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## Malpractice in Dental Anesthesiology

Allen L. Perry\*

CASES INVOLVING dental anesthesia reveal that breaches of the duty to use proper skill and care have occurred in selection of the type of anesthetic, method of administration, failure to examine the patient, use of unsterile instruments, failure to use safety devices, and failure to properly care for patients under the influence of anesthesia.

Persons practicing dental anesthesiology, like those practicing medicine and surgery, must be duly able and careful. This rule is elementary and is founded on considerations of public policy.<sup>1</sup> Whenever the behavior of a dentist or dental anesthesiologist has been of a nature such that a dereliction of these requisites is evinced, an action in malpractice may lie.

Generally, malpractice is regarded as a tort, but the term is so broad that any professional misconduct arising through ignorance, carelessness, want of proper skill, disregard of established rules, or criminal intent, is included within the definition.<sup>2</sup> The dentist or anesthesiologist may conduct himself so as to be guilty criminally,<sup>3</sup> obligated contractually,<sup>4</sup> or liable tortiously.<sup>5</sup>

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<sup>1</sup> *Stevenson v. Yates*, 183 Ky. 196, 208 S. W. 820 (1919); *Summerour v. Lee*, 104 Ga. 73, 121 S. E. 2d 80 (1961); *Allison v. Blewitt*, 348 S. W. 2d 182 (Tex. Civ. App. 1961); *Engle v. Clark*, 346 S. W. 2d 13 (Ky. App. 1961); see also, Ohio Rev. Code, §§ 4715.01-4715.99, which is exemplary of the majority of the states' codes on this subject.

<sup>2</sup> See 2 *Encyc. of Negligence*, § 418 (1962).

<sup>3</sup> *Crabb v. Kansas State Board of Dental Examiners*, 118 Kan. 513, 235 P. 829 (1925); *Batty v. Arizona State Dental Board*, 57 Ariz. 239, 112 P. 2d 870 (1941); *Richardson v. Simpson*, 88 Kan. 684, 129 P. 1128 (1913); *McDonald v. McKnight*, 248 Mass. 43, 142 N. E. 825 (1924).

<sup>4</sup> *Wheaton v. Rubin*, 162 Pa. Super. 320, 57 A. 2d 589 (1948); *Ebner v. Mackey*, 186 Ill. 297, 57 N. E. 834 (1900); *Lake v. Baccus*, 59 Ga. App. 656, 2 S. E. 2d 121 (1939); *Keating v. Perkins*, 250 App. Div. 9, 293 N. Y. S. 197 (1st Dept. 1937); *Zinze v. Frasca*, 133 N. J. L. 68, 42 A. 2d 373 (1945); *Safian v. Aetna Life Ins. Co.*, 260 App. Div. 765, at 768, 24 N. Y. S. 2d 92 (1st Dept. 1940), where the court asserted: "If a doctor makes a contract to effect a cure and fails to do so, he is liable for breach of contract even though he uses the highest possible professional skill."

<sup>5</sup> *Mastro v. Kennedy*, 57 Cal. App. 2d 499, 134 P. 2d 865 (1943); *Roberts v. Parker*, 121 Cal. App. 264, 8 P. 2d 908 (1932); *Barham v. Widing*, 210 Cal. 206, 291 P. 173 (1930); *Carr v. Dickey*, 163 Cal. App. 2d 416, 329 P. 2d 539 (1958); *Hurley v. Johnston*, 143 Conn. 364, 122 A. 2d 732 (1956); *Ribarin v. Kessler*, 78 Ohio App. 289, 70 N. E. 2d 107 (1946); *Pollack v. Dussourd*, 158 F. 2d 969 (6th Cir. Ohio 1947).

Yet each of these is malpractice. It is the general rule, however, that society will be served by holding a dentist primarily civilly liable for the consequences of his breaches, without imposing criminal liability, when he acts with good intentions.<sup>6</sup>

Liability for injuries resulting from the administration of anesthetics, general or local, is generally governed by the principles of negligence;<sup>7</sup> anesthesia in dentistry is no exception.

Normally, the dentist-patient relation is contractual.<sup>8</sup> Despite the fact that the dentist invites persons to seek his services, he is under no legal obligation to accept those attracted as his patients. Regardless of morals or professional ethics, the law does not require that one be his brother's keeper<sup>9</sup> simply because he is licensed to practice dentistry.

Only where there has been an acceptance of the invited person as a patient does the law impose duties on the dentist and on the patient.<sup>10</sup> Then the dentist undertakes, either expressly or by implication, that he possesses ordinary knowledge and skill, and that he will use ordinary care in the exercise of his skill and knowledge to accomplish the purpose for which he is employed.<sup>11</sup> Further, once the relation is established the dentist is obliged to continue his services until they are no longer needed, or until he is discharged.<sup>12</sup>

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<sup>6</sup> *State v. Schulz*, 85 Iowa 628, 8 N. W. 469, 39 Am. Rep. 187 (1881); see also, 42 Ohio Jur. 2d 630, where it is stated: "... in any event the action for malpractice is a civil action, which is the only form of action under the code."

<sup>7</sup> Carnahan, *The Dentist And The Law* 131 (1955); Wasmuth, *Standards of Care in Anesthesiology*, 7 Clev-Mar. L. R. 403 (1958).

<sup>8</sup> *Webster v. Board of Dental Examiners of California*, 17 Cal. 2d 534, 110 P. 2d 992 (1941).

<sup>9</sup> *Tvedt v. Haugen*, 70 N. D. 338, 294 N. W. 183, 132 A. L. R. 379 (1940); *Findlay v. Board of Sup'rs of County of Mohave*, 72 Ariz. 58, 230 P. 2d 526 (1951).

<sup>10</sup> *McNamara v. Emmons*, 36 Cal. App. 2d 199, 97 P. 2d 503 (1939); *Hurley v. Eddingfield*, 156 Ind. 416, 59 N. E. 1058 (1901).

<sup>11</sup> *Mernin v. Cory*, 145 Cal. 573, 79 P. 174 (1904); *Vann v. Harden*, 187 Va. 555, 47 S. E. 2d 314 (1948); *Lewis v. Soconis*, 246 App. Div. 762, 283 N. Y. S. 931 (1935); Carnahan, *op. cit. supra* note 7, at 121; Note, *Contractual Liability of Physicians and Surgeons*, 1953 Wash. U. L. Q. 413; *Louisell and Williams, Trial of Medical Malpractice Cases* 191, 193 (1960); and see generally, 70 C. J. S., *Physicians and Surgeons*, §§ 37, 38.

<sup>12</sup> *Wheaton v. Rubin*, *supra* note 4; *Gerken v. Plimpton*, 62 App. Div. 35, 70 N. Y. S. 793 (1901); Anno., *Liability of Physician Who Abandons Case*, 57 A. L. R. 2d 432 (1958).

It obviously would be unfair to require a dentist to complete effective treatment regardless of the patient's conduct.<sup>13</sup> Accordingly, the patient has the duty to give an honest medical history, to inform the dentist of unexpected matters occurring in the course of the treatment, and to make known whether he clearly understands a contemplated method of procedure. These duties may be involved in such defenses as contributory negligence<sup>14</sup> or assumption of risk; but, even more important, they may be pertinent in testing the character of the dentist's performance.

When treatment of a patient necessitates use of anesthesia, the dentist must decide what type (local or general) to administer.

General anesthesia has some advantages. It provides comfort for the patient and facilitates operative procedures, as it causes complete immobility and assures a painless operation.

Local anesthesia is better for minor oral operations, because it is less expensive, allows the patient to be ambulatory, and can be used in poor risk cases for which general anesthesia is contra-indicated.

It should be realized, however, that whatever the type, *anesthesia is a poison*, and should be administered with great care.<sup>15</sup> Consequently, the type of anesthesia selected by the dentist, or sanctioned by him, should be determined with consideration of the major criterion, the safety of the patient. The dentist, however, is not a guarantor of favorable results.<sup>16</sup> In the face of injury or even death itself, well founded rules are applied to differentiate malpractice from the mere fact of such eventualities.<sup>17</sup> A mainstay among these rules is the necessity of expert testimony to maintain a suit in malpractice against a dentist.<sup>18</sup> Experts skilled in the dental profession usually, but

<sup>13</sup> Louisell and Williams, *op. cit. supra* note 11.

<sup>14</sup> Chubbs v. Holmes, 111 Conn. 482, 150 A. 516 (1930); see also, Anno., Contributory negligence or assumption of risk as a defense in actions against physicians or surgeons for malpractice, 50 A. L. R. 2d 1043 (1954); Donathan v. McConnell, 121 Mont. 230, 193 P. 2d 819 (1948).

<sup>15</sup> Phillip v. Stillwell, 55 Ariz. 147, 99 P. 2d 104 (1940); McBride v. Roy, 177 Okl. 233, 58 P. 2d 886 (1936); Van Epps v. McKenny, 189 N. Y. S. 910 (Sup. Ct. Monroe County 1921).

<sup>16</sup> Harris v. Wood, 214 Minn. 492, 8 N. W. 2d 818 (1943).

<sup>17</sup> Donoho v. Rawleigh, 230 Ky. 11, 18 S. W. 2d 311 (1929); Mastro v. Kennedy, *supra* note 5.

<sup>18</sup> Phillip v. Stillwell, *supra* note 15; Berardi v. Memicks, 164 N. E. 2d 544 (Mass. 1960).

not always, are the only witnesses who are qualified to testify as to whether or not there was negligence in the method of treatment.<sup>19</sup>

A typical liability case was *Roberts v. Parker*.<sup>20</sup> There inflammation in the gums showed definite symptoms of infection. Where such conditions are found, it is considered dangerous in the dental profession to inject an anesthetic into the gum without first taking steps (such as x-ray) to determine the extent of the infection. When the dentist injected novocain (procaine hydrochloride) into the patient's inflamed gum, he was liable for the osteomyelitis that developed in the patient's jawbone.

There are instances in which the propriety of the treatment may be said to be common knowledge, where the matter is of a nature that may be evaluated by the ordinary use of the senses of a non-expert. In such cases expert testimony is unnecessary.<sup>21</sup> Dispensation of expert testimony is found in *Barham v. Widing*<sup>22</sup> where a patient claimed that a dentist used an unsterile hypodermic needle in administering an anesthetic, and also failed to treat the infection of the patient's gum which might have been caused by the unsterile needle. It was stated by the court, in affirming an award of damages:

Under the circumstances of this cause there is a remote possibility that the infection developed from some cause other than the defendant's failure to sterilize the needle or the gum into which it was inserted, but the evidence is sufficient upon which to warrant the jury in finding that it was caused by his negligence in failing to show these reasonable precautions in spite of his testimony to the contrary.

In *United Dentists v. Bryan*,<sup>23</sup> the infection began and centered where the needle was injected in the gum. This was enough to make unnecessary expert testimony to show lack of proper skill and care.

Proof the dentist failed to exercise the proper general

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<sup>19</sup> *Rising v. Veatch*, 117 Cal. App. 404, 3 P. 2d 1023 (1931). *Contra* (no expert needed): *Lipman v. Lustig*, 190 N. E. 2d 675 (Mass. Super. 1963).

<sup>20</sup> *Supra* note 5.

<sup>21</sup> *Benson v. Dean*, 232 N. Y. 52, 133 N. E. 125 (1931); and *Lipman* case, *supra* note 19; *Burde v. Errickson*, 132 N. J. L. 377, 40 A. 2d 573 (1945); *Zettler v. Reich*, 256 App. Div. 631, 11 N. Y. S. 2d 85 (1939), *affd.* 281 N. Y. 729, 23 N. E. 2d 548 (1939); *contra*, *Steinka v. Bell*, 32 N. J. Super. 67, 107 A. 2d 825 (1954); *Meyer v. Ross*, 31 Cal. Rptr. 110 (Cal. App. 1963).

<sup>22</sup> *Supra* note 5, at 177.

<sup>23</sup> 158 Va. 880, 164 S. E. 554 (1932).

degree of skill and care is not the end of the plaintiff's case.<sup>24</sup> Thus, in one case a patient's aching tooth was removed in two parts, one of which showed infection. The dentist, having used an infiltration (local) type of anesthesia, painted the gum with iodine, but did not curette (scrape away the morbid matter).

Finally, the patient went to another practitioner, who found it necessary to remove part of the jawbone and seven teeth. A judgment for the patient was set aside, because the defendant's failure to exercise reasonable skill and care in selecting the type of anesthesia was not shown, through expert testimony, to be the cause of the patient's injuries.<sup>25</sup> In order to recover against a dentist, the plaintiff must produce evidence from which the jury is justified in finding that the plaintiff's injury was due to the want of skill and care of the defendant.<sup>26</sup> This burden is not met by showing that the injury might have been the result of two or more causes, one of which was defendant's unskillful treatment.<sup>27</sup> The patient, however, is not required to exclude every possibility that the injury might have been caused through some means for which the dentist is not responsible.<sup>28</sup> It is only necessary that he prove his case by a preponderance of evidence.<sup>29</sup>

A broken hypodermic needle lodged in the patient's gum seems to present a vivid picture of negligence of the dentist.<sup>30</sup> While broken needles are the foci of many legal controversies, the fact that a needle breaks during the administration of anesthesia is not proof of negligence in itself.<sup>31</sup> Treatment by the dentist following the breaking, and other evidence,<sup>32</sup> are pertinent in determining whether he was exercising the proper skill and care. But it seems clear that failure to remove the broken portion of

<sup>24</sup> *Matuschka v. Murphy*, 173 Wis. 484, 180 N. W. 821 (1921); *Perifield v. Footz*, 285 P. 2d 130 (Nev. 1955).

<sup>25</sup> *Matuschka v. Murphy*, *Ibid.*

<sup>26</sup> *Donoho v. Rawleigh*, *supra* note 17.

<sup>27</sup> *Bowles v. Bourbon*, 148 Tex. 1, 219 S. W. 2d 779, 13 A. L. R. 2d 1 (1949); see also, 13 A. L. R. 2d 11 (1950), *Anno.*, Proximate cause in malpractice cases.

<sup>28</sup> *United Dentists v. Bryan*, *supra* note 23; *Vigneault v. Dr. Hewson Dental Co.*, 300 Mass. 223, 15 N. E. 2d 185 (1938); *Ley v. Bishop*, 88 Cal. App. 313, 263 P. 369 (1928); *Dimock v. Miller*, 202 Cal. 668, 262 P. 311 (1927); *Prosser, Law of Torts*, 222 (2d ed. 1955).

<sup>29</sup> *Prosser, op. cit. supra*, note 28, at 198.

<sup>30</sup> *Walter v. England*, 133 Cal. App. 676, 24 P. 2d 930 (1933).

<sup>31</sup> *Erneu v. Crofwell*, 272 Mass. 172, 172 N. E. 73 (1930); *Capolupo v. Willis*, 166 Conn. 13, 163 A. 454 (1932).

<sup>32</sup> *Smith v. McClung*, 201 N. C. 648, 161 S. E. 91 (1931); *Donoha v. Rawleigh*, *supra* note 17; *Walter v. England*, *supra* note 30.

a needle, coupled with neglect to inform the patient of its presence in the gum, raises a question for the jury without the necessity of corroborating expert testimony.<sup>33</sup>

An expert competent to testify as to whether there was proper skill and care exercised in the selection and administration of general or local anesthesia need not be skilled as a dentist.<sup>34</sup> This rule, while not limited to general anesthesia, is applied more frequently to that type, because such anesthesia is lethal when handled improperly.<sup>35</sup> For this same reason, administration of general anesthesia without prior examination of the patient is a negligent act. If injury results in the absence of the patient's contributory negligence, the dentist is liable.<sup>36</sup>

Because general anesthesia renders the patient unconscious, the dentist may be liable for failure to use a throat dam or pack when performing operations and extractions on such an anesthetized patient. Consequences of use and the neglect to use a prop are illustrated in *Bollenbach v. Bloomenthal*<sup>37</sup> and *Eggert v. Dramburg*.<sup>38</sup> Part of a broken tooth which shattered while being extracted entered the trachea and settled in the lungs of the patients in each of these cases. In the latter no pack was used, and this omission was adjudged a breach of the implied promise to exercise proper skill and care. The dentist was liable. In the former a judgment for the patient was overruled, because the dentist had used a dam. Involuntary action by the unconscious patient caused the dam to slip and become ineffective in the latter case.

Use of general anesthesia compels the dentist to exercise precautions not normally necessary when local anesthesia is employed. While a dentist was administering nitrous oxide, in one case, the partially unconscious patient grasped a part of the dentist's body with such intensity that the force necessary to relieve the grip broke the patient's finger.<sup>39</sup> The dentist was held liable for failing to use wrist straps. The care required of a

<sup>33</sup> *Barham v. Widing*, *supra* note 5; *Bennett v. Fitzgerald*, 284 Mass. 535, 188 N. E. 247 (1938); *Bates v. Dr. King Co.*, 191 Mass. 585, 77 N. E. 1154 (1906). See generally, 53 A. L. R. 2d 152 (1957).

<sup>34</sup> *Hazelwood v. Adams*, 245 N. C. 398, 95 S. E. 2d 917 (1957); *Burch v. Greenwald*, 247 App. Div. 471, 286 N. Y. S. 661 (1936).

<sup>35</sup> *Harris v. Wood*, *supra* note 16.

<sup>36</sup> *Eggert v. Dramburg*, 197 Wis. 153, 221 N. W. 732 (1928).

<sup>37</sup> 255 Ill. App. 305, reversed 341 Ill. 539, 173 N. E. 670 (1930).

<sup>38</sup> *Supra* note 36.

<sup>39</sup> *Wolfe v. Feldman*, 158 Misc. 656, 286 N. Y. S. 118 (1936).

patient after anesthetization is illustrated in *Langis v. Danforth*.<sup>40</sup> Here, the unguarded patient awakened, was released, and while still under the influence of the gas fell through a second story window, incurring multiple injuries, for which the dentist was liable.

An action for wrongful death due to administration of an anesthetic cannot be maintained simply because the patient died.<sup>41</sup> It must be shown that the dentist was negligent in some aspect of performing his duty to the patient.<sup>42</sup> The failure to use proper skill and care may be manifested in the dentist's selection of,<sup>43</sup> rather than administration of, the anesthetic.<sup>44</sup>

In *Sanzari v. Rosenfeld*<sup>45</sup> the dentist was held liable in a wrongful death action because he administered a contra-indicated anesthetic when he failed to read the manufacturer's enclosed brochures.

Whenever a dentist procures another to administer anesthesia and the patient is injured as a result of the procured party's negligence, the dentist may be liable. His liability or non-liability depends upon whether the party administering the anesthesia is viewed as an independent contractor or as a servant.<sup>46</sup>

Generally, the party administering the anesthesia is a special anesthetist qualified in his field, and insists upon exercising his own judgment in choice of anesthetic, and care of the patient during the operation. If he does so he is deemed an independent contractor and liable for his own acts. On the other hand, should the dentist select the anesthetic and generally supervise the administration and care of the patient, the administering party is a servant and the dentist is liable for his negligence.<sup>47</sup>

When legal liability results from the violation of a permission, or by exceeding the patient's consent, the courts often describe resulting liability by the term "technical assault."<sup>48</sup>

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<sup>40</sup> *Langis v. Danforth* (two cases), 308 Mass. 508, 33 N. E. 2d 287 (1941).

<sup>41</sup> *Spain v. Burch*, 169 Mo. App. 94, 154 S. W. 172 (1913); *Voss v. Adams*, 271 Mich. 203, 259 N. W. 889 (1935); *Prosser, op. cit. supra* note 28, at 711.

<sup>42</sup> *Harris v. Wood, supra* note 35.

<sup>43</sup> *Julien v. Barker*, 75 Idaho 413, 272 P. 2d 718 (1954).

<sup>44</sup> *Whetsine v. Moravec*, 228 Iowa 352, 291 N. W. 425 (1940).

<sup>45</sup> 30 N. J. 128, 167 A. 2d 625 (1961).

<sup>46</sup> *Prosser, op. cit. supra* note 28, at 357.

<sup>47</sup> *Id.*, at 351.

<sup>48</sup> *Carnahan, op. cit. supra*, note 7, at 148.



The influence of anesthesia in commission of this tort is apparent. In the early days of dentistry patients were held down by friends, while the person practicing medicine, often the village barber, proceeded with the operation. When the operator observed a need for extending the operation, he could communicate with the conscious patient, who could withhold or grant the permission accordingly. Under these conditions the problems of a technical assault rarely arose.<sup>49</sup>

With the development of anesthetics, especially those causing general unconsciousness, without relaxation of the consent rule the conscientious practitioner sometimes unwittingly becomes a tortfeasor in an effort to aid the unconscious patient.<sup>50</sup> How liability may be incurred for failing to awaken the patient and obtain his consent before going further with an operation as illustrated in *Ober v. Hollinger*.<sup>51</sup> Here the dentist extended the operation to the extraction of a tooth because he observed necrosis in the patient's jawbone. The patient sued, and was awarded judgment for technical assault. There was no room for discretion on the part of the dentist where the extension was not necessary for preservation of life or for other emergency.

Wide variations are observed in what will constitute adequate pleadings for an action based on technical assault. The conflict is illustrated by the cases of *Preston v. Hubbell*<sup>52</sup> and *Ober v. Hollinger*.<sup>53</sup> In the former the dentist extended an operation under general anesthesia in order to repair a fracture, without incurring legal liability. In the latter the dentist extended an operation in order to contain a disease, and was held liable.

Clearly, the law as to dental anesthesiology, as far as malpractice is concerned, is in a state of uncertainty.

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<sup>49</sup> *Id.*, at 149.

<sup>50</sup> *Estrada v. Williams*, 75 Cal. App. 2d 54, 170 P. 2d 43 (1946); *Moscicki v. Shor*, 107 Pa. 192, 163 A. 341 (1932); *Francis v. Brook*, 24 Ohio App. 136, 156 N. E. 609 (1924); *Louisell and Williams, op. cit. supra* note 11, at 223.

<sup>51</sup> 14 Ohio L. Abs. 514, 56 A. L. R. 2d 714 (1957).

<sup>52</sup> *Preston v. Hubbell*, 87 Cal. App. 2d 53, 196 P. 2d 113 (1948).

<sup>53</sup> *Supra* note 51.