

Ethical and legal considerations on professional liability of the orthodontist

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Introduction: After the enactment of Law 8078, of September 11, 1990, the Consumers Defense Code implied important alterations in Brazil's legal scenario, providing a greater balance in the relationship between consumers and service providers. From this law, dental surgeons came to establish a consumer relationship with their clients.

Objective: Due to the ethical and legal issues against the dental professionals, this work makes general considerations about the nature of the dentist's obligation in services, specifically in Orthodontics.

Conclusion: The responsibility of the professional shall be restricted to predictable risks and undertaken obligations. When the professional warns the client in a correct, clear and express manner, it will lower the chances of being later charged.

Keywords: Professional practice. Legal liability. Legal system.

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INTRODUCTION

Due to the complexities of the human body, dental surgeons (DDS) are increasingly specializing in different professional areas, as already happens in the field of medicine. Dental surgeons have come to understand and internalize the need to specialize in a given field, as performing too many different procedures leaves them subject to more frequent errors, facing disgruntled patients and occasional lawsuits. Another problem currently faced by DDS is the lack of professional ethics. Unhappy with their treatment, patients seek a different professional, who due to fierce and unfair competition, seeking more clients – seeking only profits – makes depreciative comments regarding their “colleague”. Added to all of this, the improved access to information, as the result of globalization, led people to become more aware of their rights. After Law 8078/90 – Consumer Defense Code¹ (CDC) – came into effect, they became able to litigate these rights in court. In light of this, the objective of this study was to review the literature and make ethical and legal considerations on the liability of orthodontists.

BRIEF HISTORICAL CONSIDERATIONS

Since the establishment of the earliest civilizations, principles of behavior were created to protect the weak against the strong in personal and collective conflicts of interest. These were merely abstract principles, without the least human awareness. Thus, when someone caused harm to another person, punishment was particularly barbaric, without any sense of social rationalization, with the preservation of the species as the primary object in the form of revenge. There was no distinction between civil and criminal liability, and human reactions were totally uncontrollable. Punishment for a given type of fault had no limits, and was often disproportionate.

In an attempt to minimize the disastrous results of these conflicts, the Hammurabi Code was created by the Emperor of Babylon, and is one of the oldest sets of laws ever found.²

Although its content is based on the previous tradition of Sumerian law, adopted by the civilizations of Eastern antiquity, it is considered the first set of laws based on the principles of Talion Law – punishment was equivalent to the crime. This would be a regulated

vengeance in which the punishment could not go beyond the limits of the damages suffered. The expression “Talion” comes from the Latin “talione”, meaning punishment equal to the blame, revenge equal to the affront or transgression,³ originating the expression “an eye for an eye, a tooth for a tooth”. In that code there were already references to punishments for medical errors during the practice of the profession.

In this older period other codes emerged, each advancing in the resolution of social disputes. The code of Ur-Nammu already adopted the principle of reparability, known currently as pain and suffering.^{4,5}

Laws were enacted with the objective of blocking the application of more severe punishments still based on the social principles of private vengeance. Among others is the code of Manu between 1300 and 800 b.C.,⁶ which already provided compensatory reparation of damages in cases of malpractice.

In spite of active opposition, the systematic and comprehensive Law of the Twelve Tables was devised between 451 b.C. and 452 b.C. That document already dealt with offenses, finding norms that established compensation for damages caused to someone in cases of recklessness. It did specifically mention health professionals, but nevertheless represents the first written legal document in Roman Law, which is the basic source for most Western legal fundamentals. During that entire period, there was no difference between civil and criminal liability offenses, or the idea or concept of fault. Punishments were based on the principle of vengeance.

With social development and the role of public authority, the consequences of vengeance-based punishments began to undergo changes by separating criminal and civil compensation, with more rational sentences for both the State and society, as those punishments caused great losses for both.

It was in Roman Law, during the Republican period in the 3rd century b.C., that the concept of fault was introduced with the general principle of damage reparation, thus introducing the subjective element of fault against the objectivism of primitive law, and further expanding the horizons of civil liability studies.⁸

In addition to other rules of punishment, pecuniary reparation of damages established the relationship between the agent, the action of fault and the existence of damages, “establishing certain types of

offenses that doctors could commit, such as patient abandonment, refusal to assist, errors from malpractice, dangerous experiences and others".⁹

Following the enactment of the Napoleonic Civil Code in 1804, the notion of fault came to be based on subjective civil liability, to compensate the damages caused to someone. After that document, countless codes were created in several countries.

In Brazil, the philosophical concepts of law were not different from other countries. The influence of the basic principle of fault-based civil liability was clearly enunciated in the Civil Code¹⁰ of 1916, which declared in article 159 that "That who, by action or voluntary omission, negligence or recklessness, violates a right or causes harm to another, is obligated to repair the damage". The determination of fault and the evaluation of liability are regulated by this Code – Articles 1518 to 1532 and 1537 to 1553. This same principle was adopted in the Civil Code¹¹ of 2002, expressing in article 186 that "That who, by action or voluntary omission, negligence or recklessness, violates a right or causes harm to another, even if exclusively moral, commits an illicit act", combined with article 927 "That who, through an illicit act causes harm to another, is obligated to repair it".

Still in article 951, the legislator explicated: "The content in articles 948, 949 and 950 further applies in case of compensation due by that who, during the practice of their professional activity, by negligence, recklessness or malpractice, causes the death of the patient, worsens his condition, causes him harm or makes him unfit for work". Article 186 comprises all people into one general form – that is, whoever violates a right or causes harm, including pain and suffering. Article 951 specifies the cases of compensation for damages caused by people practicing a professional activity.

Even prior to the enactment of the Civil Code¹¹ of 2002, Law 8078/90, known as the "Consumer Defense Code", already declared in article 14 that: "the service provider answers, regardless of the existence of fault, for the reparation of damages caused to consumers for defects related to services provided, as well as for insufficient or inadequate information on their fruition and risks",¹ thus characterizing objective liability. Paragraph 4 affirms that the personal liability of liberal professionals will be investigated upon the determination of fault – subjective liability.

In this way the principles of liability emerged and evolved, from the beginning of civilization until the present days, in which ancient and modern legislators always sought to establish a fair balance between the damage and sentence.

CONCEPT AND DEFINITION OF PROFESSIONAL LIABILITY

The term liability (responsibility) derives from the Latin verb *respondere*, "designating the fact of someone having become the guarantor of something". It contains the root *spondeo*, an expression in Roman law entailing the debtor's obligation in verbal contracts.¹² In a broader sense, legal liability consists of the situation originated through action or omission of the public or private subject, obligating the violator to repair the damage. In other words, it can be said: "... the legal liability entails the person who infringes the rule, that who is affected by the infraction, the link or causal nexus between violator and infraction, the resulting loss, the applicable sanction and the reparation, consisting of a return to the state prior to the act that caused the damage".¹³

Initially, the application of civil liability was based primarily on fault, without which there was not any chance of obligating someone to repair a given damage. However, with the evolution in Law came risk-based liability, without even considering an assessment of fault. This is the theory of objective liability – that is, liability without the existence of fault, as defined in article 14, Consumer Defense Code,¹ Lei 8078/90, as well as in article 927, sole paragraph, of the Brazilian Civil Code.¹¹

With regard to the definitions of professional liability, it can be said there are several, all funded on the obligation to repair the damage caused to another. Several authors unanimously define liability as an obligation to respond to the acts by a given person, or by persons or things that depend on him/her. The liability of dental surgeons consists in the obligation of the moral agent to answer for his acts or the acts of others, and bear the consequences.¹⁴ The professional liability of dental surgeons was defined as "the obligation by doctors (dental surgeons) to bear the consequences of faults committed by them during the practice of their craft – faults which can result in double action: civil and criminal".¹⁵

Professional liability, inherent to dental surgeons, may be understood as the penal, civil and administrative obligation to which DDS are subject during the practice of their profession, as the result of harm to patients by recklessness, negligence or malpractice.¹⁶ The civil liability of DDS consists on applying the measures that obligate him/her to repair the material or moral damage inflicted on a client as the result of an act committed by the DDS or by a person to which he is liable (Dental assistant, Dental hygienist, Dental technician among others), for something belonging to him/her or by mere legal imposition.¹²

The relationship between orthodontist and patient is a consumer relationship, in which the delivery of the service rendered is done directly to the final recipient (patient). As such, any type of conflict of interest between the parties of the relationship – including health plans – will be regulated by the CDC,¹ along with the Civil Code.¹¹ Article 38 of CDC¹ allows the judge to reverse the burden of proof in favor of the consumer (“hypo-sufficient”) – that is, the service provider (orthodontist) is the one who needs to prove innocence. To that end, full patient records are useful in defending the professional.¹⁷⁻²² The dental services contract, along with the informed consent form, should contain all necessary information, including foreseeable risks. Thus, any foreseeable uncertainty to which the consumer was not alerted will make the professional responsible for his indolence.^{21,22}

TYPES OF PROFESSIONAL LIABILITY – ACTION BY THE AGENT

When related to the healthcare field, professional liability is considered broad and complex under the standpoint of the Law. Each and any act committed during the practice of the profession, either by an independent professional, employee, owner or partner at a dental services business company, or even a member of a de-facto partnership, is subject to the norms that regulate the moral, ethical and legal rights and obligations of the profession. It can be divided according to the action practiced by the agent.

Civil liability consists of the interest in restoring the judicial balance altered or undone by the damage, returning to the prior state or providing pecuniary reparation. It is, therefore, the condi-

tion of the agent who caused the damage of repairing the losses caused to the patient, comprising not only personal or material damage, but also pain and suffering, as set in articles 186 and 927 of the Civil Code¹¹ combined with article 14 of the Consumer Defense Code,¹ and article 5, clause XII of the Dentists Ethics Code.²³

Criminal liability consists of disturbance of the social order, possibly subjecting the violator to a custodial or alternative sentence, as set by the court. Thus, whenever a DDS performs a professional act on a patient resulting in bodily harm, he/she can answer to a criminal charge, as long as the patient and legal representative press criminal charges, which result in a policy inquiry, as it is a conditioned process. In most cases, when criminal charges are pressed against the DDS, they are of a culpable nature due to malpractice, recklessness or negligence, as set in article 18, II, of the Penal Code²⁴ – that is, when the agent caused the outcome without the intention of doing so.

During Brazil’s dictatorial regime, law 4324²⁵ was enacted in April 14, 1964, creating the Federal and Regional Councils of Dentistry, while decree 68704²⁶ of June 3, 1971 regulated that law and enacted the aforesaid Councils. Thus professional associations were created, with legal force and assigned to supervise the ethical conduct of DDS nationwide, responsible for upholding and protecting the good reputation of the dental profession, as well as disciplining and examining the practice of dentistry nationwide, judging possible legal and ethical infractions. As such, under an administrative perspective, the Dentistry Ethics Code,²³ by establishing ethical rights and obligations to all who practice dentistry, makes clear in Chapter III – On the Fundamental Obligations, clause XII – the obligation of assuming the liability for practiced acts. This goes not only for dental surgeons. “The rules of this Chapter are also applicable to all those who practice dentistry, even if indirectly, either as personal or corporate entities, clinics, polyclinics, co-ops, health plans of any kind, accreditations, administrators, intermediaries, health insurers or any other entities”. An act regarded as illicit in dentistry, resulting from the practice or occurrence of an involuntary but culpable conduct (resulting

from malpractice, recklessness or negligence), can have several different consequences, all featuring sentences contained in the Dentistry Ethics Code.²³ Article 40 established the administrative sentences to the professionals who violate the norms: 1) Confidential warning, in private; 2) Confidential censure, in private; 3) Public censure, in official publication; 4) Suspension of professional practice for up to 30 (thirty) days; and 5) Repeal of professional practice *ad referendum* of the Federal Council.

CHARACTERIZING CIVIL LIABILITY

The characterization of civil liability depends on the existence of error by the professional, justifying the obligation to indemnify the damages caused to a given patient. Thus, it becomes necessary to evaluate the following elements: The agent, the professional act, the lack of malice, the existence of damages and cause-and-effect relationship.

The Agent consists of a legally accredited professional – that is, property enrolled in the Regional Council of his jurisdiction. However, those who exercise the professional illegally will not be exempt from punishment, bound by article 282 of the Brazilian Penal Code,²⁴ which characterizes the illegal practice of medicine, dentistry and pharmacy. It should be highlighted that most courts understand that a professional who holds a dental surgeon degree by an accredited university, but is not enrolled in the respective Regional Dentistry Council, is not practicing his professional illegally, in the terms of article 282 of the Penal Code,²⁴ but is rather a mere administrative infraction. It should be mentioned that the professional always answers for his staff, whether or not enrolled in the Regional Council.

To characterize liability, there must be an action by the professional– the professional act – towards the patient. This action may be commissive or omissive, considered legally as a licit or illicit act, as the obligation to indemnify, in addition to proof the professional act, is based on fault, as well as in the theory of risk and the existence of damage. It is therefore a voluntary and objectively imputable act, by the agent or a third person for who he is liable, which can cause harm to another, thus causing the obligation to indemnify.¹⁴ These acts are nothing more than procedures carried out by the profes-

sional or by someone for whom he is liable, which can be ascertained through documental proof. Therefore, the professional who has a complete set of patient records, can more easily prove whether a given dental procedure was carried out or not.¹⁷⁻¹²

Malice is characterized by the free, voluntary and conscious action of practicing an act against someone with the intention of harm. It is understood that a dental surgeon would never perform a procedure of that nature on a patient, with the specific intent of producing harm during a dental treatment. What can occur accidentally or through inobservance of technical procedures by the professional is an act without intent of harm – lack of malice – but causing damages specified in penal law, under the three types of fault: recklessness, negligence or malpractice.²⁷⁻²⁸ The professional will then be charged with two counts – one civil to compensate the damages caused, and another penal with custodial or alternative sentence, if a culpable offense is characterized.

In dentistry, characterizing contractual or extracontractual civil liability, objective or subjective, depends basically on proving the existence of damage, without which the obligation to indemnify the patient cannot be admitted.¹⁴ Article 186 of the Civil Code¹¹ is explicit: “That who, by action or voluntary omission, negligence or recklessness, violates a right or causes harm to another, even if exclusively moral, commits an illicit act”. Among the other elements of civil liability, the proof of existence of damages to the patient constitutes a basic and fundamental element leading the professional to an obligation to indemnify.

One of the most important factors in characterizing professional liability of dental surgeons is the relationship between the professional act and the damage caused to the patient, demonstrating the causal nexus. Without it, there is no obligation to indemnify. If the damage occurred, but is unrelated to the agent’s behavior, there is no relation of causality or obligation to indemnify.

A detailed evaluation of all of these factors is of utter importance to form an absolute conviction that the professional will answer for the act. The damage and relationship between cause and effect are elements that must be analyzed and based on the work performed by the professional.

It is also necessary to comment on joint-and-several liability, which is a type of multiple obligations, defined by law, in which a person answers for the acts of another in equal intensity. It is defined by the presence of more than one individual in one or both parties of the obligation relationship, such as in the case of the director of a clinic, the health plan, and even the State in the case of publicly employed DDS, as per the Civil Code¹¹ and CDC.¹ Joint-and-several liability is not present in criminal justice,¹⁹ where the crime is imputable only to whoever caused it.

RECKLESSNESS, NEGLIGENCE AND MALPRACTICE – A BRIEF CONCEPT

Negligence is also known as disregard or lack of care when performing a given act. It consists of the absence of the necessary zeal, implying in omission or inobservance of duty – of acting in a diligent and prudent manner, with the appropriate care required by the situation in question. Negligence cannot, therefore, be mistaken with lack of knowledge, but rather with carelessness and disinterest. An example of negligent conduct is the orthodontist who does not request follow-up periapical and panoramic radiographs every six months, to analyze root resorption, apical lesions, or even to diagnose bone loss. Professionals, who do not emphasize the importance of the post-treatment period and the need to use retention appliances to minimize relapse and instability, are negligent as well.

Recklessness is defined by an ill-judged action without the necessary care the act requires, related to something more than a mere lack of attention. It is an act executed in a careless manner without concern for the collateral effects or harmful results to the patient. An orthodontist who does not set a transpalatal bar correctly, resulting in swallowing of the appliance, is guilty of negligence. Another example is the recommendation for a tooth extraction without concrete confirmation of the diagnosis, or using a technique not supported by scientific literature.

Malpractice requires a lack of technique or knowledge by the agent, without proper qualification in a given specialty. It is the lack of knowledge, ignorance or inexperience in a given field. It is an omission of something the agent should not ignore,

as it is part of his job description, making use of the appropriate or required technique.¹⁴

A dentist without experience in the field of orthodontics who decides to perform complex treatments in that specialty is guilty of malpractice.^{14,29}

ORTHODONTIST LIABILITY: OBLIGATION OF MEANS OR RESULTS?

Obligation theory was devised in the last century, dividing professionals into two areas: means and results.³⁰ An obligation of means is that in which the professional is obligated to apply all necessary technical and scientific knowledge to perform a treatment, with the result regardless of will. The orthodontist will make use of all professional efforts, with dedication and prudence, and the final result may or may not meet expectations.^{14,17,31-32} This obligation is the commitment between contractor and contractee. In this situation, the patient or guardian should be properly informed about the treatment, procedures to be performed, and factors that may interfere on the professional's ability to achieve a favorable prognosis. The patient must expressly agree with the incidents that may happen during or after treatment, by signing the dental services contract and informed consent form, which must be annexed to the other documents in the patient's record.^{17,21,22}

The obligation of results must achieve a given result that is expected and desired by the patient, under penalty of suit.^{30,32} Certain authors and jurists³³⁻³⁷ diverge on the obligation of means and results. Some regard dentistry as an activity that should guarantee the result proposed at the start of treatment. Others consider that the circumstances of each specialty should be analyzed, to evaluate the obligation to the patient – means or result.

Santos³⁰ affirms that defining dentistry as an obligation of result is inadequate and illegal, given that the Brazilian Constitution³⁸ in clause II, article, 5, determines that: “no one shall be obligated to do or refrain from doing anything if not as a result of the law”. It can therefore be concluded that dental surgeons cannot be sentenced based on the obligation of results, because there is no law in Brazil in which professionals are obligated to achieve a result. Lopes et al³² corroborates this position.

The field of dentistry has currently reached a level of technological and scientific development that makes it difficult to ascertain in advance whether the nature of the dental surgeon's obligation is of means or result. All professions that perform biological procedures consist of an obligation of means, except those cases that involve fault – malpractice, recklessness and negligence.

Dividing dental specialties, systematically and in advance, classifying them into obligations of result, mean or mean-result, would be extremely troublesome, without any basis to attribute a concept to the nature of dental specialty as an obligation of means or result. There should be no randomness and unfamiliar pre-judgment of the nature of the obligation of a professional who performed a given treatment.

The type of obligation for each specialty should not be generalized, prejudged or defined, as each individual dental treatment has complexities whose prognostic depends on a great number of factors that should be carefully examined, always taking into account the general characteristics of the case, the peculiarities of the patient, the type of treatment and the unpredictability of certain biological conditions.

Many regard dentistry as an obligation of result because of a predominant aesthetic aspect, but correcting malocclusion also involves functional, phonetic and masticatory objectives. Each and every orthodontic treatment offers risk, as the movement of teeth depends of several factors that may cause undesired results that should be clearly explained and informed to the patient or guardian, in detail, prior to the start of treatment.^{21,22} One of the greatest problems for orthodontists is root resorption during treatments of this nature. The factors

that influence root resorption are extremely variable, and can be physiological, genetic or anatomical. Previous trauma, the stage of root development, the state of oral health, as well as mechanical factors such as the magnitude of orthodontic force, application interval and type (continuous, intermittent or interrupted) are related as well.³⁹

Just by citing these factors, we can imagine the complexity of orthodontic treatment, which depends basically of the patient's biological response to dispel the notion by some authors that the obligation of orthodontic treatment is of result. A case-by-case evaluation should be made by the professional during each orthodontic treatment, assessing fault due to malpractice, recklessness or negligence.¹⁴ For this and other reasons, we advise all dentistry professionals to compile full records on their patients, including a well-devised anamnesis, to get to know the patient's current and previous history in order to avoid problems that may cause misunderstandings between the professional and patient.^{20,21,22,31}

FINAL CONSIDERATIONS

It is up to the orthodontist to propose the best treatment, and to the patient to accept it, following a significant and thorough discussion on the subject, answering questions and establishing mutual respect. On these terms, the liability of the contractee is comprised between the predictable risks and the obligations undertaken. When the professional alters the patient correctly, clearly and assertively, the chances of being questioned later are reduced. Moreover, it is important that the professional remains up-to-date, and request the opinion of colleagues whenever necessary in cases of complex treatments and those involving different specialties.

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