

## Professional liability in the practice of dentistry in Costa Rica: Part I

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### Abstract

The number of complaints related to professional liability in health sciences has increased worldwide, it is essential for dental professionals to be aware of the implications of their labor, as well as to comply with bioethical and legal principles to ensure a healthy dentist-patient relationship.

It is important to understand that the practice of dentistry in Costa Rica is regulated by norms, codes, and laws like any other human activity in a State governed by the rule of law.

### Keywords

Professional practice, bioethics, liability, standards, dentistry, law.

Source: *MeSH (Medical Subject Headings)*

### INTRODUCTION

The practice of medical practice has undergone numerous changes throughout history, both in the execution of the medical act itself, and in the protection of users of different health services, laws exert their influence on all human activities and dentistry is no exception. (1)

One of the oldest examples related to the protection of patients comes from the Babylonian empire (1792-1750 BC), where the Code of Hammurabi was promulgated, which, in its text described, among other things, the sanctions to which the doctor was exposed if he injured any of his patients. (2,3)

These laws were based on the principle of retributive justice and intended that, if any part of the body was injured during a medical procedure, in case the injured was free, the doctor received as punishment the same injury, and in the case of a slave, he should pay the owner a payment for the damage. which would currently correspond to a kind of compensation. (2,3)

Currently, sanctions for medical malpractice and other health disciplines such as dentistry, are no longer based on penalties or bloody practices, but are established by the judicial apparatus of each country, which has the necessary legal tools to regulate its exercise and assure users of the different services, public or private, that health professionals must assume responsibility for the execution or omission of each of their acts.

It is important to mention that the concern about cases of medical professional liability and its increase has been the subject of research since the beginning of the twentieth century, the conceptualization of health professionals as "sacred" has evolved to "triggers or responsible for error", (4) this change has become evident in the increase in lawsuits worldwide. (5)(6)

## METHODOLOGY

A review of scientific articles on professional liability in dentistry, norms, laws, and bioethics was carried out. The search was performed using the SIBDI platform of the University of Costa Rica Library System, the National Library of Health and Social Security (BINASSS) and the Costa Rican Legal Information System - SCIJ. The key words of the search were: professional responsibility, malpractice, law, and bioethics in both English and Spanish.

### Practice of Dentistry in Costa Rica

Practicing dentistry in our country implies not only putting into practice all scientific technical knowledge through the various dental procedures, but also requires compliance with a series of regulations required by the Ministry of Health (governing body in health matters) (7) and being under the regulation of the highest trade union entity, the Colegio de Cirujanos Dentistas de Costa Rica (College of Dental Surgeons of Costa Rica). (8)

For this, dental professionals must be duly incorporated into the professional association, be accredited for the use of equipment that produces ionizing radiation and in case of having their own dental clinic, possess the corresponding sanitary permits, as well as municipal patents, tax obligations, among others. (7)

In addition to the above, it is vitally important to point out that, as health professionals, we are not exempt from the legal requirements of which any citizen of the country is subject, but, in addition, a type of special responsibility falls on us and that is precisely the central theme of this article, professional responsibility.

The term liability is defined according as: "Debt, obligation to repair and satisfy, by oneself or by another person, as a result of a crime, a fault or other legal cause" (9). The obligation to repair damage resulting from professional action, is called professional liability and applied to the medical act, medical liability. Gisbert Calabuig defines it as "The obligation that doctors have to repair and satisfy the consequences of acts, omissions and unintended errors, and even involuntary within certain limits, committed in the exercise of their profession". (10)

This definition also applies to dentists, who, as health professionals, are obliged to answer for acts or omissions, voluntary or involuntary that result in a detriment to the health of patients attending the

consultation. However, this responsibility can be evaluated from the ethical and legal point of view, being then called moral and legal responsibility respectively. (11)

The practice of dentistry has a moral charge from the moment it becomes a profession of service to others, which is based on codes, norms and values, its purpose being to regulate the conduct of the dental guild. The fact that health care has evolved from a paternalistic model to a principalistic one, allows for greater clarity when judging and analyzing dental acts from an ethical perspective. In addition, the establishment of bioethical principles (non-maleficence, beneficence, justice and autonomy), offers the professional a guide to base his practice on respect, communication and empathy with the patient (12).

In the case of Costa Rica, the College of Dental Surgeons has a Code of Ethics, published in La Gaceta on December 6, 2011, which describes guidelines and disciplinary sanctions to which a dentist would be exposed in the exercise of his profession. It should be noted that this code must be studied by all dental professionals who are going to make their incorporation, whether national or foreign (13), being that, when they are registered and sworn in, dentists then assume an ethical-moral responsibility.

### **Regulation:**

The professional practice is legally regulated in several codes and laws, of which some examples are transcribed below:

#### **(a) General Health Act No. 5395:**

*-ARTICLE 40.- Professionals in Health Sciences will be considered those who hold the academic degree of Bachelor's degree or a higher in the following specialties: Pharmacy; Medicine, Clinical Chemical Microbiology, **Dentistry**, Veterinary, Nursing, Nutrition and Clinical Psychology". (Thus amended by Article 1 of Law No. 8423 of October 7, 2004). (14)*

*-ARTICLE 43.- The professions referred to in Article 40 may only be practiced by persons who have the title or license that qualifies them for such practice and who are duly incorporated to the corresponding college or registered in the Ministry if it has not been constituted for their profession. (14)*

*-ARTICLE 45.- -It is understood that a person is illegally exercising a profession or trade in health sciences when, provided he/she has a degree or certificate that legally enables him/her to exercise it, he/she exceeds the attributions that the corresponding professional association or the Ministry, as the case may be, has established for such exercise(14)*

*-ARTICLE 46.- Professionals duly specialized and registered as such in their respective professional associations may engage in activities related to their specialty.. (14)*

*-ARTICLE 47-It shall be presumed by right that a person is illegally practicing the professions referred to in Article 40 when, without being a member of the respective college or lacking the corresponding license, if applicable, he/she has in his/her possession the instruments, equipment or material required for the practice of the aforementioned professions, unless he/she proves with the corresponding patents or permits in force that he/she is engaged in the legal trade of such goods.(14)*

*It shall also be presumed by law that a person is illegally practicing the aforementioned professions when, lacking the corresponding title, he ostensibly advertises or passes himself off as a professional in health sciences.(14)*

*-ARTICLE 52.- Only doctors and **dentists**, in the legal exercise of their professions, may certify the state of health of persons, provided that they are personally aware by virtue of that exercise. (14)*

*-ARTICLE 54.- Only doctors may prescribe medicines. Dentists, veterinarians and obstetricians may only do so within the area of their profession. (14)*

*-ARTICLE 370.- Shall be punished with imprisonment from six months to three years, whoever, in accordance with this law, illegally practices medicine, dentistry, pharmacy, veterinary medicine, clinical microbiology-chemistry, nursing or other related or collaborative professions or activities, even if he/she does it free of charge.*

*The same penalty shall apply to anyone who, whether or not he is legally authorized to practice the aforementioned professions, announces or allows the cure of diseases, for a fixed term, by secret or supposedly infallible means, as well as to anyone who lends his name to another who does not have the corresponding title or authorization to practice the aforementioned professions, even if he does so without payment.. (14)*

### **(b) Organic Law of the College of Dental Surgeons of Costa Rica:**

*-ARTICLE 2°.- To practice the profession of dental surgeon or its specialties, you need to be incorporated into the College of Dental Surgeons of Costa Rica. (8)*

*-ARTICLE 14.- They will have the character of dental surgeons, before the authorities of the Republic, those incorporated into the College. For the exercise of dental specialties, the provisions of the corresponding regulations must be complied with. Likewise, those dentists who obtain a permit to perform the mandatory social service in dentistry or who have a renewable annual contract with an institution. (8)*

*ARTICLE 39.- When a complaint is filed for non-compliance with the Code of Ethics and the complaint is pertinent, in the judgment of the Board of Directors, the Board shall order the Honor Tribunal to be convened in the manner provided for in article thirty-seven of this law. Once the secret investigation has been concluded by the Tribunal and the misconduct has been proven, the following penalties may be imposed:*

*a) Confidential reprimand.*

*b) Warning to the members.*

*c) Public warning.*

*d) Fine of up to one thousand colones.*

*e) Temporary suspension of all the duties and rights inherent to dental surgeons in this institution; and*

*f) Definitive expulsion. (8)*

### **Types of liability arising from professional practice:**

Previously it was mentioned that the responsibility derived from the professional act, can have, in addition to moral consequences, legal consequences. The latter are materialized in four types of responsibilities, administrative, ethical-disciplinary, civil and criminal, which are broken down as follows: (11)(15)

**-Administrative Responsibility:** This corresponds to the responsibility that applies exclusively to health officials who hold public office. In the case of our country, an example is the professionals in dentistry who work for the Costa Rican Social Security Fund (CCSS) and who must comply with the provisions of the

General Law of Public Administration. Among the sanctions that may be received as a result of the application of disciplinary proceedings are verbal reprimand, suspension without pay and dismissal. (16)

-Ethical-disciplinary responsibility: it is the one that is regulated by the Code of Ethics of the College of Dental Surgeons of Costa Rica. This includes the duties and obligations of all professionals in Dentistry, complaints are made to the Prosecutor's Office of the College of Dental Surgeons of Costa Rica where the case will be transferred to the Prosecutor's Office Commission or the Court of Honor, to proceed to the total instruction of the corresponding administrative disciplinary procedure. (13)

-Civil Liability: When in the presence of damage derived from a crime or quasi-crime, pecuniary compensation is given. (17) (11) Article 1045 of the Civil Code provides that "Anyone who, by intent, fault, negligence or imprudence, causes damage to another is obliged to make good it together with the damage." (18)

-Criminal Liability: When the conduct that resulted in damage, is typified as a crime (17). This can be intentional or culpable and in the case of a culpable crime, being that it is not desired to cause damage, the existence of the constituent elements of the fault must be verified, which are, incompetence, negligence, imprudence and non-observance of regulations (19)(4).

Our penal code contains several articles that indicate the sanctions that the accused professional could suffer in case of producing culpable injuries (indicated in article 128), as well as the sanctions according to the classification of seriousness of the same. The very serious are indicated in article 123, those of serious injuries in 124 and in 125 those of minor injuries:

*Article 123.- Imprisonment of three to ten years shall be imposed on anyone who produces an injury that causes intellectual, sensory or physical dysfunction or a severe emotional disorder that produces permanent incapacity for work, loss of sense, of an organ, of a limb, impossibility of using an organ or a limb, loss of speech or loss of the ability to father or conceive. (20)*

*Article 124.- Imprisonment of one to six years shall be imposed if the injury causes a persistent impairment of health, of a sense, of an organ, of a limb or of a function or if it has incapacitated the injured party to devote himself to his usual occupations for more than one month or has left an indelible mark on his face. (20)*

*Article 125.- Imprisonment of three months to one year shall be imposed on anyone who causes harm to another body or health, which determines incapacity for their usual occupations for more than five days and up to one month. (20)*

*Article 128.- Culpable injuries: Imprisonment of up to one year, or up to one hundred days fine, shall be imposed on anyone who by fault causes another injury, injuries of those defined in articles 123, 124 and 125. For the adequacy of the penalty to the perpetrator, the court must consider the degree of fault, the number of victims and the magnitude of the damage caused.*

*In any case, the perpetrator of culpable injuries shall also be disqualified from exercising the profession, trade, art or activity in which the act occurred from six months to two years. (20)*

If the type of injury produced exceeds the risk allowed ending the life of the patient, it could then be a culpable homicide and the sanctions of this, are described in article 117 of the same code, "Imprisonment of six months to eight years will be imposed on anyone who kills another by guilt. In the appropriateness of the penalty to the perpetrator, the court must consider the degree of fault and the number of victims, as well as the magnitude of the damage caused. In any case, the perpetrator of the culpable homicide shall also be disqualified from exercising the profession, trade, art or activity in which the act occurred for a period of one to five years." (20)

### Constituent elements of professional responsibility:

When a complaint (in criminal matters) or a claim (in civil) for injuries arises towards a dental professional, certain essential elements must be evaluated to determine professional liability. Required: (21)(11)

a) That there is a dentist-patient relationship: This occurs through the provision of the dental service, being that this can be contractual (with contract) or extracontractual (without contract). Usually, these are contractual relationships by means of an agreement of wills that can be documentary or tacit; Non-contractual actions can be generated, for example, in an emergency care context, where the patient, due to his condition, does not have the possibility of accepting the agreement (17)(21)(22).

It is important to highlight that, from this relationship, the type of obligation that is established when providing dental treatment is of means and not of results, this because, dentistry is not an exact science and professional responsibility is determined through compliance or not of the *lex artis* in the action of the dentist during the provision of services to the patient. (23)

b) That there is a damage caused by the professional: It is vital that, to establish the professional fault, damage occurs. For this, the work of the forensic dentist is essential who must perform a detailed evaluation of the affected patient and provide the information obtained through a report of verification of injuries. (24) At this stage, the cause or etiology and sequelae should be evaluated and whether these result in a detriment to health that merits temporary or permanent disability must be defined. (25)(11)

c) That there is a causal link between the dental act and the damage caused: At this point, an analysis must be made between the previous state that the patient presented before receiving dental care and define whether there is a direct relationship with the presence of the claimed injuries. The objective of this is to clarify whether this act of action or omission, triggered a breach of the dental *Lex Artis*, manifesting itself through the injuries themselves, derived complications, contagion of diseases and permanence in time of some pathological process, among others. (26) (21)

### Conclusions

Costa Rica does not escape the legal pressure exerted by citizens who have gone to court to make their respective claims. According to a study conducted in 2021, during the period 2015-2020, the Forensic Dentistry Unit of the Department of Legal Medicine of the Judicial Investigation Agency, analyzed a total of 124 complaints of dental malpractice. The average was 20 cases per year and most of them were framed within the area of Oral and Maxillofacial Surgery; In addition, in its conclusions it highlights that the lack of a complete clinical record does not allow an adequate analysis of the cases. (24)

In our country, unfortunately there is a percentage of professionals who do not fully use clinical records and another who does use it, but does not keep it for the period of time required (27), evidencing poor dental practice, since this document records all the elements of patient care throughout their treatment. Completing and preserving it properly, would allow the forensic dentist who performs the evaluation of the patient, to know his previous state with the complete clinical and imaging evidence. (28)(26)

The growing number of complaints and lawsuits for dental malpractice, not only generates that professionals perform a more defensive practice, but also transforms into something vital the acquisition of necessary knowledge about legislation, rights and duties of patients, bioethics and professional responsibility, in order to provide a safer, more humane and high quality consultation. (12)(29)(30)

## Bibliography

1. Bhadauria US, Dasar PL, Sandesh N, Mishra P, Godha S. Medico-legal aspect of dental practice. *Clujul Med.* 2018;91(3):255–8.
2. Aguilar Fleitas B. Be and should be in Medicine. *Rev Uruguayan Cardiol.* 2017;32(1):7–12.
3. Karchmer S. Codes and oaths in medicine. *Medigraphic.* 2012;10(4):224–34.
4. Giménez Pérez D, Pujol-Robinat A, Castellá García J, Espinal Berenguer A, Fariñas AV, Medallo Muñiz J. LEGAL MEDICINE Complaints of medical professional liability in Barcelona Medical-forensic analysis KEY WORDS. *Rev Esp Med Leg [Internet].* 2020 [cited 2023 Mar 22];46(2):56–65. Available from: [www.elsevier.es/mlegal](http://www.elsevier.es/mlegal)
5. Thavarajah R, Saranya V, Priya B. The Indian dental litigation landscape: An analysis of judgments on dental negligence claims in Indian Consumer Redressal Forums. *J Forensic Leg Med.* 2019 Nov 1;68:101863.
6. Corte-Real A, Caetano C, Alves S, Pereira AD, Rocha S, Nuno Vieira D. Patient Safety in Dental Practice: Lessons to Learn About the Risks and Limits of Professional Liability. *Int Dent J.* 2021 Feb 25;
7. Executive Power of Costa Rica. Rules for the qualification of dental establishments type A, B1, B2. Costa Rica; 2001.
8. Legislative Assembly of Costa Rica. Organic Law of the College of Dental Surgeons of Costa Rica. Costa Rica;
9. Dictionary of the Spanish Language. Royal Spanish Academy. 23.ed. 2014.
10. Calabuig G. Legal medicine and toxicology. 6th ed. Villanueva E, editor. Barcelona; 2004. 1377 p.
11. Ciocca L. Medico-Legal Dentistry. Santiago de Chile: Ediciones Jurídicos de Santiago; 2009. 547 p.
12. Torres M, Romo F. Bioethics and professional practice of dentistry. *Acta Bioeth.* 2006;12(1).
13. College of Dental Surgeons of Costa Rica. Code of Ethics. Costa Rica; 2011 p. 16.
14. Legislative Assembly of the Republic of Costa Rica. General Health Law No. 5395. 5395 Costa Rica; 1973.
15. Briseño Cerda JM. Professional responsibility in dentistry. *Medigraphic.* 2006; LXIII(3):111–8.
16. Legislative Assembly of the Republic of Costa Rica. General Law of Public Administration No. 6227. Costa Rica; 1978.
17. Romero Pérez JE. Notes on Medical Malpractice. *Rev Legal Sciences Univ Costa Rica.* 2014;135:107–22.
18. Executive Power of Costa Rica. Civil code. Costa Rica; 1887.
19. Cintron Machon K. Medical Malpractice in Costa Rican Criminal Law. *Legal Rev of Pod Judic Costa Rica.* 2019;126:227–38.
20. Legislative Assembly of Costa Rica. Penal code. Costa Rica; 1970.
21. Perea Pérez B, Labajo González E, Santiago Sáez A, Elena M, Juan A. Professional responsibility in dentistry. *Rev Esp Med Leg [Internet].* 2013 [cited 2018 Aug 26];39(4):149–56. Available from: [www.elsevier.es/mlegalARTÍCULOESPECIAL](http://www.elsevier.es/mlegalARTÍCULOESPECIAL)

22. Tiol Carrillo A. Civil Liability Insurance in Dentistry. *Rev Mex Ortod.* 2017;5:6–10.
23. Arbesú González V. The Legal Nature of the Obligation in Curative and Aesthetic Dentistry. *Rev Law UNED, Spain.* 2015;16:81–120.
24. Fernández JM. Complaints of Dental Malpractice in Costa Rica: Analysis of 124 cases in the period 2015 – 2020. *Rev Med Leg Costa Rica.* 2021;38(2):98–104.
25. Garro A. Assessment of Bodily Injury at the Extremes of Life. *Med Leg Costa Rica.* 2016;33(2):31–7.
26. Loreto DBL, de Barros BÁC, Rosa GC da, de Oliveira RN, Rosing CK, Fernandes MM. Analysis of Dental Case Reports in the Context of Court Decisions: Causal Nexus and Aspects of Fault. *J Forensic Sci.* 2019;64(6):1693–7.
27. Fernández Chaves JM. Usefulness of dental records available in Costa Rica in 2018 for the identification of disaster victims according to the INTERPOL protocol. *Rev Med Leg Costa Rica [Internet].* 2019 Mar [cited 2021 Mar 11];36(1):32–42. Available from: <https://www.scielo.sa.cr/pdf/mlcr/v36n1/2215-5287-mlcr-36-01-32.pdf>
28. Ferrara SD, Baccino E, Bajanowski T, Boscolo-Berto R, Castellano M, De Angel R, et al. Malpractice and medical liability. European Guidelines on Methods of Ascertainment and Criteria of Evaluation. *Int J Legal Med.* 2013 May;127(3):545–57.
29. González Barrón S, Jiménez Corona ME, Triana Estrada J, Ureña Ciret JL, García Hernández J, Carrillo Rocha J de D, et al. Recommendations to improve dental practice. *Rev CONAMED, ISSN-e 1405-6704, Vol 8, N° 1 (January-March), 2003, pp. 29-38 [Internet].* 2003 [cited 2021 Sep 2];8( 1):29–38. Available from: <https://dialnet.unirioja.es/servlet/articulo?codigo=4052784&info=resumen&idioma=ENG>
30. Dym H. Risk Management Techniques for the General Dentist and Specialist. *Dent Clin North Am.* 2008 Jul;52(3):563–77.



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