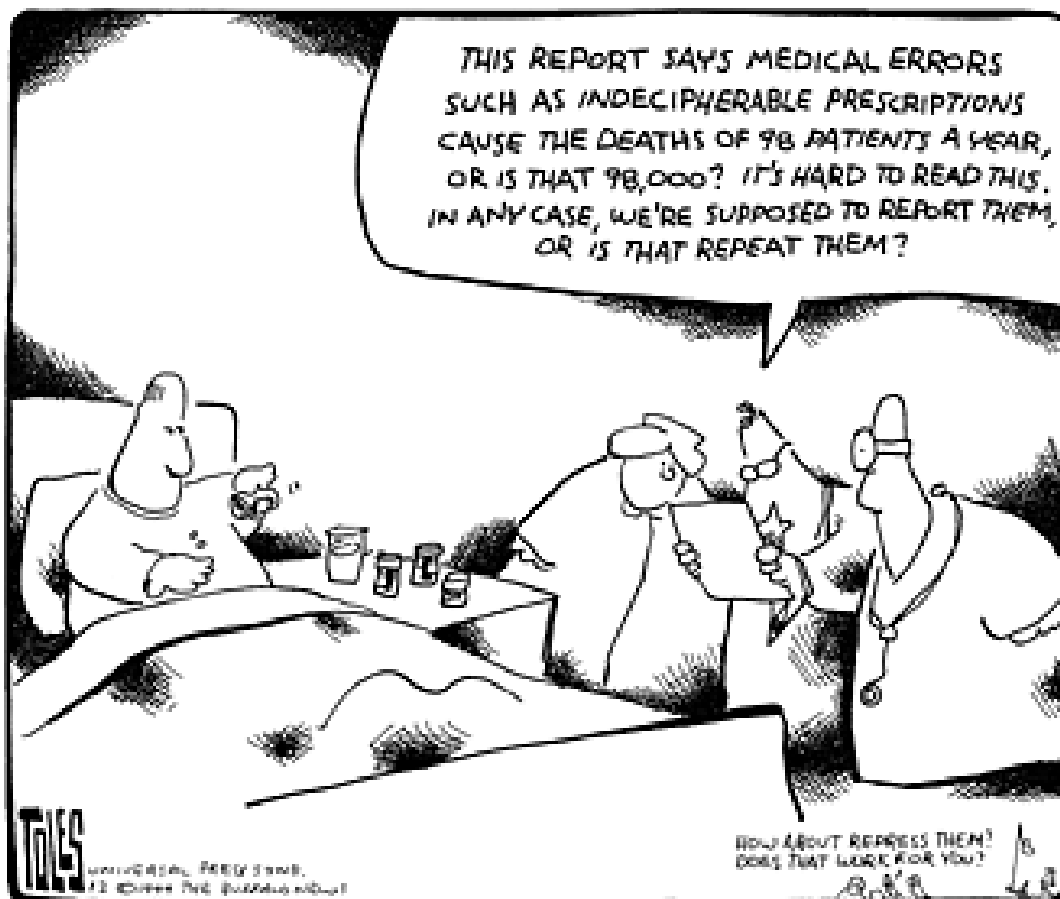


**Implementing the Open Disclosure of medical errors in
Australia - a Mediation Model
NADRAC Research Forum**

**PowerPoint Presentation by
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Slide 1



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Slide 2

Disclosure of medical error in Australia

- Adverse events happen
- Routine disclosure of adverse events is inevitable
- Implementing disclosure is difficult – a mediation model may be the way forward

Slide 3

Adverse events happen

- Medical treatment is inherently risky
- Adverse event: “an incident in which unintended harm resulted to a person receiving health care.” (ACSQHC Open Disclosure Standard, 2003)
- Occur in approx 10.6% of admissions (QAHCS 1995) – comparable with overseas findings
 - Harvard study (USA): 18,000 people die every day partly as result of iatrogenic injury (harm during health care)
 - Equivalent to 3 jumbo jets crashing every 2/3 days
- 50-80% of errors may be preventable
- Not all errors involve negligence
- Errors mostly due to system error

Slide 4

Routine disclosure of adverse events is inevitable

- Ethical obligations
- Legal duties
- Open Disclosure Standard

Slide 5

Open Disclosure Standard

- Open disclosure: open communication when things go wrong in health care
- Elements:
 - Apology/expression of regret
 - Factual explanation of what happened
 - Explanation of potential consequences
 - Explanation of what is being done to manage the event and prevent its recurrence

Slide 6

Implementing disclosure is difficult

- Legal barriers: adequacy of legislative protection for apologies, fear of increased litigation
- Physician barriers: guilt, embarrassment, fear of reaction from peers, fear of punitive sanctions, communication difficulties

Slide 7

Comparative apology provisions

	Apology incl fault	Not admission of liability	Not relevant to fault	Not admissible evidence
ACT	X	X	X	X
NSW	X	X	X	X
Tas		X	X	X
WA		X	X	X
Qld				X
NT				X
Vic		X		
SA		X		

Slide 8

“Except in NSW and ACT, saying ‘I’m sorry I did this to you can still be pleaded as an admission of liability. But so what? If the facts ultimately showed you were not liable, the facts will overcome the admission.”

- Dr Paul Nisselle senior risk advisor MDAV (Paul Smith “Sorry Mess Over Apologies” Australian Doctor, 10 January 2007)

Slide 9

Impact of disclosure on litigation

- Lexington Veterans Hospital Kentucky - full disclosure policy reduced cost of claims
 - Kraman and Hamm (1999)
- Harvard study- routine disclosure likely to increase claims volume and cost
 - Studdert et al (2007)
 - Criticisms: theoretical modelling – opinion based and no account of details of disclosure process eg whether apology, compensation, level of communication skills: Wakefield et al (2007)

Slide 10

Implementing disclosure is difficult – a mediation model may be the way forward

Slide 11



Slide 12

Potential Benefits of Effective Disclosure:

- enhanced awareness of medical errors
 - early investigation of systemic problems
- +
- avoiding unnecessary litigation of claims;
 - interests based approach to compensation;
 - protecting and preserving the physician patient relationship; and
 - minimising psychological harm to patients, physicians and their respective families.

Slide 13

Avoiding Litigation

Why do patients sue?

- People who want compensation choose non-adversarial methods
- People who want retribution choose litigation
 - Sloane et al "The Road from Medical Injury to Claims Resolution: How no fault and torts differ" (Spring 1997) 60 *Law & Contemp Problems* 35

Slide 14

Why do patients sue?

- Families' perceptions that the physician was not completely honest;
- Inability of family members to get anyone to tell them what happened;
- Sense among family members that physician would not listen; and
- Being told (not by a lawyer) that they should sue
 - Leibman and Hyman "A Mediation Skills Model to Manage Disclosure of Errors and Adverse Events to Patients" (2004) 23 (4) *Health Affairs* 22

Slide 15

Advantages of a mediation model

- Promotes interest based solutions to meet the immediate needs of the affected patient and their family;
- Prevents recurrence;
- Promotes sharing of information at an early stage
 - an explanation (emphasizing cause of negative behaviour was external/uncontrollable) reduces anger and punishment behaviour
 - (Bies,1987; Bies & Shapiro,1987;Shapiro 1991)

Slide 16

Advantages of a mediation model cont...

- Focuses on solutions to the patient's problems now
 - not allocation of blame for the past (cf litigation)
- Protects/maintains the physician-patient relationship;
 - Promotes effective communication strategies to support the physician in implementation of disclosure

Slide 17

Recommendations from NY Mediation model pilot study:

1. Physicians develop communication skills;
2. Hospitals provide in-house experts to aid in planning & conducting disclosure;
3. Hospitals encourage planning before conducting disclosure conversations;
4. Health care providers offer an apology after an adverse event/error;

Slide 18

Recommendations cont...

5. Physicians & Hospital leaders provide debriefing and support for professionals after an error;
6. Hospitals use mediation as soon as practicable after an adverse event to settle potential claims

- Leibman and Hyman "A Mediation Skills Model to Manage Disclosure of Errors and Adverse Events to Patients" (2004) 23 (4) *Health Affairs* 22

Slide 19

Risks?

- Physician support crucial
- Mediators are neutral – Physicians will feel responsible/afraid/remorseful/upset...
- Reduced psychiatric injury to patients at what cost?
- The Role of Lawyers?