

the Barrister

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 defense where the issue is failure to diagnose, the court is asked to tell the jury:

The law recognizes that physicians must be permitted to exercise their medical judgment; or

A physician is not to be found liable for a mistake or error of judgment; or

If a physician exercises his best judgment in arriving at a diagnosis, the mere fact that he erred in the diagnosis does not render him liable.

The error of judgment jury instruction is not without appellate authority. See *Ward v. Gavin*, 328 Pa. Super. 395 (1938); *Rensey v. Plummer*, 79 Pa. Super. 117 (1922); *Sanderson v. Frank S. Bryan*, 594 A.2d 353, 406 Pa. Super. 310 (1991); *Havasy v. Resnick*, 415 Pa. Super. 480, 609 A.2d 1326 (1992).

A related jury instruction, requested when the symptoms may be obscure, is as follows:

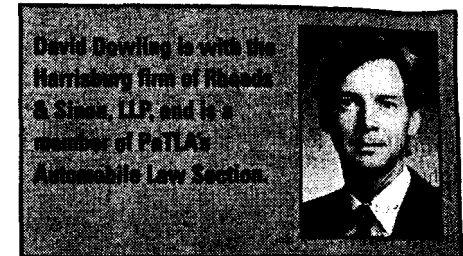
If the symptoms are obscure or such that even a skillful practitioner might after using his best knowledge and judgment be mistaken in his diagnosis, he is not liable...

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 jury 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. On appeal the Supreme Court affirmed, finding that the most that the facts disclosed was an error in judgment by the physicians. *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 comported with the principle that a physician may not be liable merely upon evidence of the commission of an error of judgment. *Id.*



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at 95.

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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judgment” 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); *Morlino v. Medical Center of Ocean County*, 152 N.J. 563, 706 A.2d 721 (1998). (Citing numerous appellate cases).

It is well-recognized that if a jury instruction has a tendency to mislead or confuse rather than to clarify a material issue, a new trial is required. *Soda v. Baird*, 411 Pa. 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, 609 A.2d 1326, 1329 (1992).

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 negligent merely because his efforts were unsuccessful 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 confusing, 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 physician who lacked the requisite skill or knowledge 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 **foregoing** instruction.” Subcommittee Note, Standard of Care - Physicians (Pa. SSJI (Civ.) §10.03A.) January 2003.

The most recent Pennsylvania appellate case to discuss the appropriateness of the “error of judgment” instruction acknowledged its tendency to muddle rather than clarify the law. In *Vallone v. Creech*, 203 Pa. Super. 111, (2003), the alleged negligence was the physician’s failure to detect cancer by ordering necessary diagnostic testing. The trial judge had given the error of judgment 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, supra*. Indeed, psychiatrists rely on their judgment more than any other healthcare specialist. However, to give the instruction when a defendant says - “in my best judgment 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.

3^d 674,627 N.E. 2d 564,567 (1993).

Decisions by jurors in **medical negligence cases** are criticized now **more than** ever. **Lawyers and judges** must ensure that instructions **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 unnecessary **and** unintelligible to all **but** the legally sophisticated juror. The authors of the newly revised Standard Civil Jury Instructions recommend using only the general definition of professional negligence in order to maximize juror comprehension. It is time to abandon the “mere error of judgment” charge and use the general definition of professional negligence. ■