DENTAL MALPRACTICE: DE FACTO et DE IURE

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ABSTRACT

Dental malpractice is a topic considerably difficulty defined. Both de facto and de iure, there are many ways in which patients, dentists or lawyers perceive the general context of dental malpractice. This study aims to identify and emphasize various biomedical and legal aspects characteristic to the dental malpractice system in Romania. Although there were some major recent changes regarding the Romanian civil and criminal codes, the principles regarding the medical and dental malpractice system remain stable. These principles are characterized by certain ethical, professional and legal values. From in-between beneficence and non-malfeasance, to professional and institutional liabilities, going further to tort law and contract breaches, dental malpractice is built on a complex structure. Each dental practitioner should be able to deal with patients’ complaints bearing in mind that such complaints, together with an injury or harm, can be precursors of litigation. In an era where dental medicine is governed by advanced technology and principles of evidence based medicine the standards of care grow higher giving way to potential negligence and professional misconduct.

Keywords: malpractice, duty of care, beneficence, liability, litigation

INTRODUCTION

All dental practitioners are used to patients complaining. In fact, this is one of the key triggers for the professional-patient relationship. Moreover, dental complaints are among the most frequent reasons for seeing a doctor, in this case a dental medicine doctor. There are many types of complaints, some of these can be solved biomedically, some not. But many practitioners tend to oversee one particular type of complaint, the one leading to dental malpractice and litigation. This should be seen in a subsidiary manner, as every complaint, independently of its source, can lead to a professional dental resolution but if it is not resolved, the patient may opt for litigation [1]. Nemo censetur ignorare legem, this is legal Latin phrase and basic principle of law implying that it is impossible to avail oneself of not knowing the laws [2]. Unfortunately, neither in Romania, nor in the most European countries, there is no medical code or bill of laws. This leads to the fact that a dental medicine doctor, with or without legal knowledge, should be able to comprehend multiple single laws or law chapters regarding the biomedical professions. Nevertheless, when it comes to the malpractice system, dental practitioners are faced not only with the incidence of professional norms, but also with norms of civil law (regarding breach liability, general
liability or damages), tort law or even criminal law. Therefore, every practitioner should at least possess information about the concept of dental malpractice, its fundamental principles and possible patterns of liability regarding the day to day dental care. This type of information we aim to present within this article, structured on three main pillars: (i) wherefrom the professional liability rises (de facto), (ii) what are the legal meanings and consequences (de iure) and (iii) what are the possible legal future solutions (de lege ferenda).

Throughout the scientific literature, there are plenty of academic works (journal articles, monographs, research papers) dealing with the dental malpractice and its related aspects. During the past decades numerous statistics have been published regarding the biomedical aspects – etiology, guides of practice – or the financial and social implications of dental malpractice in various countries. Throughout the world the vast majority of studies emphasize that the number of claims regarding dental malpractice is continuously rising [3-6]. But the concept is not new. It is alleged that the first malpractice trial took place in England in the fourteenth century within the case of Agnes of Stratton vs. John Swanlond [7]. Ever since, the overall social perception regarding medical or dental malpractice has been constantly rising. This generates not only professional but also great financial consequences. All costs regarding dental insurances, damages or compensations are getting higher and higher [1]. All in all, the professional involvement and the population cohesion regarding malpractice are nowadays very important. Unfortunately, the Romanian biomedical or legal literature regarding this domain is still poor. Even if the law system regarding civil liability, torts or the medical laws is up to date with the European Union aquis, the academic and professional perception in this respect is deficietary.

**DENTAL MALPRACTICE: DE FACTO**

As stressed earlier, the medical literature is rich in studies and surveys regarding dental malpractice claims and statistics from various countries. All these are welcome because every practitioner should be conscious of the great potential risk that various, otherwise common, dental procedures possess. Therefore, both dentists and oral surgeons should bear in mind that dental negligence could lead to serious permanent injuries such as facial deformities, significant loss of alveolar bone and also neurological and aesthetic complications [8]. This is why it is mandatory that before each dental procedure – basic or advanced – every practitioner should offer specific information and get a written informed consent not only regarding the procedure, but also about the potential risks (temporary or permanent), the methods of risk prevention and alternative patterns of treatment [1, 8, 9].

It is in our intention to stress the importance of risk management vs. malpractice because it is often thought that there is no liability caused by the incidence of scientifically recognized complications and side effects. Indeed, a practitioner is in these cases acquitted from any form of liability only if: (i) the standard of care was achieved, (ii) all the risk prevention methods were followed, (iii) there was a thorough follow-up and secondary referrals performed and (iv) the patient was taken an informed consent about the potential risks, side effects, complications or evolution patterns of the specific dental condition and/or treatment. Otherwise, as seen in the literature, there are certain dental therapy areas or specialties that are statistically confirmed as prone to dental malpractice claims. To be more specific, the overall worldwide findings describe a triangle
composed by: (i) Tooth extractions, (ii) Restorative dentistry and (iii) General oral surgery. Though we should notice some possible bias resulting from the inclusion of tooth extraction in the wider area of oral surgery.

Indeed, when referring to dental extractions we should emphasize the potential complications of extractions, especially when the workup and follow-up are neglected due to the basic character and frequency of these procedures. Unfortunately, a recent study on 69 cases of malpractice claims due to extractions found out that a large amount of patients developed permanent nervous damage, fractured mandible and serious hospitalized infections (of which there were 8 fatalities) [9]. The lack of follow-up or referral was proven to be the main source of negligence. Regarding the permanent nerve damages, most of them are supposed to be secondary to the inferior alveolar nerve blocks, proven to depend not only on the technique, but also on the anesthetic substance used – in this respect new standards of care deconciliate the usage of lidocaine, prilocaine or articaine as the single substance [10].

Restorative dentistry is on the other hand one of the most complex fields of dental therapy and rehabilitation. Generally it involves endodontics, periodontics, prosthetics and implantology. Of these specialties, the ones proven to be linked with the most malpractice claims worldwide are endodontics [8, 9, 11, 12], prosthetics [5, 6, 13] and implantology [9]. Some of the studies [8, 11, 12] go further and consider the endodontic procedures as the ones leading in malpractice claims due to: the general low quality treatment in the area [14], the specific elevated therapeutical failure risk, and not the least the lack in qualitative sterilization of the root canal [8]. Nevertheless, endodontic procedures come along with possible serious complications such as infections, many requiring hospitalization and some even fatal [9]. Prosthetics and implantology are other professional fields characterized by high number of alleged dental negligence cases [6, 9, 13] most of them resulting from the lack of high quality follow-up and pre-treatment evaluation that are otherwise mandatory in such cases. All in all, as an example, restorative dentistry, through is complex workup patterns and strict follow-up procedures is considered the leading field of dental practice regarding the malpractice claims in the United Kingdom [5].

In contrast to the upper statistic, in the United States of America, oral surgery procedures are the main cause of patient dissatisfaction [4], mainly throughout the surgical extraction of mandibular third molars [15]. The situation looks the same not only in highly developed countries, but also in countries in course of development [13]. Other, less frequent, sources of dental malpractice claims arise from unethical professional conduct (e.g. sexual harassment, high discomfort or unusual high costs) [13], side effects and threatening pharmaceutical interactions [9] or deficient communication between different dental professionals involved in the same case [16].

**DENTAL MALPRACTICE: DE IURE**

The medical law is growing nowadays stronger and stronger. Worldwide there are numerous laws regarding the medical profession, medical management, insurance policies, drug regimes, codes of conduct and certainly the medical liability. Nevertheless, there are also plenty of international treaties (e.g. The Oviedo Convention on Human Rights and Biomedicine, 1997) assuring the fundamental human rights and standards of deontological conduct relative to biomedicine and research. National regulations of the medical profession, on the other hand, vary
from one country or state to another, depending on various health policies, health system development, insurance mechanisms, etc.

When it comes to the professional liability, it is to be stressed that the general principles and essentials of medical liability are in the vast majority of legal systems the same. In what the Romanian legal system is concerned, first and foremost it should be acknowledged that there several domains of medical liability. One should make the difference between deontological and disciplinary liability, medical civil liability (tort or contract breach) and medical criminal liability (involving on the first hand common crimes committed by a professional and, on the other hand, specific medical crimes).

Important is the acknowledgement that medical and dental malpractice is a legal system that permits victims of certain medical (professional) errors to sue (or settle) for their injuries [17]. In Romania, medical and dental malpractice is strictly defined by the law as the professional error, committed during medical or medical-pharmaceutical activities, determining a specific injury and implying the civil liability of medical workers, or any other professional providing medical, sanitary or pharmaceutical activities [18]. It is to be deducted that in Romania the malpractice system involves strictly the personal civil liability; this meaning that the basis of a malpractice claims is represented only by torts, contract braches or rarely by strict liability issues. In the Romanian legal system, the dental malpractice is totally independent from the disciplinary and criminal liability.

Regarding the civil medical liability, there are some universal conditions that need to coexist in order for a professional to be liable for malpractice [19]; they are required not only in certain national law systems but are generally recognized by the international literature and law practice:

1. The duty of care – the medical professional obligation, relative to a validly established professional-patient relationship;
2. The standard of care – represented by guidelines or a certain niveau recognised by the majority of practitioners;
3. The disrespect of that duty and/or negligence regarding the standard of care and/or maleficent medical activity;
4. A harm or injury to the patient;
5. Causation.

A thorough legal description of what the above conditions legally suppose extends the purpose of our study. But we consider important to stress that the medical professional obligation is considered a diligence obligation, this meaning that the professional is not obliged to achieve a specific result but to show the best due diligence specific to a standard of care [20]. The procedural consequence of this implication is that medical liability is fundamented on subjective guilt this meaning that the plaintiff bares the obligation to prove the medical misconduct (neglect or other troublesome duties). On the contrary, whenever there is sufficient evidence to sustain that the injury or harm may have resulted from medical misconduct, even circumstantial, the doctrine shifts the burden of proof to the defendant [21]. This principle is known as Res ipsa loquitur, meaning that a certain result could not have happened by itself and therefore could be the result of guilt. It applies mostly to the omisive acts of misconduct.

Another intensely debated issue related to dental malpractice is the professional misconduct. The disrespect of a professional duty, a neglectful conduct regarding an appropriate standard of care or a maleficent medical activity, all these are patterns of possible willing or unwilling dental misconduct. The most important and case sensitive issue regarding this feature is the
method used to determine which dental conduct is appropriate and which not. Therefore, the doctrine uses a procedure called The Bolam Test, named after a famous case that established the principle that involves the permanent comparison of a specific medical activity with an abstract one, subjectively considered the medium standard of care [22]. A medical conduct is not considered negligent whenever it is found out that another average practitioner would have done the same, in the same situation, at the same time. Based on this procedure, the Romanian law literature describes several patterns of medical misconduct [23]: (i) misconduct caused by insufficient medical knowledge, (ii) negligence, (iii) misconduct by imprudence and lack of anticipation, (iv) misconduct by lack of attention and concentration, (v) misconduct by refusing medical assistance (when mandatory), (vi) misconduct by rejecting the patient’s right for a second opinion and (vii) misconduct by not obtaining the patient’s informed consent for treatment, procedures or tests.

Not the least, especially when referring to the dental practice, there is the matter of strict liabilities. This concept refers to those medical obligations confirmed by a negotiated contract between the dental practitioner and the patient in which both parties aim to achieve a certain result. In these cases, every time that result is not obtained or is not satisfactory qualitative for the patient, the professional is potentially liable for breach of the medical contract [1]. Such medical contracts are most frequent in the private practice. Less important for the dental practice is the institutional malpractice – (i) the solidary liability of the institution and its professional employees and (ii) several cases in which the medical institution is singularly liable for harms or injuries to patients (e.g. nosocomial infections, malfunction of devices, maleficient infrastructure, etc.) [18].

De lege ferenda, it is in our opinion that certain legal improvements are necessary regarding the Romanian dental malpractice system. First and foremost, the term error (professional error) from the legal definition of malpractice should be avoided as in the Romanian legal system the error is a circumstance that annuls one’s liability (it is thought that a person judging upon an error cannot be guilty of his or her actions). A more suited term would be ‘professional guilt’ or ‘professional misconduct’. Secondly, the Romanian medical fundamental law (Legea nr. 95 din 2006 privind Reforma in Domeniul Sanitar) introduced several circumstances in which the professional is not considered liable for his actions, specifically when the harm or injury that has been done derives from: work conditions, insufficient equipment, nosocomial infections, side effects, complications or risks generally acknowledged for the diagnostic and treatment procedures or from the hidden deficits of sanitary materials, equipment, devices or substances used [18]. In this respect, the law is in our opinion apparently overprotective as these possible causes of harm and injury may result primarily from the professional neglect in short/long term follow-up, workup or advice for various kinds of preventive measures.

CONCLUSIONS

1. The malpractice system has to be a concept to which every practitioner should be accustomed; as the number of complaints is worldwide continuously rising, the dental medical doctors should be aware of possible patterns of liability that they could face. The risk of complaints is higher in dental medicine as many of the procedures are planned and elaborate ones, involving considerable high costs and potential risks for
permanent serious damages.

2. Dental liability can affect all dental specialities. Thus, greater attention should be paid to the professional areas more exposed – restorative dentistry and oral surgery, where misconduct can lead to serious harms and injuries and large amounts of damages often exceeding the insurance contract sums.

3. All dental practitioners should insist equally on the diagnostic and therapeutic procedures on the first hand, and on thorough workup, evaluation, follow-up and referral on the other hand. Therefore, dentists should take measures for a better communication with colleagues and general practitioners and when necessary, they should work in interdisciplinary teams.

4. Both private and public dental offices should possess a well built informed consent form, adapted to the specific treatment or procedure involved in each case management. This form should be approved by a legal team and has to follow the due diligence normative in the field.

5. Every practitioner faced with a malpractice claim should be aware that he or she can contact the professional association for help and advice. Equally, in these circumstances it is mandatory to contact the malpractice insurance institution for further guidance. It is also advisable that dental associations should have a legal team in order to represent their members in courts of law.

6. Law suits proclaim greater costs and are spanned on a large period of time. Therefore, is case of misconduct it would be advisable that the parties involved settled. This would mean less procedural costs, a dynamic and discreet procedure. Law suits are public actions that can affect one’s professional image and career.

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