Open Disclosure: morally right but is it legally safe?

David Brown is a Sydney-based lawyer who was admitted as a Solicitor of the Supreme Court of NSW in 1988, having previously worked in both insurance
and education. The major part of his legal practice over the past 20 years has been the defence of doctors and hospitals in civil litigation and in other forums. As well as personally conducting legal cases, David has also held a number of senior legal management positions.
He headed the Tort Law section of the Crown Solicitors Office in NSW for a number of years. From 1999 to 2007, he was manager of the Legal Division of United Medical Protection and of the Avant Mutual Group. He has been a dedicated advocate for the Open Disclosure Standard and its implementation across Australia. In 2002, he was a member of the advisory group which helped develop the National Standard. More recently, he has been a member of the Steering Committee for NSW Health's Open Disclosure project.

I appreciate the chance to share this topic with Professor Cliff Hughes, whose passion for it derives not only from his official role in promoting clinical excellence in NSW, but also from his lengthy personal clinical experience - experience he is prepared to share in a remarkably open way.

'Open Disclosure' and 'The Problem'

Many of you will be familiar with the Open Disclosure program in one way or another, so I don't propose to recite the National Open Disclosure Standard or the NSW Health Guidelines on Open Disclosure, or even to provide a detailed summary of their contents.
Rather my task is to answer a single question: "Is it legally safe?" To do that, I turn my attention to something I call throughout, 'The Problem'.

Background Facts

A few background facts will provide some helpful context for this discussion.
1. Open Disclosure is the subject of a National Standard. The Standard isn't just about saying "sorry". What it calls for is that, following an adverse medical event, there should be an open communication with the patient or family, including an acknowledgement of the event, an expression of regret, and information about known clinical facts. It will not include any statement
about the fault or liability of any person or institution. The standard is expressly not concerned with blame.
2. Other key elements are:
• an investigation to find the causes of an adverse event;
• ongoing communication with the patient and/or the patient's family; and
• support of patients, family, staff and others who might have been affected by the adverse event.
3. The adoption, in 2003, of the Standard entailed a formal voting procedure. Among many other voting parties, all medical defence organisations, through an agreed representative organisation, voted in favour of the Standard.
Against that backdrop, turn to what I call 'The Problem'.

Open Disclosure

My own experience of a formal project known as Open Disclosure began in 2001 when, as manager of the legal division of a medical defence insurer, I was asked to participate firstly in some workshops and then on an advisory committee assisting in development of a national standard. In this way, I became a kind of representative or perhaps even a human embodiment of what was loosely referred
to as 'the legal problem' or sometimes just 'The Problem'.
As committees go, this was a pretty good one, because it included doctors, nurses, administrators, lawyers and insurers and also, importantly, consumers, patient advocates, victims of adverse events and proponents of patients' rights. The members found a surprising amount of common ground as they tried to describe a planned, systematic way of supporting and communicating with patients when
something had gone wrong. Their deliberations would, however, return at regular intervals to 'The Problem', at which point a kind of silence would descend, while quite a few people looked at me.

'The Problem'

'The Problem' is really two connected problems. First, if someone apologises, they might be regarded at law to have admitted liability, whether or not they really had authority to make an admission, whether or not that was their intention and whether or not liability 'deserved' to be admitted. Second,
if someone apologises, they might be breaching a condition commonly found in insurance policies, namely a requirement of co-operation with the insurer in not making any admission or promise.
'The Problem' was generally characterised or caricatured as: "You can't apologise; they won't let you." They were the kind of archetypal insurance person or lawyer responsible for telling health practitioners what they can't do. In addressing this question "... but is it legally safe?", we need to
consider these two parts of 'The Problem' - law and insurance.

General Observations on the Law

A starting point for me would be my personal experience of defending doctors and hospitals. I have not actually encountered a case where, in court, a decision on liability turned in any significant way on an apology or even on words which stated or implied an admission after the event. Others might have had that experience, but I haven't. I think there is a reason for that. Courts have to look for facts and have to draw their conclusions from facts and must use the facts and conclusions to answer and apply questions of law.

The facts as opposed to the feelings

If I say to you shortly after an accident, "I am sorry, it was my fault", that does not really tell us anything of a factual nature. It doesn't help us to know what actually happened. Rather it conveys how I feel about things.
I suppose that, if two cars side-swipe each other somewhere near the centre of a deserted country road late at night, leaving no skid marks and with no strolling accident reconstruction experts looking on, then the apology by one driver to the other, at the scene, might be thought significant in trying to guess which one of the two cars crossed slightly to the wrong side of the road. But it might really just tell you which driver has more humility.
One can understand, however, why motor insurers reputedly tell you not to make any admission after an accident. It could be that, with all its limitations, that apology might be the best, or the only, differentiating evidence. This is never the case in the medical context.

Admission of negligence

Certainly saying "Sorry, I was negligent" cannot be taken as a correct and meaningful statement of the legal position. We are all entitled to use the word "negligent" in ordinary parlance to mean whatever we think it means. But no one making such a statement, except perhaps in the context of formal court pleadings, could be taken to be saying: "Sorry, I recognise that you were in a
relationship of legal proximity to me such that a duty of care arose in me to take all reasonable steps to avoid or prevent such risks as were reasonably foreseeable and that I failed to take such a step in relation to a foreseeable risk and that risk did eventuate and the failure on my behalf did cause injury,
loss or damage to you". And even if I could be taken to have intended such a specific meaning, this would not of itself establish the correctness at law of what I have said.
Just as the modest sporting superstar or politician, when asked "So you must now acknowledge that you are the greatest this country has produced" will invariably answer, blushing: "that's something only others can judge", so it is with negligence.

Real and imagined fears

The lawyer Bob Milstein, now of Milstein and Associates, formerly of Corrs Chambers Westgarth, conducted a formal review of such issues back in January 2002 for the Open Disclosure project. While not uncovering any insurmountable legal bar to Open Disclosure, the review did acknowledge what it described as "real and imagined fears about legal risk", which, at that time, inhibited the
project and which had to be squarely faced. Not long after the delivery of this excellent report, however, a number of things occurred which changed the landscape significantly.

The year of the apology

2002 has been called 'the year of the apology', because from about that point, jurisdictions in Australia and in many states of the US began introducing so-called 'apology legislation'. The effect of such legislation, with some variations, was that

evidence of an apology could not be used in legal
proceedings as a way of proving liability. I will come to some details about that kind of legislation in a moment. But before doing so, it is helpful to look at what is probably the leading Australian case on the topic - a High Court decision which arrived in 2003, just after the Milstein review. This was the
case of Dovuro v Wilkins.

Dovuro's case

This case was not medical but agricultural. You'll have to allow me to momentarily leave the world of the cannula for the world of the canola - because Dovuro concerned the importation of a certain kind of canola seed from New Zealand. It provides, I think, a very good, dare I say, a golden
illustration of the consequences of drawing too much from a statement of apology.

Dovuro, the importing company, advertised the canola seed as "99% pure". This was essentially a true statement. The impure 1% included three kinds of weeds. Details about these weeds were not disclosed by Dovuro.

The problem that arose was perhaps not exactly what might be expected. The weeds themselves did no particular damage. Nor was it uncommon for canola seed to contain some small quantities of weeds. Nor was there any breach of current regulations at the time of importation. However, subsequent to the importation, the government of Western Australia became concerned at the potential for problems to be caused by the weeds. It introduced regulations which had the effect of causing farmers such as Wilkins to take various precautions, which, in turn, caused financial loss.

So the argument (or at least one of the arguments) was that Dovuro ought to have foreseen that regulations could change, and ought to have made enquiries of four or five state and federal agencies to check, just in case the law could change in future, before importing and selling the seed.

You might well think that this proposition is a bit rich! Certainly, as a lawyer for the defendant, you would not be rushing to advise your client to admit liability.

Apologies and admissions

Interestingly, however, senior officers of Dovuro issued two statements of apology about the situation, including words such as the following:

"We apologise to canola growers and to industry personnel. This situation should not have occurred..."

and

"I'd like to stress at this stage that this does not excuse Dovuro in failing in its duty of care to inform growers of the presence of these weed seeds..."

Pause just for a moment to reflect on this kind of language: "We failed in our duty of care" and "This should not have occurred." This is precisely the type of comment that people have most feared in the medical context in relation to open disclosure.

Not surprisingly, in an action for compensation, Wilkins the farmer sought to rely on these statements on the issue of liability.

The High Court decision

By a majority of 5 to 2, the appeal by Dovuro to the High Court was upheld. In the course of upholding the appeal, the Court reviewed the Australian authorities on the question of apologies and admissions.

The judgment of His Honour Justice Gummow, in particular, addresses this issue in some detail. His Honour cites, with approval, a number of decided cases in which admissions of negligence or of misleading or deceptive conduct were found to be of little value to the court in performing its task of judging the legal quality of the conduct in question . He concludes that the so-called admissions of officers of Dovuro: "...provide no basis for a finding of negligence in this case"

Apology Legislation in NSW

Dovuro was not a case to which the so-called 'apology legislation' applied. The events occurred prior to the introduction of such legislation. In some states, a liability arising for financial loss from a commercial transaction might still not be affected by the legislation, though in some states the legislation applies to almost any kind of civil liability.

There is no doubt, however, that apology legislation does apply to civil cases arising from an adverse medical outcome. So what does the legislation say?

In New South Wales, s69(1) of the Civil Liability Act 2002 provides that an apology made by or on behalf of a person in

connection with any matter alleged to have been caused by the person:
(a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and
(b) is not relevant to the determination of fault or liability in connection with that matter.
S69(2) of the Act provides that evidence of an apology... is not admissible as evidence of the fault or liability of the person.
The words are fairly clear and I emphasise them: "does not constitute an admission...", "is not relevant ...", "is not admissible..."
So what kind of apology is captured by the NSW Act? Section 68 tells us that an apology is "an expression of sympathy or regret, or of a general sense of compassion, in connection with any matter whether or not the apology admits or implies an admission of fault."
Bundling that up, with some paraphrasing, it seems to have the total effect that an apology, even one that conveys an implied fault, will not be admissible, is not relevant and does not constitute an admission.

Apology legislation in other jurisdictions

Though not in identical terms, every Australian state and territory has 'apology legislation' . I don't propose to undertake a state by state survey. Easily the most important differences in drafting relate to whether or not the 'immunity', if I can use that loose description, extends to statements which include words implying fault, or only to statements of regret (however named) which do not mention fault. Incidentally, between 2002 and February this year, some 35 states of the U.S have passed 'apology legislation'. There, as here, the main difference between the states is on the question of words implying fault rather than mere apology.

A national approach

It would be delightful to obtain uniformity across all states of Australia. Frankly, the lack of a single national approach is absurd. I would make the point, however, that even in those states where the statutory protection does not extend to words conveying an admission of fault, it is unlikely, in the light of case law such as Dovuro, that an Australian court would give any weight to such words.
A further fundamental point to make in relation to Open Disclosure in Australia is that, if implemented in accordance with the National Standard, the crucial communications will be expressions of regret without admission of fault on the part of oneself or on the part of any other person or institution. Such a communication would be 'protected' from use in civil proceedings by the legislation as it currently stands in any state of Australia.

Insurance issues

I turn now from the legal aspects of 'The Problem, to consider briefly the insurance issue. The short point about insurance, I think, is that insurance policies commonly contain a condition requiring that no admission or promise be made by the insured in relation to a claim. Although wordings vary, that is the general thrust of the commonest clauses. Nothing I am about to say is intended to incite anyone to breach this or any other condition of their policy. If, however, I were advising an insurer about whether or not to deny indemnity to a hospital which had offered words of apology to a patient, I would raise four issues:
1. Did the words really relate to a claim or were they part of ordinary patient follow-up and support?
After all, following an adverse medical outcome, people have to say something!
2. Was there an admission or promise, or just an apology?
3. Even if the words might be described as an admission in relation to a claim (possible but unlikely), how are you, the insurer, prejudiced by this? In relation to this point, we would look at s54 of the Insurance Contracts Act. The effect of that provision is that, where a policy condition is breached, the insurer will not be entitled to deny all liability, but merely to reduce its liability to the extent of any prejudice suffered.
4. In relation to this prejudice issue, if, by virtue of the so-called 'apology legislation', such words cannot constitute an admission, cannot be relevant on the issue of liability and cannot be admissible as evidence of liability, how do you propose to demonstrate prejudice?
I think it is apparent that these four questions in combination will be very difficult to answer in a way that would permit a denial of insurance coverage. In summary, unless accompanied by something like a specific unauthorised monetary promise or something amounting to fraudulent collusion, an apology will not result in a denial of indemnity by an insurer.

Litigation: Increasing or Decreasing?

There is another aspect of the question "... but is it safe?" that I must mention briefly. It relates to the disclosure itself rather than to the apology. From an early meeting of the Open Disclosure project, I recall the provocative remark of the program champion, Professor Bruce Barraclough, who I hope will forgive my paraphrase from memory: "We don't know whether Open Disclosure will result in
more litigation or in less litigation... and we don't care". I think most of us understand the spirit of the remark - supporting the humans and improving clinical quality are the main objectives. If patients feel less inclined to sue as a by-product of Open Disclosure, then so be it, but this is not the key
objective.

Is litigation increasing or decreasing as a result of Open Disclosure programs to date? Early results from the first US centre to adopt an active Open Disclosure policy have sometimes been quoted as showing a reduction in formal complaints and litigation . More recently a number of researchers have
postulated models suggesting a likely increase in legal actions.

My own view is that it will be extremely difficult, in practice, to isolate and analyse the specific effect of Open Disclosure, among the many possible causes for changing litigation patterns over the years. My instinct is that, if well implemented, Open Disclosure is unlikely to cause a significant
increase in litigation.

I suppose my variation on the Barraclough provocation would be: if Open Disclosure can help us improve quality by providing a way to frankly acknowledge and address our errors, and if along the way this leads to a decrease in cases of the kind that result mainly from mistrust or misinformation, but an increase in cases following treatment that was truly substandard, then who could complain too bitterly about that outcome?

Co-operation and Consultation

There is one final point that I must make. My thesis has been that 'The Problem' is not all it has been cranked up to be. It doesn't follow, however, that insurers and lawyers should simply be ignored in the aftermath of an adverse event. Insurers have a legitimate interest in the way incidents are notified and handled. They also have expertise in the practicalities of meeting incidental expenses, retaining documents, reviewing events and so on. Independent persons, both medical and legal, will provide perspective on the events, often
difficult for the even the most experienced clinician when personally involved. Sometimes individuals, for example those facing serious disciplinary or criminal consequences, will need separate personal legal advice and may not, indeed, be able to participate in the Open Disclosure process. But that can't lead to the general abandonment of the process (or of the patient!)

For Open Disclosure to be well implemented, there needs to be a fairly sophisticated and co-operative relationship between the interested parties. Training in Open Disclosure processes needs to be part of an insurer's business, not just a hospital's business. Everyone needs to understand that, when a doctor
makes an unintended nick with a scalpel on a conscious patient, the sincerity and effect of his or her apology depend almost entirely on spontaneity. It can't be delivered after consultation with the insurer. ("Just maintain firm pressure, while I make a quick phone call...")

On the other hand, where a formal patient or family meeting is arranged to share the results of an investigation after a significant adverse event, an insurer can properly expect to have been notified and given the opportunity to have some input into the way things are managed. The need for this kind of consultative approach is recognised under the National Standard.

Incidentally, some academics and moral commentators are very quick to blame insurers for inhibiting genuine disclosure and apology. These folk would do well to actually talk to Australian medical indemnity and hospital insurers, whose depth of thought and constructive involvement is being regularly underestimated or misstated.

Conclusion

I return for the last time to our question. Is it legally safe?

Having addressed and I hope to some extent undressed 'The Problem' and, with the addition of this little coda about consultation, I now feel able and ready to offer you the very short executive summary that some might wish I had provided

twenty minutes ago: Yes.

See in particular Paragraph 7.3, Open Disclosure Standard 2003, Standards Australia
"Open Disclosure Project: Legal Review" January 2002. Corrs Chambers Westgarth
Dovuro v Wilkins (2003) 210 ALR 139
ibid , at paragraphs 66 to 71
In particular: Grey v Australian Motorists & General Insurance Co Pty Ltd [1976] 1 NSWLR 669;
Eastern Express Pty Ltd v General Newspapers Pty Ltd (1992) 35 FCR 43; Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd (1986) 12 FCR 477
Dovuro v Wilkins, at paragraph 71
ACT: ss 12-14 Civil Law (Wrongs) Act 2002
NSW: ss 67-69 Civil Liability Act 2002
NT : ss 11-13 Personal Injuries (Liability and Damages) Act 2003
QLD: ss 68-72 Civil Liability Act 2003
Tas: ss 6A-7 Civil Liability Act 2002
Vic: ss 14I -14L Wrongs Act 1958
WA: ss 5AF- 5AH Civil Liability Act 2002
The experience of the Lexington Veterans Affairs Medical Centre has been widely reported. See for example: Kraman,S and Hamm,G : " Risk Mangement: Extreme Honesty May be the Best Policy" Annals of Internal Medicine 131 (12) December 21, 1999 at 646
See, for example: D M Studdert, M Mello, A Gawande, T A Brennan and Y C Wang: " Disclosure of Medical Injury to Patients: An Improbable Management Strategy" (2007) 26(1) Health Affairs 215
See for example Paragraph 7.10