

*“Judicial Decision-making in Health Care Policy:
The Role of the Media?”*

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New Kinds of Litigation: s. 7 and s. 15 of the Charter

I. Challenges to limits on private financing of medically necessary health care

- *Chaoulli* (Quebec); *McCreith & Holmes* (Ontario); *William Murray* (Alberta)

II. Challenges against denials of public funding

- *Flora v. Ontario Health Insurance Plan* (Ontario); *Auton* (Ontario and BC); *Eldridge* (BC)

New Kind of Litigation: Free Speech Challenges under the Charter

III. Challenges to limits
on direct to consumer
advertising of drugs

-- *CanWest MediaWorks Inc. v. AG
of Canada*

IV. Challenges to limits
on federal
restrictions on
tobacco advertising

— *RJR McDonald; Attorney General
of Canada, et al. v. J.T.I.
Macdonald Corp., et al.*

New Kind of Litigation: Mass Tort Challenges

V Challenges that system managers are negligent in allowing delays for essential care

-- *Cillinger v. Centre hospitalier de Chicoutimni*
(2004) R.J.Q. 3083

VI. Challenges that system managers are negligent in failing to take necessary public health precautions (e.g. SARS and West Nile virus)

- *Eliopoulos v. Ontario (Minister of Health and Long Term Care* [2006] O.J. No. 4400 (C.A.).



- “The quality of “objectivity” which is so earnestly sought is problematic at best, in the social world where competing version of “truth” abound.” The judge as well as the social scientist can only strive to minimalize the emotional, the idiosyncratic elements in his intellectual process; he cannot eliminate them altogether.”
- (Alexander B. Smith & Abraham S. Blumberg, The Problem of Objectivity in Judicial Decision-Making, (1967) 46: 1 Social Forces 96-105)

Intuitive vs. Deliberative

- Despite their best efforts, judges like everyone else have two cognitive systems for making judgment – the intuitive and the deliberative – and the intuitive system has a powerful effect on judicial decision-making”
- Guthrie, Rachlinski, and Wistrich, “Blinking on the Bench: How Judges Decide Cases” (2007) 93:xxx Cornell Law Review 101

Cognitive Reflection Test:

Shane Frederick, Cognitive Reflection and Decision Making (2005) 19 J.
Econ. Persp. 25 at 26

- (1) A bat and a ball cost \$1.10 in total. The bat costs \$1.00 more than the ball. How much does the ball cost? _____ cents
- (2) It if takes 5 machines 5 minutes to make 5 widgets, how long would it take 100 machines to make 100 widgets? _____ minutes
- (3) In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes 48 days for the patch to cover the entire lake, how long would it take for the patch to cover half of the lake? _____ days.

Chaoulli: The Right to Private Health Insurance for Queue-Jumping



- i. Media
- ii. Class-bias
- iii. Complex Case with no pre-existing precedent
- iv. Gender
- v. Rise of liberal values (autonomy etc,)
- vi. Adversarial process (evidence of $n=1$ vs. evidence of $n=28$ million)
- vii. Getting Past Intuition (and “common sense”)
- viii. Role of health researchers as expert witnesses

Auton

- Praised by health service researchers....
- Sound understanding and application of research evidence?
- No -- Formalism



Conclusion

- Judicial decision-making is closed so difficult to understand the role and impact of the media
- “New” and complex cases, like *Chaoulli*, offer judges greater opportunity to imprint their own preferences
- Judges demonstrate no greater capacity than other educated individuals to avoid common pitfalls in reasoning (intuition vs. deliberation)



Conclusion

- Common “intuitions” in health care (private is more efficient than public; a parallel system would ease the strain on the public system) were clearly apparent in the majority reasoning in *Chaoulli*
- Some conclusions appear to map on to inaccurate media portrayals of Canadian Medicare (e.g. McLachlin C.J. and Major J. reach the damning conclusion that other jurisdictions that “do not impose a monopoly” have “delivered to their citizens medical services that are superior to and more affordable than the services that are presently available in Canada”; the use of the word “monopoly” is an odd one and ties in with some articles in media comparing Canada with Cuba and North Korea)

Conclusion

- The court in *Chaoulli* may also be reflecting a change in values on the part of Canadians, with a growing consensus in favour of personal autonomy and personal freedom; less emphasis on sacrifice for the greater public good

Conclusion

- If researchers hope to persuade courts away from intuition and towards evidence they must understand that in Charter cases the courts don't assumed the status quo prevails unless proven otherwise.
 - - If a Charter right is breached the balance of proof shifts to the government to demonstrate that the breach is reasonable and that it could not have achieved its goals using a less intrusive means.
- Researchers need to become more aware of the dynamics of judicial decision-making in order to ensure their research properly informs judicial deliberations; just as a good litigator can make a difference so too may a good expert witness.

