Holographic diagnosis of the criminal responsibility of the dental professional: Stomatognathic legal prevention

Diagnosis holográfica de la responsabilidad penal del profesional odontólogo: Prevención jurídica estomatognática

Luis Andrés Crespo-Berti
ui.luiscrespo@uniandes.edu.ec
Universidad Autónoma Regional de los Andes, Ibarra, Imbabura, Ecuador
https://orcid.org/0000-0001-8609-4738

Santiago Xavier Peñarreta-Quezada
ui.santiagopq91@uniandes.edu.ec
Universidad Regional Autónoma de los Andes, Ambato, Ambato, Ecuador
https://orcid.org/0009-0005-3587-0510

ABSTRACT

This work is based on a hybrid clinical-legal domain due to the criminal liability for the legal breach of care incurred by some dental professionals. The problem is based on the symptoms that occur during the dental act, such as: (a) no oral health history; (b) oral health history as evidence; (c) lack of knowledge of the legal framework; (d) lack of expertise in the practice of the profession; (e) lack of counseling; (f) insufficient professional training; (g) marginalization of dental control, among others. The objective of this research was to explain the holographic diagnosis of the criminal liability of the dental professional as a stomatognathic legal prevention. A narrative design was applied. From the focus of the doctrinal classification of guilt, the consequences of the objective imputation fall on the lack of skill, as this is the plausible classification with the practice versus the consequences of the profession.

Descriptors: medical ethics; deontology; right to health. (Source: UNESCO Thesaurus).

RESUMEN.

Este trabajo se empodera sobre un dominio híbrido clínico-jurídico debido a la responsabilidad penal por el quebrantamiento jurídico de cuidado en que incurren algunos profesionales de la odontología. El problema vertebra por los síntomas que se dan durante el acto odontológico, tales como: (a) sin historia de estado bucal; (b), historia de estado bucal como probanza; (c) desconocimiento del marco legal; (d) impericia en el ejercicio de la profesión; (e) falta de asesoría; (f) insuficiencia en la formación profesional; (g) marginación del control odontológico, entre otros. El objetivo de esta investigación versó sobre explicar la diagnosis holográfica de la responsabilidad penal del profesional odontólogo como prevención jurídica estomatognática. Se aplicó un diseño narrativo. Desde el foco de la clasificación doctrinaria de la culpa, las consecuencias de la imputación objetiva recaen en la impericia por ser este el estamento plausible con el ejercicio versus las consecuencias de la profesión.

Descriptores: ética médica; deontología; derecho a la salud. (Fuente: Tesauro UNESCO).

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Research articles section

INTRODUCTION

The input is empowered by a panoramic view of the professional practice of dentistry and the legal liability that is generated by negligence in the exercise of the profession. Thus, both criminal sciences and criminology, among other concepts, deal with the active subject of the causal relationship; however, crime is also of interest to other disciplines and branches of knowledge: verbigracia of health sciences and particularly of dentistry. According to Diaz & Hidalgo (2022), who among other things state that: "Also called stomatology, it is a specialty of medicine that deals with the prevention, diagnosis and treatment of diseases that affect any part of the jaw structure" (p. 81). (p. 81)

In a personal interview with the professional stomatologist, Dr. Yenicell de Núñez, a specialist in dentistry, who with her consent answered the question about the broad definition of stomatology and the term of the stomatognathic apparatus, to which she responded textually:

> Stomatology is derived from the Greek stoma, which in Spanish means mouth, and is in charge of studying all the affections of the mouth, not only the teeth, RAE (2022). The training of the stomatologist is based on general medicine in order to diagnose and treat disorders of the lips, cheeks, palate, tongue, maxillary bones, jaw, gums and teeth. The stomatognathic system is the set of structures that allow us to perform chewing, sucking, swallowing and phonation. It is made up of the teeth, jaw, maxilla, gums, palate, cheeks, tonsils and pharynx" (Personal communication, 8-7-2023).

In the same order and direction, it is worth arguing that, just as dentistry and all the sciences of knowledge generate professions that are assumed responsibly by people who decide to adopt them as a source of income and sustenance, they identify their professional performance patterns in a sustained manner over time.

That is why dentistry focuses its attention on parameters and components that ensure the quality of the services provided. Thus, during the successive tract in the professional training in the different institutions of higher education, whether public or private, the student obtains certain specific learning results, among which is the diagnosis through an exhaustive preparation of the clinical record that includes the

history of the patient's background, an aspect that includes a series of radiological examinations, as well as the execution of treatments with rigorous asepsis through the use of sterilized instrumentation (González, et al., 2017); (Díaz, & Hidalgo, 2022).

In such a way that it corresponds unequivocally to the development of good practices that are derived from the dental act with strict adherence in the exercise of expertise by virtue of the degree in the academic order, since such personnel classified as first hand in the area of health, without distinction, are at the threshold to which the dentist is subject in the sphere of the fault for negligence in which he may incur for breach of the objective duty of care, without detriment to the damage of causing harm. Denied assumption that is circumscribed to malice. All this in accordance with the provisions of the Organic Integral Criminal Code of 2014, by enshrining the legal classification of the subjective typicity by the disvalue that involves a conduct contrary to law that violates a protected legal right referred to personal integrity, which for the hypothetical case falls on patients who are customarily attended through a system of shifts or appointments.

The problem is based on the symptoms that occur during the dental act, such as: (a) no oral health history; (b) oral health history as evidence; (c) lack of knowledge of the legal framework; (d) lack of expertise in the practice of the profession; (e) lack of counseling; (f) insufficient professional training; (g) marginalization of dental control; (h) lack of agreed dental procedure, among others.

This is how the penal concept constitutes an obligatory turning point, since formalism and legal normativism are incompatible with the methodological demands of a discipline that involves procedures immersed in processes linked to: (a) art and; (b) dental and oral science, almost always based on the empirical.

The point in contention lies in how docile and submissive the formal-legal definitions of crime sometimes become, which makes the concept of the disvalue of conduct a methodological issue of little or no attention. Not so the nuclear action for dyspraxis, conscious of the problematization in the ignorance of the inescapable criminal

responsibility that entails a topic of greater transcendence, for example, the functions that crime plays as an indicator of the effectiveness of social control, its volume, structure and movement, the distribution of the little or no effectiveness among the professional guild of health.

In correspondence to the above, the objective of this research was to explain the holographic diagnosis of the criminal liability of the dental professional as a legal stomatognathic prevention.

METHOD

A qualitative approach methodology was used with a non-experimental cross-sectional topical narrative design with human subjects. The research technique used was the interview, which allowed for an in-depth understanding of the migrants' experiences and perspectives. Through this approach, it was possible to identify significant patterns and themes that helped to answer the research questions. In this order, Crespo-Berti (2017) comments that the research procedure was circumscribed to the following steps through which the development of the methodology was carried out:

1. *Definition of the research problem:*

First, the research problem was clearly identified and the specific question arising from the interview used was defined. It was important to establish the objective and relevance of the research.

2. *Selection of participants:*

Once the research question was clear, the interview participants were carefully selected. These had to be individuals with relevant experience or knowledge of the topic under investigation. Two selection criteria were used, which were experience and profession.

3. Design of the interview guide:

The next step was to design an interview guide that included the question addressed during the interview. It was important that this question was open-ended, as the participant was able to express herself in detail.

4. Conducting the interviews:

Once the interview guide was prepared, we proceeded to conduct the interview. It was important to create a relaxed and friendly atmosphere so that the participant felt comfortable and willing to share her experience. During the interview, it was necessary to listen attentively and take notes on key points.

5. Data analysis:

After completing the interview, the analysis of the data collected proceeded. This analysis involved reviewing and coding the participant's response to identify patterns, recurring issues and divergences. Tools such as content analysis or thematic analysis were used to organize and classify the information obtained.

ANALYSIS OF RESULTS

The findings point to a pusillanimous (lax, passive) scenario, due to the marginalization of interest in the academic debate on the criminogenic factor of the crime of medical malpractice, which a university sector does not really take into account in its curricular programs of professional training in dentistry, which it is suggested to use the one that best corresponds to the characteristics and needs of the concrete criminological research.

There is also a lack of interest for criminology in the root of the disvalue of the dental act leading to the generation of an injurious result. The data present a greater interest, above all, as a social and community problem, a characterization that demands from the researcher a certain attitude to approach in the construction of an inidoneous scenario that is capable of being reverted in order to vindicate a sector of society that even presents with facial paralysis due to a bad supply of

anesthesia when improperly puncturing the lingual muscle (depressor and retractor of the tongue).

Note how susceptible the exercise of the profession *in question* can be due to the simultaneity of functions that converge, that is to say, the dentist becomes an integral health professional for being an anesthesiologist, oral surgeon, dental habilitator, hence the danger of being involved as a victimizer of a culpable infraction.

In the international context from the board of the most distinguished referents who have contributed to judgment, respond to (Tiol, 2022; Astudillo, et al. 2014), they state that malpractice crime is a community problem, it is born in the community, so from its bosom positive solution formulas must be found. But it is not a pandemic immersed in the community, much less endemic. It is disruptive and can be confronted on the basis of good practices that lead to the reducible mitigation of the undesirable criminal liability immanent in the profession of dentistry.

Stomatognathic legal prophylaxis:

By the descriptor stomatognathic, this section could not be more suggestive, however with the support of certain references from primary sources of information, the stomatognathic system or apparatus can be defined as (...) “the set of organs and tissues that allow the physiological functions of: (i) eating; (ii) speaking; (iii) pronouncing; (iv) chewing; (v) swallowing; (vi) smiling including all facial expressions, breathing, kissing or sucking” (Varela, et al. , 2020, p. 84). The following is a graphic. illustration of stomatology:

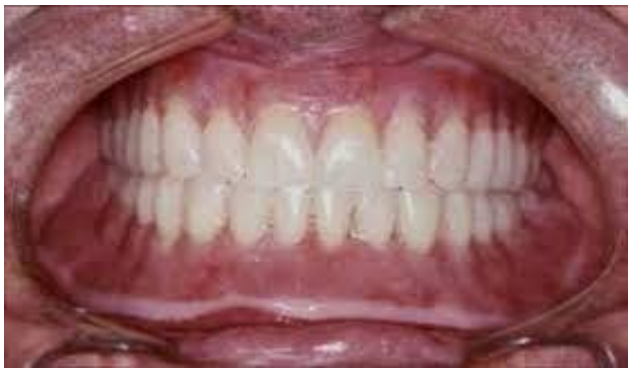

Figure 1. Anatomy and physiology of the stomatognathic apparatus.
Source: web illustration, 2023.

Meanwhile, prophylaxis deals with the prevention carried out by the dentist, also known in other latitudes as dentist or stomatologist, all synonyms based on a basically dental diagnosis with a secondary projection in the oral order (Diaz, 2017; Tigrero, 2016). According to González, et al., (2017), they postulate that despite the prophylaxis exercised by dentists, there is a segment of the population seriously affected in the following terms, "Caries and periodontal disease are the two most common oral diseases that occur in the population." (p. 64)

According to data provided by WHO, 2014 (World Health Organization), between 60% to 90% of school children worldwide have dental caries. Hence the need to implement through scientific production and educational reinforcement from within the family as part of the cultural heritage in the consolidation of practices that promote prevention protocols, since to the extent that dental health is maintained at high levels of coefficient lower will be the incidence of crime. Meanwhile, the Fundamental Law of the Republic (2008), enshrines the Right to Health in the following terms:

> Art. 32.- Health is a right guaranteed by the State, whose realization is linked to the exercise of other rights, including the right to water, food, education, physical culture, work, social security, healthy environments and others that support good living.

The State shall guarantee this right through economic, social, cultural, educational and environmental policies; and permanent, timely and non-exclusionary access to programs, actions and services for the promotion and comprehensive care of health, sexual health and reproductive health. The provision of health services shall be governed by the principles of equity, universality, solidarity, interculturality, quality, efficiency, efficacy, precaution and bioethics, with a gender and generational approach (emphasis added). (Emphasis added). According to the Ministry of Public Health of Ecuador (2014), in accordance with the WHO, it states:

> Oral health continues to be a fundamental aspect of general health conditions due to the importance it has as part of the overall burden of oral morbidity, the costs related to its treatment and the possibility of implementing effective prevention measures. Dental caries is the most common disease in children in Ecuador; so much so that 76.5% of Ecuadorian schoolchildren have dental caries (Estudio Epidemiológico Nacional de Salud Bucal en Escolares Menores de 15 años de Ecuador 2009 - 2010). However, thanks to early intervention, dental caries can be prevented or treated at a reduced cost.

According to Tamayo (2007), he further states that: “Malpractice could be defined as an erroneous practice or an unskillful practice by a health professional, which may cause harm to the patient's health”. (p. 12). In the opinion of Crespo-Berti (2020), he further states that non-compliance with the *Lex artis*, regulations, municipal ordinances, procedure manuals, rules or techniques applied to the profession, are concomitant conditions to avoid the causal nexus leading to depraxis. To this end, strict adherence to the basic standards of the profession must be considered. Otherwise, he practices out of context. Hence the Hippocratic oath he takes in front of the corporations that host them, e.g. the Dental Colleges of the different districts where he practices his professional career. (p. 226).

But Pascucci & Travieso (2008), are of the opinion that dyspraxis has its epicenter in:

> This implies carelessness, omission of due acts, inattention, which generates negative results that harm not only the patient but also the health professional. Malpractice is the failure to take reasonable care when performing a particular treatment. Malpractice is also understood as the exercise of a professional activity without the necessary knowledge or without the required skill. (p. 66).

Criminal prosecution for dental dyspraxis: considerations to be taken into account by the dental professional

Repercussions that range from incompetence, passing through inexperience and landing in the lack of skill or even experience. With this background, the professional criminal liability in dentistry arises in modern times, since some time ago it was improper. This is because the profession was seen as a profession in which dentists sought the patient's welfare and if undesirable results were obtained, it was not possible to demand liability, since it is not an exact science and different results could be obtained for the same professional action. In addition, it was impossible for the judge to determine whether or not there had been professional misconduct.

With the passing of time, such circumstances began to have the opposite effect, since it was legally recognized that the dentist was subject to legal control, just like any other human activity. Thus, at present, there is an increase in the number of complaints of imperfections, negligence and malpractice.

The relationship between the dentist and the patient generates a bond where both depend reciprocally on this nexus. In the past, a paternalistic tradition was established, if you will, where the professional was "the owner of the truth", his word was sacred, since his superiority was recognized. Nowadays, in a globalized world, in which everyone has easy access to information due to new technologies, this relationship has been modified by data that is often true. But many others lack scientific rigor, which increasingly obliges the dental professional to be highly trained in his professional knowledge, without neglecting the legal framework within which he must perform (Alonso, 2022).

When we talk about the legal framework, we should not only think about the duties and rights of the professional, but also the patient has not only rights contemplated in the Organic Comprehensive Criminal Code (2014), but also in the Civil Code (2005), so that with reference to the regulations, rights are referred to, among which

are considered: (a) assistance; (b) dignified and respectful treatment; (c) privacy; (d) confidentiality; (e) health information; (f) medical interconsultation.

The following case arises: Confidentiality: a high class patient in Peru had been seen by a prestigious dentist, he had paid a considerable sum for rehabilitation; they both belonged to the same social circle, which led to comments made by the dental professional regarding the patient's oral condition reaching his knowledge; he felt offended and filed a complaint for violating the right to confidentiality. Thus, the dental professional had to compensate the now victim. The aforementioned exposes the patient in a state of affectation as he is at a disadvantage with the one who provides the service because he is a vulnerable individual, since he goes to the professional to prevent, avoid, heal or improve the harmful effects on his health.

That is why, in situations where the patient is not satisfied with the treatment provided by the dental professional, the patient's word becomes relevant in court, since the service provider is obliged to provide clear, adequate and sufficient health information to the patient's capacity of understanding about his state of health, ideal and alternative treatment plans, benefits and risks; all this supported by complete medical records and informed consents in accordance with the services to be provided, duly signed by the patient, guaranteeing his consent.

The vast majority of malpractice claims and lawsuits against dentists are lost because of abstract, ambiguous or ambivalent clinical histories, including shorthand abbreviations that were not clarified or subscribed by the professional; in addition to this, the defendant is the one who prepares the evidentiary material (Villanueva-Cañadas, 2019). Both the medical records and the informed consents are taken into account by the justice system every time accusations of professional negligence or malpractice arise, since it is the instrument that will corroborate or refute the criminal accusation presented by the victim.

It is inferred that the dental professional has the empirical evidence and special technical knowledge. Therefore, he/she is directly involved in the harmful result due to lack of skill. In the diametrically opposite field; but plausible in synapsis with the

Forensic Sciences, the role played by the professional with respect to the error in the preparation of the odontogram (scheme of the dental arches in which all the dental pieces of the patient appear graphically, anatomically and geometrically designed), essential in the detection and identification of victims in the face of violent or catastrophic events or simply in the forced disappearance of persons.

In such circumstances, it is very important that the judicial authorities or family members can request the treating dentist the documentation to determine the identity of a person. Nowadays, computerized medical records are used, which guarantee confidentiality and the preservation of its integrity, authenticity, unalterability, durability and data recovery. The information must be perfectly encrypted, so that it cannot be violated (Mora, 2007).

Case study: informed medical history:

Dentist of Costa Rican origin, maxillofacial surgeon, was not able to refute his professional practice against a complaint filed with the Attorney General's Office, in an attempt to prove a medical history of his patient for a molar extraction with suture that was loaded on his computer in an Excel file format, something that is modifiable, therefore, had no probative value. Among other things, it was learned that he required an unsecured credit to indemnify through a payment agreement with the patient.

It should be noted that public or private health centers, as well as dental professionals who have their own dental care centers, are responsible for the material and legal custody for a period of ten years from the last service rendered recorded in the medical record; but the ownership of the medical record belongs to the patient. This means that, at the request of the patient, legal representative, spouse, heir or other professional with the patient's express authorization.

Therefore, the dentist is obliged to deliver a certification within a peremptory term. It should be known that the patient has another right, which is the right of

revocability. It consists of the right to withdraw from the continuity of a treatment, being essential to record such decision in writing:

I. **Revocability:** certain dental professionals propose ideal treatments and alternatives, where patients prefer to undergo alternative procedures somewhat cheaper; but their destiny changes to obtain a huge amount of money and requires the dentist to perform a better procedure from the aesthetic point of view.

The matter was that the dentist explained to him that it was no longer possible to perform what in theory was the best treatment, i.e. the one originally proposed, i.e. the treatment of the dental pieces not susceptible to implants, but to adopt the dental reduction milling for the realization of several dental prostheses. Thus, the dentist proposed a new treatment according to the new situation accepted by the patient.

The point of contention was that once the treatment was completed, the patient was dissatisfied, after which he filed a criminal charge against the dentist. Unlike the previous case, this one did have a clinical history and even informed consent, but without the patient's signature, so that the change in the treatment plan had to be agreed in a reparatory agreement in pecuniary terms, which resulted in a financial outlay, without detriment to all the collateral impact generated by a situation related to a trial of this nature, where there is even the risk of a conviction, the professional prestige, the use of the good name and even the disqualification from professional practice for the duration of the sentence.

CONCLUSIONS

It is necessary to rethink the practice of the profession of dentistry on a scientific basis and with a clear focus on the objective duty to act, while empowering the regulatory legal framework, including criminal law. This means that the profession of dentistry, due to the integrality of its specialties, must be shielded by an exhaustive legal knowledge. To this end, advice on legal matters in which every

dentist should be empowered is crucial, since he/she is constantly exposed to risks due to malpractice and therefore greater inconveniences in his/her professional field of action.

When a patient suffers damage or injury as a direct result of a dentist's malpractice, there is the possibility of filing a criminal complaint against the practitioner. But certain basic elements are generally required to be met in order to establish the dentist's criminal liability.

These elements may include:

1. Negligent action: It must be shown that the dentist acted without expertise in performing a dental procedure. This implies that the practitioner failed to act with the level of reasonable care and skill expected of a competent dentist in the same situation.

2. Causation: There must be a direct link between the dentist's malpractice and the harm suffered by the patient. It must be shown that the dentist's actions or inactions were the direct cause of the harm suffered by the patient.

3. Damage or injury: The patient must have suffered physical or emotional harm due to the dentist's negligence. It is important that this damage be significant and quantifiable, since only then will it be possible to establish the professional's criminal liability.

If these elements are met and the dentist's criminal liability is proven, he/she could face legal sanctions, such as fines or even imprisonment, depending on the seriousness of the harmful outcome.

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