MEDIATION

THE FIRST PORT OF CALL FOR MEDICAL DISPUTES

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Most of us are familiar with the concept of healthcare mediation. Conflicts do crop up in our healthcare settings and very often they are resolved at family conferences. However, there are some cases which require a slightly different approach and that's where mediation can help.

Here's an example: One of the first cases handled by the Healthcare Mediation Unit involved a middle-aged man who was extremely aggrieved that his father had been afflicted with Methicillin-resistant Staphylococcus aureus (MRSA) during his hospital stay. The man insisted on a five-figure sum as compensation, despite the hospital having written to him five times stating that his father had received the appropriate care which was in accordance with standard clinical practice. Burdened by a gnawing fear that his family members and caregivers who interacted with his father were at risk of contracting MRSA, he also visited his Member of Parliament (MP) four times to lodge repeated complaints.

As expected, the relationship between the son and the hospital staff was already strained. The son was angry and there was deep distrust, as is often the case in medical disputes. However, the mediators reopened and rebuilt the once fractured communication channels between the parties with a deft sensitivity. Midway during the mediation, it became clear that the son was labouring under the assumption that his father had been infected with MRSA when he was in fact *colonised* with MRSA. After the mediators explained the difference between colonisation and infection, and that his father was not ill, he was placated and withdrew his claim for compensation. The matter was resolved amicably without any money changing hands.

This MRSA dispute is illustrative of a large number of medical disputes that stem from a communication breakdown. Various landmark studies have found that medical malpractice claims and lawsuits are rooted in miscommunication.[1] It has also been suggested that when patients sue, they do not always do so for the money.[2] What they may really want is the opportunity to speak to the doctor alone for 15 minutes. Sometimes, all they want is an apology, a proper explanation or some empathy, rather than to ruin the doctor's reputation or demand an enormous monetary payout.[3]

These studies are helpful and suggest that a real solution can be found in mediation, which directly addresses the problem of miscommunication and fractious relationships. In essence, mediation is a form of assisted negotiation. More precisely, mediation is a voluntary and confidential process during which parties seek to resolve their dispute amicably with the help of a neutral third party – the mediator.

There are several reasons why mediation should be the first step in resolving medical disputes.[4] First, the mediation process humanises the parties. The patient is not just a complainant, but a person with real problems and anxieties. In the MRSA dispute, it was only when the hospital was confronted with a petrified next of kin fearful that his family was at risk of infection that they realised the family had misunderstood the concept of colonisation. In their earlier correspondence with the son, the hospital had actually explained that his father was colonised with MRSA, and there was no active infection. However, the distinction between colonisation and infection was lost on the son. The hospital was unaware of this, and the misunderstanding only came to light when the son shared his fears. After listening to the explanation of the neutral co-mediator, he was happy to withdraw his claim in its entirety.

Second, mediation is especially suited for medical disputes because such disputes cannot be legitimately measured in dollars and cents. The patient-doctor relationship is one that is characterised by weighty expectations.[5] Patients tend to have expectations of how their treatment should work. Often, doctors are looked upon as heroic healers, saving patients from an illness that is a source of fear and anxiety. On the other hand, the doctor's focus might be to treat the illness rather than the person. As a result, he/she may not display a great deal of sympathy or empathy and that may upset the patient.[6] When things go wrong, an apology or explanation may go a long way in soothing a patient's pain and correcting mismatched expectations.[7]

The mediation process searches for the parties' underlying interests, such as a patient's desire for some validation of his pain and suffering. Such interests are non-monetary in nature. It is in this aspect that mediation is indisputably different from other dispute resolution processes such as litigation. In litigation, if a finding is made in favour of the aggrieved patient, he is awarded compensation in the form of damages and a value is assigned to his pain and suffering. However, if what a patient really wants is an apology or a proper explanation, a monetary award is hardly the solution.

Third and of no less significance, mediation is empowering. The parties assume the reins of control over the process and outcome. With the help of the mediator(s), the parties invent

options to satisfy the interests identified in the course of the mediation. Some of these options include an apology, a fee waiver and provision of rehabilitative treatment. In one instance, where parties could not agree on the compensation sum, one option considered was for the doctor to donate the difference to a charity of the patient's choice. In another instance, parties agreed to jointly submit the dispute to an independent medical expert for neutral evaluation and return to mediation thereafter. Any mediated settlement is strictly confidential and without prejudice. The duty of confidentiality extends to all mediation communications and has been reinforced by the enactment of the Mediation Act (No. 1 of 2017) which came into force on 1 November 2017.[8] This also means that if a payout is agreed upon, it cannot be disclosed and used as a precedent for subsequent cases. All mediated settlements are legally binding and enforceable, and offer parties finality and closure.

In recent years, there has been a shift towards mediation in the medical malpractice context.[9] To this end, the Singapore Mediation Centre administers a Healthcare Mediation Scheme (HMS) in collaboration with the Healthcare Mediation Unit to offer mediation services for disputes between patients and healthcare providers. The HMS is a co-mediation scheme where two mediators are appointed to mediate medical disputes. HMS mediators are accredited by the Singapore Mediation Centre and have expertise and experience in managing healthcare issues. HMS mediators include senior medical practitioners, healthcare administrators, professors and lawyers. Parties can be assured of HMS mediators' neutrality and independence as the Singapore Mediation Centre (a subsidiary under the Singapore Academy of Law) alone is responsible for appointing mediators to each case. Mediators are also required to clear conflict checks before accepting an appointment.

So, when should mediation be considered? A simple answer would be when direct negotiations between the patient and hospital staff are unproductive or have reached a stalemate. Having independent mediators mediate a dispute helps to establish neutrality in the process, and re-open communication channels. While hospital staff may be trained in negotiation and conflict management, they are obviously not perceived as neutral by patients. This perception of bias colours a patient's judgement and impairs communication between the parties.

A special feature of the HMS is the provision of complimentary mediation advice and pre-mediation services to parties contemplating mediation. Since its launch in 2014, the Unit has mediated 38 cases with a settlement rate of more than 80%. Their charges can be found at: http://www.mohh.com.sg/hms/fees-and-payments.html.

A medical malpractice suit is undeniably stressful especially when a doctor's professional skills, and even integrity, are called into question. A fear of malpractice liability may adversely affect medical practice which is not in the public interest.[10] There is value in re-imagining the way hospitals and doctors manage medical disputes. Mediation should be considered as part of the overall dispute resolution strategy. The ultimate aim is for professionals in the medical community, when faced with a medical dispute that threatens to boil over beyond the institutional setting, to use mediation as the first port of call. This will give parties a real shot at resolving the dispute amicably in a manner that yields cost- and time-savings for all involved. ◆

References

1. Becker's Hospital Review. Cost of communication failures in healthcare settings: 5 study findings. Available at: https://goo.gl/TzjSo9.

2. Beckman HB, Markakis KM, Suchman AL, Frankel RM. The doctor-patient relationship and malpractice. Lessons from plaintiff depositions. Arch Intern Med 1994; 154(12):1365-70.

3. Kellett AJ. Healing Angry Wounds: The Roles of Apology and Mediation in Disputes Between Physicians and Patients. Journal of Dispute Resolution 1987; article 10:111, 124.

4. The Unit encourages negotiations (ie, direct communications such as family conferences) between the parties to resolve a conflict at the first instance. However, when negotiations have broken down and intervention is required, the parties should consider mediation as a first step in its overall dispute resolution strategy.

5. Supra note 3 at 114-115.

6. Frequently, a perception of a lack of empathy and care provided by healthcare professionals trigger complaints or litigation. Refer to note 2 above.

7. Patients may not find what they are seeking for in a court of law. See DWH Lee, PBS Lai. The practice of mediation to resolve clinical, bioethical, and medical malpractice disputes. Hong Kong Med J 2015; 21:562.

8. Attorney-General's Chambers. Singapore Statutes Online. Available at: https://sso.agc.gov.sg/Act/MA2017.

9. Singapore Academy of Law. Response by Chief Justice Sundaresh Menon Opening of the Legal Year 2016 (11 January 2016). Available at: https://www.sal.org.sg/Portals/0/PDF%20Files/Speeches/OLY%202016%20-%20CJ%20Menon.pdf.

10. See for example, Kass JS, Rose RV. Medical malpractice reform – historical approaches, alternative models, and communication and resolution programs. AMA J Ethics 2016; 18(3):299-310 and Bourne T, Vanderhaegen J, Vranken R, et al. Doctors' experiences and their perception of the most stressful aspects of complaints processes in the UK: an analysis of qualitative survey data. BMJ Open 2016; 6:e011711.

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