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Malpractice Hazards in Dental Extractions

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SCOPE AND JUSTIFICATION

The subject of dental malpractice as a unit of study and analysis has been neglected by writers on the law.[1] The author believes that they have done so without justification. Although the authorities are in agreement that the legal rules applicable to cases of malpractice involving physicians and non-oral surgeons are the same as those which apply to dentists,[2] the fact situations involved in the dental area are bound to be more or less unique. The dentist operates upon a single, relatively small body cavity, with little room in which to maneuver. The nature of the operative area creates a significant likelihood of hazardous mistakes, both in treatment and in diagnosis. Perhaps the most cogent reason for separate consideration of dental malpractice cases, however, is the same one that permits such independent study of the doctor-patient relationship: there are problems which are peculiar to each profession.

The author has sought to contain this note within the realm of dental extractions because it is the most convenient unit of study and analysis in the entire, rather broad field of dental malpractice. There are two reasons for this convenience. The first rests upon the conception that an extraction for jurisprudential purposes should not be regarded as comprehending the mere act of forcefully withdrawing the tooth from its socket and nothing more. When an extraction is considered from diagnosis to post-operative treatment, and even beyond (such as, for example, failure to inform the patient that a root has been left in the gum), a considerable portion of the dentist's routine will be subjected to scrutiny. The second reason for limitation of this study to the extraction milieu is a highly practical one: a vast majority of the lawsuits in which dentists appear as defendants are founded upon some aspect of the extraction process. The suits not covered in this note (such as those involving the filling of cavities or the adjustment of dental plates) will not only be insignificant in number, but will almost without exception give rise to such small damages (if any) as to make settlement's advisability axiomatic.

THE STANDARD OF CARE

The courts have generally regarded a suit for dental malpractice as being an ordinary negligence action.[3] Although many judges still speak

1. For extensive but not profound case notes on the subject of dental malpractice, see Annot., 129 A.L.R. 101 (1940); Annot., 69 A.L.R. 1142 (1930); Annot., Ann. Cas. 1918 C 1190; Annot., Ann. Cas. 1914 A 273.

2. REGAN, DOCTOR AND PATIENT AND THE LAW 458 (3d ed. 1956).

3. CARNAHAN, THE DENTIST AND THE LAW § 80, at 121 (1955); REGAN, *op. cit. supra* note 2, at 17, 30.

of an "implied contract"[4] between dentist and patient by the terms of which the dentist agrees to perform only the work specified and to do it skillfully, and the patient agrees to co-operate and to compensate, there is no doubt that the action sounds in tort, regardless of any allegation of the "contract" in the pleading.[5] Insofar as substantive rules of law are concerned, "malpractice" has become nearly synonymous with negligence,[6] which means that the first consideration of this study should be the duty of the dentist to his patient.

Formulating the Standard

The terms in which the standard of care has been formulated often conflict and occasionally overlap. Some opinions say that the dentist must possess and exercise the care, skill, and learning possessed by practitioners of dentistry in the same community[7] or in a community similar to that in which the defendant dentist practices.[8] Others hold that what is done in a similar community may not be considered by the jury.[9] Some courts restrict the dentist's duty to the standard of care in his general neighborhood.[10] A few add to the formula the contemporary state of dental science.[11] Many limit the standard to what is done by dentists of good standing under circumstances similar to those which existed in the case at bar.[12] For all this variation, however, there is little effect on the outcome of cases by a change in the formula. The jury would not be likely to notice the alteration in meaning if a different statement of the dentist's duty were propounded to them by the court. Only when a neighborhood or town has a peculiar professional custom (such as a specified numerical limitation on the number of teeth that may be extracted at one sitting)[13] does it make any difference whether the stand-

4. See Nance v. Beatie, 127 Kan. 505, 507, 274 Pac. 219-20 (1929); Goodlet v. Williamston, 179 Okla. 238, 239, 65 P.2d 472, 474 (1936).

5. See Patterson v. Howe, 102 Ore. 275, 202 Pac. 225 (1921).

6. See authorities cited note 3 *supra.*

7. See Brown v. Hughes, 94 Colo. 295, 308, 30 P.2d 259, 262 (1934); Staples v. Washington, 125 A.2d 322 (D.C. Munic. Ct. App. 1956); Tanner v. Sanders, 247 Ky. 90, 56 S.W.2d 718 (1933); Mitchell v. Poole, 229 Mo. App. 1, 13, 68 S.W.2d 833, 839 (1934).

8. See Hill v. Jackson, 218 Mo. App. 210, 216, 265 S.W. 859, 861 (1924); Malila v. Meacham, 187 Ore. 330, 335-36, 211 P.2d 747, 749-50 (1949); Alexander v. Hill, 174 Va. 248, 252, 6 S.E.2d 661, 663 (1940).

9. See Tanner v. Sanders, 247 Ky. 90, 56 S.W.2d 718 (1933); Mitchell v. Poole, 229 Mo. App. 1, 13, 68 S.W.2d 833, 839 (1934).

10. See McTyeire v. McGaughy, 222 Ala. 100, 130 So. 784-85 (1930); Hurley v. Johnston, 143 Conn. 364, 122 A.2d 732 (1956); Dolan v. O'Rouke, 56 N.D. 416, 420, 217 N.W. 666, 667 (1928).

11. See Lindloff v. Ross, 208 Wis. 482, 487, 243 N.W. 403, 405 (1932).

12. See Meyer v. St. Paul-Mercury Indem. Co., 225 La. 618, 623, 73 So. 2d 781, 782 (1954); Pollack v. Dussourd, 158 F.2d 969 (6th Cir. 1947) (Ohio law).

13. See Voss v. Adams, 271 Mich. 203, 259 N.W. 889 (1935).

ard is that of the defendant's community or that of "the same or a similar community" ("similar" evidently referring to population and to urban-rural proportion and development).[14] The dentist is not and should not be, for the sake of the advancement of the dental science, required to take a poll of his fellow-practitioners and then zealously to follow the dictates of a bare majority of the dentists in his community as to how a particular dental problem should be treated. There is no liability for carefully adhering to the theory of a respectable minority.[15] At least one jurisdiction, moreover, recognizes that the standards of dentists in a like or the same community may be unreasonably low. What other members of the profession do is, therefore, only evidence to be considered by the jury and to be weighed along with their own concepts of reasonable conduct under a given set of circumstances.[16]

Errors of Judgment

Although the cases are filled with platitudes to delight the ears of the unwary, that a dentist is not responsible for a "mere error of judgment,"[17] there is very little room for such mistakes.[18] In general, when the court says that the defendant was guilty of an error of judgment for which he is not liable, it is usually expressing a conclusion that there was no negligence — no violation of the standard of care — on which liability could be founded. A further limitation on the possibility of an error of judgment precluding liability is the distinction made between a mistaken diagnosis and an erroneously chosen or negligently performed operative procedure. Although both are actually mistakes of judgment (most clearly the error of choice in operative procedure is), there is no liability for the former and liability for the latter.[19] It is the mistaken diagnosis which is usually labeled a "mere error of judgment."[20] If the diagnosis is correct, and if the authorities are in conflict as to the proper procedure to be followed, the question of negligence is for the jury.[21] To narrow the safety zone even further, it has been held that when the diagnostic

14. See Tanner v. Sanders, 247 Ky. 90, 56 S.W.2d 718 (1933).

15. Moscicki v. Shor, 107 Pa. Super. 192, 200, 163 Atl. 341, 343 (1932).

16. Ribarin v. Kessler, 78 Ohio App. 289, 293-94, 70 N.E.2d 107, 110 (1946).

17. See, *e.g.*, Phillips v. Stillwell, 55 Ariz. 147, 149, 99 P.2d 104 (1940); Preston v. Hubbell, 87 Cal. App. 2d 53, 56, 196 P.2d 113, 114-15 (1948) (dictum); Burdge v. Errickson, 132 N.J.L. 377, 40 A.2d 573 (Ct. Err. & App. 1945).

18. See CARNAHAN, *op. cit. supra* note 3, § 85.

19. See Walter v. England, 133 Cal. App. 676, 686-87, 24 P.2d 930, 934 (1933); Rising v. Veatch, 117 Cal. App. 404, 409, 3 P.2d 1023, 1025 (1931); Specht v. Gaines, 65 Ga. App. 782, 784, 16 S.E.2d 507, 509 (1941); Zulkiwsky v. Greenblat, 14 N.J. Misc. 345, 184 Atl. 806 (Sup. Ct. 1936), *aff'd per curiam*, 117 N.J.L. 526, 189 Atl. 51 (Ct. Err. & App. 1937); Love v. Zimmerman, 226 N.C. 389, 38 S.E.2d 220 (1946); Ogle v. Noe, 6 Tenn. App. 485 (1927).

20. *But see* Hazelwood v. Adams, 245 N.C. 398, 95 S.E.2d 917 (1957).

21. Malila v. Meacham, 187 Ore. 330, 355-59, 211 P.2d 747, 758-59 (1949).

error is "gross," there is negligence for which the dentist is responsible.[22] There is, indeed, little room for error of judgment.

The Standard for Specialists

A specialist is held to the standard of other professionals practicing in the same specialized area in the same or in a similar community.[23] Just as a general practitioner may not be required to possess and exercise the skill and learning of an exodontist (or extraction expert),[24] an exodontist must use the superior skill and learning which he holds himself out to the public as possessing. Although the standard of the specialist is therefore higher than that of the general practitioner, actual results may, it seems, seldom correspond to this theory. This observation is derived from the frequent reiteration and application of the rule that the dentist need not exercise the highest degree of care and skill, but only that degree ordinarily accepted as part of the "duty formula" in that particular jurisdiction.[25] It makes no difference whether the dentist *has* the highest degree of skill; he nevertheless needs to employ but ordinary skill.[26] It seems that in the present advanced state of dental science, it is sufficiently difficult for a jury to distinguish the ordinary skill of a specialist (and especially of an exodontist, since the general practitioner handles many extractions) that when a jury is instructed that a dentist need not exercise his full capabilities, but only those ordinarily possessed by other specialists, the jury is likely to reach the same result it would have reached had a general practitioner been the defendant.

APPLICATION OF THE STANDARD

For a proper understanding of the dentist's legal duty, under the hazards of extraction, a study must be made of how the standard is applied to certain typical recurring problems.

Anesthetization

Expert testimony has managed to convince most courts that have considered the problem, that a hypodermic needle may break off in the pa-

22. Mangiameli v. Ariano, 126 Neb. 629, 253 N.W. 871 (1934).

23. See Stallcup v. Coscarat, 79 Ariz. 42, 50-51, 282 P.2d 791, 797 (1955); Chubb v. Holmes, 111 Conn. 482, 488-89, 150 Atl. 516, 519 (1930); Eatley v. Meyer, 10 N.J. Misc. 219, 221, 158 Atl. 411 (Sup. Ct. 1932); Malila v. Meacham, 187 Ore. 330, 335-36, 211 P.2d 747, 749-50 (1949).

24. Tennenbaum v. Klein, 252 App. Div. 796, 299 N.Y. Supp. 119 (2d Dep't 1937).

25. Meyer v. St. Paul-Mercury Indem. Co., 225 La. 618, 623, 73 So.2d 781, 782 (1954); Alexander v. Hill, 174 Va. 248, 252, 6 S.E.2d 661, 663 (1940). *But see* Keily v. Colton, 1 City Ct. Rep. 439, 441 (N.Y. Marine Ct. 1882), where the court, speaking of the dentist, who dropped an extracted tooth down an anesthetized patient's throat, said: "He [the patient] was in their charge and under their control to such an extent that they were required to exercise the highest professional skill and diligence to avoid every possible danger, for the law imposes duties upon men according to the circumstances in which they are called to act."

26. Acton v. Morrison, 62 Ariz. 139, 142, 155 P.2d 782, 783 (1945).

tient's jaw no matter how careful the dentist is.[27] After all, the dentist does not manufacture the needle; and if he carefully uses a needle which is made by a reputable manufacturer and which does not show signs of possible weakness, he should not be held liable for its breaking off. One court, however, has held that an inference of negligence is raised by the breaking off of the needle, the court invoking the ratiocination that if the breaking off of needles were a common experience among dentists, they would find another method of local anesthetization.[28]

The same standard that applies to other aspects of the dentist's professional conduct governs the administration of general anesthetics.[29] If the dentist is aware that the patient is under a physician's care for a condition which contra-indicates the use of a general anesthetic, he should not administer it. To avoid risk, it is best to inquire of the patient's physician when there is any indication of a condition to which the administration of a general anesthetic would be inimical.[30] It would be foolish for a dentist to lean very heavily on the sleep-inducing statement of the Superior Court of Delaware that "the mere fact that a patient dies under the influence of an anesthetic does not show negligence."[31] It may take little more than death to take the case from a sympathetic judge to a sympathetic jury.

Using the Tools of the Trade

The utmost care should be taken by a dentist to be certain that a piece of burr (a cutting tool) or elevator (a device used to pry the tooth from the socket) is not broken off or allowed to remain in the patient's gum.[32] To break off the instrument is not necessarily negligence;[33] to fail to discover that it has been broken, or to be sure that the patient does not leave the office with a piece of metal in his gums will be negligence.[34] The danger of allowing an instrument accidentally to come into contact with a loose tooth should be clear. It has been held, however, that it is not necessary to pre-examine teeth before inserting an instrument into the patient's mouth.[35]

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27. See Ernen v. Crofwell, 272 Mass. 172, 175, 172 N.E. 73, 74 (1930); Mitchell v. Poole, 229 Mo. App. 1, 12-13, 68 S.W.2d 833, 838-39 (1934); Smith v. McClung, 201 N.C. 648, 161 S.E. 91 (1931).

28. Alonzo v. Rogers, 155 Wash. 206, 210-12, 283 Pac. 709, 710-11 (1930).

29. Harris v. Wood, 214 Minn. 492, 498, 8 N.W.2d 818, 821 (1943).

30. See CARNAHAN, *op. cit. supra* note 3, § 93.

31. Mitchell v. Atkins, 36 Del. (6 W. W. Harr.) 451, 455, 178 Atl. 593, 595 (Super. Ct. 1935).

32. See Fairley v. Douglas, 76 So. 2d 576, 580 (La. Ct. App. 1955); Percifield v. Foutz, 71 Nev. 220, 285 P.2d 130 (1955).

33. Giesenschlag v. Valenta, 225 S.W.2d 914 (Tex. Ct. Civ. App. 1949).

34. Cases cited note 32 *supra.*

35. Meyer v. St. Paul-Mercury Indem. Co., 225 La. 618, 629, 73 So. 2d 781, 784 (1954).

Leaving a Root in the Gum

An extracted tooth is usually decayed. When force is applied to it in the process of extraction, it is so natural and common for the tooth to break off at the gumline that the dentist cannot be held negligent merely for breaking off the crown;[36] but it may be negligence to allow a root to remain in the patient's mouth and to cause difficulty.[37] It also may be negligence not to be aware of the fact that a root tip remains,[38] and though it may not be negligence to fail to x-ray the jaw after an extraction to determine whether it remains,[39] this is one of the many instances in which the timely and accurate use of x rays will save a dentist the embarrassment and inconvenience of a lawsuit.

The Tooth in the Windpipe

One type of dental malpractice case in which the fact situations closely resemble one another is that in which an extracted tooth falls down the patient's throat and lodges in the bronchial tubes. Typically, the patient has a heavy feeling in his chest after the operation. He then suffers severe pain and violent coughing spells, emitting blood and sputum in large quantities. He undergoes several examinations which bear no diagnostic fruit, and then one day, after a particularly violent fit of coughing, the tooth or a portion of it is expelled, and the patient begins to recover.[40] The authorities are in conflict as to whether res ipsa loquitur can be applied to establish negligence in such cases,[41] although it is clearly negligence not to use throat packs to avoid such occurrences.[42]

The Broken Jaw

No inference of negligence arises when the patient's jaw is broken during an extraction, but a jury might well consider it along with other evidence of negligence.[43] It is certainly negligence not to reveal the

36. Brashears v. Peak, 19 So. 2d 901, 903 (La. Ct. App. 1944); Staples v. Washington, 125 A.2d 322 (D.C. Munic. Ct. App. 1956).

37. See Blakeslee v. Tannelund, 25 Cal. App. 2d 32, 76 P.2d 216 (1938); Perrin v. Rodriguez, 153 So. 555, 557 (La. Ct. App. 1934); Hazelwood v. Adams, 245 N.C. 398, 95 S.E.2d 917 (1957); Love v. Zimmerman, 226 N.C. 389, 38 S.E.2d 220 (1946).

38. See *ibid.*

39. See Brashears v. Peak, 19 So. 2d 901, 904 (La. Ct. App. 1944).

40. See, *e.g.*, Bollenbach v. Bloomenthal, 341 Ill. 539, 173 N.E. 670 (1930); Toy v. Mackintosh, 222 Mass. 430, 110 N.E. 1034 (1916); Keily v. Colton, 1 City Ct. Rep. 439 (N.Y. Marine Ct. 1882); Goehring v. McDiarmid, 289 Pa. 193, 137 Atl. 187 (1927) (per curiam).

41. *Compare* Keily v. Colton, 1 City Ct. Rep. 439, 441-42 (N.Y. Marine Ct. 1882), *with* Bollenbach v. Bloomenthal, 341 Ill. 539, 544, 173 N.E. 670, 672 (1930). See also notes 88-93, 98 *infra* and accompanying text.

42. Yarrington v. Pittenger, 8 N.J. Misc. 143, 149 Atl. 347 (Sup. Ct. 1930) (per curiam).

43. Ogle v. Noe, 6 Tenn. App. 485, 489-90 (1927).

fracture to the patient.[44] Treatment of the fracture should be attended to immediately and adequately, and even the general practitioner is expected to set the fracture properly.[45] "[T]reatment in such cases is almost a matter of common knowledge."[46]

Infection

In cases of infection the dentist can avoid successful suits by purging himself of any possible ground for an allegation that his instruments were not sterile. Any indication of infection after the operation should be treated immediately.[47] The courts recognize that the dentist is primarily an office practitioner and normally cannot be expected to treat his patients in their homes, but on receiving information in his office which should lead to suspicion of infection, it would be wise to have the patient sent to a doctor or to a hospital.[48] Res ipsa loquitur has not been applied to cases of infection.[49]

The Use of X rays

Of course, one who holds himself out as a specialist in the taking of x rays will be held liable for faulty diagnosis based on negligently taken x rays.[50] The general practitioner, however, is not held to the standard of anyone but another general practictioner insofar as is concerned the quality of the x ray upon which he bases his diagnosis.[51] To show that the dentist might have produced a better result had he taken an x ray is not a sufficient establishment of proximate causation to send the case to the jury.[52] Taking an x ray both before and after the operation is, nevertheless, an excellent way to avoid complications that lead to the initiation of irksome (though often unsuccessful) legal embroilments.

Emergencies — Post-operative Care

Emergencies occurring during and after treatment should be cared for in the office[53] in order to avoid the liability that may follow from the

44. Shutan v. Bloomenthal, 371 Ill. 244, 20 N.E.2d 570 (1939); Wambold v. Brock, 236 Iowa 758, 763-64, 19 N.W.2d 582, 584-85 (1945).

45. Preston v. Hubbell, 87 Cal. App. 2d 53, 57-60, 196 P.2d 113, 115-16 (1948) (dictum); Wambold v. Brock, 236 Iowa 758, 763-64, 19 N.W.2d 582, 584-85 (1945).

46. *Id.* at 762, 19 N.W.2d at 584.

47. See Rising v. Veatch, 117 Cal. App. 404, 3 P.2d 1023 (1931); Specht v. Gaines, 65 Ga. App. 782, 16 S.E.2d 507 (1941).

48. See cases cited note 47 *supra.*

49. See Haliburton v. General Hosp. Soc., 133 Conn. 61, 48 A.2d 261 (1946).

50. Eatley v. Meyer, 10 N.J. Misc. 219, 221, 158 Atl. 411 (Sup. Ct. 1932).

51. See Rawleigh v. Donoho, 238 Ky. 480, 482, 38 S.W.2d 227-28 (1931).

52. Dunbar v. Adams, 283 Mich. 48, 276 N.W. 895 (1937).

53. See Barham v. Widing, 210 Cal. 206, 212, 291 Pac. 173, 175-76 (1930); Preston v. Hubbell, 87 Cal. App. 2d 53, 57-60, 196 P.2d 113, 115-16 (1948) (dictum); Hill v. Jackson, 218 Mo. App. 210, 216-17, 265 S.W. 859, 862 (1924); Donathan v. McConnell, 121 Mont. 230, 243-44, 193 P.2d 819, 826 (1948).

untoward results of lack of prompt treatment. Profuse bleeding may not safely be regarded as a natural concomitant of extraction. The wise dentist will not let his patient leave the office until he is certain that hemorrhaging is well under control.[54] A careful examination of the patient's mouth ought to follow any extraction.[55] If the patient is under general anesthesia and an emergency arises which requires prompt treatment to preserve life or health, the law does not expect the dentist to awaken the patient, explain to him the emergency, obtain consent to perform the necessary additional acts which will remove the danger, and then re-anesthetize the patient.[56] Emergency treatment is as much a part of the operation to which the patient consented as the extraction itself.[57] A real dilemma for the dentist is indicated by Brigadier General Neal A. Harper, who says that emergencies may require bold and imaginative treatment, but that experimentation and untried remedies will not be permitted without the patient's consent, which, in an emergency, cannot possibly be obtained.[58] The only solution to the dilemma seems to be for the dentist to acquaint himself with the accepted methods of treatment of various emergencies.

Contributory Negligence

Contributory negligence is seldom alleged in a dental malpractice suit. There is little opportunity for negligence on the patient's part during the extraction; there is none when he is under a general anesthetic. If, however, the patient refuses to co-operate with the dentist by following his instructions regarding post-operative care, the patient runs a distinct risk of losing any cause of action he may have had against the dentist.[59] When a patient suffered osteomyelitis from a root left in her mouth after extraction, it was held as a matter of law that the patient could not recover because (among other reasons) her damages followed failure to return the next day as the dentist had requested.[60]

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54. Harper, *Legal Aspects of Emergency Treatment*, DENTAL CLINICS OF NORTH AMERICA, SYMPOSIUM ON EMERGENCIES IN DENTAL PRACTICE 593, 594 (July, 1957).

55. See Burch v. Greenwald, 247 App. Div. 471, 286 N.Y. Supp. 661 (4th Dep't 1936).

56. See Preston v. Hubbell, 87 Cal. App.2d 53, 57-60, 196 P.2d 113, 115-16 (1948) (dictum).

57. Barham v. Widing, 210 Cal. 206, 212, 291 Pac. 173, 175-76 (1930); Preston v. Hubbell, 87 Cal. App. 2d 53, 57-60, 196 P.2d 113, 115-16 (1948) (dictum).

58. Harper, *supra* note 54, at 597.

59. See Gentile v. De Virgilis, 290 Pa. 50, 138 Atl. 540 (1927); *cf.* Tanner v. Sanders, 247 Ky. 90, 97, 56 S.W.2d 718, 721 (1933).

60. Gentile v. De Virgilis, 290 Pa. 50, 138 Atl. 540 (1927).

Imputed Negligence

The rules of respondeat superior have full play in considering liability of the dentist for the torts of his office staff.[61] The nation's outstanding authority on dental jurisprudence voices the following warning:

> A substantial number of cases fall within this category [of injury to the patient by an office assistant who is working with the dentist]. The great variety of incidents by which a patient is injured by act of a nurse or other assistant in close proximity to the dentist are suggested by these few: burns by spilling hot water, from modelling compounds and contact with electrical equipment; a bottle containing a wrong solution or compound is handed to and used by the dentist; and infection follows abrasion from an instrument.[62]

If a dentist follows the commendable practice of calling in a physician to assist him in an especially difficult or hazardous operation, and if, during the performance of that operation, the assisting physician commits some act of negligence, the dentist will not have the negligence of the physician imputed to him on the theory that they are joint enterprisers, at least so long as the doctor's negligence was not in the performance of a task which is peculiarly dental in nature.[63] A purported reason for this rule (which does not seem to support it) is that the dentist, who is, after all, with reference to the entire medical profession, a sort of specialist, is not held to the same standard of care as is a physician.[64]

The problem of liability for negligent treatment by a subsequent dentist, which treatment was made necessary by the negligence of the defendant dentist, was considered in a recent Virginia case.[65] The defendant refused to extract a root that he had left in plaintiff's gum. After the subsequent tortfeasor removed the root, he negligently sewed up absorbent cotton in the incision. The court held that although a defendant is liable for the foreseeable negligence of another who treats the injury caused by him as original tort-feasor, the negligence of the second dentist was so gross that it could not reasonably be anticipated in the present state of medical science.[66] The court did not bother to disclose the criteria by which the act of the subsequent tort-feasor was determined to be gross negligence.

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61. See Comeaux v. Miles, 9 La. App. 66, 118 So. 786 (1928).

62. CARNAHAN, THE DENTIST AND THE LAW § 144, at 207 (1955).

63. See Nelson v. Sandell, 202 Iowa 109, 114-16, 209 N.W. 440, 443-44 (1926). See also Annot., 46 A.L.R. 1454 (1927).

64. Nelson v. Sandell, 202 Iowa 108, 114-16, 209 N.W. 440, 443-44 (1926).

65. Corbett v. Clarke, 187 Va. 222, 46 S.E.2d 327 (1948).

66. *Id.* at 226-27, 46 S.E.2d 327 at 329.

The Unlicensed Practitioner

The authorities are split as to whether it is negligence per se to practice dentistry without a license.[67] Where the negligence per se concept is applied, any damage which proximately results from injury to the patient by an unlicensed dentist, even though such injury is purely accidental, may be recovered from the practitioner.[68] In a recent, particularly dissatisfying case, the decedent went to a dentist to have her three remaining snags (stumps of teeth) removed. The snags were causing decedent considerable pain, so she finally succumbed to an invitation by the wife of the absent dentist, a woman who had had no dental training whatsover, to be seated and allow defendant-wife to perform the extractions. Decedent thereafter suffered extreme agony from the pain in her mouth. Four days after the operation she was observed to have a bad case of trench mouth. In a couple of weeks she died of advanced nephritis. Plaintiff was held to have been properly nonsuited in an action for wrongful death and survival. The North Carolina Supreme Court held[69] that practicing dentistry without a license is not negligence per se;[70] that an unlicensed practitioner is held to the same standard as a licensed one;[71] that plaintiff's evidence of negligence was purely conjectural;[72] and that there was no evidence that defendant's lack of knowledge and skill was the proximate cause of decedent's injury because, although trained dentists do know that it is dangerous to perform an extraction while the patient is suffering from trench mouth, there was no proof of the existence of trench mouth at the time of the extraction.[73] If application of the doctrine of negligence per se will tend to the production of more equitable results than were achieved in the case just described, the author favors its invocation.

The Statute of Limitations

An excellent reason for immediately revealing to the patient any untoward results of the extraction is the possibility that the statute of limitations will not begin to run until the patient is informed of the alleged negligence which has caused him damage. By his silence the dentist commits constructive fraud and breaches a sacred duty which may readily be analogized to a fiduicary duty of revelation. One dentist left considerable scrap metal in a patient's jaw — a needle point and part of a

67. *Compare* Joly v. Mellor, 163 Wash. 48, 51-52, 299 Pac. 660, 661 (1931), *with* Grier v. Phillips, 230 N.C. 672, 678, 55 S.E.2d 485, 490 (1949).

68. See Joly v. Mellor, 163 Wash. 48, 51-52, 299 Pac. 660, 661 (1931).

69. Grier v. Phillips, 230 N.C. 672, 55 S.E.2d 485 (1949).

70. *Id.* at 678, 55 S.E.2d at 490.

71. *Id.* at 679, 55 S.E.2d at 490.

72. *Ibid.*

73. *Id.* at 679-80, 55 S.E.2d at 491.

drill — but was generous enough to hand plaintiff the x rays which he took after the operation. This reticent operator prevented the statute of limitations from running for seven years until another dentist discovered plaintiff's difficulty.[74]

The suit-saving nature of the efficient employment of the dentist's x-ray apparatus appears again in this area. A dentist who left a root in his patient's gum for one year without knowing it, was held to have committed a continuing tort, for which the statute of limitations did not begin to run until the last treatment, because it could be presumed that an x ray would have led to correct diagnosis.[75]

Miscellaneous

A few additional hints as to the legal duty of a dentist may be derived from consideration of some unusual incidents that have occurred in connection with extraction operations. In one case a patient was left sitting in the dentist chair after two extractions, still under the influence of nitrous oxide and in the charge of a nurse who had had no special training in the care of persons who were in such a condition. The patient slumped forward and broke out of defendant's office by way of his plate glass window. The court held that there was evidence for the jury of negligence in leaving plaintiff with such an unskilled companion.[76] In another case the New York Court of Appeals has recently decided[77] that there is no evidence of negligence for the jury when the chorda tympani and lingual nerve were discovered to be in a severed state after an extraction, since the plaintiff had no evidence that the operation was performed in a negligent manner. When another dentist was sued for severing the inferior dental nerve, the patient was more fortunate. It was alleged, and, indeed, it was admitted by defendant that there was a profuse flow of blood which somewhat obscured the operative field. The court removed some of the obscurity in the field of malpractice by the following explication:

> The negligence involved is not the adoption of an incorrect diagnosis or standard of treatment, but, having adopted a proper standard of treatment, consists in the performance thereof in a negligent manner. In such a case any pertinent evidence having any fair tendency to sustain the charge of negligence will be sufficient to take the question to the jury.[78]

Such "pertinent evidence" was found to have existed.

74. Morrison v. Acton, 68 Ariz. 27, 35-36, 198 P.2d 590, 595-96 (1948); Acton v. Morrison, 62 Ariz. 139, 143-45, 155 P.2d 782, 783-84 (1945).

75. Hotelling v. Walther, 169 Ore. 559, 130 P.2d 944 (1942).

76. Langis v. Danforth, 308 Mass. 508, 33 N.E.2d 287 (1941).

77. Cassano v. Hagstrom, 5 N.Y.2d 643, 159 N.E.2d 348, 187 N.Y.S.2d 1 (1959).

78. Daly v. Lininger, 87 Colo. 401, 407, 288 Pac. 633, 636 (1930).

Finding and understanding the law in the area of dental extractions is not nearly so difficult as proving one's case against a particular defendant dentist. To understand the proof phase of the case is of importance not only to the attorney for the patient, but also to the dentist, in that the latter can avoid some of the hazards that lead to a successful malpractice suit by knowing how his patient might make out a malpractice case against him.

PROBLEMS OF PROOF

The Expert Witness

Ordinarily, the plaintiff in a malpractice case involving an extraction must have expert testimony to support his allegations of negligence and of proximate causation before he can bring his problem to the jury for consideration.[79] The expert is needed to inform the jury of the custom in the defendant's professional community or neighborhood[80] and to apply the standards of the profession to the facts. From this the jury can determine whether the defendant violated his duty.

The expert need not be a dentist to qualify as an expert witness if he is a member of the medical profession who is purported to have knowledge of the anatomy of the mouth.[81] However, a physician who examined x rays taken by defendant dentist was not entitled to interpret those x rays on trial for the purpose of establishing that the x rays were so unclear that defendant could not operate safely upon the basis of the information contained in them.[82] In support of this decision, it may be noted that a physician who is requested to interpret x rays as an expert is likely to have significantly greater skill than the average dentist in evaluating x rays, and the dentist should not be held to a high standard of excellence in this phase of his employment unless he holds himself out as an x-ray specialist.

In many of the few malpractice actions in which the patient has met with success, a careful reading of the opinion indicates that plaintiff was assisted and guided by a physician or dentist who later appeared at the

79. Haliburton v. General Hosp. Soc., 133 Conn. 61, 48 A.2d 261 (1946); Frogge v. Shugrue, 126 Conn. 608, 613, 13 A.2d 503, 504 (1940); Person v. Lilliendahl, 118 Conn. 693, 172 Atl. 94 (1934); Chubb v. Holmes, 111 Conn. 482, 487, 150 Atl. 516, 518-19 (1930); Rawleigh v. Donoho, 238 Ky. 480, 484-85, 38 S.W.2d 227, 228-29 (1931); Borysewicz v. Dineen, 302 Mass. 461, 19 N.E.2d 540 (1939); April v. Peront, 88 N.H. 309, 188 Atl. 457 (1936); Bierstein v. Whitman, 360 Pa. 537, 62 A.2d 843 (1949); Devereaux v. Smith, 213 S.W.2d 170 (Tex. Ct. Civ. App. 1948).

80. See Rising v. Veatch, 117 Cal. App. 404, 408, 3 P.2d 1023, 1025 (1931); Nemer v. Green, 316 Mich. 307, 25 N.W.2d 207 (1946).

81. Hoskinson v. Smyser, 95 Kan. 568, 148 Pac. 640 (1915).

82. Rawleigh v. Donoho, 238 Ky. 480, 482, 38 S.W.2d 227-28 (1931).

trial as a witness for plaintiff.[83] On the other hand, it is a rare case indeed in which the plaintiff's expert was eager or even co-operative. One authority[84] observes that the dental profession has not yet developed the professional expert witness, who is willing to testify for any patient at any time if plaintiff's attorney makes it worth his while. This shortage of co-operative witnesses may be corrected, fortunately for the patient with a meritorious claim, by the growth of specialized fields of dental practice. Specialists, with their superior knowledge of certain aspects of practice, are tempted to comment upon the work, within their peculiar fields of knowledge, previously performed upon their patients by general practitioners. The best way for the general practitioner to avoid having a specialist make adverse comments upon his work is to reveal to his patient any errors that he has made and to explain the procedure of prior operations thoroughly to the specialist upon referrring a patient to him.[85] If the specialist is aware of past procedure, he may not be critical of bad results, or at least he will not voice this criticism to the patient and plant the seeds of a malpractice suit in which he will be requested to appear as plaintiff's expert witness.

Exceptions to Requirement of Expert Testimony

To compensate for the shortages of professional co-operation, the courts have developed certain exceptions to the rule requiring expert testimony to sustain plaintiff's burden of proof. These exceptions will now be considered in detail.

1. *Res Ipsa Loquitur*

> The plaintiff has a substitute for the facts constituting the alleged acts of negligence, which are not easily accessible to him, so he is freed from the duty to plead the acts of negligence of the defendant, which under the circumstances would be little more than blind guesswork.[86]

The preceding is what one authority has to say on one small aspect of the usefulness of the inference raised by res ipsa loquitur in dental cases. When res ipsa loquitur is an available doctrine, there is no need for the plaintiff to put forth expert testimony to sustain his burden of proof; for

83. See, *e.g.*, Staples v. Washington, 125 A.2d 322 (D.C. Munic. Ct. App. 1956); Bridgewater v. Boyles, 107 N.E.2d 641 (Ohio Ct. App. 1951); Malila v. Meacham, 187 Ore. 330, 211 P.2d 747 (1949).

84. REGAN, DOCTOR AND PATIENT AND THE LAW 476-77 (3d ed. 1956).

85. Boyko, *Legal Dental Responsibilities in Malpractice Suits*, 28 J. OF THE N.J.S. DENTAL SOC'Y 22 (1957).

86. Arthur, *Res Ipsa Loquitur as Applied in Dental Cases*, 15 ROCKY MT. L. REV. 220, 234 (1943).

when "the thing speaks for itself," the plaintiff is assured that the jury will consider his case.[87]

The first case[88] to apply the rule to a dental extraction was decided in 1882; significantly this was also the first American malpractice case involving a dental extraction. A lower tooth lodged in plaintiff's bronchial tubes while he was under the influence of nitrous oxide. Citing *Byrne v. Boadle*,[89] the case in which res ipsa loquitur was first applied, the court held that the event's occurrence was sufficient to make out a prima facie case of negligence for the jury.[90] The leading case on malpractice hazards in dental extractions, *Whetstine v. Moravec*,[91] also a tooth-in-the-lung affair, applied res ipsa loquitor.[92]

> It is common knowledge that, in extracting a tooth or its root, neither ordinarily passes into the trachea and thus into the lungs. In fact such an occurrence is most rare. In the words of the authorities it is a matter of such rare occurrence and unusual character, that its very happening carries with it a strong inherent possibility of negligence.[93]

A brief scrutiny of the above test indicates that res ipsa does not ordinarily apply to cases of malpractice, any more than it ordinarily applies to the usual negligence action. A few courts hold that res ipsa loquitur never applies to a malpractice action because the medical sciences are not in such an advanced state that the common experience of mankind contraindicates careful procedure when an unfortunate result arises from treatment by a dentist.[94] Some base the exclusion of the theory in these cases on the ground that a dentist does not guarantee good results.[95] Where res ipsa loquitur is employed at all to relieve plaintiff of his burden, it seems to be limited to injuries not connected with the peculiar dangers involved in the operation in question.[96] Thus, the fracture of a tooth

87. PROSSER, TORTS § 43, at 212 (1955).

88. Keily v. Colton, 1 City Ct. Rep. 439 (N.Y. Marine Ct. 1882).

89. 2 H. & C. 722, 159 Eng. Rep. 299 (Ex. 1863).

90. Keily v. Colton, 1 City Ct. Rep. 439, 441-42 (N.Y. Marine Ct. 1882).

91. 228 Iowa 352, 291 N.W. 425 (1940).

92. *Id.* at 365-66, 291 N.W. at 434.

93. *Id.* at 373, 291 N.W. at 435.

94. See Adams v. Heffington, 216 Ark. 534, 535, 226 S.W.2d 352 (1950) (dictum); *cf.* Haliburton v. General Hosp. Soc., 133 Conn. 61, 48 A.2d 261 (1946); Donoho v. Rawleigh, 230 Ky. 11, 15, 18 S.W.2d 311, 312 (1929).

95. See Malila v. Meacham, 187 Ore. 330, 354-55, 211 P.2d 747, 757 (1949); *cf.* Frogge v. Shugrue, 126 Conn. 608, 613, 13 A.2d 503, 504-05 (1940); Chubb v. Holmes, 111 Conn. 482, 489, 150 Atl. 516, 519 (1930).

96. See, *e.g.*, Wolfe v. Friedman, 158 Misc. 656, 657-58, 286 N.Y. Supp. 118, 121 (N.Y. City Ct., Trial T. 1936), which the author is wont to call the *Testicles Case.* It seems that patient, going through the "fighting stage" of nitrous oxide, grasped defendant's private parts with a powerful and tenacious grip. Defendant broke plaintiff's pinky in releasing her hold. The court staidly applied res ipsa loquitur, and required defendant to satisfactorily explain how such an event could occur, a monumental task indeed! *Cf.* Pepin v. Averill, 113 Vt. 212, 216, 32 A.2d 665, 668 (1943).

outside the operative field,[97] the dropping of a tooth into the trachea,[98] and the breaking of a needle in the patient's jaw[99] create inferences of negligence. The breaking off of a tooth which is being extracted[100] or the fracturing of a patient's jaw[101] do not imply negligence.

Although the problem has received scant consideration, the amount of control which the dentist has over the instruments which he employs and over the reactions of the patient should be an important factor to be analyzed in determining whether res ipsa loquitur applies.[102] One court has held[103] that the dentist who is performing an extraction is not in complete control of the tooth, but is merely attempting to gain control. On the foundation of this observation the court refused to hold res ipsa loquitur to be available when the extracted tooth and some of its filling fell down plaintiff's throat while she was under general anesthetic.

A few courts, without applying res ipsa loquitur by name, have employed other inferences of negligence, such as common knowledge,[104] common sense,[105] or judicial notice.[106] All of these are devices for helping plaintiff to make out a prima facie case, and they differ from res ipsa loquitur only in name.

2. *Admissions Against Interest*

Although they have seldom been sufficient in and of themselves to send malpractice cases to the jury,[107] admissions against interest often have been considered sufficient evidence to alleviate the burden of introducing expert testimony.[108] Such declarations, after all, make the defendant-dentist the expert witness of the patient *pro hac vice.* In a classic example of a dentist's over-exercise of his own jaw muscles, after jamming the needle angrily into plaintiff's jaw and breaking it off, the den-

97. Ambrosi v. Monksa, 85 A.2d 188, 190 (D.C. Munic. Ct. App. 1951).

98. Whetstine v. Moravec, 228 Iowa 352, 365-66, 291 N.W. 425, 434 (1940); Keily v. Colton, 1 City Ct. Rep. 439, 441-42 (N.Y. Marine Ct. 1882). *Contra,* Bollenbach v. Bloomenthal, 341 Ill. 539, 544, 173 N.E. 670, 672 (1930).

99. Alonzo v. Rogers, 155 Wash. 206, 210-12, 283 Pac. 709, 710-11 (1930).

100. See note 36 *supra* and accompanying text.

101. Hill v. Jackson, 218 Mo. App. 210, 215, 265 S.W. 859, 861 (1924); Francis v. Brooks, 24 Ohio App. 136, 156 N.E. 609 (1926) (dictum).

102. PROSSER, TORTS § 42, at 205 (1955).

103. Bollenbach v. Bloomenthal, 341 Ill. 539, 544, 173 N.E. 670, 672 (1930).

104. See Mastro v. Kennedy, 57 Cal. App. 2d 499, 504, 134 P.2d 865, 868 (1943); Ambrosi v. Monksa, 85 A.2d 188, 190 (D.C. Munic. Ct. App. 1951).

105. See Hill v. Jackson, 218 Mo. App. 210, 216-17, 265 S.W. 859, 862 (1924); Bode v. Robeson, 31 OHIO L. REP. 608 (Ct. App. 1930).

106. See Barham v. Widing, 210 Cal. 206, 216, 291 Pac. 173, 177 (1930).

107. But see Tully v. Mandell, 269 Mass. 307, 309, 168 N.E. 923 (1929).

108. See Whetstine v. Moravec, 228 Iowa 352, 360, 291 N.W. 425, 429 (1940); Loveland v. Nelson, 235 Mich. 623, 626, 209 N.W. 835, 836 (1926); Lydamore v. Foote, 251 App. Div. 775, 295 N. Y. Supp. 608 (3d Dep't 1937); Pepin v. Averill, 113 Vt. 212, 32 A.2d 665 (1943).

tist growled: "I guess I will quit this damn business and go to plumbing."[109] The wise dentist will avoid spontaneous, unguarded exclamations of surprise, grief, or anger, as well as those of error. The mistake admitted, of course, is not legally significant unless it is synonymous with negligent operation, as opposed to mere error of judgment in diagnosis.[110] (The admission will be legally significant under all circumstances, however, in those jurisdictions in which there is liability for error of judgment in diagnosis.)

3. *Facts Comprehensible by a Layman*

In several jurisdictions it has been decided that when the facts are of such a non-technical nature that they can be clearly comprehended by the average layman, there is no necessity for plaintiff to produce expert opinion testimony in order to establish a prima facie case.[111] The clear reason for this exception to the rule requiring such testimony is the reluctance of professionals to testify against their brother-practitioners.[112] Under this exception, a plaintiff was allowed to testify that the defendant held the hypodermic needle in plaintiff's jaw for only two to four seconds.[113] The exception has also been applied to the tooth-in-the-lung situation,[114] to the fracturing of a sound jaw,[115] and to injury caused by the stubbornness and discourtesy of the dentist.[116]

Since the exception based on facts within the knowledge of laymen is quite malleable, it may grow to an extent adequate to dissolve the rule requiring expert testimony if the profession continues to refrain from providing our courts with the benefit of their knowledge of professional standards.

Establishing Proximate Causation

In malpractice cases involving dental extractions, it is unusually difficult to prove proximate causation. The problem arises not in establishing the extent to which a defendant will be held liable for the results of his

109. Bode v. Robeson, 31 OHIO L. REP. 608 (Ct. App. 1930).

110. Walter v. England, 133 Cal. App. 676, 686-87, 24 P.2d 930, 934 (1933).

111. *Id.* at 686, 689-90, 24 P.2d at 933, 935; Nelson v. Parker, 104 Cal. App. 770, 776, 286 Pac. 1078, 1081 (1930); Steinke v. Bell, 32 N.J. Super. 67, 70, 107 A.2d 825, 826 (Super. Ct. 1954); Bode v. Robeson, 31 OHIO L. REP. 608 (Ct. App. 1930); Francis v. Brooks, 24 Ohio App. 136, 141-43, 156 N.E. 609, 611 (1926); Hill v. Parker, 12 Wash. 2d 517, 529, 122 P.2d 476, 482 (1942).

112. See Butts v. Watts, 290 S.W.2d 777 (Ky. 1956).

113. Walter v. England, 133 Cal. App. 676, 686, 689-90, 24 P.2d 930, 933, 935 (1933).

114. Nelson v. Parker, 104 Cal. App. 770, 776, 286 Pac. 1078, 1081 (1930); Malone v. Bianchi, 318 Mass. 179, 61 N.E.2d 1 (1945); Toy v. Mackintosh, 222 Mass. 430, 432, 110 N.E. 1034, 1035 (1916).

115. Wambold v. Brock, 236 Iowa 758, 19 N.W.2d 582 (1945).

116. Bode v. Robeson, 31 OHIO L. REP. 608 (Ct. App. 1930).

negligent acts, but in proving that it was this defendant who caused the injury, or that the injury would not have occurred absent his negligence — in other words, cause in fact. Where, for example, the patient suffers from a mouth infection after the operation, the infection could have been caused (with nearly equal probability) by mouth organisms naturally present,[117] by the activation of a dormant diseased condition,[118] or by the use of unclean instruments.[119] It is not sufficient for purposes of sustaining the patient's burden of proof to establish equal probabilities. The patient would be aided by showing that he has seen no other dentist but defendant prior to the injury.[120]

So long as there is not an equal probability that another cause produced the injury, the patient need not exclude every other possible cause.[121] For example, illness after an extraction, and subsidence of illness once pieces of metal that had been left in the jaw were removed, should be considered to be more than coincidence, so that the jury could find that the illness was caused by the negligence of defendant in leaving the metal in plaintiff's gums.[122] Nor need proximate causation be proved with absolute certainty, because the courts are willing to recognize that in the present state of medical science the beginnings of disease are often obscure.[123] One court felicitously stated the degree of certainty in causation which must appear in plaintiff's evidence before the case can reach the jury to be as follows:

> The defendant, by his testimony, contradicted the plaintiff on all points imputing negligence. What were the exact facts we do not know nor have we power to decide. That was the sole function of the jury, and their decision is final if based on sufficient evidence. The jury could, if they saw proper, reject the evidence of prior infection, and they could find, as they did, that the disease was occasioned by negligence of the defendant in the operations and treatment if the evidence was sufficient. That evidence need not be direct; it need only be circumstantial and is enough if it develops permissible inferences of the fact. Of course no one, doubtless not even the defendant, saw the periosteum, and consequently no one knows certainly whether it was injured by the dental instruments; but from the obstinacy of the tooth, the difficulty of extraction, the repeated attempts to extract it, the power applied, the injury to the hand of the operator, the consequent pain and pus in the jaw, there was enough evidence to support a finding that the

117. See Freche v. Mary, 16 So. 2d 213 (La. Ct. App. 1944).

118. See Shober v. McKeag, 16 Ohio Dec. 373, 375 (Super. Ct. 1905), *aff'd per curiam*, 76 Ohio St. 610, 81 N.E. 1190 (1907).

119. See Traverse v. Wing, 256 Mass. 320, 162 N.E. 354 (1926).

120. See Honaker v. Whitley, 124 Va. 194, 97 S.E. 808 (1919).

121. Morrison v. Acton, 68 Ariz. 27, 32-33, 198 P.2d 590, 593-94 (1948); Roberts v. Parker, 121 Cal. App. 264, 8 P.2d 908 (1932); Ambrosi v. Monksa, 85 A.2d 188, 189 (D.C. Munic. Ct. App. 1951); Whetstine v. Moravec, 228 Iowa 352, 361-62, 291 N.W. 425, 430-31 (1940).

122. Morrison v. Acton, 68 Ariz. 27, 32-33, 198 P.2d 590, 593-94 (1948).

123. See Roberts v. Parker, 121 Cal. App. 264, 8 P.2d 908 (1932).

> periosteum had been injured during the operations; and upon the contention that the wound was not properly treated and the offending tooth was not properly removed, there was enough evidence to justify the jury in finding that osteomyelitis developed after the operation, that it was the sole and proximate result of an injury to the periosteum and that the injury to the periosteum was proximately caused by negligence in the extraction of the tooth and in lack of treatment of the wound.[124]

This court allowed the jury to infer that the infection was caused by injury to the periosteum (bone layer), and from this inference to infer that the periosteum was injured by defendant's negligence. Not all courts, needless to say, have held such circumstantial evidence to be sufficient to make out a prima facie case.[125]

If expert testimony is necessary to establish negligence, it is clearly necessary to prove the complicated issues of proximate causation.[126] Although the issue of proximate cause is generally held to be one for the jury to decide, a jury's verdict on this point in a malpractice suit is not likely to be as binding upon a reviewing court as such verdict would be in other negligence actions, because the inference of causation is based upon expert *opinion* testimony rather than on factual testimony.[127]

Because of the difficult problems of proof with respect to the issue of cause in fact, the advisability of each person's maintaining a single dentist should be clear. It is illustrated by the following syllabus from the Southeastern Reporter:

> In an action against a dentist for malpractice, where it appeared that plaintiff, who had consulted defendant and then another dentist, suffered a fractured jaw as a result of the treatment of one or another, evidence *held* unsufficient [*sic*] to establish that defendant fractured plaintiff's jaw, so as to warrant judgment against him.[128]

One need not be litigious-minded to heed the warning above.

Damages

> Relatively fewer malpractice claims involve dentists than physicians; and, of course, catastrophic injury cases are infrequent in the field of dentistry. Nevertheless, malpractice claims against dentists are increasing in number and many judgments in considerable amounts are being recovered.[129]

Damages which naturally flow from the defendant's malpractice are recoverable. For example, when, as a result of the negligent fracture of

124. Bumberger v. Burke, 56 F.2d 54, 56 (3d Cir. 1932).

125. See Donathan v. McConnell, 121 Mont. 230, 239-40, 193 P.2d 819, 824 (1948).

126. See Hurley v. Johnston, 143 Conn. 364, 122 A.2d 732 (1956); Devereaux v. Smith, 213 S.W. 2d 170 (Tex. Ct. Civ. App. 1948); Honaker v. Whitley, 124 Va. 194, 97 S.E. 808 (1919); Lindloff v. Ross, 208 Wis. 482, 488-89, 243 N.W. 403, 405 (1932); Krueger v. Chase, 172 Wis. 163, 168-69, 177 N.W. 510, 512 (1920).

127. See *Id.* at 168, 177 N.W. at 512.

128. Honaker v. Whitley, 124 Va. 194, 97 S.E. 808 (1919).

129. REGAN, DOCTOR AND PATIENT AND THE LAW 476 (3d ed. 1956).

plaintiff's jaw, followed by a negligent setting of the broken jawbone by defendant, plaintiff was able to open her mouth no wider than the thickness of a pencil and could not chew her food, the latter condition could properly be considered by the jury in fixing damages.[130] Certainty of the measure and extent of damages equal to the certainty of negligence and proximate causation need not and should not, out of fairness to an innocent plaintiff, be necessary. Especially is this true in dental malpractice cases, for the dentist has a duty to treat the patient without negligence so as to decrease the danger of suffering and increase the chances of comfort and health.[131] Unless there is willful and gross misconduct, punitive damages are not allowed.[132] To allow them in the ordinary malpractice suit would come dangerously close to making the dentist an insurer of good results, not to mention the deleterious effect the frequent recovery of punitive damages would have on professional morale.

TECHNICAL ASSAULT

Since the courts have become used to conceiving of "malpractice" as being synonymous with "negligence," a suit for battery for extraction of a tooth not specified before the operation is not considered to be a suit for malpractice.[133] This bit of judicial labeling ordinarily has no more effect than to preclude application of the peculiar negligence doctrines, such as the requirement of expert testimony and the establishment of breach of duty and proximate cause. Negligence has nothing to do with this action for battery (commonly called "technical assault," probably because it is not reasonably possible for there to be genuine apprehension of the non-consensual operation). It seems, however, that merely by inserting the proper words in his petition, plaintiff has an option of bringing the suit as one for malpractice.[134] Courts have adopted this liberality to save plaintiffs from being barred by the shorter statutes of limitations for assault and battery.[135] Some courts indicate that in alleging extraction of a healthy tooth, plaintiff alleges *at least* negligence, and proving the fact should make out *at least* a prima facie case of negligence.[136]

130. Francis v. Brooks, 24 Ohio App. 136, 156 N.E. 609 (Ct. App. 1926).

131. Voss v. Adams, 271 Mich 203, 205-06, 259 N.W. 889, 890 (1935).

132. Eatley v. Mayer, 9 N.J. Misc. 918, 154 Atl. 10 (Cir. Ct. 1931), *aff'd on other grounds*, 10 N.J. Misc. 219, 158 Atl. 411 (Sup. Ct. 1932).

133. See, *e.g.*, Ober v. Hollinger, 14 Ohio L. Abs. 514 (Ct. App. 1933).

134. See Hershey v. Peake, 115 Kan. 562, 223 Pac. 1113 (1924); McClees v. Cohen, 158 Md. 60, 64, 148 Atl. 124, 125-26 (1930).

135. See *ibid.*; Hershey v. Peake, 115 Kan. 562, 223 Pac. 1113 (1924); Francis v. Brooks, 24 Ohio App. 136, 143-44, 156 N.E. 609, 612 (1926) (dictum).

136. See Griffen v. Norman, 192 N.Y. Supp. 322, 323 (App. T., 1st Dep't 1922); Krompoltz v. Hyman, 70 Pa. Super, 581, 582 (1919).

Absent an emergency, the dentist may not go beyond the implied contract of treatment unless, perhaps, the agreement is that the dentist may perform an exploratory operation, and the dentist discovers an unanticipated cause of the illness for which plaintiff sought a cure.[137] One dentist has recently commented on the problem just posed:

> The impracticality of waking a patient, explaining to him the change of procedure for the operation, and placing him under the anesthetic again, has been accepted only to a limited extent. For this reason hospitals and surgeons make extensive use of written waivers.[138]

Without the obstructions to reaching the jury that exist in a negligence action, the suit for technical assault may cause little difficulty in making out a prima facie case. The bare testimony of plaintiff that defendant was not authorized to extract the tooth in question, although contradicted by defendant and his office assistants, is sufficient to send the case to the jury.[139] Paradoxically, the intent of the patient may be a factor necessary to establish just what it was that he consented to. The following excerpt illustrates the issue:

> It would be consistent with the dentist's testimony that he meant or indicated the two lower molars when he said, "These two have got to come out," but it is a question of fact for the jury whether the plaintiff went to the dentist because she was suffering pain from her teeth generally and submitted to his judgment, or went there to have two roots extracted, and in violation of her instructions and without her consent he pulled two lower teeth instead. If the former, he was entitled to a verdict; if the latter, she was.[140]

Appreciation of the plight of the dentist when technical assault is alleged led to bad law in *Doniger v. Berger*.[141] The defendant was a professor of oral surgery to whom plaintiff's family dentist sent her for a removal of a first molar. Defendant, however, made his own independent diagnosis and determined that it was the second molar which was causing the difficulty. He removed the second molar, and plaintiff suffered no further pain. (In fact, her first molar was still intact at the time of trial.) When plaintiff recovered from the general anesthetic, she complained that the defendant had removed the wrong tooth, which he learned to be so upon telephoning the family dentist. Judgment for plaintiff in a trial without jury was reversed and the case was remanded for new trial on the theory that defendant had the right to make an independent diagnosis and to remove the tooth which he believed was causing the difficulty. Defendant should not be punished, said the court, for a job well

137. See Ober v. Hollinger, 14 Ohio L. Abs. 514 (Ct. App. 1933).
138. Streem, *Standards of Care in Dentistry*, 9 CLEVE.-MAR. L. REV. 154, 158 (1960).
139. Throne v. Wandell, 176 Wis. 97, 186 N.W. 146 (1922).
140. McClees v. Cohen, 158 Md. 60, 66-67, 148 Atl. 124, 127 (1930).
141. 241 App. Div. 23, 271 N.Y. Supp. 30 (1st Dep't 1934).

done. As the dissenting opinion[142] explicates, every competent adult has the right to use his body as he will. The majority allowed a far-from-urgent end to justify a less-than-moral means.

CONCLUSION

Little profundity is prerequisite to a conclusion that the expert witness is the most vital figure in any malpractice action. For this reason, the author has chosen to relate his concluding remarks to the subject of the expert witness — his importance, his testimony, and how he can make the law more just and the dental profession more appreciated. The expert is essential to successful results by the parties to a suit involving an extraction. He is the dental profession's public relations representative. He informs the public, through the medium of a public trial, precisely how high the standards of his profession are. His testimony is an indirect method of removing from the practice of dentistry those who are not fit to engage in it, but he never passes judgment upon the acts of the particular defendant.[143] The sole role of the expert witness is to vindicate the standards and ethics of the dental profession. To do so is not to lower himself into the arena of legal contest, but to elevate himself to the position of a patient-minded minister of the dentistry Gospel. Self-interest requires nothing less.[144]

On the other hand, when deserving and innocent patients do not recover upon meritorious claims because of a lack of co-operation from the dental profession, hard cases will continue to make bad law. The scope of the exceptions to the rule requiring expert opinion testimony to make out a prima facie case can easily be expanded. Evidence necessary to show proximate cause may be made less and less direct. Over-cautious and therefore inadequate treatment is bound to arise as long as dentists are fearful of their legal liability. Fear of liability, in turn, arises from uncertainty as to the state of the law. Vacillation in malpractice law, therefore, cannot avoid harming professional standards; and vacillation is correlated to frustration of legal procedures by lack of co-operation from the dental profession in the form of expert testimony. Thus, the expert witness serves as the buffer between maladjustment in the law of malpractice and the sound performance of dental operations. When the legal principles accord with the realities of practice, society will be the victor in each and every lawsuit.

ALAN ARNOLD

142. *Id.* at 26, 271 N.Y. Supp. at 34.

143. See CARNAHAN, THE DENTIST AND THE LAW § 172 (1955).

144. *Cf.* Mallett, *The Prevention of Instrument Accidents In Oral Operations,* DENTAL CLINICS OF NORTH AMERICA, SYMPOSIUM ON EMERGENCIES IN DENTAL PRACTICE 489, 501 (July, 1957).