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**DIRECTOR-GENERAL OF HEALTH MALAYSIA**

**ON 30th October 2010, ON THE OCCASION OF:**

**CONFERENCE ORGANIZED BY THE MEDICO-LEGAL SOCIETY OF MALAYSIA**

***THEME: "ALTERNATIVE DISPUTE RESOLUTION"***

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***Distinguished guests, Ladies and Gentlemen,***

***A very Good Evening and Greetings,***

The Greek philosopher Democritus once said and I quote **: "***Do not trust all men, but trust men of worth; the former course is silly, the latter a mark of prudence".* The medical profession is held in high regard by society mainly because its members have earned society's trust as people of worth and people who will benefit its citizenry. The Medical and the Legal Professions share a number of similarities. Both are revered by society, although these days, both doctors and lawyers are perceived differently by certain sections of society, thanks to some errant members of both professions.

Most of us regard the Medical profession as the "noble profession". This is because altruistic and compassionate professionals belonging to this profession save lives as well as relieve suffering. Medical professionals have been given the mandate and trust by the Malaysian public to "do things in the best interest of their patients" which is to act as their advocates, while giving strong emphasis to their rights and wishes. Doctors

are meant to be experts at curing as well as caring. They are looked upon as"competent carers".

But the reason for this continued recognition is "trust". It is this societal trust that gives the medical profession its legitimacy as well as its privileged position. We must always be mindful of the fact that professionalism is not an inherent right but is granted by society and as long as society considers them trustworthy, it will be maintained.

Today, the medical profession is being challenged. Quite a few have expressed doubts about our credibility and trustworthiness. Societal trust that the profession has enjoyed hitherto is gradually being eroded. Why you may ask? Well there have been several published incidents and mishaps involving the profession, not just in Malaysia but the world over. Glaring examples include the Bristol incident and the Shipman case in the UK. Many incidents of preventable adverse events have been highly publicized and these have caused a serious dent on our credibility as well as reputation. There is, therefore, an urgent need for us to get back to the very root of the tenets of our profession – professionalism and to live by the dictum, *Primum non nocere* or "Above all, Do No Harm". The medical profession must become the champions of the patient safety movement and galvanize efforts to systematically make our health care system a safer one. The time to redress this problem is now, ladies and gentlemen, in line with our national slogan… "people first, performance now!"

Doctors have a duty to practice safe medicine and to be careful with the lives and limbs of their patients. And here I am not just referring to technical excellence but also their commitment, safety consciousness and efforts to continuously up-grade knowledge and skills as well as practise evidence-based medicine. It is also about making our patients a team member as we strive to help them. If we accidentally harm them in the course of caring for them, it is our duty to inform them quickly and truthfully and with humility. Many a negligence suit has been averted when doctors are truthful and preserve confidentiality in their dealings with their patients.

***Ladies and Gentlemen,***

The Ministry of Health has a "Vision for Health" that mandates the development of a safe and effective health care system. The spectrum of health care however is very wide. It encompasses the seemingly routine primary care, in which a variety of acute and chronic conditions may be encountered; the occasional but unpredictable and hazardous world of surgery; some highly organized and safe processes such as transfusion medicine; and the inherently unpredictable, constantly changing emergency medicine. In addition, there is mental health, community care and self care. Within these diversities, errors and harm are a constant possibility and not an infrequent actuality. Obviously, this has posed tremendous challenges to the medical profession. Professor Sir Cyril Chantler summarized the situation very well when he

said that *"Medicine used to be simple, ineffective and relatively safe. It is now complex, effective and potentially dangerous".* This explains the present incidence rate of adverse events, which can be anywhere between 4% to 16%, approximately half of which were deemed preventable, depending on where the patient safety studies were conducted. One of the key strategies to enhance patient safety is through replacing the present "blaming culture" with a "just culture". In this way, we can develop a "learning organization" through the reporting and analysis of adverse events. However, despite many exhortations to develop this "safety culture", the reality for many health care systems today is that the blaming culture is still very much in vogue. World-wide research has shown that most adverse events are due to bad systems and not solely bad people. Some believe that professionals do not make mistakes. Of course we know that is not true as even the best people can make the worst mistakes as a result of many factors beyond their control. No less a person than Professor James Reason, an expert in human factor analysis, has promulgated this approach, which is based on scientific studies of accidents and mishaps around the world. We need to consider the 7 levels of patient safety when investigating an adverse event. These are : patient factors, the task and technology, provider issues such as competency and training, team issues such as communication, working environment issues such as overcrowding, organizational issues such as unsatisfactory policies and procedures and finally, external factors such as economic considerations. All have the possibility, to varying degrees, of affecting the safety of health care that is delivered. However, these research findings have not seemed to have been acknowledged quickly enough. Our

medico-legal system is still very adversarial and blaming in nature. Of course, having said that, we can also have, at the other end of the spectrum, good system and bad doctors. Sometimes I wonder what we mean by bad doctors?

***Ladies and Gentlemen,***

**(Increase in complaints and litigation)**

Former U.S. Solicitor-General, Professor Archibald Cox once said and I quote "Through the centuries, men of law have been persistently concerned with the resolution of disputes in ways that enable society to achieve its goals with a minimum of force and maximum of reason". Whenever there is an adverse event and there is dissatisfaction with the perceived quality of care, a dispute will arise. This can be translated into a complaint or ultimately, a medico-legal action. The cost of such a "way of doing things" to the health care system is enormous, in terms of money as well as distrust, ill-feeling and the practice of defensive medicine.

In recent years, there has been an increase in the complaints received by the Ministry and the Malaysian Medical Council as well as an increase in law suits against doctors and health care facilities, both private and public. Our lawyers are kept very busy, not that they are complaining. There are many factors that have contributed to this sorry state of affairs.

While we enhance efforts to enhance patient safety and quality of care, we must also explore ways of caring and attending to the aggrieved patient and his or her family. Some of the ways of doing this is to introduce the No Fault Compensation System or other forms of Alternative Dispute resolution. We need to find solutions and mechanisms to care for our patients who have been harmed by health care. We also need to care for the unfortunate health care professionals, the so-called "second victims of medical error", who are involved. As both the medical and legal fraternities are present at this conference, I would like to deal with some of these important aspects. I would like to quote one good example of success in this area of "m**ore transparency, fewer lawsuits".** The University of Michigan Health System in 2002 adopted a policy of investigating adverse events, sharing the findings with patients and families, and apologizing and offering compensation when appropriate. The system says it has cut litigation costs in half and seen new claims fall by more than 40%.

***Ladies and Gentlemen,***

**(When things go wrong)**

A doctor has an **ethical and a legal** duty to provide advice or information prior to commencement of treatment. The former is required by the Malaysian Medical Council's Code of Professional Conduct, which states that "The public is entitled to expect that a registered medical practitioner will provide and maintain a good standard of medical care." and the latter by the Private Health Care Facilities and Services Act and its Regulations. The MMC's Code is supplemented by its guideline, Good Medical Practice, which states that "A patient who complains about his treatment has a right to

expect a prompt and appropriate response. The doctor has a professional responsibility to deal with complaints constructively and honestly. The patient's complaint must not prejudice his further treatment…If a patient has suffered serious harm for whatever reason, the doctor should act immediately to put matters right. The patient must receive a proper explanation about the short and long term effects. When appropriate the doctor should offer an apology."

Thus, there is an ethical duty of disclosure when an adverse event occurs. Whether there is a legal duty of disclosure is less clear. Although the courts have not made a categorical statement on this, it would not be wise for any doctor to assume otherwise in the light of the current medico-legal climate.

I would like to cite as an example, the approach taken by the Harvard School of Medicine's 16 affiliated teaching hospitals, in 2006, when dealing with adverse events:

**Immediately after the event**

- Acknowledge the event.
- Express regret.
- Take steps to minimize further harm.
- Explain what happens next.
- Commit to investigate and find out why the adverse event occurred.

**Later follow-up**

- Disclose the results of the internal investigation.
- Apologize if there is an error or systems failure.

- Make changes to prevent the failure from recurring.
- Provide continuing emotional support to the patients and health professionals involved.

(Source: Lucian L. Leape, MD, *The Power of Apology*, presented May 11, 2006, at the NPSF Patient Safety Congress).

Patient dissatisfaction after an adverse event is expressed in many ways. In the worst case scenario, the patient could sue the doctor and/or health care facility. Whilst the reasons why patients sue doctors have not been studied in Malaysia, it has been done elsewhere. Charles Vincent's study in the United Kingdom (*Why do patients sue doctors. Lancet 1994; 343: 1609-1613*) is illuminating. The five main reasons cited are: reactions to incidents, standards of care, explanation, compensation and accountability.

The needs of patients and/or their relatives when an adverse event occurs are universal. This has led to the concept of open disclosure, stated succinctly in the Australian Open Disclosure Standard 2003. This include the following:

- Acknowledge that an adverse event has occurred;
- Acknowledge that the patient is unhappy with the outcome;
- Express regret for what has occurred;
- Provide known clinical facts and discuss ongoing care, including any side effects to look out for;

- Indicate that an investigation is being, or will be undertaken to determine what happened and prevent such an adverse event happening again;
- Agree to provide feedback information from the investigation when available; and
- Provide contact details of a person or persons within the health care organisation whom the patient can contact to discuss on-going care.

There are several objectives of open disclosure. These include: lessening the likelihood of litigation, facilitating a feeling of relief from guilt; promotion of trust; strengthening of doctor patient relationships; promotion of learning from errors by professionals and provision of support to professionals. (*Fallowfield and Jenkins. Communicating sad, bad, and difficult news in Medicine. The Lancet, 2004; 363(9405): 312-319*)

**(Saying sorry is effective)**

*"An apology is the superglue of life. It can repair just about anything". ~Lynn Johnston*

Allow me to say a few words about an apology. How many times have you been kept waiting and had a complaint formulated in your mind, only to find it evaporate when someone says to you "I am sorry you have been kept waiting."? An apology can and does determine whether a complaint is pursued or not.

Why is an apology effective? It acknowledges the hurt a person is feeling, allows anger to dissipate, promotes forgiveness and facilitates moving on. It may also help restore

the aggrieved person's self-respect and dignity, and help preserve the trust which is a *sine qua non* of the patient-doctor relationship.

An effective apology has to be sincere and timely. It has to contain an assurance of corrective action or assistance. An implied acceptance of responsibility for what has happened and an acknowledgement of the adverse event will render an apology most effective. However, these are also the primary reasons why an apology is so difficult to make.

Many doctors fear that an apology for the adverse event is an invitation to complaints, claims or both. This fear is often aggravated by the advice provided by their lawyers. In fact, the MOH's legal advisor has this to say: '**the apology by the doctor to the patient may amount to admission in law. If the patient decides to pursue the matter, such apology may be used against the doctor. It then becomes difficult for the lawyer to defend his client and eventually the doctor may loose out his case and will be liable to pay damages'**

However, our professionals will state that the patient's perception of a failure to accept accountability and evasiveness, are much more likely to stimulate a response from the patient and family. In the event there is a complaint, it would be much more difficult to defend oneself before the Ministry or Malaysian Medical Council due to the lack of candour.

Medical regulatory and defence organizations world-wide accept that apologies are part and parcel of civilized conduct and a professional duty. An explanation and apology will go a long way in deflecting complaints and claims than they induce. Saying sorry may be difficult but it is probably good strategy and certainly reflects good manners.

Those who have concerns about complaints and claims when an apology is given could do well to remember Judith Timson's statement that *"If you are in the wrong, an immediate apology almost always helps, and even if it doesn't, it seldom ever hurts."*

***Ladies and Gentlemen,***

**(Mediation)**

When things go wrong, some victims of medical accidents will complain to the Medical Council; others will resort to the courts. However, many neutrals are of the view that the legal process cannot provide what an aggrieved patient and family want. The justice system in our country is adversarial in nature. Litigation takes a long time to reach a conclusion. In general, it takes at least five to ten years for a medical negligence case to be concluded in our courts. There have been cases where it took more than two decades. The recent administrative measures implemented by the Chief Justice may, however, shorten this process.

The adversarial litigation process which encourages secrecy and entrenched positions do not result in an amicable, early or satisfactory resolution for many. Whichever way one looks at it, litigation incurs costs, both financial and mental, for all parties.

Mediation, a mode of alternative dispute resolution, is increasingly used in many jurisdictions as a way of dealing with patient complaints about medical care which has resulted in unsatisfactory outcomes.

It is reported that settlements result in as many as 80% of mediations. For example, court directed resolution (CDR) is offered to all who file law suits in Singapore. It is not mandatory as it takes place with the consent of both parties to the lawsuit. The implementation of CDR in its Subordinate Courts has contributed significantly to the early and amicable resolution of large number of lawsuits prior to trial, including medical negligence claims.

[*In 2006, about 7,310 cases were resolved through CDR. The Straits Times in Singapore reported that only 11 medical negligence lawsuits were filed in 2005 in the Subordinate Courts. All the cases were settled out of court. It further reported that of the 79 medical negligence suits filed in the Subordinate Courts since 1998, only two went to trial.]*

There are many advantages of mediation. Apart from speed of resolution, there is confidentiality. The latter allows the parties to state their grievances and discuss areas

of concern in private rather than in court, under the full glare of the public and the media.

It is well documented that litigation is stressful to both patients and doctors. Mediation can help avoid this and may be healing for both parties. The claimant has his or her say in a setting where he or she is listened to. Many mediated cases have addressed the emotional aspects of the complaint rather than financial compensation. There is greater likelihood of a continuation of the patient-doctor relationship unlike in litigation, where it is likely to be destroyed in most instances.

There is greater flexibility in mediation because the remedies are more varied. Settlements in litigation are monetary. However, mediation permits more customized settlements which are not just monetary e.g. explanation, apology, dissemination of lessons from the case to other doctors.

There are also equity and ethical benefits from mediation. The high cost of litigation has made it very difficult for patients without means to commence proceedings. Furthermore, there are allegations of cases being taken on a contingency basis, an unhealthy practice which is considered unethical by the legal fraternity. The lower costs of mediation can make it possible for more aggrieved patients to address their complaints. Thus, the Ministry requests both the medical and legal professions as well as the health care facilities to consider mediation first before resorting to litigation.

**A new law on mediation is currently drafted by the court together with the Attorney General Chambers of Malaysia.**

**(Amendments to the Medical Act)**

Last but not least, I would like to apprise you of the amendments to the Medical Act which are awaiting the Minister's presentation to the Cabinet prior to its tabling in Parliament. There is a need for an effective regulatory system for doctors to maintain the confidence of patients who have the legitimate expectation of being able to trust their doctors. At the same time , we have to accommodate the evolving changes in medical practice and education. The proposed amendments will ensure patient safety and prepare doctors to face the daunting challenges of globalisation and liberalisation. The Council will have a more definitive role in medical education whereby it will be involved right from the inception of the medical schools. There will be emphasis on the continuous professional development of doctors. The introduction of a National Specialist Register will be of benefit to the public and the profession. Those who are involved in non-evidence based medicine can be weeded out and those who are qualified will be acknowledged and duly recognized.

The disciplinary process will be streamlined. Whilst the present Act only provides punishment for errant doctors, the proposed amendments have included rehabilitative measures as well. The proposed amendments also provide for interim orders to be instituted where the continued practice of the doctor pose a threat to the public.

**Ladies and Gentlemen,**

I would like to congratulate your society for organizing this conference which I am sure will be beneficial to the participants. I urge your society to do more by involving the doctors and lawyers out there in the community in medico-legal matters, at the heart of which must be the best interests of the patient. Let me conclude with 2 quotes.

The first is from Mark Twain, *"Laws control the lesser man... Right conduct controls the greater one."*

'Be bold in what you stand for and careful what you fall for' by Ruth Boorstin

It is now my pleasure to declare this conference open.