DR. HAROLD HENDERSON, DR. J. H. SPENCE and DR. DONALD B. FERGUSON (*Plaintiffs*) ..... APPELLANTS;

1959
May 11
*Jun. 25

AND

DR. DAVID W. B. JOHNSTON representing the medical staff of Victoria Hospital, London, and The Board of Hospital Trustees of the City of London (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Hospitals—Hospital Board's statutory power of general management of public hospital—Validity of by-law excluding qualified practitioners from attending patients in hospital—Validity of by-law prohibiting fee-splitting among practitioners enjoying hospital privileges—The City of London Act, 1954 (Ont.), c. 11—The Public Hospitals Act, R.S.O. 1950, c. 307.

The plaintiffs, three medical practitioners in London, Ontario, sued for a declaration that two by-laws passed by the defendant Board were *ultra vires*. The first by-law had to do with the regulation of the medical staff and the second, with the practice of fee-splitting. The action was dismissed by the trial judge, and this judgment was affirmed by the Court of Appeal.

Held: The action should be dismissed.

The Board of Trustees of a public hospital has authority to exclude qualified medical practitioners from the privileges of the hospital and from attending their patients therein. The contrary claim advanced by the plaintiffs, was unsupported by authority. There was no such absolute right as the one asserted. No common law or statutory origin was suggested and it could not come from any statutory or other recognition of professional status. The right of entry into the hospital and the right to use its facilities, in the exercise of the profession of these plaintiffs, must be found in the hospital authority for, apart from them, it has no independent existence.

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Section 10 of the statutory agreement between the Board and the University of Western Ontario, providing that members of the medical profession of the City of London and vicinity who are not on the active staff of the hospital shall have the privilege of attending patients as members of the courtesy staff, was of no help to the plaintiffs. The section was expressly made subject to the regulation of the trustees. The selection of staff is an essential feature of regulation and management of the hopsital and the most that the statutory agreement could do for the plaintiffs was to give them the status defined by its terms. Moreover, the agreement did not vest any rights in the plaintiffs. They were not parties to it.

As to the by-law respecting fee-splitting, it was within the power of management of the Board and was not an attempt at general regulation of medical ethics. The Board was here concerned only with the regulation of this hospital and the members of the profession who practise there.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of LeBel J. Appeal dismissed.

W. B. Williston, Q.C., for the plaintiffs, appellants.

J. J. Robinette, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

JUDSON J.:—The appellants are three qualified medical practitioners of the city of London who are suing for a declaration that two by-laws passed by the defendant, The Board of Hospital Trustees of the city of London, are *ultra vires*. The first by-law has to do with the regulation of the medical staff of Victoria Hospital and the second, with the practice of fee-splitting. The action was dismissed; an appeal to the Court of Appeal[1] was dismissed, and, in my judgment, the appeal to this Court fails and should also be dismissed.

The Board passed the Medical Staff By-Law on April 22, 1953, after consultation and discussion with the medical staff and with its approval. The by-law was approved by the Lieutenant-Governor in Council on July 22, 1953, as required by s. 9 of the *Public Hospitals Act*. Authority to enact this by-law is ample. By s. 1 of the *Act respecting the General Hospital of the City of London* (Statutes of Ontario 1887, c. 58), the general management of the hospital is given to the Board. In addition, by the general regulations made under s. 4 of the *Public Hospitals Act*,

[1] [1957] O.R. 627, 11 D.L.R. (2d) 19.

particularly regulations 2 and 6, the Board is given power to govern and manage the hospital and to provide for the appointment and functioning of a medical staff. These regulations were approved by the Lieutenant-Governor in Council on May 29, 1952, and filed with the Registrar of Regulations on June 4, 1952, pursuant to the *Regulations Act* and I take these steps to be the departmental declaration pursuant to s. 5 of the *Public Hospitals Act* that they are in force with respect to all hospitals in the Province. One method of exercising the statutory power of government and management is by by-law even though the statutes and regulations do not expressly state that the powers may be so exercised. Such an express power did not appear until the legislation of 1954, which was enacted a short time before the second by-law under attack was passed. Nevertheless, if the regulation of the medical staff as affected by the first by-law is within the power of management, there is obviously no substance to the objection that it cannot be done by by-law.

The Medical Staff By-law deals in great detail with everything appropriate to this subject-matter. It provides for six divisions of the medical staff: 1. The Honorary staff; 2. The Consulting staff; 3. The Teaching staff (active staff); 4. The Out-Patients' staff (active staff); 5. The General Practice staff; 6. The Courtesy staff. The members of these divisions are to be appointed annually by the Board. The appellants are members of the "Courtesy staff" and their position is defined in part by the following provisions of the by-law:

The General Practice Staff

(*a*) The General practice staff shall consist of those members of the medical profession eligible as hereinafter provided who wish to attend private and semi-private patients in the hospital.

The Courtesy Staff

(*a*) The courtesy staff members shall have the privileges extended to the general practice staff members with the exception of voting privileges . . .

(*b*) Courtesy staff membership shall be restricted to those qualified physicians residing in London and within such distance from the City of London as may from time to time be determined by the Board of Trustees in collaboration with the Medical Staff . . .

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The complaint of the plaintiffs is that the Board of Trustees of the hospital in the exercise of its power of management, cannot restrict them in the practice of their profession or determine who may be members of the Courtesy Staff. They claim that as members of the medical profession in good standing, they have an absolute right to attend their patients in private or semi-private rooms in the hospital and that no power is vested in the Board to limit this right. This is the substantial point of the attack on the first by-law. The issues in this branch of the case are therefore very narrow. They amount to no more than a bald assertion of a right and a denial of the Board's power to regulate in any way the matters in controversy for it is undisputed that, beyond this, no practitioner has been denied anything—whether right or privilege—in connection with his practice in the hospital. The claim is unsupported by authority and I am satisfied that there is no such absolute right as the one asserted. No common law or statutory origin was suggested and it cannot come from any statutory or other recognition of professional status. The right of entry into the hospital and the right to use the facilities there provided, in the exercise of the profession of these appellants, must be found in the regulations of the hospital authority for, apart from them, it has no independent existence.

The appellants also claim to benefit from the terms of an agreement dated January 1, 1946, between the Hospital Board and the University of Western Ontario, which received statutory confirmation by the *Victoria Hospital, London, Act* 1946 (Statutes of Ontario 1946, c. 105). It was entered into because Victoria Hospital is the University's major teaching hospital in the City of London. Sections 6 and 10 of the agreement read as follows:

> 6. The Trustees shall make appointments to the Active Staff of the Hospital annually on the recommendation of the Board of Governors of the University and subject to the approval of the Joint Relations Committee or a majority thereof. In making appointments to the Active Staff of the Hospital regard shall be had to the previous training and record of the appointee, his capacity to render service to the sick in the Hospital, his scientific attainments, his teaching capacity and his likelihood of professional development. No member of the Hospital Medical Staff may be dismissed without the consent of the Trustees.

10. Subject to the regulation of the Trustees, members of the Medical Profession of the City of London and vicinity who are not on the Active Staff of the Hospital shall have the privilege of attending patients in private and semi-private rooms as members of the Courtesy Staff.

Section 10 is the only possible origin of any right such as the one claimed by the appellants and it is expressly made subject to the regulation of the Trustees. In spite of the argument that such regulation does not give the power to exclude any duly qualified medical practitioner, it seems to me that the selection of staff is an essential feature of regulation and management of the hospital and that the most that this statutory agreement can do for the appellants is to give them the status defined by its terms. Moreover, I think it is clear that the agreement does not vest any rights in the appellants. They are not parties to it. It is intended to govern the relations between the Hospital Board and the University in connection with a teaching hospital and the confirmation of this agreement by the Legislature adds nothing to the rights of the appellants nor does it detract from the power of management given to the Board by the Statutes and Regulations previously mentioned.

With no right established as claimed by the appellants, it is plain that the authorities relied upon by counsel for the appellants, having to do with municipal by-laws which prohibit or give a right of choice to a municipal official when they should be concerned with the licensing, regulating or governing of a trade, have no application here. These cases are all based upon the principle that there is a common-law right to engage in any lawful occupation and that a municipal power to regulate such a right does not authorize a prohibition of its exercise or a discriminatory use of the power.

The second by-law under attack is aimed against fee-splitting. It prohibits the practice among those physicians and surgeons who are privileged to attend patients in Victoria Hospital. It compels such persons to submit to inspection of their books and it provides for the denial of the privileges of the hospital to any physician or surgeon who has not complied with the provisions of the by-law. It is generally agreed, and the appellants do not question this principle, that fee-splitting is a reprehensible practice but

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the appellants question the by-law because, they say, it is not related to the management, operation or control of the hospital but is an attempt to legislate on matters relating to the ethics of the medical profession under the guise of regulating the use of the hospital. There is no validity in either of these submissions. The By-law is within the power of management. There is here no attempt at general regulation of medical ethics. The Board is concerned only with the regulation of this hospital and the members of the profession who practise there. Moreover, Victoria Hospital as a teaching hospital of the University must have such a by-law to meet the standards required by the Joint Commission of Accreditation of Hospitals of the United States and Canada and it is of vital importance both to hospital and university that these standards be met.

This second by-law was enacted January 26, 1955 and was approved by Order-in-Council dated February 17, 1955, as required by s. 9 of the *Public Hospitals Act*. At the time of its enactment the powers of the Board had been re-defined in an *Act respecting the City of London* (Statutes of Ontario, 1954, c. 115, s. 5). The 1887 legislation had merely given the Board the general management of the hospital. The 1954 legislation speaks of the general management, operation, equipment and control of the hospital being vested in and exercised by the Board, and gives express power to enact by-laws and regulations for these purposes, subject to the *Public Hospitals Act*. This is merely a re-definition of the power of the Board and nothing turns upon it. I would have held that the by-law against fee-splitting was within the power of the Board under the legislation of 1887 as well as that of 1954.

I agree with the reasons of Roach J.A. in the Court of Appeal and would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Thompson & Brown, London.

Solicitors for the defendants, respondents: Mitchell & Hockin, London.