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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