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PATIENT FAULT IN CIVIL LIABILITY LAWSUITS FOR MEDICAL MALPRACTICE

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ABSTRACT

The growing judicialization in Brazil, especially in disputes between doctors and patients, is the central theme of this scientific article. It focuses on the importance of doctor-patient civil liability, as well as its constitutional and legal foundations are applied in jurisprudence. In fact, the need to prove fault in cases of damage is addressed, highlighting the distinctions between contractual and non-contractual civil liability, in addition to demonstrating some relevant jurisprudential decisions, emphasizing the subjective analysis of the physician's fault and the nature of the health professional's obligation. In addition, the implications of the patient's fault on the physician's civil liability are discussed, including the possibility of mitigating or excluding the health professional's liability. Finally, criteria are presented to assess the feasibility of lawsuits against doctors, in order to avoid unnecessary lawsuits and promote procedural speed and good faith.

Keywords: Medical Law. Liability. Medical Error. Patient's Fault.

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INTRODUCTION

Judicialization in Brazil has reached high levels, a fact catalyzed in the last two decades. In this way, the disputes between medical professionals and patients are on the rise in the national courts, a situation that awakens the legal community on the subject.

In view of this scenario, the private, civil and substantive constitutional system brings normative prescriptions that serve as guiding guidelines for the practice of legal operators in the national territory. Among so many legal nuances, doctor-patient civil liability continues to be a relevant theme and encrusted with particularities, especially from the recognition of Medical Law as a specialized area of Brazilian and international legal knowledge.

In fact, this article brings in the chapter "civil liability in the context of the doctor-patient relationship under private-liberal law", without the intention of exhausting the subject, the essential theoretical and legislative characteristics of civil liability, and then explores some paradigmatic decisions issued by the Superior Courts and Courts on doctor-patient civil reparation in the title "jurisprudence on doctor-patient civil liability". Finally, both the attenuation and the exclusion of the physician's liability for the patient's conduct are outlined in the fourth chapter, that is, in "the patient's fault, the physician's civil liability and the lawsuits about it".

Nevertheless, the purpose of this work is to indicate, albeit succinctly, the main axiological, normative and jurisprudential vectors necessary for the introduction of the reader to the world of Medical Law and, notably, to the patient's fault in civil liability proceedings for medical error.

CIVIL LIABILITY IN THE CONTEXT OF THE DOCTOR-PATIENT RELATIONSHIP UNDER PRIVATE-LIBERAL LAW

Civil Liability is provided for in the constitutional, legal and doctrinal fields. From the perspective of the Constitution, Article 5 expressly provides, in items X and XXXV, the inviolability and inalienability of jurisdiction for the resolution of disputes.

Nevertheless, Law 10.406, namely the Civil Code, provides for the fundamental rules for civil liability between articles 186 and 188, and 927 and 943. From a careful reading of the legal provisions, the *mens legis is perceived* in the sense of guaranteeing civil liability through subjective elements, in the face of unlawful acts, as a rule, that is, through the assessment of guilt *lato sensu*. In this context, guilt in a broad sense can be subdivided into intent (intention) and guilt *stricto sensu* (imprudence, negligence and malpractice). Also,

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despite being residual, the Civil Code allows objective punishment, for apparently lawful acts, in cases of abuse of rights or in situations of risk-benefit inherent to specific economic activities, tacitly and/or expressly assumed by the agent(s) who generated the damage.

In the wake of the lessons present in the doctrine, the authors Nelson Rosenvald, Felipe Braga Netto (Netto, Rosenvald, 2024, p. 203-227) and Eduardo Nunes de Souza (Souza, 2015, p. 50-57) distinguish civil liability between non-contractual and contractual, both applicable systems in doctor-patient relationships, with greater practical incidence in the existence of contracts.

In the context of the doctor-patient relationship, civil liability of a contractual nature occurs from the breach of a prior agreement between the parties. As an example, the patient hires an elective surgery and, as a result, one of the parties does not comply with the agreement, that is, the professional does not follow the medical literature in performing the surgery, or the patient does not pay for the contracted procedure. The extra-contractual one, on the other hand, occurs in the act of a fact supervening the relationship of the parties, by the simple fact that they live in society. That is, if the doctor is in the same place where the patient has a sudden illness, he will be obliged to provide first aid to that patient and if he does not do so, he may be held extracontractually liable.

In fact, from a contractual point of view, civil liability can be configured for the fact that the patient fails to comply with the duty to pay. And this is already something that demonstrates the voluntary conduct of failing to comply with his duty. In the non-contractual perspective, there is the possibility of subjective analysis in relation to the voluntary conduct of not making the payment, because he is unable to afford the medical fees and, therefore, the patient does not comply with his obligation to pay for emergency care. In view of this, it is necessary to analyze the assumptions of civil liability:

> (...) voluntary conduct, the unfair damage suffered by the victim, which can be patrimonial or extra-patrimonial; the causal relationship between the damage and the agent's action; the factor attributing responsibility for the damage to the agent, of a subjective nature (fault or willful misconduct), or objective (risk, equity, etc.). (AGUIAR, 2000, p.4)

From another perspective, it is necessary to observe the physician's duty to follow the scientific literature for the performance of an elective surgery contracted by the patient. As a result of factors external to the doctor-patient relationship, the surgery may not achieve the intended result. And, in order for the patient to obtain compensation for the alleged damage suffered by the medical conduct, he must prove that it was the doctor's will to take

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the initiative to perform the procedure in disagreement with the indicated literature, as well as the consequences generated by the alleged medical error, the relationship between the medical conduct and the bad result and whether the doctor really acted culpably or intentionally, or there would be a risk in the procedure.

JURISPRUDENCE ON DOCTOR-PATIENT CIVIL LIABILITY

In the current legislation of the Civil Code, in its articles 186 and 951, they provide for subjective and objective liabilities, respectively. Such provisions focus on the need to prove the illegality of the damage suffered by someone who was the victim of a negligent, reckless or imperious act of an agent causing the damage.

As a result, there is an extensive discussion in the judiciary about the fault of the doctor in cases of civil liability. In fact, it is both the understanding of the Superior Court of Justice and the doctrine (Souza, 2015, p. 40-41) that the doctor's guilt must be analyzed from a subjective perspective. Otherwise, see:

> By upholding the conviction of an obstetrician for the damage caused to a newborn, the Third Panel of the Superior Court of Justice (STJ) reaffirmed the understanding that the civil liability of the physician in the event of error, whether by action or omission, depends on the verification of fault – that is, it is subjective (Brasil, 2021).

Another point to be explored is the legal nature of the obligation present in the doctor-patient relationship. In this sense, despite the intense theoretical debate, the Superior Court of Justice understands the obligation of the physician as "of means", since he cannot guarantee the patient's cure, under penalty of constituting an ethical infraction, as well as civil, criminal and administrative liability.

However, depending on medical advertising, the obligation may be understood as "result-based", since, as recommended by the Consumer Protection Code, in its article 30, the service provider is obliged to comply with the advertising conveyed and this was also understood by the Court of Justice of São Paulo (Brasil, 2019, *online*). So, if the doctor publishes in any means of publicity and propaganda, so that the public understands that there is a promise of results, he will be obliged to comply with the promise and may also suffer civil, administrative and criminal convictions, for non-compliance with his informational duty according to the dictates of his professional activity.

Therefore, for the doctor's obligation to be considered "of means", it is necessary that he or she pays attention to the duty to provide the necessary information to the patient

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before performing any procedure, except in cases of urgency and emergency. But, in the event of contractual liability, the professional cannot excuse himself from his informational duty, especially in his advertisements.

THE PATIENT'S FAULT, THE DOCTOR'S CIVIL LIABILITY AND THE LAWSUITS REGARDING IT

The Brazilian jurisdictional system prescribes mitigations and exclusions of civil liability based on the extent of the victim's co-culpability in the harmful event. In the Civil Code, in its article 945, it provides that if the victim has culpably contributed to the harmful dynamics, the compensation will be mitigated according to the scope and relevance of his fault. However, at the limit, if he acts with exclusive fault, the causal link is broken and, consequently, there is no civil compensation due. Furthermore, item II, paragraph 3 of article 14 of Law 8,078/90, also provides for the understanding that the service provider will not be held liable when it proves that the exclusive fault lies with the consumer. In fact, this ground is also applied by the Superior Court of Justice, according to judgments number AgRg in Resp 1.380.615/RS and AgRg in AREsp 313.688/SP.

The ideal follow-up to obtain a lawsuit against the physician would be if the patient seeks opinions from another physician specialized in the same area, so that this physician can make a report based on the medical literature, in addition to demonstrating the evidence or concluding that there was an error in the conduct of the physician who treated this patient. What currently occurs is the judicial claim of illicit enrichment by the patient, or even his attorney venturing into a lawsuit, without even studying the case. This is demonstrated from the filing of the lawsuits without the duty of confidentiality, given the exposure of the patient's medical record, going against the General Data Protection Law, in addition to the request having no causal link between the facts, the doctor's conduct and the damage suffered by the patient.

Therefore, it is necessary to evaluate the following points: a) the damage suffered by the patient; b) causal link (did the doctor's conduct generate this damage?); c) did the physician follow the scientifically proven literature?; d) was there evidence of error in the physician's conduct?; e) was there an adequate prescription of the duty to inform the patient's obligations after the procedure?; f) Did the patient follow the guidelines prescribed by the doctor? g) Did the patient have complications that could cause the absence of the expected result? h) Did the doctor act with the intention of causing harm to the patient?

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That said, it is necessary to carry out these questions before any procedural initiative against the doctor. Mainly, in order to follow the principle of procedural speed and good faith, in order to minimize the massification of processes in the judiciary, as well as to avoid a possible culpability and responsibility of the plaintiff for the legal adventure.

CONCLUSION

The analysis of judicialization in Brazil, particularly in litigation between physicians and patients, reveals a growing trend, attracting the attention of jurists. In this context, doctor-patient civil liability emerges as a central issue and stands out for its complexity, as well as for the legal nuances involved. Understanding the constitutional and legal foundations of civil liability, as well as the distinctions between contractual and non-contractual liability, is crucial for the pre-analysis of the professional's liability.

Examining the liability of the physician in the light of case law and understanding the basis of the entire content of decisions are fundamental for an adequate analysis of the application of this legal institute. In addition, observing the nature of the physician's obligation, whether as "of means" or "of result", and its legal and ethical implications are necessary to contribute to the definition of the parameters for the recognition of this responsibility in a legal relationship.

Finally, it is essential to consider the implications of the patient's fault on the physician's civil liability and, likewise, the criteria for evaluating the feasibility of lawsuits against health professionals. The approach to these aspects aims to promote a more conscious and responsible legal action, in line with the principles of procedural speed and good faith, aiming to mitigate the massification of judicial proceedings and avoid possible liability of the plaintiffs for legal adventures.

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