

Civil liability on accusations of medical error by orthopedists

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Abstract

Studies in regional councils of medicine point to Orthopedics as a specialty with a high rate of ethical-professional investigations and processes. Considering this, the aim of this study was to analyze the frequency of litigation for medical errors in the civil sphere involving orthopedists as the defendant in the State of Rio de Janeiro Court of Justice from 1975 to 2015. For this purpose, civil liability cases were selected in which the orthopedist appeared as the defendant, of which few (six) fulfilled the requirements, with 86% dismissed in the first instance. It was concluded that the expert's role is highlighted, since there was a 100% agreement between the expert's report and the legal decision, and since the number of cases was small, further studies are necessary in the other regions of the country for more decisive results.

Keywords: Civil rights. Physicians. Orthopedics. Damage liability. Technical responsibility.

Resumo

Responsabilidade civil nas acusações de erro médico de ortopedistas

Estudos em conselhos regionais de medicina apontam a ortopedia como especialidade com grande índice de sindicâncias e processos ético-profissionais. Diante disso, este trabalho teve como objetivo analisar a frequência de litígios por erro médico na esfera cível envolvendo ortopedistas no polo passivo do Tribunal de Justiça do Estado do Rio de Janeiro entre 1975 e 2015. Para tanto, foram selecionados processos de responsabilidade civil em que o ortopedista figurava no polo passivo, dos quais poucos (seis) preenchem os requisitos, com 86% de improcedência em primeira instância. Concluiu-se que o papel do perito é destacado, visto que houve 100% de concordância entre o laudo pericial e a decisão jurídica, e, como o número de processos foi pequeno, são necessários novos estudos nas demais regiões do país para resultados mais decisivos.

Palavras-chave: Direitos civis. Médicos. Ortopedia. Responsabilidade civil. Responsabilidade técnica.

Resumen

Responsabilidad civil en las acusaciones de error médico de ortopedistas

Estudios en los Consejos Regionales de Medicina señalan a la Ortopedia como una especialidad con un alto índice de indagaciones y procesos ético-profesionales. Frente a esto, este trabajo tuvo como objetivo analizar la frecuencia de litígios por error médico en la esfera civil que involucran a ortopedistas en el polo pasivo del Tribunal de Justicia del Estado de Rio de Janeiro, entre 1975 y 2015. Para ello, se seleccionaron procesos de responsabilidad civil en que el ortopedista figuraba en el polo pasivo, de los cuales pocos (seis) cumplían los requisitos, con un 86% de improcedencia en la primera instancia. Se concluye que el papel del perito es fundamental, dado que hubo un 100% de acuerdo entre el informe pericial y la decisión legal y, como el número de procesos fue pequeño, se necesitan nuevos estudios en las demás regiones del país para alcanzar resultados más decisivos.

Palabras clave: Derechos civiles. Médicos. Ortopedia. Responsabilidad civil. Responsabilidad técnica.

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Declararam não haver conflito de interesse.

Recent studies indicate that, among the several medical specialties recognized by the Conselho Federal de Medicina - CFM (Federal Council of Medicine), orthopaedics has been noticeably high in the percentage of inquests. It is a set of procedures that seek to ascertain the truth of alleged facts through investigation and to evaluate the occurrence of irregularities and ethical-professional judicial proceedings both in the administrative scope of the Conselhos Regionais de Medicina – CRM (Regional Councils of Medicine) and in the civil^{1,2} and criminal areas. In fact, surgical specialties have been more likely to have complaints than those areas related to clinical activities¹. In the case of orthopaedics, this is a specialty with several complications as it has a rate of 1.41% to 40.3% of infections after surgery⁵.

However, this does not seem to be the only explanation for the high number of surgical specialties in legal matters. It is possible that factors such as poor use of the informed consent, difficulty in filling the medical record in orthopaedics⁶ and failure in the doctor-patient relationship contribute to the amount of complaints. In addition, the technological evolution of orthopaedics has increased the complexity and quantity of the documentation process⁶, being this one of the possible explanations for the number of litigations. Hypothetically, this is due to the reduction of time spent dealing with the physician-patient relationship and the poor understanding of risks inherent in the procedures⁷.

Regarding the kind of error on which the orthopaedic surgeon, as well as the other surgeons, is subjected to, says article 139 of Chapter IV of the Brazilian Civil Code:

Art. 139. The error is substantial when:

I - it concerns the nature of the business, the principal object of the declaration, or some of the qualities essential to it;

II - it concerns the identity or the essential quality of the person to whom the declaration of willingness refers, as long as it has influenced it in a relevant way;

III - being legal and not implying refusal to apply the law, it is the sole or principal motive of the legal business⁸.

The medical error itself is defined as the doctor's failure to practice his or her profession *properly*. It is the poor or adverse result due to the action or omission of the physician caused by non-observance of technical conduct, being the professional in full exercise of his or her mental faculties⁹.

As to this sort of error, the analysis of civil liability of orthopaedists does not generate many divergences between doctrine and jurisprudence,

since the specialty, as a rule, is conducted by obligation of means and not of end, because of its complexity and risk¹⁰. In addition, it is necessary to differentiate the objective civil responsibility of the hospital and the subjective responsibility of the physician, since hospitals and clinics actually respond for the harm, regardless of guilt because they have a function of offer a place for inpatients, with presumption of responsibility for the patient¹¹.

Thus, the damage caused in orthopaedics by the physician, there being no deceit, malpractice, recklessness or negligence, supported by the sole paragraph of art. 927 of the Civil Code⁸, does not characterise the need for payment for moral damages or civil liability of the professional. In the Brazilian scenario, the importance of the expert in the court's decision-making is highlighted, and there is much agreement between the judicial decision and the expert's evidence¹².

In the light of the above, this work proposes to explore the medical judicial processes in the Tribunal de Justiça do Estado do Rio de Janeiro - TJ-RJ (Court of Justice of the State of Rio de Janeiro)¹³ in the scope of orthopaedic activity, including the civil responsibility of the professional in these cases, in the light of the 1990 Código de Defesa do Consumidor - CDC (Code of Consumer Protection)¹⁴, the 1988 Brazilian Constitution¹⁵ and the 2002 Civil Code⁸. In addition, we discussed its consequences in Brazilian doctrine and jurisprudence, and considered the status of the orthopaedic doctor as being the accused party, that is, the defendant.

Goals

The general objective of this study was to collect data between 1975 and 2015 on judicial processes in the TJ-RJ regarding orthopaedic practice, in which civil liability is discussed. Specific objectives include:

- To establish the frequency of litigation in orthopaedics over the years in the TJ-RJ;
- To ascertain the understanding of the judgment regarding the subject in question;
- Verify the rate of request for medical expertise by the court;
- Find who stands with the doctor in the accused party of the lawsuit;
- Analyse the validity of complaints.

Method

The research was based on keywords, focusing on lawsuits involving civil liability, by subject / word, on the TJ-RJ website¹³, using the term “orthopaedic medical error”. The decisions taken at the Tribunal de Justiça do estado (State Court of Justice) between January 1, 1975 and December 31, 2015 were considered. Only those results of civil liability in which the orthopaedic doctor was the accused party were selected. Thus, 19 cases were found in this period of 40 years, which amounts to an average of less than 0.5% per year.

The variables analysed in each case were: 1) type of surgery or clinical diagnosis on which the judicial process was based; 2) individuals and institutions from the accused party (orthopaedic doctor, clinic / hospital, municipality, state, health plan); 3) individuals from the accusing party (patient, patient's spouse, patient's son); 4) year of distribution of the case; 5) absence or presence of investigation by an expert; 6) the validity or dismissal of the complaint; 7) arbitrated value for indemnity by the court. The data were inserted into tables and analysed in Excel (2007).

Results

Of the 19 lawsuits, one was excluded because the defendant was the municipality; another because the state of Rio de Janeiro was the only accused; five were against hospital or clinic; a radiology clinic; two against health plans; one against an electric power company; and one was disregarded because it was not an orthopaedic procedure but a surgery to remove a dermoid cyst. This way, there were 7 cases to be analysed but there was data available for just 6 of them, which reduces the average percentage to just over 0.1 case per year.

In most of the lawsuits, the orthopaedist was the accuse party associated with the clinic, being alone in this category in only one of lawsuits; In another, the doctor was the accused party together with the health plan only; in two cases, with the hospital; and in two others, the case was against the orthopaedist, the clinic, and the health plan.

Expert evidence was requested by the court in 100% of the cases, and in all cases there was agreement of the court of first instance with the expert. In 5 out of 6 (83%) cases, the expert did not identify a medical error, which reflected on only one acceptance of

the validity of the complainant claim by the court, corresponding to 17% of the total analysed.

Most of the occurrences (83%) occurred in emergency and urgent situations: knee surgery due to ligament rupture (1); ulnar nerve injury not identified in emergency (1); loss of limb due to infection after bandage fracture not exposed in emergency, if not taken to a surgical center (1); finger amputation without consent in emergency to save the patient's life (1); Fracture of the finger (1). In addition to these, there was a case of knee fracture, an electively scheduled procedure, the cause of which was not identified in the study (1).

The disputes were distributed as follows: in 2001 (1); 2005 (1); 2006 (1); 2007 (2); 2008 (1). At the time of the survey, 83% of the cases had been adjudicated and, therefore, may not be pursued further.

Discussion

The few cases found with the demarcated characteristics represent the total number of cases, that is, they do not confirm the high incidence of medical errors¹⁶ that the media has been emphasising systematically. However there are explanations for this.

Preliminarily, it was hypothesised that the research available on the Court's website at the time of this study was jurisprudential, including only the second instance. Petitions, aggravations and appeals take a long time to be appreciated by the judges due to forensic slowness.

It should also be differentiate accountability from the state or hospital entity, which respond objectively, that is, regardless of the evidence of fault on the part of the author of the fact. However, in order to convict the professional, it is essential to note that he or she was to blame for the outcome in question. Because of this, when alleged medical error occurs, lawyers tend to sue the public Administration or the hospital (accused party) rather than the doctor.

The low absolute value in the number of legal cases is not unique to this research. A study carried out in the public prosecutor's office specialised in the defense of health in Maranhão, with judicial administrative actions from 2002 to 2007, found only 46 cases¹⁷. Another study, which focused on the Conselho Regional de Medicina de São Paulo – Cremesp (Regional Medical Council of São Paulo), found only 41 ethical-professional legal cases involving the revoking of the license of 45 physicians between 1988 and 2004¹⁸. Nevertheless, it was difficult to compare the present study with others

of this type, given the lack of research involving jurisprudence and medical errors⁴.

Despite having only six cases, the 40-year time coverage (1975-2015) of this work is emphasised, noting that it is not a sample but the whole data of the court. It is also important to highlight that there was no case selected by the research criteria between 1975 and 2000, and that most of the actions related to emergency and emergency situations.

We lack comparative data, since no studies were found in the Conselho Regional de Medicina - CRM (Regional Council of Medicine) of Rio de Janeiro. However, a study of medical malpractice reports from 2000 to 2006, carried out by the Goiás CRM¹⁹, showed an annual total of 155 and 461, respectively, for the years mentioned above, showing that the number of complaints increased three times in six years.

Currently, there are some hypothesis for this growth. One of them is the break off from the expectation of “infallibility” attributed by patients to doctors²⁰ together with the deconstruction of the physician’s image by the media¹⁶, associated with the chaos of public health²¹.

In the litigations analysed, some data pertinent to medical and expert activity are not well understood. For example, in the case of finger fracture it was not possible to determine the fractured phalanx, probably because the report was not written by doctors but by law professionals. In addition, there is evident shortage of literature on the subject in scientific journals and it is emphasised that most of the information for comparison refers to the state of São Paulo.

Udelmann²² analysed data from Cremesp and pointed out the prevalence of complaints in the field of orthopaedics, which ranked fourth in 1997, second in 1998 and third in 1999 and 2000², when comparing complaints registered in all specialties. However, in his “Medical Law Course”, Enzweiler and Pereira²³ evidenced the statistical tendency of an increase in the number of medical civil lawsuits in general²³.

Bitencourt *et al*¹ carried out a study on the judgment of ethical-professional cases of the Conselho Regional de Medicina do Estado da Bahia - Cremeb (Regional Council of Medicine of the State of Bahia) between 2000 and 2004, and reported a proportion of 10% of cases in the orthopaedic area. On the other hand, Koeche *et al*² described convictions for medical error, between 2005 and 2009, in cases judged by the Conselho Regional de Medicina do Estado de Santa Catarina – Cremesc (Regional Council of Medicine of the State of Santa Catarina), with orthopaedics

reaching third among specialties with complaints, but not among the most convicted. This trend was also observed in the present study.

The incidence of medical error can be much higher than is usually thought. Kaushal, Gandhi and Bates²⁴ analysed 10,778 medical records and found a 5.7% rate of errors related to prescription, dosage or drug administration in paediatric patients. About 19% of failures could have been avoided.

In only one of the cases analysed here was verified the validity of the complaint: the case of amputation of the upper limb of the plaintiff of the lawsuit due to infection which occurred after hospital discharge. She claimed that the fracture had not been washed and treated in a surgical center, which is why she would have been infected. In the first instance, all defendants (clinic and hospital) were ordered to pay R \$ 70,000 for moral damages and R \$ 46,500.00 for aesthetic damages, in addition to a monthly minimum wage.

The defendants argued that it was not an open fracture, so there was no need for cleaning it in a surgical center. The decision was changed in the second instance, when the responsibility of the doctors was removed, but not of the hospital. In this case, it is clear the differentiation between the objective civil liability of the hospital and the subjective one of the orthopaedic doctor.

Evidently, orthopaedic damage caused by a physician, there being no deceit, malpractice, recklessness or negligence, with the support of the sole paragraph of art. 927 of the Civil Code, due to the inherent risk of the activity, does not characterise payment for moral damages. According to Silva, the civil liability of the orthopaedists does not generate many divergences, since it is a specialty that is normally conducted by obligation of means, not end, given its complexity and risk¹⁰.

However, there is a caveat related to this issue. As indicated by Kfoury Neto²⁵, the obligation regarding the placement of medical plaster device is one of outcome, and it is the duty of the professional to monitor the evolution of the plaster and pay attention to the patient’s complaints. That was the understanding of the court of first instance in the litigation reported.

In this article, despite the small number of cases, there was a 100% agreement of the court with the expert report. This trend is in line with the study by Leal and Milagres¹² about the importance of expert activity in judicial decisions - the authors examined official reports and judicial decisions in 100 civil cases of 2009 referring to poor medical practice in general surgery,

proposed in the state of Sao Paulo. It was evidenced that up to the court of first instance, the medical-legal report influenced the judicial decision in 96% of the cases. There were in 16% of the experts reports, elements that allowed to conclude professional error due to malpractice, recklessness or negligence. The rate of agreement of the court with the expert report was 75% when there was inadequate medical conduct and 100% when was considered that the patient received appropriate assistance, that is, when the unsatisfactory outcome was not understood by the expert as being the physician's responsibility. Therefore, medical expertise is shown as the main means of evidence in medical malpractice actions¹².

Among the analysed cases, one was highlighted in which there was amputation of the finger, not specified in the available data of the case, by orthopaedic team of the emergency department due to accident, without a signed consent from the patient. According to the orthopaedist, this was the only alternative, and the expert in his report confirmed that the risk would be great for the patient if the procedure had not been performed. The case was therefore dismissed as unfounded complaint.

In another case, the subject suffered a finger injury during a football (soccer) match on the left hand phalanx, also unspecified in the process. When contacting an orthopaedist the following week, splint placement was indicated on the fracture of the finger but it was not used. The first assessment was contested, and the following evaluation concluded that there was no error in the physician's conduct, claiming that the delay in treatment may have contributed to aggravate the lesion, with poor consolidation (pseudoarthrosis) of the distal phalanx.

The expert was assured that all the procedures performed by the defendant (physician) were within the recommended for the clinical picture of the patient. Again, the case was dismissed.

It is worth remembering that orthopaedics presented a lower rate of civil liability conviction than other surgical specialties. Braga, Vieira and Martins⁷ investigated, in a similar study, cases involving ophthalmologists in the Tribunal de Justiça de São Paulo (Court of Justice of São Paulo) and showed that the court considered 72% of the cases to be unfounded.

The doctor-patient relationship in orthopaedics is another point that deserves to be highlighted. A study carried out on victims of musculoskeletal trauma in Fortaleza showed a direct correlation between the quality of this relationship and the rate of complications recorded⁶. This finding makes it possible to confirm that in orthopaedics, as in other specialties, there is a need to create a relationship of trust between doctor and patient²⁶.

Final considerations

The study points to a tendency to increase the frequency of legal proceedings related to orthopaedic medical procedures. Although the data are still incipient, this movement seems obvious, and should be taken as a warning by all health professionals.

We found high rates of acquittal and a high rate of expertise requested. Despite the effort to find and systematise the data, unfortunately the subject has not been exhausted and new studies are recommended in order to examine in more detail the panorama involved.

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All the authors of this article participated in the planning, data analysis and other stages of this study.

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