Are medical records not in the plaintiff's possession discoverable? Two very different WA decisions:

Chavarria v Rodman and *Royal v Alcoa of Australia Limited*

By Laura Angel

In the recent decision of *Chavarria v Rodman*,[1] the District Court of Western Australia was asked to determine whether the *Privacy Act* 1988 (Cth) (*Privacy Act*) grants plaintiffs the right to obtain documents from their medical file. If plaintiffs do have such a right, but do not have the documents in their possession, can they ask for them for the purposes of discovery?

This issue was previously canvassed in *Royal v Alcoa of Australia Limited*.[2] While both cases are decisions of registrars only, access to medical records is such a polarising issue in personal injury litigation that a comparison of the different approaches taken is of interest. In *Royal*, Registrar Wallace decided that where a plaintiff has a right to access documents, s/he has a legally enforceable right to obtain them. Hence, the plaintiff has the right to obtain the documents and they are therefore discoverable, even though not in the plaintiff's actual possession.

In *Chavarria*, Principal Registrar Gething reached a different conclusion. After careful analysis and interpretation of the common law and relevant legislation, he decided that although plaintiffs may have rights to access documents under the *Privacy Act*, they do not necessarily have rights to obtain documents or copies of these documents. Accordingly, these documents are not within their power and are therefore not discoverable.

BACKGROUND

In Western Australia, discovery and inspection of documents is regulated by Order 26 of the *Rules of the Supreme Court* 1971. Discovery may be requested by notice in writing[3] or by making an application to the court for a discovery order for particular documents.[4] A party that has been requested to give discovery is under a continuing obligation to give discovery until the conclusion of a trial.[5]

FACTS AND ISSUES

In *Royal*, the plaintiff was claiming damages for personal injuries that he allegedly sustained while working at the defendant's premises. The matter came before Registrar Wallace when the defendant sought orders for specific discovery under Order 26, Rule 6 – namely, discovery of medical records held by the plaintiff's treating medical practitioner, and records held by the hospital where he was admitted after the accident. Registrar Wallace was satisfied that the documents sought did exist and were relevant to the matters in issue. Therefore the issue to be determined by the court was whether the documents were in the 'power' of the plaintiff when they were not in the plaintiff's actual possession.

The matter of *Chavarria* came before Registrar Gething when the defendant made an application seeking orders that the plaintiff file and serve an affidavit stating whether certain medical records were or had been in her possession, custody or power. The relevance of the documents was conceded. However, the plaintiff claimed that the documents sought were in the possession of her treating GP, Dr Will, not her. Registrar Gething then had to decide whether the *Privacy Act* created rights to medical records such that they could be said to be within the power of a party for the purposes of discovery.

SUBMISSIONS

In *Royal*, the plaintiff contended that the documents sought were not within his power and relied on *Mildalco Pty Ltd v Simpson*[6] as authority for the argument that documents remain in the power of the hospital and/or medical practice, despite the fact that the hospital or practice may, with consent, show them to another party. The defendant relied on the decision in *Lonrho Ltd v Shell Petroleum Co Ltd*,[7] which was applied in *Australian Railroad Group Pty Ltd v Rowan*[8] as authority for the argument that a document is within the power of a party when s/he has a presently enforceable legal right to obtain inspection of it without the consent of a third party. The defendant submitted, therefore, that the *Privacy Act* gives a person a present, enforceable legal right to obtain documents and, as such, the documents are within the power of the party and are therefore discoverable.

Similar arguments were made in *Chavarria*. The plaintiff relied on the decision of *Breen v Williams*[9] as authority for the argument that a patient has no legal right to access, inspect or copy a file maintained by a treating doctor because ownership lies with the doctor. The defendant conceded the authority in *Breen*, but argued that this authority had been superseded by the private sector amendments to the *Privacy Act*. By virtue of this legislation, the plaintiff had rights to access her medical records and thus had possession, custody and control of the contents of her medical file. The defendant also relied on the decision of Registrar Wallace in *Royal*. >>

REASONING

In *Royal*, Registrar Wallace turned first to clause 6.1 of the National Privacy Principles (NPP), which are set out in schedule 3 to the *Privacy Act*, to determine whether or not the plaintiff did have a presently enforceable legal right to obtain inspection of the documents.

Clause 6.1 provides that:

'If an organisation holds personal information about an individual, it must provide the individual with access to the information on request by the individual ...'

Various exceptions follow, none of which were seen to be relevant to the circumstances of this case.

Although Registrar Wallace was satisfied that the plaintiff had a presently enforceable legal right to obtain access to the documents, did he have the right to inspect the documents? To answer this question, Registrar Wallace turned to the guidelines published by the Office of the Federal Privacy Commissioner (the NPP guidelines), which outline the ways in which an organisation can give individuals access to information and inspect records.

After considering these provisions, Registrar Wallace concluded that where plaintiffs can access documents, they also have a legally enforceable right to inspect them. Such documents are therefore within the plaintiffs' power and are discoverable, even if not in their possession.

In *Chavarria,* Principal Registrar Gething conducted a more thorough investigation into what documents are discoverable under Order 26. He firstly considered what was meant by the 'power' over a document. After citing the English cases of *B v B*[10] and the judgment of Lord Diplock in *Lonrho Ltd v Shell Petroleum Co Ltd,*[11] he considered the South Australian decision of *Taylor v Santos Ltd.*[12] In this case, Doyle CJ made the following comments as to what constitutes power over a document:[13]

> '...in my opinion, the obligation to discover hinges upon having a right or actual and immediate ability to examine the document. A person does not have that right or actual immediate ability if the person is able to inspect the document only if a third person, who has control of the document agrees to refrain from so exercising that person's control as to prevent inspection...
>
> The point I wish to emphasise is that to the extent that the concept of power extends beyond a presently enforceable legal right, it should be held to so extend only when the court can say that the person in question does have the actual immediate ability to inspect the document. Otherwise, I consider, the law would place an impossible obligation upon a party.'

Principal Registrar Gething then considered by analogy whether the *Freedom of Information Act* 1982 (Cth) created rights to documents that would bring them within the 'power' of a party. He considered the case of *Theodore v Australian Postal Commission*,[14] where Murray J found that every request for documents under the Act is subject to a decision by an appropriate official, so documents are not automatically available and it could not be said that a plaintiff has a presently enforceable right to them.[15] Therefore, the rights granted by the *Freedom of Information Act* were not sufficient to place documents in the 'power' of the plaintiff.

He then looked at Order 26 in context, concluding that the 'power' required over a document would need to be a power that would allow another party to 'conveniently and quickly inspect and copy the documents'.[16] After finding that Dr Will was covered by the *Privacy Act*, did the *Privacy Act* grant a plaintiff sufficient power over documents?

The court found that under s98 of the *Privacy Act* and by virtue of Principle 6 of the NPP, the plaintiff had a legally enforceable right of 'access' to information held by Dr Will. The term 'access', however, is not defined in the *Privacy Act*, so the court had to interpret its meaning. After finding that the ordinary meaning of access did not appear to include the ability to copy or remove the documents being accessed, the court referred to the NPP guidelines. In short, the concept of access included allowing an individual to inspect personal information, take notes or obtain a copy of the information. However, the NPP guidelines also state that there are situations where an individual may be denied access to personal information.

Next, the court explored the *Guidelines on Privacy in the Private Health Sector*, issued by the Privacy Commissioner, which were more or less the same as the NPP guidelines, but directed towards health service-providers. The various ways of giving individuals access to information has been outlined in an information sheet also issued by the Privacy Commissioner and includes inspection, copying, taking notes, faxing, providing a summary of some of the methods available to those who hold the information. It was also noted that the Australian Medical Association does not interpret the *Privacy Act* as requiring a doctor to provide a patient with a copy of their records.[17]

After considering this interpretive material, Principal Registrar Gething decided that the right of access acquired by the plaintiff under the *Privacy Act* does not necessarily extend to a right to obtain a copy of information. Therefore, there is no power over the documents and they are not discoverable under Order 26. At 31, he states:

> '... it is possible for an organisation to comply with NPP 6 by giving an individual access to a document in a form that does not involve the individual actually seeing the document – for example if the individual is given an accurate summary of the information – and in particular in a manner that does not involve the individual being able to copy the document. This interpretive position is of course not binding on the court, though it is instructive in setting the context in which the *Privacy Act* is to be construed. In any event, the interpretive guidance set out by the Privacy Commissioner is entirely consistent with the ordinary meaning of the word "access" discussed above. As I have already indicated, on its ordinary meaning, it is entirely possible for an individual to have "access" to a document, without the individual having the right to copy the document.'

And at 32:

> '... the power over the document which a party must have in order for it to comply with the obligations flowing from the inclusion of the document in a discovery list

includes the power to allow other parties to conveniently and quickly inspect the document, and the power to allow another to copy the document. On the analysis that I have set out above, the rights of the plaintiff do not extend this far. There is no right to take copies of the document. Neither does there appear to be a right to allow a third party, namely an opposing party to litigation, to inspect the documents in the hands of the organisation holding them. In the words of Doyle CJ in *Taylor*, an applicant under the *Privacy Act* does not have an "actual and immediate ability to inspect" any documents. In this regard, the position under the *Privacy Act* seems analogous to the position of the FOI Act as considered by Murphy J in *Theodore*.'

CONCLUSION

To plaintiff litigators, the decision in *Chavarria* simply makes common sense. I believe that the principal registrar's studied analysis would hold sway at appellate level. Interestingly, the defendants did not appeal. Of course, they could subpoena the doctors and inspect documents before trial. In other Australian jurisdictions the issuing of such subpoenas is far more commonplace than in WA. Leave must be sought here and *prima facie* relevance established. Practitioners from those other jurisdictions may wonder why the defendants simply didn't do so in the first place in each of these cases (particularly given that the plaintiff had conceded relevance).

This raises the important question as to whether a plaintiff, by commencing a claim for personal injury damages, exposes their entire health to scrutiny and therefore makes all medical records relevant for the purpose of production on subpoena. Practitioners should be vigilant and prepared, where appropriate, to search for valid grounds of objection to defendants who seek leave to issue subpoenas in a blanket fashion. Bear in mind that it has been held that a doctor's obligation of confidence will not be overcome or defeated merely by the commencement of litigation between private interests.[18]

Alternatively, nothing beats a properly proofed plaintiff and the early request of medical notes before proceedings start. Decisions can then be made as to whether some of those records are in fact not relevant, and what the grounds for objection might be should their production be requested. ■

Notes: **1** [2006] WADC 42. **2** [2005] WADC 170. **3** Order 26, Rule 1. **4** Order 26, Rule 6. **5** Order 26, Rule 2. **6** Unreported; FCt of SCt of WA; Library No 6747; 1987. **7** [1980] 1 WLR 627. **8** [2004] WASC 165. **9** (1996) 186 CLR 71. **10** [1979] 1 All ER 801. **11** (No. 2) (1980) 1 WLR 627. **12** (1998) 71 SASR 434. **13** At 14. **14** *Theodore v Australian Postal Commission* [1998] VR 272. **15** *Ibid*, per Murray J at 279. **16** At 16. **17** At 33. **18** *Richards v Ankur Kadian (by his tutor Janak Kadian) & Ors* [2005] NSWCA 328).

Laura Angel *is a solicitor at Slater & Gordon, Perth.*
PHONE *(08) 9223 4800* **EMAIL** *langel@slatergordon.com.au*