Common Theories of Recovery in Dental Malpractice Claims

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When is a dentist liable for malpractice? What theories of recovery are generally asserted by patient plaintiffs?

Lawsuits against dentists in New York customarily involve a claim that the dentist's actions fell below the appropriate standard of care. Increasingly, complaints to professional boards and lawsuits also allege that the dentist failed to obtain the patient's informed consent prior to rendering treatment.

In New York, neither general dentists nor specialists are immune from malpractice lawsuits. The American Dental Association has recognized eight areas of dental specialty including endodontics, oral and maxillofacial pathology, oral and maxillofacial radiology, oral and maxillofacial surgery, orthodontics, pediatric dentistry, periodontics and prosthodontics.
Endodontists typically encounter claims of malpractice for issues that arise during root canal procedures. Foreign objects such as drill bits occasionally fall or get lodged in canals and, while generally harmless, may lead to complications such as infections or subsequent extractions. Endodontists, as well as general dentists, are also susceptible to claims of malpractice when preparing an area for a root canal procedure. Injections of numbing agents may come into contact with nerves potentially resulting in paraesthesia. Other common claims occur when the apex of the tooth's root is perforated or when the root is overfilled.

Oral and maxillofacial pathology specialists typically encounter claims of malpractice when failing to diagnose and treat diseases of the mouth. Such claims generally arise out of a failure to identify a lesion or fistula as a potential problem. Similarly, oral and maxillofacial radiology specialists run into trouble when failing to identify potentially problematic areas of concern on radiographs or scans.

Oral and maxillofacial surgeons, commonly known as oral surgeons, are typically sued for complications from extraction of teeth and placement of implants. Such allegations of malpractice can stem from injury to facial nerves during an extraction, failure to determine bone height and strength prior to placing implants, and failure to diagnose infections at the extraction and/or implant site.

Claims for malpractice against orthodontists and pediatric dentists tend to have some overlap. Claims can involve failure to diagnose slow loss of baby teeth, crowding of baby and adult teeth, overuse of appliances and failure to accommodate proper spacing of teeth.

One of the most common claims for malpractice against periodontists is the failure to diagnose and treat gum disease. Such claims will generally allege that the doctor improperly measured gum pockets and failed to diagnose chronic infections of the gums.

Prosthodontists, as complete oral rehabilitators, face claims of malpractice for improper placement and fitting of veneers, crowns and bridges and the general sequelae stemming from improper and uncomfortable placement.

Malpractice

The plaintiff in a dental malpractice action must establish that the defendant departed from good and accepted dental practice and that such departure was a proximate cause of his injuries. See, Terranova v. Finklea, 45 A.D.3d 572, 845 N.Y.S.2d 389 (2d Dept. 2007); Calabro v. Hescheles, 22 A.D.3d 622, 801 N.Y.S.2d 921 (2d Dept. 2005). The
standard elements of a negligence claim must be proven: duty, breach, proximate cause and damage/injury.

In *Becker v. Woods*, 2005 N.Y. Slip. Op. 10093 (2d Dept. 2005), the plaintiff alleged that the defendant failed to properly administer a mandibular-block injection, that the failure constituted malpractice and that defendant's practice group was vicariously liable for defendant's actions. Plaintiff suffered paresthesia and neuropathy of her right trigeminal nerve. Prior to trial, plaintiff discontinued her claim against the practice group.

Plaintiff's expert opined that defendant did not have adequate knowledge of the mandibular region and that the injection was wrongly administered directly into the plaintiff's mandibular nerve. The jury found that plaintiff sustained her burden and found plaintiff's expert's opinion credible that the defendant negligently administered the injection. Plaintiff was awarded $840,700 and accepted a reduction from $15,000 to $1,560 in future medical expenses.

Similarly, plaintiff met her burden and showed that defendant's action fell below the standard of care in *Verbeke v. Golub-Evans, et al.*, 2006 WL 4010615 (1st Dept. 2006). In *Verbeke*, the defendant dentist placed 20 veneers in plaintiff's mouth. Plaintiff contended that the veneers were of poor quality and failed to cover all of the prepared tooth structure, which exposed dentin that resulted in pain. Plaintiff claimed that because of defendant's negligence, she was caused to suffer temporomandibular joint dysfunction (TMJ), pain and unbalanced bite. The jury awarded the plaintiff $366,000 for past and future medical costs and past pain and suffering.

However, in *Ticali v. LoCascio*, unreported, index no. 28472 (Sup. Queens 2003), the plaintiff failed to prove that the defendant deviated from the standard of care, and a defense verdict was rendered. In *Ticali*, the plaintiff alleged that defendant missed a tumor which led to four oral surgeries including removal of the right side of plaintiff’s jaw which was replaced by a bone graft. Edward Ticali alleged that the defendant failed to diagnose the tumor and failed to recommend a consultation with an oral surgeon. However, the jury found that, despite the plaintiff's injuries, the defendant did not deviate from the standard of care as dental records proved she recommended that the plaintiff see an oral surgeon, and that plaintiff did not.

Lack of Informed Consent

Another theory of recovery used by plaintiffs in New York is the failure to obtain informed consent prior to a procedure. As it pertains to dentists in New York, the lack of informed consent is defined as the failure of the dentist to disclose to the patient the
alternative methods of treatment, the reasonably foreseeable risks and the benefits involved. New York State Public Health Law §2805-d.

Lack of informed consent is generally pleaded in a complaint by alleging that the treatment was elective in nature, that the dentist failed to advise the patient of the reasonably foreseeable risks, alternatives and benefits involved, that a reasonable dental practitioner would have disclosed such risks in a manner that would have permitted the patient to make a knowledgeable decision whether to proceed with the treatment, that a reasonably prudent person in the patient's position would not have undergone the treatment having known the risks, and that the patient was injured as result of the dentist's failure to advise the patient of the reasonably foreseeable risks.

The element of proximate cause is axiomatic in a cause of action based upon the lack of informed consent. The patient plaintiff must present proof that the lack of informed consent was a proximate cause of the injury or condition. Santilli v. CHP Inc., 274 A.D.2d 905, 907, 711 N.Y.S.2d 249 (3d Dept. 2000); Foote v. Rajadhyax, 268 A.D.2d 745, 745-746, 702 N.Y.S.2d 153 (3d Dept. 2000). Failure to prove the all important causation element can be detrimental to a plaintiff's case. In Amodio v. Wolpert, 52 A.D.3d 1078, 861 N.Y.S.2d 799 (3d Dept. 2008), the Third Department upheld the trial court's dismissal of plaintiff's cause of action based upon lack of informed consent. Defendant dentist filed for summary judgment and relied upon his expert affidavit where he opined that plaintiff's injuries were due to either infection or the anesthetic injection. Plaintiff failed to provide proof that defendant's admitted failure to discuss the risks of a root canal procedure and failure to obtain a signed informed consent were the proximate cause of her injuries.

Recovery under the theory of lack of informed consent is not premised upon a finding of malpractice against the dentist. It is enough that the plaintiff prove proximate causation and injury resulting from the dentist's failure to advise of any reasonably foreseeable risks/complications and that had the plaintiff known the risks in advance, she would not have consented to the treatment. Id. and Petty v. Brookstone, 819 N.Y.S.2d 850 (1st App. Term 2000).

Conclusion

The practicing dentist must be cognizant of the different theories of recovery used by patient plaintiffs in New York. Understanding theories of recovery in dental malpractice will assist dentists in providing good and accepted care to their patients.

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