Medicolegal Sidebar

The Judgment Defense in Medical Malpractice

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Introduction

In medical malpractice litigation, one well-recognized defense is that the physician or surgeon was simply using his or her best judgment, such that an adverse outcome was simply a matter of probability. In fact, the shielding of physicians and surgeons from legal

liability under circumstances where it is clear that prudent professional judgment was exercised is a time-honored principle of American jurisprudence. To wit, in 1898, the court in the legal case of *Pike v Honsinger* set forth the principle that a physician or surgeon would not be "... liable for a mere error of judgment, provided he does what he thinks is best after careful examination" [1]. The *Pike* case dealt with a poor outcome from closed treatment of a patella fracture.

This "error of judgment" doctrine became part of American legal thinking, and at first glance, its application appears straightforward. If the physician did the best that a similarly-situated

professional could under the circumstances, there should be no legal liability for an adverse outcome, when that outcome arose despite reasoned decision-making among competing treatment alternatives. Like most legal doctrines, however, the so-called "error of judgment" defense is more complex than it may first appear. This complexity begins with defining what "judgment" means in the context of a professional liability lawsuit.

As an egregious example, if an orthopaedic surgeon were to operate on the wrong limb, one could argue that the surgeon made a judgment not to confirm which extremity to operate on. The law certainly does not contemplate that such judgment errors should be protected. Given the definitional ambiguity surrounding the word "judgment," the inevitable question that this article will attempt to address, is: Can courts develop a rational and fair jurisprudence around the meaning of "judgment" in professional liability cases?

Defining Physician Judgment

At least one court has attempted to develop such jurisprudence. In the

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1978 legal case of *Spadaccini v Dolan* [3], a 47-year-old man was admitted to the hospital for Ludwig's Angina, an acute infection of the mouth marked by swelling in the mandibular and hypoglossal area. Usually related to a dental procedure or infection, Ludwig's Angina can progress to a life-threatening cellulitis, leading to airway compromise. Treatment consists of appropriate antibiotic therapy, close monitoring of the airway, and prompt incision and drainage of the abscess. If the airway is in doubt, a tracheotomy or intubation must be performed, and the patient should be monitored in an intensive care setting.

In *Spadaccini*, the evidence showed that neither intubation nor tracheotomy was considered. Furthermore, the hospital lacked ICU resources. The patient went into postoperative respiratory arrest and was comatose for 21 days before dying. The family filed a malpractice lawsuit.

At the close of evidence at trial, the defense attorney asked the court to instruct the jury that his client (the physician) should be absolved of liability because his decision was a legitimate "error of judgment" [2]. Specifically, defense counsel asked the judge to give the following instruction to the jury: "If you find there was an error of judgment made by the defendant, you are not to infer or attribute negligence from such mere

error of judgment since the standard of care...allows for error of judgment..." [4].

The court disagreed and did not give such jury instruction. The verdict, in favor of the plaintiff patient, was affirmed on appeal. The appeals court clarified that the "error of judgment" instruction does not have to be delivered by a trial court in all professional liability cases. The appeals court acknowledged that doctors are often confronted with legitimate, competing treatment alternatives. Where a physician makes a reasoned choice among available alternatives, there should be no liability for a poor outcome. Indeed, the court recognized that failure to protect physicians and surgeons from liability arising out of the exercise of so-called "professional judgment" could lead to unfair results, whenever a patient should happen to encounter an undesirable outcome.

The *Spadaccini* court went on to list three reasonable alternatives that were available to the doctor: (1) prophylactic tracheotomy before incision and drainage, (2) postoperative tracheotomy, or (3) ICU monitoring for signs of respiratory distress. None of these options were chosen by the surgeon, nor was any other action taken to protect the patient from the known risk of airway loss. The appellate court remarked that the "error of judgment" defense "... is appropriate only in a case where

a doctor is confronted with several legitimate and reasonable alternatives and, in determining appropriate treatment to be rendered, exercises his judgment by following one course of action in lieu of another" [5].

The *Spadaccini* decision clarifies that the "error of judgment" defense does not confer blanket immunity when a physician, faced with a medical negligence suit, counters that he/she was exercising the best possible professional judgment, which should not be second-guessed. Rather, the "error of judgment" defense should address defendants who chose one of multiple competing treatment alternatives—all of which were within the established of care; each choice entailing its unique risks and benefits. While *Spadaccini* may dispense of the notion of blanket immunity for the exercise of professional judgment, the decision also identified an important mechanism that allows prudent physicians to protect themselves from successful medical liability claims.

To understand how the *Spadaccini* ruling can protect a physician, consider the following two hypothetical clinical scenarios:

1. An orthopaedic surgeon removed a spur from a patient's foot. Postoperatively, the patient had a low-grade fever, with some serous discharge from the wound. The surgeon did not culture the drainage, nor start

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antibiotics. Due to medical comorbidities unrelated to surgery, the patient ended up staying for 5 days in the hospital. On the day of discharge, the patient had a slight temperature, pain over the surgical site, and some discharge from the incision. Four days after uneventful discharge, the patient suffered increased drainage, redness, and pain and went to the emergency department of another hospital. Deep surgical infection was diagnosed, with eventual osteomyelitis; the patient ultimately ended up with an amputation.

In the medical negligence suit that followed, the orthopaedic surgeon asserted that his decision not to culture the wound nor start antibiotics was a “judgment decision” such that he should not be held liable for the patient’s amputation.

2. A 56-year-old woman underwent a revision total hip replacement and developed a deep wound infection. The surgeon recognized that hip resection would lead to serious morbidity and bone loss, resulting in permanent disability for the patient. Treatment with intravenous antibiotics followed by chronic suppression of the infection also carried risks related to the antibiotic regimen. The surgeon chose the suppression route and initiated

intravenous gentamicin followed by chronic oral suppressive antibiotic therapy. Despite appropriate monitoring of drug levels, the patient developed severe renal failure from the intravenous gentamicin.

In the medical negligence suit that followed, the orthopaedic surgeon asserted that he made a “judgment decision” when he chose one treatment option over the other, and that he liability for the patient’s renal problems should therefore not attach.

Analysis

The *Spadaccini* court’s findings suggest that there are important differences between these two examples, but also some similarities.

As a result of the “error of judgment” defense as defined by *Spadaccini*, surgeons can defend themselves from legal liability when confronted with competing treatment choices. *Spadaccini* distinguished between reasonable professional choices and situations where a treatment option fell outside the contours of reasonable medical care. In order for orthopaedic surgeons to avail of the “error of judgment” defense, they must be careful to document their thought processes in the medical record

when confronted with competing choices. They should also involve the patient in the decision-making process when a “judgment decision” has the potential to materially affect the patient’s outcome.

Thus, at least at face value, the gentamicin case example appears to favor the physician, since he made a choice among two reasonable options. In practice however, this case may very well rise or fall on whether or not the patient understood and consented to the use of a potentially toxic drug to deal with the infection. In contrast, the physician in the osteomyelitis case could easily argue that despite the catastrophic outcome, in his judgment, the patient’s wound was such that neither wound culture nor antibiotic therapy was warranted.

The distinction between the above case examples is pertinent to the role of medical documentation in malpractice loss prevention. Often, scholars exhort surgeons to document steps taken to protect the patient. In cases involving judgment decisions however, it is important to also document the thought processes of the orthopaedic surgeon. This allows a reviewer or juror to understand that the orthopaedic surgeon was: (1) aware of the clinical dilemma and (2) acted prudently to mitigate risk. Equally important, the surgeon should ensure that the patient

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participates in decisions that affect the patient's health, when the choices are clinically ambiguous.

A common misconception about medical documentation is that it must be extensive. A note in the medical record that reflects awareness of clinical dilemmas, communication to the patient, and shared decision-making does not necessarily have to be long. For example, in the gentamicin case, the orthopaedic surgeon could simply have noted: "Patient developed deep sepsis. Treatments are resection versus chronic antibiotic suppression. Options were discussed with the patient. Our mutual decision is to proceed with antibiotic treatment."

The Future of "Error of Judgment"

Interestingly, since the *Spadaccini* decision 35 years ago, there has been little, if any, judicial expansion or

clarification of the "error of judgment" doctrine. Consequently, there is no well-developed law, for example, describing whether or not an "error of judgment" defense might apply when a physician is confronted with a decision entailing a comparison between costs and benefits of a treatment choice.

We believe that in future judicial cases, the rationale of the *Spadaccini* analysis should be extended to judgment decisions that involve cost versus clinical utility. Indeed, such as result is virtually mandatory, lest physicians are denied the benefit of the "error of judgment" defense when confronted with costs that realistically preclude certain treatment options that are unlikely to produce any benefit to the patient. This proposed expansion of the "error of judgment" doctrine is especially compelling given the cost constraints of contemporary medicine.

Conclusion

It is important for all orthopaedic surgeons to be aware of the "error of judgment" defense, and its explicit meaning. This doctrine can allow orthopaedic surgeons to protect themselves from liability through the exercise of well-recognized principles of good medicine. These include the need to both document relevant thought processes in important clinical decisions, as well as to share the uncertainties inherent in those decisions with the patient.

References

1. *Pike v Hosinger*, 155 NY. 201, 49 NE 760 (1898).
2. *Ressis v Mactye*, 485 NYS2d 132, 108 A2d 960 (1985).
3. *Spadaccini v. Dolan*, 407 NYS2d 840, 63 A2d 110 (1978).
4. *Spadaccini v Dolan*, 407 NYS2d 840, 844, 63 A2d 110 (1978).
5. *Spadaccini v Dolan*, 407 NYS2d 840, 845, 63 A2d 110 (1978).