COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Logan v. Hong,*
2013 BCCA 249

Date: 20130527
Docket: CA039997

Between:

Sharon Lynn Logan

Respondent
(Plaintiff)

And

Dermatech, Intradermal Distribution Inc. and Vivier Pharma Inc.

Respondents
(Defendants)

And

Dr. Harlow Hollis

Respondent
(Third Party)

And

Dr. Chih-Ho Hong, Dr. Mark Lupin, Dr. Gidon Frame, Dr. Giles Raymond Dr. Marilena Marignani, Dr. J. Alastair Carruthers, Dr. A.P. Lockwood, Dr. Hercules Duvel, Dr. Barry Lycka, Dr. John Curry, Dr. Cam Hahn Nguyen, Dr. David Jordan, Dr. Linda Ptito, Dr. Ian Landells, Dr. Gail Nield, Dr. Frances Jang, Dr. James Oestricher, Dr. Peter Vignjevic, Dr. Patricia Teal, Dr. Jean Boulanger, Dr. Kevin Smith, Dr. Nicholas Morison, Dr. Cameron Bakala, Dr. Linda Tietze, Dr. Zigurts Strauts, Dr. Martyn Chilvers, Dr. Scott Barr, Dr. Richard Kelly, Dr. Michael Kreidstein, Dr. William Middleton, Dr. Thomas Nakatsui, Dr. Robert Sleightholm, Dr. Marc Dupere, Dr. Louise Grondin, Dr. John Bartlett, Dr. Christine Roy, Dr. Lilliane Wouters, Dr. Ronald Young, Dr. Eric Einsenberg, Dr. Michel Roy, Dr. Rossana Arcega, Dr. Patricia Berbari, Dr. Jacques Charbonneau, Dr. Bruno Mastropasqua, Dr. Stephanie Morin, Dr. Robert Mulholland, Dr. Sharyn Laughlin, Dr. Tarik Ali Farooq, Dr. Mark Sunderland, Dr. David A.F. Ellis, Dr. David Bridgeo, Dr. Janis Campbell, Dr. Parminder Sandhu, Dr. Robert P. Thompson, Dr. Ross C. Horton, Dr. Mario Bernier, Dr. Gregory P. Antoniak, Dr. Fersada B. Bajramovic, Dr. Peter Brownrigg, Dr. Eric Pugash, Dr. Robert Peers, and Dr. B. Kent Remington

Appellants
(Application Respondents)

Corrected Judgment: Page 2 was corrected on May 29, 2013.

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Groberman
The Honourable Madam Justice A. MacKenzie

On appeal from: Supreme Court of British Columbia, May 9, 2012
(*Logan v. Dermatech*, Vancouver Docket No. S090937)

Counsel for the Appellants:	W. Branch D. Lebans
Counsel for the Respondent, S. Logan:	D. Rosenberg, Q.C. G. Kosakoski
Counsel for the Respondents, Dermatech, Intradermal Distribution Inc. and Vivier Pharma Inc.:	J. Vamplew L. Leung
No One Appearing for the Respondent, Dr. Hollis:	
Place and Date of Hearing:	Vancouver, British Columbia February 5, 2013
Place and Date of Judgment:	Vancouver, British Columbia May 27, 2013

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Madam Justice A. MacKenzie

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] The order appealed requires doctors who are not party to this litigation to provide to the plaintiff names, addresses and contact information of patients to whom they have administered injections of a product manufactured by the defendants. The object of the order is to facilitate notice of a class action to persons who may be members of the class, thereby to provide those residing in British Columbia the opportunity to opt out, and those residing outside British Columbia the opportunity to opt in.

[2] This order trenches upon the privacy interests of patients deriving from the physician-patient relationship. This appeal focuses upon the legal propriety of that interference.

[3] The class action is for damages for deleterious physical effects allegedly suffered by patients who received injections of product manufactured or distributed by the corporate respondents. The action has been certified as a class action under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, and the class has been defined as:

> All persons who were injected with Dermalive in Canada and who thereafter developed granulomas in the area injected with Dermalive.

[4] The question upon certification became how the plaintiff Ms. Logan would notify class members of the proceeding. She proposed that notice be provided by a direct mailing to persons who had been injected with Dermalive, and to facilitate that mailing, sought an order requiring a very large number of physicians in Canada who may have injected patients with Dermalive to provide her counsel with the names, addresses and other contact information of those injected patients. This was said by counsel for the plaintiff to be the most efficient way to give the notice.

[5] The doctors who were the subjects of the application appeared before the judge as application respondents. Over their objection, Mr. Justice Sewell ordered the physicians to provide the information concerning these patients to counsel for the plaintiff, as requested.

[6] Madam Justice Ryan, in 2012 BCCA 399, gave leave to appeal the order on the grounds that:

> 1. by positively compelling the physicians and clinics to search for and provide confidential patient information to Class counsel, the Order (a) shifts the burden and cost of notice onto physicians and clinics who are not parties to the action and whose conduct is not impugned in any way, and (b) is contrary to prior authority that adopts a cooperative approach to non-party assistance with notice and thereby more fairly balances the interests of all persons concerned;
>
> 2. the mandatory production of information from non-parties required by the Order (a) is not expressly authorized by the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "*CPA*"), or, alternatively, is an unreasonable exercise of any discretion in the *CPA* as it fails to give proper weight to all relevant considerations, and (b) does not accord with the process found in the *Supreme Court Civil Rules* for compelling non-parties to provide material evidence;
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> 3. the Order is overly broad in that (a) the vast majority of confidential patient information that must be provided to Class counsel belongs to individuals who are not members of the Class, and (b) it assumes that the court below has proper jurisdiction over all the affected physicians and clinics, even those outside of British Columbia; and
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> 4. the terms of the Order are not sufficiently clear and specific, given the mandatory nature of the relief granted, and are potentially impossible to satisfy.
>
> [Emphasis in original.]

[7] It appears the order was made under either Rule 7-1(18) of the *Supreme Court Civil Rules*, or the inherent jurisdiction of the Supreme Court of British Columbia. Rule 7-1(18) provides:

> If a document is in the possession or control of a person who is not a party of record, the court, on an application under Rule 8-1 brought on notice to the person and the parties of record, may make an order for one or both of the following:
>
> (a) production, inspection and copying of the document;
>
> (b) preparation of a certified copy that may be used instead of the original.
>
> [Emphasis added.]

[8] While I question whether Rule 7-1(18) applies, as it is directed to existing documents and not to production of a new document, I assume for the purposes of the appeal that the order was available to the learned judge.

[9] Whatever may be the source of authority for the making of the order, it is clear it was made in the management by the trial court of its own processes and involves the exercise of discretion. Accordingly, this court must approach the appeal with the requisite deference. It is well known that we may interfere with an order made in the exercise of discretion only if we consider the judge did not give weight to all relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, 96 D.L.R. (3d) 14; and *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6. An error of principle, by definition, fits within the test established for interference with such an order.

[10] Although the appeal raises issues of impermissible transfer of costs to non-party physicians, and the jurisdiction of the court to order physicians outside British Columbia to provide information, those issues were not advanced before the judge, have not been addressed by him, and should not be resolved on this appeal. This is particularly so, in my view, because I consider the appeal should be allowed on the basis the order impermissibly pierces the physician-patient relationship in circumstances that do not meet the high test for such interference.

[11] Laudable as the plaintiff's intention may be to seek redress for persons who may have a claim to compensation for deleterious consequences from this medical treatment, such generous intention does not justify, in my view, the invasion of privacy that is inherent in dipping into the physician-patient relationship to discover the names, addresses, and contact information of persons who received this treatment. Each patient is entitled to maintenance of the confidentiality implicit in his or her attendance in a physician's examining room and protection of his or her privacy on a personal matter, absent serious concerns relating to health or safety, or express legislative provisions compelling release of the information in the public interest. In my view, the judge erred in principle by elevating the purposes of the *Class Proceedings Act* and the search for legal redress above the fundamental principle of confidentiality that adheres, for the benefit of the community, to the physician-patient relationship.

[12] Although the judge observed that the order does not require disclosure of the medical records, this does not appear to me to be a helpful distinction. The order discloses the fact of a particular medical treatment, in addition to the address and contact information, all of which the patient may choose not to broadcast. Further, it matters not, in my view, the nature of the medical treatment. Here the treatment in issue is a cosmetic one, but the applicable principle protects patients in that situation just as it would were the treatment for mental health issues, sexual and procreative issues, or any of the myriad of medical issues of a more general nature.

[13] The special place of confidentiality in the physician-patient relationship is of long standing. In *Halls v. Mitchell*, [1928] S.C.R. 125, the Supreme Court of Canada commented upon the duty of secrecy owed to a patient, affirming that the patient's right of confidentiality is superseded only by issues of paramount importance. Mr. Justice Duff, for the majority, described this principle at 136:

> We are not required, for the purposes of this appeal, to attempt to state with any sort of precision the limits of the obligation of secrecy which rests upon the medical practitioner in relation to professional secrets acquired by him in the course of his practice. Nobody would dispute that a secret so acquired is the secret of the patient, and, normally, is under his control, and not under that of the doctor. *Prima facie*, the patient has the right to require that the secret shall not be divulged; and that right is absolute, unless there is some paramount reason which overrides it. Such reasons may arise, no doubt, from the existence of facts which bring into play overpowering considerations connected with public justice; and there may be cases in which reasons connected with the safety of individuals or of the public, physical or moral, would be sufficiently cogent to supersede or qualify the obligations *prima facie* imposed by the confidential relation.
>
> [Emphasis added.]

[14] And, at 138:

> It is, perhaps, not easy to exaggerate the value attached by the community as a whole to the existence of a competently trained and honourable medical profession; and it is just as important that patients, in consulting a physician, shall feel that they may impart the facts touching their bodily health, without fear that their confidence may be abused to their disadvantage. ...
>
> [Emphasis added.]

[15] More recently, the Supreme Court of Canada, referring to *Halls*, restated the significance of confidentiality to the physician-patient relationship in *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, 93 D.L.R. (4th) 415, discussing at 148 a patient's right to access to medical records:

> When a patient approaches a physician for health care, he or she discloses sensitive information concerning personal aspects of his or her life. The patient may also bring into the relationship information relating to work done by other medical professionals. The policy statement of the Canadian Medical Association cited earlier indicates that a physician cannot obtain access to this information without the patient's consent or a court order. Thus, at least in part, medical records contain information about the patient revealed by the patient, and information that is acquired and recorded on behalf of the patient. Of primary significance is the fact that the records consist of information that is highly private and personal to the individual. It is information that goes to the personal integrity and autonomy of the patient. As counsel for the respondent put it in oral argument: "[The respondent] wanted access to information on her body, the body of Mrs. MacDonald." In *R. v. Dyment*, [1988] 2 S.C.R. 417, at p. 429, I noted that such information remains in a fundamental sense one's own, for the individual to communicate or retain as he or she sees fit. Support for this view can be found in *Halls v. Mitchell*, [1928] S.C.R. 125, at p. 136. There Duff J. held that professional secrets acquired from a patient by a physician in the course of his or her practice are the patient's secrets and, normally, are under the patient's control. In sum, an individual may decide to make personal information available to others to obtain certain benefits such as medical advice and treatment. Nevertheless, as stated in the report of the Task Force on *Privacy and Computers* (1972), at p. 14, he or she has a "basic and continuing interest in what happens to this information, and in controlling access to it."
>
> [Emphasis added.]

[16] Whether referred to as secrecy, personal autonomy, confidentiality, or privacy, the patient's interest in protecting information of his or her medical treatment is reflected in the Code of Ethics of the Canadian Medical Association under the heading *Fundamental Responsibilities*:

> Privacy and Confidentiality
>
> 31. Protect the personal heath information of your patients.
>
> ...
>
> 35. Disclose your patients' personal health information to third parties only with their consent, or as provided for by law, such as when the maintenance of confidentiality would result in a significant risk of substantial harm to others or, in the case of incompetent patients, to the patients themselves. In such

> cases take all reasonable steps to inform the patients that the usual requirements for confidentiality will be breached.

[17] Although the case for the appellants is enhanced by the feature, commented upon by Madam Justice Ryan in her reasons for judgment giving leave, that nearly 95% of the patients whose names are expected to be produced under the order will not be members of the class, I would form the same conclusion were the proportion of potential class members to non-class members reversed.

[18] The value of redress through the justice system is significant. However, in my respectful view, one cannot say that recovery of money trumps the rights of the patient to keep private both the nature of medical services received and contact information held by the physician.

[19] We were referred to several cases in which, it is said, orders akin to the one in issue before us were made: *Hoy v. Medtronic Inc.*, 2002 BCSC 1551; *Dalhuisen v. Maxim's Bakery Ltd.,* 2002 BCSC 1146, 4 B.C.L.R. (4th) 196; *Farkas v. Sunnybrook & Women's College Health Sciences Centre*, [2004] O.J. No. 5134 (S.Ct.J.); and *Dominguez v. Northland Properties Corporation*, 2012 BCSC 328.

[20] None of these cases, in my view, involve an order similar to the one before us, and so it is not necessary to consider whether they reflect an accurate view of the principle of privacy engaged by the circumstances.

[21] *Hoy* concerns an action against a manufacturer in respect to defective pacemaker leads. The notice of the class proceeding was sent, in envelopes with the defendants' return address, to doctors and clinics asking them to forward the notice to individuals who may have been implanted with the pacemaker in issue. The doctors and clinics were under no compulsion to do so. A certain number of the letters were returned to the defendants as non-deliverable. In ordering the defendants to provide the names of those addressees and the ineffective addresses, Madam Justice Kirkpatrick observed that the defendants had no doctor-patient relationship with the addressees engaging confidentiality.

[22] In *Dalhuisen,* Mr. Justice Burnyeat ordered the B.C. Centre for Disease Control to provide the names and last known addresses of 48 people who had suffered salmonella enteritidis infection from eating products baked at the defendant's bakery. All 48 people were members of the class, and their names had already been forwarded to the B.C. Centre for Disease Control in the interest of public safety. Accordingly, unlike this case, there was legislation before the judge, the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, that provided for release of information from a public body. The judge concluded that in the circumstances known to him, the information sought was available under that statute.

[23] Nor, in my view, does the Ontario trial decision in *Farkas* provide guidance. The decision itself provides little information. What is clear, however, is that the case concerns information of persons coming within the class, held by a defendant. It is not clear that the case engages physician-patient privilege, and it appears to have turned on the duty of class counsel under the applicable Ontario legislation.

[24] The fourth case, *Dominguez*, concerns information in a claim against an employer in respect to terms and conditions of employment of temporary foreign workers. The information required was held by the defendant, was in respect to class members only, and did not engage the high confidentiality aspects inherent in the physician-patient relationship.

[25] I conclude that, giving full weight to the principle of privacy and confidentiality inherent in the physician-patient relationship, the limited circumstances that call for breaching the patients' privacy are not present here.

[26] In conclusion, I would allow the appeal and set aside the order.

"The Honourable Madam Justice Saunders"

I Agree:

"The Honourable Mr. Justice Groberman"

I Agree:

"The Honourable Madam Justice A. MacKenzie"