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DENTAL LITIGATION

WILLIAM O. MORRIS*

Through the years medical practitioners have been involved in far more malpractice cases than dentists. However, in recent years the number of malpractice cases which have been brought against dentists has increased.

Because of the onerous connotations of the word "malpractice," an attempt has been made to drop the term and to substitute in its place the phrase "professional liability." This effort has met with little success. Whatever the wrong is called the result is the same—more frequent and larger verdicts in favor of the patient against the dentist.

In this day and age, it is no more wrong for a patient who has been injured by the negligent or willful act of a dentist to recover damages from the dentist for his pain and suffering than it is for a dentist to seek recovery from a patient for his fee or to recover from a negligent auto driver for damage which the driver caused to the dentist. Professional liability or malpractice cases involving dentists as well as physicians will not only continue but will increase in frequency until some form of recovery is provided to the injured patient without the necessity of litigation. Perhaps some form of no-fault insurance could be provided to protect both the patient and the dentist.

Dentistry is, and probably will always be, considered a portion of the medical practice in the eyes of the courts. This is especially true with respect to the applicable law in professional liability cases.¹ Dentists are governed by the same legal rules applicable to physicians and surgeons with respect to the exercise of due care and skill.² One who holds himself out as a specialist in a particular branch of dentistry is legally expected to possess and to exercise that degree of skill and care which is possessed and is exercised by

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¹W. MORRIS, *DENTAL LITIGATION* 12 (1972); Sarver, *Landmark Decisions in Dental Malpractice*, 16 DEF. L.J. 11 (1967).

²*McTyeire v. McGaughy*, 222 Ala. 100, 130 So. 784 (1930); *Wilson v. Kornegay*, 108 Ga. App. 318, 132 S.E.2d 791 (1962); *Harris v. Exon*, 161 Kan. 582, 170 P.2d 827 (1946); *Mangiameli v. Ariano*, 126 Neb. 627, 253 N.W. 871 (1934); *Shoumatoff v. Wiltbank*, 226 N.Y.S.2d 576 (Sup. Ct. 1962); *Hill v. Parker*, 12 Wash. 2d 517, 122 P.2d 476 (1941).

similar specialists acting under similar circumstances and not merely the average skill and care of a general practitioner.³

The law is clear that a practitioner of any of the medical arts may be guilty of professional irresponsibility and, therefore, may be called upon to pay damages if he acts without possessing the requisite skill⁴ or fails to exercise the expected skill in making his diagnosis or treating his patient.⁵ Dentists have been named defendants in a number of actions on the theory of negligent failure to use all proper diagnostic aids prior to undertaking treatment of the patient. In *O'Brien v. Stover*,⁶ a damage award was sustained against a dentist because of his negligence in failing to take a tissue biopsy of the patient. This procedure probably would have revealed the presence of a tissue cancer which was the ultimate cause of the patient's death. Similarly, in a case against a physician,⁷ the jury awarded a woman \$300,000 because it found the physician negligent in failing to timely take a biopsy which would have disclosed breast cancer in the patient. The failure of a dentist to make use of X-rays both before and after an operation may amount to negligence on the part of the dentist.

In the absence of an express contractual arrangement between the dentist and patient, the dentist does not warrant or guarantee to cure the patient or to render totally satisfactory services.⁸ However, if the dentist does guarantee success in his treatment or procedure and fails to live up to his guaranty, he will be liable in damages to the patient for breach of contract. But he will not be liable on this theory for any pain and suffering the patient may endure as a result of the breach. For example, in *Carpenter v. Moore*,⁹ the issue was raised as to "what should be the recovery in an action by a patient against a dentist for breach of a contract to

³*O'Brien v. Stover*, 443 F.2d 1013 (8th Cir. 1971); *Hopkins v. Heller*, 59 Cal. App. 447, 210 P. 975 (1922); *Chubb v. Holmes*, 111 Conn. 482, 150 A. 516 (1930); *Barnes v. Bouenmyer*, 255 Iowa 220, 122 N.W.2d 312 (1963); *Eatley v. Mayer*, 10 N.J. Misc. 219, 158 A. 516 (Sup. Ct. 1930).

⁴*See Mitchell v. Adkins*, 36 Del. 451, 178 A. 593 (1935); *Morse v. Rapkin*, 24 App. Div. 2d 24, 263 N.Y.S.2d 428 (1965).

⁵*Germann v. Matriss*, 55 N.J. 193, 260 A.2d 825 (1970).

⁶443 F.2d 1013 (8th Cir. 1971).

⁷*Heilbrun v. Kaiser Foundation Hosp.*, No. 627860 (San Francisco City Super. Ct. Oct. 1971).

⁸*McTyeire v. McGaughy*, 222 Ala. 100, 130 So. 784 (1930); *Giering v. Lemoine*, 106 So. 2d 534 (La. App. 1958); *Viland v. Winslow*, 34 Mich. App. 486, 191 N.W.2d 735 (1971); *Robins v. Finestone*, 308 N.Y. 543, 127 N.E.2d 330 (1955); *Colvin v. Smith*, 276 App. Div. 9, 92 N.Y.S.2d 794 (1949).

⁹51 Wash. 2d 795, 322 P.2d 125 (1958). *See W. MORRIS, supra* note 1, at 31.

make upper and lower plates to the patient's complete satisfaction." The court correctly held that the amount of compensation paid to the dentist for his services was the limit of the patient's recovery and the patient was not entitled to recover for pain and suffering.

Problems relating to obtaining the patient's consent to a procedure are becoming increasingly important. Judge Cardozo said: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."¹⁰ One who undertakes to treat a patient without the patient's consent, implied or expressed, or extends the operation beyond that to which the patient has consented is guilty of a technical battery.

The California court has held that an integral part of the physician's overall obligation to the patient is the duty of reasonable disclosure to the patient of available choices with respect to the proposed therapy, and of the dangers inherently and potentially involved in each. There is no consent if the patient is not knowledgeable with respect to these matters. The dentist treating a patient who does not have sufficient knowledge is guilty of committing a battery.¹¹ The application of this principle is well illustrated in *Watkins v. Parpala*.¹² The plaintiff alleged that a serious infection in her sinus had been caused by the forcing of a substance called "Jelrate" into the sinus through a root canal while the dentist was making an impression for dentures. The patient argued with success that the dentist had not informed her of the possibility of the development of a fistula at the root canal through which foreign material might be ingested into the sinus, and that he had, in consequence of that neglect, proceeded with the treatment without her consent.

It seems clear that each patient is entitled to the opportunity to weigh the risks of treatment, except when it is evident that he cannot evaluate the data, as for example where there is an emergency or the patient is a child or incompetent. To cover these situations the law provides that consent is implied in emergency situations. If the patient is a minor or incompetent, the authority

¹⁰*Schloendorff v. New York Hospital*, 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914).

¹¹*Cobbs v. Grant*, 104 Cal. Rptr. 505, 502 P.2d 1 (1972).

¹²Wash. App. 484, 469 P.2d 974 (1970).

to consent is transferred to the patient's legal guardian or closest available relative.

The issue of insurance coverage when a dentist is the defendant in an action based on assault and battery should not be overlooked. In one case¹³ in which malpractice insurance was involved, the court noted that counsel for the insurance company had made a remarkable concession when he admitted that the word "malpractice" had been almost universally construed by the courts to include an operation performed without the consent of the patient. Except for this admission, it is difficult to think that the court would have held the insurance company liable on its policy. If a fire insurance policy does not cover loss caused by the insured's arson, why should a malpractice insurance policy cover a dentist from loss for intentional wrongs as distinguished from negligent wrongs?

The law requires that every professional man exercise that degree of skill and care which the law imposes upon him. A failure to meet this standard which causes injury to the patient gives the patient a cause of action against the wrongdoer. The law presumes, in the absence of evidence to the contrary, that, in a given case, the dentist did in fact perform his services with care and skill.¹⁴ The law does not presume negligence simply because the results anticipated did not in fact occur from the treatment.¹⁵

In some jurisdictions the locality rule is still in effect. This is a rule of law which states that a dentist or physician is to be held to the obligation to exercise the degree of care and skill possessed and exercised by other practitioners in the same locality.¹⁶ The locality rule is losing popularity, as well it should.¹⁷ In fact, it has been modified in West Virginia.¹⁸ The rule has two practical difficulties: First, the scarcity of professional men in the community who are qualified and willing to testify about the local standards

¹³Shehee v. Aetna Cas. & Sur. Co., 122 F. Supp. 1 (W.D. La. 1954).

¹⁴Wilson v. Kornegay, 108 Ga. App. 318, 132 S.E. 791 (1930); Angulo v. Hallar, 137 Md. 227, 112 A. 179 (1920); Devereaux v. Smith, 213 S.W.2d 170 (Tex. Civ. App. 1948).

¹⁵Brown v. Hughes, 94 Colo. 295, 30 P.2d 259 (1934); Blodgett v. Nevius, 189 Ill. App. 544 (1914); Negaard v. Fedra, 152 Mont. 47, 446 P.2d 436 (1968); Inglis v. Morton, 99 Wash. 570, 169 P. 962 (1918). See 18 NACCA L.J. 352 (1956).

¹⁶Robinson v. Crotwell, 175 Ala. 194, 57 So. 23 (1911); Hamilton v. Kelsey, 126 Ore. 26, 268 P. 750 (1928); Hill v. Parker, 12 Wash. 2d 517, 122 P.2d 476 (1942).

¹⁷Pederson v. Dumouchel, 72 Wash. 2d 73, 431 P.2d 973 (1967).

¹⁸Hundley v. Martinez, 151 W. Va. 977, 158 S.E.2d 159 (1967).

of care; second, the possibility of a small group who, by their laxness and carelessness, could establish a local standard of care below that which the law should require.¹⁹ The locality rule is not, and has not been used in England.²⁰ There, the same care is expected and required throughout the country; that is, the known rule and usage of the profession at large.

The courts are concerned not only with the area in which the dentist practices, but also with the state of professional knowledge at the time of the treatment. A dentist, physician, or surgeon holds himself out to possess the degree of learning and skill that is possessed by the profession at the time, and not as it may have existed in the past.²¹

The *res ipsa loquitur* doctrine was first applied in a dental malpractice case in *Keily v. Colton*,²² decided in 1882. That case involved the extraction of a tooth. The extracted tooth was permitted to fall into the bronchial tube while the patient was under anesthetic. The court held that the evidence of the occurrence was sufficient to make out a *prima facie* case of negligence for the jury. Professor William R. Arthur wrote, in an article entitled *Res Ipsa Loquitur as Applied in Dental Cases*:²³ "The application of the *res ipsa loquitur* doctrine relieves the plaintiff of the troublesome duty of providing expert witnesses. To secure the aid of the doctrine, the plaintiff must establish his injury and the background of facts, which, if unexplained, make the inference of negligence permissible."²⁴ Unless the facts can be established by the testimony of non-expert witnesses, the rule cannot be applied. Consequently, in all cases in which care and skill are involved, expert testimony is required to establish the requisite skill and whether that skill was exercised. These cases include, for example, jaw fractures in extraction cases. If a layman cannot look at the circumstances in the case and say that the accident would not have occurred in the ordinary course of dentistry but for someone's negligence, the doctrine cannot be applied. The *res ipsa loquitur* doctrine normally is not applied in cases involving anesthesia, broken needles, wrongful death, or cases involving the use of X-rays.²⁵

¹⁹*Pederson v. Dumouchel*, 72 Wash. 2d 73, 431 P.2d 973 (1967).

²⁰*Slater v. Baker & Stapleton*, 95 Eng. Rep. 860 (1767).

²¹*McCracken v. Smathers*, 122 N.C. 799, 29 S.E. 354 (1898); *Cox v. Cartwright*, 96 Ohio App. 245, 121 N.E.2d 673 (1953).

²²1 City Ct. Rep. 439 (N.Y. Marine Ct. 1882).

²³15 Rocky Mt. L. Rev. 220 (1942).

²⁴*Id.* at 224.

²⁵See W. MORRIS, DENTAL LITIGATION, *supra* note 1, at ch. 8, for consideration

Mere bad results are not evidence of negligence.²⁶ Courts have generally refused to infer negligence on the part of a dentist simply because the patient suffered a cut. Without the aid of the *res ipsa loquitur* presumption, negligence on the part of the dentist normally must be proven by testimony from an expert rather than a lay person.²⁷ Whether or not the negligent treatment or lack of treatment by the defendant accelerated or contributed to the death of the plaintiff's decedent has to be established by expert testimony, inasmuch as such knowledge is not in the domain of the jury.²⁸

A dentist owes the same duty of care and skill to a patient during post-operative treatment as during the operation itself unless the terms of the employment otherwise limit the duty or the patient refuses to permit the dentist to continue with the treatment.²⁹ Premature discharge of the patient by the dentist may amount to post-operative negligence, as may the failure to take an X-ray after an operation. The failure to reasonably sterilize and treat a socket from which a tooth has been removed will result in liability for the dentist if the omission causes injury to the patient.

The application of post-operative negligence is beautifully illustrated in the case of *Graham v. Roberts*.³⁰ This case involved the extraction of a tooth. There was no allegation of negligence in the extraction, but rather that "the dentist was negligent in continuing to treat a worsening condition of pansinusitis over a period of four months, instead of referring appellant's condition to a properly qualified medical specialist for treatment"

To sustain a recovery in a malpractice case, the plaintiff, in addition to proving negligence on the part of the defendant, must establish that the proven negligence was the proximate cause of

of many cases in which the courts have considered the application of the *res ipsa loquitur* doctrine in dental cases. It should be noted that *res ipsa* does not apply in malpractice cases in West Virginia. See *Moore v. Guthrie Hosp., Inc.*, 403 F.2d 366 (4th Cir. 1968); *Vaughn v. Memorial Hosp.*, 103 W. Va. 156, 136 S.E. 837 (1927).

²⁶*Negaard v. Feda*, 152 Mont. 47, 446 P.2d 436 (1968); *Inglis v. Morton*, 99 Wash. 570, 169 P. 962 (1918); *Vale v. Noe*, 172 Wis. 421, 179 N.W. 572 (1920). See 18 NACCA L.J. 352 (1956).

²⁷*Barham v. Widing*, 210 Cal. 206, 291 P. 173 (1930); *Perkins v. Trueblood*, 180 Cal. 437, 181 P. 642 (1919); *Butts v. Watts*, 290 S.W.2d 777 (Ky. 1956); *Donoho v. Rawleigh*, 230 Ky. 11, 18 S.W.2d 311 (1929).

²⁸*Brown v. Hughes*, 94 Colo. 295, 30 P.2d 259 (1934).

²⁹*Butts v. Watts*, 290 S.W.2d 777 (Ky. 1956); *Donathan v. McConnell*, 121 Mont. 230, 193 P.2d 819 (1948).

³⁰441 F.2d 995 (D.C. Cir. 1970).

the injury. Both negligence and proximate cause are questions of fact for the jury. Once the plaintiff has introduced evidence of sufficient weight and character, the court is warranted in submitting the case to the jury for determination of factual matters.³¹ If there is evidence of negligence and some competent testimony that tends to establish that such negligence was the proximate cause of the plaintiff's injury, the case should go to the jury. The trial judge may not rule on the issue of proximate cause as a matter of law.³²

In most jurisdictions, contributory negligence on the part of the plaintiff is a defense in tort cases.³³ Thus, in the states following this rule, the dentist may show the patient's contributory negligence as a defense in a malpractice action. However, if the patient's negligence does not concur with that of the dentist but is later in time, the negligence of the patient does not constitute contributory negligence and will not serve as a defense. It may, however, be shown in mitigation of damages.³⁴

Where the patient moves his head at the time a needle is about to be inserted in his gums and the needle breaks in the gums, the movement of the head may constitute contributory negligence. This assumes, of course, that the dentist had been negligent in selecting the size of the needle or the place of insertion.³⁵ The patient's failure to go to an oral surgeon to have a broken needle removed after having been advised by the treating dentist to do so does not amount to contributory negligence on the part of the patient, but such refusal may be shown to mitigate damages where the patient's failure to follow the recommendation added to his injury. It is easy to see that the patient's post-operative negligence and contributory negligence are two entirely different things.³⁶

There are several possible reasons why "malpractice" or "professional liability" actions have increased greatly in size and number in recent years. Some of the reasons suggested are:

³¹Lindloff v. Ross, 208 Wis. 482, 243 N.W. 403 (1932). See Note, *Medical Malpractice—Expert Testimony*, 60 Nw. U.L. Rev. 834 (1966). See also W. MORRIS, DENTAL LITIGATION, *supra* note 9, at ch. 10 for other cases.

³²Whetstine v. Moravec, 228 Iowa 352, 291 N.W. 425 (1940); Darling v. Semler, 145 Ore. 259, 27 P.2d 886 (1933); Friend v. Kramer, 236 Pa. 618, 85 A. 12 (1912).

³³W. MORRIS, DENTAL LITIGATION, *supra* note 1, at 95 (1972).

³⁴DuBois v. Decker, 130 N.Y. 325, 29 N.E. 313 (1891); McCracken v. Smather, 122 N.C. 799, 29 S.E. 354 (1898).

³⁵Alonzo v. Rogers, 155 Wash. 206, 283 P. 709 (1930).

³⁶Chubb v. Holmes, 111 Conn. 482, 150 A. 516 (1930); Patterson v. Howe, 102 Ore. 275, 202 P. 225 (1921).

- (1) . People are more aware of the possibility that they may recover from a dentist or physician. Television has played its part in educating the people to this possibility.
- (2) Patients now know that most professional men carry malpractice insurance and any recovery against the physician or dentist will be paid by the insurance company.
- (3) Some claimants may have been advised by unethical counsel to sue despite lack of a real basis for litigation.
- (4) Actions are sometimes engendered when the physician or dentist fails to establish a proper rapport with the patient or the patient's family.
- (5) The professional man may himself have caused malpractice actions by unduly criticizing the work of another.

It has been said that a dentist who can say that he has never been sued or threatened with a malpractice suit after actively practicing ten or more years is a man who has developed the fine art of liking and getting along with people. A good relationship between the patient and the dentist is the best contraceptive to malpractice and professional liability cases.