SUPREME COURT OF NOVA SCOTIA
Citation: *Gibbons Estate v. Forbes*, 2017 NSSC 266

Date: 2017-09-12
Docket: Hfx, No. 460428
Registry: Halifax

Between:

Monica Gibbons through the Estate of Darrell Gibbons, pursuant to the **Fatal Injuries Act**, RSNS c. 163, as amended, and the **Survival of Actions Act**, RSNS., c. 453, as amended, and Cindy Prince

Plaintiffs

v.

Leanne Forbes, Maria Bailey, Angie Cameron and Geoffrey Ryan

Defendants

Decision: Motion to Require Production by a Non-party

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	September 12, 2017, in Halifax, Nova Scotia
Written Decision:	October 11, 2017
Counsel:	Jeff Mitchell, for the plaintiffs Kyla Russell and Sarah-Jo Briand, for the defendants Scott Sterns, Counsel for Nova Scotia College of Pharmacists

By the Court:

[1] Darrell Gibbons died on December 3, 2015. An amended notice of action was filed April 7, 2017, in which it is alleged that the defendants are liable to the plaintiffs as a consequence of the defendants' professional negligence in the performance of their duties as pharmacists in relation to the medical treatment of Mr. Gibbons.

[2] The defendants are regulated in their profession by the Nova Scotia College of Pharmacists acting under the authority of the **Pharmacy Act** S.N.S. 2011, c. 11 (the Act). Monica Gibbons, daughter of the deceased Darrell Gibbons, filed a complaint with the College alleging professional misconduct by the defendants in their management of Mr. Gibbon's medications, and that his death was caused by their negligence.

[3] The Investigation Committee rendered decisions in relation to all four of the defendants. Those decisions were attached as exhibits to Mr. Mitchell's affidavit. At the beginning of today's hearing, I posed the question as to whether the decisions were admissible. I heard submissions and concluded that under section 40(4) of the Act, the decisions were not admissible in this proceeding, and so they do not form part of my considerations.

[4] The current motion assumes that during the course of its review the investigative arm of the College collected or created certain documents relevant to the complaint and which the plaintiff views as also relevant to this claim. The College does not take an adverse position to the motion and it has agreed to release any of Mr. Gibbons' "medical records" that the College has in its possession. However, it has refused to produce the remaining sought after documents, saying that the governing statute bars such disclosure.

[5] The defendants support the College's position that disclosure is statute barred. They add, as an alternative submission, that the information sought is subject to settlement privilege and not disclosable. In the final alternative, the defendants submit that any court ordered disclosure of the information be accompanied by strict conditions to ensure that the stipulations of the Act that favor confidentiality of the information are honored to the maximum extent possible.

Materials sought

[6] The plaintiff requests the following:

(a) The complaint(s) made to the College or (sic) any Defendants with respect to the injury or death of Darrell Gibbons;

(b) Any and all medical information pertaining to Darrell Gibbons (already agreed to be released);

(c) Any and all correspondence and reports by assessors, reviewers, experts, or other persons engaged to assess, review, consider or comment on the merits of the complaint or suitability of treatment by the Defendant(s) provided to Mr. Gibbons; and

(d) Any and all correspondence between the College and the Gibbons family, or any other person to whom information regarding the proceeding, its contents or its result, was given.

Civil Procedure Rules

[7] **Rule 14.08** instructs litigants that: "Making full disclosure of relevant documents, electronic information, and other things is presumed to be necessary for justice in a proceeding."

[8] The test of relevancy is described in **Rule 14.01**. Cases interpreting this provision describe it is a "trial relevancy" test. *See*, *Laushway v. Messervey* 2014 NSCA 7 at paras. 45-50 for a discussion of the Rule. I note, in particular, the appellate court's citation with approval of Justice Wood's comments in S*aturley v. CIBC World Markets Inc.*, 2012 NSSC 57 where it is stated:

> [9] In my view, the Court should take a somewhat more liberal view of the scope of relevance in the context of disclosure than it might at trial. This is subject, of course, to concerns with respect to confidentiality, privilege, cost of production, timing and probative value.
>
> [10] At the disclosure and discovery stage of litigation, it is better to err on the side of requiring disclosure of material that, with the benefit of hindsight, is determined to be irrelevant rather than refusing disclosure of material that subsequently appears to have been relevant. In the latter situation, there is a risk that the fairness of the trial could be adversely affected.

[9] The Appeal Court, in *Laushway*, offered guidance to the trial courts in making these assessments:

86 If it would assist trial judges in the exercise of their discretion when considering whether or not to grant production orders in cases like this one, let me suggest that their inquiry might focus on the following questions. They would supplement the guidance already contained in the **Rules**. The list I have prepared is by no means static and is not intended to be exhaustive. No doubt the points I have included will be refined and improved over time, and adjusted to suit the circumstances of any given case:

1. Connection: What is the nature of the claim and how do the issues and circumstances relate to the information sought to be produced?

2. Proximity: How close is the connection between the sought-after information, and the matters that are in dispute? Demonstrating that there is a close connection would weigh in favour of its compelled disclosure; whereas a distant connection would weigh against its forced production;

3. Discoverability: What are the prospects that the sought-after information will be discoverable in the ordered search? A reasonable prospect or chance that it can be discovered will weigh in favour of its compelled disclosure.

4. Reliability: What are the prospects that if the sought-after information is discovered, the data will be reliable (for example, has not been adulterated by other unidentified non-party users)?

5. Proportionality: Will the anticipated time and expense required to discover the sought-after information be reasonable having regard to the importance of the sought-after information to the issues in dispute?

6. Alternative Measures: Are there other, less intrusive means available to the applicant, to obtain the sought-after information?

7. Privacy: What safeguards have been put in place to ensure that the legitimate privacy interests of anyone affected by the sought-after order will be protected?

8. Balancing: What is the result when one weighs the privacy interests of the individual; the public interest in the search for truth; fairness to the litigants who have engaged the court's process; and the court's responsibility to ensure effective management of time and resources?

9. Objectivity: Will the proposed analysis of the information be conducted by an independent and duly qualified third party expert?

10. Limits: What terms and conditions ought to be contained in the production order to achieve the object of the Rules which is to ensure the just, speedy and inexpensive determination of every proceeding?

87 It goes without saying that some of these same points may arise at trial when the judge may again be faced with challenges related to the relevance and

> reliability of the evidence. It is hoped that these suggested points for inquiry will enable trial judges to take a flexible approach when fashioning production orders containing terms and conditions which will best suit the circumstances of any given case.

Is the information relevant?

[10] Each party has referred to the ten points set out above when putting forth their respective positions. Before turning to those submissions, it is necessary to look at the pleadings and identify those issues to which the sought after information may be relevant.

[11] The statement of claim avers that Mr. Gibbons was prescribed methadone and naltrexone, but that the defendants failed to dispense the naltrexone (paras.10 and 11). Mr. Gibbons died of methadone intoxication (para. 14). The negligent acts are alleged to have caused or materially contributed to Mr. Gibbons' death, thus causing compensable damage to the plaintiffs.

[12] The pharmacists are alleged to have failed, (and I paraphrase from paras. 15 and 16 of the amended claim):

- to recognize a drug interaction that put Mr. Gibbons at risk;
- to adequately consult with the prescribing physician to discuss the issue of dispensing only the methadone;
- to adequately counsel Mr. Gibbons as to the proper use of the medication and of the risks of not taking the naltrexone;
- to properly monitor his use of the medication;
- to adhere to the provisions of the **Pharmacy Act**, the **Pharmacy Practice Regulations** and the **Standards of Practice**.

[13] The Statement of Defence admits that the defendants are pharmacists and that they did dispense methadone but not naltrexone in the days immediately preceding Mr. Gibbons' death. They admit his death and the date thereof. They deny the specifics of the alleged negligence and state, as facts, information that is contrary to those set out in the claim that speak to the interactions between themselves, the deceased, and his family about the dispensing and administration of Mr. Gibbons' medications.

[14] In my view, it is apparent that at least some of the information sought is relevant to the claim. e.g., the defendants' statements provided to the Investigation Committee would reasonably be expected to be part of the file, and provide the defendants' responses to the questions surrounding their respective conduct in the dispensing of medication to Mr. Gibbons. Some of the requested information is available to the plaintiffs through other sources e.g., correspondence and communications between the plaintiffs and the College. Some of the information is unlikely to be relevant. e.g., investigator opinions.

[15] It is not in the interests of time today to consider the relevance question in greater detail, since the overriding question is whether the College is statutorily required to refuse production of what would otherwise be relevant information subject to production.

Pharmacy Act

[16] Counsel for the College and the defendants have referred the Court to sections 40 and 41 of the **Pharmacy Act** as the statutory basis upon which the refusal to produce is mandated. Those sections read:

> Confidentiality
>
> 40 (1) All complaints received or under investigation, all information gathered in the course of the professional accountability process and all proceedings and decisions of the Investigation Committee, the Fitness to Practise Committee, the Hearing Committee, the Registration Appeals Committee and the Reinstatement Committee that are not open to or available to the public in accordance with this Act or the regulations must be kept confidential by anyone who possesses the information.
>
> (2) Notwithstanding subsection (1), where it is consistent with the purpose of the College,
>
> (a) the Registrar shall, on the recommendation of a statutory committee, disclose any information about possible criminal activity on the part of a registrant that is obtained during an investigation pursuant to this Act to a law enforcement agency;
>
> (b) a statutory committee may authorize the Registrar to release specific information to a specific person, including the regulatory authority of another health professional, if the committee considers it to be in the public interest to do so;
>
> (c) the Registrar may disclose information with respect to a complaint or a matter before the Fitness to Practise Committee to another

> pharmacy regulatory body if it is relevant and concerns the fitness of the registrant for membership in that other pharmacy regulatory body;
>
> (d) the Registrar shall inform the manager of the pharmacy that employs the registrant, or the owner if the manager is the subject of the complaint, of the fact of and content of any complaint, and of the resolution of the complaint; and
>
> (e) the Registrar may disclose information with respect to a complaint for purpose of administration of this Act or to comply with the purpose of the College.
>
> (3) Any patient record or patient information disclosed to the College is subject to the same provisions respecting confidentiality and non-disclosure set out in this Act as if the information continued to be held by the registrant or pharmacy.
>
> (4) A decision of the Investigation Committee or the Hearing Committee is not admissible in a civil proceeding other than an appeal or a review pursuant to this Act. 2011, c. 11, s. 40.
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> Non-compellability
>
> 41 (1) A witness in any legal proceeding, whether a party to the proceeding or not, shall not answer any question as to any proceedings of a statutory committee, and shall not produce any report, statement, memorandum, recommendation, document or information prepared for the purpose of the professional accountability process, including any information gathered in the course of an investigation or produced for a statutory committee.
>
> (2) Subsection (1) does not apply to documents or records that have been made available to the public by the College.
>
> (3) Information disclosed pursuant to Section 40 is deemed not to have been made available to the public, and the provisions respecting confidentiality and non-disclosure set out in this Act continue to apply. 2011, c. 11, s. 41.

[17] While I find that the wording of sections 40 and 41 is, in some respects, less clear than it could be, I am satisfied that when read together these sections express a clear legislative intent to prohibit the release of materials gathered by the Investigative Committee, except in very limited circumstances, which do not exist in this case.

[18] Section 41(3) of the Act deems any disclosure under section 40 not to be made to the public and preserves the confidentiality of that information. Section 41(1) is clear that the testimony of witnesses and production of documents from the investigative process will not be admitted in a legal proceeding.

[19] There is no express authority for the Court to order disclosure of that confidential information, in the face of the statutory prohibition.

[20] One may speculate as to the reasons for these provisions.

[21] Statutorily prescribed disciplinary processes of some other regulated professions in Nova Scotia contain similar provisions for confidentiality. This may reflect a policy decision that the public interest is best served by ensuring the complete cooperation of the regulated professional when responding to the particular concerns that the regulator is focused on. These concerns may or may not overlap with those of a plaintiff in a legal proceeding.

[22] This case may be an example of the concern underlying the statutory protection. The plaintiffs filed a complaint based upon the same factual underpinning that gives rise to the claim against the pharmacists. They now seek to use the regulator's investigative materials to advance their claim. It could result in the use of the regulated professional's information, provided to the disciplinary authority, to further the litigation against that professional.

[23] The public interest is served by ensuring that the investigative process fulfills the accountability objectives included in the **Pharmacy Act**, *see* s. 39. Therefore, it is in the public interest for the regulator to obtain complete and candid information from the professional who is subject to a complaint. One can see the potentially chilling effect on the investigative process if the regulated professional feared that their statements to the regulator could be used to initiate or advance a civil claim against them.

[24] The Act does create certain exceptions. Section 40 permits the release of otherwise confidential information in limited circumstances. Subsections 40(2)(b) and (e) would seem to apply to the information sought in this case:

> (b) a statutory committee may authorize the Registrar to release specific information to a specific person, including the regulatory authority of another health professional, if the committee considers it to be in the public interest to do so; and
>
> ...
>
> (e) the Registrar may disclose information with respect to a complaint for purpose of administration of this Act or to comply with the purpose of the College.

[25] Thus, the College through a "statutory committee" or the Registrar (depending on the facts) can release information if the pre-conditions of (b) or (e) are met.

[26] In this respect, I take the position of the College to be that the release of the requested information is barred by statute, and that the College decided that these exceptions were not satisfied in relation to the material it has refused to produce.

[27] Whether the College can be compelled to produce the information under (b) and (e) , in spite of their current view, is not before me. That is, whether the College properly exercised (or failed to exercise) its discretion to release the information is not an issue I have to resolve. I would not speculate on the likelihood of success of such a review.

Conclusion

[28] I am satisfied that the legislation is structured as the College and the defendants suggest. It does constitute a bar to the release of the requested information, other than that information the College had previously agreed to produce.

[29] The plaintiffs' motion pursuant to **Rule 14.12** is denied.

[30] It is unnecessary to consider alternative arguments presented by the defendants and the College.

Costs

[31] No costs have been requested. Each party will bear their own.

Duncan J.