

## Original Research Article

# Litigation of civil liability proceedings and its respective indemnification judgments against dental surgeons in the Court of Justice of the state of Paraná

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## Abstract

**Introduction:** The dental surgeon, which is a health professional, besides the responsibility common to all people as a citizen, also assumes a specific responsibility: to answer for the acts committed in the exercise of the profession. The so-called professional responsibility involves a fourfold framework: criminal, civil, administrative and ethical. With the greater access of the population to justice, it is not uncommon to know of a dental surgeon who is being fired by a patient and civilly responsible. In this sphere, the professional can be condemned due to his conduct during the treatment being classified as: Negligent, Imprudent and Malpractice. Conviction for any of these conducts, or even the combination of more than one of them conducts monetary reimbursement. These are the so-called material, moral and aesthetic indemnities. **Objective:** Observe how many processes were judged in the Court of Justice of the State of Paraná (TJPR) between 1995 and 2018 and to establish a default value for civil liability actions against dentists. **Material and methods:** We conducted a search on the TJPR website of all civil liability cases against dental surgeon tried in second instance between 1995 and July 2018 using pre-established keywords and including all judgments in the statistic results. **Results:** Between

1995 and 2018 there was an increase of 3.420% in the number of shares. The majority of material damages are below 15,000 reais, moral damage 13,000 and aesthetic damage 3,000 reais. The medium indemnified value was 4.142 reais. **Conclusion:** We observed the high degree of incidence of this type of process and that the highest indemnity was about material injury. However moral injuries got the highest medium value, showing the importance of human care.

## Introduction

The dental surgeon is a health professional and must carry out his professional activity beyond the common responsibility of all people as a citizen. Also assumes a specific responsibility, to answer for the acts committed in the exercise of the profession, we call this legal aspect by professional responsibility. It involves a fourfold framework: criminal, civil, administrative and ethical [20]. In the civil sphere, is judged the duty to repair the damage caused to another, by the practice of an unlawful act or disregard of the complex of norms that guide daily life. It aims at restoring the legal balance altered or undone by the injury, by means of the pecuniary indemnity [20, 17].

The Constitution of the Federative Republic of Brazil, 1988, established in addition to other guarantees, the right to health, made civil liability, a topic that is increasingly present in Brazilian law. Changed the recognition of the people as a citizen, making them participate in the social environment and seek more fervently their rights. Consequently, there was a large increase in the number of indemnity action [20, 17]. In addit to it, 1970 brought the Brazilian Code of Consumer Protection (CDC), who increased the patients/costumers rights [2].

With regard to subjective liability are the elements: act, damage, causal nexus and proven guilty of the professional. In objective responsibility only the act, the damage and the causal nexus compete, without the presence of the element fault [11]. Subjective responsibility is based on the notion of guilt, whose modalities are malpractice, imprudence and negligence. The first two are commissive acts and the last, omissive act. We consider that negligence is “not to do something that should have been done or to do it partially”; malpractice is doing something without technical or scientific knowledge, and imprudence is doing something wrong without the duty of caution that it requires, without thinking or foreseeing the consequences [11, 16].

The damage arises from the non-performance of a contractual obligation of means, which harms

the patient and is the fault of the professional. In this respect, it is necessary to distinguish fault, error and failure [4]. In this way, the dental error can be defined as the physical or psychological fact harmful to the patient, which is the result of an act arising from the professional dental surgeon. In addition, is judge responsibility to determinate: the lawful or illicit conduct of the alleged offender, if there is evidence, if the alleged offender practiced any conduct contrary to the rules and among the punishments described in the Law, which one would be more appropriate [22].

The amount of the indemnity that must be paid, due to the damage resulting from the dental error is established by the judge considering several aspects described in the Civil Code. However, to define this value, we can divide them into: patrimonial, moral and aesthetic damage [4]. The patrimonial or “material damage” is concrete and immediate; can be accurately measured, being pecuniary and involving present obligations (emergent damage, what is lost) and future (loss of profit, that which is no longer won). “Moral damage is conceptualized as one that is in direct form related to the human psyche and is therefore called ‘soul damage’, since it is intrinsic and integrates the essence of being” [16]. In the same vein, Venosa [23] defines: “Moral damage is the damage that affects the psychic, moral and intellectual spirit of the victim”. Aesthetic damage is considered, “directly related to personal aesthetics, beauty, harmonious. It is caused by an injury that causes shame, suffering from deformity and consequently, social rejection, because it is extrinsic and affects the so-called heritage of appearance” [23].

Legally, dental surgeons are not only responsible for their own mistakes, but also, in principle, for their employees. Depending on the situation, dental surgeons can also be held accountable for the mistakes of a dentist who is working on their staff even if on their own [1]. This way, he must pay attention in all team and is up to the dental surgeon to produce evidence of good professional practice. It includes the creation of dentistry documents, that is, statements, oral or written, signed by the

dental surgeon in the exercise of his profession and grouped in the form of a dental record. This, besides serving the traditional clinical purposes, can be used as evidence in case of legal action. The dental record is the main document and the main defense weapon of the professional [22, 12].

This paper is an unpublished research on the frequency of cases judged in the second office in the Court of Justice of Paraná regarding the civil liability of the professional dental surgeon. It aims to show an overview of the judicial situation of this category and the importance of maintaining a prophylactic routine to the actions provided by patients in the office. Avoiding the triggering of unnecessary legal processes or even providing documents that allow the defense of the professional if it is triggered.

## Material and methods

The present study is characterized as grounded theory, that is, the research based on existing documentary analysis. The research was conducted online at the Court of Justice of Paraná website (<http://portal.tjpr.jus.br/jurisprudencia>) with the objective was to verify the frequency of civil liability cases against dental surgeons, addressing the following topics: action, characteristic of the damage (material, moral or aesthetic), value of convictions, accusation as to the civil responsibility of the professional dental surgeon.

The survey was conducted on July 28, 2018 and all survey results was observed. The first recorded in the TJPR website electronic system was in January 1995 and the last one in July 2018. The keywords used in the search were: dental, dentist, odontologist, odontologist, odontologist, dental error, tooth, endodontic treatment, implant, implantologist and orthodontics.

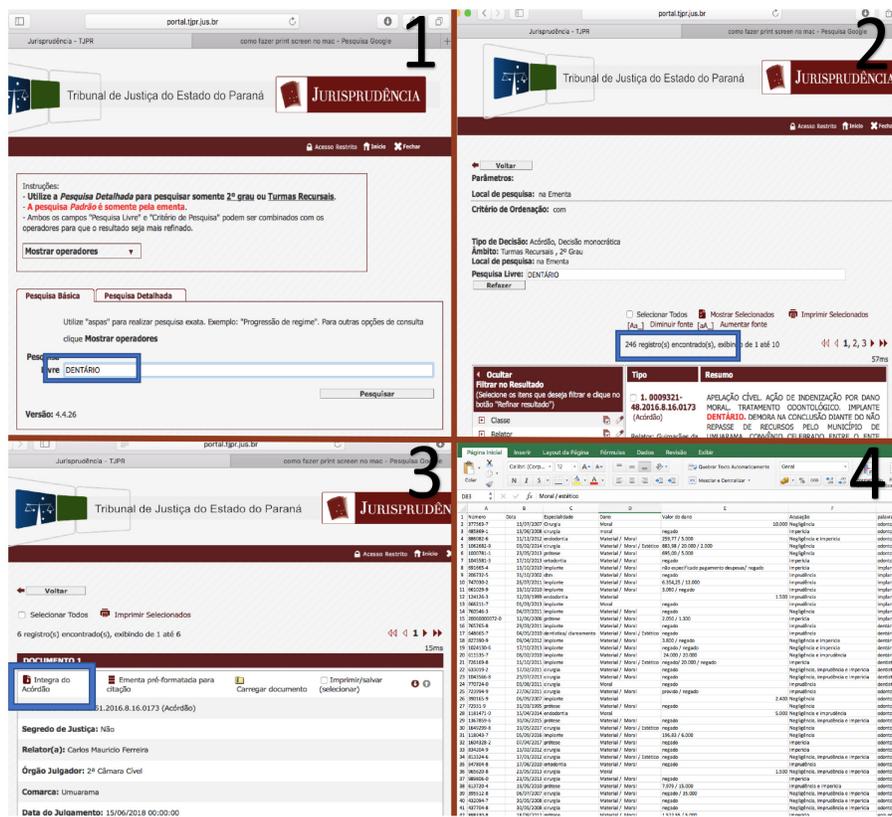
For the survey, the keywords were used in the search mechanism of the website of the Court of Justice and the results recorded. This mechanism searches the keyword on text of the Accordion, independent of the nature of the process. This way, several processes that did not fit the desired by the work were found and needed to be excluded. So, a careful reading of all the summaries of the judgments was conducted. Step called: first filtering. Afterwards, the pre-selected summaries were verified, and the full text read and then filtered again. All to ensure that the processes that would be included in the analysis concerned only by the civil liability of the dental surgeon. This step was called second filtration (table I).

This methodology of searching was repeated individually with each previously established keyword. The duplicates were excluded and counted once for statistical purposes. Due to such repetitions, the final work number does not match the sum of the judgments after the second filtering.

**Table I** - Frequency of occurrence of uniterms/keywords searched on the site <http://portal.tjpr.jus.br/jurisprudencia>

Uniterm/Keyword	Result	First filtration	Second filtration
dental	238	183	98
dentist	494	122	75
odontologist	70	15	15
odontology	195	36	30
odontological	769	32	26
odontologic	721	288	66
odontological error	90	71	45
tooth	975	157	25
endodontic treatment	166	12	12
Implant	669	100	49
Implantologist	0	-	-
Orthodontics	47	11	7

In order to guarantee that all the judgments of interest were included in the research and to ensure the validity the statistical numbers, two operators performed the same search steps, following the same pre-established sequence. At the final of the searching, were empowered 302 judgments.

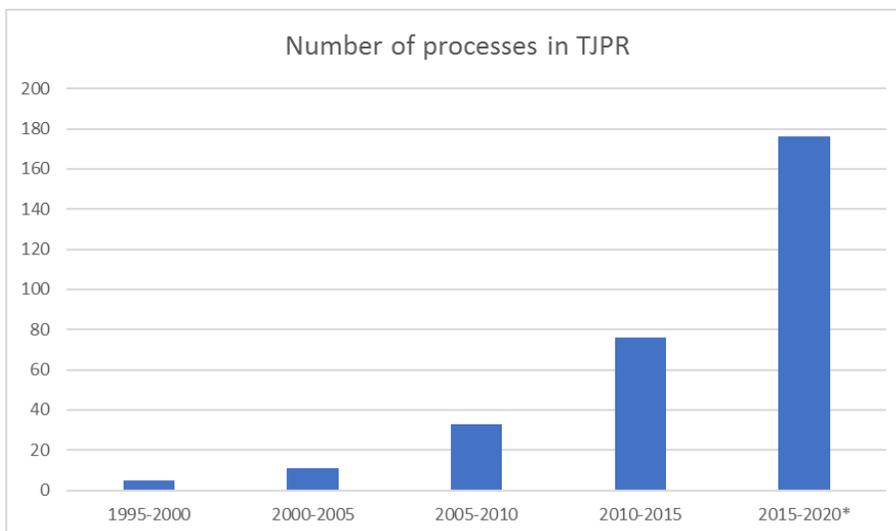


**Figure 1** - Pre-established search sequence to obtain the work data: 1) Site search blank (<http://portal.tjpr.jus.br/jurisprudencia>); 2): Search results of the search blank and summary of the Judgments; 3): Detail of the Judgment of interest selected; 4): Table showing the number, date, specialty, nature of the damage required, value assigned to the sentence and the keyword used to find the particular process

The highlights of the research were: the date, the specialty, the nature of the damage and the amount of the conviction. The information obtained was set out of the table in the program Microsoft Excel 2018® and performed the analysis of data by descriptive statistics. We used the frequency analysis to construct chart number 1. For chart number 2 and 3 we used Statista software version 10.0 Stat Soft.

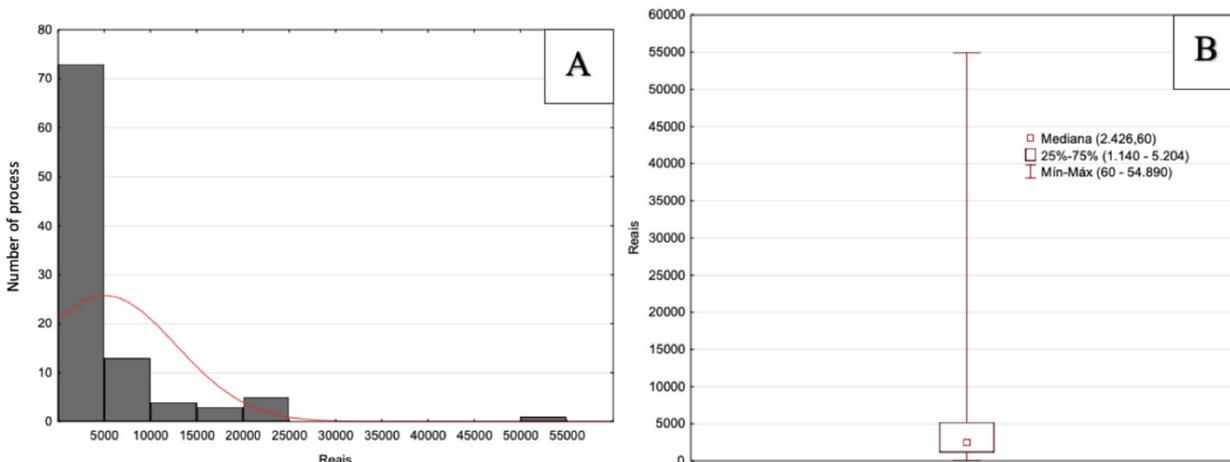
## Results

After the data collection, we obtained a total of 301 cases judged that were divided at intervals of 5 years from 1995 to 2018 in (graph I), we can observe that in the first 5 years of the research, 5 processes of civil liability were found against dental surgeons. Already in the last years (open window from 2015 to 2020), the number of processes reached the mark of 176 until July 2018, representing an increase of 3.420% In relation to the initial period.



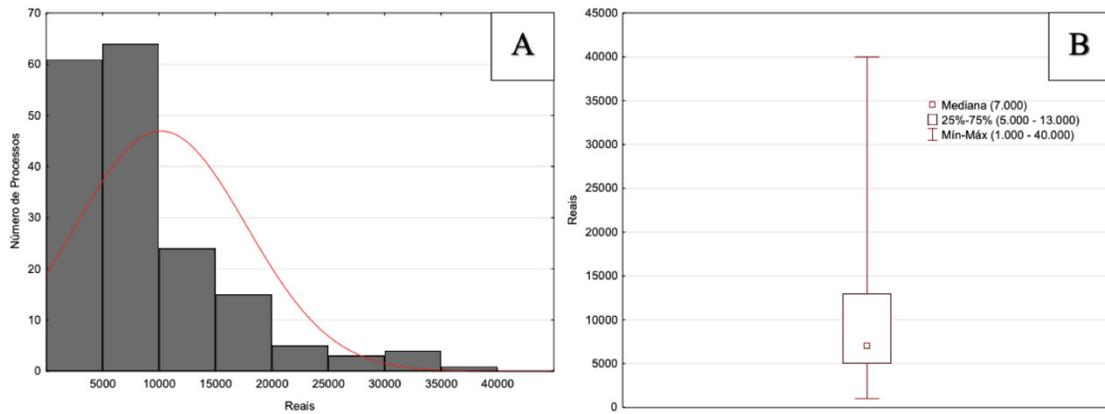
**Graph I** - Number of processes in TJPR x interval of 5 in 5 years since 1995

With regard to the material valuation of the share (graph II A), it can be seen that most of them are at a level of up to 5.000 reais. Being 55.000 reais the highest amount paid and 60 reais the lowest. The interquartile range, (graph II B) shows that 50% of the cases where there was compensation, values are below 5.000 reais (between 1.140 and 5.204 reais). The median was 2.426 reais.



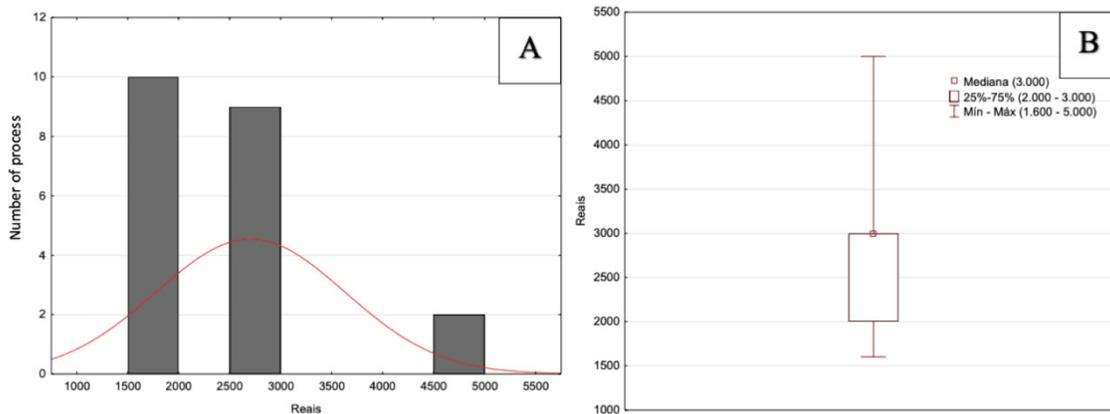
**Graph II** - A) Distribution of the number of processes in the TJPR x Material valuation of the share in Reais; B) Maximum indemnity amount paid 55.000 reais, minimum value 60 reais, interquartile range 1.140 - 5.204 reais and median 2.426 reais

For the moral valuation of the action (graph III A), the highest amount paid was 40.000 reais while the lowest was 1.000 reais. Half of the processes analyzed that presented this type of indemnification, the amounts paid were below 15.000 reais (between 5.000 and 13.000 reais) (graph III B). The median was 7.000 reais.



**Graph III** - A) Distribution of the number of processes in the TJPR x Moral valuation of the share in Reais; B) Maximum moral indemnity amount paid 40.000 reais, minimum value 1.000 reais, interquartile range 5.000 - 13.000 reais and median of 7.000 reais

In the assessment of the aesthetic damage of the action (graph IV A), 5.000 reais was the highest amount paid and 1.600 reais the lowest. The interquartile range, (graph IV B) shows that half of the cases presented compensation below 3.000 reais (between 2.000 and 3.000 reais). The median was 3.000 reais.



**Graph IV** - A) Distribution of the number of processes in the TJPR x Valuation of aesthetic damage of the action in reais; B) Indemnity amount of maximum aesthetic damage paid 5.000 reais, minimum value 1.600 reais, interquartile range 2.000 - 3.000 reais and median of 3.000 reais

## Discussion

The lack of legal Dentistry studies, and especially the lack of knowledge of the dental class about the new legal demands for the area, justifies the realization of new studies of civil liability cases against dental surgeons. With the use of the Internet, it has been shown that it is possible to access the Brazilian Courts' websites, without needing to travel to the different states, to find jurisprudence, presenting ease and agility in their research, when compared to other search

engines. The information is available bringing the databases of the Courts quickly and easily [6, 8, 9, 19, 24]. We took advantage of the availability of this data and used the site to TJPR for research. Absorbing data since 1995 until July 2018.

The great concern with the dental surgeon professionals motivated this research. These professionals should know about their legal scene and have the opportunity to deal with the lawsuits and indemnities. The risk of process must be included at the time of formulating the treatment

plan and stipulated value for such. We are moving to a dentistry that cannot neglect documentation and attention [14].

Is important to know how the reason for this kind of process. We believe that the changes in Brazilian Law and the knowledge of the people about justice could be the answer. Some authors agree with this argument, stating that the greater clarification of the population through the media and advertisements has increased the occurrence of extrajudicial cases and agreements [3, 15]. Garbin *et al.* [10], states that, in the opinion of the lawyers, there are several reasons that would lead the patient to file suit against the dentist. They are: for feeling deceived by the professional that did not meet their expectations (47.2%); only due to treatment failure (29.6%); by the ratio of inadequate information between patient and professional (28.2%); for other reasons (14.1%); lack of confidence in the professional during treatment (8.5%); and by bad faith, when the patient acts with the objective of obtaining compensation advantage (3.5%) [9].

The professional / patient relationship was always based on mutual respect, but all the records made between the parts, which were always verbal, began to be written. This change in attitude began to be observed after the promulgation of the Brazilian Consumer Defense Code - CDC / 90 [7]. According to the Code, the basic rights of the consumer include: "the facilitation of the defense of one's right, including the inversion of the burden of proof, to one's favor, in the civil lawsuit, when, at the judge's discretion, it is similar to the allegation or when it presents a lack of sufficient disclosure, according to ordinary rules of experience". Which means that the patient doesn't need to prove of his request, if he suspects that something during the treatment was wrong, that's enough to start a process [17].

Due to this change, a form of reducing or even defending oneself would be the accomplishment of a complete medical record with the authorization and consent of the patient or his / her responsible in writing with the due signatures, attesting that the patients are aware and according to the effective professional treatment, as well as their budget and payment [3, 5, 12, 18].

The present study shows that over the years the number of cases has increased. It is enough to note that between 1995 and 2000 we found only 5 and between 2015 and 2020 \* (which is a period still open) there are already 176 cases in the second instance. This corresponds to an increase of + 3.420%. Other studies have also verified the increase in the number of legal proceedings in

disfavor of dental professionals [14, 19]. These facts prove the consistency of increasing in litigation against dental surgeons. Given that the investigation of jurisprudence in the TJPR demonstrates only concluded processes, we believe that if we could consider all cases opened in the same period, the number would be much larger. Several actions of first instance may not reach this stage, jurisprudence represent only the top of the iceberg [8].

About the regionalization of processes in Brazil, De-Paula *et al.* [8] shown that the Brazilian state with the largest number of cases was Rio de Janeiro. A Coefficient of Process Experience (COEXP) was proposed, they estimate that for every 1,000 professionals, 2,23 have already been processed. The Region with the highest COEXP was the Southern Region (3.31), and the Federal District had the largest COEXP (6.22). The most cited specialty was surgery [8]. These data are congruent with the finding of Lima *et al.* [13]. They used a procedural coefficient (CP = Number of processes x 1000 / Number of dentists in the state) and reveals that the largest amounts of accords were presented by the state of Rio de Janeiro (11.75); Federal District (6.81); Rio Grande do Sul (5.49); São Paulo (4.83) and Sergipe (4.56) [13]. Again, these data make believe that the number of processes is linked to the degree of population development. Since the Brazilian Southeast region presents the best rates of human development.

There is a different opinion in the studies about the specialty most processed. While for Rosa *et al.* [19] the dental area most complained was implantodontology, for Zanin *et al.* [24] was Prosthodontics. On the other hand, others claim that the most cited was surgery [8, 9]. We believe that this difference must occur because surgery has the major tax of malpractice condemnation, and the accords bring more information about solved processes [24]. About gender, several studies agree that the gender that seeks justice the most is the feminine. They believe that Women tend to take better care of their health and are responsible for a major share of the consumer market, including the oral healthcare services market [8, 14, 19, 24].

Costa-e-Silva and Zimmermann [6] consulted Courts of Justice of the states of Rio de Janeiro, Minas Gerais, Rio Grande do Sul and Paraná in the period of one year, between 2005 and 2006, looking for the indemnity's values. Reported that when the Dental Surgeons were condemned the indemnifications ranged from 500 reais to 40.000 reais. Regarding the opinion of the judges in the actions unfavorable to the dental surgeon, it was observed that in 35% of the cases, Dentistry was

expressly characterized as an outcome activity instead to a middle obligation. These authors concluded that it is “imperative to raise the awareness of professionals about the legal aspects of their professional practice, as well as being fundamental that the category is based on the understanding that they are indoctrinated in relation to the type of obligation”, that is, we must give an example of professional conduct [6, 12].

The values found in our study were divided by the category of damage: material, moral and aesthetic. The material valuation of the stock at a level of up to 5.000 reais. Being 55.000 reais the highest amount paid and 60 reais the lowest. The median was 2.426 reais. The moral value of the action is below 15.000. The highest amount being paid 40.000 reais and 1.000 reais the smallest. The median was 7.000 reais. The valuation of aesthetic damage of the action, had 5.000 reais was the highest amount paid and 1.600 reais the lowest. Most of the damages were below 3.000 reais. The median was also 3.000 reais. The arithmetic average of the three indemnity categories was 4.142 reais. We can verify that the highest amounts paid involve moral damages, with a median value of 7.000 reais. However, the highest indemnity found in our study was related to material damage, 55.000 reais, which refers to reimbursement of expenses arising from repair of damage and return of amounts paid for treatment. Curiously, the lower indemnity paid also relates to the action of material damage. Realized reimbursement of the amount paid for the treatment in the amount of 60 reais [6]. However, our study breaks down the values by the characteristic of the indemnifying damage and in some cases, more than one indemnification was granted. That is, if we made the sum of the total indemnity, the total value of the action would be greater.

We emphasize that, as health professionals, we must pay more attention to our responsibilities and duties to the patient. Particularly with regard to the documentation of treatment. Therefore, in addition to diligent in professional practice, the dentist must record in writing all his acts. The medical record has a recognized contractual legal nature serving to prove the occurrence of the legal relationship between the professional and the patient. A deficient and incomplete medical record and the lack of authorization and consent of the patient or his / her caregiver are valuable ammunition in the legal process [3, 12, 18]. It is necessary to develop further studies that address and alert the civil liability of the dental surgeon as well as other health professionals.

## Conclusion

In view of the research done and the results obtained, we conclude that we have a growing number of actions against dental surgeon, very consistent (+3.420% in 23 years). Even though the median values for damages are not considered as high (total average between the indemnities of 4.142 reais) they may represent a great monetary loss. Apart from the great psychological damage that an action can cause to the professional triggered.

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