



## Medical liability insurances in Dentistry

### *Los seguros de responsabilidad civil en Odontología*

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The law is a social science in charge of regulating human behavior in society through the imposition of duties, granting of rights and application of sanctions.<sup>1</sup> On the other hand, private law refers to the relationship established between individuals without the direct intervention of the state and is classified in civil, commercial and international private law. Therefore, any disagreement or dispute between individuals can be settled through the support of civil law in accordance with its legal nature. Civil law is directly related to contracts, as well as with the responsibilities and obligations from which they emanate.<sup>1</sup>

When a patient arrives at a clinic requesting dental care, a tacit contract is automatically created between the patient and the dentist, which shall be made in writing by the contract for provision of integrated services in the clinical file.<sup>2</sup>

As specified in article 1793 of the Federal Civil Code, a contract is set up when two or more persons come to an agreement of wills that is able to create or modify rights and obligations.<sup>3,4</sup>

No clinician, no matter how experienced he or she may be, is exempt of complications arising from a particular procedure and, of course, the afflicted individual will request repair of the damage. In the best of cases it is possible to reach an agreement between the dentist and the patient to solve the conflict, however, if circumstances are complicated it is possible that the patient may go to a competent authority to express their discontent and seek redress of the damage. In order to avoid legal repercussions to the health staff, medical liability insurances have been created.

#### THE DAMAGE

Any damage caused to a third party can be executed willfully or culpably as specified in article 9 of the Federal Criminal Code. They act culpably those who intend no harm to a third party, but such damage is included in the Penal Code as a crime. On the contrary, when an individual causes harm with intent,

premeditation and in full possession of their mental faculties it is said to be a willful or malicious action.<sup>5,6</sup> It is important to know this since a culpable action has completely different sanctions than malicious actions.

The majority of the damages caused by oral health professionals are culpable, that is to say, the dentist does not wish to cause damage to the integrity of the patient, however, he or she produces damage by committing actions or omissions qualified as incompetence, negligence, failure or lack of judgement.<sup>7</sup>

It is relevant to understand the different articles that relate to damage in both criminal and civil courts. Article 1910 of the Federal Civil Code quotes as follows: «Anyone who illegally or against morals causes harm to another, is obliged to repair it.»<sup>3</sup> The abovementioned requires any person who causes injury to indemnify him. On the other hand, the Federal Criminal Code, in the section «professional responsibility» in article 228 expressed the following: «The professionals, artists or technicians and their assistants, will be responsible for crimes committed in the exercise of their profession.»<sup>5</sup>

With regard to the repair of damage, it is necessary to cite as specified in article 1915 of the Federal Criminal Code: «The redress of the damage must consist in the choice of the offended in the re-establishment of the previous situation, or when it is impossible, the payment of damages.»<sup>5</sup>

This is important for the health care professional since once damage in the bodily integrity of an

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individual is built, it is impossible to return the patient to his or her previous condition. Therefore any damage repair in the field of health must be recovered through payment of damages and injuries. It must not be forgotten that these concepts are not synonymous and that there is a well-defined legal difference between them. As described in article 2108 of the Civil Code: «It is understood by damage the loss or impairment suffered in the heritage due to the lack of fulfillment of an obligation.»<sup>3</sup> For example, it is considered damage when the patient requests dental care and finishes the payments prior to the completion of the service, but at the time of placing the final restoration, it is of an inferior quality to that paid by the patient.

An injury occurs when a patient pays for the dental treatment in advance and does not receive the requested care.

Legally speaking it is possible to produce three different types of damage (*Table I*).<sup>8</sup>

As specified in the Federal Civil Code article 1916: «Moral damage is the harm that a person suffers in his or her feelings, decorum, honor, reputation, private life, configuration and physical aspects, or in the consideration of others.»<sup>3</sup> Therefore, a moral damage will be set up whenever there is a violation of freedom, or the physical or psychological integrity of people. When the expectations of any dental procedure that involves aesthetics such as orthognathic surgery, placement of veneers or prosthetic restorations are not met and derived from that the patient suffers self-insecurity, then we speak of moral damage. Or, if there is any surgical treatment badly performed and derived from that surgical procedure complications occur which for their resolution a hospital is required, the patient may request the repair of material damage, having failed to earn his or her salary due to an inability for working the days that he or she was hospitalized because of the negligent act of the dentist.

Moral damage is perhaps the kind of damage that more compensation requires in some cases and repair can raise to exorbitant amounts, provided that a judge rules so.

**Table I.** Types of damages.

Type of damage	Characteristics
Material	Material loss of the heritage of a third party
Physical	Alteration in the health or vigor of the afflicted person
Moral	Set of psychological alterations affecting the individual

## CONTRACTUAL AND EXTRA-CONTRACTUAL CLAIMS

In the Mexican Republic claims may be of two kinds: contractual and textra-contractual.<sup>8</sup> The contractual claim refers to the obligation of the dentist to offer services that provide a solution to the condition of the patient, with prior existence of a concurrence of wills between both parties (i.e. a contract).

On the other hand, the extra-contractual claim relates to the provision of a health service that culminates culpably in a wrongful act in the absence of a contract or mutual agreement between the patient and the dentist. These kinds of cases usually arise when the patient must be treated urgently and due to the gravity of the situation it is not possible to conveniently fill the complete documentation.

The main difference between the contractual and the extra-contractual claim is that the first tends to occur in long periods of time, while the extra-contractual is usually sudden and spontaneous.

With regard to the contractual claim, if the dentist does not provide a solution to the patient's problem, the patient can claim a failure of the dentist's obligation, thus being forced to objectively demonstrate negligence or incompetence. To corroborate the above, documents such as the clinical file, progress notes and prescriptions are used.

In the extra-contractual claim it is the dentist who has that prove that the damage is not attributable to him or her due to the patient's negligence.

## TYPES OF CIVIL LIABILITY

The civil liability that a health care professional may incur into may be of two types: subjective and objective.

It is called subjective liability when due to wrongful lawful or unlawful acts damage is caused. In other words, it refers to doing or not doing something that causes damage to the health of the patient. To cite a few examples, giving a wrong diagnosis, acting with negligence, incompetence, lack of judgment or failure to observe something are considered to be within the subjective civil liability.<sup>3,9</sup>

On the other hand, the objective civil liability is specified in article 1913 of the Civil Code and refers to the type of damage that occurs to an individual through the use of instruments, objects, or hazardous substances.<sup>3</sup> The individual who is the owner of these instruments, objects, devices or substances shall be responsible for the damages caused by these and is obliged to repair them even though he or she

did not act illegally. Examples of this is accidentally poking the eye of a patient with a sharp instrument for not having placed protective glasses during the consultation, an allergic reaction to the infiltrated local anesthetic or tissue injury by use of rotary instruments.

As such, we can infer that the dentist can easily incur in both subjective and objective civil liability, or, in the worst case, engage in both at the same time.

### INSURANCE CONTRACTS

An insurance contract is agreed between an insured person and an insurance company. The latter is obligated (thanks to the payment of a premium) to cover expenses that are generated in the event of a particular incident, within the limits agreed and the damage caused to the insured party.

Civil liability insurances are responsible for compensating moral and material damages, as well as injuries caused to a third party for which the insured person is responsible.

When a dentist wishes to be insured, a contract with the company of choice must be made. As indicated in the Insurance Contract Law in article 1: «By the contract, the insurance company is obliged, by means of a premium, to compensate for damage or to pay a sum of money upon verification of the possibility provided for in the contract.»

It is of utmost importance, therefore, that the oral health practitioner checks the risks that the insurance company will cover through an insurance policy.<sup>10</sup>

Article 20 of the same Act specifies that the insurance company must provide a policy that details the rights and obligations of both parties (*Table II*).

### COVERAGE AND ITS SCOPE

While each insurance company offers different benefits, in general liability insurances cover the

**Table II.** Mandatory elements that any insurance policy must contain.

#### Elements of an insurance policy

- Insured person's name, address and signature of the insurance company
- Designation of the thing or person to be insured
- Nature of the guaranteed risks
- Time from which the risk is ensured and the duration of the warranty
- Amount of the guarantee
- Insurance premium

health professionals against risks such as injury, illness or death of the patient during the execution of any procedure, as long as they are caused by culpable acts, acts of negligence, or incompetence, by means of instruments, apparatus or substances that are used in the patient with therapeutic or diagnostic purposes.<sup>11</sup> However, it should not be forgotten that the death of a patient during a medical procedure is considered homicide, wrongdoing and fully punishable. Then, when does a liability insurance protect the health care professional if there is accidental death of the patient?, As it was previously mentioned, article 1910 of the Civil Code indicates that it is the duty of those who cause damage to repair it; the wording of the article finishes as follows: «unless it is proven that the damage occurred as a result of fault or negligence of the victim»,<sup>3</sup> therefore, if the patient did not inform the health professional about any pathological condition during the clinical interrogation and as a result unexpected events happen that lead even to the patient's death, it is clear that it is not the direct responsibility of the dentist to be aware of this situation, therefore, the liability insurance may be applicable.

Some insurance companies offer legal defense for the insured person by criminal, civil and administrative law. It is pertinent to mention that the medical liability insurance covers any damage to health that has been caused by any dental procedure provided that these treatments are in alignment with what is described in the current scientific literature. Under no circumstances shall the company be liable for health damage derived from treatments that lack demonstrable scientific basis in humans. The insurance also covers accidents that occur in the dental office<sup>12</sup> for patients and their companions, for example, injuries caused by falls within the dental office. On the other hand, in addition to basic coverage, it is also possible to hire additional coverage to cover damages to the buildings used as dental offices caused by latent risks such as theft, fire, or explosion.<sup>12,13</sup>

### RESPONSIBILITIES NOT COVERED BY INSURANCE

There are certain circumstances that are not within the coverage of insurance companies, for example, damage to the health as a result of surgical interventions that do not correspond to the specialty of the insured person, damages made to a patient when the dentist is under the influence of narcotics, damage caused by medical acts that depart from the diagnosis or treatment of any condition, damage resulting from the violation of professional secrecy, damage caused

by drugs in the experimental stage, nor when the patient claims a refund of the dentist's fee.<sup>12,13</sup>

To cite some examples, it is common that some health professionals, based on clinical experience, perform procedures never before studied or made with uncertain clinical success, however, if any unexpected harm appears as a result of this act, the insurance may not apply. Some dentists perform procedures under general anesthesia in places not suitable for this purpose and, therefore, the insurance company will not cover problems arising from complications of general anesthesia performed at these facilities under any circumstances.

### BENEFITS OF CIVIL LIABILITY INSURANCE IN DENTISTRY

The peace of mind that comes from knowing that the health care professional is protected against possible unexpected events is perhaps the greatest benefit of being insured.

It is important to emphasize that the civil liability insurance coverage begins in the date agreed with the insurance company and under no circumstances covers the damages produced before the contract, because it is very common that health professionals who are not insured will seek to ensure themselves only when they have legal problems wrongly thinking that the insurance will defend them of incidents which took place before their recruitment.

In case of any problem caused by the professional acts of a dentist, the insurance company will assist the secured professional through the payment of a deductible that varies depending on the insurance company and will be responsible for payments on the basis of the insured sum. There are few insurance companies that offer the health care professional a liability insurance; each insurance company offers different benefits, therefore, the best choice depends on the needs of each professional considering the professional risk in his or her area of expertise.

### CONCLUSION

No matter how much clinical experience he or she has, the oral health professional will always be vulnerable to suffer legal consequences in case of

disagreement with some patient regarding the provided dental care, in spite of not having acted intentionally. It is important that dentists and all medical professionals have awareness of the real risks that are involved in providing health care due to the fact that no patient responds as well as another in the clinical evolution with the same treatment. Although in many cases complaints may be solved directly between the doctor and the patient, it is possible that the patient requests legal assistance from competent authorities such as the National Commission of Arbitration, civil or criminal courts in search of alternative economic solutions that can affect the dentist importantly. The lack of preventive culture in health professionals in Mexico is a strong risk factor for legal problems and having civil liability insurance is the best option to avoid problems arising from damage to health.

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