Revision of the "Error in Judgment" Charge in Medical Malpractice Cases Is Long Overdue

By Stephen G. Schwarz

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I tried my first medical malpractice case on behalf of a plaintiff more than 30 years ago. That is when I was first introduced to a portion of the standard New York Pattern Jury Instruction (PJI) charge in medical malpractice cases, a charge that has continued to delight defense counsel, anger plaintiffs' counsel, and most important, confuse jurors, for decades. Although the charge has been modified slightly over the years, in its present form, it remains both confusing and internally inconsistent. As contained in the 2019 PJI Edition, PJI 2:150 states in pertinent part:

> A doctor is not liable for an error in judgment if (he, she) does what (he, she) decides is best after careful evaluation if it is a judgment that a reasonably prudent doctor could have made under the circumstances. In other words, a doctor is not liable for malpractice if he or she chooses one of two or more medically acceptable courses of action.

The legal premise behind the charge is simple enough to understand. For example, patient P is properly diagnosed by doctor D with a medical condition X. Doctors universally agree there are two (or more) acceptable treatments for condition X, either surgical treatment A or medication B. Either is within the standard of care and both have their advantages and disadvantages. Under the law, if doctor D recommends surgical treatment A and the result is not great, doctor D cannot be held liable to patient P under the theory that had medication B been recommended instead of surgical treatment A, patient P would have had a better outcome.

The current charge accurately describes this theory except for the phrase "an error in judgment." In the early 1990s I wrote to a judge who then served on the PJI Committee and argued that these four words took an otherwise comprehensible charge and made it nonsensical. Actually, back then, the charge included the word "mere" before "error in judgment," so it was even worse. I explained if a doctor chooses one of two or more acceptable treatments he or she has not committed an error of any kind. Error is defined as "a mistake" or "the state or condition of being wrong in conduct or judgment." Doctor D did not make a mistake and was not wrong in recommending one of two acceptable treatment options. The judge politely replied that he and his colleagues on the Committee were not inclined to modify the charge.

As the years passed and I prosecuted more medical malpractice cases, I noticed when deposing defendant doctors they had been instructed to insert the word "judgment" into as many answers as possible to argue later that the charge should be given even in circumstances where it clearly should not. I used to joke that if these depositions were likened to a drinking game so that attendees had to drink every time the word "judgment" was used, no one would be able to stand without assistance at the end of the deposition. Entertaining as this was in theory, it created a serious problem. With deposition transcripts replete with the word "judgment," trial judges could at times be persuaded to give the charge to the jury in situations very different from those the drafters of the charge and the law intended.

One of the great myths under which lawyers and judges have been conditioned to operate is that jurors can listen for an hour to the charge provided by the trial judge and absorb every word. There is virtually no other setting in our society where people are expected to simply listen to long, complex instructions once and understand, retain, and apply these instructions flawlessly. This is an inherent weakness of our system that no one wishes to address, other than the occasional suggestion that the instructions be provided to the jurors in written form after it is read to them. With this in mind, when jurors hear "a doctor is not liable for an error in judgment" in a case based upon an allegation that the doctor did err, it is one phrase that sticks. Most jurors remember that part of the charge when given and mistakenly believe that doctors are not liable for their errors. Actually, an error in judgment by a physician or anyone else is the definition of negligence, just as a motorist who makes a bad judgment that he or she can beat a traffic light and causes a collision is, by definition, negligent. This charge gives doctors much more than the one free bite granted your average dog. In fact, when mistakenly interpreted, which it frequently is, the charge grants doctors unlimited free bites because they are permitted an infinite number of "errors in judgment" without consequence.

Even prior to my letter requesting the charge be modified, some trial judges understood the rule and refused to use the problematic phrase in the proposed charge. In *Spadaccini v. Dolan*,[1] the First Department upheld a verdict for the plaintiff in a case where the trial judge refused to utilize the phrase "mere error in judgment" holding that "[s]uch a charge under the facts presented would have been unwarranted" because the underlying case did not involve a choice by the physician between multiple reasonable alternatives. Similarly, in *Grasso v. Capella*,[2] the Second Department refused to overturn a verdict in favor of the plaintiff on the ground that the judge refused to give the charge: "There was no evidence that the defendant, a surgeon, had to consider or choose among medically-acceptable alternatives regarding the treatment of the plaintiff. Accordingly, under the circumstances of this case, the defendant was not required to exercise the type of medical judgment that would warrant the 'error in judgment' charge."

Later, the Fourth Department began to reverse defense verdicts where the charge was improperly given. In *Martin v. Lattimore Road Surgical Center*, the Court, citing *Spandaccini*, reversed, stating: "In this case, however, the evidence simply raised the issue whether defendant deviated from the degree of care that a reasonable physi-

cian would have exercised under the same circumstances, and there was no reason to give an error in judgment charge with respect to defendant's manner of stitching the incision."[3]

A year later, the Court of Appeals entered the discussion in *Nestorowich v. Ricotta*,[4] sending a strong message to trial courts that this charge should not be given haphazardly:

> The Appellate Divisions, as well as certain other jurisdictions, have embraced an "error in judgment" charge [citations omitted]. As it has developed, the charge has been appropriate in instances where parties present evidence of a choice between or among medically acceptable alternatives or diagnoses. . . . Absent a showing that "defendant physician considered and chose among several medically acceptable treatment alternatives" the error in judgment charge has been found inappropriate (Martin, 281 A.D.2d at 866, 727 N.Y.S.2d 836).

This limited application of the error in judgment charge preserves the established standard of care. Broader application of the charge would transform it from a protection against second-guessing of genuine exercises of professional judgment in treatment or diagnosis into a cloak for professional misfeasance. The doctrine was intended to protect those medical professionals who, in exercising due care, choose from two or more responsible and medically acceptable approaches. A distinction must therefore be made between an "error in judgment" and a doctor's failure to exercise his or her best judgment. Giving the "error in judgment" charge without regard for this distinction would otherwise relieve doctors whose conduct would constitute a breach of duty from liability.

Despite this clear admonition, some trial courts continued to inappropriately give the charge, resulting in reversals and retrials.[5] However, after *Nestorowich*, most trial judges have been more thoughtful and have declined to give this charge where it is not appropriate. But this has not stopped defendants from requesting the charge even where it is clearly inappropriate. The fact that seasoned attorneys continue to request the charge in circumstances where it is clearly unwarranted and makes a defense verdict vulnerable on appeal illustrates the power of the words "an error in judgment." For this reason, the word "judgment" continues to be one of the most common words used by a defendant doctor during his or her deposition and trial testimony.

The current PJI charge has also been modified from what it was when I first criticized it, removing the word "mere" that formerly modified "error" and clarified, providing a better explanation of its intent to convey a choice between one of two or more acceptable alternative treatments. Yet, the phrase "error in judgment" remains and continues to contradict the rest of what the jury is told about the doctrine. The jury is still instructed a doctor cannot be held liable for an "error in judgment" which remains an obviously confusing and incorrect instruction of the law.

To reduce juror confusion, unjust outcomes, reversals and retrials, it is time to drop the offending five words from the existing charge, just as the trial judge in *Spadacinni* chose to do 40 years ago. This amendment is long overdue. When the offending phrase is removed, the charge becomes clear and provides the jury with the appropriate instruction to apply when the facts of the case warrant it:

> A doctor is not liable for an error in judgment if (he, she) does what (he, she) decides is best after careful evaluation if it is a judgment that a reasonably prudent doctor could have made under the circumstances. In other words, a doctor is not liable for malpractice if he or she chooses one of two or more medically acceptable courses of action.

The fact that these words have remained in the charge for decades does not justify keeping them. Removing them will put a stop to the mischief and added burden to the parties and the court system they continue to cause.

1. 63 A.D.2d 110 (1st Dep't 1978).
2. 260 A.D.2d 600 (2d Dep't 1999).
3. 281 A.D.2d 866, 866 (4th Dep't 2001).
4. 97 N.Y.2d 393, 399–400 (2002).
5. *Vanderpool v. Adirondack Neurosurgical Specialists, P.C.*, 45 A.D.2d 1477 (4th Dep't 2007); *Anderson v. House of Good Samaritan Hospital*, 44 A.D.3d 135, 140–42 (4th Dep't 2007); *Rospierski v. Haar*, 59 A.D.3d 1048 (4th Dep't 2009).