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Open disclosure - an opportunity lost?

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# A right to know

“Every human being of adult years and sound mind has a right to determine what shall be done with his own body.”

Justice Benjamin Cardozo

*Schloendorff v. The Society of New York Hospital*, 211 N.Y. 125  
(at 129-130), 105 N.E. 92, 93 (1914)

# Open disclosure – an everyday event

Open disclosure is ...

- providing information to patients.

# A positive benefit

60% of patients sued because:

- Failed to receive an explanation of the error or
- Felt ignored or neglected by their doctors.

30% of these said an explanation, apology and honesty may have prevented litigation.

*Why do people sue doctors?*

*A study of patients and relatives taking legal action*

Vincent, Young & Phillips

The Lancet Vol 343 June 25th, 1994; 1609-1613

# A positive benefit

Patients sued because:

- Perception that the doctor was not completely honest
- Perception that the doctor would not listen to them
- Unable to get anyone to tell them what happened

Hickson et al  
*"Factors that prompted families to file  
malpractice claims following perinatal injuries*  
JAMA 267, no 10 (1992) 1359 - 1363

# Historical context

- Kraman and Veterans Hospital, Kentucky
- "... humanistic risk management policy that includes early injury review, steadfast maintenance of the relationship between the hospital and the patient, proactive full disclosure to patients who have been injured because of accidents or medical negligence, and fair compensation for injuries."

Kraman et al,  
*Annals of Internal Medicine*, December 21 1999,  
Volume 131, Number 12, 963 - 967

- Open Disclosure Standard July 2003
- Medical Defence Organisations accepted the standard.

# Process

Most open disclosure processes include:

- Expressing regret for what has happened
- Explain what happened and what is going to happen
- Providing information about ongoing care, and
- Providing information about ways of preventing recurrence

# Legislation

- Apology laws
- Statutory privilege

# Apology

- As early as possible, the patient and their support person should receive an expression of regret for any harm that resulted from an adverse event.

Open Disclosure Standard,  
April 2008 Reprint page 2.

- Apology - an expression of sorrow, regret or sympathy but does not include a clear acknowledgment of fault.

s14I, Wrongs Act 1958 (Vic)

# Apology cont'd

- The difference between the almost right word & the right word is really a large matter--it's the difference between the lightning bug and the lightning.

Mark Twain, Letter to George Bainton, 15 October 1888

- Is an expression of regret the right word?

# Apology - legislation

- Civil Law (Wrongs) Act 2002 (ACT)
- Civil Liability Act 2002 (NSW)
- Personal Injuries (Liabilities and Damages) Act 2003 (NT)
- Civil Liability Act 2003 (Qld)
- Civil Liability Act 1936 (SA)
- Civil Liability Act 2002 (Tas)
- Wrongs Act 1958 (Vic)
- Civil Liability Act 2002 (WA)

# Legislation - apology

## Variations

- An apology cannot not include any admission of fault – Qld, Vic, WA, Tas, NT
- An apology may contain admission of fault - NSW, ACT.

## Protection

- In Vic, an apology not evidence of an admission, but if an apology contains any admission of fault it is not protected.
- ACT, NSW, QLD, TAS, WA, NT an apology is inadmissible in civil proceedings;
- WA and TAS protect apologies from use in civil proceedings of any kind;
- SA protection applies to claims in tort

# Statutory privilege

- Part VC *Health Insurance Act* 1973 (Cth)
- Section 139, Division 3, Part 7, *Health Services Act* 1988 (Vic)
- Part 2, Division 6B, *Health Administration Act* 1982 (NSW).
- *Health Services (Quality Improvement) Act* 1994 (WA)
- Section 4 of the *Health Act* 1997 (Tas)
- Part 4 *Health Act* 1993 (ACT)
- Part 4 and Part 4B, Division 2, *Health Services Act* 1991 (Qld).

## Statutory privilege cont'd

- Does not address open disclosure
- Limited to approved / declared quality assurance activities
- To the extent information obtained in a quality assurance activity is disclosed in accordance with statutory rules the information is available to the patient to use

# Disclosure versus exposure

- Open disclosure standard is not concerned with blame
- National mandatory reporting
- Anxiety / confusion amongst health professionals
- Any increased concern that participation will expose individuals to risk will decrease active participation.

# Avant's position on open disclosure

## Avant:

1. supports open disclosure by its members that occurs in accordance with the National Open Disclosure Standard.
2. supports members who are undertaking or wish to undertake an open disclosure process with patients and will provide advice, information and support in what can be a stressful and difficult time.
3. encourages members to seek early advice and support during this process.
4. believes that for open disclosure to be effective appropriate education and training of health care practitioners is essential.
5. provides education and training to members who wish to participate in open disclosure.
6. supports members providing apologies to patients who have suffered an adverse outcome from treatment.

## Avant's position cont'd

7. While Avant's policies of insurance provide that an insured person must not make any admission in relation to any claim, complaint or matter covered by the policy without Avant's prior written consent, the policies do not prevent health care practitioners expressing sincere regret for what has happened.
8. Avant believes that a sincere apology or expression of regret for what has happened, which acknowledges any distress that the patient is suffering and which provides information as to what occurred, what future treatment may be required and where appropriate what steps are being taken to further clarify the circumstances of the incident, assists health care practitioners and their patients to maintain their therapeutic relationships.

## Avant's position cont'd

9. Avant's position, in accordance with the National Open Disclosure Standard, is that an apology is not intended to be and should not be seen as an admission of liability or a statement casting blame on some other person or organisation.
10. Accordingly, Avant will support members who undertake open disclosure in accordance with the National Open Disclosure Standard in dealing with a claim or complaint that might arise from the adverse outcome, subject to the terms of the member's policy of insurance.
11. Avant strongly supports the introduction of nationally consistent laws protecting apologies, and discussions that occur within an open disclosure process from use in any legal proceeding, including civil or disciplinary proceedings or complaint processes, as Avant believes such laws will facilitate the implementation of open disclosure.

# A national approach

- National registration of health professionals
- National approach to safety and quality – ACSQHC
- National laws dealing with open disclosure that facilitates the implementation of open disclosure by protecting information given in the process is both a desirable and logical goal.