Surgeons find themselves on trial in forum featuring CMPA lawyers

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In brief

During a recent forum, Ontario surgeons learned that the courtroom requires a much different form of behaviour than the operating room. These lessons hit home during a mock trial featuring CMPA lawyers.

Doctors who testify as expert witnesses in court must learn to perform in an environment that is the opposite of the one they're used to, surgeons attending a Toronto workshop were told recently.

"Doctors are used to discussing the fact that error occurs in their profession — they discuss complications quite openly," lawyer Paul Steep of the Toronto firm McCarthy Tétrault told the Toronto workshop, which attracted 75 surgeons from across Ontario. "It's part of your culture to think about errors and discuss them in order to resolve them."

Similarly, doctors are used to "living in a world of uncertainty. You recognize the limits of medical science and equipment and accept that, despite due diligence, there is always a level of error," said Steep, whose firm is well known for defending physicians on behalf of the Canadian Medical Protective Association.

The language of medicine

However, when surgeons move from the operating room to the courtroom they will discover that "people believe there is a level of certainty to medical practice that is unrealistic. The challenge for [expert witnesses] is to move from one culture to another with ease and to explain standards of practice to people who may expect perfection."

Steep pointed to electronic fetal monitoring (EFM) as an example. He said it is of less value in predicting fetal distress than was originally thought, but in a court case involving an obstetrician the EFM strip is "a compelling piece of evidence when the case is otherwise full of the impressions of doctors and nurses. The hard-copy EFM graph plays to the cultural bias [of the court]. [The plaintiffs' experts] will testify how it should be read and will speak calmly in a neutral tone, indicating that the strip can be read as a straightforward translation."

The challenge to the expert witness appearing on behalf of the obstetrician, then, is to "convey the real limits of this modality in light of common usage."

Similarly, a good medical expert will ensure that medical jargon is not used in a "nonsensical" way, Steep said. "If it is used, it should be explained briefly. In general, it is not appropriate for the expert witness to lecture, argue or act as an advocate."

During a cross-examination, expert witnesses should neither overestimate nor underestimate the lawyer facing them, Steep said. "At the same time, lawyers can go spectacularly wrong. Don't assume they know what they're talking about."

Expert testimony is received in court according to its relevance and how necessary it is in helping the judge or jury understand the medical standard of practice. Expert medical opinions, since they are based on versions of evidence that may or may not be admitted to court, are accepted as an exception to the hearsay rule, he noted.

Steep says his firm tends to retain medical experts early in a case because they are used to help lawyers prepare for court. The expert report is prepared before trial, and both sides have access to it.

Proving negligence

Neils Ortved, lead trial counsel at McCarthy Tétrault, said patients who take doctors to court for negligence enjoy only limited success — two-thirds of cases that get as far as a statement of claim are dismissed. "These cases often come down to the experts. Experts are expensive, and if there is not a good likelihood of success, people are ill advised to run up the cost," he said in an interview.

If doctors encounter a problem, their first step should be to deal with patients' anxiety. "The vast majority of cases that we deal with that actually come down to lawsuits have as a corollary poor communication."

Dr. Alan Hudson, the neurosurgeon who serves as president and CEO at the Toronto Hospital, said the medical profession "handles human error and the variability of disease progression very badly. For example, wrong-site surgery can be universally avoided — there are policies that can be put in place. Yet if you look at wrong-site surgery, there is a catastrophic rate. We must pay more attention to preventive strategies."

While the workshop focused on protecting doctors, University of Toronto President Robert Prichard urged surgeons to remember patients who suffer disfigurement, disability or even death as a result of medical injury.

Mock trial brings surgeons face to face with defence lawyer's "worst nightmare"

The defendant, an orthopedic surgeon, was slumped in his chair. When the jury was asked for a verdict, the surgeon quickly shot up his hand before anyone could say anything. "Guilty," he wailed.

Mr. Justice Horace Krever wasn't impressed. Looking stern, he jumped into the fray immediately. "This is not a question of guilt or innocence. This law has nothing to do with the stigma of punishment. It is merely to determine compensation for the patient. Unfortunately, even judges say that someone is guilty of negligence — it is a mistake of language."

Unusual court room happenings? It was the conclusion of a mock trial played out in front of a "jury" of surgeons taking a day-long course in medicolegal issues.

Participants were acting out roles from an actual case, but the man in the hot seat — Dr. Robert McBroom, the orthopedic surgeon who played the defendant — appeared truly beleaguered as the "trial" went on. He became increasingly defensive and grim, his hair was more and more dishevelled, and his shoulders slumped.

The case in a nutshell: the patient had come to Toronto, referred by his doctor in Northern Ontario because of low back pain and a left buttock and leg that sometimes became numb. After surgery, he suffered from sexual and bowel dysfunction, as well as more pain and constant numbness.

Was the surgeon negligent?

Neurosurgeon Alan Hudson, described by some lawyers as the defence lawyer's worst nightmare, appeared as expert witness for the patient. In a low-key, authoritative fashion, he noted that to make a good diagnosis in such a case there has to be a careful balance involving a patient history, physical examination and special tests. In this case, he felt the balance had not been achieved.

The surgeon's negligence appeared obvious after Hudson's presentation, but then defence lawyer Paul Steep went to work. During the cross-examination he reined Hudson in tightly, requiring short answers to a steady flow of carefully crafted questions, and the case no longer appeared to be open and shut.

"You have to take the judge through the case in a logical fashion with bite-size questions," lawyer Neils Ortved of McCarthy Tétrault commented after the trial. "Narrative is not good.

"Hudson is an excellent expert because he gives on points where he has to give. Judges are not necessarily attracted to witnesses who fight when they shouldn't, because it turns them into advocates."

A key issue through the mock trial was the absence of notes by the orthopedic surgeon. During a question-and-answer session, a surgeon said he sees so many patients every day that "taking accurate notes would be absolutely impossible. You guys [lawyers] make a living off our records."

This prompted another speedy intervention from Krever. "Practising good medicine involves keeping good records," he remarked sternly.

Prichard, author of a widely reported 1991 study on no-fault insurance, said patients who suffer serious accidental injury should have options other than having to face the expert witnesses and lawyers hired by the CMPA.

"Medical injury remains a main source of systemic injustice," he said. "The single best thing we can do is avoid it . . . and then deal in a compassionate and effective way [with those who are harmed]. We need to find an alternative to tort legislation."

The February workshop was cosponsored by the University of Toronto's Department of Surgery, 2 Toronto hospitals and McCarthy Tétrault.

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