

The civil liability of paediatric dentists in Italy. Trains of thought on novelties introduced by law n. 24/2017 (“Gelli-bianco” law)



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Abstract

This study offers an overview regarding news and main themes which have been introduced by Law n. 24/2017 (the so called “Gelli-Bianco” law) in Italy. The normative content deals with the features of civil liability for healthcare professionals. More specifically, this article is referred to the contractual and extra-contractual liability of paediatric dentists.

Dentists often provide services combining healthcare and dental procedures as well as aesthetic activities.

Thanks to the case law and doctrine tradition, the distinction between contracts of employment and contracts of work is clearly stated.

This examination is focused on highlighting methods employed by paediatric dentists to prevent possible actions of suing for compensation.

Introduction

The “Gelli-Bianco” law n. 24/2017 is named after the deputy Federico Gelli and the senator Amedeo Bianco who worked on the law content and text revision.

The official title of the law is “Provision on assisted persons healthcare and security, and professional liability of healthcare masters”. Since it deals with such a delicate matter, this law has been introduced in a complex general background with a dual purpose, ensuring better healthcare for patients as well as a definitive clarification of the main aspects of healthcare professional liability.

The features of healthcare professional liability were not clearly defined before the introduction of Law n. 24/2017. According to the content of the previous applicable law n. 189/2012 (the so called “Balduzzi” law) and the case law tradition, it was possible to distinguish between contractual and extra-contractual liability of healthcare masters depending on individual cases.

Through the interpretation of art. 1218 c.c. (Italian Civil Code), Italian law does identify the “contractual” liability in breaches caused by healthcare institutions. The extra-contractual liability is connected to individual professional activity of healthcare masters (according to art. 2043 c.c.), as long as the mentioned healthcare is not a contract asset [Pascale, 2017].

The subject of law n. 24/2017 is turning more and more relevant in the last years: a rising amount of actions of compensation are frequently referred to healthcare professional liability determining the existence of many long and expensive trials. This result depends on several factors like the extent of medical protection for new diseases or a major self-confidence of patients regarding their healthcare rights. Moreover, this situation is due to the extensive use of diagnostic tests and clinical investigations as well as a longer life expectancy. Furthermore, the speculation regarding individual professionals or business activity must be highly considered in ‘malpractice’ actions of compensation.

The liability of dentists is strictly related to the mentioned background. They are subject to L. 24/2017 (“Gelli-Bianco” law) as well as other healthcare professionals are.

KEYWORD Gelli-Bianco Law; The Civil Liability; Paediatric Dentists

The main aspects of civil liability

The contractual liability is subject to art. 1218 of the Italian Civil Code, which states that: "The debtor who does not correctly perform according to the contract asset is liable for damages. He must provide compensation if he does not prove the absolute impossibility which determined the delayed performance or the breach of the obligation". This sort of liability comes from the infringement of specific duties of obligation determining the failure to implement the contract asset.

The extra-contractual liability is subject to art. 2043 of the Italian Civil Code, which states that: "Whoever causes an unjustified injury in situations of intentional or negligent behaviour must provide compensation". The second kind of liability comes from the breach of a generic duty which does not consider the existence of a previous obligation. The mentioned normative content is inspired to the Latin principle "neminem laedere" ("nobody must be wronged"), in order to prevent injuries in the legal sphere of other people [Feola et al., 2015]. This distinction correctly permits to define the identity of these two kinds of liability and their effects for substantive and procedural law.

According to this report, it is possible to describe three kinds of effects referred to the two mentioned liabilities: burden of proof, statute of limitation and compensation for damages.

The burden of proof particularly concerns actions of compensation for extra-contractual liability; the plaintiff must demonstrate the founding facts of his/her claim and the causal link with the conduct of the counterpart. A different procedure works for contractual liability: in this case the creditor must only prove the contract breach and the extent of the damage. This procedure determines a reversal for the burden of proof, since the debtor, in turn, must demonstrate the external reasons which determined the impossibility of his/her performance.

The Italian Civil Code disciplines the procedural aspect of the statute of limitation, setting limits of ten years for contractual liability (art. 2946 c.c.) and five years for extra-contractual liability (art. 2947 c.c.).

Furthermore, it is possible to provide compensation for predicted and unpredicted injuries in extra-contractual liability. A different measure is provided for contractual liability determining possible compensation only for wilful injuries or other kinds of damages which are limited to the time and terms of the obligation (art. 1255 c.c.) [Feola et al. 2016].

The civil liability of healthcare professionals

The civil liability of healthcare professionals is applicable in cases of injuries concerning the physical and psychological integrity of the patient, involving life itself. Persons who are regarded as injured by a negligent healthcare conduct or procedure are entitled to sue for compensation.

According to the previous normative contents, Law n.

24/2017 determines the application of both contractual and extra-contractual liabilities referring to individual cases. The obligation and the professional relationship between patients and healthcare masters is defined by circumstances like the moment when healthcare begins or where it takes place.

In case of private healthcare activity, its contract asset always defines and determines a contractual liability. The same contract asset is provided by public or private healthcare institutions; in case of injury, patients are entitled to sue for compensation for contractual liability of healthcare institutions.

Actions for compensation for extra-contractual liability are referred to individual healthcare professionals (e.g. doctors, nurses or physiotherapists) for their individual work without any sort of contract asset.

The following examples concern the professional liability of healthcare professionals working in hospitals or private clinics:

- A patient seeks compensation from a nurse (exclusively) because of an alleged error in his/her professional activity.
- A dentist works in a hospital and his/her patients are directly assigned by the health directorate.

According to the examples given, the contractual liability will be defined in case of claims for damages referred to healthcare institutions. If patients ask for compensation from individual health professionals, the extra-contractual liability can be applied.

The civil liability of paediatric dentists

the professional liability of paediatric dentists is subordinate to the content of Law n. 24/2017 as well as other healthcare professionals.

What makes paediatric dentistry different is the kind of obligation referred to dentist's activity: they are often required to provide aesthetic care (like plastic surgeons do) next to necessary healthcare assistance [Ferrazzano et al., 2010; Conti et al., 2012; Saha et al., 2012]. The definition of the contract asset is necessary to identify the sort of professional liability in these cases (which are turning more and more frequent) [Saha et al., 2012; De Intron and Tonelli, 2014].

Statistics

A statistical analysis can be helpful in anticipating an accurate description of the professional liability of dentists. Since 2008 dentistry has been considered one of the riskiest healthcare activities, listed in the fourth place in the related classification.

According to 'Pit Salute' 14th Report by Cittadinanza Attiva of 2012, the 7.5% of the proceedings for compensation for healthcare injuries involved dentistry (even if a lower level of damage rates has been registered since 2008 > 2010 reporting).

"Dentistry's trend for presumed medication errors has been slightly decreasing in the last years. The average was 9.4% from 1996 to 2009, it decreased to 8.5% in 2008 and it went up to 9.0% in 2009. Reports referring to presumed

Actions of compensation for presumed medication errors				
Specialistic Area	Year 2011	Year 2010	Year 2009	Year 2008
Orthopaedics	23,1%	17,6%	24,3%	20,5%
General surgery	11,3%	11,7%	8,6%	8,0%
Gynaecology and Obstetrics	9,9%	4,1%	8,2%	8,8%
Dentistry	7,5%	8,9%	9,0%	8,5%

*Source: Cittadinanzattiva – Rapporto Pit Salute 2010, 2011 e 2012

medical errors in dentistry were mainly concerning root canal surgery or fillings, errors in tooth extraction, dental fittings made of poor materials; trigeminal injuries caused by errors in tooth extractions or incorrect placement of posts; injuries to healthy teeth during healthcare interventions; ineffective granulomas care; immediate prosthesis breaking after their placement. Doubts are also concerning the correct sterilisation of medical instruments. The mentioned reporting does even contain demands for counsels on how to obtain personal medical documents or verifications in medical offices. The reporting describes trends showing that several dentists are not frequent on getting useful medical information for their work by patients" [PIT Salute, 2010].

The last "PIT Salute" reporting by Cittadinanza Attiva of December 2017 does not consider dentistry as one of the riskiest medical professions. The risk record is referred to other healthcare professionals for several aspects. The most frequent diagnostic errors are concerning oncology (19%), orthopaedics (16,4%), and gynaecology/obstetrics (12,4%). Medication errors are mostly referred to professionals working for orthopaedics (20,3%), general surgery (13,4%) and gynaecology/obstetrics (12,1%) (this information seems to conflict with the resume from MedMal Claims report by Marsh 2018) [Arcangeli et al., 2017; Marino et al., 2018]. Information concerning dental healthcare is highlighting medical (diagnostic and therapeutic) activities which have been frequently subject to actions of compensation. Diagnostic errors are concerning low quality of panoramic X-rays or wrongful examinations of granulomas and cavities. It is also dealing with an incorrect evaluation for prosthesis application [Marella et al., 2018].

Therapeutic errors include injuries caused during ordinary healthcare on sound teeth or during more specific healthcare activities like tooth extractions or placement of posts causing damages to the trigeminal nerve and infections. Moreover, specific errors like incorrect prosthetic fittings do often determine aesthetic damages and difficulties in chewing and speech [De Introna and Tonelli, 2014].

Furthermore, it is possible to find a quickly increasing amount of actions of compensation for over expectations in aesthetic or mixed (aesthetic-medical) treatments results. The mentioned increase is also caused by less leniency of patients to professionals. According to the authors experience, internet is playing a prominent role creating misleading and unfaithful sorts of advertising, determining false expectations devoid of any concrete response. This is actually causing a dangerous misalignment among feasibility, costs and results of treatments.

Clinical recommendations of the Italian Ministry of Health: paediatric dentistry

In September 2017 the Italian Office for Health emanated some recommendations concerning paediatric dentistry, which deals with prevention and therapies for pathologies of the oral cavity in children and adolescents. This activity is particularly referred to the following.

- Primary prevention and risk evaluation of tooth decay (by means of Caries-Risk Assessment Tool (CAT) (which can be low, moderate, high) or Cariogram [Campus et al., 2007; Cianetti et al., 2016].
- Therapies on early childhood caries or baby bottle syndrome or first childhood caries, either multiple or early quickly evolving lesions, caused by streptococcus infection or by the intake of sugar [Ribelles et al., 2010; Ozer et al., 2011; Relvas et al., 2014; Giannattasio et al., 2015; Paglia et al., 2016; Caruso et al., 2018; Hazar et al., 2018].

- Conservative therapy of deciduous or immature permanent teeth affected by caries [Saha et al., 2012; Caprioglio et al., 2014; Duangthip et al., 2016; Agrafioti et al., 2017].
- Early diagnosis and therapy of deciduous and permanent teeth related to the presence/absence of an associated systemic disease (e.g. gastroesophageal reflux, eating disorder, malabsorption, etc) which need a multidisciplinary approach [Giannattasio et al., 2015; Dane et al., 2016; Diaz Rosas et al., 2018].
- Dental pulp therapy on deciduous teeth with immature roots, which are affected by caries lesions and demineralised tissues [Smail-Faugeron, 2016; Agrafioti et al., 2017].

Paediatric dentists are firstly called upon to make parents sign an exhaustive informed consent in specialistic medical examinations, since they are exercising the parental responsibility over the child. The following steps always consist in a careful physical examination of the patient's mouth for an in-depth evaluation of teeth and oral mucosa health status. This particular analysis is generally strictly recommended since children are in a developmental phase which also involves the oral cavity.

It is useful to consider some peculiarities of children and adolescents such as dental exfoliation - usually regarding children from 6 to 14 years old -, immune system immaturity, and also difficulties for children in describing, pinpointing and defining symptoms.

According to what the Italian Ministry of Health has recently recommended, it is necessary to know, to individuate and handle all dental and oral problems following specific interdisciplinary protocols. It is also recommended to provide specific prevention, diagnosis and healthcare programmes for children, to meet all the needs regarding children oral healthcare [Italian Ministry of Health, 2017].

It is essential for paediatric dentists to be always up-to-date informed about all the most frequent oral pathologies regarding children in order to be able to correctly advise parents for the possible effective prevention solutions.

Prevention for actions of compensation and civil lawsuit against dentists

After the legitimacy judgment by the Italian Court of Justice (Cass. Sez. Unite n. 3520/2008) and the entry into force of Law n. 24/2017 (Gelli – Bianco), the difference between contracts of employment and contracts of work is turning less relevant for medical liability where intellectual work performances by professionals is related to healthcare activities [Viola, 2017].

It is possible to identify and avoid errors usually determining the non-compliance of obligations by healthcare professionals (specifically paediatric dentists), even if the contract asset of the stated obligations is still hard to be defined [Mari, 2018].

According to each individual case, the first step in order to avoid errors involves the correct and exhaustive information given to patients or parent and legal guardians of children.

Afterwards, it is necessary for healthcare professionals to respect the present guidelines, internationally agreed medical protocols and (lastly) clinical care best practice.

To obtain a wide, aware and detailed 'informed consent' plays a fundamental role in modern dentistry, since it actually determines the contract asset for dentistry obligations which are often combining aesthetic and healthcare treatments.

It is not possible, especially for purely aesthetic treatments, to avoid patient consent on the procedure that the dentist provides.

In case of missing consent or insufficient/incorrect

information given to patients an independent sort of injury is determined and damages must be compensated even if performances are correctly conforming to best practice.

Through the recent judgement by the Sezioni Unite n. 8770/2018, the Supreme Italian Court of Justice has masterfully explained the content of L. 24/2017 (art. 5); "Guidelines" will definitely play a fundamental role for medical civil and criminal liability in the future. Even if the mentioned judgment is specifically referred to criminal law (art. 6 L. 24/2017 – art. 590 sexies c.p.), it is possible to consider it an excellent contribution concerning to the correct professional behaviour by healthcare professionals (respecting guidelines and clinical care best practice).

Medical professionals who provide their activity to adults and minors, are obliged to consider national issued guidelines (which are currently being updated, cf Law n. 24/2017, art. 3 and art. 5) in order to establish which procedure must be applied to each individual case and its related healthcare treatment. Some critiques referred to this strict approach are defining it as a limit for healthcare professionals: they are at risk of being considered as mere executors with relevant consequences for defensive medicine.

Conclusions

Law n. 24/2017 (Gelli-Bianco) is actually showing several critical aspects in its concrete application, including paediatric dentistry, even if it was originally meant to improve the medical professional background. These critical aspects need to be corrected and concretely adapted.

The double choice between contracts of work and contracts of employment is occasionally and lastly applied. Since it is possible to take legal actions against healthcare institutions for their contractual liability, actions of compensation are rarely referred to individual professionals.

Despite the establishing of the "new" Italian SNLG (National Guidelines System), it is still difficult for healthcare professionals to consult clear, definite and updated guidelines.

Dentistry keeps on being one of the most particularly risky healthcare disciplines which are most subject to malpractice actions of compensation. Dentists are necessarily required to have particular foresights in order to safeguard their professional profile and their working activity.

The initial phase regarding the professional relationships with parents or guardians and with the young patient (according to his/her age), concerning the informed consent by patients and the 'clearly agreed costs' require the utmost attention. This phase is considered the best prevention mean for dentists in order to ensure the procedure they are prepared to provide. Moreover, it is possible to list detailed information for patients, a clear distinction between healthcare and aesthetic treatments, a mandatory treatment or an option between two different solutions (e.g. denture or fixed prosthesis) and information regarding risks and complications that may occur during or after therapeutic procedures.

A prior written quote, also providing improvements occurred in progress, has to be accepted, dated and subscribed by the treatment recipient in order to prevent specious claims against the professional (especially in cases of not fully satisfied patients).

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