

Offshore Radiology: The Legal Questions

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One of the few legal truths of which I am reasonably certain is that the law does not keep pace with the speed of technology. Technologic developments move quickly and often leave unanswered the legal questions that arise from those developments. Advances in online computer technology that have led to the relatively new medical practice of teleradiology are a good example of this. The answers to many of the legal questions that have arisen from this new form of medical practice have simply not kept up with the practice itself.

Today, offshore radiologists around the world provide virtually real time interpretations of diagnostic imaging studies of patients in the United States. It has become routine to outsource radiologic services, even though this now-routine practice of sending radiology services to sources abroad raises many legal questions. The legal consequences of using offshore radiology services, particularly in the area of medical malpractice, are largely unknown. Local hospitals and medical providers that outsource radiologic studies for offshore interpretation should be aware of the potential complications in connection with its use.

I developed an interest in the legal implications of offshore teleradiology as a result of a medical malpractice case I handled. About 5 years ago, I tried a case in which a jury awarded my client damages in excess of \$27 million over the course of her life expectancy. In 2000, when the case was tried, the jury verdict was the largest awarded in California for a medical malpractice case. The verdict was against a

hospital radiologist and the hospital's radiology group.

In May 1997, my client went to an emergency room in the middle of the night with a very sore and twisted neck. Radiographs were taken of her cervical spine. The emergency room doctor detected something unusual in my client's lateral radiograph at C6-C7. At approximately 4:30 AM, the lateral radiographic film was digitized by the hospital's x-ray technician and sent online for a preliminary review by the on-call radiologist. The on-call radiologist was then an employee of the medical group that provided all of the radiologic services to this particular hospital. He also held the title "director of imaging" at the hospital. In general, this radiologist worked daytime hours; however, he had been awakened several times that night to review studies from this hospital and from other local hospitals for which he was taking call.

The radiologist was probably informed of the emergency room doctor's concern about my client's lower-cervical-spine radiograph. Viewing the lateral radiograph on his home computer, he correctly interpreted the irregularity in the lower-cervical-spine radiograph as a benign congenital fusion at C6-C7, and this information was imparted to the emergency room doctor. However, the radiologist did not detect a serious finding that was also apparent on the radiograph: a prominent subluxation at C1-C2. As a result of the subluxation going undetected, my client was cleared and discharged from the emergency room at approximately 7 AM that same morning. While she was leaving the emergency room, she vomited (probably from

the pain medication she had been given), causing additional damage that resulted in quadriplegia.

There was sufficient time for the radiologist to interpret the subluxation on the preliminary read and advise the emergency room physician so that precautions could have been taken to immobilize my client's cervical spine. Unfortunately, the major damage occurred after the "preliminary" review but before the "final" review could be obtained. When the same radiologist read my client's radiographs later that same morning at the hospital, he did not detect the subluxation, so there was no finding addressed in the final written report.

During the trial of the case, I argued that if the radiologist were found liable, the hospital should also be held liable for the radiologist's negligence. My client was looking to the hospital for her medical services, not to any particular physician. She did not choose the unknown radiologist, and she did not know of, nor did she have any reason to know of, the "independent contractor" relationship between the radiologist and the hospital. At the close of our case, before any of the defendant health care providers began their cases, the trial court judge dismissed our claims against the hospital, granting the hospital's motion for judgment of nonsuit. The trial court judge held that the hospital could not be liable for the negligent acts of its independent contractor physicians.¹ After

¹ As a general legal proposition, an employer or principal is not liable for the negligence of an independent contractor but is liable for the negligence of an employee or agent.

the trial concluded, we appealed the nonsuit judgment, and the court of appeal reversed in our favor [1]. In the appeal, we argued the law of “ostensible” or “apparent” agency in support of our position that the hospital should be held vicariously liable for the negligence of its independent contractor physicians.

Because the published appellate opinion was fairly controversial in health care circles, I was asked to give a few presentations about the decision at various medical conferences. At one presentation to a group of skeptical hospital risk managers, I defended the court’s decision, arguing that it was important for a local health care provider to be accountable to a locally injured patient, particularly when the negligent physician could not be brought to court. My argument centered on the fact that technology now exists to have studies interpreted by offshore radiologists just as easily as by local radiologists. Therefore, if one is not able to bring a negligent offshore physician to court, to whom is an injured patient supposed to look for redress? Even if one could bring the doctor to court, as a practical matter, how could the injured patient litigate a case against a doctor residing on the other side of the world?

An offshore radiologist might not be subject to the “jurisdiction” of the local state court where a case is brought. The radiologist could contest the local court’s right to hear the case against the radiologist on the grounds that the radiologist did not have sufficient “contacts” with the state where the case is brought. If the court agrees, the plaintiff cannot pursue the case against that radiologist in that jurisdiction. The competing factors for and against a court finding jurisdiction will depend on the particular

facts of the case, but there is no clear legal precedent as to whether a US state court can obtain jurisdiction over an offshore radiologist.²

Even if an offshore radiologist is ultimately held to be subject to a local court’s jurisdiction, it may not be possible to compel the physician to appear.³ And even with a willing participant, the logistics of litigating such a case would be very difficult.

Assuming that a state court acquires jurisdiction over an offshore radiologist, there is still the issue of whether the radiologist will “appear” in the case. Obtaining jurisdiction over an offshore radiologist means only that the court can take legal actions against that defendant within the lawsuit. It does not guarantee that the offshore radiologist will respond and participate in the defense of the case. Depending on circumstances, there may be compelling reasons for the offshore radiologist to participate or avoid participation in the lawsuit. Even if a default civil judgment can be obtained from a local state court against the offshore radiologist, it would likely be difficult if not impossible to enforce the judgment.⁴ Generally, that would not be the case when the radiologist lives here,

² By “legal precedent,” I am referring to judicial opinions that are published by courts of appeal that may be cited as authority for a particular legal contention and serve as guidance as to how a court will rule prospectively.

³ All references in this article to “offshore radiologists” are intended to include the “offshore” medical groups employing those physicians. I also intend “offshore” to mean places outside of the United States, although similar legal issues can be applicable when a study originates in one state and is interpreted by a radiologist in another state.

⁴ It is true that there are treaty obligations between the United States and various foreign countries that could enable a local plaintiff to collect on a US judgment in a foreign country. However, from an injured patient’s standpoint, this still does not solve the issue of bringing the offshore physician to a US court.

has property and assets here, and is insured here. In reality, unless the offshore radiologist voluntarily agrees to travel to a US jurisdiction and submits to the court’s authority, there is no guarantee that any judgment against that physician can ever be implemented. Although there may be contractual obligations and other considerations to pressure an offshore physician to appear and defend a malpractice lawsuit in a US court, as far as I know, there is no legal procedure that can compel an unwilling individual to appear in a US court for a civil matter such as a malpractice case.

To my knowledge, there has not been a reported medical malpractice case against an offshore radiologist in a US court, and there has not been a reported case of an offshore radiologist contesting jurisdiction in US courts. The ACR’s legal department reports that it “knows of no lawsuit that specifically involves a teleradiology interpretation,” and there is “no reported precedent” as to whether a teleradiologist sitting in Israel would come under the auspices of New York law for the interpretations of a magnetic resonance imaging scan taken of the brain of a patient lying in a New York hospital [2].⁵ It will be interesting to see how the courts handle the jurisdiction issues that arise from these cases, but we do not have any definite answers yet.

This is more than just an academic exercise. Take the facts I just described in my client’s case, but imagine that the online image was read by an offshore radiologist instead of a California radiologist. How might that have affected my

⁵ The example of New York and Israel is only hypothetical. Any state and any country could apply.

client's case? First, how would the California court have decided the issue if the offshore radiologist contested jurisdiction? A number of factors would likely have been involved, including the nature of the relationship between the offshore radiologist and the local hospital or medical group that hired the offshore radiologist. If the offshore radiologist were a member of a US-based medical group, but working abroad, or the offshore radiologist provided radiology services under contract to domestic US health care providers within this state on a regular basis, the court would likely have found jurisdiction. However, obtaining jurisdiction might have been more problematic if the offshore radiologist did not have the same degree of local ties to this jurisdiction as just described. Suppose the offshore radiologist who read my client's radiograph only did occasional radiology consultations for the local hospital? Perhaps there was a written contract between the radiologist and the local group stating that the radiologist was merely a consultant providing preliminary readings only, and it was the responsibility and obligation of the local group to provide all final interpretations. If the request had only been to read the lower portion of the cervical spine for the benefit of the emergency room physician, the offshore radiologist could argue that he was providing a consultation only on this one area of interest. He could argue that there was no patient-physician relationship and that he owed no legal duty to the patient.

A medical malpractice case is predicated on a finding of a patient-physician relationship. Unless such

a relationship is found, there is no basis for a case. The law of negligence in any jurisdiction requires a legal duty that is owed by the defendant to the plaintiff. Would there have been a legal duty for this offshore radiologist "consultant" to review my client's entire radiograph? Although a patient-physician relationship is generally found as to the radiologist who performs the final interpretation and issues an official written report on the patient, it is not clear whether that would be the case for the offshore radiologist who performs only a preliminary reading and issues a preliminary report. Could that radiologist have evaded liability to my client on the grounds that no physician-patient relationship was created? Again, there is no precedent on the issue.

Other facts in my client's case illustrate how complicated the legal issues of the case could have become in an offshore setting. The defendant radiologist who performed the preliminary read of my client's radiograph was the only radiologist in a position to diagnose and prevent the injuries that ultimately befell her. The defendant radiologist was not in a position to argue the absence of a patient-physician relationship in my client's case, because that physician also performed the final review and issued a final written report on the patient. However, in most cases in which outside radiology services are used, different radiologists perform the preliminary and final reviews. Suppose, in my client's case, that the first radiologist performing the preliminary read missed the finding, but a second radiologist de-

tected it, but too late to do anything about it? The second radiologist should not be held liable, because he was not negligent. Could the first radiologist, who was in a position to diagnose the injury and prevent a catastrophe, evade liability on the basis that he was only providing a consultation to the emergency room physician? That would be an extremely harsh result.

Our legal system has not completely evolved in equal measure to the medical technology that now exists. Until it does, the answers to the questions discussed in this article will remain uncertain. Everyone, including patients, radiologists, medical groups, and hospitals that use the services of foreign-based radiology, will not know how to best protect their own interests.

I am not against the use of offshore teleradiology per se. The technology obviously works, and I understand the reasons for its increased use. It makes a lot more sense to have somebody who is well rested reviewing images from across the world than to have somebody nearby who is sleep deprived from being awakened several times in one night. It is not lost on me that my client's radiograph would probably have been correctly interpreted and a tragedy averted if a better system of night-call radiology had been in place.

REFERENCES

1. *Mejia v Community Hospital of San Bernardino*, 99 Cal App 4th 1448 (2002).
2. Hoffman T, Shields B. Teleradiology: an underdeveloped legal frontier. *ACR Bull* September 2005;60.

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