

Short Communication

Criminal liability in dental practice

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Abstract

Introduction: The technical and scientific evolution is the greatest advance in dentistry since its regulation with the law 5.081/1966; however it is worth remembering that constant modernization of treatments brings along a proportional increase on the dentist's responsibilities with his patient. The professional should always keep in mind that along with his hand ability, innovative techniques and the best material applied there is Deontology evaluating three areas: civil, ethical-administrative and criminal. It is the dentist's obligation to follow and respect the deontological issue in a world where lawsuits against peers have increased exponentially. **Objective and Conclusion:** The presented study reports the relations in the Brazilian penal code concerning to criminal responsibility of the health professionals, analyzing the dental behaviors which, once applied, configure criminal types, **subjecting the agent to the prosecution and trial of criminal justice.** A little known subject hardly ever discussed in dentistry.

Introduction

“To ensure the health and dignity of the patient”, so claims Article 5th, Paragraph V, Chapter III of the Code of Dental Ethics [3]. Dentistry is intrinsically linked to life, public health and the health of individuals, property

safeguarded by the State, that is, everything that has value to society and therefore is protected by law. With the promulgation of the Federal Constitution (FC) in 1988, the judiciary has become more accessible to the population. With the creation of the Consumer Protection Code, which clarified the society about which are the

obligations of the service provider, there was significant growth in the number of cases against dentists.

The evolution of dentistry as a science leveraged the **treatment possibilities that can and should be offered to the patient in an attempt to seek improvement in their oral situation, both functional and aesthetic. The professional must always have in mind that, along with the skill, innovative techniques and the best material applied, Deontology is evaluating three distinct areas: civil, administrative-ethical and criminal.** However, **it is noted the lack of interest of the dentists on knowing the connection between Dentistry and law, thus not knowing that many of the consequences of the actions at the office can be within the juridical laws.**

Criminal liability

The origin of the word responsibility comes from the Greek "*respon*", which means independence, and the Latin "*sabili*" which means wise. It is the obligation to answer for their own actions, and it is assumed that they rely on reasons or motives. It is a requirement that all free human being must respond by their actions and suffer the consequences of them [5].

Criminal liability is one that has the acts of the agent reverberated on the criminal sphere, as felonies or misdemeanors. The interest protected is the person, by direct violation of the social order. The consequence of the damage is the penalty, that is punitive and calculated by measuring the disapproval of the act. The penalty, as Article 32 of the Penal Code (PC) may be the freedom restricting to come and go, imposition of fines or restrictions of another nature, so-called alternative sentencing, such as the provision of services to the community, the restriction the right to drive a motor vehicle etc. **These measures aim to discourage the recurrence of the criminal fact [4, 7, 9].**

There are several crimes in the current penal legislation capable of charging to the dentist, some regarded as *own crimes*, which can be committed by a particular person or class of the person (in this case the health professional), and others as *common crimes* that can be committed by anyone, but that can be practiced by the dentist in the exercise of the profession. It is understood that the dentist can commit any of the common crimes but not everyone can be regarded as arising from professional misconduct. In the first type

it is worth referring the violation of professional secrecy and the illegal practice of dentistry. In the second, the dentist, in the exercise of his/her own professional activities, can commit crime with intent, mainly eventual intention or fault (negligence, imprudence or inexperience), including: wrongful injury, quackery, help omission, infraction of preventive health measure, misrepresentation, unlawful restraint, false testimony and false expertise.

Own crimes

Breach of confidentiality

Article 154 – **To reveal to someone without just reason, secret known because of function, ministry, trade or profession, and whose revelation may produce harm to others:**

Penalty – **imprisonment from three months to one year or fine.**

Single paragraph – **only take place through representation [2].**

The crime is characterized when there is free will and consciousness to reveal the secret known and when the revelation produce material or moral damage to others, in this case is an intentional crime. It is understood that the dentist, as an active subject of a criminal offense, is either a required or enabled confidant. As holder of the information because of its profession and revealing to third parties the individual secrets of the patients, the dentist commits crime against individual freedom. It is important to remember that no crime is committed if the revelation is with just cause because of the function, for example, the dentist tells the health authority the occurrence of a contagious disease or make complaint of domestic violence to the authorities.

Illegal medicine, dentistry and pharmaceutical practice

Article. 282 – **To exert, even free of charge, the profession of doctor, dentist or pharmacist, without legal authorization or exceeding the limits:**

Penalty – **imprisonment from six months to two years.**

Single paragraph – **If the crime is committed in order to profit, fine is also applied [2].**

Exclusively concerning to the dentist, focus of this study is to analyze the crime itself only

in two situations: first, the active subject practice professional acts **but without legal authorization**, in the second, although legally trained, the professional **exceeds the boundaries of the profession itself. To be featured as crime, the dentist should exercise their profession without the relevant legal requirements with habituality.** However, the current case law has held that the lack of record in the Dental Council does not characterize crime, but an administrative violation [7]. **The illegal practice of dentistry is a serious crime and threat to public health, the community and the individual.**

Common crimes

Body injury

Article 129 – **To offend the body integrity or health of others. [...]**
§ 6.º **if the lesion is guilty:**
Penalty – **detention of 2 months to 1 year [2].**

A personal injury can be classified as mild, severe or very severe. However, **as culpable the severity of the injury does not matter, the limits of the penalty will be the same.** There must be a legal duty of care, and in the case of the dentist, **it occurs when the non-compliance of the technical standard of the profession.**

It should be noted that several medical procedures offense to the integrity and health of the patient are part of the treatment of the problem at hand. Thus, **if there is the need to apply that may offend the patient's health, but admittedly, is part of the treatment, there will be no crime [7].**

Omission of aid

Article 135, PC – **Fail to provide assistance** when possible to do so without personal risk, to the child abandoned or lost, or to the injured or disabled person, to the helpless or in grave and imminent danger, or not asking, in these cases, the relief of the public authority:
Penalty – **imprisonment from one to six months, or a fine.**
Single paragraph – **The penalty is increased by half if the omission results in serious bodily injury, and tripled if death results [2].**

The aforementioned article incriminates the mere abstention from a social useful conduct, ie, the aid **should be immediate.**

Relevance of omission

Article 13, § 2.º, PC – **The omission is criminally relevant when the person should and could act to prevent the outcome.** The duty to act applies to those who:

- a) has by law duty of care, protection or surveillance;
- b) otherwise assumed the responsibility to prevent the outcome;
- c) with its previous behavior, created the risk of the occurrence of the outcome [2].

The dentist, as an active subject, responds to abstain from conduct positive: stop providing assistance, either by itself or through third parties. It is not acceptable in modern times that the dentist still **dissociates oral health from the patient's general health.** In dental practice it is possible to find situations of emergency or medical emergencies as constant risk, since the patient at the **appointment** faced a high degree of emotional stress and use of therapeutic drugs. Stress and fear are the main causes of emergencies and medical emergencies in dental offices, accounting for 75% of the **occurring cases [6].**

Risk situations require professional actions with quick and accurate order to decrease the possibility of sequelae and death. To make this possible, the dentist should be prepared for events that may happen inside the office before, during or after the service. The professional has the legal support in the act of helping a medical emergency in his office, and the crime of omission will be characterized at the time, ie, at the time the dentist refuses to provide the assistance required by law. In providing relief to an emergency, **the is not bound to a result, but to an obligation of means, as shall employ any technique that is in their power to achieve the desired result, even if this result has not been achieved, it is considered the obligation is fulfilled [1, 7].**

Illegal restraint

Article 146 – **To embarrass someone by violence** or serious threat, or after having reduced it by any other means, the resilience, not to do what the law allows, or does not do what is told:
Penalty – **imprisonment from three months to one year or a fine [2].**

A typically conduct not perceived as criminal is performing surgery or treatment against the patient's will or not authorized by the patient or legal representative [4, 12]. **The performance of unauthorized**

procedures in treatment plans for later recovery, aiming the profit; orders laboratory tests for critical illnesses such as Elisa and anti-HCV in preoperative procedures without consent or a blood transfusion in maxillofacial surgery in patients who did not authorize it because of religious reasons are examples of illegal constraint, unless they are justified by imminent danger to life. Therefore, it is the patient or legal representative's right to consent or refuse procedures, diagnoses and treatments to be performed, except in cases of imminent danger to life.

Infringement of preventive health measure

Article 268 – **To infringe determination of the government, aimed at preventing the introduction or spread of contagious disease: Penalty – imprisonment of one month to one year and a fine.**
Single paragraph – **The penalty is increased by one third if the agent is an employee of public health or exercises the profession of doctor, pharmacist, dentist or nurse [2].**

It is included in this article all the care recommended by the health authority for maintaining biosecurity within the dental office.

Sciolism

Article 283 – **To inculcate or advertise healing through secret and infallible medium. Penalty – imprisonment of three months to one year and a fine [2].**

Charlatan is one that uses the lie to deceive their patients by making false or exaggerated diagnoses, unnecessary interventions, guarantee of cure, mercantilist exploitation of advertising [11].

Fraudulent misrepresentation

Article 299 – **To omit, in public or private document, statement that it should be included or inserted false or different declaration from which should be written with the purpose of disrupting law, create liability or alter the truth about legally relevant fact. Penalty – imprisonment from one to five years and fine, if the document is public, and imprisonment for one to three years and fine, if the document is private.**
Single paragraph – **If the offender is a public official, and commits the crime relying on the post, or if the forgery or tampering is settling civil registry, the penalty is increased by its sixth [2].**

The law number 5081/66, Article 6th, item III, expresses the dentist's right to emit certificates within its area of operation, and the Law number 6215/75 includes the item "justification of absence from work", resulting in more autonomy to the dentist, either autonomous or public official. The certificate must be prepared according to ethical and legal standards to be legally valid and it must be properly delivered to the patient. Any statement that does not correspond to the truth can be attributed to professional crime of misrepresentation, not the crime of falsity of a medical certificate (Article 302, PC), because this latter characterizes crime of the own physician.

Perjury and false expertise

Article 342 – **To perform false statement or deny the truth as a witness, expert, accountant, translator or interpreter in legal proceedings or administrative or police investigation or arbitration. Penalty – imprisonment of one to three years and fine [2].**

The dentist, in the role of expert, can commit the offense of commission or omission. In the first, the agent makes a false statement presenting as fact which is not, or deny the truth. In omission (or reluctance) the dentist silence or hide the truth. Therefore, there are three types of criminal conduct in this crime: to affirm which is false as true, deny the truth when confronted with it and silent about the fact in question. Do not confuse the person with the expert technical assistants of the parts, which are not subject to the attribution of false expertise. The expert who, by fraud or negligence, provide untrue information will respond by losses that cause the damage to the other person, besides being disqualified for two years to make further skills and suffer the sanction of the criminal law. If before the trial process the own expert declares the truth, the fact is no longer punished. If the damage repairing is performed later, even still is subject to appeal, the apology or statement of truth will only mitigating effect [10]. If there is the delivery of the report to the requesting authority, the crime is consumed. If the false expertise is made through bribery, the penalty increases by one third [5].

Discussion

The massification of higher education with indiscriminate opening of new educational institutions, the tendency to isolation of the professionals within their offices in relation to

other scientific activities and insufficient knowledge of current law can be listed as the main causes of the constant occurrence of harmful results in dental activity and other health areas. These results can be configured for conduct contrary to the professional ethics or by a counterpoint to the rights protected by law through the practice of professional errors and negligent or intentional crimes involving administrative, civil and criminal liability of its agent. It should be noted that the inclusion of the triple responsibility to health professionals, increasing in contemporary law, does not mean devaluing or even persecute good professionals. **Unlikely, it meets the patient's importance in relation to the elements that make up a human being, such as the right to have psychological condition, the aesthetics, the health, the body, the life, which after all is a right that goes beyond the individual. It is a society right and duty of the state, because this lays its protection [8]. Most crimes reported in this paper is considered as a crime of minor offenses, which are those whose maximum penalty is equal to or less than 2 years, except murder and grievous bodily harm and serious. These simplest crimes only lead to prison in cases of recurrence, because some of them can be punished only by fine. They are protected by a simplified procedure and can be resolved through indemnity agreement, the conditional suspension of the proceedings or the imposition of an alternative sentence, such as providing services to the community [8]. Some procedural changes in the system by the Law n. 9099/95, which established the jurisdiction of the Special Criminal Courts for conciliation, the trial and execution of the offenses of lower offensive potential, transferred to the Special Criminal Courts mild cases of personal injury and culpable injury. Therefore, the victim or his legal representative should exercise the right of complaint within six months, on penalty of extinction of criminal liability. The Special Criminal Courts can be effective ways to solve conflicts between patients and professionals. The practice of crime may also result in civil restitution to repair the damage and, in the case of final criminal conviction, it will be discussed in civil justice only the amount of compensation due, and not if the professional is guilty or not. Moreover, it is important to know that the criminal acquittal does not mean simultaneously the acquittal under civil**

scope, because many of the criminal acquittals is due to insufficient evidence, and not by a decision declaring the nonexistence of crime or deny his authorship [4, 8]. **Parallely to the judicial process there is usually an ethical or disciplinary process in professional council, which may influence on the trial court, as well as to submit the the agent to administrative sanctions of warning, suspension and revocation of professional practice.**

Conclusion

What is intended here is a culture change in which the professional establishes the limits of performance, becomes aware of the need for careful and learns to be protected from a lawsuit through the study of Deontology and proper documentation. This present study aimed to shed light onto the little-known legal aspects reflection, reiterating the need for a moral and ethical conduct that sometimes seems forgotten.

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