

# Professional liability in endodontic practice

## Responsabilidade profissional em endodontia

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### ABSTRACT

Nowadays, the increase in legal action against the dental surgeon is causing concern for the dental profession, which is being observed in various ways by society and so results in numerous reflections on the final outcome of treatment. In the case of Endodontics, the goal is that the tooth is clinically asymptomatic, without any radiographically visible pathology and which is functional. This study aims to review literature relevant to the subject and to provide the dentist with information on the evaluation of cases of failure of endodontic treatment, to have legal security in undertaking their activities without the professional being exposed to litigation. This survey shows that there is a need to place greater emphasis on the documentation of each patient in order to protect against possible litigation. There is also a need for better regulation of standards of conduct to be followed by professionals, authorities and professional bodies. Thus, the need is confirmed to place greater emphasis on recording the documentation of each patient in order to protect against potential suits and to have better regulation of standards of conduct to be followed by professionals, authorities and professional bodies.

**Indexing terms:** Dentistry. Endodontics. Forensic dentistry. Liability legal.

### RESUMO

Nos dias atuais, o aumento de demandas judiciais contra o cirurgião-dentista vem ocasionando uma preocupação para a classe odontológica, que está sendo observada por diversas formas pela sociedade e, produzindo assim, inúmeras reflexões sobre o resultado final do tratamento. No caso da Endodontia, a meta é que o dente se apresente clinicamente assintomático, sem patologia visível radiograficamente e se apresente funcional. O presente estudo visa a uma revisão bibliográfica pertinente ao tema, de modo a subsidiar o cirurgião-dentista a ter uma segurança jurídica para poder desenvolver suas atividades sem ficar exposto a ações processuais. Esse levantamento permite concluir que há necessidade de dar-se maior ênfase na documentação de cada paciente, a fim de se resguardar de um possível processo. Há também a necessidade de uma melhor regulamentação dos padrões de conduta a serem seguidos pelos profissionais, pelas autoridades e órgãos de classes. Dessa forma, ratifica-se a precisão se dar uma maior ênfase no registro da documentação de cada paciente, a fim de se resguardar de um possível processo e uma melhor regulamentação dos padrões de conduta a serem seguidos pelos profissionais, pelas autoridades e órgãos de classes.

**Termos de indexação:** Odontologia. Endodontia. Odontologia legal. Responsabilidade legal.

### INTRODUCTION

The success of endodontic treatment can be defined as the end result of the therapy, with the tooth being clinically asymptomatic, with no radiographically visible pathology and being fully functional. Failure, on the other hand, may be related to incorrect diagnosis, unfavorable prognosis, difficulty with the technique and/or professional negligence.

Nevertheless, it is not always the dental surgeon who is responsible for the lack of success, during or after endodontic therapy, as a number of factors may be interconnected with potential success or failure, ranging from the patient's dental anatomy to the behavior of his immune system<sup>1</sup>.

Simi-Júnior et al.<sup>2</sup> analyzed the difficulties, in the various stages of endodontic treatment, experienced by graduate students in Dentistry, in which 740 treatment plans were selected and interviews were conducted to determine the main problems. The results showed that the difficulties encountered by the students were as follows: access to the pulp chamber and entry into the canals (27.02%), chemical/mechanical preparation (24.33%), filling of the root canal system (18.92%), repeat treatment (16.22%) and odontometrics (13.51%).

Endodontic treatments carried out in various locations and by different authors have, over the years, shown high percentages of failure. This situation is often due to the lack of preparation by the operator, given

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the complexity of the endodontic morphology and the limitations of the radiographic technique applied during the procedure<sup>3</sup>.

These failures occur through errors in the selection of the case for treatment, the non-localization of canals or technical errors such as: precarious nature of the aseptic chain, with canal fillings, in terms of lateral condensation, underfilling and overfilling. The presence of broken instruments or silver cones inside the canals also contributes to an increased rate of failure.

So the importance of repeat intervention in chronic cases cannot be overemphasized and, in addition, subsequent radiographic monitoring should not exceed a period of five years, since it is a question of careful observation or of supervised negligence, i.e. the lack of observance of certain care required to avoid injury, carelessness and disinterest<sup>4</sup>.

Using radiography, Safioti et al.<sup>5</sup> evaluated the endodontic treatment of patients in a private clinic and found that 51.4% of cases had inadequate filings and 2.37% with the presence of perforations.

With the evolution of consumer protection and the growing awareness by the citizen of his consumer rights, professionals are being held more and more accountable and, in this regard, liability includes three distinct aspects: civil, criminal and ethical. These are the subject of the present study<sup>6</sup>.

### **Professional liability in endodontic practice: civil aspects**

The main legal concepts related to civil liability are documented in article 186 of the Brazilian Civil Code<sup>7</sup>. With regard to ethical liability, the regulations are set out in the Federal Dental Council's Code of Dental Ethics<sup>8</sup>, in which, in chapter 7, special emphasis is placed on the professional-patient relationship.

According to the cornerstone of the origins of civil liability, it can be either subjective or objective. Subjective refers to the liability that has negligence of the agent as a prerequisite. As far as the Brazilian consumer protection code (CDC) is concerned, the patient is the consumer, as he uses the dental services as an end user (article 2). The dental surgeon is the purveyor of these services provided that he undertakes his activities without any bond of employment (article 3, caput, §2). In the mold of the general rules of the Consumer Protection Code, article 14, caput, their liability shall be objective, regardless of proof of professional negligence<sup>9</sup>.

The subjective liability attributed by article 14 §4 of Law 8078/90 (Consumer Protection Code) is an exception attributed by this legislation<sup>9</sup>.

Negligence becomes confused with carelessness, with lack of attention and even with feckless omission, or even the lack of necessary care and precautions when faced with intervention by the professional. To cut a long story short, "it is a question of not observing the due care required to avoid injury not desired by the agent"<sup>10</sup>. In this way the dental surgeon, who does not take precautions to prevent an instrument breaking inside a root canal, is acting negligently.

Imprudence is characterized by a hasty act, without the due care that the act demands, inopportune and without concern for the collateral effects or potential harm resulting to the patient<sup>11</sup>. He acts imprudently by carrying out unnecessary, risky treatment or treatment that has dubious results, with low probability of recovery.

Incompetence occurs when the dental surgeon acts in a separate area of Dentistry, by attempting to transfer dental concepts to other areas of activity. The dental surgeon is acting incompetently when, aware of the principles of applying sutures, he decides to perform a suture procedure in a location that is outside his legally established area of activity.

In this sense the law determines, in specific situations, an obligation to make reparations for the harm done, irrespective of the finding of the existence of the guilt of the agent. This comes under the category of objective civil liability, i.e. in particular cases it dispenses with and does not require proof of guilt for the duty to indemnify for the injury to apply. With objective civil liability, it is sufficient for the injury to have occurred and for there to be a chain of causation to give rise to the obligation to indemnify<sup>12</sup>.

Article 5, paragraph XII of the Code of Dental Ethics<sup>9</sup>, imposes the following as a fundamental duty: "to take responsibility for actions performed". Accordingly, the types of obligations of the dental surgeon should be included and how he should respond in view of it.

A large proportion of lawsuits that affect both doctors and dental surgeons arise from defective, poor, insufficient or incorrect diagnosis, and when preparing the diagnosis there is a need for a complete case history, with all the required complementary examinations, general physical examination and where it took place, and an evaluation of a full, well-constructed anamnesis<sup>13</sup>.

So a significant complication in litigation against dental surgeons is a deficient, incomplete patient history and the lack of authorization and consent by the patient or guardian (in writing and duly signed), attesting to the fact they are aware of and in agreement with the execution of the specified professional act, as well as the estimated fees and form of payment<sup>14</sup>.

Therefore, as well as being diligent in the exercise of his professional activities, the dental surgeon must record all of his acts, any warnings given to the patient and acquire his/her signature<sup>15</sup>. The dental surgeon, when his patient records are deficient or incomplete and missing the appropriate signatures confirming patient/customer consent, is exposed, in any lawsuit, and will have difficulty in proving his innocence. Consequently, it is recommended that these professionals cover themselves by filing all clinical documentation and examinations, together with any certificates, service provision contracts and forms of payment<sup>12</sup>.

Another aspect, which often results in not just profound damage but also actual legal action against dental surgeons, is the occurrence of a failure or deficiency of communication between surgeon and patient. In this case, the dental surgeon must always be open to furnishing the patient or guardian with the necessary instructions, clarifications relating to the problems or difficulties and to the progress of the treatment, thus maintaining a line of communication and consequently a good relationship with the patient or with his family<sup>13</sup>.

As for Obligation of Means and Obligation of Results, Calvielli<sup>10</sup> states that the resolute involvement of dental surgeons, spearheaded mainly by researchers and lecturers in the area of Forensic Dentistry, have caused legal experts to analyze that the stage in which dental science finds itself could not be compartmentalized in the field of outcome predictability, as they are dependent on the biological responses of their patients and also, indeed, on their cooperation<sup>5,16-17</sup>, seeing that in Surgery, in Endodontics, in Periodontics, for example, there exists an undeniable unpredictability of biological response.

So the obligation of the Endodontist essentially consists of the performance of the agreed service (which consists of a plan of treatment), which may be regarded as fulfilled, in specific cases, if the professional acted with zeal and diligence (obligation of means). In other cases, only the outcome will exonerate the professional<sup>18</sup>.

The Endodontist must make it perfectly clear that his analysis and decisions are aimed at a procedure based on technically acceptable logic, based on proven practice and with a financially viable outcome for the patient<sup>19</sup>.

A large part of the doctrine understands that the dental activity ends the obligation for results, only constituting an obligation of means in a few cases<sup>15,20</sup>. They adopt this stance as they consider Dentistry to be a sophisticated science which permits the professional to guarantee the patient the outcome he/she expects.

The opinions of the legislators and legal experts are not unanimous over whether the activity of the dental surgeon should be classified as being an obligation of result or means. However, the majority of legal experts understand that, contrary to procedures in the field of Medicine, for the majority of dental treatments, it is possible to predict a final outcome. Accordingly, these treatments, as a rule, fall into obligations of result, where the dental surgeon, as well as having the duty to exercise all possible zeal in the exercise of his office and to use the resources at the disposal of his profession, also has the obligation to ensure the outcome expected by the patient<sup>14</sup>.

### **Professional liability in endodontic practice: criminal aspects**

The exercise of the profession of dental surgeon is regulated by Law 5081<sup>21</sup> of August 24, 1966, which establishes as prerequisites for the legal performance of the profession, that the interested party complies with two conditions: professional qualification and legal authorization.

Professional qualification is obtained via the acquisition of a diploma of graduation in Dentistry, issued by a faculty recognized by the Ministry of Education; legal authorization is obtained via the procedure of registering the diploma with the same Ministry, in the eligible State and/or Municipal Health Department, the Federal Council of Dentistry and a registration with the Regional Council in whose jurisdiction the place of activity is located<sup>22</sup>.

Illegal exercise is deemed to be: "Exercising, even if free of charge, the profession of a Doctor, Dentist or Pharmacist without legal authorization or by exceeding the limits"; the penalty for which is detention of between six months and two years, as described in article 282 of the Brazilian Criminal Code<sup>23</sup>.

The lack of legal authorization is characterized by the absence of a certificate of qualification and respective legal records. As for exceeding the limits, this occurs when a crime is committed by one of the professionals cited in the cited article, exercising acts exclusive to the profession of one of the other professionals. As an example, one might quote the dentist who performs surgery away from the oral maxillofacial region<sup>24</sup>.

According to Calvielli<sup>10</sup>, the prohibition of the exercise of "health professions" by individuals not authorized to do so, is one of the oldest in the legislation and, to some extent, accompanies the evolutionary stages through which these professions have passed.

## Professional liability in endodontic practice: ethical aspects

Ethical issues are routine in the practice of Dentistry and can involve aspects that relate to the patient, to a health service organization, to relationships with colleagues and society as a whole.

However, professionals are not always equipped to deal with issues of an ethical nature, which can lead to them experiencing ethical conflicts in the exercise of their profession. For dental surgeons in particular, the difficulties in resolving such conflict are heightened by increasingly advanced dental technology.

One ethical principal (broadly speaking) which needs to be remembered in this context, is that no professional can be obliged to implicate himself; it is only "ethical" if it is "just". Justice, classical Western thinking has it, as Pieper<sup>25</sup> recalls, is "the unceasing desire to give to each individual with whom we interact that which he is due that there should be someone to whom something is due and that he who is invited to exercise Justice should accept this duty".

That being said, we must consider that if, on the one hand, dental professionals are entreated not to neglect the treatment of these patients, on the other hand the complexity of the factors involved should also be noted<sup>26-28</sup>, which could even lead to dental treatment being confirmed as inappropriate due, for example, to the fragile systemic condition of the patient or even to a difficult psychological moment in the life of the patient.

In this way, the ethical training of the professional does not permit critical reflections of his practices and is also strengthened by fragmented forms of knowledge, with an emphasis on an overreliance on technology, on learning surgical restoration techniques the object of which are the teeth, distancing itself from the wider understanding of the health-illness process<sup>12</sup>.

These limits present for Dentistry the need for a new methodology which includes humanization, care, exercising citizenship and the understanding that the conditions of life have a fundamental role in defining the health-illness process of populations, demanding of the professionals new skills to deal with social realities, in an attempt to achieve integrality of oral health actions<sup>12</sup>.

So it becomes important to incorporate into the daily work routine in the health sector, educational processes that permit the organization of professional practices based on the population's health needs. Education should be emphasized as a tool to form a socially responsible individual and as a fundamental element in the context of healthcare<sup>12</sup>.

## DISCUSSION

### How to avoid litigation: dental documentation

At the present time, the act of litigation has become routine practice for all, accounting for a total of around 9 million compensation lawsuits each year, imitating the American model. In the health sector in the USA, doctors and dental surgeons are sued at least three times during their career. This can be explained, however, by the fact that the American Constitution does not guarantee the right to healthcare, it being insurance that regulates this market<sup>29</sup>.

The present-day avalanche of lawsuits that threaten to destabilize the dental profession finds in the native legislation a relief, or actually various reliefs, whether it be the gratuity of justice, inversion of the burden of proof, objective liability, not to mention the theory, into which the dental surgeon is compartmentalized as a professional, such as obligation of result, as well as the unaccustomed doctrine of "loss of a chance"<sup>29</sup>.

When commencing a consultation, the importance of patient records to Endodontics should be taken into consideration. The records should contain the identification of the professional, in compliance with article 33 of the Code of Dental Ethics<sup>8</sup>.

When identifying the patient, the following information is essential: full name, federal ID, taxpayer ID, date of birth, place of birth, nationality, marital status, sex and complete residential and business addresses. In addition, the route which the patient took to arrive at the professional (referral) should also be recorded as well as the date of the appointment. This is even more of a necessity when the treatment is dispensed to a patient under 18 years old or a person with total incapacity<sup>30</sup>.

In the field of Dentistry, dental surgeons have a great interest in gathering information about the care that should be observed in respect of dental documentation. This should embrace all possible information that the patient communicates to the professional as well as the respective treatment performed, the prescribed medication and much more besides<sup>31</sup>.

According to Guerra<sup>32</sup>, the increasing frequency of lawsuits against dental surgeons is down to the influence of what has been happening in countries in the developed world, such as the USA, as a result of the better understanding and awakening of citizenship.

Pêgo<sup>33</sup> stated that, in the vast majority of ethical lawsuits brought to the Dental Councils, the dental professionals did not commit technical errors,

but rather errors of information, as they failed to clarify adequately the risks of and alternatives to the proposed treatment.

The bigger issues and the worst kinds of litigation arise out of the plan of treatment and for this reason these should be extremely detailed and include the recommended option and potential alternatives<sup>34</sup>.

As well as the production and filing of dental documentation, the dental surgeon should furnish clear, adequate information about the different products and services, with correct specification of their characteristics, and also the risks that may ensue<sup>9</sup>.

All this information should be present and detailed in the treatment plan, and if there is more than one option, the patient has the right to choose which best fits his criteria of esthetics, functionability and is within his financial means.

The patient should fully understand the procedures related to his treatment and that his failure to provide information could be one of the causes of conflict, occasioning potential lawsuits against the dental surgeon<sup>35-36</sup>.

It is therefore recommended that the patient receives both verbal and written instructions about the treatment to be performed, as well as about the progress of the treatment and the post-treatment<sup>37</sup>.

As regards the treatment plan, patients should be informed about each diagnosis and agree to each treatment, before the therapy can begin. The possibility of an approach that differs from this treatment should be explained to the patient as well as the consequences and conditions, and should include the risks of not having treatment or opting to have treatment at a later time, and that this could have an influence on the outcome of the intended therapy. All of this should be documented, by completing the list of observations<sup>18</sup> and double-checking it with the patient.

Finally, in addition to the notes regarding the prior condition of the patient, the clinical record card should reflect not only the clinical actions carried out and the materials used, but also detail events such as non-attendance, lack of cooperation, conditions of hygiene and others that in some way could interfere with the outcome expected by the patient and even the professional, primarily because they could corroborate allegations by the professional as to the responsibility of the patient in not achieving the particular outcome<sup>38</sup>.

Having clarified any doubts of the patient, it is recommended that the latter signs permission for treatment<sup>11</sup>. After the procedure(s), orientation on post-op and hygiene behavior also represent proof of duty of care and may or may not be produced by way of printed forms, it being important that they are submitted with a signature as proof of receipt, in copy or in a logbook<sup>5</sup>.

One of the complementary exams most performed by the dental surgeon is the radiographic examination. Radiographs are used as evidence in the majority of lawsuits. Frequently, however, when radiographic material is requested by the experts or technical assistants, there is some difficulty in bringing it all together to help with the allegations of the dental surgeon, as he may not be able to find them in his files<sup>38</sup>.

Thus, the attention of professionals is drawn to the need to adopt a system of duplicates, as a means of preventing disputes, or in the eventuality of being required by the courts of law or when requested by the patient, by submitting the copy, as they represent the building bricks of operational actions performed by the professional<sup>30</sup>.

The study models and working models heavily used in particular specialties, should also be filed so as to be able to prove, if required, diagnosis and correctness of the treatment plan and its execution. Photographs are also excellent resources in proving treatment-related issues and should accordingly be labeled, tagged and filed.

In summary, all the documents produced when treating patients should be retained in separate files, as advocated by the Code of Dental Ethics<sup>8</sup>, in article 5, paragraph VIII.

### Understanding civil liability

The Endodontist's obligation essentially includes the performance of the agreed service (which consists of the plan of treatment), which can be regarded as fulfilled, in specific cases, if the professional acted with zeal and diligence<sup>39</sup>.

A large part of the doctrine understands that the dental activity terminates the obligation of results, constituting an obligation of means only in a few cases<sup>4,18,20,40</sup>, as Dentistry is considered to be a sophisticated science that enables the professional to guarantee the patient the outcome he expects.

However, according to Aguiar-Junior<sup>41</sup>, Troncon<sup>42</sup> and Tanaka<sup>22</sup>, the dental surgeon has an obligation of means, being mindful of the fact that, for the success of the oral rehabilitation, intervention always relies on the biological response and cooperation of the patient in complying with the professional's recommendations.

With regard to specialties, Oliveira<sup>43</sup> classifies them by considering the following as exclusively obligation of result: restorative dentistry, orthodontics, oral pathology, dental prosthesis, collective health dentistry, radiology and endodontics.

Kfoury-Neto<sup>11</sup> characterizes the following specialties as obligation of result: restorative dentistry, forensic dentistry, preventive social dentistry and orthodontics, dental prosthetics and radiology. With immediate regard to the other specialties, a case by case analysis is recommended, namely: oral maxillofacial surgery and traumatology, endodontics, periodontics, orthodontics, oral pathology and oral maxillofacial prosthetics.

Accordingly, these treatments as a rule fall under obligations of result, where the dental surgeon, in addition to his duties to employ all necessary zeal in the exercise of his office and to use the resources available to his profession, also has the obligation to guarantee a result that is expected by the patient<sup>14</sup>.

## FINAL CONSIDERATIONS

The dental surgeon must have a technical and scientific understanding and above all know how to provide treatment within the ethical limits imposed on him by the profession. He should always be mindful that his work has the function of reestablishing the health of his patients and not to cause them harm or inconvenience that lead them to seek the protection of the Brazilian justice system.

## Collaborators

RP MARINELLO took part in all stages of the preparation of the article. RHA SILVA and CM BRAMANTE directed the research study and took part in the composition of the article.

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