



Healthcare and the Law: A View from the Bar

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Abstract

When a patient's care becomes the subject of medical-legal litigation, those from healthcare involved in the case may not understand the decisions of the lawyers and the final judgment of the judge. An appreciation of how legal professionals review healthcare decisions requires an understanding of the process that courts follow in analyzing medical cases and arriving at their own legal judgments.

The concept of "medical evidence" can also be problematic. Since lawyers and judges are not medically trained, how lawyers present their evidence and how judges or juries review and understand that evidence can have an enormous impact on the outcome of litigation. This article outlines the types of evidence.

When a medical event is reviewed in isolation in a non-medical setting – such as a courtroom – there are obvious problems with omission of the larger contextual background. In this paper, an actual legal case is reviewed, serving as an example of how such problems may be handled. There are factors other than those pertaining to the immediate medical case that have a role in shaping the medical judgment, including other ongoing events, changing medical standards and a reliance on outside resources.

This paper presents a summary of how lawyers and judges review healthcare decision-making. The process that courts follow in analyzing medical cases and arriving at a legal judgment is outlined. Since lawyers and judges are not medically trained, consideration is given to how lawyers present their evidence and how judges or juries deal with and understand

that evidence. There is a discussion of the process of reliance on experienced, objective medical experts. An actual legal case is presented so that the difficulties of analyzing a medical event in isolation can be considered. In addition, outside factors that may play a role in the shape of a medical judgment or treatment are analyzed.

It is interesting to compare the process of decision-making in the law with that of decision-making in medicine. First, a brief primer on the legal process involved is presented, followed by a look at how judges make decisions regarding medical cases.

How Courts Review Medical Cases

In any trial, the judge must apply the appropriate legal principles or “the law.” At the trial, the evidence (“the facts”) is presented by the parties involved, and the trier of fact (which can be either a judge or a jury) makes crucial “fact findings.” Once a decision has been made as to those fact findings, the judge must follow the applicable legal principles. The decision is shaped by the evidence presented. When medical performance is being assessed, independent expert opinion is needed to properly assess the medical performance.

In cases where medical malpractice is alleged as against a healthcare provider (e.g., nurse, doctor, laboratory technician, etc.), the law of negligence applies. The general principles of negligence are straightforward; it is the application that is frequently more complex. Four basic requirements must be met (Picard and Robertson 2007):

1. The defendant must owe the plaintiff a duty of care
2. The defendant must breach the standard of care established by law
3. The plaintiff must suffer an injury or loss
4. The defendant’s conduct must be the actual and legal cause of the plaintiff’s injury

If a malpractice case fails to meet any of these requirements, then the action is dismissed.

The proof in a civil case (as opposed to a criminal case) must be established on “a balance of probabilities.” Proof in a criminal matter must be “beyond a reasonable doubt,” which is a higher standard than that found in civil cases. One demonstration of this distinction is the well-known murder trial of O.J. Simpson: the jury did not find the case proved beyond a reasonable doubt in the criminal matter, but Simpson was found liable in the civil case, based on a balance of probabilities.

Understanding the Medical Evidence

Because the judge or jury has no medical training, the trier of fact must rely on medical experts. The trier of fact might have considerable difficulty comprehending technical medical evidence, so it is the job of trial counsel, together with the chosen experts, to provide a clear explanation of such matters.

The way in which lawyers present the evidence is crucial to the outcome. Each side wants to craft the case carefully, providing all facts relevant to its argument and making the presentation comprehensible and memorable. The evidence at trial may take the form of written evidence (e.g., charts, radiographs, labora-

tory reports, consultations, diaries, calendars, letters) and oral evidence provided by various witnesses, including the plaintiff in the action, the defendant(s) and other parties who can shed light on the surrounding facts. This may include the spouse and family of the patient, as well as treating physicians, therapists and other consultants.

Opinion evidence can also be presented, but this can only be provided by qualified experts in a particular field. In a malpractice action, it is vital to have expert opinion from experts in the field that is under scrutiny.

Often, it is useful to use drawings (typically on a flip chart so that the sheets can be kept as exhibits), videos, diagrams, surgical instruments, etc. In short, it is the lawyer’s responsibility to educate the trier of fact and to demonstrate how there can be but one logical conclusion drawn from the facts in question. Naturally, any trier of fact may bring certain biases to the courtroom, and counsel should be alert to any concerns being demonstrated by a judge or jury, ensuring that a full explanation is given.

Putting the Medical Case in Context in the Courtroom

It may be useful to review an actual case that arose in Alberta and went through trial and appeal procedures (*Kehler v. Myles* 1987 48 Alta L.R. (2d) 258). It is instructive to observe how a court analyzed this medical malpractice case and arrived at a decision.

The facts involved a male patient in his forties who was working as a sales representative in the oil industry. He had suffered significant brain damage at a drilling site in Southern Alberta when a heavy weight fell on him from a rig, causing him a severe injury, despite the fact that he was wearing a hardhat. He was placed upright in a pickup truck and endured a rough ride over backcountry roads to a rural hospital. There, he was assessed in the emergency department and then flown to a major tertiary care hospital for further assessment and treatment.

At the city hospital, he was assessed and cervical spine precautions were instituted. As part of the assessment, a number of radiographs were taken of the cervical spine. Surgery was required for the brain injury and was considered, both at the time and in retrospect, to be successful.

The patient’s neck was assessed as being stable, and in due course the cervical collar was removed. At some point after that removal, the patient experienced a subluxation (partial dislocation).

The patient alleged that the cervical spine had not been properly assessed and that the subluxation occurred as a result of that negligence, causing paralysis beyond that which would have been caused by the brain injury. The neurosurgeon in charge of the case was sued, as was the hospital.

At the trial, considerable attention was paid to the series of radiographs that had been taken. At the time of the case,

computed tomography was not universally available, let alone magnetic resonance imaging or positron emission tomography. In interpreting the radiographic evidence, opinions were sought from seven different medical experts. There was, of course, the opinion of the defendant neurosurgeon himself, in addition to that of the neuroradiologist on call at the time. There were expert opinions provided by an orthopedic surgeon, a neurosurgeon and a neuroradiologist, all called on behalf of the plaintiff patient, and two further independent opinions sought from two neurosurgeons called on behalf of the defendant physician.

Perhaps not surprisingly, the interpretation of the radiographs was far from unanimous. Indeed, the trial judge stated: "If there is any one thing which emerges as being dominant, after the extensive review of the expert evidence ... it is the total lack of unanimity of opinion by the experts on any aspect of the interpretation of the x-ray films in this case" (Kehler v. Myles: 277).

The judge went on to state correctly his role in assessing the malpractice case before him: "It follows that I must determine on the evidence whether the Plaintiff has discharged the onus upon him to demonstrate negligence by the neurosurgeon in taking the decision which he did, and in so doing, I must apply the appropriate criteria in deciding that issue. I must also take cognizance of the expert evidence which has been adduced and decide how it is to be applied to the circumstances of the case before me, relative to the issue of liability" (Kehler v. Myles: 288).

The judge then reviewed the well-established principles of negligence and discussed the burden of proof. In particular, he considered the balance of probabilities and whether or not the doctor's conduct fell below the standard of care established by law. He stated, "In this regard I am of the view that where a matter falls to be decided on the testimony of experts and where the evidence given by the opposing sides is evenly balanced, then the finding must be against the party who has the burden of proving it" (Kehler v. Myles: 288).

The trial judge cited several earlier cases including a well-known English decision, *Maynard v. West Midlands RHA* (1984: 639): "A court may prefer one body of opinion to the other: but that is no basis for a conclusion of negligence ... I have to say that a judge's 'preference' for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received a seal of approval of those whose opinions, truthfully expressed, honestly held, were not preferred."

The judge then concluded:

In my opinion, the doctor's conduct is to be judged for his performance at that time, under stress, facing the very real and serious injuries and complications which the plaintiff presented. The plaintiff had sustained a very grave and life threatening head injury which required immediate atten-

tion ... Can the doctor's erroneous assessment and stability then be categorized as an honest error of judgment? It is well established law that a doctor will not be held liable for an honest error in judgment if he possessed and exercised the skill, knowledge and judgment of the average of his specialty when considering the patient's case.

An error in judgment has long been distinguished from an act of unskillfulness or carelessness or due to lack of knowledge. Although universally accepted procedures must be observed, they furnish little or no assistance in resolving such a predicament as faced the surgeon here. In such a situation, a decision must be made without delay based on the limited known and unknown factors; and the honest and intelligent exercise of judgment has long been recognized as satisfying the professional obligation (Kehler v. Myles: 280).

Judicial Decision-Making

A reasonable body of literature has now come into existence regarding the process of decision-making in medicine. Interestingly, there is much less literature to date on decision-making in the legal arena. The analyses that have been done,

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however, suggest that the same models are applicable in both medicine and law. One might presume that a judge, with the luxury of time to analyze the evidence and arrive at a conclusion, would logically follow the "formalist" method. In fact, as the papers to date suggest, it appears that judges, every bit as much as doctors, frequently follow an intuitive process.

One recent thorough paper on judicial decision-making has emerged from the Vanderbilt University Law School ("Inside the Judicial Mind" Guthrie et al. 2001). In a related paper titled "Blinking on the Bench: How Judges Decide Cases," Guthrie et al. (2007) contend that there are two models of judging, the formalist and the realist:

"According to the formalists, judges apply the governing law to the facts of a case in a logical, mechanical and deliberative way. For the formalists, the judicial system is a "giant syllogism machine", and the judge acts like a "highly skilled mechanic". Legal realism, on the other hand, represents a sharp contrast. According to the realists, judges follow an intuitive process to reach conclusions which they only later rationalize with a deliberative reasoning. For the realists,

the judge “decides by feeling, and not by judgment; by ‘hunching’ and not by ratiocination” and later uses deliberative faculties “not only to justify that intuition to himself, but to make it past muster”. Neither model has proved satisfactory. Judges surely rely on intuition, rendering a purely formalist approach of judgment clearly wrong, yet they also appear able to apply legal rules to facts, similarly disproving a purely realist model of judging”. (Guthrie et al. 2007: 102)

The authors conclude that, upon analysis, the way judges make decisions is actually a blend of formalism and realism, which they call the “intuitive-override” model of judging. They state: “Supported by contemporary psychological research on the human mind and by our own empirical evidence, this model posits that judges generally make intuitive decisions but sometimes override their intuition with deliberation. Less idealistic than the formalist model and less cynical than the realist model, our model is best described as realistic formalism” (Guthrie et al. 2007: 103).

The authors found from their studies that judges are predominantly intuitive decision-makers. They cite Malcolm Gladwell’s popular book *Blink* (2005).

In applying the authors’ theory to the case we have just analyzed, while there may be some blend of intuitive and deliberative decision-making, it would appear that this particular judge, regardless of whatever hunches he may have had, most certainly went about his analysis and decision-making in a deliberative and systematic fashion.

One lesson to be taken from the analysis on decision-making is that the lawyers must be thorough in assisting the judge to follow a process that involves a full analysis and not merely a gut feeling. It is easy to lose sight of the overall context in which a decision is being made. It is the lawyers’ responsibility to ensure that the judge is reminded of all the factors involved in arriving at the medical decision under analysis.

Contributing Factors

In general, there can be any number of factors that, while not immediately involved in a case under review, may well have had an influence on the problem that has arisen. Examples include hospital wards being overloaded, with patients sometimes having to wait in the halls of an emergency department; changes in hospital administration procedures; inadequate funding, which can result in poor or outdated equipment, insufficient facilities and sometimes a shortage of staff. Frequently, there are simultaneous ongoing events in a hospital, such as the needs of other patients or an outbreak of infection. In addition, medical standards are constantly changing, so one must avoid the pitfall of judging a case occurring some years ago by today’s standards.

In the case we have analyzed, there were a number of outside

factors that came into play. For example, the neurosurgeon in question was on duty alone and was under significant pressure due to the volume of other serious cases. As a result, he was unable to make full notes in the chart of his decisions and assessments. At the time of this medical incident, the entire system at the hospital in question was under pressure due to the significant trauma volume being handled. The cervical subluxation was the injury complained of, but it was entirely relevant to consider the severity of the primary injury to the brain, which appropriately was the focus of the caregivers at the time.

Counsel at trial and judges hearing the evidence and arguments must constantly ensure that all contributing factors are taken into account when assessing the medical judgments involved.

Conclusion

It is fascinating to compare the decision-making process in the two rather different professions. For lawyers and judges, much can be learned from the medical literature about decision-making. It is evident that these studies are far more comprehensive than anything developed to date in the legal community. For doctors, I believe that it is useful to understand how legal decision-makers go about their work. The methods for the comprehensive gathering and presentation of evidence are instructional and give a true insight as to how the legal system reviews medical cases, assessing the factors that go into sound judgments. A good understanding and appreciation of the legal decision-making process should assist healthcare professionals in ensuring that their daily work is done in a way that can stand outside scrutiny; this, in turn, enhances patient safety. **HQ**

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