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Evidence—Malpractice: Basis for Expert Testimony

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would disappear, plaintiff manufactured raincoats from the textiles. The odor did not disappear and the goods were a total loss to plaintiff. Plaintiff thereupon brought suit against defendant.

Defendant contended that the evidence 1) was insufficient to show that the goods were undamaged at the time he received them and, therefore, no inference of his guilt could be raised which would necessitate his coming forward with evidence, and 2) did not show that the odor was traceable to his waterproofing process.

The Court of Appeals held that defendant's statement, that a few of the goods had an odor when received by him, manifested the implication that the remaining goods were odor free. This implication was substantiated by the fact that the sample pieces sent to plaintiff did not contain any odor. These findings sufficed to show that the goods were in good condition when defendant received them, and to raise the inference that the damage occurred during his period of exclusive control. Therefore, his silence at the trial justified the jury's finding that damage resulted from an improper discharge of his bailment obligation.

In many cases, where there is injury to the plaintiff, the only reasonable inference is that the damage was the result of fault. Yet, because one party has had exclusive control over the goods, any clue as to the possibility that damage occurred during this period of control lies with the defendant alone. It is virtually impossible for an aggrieved plaintiff in such case to prove the injury. Therefore, it does not seem inequitable to expect the party who has had exclusive control to explain his conduct during such period, and if he chooses to remain silent, to construe that silence against him.

MALPRACTICE: BASIS FOR EXPERT TESTIMONY

Before a controversy may be submitted to the jury the complaining party must establish a *prima facie case.* Failure to do so requires the court to dismiss the complaint as a matter of law.

In a recent New York malpractice action the plaintiff alleged she had suffered a partial loss of sensation and taste in her tongue following an extraction of one of her teeth by the defendant dentist, and that such loss was the result of the defendant's negligence in severing two nerves during the extraction.[99] The defendant not only denied having severed the nerves but further testified he had done no work on the side of the tooth wherein the nerves lay.

At the trial the Supreme Court disregarded the testimony of an expert witness for the plaintiff who had testified that, in his opinion, the lost senses in the tongue were caused by the severance of the nerves during the extraction performed by the defendant, and dismissed the complaint at the close of the plaintiff's case. The Appellate Division affirmed the dismissal of the complaint

99. Cassano v. Hagstrom, 5 N.Y.2d 643, 187 N.Y.S.2d 1 (1959).

and the Court of Appeals, in a four-three decision, also affirmed, holding there was insufficient evidence to raise a question for the jury.

The immediate issue before the court was not the final determination of the controversy but rather a determination of whether or not the plaintiff had established a *prima facie* case of negligence by the defendant. In affirming the dismissal of the complaint the Court stated that as there was no affirmative proof in the record that the defendant had cut the nerves in question, nor all other possible causes of the injury excluded, the plaintiff had failed to establish a *prima facie* case. The opinion of the plaintiff's expert witness was properly disregarded, the court added, there being no facts upon which to draw such a conclusion.

While it is certainly true that opinion evidence must have a basis of facts in the record or be based on facts within the personal knowledge of the witness,[1] this writer cannot agree that the testimony of the expert witness was properly excluded or that there was not sufficient evidence in the record to present a question of fact for the jury.

The majority states that in some cases, where no other possible cause exists, it may be possible for the jury to draw the inference, on circumstantial evidence, that a defendant must have severed the nerves and thereby caused the injury. But here, the possibility of non-traumatic destruction of the nerves not having been positively ruled out, the controversy may not be submitted to the jury, although it may be likely that something occurring during the extraction did cause the condition.

The plaintiff testified that immediately prior to the extraction she had complete sensation and taste in her tongue but immediately after the extraction a partial numbness in the tongue developed. This testimony had been corroborated by her physician and her own dentist. Further, plaintiff produced a specialist who testified as to his familiarity with the operative procedures used by the defendant during the extraction and, after tests, who concluded that the injury to plaintiff's tongue was the result of a degeneration or destruction of the aforementioned nerves caused by the defendant's drill having severed these nerves.

Considering this evidence offered by the plaintiff, along with the fact that the nerves could not be examined except upon dissection, it seems that a question of fact was presented which should have been submitted to and resolved by the jury, for, in reviewing a judgment dismissing a complaint, the facts must be considered in a light most favorable to the plaintiff. In determining whether the facts proved constitute a cause of action the benefit of every favorable inference which may be reasonably drawn should be given to him.[2]

1. Marx v. Ontario Beach Hotel and Amusement Co., 211 N.Y. 33, 38, 105 N.E. 97, 98 (1914).
2. Lubelfeld v. City of New York, 4 N.Y.2d 455, 460, 176 N.Y.S.2d 302, 305 (1958).