

Gone fishing

Bernard S Pearn-Rowe

TO THE EDITOR: No one denies the right of insurers, or law firms acting for an interested party, to obtain information relating to a claim with due authority from the patient. After all, it's fair enough for insurers to check the details of a claim.

This system has worked well for decades and allows the insurance industry to operate reasonably and fairly.

But a recent development gives cause for great concern.

There is a trend among both insurers and lawyers to demand copies of a patient's entire medical file. Not just details relevant to the claim, but the *entire* medical file, often extending for years before the relevant event. A cynic has suggested this is financially motivated, as a reasonable fee for copying and forwarding a file is likely to be less than the fee for reviewing the file and preparing a report. Another equally uncharitable explanation is that insurers are embarking on "fishing trips", hoping to find grounds to mitigate a claim.

I'm sure the industry could produce examples in which fishing trips have identified dishonest claims that might not otherwise have been detected. But I cannot justify sacrificing the privacy of many patients to expose the occasional fraudulent claim.

In one case, one of my patients suffered a work-related injury that prevented her working as a private contractor for some months. The case was clear-cut, simple and straightforward. Yet the insurer refused to process her claim without receiving a copy of her entire file — including very personal details of a sexual assault nearly 20 years earlier, together with confirmation that she had contracted a sexually transmitted infection and details of her subsequent break-

down. For a vulnerable and very private person, it was a terrible ordeal to have this brought up and to have to sanction its disclosure to a claims officer.

My financially strapped patient was held to ransom when the insurer advised that the claim would not be processed until the disclosure was authorised.

How can the individual claimant ever stand up to a multinational insurer? And, in this case, appeals to the industry regulatory body were peremptorily dismissed. I support any stand by our profession against this unjustifiable invasion of privacy.

Bernard S Pearn-Rowe, Professor
College of Medicine, The University of Notre
Dame Australia, Fremantle, WA.
bernard@inet.net.au

Paul Nisselle

COMMENT: Agents for a workers compensation authority commonly assert they have the right to see the patient's entire medical history to assess whether the injury arose from work or from another past or current illness or injury.

Two points need to be underscored.

Firstly, patients have a right to waive their right to privacy. A consent for total disclosure, given when initiating a claim for compensation, could be invalid, as it is a consent given under (economic) duress — that is, payments will not commence unless the patient consents to full disclosure. A doctor may feel a duty to point out to the patient that full disclosure will reveal distressing matters from the patient's past that the doctor believes are not relevant to the claim. The doctor may recommend that the patient seek legal advice on how to object to full disclosure. Whether the patient objects or agrees to total disclosure is a decision for the

patient, not the doctor, with the help of legal advice. Doctors should not give that advice.

Secondly, the legislation governing statutory compensation schemes in Australia gives extraordinarily broad powers to the relevant authority to demand information. For example, section 239 of Victoria's *Accident Compensation Act 1985* states that the Victorian WorkCover Authority (and its agents) may "require any person — to furnish the Authority with such information as the Authority requires . . . and may require the person to produce all books in the custody or under the control of the person relating thereto." Doctors and medical records are not excluded from the broad sweep of section 239.

Notwithstanding such clauses, a claimant can object directly to WorkCover about a request or demand to supply his or her entire medical history if the claimant believes there are matters not relevant to the claim that he or she does not wish to be disclosed. If that process fails, the claimant then has a number of legal avenues that can be pursued.

Pearn-Rowe may be concerned at the David-Goliath imbalance of power between patient and insurer, but that does not justify omission of information because the doctor thinks it is not relevant. The Medical Defence Association of Victoria recently settled a case in which a member, asked to provide a "Personal medical attendant's report" for a patient applying for a new disability insurance policy, omitted information about the patient's history that would have affected the insurer's assessment of the application. The patient had signed a consent for full disclosure. The insurer issued the policy, and a short time later the patient was diagnosed as suffering a major illness, the premonitory symptoms of which were described in the omitted information. Whether or not it was a deliberate omission was not the point — it was a negligent omission.

In summary, the patient has a right to object to disclosure. If the patient chooses not to, the doctor has a legal obligation to comply with the literality of the patient's signed consent for disclosure.

Competing interests: I am a Senior Advisor for Risk Management at the Medical Defence Association of Victoria and Convenor of Medical Panels in Victoria's WorkCover scheme.

Paul Nisselle, Senior Advisor
Risk Management, Medical Defence
Association of Victoria, Carlton, VIC.
Paul.Nisselle@mdav.org

Correspondents

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