

Medical error in the courts: an analysis of the decisions of the Court of Justice of the Brazilian Federal District

O erro médico nos tribunais: uma análise das decisões do Tribunal de Justiça da capital brasileira

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Abstract

This study aimed to analyze medical errors and the response of the Court of Justice of the Federal District and Territories (TJDFT) from 2002 to 2019. This is a documentary, qualitative, and retrospective study performed using procedural documents of the lawsuits subjected to the TJDFT. The following variables were considered: medical specialty, type of damage caused, public or private health professional, type of the plaintiff's claim, court decision, amount of compensation, and others. Data were obtained from the TJDFT website—which provides full case files—and analyzed by descriptive statistics. The number of lawsuits involving medical error increases in the studied court and judges tend to sentence higher compensations to public professionals. The final court decision of most cases analyzed was unfavorable to the plaintiff and even those that were successful showed a reduction of about 30% in the amount of compensation requested. Claims for moral and material damages were the most common. The number of lawsuits involving medical error judged over the last 17 years by the TJDFT increased exponentially and became a new way to judicialize health.

Keywords: Medical Error; Right to Health; Judicialization of Health.

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Resumo

Neste artigo buscou-se a ocorrência de erros médicos e sua resposta pelo Poder Judiciário, no âmbito do Tribunal de Justiça do Distrito Federal e dos Territórios (TJDFT), situado na capital da República brasileira, entre os anos de 2002 e 2019. Trata-se de pesquisa documental, retrospectiva com análise qualitativa das peças processuais dos processos judiciais tramitados nas varas cíveis do TJDFT e estatística descritiva. Foram levantadas as variáveis: especialidade médica da ocorrência, tipo de dano causado, vínculo do médico, se público ou privado, tipo de pedido do autor(a), decisão judicial e valor da indenização, dentre outros. O número de ações sobre erro médico está em crescimento no tribunal estudado e há uma tendência dos juízes em condenar com valores mais altos os médicos de instituições públicas. Mais da metade dos processos analisados tiveram a decisão judicial final desfavorável ao autor da demanda e mesmo os procedentes tiveram redução de aproximadamente 30% no valor da indenização pedida. Os pedidos de indenização por dano moral e dano material são de maior frequência. Os processos julgados ao longo dos últimos 17 anos pelo TJDFT em matéria de erro médico tiveram crescimento exponencial, caracterizando-se como uma nova forma de judicializar a saúde.

Palavras-chave: Erro Médico; Direito à Saúde; Judicialização da Saúde.

Introduction

In medicine—as well as in other health areas—an error occur when an act performed by wrong and unintentional action or omission cause consequences that range from physical, moral, and aesthetic damage to death. Thus, in legal language, the term “medical error” defines an error made by any health professional category.

Although all human actions have potential possibility of error, adverse events (WHO, 2021) that occurred during health care delivery can lead to disciplinary measures in medical councils, as well as to lawsuits for damage to the patient.

The management of these errors and the potential damages resulting from them are part of the idea of promoting patient safety inherent in the quality of health care provided, and this is a worldwide challenge that health organizations have to face. For health law, this is related to the protection of fundamental rights, such as the right to health, life, and the physical integrity of the patient.

The civil liability of health professionals derives from guilt in the broad sense, including intent—the deliberate will of causing damage—and guilt in the strict sense, which are both provided for in criminal law. Thus, in case of damage, the causal link must be assessed. Establishing that the damage was actually caused by the action or omission of the health professional and their fault is essential. The essence of guilt lies in predictability: if an unfavorable result was predictable and was not avoided, guilt exists (Udelmann, 2002).

In case of damage and proven guilt, the compensation is certain, according to Article 186 of the Brazilian Civil Code: “The individual who, by voluntary action or omission, negligence or recklessness, violates law and harm others, even if only moral, commits an unlawful act.” (Brazil, 2002).

Guilt in the strict sense has three aspects: malpractice, recklessness, and negligence. Recklessness is a behavior of precipitation and lack of care. Negligence is the omissive act of a health professional disregarding established professional rules. Malpractice is unpreparedness (performing acts without the necessary technical and scientific knowledge).

The issue of civil liability of health professionals and the duty to compensate patients for the damages caused is very sensitive. Items V and X of Article 5 of the Constitution of Brazil (Brazil, 1988) state that, even if the professional is acquitted in the criminal sphere, he is not exempt from compensating the patient for moral, material, and aesthetic damages.

In Brazil, the search for clinical interventions increases dramatically and the causes range from necessary interventions to aesthetic improvements. At the same time, the number of medical errors also increase (Braga; Ertler, 2010; Garbim, 2017; Braga et al., 2019; Gomes, 2017; Fujita, 2009; Rodrigues; Nunes, 2018). According to Schulze (2019), in 2018, the number of lawsuits involving medical error in Brazil was 107,612. Studies on medical error in courts are quite scarce and the literature presents a small number of cases.

Therefore, in order to know the legal framework of these lawsuits that led to civil condemnation in the Court of Justice of the Federal District and Territories (TJDFT), Brasília, Brazil, studies on lawsuits involving medical errors can support decisions and actions of managers, workers, and educators when promoting care to develop a culture of patient safety.

Methodology

This study, in the context of health law, used methods of analysis of judicial decisions on medical errors of the Court of Justice of the Federal District and Territories (TJDFT), with descriptive statistics, under the empirical legal studies, which were significantly different from those of traditional legal research.

McConville and Hong Chui, in *Research Methods for Law* (2017), state that qualitative research in law is complementary to the traditional doctrinal research and that the central element of empirical research is the reference to facts, which can be historical, contemporary, interview-based, legislation-based, taken from public archives,

and, of course, from court decisions. Therefore, this methodology is hybrid, applies to health law, and uses qualitative methods characteristic of public health along with dogmatic information of pure law.

This was an exploratory, analytical, descriptive, and qualitative study based on lawsuits judged in the second instance by the TJDFT. Only the year of decision of lawsuits in the second and final instance was considered, and not their starting date¹.

Procedural information were collected on the TJDFT website². Lawsuits already judge and embodied in civil judgments of the TJDFT were considered. The judgment, despite of being a decision in the second instance, is rich in detail about the case, since it presents a complete history of the *iter criminis* of the lawsuit, from its inaugural piece to the first- and second-degree sentence. This is the reason why this study opted for data from the second instance.

Research with judgments is a form of documentary research. Official written documents from the Judiciary are their main data source. Studies with judgments can be classified as case studies or cross-case studies, according to the Gerring's typology mentioned by Coacci (2013).

In the search form of the website, medical error, medical malpractice, and medical damage were the keywords searched. Lawsuits judged in the second instance from 2002 to 2019 were considered.

From the search results, the main information of each lawsuit were collected: medical specialty, type of damage caused, type of the plaintiff's claim, public or private health professional, court decision, amount of compensation (requested vs. paid), and others.

All data were tabulated in spreadsheets and analyzed using descriptive statistical techniques.

This study was not subjected to the Research Ethics Committee, since it was based on a public database, but the names and any form of identification of the plaintiffs and defendants were preserved. Thus, this study is in accordance with the ethical guidelines and principles in Resolution No. 510/2016, which was issued by the National Health Council (CNS).

1 The term "second and final instance" is used because, after the judgment of the TJDFT, lawsuits are taken to higher courts.

2 Available at: <https://www.tjdft.jus.br/>.

Results and discussion

We found 693 lawsuits referring to the keywords on the TJDFT website and selected 557 involving medical error that were judged from 2002 to 2019. We excluded non-civil lawsuits and those in secrecy of justice.

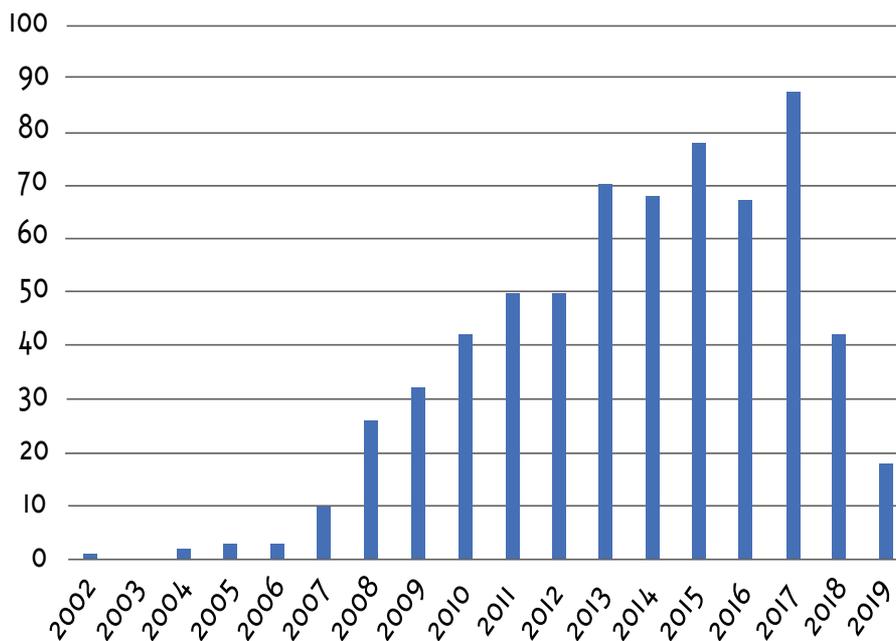
Graph 1 shows that since 2008, the number of lawsuits increased exponentially. The installation and consolidation of the Public Defender's Office of the Federal District in Brasília and all peripheral cities that are part of the administrative regions of the Federal District were one of the main reasons for that.

In total, 68.97% of patients who were poor and unable to hire a lawyer were represented

by this professional in the judgment against the professional or hospital or both in joinder³. On the other hand, 31.03% were represented by the Public Defender's Office. We found no other representation of patients during research.

Associating the economic capacity of a person with hiring a lawyer is common. These professionals, however, usually represent even those who can not afford their fees, trusting that, if they win the lawsuit, they will fully receive the amount sentenced by the judge from the losing party, which will pay all the expenses of those who "won" the lawsuit. Thus, the losing party pay the lawyers at the end of the lawsuit and their clients, who won it, have no expenses.

Graph 1. Representation of lawsuits involving medical error per year in the Court of Justice of the Federal District



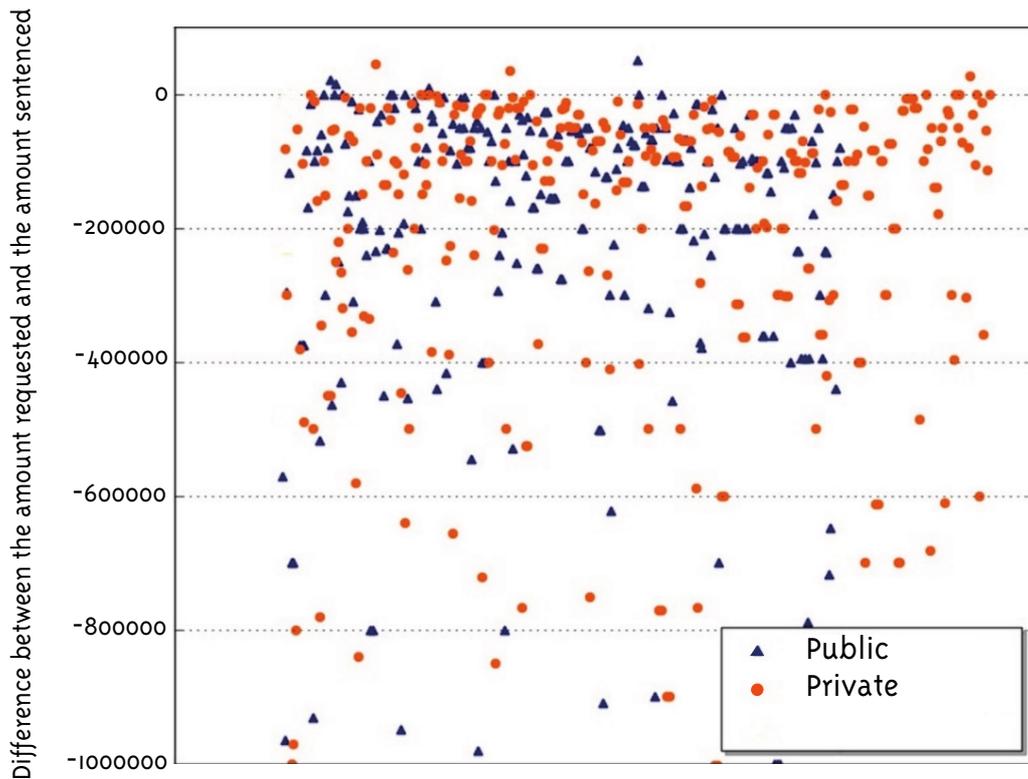
Source: data collected from the Court of Justice of the Federal District.

Regarding the legal personality of health entities, 56.1% of lawsuits involved private health entities and 43.9% involved public health entities. However, when comparing the amounts of compensation

requested by plaintiffs and sentenced by the judge, separately, the highest amounts concern public health entities, although, in total amounts, private health entities paid higher amounts.

³ In procedural law, joinder is an expression used when a single lawsuit is characterized by a plurality of parties; for example: at the same time, the physician, the nurse, the hospital, and the health department are defendants.

Graph 2. Difference between the amount requested and the amount sentenced by the judge for public and private health entities in the Court of Justice of the Federal District



Source: lawsuits involving medical error judged in the Court of Justice of the Federal District from 2002 to 2019.

Most compensations above R\$ 800,000 concern public health entities. On the other hand, most compensations below R\$ 200,000 concern private health entities.

Most lawsuits involved obstetrics and gynecology professionals, followed by general surgery professionals, although almost all medical specialties were represented in the lawsuits studied.

Studies performed with data from the Court of Justice of Pará showed similar results: 83.33% of lawsuits involved clinical cases and 16.77% involved surgeries, and the most recurrent medical specialty was obstetrics and gynecology, followed by clinical emergency, general surgery, anesthesiology, plastic surgery, ophthalmology, orthopedics, and radiology, in that order (Braga et al., 2019).

Fujita and Santos (2009) studied complaints against physicians, along with the Regional Medical

Council of the State of Goiás, and showed that 64% of complaints were against obstetrics and gynecology professionals, followed by plastic surgery and orthopedics professionals.

Rodrigues and Nunes (2018), in a study at the national level, analyzed decisions of higher courts on compensations from lawsuits against obstetrics professionals, which shows that in all Brazilian states, the medical specialty most involved in lawsuits is obstetrics and gynecology. Thus, obstetrics is the medical specialty with the highest number of lawsuits due to the large number of complications in the prenatal period and in emergencies in childbirth.

In 2021, the World Health Organization (WHO), with regard to health commitments, chose the theme “safe maternal and newborn care” to celebrate the World Patient Safety Day, warning of the need to

reduce deaths from preventable causes related to pregnancy and childbirth, especially by providing safe and quality care (WHO, 2021).

In Brazil, more than 38,000 maternal deaths occurred from 1996 to 2018 and hypertension, hemorrhage, and puerperal infection were the main direct obstetric causes (Brasil, 2020).

Regarding the type of damage caused, most lawsuits concerned death, material damage, aesthetic damage, moral damage, and the combination between them. Lawsuits concerning moral damage were the most recurrent and those with higher amounts of compensation.

Table 1. Medical specialties sued in the Court of Justice of the Federal District for error and type of the plaintiff's claim

Medical specialty	Number of lawsuits	%
Angiology	2	0.3591
Cardiology	2	0.3591
General surgery	103	18.4919
Plastic surgery	37	6.6427
General practice	43	7.7199
Dermatology	4	0.7181
Endocrinology	3	0.5386
Gastroenterology	15	2.6930
Obstetrics and gynecology	171	30.7002
Hematology	2	0.3591
Infectious diseases	1	0.1795
Nephrology	2	0.3591
Neurology	7	1.2567
Dentistry	14	2.5135
Ophthalmology	24	4.3088
Orthopedics	89	15.9785
Pediatrics	16	2.8725

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Table 1 – Continuation

Medical specialty	Number of lawsuits	%
Urology	10	1.7953
Laboratory	2	0.3591
Other	10	1.7953
Total	557	100

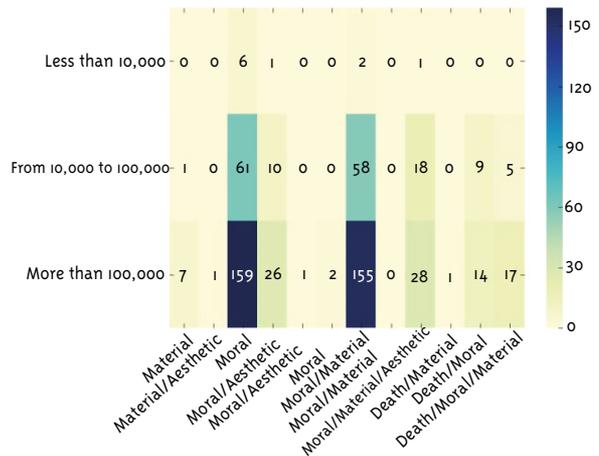
*We included both clinical care and gastrointestinal surgery in gastroenterology.

**We included both clinical care and orthopedic surgery in orthopedics.

***We included both clinical care and obstetric surgery in obstetrics and gynecology.

Source: lawsuits involving medical error judged in the Court of Justice of the Federal District from 2002 to 2019.

Graph 3. Type of damage and amount of compensation in lawsuits judge in the Court of Justice of the Federal District from 2002 to 2019

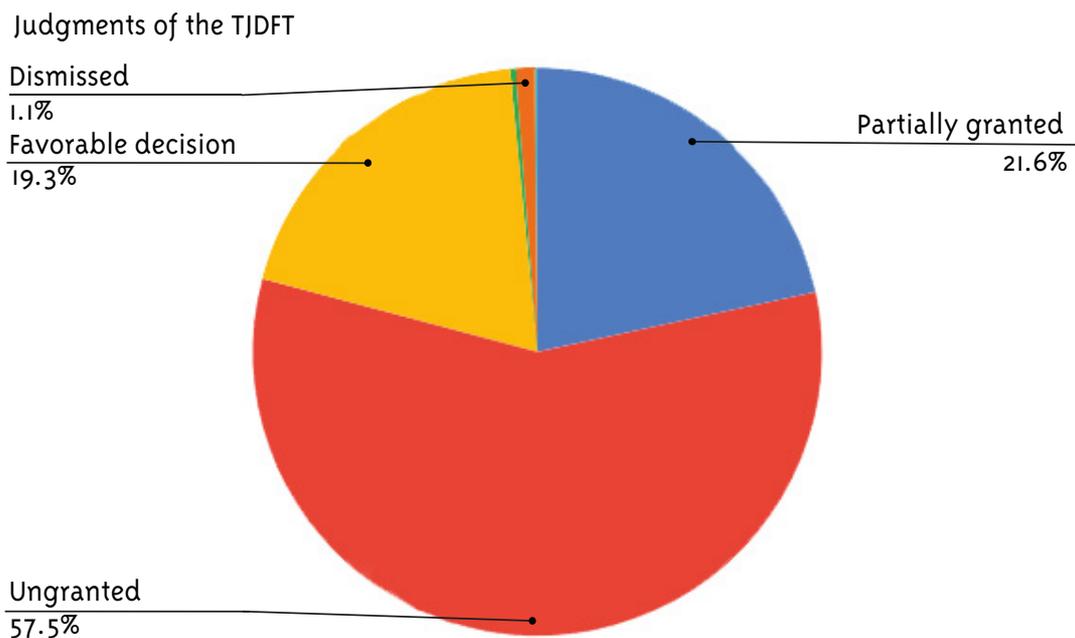


Source: lawsuits involving medical error judged in the Court of Justice of the Federal District from 2002 to 2019.

Lawsuits with the highest amounts of compensation involved moral damage alone or combined with material damage. In case of death, claims combine moral damage and material damage, but, statistically, they are rare. Some plaintiff's claims in this study also combined aesthetic damage and moral damage.

The court decision of more than half of the lawsuits analyzed was that the claim was unfounded. Moreover, the amounts of compensation reduced by an average of 30% or lower than the amount requested by the plaintiff.

Graph 4. Decision of judgments involving medical error in the Court of Justice of the Federal District from 2002 to 2019



Source: lawsuits involving medical error judged in the Court of Justice of the Federal District from 2002 to 2019.

When the judge agreed that a damage occurred but considered the amount of compensation too high, the claim was partially founded. Only 19% of claims were completely founded. Complaints can be dismissed without judgment when they cease to be a judicial process—due to the withdrawal of the plaintiff, for example.

Final considerations

Medical error and its interpretation by the Judiciary is a research topic that, despite of its relevance and impressive numbers, is not much addressed in scientific studies or compatible scientific productions. It shows that researchers, especially those related to health and the well-being of unborn children and pregnant women, are not very interested in this topic.

Most patients in the lawsuits analyzed were represented in court by hired lawyers and the participation of the Public Defender's Office of the Federal District (DPDF) did not reach 50% of the total. Although the work of the DPDF is extremely

important, the participation of private lawyers was higher. It shows that lawyers found a niche in the market and offer payment terms that facilitate their hiring. On the other hand, this result also shows a lack of confidence of the plaintiffs in the public services of the Defender's Offices.

Lawsuits involving medical error in obstetrics and gynecology show the urgent need for public health policies aimed at reducing errors in this area, since the literature proves that these kind of lawsuit exists not only in the Federal District, but throughout Brazil.

Most claims for compensation for medical error involve moral damage alone or combined with material damage. Even in case of death, plaintiffs request compensation for moral damage, showing that possibly suffering and pain are stronger than physical damage.

Most court decisions considered the claims unfounded, which shows that the Judiciary of the Federal District is very careful when judging claims for compensation for medical error and rarely sentences health professionals and health entities

in lawsuits for damage to the patient. Similarly, when the damage is proven, judges usually reduce the amounts requested by an average of 30% of the initial request, but they are severe in sentencing the public health sector.

Medical malpractice—as well as of health professionals in general—does not have a single cause. The literature studied shows that numerous factors promote the occurrence of errors that harm patients, but health entities may not be prevented from seeking the reduction of their sentence. Thus, a new way of judicializing health emerged.

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Authors' contributions

Delduque, MC designed the study and methodology, collected and analyzed data, wrote the article and revised all its versions, including the final one. Montagner, MA wrote the article, reviewed data, and approved its final version. Alves, SM revised all versions of the article, including the final one. Montagner, MI revised the final version of the article. Mascarenhas, G revised the final version of the article.

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