



Risk Management

NEWSLETTER

VOLUME 25 • NO. 1

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This newsletter is prepared by the staff of the National Society of Dental Practitioners, Inc.

Senior Editor: Burton R. Pollack, D.D.S., J.D., and President of the Society.

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The opinions expressed are not intended to provide legal advice, but are attempts to summarize general principles and emerging trends in the law. Legal matters should be referred to an attorney.

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INTRODUCING MARGARET SUROWKA ROSSI, J.D.

At the last meeting of the Board of Directors of the National Society of Dental Practitioners, Ms. Rossi was elected to membership. Her membership on the Board and the National Society of Dental Practitioners, and Dentist's Advantage is a major step in increasing the risk management services and support we offer our members.

Before joining us Ms. Rossi served for over 5 Years as General Counsel and Sole in-house counsel to 14,000 members of the New York State Dental Society which is one of the largest constituent organizations of the American Dental Association. One of her many activities was to keep current on the activities of the New York State Department of Education, the licensing agency of all professionals, including dentists, practicing in the state. Her interests included the disciplinary actions taken by the Department against errant practitioners. She has published many articles in the New York State Dental Society Journal regarding the laws regulating dentists and dental practice. In addition, Ms. Rossi developed and has presented the mandated Dental Jurisprudence and Ethics Course for New York Dentists under the auspices of the Henry Spenadel Continuing Education Program of the New York County Dental Society. Ms. Rossi currently is in private law practice with the firm of Hiscock & Barclay, LLP and represents healthcare professionals before state agencies.

Ms. Rossi will serve as Associate Editor of the Newsletter and contribute articles that focus on the Dental Practice Acts of the states, and disciplinary actions taken against dentists who are in violation of the dental laws. She will lend her special knowledge as a resource back-up in the field to the Hot Line. Clearly, Ms. Rossi is well suited by experience and ability to take responsibility for contributing to the Disciplinary Section of the Newsletter. She will work with Dr. Philip Barbell in the publication of the Risk Management Alerts and other notices on our Web site. In addition, Ms. Rossi has wide experience as a lecturer in the field of dental law and risk management. It was at one of those lectures that we first met and have become friends and colleagues ever since - about 20 years ago.

Burton R. Pollack, D.D.S., J.D.
Senior Editor, The Newsletter
President, The National Society of Dental Practitioners

ENDODONTICS THE REAMER AND THE RUBBER DAM

By Burton R. Pollack, D.D.S., J.D.

This is a short review of a case decided by the Supreme Court in Kansas.ⁱ

Summary of Facts:

In treating his patient, Dr. D decided that the offending tooth the patient complained of required an endodontic procedure. Dr. D and his dental assistant administered nitrous oxide and xylocaine. Dr. D began the endodontic procedure. A cotton roll holder was used to isolate the area of the tooth being worked on, and to prevent saliva from getting into the area of the tooth. **No rubber dam was used.**

About the rubber dam the court stated,

The rubber dam fits around the tooth to prevent ingress of saliva, moisture from the breath or bacteria, prevent the tongue from getting into the operative area **and trap or catch any instrument dropped by the dentist.**

Doctor D testified as he started using a reamer with a slight rotating motion the appellant moved her head and the reamer was knocked out of his hand. He unsuccessfully tried to find the reamer with his fingers. For several days following the treatment the patient suffered gastric pains and discomfort. She was hospitalized and x-rays revealed the presence of the reamer in her stomach. It was later surgically removed.

A dental expert who testified for the patient stated,

... there is no dental school or book on endodontics in the world that teaches dentists to perform endodontic procedures without a rubber dam. ... Dr. D deviated from the standard of care required of him in _____, _____, and like communities, in his care and treatment of the appellant by not using a rubber dam.

On the issue of the failure of Dr. D to use a rubber dam that was the cause of her injury the court found in favor of the patient.

Risk Management Conclusion

In all endodontic procedures, wherever possible, a rubber dam should be inserted before the procedure is begun. Cotton rolls are not enough.

CITATIONS

i.219 Kan. 584, 549 P.2d 950

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*Last year, our 24-hour hotline received 423 calls,
giving us the opportunity to help our dentists
with their risk management concerns...
sometimes while the patient was still in the chair!*

WE WANT YOUR FEEDBACK

The NSDP newsletter is in its 25th year of publication. We are committed to providing valuable risk management information to our members. Therefore it is essential that we learn if the risk management materials we are developing meet your expectations. The best way we know how to assess this is to ask for your feedback.

Please take a few minutes to share your opinion on the NSDP Newsletter. Visit
www.dentists-advantage.com/nsdp25
to take a brief survey.

Thank you!

AWARDS IN DENTAL MALPRACTICE CASES

Cases edited by
Burton R. Pollack,
D.D.S., J.D.

It is informative for dentists to know the amount juries award patients following a finding of culpability on the part of the defendant dentist. When reading the reports keep in mind that there is not always a notice of appeal in the reports, although in some cases one could anticipate an appeal most likely on the issue of the amount of the award. The information is taken from the text Medical Malpractice by Louisell and Williams, published by LexisNexis, Matthew Bender, Newark, NJ. It is published in 5 volumes, updated at regular intervals, and contains all there is to know about medical and dental malpractice. The Newsletter will provide the relevant information contained in the Medical Malpractice text. There is some editing to protect the privacy of the parties.

Case 1

AMOUNT: \$355,000 (settlement) (IL).
CASE: P v. W, as reported in 17 Verdicts, Settlements & Tactics.
PLAINTIFF: 75-year-old female.
EVENT: Dental implants were unsuccessful and had to be removed.
INJURY: Mouth pain, discomfort.
RELEVANT DATA: The plaintiff was already missing most of her teeth.

Case 2

AMOUNT: \$110,000 (\$100,000 for pain and suffering; \$10,000 for medical expenses) (NJ).
CASE: Anonymous v. Anonymous, as reported in Jury Verdict Review Publications, Inc., Medical Litigation Alert.
PLAINTIFF: Adult male (with history of periodontal disease).
EVENT: Plaintiff, who was undergoing ten dental implants, repeated informed dentist of symptoms of paresthesia and pain. Dentist told him that he merely had suffered a bruised nerve. Four years later, dentist told him the condition was permanent.
INJURY: Permanent paresthesia, resulting in numbness, drooling.
RELEVANT DATA: Dental malpractice. Plaintiff contended that dentist negligently utilized implant which was too large and negligently inserted it too deeply, causing nerve damage, and failed to diagnose injury in timely manner.

Case 3

AMOUNT: \$100,000 (\$50,000 and \$50,000 for past and future pain and suffering) (NY).
CASE: E. v. C., as reported in ALM Properties, Inc., VerdictSearch, New York Reporter.
PLAINTIFF: 44-year-old male professional displays/exhibits salesperson.
EVENT: Defendant performed tooth extractions and placed two dental implants in plaintiff's jaw. Plaintiff subsequently experienced numbness to lower left lip and jaw.
INJURY: Paresthesia to chin and lower left lip. Drooling. Loss of sensation when eating and kissing.
RELEVANT DATA: Dental malpractice. Plaintiff contended that defendant negligently failed to obtain accurate measurements and negligently chose 13-millimeter implants.

Case 4

AMOUNT: \$750,000 (for pain and suffering) (NY)
CASE: B. v. P., as reported in Jury Verdict Review Publications, Inc., New York Jury Verdict Review & Analysis.
PLAINTIFF: 46-year-old female (married).
EVENT: Periodontist traumatized nerve in plaintiff's jaw while installing implants.
INJURY: Permanent paresthesia; difficulty in eating; drooling.
RELEVANT DATA: Dental malpractice. Plaintiff contended that periodontist negligently failed to advise her of risks of nerve damage during implant procedure. Jury found that surgery was not performed in negligent manner, but that post-operative care was negligent.

Case 5

AMOUNT: \$700,000 (settlement) (CA).
CASE: F. v. D., as reported in Confidential Report for Attorneys.
PLAINTIFF: 66-year-old female.
EVENT: Within hours after general dentist performed root canal treatment on upper molar, plaintiff experienced excruciating pain, burning and throbbing in upper right cheek and eye area. Compound used in root canal treatment, called N2, Sargenti paste or Gold Cross paste, contained paraformaldehyde.
INJURY: Permanent and untreatable facial nerve injury.
RELEVANT DATA: Dental malpractice. Plaintiff contended that product has never been approved as safe and effective by FDA, and that every dental school in the country instructs students not to use product. Dentist contributed \$300,000; pharmacy contributed \$400,000. (See Ed. Note below)

Case 6

AMOUNT: \$1,400,000 (HI).
CASE: S. v. C., as reported in Association of Trial Lawyers of America.
PLAINTIFF: 28-year-old female cement quality control worker.
EVENT: Plaintiff underwent five oral surgery procedures performed by defendant.
INJURY: Permanent nerve damage in face; post-traumatic stress disorder.
RELEVANT DATA: Plaintiff contended that defendant's treatment fell below standard of care; defendant contended that plaintiff was contributorily negligent for failing to show up for appointments and disclose her psychological problems.

Ed Note Risk Management: Readers should pay careful attention to Case 5, above. It was the dentist who prescribed and applied the paste and the pharmacy that compounded the paste. Both the dentist and pharmacist were found guilty of negligence for the injury suffered by the patient as a result of the use of the paste. Sargenti paste used as a filling compound placed in the canal in an endodontic procedure may extend past the apex of the canal and enter the surrounding bone. The result will be for it to cause wide spread necrosis of the bone and damage to other structures in the jaw.

Recall the cases reported here are jury trials. Their decisions are not precedent setting, and therefore have no effect on setting standards of care in dental practice. There are no notices in the reports of any of the decision being appealed."

NEW SERIES 8

**COMPARATIVE NEGLIGENCE:
LIMITING AWARDS**

by Burton R. Pollack, D.D.S., J.D.

HISTORY

There was a time, many, many years ago when a unique precedent law applied in negligence cases. It was known as Contributory Negligence. It had a major effect on the amount of the award given to the plaintiff injured as a result of the negligence of the defendant. The precedent law stated that if the jury or judge, following the evidence entered during the trial was of the opinion that the plaintiff contributed in any manner to his injury, allegedly caused by the defendant, there was to be no financial award to the plaintiff. The judge's instructions to the jury would, by precedent, be, "If you find that the plaintiff contributed in any way to his injury, the defendant must be relieved of any liability." A harsh result to relieve the defendant of any financial liability if the plaintiff contributed in even a small way to his injury. The same principle of the use of contributory negligence in cases of alleged dental negligence were applied. But it was not to last very long.

THE MODERN PRECEDENT

The awakening of the courts to the injustice of the application of Contributory Negligence in cases sounding in negligence took place over a period of years. The change applied today began several years ago. The phrase Contributory Negligence has been replaced with the phrase Comparative Negligence. In some jurisdictions the phrase Contributory Negligence is still used, but it is a substitute for the phrase Comparative Negligence and the rules of Comparative Negligence are applied. And so, under the new rules, if the plaintiff "contributed" to his injury caused initially by the defendant, the award would be reduced by the percentage the jury or judge was of the opinion should be awarded as a result of the injury caused by the defendant. How much did the plaintiff contribute to his injury?

What took place in New York State serves as an excellent example of the change. Subsequent to September 1, 1975 New York converted from a traditional contributory negligence state to one applying the legal doctrine of comparative negligence. The change is best noted in the text, *The New York Pattern Jury Instructions — Civil*.¹ The text provides judges with instructions they may use in instructing the jury as to the law the jurors are to follow given the facts as determined by them. It is a review and summary of all cases decided by the appellate courts in New York on the specific subject. Below is a section taken from the text that applies to cases in which there appears

to be negligence on the part of the patient that added to the severity of the injury.

The judge is advised to state to the jury,ⁱⁱ

If you find that defendant [doctor] was negligent and that defendant's negligence contributed to causing the injury, you must next consider whether plaintiff [patient] was also negligent and whether plaintiff's conduct contributed to causing the injury.

The burden is on defendant to prove that plaintiff was negligent and that his negligence contributed to causing the injury. If you find that plaintiff was not negligent, or if negligent, that his negligence did not contribute to causing the injury, you should go no further and report your findings to the court.

If, however, you find that plaintiff was negligent and that his negligence contributed to causing the injury, you must then apportion the fault between plaintiff and defendant.

Weighing all the facts and circumstances, you must consider the total negligence, that is, the negligence of both plaintiff and defendant which contributed to causing the injury and determine what percentage of fault is chargeable to each. In your verdict, you will state the percentages you find. The total of those percentages must equal one hundred percent.

For example, if you should find that the defendant and plaintiff were equally negligent you would report that each was 50% responsible. If you should find that one party was more negligent than the other in causing the injury, you would assign a higher percentage to that party and a lower percentage to the other, with the total of the percentages equaling one hundred percent.

DENTAL APPLICATION OF COMPARATIVE FAULT

An example of the award reduction is found in the past issue of the Newsletter, Vol. 24, No. 4 in the Section Jury Awards In Dental Malpractice Cases: Case 3.

A CASE ON POINT

It was decided in New York in 1982. The issue of contributory negligence on the part of the patient leading to an injury was an issue. Keep in mind that the dentist was found negligent in the treatment of the patient, but as a result of the comparative negligence on the part of the patient the award was reduced.

FINDINGS OF THE APPELLATE COURT:

Any negligence on her part [the patient/plaintiff] in the practice of her oral hygiene prior to the commencement of treatment is totally irrelevant, since defendant is liable only for injuries caused by his own malpractice. However, any negligence on plaintiff's part occurring subsequent to improper professional treatment could operate to reduce the damages attributable to that treatment to the extent such contributory negligence increased the extent of the plaintiff's injury, although it would not bar all recovery. ... A trial should be had on the issue of whether plaintiff's alleged failure to follow the home care regimen prescribed by defendant contributed to or aggravated her ultimate injuries.

In a subsequent case, also decided in New York, again the legal doctrine of comparative negligence was applied.

FINDINGS OF THE TRIAL COURT:ⁱⁱⁱ

The jury found the dentist guilty of malpractice. However, evidence was produced that the patient did not follow the dentist's instruction for a full course of treatment (Note: no mention in the report of the case detailed what was the "full course of treatment" recommended by the dentist). And so, the award to the patient was reduced by 50%. The award, after the apportionment of liability, was \$12,500 for pain and suffering, and \$10,000 for medical and dental expenses. The dentist appealed the decision to the Appellate Court.

DECISION AND OPINION OF THE APPELLATE COURT:^{iv}

In affirming the decision of the trial court, the court stated,

A review of the record demonstrates that there existed a rational and valid line of reasoning by which the jury could find that defendant Dr. _____ committed dental malpractice and that such malpractice constituted a proximate cause of plaintiff's injuries when he failed to install an upper roundhouse bridge to match the lower roundhouse bridge that had been installed in plaintiff's mouth. ... The parties' expert testimony concerning the source of plaintiff's jaw pain created a factual issue which was resolved by the jury.

All jurisdictions have adopted the new legal rule that an

award to a patient should be reduced if the patient contributed to his or her injury, and the reduction should be proportional to the amount the jury believes resulted in the injury. However some few states continue to use the term *contributed* instead of the newer term *comparative*, but the meaning and result are the same.

The following is a list of actions on the part of a patient that courts have found fall within the rule of comparative negligence that would reduce the award to the patient following a finding of malpractice on the part of the defendant dentist.

Failure of the patient to:

- Follow home care instructions given by the dentist;
- Follow instructions on the use of drugs and medications given by the dentist or pharmacist or on the drug package inserts;
- Comply with recommendations of the dentist regarding the need for consultations, and or treatment by a specialist;
- Provide honest answers to questions about medical and dental histories;
- Comply with recall notices; and
- Keep regular dental appointments.

(Note: The list does not include all situations that may lead to a finding of comparative negligence by the patient.)

RISK MANAGEMENT LESSON

Keep accurate records of the failure of a patient to follow your home care instructions, and any failure to keep appointments, including scheduled recall notices.

NOTES AND CITATIONS

- i. Published by Lawyers Cooperative Publishing, New York.
- ii. As in all jury trials, the jury determines the facts (what it believes took place based upon the evidence and testimony presented during the trial), and the judge instructs the jury on the law to be applied. In bench trials, where there is no jury, the judge decides the facts and applies the law.
- iii. 456 N.Y.S.2d 80 (1982).
- iv. 582 N.Y.S.2d 708 (1992).

DISCIPLINARY ACTIONS TAKEN AGAINST DENTISTS

Edited by Burton R. Pollack, D.D.S., J.D.

Continuing with the list of dentists in New York disciplined, and reported by the State Education Department, and published on the Internet. The reader should keep in mind that although the disciplinary actions reported below are those taken by the New York licensing agency, they serve as an example of what other states may do under their state specific dental practice acts. Although the details of the acts are not the same in each state there is general agreement among them as to what constitutes professional misconduct or unprofessional conduct. In addition, the penalties may, and probably do vary in each state, but each state does penalize errant dentists. Many unlawful acts reported are repetitious but they serve an important purpose in reporting the frequency that certain acts recur, e.g. insurance fraud, controlled substance violations, inaccurate patient records, delegating illegal duties, etc. The suspension of the license to practice is one of the major penalties that can be imposed against a dentist. Suspension of the license has been noted in black in the reports that follow. To protect the privacy of the practitioners, random initials have been used instead of names in the report. However, the names of the dentists against whom discipline was taken is available to the public on the State Education's Web site.

Cases Reported in New York, June 2000

Case 1

Dr. _____, NY

Summary: Licensee did not contest the charge of causing false and fraudulent New York State Medicaid claims to be submitted for dental services and causing false entries to be made in dental patient charts in furtherance of his efforts to defraud the Medicaid program.

Action: Application to surrender license granted.

Case 2

Dr. _____, NY

Summary: Licensee admitted to charge of advising two patients that they required fillings and an extraction, when, in fact, said treatment was not warranted by the condition of the patients.

Action: Application for consent order granted; Penalty agreed upon: **2 year suspension**, execution of suspension stayed, probation 2 years, \$2,500 fine.

Case 3

Dr. _____, NY

Summary: Licensee did not contest charge of utilizing radiographs that were not of diagnostic quality to assess a patient, failing to completely excavate carries when preparing two teeth for replacement fillings, inserting two fillings that had open margins and gross overhangs, and utilizing a tooth with gross decay as an abutment for a partial denture.

Action: Application for consent order granted; Penalty agreed upon: **2 year suspension**, execution of suspension stayed, probation 2 years, \$1,000 fine.

Case 4

Dr. _____, NY

Summary: Licensee did not contest charge of performing implant surgery without having sufficient radiographs, plans, and records to properly perform said surgery.

Action: Application for consent order granted; Penalty agreed upon: **2 year suspension**, execution of suspension stayed, probation 2 years, \$2,500 fine.

Case 5

Dr. _____, P.C., (Above dentist named)

Summary: Respondent did not contest charge of performing implant surgery without having sufficient radiographs, plans, and records to properly perform said surgery.

Action: Application for consent order granted; Penalty agreed upon: **2 year suspension**, execution of suspension stayed, probation 2 years.

Case 6

Dr. _____, NY

Summary: Licensee did not contest charge of processing credit card charges for dental services never rendered, as part of a scheme to defraud the credit card issuer, and making false entries in a patient record in furtherance of said scheme.

Action: Application for consent order granted; Penalty agreed upon: **2 year suspension**, execution of suspension stayed, probation 2 years, \$7,500 fine.

Case 7

Dr. _____, NY

Summary: Licensee admitted to charge of willful failure to comply with New York State laws and regulations governing the profession.

Action: Application for consent order granted; Penalty agreed upon: **1 year suspension**, execution of suspension stayed, probation 1 year, \$4,000 fine.

Case 8

Dr. _____, NY

Summary: Licensee admitted to charge of failing to maintain accurate patient records.

Action: Application for consent order granted; Penalty agreed upon: Censure and Reprimand, \$1,000 fine.

Case 9

Dr. _____, NY

Summary: Licensee admitted to charge of failing to properly place a crown.

Action: Application for consent order granted; Penalty agreed upon: **2 year suspension**, execution of suspension stayed, probation 2 years, \$2,500 fine.

YOUR WORDS CAN HURT YOU

by Burton R. Pollack, D.D.S., J.D.

Introduction

The case reported as an example presents the most unusual set of facts, some of which are difficult to believe in what took place in the treatment of the patient.

Facts (as decided in the lower court and reported by the appellate court:)¹

On November 21, 1935, plaintiff visited the office of defendant, a dentist, for the purpose of having some teeth filled. At that time he informed defendant that X-rays showed an impacted tooth in his lower left jaw. This tooth defendant advised him to have removed and directed plaintiff to bring the X-ray plates for inspection. Four days later plaintiff returned to defendant's office with the X-rays and defendant thereupon extracted a capped tooth which was directly in front of the impacted tooth, and then proceeded to cut away the gum. His nurse then applied a hammer and a chisel and after she had tapped with the mallet for some time the doctor seized the mallet and struck it with such force that it broke plaintiff's jaw. Plaintiff related the incident as follows. 'I immediately told him that he had broken my jaw. He asked me not to interrupt him, and he proceeded to hammer until he got this impacted tooth out. After he had removed it he asked me to bring my teeth together for him, which I did. He said, 'Well, I did break your jaw, I guess I hit you a little too hard.' [Ed. Black added for emphasis]

Under ordinary circumstances what a witness says about what another party said, and that party is available to testify, it is not admissible into evidence - it is hearsay. But an exception to that hearsay rule is that if the party, here the defendant dentist, who is quoted, makes an immediate statement following the injury, that is "against his interest," it can be admitted as evidence during the trial. A more common example than the one cited in this case, is if you are in an automobile accident and immediately after the accident you say, "I'm sorry it happened. It was my fault." Any one who heard you make the statement can repeat what you said, during the trial, as an exception to the hearsay evidence rule,

Back to the case: After stating the facts the court said,

The foregoing is the substance of the evidence adduced by plaintiff on the trial of the action brought by him to recover damages for the injuries suffered as a consequence of the defendant's malpractice. Plaintiff was the only witness who testified. At the close of plaintiff's case the [trial] Court dismissed the [plaintiff's] complaint.

The patient did not offer the testimony of an expert as to the standard of care to which the defendant dentist was held, or if the defendant was guilty of malpractice. Clearly, the general rule that in a suit alleging malpractice the plaintiff/patient must provide testimony of an expert to inform the jury of the standard of care to be exercised by the defendant dentist, and whether the dentist departed from the standard. This general rule was not met in the instant case. Only the plaintiff/patient testified in his own behalf. It was based upon the failure of the patient to offer expert testimony that the judge in the trial court dismissed the complaint of the patient. The patient appealed the decision to the appellate court.

The Appellate Court reversed the decision of the trial court and ordered a new trial. The court opined that the failure of the plaintiff to produce an expert witness was outweighed by the dentist's "admission against interest" in reaching the decision at the lower court.

Risk Management Lesson

Should things go wrong during the treatment of a patient it is best not to immediately admit fault to the patient. What you might say later, for example after several days, may not be stated by the patient during the trial - it becomes hearsay. The latest advice given to physicians in some risk management articles, is to admit errors in treatment. My advice is essentially the same, but don't do it immediately after the error was committed or discovered.

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THE NATIONAL SOCIETY OF DENTAL PRACTITIONERS



Risk Management

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As a member, you have access to a full range of helpful information that you can use everyday in your practice. They include:

- **Dental Office Forms** - Our Dental Office Forms system represents one of the valuable and useful tools we provide to assist you in managing your practice in the safest way possible. Included in this library are dozens of Record Keeping Forms and Consent Forms. Some examples are:
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 - Chart Review Checklist
 - Consent Forms
 - Post Extraction Instructions
- **Articles** - Browse through our articles index for a specific risk management-related topic.
- **NSDP Newsletters** - read past issues of the NSDP newsletters.
- **Risk Management Alerts** - periodic alerts to recent changes in dental practice, dental law and trends in dentistry.

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