Myth Busters—Duty of Candour and Saying Sorry: Comment

There are two key myths surrounding the Duty of Candour and saying Sorry which need to be addressed:

1. That Duty of Candour only applies in cases of negligence and
2. That saying "Sorry" amounts to an admission of guilt.

DUTY OF CANDOUR AND NEGLIGENCE

The first thing to highlight is that nowhere in Regulation 20 is there reference to negligence as a trigger.

The Duty of Candour applies to a Notifiable Safety Incident which is an unintended or unexpected incident which could or has caused the requisite level of harm.

It is not limited to cases involving errors, omissions or which fall into the Serious Incident category and can apply even were the "incident" and associated "harm" arise from a non-negligent complication which has been consented for.

It is important that practitioners, providers and Trust's alike move away from this idea that the Duty of Candour is only associated with negligence if they are to avoid prosecution by the CQC.
Duty of Candour is essentially an extension of the existing general and professional duty to be open and honest with patients, and must become part of the day to day, not something reserved for special occasions.

For example, during a colonoscopy there is a bowel perforation. A risk both warned of and consented for. Whilst not entirely unexpected (there being a risk it might occur albeit low) it was unintended. If the patient suffered moderate or severe harm as a result, such that they need additional treatment, have an extended recovery or experience permanent injury then Duty of Candour will apply. Triggering the need for a face to face discussion, explanation and apology which should be followed up in writing.

However, there remains a need for clinical judgment because in the same situation, where the perforation is resolved in surgery with no additional treatment or extended stay in hospital, then the harm is likely to be classified as low. Therefore, whilst the general duty still applies and a discussion with the patient about what happened appropriate, the specific Regulation 20 requirements are not triggered.

Assessment of whether Candour applies has to be done on a case by case basis, with the involvement of a healthcare professional to say whether there is a link between the unexpected or unintended incident and the harm, or whether the harm represents a natural progression of the disease or underlying condition. If in doubt, consider it from the patient's perspective and have the discussion. You will never be criticised for that.

THE IMPACT OF SAYING "SORRY"

The second myth we need to clear up is the apparent belief that saying "sorry" amounts to an admission of negligence which is impacting medical practitioners and patients alike.

For medical practitioners, there is a fear that "sorry" will lead to disciplinary action, litigation and loss of insurance cover impacting their career. For patients, the lack of apology is often seen as trivialising their experience or as a cover-up breading distrust. The result, both suffer anxiety about the consequences of events and their relationship breaks down.

I want to reassure you all now that saying "I am sorry" is not the same as saying "I made a mistake".

The Compensation Act 2006 makes it clear stating "an apology, offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty" and I am not aware of any indemnifier that I have worked with withdrawing cover because an apology was made.

When there has been an unexpected outcome, negligent or not, then an apology is the right thing to do. The patient needs to understand what has happened, what the impact is and the next steps. That process should be the same regardless of the situation.

It is a vital part of relationship management and now a Duty of Candour requirement. We have seen in the recent cases that a delay in providing an apology can at best result in a fine but at worst, prosecution and reputational damage as seen in the cases brought against the University Hospitals Plymouth NHS Trust and Spire Healthcare.

Whilst on the face of it the Duty of Candour may seem onerous and an apology daunting, in reality it is simply formalising discussions that doctors and patients should be having in any event. The key is identifying those cases where a more formal process has to be recorded and if in doubt, check rather than risking prosecution by the CQC.

LEGAL PRINCIPLES OF DUTY OF CANDOUR

Regulation 20

- 20 (1) - General duty of candour
- 20 (2) - specific Duty and Candour applies when a Notifiable Safety Incident occurs.
- 20 (8) & (9) - A Notifiable Safety Incident is:
  - An unintended or unexpected incident that
  - Could or Has resulted in
  - Harm of the requisite level

There are different triggers for harm:

For NHS bodies

- Death - other than caused by progression of the underlying condition
- Severe Harm
- Moderate Harm
- Prolonged psychological harm

For all other providers

- Death - other than caused by progression of the underlying condition
- Impairment of functions
- Changes to structure of body
- Prolonged pain or prolonged psychological harm
- Shortening of life expectancy or Treatment to prevent any of the above occurring

- 20 (2) - (6) - Unless the relevant person cannot be contacted or refuses to speak with the provider
  - As soon as reasonably practicable, in person, notify the relevant person of the following:
    - » What happened, what steps have been taken and what the impact is?
    - » What (if any) further enquires are being made.
    - » An apology
    - » When any additional update is expected and
    - » Who to contact in the interim with any queries.
- Record the discussion in the notes and confirm in writing.
- Penalties vary from fixed penalty fines to criminal prosecution.

THE IMPACT OF SAYING SORRY

Harrison R et al, Doctors' experience of adverse events in secondary care: the professional and personal impact Clinical Medicine 14 (6):585-90 (2014)

- 76% of doctors surveyed felt personally and professionally affected by adverse patient safety events causing stress, anxiety and reduced work satisfaction.
- 25% admitted not reporting incidents as a result.

Behavioural Insights into patient motivation to make a claim for clinical negligence - commissioned by NHS Resolution August 2018

- 63% of patients surveyed felt that no explanation of events had been received.
- 31% received an apology and a third of those felt the apology was unsympathetic, insincere or lacked compassion.
- 20% of people sited compensation as the motivator for raising a complaint/claim

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