He said, she said: demystifying the dreaded disciplinary hearing

Barbara Sibbald

Disciplinary hearings are every physician’s nightmare, and this helps explain why even a mock hearing can send shivers down a spine or two. A mock hearing held this winter, part of a medicolegal course for surgeons sponsored by the University of Toronto and McCarthy Tétrault, was designed to give surgeons an idea of the processes involved in these proceedings. Certainly it seemed real enough: there was a defendant, plaintiff, 2 witnesses and a bevvy of lawyers, with 3 staff from the College of Physicians and Surgeons of Ontario assuming the panel’s role. (The panel, which renders decisions, usually comprises 3 practising physicians and 2 members of the public.)

The case was chosen to illustrate the problems of communication and documentation that are often the underlying reasons behind disciplinary cases. It involved Hannah Spence, a 33-year-old woman who claimed she had been sexually abused on 2 occasions by her orthopedic surgeon, Dr. Felix Wembley. Specifically, she alleged that Wembley had performed 2 unnecessary and inappropriate breast examinations. He pleaded not guilty.

Spence had been referred to Wembley by her family physician because of bone spurs, and after an initial consultation an operation was scheduled for her right foot. On Oct. 16, 1997, Wembley performed a pre-operation check, which included a breast examination, at his hospital office; he remarked that Spence was “in good shape.” Spence said she told Wembley she didn’t need an exam because her FP had recently performed one. And she said this exam wasn’t like previous ones.

Wembley repeatedly stated that breast exams are a standard part of his pre-operation routine — they are used to ensure that patients don’t have pre-existing medical conditions that might preclude elective surgery. However, in an earlier statement to the college he said he only carried out a breast exam if the patient has some discomfort or a complaint. At the hearing, Wembley said this previous statement “doesn’t make sense to me.” He had noted the breast exam in Spence’s chart by writing “no adenopathy.”

Wembley initially agreed that he had said Spence was in “good shape” but said it was only small talk to put the patient at ease. Under cross-examination, he denied making the remark. Spence alleged Wembley performed a second breast exam during a postoperative examination Dec. 10. Wembley denied doing this.

In March, Spence saw Wembley to discuss an operation for her left foot, but because she didn’t feel “comfortable” with the physician she didn’t visit him again. In June 1998 she wrote a letter to the college complaining about a visit during which she had felt “humiliated and vulnerable.” Asked why she didn’t initially refer to both incidents, Spence agreed she should have been more specific. Although she was “confused and embarrassed” after the first breast exam, it wasn’t until the second incident that the “light went off for me. It didn’t feel like a regular breast exam.”

Two expert witnesses were called. Dr. Ray Lake, an expert in breast examinations, didn’t understand why a breast exam was necessary and questioned Wembley’s technique. He also advised that physicians should be aware of patients’ concerns and explain what they are doing — Wembley had failed to do this.

Wembley’s lawyer called expert witness Dr. Terry Axelrod, a Toronto orthopedic surgeon, who said it is the surgeon’s responsibility to do a complete general exam pre-operatively, including a breast exam. Under cross-examination he qualified this, saying that a breast exam was not needed for this operation.

This mock hearing lasted only 2 hours, although cases of this type normally run 2 days or more and involve character and other witnesses and more cross-examination; the longest hearing lasted 7 weeks. About a third of Ontario’s disciplinary hearings involve sexual-abuse allegations; there were 18 hearings in 1998 and 30 in 1999. Penalties can range from a recorded reprimand to licence revocation.

Before making their decision, the panel members were advised that there had to be clear evidence supporting guilt. Members of the audience were also polled, with 12 of the 18 surgeons finding Wembley not guilty. The panel came to the opposite conclusion by a 2-1 margin.

The college’s chief prosecutor, Neil Perrier, said the college intentionally constructed a case with lots of grey areas that emphasized the importance of communication and charting. “If Dr. Wembley had explained why he was doing [the breast examination] none of this would have happened.” Michael Barrack, a lawyer at McCarthy Tétrault, offered some tips for doctors defending themselves against a complaint to the college. He said doctors must keep complete charts and communicate openly with patients and family members. If the college does call about a patient’s complaint, call the CMPA before responding.

He also warned that physicians should not talk or complain about a case to colleagues, because they might be called to testify.

Barbara Sibbald is CMAJ’s Associate Editor, News and Features