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MINNESOTA'S "HONEST ERROR IN JUDGMENT" RULE: AN ERROR IN ITSELF?

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Minnesota's honest error in judgment rule is embodied in JIG II 425 G-S. This jury instruction, however, was recently modified. Unfortunately, the new jury instruction retained the word "honest" which has led to jury confusion in the past. Thus, the new jury instruction will still create confusion unless the word "honest" is removed.

INTRODUCTION

A doctor has a continuing duty to keep informed of all the facts and circumstances surrounding his patient's condition and regarding the accepted methods of treatment or diagnosis for that condition.[1] After obtaining a proper history of a patient's case, a doctor is under a duty to execute his skills with reasonable care by using accepted methods of treatment or diagnosis.[2] Having done this, a doctor will not be held liable in the majority of jurisdictions if an undesirable result follows.[3]

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1. *See, e.g.*, Staloch v. Holm, 100 Minn. 276, 280-81, 111 N.W. 264, 266 (1907).
2. *See, e.g.*, Kinning v. Nelson, 281 N.W.2d 849, 852 (Minn. 1979).
3. *See, e.g.*, Fall v. White, 449 N.E.2d 628, 635-36 (Ind. Ct. App. 1983) (physician not liable for negligent diagnosis of heart attack when prescribed Dimetapp for flu-like symptoms); Dailey v. Shaffer, 178 Mich. 574, 579, 146 N.W. 192, 193 (1914) (physician liable for death of patient suffering from gunshot wound when physician

A doctor is not a guarantor of a cure.[4] Differing but accepted methods of treatment or diagnosis may exist for each case. Whenever there is a reasonable doubt within the medical community as to the nature of the patient's physical condition or the proper course to follow, a doctor will not be held liable if he chooses one method of diagnosis or treatment over others and obtains an undesirable result.[5] In a situation such as this, the majority rule is that a doctor has not deviated from the standard of care, but rather, has made an "honest error in judgment" in choosing the approach which led to the result.[6]

The general rule in a negligence case is that the use of one's best judgment is no defense.[7] A person's actions are judged by the standard of reasonable care.[8] Whether a person acted according to his best judgment is irrelevant to the negligence

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failed to determine whether arteries had been severed before offering treatment); *Kinning*, 281 N.W.2d at 852 (physician not liable for failing to perform tests which would have diagnosed osteomyelitis at earlier time); Grindstaff v. Tygett, 655 S.W.2d 70, 74-75 (Mo. Ct. App. 1983) (verdict for plaintiff in birth injury case reversed and remanded where jury instructions were inadequate); Wilson v. State, 491 N.Y.S.2d 818, 820 (N.Y. App. Div. 1985) (psychiatric patient's claim for personal injuries incurred while using grounds privileges at treatment center denied where record contained no evidence that doctor's decision to allow privileges was improper); Ellis v. Springfield Women's Clinic, 67 Or. App. 359, 361-62, 678 P.2d 268, 269-70 (1984) (jury instruction inquiring into good faith of physician in birth injury case was erroneous); Block v. McVay, 80 S.D. 469, 476, 126 N.W.2d 808, 811 (1964) (surgeon not liable for misdiagnosing benign nerve tumor as malignant absent showing that tumor removal was unskillfully performed); Miller v. Kennedy, 11 Wash. App. 272, 22 P.2d 852, 859 (1974) (physician not liable for lost kidney due to biopsy absent negligence), *aff'd*, 85 Wash. 2d 151, 530 P.2d 334 (1975), *appeal after remand*, 91 Wash. 2d 155, 588 P.2d 734 (1978).

4. *See, e.g.*, Huffman v. Lindquist, 37 Cal.2d 465, 474-75, 234 P.2d 34, 40-41 (1951) (absent evidence of negligence, physician not liable for death of plaintiff due to injuries sustained in auto accident); Moeller v. Hauser, 237 Minn. 368, 375, 54 N.W.2d 639, 644 (1952) (physician not insurer of cure, but may be negligent for failing to call on patient).

5. *See, e.g.*, Watterson v. Conwell, 258 Ala. 180, 183, 61 So. 2d 690, 692 (1952) (physician not liable for negligent casting absent showing of departure from standard of skill and proficiency); Manion v. Tweedy, 257 Minn. 59, 66-67, 100 N.W.2d 124, 129-30 (1959) (physician's failure to consult specialist for alternative casting technique not negligent absent showing that the patient's condition was beyond the physician's knowledge and skill); Haase v. Garfinkel, 418 S.W.2d 108, 114 (Mo. 1967) (physician not liable for omitting anticoagulant in treatment of person suffering from coronary artery insufficiency absent showing departure from standard of skill and proficiency).

6. *See infra* notes 43 & 106.

7. *Staloch*, 100 Minn. at 280-81, 111 N.W. at 266. *See generally* W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 32, 173-75 (5th ed. 1984)[hereinafter cited as PROSSER & KEETON].

8. *See Staloch*, 100 Minn. at 280-81, 111 N.W. at 266.

issue. The honest error in judgment rule is an exception to the general rule in negligence cases,[9] and is limited to cases of professional malpractice.[10] Although the honest error in judgment rule has been the law in Minnesota since 1907,[11] it has recently come under attack in Minnesota as being misleading.[12] In other jurisdictions, it has been criticized as being exculpatory[13] or argumentative,[14] and as unnecessarily introducing a doctor's mental state[15] into the jury's deliberations on negligence issues.

The first section of this Article discusses the elements of a medical malpractice action. The second section reviews the history of the honest error in judgment rule and examines how other jurisdictions have treated the rule. The third section of the Article analyzes the application of the rule in Minnesota, which is followed by a discussion of recent applications of the rule in other jurisdictions. The final section of the Article examines the recently modified Minnesota Practice Jury Instruction Guide III 425 G-S (JIG III 425 G-S), which encompasses the honest error in judgment rule. This section proposes a further modification of the instruction that would alleviate confusion that, unfortunately, will still exist despite the language in JIG III 425 G-S.

I. GENERAL PRINCIPLES OF MEDICAL MALPRACTICE LAW

Medical malpractice has been defined as "bad or unskillful practice on the part of a physician or surgeon resulting in injury to the patient."[16] In a traditional negligence action, the defendant is required to act with the degree of care that a rea-

9. *See id.*

10. *See* PROSSER & KEETON, *supra* note 7, § 32, at 185-88.

11. *See Staloch,* 100 Minn. 276, 111 N.W. 264.

12. *See Kinning,* 281 N.W.2d at 853.

13. *See, e.g.,* Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571, 577 (1984).

14. *See* SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS IN CIVIL CASES, FLORIDA STANDARD JURY INSTRUCTIONS (1981).

15. *See* Logan v. Greenwich Hosp. Ass'n, 191 Conn. 282, 299, 465 A.2d 294, 303 (1983); Hunsaker v. Bozeman Deaconess Found., 179 Mont. 305, 329, 588 P.2d 493, 507 (1978); Teh Len Chu v. Fairfax Emergency Medical Assocs., 223 Va. 383, 368, 290 S.E.2d 820, 822 (1982).

16. 70 C.J.S. *Physicians and Surgeons* § 40, at 945 (1951); *see also* Webster's New Collegiate Dictionary 690 (1980)("malpractice" is a failure to exercise an accepted degree of professional skill by one rendering professional services which results in injury, loss, or damage).

sonably prudent person[17] would use in the same or similar circumstances.[18] In a medical malpractice action, a physician must meet a higher standard of care because he possesses greater skill and knowledge.[19]

In order to recover for malpractice, a plaintiff must prove the following: (1) the existence of a physician-patient relationship;[20] (2) the applicable standard of care; (3) that the physician breached the duty of care owed to the patient;[21] and (4) that the breach proximately caused an injury.[22] Each of these four elements will be briefly examined.

A plaintiff in a medical malpractice action must establish that a physician-patient relationship existed between himself and the physician at the time of his injury. Whether a physician-patient relationship existed is a question of fact.[23]

Once a relationship is formed, a physician is bound to continue treatment until the relationship is terminated.[24] Generally, the relationship may be terminated in one of four ways. It may be terminated by the completion of the treatment,[25] by mutual consent of the patient and physician prior to the completion of treatment, or by unilateral action of the patient prior

17. For a discussion of the "reasonable person" standard, see generally PROSSER & KEETON, *supra* note 7, § 32, at 173-93.

18. *Id.* In order to recover for ordinary negligence, the plaintiff must establish four elements: (1) that the defendant owed the plaintiff a duty of care; (2) that the defendant breached that duty; (3) that there was a reasonably close causal connection between the breach and the resulting injury, known as proximate cause; (4) that plaintiff suffered actual injury or damage. *See id.* § 30, at 165-66.

19. *See* RESTATEMENT (SECOND) OF TORTS § 289 comment m (1965). The standard becomes that of a reasonable person with superior attributes. *Id.; see also* McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 558-59 (1959).

20. C. KRAMER & D. KRAMER, MEDICAL MALPRACTICE 6 (5th ed. 1983); Lyons v. Grether, 218 Va. 630, 633, 239 S.E.2d 103, 105 (1977).

21. Perdue & Koury, *The Law of Texas Medical Malpractice*, 22 HOUS. L. REV. 1, 47 (1985) (citing PROSSER & KEETON, *supra* note 7, § 30, at 165); *see also* Robbins v. Footer, 553 F.2d 123, 126 (D.C. Cir. 1977) (plaintiff must prove the recognized standard of medical care exercised by physicians, and that defendant departed from that standard); Silver v. Redleaf, 292 Minn. 463, 465, 194 N.W.2d 271, 272 (1972) (to prove negligence in a malpractice action, plaintiff must establish standard of medical care recognized by medical community and establish that defendant departed from that standard).

22. C. KRAMER & D. KRAMER, *supra* note 20, at 6.

23. *Lyons*, 218 Va. at 633, 239 S.E.2d at 105.

24. Note, *Civil Liability of Physicians and Surgeons for Malpractice*, 35 MINN. L. REV. 186, 187 (1951); *see Tweedy*, 257 Minn. at 65, 100 N.W.2d at 127 (when physician is employed to treat injury, he owes duty to continue treatment and duty continues until relationship terminates).

25. Note, *supra* note 24, at 187.

to the completion of treatment.[26] Under certain circumstances, the physician may withdraw from a case prior to completion of treatment without the patient's consent if the patient has a reasonable opportunity to continue treatment with another physician.[27]

Next, the plaintiff must establish the standard of care that applies in the case. The law does not require a physician to exercise the highest degree of skill known by medical science.[28] The physician is required to exercise the reasonable degree of skill and learning ordinarily possessed and exercised under similar circumstances by other members of the profession in good standing,[29] and to use ordinary and reasonable care and diligence, and his best judgment, in the application of his skill and learning to accomplish the treatment undertaken.[30]

The plaintiff must accordingly prove that the physician breached the requisite duty of care. Because a physician's conduct involves professional skill and knowledge, it must be evaluated by professional standards.[31] Since juries are composed of laypersons who are not familiar with the science of medicine, expert testimony is generally required to assist the jury in understanding the case.[32] Expert testimony is not required when the subject matter of the case is within the common knowledge of laypersons.[33] The typical medical malprac-

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26. *Lyons,* 218 Va. at 634, 239 S.E.2d at 106.

27. *Id.*; *see also* Annot., 57 A.L.R.2d 432, 439 (1958) (discussing right of physician to withdraw from case and physician's liability for abandonment). *Compare* Minnesota Rules of Professional Conduct 1.16, entitled "Declining or Terminating Representation." Subdivision (d) of the rule states:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, *allowing time for employment of other counsel,* surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.

Minn. R. of Prof. Conduct Rule 1.16(d) (1985) (emphasis added).

28. Martin v. Courtney, 75 Minn. 255, 260, 77 N.W. 813, 815 (1899) (physician not required to perform to the highest standards of skill known to the profession).

29. C. KRAMER & D. KRAMER, *supra* note 20, at 8-9.

30. *See generally* Pike v. Honsinger, 155 N.Y. 201, 209, 49 N.E. 760, 762 (1898) (the seminal case on physician's standard of care).

31. Perdue & Koury, *supra* note 21, at 48; *see also* Note, *Degree of Skill and Care Required of Physicians and Surgeons in Iowa,* 36 IOWA L. REV. 681, 690 (1951) (discussing problems faced by court and jury in medical malpractice trial).

32. Note, *supra* note 24, at 192; *see* Note, *Expert Testimony by Physicians and Surgeons,* 36 MARQ. L. REV. 392 (1953) (discussing qualification of expert witness).

33. Cornfeldt v. Tongen, 262 N.W.2d 684, 692 (Minn. 1977) (expert testimony not required where alleged negligent conduct is clearly within the common knowl-

tice case, however, requires expert testimony.[34]

The patient must prove that the breach was the proximate cause of the plaintiff's injuries.[35] The plaintiff need not prove proximate cause to a certainty.[36] The plaintiff need only offer evidence that it was more likely than not that the injury was caused by the physician's course of action.[37]

II. HISTORY OF THE RULE

The honest error in judgment rule was first announced over 120 years ago in *Graham v. Gautier.*[38] In *Graham,* the physician sued the defendant for money owed for treatment of the defendant's slaves.[39] The slaves died in spite of the treatment, and the defendant counter claimed for the value of the slaves.[40]

The *Graham* court first noted that a physician has a duty to use ordinary care, diligence, and skill in his treatment.[41] The court then stated that if the physician exercised ordinary skill and care, "he is not responsible for a mistake of judgment, or

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edge of layperson); Wilson v. Scott, 412 S.W.2d 299, 303 (Tex. 1967) (testimony of defendant physician may satisfy the expert testimony requirement).

34. Walstad v. University of Minn. Hosps., 442 F.2d 634, 638 (8th Cir. 1971). The *Walstad* court stated that, under Minnesota law, there can be no finding of negligence in a medical malpractice case without expert testimony. *Id.* However, in Hestbeck v. Hennepin County, 297 Minn. 419, 424, 212 N.W.2d 361, 364 (1973), the Minnesota Supreme Court explicitly stated that expert testimony is not necessary where the matters to be proved are within the common knowledge of laypersons. *Id.* The *Hestbeck* analysis is followed in the majority of jurisdictions in the United States. *See* Note, *supra* note 24, at 192.

35. *Walstad,* 442 F.2d at 639. "Proximate cause" is a reasonable connection between a defendant's breach of duty owed to a plaintiff and an injury sustained by the plaintiff. For a general discussion of proximate cause, see PROSSER & KEETON, *supra* note 7, §§ 41-45, at 263-321.

36. D. KRAMER & C. KRAMER, *supra* note 20, at 29.

37. *Walstad,* 442 F.2d at 639. The standard of proof is thus a "more probable than not" standard. Monahan v. Weichert, 82 A.D.2d 102, 108, 442 N.Y.S. 295, 299 (1981).

38. 21 Tex. 112, 120 (1858). It is interesting to note that the *Graham* court quoted a physician's duty, including the rule, from a Pennsylvania judge, but failed to cite the case or indicate it if was an appellate decision. Therefore, although *Graham* is the first reported decision which applies the honest error in judgment rule, the rule was apprarently in existence for some time prior to the *Graham* decision.

39. *Id.* at 112.

40. *Id.* The Texas Supreme Court, however, reversed and remanded for a new trial. *Id.* at 120.

41. *Id.* at 119. The trial court erred in not giving a jury instruction on the physician's duty of care. *Id.*

for the result if he should happen to be mistaken."[42]

Since the rule was initially announced, a majority of states have adopted it.[43] Of these states, several have standardized the rule as a court-approved pattern jury instruction.[44] The remaining states maintain the rule only through case law.[45]

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42. *Id.* at 120.

43. *See, e.g.*, Moore v. Smith, 215 Ala. 592, 595, 111 So. 918, 920 (1927); Boyce v. Brown, 51 Ariz. 416, 421, 77 P.2d 455, 457 (1938); Rickett v. Hayes, 256 Ark. 893, 904, 511 S.W.2d 187, 195 (1974); Fraijo v. Hartland Hosp., 99 Cal. App. 3d 331, 341 n.8, 160 Cal. Rptr. 246, 251 n.8 (1979); Burnham v. Jackson, 1 Colo. App. 237, 249, 28 P. 250, 254 (1891); Green v. Stone, 121 Conn. 324, 330, 185 A. 72, 74 (1936); Bourgeois v. Dade County, 99 So. 2d 575, 577 (Fla. 1957); Hopper v. McCord, 115 Ga. App. 10, 11, 153 S.E.2d 646, 647 (1967); McAlinden v. St. Maries Hosp. Ass'n., 28 Idaho 657, 675, 156 P. 115, 120 (1915); Spike v. Sellett, 102 Ill. App. 3d 270, 273, 430 N.E.2d 597, 600 (1981); Edwards v. Uland, 193 Ind. 376, 381, 140 N.E. 546, 548 (1923); Durflinger v. Artiles, 234 Kan. 484, 490, 673 P.2d 86, 93 (1983); Hazard Hosp. Co. v. Combs' Adm'r., 263 Ky. 252, 256, 92 S.W.2d 35, 36 (1936); Meyer v. St. Paul-Mercury Indem. Co., 225 La. 618, 623, 73 So. 2d 781, 782 (1953); Downer v. Veilleux, 322 A.2d 82, 87 (Me. 1974); Marlow v. Cerino, 19 Md. App. 619, 632, 313 A.2d 505, 512 (1974); Barrette v. Hight, 353 Mass. 268, 275, 230 N.E.2d 808, 813 (1967); Luka v. Lowrie, 171 Mich. 122, 133, 136 N.W. 1106, 1110 (1912); *Staloch*, 100 Minn. at 281, 111 N.W. at 266; Hall v. Hilbun, 466 So. 2d 856, 866 (Miss. 1985); Heier v. Funsch, 61 S.W.2d 253, 257 (Mo. Ct. App. 1933); *In re* Johnson's Estate, 145 Neb. 333, 349-50, 16 N.W.2d 504, 513 (1944); Woody v. Keller, 106 N.J.L. 176, 178, 148 A. 624, 624 (1930); DuBois v. Decker, 130 N.Y. 325, 330, 29 N.E. 313, 314 (1891); *Wall*, 310 N.C. at 190, 311 S.E.2d at 575-76; Champion v. Keith, 17 Okla. 204, 2067-08, 87 P. 845, 846 (1906); Moultin v. Huckerberry, 150 Or. 538, 546, 46 P.2d 589, 592 (1935); Duckworth v. Bennett, 320 Pa. 47, 50, 181 A. 558, 559 (1935); Coleman v. McCarthy, 53 R.I. 266, 270, 165 A. 900, 902 (1933); Fjerstad v. Knutson, 271 N.W.2d 8, 14 (S.D. 1978); Heskins v. Howard, 159 Tenn. 86, 95, 16 S.W.2d 20, 22 (1929); *Graham*, 21 Tex. at 120; Everts v. Worrell, 58 Utah 238, 252, 197 P. 1043, 1049 (1921); Domina v. Pratt, 111 Vt. 166, 170, 13 A.2d 198, 200 (1940); Fritz v. Horsfall, 24 Wash. 2d 14, 16, 163 P.2d 148, 150 (1946); Totten v. Adongay, 337 S.E.2d 2, 6 (W. Va. 1985); Smith v. Beard, 56 Wyo. 375, 406, 110 P.2d 260, 270 (1941).

44. *See, e.g.*, CALIFORNIA JURY INSTRUCTIONS, CIVIL, BOOK OF APPROVED JURY INSTRUCTIONS, BAJI 6.02, 178 (7th ed. 1986); H. JOHNSON III, LOUISIANA JURY INSTRUCTION, CIVIL 88 (1980); 4 J. HETLAND & O. ADAMSON, MINNESOTA PRACTICE, JURY INSTRUCTION GUIDES II 425 G-S, at 330-31 (2d ed. 1974)[hereinafter cited as JIG II 425 G-S]; NORTH DAKOTA JURY INSTRUCTIONS, CIVIL, NDNJ 410 (1977); J. CONWAY, WISCONSIN JURY INSTRUCTIONS, CIVIL, WIS. JI 1023 (1974).

45. *See Watterson*, 258 Ala. at 184, 61 So. 2d at 692; Kalar v. MacCollum, 17 Ariz. App. 176, 180, 496 P.2d 602, 604 (1972); *Rickett*, 256 Ark. at 904, 511 S.W.2d at 195; Levett v. Etkind, 158 Conn. 567, 578, 265 A.2d 70, 74 (1969); *Hopper*, 115 Ga. App. at 11, 153 S.E.2d at 647; *McAlinden*, 28 Idaho at 675, 156 P. at 120; *Spike*, 102 Ill. App. 3d at 273, 430 N.E.2d at 600; *Edwards*, 193 Ind. at 381, 140 N.E. at 548; *Durflinger*, 234 Kan. at 490, 673 P.2d at 93; Hackworth v. Hart, 474 S.W.2d 377, 381 (Ky. Ct. App. 1971); *Downer*, 322 A.2d at 87; *Marlow*, 19 Md. App. at 632, 313 A.2d at 512; *Barrette*, 353 Mass. at 275, 230 N.E.2d at 813; Rostron v. Klein, 23 Mich. App. 288, 295, 178 N.W.2d 675, 678 (1970); Hart v. Steele, 416 S.W.2d 927, 931 (Mo. 1967); Hall v. Hilburn, 466 So. 2d 856, 866 (Miss. 1985); Walck v. Johns Mansville

Despite the fact that most states have applied the honest error in judgment rule at some time during the past,[46] a minority of jurisdictions has recently rejected the rule.[47] The appellate courts of these jurisdictions have concluded that the language of the rule is too confusing for a jury to apply in a malpractice trial.[48] The courts state that the confusion centers around two elements of the plaintiff's case: the plaintiff's burden of proof[49] and the standard of care required of physicians.[50]

Prod. Corp., 56 N.J. 583, 564, 267 A.2d 508, 524 (1970); Topel v. Long Island Jewish Medical Center, 55 N.Y.2d at 658, 431 N.E.2d 293, 297-98 (1981); Smith v. Yohe, 412 Pa. 94, 103, 194 A.2d 167, 174 (1963); *Coleman,* 53 R.I. at 270, 165 A. at 902; *Fjerstad,* 271 N.W.2d at 14; Methodist Hosp. v. Ball, 50 Tenn. App. 460, 482, 362 S.W.2d 475, 487 (1961); Burks v. Meredith, 546 S.W.2d 367, 370 (Tex. Civ. App. 1976); *Everts,* 58 Utah at 252, 197 P. at 1049; Largess v. Tatem, 130 Vt. 271, 280, 291 A.2d 398, 402 (1972); Miller v. Kennedy, 11 Wash. App. 272, 282, 522 P.2d 852, 859 (1974); *Smith,* 56 Wyo. at 406, 110 P.2d at 270.

46. *See supra* note 44 and cases cited therein.

47. *See* Somer v. Johnson, 704 F.2d 1473, 1475-77 (11th Cir. 1983) (applying Florida law); Baker v. Werner, 654 P.2d 263, 267-68 (Alaska 1982) (court finding that jury instruction stating physician was not negligent because he errs in judgment was erroneous); *Logan,* 191 Conn. at 299, 465 A.2d at 303; *Wall,* 310 N.C. at 194, 311 S.E.2d at 577-78; *Ellis,* 67 Or. App. at 361-62, 678 P.2d at 269-70, *rev. denied,* 297 Or. 228, 683 P.2d 91 (1984); *Teh Len Chu,* 223 Va. at 386, 290 S.E.2d at 821-22.

48. *Somer,* 704 F.2d at 1478 (jury charge stating "physicians are not liable, however, for honest errors of judgment" is confusing and difficult to apply).

In *Somer,* the plaintiff objected to the trial judge's use of the rule as a jury instruction. *Id.* at 1475. The 11th Circuit Court of Appeals examined the jury instruction given by the trial judge. *Id.* at 1475-78. The court found that the common law standard of care in Florida allowed the use of the rule. The *Somer* court also examined the statutory standard of care for health care providers, which did not explicitly mandate the use of the rule. *Id.* at 1475-77. The court determined that the statutory standard of care superseded the common law standard. *Id.* at 1477. The common law standard used by the trial judge was, thus, an erroneous statement of Florida law. Accordingly, the use of the rule as a jury instruction constituted reversible error by the trial court. *Id.* at 1478.

49. *Teh Len Chu,* 223 Va. at 386, 290 S.E.2d at 822 (the "honest error" language tends to muddle the jury's understanding of the plaintiff's burden of proof).

In *Teh Len Chu,* the trial judge instructed the jury that a physician was not liable for an honest mistake or bona fide error in judgment. *Id.* at 384, 290 S.E.2d at 821. The jury found no liability, stating on the verdict form that the defendant was not liable "since the law requires only that the judgment be made in good faith etc. as per instruction J [on errors in judgment]." *Id.* at 385, 290 S.E.2d at 821. The Virginia Supreme Court reversed, stating that the use of the "honest mistake" jury instruction was error. *Id.*

50. *Logan,* 191 Conn. at 299, 465 A.2d at 303 ("bona fide error" language confuses jury by implying that only bad faith errors are actionable).

In *Logan,* the trial court, upon the request of defense counsel, included a statement in the jury instructions that a physician is not liable for bona fide errors of judgment. *Id.* at 298, 465 A.2d at 303. The plaintiff objected that the bona fide error language was superfluous and unfairly emphasized the defendant's position. *Id.* The

Courts that have not applied the honest error in judgment rule believe that the language of the rule confuses a jury's understanding of the plaintiff's burden of proof.[51] The courts note that the plaintiff must prove that the defendant physician was negligent;[52] specifically, that he failed to act with reasonable care.[53] Under traditional negligence analysis, the intentions and motivation of the physician are irrelevant to the issue of the physician's use of reasonable care.[54] Thus, honesty and dishonesty are not elements of negligence.[55]

Courts argue, however, that the use of the honest error language often leads the jury to believe that the defendant's intentions or motives are factors to be considered.[56] The courts contend that the use of this language requires the plaintiff to show that the defendant's actions were dishonest.[57] As a re-

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Connecticut Supreme Court discussed the error in judgment rule, but refused to rule on this issue because it was raised for the first time on appeal. *Id.* at 300, 465 A.2d at 304.

51. *See Teh Len Chu,* 223 Va. at 386, 290 S.E.2d at 822; *see also Ellis,* 67 Or. App. at 362, 678 P.2d at 270 ("honest error" language adds element of good faith to the traditional negligence analysis).

52. For the elements a plaintiff must prove in a malpractice action against a physician, see *supra* notes 20-22 and accompanying text.

53. *See Teh Len Chu,* 223 Va. at 385, 290 S.E.2d at 822.

54. *Id.; Logan,* 191 Conn. at 299, 465 A.2d at 303 ("errors in judgment which occur with the best intentions constitute negligence if they result from a failure to use reasonable care"). *See also* PROSSER & KEETON, *supra* note 7, § 28 (discussing the history of negligence and its growth into an independent form of tort liability distinct from intentional torts).

55. *See Ouellette v. Subak,* 379 N.W.2d 125, 132-33 (Minn. Ct. App. 1985) (Nierengarten, J., dissenting) (negligence has never been predicated on honest or dishonest behavior).

56. *Ellis,* 67 Or. App. at 362, 678 P.2d at 270 (use of the "honest error" language allows the jury to consider the physician's motivation).

In *Ellis,* the trial court instructed the jury that if the defendant exercised reasonable care, but erred in judgment in good faith, the defendant would not be negligent. *Id.* at 361, 678 P.2d at 269. The Oregon Supreme Court noted that the instruction correctly stated Oregon law prior to the *Ellis* case. *Id.* However, the *Ellis* court then stated that the good faith language was no longer approved in Oregon. *Id.* at 362, 678 P.2d at 270. Thus, the case was reversed and remanded for a new trial. *Id.* at 363, 678 P.2d at 270.

57. *Wall,* 310 N.C. at 193-94, 311 S.E.2d at 577; *Teh Len Chu,* 223 Va. at 386, 290 S.E.2d at 822.

In *Wall,* the plaintiff objected to a jury instruction stating that a physician is not responsible for a mistake of judgment if it was the result of an "honest error." *Wall,* 310 N.C. at 188, 311 S.E.2d at 576. The North Carolina Supreme Court first stated that the instruction complied with the pattern jury instructions and prior case law. *Id.* at 190, 311 S.E.2d at 576. However, the court noted several problems with the "honest error" language, quoting extensively from *Teh Len Chu. Id.* at 193-94, 311 S.E.2d at 577.

sult, using the honest error in judgment rule in jury instructions may confuse the jury by suggesting that the plaintiff must prove additional elements above and beyond basic negligence.[58]

The courts that have not applied the rule also find that its language confuses the jury regarding the standard of care required of physicians.[59] Those courts noted that a physician is not liable for errors of judgment if the judgment is consistent with the exercise of reasonable skill and care.[60] Therefore, the standard of care is unitary, encompassing both the use of reasonable care and the physician's best judgment.[61]

The rule, however, makes the standard of care appear to be two separate elements because it states that the physician is not liable for honest errors in judgment.[62] The courts argue that, although the physician must exercise reasonable care *and* execute his best judgment to avoid liability for negligence, the rule allows the jury to find no liability for failing to use reasonable care if the jury believes the physician's medical judgment was exercised in good faith.[63] Thus, the rule seems to state that the jury cannot find liability for an honest error of judgment, even if it believed that ordinary medical care would have mandated a different judgment by the physician.[64] Consequently, a jury may view the rule as lowering the defendant's standard of care.[65] Because of the potential difficulty the jury may have applying the honest error in judgment rule, certain jurisdictions have discarded it. The rule, however, is still recognized by case law in a majority of jurisdictions in the United States.[66] Other states have adopted the rule outlined in pat-

58. *Teh Len Chu,* 233 Va. at 386, 290 S.E.2d at 822 (if "honest mistake" language were used, it would be appropriate to question whether plaintiff must prove "dishonest mistake").

59. *Id.* (using "good faith" language in jury instruction allows jury to exonerate defendant physician who acted in good faith, even if physician was negligent).

60. *Ellis,* 67 Or. App. at 361, 678 P.2d at 269.

61. *Wall,* 310 N.C. at 193, 311 S.E.2d at 577.

62. *Id.*

63. *Teh Len Chu,* 233 Va. at 385, 290 S.E.2d at 822.

64. *Id.*

65. *Somer,* 704 F.2d at 1478 (jury could have found that defendant failed to exercise an acceptable level of care, but any mistakes made resulted only from honest errors).

66. *See, e.g.,* Cooper v. United States, 313 F. Supp. 1207, 1209 (D. Neb. 1970); *Watterson,* 258 Ala. at 184, 61 So. 2d at 692; *Kalar,* 17 Ariz. App. at 180, 496 P.2d at 604; *Rickett,* 256 Ark. at 904, 511 S.W.2d at 195; *Levett,* 158 Conn. at 587, 265 A.2d at

tern jury instuction guides.[67]

A majority of states recognize that a physician must have a certain amount of latitude when making judgments.[68] Nonetheless, situations arise where a physician exercises his judgment, but the judgment is not based on the physician's intelligence, skill, and knowledge.[69] In such a situation, the physician's exercise of judgment is said not to be in good faith.[70] The error of judgment may be so gross as to be incon-

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74; *Hopper,* 115 Ga. App. at 11, 153 S.E.2d at 647; *McAlinden,* 28 Idaho at 675, 156 P. at 120; *Spike,* 102 Ill. App. 3d at 273, 430 N.E.2d at 600; *Edwards,* 193 Ind. at 381, 140 N.E. at 548; *Durflinger,* 234 Kan. at 490, 673 P.2d at 93; *Hackworth,* 474 S.W.2d at 381; *Downer,* 322 A.2d at 87; *Marlow,* 19 Md. App. at 632, 313 A.2d at 512; *Barrette,* 353 Mass. at 275, 230 N.E.2d at 813; *Rostron,* 23 Mich. App. at 295, 178 N.W.2d at 678; *Hart,* 416 S.W.2d at 931; *Hall,* 466 So. 2d at 866; *Walck,* 56 N.J. at 564, 267 A.2d at 524 ; *Topel,* 55 N.Y.2d at 689, 431 N.E.2d at 294-95, 446 N.Y.S.2d at 939; Willard v. Hutson, 234 Or. 148, 158, 378 P.2d 966, 972 (1963); *Yohe,* 412 Pa. at 103, 194 A.2d at 172; *Coleman,* 53 R.I. at 270, 165 A. at 902; *Fjerstad,* 271 N.W.2d at 14; *Methodist Hosp.,* 50 Tenn. App. at 482, 362 S.W.2d at 487; *Burks,* 546 S.W.2d at 370; *Everts,* 58 Utah at 252, 197 P. at 1049; *Largess,* 130 Vt. at 280, 291 A.2d at 402; *Miller,* 11 Wash. App. at 282, 522 P.2d at 859; *Totten,* 337 S.E.2d at 6; Rost v. Roberts, 180 Wis. 207, 216-17, 192 N.W. 38, 41-42 (1923); *Smith,* 56 Wyo. at 406, 110 P.2d at 270. *See, e.g.,* CALIFORNIA JURY INSTRUCTIONS, CIVIL, BOOK OF APPROVED JURY INSTRUCTION, BAJI 6.02 (7th ed. 1986).

BAJI 6.02 provides:

> A physician is not necessarily negligent because he or she errs in judgment or because his or her efforts prove unsuccessful. The physician is negligent if the error in judgment or lack of success is due to a failure to perform any of the duties as defined in these instructions.

Id.

Louisiana also has a pattern jury instruction guide. The Lousiana jury instruction provides:

> It was the duty of the defendant, in rendering medical services to the plaintiff and treatment of his injuries, to exercise that degree of care, skill, and judgment which is usually exercised by reputable physicians and surgeons of the same school of medicine or in the same, similar, or surrounding localities, under like or similar circumstances, having due regard for the advanced state of medical science at the time in question. Failure on the part of the defendant to have exercised that degree of care, skill, and judgment in his treatment of plaintiff's injuries would constitute negligence.
>
> The mere fact that a bad result may have followed the treatment administered by the defendant does not, in itself, require you to find that he was negligent in treating the plaintiff. If Dr. ____ exercised the degree of care, skill, and judgment required of him he cannot be found negligent simply on the basis of the results obtained.

H. JOHNSON III, LOUSIANA JURY INSTRUCTIONS, CIVIL at 88 (1980).

67. *See, e.g.,* CALIFORNIA JURY INSTRUCTIONS, and LOUISIANA JURY INSTRUCTIONS, *supra,* note 66.

68. *See, e.g.,* Christie v. Callahan, 124 F.2d 825, 828 (D.C. Cir. 1941) (physician must have latitude for reasonable judgment).

69. Mangiameli v. Ariano, 126 Neb. 629, 635, 253 N.W. 871, 874 (1934); Rayburn v. Day, 126 Or. 135, 151, 268 P. 1002, 1007 (1928).

70. *Id.* at 151, 268 P. at 1007.

sistent with the duty of care required of every physician.[71] These states recognize a distinction between honest errors of judgment and bad faith errors in judgment which constitute negligence.[72] Therefore, these states allow the rule to be asserted as a defense to protect the physician from liability for making an honest error in judgment.[73]

III. Minnesota Law

In Minnesota, three distinct circumstances must be present in any given medical malpractice case before the honest error in judgment instruction is warranted: (1) There must be available different courses of procedure concerning treatment or diagnosis which are in line with recognized authority and current good practice;[74] (2) The doctor must have informed himself of all the relevant facts and circumstances concerning his patient's condition;[75] (3) Reasonable doubt and uncertainty as to the proper diagnosis or course of treatment must exist among competent doctors.[76]

Among the Minnesota cases decided according to the honest error in judgment rule, three stand out as being particularly important in the interpretation of this doctrine.

The case of *Staloch v. Holm*[77] was the first Minnesota case to

71. Hodgson v. Bigelow, 335 Pa. 497, 505-06, 7 A.2d 338, 343 (1939)(physician must base professional decisions on careful study of the patient's case; an exercise of judgment is not in good faith if it is not founded on the physician's intelligence and skill).

72. *See, e.g.*, DeGroot v. Winter, 265 Mich. 274, 277, 251 N.W. 425, 426 (1933)(whether error of judgment will make physician liable in given case depends upon whether physician exercised the degree of skill and care which it is his duty to apply); *Mangiameli*, 126 Neb. at 635, 253 N.W. at 874 (while physician is not ordinarily liable for errors of judgment, error of judgment may be so gross as to be inconsistent with physician's duty of care); *Rayburn*, 126 Or. at 151, 268 P. at 1008.

73. C. Kramer & D. Kramer, *supra* note 20, at 10 n.19.

74. *See Subak*, 379 N.W.2d at 129; *Kinning*, 281 N.W.2d at 852; *Manion*, 257 Minn. at 67, 100 N.W.2d at 130; Harju v. Allen, 146 Minn. 23, 25-26, 177 N.W. 1015, 1016 (1920); *Staloch*, 100 Minn. at 281, 111 N.W. at 266.

75. This requirement is implicit in the physician's standard of care. *See Staloch*, 100 Minn. at 281-82, 111 N.W. at 266. *But see Kinning*, 281 N.W.2d at 853 (plaintiff not entitled to instruction to the effect that negligent failure by physician to ascertain essential preliminary information upon which to form judgment can constitute negligent error in judgment).

76. *See* Fritz v. Parke Davis & Co., 277 Minn. 210, 212, 152 N.W.2d 129, 131 (1967); *Manion*, 257 Minn. at 67, 100 N.W.2d at 130; Berkholz v. Benepe, 153 Minn. 335, 338, 190 N.W. 800, 800 (1922); Prosser & Keeton, *supra* note 7, at 186-87; *see also Harju*, 146 Minn. at 27, 177 N.W. at 1017.

77. 100 Minn. 276, 111 N.W. 264 (1907).

recognize the doctrine and explain the reasons for it. According to the *Staloch* court, the first reason for the rule is related to the emergency doctrine.[78] The court noted that when a physician is called upon to act in an emergency situation, he must act fast. If he does not, he will be liable for the undesirable results.[79] Faced with an emergency, a doctor is expected to do the best that he can. If he errs in judgment during the emergency, the court noted that "[t]he act or omission, if faulty, may be called a mistake, but not carelessness."[80]

The second reason given by the court for the rule "lies in the nature of the undertaking."[81] The nature of the undertaking is to provide professional services which include a doctor's skill and judgment. The court made an analogy to the professional services provided by a lawyer. Noting that it would be unreasonable to hold a lawyer liable for a mistaken opinion as to the outcome of a particular case, the court declared "[i]t would be just as unreasonable to hold a physician responsible for an honest error of judgment on so uncertain problems as are presented in surgery and medicine."[82]

The third reason for the rule noted by the *Staloch* court is "the peculiarities of the subject matter . . . ."[83] The peculiarities included the complexity of the human mind and body and the nature of the science itself. The court was concerned about the prospect of a jury deciding what a "proper judgment" should be where physicians themselves have different opinions of the proper judgment even after applying their expertise to the facts of the client's case.[84] The court even went so far as to suggest that a physician should be granted a directed verdict where physicians differ as to the proper treatment.[85]

The *Staloch* court also noted "the inherent and inevitable un-

78. *Id.* at 282, 111 N.W. at 266-67.

79. *Id.* at 282, 111 N.W. at 267; *see also Korman,* 165 Minn. at 321-23, 206 N.W. at 651 (doctor determined that baby needed to be delivered to save its life; the court stated that doctor not liable if the delivery was in fact necessary).

80. *Staloch,* 100 Minn. at 282, 111 N.W. at 267.

81. *Id.*

82. *Id.* at 283, 111 N.W. at 267.

83. *Id.*

84. *Id.* at 283-84, 111 N.W. at 267.

85. *Id.* at 284, 111 N.W. at 267. The court followed its own suggestion by granting a judgment notwithstanding the verdict in favor of the defendants. *See id.* at 288, 111 N.W. at 269.

certainty of available testimony [in cases of this sort]."[86] Testimony in medical malpractice cases is usually not easily obtained. However, where the question of judgment is open to reasonable doubt or where there are different acceptable standards of care, a plaintiff usually can find an expert to attack the quality of the defendant's medical services and judgment. The court noted that if every verdict against a physician must be sustained whenever another doctor is persuaded to testify against the defendant, "the profession would be one [in] which 'unmerciful disaster follows fast. . . ."[87]

The 1979 case of *Kinning v. Nelson*[88] is another highly significant Minnesota case. In *Kinning*, the plaintiff argued that the trial court erred by not instructing the jury regarding the definition of "honest" and "judgment."[89] Those terms were contained in Minnesota Practice Jury Instruction Guide II 425 G-S (JIG II 425 G-S),[90] the instruction given to the jury. The court noted that the gravamen of the plaintiff's argument was that the jury instruction given was confusing because the terms "honest" and "judgment" were without clear definition. Thus, the jurors may have believed that they had to find the defendant dishonest in order to find him guilty of malpractice.[91] The court dismissed plaintiff's argument finding that the record before them did not indicate any confusion among

86. *Id.* at 284, 111 N.W. at 267. The court noted that the plaintiff's expert would base his opinion on the biased viewpoint of family and friends of the patient. *Id.*

87. *Id.* at 285, 111 N.W. at 268.

88. 281 N.W.2d 849 (Minn. 1979).

89. *Id.* at 853. The plaintiff's attempt to instruct the jury pursuant to this request is well taken. The term "honest" in JIG II 425 G-S has nothing to do with the doctor's state of mind at the time he chose a course of treatment. It is unfortunate that courts across the nation have chosen such an inappropriate term to define the nature of a doctor's duty according to the error in judgment rule.

90. JIG II 425 G-S reads:

> In performing professional services for a patient, a (Doctor) (Dentist) must use that degree of skill and learning which is normally possessed and used by (Doctors) (Dentists) in good standing in a similar practice, [in similar communities] and under like circumstances. In the application of this skill and learning the (Doctor)(Dentist) must also use reasonable care. [The fact, standing alone, that a good result may not have followed from the treatment by the defendant is not evidence of negligence or unskilled treatment.] [A (Doctor)(Dentist) is not a guarantor of a cure or a good result from his treatment and he is not responsible for an honest error in judgment in choosing between accepted methods of treatment.]

Id.

91. *See Kinning*, 281 N.W.2d at 853.

the members of the jury.[92] The *Kinning* case is important in two respects. First, it represents the Minnesota Supreme Court's stamp of approval of the honest error in judgment instruction in its entirety. Second, it approves of the instruction without any definition of "honest." Apparently, the *Kinning* court was confident that the meaning of the instruction is self-evident. Other jurisdictions which have considered the issue, however, have found the *Kinning* court's confidence misplaced.[93]

A third and very recent Minnesota decision, *Ouellette v. Subak,*[94] further interprets the status of the honest error in judgment rule. The Minnesota Court of Appeals ruled that the trial court committed reversible error when it failed to submit to the jury as part of the jury intructions that part of JIG II 425 G-S which contained the honest error in judgment rule.[95] *Subak* represents the only case in Minnesota medical malpractice jurisprudence where a failure to give the honest error in judgment instruction mandated a new trial.[96] The court reasoned that because the evidence presented a very close question of negligence,[97] "[p]roper and full instruction as to the

92. *Id.*

93. *See infra* notes 115-25 and accompanying text.

94. 379 N.W.2d 125 (Minn. Ct. App. 1985).

95. *Id.* at 132. The trial court gave the following instruction on the standard of care applicable to a physician:

> In performing professional services for a patient, a physician must use that degree of skill and learning which is normally possessed and used by physicians in good standing in a similar practice and under like circumstances.
>
> In the application of this skill and learning, the physician must also use reasonable care.
>
> The fact standing alone that a good result may not have followed from the treatment by a physician is not evidence of negligence or unskilled treatment.

Id. at 127-28. Interestingly, the court intimated that reversible error may not have occurred had the trial court allowed the defense to argue from the perspective of the "honest error in judgment rule" even though the instruction was not read. *See id.* at 130-131. In *Subak,* the trial court did not allow the defense attorney to do this and the Minnesota Court of Appeals was of the opinion that this tainted the entire verdict. *Id.*

96. At least one other jurisdiction has ruled that failure to give the "honest error in judgment" instruction was error. *See* Kelly v. Hollingsworth, 44 S.D. 23, 27, 181 N.W. 959, 961 (1921).

97. *Subak,* 379 N.W.2d at 132. The *Subak* case involved a 20-year-old who gave birth to her first child which was born with significant brain damage. The plaintiff alleged that the defendants were negligent in their diagnosis of the mother's due date. On the facts of the case, there were two possible due dates. One was derived from the oral history given by the mother. The other was arrived at after clinical

duty of care of the physician in this case was thus of critical importance."[98] According to the court, the trial court's refusal to instruct the jury according to the honest error in judgment rule conveyed an erroneous statement of the standard of care.[99] Relying on *Kinning, Staloch,* and *Cook v. Connolly,*[100] the court declared that "[t]he law has long recognized the importance of professional judgment in matters of medical diagnosis and treatment."[101] Thus, the *Subak* majority held that an accurate statement of the standard of care in medical malpractice cases would have to include the honest error in judgment rule.

Although *Subak* is consistent with Minnesota law on the honest error in judgment rule, it should be reexamined. Excusing a doctor under the honest error in judgment rule really means that the doctor has complied with the requisite standard of care, and therefore is not negligent.[102] Minnesota law specifically requires a physician to choose a course of treatment from among equally available, proper, and reasonable procedures before the honest error rule applies.[103] A jury following the standard of care set forth in JIG II 425 G-S, even without the instruction on the honest error in judgment rule,[104] could never find a defendant negligent for exercising his best judgment or for making an error unless the treatment given was inconsistent with accepted standards of practice. The Minnesota Supreme Court in *Kinning* was of the opinion that the jury was not compelled to find the defendant dishonest in order to

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testing and observations. The defendants, using their best judgment, decided that the oral history given by the mother was inaccurate. They determined, based on the tests performed, that plaintiff would deliver four weeks later than the due date indicated by the oral history. The question of negligence was close because the defendants performed accepted tests to arrive at a due date different from that obtained through the oral history. This conclusion allegedly caused plaintiff to be born four weeks late which, in turn, allegedly caused plaintiff's brain damage. The trial court returned a verdict in favor of the plaintiff for $1,000,000. *See id.* at 126-28.

98. *Id.* at 130.

99. *Id.*

100. 366 N.W.2d 287 (Minn. 1985). The *Cook* case involved the application of the honest error in judgment rule to an attorney malpractice case.

101. *Subak,* 379 N.W.2d at 145-46.

102. *See infra* notes 124-26 and accompanying text.

103. C. KRAMER & D. KRAMER, *supra* note 20, at 7. *See* Annot., 34 A.L.R.3d 176 (1970) (discussing the liability of a person requesting medical practitioner or hospital to furnish services to a third party for the cost of services in the absence of an express undertaking to pay); *see also Kinning,* 281 N.W.2d at 852.

104. This is exactly how the trial court in *Subak* instructed the jury. *See supra* note 95 and accompanying text.

find him negligent. Therefore, the word "honest" is really nothing more than excess baggage and it has been found to be so confusing as to have mandated new trials in other jurisdictions.[105] Thus, it would seem to be, at most, harmless error to fail to instruct the jury according to the honest error in judgment rule.

IV. Recent Developments in Other Jurisdictions

Many jurisdictions recognize the principle of the honest error in judgment rule.[106] However, a growing number of jurisdictions have expressly disapproved of incorporating the language "honest error" in jury instructions. These jurisdictions recognize that this language encourages juries to examine a doctor's mental state at the time of the alleged act of negligence.[107]

The Supreme Court of Virginia in *Teh Len Chu v. Fairfax Emergency Medical Associates, Ltd.*,[108] disapproved of Virginia jury instruction J which reads in pertinent part: "[The doctor] is not liable for damages resulting from his honest mistake or a bona fide error in judgment. . . . [T]he law requires only that the judgment be made in good faith, and in accordance with accepted medical standards of practice in the Fairfax, Virginia area . . . ."[109] The court concluded that this instruction is both misleading and prejudicial.[110] The court was troubled by the possibility that the jury may have decided that, even though the doctor was negligent, he was not held liable because he acted in good faith.[111] The court expressed doubt about the use of the language "honest mistake" and "bona fide

105. *See, e.g., Veliz,* 414 So. 2d at 227-28; *Wall,* 310 N.C. at 193-94, 311 S.E.2d at 577; *Teh Len Chu,* 223 Va. at 385-86, 290 S.E.2d at 822.

106. *See, e.g., Watterson,* 258 Ala. at 183, 61 So. 2d at 692; *Fraijo,* 99 Cal. App. 3d at 341 n.8, 160 Cal. Rptr. at 251 n.8; Fall v. White, 449 N.E.2d 628, 635 (Ind. Ct. App. 1983); *Dailey* 178 Mich. at 577-78, 146 N.W. at 193; *Haase,* 418 S.W.2d at 114; Wilson v. New York, 491 N.Y.S.2d 818, 819 (1985); *Block,* 80 S.D. at 475, 126 N.W.2d at 811; *Miller,* 11 Wash. App. at 280, 522 P.2d at 859.

107. The defendant's mental state is not an appropriate issue for jury consideration in negligence cases. *See, e.g., Logan,* 191 Conn. at 299, 465 A.2d at 303 (the issue in an ordinary negligence case is whether the defendant deviated from the reasonable care standard, not his mental state at the time of the act).

108. 223 Va. 383, 290 S.E.2d 820 (1982).

109. *Id.* at 384-85, 290 S.E.2d at 821.

110. *Id.* at 385-86, 290 S.E.2d at 822.

111. *Id.* at 385, 290 S.E.2d at 822. "[T]he instruction allows the jury to determine a physician's duty as an either/or proposition; the jury may find no liability if it be-

error" declaring that such expressions "defy rational definition . . . [and] tend to muddle the jury's understanding of the burden imposed upon a plaintiff in a malpractice action."[112] The court feared that jurors may decide that they are required to find that the doctor made a dishonest mistake or a bad faith error for the plaintiff to recover.[113]

The North Carolina Supreme Court in *Wall v. Stout,*[114] following *Teh Len Chu,*[115] disapproved of a jury instruction which incorporated the language "honest error." The language was rejected due to its "potentially misleading and exculpatory import."[116] The court reasoned that "[a]n instruction using the term 'honest error' could easily be interpreted by the jury to mean that a physician could not be liable for negligence unless he was somehow dishonest, particularly when the term is not defined with reference to the physician's other obligations to the patient."[117]

In Florida, the Supreme Court Committee on Standard Jury Instructions[118] recommends that no jury instruction be given with respect to the honest error in judgment rule because the rule is "confusing, difficult of application and argumentative."[119] A recent Florida case, *Veliz v. American Hospital, Inc.,*[120] heeded the committee's recommendation. In *Veliz,* the district court of appeals reversed a judgment for the defendant hospital and remanded for a new trial, reasoning that general instructions on both negligence and honest error were contradictory.[121]

Other jurisdictions which have considered the honest error in judgment instruction have expressed disapproval of the instruction. Nevertheless, these jurisdictions have retained a modified error in judgment instruction by eliminating lan-

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lieves a medical judgment is made in good faith, notwithstanding its further belief that ordinary medical care might require a different judgment." *Id.*

112. *Id.* at 386, 290 S.E.2d at 822.

113. *Id.*

114. 310 N.C. 184, 311 S.E.2d 571 (1984).

115. *Id.* at 193-94, 311 S.E.2d at 577.

116. *Id.* at 194, 311 S.E.2d at 577.

117. *Id.* at 193-94, 311 S.E.2d at 577.

118. FLORIDA STANDARD JURY INSTRUCTIONS, *supra* note 14.

119. *Id.* at 4.2(a) comment.

120. 414 So. 2d 226 (Fla. Dist. Ct. App. 1982).

121. *See id.* at 227-28. The court stated that giving two conflicting standards may constitute reversible error, even though one of the standards is correct. *Id.* at 228.

guage such as "honest" and "good faith."[122]

In the jurisdictions which have disapproved of the honest error in judgment instruction in its entirety,[123] the state law on medical malpractice did not include two very important elements of the honest error in judgment rule as it is used in Minnesota. Those elements are: (1) that different courses of treatment or diagnosis be available and in accord with recognized authority and current good practice, and (2) that reasonable doubt exist within the medical community as to the proper course to follow from the accepted medical treatments available.[124] If the doctor exercises his professional judgment and chooses one alternative over another, and that alternative culminates in an undesirable result, Minnesota law provides that then, and only then, is the doctor excused under the honest error in judgment rule.[125] In other words, under Minnesota law, excusing a doctor on the grounds that a bad result was due to nothing more than an honest error in judgment is really another way of saying that the doctor complied with an accepted standard of care.[126] The alleged error was choosing one accepted method of practice which led to the patient's injuries. In contrast, in the jurisdictions which have rejected the honest error in judgment rule, the rule was rejected because it was possible for a jury to find that the defendant doctor was negligent but not liable, because his decision to use an unacceptable method of practice was an honest one or one made in good faith.[127]

V. MINNESOTA'S NEW JIG III 425 G-S AND A SUGGESTION FOR ADDITIONAL REFORM

JIG II 425 G-S recently has been restructured by the Civil

122. *See, e.g., Hunsaker*, 179 Mont. at 329, 588 P.2d at 507; *Ellis*, 67 Or. App. at 361-62, 678 P.2d at 269-70.

123. Among the jurisdictions which have disapproved of the "honest error in judgment" instruction are Florida, North Carolina, and Virginia. *See supra* note 105.

124. *Compare supra* text accompanying notes 74-76 *with* cases cited *supra* note 105.

125. *See supra* text accompanying notes 74-76.

126. This conclusion is implied by consideration of Minnesota law on the "honest error in judgment" rule. A doctor in Minnesota must exercise his professional judgment within the bounds of accepted methods of treatment or diagnosis. If he does, he has complied with the standard of care. If, however, his judgment is based on disapproved methods of practice, he has not complied with the standard of care.

127. *See supra* notes 108-21 and accompanying text.

Jury Instruction Guide Committee of the State District Judges Association. The modified instruction now reads:

> In performing professional services for a patient, a (Doctor) (Dentist) must use that degree of skill and learning which is normally possessed and used by (Doctors) (Dentists) in good standing in a similar practice [in similar communities] and under like circumstances. In using the application of this skill and learning the (Doctor) (Dentist) must also use reasonable care.
>
> [A (Doctor) (Dentist) is not negligent simply because the (Doctor's) (Dentist's) efforts prove unsuccessful (and) is not responsible because the (Doctor) (Dentist) makes an honest error in judgment in choosing between accepted methods of treatment. However, a (Doctor) (Dentist) is negligent if the (Doctor's) (Dentist's) lack of success (or choice) is due to a failure to exercise reasonable care.][128]

This new version reduces jury confusion. However, because the word "honest" was retained, the jury still could be misled. The use of the word "honest" can lead a jury to believe that a physician's motives and intentions are to be considered, and that a physician can be found negligent only if the physician acted dishonestly. In addition, this instruction is not an entirely accurate description of Minnesota law. The instruction fails to inform the jury that a doctor cannot be found liable for an error in judgment where reasonable doubt exists as to the nature of the patient's condition and where there are two or more equally acceptable diagnoses for the patient's particular condition.[129] To reflect this aspect of Minnesota law, the second paragraph of JIG III 425 could be further modified to read:

> A (Doctor) (Dentist) is not negligent simply because *(1) the (Doctor's) (Dentist's) efforts prove unsuccessful (or) (2) because the (Doctor) (Dentist) chooses between two accepted methods of treatment or diagnosis and obtains a bad result. A (Doctor) (Dentist) is not liable for making an error in judgment concerning diagnosis, or in choosing between accepted methods of diagnosis or treatment when the (Doctor) (Dentist) exercises reasonable care in forming his diagnosis or in choosing between accepted methods of diagnosis or treatment.*

128. JIG III 425 G-S will be published in the forthcoming edition of J. HETLAND & O. ADAMSON, MINNESOTA PRACTICE, JURY INSTRUCTION GUIDES III. West Publishing Company granted permission for the William Mitchell Law Review to publish the restructured JIG III 425 G-S prior to its official publication.

129. *See supra* notes 74-76 and accompanying text.

However, a (Doctor) (Dentist) is negligent if the (Doctor's) (Dentist's) lack of success (or choice) is due to a failure to exercise reasonable care.][130]

This suggested version of JIG III 425 would eliminate any possibility of a court granting a new trial in connection with the use of an instruction based on Minnesota's honest error in judgment rule. This new version accurately states the law in Minnesota and would eliminate any jury confusion that could occur by the use of the word "honest."

CONCLUSION

The honest error in judgment rule recognizes that a physician should not be held liable for unintended consequences resulting from choosing a particular method of diagnosis or treatment that is widely accepted in the medical profession. The rule is premised on the belief that a physician is not a guarantor of a cure. In essence, the rule indicates that a physician has not deviated from the requisite standard of care by choosing an accepted method of treatment.

The recent restructuring of Minnesota's jury instruction (JIG III 425), which embodies the honest error in judgment rule, has alleviated only some of the jury confusion that has been created by the rule in the past. The jury instruction should be further modified to eliminate the word "honest." Modifying the rule in this fashion would not harm its application. Rather, eliminating the word "honest" would mitigate a jury's confusion and promote a more sound application of rule's substance by a jury of laypersons.

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130. *See Kinning*, 281 N.W.2d at 852. Another alternative for the second paragraph in JIG III 425 would be:

> Where there is more than one recognized method of diagnosis or treatment, and no one of them is used exclusively and uniformly by all practitioners of good standing, a (Doctor) (Dentist) is not negligent if, in exercising his best judgment, he selects one of the approved methods, which later turns out to be a wrong selection, or one not favored by certain other practitioners. A (Doctor) (Dentist) is not necessarily negligent because he errs in judgment or because his efforts prove unsuccessful. He is negligent if his error in judgment or his lack of success is due to a failure to perform any of his duties as defined in these instructions.

This modification of the second paragraph of JIG III 425 is based on CALIFORNIA JURY INSTRUCTIONS CIVIL BOOK OF APPROVED JURY INSTRUCTIONS BAJI 6.02 (7th ed. 1986) and BAJI 6.03 (7th ed. 1986). This form of the instruction would be acceptable in Minnesota.