

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Sparavalo 2017 NSPC 32

Date: June 29, 2017

Docket: 2957661, 2957662

Registry: Halifax

Between:

Her Majesty the Queen

v.

Nebojsa Sparavalo

TRIAL DECISION

Judge: The Honourable Judge Anne S. Derrick

Heard: April 10 and 11, May 29 and 31, June 14, 2017

Decision: June 29, 2017

Charges: sections 271 and 153(1)(a) of the *Criminal Code*

Counsel: Glenn Hubbard, for the Crown

Ian Hutchison and Loretta Manning, Q.C., for Dr. Sparavalo

By the Court:*Introduction*

[1] Dr. Sparavalo is charged with sexually assaulting J.C. on March 18, 2015, contrary to section 271 of the *Criminal Code*. He has also been charged, pursuant to section 153(1)(a) of the *Criminal Code*, with touching J.C., a young person, for a sexual purpose with his hand, a charge that includes the element that he was in a position of trust or authority.

[2] J.C. was referred to Dr. Sparavalo for a lumbar puncture. He has alleged that after the procedure and while he was recovering in bed, Dr. Sparavalo placed his hand on his penis and squeezed it a couple of times.

[3] Dr. Sparavalo disputes aspects of J.C.'s description of events both before and after the lumbar puncture and denies absolutely any touching of J.C.'s genital area or penis.

[4] Before I discuss the evidence, I am going to set out the legal principles that apply in relation to the charges against Dr. Sparavalo.

The Crown's Burden of Proof Beyond a Reasonable Doubt

[5] Dr. Sparavalo enjoys the presumption of innocence, a presumption only displaced if the Crown proves his guilt beyond a reasonable doubt. Suspicion of guilt or a belief in probable guilt do not displace the presumption. Only proof beyond a reasonable doubt can establish guilt.

[6] A reasonable doubt is based on reason and common sense which must be logically connected to the evidence or lack of evidence. Suspicion and probability fall far short of the reasonable doubt standard. Proof beyond a reasonable doubt falls much closer to absolute certainty than it does to a balance of probabilities. (*R. v. Lifchus*, [1997] S.C.J. No. 77, para. 36; *R. v. Starr*, [2000] S.C.J. No. 40, para. 242)

The Essential Elements of the Offence of Sexual Assault

[7] The leading case on the elements of the offence of sexual assault is *R. v. Ewanchuk*, [1999] S.C.J. No. 10. *Ewanchuk* explains that for an accused to be convicted of sexual assault the Crown must prove beyond a reasonable doubt "two

basic elements”, that the accused committed the actus reus – unwanted sexual touching – and had the necessary mens rea – the intention to touch, knowing there was no consent. (*para. 23*) As *Ewanchuk* indicates, the actus reus of sexual assault is established by proving: intentional touching; the sexual nature of the contact, both of which are to be assessed through an objective lens; and the absence of consent, which is assessed on a subjective basis. (*para. 25*)

The Actus Reus of Sexual Assault – Intentional Touching, The Sexual Nature of the Touching and the Absence of Consent

[8] The determination of whether touching was intentional requires consideration of all the circumstances surrounding the touching, including the nature of the contact and any words or gestures that may have accompanied it along with anything else that indicates the accused’s state of mind at the time the touching occurred.

[9] Assessing whether touching was sexual in nature is also an objective exercise. Consideration must be given to the part of the body touched by the accused, the nature of the contact, and the situation in which it occurred. Any words or gestures that may have accompanied the contact and all the other surrounding circumstances should be taken into account. The purpose of the touching may also assist in the assessment of whether it was sexual in nature.

[10] Whether the Crown has proven the absence of consent must be determined by reference to the complainant’s internal state of mind towards the sexual touching, at the time it occurred. (*Ewanchuk, para. 26*) It is a purely subjective assessment that considers only the complainant’s perspective. (*Ewanchuk, para. 27*) The criminalization of intentional touching in the absence of consent reflects society’s commitment “to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one’s body, and how, lies at the core of human dignity and autonomy...” (*Ewanchuk, para. 28*)

The Mens Rea of Sexual Assault

[11] Sexual assault is an offence of general intent. (*Ewanchuk, para. 41*) As *Ewanchuk* states: “Therefore, the Crown need only prove that the accused intended to touch the complainant in order to satisfy the basic mens rea requirement.”

The Mens Rea of Sexual Exploitation

[12] Touching a young person “for a sexual purpose” is a specific intent offence. To secure a conviction against a person in a position of trust or authority accused of touching a young person for a sexual purpose the Crown must prove the sexual purpose of the touching. Mr. Hutchison referred me to *R. v. Bone*, [1993] M.J. No. 222 where the Manitoba Court of Appeal held in a sexual exploitation case that: “It is not enough for the Crown to prove...a touching; the Crown must also prove the touching to have been for the specific purpose referred in the section.” (*page 3, QL version*) Despite Mr. Hubbard’s view of this decision as an outlier, I regard it as a correct statement of the law as found in the sexual exploitation provisions of the *Criminal Code*.

[13] In this case, it has not been disputed that Dr. Sparavalo was in a position of authority in relation to J.C. and that, on March 18, 2015, J.C. was a young person. The only controversy is in relation to the issue of touching: Mr. Hutchison has submitted on Dr. Sparavalo’s behalf that even if I find there was touching, I should not be satisfied beyond a reasonable doubt that its purpose was sexual.

Accident

[14] As I will be discussing, Mr. Hutchison has submitted that if I do not accept Dr. Sparavalo’s denial of having touched J.C. on his penis, I should find that any touching of J.C.’s genital area was accidental. As the Supreme Court of Canada has held, as long as an alternative defence meets the air of reality test, it does not matter that the alternative defence is incompatible with the primary defence. (*R. v. Gauthier, 2013 SCC 32, para. 34*)

Assessing the Evidence

[15] Both the Crown and Dr. Sparavalo called evidence. The Crown called J.C., his mother, B.M., his former girlfriend, M.M., the nurses who were working in the Medical Day Unit, and the investigating police officer who took statements. The Defence called Dr. Hasegawa, the hematologist who arranged for the lumbar puncture and Dr. Sparavalo. In assessing the witness evidence, I am governed by the following legal principles: (1) I can accept all, some, or none of a witness's evidence;

and (2) Dr. Sparavalo's evidence must be assessed in accordance with *R. v. W.(D.)*, [1991] S.C.J. No. 26.

[16] The *W.(D.)* principles require me to acquit Dr. Sparavalo if I believe his testimony; if his testimony raises a doubt even if I do not believe it; and, if on the whole of the evidence I have a doubt even if I do not believe Dr. Sparavalo.

[17] Since *W.(D.)*, the Supreme Court of Canada has clarified the obligation that rests on a trial judge deciding a case that turns on credibility: "... the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. Put differently, the trial judge must consider whether the evidence as a whole establishes the accused's guilt beyond a reasonable doubt." (*R. v. Dinardo*, [2008] S.C.J. No. 24, para. 23)

J.C.'s Medical Procedures and the Referral to Halifax

[18] In March 2015, J.C. was 17 years old. He had been having health problems for several years and doctors in [...] and Halifax were trying to make a diagnosis. J.C. had undergone a lumbar puncture in [...] performed by Dr. S.. The results suggested the presence of lymphoma. As a consequence, J.C. was given an appointment to have a second lumbar puncture done, this time in Halifax.

[19] On March 17, 2015, J.C., his mother, B.M. and his girlfriend, M.M. were in Halifax for J.C.'s various medical procedures at the QEII Health Sciences Centre, Victoria General site. They stayed near the hospital at the Ronald MacDonald House.

[20] A bone marrow biopsy was performed on March 17 by Dr. Hasegawa. She arranged for the lumbar puncture procedure that Dr. Sparavalo would do the next day.

J.C.'s Testimony About Dr. Hasegawa's Description of Dr. Sparavalo

[21] J.C. testified that Dr. Hasegawa told him Dr. Sparavalo was Russian, a big Russian whom everyone called Mr. Big, and that he was "really funny" and J.C. would really like him. J.C. said he is "1000 percent" sure it was Dr. Hasegawa who told him Dr. Sparavalo was Russian.

[22] J.C. has said he is “pretty sure” Dr. Hasegawa also told him that Dr. Sparavalo was an anaesthesiologist.

The Lumbar Puncture Procedure as J.C. Recalls It

[23] J.C., his mother and his girlfriend made their way to the hospital on March 18 in the teeth of a fierce blizzard. They waited for Dr. Sparavalo on the Medical Day Unit where the procedure was to be done. When Dr. Sparavalo arrived, he introduced himself. J.C. testified that Dr. Sparavalo said to call him “Mr. Big.”

[24] J.C. says the nurses were present when Dr. Sparavalo suggested calling him “Mr. Big.”

[25] J.C. testified that Dr. Sparavalo introduced himself as an anesthesiologist.

[26] Dr. Sparavalo explained the procedure to J.C. He had J.C. sit on the edge of the hospital bed, pull up his T-shirt and lean over a table that had been swiveled next to the bed. This exposed his spinal column. Dr. Sparavalo, positioned behind J.C., swabbed his back, injected a numbing agent and did the lumbar puncture.

[27] J.C. testified that Dr. Sparavalo said the local anaesthetic he was about to administer had expired. It was J.C.’s evidence that Dr. Sparavalo took the medication out of a cupboard, looked at it, said it was expired but okay, and stuck it in the needle to be used on him.

[28] J.C. testified that he was impressed with how the procedure went. He told Dr. Sparavalo it had not hurt like the one done in [...]. He says he thought this compliment pleased Dr. Sparavalo. J.C. recalls that Dr. Sparavalo had a very high opinion of Dr. S. so the favourable comparison seemed to J.C. to be well-received.

[29] J.C. told Mr. Hutchison on cross-examination that he does not recall being nervous before the procedure.

J.C.’s Sexual Assault/Sexual Touching Allegation

[30] After the procedure, J.C. lay down flat on his back on the bed. This position was necessary to prevent J.C. from developing a severe post-procedure headache. The nurses brought one or two warmed, flannel hospital blankets. The blankets covered J.C. from just above his belly button to past his feet. J.C. was wearing his

T-shirt and underneath the blankets, he had on jeans. He was also wearing underwear, and agreed with the suggestion made in cross-examination that it was “quite possible” the underwear was shorts.

[31] According to J.C.’s recollection, once he was lying down, his mother and M.M. moved to either side of his head. B.M. was on J.C.’s right and M.M. was on his left. It was J.C.’s evidence that prior to that M.M. had been seated directly in front of him and B.M. had been seated behind Dr. Sparavalo.

[32] J.C. recalls Dr. Sparavalo sitting next to him on his right side. J.C. testified that Dr. Sparavalo was leaning over him and stroking the outside of his left thigh, over the blankets, with his right hand. According to J.C., Dr. Sparavalo was not “squishing” him, just leaning completely over him.

[33] J.C. testified that Dr. Sparavalo maintained this position for a while during which time he was, as J.C. described it, “rambling”, providing post-procedure advice and care instructions. J.C. says Dr. Sparavalo was giving him advice about the lumbar puncture procedure, the need for fluids and lying in bed. J.C. says he was advised to consume drinks containing caffeine.

[34] It was J.C.’s evidence that while Dr. Sparavalo was stroking his leg he was telling J.C. that Dr. S. is a very attractive man. J.C. says this made him uncomfortable although he was quick to say he is not homophobic. On cross-examination J.C. said he did not know if there was a sexual overtone to Dr. Sparavalo’s comment.

[35] J.C. testified the sexual touching occurred when Dr. Sparavalo moved his hand from stroking his thigh and “stuck” it over his “pelvic area”. J.C. says Dr. Sparavalo “pulsated” the area twice, an action J.C. described as “two squeezes.” He says this came “out of nowhere” after Dr. Sparavalo had been stroking his leg, “Maybe ten minutes, I couldn’t be exact on that. He just went for it.”

[36] J.C. did not see Dr. Sparavalo’s hand on his genital area. His evidence is that he felt it. J.C.’s medical issues include blindness in his right eye.

[37] J.C. testified that Dr. Sparavalo’s hand was on his genitals for 8 to 10 seconds during which time he - Dr. Sparavalo - showed no acknowledgment of the touching “in any way, shape or form.” J.C. testified that Dr. Sparavalo did not stop talking

while he had his hand on his penis. He says Dr. Sparavalo carried on as though “nothing happened.”

After the Touching

[38] J.C. says he was in shock when Dr. Sparavalo touched his genital area. It made him uncomfortable. He testified that after the touching he turned his head around and locked eyes with M.M. who was positioned on his left side by his head. J.C. says as he looked at her M.M.’s jaw dropped.

[39] It is J.C.’s evidence that Dr. Sparavalo spent another 15 minutes to half an hour in the room after the touching.

[40] The “second” Dr. Sparavalo left the room, J.C. says he said to M.M., “Did you see that?” to which he says she answered: “Yes.”

The Evidence of M.M.

[41] M.M. and J.C. were in a relationship for about nine months, breaking up not long after the trip to Halifax. M.M. testified they were not in any contact for months prior to this trial.

[42] M.M. recalls Dr. Sparavalo explaining the lumbar puncture to J.C. whom she says was “really nervous” about the procedure and “the results.” She was there for support.

[43] M.M., like J.C., testified in her direct examination that Dr. Sparavalo introduced himself as “Mr. Big”, saying he was well known as the big Russian doctor. On cross-examination however she was not so sure about the “Russian doctor” reference and acknowledged this may have come from J.C. or his mother. She says she now does not recollect if Dr. Sparavalo said that. However, she told Mr. Hutchison that she is “sure” Dr. Sparavalo introduced himself as “Mr. Big.”

[44] M.M. recalls Dr. Sparavalo as polite. She remembers his favourable comments about Dr. S.. She did not say Dr. Sparavalo had talked about Dr. S. being an attractive man.

[45] After the procedure, M.M. remembers J.C. lying flat on the bed. She was seated beside him as she had been during the procedure. Dr. Sparavalo was looking

directly at J.C. and explaining what to expect post-procedure and what to do, such as ensuring he drank lots of fluids. M.M. recalls Dr. Sparavalo standing while he was doing this. He was leaning over J.C. and stroking the outside of his left thigh. She testified: "...at first like I thought he was like touching his leg and then like it kind of looked like he was groping him a little bit and like I don't know like what his intentions are..."

[46] M.M. says she saw Dr. Sparavalo place his hand, palm down, in J.C.'s pelvic region. It was not lower on J.C.'s leg. According to M.M. it was "directly between his legs in his private region." She says she was "stunned" by what she was seeing. She says J.C. looked at her with his eyes "wide open." She and J.C. "locked eyes." It was M.M.'s evidence that J.C., "...didn't say anything."

[47] M.M. testified she was thinking "maybe that's not what he meant to do..."

[48] Although M.M. at first said that "it kind of looked like he was groping him a little bit", on cross-examination she modified this considerably by saying all she saw was Dr. Sparavalo's hand on J.C.'s genital area. She testified that she cannot recall if there was any motion of Dr. Sparavalo's hand.

[49] M.M. also said that while his hand was on J.C.'s genital area Dr. Sparavalo kept talking as though nothing was happening.

[50] M.M. thought what had happened was "weird". Dr. Sparavalo had seemed like "a nice guy" and "professional." On cross-examination M.M. agreed she told the police investigator that at the time she didn't think that much of what she observed. She agreed with Mr. Hutchison's statement that she "didn't perceive this as being a big deal" until J.C. told her he felt he had been sexually assaulted.

[51] Although she followed that up by saying she had perceived what had happened as "inappropriate", when asked if maybe it was an accident, M.M. said it could have been.

The Evidence of B.M.

[52] J.C.'s mother testified that Dr. Sparavalo was "a very nice man" who "presented very well" and was light-hearted, joking, jovial, and friendly. She also

says he introduced himself as “Mr. Big.” J.C.’s mother testified that probably the nurses were present when Dr. Sparavalo was calling himself “Mr. Big.”

[53] B.M. says that Dr. Hasegawa described Dr. Sparavalo as a big Russian guy whom they called “Mr. Big.”

[54] B.M. gave the same evidence as J.C. about expired anaesthetic medication being used, saying that Dr. Sparavalo fetched the medication from the cupboard and noted it was expired but okay.

[55] While Dr. Sparavalo was doing the lumbar puncture, B.M. was to his right taking photographs. B.M.’s photographs were entered into evidence as Crown Exhibit 1. Dr. Sparavalo was aware of her documenting the procedure because he told her the images should not be posted to the internet or social media.

[56] Although J.C. believes his mother was just over his right shoulder at the head of the bed post-procedure, B.M. recalls being at the foot of the bed and to Dr. Sparavalo’s right, slightly behind him. She was unable to see J.C.’s genital area and could only see J.C.’s right side. Like J.C., B.M. testified that Dr. Sparavalo was perched on the edge of the bed on J.C.’s right side.

[57] B.M. testified that when Dr. Sparavalo was leaning over J.C. after the procedure she could see him rubbing J.C.’s hip - “the movement of his hand on [J.C.]’s hip” - as J.C. was lying flat on the bed. While this was happening, B.M. says Dr. Sparavalo was talking to J.C.

[58] B.M. testified that at the time she perceived Dr. Sparavalo’s stroking of J.C.’s thigh as comforting and didn’t think much of it.

[59] B.M. did not see Dr. Sparavalo touch J.C. in his genital area. She agreed on cross-examination that J.C.’s genital area would have been in line with his right hip, the hip she could see.

Leaving the Medical Day Unit on March 18, 2015

[60] J.C. testified that once Dr. Sparavalo had left and he was getting ready to go, he told his mother what had happened. B.M. offered the same evidence. She says she has a clear memory now of J.C. putting on his coat and telling her. She says she asked him if there was anything he wanted her to do.

[61] J.C. and B.M. both had a different recollection when they were interviewed by D/Cst. Lake in November 2015. J.C. told the officer he had spoken to his mother about Dr. Sparavalo when they returned to Ronald MacDonald House. He says now that was an error he did not realize until the following day. B.M. says when she spoke to D/Cst. Lake she felt overwhelmed by the questioning and “putting it all together” and so wasn’t sure whether J.C. had disclosed to her in the hospital room or back at the Ronald MacDonald House. She does not think she and J.C. talked about it again until they had to deal with it. In her testimony B.M. said that after March 18, 2015, she and J.C. did not discuss the events at the Medical Day Unit again for “six months or so.”

[62] J.C. testified there were lots of things going through his mind after the lumbar puncture procedure. He said he thought he had [...], which was a possible diagnosis his doctors had been exploring in relation to his symptoms.

[63] M.M. testified that the touching was mentioned to J.C.’s mother as they left the hospital. She says that she, J.C. and B.M. started talking about Dr. Sparavalo as soon as they left the hospital room.

Reporting the Allegation

[64] J.C. testified that he did not complain initially about what had happened because he was “in a lot of pain” and didn’t want to be in the hospital. He says he wanted to be “somewhere safe.”

[65] B.M. gave similar evidence, saying that J.C. did not want to talk to anyone as they left the hospital. There was a bad storm and J.C. wanted to get back to the Ronald MacDonald House. B.M. also testified that J.C. was in pain and exhausted.

[66] J.C. suffered nasty after-effects from the lumbar puncture. That night and the next day he experienced pain and was vomiting violently. He and his mother went to the hospital on March 19 to see Dr. Hasegawa before heading back to [...]. Dr. Hasegawa arranged for J.C. to be treated on the Medical Day Unit where he received intravenous medication for nausea and pain. He was also given a prescription by Dr. Hasegawa for strong anti-nausea medication. J.C. testified that on March 19 he and his mother were focused on his symptoms and did not mention anything to Dr. Hasegawa about Dr. Sparavalo.

[67] Dr. Hasegawa had J.C.'s lumbar puncture and the blood and bone marrow test results on April 1, 2015, and made a telephone call to J.C. to discuss them. It was B.M. she spoke with. Dr. Hasegawa testified that at the end of the telephone call B.M. mentioned that "something might have happened" after the lumbar puncture procedure. Dr. Hasegawa recalls B.M. indicating that J.C. had told her "on the car ride back on March 19 that possible inappropriate touching may have occurred."

[68] Dr. Hasegawa told B.M. she would share the information with her "higher-ups" and did so later, after she had met with J.C. Dr. Hasegawa wanted to speak to J.C. directly before going further because B.M. had told her she hadn't seen anything. She arranged to see J.C. on April 16, after his return from a school trip to [...].

[69] It was Dr. Hasegawa's evidence that B.M. later told her that she did not speak to J.C. about the conversation with Dr. Hasegawa until April 15 so as not to spoil his trip to [...].

[70] J.C. testified that he told Dr. Hasegawa he didn't know if the touching had been intentional or not.

[71] In the fall of 2015 when J.C. and his mother learned the hospital had closed the file, J.C. made the decision to contact the Halifax Regional Police.

The Nurses Who Dealt with J.C. on March 18, 2015

[72] Three Medical Day Unit nurses had some involvement with J.C.'s lumbar puncture procedure on March 18, 2015 – Registered Nurses Boudreau, Porter and Galloway. B.M. testified that there were two nurses "for sure" in the room during the procedure watching, and handing Dr. Sparavalo what he needed. (This is borne out by Crown Exhibit 1, photograph 1 which shows a nurse's torso in the frame and a separate set of hands holding a green vial.) B.M. testified that "there were nurses in the room at all times."

[73] Registered Nurse Charlene Galloway was present during the entirety of the lumbar puncture procedure. She remembers J.C. and his mother and girlfriend. She identified herself in the photographs taken by B.M. as the nurse in a grey floral top with her hand on the table J.C. was arched over. She stood near the foot of J.C.'s bed

and opposite Dr. Sparavalo, facing him. She testified that she explained the procedure to J.C. and remained in the room while Dr. Sparavalo conducted it.

[74] Nurse Galloway cannot recall if she was in the room during J.C.'s recovery nor can she say for sure if Dr. Sparavalo was there then. She testified that she thinks Dr. Sparavalo did come back to check on things. She recalls she went on break during that time.

[75] Nurse Galloway observed nothing unusual taking place during her time on duty with J.C. and Dr. Sparavalo. She had no concerns on March 18 with Dr. Sparavalo's professionalism. She remembers thinking that J.C. seemed "a bit quiet, reserved". She thought J.C. was nervous.

[76] Registered Nurse Karlene Boudreau remembers J.C. as a patient that came into the unit on March 18 for a lumbar puncture. She does not particularly remember the procedure and said that there was nothing afterwards that sticks out in her mind.

[77] Nurse Boudreau was asked about the photograph showing the two hands, one of which is holding a green vial. (*Crown Exhibit 1, photograph 1*) She testified that those hands likely belonged to a colleague, Joanne Porter, the third nurse working in the Medical Day Unit on March 18.

[78] Registered Nurse Joanne Porter remembers doing J.C.'s assessment when he came in but testified that she was then only present for the recovery after returning from a coffee break. Given the identification of her hands holding the green vial in Crown Exhibit 1, photograph 1, she was also present just before the procedure. Her hands are not shown in the subsequent photographs of the procedure. (*Crown Exhibit, photographs 2 and 3*)

[79] Nurse Porter testified that she had no concerns about the interactions between Dr. Sparavalo and J.C. or in relation to Dr. Sparavalo's professionalism. She did not see Dr. Sparavalo place his hand on J.C.'s penis.

The Positioning of the Curtains Around the Bed

[80] Nurse Galloway testified that post-procedure, once J.C. was lying down and covered, the curtains that had been pulled around the bed would have been opened so that J.C. could be monitored.

[81] Nurse Boudreau testified that the privacy screen curtain may not have been pulled right back to the wall after the procedure but it would have been opened so that J.C. could be observed by the nurses. It was her evidence that “Normally we do that and nothing sticks out.” She said it would be unusual to leave the curtain closed.

[82] Nurse Porter testified that after the procedure the nurses would open the curtain to observe the patient and see if there was any distress.

The Busy Medical Day Unit

[83] Nurse Galloway testified that generally there were 10 patients or less in the room where J.C. was being treated. Nurse Boudreau said there were probably 10 patients a day in that room. Nurse Porter said that on an average day there would be 5 to 10 patients in the room.

[84] M.M. recalls a female patient being behind the curtain in a bed. B.M. observed that the Medical Day Unit was quite busy with a lot of people around and patients in the next bed.

[85] Nurse Galloway agreed on cross-examination that the Medical Day Unit was a very busy unit and that the doctors and nurses working on the unit were busy. She said Dr. Sparavalo was a “very, very busy” physician. She testified that there would not generally be time for him to chat for 10 to 15 minutes with a patient. Nurse Porter agreed that the Medical Day Unit is a very busy unit and said that the doctors do not just stand around chatting. Nurse Porter has no recollection of Dr. Sparavalo standing by J.C.’s bed for 10 to 15 minutes.

The Evidence of Dr. Sparavalo

[86] Dr. Sparavalo testified in his own defence through a Serbo-Croatian interpreter. He emphatically denied touching J.C. on his genital area. He also testified that he did not touch J.C. on the leg as J.C., B.M. and M.M. have testified he did. Dr. Sparavalo told Mr. Hubbard he does not have any recollection of touching J.C. after the procedure. He testified he had no reason to touch J.C.: J.C. was “satisfied, he was happy, the procedure went well.” Dr. Sparavalo says he has nothing to hide and does not remember anything after the procedure that was unusual.

[87] Dr. Sparavalo qualified as a medical doctor in the former Yugoslavia and worked there for almost twenty years as a family physician. The civil war drove Dr. Sparavalo out of Sarajevo where he was living and working and he emigrated to Canada in the winter of 1996. He has no criminal record in Canada or the former Yugoslavia and no discipline history.

[88] Dr. Sparavalo has been employed by the Nova Scotia Health Authority since 1999. He has medical privileges that are restricted to working in hematology at the VG site of the QEII Health Sciences Centre.

[89] Dr. Sparavalo testified that he recalled J.C. and the lumbar puncture procedure of March 18, 2015. He recalls J.C.'s name was a late addition to the patient list for the day. He says the reason he remembers the appointment is the discussion he had with J.C. about Dr. S. and the previous lumbar puncture. He says he remembers his discussions with J.C. prior to the procedure "very well." It was "very unusual" for a person to come in "so unprepared and anxious" about the procedure. When he inquired about the reason for J.C.'s anxiety he was told that the previous procedure had been done by Dr. S., a doctor he knew, and that it had been very traumatic for J.C. Dr. Sparavalo testified that the connection with Dr. S. fixed J.C.'s appointment in his memory.

[90] Part of what Dr. Sparavalo remembers is what he didn't say. He testified that he did not introduce himself as Russian. He says he said he was from the former Yugoslavia. He says he "absolutely" did not invite J.C. to call him Mr. Big. He did not tell J.C. that he was an anaesthesiologist.

[91] Dr. Sparavalo also says there was no discussion about expired medication. He says the anaesthetic was not expired in J.C.'s case. He testified that every time he does a lumbar puncture, a new anaesthetic is opened with the nurses checking the expiry date, "for safety." He says the nurses prepare everything for the procedure. They retrieve the anaesthetic and prepare it for use.

[92] Dr. Sparavalo rejected Mr. Hubbard's suggestion that he had made a joke about expired medication because J.C. was anxious. He testified "Maybe I made a joke but no, I never said the medicine was expired. It is not a joke."

[93] Dr. Sparavalo's response to being asked if there was anything unusual about J.C.'s lumbar puncture was that J.C. was "very nervous." He testified that he was trying to convince J.C. that having the procedure done in the sitting position was different from it being done with the patient lying down, the position J.C. had been in for the previous lumbar puncture.

[94] Just before the procedure, Dr. Sparavalo became aware that J.C.'s mother was taking photographs. He did not say anything about this other than to ask that the photographs not be posted on the internet or social media.

[95] After he finished the procedure, Dr. Sparavalo went and looked at his schedule and saw he had a transplant procedure that was not in the same unit. As a result of this, he left and was gone for about 30 to 40 minutes.

[96] Dr. Sparavalo testified that he normally goes back to check on how the patient is doing and did so in the case of J.C. He says that usually in an urgent situation like J.C.'s he gets preliminary results from the lumbar puncture within 30 to 45 minutes. In J.C.'s case he went back to speak to him and says he did so from the foot of the bed. He was there for five minutes at most.

[97] Dr. Sparavalo says he told J.C. not to have any activities for the next 24 hours and to drink lots of water, coffee and Coca-Cola. He had also given advice prior to the procedure about after-care. He says he asked J.C. if he was in pain. He told J.C. the preliminary results and said, "everything looked ok" but they would need to wait for other results.

[98] It was Dr. Sparavalo's evidence that a nurse would have been present when he was talking to J.C. after the procedure. He always has a nurse present "especially when I am telling the patient the results" because English is not his first language. On cross-examination Dr. Sparavalo testified he was absolutely certain a nurse was there "to make sure the patient understands what I'm saying."

[99] Dr. Sparavalo was emphatic that when talking to J.C. after the procedure he did not sit on the right side of the bed, did not lean over and touch J.C.'s left leg with his right hand and did not place his hand on J.C.'s "private parts" and squeeze his penis.

[100] Dr. Sparavalo rejected the suggestion that at any point he sat on the edge of J.C.'s bed. He described the bed as having a special mattress that could be inflated to make the patient more comfortable. He testified that he never sits on a patient's bed and gave two reasons for not doing so: (1) because it is impossible to sit on the mattress without causing the patient, who is supposed to be lying flat, to be moved, and (2) because it is "not professional" to sit on a patient's bed.

[101] On cross-examination, Mr. Hubbard attacked Dr. Sparavalo's claim of recalling the appointment with J.C. Dr. Sparavalo acknowledged that he would see "a couple of thousand" patients per year. Most of his patients are chronic patients that he would see more than once. He has done more than one thousand lumbar punctures in his career and in J.C.'s case everything went routinely. He agreed with Mr. Hubbard that if nothing unusual happened he would not remember a patient.

[102] This acknowledgement led to Mr. Hubbard putting it to Dr. Sparavalo that something unusual must have happened for him to remember J.C.

[103] Dr. Sparavalo responded by saying "yes". But it was apparent from Dr. Sparavalo's evidence that his answer did not have anything to do with J.C.'s sexual touching allegation. It had to do with why he recalls the appointment with J.C. Earlier in his testimony, Dr. Sparavalo had said that the discussion about Dr. S. happened before the lumbar puncture procedure and is the reason he remembers J.C. He testified: "This is why I remember really good because I know personally Dr. [S.]." Dr. Sparavalo recalls J.C. complimenting him in comparison with Dr. S.'s procedure.

[104] It was Dr. Sparavalo's evidence concerning his observations about J.C.'s pre-procedure anxiety that he understood from what J.C. said to him that, "He doesn't trust the system, the doctors, he's of the opinion no one knows what's going on with him, very skeptical."

[105] Dr. Sparavalo testified he understood during this conversation with J.C. that he was very anxious. Asked on cross-examination whether he touched J.C. before the procedure on the shoulder and reassured him, Dr. Sparavalo said that was possible. Dr. Sparavalo said he was able to calm J.C. somewhat.

[106] Dr. Sparavalo learned about J.C.'s complaint at the end of April 2015. Mr. Hubbard challenged Dr. Sparavalo's claim of recalling his conversations with J.C. when it was a month and a half after seeing J.C. that he learned of the allegation. Mr. Hubbard said: "I am going to suggest to you that you don't really recall." Dr. Sparavalo responded spontaneously and emphatically in English: "I recall conversation very well because..." and then, continuing in Serbo-Croatian said, "because the person who did the first puncture on him I know very well..."

[107] Mr. Hubbard put it to Dr. Sparavalo on cross-examination that he could not remember the exact words he spoke to J.C. In response, Dr. Sparavalo said he can "repeat absolutely the words about Dr. [S.]. For the rest of the conversation I can remember vaguely."

Assessing the Evidence – Reliability and Proof Beyond a Reasonable Doubt

[108] Although I am not as confident about aspects of Dr. Sparavalo's recall of March 18, 2015, as he is, I find he gave straightforward and consistent answers to the questions put to him. I discerned no attempt to be evasive. He impressed me as a truthful. I do not find, as the Crown has suggested, that Dr. Sparavalo had a convenient memory of J.C.'s appointment. I accept his evidence that the discussion with J.C. about Dr. S. stands out in his memory because of his familiarity with Dr. S.. I accept that he has a general recollection of the appointment with J.C. notwithstanding the number of lumbar puncture procedures he has done. However, I do not accept his evidence that he did not touch J.C. at all after completing the procedure. I think he has failed to recall that he rubbed J.C.'s leg when J.C. was recovering in bed. To that extent, Dr. Sparavalo's recollection of his interactions with J.C. is unreliable.

[109] That does not mean I find other recollections by Dr. Sparavalo to be unreliable.

[110] The evidence of M.M., Nurse Galloway and Dr. Sparavalo satisfies me that J.C. was nervous. I don't accept the evidence of J.C. and B.M. that he was not. Common sense tells me his past experience of a painful lumbar puncture and the uncertainty of what he was facing as a diagnosis would have made J.C. anxious and apprehensive. I find that Dr. Sparavalo, who has been described as a friendly and professional doctor, was concerned about his young patient and sought to reassure

J.C. post-procedure through touch and talking. Dr. Sparavalo repeated after-care instructions and advice he had given earlier. He was aware that J.C.'s previous lumbar puncture procedure had been difficult.

[111] I will be discussing the reliability of various witnesses shortly but on the issue of Dr. Sparavalo touching J.C.'s leg after the lumbar puncture procedure, I accept the evidence of J.C., M.M. and B.M that he did so. I find Dr. Sparavalo used touch to try and reassure his anxious patient.

[112] Although I accept the evidence of Dr. Sparavalo touching J.C.'s leg, I have concluded that important aspects of the recollections of J.C., B.M., and M.M. are unreliable.

[113] As a prelude to discussing the evidence, I will explain what is meant by unreliable testimony in circumstances where a witness is apparently giving evidence he or she honestly believes.

[114] The phenomenon of the honest-but-mistaken witness was noted by A.C.J. Tufts of this Court in *R. v. Hawkes*, 2017 NSPC 4, where, citing *R. v. H.C.*, 2009 ONCA 56, he stated that "a credible witness may give unreliable evidence." The Ontario Court of Appeal in *H.C.* cited the earlier decision of that Court - *R. v. Morrissey*, [1995] O.J. No. 639. In *R. v. Morrissey* the Ontario Court of Appeal explained credibility and reliability as follows:

Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with the witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The

evidence of a credible, that is, honest witness, may, however, still be unreliable...

[115] I do not believe J.C., M.M. or B.M. were trying to mislead with their evidence or engage in fabrication. I accept that J.C. and M.M., and B.M., based on what J.C. has told her, honestly believe the evidence they gave. This has lent confidence and assurance to their testimony and given their evidence the appearance of accuracy. Their confidence brings to mind erroneous eyewitness identification evidence: the eyewitness honestly believes she has correctly identified the perpetrator and that honest belief makes her a convincing witness, but she is mistaken. (*R. v. Quercia*, [1990] O.J. No. 2063 (C.A.), para. 5) In the context of identification evidence there is a “very weak relationship between the witness’ confidence level and the accuracy of the identification.” (*R. v. Hanemaayer*, 2008 ONCA 580, para. 21)

[116] I have concluded that over time, both the recollections by J.C., M.M. and B.M. of what happened and their interpretation of the events have become distorted and have hardened into certainty.

[117] What I do accept from the evidence of J.C., B.M. and M.M. is that when J.C. was lying in bed after the lumbar puncture, Dr. Sparavalo rubbed his left leg to comfort him as he was talking to J.C. about post-procedure care. I find that Dr. Sparavalo’s firm belief now that he did not touch J.C. is simply incorrect.

Evidence of J.C. and B.M. that was Contradicted by Other Witnesses

[118] Certain recollections of J.C. and B.M. have been contradicted by other witnesses, throwing their reliability into doubt. These recollections are of how Dr. Sparavalo introduced himself, the use of expired medication and J.C.’s physical condition on March 18 after the lumbar puncture.

The “Big Russian Doctor” Descriptor

[119] The evidence that Dr. Sparavalo was known as the big Russian doctor came only from J.C. and his mother. On cross-examination, M.M. was unable to say she had heard this from Dr. Sparavalo and thought perhaps she picked this description up from J.C. and B.M.

[120] None of the Medical Day Unit nurses, all of whom have known and worked with Dr. Sparavalo for many years, have ever heard him described as a big Russian doctor nor have they heard him invite patients to call him “Mr. Big.” All the nurses correctly identified Dr. Sparavalo’s country of origin as the former Yugoslavia.

[121] Dr. Hasegawa was asked if she would have described Dr. Sparavalo to J.C. and B.M. as a “big Russian doctor.” She responded by saying she might have described him “as large or big” but does not think she would have used “those exact words.”

[122] Dr. Hasegawa recalls the March 17, 2015, meeting with J.C. and his mother. She has known Dr. Sparavalo since 2005 when he started working with her as a clinical associate in hematology. She knew that Dr. Sparavalo is originally from Bosnia and does not think she would have said he was a Russian. Asked on direct examination why she thinks she would not have said Dr. Sparavalo was Russian, Dr. Hasegawa said: “He’s not Russian, he’s Bosnian and I think I would have known that at the time.”

[123] “At the time” was 2015. As I have just noted, Dr. Hasegawa had by then worked with Dr. Sparavalo for ten years. I think is highly probable she knew where he was from and that he was not Russian.

[124] Dr. Hasegawa testified that she would not have said Dr. Sparavalo was known as “Mr. Big.” She believes she has been present when Dr. Sparavalo introduced himself to a patient and has not heard him describe himself as a Russian doctor. She has also not heard him invite patients to call him Mr. Big.

[125] On cross-examination by the Crown Dr. Hasegawa agreed that she may have described Dr. Sparavalo to J.C. and his mother at their meeting on March 17. Asked what she may have said to J.C. about Dr. Sparavalo, Dr. Hasegawa testified she does not “exactly recall” what she discussed with J.C. about him.

[126] Dr. Hasegawa saying she does not “exactly recall” does not alter what she has said she recalls she did not say. I found her evidence to be clear and convincing and, like the evidence from the nurses, free of anything to suggest it was influenced by a bias in favour of Dr. Sparavalo.

J.C.'s Claim about Expired Medication

[127] J.C.'s evidence about expired anaesthetic, also mentioned by his mother in her evidence has been disputed by Dr. Sparavalo and Nurse Galloway. Nurse Galloway, the nurse who was present for the lumbar puncture, testified that no expired medications were used on March 18, 2015. Dr. Sparavalo explained that the nurses always check when they prepare the medication to ensure it is not expired.

J.C.'s Evidence about His Condition After the Lumbar Puncture

[128] J.C. testified to being in "a lot of pain" when he left the hospital on March 18 and says that influenced why he did not complain then about what he says was sexual touching by Dr. Sparavalo. However J.C.'s evidence about his condition was contradicted by the Medical Day Unit nurses. None of the nurses on the Unit observed J.C. to be in any medical distress when he left. Nurse Boudreau testified that she would have made a chart note if J.C. had been in any mental distress. The nurses would not have permitted J.C. to go had he required additional treatment for any post-procedure symptoms.

Unreliable Recollections about Dr. Sparavalo, the Expired Medication and Other Circumstances

[129] My determination that the recollections of J.C., his mother, and M.M. are not wholly reliable is relevant to my assessment of J.C.'s allegation that he was touched sexually.

[130] I do not accept that Dr. Sparavalo identified himself as Russian or suggested he could be called "Mr. Big." The evidence of the nurses and Dr. Hasegawa strongly undermines the claims of J.C. and B.M. that he did so. They also refute the claim that Dr. Sparavalo would have said he was an anaesthesiologist. Asked to comment on evidence that Dr. Sparavalo was described as an anaesthesiologist, Dr. Hasegawa replied: "I wouldn't have said that. I knew he wasn't an anaesthesiologist."

[131] And while there could be a kernel of explanation for why Dr. Sparavalo might be associated with Russia – he did graduate studies in Moscow – it would be wholly speculative to make that linkage. Not a single witness indicated any knowledge of this aspect of Dr. Sparavalo's resume. It is information that came out when Dr.

Sparavalo was being examined on direct at the start of his testimony. No one else mentioned recalling any connection to Russia in Dr. Sparavalo's prior history.

[132] I do not know why it is lodged in J.C.'s and B.M.'s memories that Dr. Sparavalo introduced himself as an anaesthesiologist and the big Russian doctor who could be referred to as Mr. Big but I do not accept that he did this. For me to accept this evidence I would have to be satisfied it is reliable. I am not satisfied. I find this to be an unreliable recollection.

[133] I also do not accept the evidence of J.C. and B.M. about the expired medication. Nurse Galloway, whose evidence I accept, refuted the claim that Dr. Sparavalo commented on or used an expired anaesthetic. I note that M.M. was not asked about this and gave no evidence that expired medication was utilized. I believe this is something she would have noted had it happened.

[134] There are other instances of J.C.'s recall being contradicted. J.C. says the curtain around his bed was not pulled back after the procedure. M.M. says it was and the nurses say it was standard protocol to open the curtain so the patient can be observed.

[135] And J.C. and his mother have been inconsistent in their recollections of when J.C. expressed concern about Dr. Sparavalo's touching. Did this happen in the hospital? At the Ronald MacDonald House? On the drive back to [...]? Each of these possibilities was mentioned at various times to different people.

[136] It is also of considerable concern to me that J.C. has memory issues. When testifying on cross-examination that Dr. Sparavalo was at his bedside for a considerable time post-procedure, J.C. offered that he gets "brain fog" that affects his memory. He said his multiple sclerosis affects his short-term memory.

[137] And although B.M. testified that "not that she knows of" did J.C. have memory problems in 2015, J.C.'s evidence was that in Grade 11 or 12, he passed all his exams "because of a doctor's note saying that my MS affected my academics...my memory." The evidence establishes that J.C. graduated from Grade 12 in 2015 and had been diagnosed with multiple sclerosis that spring. Therefore, at the time of the March 18 lumbar puncture, J.C.'s medical condition was affecting

his memory. This is relevant to his evidence about the touching of his penis – what that felt like and how long it lasted.

[138] It is also relevant to recognize that J.C. has acknowledged being under a great deal of stress at the time of the lumbar puncture; he was thinking that he might have [...] which was a possibility his doctors were entertaining.

*Assessing the Reliability of J.C.'s Evidence about the Touching of His Penis
by Dr. Sparavalo*

[139] As I found earlier, I accept that Dr. Sparavalo touched J.C.'s leg while he was recovering from the lumbar puncture. J.C.'s memory of this is supported by the testimony of M.M. and B.M. It is a recollection that I find is consistent with, and therefore bolstered by, the description of Dr. Sparavalo as a caring, friendly doctor with a good bed-side manner.

[140] The evidence indicates that J.C.'s perception of this touching has evolved – from a view of it as benign to a view of it as inappropriate. This is another factor I must take into account in evaluating the reliability of J.C.'s sexual assault allegation.

[141] J.C.'s evidence about his perception of Dr. Sparavalo's purpose in touching his leg was inconsistent. On direct evidence when asked how Dr. Sparavalo behaved toward him, J.C. gave this answer, indicating that the leg-rubbing was caring and comforting:

...he was extremely caring and like really good bedside manners, making sure I'm – I believe, comfortable and stuff like that. He was rubbing my side and making sure that I seemed to be okay and not like being anxious because of the procedure or anything like that. He was just making sure that I'm good and he's letting me know that it went by really well and like right away I complimented how it didn't hurt at all compared to the first one, so. He – he seemed very happy with me saying it didn't hurt and stuff like that.

[142] In cross-examination, when asked if the touching might be a form of reassurance, J.C. responded quite differently, saying: "Oh, some may see it as that. I personally found it very uncomfortable."

[143] B.M. herself perceived the touching as benign. She testified that she saw it at the time as intended to comfort and thought nothing of it. M.M. also thought nothing of the touching until J.C. told her he felt he had been sexually assaulted.

[144] J.C. and M.M. have both testified that Dr. Sparavalo went further than just touching J.C.'s leg and touched his genital area. J.C. now believes this to have been intentional. Mr. Hutchison submits this has not been established beyond a reasonable doubt.

[145] I find it is plausible that in the context of touching J.C.'s leg, Dr. Sparavalo's hand came into contact with a proximate area of J.C.'s body – his genital area. Both J.C. and M.M. testified about this. Despite my concerns with J.C.'s memory and reliability, I accept this could have happened.

[146] But I am not satisfied beyond a reasonable doubt that Dr. Sparavalo intentionally touched J.C. on his genital area or did so for a sexual purpose. I find the Crown has not established beyond a reasonable doubt that any touching of J.C.'s genital area was anything other than an unintended incidental event related to the comfort rubbing of J.C.'s leg. The high standard of proof required of the Crown is not met in this case due to what I find to have been the fleeting duration of the contact, J.C.'s fluctuating assessment of whether the touching was accidental, the close proximity of other people at the time, and what Dr. Sparavalo was doing when the contact occurred. These facts are fatal to the Crown's case and cause it to fall far short of proof beyond a reasonable doubt.

[147] J.C. has given varying accounts of how long the touching lasted. While J.C. testified that Dr. Sparavalo's hand was on his penis for 8 to 10 seconds, he acknowledged on cross-examination that he had told the police investigator, D/Cst. Jennifer Lake, that Dr. Sparavalo had his hand "on it for a second." Asked about having said this, J.C. testified this was a figure of speech and that he had not meant "a literal second." He went on to say: "I was only 17 and I am more mature now and my vocabulary has expanded."

[148] That explanation does not satisfy me that J.C. accurately recalls how long Dr. Sparavalo's hand was in contact with his pelvic region. It also suggests to me the possibility of an evolving and changing recollection.

[149] And then there is what J.C. agrees he told Dr. Hasegawa on April 16, 2015, that the touching lasted “a minute.” Dr. Hasegawa testified J.C. could not tell her the duration of the touching: she said he couldn’t tell her if it was “one second, three seconds, thirty seconds.” He told her it seemed like a long time to him.

[150] J.C.’s evidence, taken as a whole, does not provide a reliable measure of the duration of the touching.

[151] The evidence of B.M. has to be added into the analysis of the duration of the touching. B.M. saw the leg-rubbing but no touching of J.C.’s genital area. She was asked on cross-examination why she wouldn’t have seen the touching if it had happened. She responded by saying:

...I could have turned my head in that instant. I could have – all I seen was him – that – what I seen was him touching [J.C.]’s hip in that moment, comforting him, and asking him, and telling him, oh, how was it? It was good, and – and just being a couple – Now, I could’ve turned away in a second, I don’t know, but that’s what I seen was that, and when he actually touched [J.C.]’s penis, I never seen it.

[152] B.M.’s testimony supports fleeting contact. It also must be taken into account that M.M. who witnessed the leg-rubbing and had a close and direct view of J.C.’s pelvic area ultimately acknowledged having no recollection of any movement in Dr. Sparavalo’s hand. This too supports it being a transitory event. M.M.’s testimony undermines J.C.’s description of the contact involving palpation.

[153] I find there is no reliable evidence to support touching that lingered. Lingering could support an inference of intention. A transitory touch is consistent with inadvertence.

[154] J.C. has been unclear in his own mind about whether the touching of his genital area was an accident. He told D/Cst. Lake in November 2015 it could have been. Now he is much more confident it wasn’t. When asked in cross-examination about what he said to D/Cst. Lake, J.C. said, “But I did state that I don’t think it was an accident because of the way he did pulsate his hand. He wasn’t pulsating it anywhere else.” J.C. testified on cross-examination that he disagrees “personally that

it was accidental because of the grabbing motion.” He testified: “I didn’t know in the moment if it was accidental or on purpose.” He agreed he told Dr. Hasegawa that he was not sure if the touching was accidental or deliberate.

[155] According to Dr. Hasegawa J.C. told her he wasn’t sure what happened next but thought he was touched in the scrotal area. (“Scrotal” is Dr. Hasegawa’s terminology.)

[156] J.C.’s evidence strongly suggests an evolving theory of what happened. Initially J.C. wasn’t sure that Dr. Sparavalo intended to touch his genital area. Now he is certain. His view of the nature of the touching has hardened over time. That doesn’t make it reliable.

[157] I do not have confidence that J.C.’s testimony that Dr. Sparavalo “pulsated” his penis is a reliable recollection of what happened. As I have discussed, I have good reason to lack confidence in the reliability of J.C.’s recall. In addition to there being no reliable evidence that establishes touching that lingered, I am left with a doubt about the reliability of J.C.’s description of “pulsation.”

[158] J.C. testified that he was shocked by the touching of his penis. M.M. says she noted his reaction. She has also acknowledged she told D/Cst. Lake she didn’t view what had happened as being significant. And J.C.’s claim of a shocked reaction does not establish the touching was intentional. It can be a shock to experience the unintentional touching of a private area of the body. And even if J.C. was shocked the evidence establishes that he was unsure about whether the contact was accidental or not. I find that if J.C. did experience a feeling of shock it could have influenced how he came to perceive the nature of the touching.

[159] Other circumstances raise a very substantial doubt about the sexual nature of the touching. The touching alleged by J.C. occurred in the presence of J.C.’s mother, M.M. and, I find, at least one or two nurses, all in close proximity. J.C. told D/Cst. Lake there were two nurses present when Dr. Sparavalo touched his genitals. Dr. Sparavalo testified he always has a nurse present when he is providing test results to a patient (as he was here.) And, in addition to the witnesses clustered around J.C., I find the curtain around J.C.’s bed had been pulled back so that J.C. could be monitored. The unit was busy, with other patients being attended to in nearby beds.

In these circumstances it is highly improbable that any touching of a patient would be sexual in nature.

[160] Furthermore, Dr. Sparavalo knew that B.M. had a camera which she had been using to take photographs of the procedure. She was not still taking photographs while J.C. was in recovery but Dr. Sparavalo was well aware that she had the ability to do so.

[161] And there is no dispute that at the same time as the touching, Dr. Sparavalo was looking directly at J.C. and giving him after-care advice. J.C. and M.M. both testified that Dr. Sparavalo kept talking as though nothing had happened. This raises considerable doubt in my mind that Dr. Sparavalo even realized his hand had made contact with J.C.'s genital area. This evidence strongly indicates he did not.

[162] Mr. Hutchison has also pointed out that Dr. Sparavalo engaged in no inappropriate conduct with J.C. There is no evidence of him making inappropriate jokes and or engaging in inappropriate or suggestive touching.

[163] All these circumstances created a context that was inconsistent with an intentional touching of a sexual nature or for a sexual purpose. They are the circumstances of regularity and professional care: the reassurance of a patient who previously underwent a painful lumbar puncture, the emphasis on proper post-procedure care and information, and the routine monitoring of the patient's recovery.

[164] I find that Dr. Sparavalo's defence of accident, offered in the alternative if I found, despite his denial, that there had been touching, more than meets the air of reality test as required by *R. v. Gauthier*. Not only does it have a sufficient factual foundation to satisfy the air of reality test, it raises a reasonable doubt in relation to both the charge of sexual assault and the charge of sexual exploitation. An act done accidentally is an unintentional act. Unintentional touching cannot be sexual in nature or have had a sexual purpose. It is simply unintended contact with an area of the body, in this case an area of the body that was very proximate to where Dr. Sparavalo had been applying a reassuring touch to J.C.

[165] I am amply satisfied there is a reasonable doubt that Dr. Sparavalo intentionally touched J.C.'s genital area. It is unnecessary to get into the issues of consent or recklessness as to lack of consent because those issues are not in play.

(*section 265(4), Criminal Code*) The Crown has failed to prove that Dr. Sparavalo intentionally went beyond the leg touching he undertook to reassure J.C. The evidence raises a doubt that Dr. Sparavalo did anything other than comfort J.C. and in the course of doing so, unintentionally touched him, very briefly, on his blanketed and clothed genital area.

[166] Intentional touching must be proven to establish common assault, an included offence the Crown invited me to consider. As I have explained, the Crown has failed to prove beyond a reasonable doubt any touching that constituted a criminal offence. (*section 265(1)(a), Criminal Code*)

Conclusion

[167] I find I am left with a reasonable doubt about the actus reus of the sexual assault charge and the “for a sexual purpose” element of the sexual exploitation charge. Considering all the circumstances, I find the Crown has failed to prove either charge against Dr. Sparavalo beyond a reasonable doubt.

[168] On the basis of the reasons I have given, I am acquitting Dr. Sparavalo of both charges.

Derrick, PCJ