

## Personal Injury

## FOCUS

## When do plaintiffs have 'control' over non-party documents?

Court rules require parties in personal injury litigation to produce all "relevant" documents in their "possession, control or power." Many relevant documents are in the possession of non-parties (for example, employment records, employment insurance (EI) records or workers' compensation files). A key issue in many cases is whether the plaintiff has "control or power" over these documents, and therefore an obligation to request copies or seek production from the non-party.

If the plaintiff does not have "control or power," then the defendant's remedy is to seek production directly against the non-party. Many defendants wish to avoid this because it is more costly, technical and limiting.

The New Brunswick Court of Appeal has interpreted the meaning of "control or power" in the context of personal injury litigation. The decision, along with a subsequent decision of the Alberta Court of Queen's Bench, provides guidance on when a plaintiff has control or power over documents held by non-parties.

*Reilly v. Paul*, [2006] N.B.J. No. 380, involved a claim for personal injuries arising from a motor vehicle accident. During discovery, the defendant asked



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the plaintiff to request a copy of the accident benefits file. The plaintiff declined to make the request. The defendant brought a motion seeking an order for the plaintiff to request a copy of her insurer's files, on the basis that the documents were relevant and within the plaintiff's control. The motions judge declined to make the order.

In dismissing the defendant's appeal, the appeal court confirmed that the rules do not authorize a court to order a plaintiff to request documents from non-parties to the litigation unless the document is in

the plaintiff's control or power. A document is not in the control or power of a plaintiff just because she might, upon request, obtain a copy from the person who has possession. A document will only be in the control or power of a plaintiff if she has a legally enforceable right to production.

The defendant led no evidence that the plaintiff had a legal right to the accident benefits file. Therefore, the court concluded the accident benefits file was not in the plaintiff's control or power.

A careful reading of *Reilly* reveals that the defendant may have lost simply because of a failure to produce evidence of "control." For example, provincial and federal privacy legislation affords people protection of their personal information, but also a right to request copies of their personal information from government and private sector organizations. Would a plaintiff's rights under privacy legislation amount to "control or power" as contemplated in *Reilly*? This question was answered by Alberta Court of Queen's Bench in *Brown v. Nguyen*, [2006] A.J. No. 1752.

Like *Reilly*, *Brown* involved personal injury litigation and was an appeal from a motion judge's decision not to order the

plaintiff to request documents from non-parties. The defendant sought an order for the plaintiff to request documents from a number of non-parties, including employment files, workers' compensation files and EI records.

Citing *Reilly*, the defendant argued the test for control or power was met, because provincial and federal privacy legislation afforded the plaintiff a "legally enforceable right" to the documents in question. The court rejected this argument, noting that the privacy legislation afforded the plaintiff a legal right to request the documents, but not a legal right to the documents themselves. This limited right was not sufficient to establish the plaintiff had control or power over the documents.

The court cited further indicia that the documents in question were not in the plaintiff's control, including the statutory privilege clause in the *Worker's Compensation Act* and the common law rule that employees do not have a right to copies of records maintained by their employers.

What are the implications of these decisions for those involved in personal injury litigation? As a practical matter, plaintiffs often consent to request documents from non-

parties, so there is no issue. If a plaintiff declines to make the request, the defendant will need to seek production directly from the third party, or lead sufficient evidence to establish the plaintiff has control or power over the documents in question.

*Brown* is important for two reasons—it rejected the argument that privacy laws can establish power or control, and perhaps more significantly, it accepted that statutory privileges may be sufficient, on their own, to negate a plaintiff's power or control. This has broad implications because many documents commonly sought by defendants are protected by statutory privileges, including WCB, EI and CPP files, as well as files held by provincial ministries or departments.

*Reilly* and *Brown* shift some of the burden of document production to the defendant. However, it remains to be seen if other superior and appellate courts will reach the same conclusions. ■

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