

Administrative error resulting in lost opportunity for ACC claim

Legislation	Ombudsmen Act 1975
Agency	District Health Board (DHB)
Ombudsman	Leo Donnelly
Case number(s)	385440
Date	March 2018

Summary

A patient who was unaware he had asbestosis underwent a CT scan while being treated at a DHB Hospital. On the scan's accompanying notes a radiologist noted previous asbestos exposure. This CT scan with accompanying notes was misfiled, for unknown reasons, and the patient's diagnosis of asbestosis was not confirmed until autopsy.

The patient's wife asked the DHB for compensation, claiming that the DHB's misfiling of the CT scan resulted in a lost opportunity for a lump sum payment to be pursued with the Accident Compensation Corporation (ACC). The DHB did not accept that its administrative error in misfiling the scan had resulted in a lost opportunity, and declined to offer compensation. The patient's wife then complained to the Ombudsman.

The Ombudsman concluded there was compelling evidence to show that the misfiled CT scan meant practitioners caring for the patient were denied access to important information, and subsequently had not initiated an ACC lump sum claim while the patient was alive. As a result, the patient's family lost the opportunity to receive the payment following his death.

The Ombudsman formed the opinion that it was unreasonable for the DHB not to accept that there was a lost opportunity for the family as a result of its practices. He suggested that by way of resolution, the DHB should offer the complainant an *ex gratia* payment of \$10 000. The DHB agreed, and in those circumstances it was not necessary for the Ombudsman to make a recommendation.

Background

1. The patient's exposure to asbestos, confirmed at autopsy, was recorded in a CT scan conducted at a hospital in April 2007. However, the CT scan was misfiled and practitioners treating the patient did not have access to his full and relevant clinical records.
2. Under ACC legislation, claims for consideration of lump sum compensation must be lodged before death. As the practitioners treating the patient did not have access to the CT scan, they did not consider completing the ACC lump sum claim documents while he was alive.
3. The patient's family subsequently asked the DHB to compensate for the loss of opportunity to make a claim to ACC, alleging that but for the administrative errors made by staff at a hospital, the practitioners treating the patient would have initiated an ACC claim at the relevant time. The family asked the DHB to pay the full amount of the lump sum payment, by way of compensation.
4. The DHB declined to pay compensation, on the basis that the misfiled CT scan was not significant (and notes on it may have been incorrect), the patient had denied exposure to asbestos when asked about the possibility, and asbestosis was not proven until autopsy.
5. The DHB also considered that there was no lost opportunity for the family because in those circumstances there was no reason for practitioners to consider asbestos exposure, notwithstanding the clinical notes on the 'lost' CT scan. The DHB advised the complainant that it was for ACC to determine whether there had been an error in diagnosis, which there had not been in this case.

Investigation

6. The Ombudsman commenced an investigation to determine whether the DHB should have considered offering an *ex gratia* payment to the deceased's estate in the circumstances of this case.
7. He found there was factual support for the claim that an administrative error (misfiling of a clinical report) caused the loss of an opportunity for the family to qualify for consideration of the lump sum payment from ACC.
8. The Ombudsman clarified that the issue for determination was not whether the DHB should compensate the family of the deceased for the equivalent ACC lump sum payment that may have been available, but whether the DHB should make an *ex gratia* payment in recognition of the administrative error and consequent lost opportunity.
9. During the investigation, the Ombudsman considered the findings made by two other agencies in relation to complaints made by this complainant. Their findings were compelling. The DHB was unable to explain why it considered that the misfiled CT scan report was not relevant to an early diagnosis of asbestosis. Furthermore, the DHB had

claimed that the radiologist who noted previous asbestos exposure may have been wrong, but was unable to explain why this conclusion had been reached or whether staff had been questioned about the matter.

Outcome

10. The Ombudsman indicated to the DHB that if he confirmed his provisional opinion as final, the resolution he would likely recommend would be to offer the family an *ex gratia* payment of \$10 000. The DHB agreed to do this, and its offer was accepted by the complainant in resolution of their complaint. The Ombudsman confirmed his opinion, but did not need to make any recommendation.