

Civil liability of dental surgeons: the importance of technical experts

Ricardo Henrique Alves da Silva*, Jamilly de Oliveira Musse**, Rodolfo Francisco H. Melani***, Rogério Nogueira Oliveira***

Abstracts

Introduction: dental surgeons may be subject to responsibilities that encompass penal, civil, ethical and administrative obligations during the practice of their profession. As such, if results are verified to have been harmful to the patient – either by imprudence, ineptitude or negligence – the dental surgeon will be subject to the penalties set forth in the Brazilian Civil Code, which include repairing the damage and compensating the victim according to the harm caused. In civil lawsuits, the parties can hire technical experts to provide scientific and technical information on the issue at hand to their respective attorneys. **Objective:** to inform on the importance of technical experts in civil lawsuits, giving the parties a better understanding of the technical, ethical and legal aspects in these proceedings. **Conclusion:** there is need for greater knowledge on the part of dentistry professionals of the ethical and legal aspects that guide their profession.

Keywords: Civil liability. Dentistry. Forensics.

INTRODUCTION

In the course of their labor activities, in addition to the responsibility common to all people as citizens, workers also bear a specific responsibility: to answer for their acts while in the practice of their profession.

For the health professions in particular, this obligation to answer for acts which happened during the practice of the profession (professional liability) is represented in four spheres: penal, civil, administrative and ethical²⁵.

The popularization of cure methods and the awareness of suffered damages have led to a significant increase in the number of patients seek-

ing relief for harm resulting from professional liability. Nevertheless, it is observed that Brazilian jurists have not examined in depth the question of the civil liability of dentists¹⁹. This position leads to the thought that, in the matter of human life, there is no room for small faults¹⁷.

And, in the current market reality – highly competitive and often aiming solely for profit – an increase can be observed in the number of lawsuits against health professionals. With dentistry being intrinsically connected to public healthcare, violating its requirements would certainly represent a crime²⁷.

The so-called healthcare marketplace, previ-

* PhD Faculty – Forensic Dentistry – Department of Child Practice, Preventive and Social Dentistry – FORP/USP.

** Doctorate in Social Dentistry, FO/USP. Dentistry Faculty, UEFS/Bahia. Forensic Dentist, Technical Police Department, Feira de Santana, Bahia, Brazil.

*** PhD Faculty, Department of Social Dentistry, FOU SP.

ously considered to be “untouchable”, nowadays receives numerous complaints, both from users and other professionals. In 2004, the São Paulo State Consumer Advocate Agency (Procon-SP) fielded a total of 345,447 consultations, of which 84% were referred to or solved by companies without charges being filed, 11% were not subject to the agency’s mandate, and the remaining 5% were considered to be well-founded complaints, and resulted in administrative proceedings at Procon⁹.

In 2005, Procon-SP received a total of 359,811 complaints, with healthcare-related complaints comprising 4.70% of that number – more than 12,000 complaints²³.

As an example, in a survey conducted in the city of Bauru, São Paulo State, during the first semester of 2006, 6,447 complaints were filed concerning the services field (which includes the healthcare field), from a total of 11,956 records at Procon-Bauru⁵.

The issue is almost always dealt as a mere appendix in works discussing the civil liability of physicians, ignoring the fact that the numerous peculiarities of this profession, which is becoming ever more sophisticated with technological and scientific advances, will have a unique and decisive influence is the judicial outcome of each concrete case¹⁴.

By definition, the term liability (responsibility) originates from the Latin term *re-spondere*, meaning the reconciliation, the obligation by the causing agent of the damage to repair it³⁰. Currently, judicial liability is generically divided into civil and penal liability, with the possibility, in both, of using the services of a legal expert, as established into law.

Civil liability may be defined as the duty to compensate the damage caused to another, by the practice of an illicit act or by failing to observe the set of rules that guide daily life¹¹. Its proximate cause is the interest in reestablishing the legal balance that was altered or undone by the offense,

through pecuniary compensation²⁵.

Human actions must always be in accordance with legal principles. Therefore, any acts that defy a legal rule are illegal, as they go against the Law. And, according to Brazilian Civil Law, any act based upon the Law is considered to be licit; meanwhile, an illicit act is one that goes against the Law, by deviating from legal guidelines, becoming a crime which can be civil or criminal, depending on the law that is broken by the act in question⁷.

The following make up the civil procedures: the plaintiff (who initiates the action before a court), the defendant (against whom the action is directed), the attorneys, the judge, and the technical experts²⁰.

The technical expert, as the main focus of this article, is seen as an aide to the part in question, with an obligation to agree with, criticize or request that information be added to the report made by the official expert; it is up to the judge, through the principle of free motivated conviction, to analyze the arguments of the technical expert¹⁸. It is also important to emphasize that the technical assistant acts in the benefit of one of the parts in the case, unlike the official expert, who must be impartial.

Thus, the objective of this literature review is to instruct students, dentistry professionals and attorneys on the civil liability of dentists, and emphasize the importance of the presence of technical experts in civil lawsuits involving the field of dentistry.

LITERATURE REVIEW

Civil liability is an ever more present theme in Brazilian law. This is due to significant advances in legislation, with important changes in the acknowledgement of the populace as true citizens, especially in the aftermath of the 1988 constitution, which instituted, among other guarantees, the right to healthcare. It confirmed the citizenry as participative entities in the social realm, lead-

ing all to pursue their rights with greater fervor. Consequently, there was a great increase in the number of lawsuits seeking redress for damages caused by healthcare professionals³⁰.

Moreover, with the advent of statute 8078, from September 11th 1990, known as the Consumer Defense Code, dentists came to be considered service providers. This increased discussion on the issue and increased the number of cases referred to the judiciary system seeking compensation for damages caused by professional malpractice⁸.

The Consumer Defense Code defines service as “any payment-based activity executed in the consumer marketplace”, thus encompassing the practice of dentists²⁹.

Such damages are obligations derived from illicit acts through actions, intentional or unintentional, practiced as infractions of a given conduct to be followed¹². In that sense, according to article 927 of the Brazilian Civil Code (2002) “whoever, through an illicit act, causes damages to another, is obligated to rectify it”³.

Therefore, every harmed party has the right to seek reparation of the injuries inflicted upon them, which makes the professional-patient relationship even more delicate: nowadays, most procedures performed by dentists are subject to quality analysis, leaving these professionals with the possibility of answering for their acts in civil court²².

On subjective and objective liability

Civil liability is divided into objective and subjective liability³⁰.

Subjective liability is founded on the concept that, in order for the causing agent of the harm to be held responsible, it is essential to prove fault – in other words, the agent must act out of his own will and conscience¹⁶.

Fault always presupposes the violation of a pre-existing obligation. If that obligation is set under contract, it is a contractual fault; if based

on the general guidelines of the Law, which commands respect towards the person and goods of others, it is considered an extra-contractual fault²¹.

The law, however, also imposes upon certain people and in given situations, the duty to repair a given damage caused without fault. When that happens, it is said that the liability is legal or objective, because it does not require fault and is satisfied only with the damage and causal nexus¹⁹.

Upon analysis, the legal framing of liability in dentistry is classified as subjective, according to the Consumer Defense Code (1990), which expresses in article 14: “The supplier of services is responsible, regardless of culpability, for the redress of damages caused to consumers for defects related to the rendering of services as well as for incomplete or improper information about their use and risks. §4. The personal responsibility of independent professionals shall be determined upon verification of the fault”.

Civil liability lawsuit

A lawsuit consists of the instrument or process used to solve conflicts of interest regulated by existing law between different persons, named parties (plaintiff and defendant)¹¹. Civil liability lawsuits usually are lengthy processes, lasting from a few months to years, as in most cases they require specialized forensic analysis¹⁵.

The Brazilian Civil Procedure Code (Statute no. 5869, from January 11, 1973) describes in its Title 7, chapter III, articles 276 to 278, all the pertinent phases of a civil suit⁴, as we have summarized in the illustrations contained in figures 1 and 2.

In the initial petition, the plaintiff, represented by an attorney, exposes the problem and formulates the inquiries⁴. In general, the plaintiff must prove the causal nexus between the act practiced by the other part and the damage suffered¹⁶. With that document, the judge will summon the defendant, setting a conciliation hearing to take place within 30 days. If a settlement is not possible, a

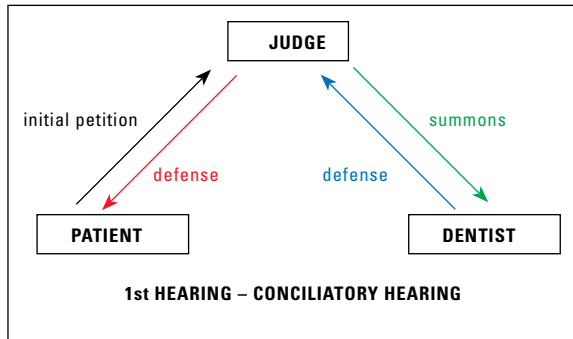


FIGURE 1 - Civil procedure protocol (initial stage).

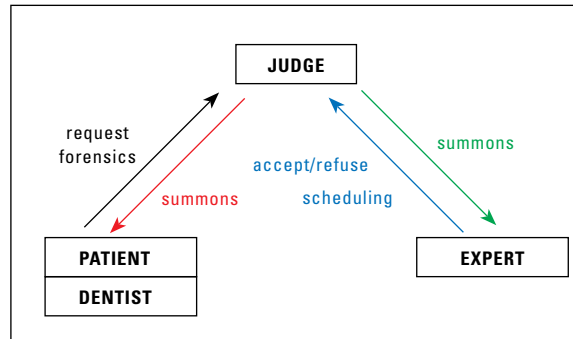


FIGURE 2 - Civil procedure protocol – dental forensic analysis.

written or oral response will be presented by the defendant’s attorney, using documents or inquiries, defending against the accusation being made⁴.

In case forensic analysis is required, the judge will name an expert, who in turn will file a report⁴. It is important to remember that the judge can call for an analysis even without a request from either of the litigating parties. In addition to the expert appointed by the judge, the litigating parties may name their own technical experts, who will observe the forensic analysis and will present their own technical reports, which will be added to the record⁶.

After all evidence is examined, the judge will issue a sentence according to his/her conviction, which is not required to reach the same conclusion as the forensic examination⁴. Based on this sentence, the losing party may appeal to a competent court.

Technical assistance

In the system of the Civil Procedure Code (1973), the parties are free to name their own technical experts – one per party, out of their own free will¹⁵.

Thus, technical assistant is the label that civil procedure law gives to professionals who are experts in a given field, appointed and hired by one of the parties to help establish forensic proof. In theory, they have the same privileges as official forensic experts – such as interviewing witnesses,

requesting documents, and obtaining information – with differences only with regard to timeframe, as the technical assistant has only 10 days after the official expert’s report is filed¹³.

The expert should preferably be a forensic dentistry expert, given all the procedures involved as well as the need for knowledge of juridical aspects required in forensic analysis, in addition to the help of an attorney in drafting documents and structuring the defense of the party.

The Civil Procedure Code (1973), in its Title I, chapter V, section II, article 50, which deals with technical assistance, confirms the possibility of third parties acting in the suit, as assistants to one of the parties, as long as they have interest in seeking a favorable verdict for the party in question⁴.

DISCUSSION

Knowing the rights and obligations, as well as abiding by the Code of Ethics, are fundamental conditions for the successful practice of any profession, including those related to healthcare and society, such as medicine and dentistry¹.

In the course of performing their routine activities, workers have, in addition to the responsibility common to all persons as citizens, a specific responsibility: to answer for acts committed during the practice of their profession²⁴.

The moment a dentist admits someone as a patient, a contract for services rendered is established between the two parties, which could be

interpreted as a performance obligation or a relative obligation. A performance obligation is that in which the creditor has the right to demand a result from the debtor, whereas with a relative obligation the debtor is required only to use normal prudence and diligence when performing a given service in order to obtain a result, without, however, entailing an obligation to obtain such a result²⁵.

Lately, dentistry has been classified as a performance obligation, as many professionals promise “miraculous” results, few unsuccessful treatments are divulged, and inadequate advertising ploys are used (such as “before and after” portraits). This leads the patient to believe that the entire procedure will always be successful and does not depend on other factors (such as biological responses and patient compliance).

Long gone is the time when the professional-patient relationship was based entirely on trust, without so much questioning and demands from the patient²². Nowadays, there is no question that patients are aware and knowledgeable of the contract relationship that is established with dentistry professionals², as well as having greater demands regarding the services to be rendered.

Motivated by their social circle or even by the news media, a significant part of these patients/clients often pursue some sort of monetary compensation in cases of errors resulting from the fault of a dentist, seeking redress in the court system. The judiciary process, however, can often lack the technical and scientific control that rules the field of dentistry, as well as any other field of healthcare³⁰.

Therefore, dental surgeons must perform their entire work based on a coherent and diligent technique, remembering that, in a lawsuit, dental appointment records are the primary evidence²⁸.

If harm is confirmed and the dentist is subject to a civil lawsuit, it is time to locate the documentation of the patient who has filed the suit, and hire a good attorney and technical assistant with

experience in the field of forensic dentistry.

The dentist and patient may be legally represented by any dentist, according to Statute no. 5081 (1966), which regulates the practice of dentistry, and establishes in article 6 that they are competent to conduct legal dental forensic analysis in civil, criminal, labor and administrative courts.

With regard to the documentation, all evidence to be presented by the professional must have been previously accrued and produced on occasion, or else it will not serve their purpose²⁴. The professional must build up the patient’s records over time. Otherwise, forged records or those containing only notes regarding costs and payments, interspersed with scant information about the actual treatment, will be irrelevant⁹.

Therefore, dental appointment records must contain all occurrences, their consequences verified over the treatment period, as well as all measures taken, as the lack of information or errors in the documentation will compromise its legal validity.

Records containing details of the anamnesis, clinical sheet, treatment plan, prescriptions, notes, models, x-rays and post-op and/or hygiene recommendations can be kept by any and every professional²⁶.

Thus, all recommendations regarding dental documentation, as well as a faithful account of the facts that transpired, will be evaluated by the technical assistant, who can consult experts in the field of suit, in order to pursue a better position for the client’s defense. Nevertheless, knowledge of Brazilian legislation, of the specific ethics code and professional rights, as well as practical experience in the area, are recommended requisites when choosing a forensic dentistry professional.

Still, with regard to technical assistance, there are several suggestions directed specifically to attorneys, with the intent of aiding their actions regarding the experts, in accordance to the new civil procedures for expert evidence¹⁸:

- Try to contact the technical assistant prior to the proceedings, as he/she can become a technical consultant in all stages of the suit, given the possible lack of knowledge by the attorney of the technical aspects of dentistry.
- Act prior to the appointment of the official expert, thus allowing the technical assistant to become familiar with the case, survey the data and suggest queries.
- Notify the technical assistant regarding the appointment of the official expert, including his/her name, address and phone number, so that the assistant can contact the expert more easily in order to exchange information and make any possible requests.
- Ask the technical assistant about the fees usually charged by the official experts in similar situations. Costs can be based on set fees or local customs.
- Do not comment officially on any actions by the official expert without first consulting the technical assistant, as there are often issues restricted to their professional field.
- Notify the technical assistance of the payment of the fees charged by the official expert, after which forensics can begin at any time.
- Alert the technical assistant to the start of forensics, providing the full content of the order, as judges often fix a date and time for the inspection, which the technical assistant should preferably attend.
- Inform the technical assistant of the publishing of any order related to forensic evidence,

directly or indirectly.

- Immediately provide information to the technical assistant regarding the forensic report when issued by the official expert.
- Become aware of, and pass on to the technical assistant, the contents of the findings of the other party's technical assistant regarding the forensic report filed by the official expert.
- Discuss the content of the opinion of the forensic report, as the technical assistant's work should follow a line of thought and strategy developed by the attorney for the proceedings.

FINAL CONSIDERATIONS

It can be concluded that forensic technical assistants play a vital role in professional liability suits, by providing technical, biological and legal information. Forensic dentistry professionals should preferably be selected as technical assistants, because their role is not limited to technical knowledge of the field.

Moreover, it is observed that the guidance of a technical assistant may bring advantages to dental surgeons, such as: improved organization of patient dental documentation, better awareness of rights and obligations, and above all, greater job security.

Sent on: January 2007
Reviewed and accepted: July 2007

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Contact Address

Ricardo Henrique Alves da Silva
 Faculdade de Odontologia de Ribeirão Preto – USP
 Departamento de Clínica Infantil, Odontologia Preventiva e Social
 Avenida do Café, s/n, Bairro Monte Alegre
 CEP: 14.040-904 – Ribeirão Preto / SP
 E-mail: ricardohenrique@usp.br