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Medical Error in Psychiatry - Brazilian Analysis and Proposal For A Doctor's Protection Protocol

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Abstract : There is an increase in the number of medical malpractice cases all over the world and the detachment of the role of the judiciary and the real practice of medical activity is striking, converging to a weakness of the doctor in the face of a system that does not advocate the equalization of plaintiff and defendant in the process, bringing procedural difficulties to the doctor due to the legislation, especially the Brazilian**.**

In a transdisciplinary way, permeating the law and medicine, the article mapped the operation of the Brazilian judiciary in the face of medical error and, specifically, measured how the state power understands cases about psychiatry, a specialty that is difficult to prove medical error. It was analyzed statistically how Brazilian courts behave, creating a procedural diagnosis of justice.

This research offers a protection protocol to the psychiatrist inspired by the General Data Protection Law, which in turn comes from the European General Data Protection Regulation and the California Consumer Privacy Act of 2018 to address the procedural vulnerability of the doctor in medical error processes respecting patient privacy and intimacy, applicable and adaptable to countries and continents that have legislation for specific data protection.

The article concludes by critically analyzing the format of processing and judgment of medical malpractice cases in Brazil, proposing a multidisciplinary configuration in search of real justice.

Keywords: Medical error; Psychiatry; General data protection law; Jurisprudence; Real truth; Formal truth; Physician protection protocol; Judiciary format

I. INTRODUCTION

Medical error can be defined as the failure in the exercise of the profession bringing a different result from that intended, due to the action or omission of the doctor or other professionals on his team [1].

In 2018, medical errors reached jurisdictional relevance that culminates in society's fear of medical conduct. On the other hand, the cornered doctor practices defensive medicine in order to protect himself from possible sues. In unfolding it increases the risk of appearing as a defendant and increases the cost of healthcare in Brazil. The Conselho Nacional de Justiça (National Justice Conseil) counts 70 new lawsuits per day in Brazil - or 3 per hour [2] - referring to medical error. In 2017 alone, there were at least 26 thousand new medical malpractice cases.

Another important definition is defensive medicine, which can be defined as a medical practice that prioritizes diagnostic and / or therapeutic approaches and strategies that aim to avoid demands in the courts [3].

In a recent study it was also proven that doctors deliberately exercise defensive medicine as a way to protect themselves from lawsuits or even when they know a fellow doctor who has been sued for medical error and that, therefore, their clinical conduct is significantly altered [4].

Anachronistic is the search for the definition of terms such as negligence, imprudence and malpractice when discussing the process for medical error, while it is necessary to differentiate medical error from the process for medical error and substantially the patient's distant understanding on the subject, because the doctor who responds for medical error in any of the four possible spheres (civil, criminal, administrative and ethical-disciplinary) in most cases did not even act with error. According to the

Superior Tribunal Federal (Superior Court of Justice), 57% of the claims brought to the judiciary are unfounded, that is, there is no condemnation of the doctor [5].

While we already have the definition of medical error, the lawsuit for medical error can derive from infinite variables, including how the doctor talks to the patient, that is, regardless of error, whether through guilt or intent, the latter, rarely verifiable.

Oblivious to the factual error, psychologist Nalini Ambady listened to recordings between doctors and patients, selected two ten-second excerpts from each conversation and excluded high-frequency sounds from speech that allow us to recognize words individually. There was a confused sound, but one that suggested intonation and rhythm. After that, she asked some people to classify sounds according to cordiality, hostility, dominance and anxiety. She found that, with these categories, she could predict which doctors would be prosecuted [6].

The people who made the classification did not know the professional qualifications of doctors, what was said, but the tone of voice. In fact, the analysis was elementary: if the surgeon's voice were classified as dominant, he would tend to be in the group of prosecuted; if the voice sounded less dominant and more concerned, it would tend to be in the group of not prosecuted [7].

It is clear in this sense that the framework evangelized by the legal system, static and unalterable, does not advocate the factual reality of medical care, much less manage to measure the technicality applied to the clinical or surgical act, being at the expense of the doctor, in the possibility of appearing as a defendant in indemnity action for medical error, proof of the integrity of his conduct.

Another vulnerability open to the doctor is the inversion of the burden of proof in the Brazilian civil process, a rite that fits all the processes for medical error in the country, which are aimed at the pecuniary condemnation. According to Grinover [8], the inversion of the burden of proof requires the inversion of the burden of proving the allegation that is made in civil proceedings. It means to say that the accused of the damage will have to prove that he did not act with guilt, negligence or recklessness. The plaintiff is responsible for proving only the occurrence of the damage and the causal link (cause and effect relationship) between the act and this damage.

Associated with this, it still militates in favor of the patient the gratuity of justice, which, in most cases, is deferred by the judiciary and the patient, in this orbit, is exempt from financial costs, because his lawyer also works with a promise of linked payment to the financial result of the demand, and the condemnation of the doctor or health service is a premium that, if not achieved, the reverse risk is zero [4].

In perspective, for the doctor, the process for medical error does not depend on the error itself, but on the demand filed or before the Medical Council, whereas from then on the professional will already attend public agencies, law firms and the who considers it worse, will have his name linked to the prosecuted roster [4].

Hard to prove in many cases, most of the times the doctor did not make any mistake and is still condemned as if consummated, the cradle of the judge's conviction formation is in the patient's record (medical record) or in the expert report, a document that in almost all medical malpractice cases is indispensable for the production of evidence, both for the plaintiff and the defendant.

The verisimilitude of the accusations becomes more complex according to the medical specialty. In medicine, specialties are at the heart of the obligation of result, with the majority being legitimized as a half activity and half of the evidence in the process is provided.

For Minister Luis Felipe Salomão, of the Fourth Panel of the Superior Tribunal de Justiça, in the obligations of means is enough for the professional to act with due diligence and necessary technique, seeking to obtain the expected result [9]. In contrast, as a result, as is the case with aesthetic dermatology, aesthetic plastic surgery, anesthesia and in some cases radiology, they keep in their core a mandatory outcome according to what is expected.

There are clinical specialties errors that are more difficult to prove in court and psychiatry is rarely included in the list of specialties prosecuted in view of the patient’s and the judiciary’s difficulty in realizing the medical error, including on the expert level.

Somewhat complex is the definition of mental illness. Notwithstanding a person's behavior provides indicators of his mental health, each individual, depending on his beliefs and principles, can re-signify the concept in question.

Psychiatry, too, has stalled to establish itself outside supernatural conceptions. In the 19th century, psychiatry literally survived between walls, in asylums, far from the medical field. Throughout the 20th century, the distance between psychiatry and medicine has been reduced and the psychosomatic movement, the emergence of psychiatric drugs, nosographic classifications, epidemiological studies and neurosciences have brought the psychiatrist's way of seeing and speaking closer to that of his colleagues from others specialties [10].

The concept of mental health defies complexity and, in another way, the Constituição Federal (Federal Constitution) prohibits discriminatory treatment of people with psychic treatments, since the dignity of the human person is not linked to concrete circumstances, as it is inherent and any and all people [11], regardless of their level of lucidity.

The complexity surrounding the definition of mental illness, in terms of “normal” and “pathological”, is more evident with the changes in the classification system of the American Psychiatric Association, signed by the Diagnostic and Statistical Manual of

Mental Desorders (DSM[1]) [12], whose first edition, from 1952, brought 160 disturbances. The fourth version, DSM-IV, from 1994, points to 410. In the seven years between the publication of DSM-III-R (1987) and DSM-IV (1994), there were changes in criteria in relation to 120 disorders, the addition of 13 new ones and the elimination of eight. The last edition, of May 2013, details 450 new diagnostic categories.

This study aims to identify a healthy performance of the physician specialist in mental health in the light of the judiciary, in addition to diagnosing parameters of condemnation and acquittal of the doctor in lawsuits that have been or have been processed in the country since 2017.

In addition, the aim of the research is to verify, from the perspective of law and medicine, the culpability of the physician in cases already judged and in progress, creating a transcendental understanding between medicine, law and jurisdictional behavior.

It is important to mention that the advancement of science and technology in this century is considered to be the greatest thing that we had managed to advance previously [13], in this orbit and in view of the transdisciplinary, multidisciplinary and interdisciplinary scope of the work, the levels of interactions deserve conception of the proposed theme:

1. **Multidisciplinarity** - according to Piaget (1981) occurs when the solution of a problem makes it necessary to obtain information from two or more sciences or knowledge sectors without the disciplines involved in the process being modified or enriched.
2. **Interdisciplinarity** - the same author is inclined to use this term to designate the level at which a transaction between several disciplines or heterogeneous sectors of the same science leads to real interactions with a certain reciprocity in the exchange leading to mutual enrichment
3. **Transdisciplinarity** - the concept searches not only as interactions or reciprocity between specialized research projects, but a category within a total system, without any strict limits between disciplines [14].

Based on this hybrid analysis, the General Data Protection Law [15] seeks to protect privacy, self-determination, freedom of expression, communication of opinion, the inviolability of intimacy, honor, people's dignity and creates a margin of possible protection for the physician as will be assessed below, and, through it, we sought, in this study, to develop a protocol for the defense of the physician in the face of the problem assessed in this research.

II.STUDY'S GOAL

The objective of the study was to map the lawsuits for medical error in Brazil detailing the activity of the psychiatrist measuring his guilt in the light of Brazilian law. It took the opportunity to stratify the medical specialties processed and the format of understanding that causes condemnation. It was also the objective to create a protocol for the protection of doctors under the Brazilian legislation of the General Data Protection Law (LGDP), but based on European law, the European Personal Data Protection General Regulation (GDPR) and the North American California Consumer Privacy Act of 2018 (CCPA) providing procedural equity to doctors.

III . MATERIALS AND METHODS

This is a cross-sectional, quantitative and qualitative study with a convenience sample formed in the years 2019 and 2020 with cases that ended after the year 2017. The database was reached with internet support in fifteen Brazilian courts (out of a total of 27) of the states: Acre, Alagoas, Amapá, Amazonas, Distrito Federal, Goiás, Mato Grosso, Mato Grosso do Sul, Paraná, Pernambuco, Rio Grande do Sul, Roraima, Santa Catarina, São Paulo and Sergipe and the specialties were stratified after the selection of processes.

The material used was the lawsuits completed between January 2017 and December 2019. These cases were accessed personally by the researcher. An archive was formed by state and after obtaining the judgments it was divided by specialty and the causes and consequences of the conviction or acquittal of the psychiatrist in the researched processes were emphasized.

The information obtained was analyzed using the Excel software, describing the specialties that appear as defendants in medical error cases and examining psychiatry with the clinical pictures and legal developments of the cases.

The sample consisted of six hundred and twelve cases and a diagnosis was created according to the judgments and understandings of the judiciary on how the state power understands the role of the psychiatrist who finds difficulty in conceptualization even in the most current medical literature. In the cases research banks and in a forensic environment, a mapping of the medical error was sought.

The inclusion criteria were: Lawsuits terminated in the national territory, Lawsuits in which doctors appear as the only defendant, Lawsuits in which doctors appear as a defendant in association with another defendant, Lawsuits of medical error in the civil scope and Lawsuits with last decision after January 2017.

[1] DSM, as a kind of psychiatry dictionary, it classifies the various mental disorders, offering parameters for the diagnosis of each one. Each update presents new categories of diseases, changing the guidelines consolidated by previous editions..

The exclusion criteria were: Lawsuits under secrecy, Lawsuits inaccessible due to inadequacy of the State Court, Proceedings that do not include doctors as the only defendant, Processes that do not include doctors as a defendant in association with another defendant and Physical processes.

Based on literature, a theoretical framework was formed with data obtained through primary and secondary sources, bibliographic survey via qualitative, explanatory and basic research and the project was approved by the Research Ethics Committee of the Faculdade de Medicina de São José do Rio Black on April 11, 2019 (CAAE 09932919.0.0000.5415 Opinion No. 3,258,903) and there is no need for a free and informed consent term due to the constitutional publicity of the processes.

II. RESULTS

THE SAMPLE BASED ON 612 PROCESSES AND THE SIMPLICITY OF THE TABLES DOES NOT HAVE THE POWER TO TAKE ITS IMPORTANCE AWAY. THE ANALYSIS WAS CHARACTERIZED AS FOLLOWS

TABLE 1. DISTRIBUTION AND FREQUENCY OF PROCESSES BY BRAZILIAN STATE

State	Number of cases	Percentual
Acre	**41**	**7,47%**
Alagoas	31	5,65%
Amapá	43	7,83%
Amazonas	43	7,83%
Distrito Federal	57	10,38%
Goiás	60	10,93%
Mato Grosso	22	4,01%
Mato Grosso do Sul	56	10,20%
Paraná	19	3,46%
Pernambuco	31	5,65%
Rio Grande do Sul	63	11,48%
Roraima	34	6,19%
Santa Catarina	21	3,83%
São Paulo	53	9,65%
Sergipe	38	6,92%
Total	612	100,00%

Despite the state of São Paulo being the largest in terms of population and with the highest rate of lawsuits per capita in the country, the sample shows that it does not occupy the first place in litigation.

The Brazilian states that do not appear in the graph above are those that are not in compliance with Law number 11.419 / 2006 – Lei Processo Informatizado (Brazil – Lei 11.419 / 2006, 2006) and the Resolution of the Conselho Nacional de Justiça (Nacional Conseil of Justice) number 185/2013 (Conselho Nacional de Justiça, 2013). Regulations that computerized the judicial process, but that some states, due to lack of structure and or budget, have not managed to adjust to the law until today.

TABLE 2. FORMATION OF DEFENDANTS IN THE ASSESSED CASES

Defendant (sued)	Quantity
Medic	**76**
Hospital	254
Medic and Hospital	254
Clinic	5
Medic and Clinic	23
Total	612

Brazilian law allows the plaintiff (patient or family in the event of death) to choose the defendant and may appear as the doctor alone, or together with the clinic, hospital and other members of the clinical staff and, therefore, equality between topics doctor and hospital and hospital only.

This assertion also demonstrates that it is a legal strategy for the patient's lawyer to include in the passive pole of the action two potential responsible for the possibility of complying with the sentence, if not by one, by the other.

Table 3. Characterization of processes by medical specialty

Specialt	Number of cases	Percentual
Gynecology and obstetrics	175	30,22%
Orthopedics	93	16,06%
General surgery	67	11,57%
Pediatrics	57	9,84%
Plastic surgery	56	9,67%
Ophthalmology	23	3,97%
General clinic	22	3,80%
Anesthesia	17	2,94%
Urology	13	2,25%
Cardiology	8	1,38%
Gastroenterology	7	1,21%
Nephrology	6	1,04%
Psychiatry	6	1,04%
Vascular surgery	5	0,86%
Dermatology	5	0,86%
Neurology	5	0,86%
Total	579	100,00%

The difference between the number of 612 cases analyzed and that of 579 in this table is due to the lack of declaration, in the cases analyzed, of the declared specialty of the processed doctor.

Table 4. Sample of Detailed Psychiatry.

Process number	State	Res judicata	Cause	Result
00184322620058080024	**ES**	**30/06/2015**	**Diagnostic error. Dandy Walker syndrome not identified by a psychiatrist.**	**Acquitted**
STJ - AREsp: 1206679 2017/0291159-5	SP	04/12/2017	Suicide in a psychiatric hospital - Death of a patient by mechanical asphyxiation (hanging - suicide).	Condemned
STJ - RESP 1.743.656	RJ	09/02/2019	mental and behavioral disorder - ICD X - F 32 (occupational accident)	Acquitted
STJ - RESP 1.000.009	MG	07/12/2016	Absolute disability due to loss of brain mass	Acquitted
101781895.2014.8.26.0053	SP	03/10/2018	Suicide in a psychiatric hospital - Death of a patient by mechanical asphyxiation (hanging - suicide)	Condemned
100103846.2014.8.26.0032	SP	08/07/2017	Compulsory hospitalization without the presence of a detailed medical report proving the need for medical intervention	Condemned

It appears in this study that in individual practice the Psychiatrist has procedural success and is acquitted, whereas, when a defendant jointly (as defendant) with a hospital, clinic or inpatient home, the solidarity of civil liability militates against the facultative reaching in this sample half of the convictions analyzed.

III. **DISCUSSION**

In perspective, the article presents the behavior of most Brazilian courts and diagnoses, both by specialty and by defendant, the way in which the processes of medical error works.

This study bases its analysis on civil lawsuits, but it is important to bring up the possible responsibilities of the doctor.

Table 5. Types of responsibility and legal reflexes

Nature of responsibility	Civil liability	Administrative liability	Criminal liability	Disciplinary liability
Doctors (type)	All the doctor	Doctor and hospitals	All the doctors	All the doctors
Legal basis	Contract between doctor-patient and hospital-patient	Patient as a public service user	Crimes: Homicide, personal injury, omission of help and prescription of unnecessary drugs	Violation of the Medical Code of Ethics
Demand object	Loss and damage compensation	Disciplinary punishment / damage compensation	Criminal sanctions / loss and damage compensation	Confidential warning, confidential censorship, public censorship, suspension for 30 days and forfeiture
Prescription	5 years after knowledge of the fact and authorship (Art. 27 CDC[2])	1 year (Decree 20.910/32)	3 to 20 years (art. 109 CP[3])	5 years after knowledge of the fact (Art. 1º of Law 6.838/80)
Type of procedure	Damage repair action	Application to the hospital director	Criminal action	Complaint to initiate an investigation
Jurisdiction of 1st Instance	Civil court	Hospital management or sector	Criminal court	Conselho Regional de Medicina (Regional Council of Medicine)
Jurisdiction of appeal	Tribunal de Justiça (Appeal court)	Secretaria da Saúde (Secretary of Health)	Tribunal de Justiça (Appeal court)	Conselho Federal de Medicina (Federal Council of Medicine)

The phenomenon of the growth of medical malpractice cases also originates in developed societies, such as the case of South Korea, which since 1980, due to the growing awareness of patients in relation to their rights and easier access to information on health and disease-related issues. Typically, a lawsuit begins with a patient's claim regarding failed medical conduct. The patient alleges lack of attention and care regarding the doctor's obligations, which may have resulted in worsening symptoms or death, as a result of negligent behavior [16].

The same occurs in the United States, where medical error is the third leading cause of death attested by the Centers for Disease Control and Prevention (CDC) published by BMJ USA - Primary Care Medicine for the American Physician [17]. However, the same research reveals that there is a bias in accounting, since death certificates require an International Disease Code (ICD) and these causes are not associated with an ICD.

Materializing, in a study that examined the relationship between medical team work and adverse safety events in pre-hospital emergency care for children using high-fidelity simulation, at least one error was found in 82% of the simulations [18].

Distinguishing the physician's guilt is an arduous task and by way of example Campo et al. [19] found that a patient in an intensive care unit receives an average of 178 interventions per day and the risk of error or adverse event increases by 6% each day of hospitalization. If a medical error occurs, who is directly responsible? What is the probative difficulty?

In psychiatry, the findings of medical error are linked to hospitalization in recovery and treatment homes, inpatient clinics and psychiatric hospitals and this measure can be measured by publications that are almost always guided by a “clinical case” [20] and rarely in diagnosis [21].

And in this specialty, the discussion about diagnosis is sharpened when two currents arise to debate the concept. For the first, the diagnosis is devoid of any given value, that each and every person has a unique reality that is not subject to classification; in this perspective, the diagnosis would only lend itself to the labeling of different people, in order to allow medical power and social control over the maladaptive or questioning individual [22]. The second current defends the psychiatric diagnosis, which would

[2] Código de Defesa do Consumidor (Consumer protection code)
[3] Código Penal (Penal Code)

assume similarity with the diagnoses of the other medical specialties; in this sense, the diagnosis constitutes the main and most important element of psychiatric practice [23].

For the Law, Adverse Events (AEs) are defined as unwanted complications resulting from the care provided to patients, not attributed to the natural evolution of the underlying disease [1].

At the same time that there is an effort to horizontalize the doctor-patient relationship, even faced by the German Constitutional Court bringing the terminologies "Waffengleichheit in Prozess" and "Rechsanwendungsgleichheit" which respectively mean "Equality of Arms" and "Equality in the Application of Law" [24], it is seen, on the other hand, that paternalism is exalted, creating a pendular movement annulling the patient's individualities, giving the person, as a patient, the character of an object without power, knowledge and will. Thus, from the fluctuation promoted between relationship symmetry, promoted by autonomy, and complete asymmetry, guaranteed by medical paternalism, there is an increase in procedural risk [25,26,27].

The medical professional has been replacing the paternalistic conduct with an attitude of appreciation and respect for the patient's autonomy. For this, the duty to inform must be fulfilled, allowing the patient to exercise his / her decision-making ability freely and consciously [28].

A. General Data Protection Law

This norm carries with it the possibility of protecting the doctor in dispute and this hypothesis is ventured in the scientific or legal plan for the first time.

Still, perfectibilizing the concept of sensitive personal data, it is known that data is related to characteristics of the individual's personality and personal choices, such as racial or ethnic origin, religious belief, political opinion, union membership or religious organization, philosophical or political, data related to your health or sexual life, genetic or biometric data, when linked to a natural person [29].

The Law in question (Brazilian Federal Law number 13.709/2018 – "Lei Geral de Proteção de Dados") allows the physician the possibility of using this data. This also occurs in its European analogues:

Table 6. Data protection laws and health applicability.

LGPD – Brazil	GDPR – Europe	CCPA - USA
Art. 11. The processing of sensitive personal data may only occur in the following cases: **f) health supervision, exclusively, in a procedure performed by health professionals, health services or health authority;**	Personal data concerning health should include all data pertaining to the health status of a data subject which reveal information relating to the past, current or future physical or mental health status of the data subject. 2This includes information about the natural person collected in the course of the registration for, or the provision of, health care services as referred to in Directive 2011/24/EU of the European Parliament and of the Council[1] to that natural person; a number, symbol or particular assigned to a natural person to uniquely identify the natural person for health purposes; information derived from the testing or examination of a body part or bodily substance, including from genetic data and biological samples; and any information on, for example, a disease, disability, disease risk, medical history, clinical treatment or the physiological or biomedical state of the data subject independent of its source, for example from a physician or other health professional, a hospital, a medical device or an in vitro diagnostic test.	California Consumer Privacy Act of 2018 [1798.100 - 1798.199] (A) Medical information governed by the Confidentiality of Medical Information Act (Part 2.6 (commencing with Section 56) of Division 1) or protected health information that is collected by a covered entity or business associate governed by the privacy, security, and breach notification rules issued by the United States Department of Health and Human Services, Parts 160 and 164 of Title 45 of the Code of Federal Regulations, established pursuant to the Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191) and the Health Information Technology for Economic and Clinical Health Act (Public Law 111-5).

It means that the treatment of data understood as the use of personal data materialized by the recommended use by law (act or effect of the data use), gives the doctor the possibility not yet reached by Brazilian legislation and compared to match, according to understanding of the German Court above, to the patient in due process.

In law, knowledge from legal systems in other countries, that is, the world and its differences and similarities, can be conceptualized as comparative law. The origin of this Brazilian law is based on the General European Personal Data Protection Regulation (GDPR) approved on April 27, 2016 [30] and the California Consumer Privacy Act of 2018 (CCPA), at the state level approved on June 28, 2018 [31, 32].

Brazilian law has direct Portuguese influence, which in turn includes Iberian, Celtic, Greek, Phoenician, Roman, German and Arab cultures. The first Brazilian constitution, still imperial in 1824, brings in addition to the Lusitanian origin, French, German and North American inspiration [33]. This legal tangle brings legal uncertainty and an edifying criticism within the scope of medical law.

The doctor, when dealing directly with the patient, needs to use new means of protection and the LGPD underlies a new legal framework that militates in favor of this issue.

A priori, health entities and other institutions should, in Brazil in 2021, be able to comply with the new regulation proposed by the LGPD. With a high bureaucratic level and heavy fines that can reach fifty million reais [34], it is possible to see yet another task derived from the State for Society. GDPR, the same type of law but with European validity, has already raised US$ 126 million from public coffers.

But taking advantage of the good part of the ordering and mainly of its mandatory establishment, the possibility of:

a) a) Have the Free and Informed Consent Term or Consent at each consultation, whether by means of video recording, documentary or both;
b) b) Record medical conduct for use both in research and to protect against possible medical error;

With these two variables fulfilled, the doctor's risk in the procedural scope will significantly decrease while it will reduce the difficulty of proving his conduct and in case of divergence by the patient from medical practice, the patient's exclusive guilt becomes clear.

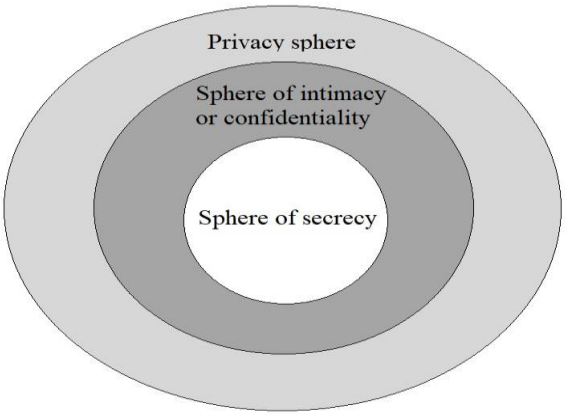
B. Concentric Circle Theory - Private Life and Psychiatry

Within a constitutional orbit, morality gained prominence in the legal sphere and a significant fraction of the cases brought to the judiciary seek compensation for moral damages. Moral damage is what strikes the victim as a person, without damaging his [...] assets and which causes the injured person pain, suffering, sadness, shame and humiliation. Pains and misfortunes unfold from moral damage and the aforementioned author explains that these are contingent and variable states of mind in each case, as each person feels in their own way [35].

Epistemologically and with a focus on creating a greater understanding of human intimacy, it is necessary to use the Theory of Concentric Circles to divide intimate life into layers and the way in which psychiatry works within that division.

The theory of concentric circles of the private sphere or theory of the spheres of personality, of German origin, from 1953 with Heinrich Hubmann [36] gains prominence. There was a division of the human being's private life into 3 circles, according to their density, the outer sphere being privacy, the middle one would allocate the secret and the innermost sphere would be the plane of intimacy. This current was brought to Brazil by Elimar Szaniawski [37,38] and disseminated by Paulo José da Costa Junior [39] who also brought the following illustration:

Figure 1: Division of the human being's private life



Source: Costa Jr, 1995

1. Privacy is the circle of private life in the strict sense (Privatsphäre), in which the shallowest interpersonal relationships rest, in which there is not a wide degree of knowledge of the others' life, bordering on collegiality. Public access is restricted, but its degree of adherence is the lowest among the 3 spheres, and the public interest is a plausible reason for its violation. It is in this circle that lies, for example, the confidentiality of telephone data (access to the list of calls made and received), which can be broken by the Judiciary or by parliamentary committee of inquiry. In this sphere there are also episodes of public nature that involve the individual, which are extended to an indeterminate circle of people and therefore not protected against disclosure.
2. Intimacy is the middle circle (Vertrauensphäre), which contains more restricted information about the human being, shared with a small number of people from their family environment, close friends and professionals who are aware of the information due to their profession (the example of psychologists, priests and lawyers). It is in this circle that home, professional and telephone communications secrecy are protected, which are more severely restricted to their opening, such as the latter whose breach can only be decreed by a reasoned judicial decision.
3. The secrecy (Geheimsphäre) is the most hidden circle of the spheres of privacy lato sensu, in which the most intimate information of the Self is kept, which is often not shared with other individuals and over which the public interest cannot to meddle, like the sexual, philosophical and religious option [37].

Psychiatry started with a primitive man trying to relieve the suffering of another, often there were associations about mental patients about being "messengers" or having malevolent spirits [40]. Contemporary and subsidized by the last decades, important changes in the area of theoretical knowledge in neurosciences and the technical instruments of medicine in general and psychiatry in particular, in addition to those belonging to other knowledge areas, have facilitated the transformations in the field of health policies, favoring the reorganization of assistance to the mentally ill. In this sense, through interventions of a different nature, it has been possible to keep people seriously ill for longer in their social environment, extend periods free of symptoms and obtain greater success with procedures aimed at rehabilitation [41].

Psychiatry is the specialty that acts most intimately in relation to the patient, permeating all layers of concentric circles. For the proper diagnosis, it is necessary that the physician specialized in mental health access the patient's privacy, understood as a very personal right and that refers to many areas of the human intimate, encompassing not only disorders, but also self-determination, secrets, honor, intimacy, sexual habits, conjugal, social life and even spurious orders such as criminal practices.

On some occasions, privacy is supplanted by the public interest, such as in the case of telephone interception in criminal investigations (Brazilian Federal Law number 9.296/1996) (Brazil – Lei de Interceptação de Comunicação Telefônica, 1996) [42] and, in particular, by the Judiciary when you need to prove something.

It is in this context of "proving something" that the Brazilian Medical Code of Ethics [43] also eases medical confidentiality and does so as a fundamental principle when it advocates:

XI - The doctor will keep confidentiality about the information he is aware of in the performance of his duties, except in cases provided for by law.

Because, when prosecuted, the doctor will be able to use all the legal evidence admitted to defend himself and such a precept finds shelter both in the LGPD and in the Código de Processo Civil (Civil Code of Procedure), especially in articles 396 to 404 – the display of document or thing and 405 to 441 – about documentary evidence [44] and the Carta Republicana [45] in its fifth article:

LV - Litigants, in judicial or administrative proceedings, and defendants in general are guaranteed the audi alteram partem and full defense principles, with the means and appeals inherent to it;

The private life protected by the legal system can be relativized in favor of the psychiatrist if it is necessary for his defense, fulfilling the due legal process and the constitutional principles of the full defense and the adversary audi alteram partem principle.

C. Criticism of medical error processing and judgment format

All indemnity actions that are being processed in Brazil follow a rite governed by the Brazilian Civil Procedure Code [46] and this march has a serious defect of origin.

Except for specialties that have documented exhaustive proof, such as the case of radiology and laboratory tests as a whole, medical error processes, almost in their entirety, require an expertise to be judged; it happens that, very rarely, the expert is of the same specialty at issue in the litigation and it may, depending on the specificity of the subject in question, harm this production of evidence by burdening the defense of the doctor in opposition to the principle of due legal process [47].

It is typical of day-to-day forensics that specialties that do not have the slightest link to the case offer expertise, such as clinicians exercising expertise in procedures for surgery, ophthalmology, among others and the reciprocal is also true. Such jurisdictional defect does not, for the time being, be expected to end.

Several studies advocate the importance of creating specialized courts [48,49,50,51,52] and Cavalcanti [53] highlighted the recommendations that influence the creation of specialized courts in health and technical support centers for the Judiciary, however, this study only addresses the issue of access to health and not the protection of the doctor in dispute.

What is criticized in an edifying way is the fragility raised to the doctor on the procedural level, given that, in addition to the inversion of the burden of proof [54] still militates to the disadvantage of the physician the absence of full expert knowledge in judging the case and, in unfolding, the judge randomly judges against the expert report.

The purpose of this study is a judgment chamber formed by medical specialists, members of the judiciary and members of civil society with remarkable knowledge about the matters that are quarreling in the process in order to provide the judge with greater technical scope and with the expertise to exercise the full defense principle of the doctor. Only in this sense would we be looking for "Waffengleichheit in Prozess" and "Rechsanwendungsgleichheit" - "Equality of Arms" and "Equality in the Application of Law" [24].

It is also known that the Brazilian judiciary is composed of the first and second instance, the special instance exercised by the Superior Court of Justice (STJ – Superior Tribunal de Justiça) and the final, extraordinary instance, with the Supreme Federal Court (STF – Supremo Tribunal Federal) having jurisdiction over the assessment and judgment of constitutional matters.

When there is no death, the process for medical error most of the time ends in the STJ and if there is, in the expert plan, an error, even if gross and in the scope of the second instance has not been successful in the demonstration or as a result, too, of misapplication of the law, the STJ does not authorize the revision of evidence in understanding, nonetheless, summarized:

STJ - summarized understanding nº 7 - PRETENSION OF SIMPLE REVIEW OF EVIDENCE DOES NOT ALLOW SPECIAL APPEAL TO THIS COURT

This summarized understanding can be seen as a form of interpretation embodied in an entry that pacifies and shows the majority understanding of a court on a given topic. The function is to guide similar cases in order to standardize the jurisprudence and give more legal security to society.

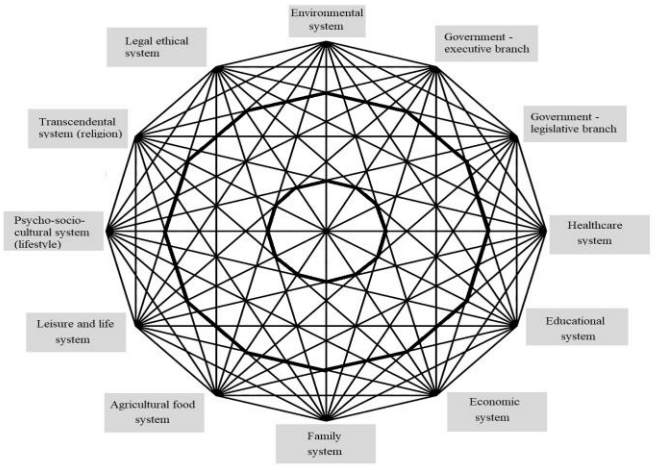
Special Appeal is the means of reaching the STJ, it is the means used in the legal field to have the right to review an unfair or mistaken decision, and such handling is not available for reexamination of evidence, even if it was produced riddled with imprecision or failure.

Since medical error is a major reason for the work of the judiciary, as well as specialized family courts, probate, special courts, bankruptcy, business and organized crimes, there is no longer a possibility for medical law cases to be judged exactly like other cases of consumption relationship in lato sensu.

D. Protection protocol of the doctor (Psychiatrist or clinician)

It is important to proclaim that, in an award-winning publication [55] represented, according to the Lalonde scheme, responsible for promoting health in four main areas: human biology, environment, lifestyle and organization and attention to health [56], a chain of possibilities and its influences on the process due to medical error, even if there is no actual erro

Figure 2: Chain of influences that may give rise to a medical error



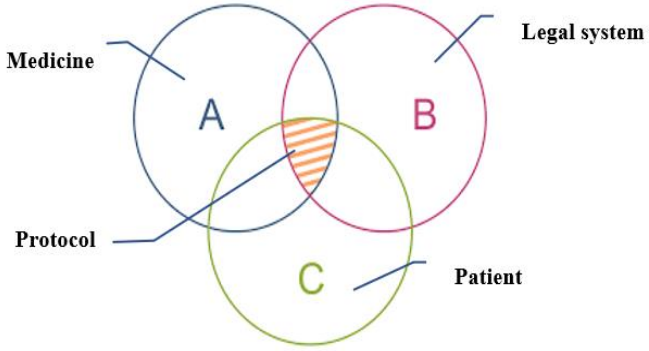
Complex chain representation of the health sector and its influences / dependencies (adapted from http://psy.med.br/textos/complexidade/complexidade.pdf). Scheme by Lalonde M. [A new perspective on the health of Canadians](). Ottawa: Government of Canada, 1974.

Faced with an inseparable whole, with a significant range of variables, with a multi-referenced framework, treating medical practice under the aegis of the Consumer Protection Code [57], as does Brazilian jurisprudence, raising the physician the burden of proving their conduct, which the doctor must invest in the doctor-patient relationship and protect himself with the protocol that is now being proposed.

With the growing importance of Evidence-Based Medicine (MBE), it is important to set standards for the development process and report of clinical guidelines/protocols [58], as well as the clinical protocol whose basic premise is to guide health

professionals as for clinical interventions, based on the MBE, in technological assessment, aiming at guaranteeing the quality of care [59], the protection and medical care protocol must follow a methodology that rests in an area of intersection between legislation and medicine.

Figure 3: Science intersection zone and protocol performance



There is great variability in clinical conduct in health services, mostly without relevant scientific evidence to explain them [60], but with the protection protocol the doctor will be more protected.

Protection topic	Protection	Legal support
Introduction to treatment	Are you undergoing mental health treatment and are you aware of the problems you currently face, which you have just reported?	CDC Art. 6º item III CF Art. 5º item XIV CEM XXI PF CEM II DM CEM Art. 34
Accurate and clear information	During the consultation I will not use technical terms, but if it goes unnoticed, I ask you to kindly ask; the most important thing here is that you leave this consultation without a doubt.	CDC Art. 6º item III CF Art. 5º item XIV CEM XXI PF CEM II DM CEM Art. 34
Origin of the condition (anamnesis) with ICD	You are a patient affected by ... ICD ... and reported ... that you have been harming your life needing medication treatment and follow-up for ... period.	CDC Art. 6º item III CF Art. 5º item XIV CEM XXI PF CEM II DM CEM Art. 34
Purpose of treatment	Treatment is a means that seeks to reduce or eliminate symptoms, issues and signs of one or more pathologies, always with the purpose of healing within the possibilities of each clinical condition.	CDC Art. 6º item III CF Art. 5º item XIV CEM XXI PF CEM II DM CEM Art. 34
Drug function	In addition to preventing new episodes, the prescribed medication will cause ... and also reduce symptoms ...	CDC Art. 6º item III CF Art. 5º item XIV CEM XXI PF CEM II DM CEM Art. 34
Possible adverse reactions and or side effects	Adverse reaction is any unintended harmful or undesirable effect that appears after the administration of a drug in doses normally used in humans for the prophylaxis, diagnosis and treatment of an illness [61,62,63,64], in your case in particular, in addition to the recommended in bull, I can tell you ...	CDC Art. 6º item III CF Art. 5º item XIV CEM XXI PF CEM II DM CEM Art. 34

Patient responsibility in therapy	Your responsibility in the treatment is to take medication according to the prescription and not to practice acts contrary to the treatment, being they ...	CDC Art. 6º item III CF Art. 5º item XIV CEM XXI PF CEM II DM CEM Art. 34
Agreement / acquiescence	After so much information, do you have any questions? Do you agree with the proposed treatment and all its implications?	CDC Art. 6º item III CF Art. 5º item XIV CEM XXI PF CEM II DM CEM Art. 34

The doctor will be able to use two ways on the above proposed:

1. Report, in writing, forming terms of consent and free and informed consent and with the patient's written acquiescence; or
2. Record the service by video, especially a synthesis that, referenced by the protocol topics, would create a robust file of medical records and protection

Such a measure would provide him, in court, a condition of procedural equality in the face of demands that reach the judiciary on an industrial scale today and, thus, would weaken the inversion of the burden of proof in his disadvantage.

CONCLUSIONS

It is concluded that, through literature review and jurisprudential ementary, there was a robust increase in the number of cases for medical error, even though in the special instance - Superior Tribunal de Justiça, the majority are unfounded, which proves a dissonance between the error of fact and the error imagined by the patient. Such growth was attested not only in Brazil but also in developed societies such as the United States and South Korea.

At least four types of proceedings are incumbent upon the physician in which he may appear as a defendant: Administrative proceeding - of an internal corporis order before the employer or office; Ethical Process - existing with the State and/or Federal Medicine Councils; Crime Process - executed by the Criminal Justice and Civil Process - of indemnity order, real emphasis of this study, but not dependent on it. Each process type carries different reflexes and punishments.

This study, of a multi, inter and transdisciplinary nature, sought critically to demonstrate inequities that go back to the disadvantage of the physician in the procedural evidential tract and, based on the General Data Protection Law (LGPD), a method of protecting the physician in the face of the growing lawsuit for medical error.

The psychiatrist's peculiarity is raised in his medical practice and in the doctor-patient relationship, supported by the theory of concentric circles, permeated the three spheres of medical practice with the possible relativization of the demonstration of secrets in favor of the protection of the doctor.

Via quanti-qualitative prospecting, medical error processes were measured in fifteen Brazilian states, the focus of the work being the minutiae that involve Psychiatry, since half of the sample (3) were condemned whenever connected to hospitals, clinics or nursing homes of patients due to joint and several liability with other workers (nurses, circulating, etc.).

Finally, a protocol was conceived that acts in the intersection area between legislation, medical autonomy and patient aspirations, whose central purpose is to protect the doctor, bringing, in the mold of the cultured German Court, equality of arms and procedural equality in the face of the burden of proof that, legally, it is attributed to the doctor both by the Código de Defesa do Consumidor (Consumer Protection Code), and by the Código de Processo Civil (Civil Procedure Code) and by the domestic jurisprudence.

Finally, it was proposed to set up a specialized court to judge cases that depend on painstaking knowledge, such as medical litigation and the narrowing of the real truth and the formal truth, this being produced in a judicial contradiction through evidence carried to the records and the one that in fact it is the truth.

This study innovates and creates a starting point for new research that will help the doctor to become uniform in the litigation and preventive judicial plan in face of the judiciary activity.

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