Journal of Medical Safety 2011 p.9 - p.15 ISSN 1349-5232

[Review]
Legal Issues of Crisis Communication in Medical Accident in Japan

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Abstract

Japan shares the experience with western countries that poor disclosure and communication after an accident is a motivation for patients and relatives to sue doctors. Despite this, there are no guidelines in Japan concerning when the disclosure should be given, who should give the disclosure, what should be disclosed, and how it should be disclosed. This article introduces some practical cases based primarily on the author's experience where disclosures were given and analyzes the effects. The examples show that the significance of explanation/apology and compensation differs between cases in which the patient has died as opposed to being injured. In a permanent disability case where 24 hours nursing care was required, the patient's relatives did not persist on an apology and admission of responsibility, but instead focused on the compensation necessary for the patient's future care. In contrast, in a death case, patient's relatives told the mediator that if the physician issued an apology, they would not claim for compensation. Thereafter the case was settled without payment. These cases, and others like them, suggest that medical professionals need to understand the differences in patients/relatives' expectations between the death cases and the non-death cases. In general, explanation and apology are more important in death cases, while compensation may be more important in non-death cases.

Regarding apologies, Japanese medical professionals share the same fear of litigation as those in western countries, and are sometimes reluctant to give apologies that may be viewed as admissions of liability. However, judges generally do not rule apologies as an admission of liability without determining other factors and apologies may be effective at resolving disputes in some cases, and are oftentimes expected by the public. In an elevator accident case, for example, the company reportedly followed its lawyer's advice and did not apologize for the accident. It was highly criticized. In another case, hospital's late apology for the deaths of four patients who underwent cardiac bypass surgery was highly criticized as well. Medical professionals need to compare the risk of having an apology being used against them at trial with the possibility of resolving the dispute earlier. In sum, a flexible approach to apologies should be adopted. Lawyers and insurance companies need to rethink their leery approach to apologies.

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Lastly, this article examines mediation as a good tool for medical professionals to consider as an option to resolve disputes early when disclosure does not work. In one example, when the patient's family continuously yelling at medical staff in front of other patients no matter what explanations were given, the hospital filed mediation against the patient's family. The patient's family promised to stop yelling and accepted periodical meeting with medical staff.

I. Crisis Communication and Disclosure

1 Why do patients/relatives sue doctors?

Why do patients/relatives sue doctors? In western countries, the answer was already given in 1994 by the article in The Lancet with the title of the same question.[1] The article concludes that "The decision to take legal action was determined not only by the original injury, but also by insensitive handling and poor communication after the original incident."[2] It further states that "Where explanations were given, many respondents were dissatisfied. Table 3 shows that explanations were given sympathetically in under 40% of cases, and the majority were felt to be unclear, inaccurate, and lacking information."[3] It also analyzes the reasons for litigation as follows: "Four main factors were identified in the analysis of reasons for litigation….The four factors were accountability-wish to see staff disciplined and called to account; explanation- a combination of wanting an explanation and feeling ignored or neglected after the incident; standards of care-wishing to ensure that a similar incident did not happen again; and compensation- wanting compensation and an admission of negligence….Standards of care and explanations are important for all groups."[4] Similar analysis was also made by Clinton-Obama: "Malpractice suits often result when an unexpected adverse outcome is met with a lack of empathy from physicians and a withholding of essential information."[5]

Japan shares the experience with western countries that poor disclosure and communication after an accident is a motivation for patients and relatives to sue doctors. In Japan, in several medical malpractice lawsuits (Case 1), patients/relatives argued in their complaint and briefs that the reason they sued was because of lack of explanations and apologies.[6] Similar could be found in the Hiroo Hospital case (Case 2) in 1999, in which the nurses mistook a disinfectant for heparin and the patient died.[7] In criminal proceeding, the nurses, the doctors, and the president of the hospital were prosecuted and found guilty.[8] In civil proceeding, the patient's relatives sued the doctors and the president of the hospital, but did not sue the nurses.[9] Why did the patient's relatives specifically exclude the nurses who had a direct responsibility to the patient's death? It may be because the patient's relatives were angry at the doctors who tried to hide the medical error. The plaintiffs claimed that the doctors did not report unusual death to the police which is required under Article 21 of the Medical Practitioners Law[10] although they knew incorrect dosage was given, and that the doctors did not explain to the patient's relatives about the possibilities of medical error.[11] These cases show that the patients/relatives are motivated not only by the original injury, but also by poor communication after the original incident.

2 Does disclosure reduce litigation?

The significance of the disclosure is thus clear. However, does it reduce litigation?

In the U.S., several reports find support in studies suggesting that patients who are treated with openness and honesty are less likely to sue.[12] These include the experience of the Veterans Affairs Medical Center in Lexington, Kentucky, where a proactive disclosure policy has reportedly not been resulting in higher liability payments at the institutional level, and the anecdotal evidence from the Dana Farber Cancer Institute in Boston that their policies to disclose have not being accompanied by notable increases in lawsuits.[13] The opponents, however, say that the notion of disclosure reduces litigation is largely unproven and implausible.[14]

In Japan, some cases show positive effect while others do not. In case 3, the patient with atrial fibrillation took defibrillation and became bedridden. The patient suffered permanent disability which required 24 hours nursing care.

The disclosure conference was held after the accident and the physician expressed apology of sympathy to relatives, but not apology of responsibility. Insurance company admitted negligence and approved the payment. Thus the case was settled without litigation after the disclosure. In case 4, the doctor was detained for misconduct. He offered apology and compensation; however, the victim never accepted them. The doctor was then prosecuted since no settlement was reached. On the very next day of the prosecution, the victim's lawyer requested for compensation. It was clear that the victim wanted retaliation in this case, and disclosure never works in such cases.

II. Disclosure Method- When/Who/What/How?

In the U.S., Pennsylvania[15] and Harvard teaching institutions [16] have provided guidance to the disclosure. Despite the significance of the disclosure, however, there are no guidelines in Japan concerning when the disclosure should be given, who should give the disclosure, what should be disclosed, and how it should be disclosed. Decisions on appropriateness, timing, and content of the disclosure remain a private matter and preference to individual clinicians and health care institutions.[17] Although the disclosure is not amenable to "cookbook" rules[18], this article will try to introduce some clues based on actual cases.

1 Disclosure Method- When?

When the disclosure should be given? The earlier, the better. However, it is always easier said than done. Medical professionals should collect as much information as possible right after the accident and assess whether negligence is involved. If negligence is obvious but apology of responsibility is not given, dispute will arise. The difficulty in practice is that the assessment of the accident could not be done in a short time while patients/relatives are eager to get any kind of information as early as possible. In such cases, it is important to provide all available information known at that moment [19] and promise patients/relatives to follow up with any further development.

2 Disclosure Method- Who?

Who should give the disclosure? In Japan, a typical complaint from victims of traffic accidents is that once insurance company is involved in the settlement negotiation, it blocks the contact with person who causes accident. Thus the victims will most likely not receive any apology. Same complaints are heard from the patients/relatives in medical accidents. They claim that the hospitals block contact with the physicians, who took care of the patient, responsible for the medical error. Thus the patients/relatives are given no opportunity to talk to the physicians. They feel the hospitals are protecting the physicians.

To reduce these complaints, shall the physicians who are responsible for the medical error be present in the disclosure? Does the presence of the physicians make the disclosure fruitful? Some advise having physicians present while the others are against it and would rather designate others. Physicians are trained to diagnose medical problems, and to deliver bad news to patients.[20] However, they are not trained for listening skills, which is needed in the disclosure. [21] Some physicians become too emotional to be present in the disclosure which will only give an adverse effect. Although it is preferable to have the physicians responsible for the medical error to be present in the disclosure, it should be decided on case by case bases [22] with a careful consideration of physician-patient relationship and physician's character. In addition, irrespective of whether the physicians responsible for the medical error should be present in the disclosure, it is quite helpful if skilled and experienced staff members could help others to prepare for it and participate when appropriate.[23]

3 Disclosure Method- What?

What should be disclosed?

a. Lawyers' advice

In the U.S., traditionally, lawyers and risk managers have told physicians "Say as little as possible after an adverse event and do not apologize but, if you do, be sure you do not admit fault."[24] "[i]f a person asked an American lawyer (or more likely an insurance company claims adjuster) for advice on how to behave in this situation, the advice would likely be that an apology could be treated as an admission of liability that would adversely affect the legal obligations relating to the accident and also might complicate the apologizer's relations with his own insurance company." [25]

Same applies to Japan. For example, in the Hiroo Hospital case (Case 2) mentioned above, the judgment cites Hiroo Hospital's practice as follows: [26] 1) Unless negligence is clear, explanation should be limited to facts. Cause of medical accident and apology should be avoided.

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2) If there is negligence, responsible physician cannot explain alone, and hospital should explain later. 3) Physicians or nurses present at accident are strictly prohibited from giving their private comment to patients/relatives.

b. Apology

Is this lawyers' advice not to apologize correct? Is it preferable that the disclosure not be accompanied by apology?

There are real differences in apologetic behavior in Japan and the United States. Examples can be found in major league baseball. When Daisuke Matsuzaka, the Boston Red Sox pitcher, hit a batter, he took off his hat and showed apology. His behavior hit the news in the U.S. as most of the Americans would not apologize after the batter is hit. When Hideki Matsui, the previous New York Yankees batter, broke his wrist, he mentioned in a statement, "Due to this injury, I feel very sorry and, at the same time, very disappointed to have let my teammates down." As most of the American players do not apologize for their own injuries, his behavior also surprised many Americans. Another example is Ehime-maru case. An U.S. Navy submarine collided with Ehime-maru, a Japanese high school fishing training ship, and killed nine Japanese passengers. The U.S. Navy commander, Scott Waddle, angered the victims' families because he did not apologize after the incident. Only after the commander traveled to Japan to make a formal apology, the victims' families finally made up their mind to settle the incident. More than two decades ago, Wagatsuma & Rosett already analyzed, "Americans attach greater significance and legal consequence to the perceptions of autonomy and internal coherence, thus making apology important as an expression of self.... In contrast, the Japanese concept of apology attaches primary significance to the act as an acknowledgment of group hierarchy and harmony."[27]

Although this essential difference seems unchanged today, two nations share the same fear that apologies could be used adversely against them at trial. In the U.S., fear of medical malpractice litigation is still the most commonly cited institutional barrier to develop and implement disclosure policies. [28] Physicians fear that apologies will come back to them at trial.[29] To respond to these concerns, sorry law was enacted. [30] Recently, the Harvard-affiliated hospitals proposed a full disclosure when adverse events or medical errors occur, including an apology to the patient. [31] A new organization, Sorry Works! Coalition, encourages the use of apology after an adverse event. [32] Japanese medical professionals share the same fear of litigation as those in western countries, and are sometimes reluctant to give apologies that may be viewed as admissions of liability. Although some cases used apology as an admission of liability, judges generally do not rule apologies as an admission of liability without determining other factors. Judges would carefully distinguish apology of sympathy and apology of responsibility. Apologies may be effective at resolving disputes in some cases, and are oftentimes expected by the public.

In an elevator accident case (Case 5), for example, a high school student was trying to get off an elevator when it suddenly moved up. He was caught in the middle and died. Schindler, manufacturer of the elevator, reportedly followed its lawyer's advice and did not apologize for the accident.[33] It was highly criticized. The company later apologized; however, it was too late. This case tells us that lawyers' traditional advice may make the situation worse in some cases and should be reconsidered. In the Tokyo Medical University Hospital case (Case 6), the hospital's late apology for the deaths of four patients who underwent cardiac bypass surgery was highly criticized as well. Although fear of litigation cannot be overcome easily, medical professionals need to compare the risk of having an apology being used against them at trial with the possibility of resolving the dispute earlier.[34] They may, in some cases, decide that the gains from an apology outweigh the potential cost.[35] In sum, a flexible approach to apologies should be adopted. Lawyers and insurance companies need to rethink their leery approach to apologies.[36]

c. Which one is more important- apology or compensation?

When disclosure is given, which one is more important for patients/relatives, apology or compensation? In western countries, the analysis is made as follows. "Compensation was usually a determining factor for those suing on behalf of a relative (often a dependent child), but it was less important for the bereaved." [37] "Some cases are only about money. Plaintiff focused on obtaining sufficient funds to take care of her family. However, many cases are both money and being heard."[38]

How about in Japan? In traffic accident cases, relation between the degree of injury and victim's expectation can be observed as follows. In non physical injury cases where only cars are

damaged, compensation is most important. Apology is not usually sought for. In non-permanent disability cases, compensation is important while apology is not critical. In permanent disability cases, apology is important. However, compensation is critical to provide care. In death cases, apology is critical. Compensation is critical if breadwinner is dead whereas it is not so critical if the victim is not a breadwinner.

The same pattern could be observed in medical accident cases except for non physical injury. The examples show that the significance of explanation/apology and compensation differs between cases in which the patient has died as opposed to being injured. Example of non-permanent disability case (Case 7) is as follows. A patient drank his false teeth by mistake, surgery was conducted but part of the stomach was mistakenly cut. The case was settled without litigation. The patient did not persist on an apology, but he cared more about compensation and whether the condition would be worse in the future. Case 3 introduced above was an example of permanent disability. In this case, the patient with atrial fibrillation received defibrillation become bedridden and required 24 hours nursing care. Although the apology of responsibility was not given, the patient's relatives did not persist on it. What was most important for them was compensation to take care of the patient. For example, in a death case, a patient died of liver cancer and relatives filed mediation believing there was a medical error (Case 8). Both parties could not compromise and mediation almost failed, but the relatives' proposal changed the situation. They told mediator that they would not claim for compensation if the physician could make appearance at mediation and give apology to them. The physician appeared and apologized. Thereafter, the case was settled without any payment. This case shows that the relatives valued apology more than compensation.

These cases, and others like them, suggest that medical professionals need to understand the differences in patients/relatives' expectations between the death cases and the non-death cases. In general, explanation and apology are more important in death cases, while compensation may be more important in non-death cases. As Wagatsuma & Rosett suggests, "There are some injuries when an apology alone surely is inadequate compensation, but there are other injuries when traditional common law remedies are unsatisfactory and an apology may be a crucial element in the recognition and restoration of human relationship."[39]

d. Disclosure to the Media

Disclosure is not limited to patients/relatives but also could be given to the media. Disclosure to the media is important in a crisis communication; however, it is usually a difficult task to medical practitioners. In the Tokyo Medical University Hospital, four (4) patients who had cardiac bypass surgery died successively (Case 6). Prof. X told the media, "I wanted to give surgeon a training experience." He later apologized; however, it was too late. Thereafter, the president of the hospital, Prof. X, and the surgeon had all resigned. The hospital lost approval to be a special function hospital. This case shows that physicians and/or hospitals are not accustomed to talk in front of the media. As is needed for companies who face the media, physicians and/or hospitals also need a negative list to form a uniform understanding of what to say and what not to say in advance.

4 Disclosure Method- How?

How the disclosure should be given? In some medical malpractice lawsuits (Case 9), the reason patients/relatives sued doctors was because of their attitude and the way they looked at patients/relatives. What the physician says is less important than the process and tone of the conversation.[40] Maintaining appropriate body language is important[41] as the true feeling tend to appear in body language. Although it is true that there is a cultural difference in the message given by eye contacts[42], there is a risk that few eye contacts may be interpreted as hiding information, even by Japanese. Thus, Japanese medical practitioners are encouraged to make more eye contacts with patients/relatives than in normal situation.

III. When Disclosure does not work- Mediation

In some cases, no matter how much effort has been done, the disclosure does not work. In such cases, it is a usual course for patients/relatives to take the initiative at whether to sue doctors or not. However, hospitals and/or physicians can take a lead by filing mediation. Mediation can be a good tool for medical professionals to consider as an option to resolve disputes early when disclosure does not work.

In one case, a patient became vegetable after the surgery (Case 10). The patient's family was continuously yelling at medical staff in front of other patients no matter what explanation was given. The nurses were resigning because of this incident. The morale of the remaining nurses became low, which could also affect other patient's safety. To resolve the problem, the

Journal of Medical Safety 2011 p.9 - p.15 ISSN 1349-5232

hospital filed mediation against the patient family. In the mediation, the patient's family promised to stop yelling and accepted periodical meeting with medical staff.

IV. Proposals

In conclusion, medical professionals need to understand that appropriate disclosure in early stage is a key to avoid litigation although some could not be avoided. They need to carefully consider when the disclosure should be given, who should give the disclosure, what should be disclosed, and how it should be disclosed according to the nature of the case. They need to understand the difference in patients/relatives' expectations between death cases and non-death cases. In general, explanation and apology are more important in death cases while compensation may be more important in non-death cases. They need to compare the risk of having an apology being used against them at trial with the possibility of resolving the dispute earlier. Flexible approach to apology should be adopted. Lawyers and insurance companies need to rethink their leery approach to apologies. Medical professionals need to understand that when disclosure does not work, mediation may be a good tool to resolve the dispute early.

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