Error of judgment – An obsolete jury instruction

Participating as a juror in a medical negligence case is often a new and challenging experience. After being required to remember facts gleaned from days or even weeks of testimony, decipher the technical language of expert witnesses and make some sense of medical records, jurors must then try to comprehend the court’s instructions. Trial lawyers and judges expect the jury to understand legalese and medical terminology, such as substantial factor, preponderance of the evidence and pre-existing, asymptomatic condition. One of the most confusing legal concepts a jury is asked to comprehend in a medical negligence case is the so-called “error of judgment” instruction, and its relation to the professional standard of care. Routinely requested by the court’s instructions. Trial lawyers and judges expect the jury to understand legalese and medical terminology, such as substantial factor, preponderance of the evidence and pre-existing, asymptomatic condition. One of the most confusing legal concepts a jury is asked to comprehend in a medical negligence case is the so-called “error of judgment” instruction, and its relation to the professional standard of care. Routinely requested by the defense where the issue is failure to diagnose, the mere fact that the symptoms may be obscure, is as follows:

If the symptoms are obscure or such that even a skillful practitioner might after using his best knowledge and judgment be mistaken in his diagnosis, he is not liable...

The error of judgment charge is confusing and misleading to the jury, and without careful explanation, which is rarely comprehensible, is a misstatement of the law and should, therefore, no longer be given.

The origin of the error of judgment instruction can trace its history to the ancient, nonjury trial of Williams v. LeBar, 141 Pa. 149, 21 A. 525 (Pa. 1891). The defendant physicians were alleged to have been negligent in the examination of the plaintiff and in signing a certificate certifying his insanity. Based upon their judgment, the plaintiff’s father had him arrested and committed to a hospital. The court found that while the plaintiff was not actually insane, the defendants were not negligent in their examination of him. Thus, the court held there was no deviation from the standard of care in the examination of the plaintiff. The error of judgment defense is largely discretionary, and this determination will not be reversed by our appellate courts. In Soda v. Baird, 411 Pa. Super. 80, 600 A.2d 1274 (1991), the decedent’s family physician and radiologist misdiagnosed a breast mass as a cyst, when in fact it was a cancerous growth. The cancer metastasized and Mrs. Soda died. The error of judgment charge was given and the jury returned a verdict for the defendant. The Superior Court summarily rejected plaintiff’s argument that the trial court should not have given the jury instruction on error of judgment, finding that the charge comporting with the principle that a physician may not be liable merely upon evidence of the commission of an error of judgment. Id. at 159.

One hundred years and many decisions later, case law suggests that the trial court’s decision on whether to instruct the jury on the error of judgment defense is largely discretionary, and this determination will not be reversed by our appellate courts. In Soda v. Baird, 411 Pa. Super. 80, 600 A.2d 1274 (1991), the decedent’s family physician and radiologist misdiagnosed a breast mass as a cyst, when in fact it was a cancerous growth. The cancer metastasized and Mrs. Soda died. The error of judgment charge was given and the jury returned a verdict for the defendant. The Superior Court summarily rejected plaintiff’s argument that the trial court should not have given the jury instruction on error of judgment, finding that the charge comporting with the principle that a physician may not be liable merely upon evidence of the commission of an error of judgment. Id. at 159.

In Gunn v. Grossman, 748 A.2d 1235 (Pa. Super. 2000), several physicians were found negligent in the death of the plaintiff’s decedent after she suffered a severe reaction to intravenous antibiotic injections. On appeal, the physicians argued that the court should have instructed the jury “that a physician cannot be liable for a mistake in judgment...”. Id. at 1244. The Superior Court observed that the trial court had correctly charged the jury on the definition of medical negligence, causation, as well as the duty of care and found the physicians’ argument utterly devoid of merit. Id. at 1244.

Similarly, in Glover Peters v. Prudencio, 121 Dauph. 18, 30 (2001), Dauphin County Jurist Richard A. Lewis rejected a physician’s argument that error occurred by refusing the specific jury instruction on “error of

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j udgment” or “best judgment.” Judge Lewis
said that the better approach is to use the
general instruction on a physician’s duty of
care. Id. Indeed, the growing trend is to find
the “error of judgment” instruction to be
prejudicial, confusing and unnecessary when
the general explanation of negligence and
professional standard of care is given. See
Hirahara v. Tanaka, 87 Hawaii 460, 959 P.2d
830 (1998); Morin v. Medical Center of
Ocean County, 152 N.J. 563, 706 A.2d 721

It is well-recognized that if a jury instruc-
tion has a tendency to mislead or confuse
rather than to clarify a material issue, a new
Super. 80,600 A.2d 1274 (1991). One of the
primary duties of a trial judge is to clarify
the issues and explain to the jury the legal
principles needed to correctly decide the
case. Havasy v. Resnick, 415 Pa. Super. 480,

Juror confusion is likely to occur when the
error of judgment charge is coupled with the
general instruction on standard of care. In
order to correctly state the law, the jury
should be told that a physician is not negli-
gent merely because his efforts were unsuc-
cessful or he made a mistake or that there
was an error in judgment. However, if the
physician or surgeon was negligent, that is,
there was a deviation from the standard of
care, it is not a defense that he did the best he
could and exercised his best judgment. The
error of judgment charge is not only confus-
ing, it implies that only a dishonest or bad
faith deviation from the applicable standard of
care constitutes negligence. Similarly, it
may permit a jury to conclude that a physi-
cian who lacked the requisite skill or knowl-
dege is not liable as long as he used his best
judgment.

This dilemma was discussed at some
length in the recent note to §10.03 of the
Pennsylvania Standard Civil Jury
Instructions. The note discussing the error of
judgment instruction concludes, “...such
phrases, at worst, risk misstating the law. At
best, they seem unnecessarily circular in
form. In any event, such language seems far
more likely to mislead and confuse the jury
than to enlighten it. For these reasons, the

subcommittee does not include any language
regarding professional judgment in the for-
going instruction.” Subcommittee Note: Standard of Care — Physicians (Pa. SSJI
§10.03A.) January 2003.

The most recent Pennsylvania appellate
case to discuss the appropriateness of the
“error of judgment” instruction acknowl-
edged its tendency to muddle rather than
Super. 111, 276 A.2d 689 (1971), the alleged negligence
was the physician’s failure to detect cancer
by ordering necessary diagnostic testing.
The trial judge had given the error of judg-
ment charge and a defense verdict was
returned. On post-trial motions, the lower
court ordered a new trial based upon the
erroneous jury instruction. The Superior
Court affirmed finding that the “mere error
of judgment” charge was not supported by
the evidence and indeed had confused the
jury.

The origin of the mere error of judgment
defense is a psychiatric malpractice case
where the defendant’s judgment or opinion
concerning sanity was paramount. Williams,
Saedi. Indeed, psychiatrists rely on their
judgment more than any other healthcare
specialist. However, to give the instruction
when a defendant says “in my best judg-
ment a CAT scan or MRI was not necessary”
or “a needle biopsy of a lump in a woman’s
breast is not required” injects a degree of
subjectiveness into the standard of care that
has no place in a typical medical negligence
claim. See Kurzner v. Sanders, 89 Ohio App.


Decisions by jurors in medical negligence
cases are criticized now more than ever.
Lawyers and judges must ensure that instruc-
tions are understandable to the lay juror.
Instructing a jury that a physician is not
liable for an error of judgment or for using
his best judgment but is liable if there was a
departure from the standard of care is unnec-
essary and unintelligible to all but the legal-
ly sophisticated juror. The authors of the
newly revised Standard Civil Jury
Instructions recommend using only the gen-
eral definition of professional negligence in
order to maximize juror comprehension. It is
time to abandon the “mere error of judg-
ment” charge and use the general definition
of professional negligence.