

# Professional liability and litigation in dental medicine: an analysis of the Portuguese context

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## KEYWORDS

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## ABSTRACT

The activity of a dentist reveals itself in numerous aspects, and its regulation is determined by the Deontological Code of the Dental Association, which contains a set of rules that dentists are obliged to follow in the exercise of their profession. The regulation of this activity goes beyond following these precepts because, in the legal relationship that is established whenever an agreement is made with a patient to carry out the treatment deemed appropriate, a series of duties and obligations begin for each party, translated into a reciprocal contract, in which the non-compliance of one of them may result in a legal claim.

The objective of this study was to research most court decisions delivered in this century, in Portugal, regarding the activity of dentists when faced with patient claims and to outline a framework that better allows us to understand the regulation of this activity within the scope of the contracts established with them. This includes identifying the patients' sex, the judicial instance, the area of dentistry, the location of the injury, the type of liability, the characterization of the obligation, the basis of responsibility, the alteration of biological assets, and the outcome of the action while also not neglecting the identification of trends and jurisprudential evolutions, should they arise.

A survey of judgments from the Portuguese Superior Courts was carried out, which focused on decisions from the Supreme Court of Justice, Court of Appeal of Porto, Court of Appeal of Lisbon, Court of Appeal of Coimbra, Court of Appeal of Guimarães, and Court of Appeal of Évora.

To understand the judgments analyzed in this study, a brief approach to various legal concepts and institutions of interest was conducted. A summary characterization of the factual basis of the injured party's claim and the legal framework applied, as well as subsequent decisions by higher courts regarding the activity of dentists, was also elaborated.

It was impossible to identify any relationship between the field of dentistry and the characterization of the obligation and the basis of responsibility, nor between the outcomes of the actions and these two parameters mentioned. This is likely due to the small sample size, which, although limited, represented all available published superior court decisions in Portugal related to the proposed topic, and because there were different decisions for similar and identical factual situations due to the various scientific and social conceptions adopted by the courts being susceptible to other interpretations.

## INTRODUCTION

For centuries, the medical profession was regarded as mythical-magical, making it unthinkable for doctors to be held accountable for their actions. The patient did not actively participate in his treatment; he was utterly dependent on the doctor and his conduct. Professionals made decisions exclusively, removing the patient's autonomy during his medical appointment.<sup>1</sup>

If, once, medical activity was seen as superior, resulting in a significant lack of accountability for doctors, nowadays, due to the extraordinary scientific and social advancements, the standard that once existed is severely altered. The evolution of healthcare, which brought about new diagnosis techniques and advanced treatment methods, witnessed the patient's recent and active engagement. Since they were no longer stripped of their autonomy, patients could participate and critique the procedures adopted by their doctors. These different dynamics were translated into an altered relationship between patient and doctor, characterized by a bidirectional nature, allowing both parties to participate in medical consultations actively. As a result, clinical errors emerged, and doctors became susceptible to being held accountable for their acts and mistakes. This trend can be seen worldwide, with several countries' increasing medical liability concerning dentistry.<sup>2-7</sup>

Even though failures and errors in activities based on scientific criteria should be acknowledged because they are often based on probabilities rather than certainties, these are becoming increasingly less accepted.<sup>8</sup>

This reality has a strong impact in many healthcare areas, including dental medicine, because every activity performed by a human being, who is not perfect, has an inherent uncertain nature, carrying the potential for mistakes and errors and never being able to guarantee infallible results.<sup>9</sup>

Dental medicine professionals must adopt specific standards, respect various obligations, and fulfill different requirements to effectively practice and protect their profession. Above all else, dentists need to stay informed.

Dental medicine encompasses numerous aspects. Nonetheless, the correct conduct dentists must adopt is not limited to observing such principles. When a contract is established between the patient and the dentist, a legal relationship is also

fixed, and both parties need to respect a series of duties and obligations. Non-compliance or breach of this contract may result in legal claims. Here lies the core of the present article. Considering the factual and unequivocal truth that human activity is susceptible to errors and mistakes, dental medicine, even with the utmost diligence, can result in injuries due to unpredictable factors and unforeseen events. When one of these situations occurs, and the patient believes an error resulted in his harm, he may seek a court intervention<sup>10,11</sup>. At this point, the courts may be called upon to analyze a specific situation and the conduct and medical activity practiced by a particular doctor to reach a decision ultimately.<sup>12,13</sup>

## MATERIALS AND METHODS

To evaluate how Portuguese courts see the activities performed by dentists, the research aimed to examine the treatment given by the superior courts to legal actions filed by patients against dental medicine professionals. It involved the search and analysis of all the published court decisions from the Portuguese Superior Courts, including the Supreme Court of Justice, Court of Appeal of Porto, Court of Appeal of Lisbon, Court of Appeal of Coimbra, Court of Appeal of Guimarães and Court of Appeal of Évora. The search for these court decisions was conducted using research tools such as the Supreme Court of Justice and the Court of Appeal of Porto databases and the database "jurisprudência.pt".

The inclusion criteria were:

- Court decisions issued after the year 2000 until 2023;
- The plaintiff is the injured patient;
- Indicating the specific area of dentistry that caused the situation;
- Court decisions from the civil or criminal field;
- Court decisions with proven facts.

As for the exclusion criteria, the following were considered:

- Court decisions before the year 2000;
- The plaintiff is a dentist or a clinic;
- Judgments not related to dental practice or where it is mentioned but not the focus;
- Writs of execution;
- Absence of proven facts.

The data were then statistically analyzed using IBM SPSS Statistics 27<sup>®</sup> (Statistics Package for

Social Science). The categorical variables were described using absolute and relative frequencies.

**RESULTS**

After the research and data collection, 30 court decisions were obtained, which could be included in the present study according to the inclusion and exclusion criteria (Table 1).

The Court of Appeal of Porto presented the highest number of cases (13; 43%), followed by the Court of Appeal of Lisbon (8; 27%). The

Court of Appeal of Guimarães had the lowest number of court decisions (1; 3%) in the databases used. The Court of Appeal of Coimbra was the only Superior Court with no results.

Female patients complained more frequently (22; 73.3%) than male patients (8; 26.7%). Prosthodontics (18; 60%) was the most frequent area involved, accounting for more than half of all cases, followed by Dental Surgery (9; 30%). Orthodontics also accounted for a tiny portion of the results (2; 6.7%). Only one case did not fit into a specific area (1; 3.3%) (Table 2).

**Table 1.** Court where the appeal was filed.

	<b>Supreme Court of Justice</b>	<b>Court of Appeal of Porto</b>	<b>Court of Appeal of Lisbon</b>	<b>Court of Appeal of Guimarães</b>	<b>Court of Appeal of Évora</b>	<b>Court of Appeal of Coimbra</b>
Cases (n)	5	13	8	1	3	0
Percentage (%)	17%	43%	27%	3%	10%	-

**Table 2.** Cases' distribution according to the dental medicine area

	<b>Prosthodontics</b>	<b>Dental Surgery</b>	<b>Orthodontics</b>	<b>Others</b>
Cases (n)	18	9	2	1
Percentage (%)	60%	30%	6.7%	3.3%

Regarding the location where the patient's lesion occurred, the areas were divided into the maxilla and mandible, and both concurrently. In most situations, the injury occurred in both locations (14; 46.7%), accounting for nearly half of all cases. The number of injuries that happened exclusively in the mandible (12; 40%) was significantly larger than those that occurred only in the maxilla (4; 13.3%) (Table 3).

**Table 3.** Local of the injury suffered by the patient.

	<b>Maxilla</b>	<b>Mandible</b>	<b>Both</b>
Cases (n)	4	12	14
Percentage (%)	13.3%	40%	46.7%

In most cases (26; 86.7%), permanent body injury occurred, while only a few did not show such alteration (4; 13.3%), which allowed the patient to return to their pre-injury state.

The outcome of the court decisions was classified as proven, partially proven, and

dismissed. The first outcome refers to situations where the amount claimed by the patient was equivalent to the amount awarded by the court (2; 6.67%). The second outcome relates to situations where, even though the dentist's responsibility was verified, the damage claimed by the patient was not fully proven, thus reducing the compensation amount (15; 50%). When the court decision was classified as dismissed, it referred to situations where the plaintiff failed in the lawsuit, and consequently, the dentist was acquitted (12; 40%).

Concerning the type of liability, it can be contractual when a contract is established between a dentist, clinic, or institution and a patient for dental services, and there is a breach of the obligations set in the agreement (22; 73.3%). It can also be non-contractual when an absolute right is violated, even though this was verified in one case (1; 3.3%).<sup>14</sup> There were, however, situations where both types of liability were assessed simultaneously (3; 10%).

Regarding the traditional characterization of the type of obligation imposed on the dentist, it can

be an obligation of means or a result. The first one consists of cases where the dentist is not bound to produce any specific effect, only to practice his activities with the utmost care and diligence (9; 30%). In the second type of obligation, the dentist commits to guarantee the production of a particular result for the patient's benefit (9; 30%).<sup>15</sup> Both kinds of obligation showed the same frequency.

From the analyses of the different court decisions, it was possible to observe a wide range of varying bases of liability used to hold the dentist accountable. In most cases, the basis of liability was the violation of *leges artis* (14; 47%). There were also an equal number of cases related to the defective performance of the contract (5; 17%) and violation of the duty to inform the patient (5; 17%) (Table 4).

**Table 4.** Basis of liability used to hold the dentist accountable (NA non-available data)

	<b>Leges artis' violation</b>	<b>Defective performance of the contract</b>	<b>Defective performance of the contract and leges artis violation</b>	<b>Violation of the duty to inform</b>	<b>Error in consent</b>	<b>Physical harm</b>	<b>NA</b>
Cases (n)	14	5	1	5	1	1	3
Percentage (%)	47%	17%	3.3%	17%	3.3%	3.3%	10%

NA: Non available data

## DISCUSSION

The present study aimed to understand how dentists' activities are perceived within Portuguese jurisprudence.

Regarding the different areas of liability, implantology had the most considerable frequency within prosthodontics. Yet, compared to similar studies conducted in other countries, such as Brazil, implantology was only the fourth most frequent, representing 13% of all cases. At the same time, surgery was the most pervasive area, accounting for 33% of all instances.<sup>16</sup> Similar research in Italy revealed that prosthodontics had the highest frequency there, accounting for about 70% of all the cases.<sup>17</sup> Likewise, a jurisprudence analytic study conducted in Peru discovered prosthodontics was the field most closely connected with liability.<sup>18</sup>

The most frequent basis of liability in the current analysis was the *leges artis*' violation, which accounted for 47% of all cases. Comparatively, a recent study of the legal systems of another nation discovered a similar pattern in Chile, where the breach of *leges artis* was the most common basis of liability, accounting for 35% of all the cases examined.<sup>19</sup>

To determine whether the characterization of the obligation and the basis of liability were related to the varying degree of intrusiveness of different dental specialties, an analysis was conducted to

explore any statistically significant relationship between them. However, no significant relationship was found between these factors. We also attempted to identify any statistically significant relations between the outcome of the court decisions and the characterization of the obligation and basis of liability. However, it could not be done due to the small sample size or because identical situations saw different bases of liability attributed to them, different ways of evaluating the evidence, and above all, how the courts configured the legal issue and principles they relied upon to do so. This is troublesome as the same matters should be assessed similarly. Despite not being able to find statistical correlations, the in-depth analysis of the select court decisions made it possible to verify the existence of some jurisprudential trends:

- The predisposition to characterize actions based on aesthetic dentistry as obligations of result.
- The trend for the outcome of actions characterized as obligations of means to be dismissed since they are inherently more favorable to the doctor.
- The tendency for the outcome of actions characterized as obligations of means to be partially proven or partially proven since they are inherently more favorable to the patient.

- The transition from characterizing obligations as obligations of means or result to describing them as obligations with an indefinite and definite content, respectively.

The first mentioned trend was seen in 2013 when one of the court decisions concluded that “in the specific case of dental prostheses, we believe that not only their fabrication but also their application, representing different moments in dental practice, should be classified as obligations of results. As these procedures are commonplace in dental practice and the technique is highly advanced, the uncertainty regarding the desired outcome is negligible. Moreover, issues related to the acceptance or rejection of the prosthesis in the patient's mouth do not typically arise”. This understanding is then extended to other areas of dentistry when this court decision states that “dental interventions with predominantly aesthetic purposes, such as prosthetic placements, tooth restorations, and even dental implants, also fall under obligations of results”. It concludes that all these areas have negligible uncertainty in achieving the intended outcome. This trend is followed by six (of the nine) court decisions resulting from obligations.

In our modest understanding, we do not fully agree with this thinking. Despite the procedures being executed with highly advanced techniques, in constant evolution, and with great frequency, like many other areas of medicine, they are always dependent on the patient's body and associated variables, their behaviors and habits, and numerous factors that affect all procedures involved in patient treatment. Although highly

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sought-after and popularized nowadays, implants are not immune to failure, as they depend on a series of factors inherent to the dentist, the patient, and the implant itself.<sup>20</sup> Prosthodontics is also not exempt from uncertainty in its various forms, as it relies on different technical and biological factors.<sup>21-23</sup>

While the level of uncertainty may be negligible since these procedures do not occur in an isolated system and are always dependent on multiple factors, considering that dentistry, like the human being, is not exempt from errors or mistakes, these procedures cannot be considered “certain”. The transition from characterizing obligations as obligations of means or result to describing them as obligations with an indefinite and definite content, respectively, arose from the fact that some court decisions believed that the distinction between the obligation of means and obligation of result led to inaccuracies. Specifically, the concept of an obligation of means creates an idea of diminished responsibility by the dentist.<sup>24</sup>

## CONCLUSION

While these jurisprudential trends were noticeable, meaning tendencies to decide similar issues in the same manner, this was not always followed, resulting in different rulings and understandings for identical factual situations, which can be related to the various scientific and social conceptions that the courts may adopt.

The unpredictability of court decisions appeared to be even more significant than the risks and uncertainties of a medical intervention.

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