, 1998. A different jury found the Appellant guilty on both charges and recommended his expulsion from the University. The Appellant now appeals to the Tribunal Appeals Board from the decisions taken at both hearings.

Counsel for the Appellant proposed that the Tribunal Appeals Board proceed with the hearing of this appeal by way of written argument only. This was later varied by direction of the Associate Chair, on the consent of counsel, so as to make provision for an additional, time-limited, oral hearing at which each counsel would have the opportunity to address argument and answer questions. The appeal hearing accordingly proceeded in that way on February 2, 1999 and our decision was reserved.

The Notice of Appeal contains 46 separately numbered grounds of appeal. None of these was abandoned at the oral hearing. While the Notice of Appeal groups them into four (4) broad categories, Appellant's factum identified thirty (30) separate issues spread over 293 paragraphs. In a helpful analysis, counsel for the University in her factum was able to reduce these to twelve (12) categories. Having carefully reviewed the submissions, it seems to us that this latter approach lends clarity to the rather voluminous material and we therefore propose to use this method of dealing with the matters before us. For the sake of convenience, we follow the same order as they appear in the Respondent's Factum.

Before embarking upon a discussion of the argument as it relates to each of these twelve categories, it is necessary to make note of a further issue of jurisdiction which was raised by the Appellant prior to the hearing of the appeal. The 1991 Code (s. C. III.2) required that the Senior Chair of the Tribunal preside at all appeal hearings. The 1995 Code (s. E 2) modified this requirement to permit either of the Associate Chairs to preside, in addition to the Senior Chair. Although the second trial was required to deal with charges laid under the 1991 Code, extending its application to the appeal

procedure became problematic. By reason of his involvement as Chair of the Tribunal Appeals Board which had sat in judgment on the appeal from the decisions taken at the first trial, the Senior Chair quite properly declined to preside over the appeal from the second trial and delegated that duty to one of the Associate Chairs, a position which was created by the 1995 Code and which did not exist under the 1991 Code. Objection was taken on behalf of the Appellant on the basis that (to paraphrase) the procedure outlined in the 1991 Code must be followed, and if the Tribunal should find itself unable to do so, that was not his problem. However counsel for the Appellant nevertheless agreed to proceed with the hearing of the appeal by a panel chaired by an Associate Chair on the basis that his objection was noted, and was not waived. His position was duly noted on the record at the commencement of the hearing of the appeal. We should perhaps also add that counsel made it clear that no objection was taken with respect to any of the panel members personally, none of whom had any previous knowledge of or connection with the matters in issue, apart from having read the material filed by counsel prior to the hearing.

We will now turn to a consideration of the issues.

ISSUE I - Jurisdiction and Power to Discipline

The essence of the Appellant's argument is that the creation of the University Tribunal by the Governing Council in 1974 was without statutory authority, and was in fact was contrary to the very words of the *University of Toronto Act*, 1971 ("the Act"). This issue was carefully examined by the Chair in her Reasons for Decision dated October 14, 1997, and we respectfully agree with her conclusions. We are satisfied that in creating the Tribunal, the Governing Council was acting in pursuance of its general authority to govern, manage and control the affairs of the University (the Act, s. 2 (14)), having been accorded the same powers which had previously been vested in the Governors and Senate of the University under the *University of Toronto Act, 1947*. Among the particular powers cited by the Act (which is done without limiting the general vesting of powers) is the power to do all such acts and things as are necessary or expedient for the conduct of its affairs and of the affairs of the University (s. 2 (14) (o)). That being so, we do not see that the creation of a disciplinary Tribunal and the delegation to it of a disciplinary function was in any way improper.

ISSUE II - Jurisdiction and Mr. K. 's Status as a Student

The Appellant argues that the Tribunal, if it has any jurisdiction, can take action only with respect to students registered at the University with respect to their conduct while students; *ergo*, as the conduct complained of is alleged to have occurred before Mr. K. 's admission to the University, the Tribunal has no jurisdiction over him. He further points to what he identifies as a relevant discrepancy between the definitions of the term "student" in the Act and in the 1991 Code.

This is not a case of a successful applicant having rejected an offer of admission. It is clear that the Appellant was registered as a student at the University at the time the initial charges were laid in 1993. Likewise, it cannot be denied that he became a student *because of* his actions during the admission process, actions which two juries have found to have been consciously taken and calculated to deceive. Having chosen to accept the University's offer of admission, he thereby subjected himself to all of the University's policies, procedures and regulations.

Appellant argues that if his application for admission was somehow not in compliance with its requirements, the only procedure open to the University was to revoke his admission and cancel his registration, in accordance with the express statements contained in the admission materials.

In our view, the disciplinary hearing provided far greater procedural protection to Mr. K than he would have received had his registration been summarily cancelled without a hearing. Having availed himself of that protection when he hoped that it would enable him to stay in medical school and having been unsuccessful in that endeavour, Mr. K. cannot now turn around and insist that the University should have cancelled his registration as soon as his actions had come to light. We do not need to decide whether or not he could have avoided the Tribunal's jurisdiction by voluntarily withdrawing from the Faculty of Medicine - that is not what happened. Having accepted the Tribunal's jurisdiction when it provided him with a disciplinary hearing, he cannot now deny it because the Tribunal did not reach the decision he had sought.

ISSUE III - the alleged impropriety of the charges

Counsel for the Appellant argued that the charges to which the Appellant was called upon to plead did not correspond to any offence in the 1991 Code. We are not so persuaded. In our view the language of the charges quite clearly identified the offences with which he was charged, and provided sufficient particulars to enable him to understand the circumstances and the conduct which were called into question by those charges. The absence of the word "intentionally" from the statement of the charges does not, in our view, assist him, as there was no doubt that his intention was an integral part of the case the prosecution was obliged to prove. Moreover, having taken the matter to the Divisional Court on Judicial Review following the first trial and conviction, and having failed there to raise any question pertaining to the language of the charges under consideration, the Appellant is in no position now to complain that he was retried on the very same charges. Indeed, he insisted that this be done, as is illustrated by a quotation from the transcript cited in connection with another issue, below.

Much was made of alleged "changes" to the charges in the period leading up to the trials. We are satisfied that, to the extent any such changes may have occurred without consent, there was no prejudice to the Appellant.

The Appellant has sought to import the technicality of the Criminal law and practice into the field of the University discipline process. While in the main discipline cases proceed by way of analogy to the criminal law, it is well to recall the observation made by Adams, J. in the Divisional Court when disposing of the Appellant's appeal from the results of the first trial, where he said

> "Our courts have been reluctant to impose on domestic tribunals the full trappings of criminal proceedings. To do so would change the essential character of such tribunals and hand control over to the legally trained. The paramount consideration is, therefore, one of fairness."

[1995] O.J. No. 3734 para. 4.

We therefore are unable to give effect to any of the grounds of appeal under this heading.

ISSUE IV - alleged loss of jurisdiction due to delay

The present appeal is the latest confrontation between Mr. K. and the University in a succession of proceedings which commenced with the laying of the first charge in June, 1993. The history of these proceedings is set out in detail in the affidavit of Stephen Satchel, sworn on May 7, 1998 and filed for the purpose of placing that history before the Chair of the Tribunal in the context of the refusal of counsel for Mr. K. to proceed with the second trial scheduled for May 11, 1998 and his request for a further adjournment. The statements contained in the affidavit were not contested.

It is not necessary to review each of the steps taken down to the present time. It is sufficient to state that we are not satisfied that there has been any unreasonable delay which can be attributed to the University in proceeding with the charges against the Appellant, nor has there been any prejudice to the Appellant. On the contrary, the first trial proceeded in March, 1994, eight months after the initial charges were laid. Prior to the trial a number of adjournments were granted at the request of Mr. K. He then sought judicial review. This application was not concluded until December, 1995, when the Divisional Court quashed the results of the first trial and ordered that the matter be remitted back to the Tribunal to be heard again. The University promptly sought to schedule new trial dates. Any delays at this stage resulted from the unavailability of Appellant's legal agent at the time, his subsequent decision to retain counsel, and the difficulty which that counsel had in fitting the matter into his own busy schedule.

New counsel for Mr. K. then raised, for the first time, the issues of jurisdiction previously noted. It was necessary to arrange a preliminary hearing to deal with those matters, which were disposed of by the Chair's ruling dated October 14, 1997. There were then persistent difficulties in obtaining agreement to a schedule for the trial itself, but it is clear to us from the record that none of these was the responsibility of the University.

It is true that the disposition of the charges against the Appellant has taken a long time, but as is

made clear by the above summary, it is largely his own actions, or those of his representatives, which have dictated the timing of the proceedings. In these circumstances it is inappropriate to consider a stay of proceedings on the basis of delay: *R.(J.) v. College of Psychologists of British Columbia,* (1995) 33 Admin. L. R. (2d) 174 (B.C.S.C.). In any event, we are not satisfied that the Appellant has been prejudiced in any way by any delay which has occurred in bringing these charges to a hearing.

The Appellant has also contended that his rights under the *Canadian Charter of Rights and Freedoms* have been violated by delay. There is no evidence before us that this issue was ever raised before the Tribunal in first instance. In any event, we are satisfied that these proceedings are not subject to the provisions of the Charter: *University of Guelph v. McKinney,* [1990] 3 S.C.R. 229.

ISSUE V - Costs

Mr. K. appeals from the refusal of the Chair to make an award of costs of the proceeding in his favour. The arguments in support submitted in the Appellant's Supplementary Factum consist of the points raised earlier on jurisdiction and the language of the charges and, in addition, an attempt to show that the laying of the charges was somehow malicious or thoughtless. There are also arguments put forward to the effect that the actions of the prosecutor amounted to "gross negligence" and "misconduct" and that University Discipline Counsel was involved in an unacceptable conflict of interest. These charges were categorically rejected by the Chair.

The 1991 Code provides that where it is considered to be warranted by the circumstances, the Chair of a hearing may, in his or her discretion, award costs of any proceeding at trial, and may make orders as to the party or parties to whom and by whom and the amounts and manner in which such costs are to be paid (s. C. II (a) 17 (b)). Submissions respecting costs were made to the Chair following the second trial, and on December 4, 1998 she released written reasons denying costs to the Appellant. She found that there were no unusual circumstances which in her view would have merited an award of costs, had the Appellant been acquitted. As the jury had found him guilty, she declined to exercise her discretion in his favour.

It is quite clear on the authorities that an award of costs in such matters will only be made in very limited circumstances: *Attorney General of Ontario v. Dieleman et al*, (1995) 22 O.R. (3d) 785 (O.C.J. G.D., Adams, J.) Costs were awarded in that case against the Attorney General in favour of two individuals in circumstances where she ought to have known in advance that there was no basis for proceeding against them. However, the Court noted that while there is judicial discretion to award costs where the state is seen to have unfairly conscripted a citizen to effect a social purpose, this should be confined to exceptional circumstances. Further, impecuniosity is not a ground for awarding costs in favour of a litigant where there has been a successful response to misconduct.

We are entirely satisfied that in exercising her discretion with respect to costs under the 1991 Code, the Chair did so in a careful and principled way, and in accordance with the authorities. We see no basis for interfering with the exercise of that discretion.

The Appellant has made serious allegations. We have found no evidence on this record of any misconduct or negligence on the part of either the University Discipline Counsel or the University Administration. We will return later to this matter, in the context of the appropriate award of costs on the appeal.

ISSUE VI - Alleged violation of the *Statutory Powers Procedure Act*

The principal allegation by the Appellant under this heading is that he did not receive proper notice of the trial which took place in July, 1998, as required by the *Statutory Powers Procedure Act*, s. 6. This requires an examination of the circumstances, which are outlined in detail in the affidavit of Stephen Satchel *(supra)* as far as the steps taken leading up to the trial scheduled to proceed on May 11, 1998.

We have been provided with a certified transcript of the proceedings before the Chair on May 11, 1998. Neither the Appellant nor his counsel were in attendance, although their request for a further adjournment had been communicated to the Tribunal. The transcript also discloses that the Appellant had recently perfected an application to the Divisional Court for Judicial Review of the Chair's

decision on jurisdiction earlier referred to. In the result, the request for an adjournment was denied. Noting that the Tribunal cannot be subject to the multiple delays of the sort that had resulted from the course of action pursued by the Appellant since the release of her decision on jurisdiction, the Chair then fixed two peremptory dates. She directed that any further preliminary issues be disposed of on June 2, 1998 at 4:00 p.m., and that the trial proceed on July 13, 14 and 15, 1998. She further ordered that the transcription of the proceedings that day (May 11, 1998) be expedited and that a copy be provided to counsel for the Appellant without delay.

We have no evidence before us that this was not done nor that Appellant and his counsel were not immediately made aware of the timetable which had been set. Indeed, they attended for the trial on July 13th and participated until its conclusion on July 29th. At the opening of proceedings on July 13th, counsel for the Appellant raised the matter of notice as a preliminary objection, the discussion being recorded in pages 2 to 13 of the transcript of that day's proceedings. That discussion, however, is entirely directed to the language of the charges, whether changes had been made and if so was there consent, and whether the charges as framed were as directed by the Divisional Court. I quote from page 9 of the transcript:

> "MR. POLTEN: Well, it's not a matter of the meaning. We are supposed to be tried on exactly the same charges which were before the Divisional Court, and the word uttered has been deleted."

We pause to observe that the Divisional Court did not in fact so direct. The Reasons for Decision in [1995] O.J. No. 3734 (supra) simply state, in disposing of the matter, that "the decision of the Governing Council is quashed and the matter is remitted to the Tribunal to be heard again". In accordance with the Appellant's stated position, however, the second trial considered precisely the same charges as had been the subject of the first trial and the proceedings before the Divisional Court.

After hearing argument, the Chair ruled that it was not open to the Appellant to take objection to any

matter which could have been raised before the Divisional Court . As to the charges at the second trial being the same as those on which the Appellant had been previously tried, it is clear that in fact they were (see. Ex. 2).

There was nothing in the argument by Counsel for the Appellant which suggested that his client did not receive adequate notice, or that he was prejudiced in any way by having to proceed with the trial on July 13th and following. We see no merit in the arguments advanced on this issue.

ISSUE VII - the alleged Conflict of Interest of Linda Rothstein and Gowling, Strathy and Henderson

Appellant has raised an issue with respect to the allegedly improper contact between University Discipline Counsel prosecuting the charges against him which are the subject of this appeal and counsel appearing for the Governing Council in response to the Appellant's applications for judicial review of the previous trial and in response to several motions brought by him before the Divisional Court with respect to academic matters. It is alleged that this contact between the two law firms involved, described in the Appellant's Memorandum (para. 161) as collusive, is of great concern to him, "especially with respect to the administration of justice and the supposed independence and impartiality of the University Tribunal" (para. 154). It is specifically alleged that representatives of the law firm which represents the Governing Council have met with and/or exchanged information with the University Discipline Counsel. It is further alleged (para. 158) that as the Tribunal is a judicial body acting quasi-criminally under the *Statutory Powers Procedure Act* in disciplinary matters under the direct control of the Governing Council, the repeated contact complained of creates a conflict of interest, and that in the result there is a real appearance of impropriety, bias and manifest unfairness to Mr. Khan (para. 160, 161).

Reference is also made to Rule 5 and Rule 10 of the Rules of Professional Conduct promulgated by the Law Society of Upper Canada. The conduct of the law firm representing the Governing Council is said to be "unethical and repugnant to the public's sense of justice and fair play. It contravenes principles of judicial independence and impartiality and amounts to unfairness to the

Appellant"(para. 163).

There is no evidence on this record to suggest that there is or was a conflict of interest on the part of University Discipline Counsel or the firm of which she is a member, which was or might have been prejudicial to the Appellant. In this we agree with the Chair at trial. If it is suggested that the appearance of this particular counsel raises a reasonable apprehension of bias, given her alleged contact with other counsel representing the Governing Counsel in the proceedings before the Divisional Court, we reject such suggestions as being unfounded. We are informed that this argument was rejected by the Divisional Court at another Application for Judicial Review heard in June, 1998. We will not consider it further, except in the context of costs.

ISSUE VIII - Admissibility of Evidence

As mentioned at the outset of these Reasons, the true facts concerning the Appellant's academic record were discovered by accident. The Appellant had applied for admission to the Faculty of Medicine in 1989. Following his rejection, the written application form and attachments had been consigned to storage, where they would likely have remained buried except for the chance filing of other documents pertaining to a different student bearing the same family name. It was this coincidence of name which led the admissions officer to notice the earlier application material bearing the name of the Appellant.

The OMSAS instruction booklet for the completion of the admission application (Ex. 3) states that:

> "Transcript and assessment forms in support of applications filed in a previous year are not kept and therefore will not be used if a candidate wishes to reapply. This is to retain the privacy of previous applicants and to ensure that the medical schools receive the most current version of the candidate's academic record and referees' assessments."

The Appellant submits that his earlier application was a privileged document. On the basis of the

passage quoted above, he argued that it was improper for the University to have retained this document in storage, and that it was a breach of a duty of confidentiality towards him to have admitted it into evidence. It is our view that the Appellant cannot argue that his own material was misused, when the use to which it was put by the University was to expose his own fraud and deceit. We hold the same view with respect to the Appellant's complaints concerning the admission into evidence of the tape of his admission interview, and the written transcript of that interview.

ISSUE IX - the Chair's Charge to the Jury

The Appellant takes issue on this appeal with those elements of the charge dealing with reasonable doubt. Notwithstanding the fact that no such objection was made at trial, we have nevertheless examined the charge in order to ascertain if it contained error and if such error was prejudicial. The leading authority is the decision of the Supreme Court of Canada in *R. v. Lifchus,* [1997] 3 S.C.R. 320 where the use of the term "moral certainty", without more, was criticized, on the basis that jurors so instructed may think that they are entitled to convict if they feel certain, even though the Crown has failed to prove its case beyond a reasonable doubt. However the Court took pains to emphasise that the charge as a whole is to be considered, and if, when read as a whole, it makes clear that the jury could not have been under any misapprehension as to the correct burden and standard of proof to apply, it ought not to be disturbed.

It is true that while charging the jury on the issue of reasonable doubt, the Chair used the phrase "moral certainty". However, her charge contained much more on that subject and we conclude that, read as whole, the charge to the jury in this case could not have left them in any doubt as to burden and standard of proof.

The Appellant next argues that the jury was misdirected on the issue of intent. As the Appellant did not testify at trial, there is no direct evidence as to his intentions in acting as he did. The Chair told the jury that

"the prosecution has to satisfy you beyond a reasonable doubt that Mr.

> K., if these things were false and if he did them, intended in doing them to provide a false or misleading picture with respect to the University. In Mr. Polten's words, 'that he intended to deceive'."

The Chair further gave direction to the jury as to how to evaluate circumstantial evidence, particularly when dealing with the issue of intent, in the following terms:

> "At the end of the day, that question is for you, and the question is: when you put it all together, are you satisfied beyond a reasonable doubt with respect to the falsity, the actions by Mr. K. and with respect to the evidence that there is, from which you can draw conclusions about what he intended?
>
> Really, you have to conclude, for the prosecution to meet its burden, you must be able to conclude there is no other rational inference from the evidence, with respect to one or more of the false statements relied on, but that he intended to falsify or mislead. And if you are satisfied when you look at the evidence as a whole with respect to any one of the alleged false statements, that there is no other rational explanation, and you are satisfied beyond a reasonable doubt with respect to the other elements of the offence, then you should convict."

This in effect may have placed the burden on the prosecution higher than the law requires: *R. v. Cooper,* [1978] 1 S.C.R. 860. Even assuming that the direction was in error, there is no possibility that the Appellant was prejudiced.

The Appellant then shifts his focus to statements by the Chair in her charge which he says placed the issue of negligence on the part of the Appellant before the jury for its determination:

> "You could and should consider his conduct throughout the process, including the interview, his actions as revealed in the evidence. It is appropriate, as you have been asked to do by the prosecution, to consider the significance and the importance of this process *and the likely care with which Mr. K. approached it.*
>
> And as I say, you can and you should consider the evidence in its

> totality; in other words, not just individual instances of things he did or said, but the entire picture of what he did or said. And, in respect of intention, what Mr. K did and said to the extent that it is revealed in the evidence, is of considerable significance."

(Emphasis added)

In reviewing the above passage in the context in which it occurs, it becomes quite clear that there was no suggestion whatever that the jury was being asked to consider whether Mr. K. might have been negligent. It is rather a very proper exhortation to the jury to look at the whole picture in determining whether there was falsity and whether Mr. K. intended to deceive or mislead.

In our view, the charge to the jury was thorough, careful and complete, and did not in any way prejudice the right of the Appellant to a fair hearing. We would not disturb the result on the grounds alleged.

ISSUE X - Alleged prejudicial remarks

The Appellant submits that both the Chair and the University Discipline Counsel inflamed the jury by their prejudicial remarks against the Appellant; indeed at the oral hearing on February 2, 1999 he characterized the Chair as having acted, in effect, as a second counsel for the Prosecution. He further alleged that many of the improper remarks attributed to the Chair were made in the presence of the jury.

These are serious charges, and, if true, would require firm and unhesitating condemnation. We have accordingly carefully examined the passages to which counsel for the Appellant has drawn our attention. We are unable to find anything attributed to University Discipline Counsel which might be characterized as improper or unfair. Concerning the alleged impropriety of the Chair, we respectfully commend her for the patience and forbearance which was shown by her throughout the trial.

In the Notice of Appeal, Appellant asserts that there was direct interference by the Chair with the jury amounting to tampering (ground # 32). We are unable to find any supporting argument for this allegation in the Appellant's Memorandum, nor is there any reference to such alleged conduct in the transcript of the hearing. The charges must therefore be viewed as baseless, but having made them, Appellant and his counsel must live with the consequences of having done so. We will have more to say when we come to address the question of costs of the appeal.

ISSUE XI - a fair hearing

The Appellant takes issue with the verdict of the jury, characterizing it as perverse and unsupported by the evidence. Having carefully reviewed the evidence , we are of the view that there was evidence upon which the jury might reasonably have concluded beyond a reasonable doubt that the Appellant intentionally sought to deceive, and did deceive, the University with respect to his qualifications for admission to the Faculty of Medicine, both in his written application and supporting documents, and by his statements during the interview. We therefore find no merit in these grounds of appeal.

ISSUE XII - Right of Mr. K. to Apply to the courts

In paragraphs 288 - 290 of the Appellant's Memorandum, it is argued that the Appellant is justified in seeking recourse to the courts without first exhausting the internal appeal process of the University. Specific reference is made to the Chair having taken into account many irrelevant matters which affected her judgment and rejected relevant evidence in arriving at her conclusions on jurisdiction (para. 290).

As Appellant did in fact proceed with the internal appeal process, it is not necessary for us to deal with these points.

DISPOSITION

For all of the above stated reasons, this appeal is dismissed.

COSTS ON THE APPEAL

Each party seeks costs of the appeal on a solicitor/client basis. As with the case of hearings at trial, the 1991 Code grants a discretion to the Tribunal Appeals Board to award costs of any proceeding on appeal, and to make orders as to the party or parties to and by whom and the amounts and manner in which such costs are to be paid, where it is considered to be warranted by the circumstances (s. C. III. 10).

We are prepared to provide to the parties and their counsel the opportunity of making written submissions as to costs, such submissions to be received by the Secretary of the Tribunal within fifteen days of the date of release of these reasons. Any submissions received within that time will be considered, after which we shall render a decision on that issue.

Anthony Keith, Q.C., Associate Chair

Prof. Lorraine Weinrib

Prof. Arthur Ripstein

Sally Safa

Date: April 20, 1999

Chronology of Discipline Proceedings in the Case of Mr. "K"

1993/94-09	March 23, 1994	University Tribunal recommends expulsion
1994/95-09	April 24, 1995	Tribunal Appeals Board dismisses the student's appeal
	June 1, 1995	Governing Council confirms the expulsion
[1995] O.J. No. 3734	December 4, 1995	Divisional Court quashes the decision of Governing Council to expel and orders a new trial before the University Tribunal
1997/98-04	October 14, 1997	University Tribunal issues written ruling on jurisdictional objections raise by the student (2nd trial)
1998/99-06	July 31, 1998	University Tribunal recommends expulsion (2nd trial)
1998/99-07	December 4, 1998	Chair of the Tribunal panel rules on the student's request for costs (2nd Trial)
1998/99-08	April 20, 1999	The student's appeal is dismissed by the Discipline Appeals Board (2nd Appeal)
	May 13, 1999	Governing Council confirms the expulsion (2nd Expulsion)
[1999] O.J. No. 2944	July 16, 1999	Divisional Court dismisses application for judicial review
1999/00-14		Discipline Appeals Board Rules on Student's request for cost at the 2nd Appeal