

Medico-legal analysis of lawsuits in medical imaging*

Análise médico-legal das demandas judiciais em imagiologia

Luiz Carlos Leal Prestes Jr¹, Euderson Kang Tourinho², Mary Rangel³

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INTRODUCTION

A false and damaging understanding is becoming pervasive in our society, under the democratic rule of the Law: that by which, as consumer rights are considered, whenever the consumer demands anything, his/her demands will be promptly fulfilled.

The Brazilian Constitution of 1988 instituted the *habeas data*, which provides that any citizen has the right to access any existing information about himself/herself, including, naturally, medical records. That, together with the Consumer Protection Code, which establishes the obligation by the supplier of products or services to provide information, made citizens become aware of the need to be provided with information about all medical procedures to which he or she will be submitted.

There is a certain misconception that physicians should be held accountable for every atypical or undesirable outcome resulting from the practice of medicine⁽¹⁾.

According to the doctrine and jurisprudence established under the principles of medical civil responsibility, the health professional will be held accountable either by acting wrongfully on a given instance, or by not doing something that should have been done or by informing something or not providing information.

The description of problems raised in lawsuits based on the reports of patients

themselves reveal a wide variety of complaints which lead to conflict, namely, illegible handwriting on a medical prescription form, problems or complications originated from surgical interventions, study reports with vague or laconic contents with equivocal diagnosis; and in most cases there are charges of nonexistent or insufficient information on the treatment.

There are no official statistics on the number of lawsuits involving medical errors in Brazil. However there is a consensus in the legal community that the number of such lawsuits is significantly growing. It is estimated that currently there are 10,000 lawsuits against medical professionals in the Brazilian courts, most of them arguing civil liability of physicians⁽²⁾.

The number of lawsuits against physicians follows the pattern of developing countries. Brazil, even in the absence of official statistical data, has a comparably lower number of lawsuits than developed countries, and a higher number of lawsuits than less-developed countries.

Other factors that play a role in the increase in the number of such lawsuits are population growth, improvement in education and access to information sources.

In several occasions, the spoken and written media as well as the television have provided a social disservice, as in the pursuit of journalistic and sensationalist profits, thoughtlessly submits physicians to prejudgment and conviction by laypersons long before proper technical and detailed investigation on the facts is actually carried out. Thus, it inflicts moral and material damages to both physicians and patients, contributing to an increasingly defensive and costly medical practice, and increasingly distant from meeting society's constitutional right to health.

The Judicial System, in facing the increasing number of lawsuits, also plays a relevant role in discouraging unfounded

demands, which some qualify as "judicial lottery", that is to say an uncompromising and irresponsible attempt by some patients without any actual grounds to make money or obtain some financial advantage, resorting to the inconveniences that a lawsuit causes to the physician, such as the high judicial costs, emotional strain, loss of motivation towards the specialty or even towards the profession, as well as the feeling of helplessness and injustice.

The increasing incentives and democratic appeal to the so called "moral damage industry" also add to the victimization process that affects society.

The institution of the Consumer Defense Code was the landmark, allowing greater protection to the victims of "medical errors" by means of judicial mechanisms such as the reversal of the burden of proof, the costlessness of legal procedures and the granting of astronomical indemnities for moral damages⁽³⁾.

The socialization of medicine and competitiveness in the labor market have turned medicine into the profession which more absorbs the impacts of new social concepts, at the same time becoming a very high risk profession.

THE DUE PROCESS OF THE LAW IN THE CONTEXT OF PROFESSIONAL PRACTICE

An aspect of great relevance for this theme is the huge transformation which the doctor-patient relationship has undergone over the past few years. The nostalgic almost brotherly relationship cultivated between the patients, doctors and family members has all but disappeared, giving room to an impersonal, cold and essentially technical relationship.

A distorted relationship many times characterized by very short and superficial visits, without a more profound dialogue

1. Master of Medicine, Coordinator for the Technical Chamber of Legal Medicine – Conselho Regional de Medicina do Estado do Rio de Janeiro, Forensic Expert, Medical Legal Expert, Rio de Janeiro, RJ, Brazil.

2. PhD, Associate Professor, Department of Radiology, Head of the Unit of Imaging Diagnosis, Instituto de Ginecologia da Universidade Federal do Rio de Janeiro (UFRJ), Coordinator for the Technical Chamber of Radiology, Conselho Regional de Medicina do Estado do Rio de Janeiro, Rio de Janeiro, RJ, Brazil.

3. PhD of Education, Post-Doctorate of Social Psychology, Professor of Didactics, Universidade Federal Fluminense (UFF), Niterói, RJ, Full Professor in the area of Teaching/Learning, Universidade do Estado do Rio de Janeiro (UERJ), Rio de Janeiro, RJ, Brazil.

Mailing Address: Dr. Luiz Carlos Prestes Jr. Rua Visconde de Ouro Preto, 79, ap. 502, Botafogo. Rio de Janeiro, RJ, Brazil, 22250-180. E-mail: luizprestesjr@gmail.com

and without the participation of the patient himself and family members in therapeutic decisions, certainly provides the grounds for questionings that may lead to lawsuits⁽⁴⁾.

One must also consider the considerable social and values transformations occurring nowadays. The influence of biotechnology is a determinant of higher expectations on the cure of diseases, but also poses innumerable and unavoidable risks.

It is impossible for the physician to stay out of this context of changes in paradigms.

Society reacts naturally when the medicine professional is successful in achieving the cure by means of the instituted treatment. However, in cases where expectations do not materialize, and success is not reached, the physician is excoriated and is presumably guilty, and subjected to the troubles of legal proceedings.

The huge technological arsenal available for the medical imaging professional, increasingly less invasive, from a technical stand point makes the approach to patients easier. On the other hand, it places some distance between the physician and the patient or simply weakens the relationship between both.

Undoubtedly, one of the greatest developments was brought by ultrasonography, a really noninvasive imaging method which causes no damage to the patient.

However, it is an imaging technique which is essentially operator-dependent, thus requiring operator training and experience for the correct interpretation of images.

THE DIAGNOSTIC ERROR

Failure in radiological diagnosis ("missed" radiographic diagnosis) is responsible for 70% of lawsuits involving radiologists in the United States. However it is important to establish the difference on whether such failure was caused by neglect, malpractice or imprudence, which most of times make the task of appointed experts a very arduous experience.

Some of the so called "diagnostic errors" are related to misinterpretation by the professional either due to deficient knowledge, inadequate conclusion, or poor choice of the technique to be adopted⁽⁵⁾.

In the experience acquired along the years in medical-legal analysis of lawsuits

involving medical liability, failures originated from the identification or perception of sometimes very small or ill defined lesions have been observed.

Considering the analysis of such parameters, one cannot fail to consider the poor quality of equipment, lack of appropriate maintenance, particularly in locations far from large centers, where investments do not contemplate technological advances.

Obsolescence is quite noticeable in most clinics and small-sized hospitals in the huge Brazilian countryside. Whenever novel equipment hits the market, the apparatuses in use in large health centers are replaced and sold at "low" prices to small city governments and smaller hospitals or clinics.

It is important to highlight that such practice is quite common with mammography apparatuses. The non visualization of lesions on their images, or misinterpretation of such images may generate severe consequences for the patients.

Mammography is currently the main method utilized for breast cancer screening. Therefore it is a key diagnostic method for women and may originate lawsuits involving great amounts of money when the images are not properly interpreted.

With a certain frequency in medical liability proceedings, one observes conducts involving failures in the diagnosis of "suspicious" images or even the occurrence of false negative results which may delay the initiation of proper treatment.

Some actions are extremely important to avoid such lawsuits, such as the participation in the Program of Quality Control in Mammography, managed by the Colégio Brasileiro de Radiologia e Diagnóstico por Imagem, and also the standardization of the BI-RADS criteria, which is widely utilized⁽⁶⁾. The interaction with the assisting physician is always recommendable for a multidisciplinary patient approach.

Another extremely relevant aspect to be taken into consideration as medical-legal and expert matters are analyzed is the report itself.

A document is a written expression of a fact; therefore it accurately defines the moment in the image interpretation. It is the very analysis of such a document and its clinical correlation with the image findings that will be the object of attention by the

appointed expert in the course of a legal proceeding.

In the case of obstetric ultrasonography studies, this becomes extremely relevant since besides pregnancy, which constitutes a dynamic condition in constant transformation, there are factors that may directly influence the images interpretation such as fetal positioning and the presence of images affecting the visualization of the main parameters. In lawsuits involving ultrasonography studies, most of the questioned studies are for obstetric purposes. In the case of fetal biometric analysis, if any malformation or changes in structures are visualized or not, these shall be described in detail and, whenever possible, documented by means of photography. It is important to highlight that all imaging methods have limitations. Fetal morphology studies have contributed for the increase in the number of lawsuits.

Special attention must be placed on the correct correlation between the study report and the patient who underwent examination. Cases of patients who received wrong medical reports, once characterized, may lead to the conviction of the responsible professional and indemnity for moral and material damages, depending on the assessment of such damages.

The report comprising all the actions carried out during the study must objectively and comprehensively describe the utilized technique, the patient's data, examined region and the findings⁽⁷⁾.

In those cases where the imaging specialist is absolutely convinced of his/her interpretation, the report may be more direct and objective.

Special attention should be dedicated for the report review, a moment in which mistakes can be corrected. Standardized reports with the purpose of speeding up the reporting process may constitute a cause of errors by containing, for example, information such as "gall bladder with normal appearance" in patient who underwent cholecystectomy.

It is important to affirm that, considering the complementary nature of imaging studies for most indications, it is implicit that it is imperative to continue the diagnostic investigation and correlate the findings with clinical data⁽⁸⁾.

A relationship that should never be broken is that between the imaging specialist and the assisting physician, whether during reference to the patient's data or in the discussions about the case, moreover in those cases requiring more urgent action. The identification of an ovarian cyst "with functional characteristics" in an asymptomatic patient in menacme, reveals a conservative approach.

In more complex cases of difficult interpretation opinion from other colleagues in the area of radiology should never be disregarded.

As previously mentioned, technological advances provide a greater diagnostic accuracy but, in interventional radiology, some situations may provide grounds for litigation. Considering their invasiveness, the utilization of contrast agents, needles, catheters and other devices enhances the risks for the patient, so he/she must be duly informed on the possibility of occurrence of certain situations or secondary complications.

The duty of information is relevant in legal procedural analysis. Judges usually base their interpretation on the application of the Consumer Protection Code, considering that currently the duty of information leads the patient to active participate in the medical decision making process, including the right to refuse to be submitted to procedures, provided an emergency situation is not present^(9,10).

The informed consent may help in the compliance with the duty of information, allowing the patient to jointly decide, provided the term of informed consent is spe-

cifically written for each individual procedure, with a detailed description perfectly understood and authorized by the patient^(11,12).

As it is well known, this could never avoid litigation, but it constitutes a proof that the information was duly provided to the patient, whenever such technical evidence is required on the course of lawsuit.

Every service, clinic or hospital where invasive or interventional procedures are performed must be equipped with a complete set of instruments, apparatuses and medications available for prompt utilization in cardiorespiratory resuscitation. And, as applicable, a contractual arrangement or direct connection with a mobile intensive care unit service to provide the patient with the necessary safety if necessary. Under judicial scrutiny, such actions will assure the care and liability of the institution towards the patient.

Special attention must be dedicated to medical teaching and its practice in university hospitals or maternities. Although the resident physicians are autonomous with respect to their professional acts, they should always be under the supervision of a preceptor, or a more experienced physician. Reports, image analyses, invasive procedure maneuvers and technical decisions making are under the responsibility of a preceptor, counselor, head of the service, or even a technical director of the unit.

It would be a great mistake to say that nowadays there is a safe manner to avoid litigation.

Based on innumerable lawsuits involving physicians and particularly imaging

specialists, one can observe that the adoption of preventive actions may eventually provide irrefutable evidence of an appropriate conduct, perfect interaction in images interpretation and presentation of conclusions, demonstrating good medical practice.

An extremely salutary measure would be approaching themes on medical liability in medicine graduation courses, in a more comprehensive and complete manner, in order to provide future medical professionals with a deeper knowledge on practical issues of the daily practice, with emphasis on legal and ethical aspects involving the medical practice.

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