



LEGAL CASE

That Happened When?

Different states have different time limitations (known as statutes of limitations) as to when a lawsuit must be started following a claimed negligent act. Dentists often ask about this issue, and its importance can be demonstrated in this recent actual case. In some jurisdictions, this time period may even be extended due to the age of the patient, death of the patient, ongoing treatment and other factors. That's why dentists need to consider the issue carefully. The case presented here is the simplest and most common scenario we see with statutes of limitations.

FACTS

A 38-year-old man presented to a general dentist, Dr. G, unhappy with the appearance and function of his teeth. He had not been to a dentist for several years, and his home hygiene regimen was inadequate. In the patient's initial presentation, Dr. G found large amounts of plaque and calculus which required address before any treatment could be undertaken. Remarkably, the patient did not have any periodontal pocketing greater than 3mm, although there was gingivitis due to the build-up of accretions.

Once Dr. G did a full-mouth scaling, he developed a restorative treatment plan which involved the removal of decay in a large number of teeth and, most significantly, the fabrication of individual crowns on the upper arch from first premolar to first premolar (#5-12). The placement of these crowns was meant to treat the decay in many of them and also improve the cosmetics when the patient smiled, just as he had desired.

All posterior teeth were treated first for caries removal, and then attention was directed to the 8 planned maxillary crowns. The teeth were prepared for crowns, impressions were taken using a polyvinyl siloxane, an acrylic temporary bridge was made and inserted, and, after a number of try-in visits, the completed crowns were temporarily cemented.

The patient complained about the aesthetics after having the crowns in place for a week, specifically regarding the shade. So Dr. G agreed to send them back to the lab to be remade in the new shade painstakingly selected by the patient.

When the crowns were ready, Dr. G placed them in the mouth — first provisionally, until the patient gave his written approval, and then permanently. As Dr. G had feared, the patient returned a few weeks later, again displeased with the appearance of the crowns. Dr. G agreed to remake them again, with only the lab costs to be borne by the patient. The patient was upset by this arrangement, so he left the practice.

About 2 months later, Dr. G sold his practice and retired. The purchasing dentist, Dr. W, sent out announcements to all patients past and present, including this patient, welcoming them to come to the office. This patient never came.

Unbeknownst to Dr. G, and only learned later during litigation, the patient went to a number of other dentists, most of whom did not wish to get involved because the complaint was cosmetic. But one dentist, Dr. S, saw fit to be critical of the work, not from a cosmetic standpoint, but contending that margins were not sealed,



emergence profiles were deficient so as to set up potential food traps, and that the gingiva near the crowns was inflamed due to bulkiness.

Dr. S removed and replaced all of the crowns and also made crowns for all of the opposing teeth, claiming that better occlusion could be obtained if he made crowns opposing crowns than opposing natural teeth.

LEGAL STANCE

Just as the patient had difficulty finding a dentist to intervene, he was unable to find an attorney willing to sue on his behalf. But he was intelligent and savvy, so he took on the case himself, without an attorney — therefore, pro se — seeking the costs of the upper and lower crowns, as well as for pain and suffering. The case was filed 32 months after the final treatment with Dr. G who placed the crowns, but only 8 months after Dr. S started treatment, and 3 months after it was completed.

ISSUES RAISED

The first issue is a legal one: whether the filing of the case was timely in the jurisdiction where it took place. The statute of limitations for dental malpractice in that state was 2 ½ years (30 months), but the plaintiff claimed that he was entitled to an extension because he had begun to have his replacement work performed within that time period, so he should not be penalized that he was not able to file the case until after his work had been completed, when he began to seek legal representation.

The second issue relates to Dr. G regarding whether he had insurance coverage after his retirement, because he no longer paid malpractice insurance premiums after he retired, although he did purchase extended reporting period (or “tail”) coverage upon his retirement.

The third issue is the effect of the subsequent treating dentist, Dr. S, being critical of prior treatment, and the relationship to patients suing their prior dentists — also known as jousting. While dentists do have a duty to advise their patients of existing conditions they believe to be problematic, it is the way this information is disclosed that will very often dictate whether patients become plaintiffs.

“TAIL” COVERAGE

In Claims-made dental malpractice policies, which are the most common type, coverage for defense costs and indemnification (payment of a judgment or settlement) is triggered if a suit is filed or a claim is made while the policy is in effect. So, if a dentist with a Claims-made policy simply ceases to pay premiums upon retirement, and is then sued some time later — even for acts that took place while the policy was in effect — there will be no coverage for defense costs or indemnification.

On the other hand, if a “tail” is purchased upon retirement, as Dr. G did here, then that dentist will have coverage for a later-filed lawsuit as if the case were filed while the dentist was still in practice and the malpractice policy was in place actively. So, Dr. G was fully protected during his retirement for claimed negligent acts during the years he practiced dentistry.

Had the “tail” not been purchased, he would have been personally responsible to pay legal costs and any monies owed to the patient due to his claimed negligence; the impact of that upon retirement can be significant, to say the least.



TRIAL

It should be noted that, prior to trial, the judge refused to rule on our claim of untimeliness, opting instead to leave that as a trial issue. At trial, the same issue was raised after Dr. S testified to the poor quality of Dr. G's crowns, and Dr. G testified to both the propriety of his work and the date of his final treatment. The judge ruled that in the jurisdiction of trial (except for a few statutorily enumerated exceptions) the statute of limitations is a fixed date in time, which starts on the final date of the claimed negligent treatment.

So here, regardless of when replacement was begun or completed, that did not constitute a legitimate basis for extension. Therefore, even though the plaintiff's subsequent treating dentist, Dr. S, laid out a number of areas of negligent dentistry in association with the upper anterior crowns, none of that ended up having any legal value to the plaintiff, because the judge dismissed the action as having been filed after the expiration of the statute of limitations period.

DENTISTS' EVALUATIONS OF OTHER DENTISTS' WORK

In dentistry, unlike other professions, patients are often convinced to replace existing work, to the financial benefit of the dentist doing that replacement. It is well-known that dentists often disagree among themselves regarding any number of issues, including quality assessments. But it would serve the entire profession if criticisms were couched less aggressively, with the underlying acknowledgment that the earlier-treating dentist may have been faced with complicating circumstances about which a later-assessing dentist is not aware.

This is also known as 'jousting', where dentists second-guess or make critical comments about the care of other dentists. There are ways to criticize and there are ways to critique. Patients do need to be made aware of existing problems, but that can be done diplomatically so as to inform but not point critical fingers. This approach is far more likely to direct patients to receive needed treatment, while not simultaneously directing them to attorneys.

TAKEAWAYS

Regardless of the details of a case, there are some critical legal principles — such as statute of limitations — which must be met before any factual issue may become relevant. Cases must be started timely, or they become nullities. But, as noted above, legal issues frequently have exceptions, so dentists cannot count on them to defend their actions.

Jousting can validate or heighten a patient's concern and plant a seed that negligence might have occurred, which can lead directly to malpractice claims. Here's what to remember to help avoid jousting:

1. Generally beware of second opinions and patients with a long history of previous dentists
2. Patients often remember their negative previous experience subjectively, not in fact
3. Most of the time you are only hearing half of the story, so be open to getting the full story by communicating with prior dentists
4. Try not to speculate or guess when discussing previous treatment with a patient
5. Remember that treatment plans run the spectrum from conservative to aggressive treatment
6. Contemplate the potential effect of your words or documentation (reverse the roles)



Finally, carrying malpractice insurance during practice years is of the utmost importance as a means to protect assets. But, that importance does not end when retirement begins. This can be resolved by the purchase of a “tail”, or having chosen an Occurrence policy, which will provide coverage so long as the negligent “occurrence” took place while active coverage was in effect, rather than a Claims-made policy.

If you believe you’ve experienced “jousting” by another dentist or have an unsatisfied patient, one resource to turn to is MedPro Group’s risk management team. They help dentists navigate these daily issues and, in most cases, avoid litigation.

MedPro’s insurance offerings also include Occurrence coverage and free tail coverage upon retirement after being insured for one year with a mature Claims-made policy. That kind of coverage is exactly why Dr. G was able to defend this case, and ultimately win it.

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