

APPENDIX: L

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THE ONTARIO COURT OF JUSTICE

COLLEGE OF OPTICIANS OF ONTARIO

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v.

SANDRA WADDEN and KING OPTICAL GROUP INC.

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REASONS FOR JUDGMENT

BEFORE THE HONOURABLE MR. JUSTICE W. D. AUGUST

On November 15, 1999, at Toronto.

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A P P E A R A N C E S :

Counsel for the Crown

D. Rosenbaum, Esq.

Counsel for the Defendant

J. Liswood, Esq.

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Old City Hall
Courtroom #128

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REASONS FOR JUDGMENT**W. D. AUGUST, (O.C.J.) Orally:**

The matter of Wadden and King Optical Group Incorporated is before me this morning for my decision. The reasons for my decision are as follows.

First, I would like to deal with the facts, and I would also like to deal with the charges. Sandra Wadden is charged between February the sixth and the February the 19th, 1997 of committing the offence of performing in the course of providing health care services to an individual the controlled act of dispensing eye glasses for vision or eye problems to Wilfrid H. Barker without being a member authorized by a health professions act to perform the controlled act, contrary to The Regulated Health Professions Act.

King Optical Group Incorporated is charged with the offence of being a party to the commission by Sandra Wadden of the offence referred to, and in addition with the offence of being the employer of Sandra Wadden, a person who while acting within the scope of her employment and in the course of providing health care services to an individual performed the controlled act of dispensing eye glasses for vision or eye problems to Wilfrid J. Barker without being a member authorized by a health profession act to perform the controlled

act, contrary to s.27(1) and s.42(1) of the R.H.P.A.

The relevant sections of the R.H.P.A. as they existed at the time of the offences are as follows:

S.27(1), no person shall perform a controlled act set out in ss.(2) in the course of providing health care services to an individual unless, (a), the person is a member authorized by a health profession act to perform the controlled act, or, (b), the performance of the controlled act has been delegated in accordance with s.28 to the person by a member described in clause (a).

Then ss.(2) of 27, a controlled act is any one of the following done with respect to an individual. S.9, prescribing or dispensing for vision or eye problems, normal vision devices, contact lenses, or eye glasses other than simple magnifiers.

And in s.37 a person who is charged with an offence to which registration under a health profession act would be a defence shall be deemed in the absence of evidence to the contrary to have not been registered.

Those are the charges that I dealt with against the corporation and Ms. Sandra Wadden.

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Now, the facts are as follows. We have the evidence of Mr. Wilfrid Barker. After observing him and listening to his evidence I find that he is a credible and reliable witness, and the evidence which he did give is very relevant to these charges. Mr. Barker described how on February the sixth, the 13th, the 19th in the year 1997, at the Braddock Optical store in the Toronto Dominion Centre, Sandra Wadden served him and sold him a pair of eye glasses.

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On February the 6th, 1997 Ms. Wadden was alone in the store when Mr. Barker arrived there and during the entire time he was there. At that time she showed Mr. Barker various frames and asked him if he wanted bifocals, and if so, whether with or without the line.

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On his visit to the store on February the 6th, 1997 Ms. Wadden gave Mr. Barker a business card showing the name Braddock Optical on which she wrote her name. She gave him another such card on February the 13th. Mr. Barker also picked up a business card showing the name of an optician named Shirley Robertson under the letterhead Braddock Optical, identified as a registered trademark of King Optical Group Incorporated. After Mr. Barker left the store he observed the optician Shirley Robertson enter the store.

When Mr. Barker first arrived at the store on the

5 morning of Thursday, February the 13th, 1997 it was closed. He observed Ms. Wadden unlock the door and enter the store. She was the only person in the store during his entire time in the store that day.

10 The acts that occurred on Mr. Barker's visit to the store that day were as follows. Ms. Wadden brought the frames to Mr. Barker that he had previously looked at, asked him to put them on, and commented on how they looked. She opened the pads on the frames so that they would sit lower on Mr. Barker's nose. She took Mr. Barker's prescription for bifocal eye glasses. She discussed bifocals with Mr. Barker, including asking him if he would be reading anything wide. He decided to choose bifocals with a line. She took certain of Mr. Barker's facial measurements, including the distance between the centre of his cornea and the centre of his nose. She discussed lens material and coating for his glasses. Mr. Barker ordered glasses and she took a deposit from him.

25 On February the 19th, 1997 Ms. Wadden was again alone in the store. Mr. Barker observed her opening the store which had previously been locked on that day. She brought Mr. Barker the glasses that he had ordered, handed them to him and asked him to put them on and to look at a magazine. She advised Mr. Barker on the correct range for

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reading, performed adjustments on the arms of the glasses behind Mr. Barker's ears and then verified their fit. She gave Mr. Barker advise on taking care using stairs until he adjusted to using the bifocals, performed additional adjustments on Mr. Barker's glasses and received payment from Mr. Barker for the balance owing on the eye glasses.

The College's expert optician, Mark Raymond, examined the glasses that were sold by Ms. Wadden to Mr. Barker and confirmed that they were in fact prescription eye glasses.

On his February the 19th, 1997 visit to the store Mr. Barker received from Ms. Wadden a customers comments card which could be filled out and mailed to the V.P. of Sales and Marketing of King Optical Group Inc., as well as a Braddock Optical warranty. At no time during any of his visits to the store did Mr. Barker deal with any employee of Braddock Optical other than Ms. Wadden.

Sandra Wadden had been a registered optician for eye glasses only in Nova Scotia. When she arrived in Ontario she applied to be registered with the College as an intern optician. She was advised that she did not qualify to be an intern optician. She was also told that in order to qualify as a registered optician in Ontario she would have to enrol in a program at either Georgian or Seneca College, and that she could apply for registration

as a student optician once she had enroled.

She informed the College that she had enroled at Seneca College. She was then registered by the College as a student optician. Then, approximately a month later, she informed the College that she was no longer enroled at Seneca College. She was therefore automatically revoked as a student optician in October of 1996. She was so informed by notice sent to her home address on November the 20th, 1996. A copy of this notice was sent by mail to the manager of the store. Ms. Wadden had indicated to the College on her application for student registration that she worked at the store.

Those are the relevant facts as put in by way of evidence.

The Act which we dealt with here does not define the word "dispensing". The College called three expert witnesses: an optician, an optometrist, and an ophthalmologist. Each witness was highly experienced in their respective field and their evidence was not shaken by cross-examination. These witnesses were of the opinion that the entire process of serving Mr. Barker by Ms. Wadden constituted dispensing. Each act was an act of dispensing. I accept and believe the evidence of the three College experts and I find that their evidence is very relevant and reliable.

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In reply, I find that the defendants' evidence was very weak and failed to challenge the three College experts' evidence. I do not accept the submission that dispensing is not part of prescribing. I also reject the defendants' submission of protection of turf by the College. There is absolutely no evidence that would substantiate this allegation.

The defendants' proposed to define the controlled act of dispensing in terms of the elements that posed a risk of harm. I find that the College's three experts provided sufficient evidence to establish beyond a reasonable doubt a risk of harm in the dispensing of eye glasses to adults.

After giving full consideration to the evidence, to prior judicial authorities, to statute interpretation as argued by counsel, dispensing in s.27(2) is the preparation, adaptation and delivery of eye glasses, contact lenses, or subnormal vision devices to a person, I find that each of the acts of Ms. Wadden constituted dispensing, and these acts fit within the definition which I have just stated.

Therefore, on that evidence I am satisfied beyond a reasonable doubt that Ms. Wadden is guilty as charged. Ms. Wadden did not provide evidence to displace the presumption in s.37 and the Crown has satisfied me beyond a reasonable doubt that Ms.

Wadden did not come within s.27(1)(a)(b), and as I have already stated I find that she is guilty as charged.

The evidence establishes that on each of the relevant dates the defendant, King Optical Group Inc., was Ms. Wadden's employer. The evidence establishes that at all material times Wadden was acting within the scope of her employment. Since Ms. Wadden contravened s.27(1) it follows that King Optical is guilty of an offence under s.42(1) and I find the defendant King Optical Group Inc., guilty as charged.

That is the decision of the Court.

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THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT OF MY RECORDINGS TO THE BEST OF MY SKILL AND ABILITY.

Smith
.....
LAURA A. SMITH
OFFICIAL COURT REPORTER

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THE ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

SANDRA WADDEN AND KING OPTICAL GROUP INC.

J U D G M E N T

BEFORE THE HONOURABLE MR. JUSTICE W.D. AUGUST

On December 13, 2000, at Toronto, Ontario.

APPEARANCES:

Counsel for the Crown

Mr. Rosenbaum

Counsel for Sandra Wadden
King Optical Group Inc.

Mr. Lisswood

Old City Hall

Courtroom A

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J U D G M E N T

5 August, W.D.: (Orally)

10 I will deal with the charge against Sandra Wadden.
First, I register a conviction on that charge and
in considering the sentence I can find no
mitigating factors here ~~except for the~~ ^{such as a} guilty plea
and the other factor which was referred to by
counsel, Mr. Rosenbaum.

15 Ms. Wadden conducted business and she knew that
what she was doing was contrary to the rules. She
totally disregarded that and she continued to
perform the procedures and operations that I set
out in my reasons for judgment. Further, I find
that she has shown no remorse in regards to this
matter. And lastly, which I think is extremely
important and probably the most important, is that
20 what she did she created a risk of harm to the
public.

25 Counsel submits that there's no evidence that
anyone was harmed. That's not the point. The
point is that what she was doing created a risk of
harm to the public. And the public expects that
people who perform such operations and procedures
will be qualified and licenced to perform such
procedures. Therefore, a specific deterrence is
very important in consideration towards sentencing
30 Ms. Wadden.

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R. v. Wadden, S.
Judgment

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I take into consideration as one possible mitigating circumstance and that is that she has no previous convictions. Therefore having said that, I take into consideration that the law in this province sets a maximum penalty of \$25,000. That shows how concerned the Legislature is in regards to people who breach these laws and by imposing a fine within the range that was suggested by Mr. Rosenbaum I think that what he suggests is extremely lenient.

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Therefore on his suggestion she will be fined \$1000, and in addition she will be placed on probation for two years. Probation shall contain the statutory conditions which are as follows;

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The defendant not commit the same or any related or similar offence or any offence under the Statute of Canada or Ontario or any other province in Canada that is punishable by imprisonment. That the defendant appear before the court when required.

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That the defendant notify the court name of any change in the defendant's address. In addition to that the last condition will be that condition set out by Mr. Rosenbaum. Will you do that again, Mr. Rosenbaum.

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MR. ROSENBAUM: Yes. I had asked that if she works in an optical dispensary that at all times that she is present in the dispensary, a registered optician must be present.

CLERK OF THE COURT: That at all times?

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MR. ROSENBAUM: A registered optician must be present. At all times that she is in the store a registered optician must be present.

THE COURT: Those are the conditions of the probation order. Is Ms. Wadden in court?

MR. LISSWOOD: No, she isn't.

THE COURT: All right. Well, then you will advise her of the conditions?

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MR. LISSWOOD: Of course.

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THE COURT: Now as far as the corporate defendant, I register a conviction against the corporate defendant on the charge. A factor that must be taken into consideration by me and I find it to be relevant even though it dates back two years and that is the record that this defendant has established over the period of some years.

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The total fines that this corporate defendant has been charged with was, I think it amounts to \$16,000, there are four previous convictions. All of that must be taken into consideration as being relevant. This is a company that continues to breach the law and any sentence that I impose upon this defendant must be a specific deterrent must also be a general deterrent.

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It has to be as Mr. Rosenbaum has stated, "a sting to the fine" and this sting hopefully will send a message out that this type of conduct will not be tolerated. Therefore the defendant company will be fined \$20,000 and there will be a surcharge of 20 percent on that fine and in addition the

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Judgment

5 corporate defendant will pay the cost to the
College of Opticians of Ontario. I'm not going to
go through all that again.

10 Mr. Rosenbaum has outlined his cost and the court
orders that those cost be paid to the College.
And that they be paid within 90 days of today's
date. The cost will be paid to the ... directly
to the College of Opticians of Ontario and a copy
of those cost should be forward to the court so
that we have a record of the cost in the court.

15 I am asking Mr. Rosenbaum to set out these cost
and to provide counsel with a copy and a copy to
the court.

MR. ROSENBAUM: Yes, I will Your Honour.

20 THE COURT: All right and as far as the sentence
for Sandra Wadden? How much time does she need to
pay that?

MR. LISSWOOD: Ninety days.

THE COURT: Ninety days? And as far as the
corporate defendant, 90 days.

25 THIS IS TO CERTIFY that the
foregoing is a true and accurate
transcription from the record
made by sound recording apparatus,
to the best of my skill and ability.

30 *Cheryl Mayhew*
Cheryl Mayhew, Court Reporter

COURT OF APPEAL FOR ONTARIO

McMURTRY C.J.O., ROSENBERG AND SIMMONS J.J.A.

B E T W E E N:)	
)	
SANDRA WADDEN AND KING)	Joshua Liswood
OPTICAL GROUP INC. (carrying on)	for the appellant
business as Braddock Optical))	
)	
Applicants (Appellants))	
)	
- and -)	
)	
COLLEGE OF OPTICIANS OF)	David C. Rosenbaum and
ONTARIO)	Karyn Wasserstein
)	for the respondent
Respondent)	
)	
)	
)	Heard: November 20, 2001

On appeal from an Order of Justice Norman D. Dyson dated January 18, 2001.

SIMMONS J.A.:

[1] Sandra Wadden and King Optical Group Inc. (“Braddock Optical”) appeal from an order of a Superior Court judge dated January 18, 2001, upholding convictions entered and sentences imposed by an Ontario Court judge on November 15, 1999 and December 13, 1999 respectively, on charges laid under ss. 27(1), 27(2), 40(1), and 42(1) of the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18, as amended (*RHPA*), and s. 77(1) of the *Provincial Offences Act*, R.S.O. 1990, c. P. 33 (*POA*).

[2] Ms. Wadden was convicted of performing the controlled act of dispensing eye glasses for vision or eye problems in the course of providing health care services to an individual without being a member authorized by a health professions act, to perform the

controlled act. Braddock Optical was convicted on the basis of being Ms. Wadden's employer.

[3] The issues on appeal are whether the retail sale of prescription eye glasses falls within the scope of "providing health care services to an individual", and what constitutes the proper definition of "dispensing" prescription eye glasses under the *RHPA*. A specific issue arises concerning whether "risk of harm" plays any role in the definition of these concepts.

Background

[4] While working at Braddock Optical on February 6, 13 and 19, 1997, Ms. Wadden served and sold a pair of prescription bifocal eye glasses to a Mr. Barker. Ms. Wadden was the only employee working during the times in question. Mr. Barker is a private investigator hired by the College of Opticians of Ontario (the "College").

[5] Ms. Wadden was a registered optician for eye glasses in Nova Scotia. Following a move to Ontario, she chose not to pursue the four-year program required for her to register here.

[6] In making a finding of guilt against Ms. Wadden, the trial judge noted that the *RHPA* does not define "dispensing". After hearing expert evidence he found that dispensing means "the preparation, adaptation and delivery of eye glasses, ... to a person."

[7] The trial judge listed the activities performed by Ms. Wadden as part of serving Mr. Barker and selling eye glasses to him. These activities included: greeting the customer, showing him frames, commenting on their appearance, discussing bifocals, determining whether the customer wanted bifocals with lines, discussing lens materials and coatings, taking facial measurements, including the distance between his cornea and the centre of his nose, asking the customer to read with the glasses, and adjusting the arm piece and fit. He found that "each of the acts of Ms. Wadden constituted dispensing" and that they "fit within the definition" that he had stated.

[8] Of note, the trial judge stated that he did "not accept the submission that dispensing is not part of prescribing" and that there was "sufficient evidence to establish beyond a reasonable doubt a risk of harm in the dispensing of eye glasses to adults".

[9] The judge hearing the original appeal under the *POA* made the following findings:

The findings of the trial judge were reasonable and supported by the evidence. Further, I find no fault with his application of the law.

He found that an unauthorized person was performing controlled acts, namely “dispensing”, contrary to s. 27(2)(a).

He accepted that such activity constituted a risk of harm to the public, pursuant to evidence presented.

He did not apply the standard of care set out in s. 30 to the prohibitions set out in s. 27.

He was correct to ignore s. 30 because, despite the lack of clarity in the section with respect to its application, s. 30 is a so called “basket” clause which applies to situations not contemplated or specified in s. 27.

A review of the information from committee hearings and Hansard prior to the enactment of the legislation leads one to the conclusion that the Legislators considered that a risk of harm was implicit in the prohibited acts specified in s. 27 with which I agree.

The penalties were well within the reasonable discretion of the Trial Judge.

Relevant Statutory Provisions

[10] Section 1(1) of the *RHPA* defines “health profession” as a “health profession set out in Schedule 1.” Schedule 1 of the *RHPA* lists “opticianry” as a self-regulating health profession.

[11] Section 3 of the *Opticianry Act, 1991*, S.O. 1991, c. 34 sets out the scope of practice of opticianry as follows:

3. The practice of opticianry is the provision, fitting and adjustment of subnormal vision devices, contact lenses or eye glasses.

[12] The relevant portions of ss. 27(1) and (2) of the *RHPA* are as follows:

27. (1) No person shall perform a controlled act set out in subsection (2) in the course of providing health care services to an individual unless,

(a) the person is a member authorized by a health profession Act to perform the controlled act; or

(b) the performance of the controlled act has been delegated to the person by a member described in clause

(a).

(2) A “controlled act” is any one of the following done with respect to an individual:

...

9. Prescribing or dispensing, for vision or eye problems, subnormal vision devices, contact lenses or eye glasses other than simple magnifiers.

[13] Section 30 of the *RHPA* provides that:

30. (1) No person, other than a member treating or advising within the scope of practice of his or her profession, shall treat or advise a person with respect to his or her health in circumstances in which it is reasonably foreseeable that serious physical harm may result from the treatment or advice or from an omission from them.

Grounds of Appeal

[14] The appellants raise the following issues as grounds of appeal:

- i. did the Provincial Appeals Court judge and the trial judge err by failing to determine whether dispensing eye glasses to an adult is a health care service;
- ii. did the Provincial Appeals Court judge and the trial judge err in failing to define the controlled act of dispensing in terms of risk of harm, and in particular, serious risk of physical harm;

- iii. did the Provincial Appeals Court judge and the trial judge err in finding that the dispensing of eye glasses to a person of visual maturity presents a risk of harm;
- iv. did the Provincial Appeals Court judge and the trial judge err in finding that dispensing is part of prescribing; and
- v. did the Provincial Appeals Court judge and the trial judge err in failing to define the controlled act of dispensing within the spirit and intent of the *RHPA*?

Did the Provincial Appeals Court Judge and the Trial Judge Err by Failing to Determine Whether Dispensing of Eye glasses to an Adult is a Health Care Service?

[15] The term “health care services” is not defined in the *RHPA*. The appellants point out that many appropriately trained, but unlicensed individuals perform consultative, measuring, fitting, and clerical duties in optometrist’s and ophthalmologist’s offices but are not liable to conviction because their acts are delegated by a regulated profession that permits delegation. They also point out that over-the-counter reading glasses are sold in drug, hardware, book, and department stores across Canada. Consumers simply choose a pair of glasses that suits their needs without assistance from a health care professional.

[16] Consumers have the ability to choose how much to spend when purchasing eye glasses based on a variety of choices including the style of frames, lens type, lens coatings, and ultimately, where and from whom to buy the product. The appellants submit that the sale of eye glasses to visually mature individuals is a retail function that does not meet a common sense definition of the provision of “health care services”.

[17] In the alternative, the appellants say that the only aspect of “dispensing” prescription eye glasses to adults that constitutes a health care service is the final verification by an optician that the product delivered corresponds with the prescription that was given. The appellants say that there was no evidence presented to demonstrate that Ms. Wadden undertook the “verification aspect” of dispensing.

[18] Although neither the trial judge nor the Provincial Appeals court judge specifically alluded to the issue of whether dispensing prescription eye glasses to an adult constitutes “providing a health care service to an individual”, I am not persuaded that either judge erred in failing to do so.

[19] The origins of the *RHPA* lie in the Health Professions Legislative Review, *Striking a New Balance: A Blueprint for the Regulation of Ontario’s Health Professions* (Toronto:

The Review, 1989), generally referred to as the Schwartz Report. The Executive Summary to that report includes the following comments:

The Review's mandate was to make recommendations to the Minister in the form of draft legislation, with respect to:

- which health professions should be regulated;
- updating and reforming the Health Disciplines Act; [and]
- devising a new structure for all legislation governing the health professions

...

Through professional regulation *the nature and quality of health care services can be regulated*. Professional regulation is aimed at advancing the public interest, not the interests of the professions. The Review's recommendations are aimed at advancing the public interest in four ways:

- Protecting the public, to the extent possible, from unqualified, incompetent and unfit health care providers.
- Developing mechanisms to encourage the provision of high quality care.
- Permitting the public to exercise freedom of choice of health care provider within a range of safe options.
- Promoting evolution in the roles played by individual professions and flexibility in how individual professionals can be utilized, so that health services are delivered with maximum efficiency. [emphasis added]

...

The Review recommends that a uniform or omnibus Health Professions Procedural Code be enacted and that the Code be

coupled with an individual Professional Act for every profession ... to be regulated.

[20] As noted by Laskin J.A. in *M.F. v. Sutherland*¹ at page 309, “[t]he relevance and use of government reports in interpreting legislative provisions has been much debated”, however, I adopt his conclusion that “where legislation is closely tied to the

recommendations of a government report...then the report should be considered in interpreting the statute [i]t is relevant, though not determinative.”

[21] As noted in the executive summary of the Schwartz Report the very purpose of the *RHPA* is to regulate the provision of health care services. “Opticianry” is designated as a self-governing *health care* profession by virtue of Schedule 1 to the *RHPA*. The services Ms. Wadden provided to Mr. Barker are clearly within the scope of practice of opticianry, namely the provision, fitting and adjustment of eye glasses. By definition Ms. Wadden was providing health care services to Mr. Barker when she sold him a pair of prescription eye glasses.

Did the Provincial Appeals Court Judge and the Trial Judge Err in Defining Dispensing?

[22] The appellants submit that the trial judge erred by failing to define the controlled act of dispensing eye glasses in terms of risk of harm; by finding that dispensing is part of prescribing; by finding that dispensing eye glasses to a person of visual maturity presents a risk of harm; and by failing to define the controlled act of dispensing within the spirit and intent of the *RHPA*.

[23] The appellants’ first and fourth submissions rest on the premise that the purpose and intent of the *RHPA* is to move away from a restrictive predecessor regulatory scheme, which they say created professional monopolies by prohibiting unlicensed persons from performing activities that fell within the “scope of practice” of a particular profession. The appellants submit that the purpose and intent of the *RHPA* is to restrict unlicensed persons from performing only those health care activities that are associated with risk of harm. Unlicensed persons are no longer restricted from activities based on a profession’s scope of practice under the *RHPA*. Rather, they are prohibited only from performing the “controlled acts” listed in s. 27(2), and are subject to the “basket clause” prohibition set out in s. 30.

¹ (2000), 188 D.L.R. (4th) 296 (Ont. C.A.), leave to appeal to the Supreme Court of Canada refused April 15, 2001

[24] The appellants accordingly submit that before determining whether a particular activity falls within the purview of a controlled act, the court should assess the risk of harm associated with that activity. Moreover, the standard of risk that should inform the definition, interpretation, and threshold of the controlled acts listed in s. 27(2) is that set out in s. 30.

[25] I reject this submission. I agree that one purpose of the *RHPA* is to limit the health care activities that unlicensed persons are prohibited from performing to those specific activities associated with a risk of harm. In my view, however, a primary purpose of the *RHPA* is to protect the public from risk. Section 27(2) does not delegate identification of the level of risk to be protected to the court. Rather, the Legislature signalled its intent as to the level of risk to be protected by listing the prohibited activities that constitute controlled acts.

[26] Again, I adopt the views of Laskin J.A., as set out in *M.F. v. Sutherland, supra*, at pages 306-7, concerning the appropriate approach to interpretation of the legislation:

A basic principle of statutory interpretation is that the court should adopt the ordinary meaning of a legislative provision absent a good reason to reject it. The ordinary meaning is presumed to be the intended or most appropriate meaning unless the context, or the purpose and scheme of the legislation, or the consequences of adopting the ordinary meaning suggest otherwise. Professor Ruth Sullivan, who edited the third edition of *Driedger on the Construction of Statutes*, sets out the presumption in favour of the ordinary meaning:²

- 1) It is presumed that the ordinary meaning of a legislative text is the intended or most appropriate meaning. In the absence of a reason to reject it, the ordinary meaning prevails.
- 2) Even where the ordinary meaning of a legislative text appears to be clear, the courts must consider the purpose and scheme of the legislation, and the consequences of adopting this meaning. They must take into account all relevant indicators of legislative meaning.

² Ruth Sullivan, ed., *Driedger on the Construction of Statutes*, 3d ed. (Markham, Ont.: Butterworths, 1994) at p. 7

- 3) In light of these additional considerations, the court may adopt an interpretation in which the ordinary meaning is modified or rejected. That interpretation, however, must be plausible; that is, it must be one the words are reasonably capable of bearing.

[27] I see nothing in the language of the *RHPA* that indicates that, in interpreting the meaning of a particular controlled act, courts are to engage in a risk analysis. Rather, the plain meaning of the words, and any meaning that may be commonly understood in the respective professions, defines the scope of a controlled act and determines the level of risk to be protected.

[28] Here the trial judge heard expert evidence as to the meaning of dispensing. He defined the term in a manner consistent with that evidence, dictionary definitions and the definition of dispensing as it appeared in predecessor legislation.

[29] For example, the defence expert optician agreed that dispensing an optical prescription for eye glasses would include: “selection, designing, measuring, manufacturing, verification, fitting/delivery”.³

[30] Dictionary definitions of dispensing include:

The Concise Oxford Dictionary of Current English (1998),

dispense...make up and give out (medicine etc.) according to a doctor's prescription.

The Dictionary of Canadian Law, 2d ed.,

Ophthalmic Dispensing. (i) Supplying, preparing and dispensing ophthalmic appliances; (ii) interpreting prescriptions of legally qualified medical practitioners and optometrists; and (iii) the fitting, adjusting and adapting of ophthalmic appliances to the human face and eyes in accordance with the prescriptions of legally qualified medical practitioners and optometrists.

³ Book of Transcripts, Volume II, McCormack, p. 65.

[31] “Ophthalmic dispensing” was formerly defined in s. 1 of the *Ophthalmic Dispensers Act*, R.S.O. 1990, c. O.43 as the:

- (a) supplying, preparing, and dispensing ophthalmic appliances;
- (b) interpreting prescriptions of legally qualified medical practitioners and optometrists, and
- (c) the fitting, adjusting and adapting of ophthalmic appliances to the human face and eyes in accordance with the prescriptions of legally qualified medical practitioners and optometrists...

[32] I see no error in the definition of dispensing adopted by the trial judge. However, I add that I do not view the words chosen by him as exclusive or all encompassing. Further, I wish to clarify that I do not equate the term “preparation” with “fabrication”. Rather, I view its meaning as “all actions necessary to be performed prior to adaptation and delivery”.

[33] As I reject the appellants submission that “risk of harm” should be assessed before determining whether particular activities fall within the purview of a controlled act or should inform the definition of dispensing, it is unnecessary to deal with whether the trial and Provincial Appeals court judges erred in finding that dispensing eye glasses to a person of visual maturity presents a risk of harm.

[34] I agree that the trial judge overstated his conclusion when he said of the activities performed by Ms. Wadden: “[e]ach act was an act of dispensing”. I observe, however, that dispensing may be a single act or part of a continuum of activities. Carried out in isolation, activities such as commenting on the appearance of frames, and receiving payment would not in and of themselves constitute dispensing. Nevertheless, I find no error in the trial judge’s overall finding of guilt.

[35] The trial judge made an obvious error when he said, “I do not accept the submission that dispensing is not part of prescribing.” Each of the terms “dispensing” and “prescribing” clearly forms a distinct part of the activity prohibited by s. 27(2) 9. I am not however persuaded that this error impacts in any way on the validity of the trial judge’s other conclusions.

[36] I would accordingly dismiss the appeals against conviction.

Sentence Appeal

[37] The appellants failed to raise any error in law in relation to the sentences imposed. I would accordingly dismiss the appeals against sentence.

Signed: "Janet M. Simmons J.A."

"I agree R. Roy McMurtry J.A."

"I agree Marc Rosenberg J.A."

Released: "RRM" DECEMBER 10, 2001

**ENDORSEMENT OF
THE HONOURABLE MR. JUSTICE DYSON
DATED JANUARY 18, 2001**

The findings of the trial Judge were reasonable and supported by the evidence. Further, I find no fault with this application of the law.

He found that an unauthorized person was performing controlled acts, namely "dispensing", contrary to s.27(2)(9).

He accepted that such activity constituted a risk of harm to the public, pursuant to evidence presented.

He did not apply the standard of care set out in s.30 to the prohibitions set out in s.27.

He was correct to ignore s.30 because, despite the lack of clarity in the section with respect to its application, s.30 is a so called "basket" clause which applies to situations not contemplated or specified in s.27.

A review of the information from committee hearings and Hansard prior to the enactment of the Legislation leads one to the conclusion that the Legislators considered that a risk of harm was implicit in the prohibited acts specified in s.27, with which I agree.

The penalties were well within the reasonable discretion of the Trial Judge.

Therefore the appeal is dismissed with costs to be assessed.

Dyson J.