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Obiter Dicta

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OBITER DICTA

"An *obiter dictum,* in the language of the law, is a gratuitous opinion, an individual impertinence, which, whether it be wise or foolish, right or wrong, bindeth none—not even the lips that utter it."*

Trials and Tribulations of the Professional Man

"The best doctors in the world are Doctor Diet, Doctor Quiet, and Doctor Merryman." Polite Conversation, Dialogue ii, Jonathan Swift.

At a time when doctors are being scourged by patients and politicians for rising medical and dental costs and being threatened by a fate worse than death, compulsory health insurance, it would seem inopportune to add to his burden by throwing faggots on the pyre. However, the broad backs of the American Medical and Dental Associations can well sustain the subject of malpractice and its adequacy as a remedy for the complaining patient.

Haste Makes Waste

In Weaver v. Traver, 222 N.Y. 674, 119 N.E. 1085 (1918) the defendant doctor removed the plaintiff's appendix and gallstones in a most expeditious manner. However, a year later a thread appeared through the unclosed sinus. The plaintiff could not understand this unnatural phenomenon and went to another doctor. The doctor began drawing upon it, and finally the foreign matter was discovered to be a gauze tampon, a souvenir of the previous operation. The court found for the plaintiff, in that the reasonably skilled surgeon would not have been so forgetful.

The Proverbial Needle

The defendant physician in Benson v. Dean, 232 N.Y. 52, 133 N.E. 125, (1921) while operating on the plaintiff for ulcers, accidentally broke his needle. The doctor searched for the needle but since the plaintiff was not taking the anaesthetic well, he had to cease and conclude the operation. The doctor did not tell the plaintiff of the missing needle, for fear it might cause him worry, especially when the medical bill arrived. The plaintiff suffered from stabbing pains for over a year at last changing doctors and also his luck. A second operation removed the needle. The jury got the point of the plaintiff's story but it was reversed on appeal, the court holding that the mere breaking of the needle was not negligence.

Try, Try Again

The plaintiff in Sherlock v. Manwaren, 208 App. Div. 538, 203 N.Y. Supp. 709 (4th Dep't 1924) suffered an injured shoulder in a fall. Doctor A set the shoulder negligently. Doctor B, his next physician, reset the shoulder, but it still remained out of place. Doctor B, feeling that this was a two-man job, called Doctor C and it was again reset. The result was further inflammation. The plaintiff, by this time was thinking in terms of secret herbs and potions, but gave the medical profession one more chance. Doctor D made the final reset and, consequently, the plaintiff lost the permanent use of his arm and shoulder. The plaintiff brought this action against all the doctors and the court held that all the doctors were properly joined, since the cause of action arose from the same transaction and the same subject matter.

On the advice of his doctor, the plaintiff in Dictz v. Aronson, 244 App. Div. 746, 279 N.Y. Supp. 66 (2d Dep't 1935) agreed to have his tonsils removed. After the

* Birrell, Obiter Dicta (1885) title page.

Not Long Now

operation, the plaintiff continued to complain of pain in his throat. He became suspicious when the defendant doctor stated "I cut it just a little too far." An action was brought for alleged injury to his throat and was dismissed at the close of the plaintiff's case. The Appellate Division reversed and stated that the plaintiff with the statement of the doctor and other facts had established a prima facie case.

Again a needle was the cause of an intensive but unsuccessful search in Bernstein v. Greenfield, 281 N.Y. 77, 22 N.E. 2d 242 (1939). The doctor, while injecting with a hypodermic needle in the tonsillar area of the plaintiff's throat, broke the needle, the end becoming embedded in the throat. The tonsil was removed but the needle was not. The defendant and his assistant probed for an hour without success. Finally, the patient was sent home and told to return. Two more operations were performed and still no needle was found. Judgment of the trial court was reinstated in favor of the plaintiff.

Case of the Disappearing Needle

The plaintiffs in Kaufman v. Israel Zion Hospital, 183 Misc. 714, 51 N.Y.S. 2d 412 (Sup. Ct. 1944) were told by the defendant hospital that they were the parents of a bouncing baby girl. Daddy adjusted himself to the idea of a daughter and quickly readied the nursery. The next day Mother found that the "she" was in fact a "he." Instead of being delighted with the new development, the parents brought this action for extreme mental pain and anguish, in that this might not be their child. The court, although sympathetic to their plight, took note of equality of the sexes and found that the complaint failed to state a cause of action in the absence of physical injury.

A Fair Exchange

The physicians have been joined in malpractice by their "painless" brethren as is illustrated by Rosenthal v. Hasbrouck, 161 N.Y. Supp. 354 (App. T. 1st Dep't 1916). The plaintiff went to the defendant dentist with a letter from her own dentist, asking that the defendant remove the "upper left 12 year molar." The dentist removed instead the upper left wisdom tooth. The plaintiff brought this action for the additional expense for plate work which became necessary and for the pain and suffering endured with the plate rather than a bridge. The dentist claimed that the plaintiff gave him permission and further, that the tooth he pulled was decayed. The court held that the plaintiff had failed to prove that the defendant did not use that reasonable degree of learning and skill which is ordinarily possessed by a surgeon dentist. It was not brought out whether the defendant offered the extracted tooth in evidence to corroborate his testimony.

Tooth for a Tooth

The reluctant expert witness was a bane to the suffering plaintiff in Van Epps v. McKenny, 189 N.Y. Supp. 910 (Sup. Ct. 1921). During the extraction the defendant dentist met resistance from the enemy, an impacted wisdom tooth. The tooth, after Herculean effort, gave way but the plaintiff's jaw came with it. The action was brought and an expert witness for the plaintiff testified that the defendant should have removed the bone before extracting the tooth. The witness soon after retracted his testimony and then retracted his retraction to a degree. The jury, although confused, found for the plaintiff but the court granted a new trial stating that expert testimony was necessary.

A Little Pull

An eagerness to demonstrate his tooth pulling ability was shown by the defendant in Griffin v. Norman, 192 N.Y. Supp. 322, (App. T. 1st Dep't 1922). The plaintiff

To Err is Human

patient went to the defendant and complained of a toothache. It was agreed that the tooth was to be extracted. While the patient was under gas, the doctor, slightly gassed himself, performed the perfect extraction but of the wrong tooth. Immediately realizing his error, he sought to rectify it by pulling the correct one. When the plaintiff awoke to find two teeth gone instead of one, the dentist expressed regret that he had pulled an extra one. The complaint was dismissed but reversed on appeal, the court holding that the plaintiff had established a prima facie case of negligence.

The plaintiff, in Alteresko v. Phillips, 208 App. Div. 171, 203 N.Y. Supp. 198, (1st Dep't 1924), went to the defendant dentist to correct a 1/16 of an inch space between her two lower front teeth. She believed this minute space to be the cause of all her troubles. The dentist assured her that very little would be necessary to correct the space. He first removed the top of the two teeth and inserted pivot teeth which continued to pivot when they should not have done so. The patient was then informed that the roots of the teeth would have to be removed and a bridge inserted. As the 1/16 inch space was now closer to ½ an inch, she had no other recourse. This first bridge, of course, had to be removed for a stationary one. However, before this could be done, gum treatments and an impression for the bridge were necessary. After the installation of the stationary bridge, the plaintiff experienced severe pain and the defendant had to remove the caps and enamel from 4 teeth in the upper jaw, in order that the spacing between the upper and lower jaw be proper. After receiving the dentist's bill for services rendered, the plaintiff brought an action for malpractice and the court held that there was sufficient evidence to submit the question to the jury. The plaintiff not only had dental worries but she suffered also from a vacillating expert witness, a common sickness in malpractice cases.

Vanity and Women

The inevitable class struggle was the subject before the court in Wolfe v. Feldman, 158 Misc. 656, 286 N.Y. Supp. 118 (City Ct. City of N.Y. 1936). The opponents were dentist and patient. While the patient was under anesthesia and not responsible for her actions, she clutched the dentist, who was in the middle of an extraction. He could not free himself of her grip and it was necessary that he use all his strength. In so doing, the patient's finger was broken. The court found for the plaintiff because the defendant failed to show he exercised ordinary care to protect the patient from injury.

No Holds Barred

In Zettler v. Reich, 256 App. Div. 631, 11 N.Y.S. 2d 85 (1st Dep't 1939), the patient went to the dentist for his semiannual examination. The defendant dentist informed the plaintiff that he had an impacted wisdom tooth in his lower left jaw and the plaintiff agreed to have it removed. The dentist extracted a tooth directly in front of the impacted tooth in order that he might get at it. His nurse employed hammer and chisel to loosen the tooth. The dentist, not being satisfied with the light blows by his nurse, seized the instruments of torture and struck the stubborn tooth a considerable number of blows. The plaintiff protested weakly but the dentist dismissed his cries with more forceful use of the hammer and chisel. As a result of the dentist's vigorous effort to loosen the tooth, he succeeded in breaking the patient's jaw. After the operation the dentist said, "Well, I did break your jaw, I guess I hit you a little too hard." The plaintiff nodded in agreement for he was unable to speak and his jaw had to be wired for over 6 weeks during which time he lost weight and

Understatement of the Year

suffered pain and discomfort. The complaint was dismissed but the appellate court reversed, holding that the plaintiff had established a prima facie case without expert testimony.

It can be seen that the patient must labor under an additional handicap in malpractice cases, namely, his inability to receive expert testimony. At times it is an insurmountable obstacle to a successful action, not on the merits of the plaintiff's case but only because he cannot obtain a witness to present the facts. It is extremely difficult to find a doctor who will testify to the imperfection of a fellow professional man. It must be remembered that the expert witness of today may be the defendant of tomorrow!