IN FACT AND IN LAW

Professional Liability Law

June 2005

Access to Medical Record -

The Principle of Relevance and the Extent of Disclosure

By Odette Jobin-Laberge

On May 20, 2005, the Supreme Court issued its judgment in the Smith & Nephew Inc. *v.* Louise Glegg *and* Christopher Carter and Gilles Dextradeur *v.* Louise Glegg *cases*[1]. *The Supreme Court recognized that a Plaintiff who raises the issue of his or her own state of health tacitly waives the right to invoke the duty of professional secrecy of the practitioners he or she consulted; the Court also addressed the issue of the scope and limits of such waiver in the context of disclosure of evidence prior to a trial. A flexible relevance rule must be applied. In the event of a dispute respecting such relevance, the Court proposed various mechanisms to deal with it.*

The Facts

Ms. Glegg fell off a bicycle and fractured her right femur and her hip. After she was taken to a hospital, Dr. Carter, an orthopaedic surgeon, performed a surgical reduction of the fracture. As part of the procedure, he inserted a metal implant manufactured by Smith & Nephew. Dr. Carter conducted the medical follow-up that is normal in such cases. However, on or about May 26, 1997, Ms. Glegg consulted another orthopaedic surgeon, Dr. Dextradeur, about pain she was suffering in her foot. Eighteen months later, after confirming the consolidation of the fracture, Dr. Carter performed a second operation to remove the implant.

Ms. Glegg complained of a personal inability to tolerate certain components of the implant and claimed $4,655,000, including $2,000,000 for pain and suffering, shock, nervousness and loss of enjoyment of life on the grounds that the allergic reactions left her disabled and allegedly triggered a reactive depression.

Ms. Glegg claimed that the physicians were liable for failing to foresee, diagnose or treat the allergic reactions caused by the implant and provide her with sufficient information about the implant's characteristics. She also claimed that the manufacturer was liable for the alleged dangerousness of its product and its failure to provide information respecting the risks involved in its use.

After the action was served, counsel for the appellants followed the usual procedures of requesting the production of documents and holding examinations on discovery. During an examination on discovery of Ms. Glegg held in April 2002, they learned that one of the allergists she consulted had advised her to consult a psychiatrist respecting the hypersensitivity she had experienced and her resulting depression. Ms. Glegg confirmed that she had consulted Dr. Gawlik approximately 40 times between November 1999 and November 2000 but she opposed the production of the psychiatric record.

However, Ms. Glegg agreed to meet with the appellants' expert psychiatrist, who concluded that Dr. Gawlik's record would be relevant to and useful for the purpose of assessing her condition and forming an expert opinion on the subject. After a new request was made to Ms. Glegg's lawyers, she persisted in opposing the disclosure of her record. The objection was thereafter argued before a judge in chambers.

LAVERY, DE BILLY

BARRISTERS AND SOLICITORS

[1] 2005 S.C.R. 31

The Superior Court's Judgment

The parties initially appeared in the judge's chambers on February 25, 2003 but Ms. Glegg's lawyer did not have the record in his possession and stated that he was unaware of its contents. The trial judge therefore ordered him to return two days later, on February 27, 2003, and bring with him the boxes of documents he had received from his predecessor, especially Dr. Gawlik's reports or notes. The second hearing was held as scheduled on February 27, 2003. Ms. Glegg's lawyer then indicated to the judge that he had instructions from his client to oppose the disclosure of any other document concerning Dr. Gawlik. In view of the absence of adequate answers respecting the grounds for opposing the disclosure, the first judge dismissed the objection.

The Appeal Judgment

Ms. Glegg appealed the decision.

Baudouin J., speaking for the Court, acknowledged the existence of an implicit waiver rule and held that the record was probably relevant in the case. He nevertheless was of the view that the trial judge could not rule on the issue without carrying out a specific review. He therefore referred the case back to the Superior Court for it to determine, after hearing both sides and *in camera* if necessary, which parts of the psychiatric record were relevant and should be disclosed. The judgment stressed the importance of the physician's duty of professional secrecy, particularly in the field of psychiatry. Baudouin J. was of the view that *Frenette v. Metropolitain Life Insurance Co.*[2] was not decisive and that the Supreme Court's decision in *M. (A.) v. Ryan*[3] now gives greater weight to the right of privacy and imposes a more onerous burden on someone wishing to gain access to a patient's psychiatric record. The Court of Appeal also criticized the approach adopted by the physician and the manufacturer in resolving the issue of access to the psychiatric record, namely through challenging an objection, suggesting that it would have been more appropriate to handle the matter by introducing a motion under article 402.1 C.C.P.

The Supreme Court Judgment

LeBel J. pointed out that all professionals are bound to keep information they receive in the course of discharging their professional duties confidential, under sections 42 of the *Medical Act*[4] and 9 of the *Charter of human rights and freedoms*[5]. He considered that the case at bar not only involved the application of professional secrecy itself, but also the issue of competing interests. However, as important as professional secrecy may be, it is not absolute and the disclosure of confidential information may be required to protect competing interests.

The Waiver

An express waiver respecting professional secrecy poses no difficulty whatsoever. Although an implied waiver cannot be presumed, the courts and commentators have acknowledged this form of waiver and given effect to it. Such a waiver is inferred from the actions of the holder of the right that are inconsistent with an intent to maintain professional secrecy. LeBel J. noted that Quebec decisions on this subject have been consistent and apply in favour of both the physicians and the manufacturer of the prosthesis. By bringing an action against the physicians and the manufacturer whereby she claimed psychological damages, Ms. Glegg thus consented to having questions that would be very private in nature discussed in court or at the preliminary stage of readying the case for trial.

LeBel J., while stating that the nature of the interests at stake brought into play a principle that has a moderating effect on the evidentiary process, nevertheless specified that the *Frenette* case never established the principle that an express or implied waiver authorized unlimited and uncontrolled access to a patient's medical record. An examination on discovery facilitates the disclosure of evidence to ensure that trials are conducted fairly and efficiently. It enables a litigant to clarify the bases of the claim against him or her, assess the quality of the evidence and determine the appropriateness of carrying on with the defence or at least better define its framework. **He therefore confirmed that access to relevant evidence inevitably remains part and parcel of the right of a defendant to prepare and put forward a full answer and defence.**

The Relevancy Rule

Where the relevance of proposed evidence is challenged, the judge decides and, in so doing, must give a wide interpretation to the concept of relevance. According to LeBel J.:

> **"23 (. . .) the concept of relevance is interpreted broadly. Being relevant means being useful for the conduct of an action, as Proulx J.A. noted in a case concerning the disclosure of a written document:**

[2] [1992] 1 S.C.R. 647
[3] [1997] 1 S.C.R. 157
[4] R.S.Q. c. M-9
[5] R.S.Q. c. C-26

Odette Jobin-Laberge
514 877-2919
Insurance Law

[translation] ". . . the defendant must satisfy the court not that the evidence is relevant in the traditional sense of the word in the context of a trial, but that disclosure of the document will be useful, is appropriate, is likely to contribute to advancing the debate and is based on an acceptable objective that he or she seeks to attain in the case, and that the document to be disclosed is related to the dispute ..."[6]

LeBel J. considered that this legal framework applies to Québec. The Supreme Court, by setting out specific rules in the *Ryan* case, never intended to set such framework aside or modify it. The *Ryan* case introduced developments into the common law in an area where, unlike the Quebec law of evidence, it recognizes only a few "class" privileges encompassing an entire class of situations. Common law precedents are more or less relevant in Quebec, since Quebec law has its own rules on the subject.

The Burden of Proof

The relevance criteria, within the meaning ascribed to it by Quebec case law, requires that the importance of the right to privacy be taken into account. It requires the party seeking access to the information to establish the **apparent relevance** of the requested information to the exploration of the merits of the case and the conduct of the defence. In assessing the impact of disclosure, it must be kept in mind that it is sought in the context of the examination on discovery, a stage at which the parties are under an implied obligation of confidentiality both under the *Lac d'Amiante* case[7] and the Rules of Practice of the Superior Court.

In the case under review, the physicians and the manufacturer had demonstrated the relevance of the information they sought and the existence of an implied waiver; Ms. Glegg's failure to explain the basis of her objection and demonstrate why the documents sought should not be produced caused her objection to be dismissed. She had the burden to make the judge aware of the scope of her objection and to determine how it would be argued before him to allow him to rule on it with full knowledge of the facts.

The Procedural Rules

Various procedural avenues are proposed to deal with an objection pertaining to secrecy and relevance and avoid the premature or unnecessary disclosure of confidential information, while enabling the judge to obtain adequate information on the nature of the dispute and guide the proceedings on the issue.

LeBel J. proposed the following procedure:

- The judge may require the party making the objection to file an affidavit explaining the basis for the objection and listing and describing the documents at issue.
- He could then review the evidence in private, without the parties being present.
- The judge could also order that the documents be disclosed subject to the obligations of confidentiality that would apply at this stage of the proceedings.
- He could also order counsel not to disclose the documents to third parties or to the parties themselves.

LeBel J. concluded that, in the Glegg matter, the Court of Appeal could not, at that stage of the proceedings, impose as heavy a burden on the appellants, who had already demonstrated the apparent relevance of the requested information; Ms. Glegg's unjustified refusal was insufficient. LeBel J. refrained from ruling on specific objections that may eventually be raised; if such objections were to be made, he said that they would be dealt with by the Superior Court exercising the powers explicitly or implicitly conferred on it under Québec civil procedure.

Comments

This judgment is important in all cases involving the disclosure of medical files, whatever the grounds for the request. Although a definite refusal to consent to the disclosure of a medical file is rare, the lessons learned from this particular case include the following:

- A simple refusal does not constitute grounds for allowing the objection once apparent relevance is established.
- The concept of relevance must be interpreted very broadly at the disclosure of evidence stage. It is sufficient that *"disclosure . . . will be useful, is appropriate, is likely to contribute to advancing the debate and is based on an acceptable objective that he or she seeks to attain in the case, and that the document to be disclosed is related to the dispute. . . ."* The Supreme Court did not say that it must be necessary.

[6] *Westinghouse Canada Inc.* v. *Arkwrigh Boston Manufacturers Mutual Insurance Co.,* [1993] R.J.Q. 2735 (C.A.), p. 2741

[7] [2001] 2 S.C.R. 743

- The rules established by the Supreme Court in common law cases, and in particular in the *Ryan* decision, do not apply in Quebec since Quebec law of evidence and procedure have recognized the professional secrecy privilege and codified the rules pertaining thereto. The Court is vested with the inherent power to exercise its jurisdiction to control disclosure of evidence at the pre-trial stage.
- Where a dispute occurs, whatever the procedural means used, the judge can rule on the basis of representations made to him respecting both the relevance of the document and the grounds for refusal. The judge may then, if necessary, use any means required to examine the documents and order their complete or limited disclosure.
- The judge's decision must establish a balance between plaintiff's right to privacy and defendant's right to put forward a full answer and defence.

Ms. Odette Jobin-Laberge of our firm represented the interests of Smith & Nephew in this matter.

You may contact any of the following members of the Professional Liability Law group with regard to this bulletin.

At our Montréal office

Anne Bélanger
514 877-3091
abelanger@lavery.qc.ca

Jean Bélanger
514 877-2949
jbelanger@lavery.qc.ca

Maryse Boucher
514 877-2955
mboucher@lavery.qc.ca

Marie-Claude Cantin
514 877-3006
mccantin@lavery.qc.ca

Isabelle Casavant
514 877-3005
icasavant@lavery.qc.ca

Jean-Pierre Casavant
514 877-2951
jpcasavant@lavery.qc.ca

Louis Charette
514 877-2946
lcharette@lavery.qc.ca

Louise Cérat
514 877-2971
lcerat@lavery.qc.ca

Daniel Alain Dagenais
514 877-2924
dadagenais@lavery.qc.ca

Sophie Dormeau
514 877-2961
sdormeau@lavery.qc.ca

Jean Hébert
514 877-2926
jhebert@lavery.qc.ca

Odette Jobin-Laberge
514 877-2919
ojlaberge@lavery.qc.ca

Bernard Larocque
514 877-3043
blarocque@lavery.qc.ca

Jean-François Lepage
514 877-2970
jflepage@lavery.qc.ca

Anne-Marie Lévesque
514 877-2944
amlevesque@lavery.qc.ca

Pamela McGovern
514 877-2930
pmcgovern@lavery.qc.ca

Cherif Nicolas
514 877-3036
cnicolas@lavery.qc.ca

Jacques Nols
514 877-2932
jnols@lavery.qc.ca

Vincent O'Donnell
514 877-2928
jvodonnell@lavery.qc.ca

André René
514 877-2945
arene@lavery.qc.ca

Ian Rose
514 877-2947
irose@lavery.qc.ca

Jean Saint-Onge
514 877-2938
jsaintonge@lavery.qc.ca

Montréal
Suite 4000
1 Place Ville Marie
Montréal, Quebec
H3B 4M4

Telephone:
514 871-1522
Fax:
514 871-8977

Québec City
Suite 500
925 chemin Saint-Louis
Québec City, Quebec
G1S 1C1

Telephone:
418 688-5000
Fax:
418 688-3458

Laval
Suite 500
3080 boul. Le Carrefour
Laval, Quebec
H7T 2R5

Telephone:
450 978-8100
Fax:
450 978-8111

Ottawa
Suite 1810
360 Albert Street
Ottawa, Ontario
K1R 7X7

Telephone:
613 594-4936
Fax:
613 594-8783

Subscribing
You may subscribe, unsubscribe or modify your profile by visiting our website at: www.laverydebilly.com/htmlen/Publications.asp or contacting Andrée Mantha at 514 877-3071.