Karen Stott – ADR & Mediation Services

ABN 72 114 844 939
Karen@ADRmediation.com.au
Tel 02 9223 2362
0418 292 283
5/82 Elizabeth Street Sydney NSW 2000

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ADR in Healthcare:
Why a patient goes to a lawyer and how this may be prevented by Open Disclosure

Having acted predominately for plaintiffs in medico-legal litigation from 1995 to 2005, I have experienced first hand, the common reasons why patients consult a lawyer in the first place.

I believe there are 5 main reasons why aggrieved patients and their families seek medico-legal advice:

1. When there was a complication with their medical treatment, no explanation was provided and there was no opportunity to ask questions.

2. The patient felt they had nowhere else to turn for answers, for understanding or for assistance. There may even be the perception (real or imagined) of a cover-up.

3. No apology or expression of empathy or regret, was offered.

4. The patient and their family do not want the same event to happen to anyone else.

5. The patient's complications of treatment have caused a serious adverse impact on their life, including their livelihood, earning capacity and enjoyment of life and they require financial support in respect of this.

In all but the last example, Open Disclosure where any medical complication has occurred, should be able to achieve an effective resolution of issues, (providing no or only minimal damage has been suffered), if performed in a professional and genuine way.

Open Disclosure is the open discussion with (the) patient, their family, carers and other support persons, of incidents that result in harm to a patient while receiving health care. - Avant Mutual Group

I believe that many disciplinary complaints to HCCC and AHPRA **and** many litigated claims could be avoided if all healthcare providers embrace open disclosure and undertake the process in a genuine manner.

Relatively speaking, it costs nothing to show genuine empathy, to offer an apology or an expression of regret and to accept responsibility for resolving an issue with a constructive outcome in mind.

A case in point – (*and there are countless others like them*):

A patient suffered an unexpected complication of a minor surgical procedure and was frightened when she woke up in ICU following emergency surgery and recalled the commotion of having been wheeled back to theatre with lots of people around. Her husband was not there because he had not been notified.

The patient's gynaecologist who performed the initial procedure made a comment to her in words to the following effect: "*What happened was an associated risk of the procedure but in 30 years nothing like this has never happened to me*".

That doctor's explanation and account for the complication which had occurred was viewed by the patient as self-serving and unreliable.

To make matters worse: the patient felt further let down upon consulting her referring GP 8 weeks after the event. The specialist had reported on the procedure but with no mention of the complication which had occurred. Not surprisingly, the patient felt that her specialist had tried to play down or cover up the incident and she was particularly upset because she felt the lack of information reported to her GP was to the detriment of her recovery and general health.

Two years later, the patient came to see me for medico-legal advice because she was **still angry** about her specialist's response to the complication and she wanted **reliable answers** to what had occurred.

The independent expert evidence was supportive of a claim for negligent technique causing the complication; however the legal value of the claim was modest and the patient was not driven by the prospect of monetary compensation in seeking my advice. She simply wanted answers that her specialist did not provide in an appropriate manner at the time, and answers that I could not provide without the benefit of an expert opinion.

Furthermore, I believe that the legal claim could have been settled shortly after the issue of a letter of demand, by way of Mediation, which would have enabled the patient to communicate her emotions and anger at the feeling that her specialist had prioritised her good record and professional reputation over her patient's right to know. If the patient's perception had been misguided, early mediation (given that Open Disclosure had not occurred) could have afforded her the opportunity to resolve these issues in a positive way.

This raises the issue of whether healthcare providers should actually attend mediation – *the subject of a separate post in the near future*.

Resources for Open Disclosure

The Australian Open Disclosure Framework (the OD Framework) was endorsed by the Australian Commission of safety and Quality in Healthcare, (the Commission) in March 2013.

The OD Framework is designed to enable health service organisations and clinicians to communicate openly with patients when health care does not go to plan. It provides a nationally consistent basis for open disclosure in Australian health care.

See:http://www.safetyandquality.gov.au/our-work/open-disclosure/the-open-disclosure-framework/

About Karen Stott, ADR & Mediation Services:

I am a lawyer with 20 years of litigation experience in a wide range of areas, particularly personal injury and medical negligence, where I have successfully represented both plaintiffs and defendants. I am also a nationally accredited mediator (NMAS) with a strong belief that resolving disputes as opposed to litigating them, can result in a much more favourable outcome for both parties. This belief is consistent with the approach I have taken throughout my career.

I can advise and assist on any aspect of the Open Disclosure process, including:

The importance of Openness and timely acknowledgment:

- Patient views and experience
- What to disclose
- Legal issues

Saying sorry:

- Role of an apology
- Apology and open disclosure
- Elements of an apology
- Legal aspects of apology

For more information please see my website ADRmediation.com.au or KarenStott.com.au - or contact me directly: Karen@ADRmediation.com.au Tel: 02 9223 2362 / 0418 292 283