



The effectiveness of the law of special priority in relation to judicial health demands in the 2nd. Instance of the Rio de Janeiro State Court of Justice

Aldilene Abreu de Azevedo¹ Vania Reis Girianelli² Renato José Bonfatti³

Abstract

Objective: To evaluate the effectiveness of the law of special priority regarding the processing of lawsuits about health demands in the 2nd Instance of the Court of Justice of the State of Rio Janeiro, RJ, Brazil. **Method:** A descriptive cross-sectional study was carried out on the lawsuits referring to old people judged from August 2017 to July 2018. The data were accessed from the court's website. The effectiveness of the law was assessed considering: request of priority, citation of the law in the judicial decision and/or if the median time of duration of lawsuits was shorter for octogenarians than for the others. **Results:** A total of 990 lawsuits were identified, but only 72 eligible (7.3%). The main defendant was the health plan (76.4%). The predominant demand was home care service (31.9%). There was a request and decision of priority for old people (86.1%), but none for special priority, no difference was observed too in the review time of the lawsuit between the octogenarians and of the other old people ($p \geq 0.650$). **Conclusion:** The law of special priority still has no legal effectiveness in the lawsuits to exercise the right to health in Rio de Janeiro.

Keywords: Aged Rights. Aged, 80 and Over. Legislation. Health's Judicialization. Human Rights. Octogenarians.

¹ Fundação Oswaldo Cruz (Fiocruz), Escola Nacional de Saúde Pública Sergio Arouca (ENSP), Programa de Pós-Graduação em Saúde Pública. Rio de Janeiro, RJ, Brasil.

² Fundação Oswaldo Cruz (Fiocruz). Escola Nacional de Saúde Pública Sergio Arouca (ENSP), Departamento de Direitos Humanos, Saúde e Diversidade Cultural (DIHS). Rio de Janeiro, RJ, Brasil.

³ Fundação Oswaldo Cruz (Fiocruz). Escola Nacional de Saúde Pública Sergio Arouca (ENSP), Centro de Estudos da Saúde do Trabalhador e Ecologia Humana (CESTEH). Rio de Janeiro, RJ, Brasil.

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Correspondence
Aldilene Abreu de Azevedo
aldilene27@hotmail.com

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INTRODUCTION

The right to health was incorporated into the Magna Carta as a fundamental social right, being considered a right of all and a duty of the State¹. The political, social and economic scenario, however, has hampered the population's access to services and health care, which has led to an increase in lawsuits to guarantee rights to medicines, care and other demands^{2,3}. The Protection of the Right to Health for old people has been more relevant, due to the growth of this portion of the population and the consequent increase in the demand for health care, both in the private and public spheres⁴. The Statute of the Old Person⁵ constituted a true legal and political framework in order to realize the rights of old people, recognizing them as special human beings who must be fully respected. This law, however, presents a homogeneous look for the Brazilian old person, not taking into account numerous fundamental factors in the aging process, such as the differences between the third and fourth age.

Brazil signed the Inter-American Convention on the Protection of the Human Rights of the Old Person⁶, of the Organization of American States (OAS) in 2015, which is the first international treaty on the human rights of the old person. Since 2017, its text is in the process of being approved by a legislative decree and if approved, the ratification process begins. This implied the requirement to create a Special Subcommittee, to reformulate and update the Statute of the Old Person and the National Old People Policy. The country, however, had already become sensitized to the issue, leading to the sanction of a law that amended articles 3, 15 and 71 of the Statute of the Old Person, giving special preference to the octogenarians⁷, mainly in health care (except in emergency cases) and in court proceedings. The priority is special, since the Statute in its original wording already gave priority to old people over 60 years old, however, there was a need to create a new type of priority in an attempt to guarantee guaranteed rights and interests. This group is more vulnerable due to the conditions resulting from age, requiring a faster service both in lawsuits and in health care.

Despite the existing laws guaranteeing the fundamental rights of old people, in particular the

octogenarians, they are not always effective, that is, they are applied as planned. The analysis of the dimension of a legal norm is based on the study of some of its aspects, among them the study of effectiveness. Effectiveness, for some authors, is also known as social efficacy, that is, it is the recognition and compliance with norms by society, and thus, being materialized in social life⁸.

The objective of the present study is to evaluate the effectiveness of the Law of special priority regarding the judicial health demands in the 2nd Instance of the Court of Justice of the State of Rio Janeiro, which is fundamental to understand the repercussion of this recent law in the community.

METHOD

This is an observational, cross-sectional descriptive study, referring to the cases judged at the 2nd Instance of the Court of Justice of the State of Rio de Janeiro (TJ/RJ), a state that has the highest proportion of old people (19.0%) in Brazil³. In the 2nd Instance, the appeals of the cases decided in the 1st Instance are judged, which presuppose non-conformity, dissatisfaction with judicial decisions and which seek another pronouncement from the Judiciary, regarding the issues submitted to it. The Brazilian legal system, as a rule, allows judicial decisions to be reviewed.

In this study, cases related to old people (60 years or more), as established in the Statute of the Old Person⁵, judged from August 2017 to July 2018, after the promulgation of the octogenarian law⁹. Non-health claims, non-old-people plaintiffs, non-appeal lawsuits, civil liability lawsuits, extinction of lawsuits and other actions related to consumer law that did not deal with health were excluded.

The data were accessed from the website of the Court of Justice of the State of Rio de Janeiro (TJ/RJ), which are publicly accessible, after consulting the jurisprudence, considering the Judgments and Monocratic Decisions. The descriptors used were: old people and health.

The variables analyzed were related to the characteristics of the old person, the processes

and types of demand. Regarding the old person, socioeconomic and demographic characteristics were described: age group (60 to 79 years and 80 years and over), sex, marital status, nationality, municipality of residence, economic under-sufficiency (request for free justice) and profession/occupation.

In relation to the proceedings, the following were identified: the type of defendant (Public Sphere or Private Sphere, which may be State, Municipality or both and Health Plans), type of lawsuit (Appeal, Instrument Appeal, Writ of Mandamus, etc.), type of document (Judgment or Monocratic Decision), type of decision (recognized and provided, recognized and not provided, recognized and partially provided and not recognized), judging body (composed of 27 civil chambers), origin of the Process (regional, capital and other districts), length of the process (interval between the date of distribution and the date of the court decision, between distribution and publication of the court decision, and between court decision and publication), priority request (old people and octogenarian) and citation of the priority law (old people and octogenarian) in the judicial decision. The law will be classified as legally effective when there is a request for the speed of action of the process according to the law, if it is considered in the grounds of the decision, and/or if the median time for processing the cases is shorter among the octogenarians than among the other seniors.

Regarding the characteristics of the demands, those related to the health area were verified: hospitalization, supply of medications, carrying out exams, admission to the ICU, provision of health supplies, surgery, medical insurance with SUS, home care, among others.

The percentage of each category of the studied variables and the median time of processing of the process were calculated, stratifying by age group (octogenarians and other old people). The chi-square test was calculated to assess the existence

of a statistically significant difference ($p \leq 0.05$) between the strata. Curves of the processing time of the resource at the 2nd Instance of the TJ/RJ were also constructed, using the Kaplan-Meier method and the respective Log-rank test, to compare the strata of the variables¹⁰. The data were stored in the Excel program, version 2013, and analyzed in the statistical program R version 3.4.3.

The study was excused from the Research Ethics Committee of the National Public Health Sérgio Arouca (ENSP) of the Oswaldo Cruz Foundation (Fiocruz), opinion number 15/2018.

RESULTS

Figure 1 shows the procedure performed to select the processes. A total of 990 cases were identified, with only 72 eligible (7.3%). The excluded cases were: repeated cases (2.8%), with entry date prior to the survey period (0.5%), which were not an appeal (36.6%), related to consumer law demands (30.8%), non-old-person author (4.5%) and demand unrelated to health (12.3%).

Most of the old people who filed demands related to the right to health were female (69.4%), married or in a consensual union (36.1%), and retired (70.8%) (Table 1). The age group of 80 years or more had a higher percentage of widowed (47.2%) and retired (83.3%) than the others ($p < 0.050$). There was no difference between the age groups studied for the other variables analyzed ($p \geq 0.354$).

Table 2 presents the characteristics of the lawsuits. The main defendant was the health plan (76.4%) and there was a request to anticipate the effects of guardianship (95.8%). Most of the cases were recognized, but not provided (65.3%), and had a request and priority decision for the old person (86.1%). There was no difference between the age groups for the variables analyzed ($p \geq 0.307$).

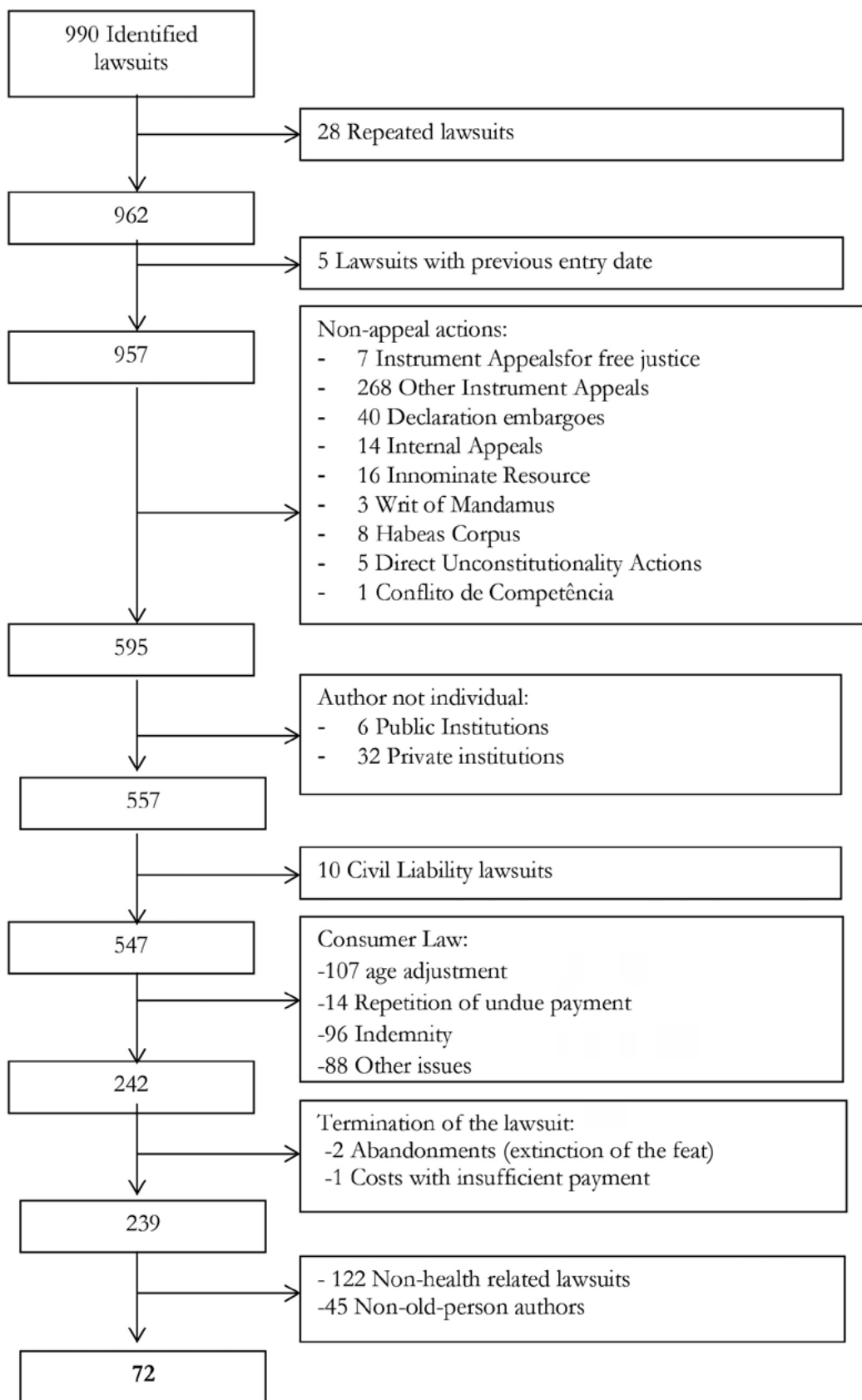


Figure 1. Diagram of the procedure for identifying health-related lawsuits of old people at the 2nd Instance of the Rio de Janeiro State Court of Justice, August/2017-July/2018.

Table 1. Distribution of the sociodemographic characteristics of the old people, by age group, authors of the proceedings at the 2nd Instance of the Court of Justice of the State of Rio de Janeiro, August/2017-July/2018.

Characteristics of the old person	Total N(%)	60 to 79 years n(%)	80 years and more n(%)	<i>p</i> value
Sex				
Male	22(30.6)	12(33.3)	10(27.8)	0.798
Female	50(69.4)	24(66.7)	26(72.2)	
City of residence				
Capital	41(56.9)	19(52.8)	22(61.1)	0.634
Others	31(43.1)	17(47.2)	14(38.9)	
Marital status				
Not married	10(13.9)	6(16.7)	4(11.1)	0.012
Married or consensual union	26(36.1)	15(41.7)	11(30.6)	
Divorced	5(6.9)	3(8.3)	2(5.6)	
Widower	21(29.2)	4(11.1)	17(47.2)	
Ignored	10(13.9)	8(22.2)	2(5.6)	
Profession				
Retired	51(70.8)	21(58.3)	30(83.3)	0.038
Others	21(29.2)	15(41.7)	6(16.7)	
Nationality				
Brazilian	67(93.1)	35(97.2)	32(88.9)	0.354
Foreign	5(6.9)	1(2.8)	4(11.1)	

Table 2. Distribution of the characteristics of the lawsuits of old people people by age group in the 2nd Instance of the Court of Justice of the State of Rio de Janeiro, August/2017-July/2018.

Characteristics of the lawsuits	Total N(%)	60 to 79 years n(%)	80 years and more n(%)	<i>p</i> value
City and State	15 (20.8)	7(19.4)	8(22.2)	0.959
Municipality, State and Union	2(2.8)	1(2.8)	1(2.8)	
Health insurance	55(76.4)	28(77.8)	27(75.0)	
Decision type				
Recognized and provided	8(11.1)	3(8.3)	5(13.9)	0.458
Recognized and not provided	47(65.3)	26(72.2)	21(58.3)	
Recognized and partially provided	17 (23.6)	7(19.4)	10(27.8)	
Guardianship Request				
Yes	69(95.8)	34(94.4)	35(97.2)	1.000
Not	3(4.2)	2(5.6)	1(2.8)	
Origin of the Lawsuit				
Capital	36(50.0)	17(47.2)	19(52.8)	0.847
Regional	18(25.0)	10(27.8)	8(22.2)	
District	18(25.0)	9(25.0)	9(25.0)	

to be continuation

Continuation of Table 2

Characteristics of the lawsuits	Total N(%)	60 to 79 years n(%)	80 years and more n(%)	<i>p</i> value
Priority Request for Old Person				
Yes	62(86.1)	29(80.6)	33(91.7)	0.307
Not	10(13.9)	7(19.4)	3(8.3)	
Priority Decision for Old People				
Yes	62(86.1)	29(80.6)	33(91.7)	0.307
Not	10(13.9)	7(19.4)	3(8.3)	

The lawsuits originated predominantly in the capital (50.0%), and were processed in the 23rd (15.3%) and 27th Civil Chamber (16.7%). In the present study, the request for special priority was not verified and there was no judgment in the 2nd Instance that cited the special priority in a discretionary manner by the court.

The median time between the start of the lawsuit and the judicial decision, and between the start of the lawsuit and the publication of the judicial decision was 13.5 months; ranging from twelve days to nine months and from twelve days to almost ten months, respectively. Between the court decision and the

publication, the median time was two days, ranging from publication on the same day to 28 days.

Figure 2 shows the processing time curves and publication of judicial processes stratified by age groups. There was no statistically significant difference in the evaluated times ($p \geq 0.650$).

The main request was for Home Care service (31.9%), followed by Surgery (23.6%) (Table 3). Old people aged 80 and over had a higher proportion of demand for Home Care than the others ($p=0.043$). There was no difference between the age groups for the other demands analyzed ($p > 0.050$).

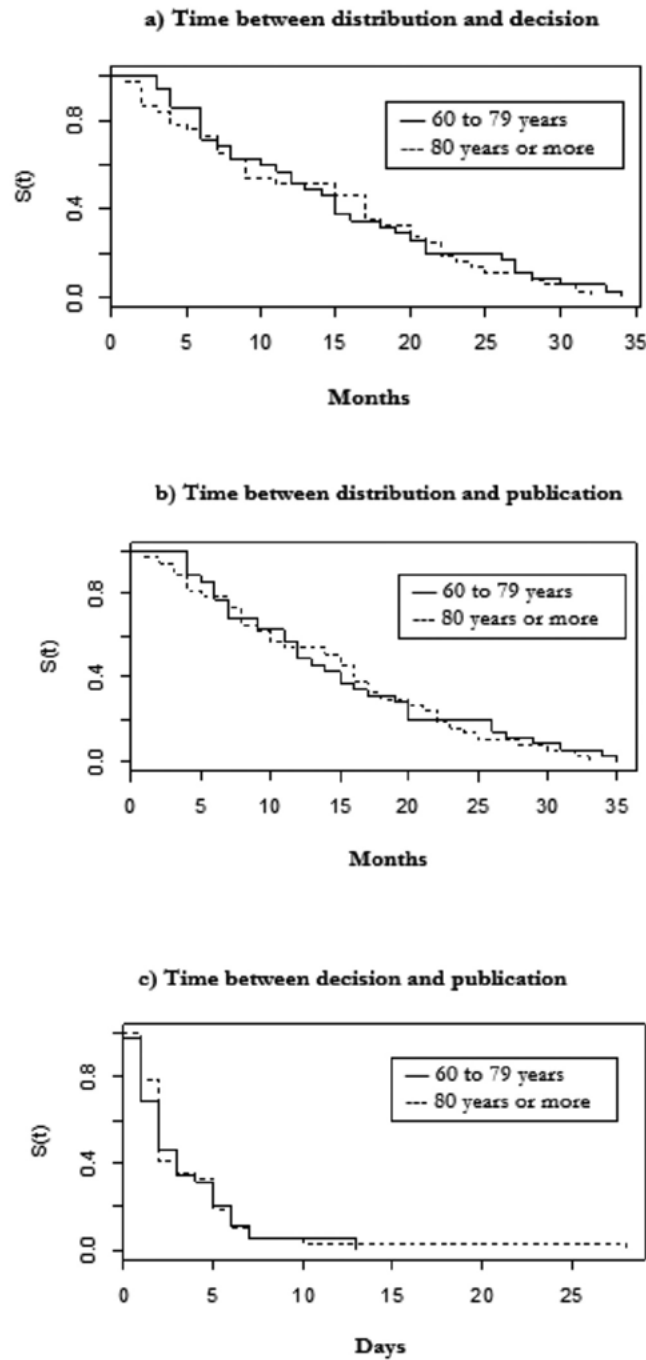


Figure 2. Time curves, in months, between the distribution of the case and the court decision (a) and between the distribution of the case and the publication (b), and the interval in days between the court decision and the publication (c), by age group, at the 2nd Instance of the Rio de Janeiro State Court of Justice, August/2017-July/2018.

Table 3. Characteristics of the demands of the old people, by age group and judicial decision at the 2nd Instance of the Court of Justice of the State of Rio de Janeiro, August/2017-July/2018.

Demand	Total N(%)	Age Group		Judicial Decision		
		60 to 79 years	80 years or more	Provided	Not provided	Partially provided
		n(%)	n(%)	n(%)	n(%)	n(%)
Hospitalization	7(9.7)	4(11.1)	3(8.3)	2(28.6)	4(57.1)	1(14.3)
SUS medication	8(11.1)	4(11.1)	4(11.1)	1(12.5)	5(62.5)	2(25.0)
Non-SUS medication	4(5.6)	1(2.8)	3(8.3)	1(25.0)	3(75.0)	0(0.0)
Hospitalization and Non-SUS Medication	1(1.4)	1(2.8)	0(0.0)	0(0.0)	1(100.0)	0(0.0)
Surgery	17(23.6)	10(27.8)	7(0.0)	2(11.8)	12(70.6)	3(17.6)
Examinations	5(6.9)	4(11.1)	1(2.8)	2(40.0)	2(40.0)	1(20.0)
Home Care	23(31.9)	7(19.4)	16(44.4)	0(0.0)	14(60.9)	9(39.1)
Prostheses	2(2.8)	1(2.8)	1(2.8)	0(0.0)	2(100.0)	0(0.0)
Transfer	1(1.4)	1(2.8)	0(0.0)	0(0.0)	1(100.0)	0(0.0)
Treatment	4(5.6)	3(8.3)	1(2.8)	0(0.0)	3(75.0)	1(25.0)
Total	72(100.0)	36(100.0)	36(100.0)	8(11.1)	47(65.3)	17(23.6)

Of the 23 requests for home care, 14 (60.9%) were denied. Of these, 10 due to the lack of justification for the need for treatment under a hospitalization regime, which must be proven through medical reports and expertise. The others (4) were denied due to the absence of a contractual clause that includes home care in the coverage of the health plan. In relation to the nine partially met demands, the provision of full-time home care service was denied, restricting to only 12 hours of day care, according to a medical report on the need for home care.

Most of the requests for surgery were not provided (70.6%), and all the defendants were from health plans. The judicial decision considered the lack of provision in the contract for the use of imported materials or products or a specific supplier not registered in the health plan, or without coverage by the National Health Agency (ANS) list, or the absence of precise and specific information in the doctors' reports.

Regarding the three requests for surgeries that were partially provided (17.6%), the use of imported surgical material requested by the attending physicians was denied, due to the defendant's claim of its high financial cost, but the surgery with similar surgical materials of national origin was provided.

Of the seven demands that dealt with hospitalization, four were denied respectively due to: lack of signature confirming receipt of the summons by the plaintiff; contracted health plan with only outpatient coverage and 12-hour emergency care; divergence between the material requested by the doctor in relation to that provided by the health plan and the medical indication was home care and not hospital. With regard to partially provided hospitalization, the request for admission to the ICU was denied due to the lack of a bed in the public network because the patient was admitted to the SUS in a common bed before the action was judged.

The five denied SUS drug requests were due to the defendant's proof of availability of the medicine at the municipal or popular pharmacy. Of the two that were partially provided, in one the reason for the denial was in relation to a drug that was not registered with the National Health Surveillance Agency (Anvisa) and in the other the requested moral damage was denied.

The remaining denied or partially met demands related to the request for prostheses, transfer, treatment and exams. The judicial decision for dismissal was based on the lack of evidence or on

the rules established by the National Supplementary Health Agency (ANS).

Only one medication request, referring to a vitamin supplement, which is not made available by SUS, was provided. The judicial decision considered the prerequisites established by the Superior Courts: ineffectiveness of the drugs provided by SUS for the purpose of the intended treatment, financial incapacity of the plaintiff and existence of registration of the drug with Anvisa.

DISCUSSION

In the evaluated period, 990 lawsuits were identified in the 2nd Instance of the Court of Justice of the State of Rio de Janeiro (TRT/RJ), but only in 72 (7.3%) the plaintiffs were old people and with demands related to health. The identification procedure on the institution's website is inflexible, not allowing the restriction of authors' characteristics and the exclusion of uninteresting aspects, making the identification process more laborious and time-consuming.

Aging is a natural consequence of the life process, so if the number of old people increases, there will also be an increase in the search for health care, both in the public and private spheres. In this study, the majority of judicialized health demands had health plans as a defendant, despite the fact that a large part of the old people are assisted by the Unified Health System¹¹.

Old people are the fastest growing age group among health insurance customers in the country, mainly from the age of 80, and also those who pay the highest monthly fees. In the last ten years, the number of beneficiaries over 80 years of age has increased by around 60%, corresponding to four times the growth registered for the total beneficiaries in the country¹².

When the old person has a contract with a health plan, they are within a consumption relationship, in which the consumer is the vulnerable part of the relationship. When this consumer is an old person, however, hypervulnerability occurs, that is, a potentialized vulnerability, as it is a principle of

the law that recognizes the quality of the person's weakness before the service provider, in this case, the health insurance. Furthermore, in the situation of sick old person and in need of care, the vulnerability becomes even greater^{4,5,13}.

The home care service was the main demand and none was fully provided. This service involves the provision of a multidisciplinary team to provide assistance at the patient's residence, which is clinically stable, as well as diagnostic and therapeutic resources¹⁴. Home care provides benefits for patients who may be close to their family members and for health plans the financial costs are generally lower than in the hospital environment.

At the end of 2017, the National Supplementary Health Agency (ANS) regulated this service¹⁵, determining that if the health operator offers home care instead of hospitalization, with or without contractual provision, it must comply with the requirements of the National Health Surveillance Agency (ANVISA) and the provisions of the Health Plans Law¹⁶, referring to hospitalization. These legal provisions are consistent with the rules of the Federal Council of Medicine¹⁷. Despite the existing legislation, health plans have denied the request for home care, based on the exclusion of this service in the contract. The Consumer Protection Code¹³, which governs this type of relationship, however, states that any adhesion contract, that is, contracts in which the parties do not discuss the clauses, will be interpreted in favor of the consumer. Additionally, there is jurisprudence from the Supreme Court of Justice¹⁸ emphasizing that the health plan can establish the diseases that will be covered, but not the type of therapy indicated by a qualified professional in the search for a cure, which is why you must bear the expenses related to medical treatment at home. Precedent 90 of the São Paulo Court of Justice¹⁹ also establishes that the request for home care must be granted if there is a medical indication.

In the cases analyzed, judicial requests for home care, even those with a proven medical indication, were also denied due to the absence of a contractual provision, going against current legislation. This argument has also been used to disregard the other demands.

The study found that there was no legal effectiveness in the law of special priority for octogenarians⁷. In none of the cases analyzed, the lawyers requested the law in the petition and the judges considered it in the grounds of the decision. Additionally, there was no difference in the time taken to process octogenarians' cases in relation to other old people ($p \geq 0.650$). The analysis, however, was carried out during the first year after the publication of the law, therefore, the short time that the law is in force may have contributed to the result found. In addition, the Rio de Janeiro State Court System itself provides only the alternative of priority for the old people when filing a lawsuit, without making a distinction for the old person aged 80 and over.

The priority for old people in general⁵, however, which has been around fifteen years since publication and has a specific space for indicating whether the author is an old person in the online petition form, was 86.1% legally effective. Although the Statute of the Old Person contains this preemptive right in its text, it was the Civil Procedure Code (CPC) that determined how the request should be made in practice, indicating that "The priority procedure is independent of approval by the court and should be immediately granted upon proof of beneficiary status"²⁰. For many authors, however, this text was difficult to understand, which ended up leading to different positions. Some authors argue that there is no need for approval of the request for processing, by any authority or judicial officer, as it deals with a right created especially to protect old people, who need greater speed, that is, they should not speak of granting but to comply with a right²¹. On the other hand, other authors maintain that there is no way to have priority processing without a judicial decision, because without this determination the judicial registry office will not have the autonomy to establish the priority. Even the approval is discussed, even in the face of the documentary presentation proving the age, which may or may not occur in office, regardless of the party's requirement, as the form provided for in the article, there remains a small appearance that the approval depends on provocation, which does not seem to be the most appropriate²².

Therefore, it is worth questioning whether a law that changed the Statute of the Old Person, which is not enforced in the judiciary, should have its effectiveness properly questioned by society. Thus, for the positivized right to be effective in the context of people's social relations and with the State, the necessary efforts of the public administration are necessary, due to a political decision to comply with the current law. The formulation and execution of public policies are the main drivers of the process of making the proposed law effective²³.

It is very serious to imagine that a right conquered by old people would be just a disguised political maneuver to reach votes, as legal norms are not created randomly, but to achieve certain social results. On the other hand, even if the rules are structured to provide maximum effectiveness, it may not be achieved; but there are several levels of effectiveness²⁴ and it is up to society to accompany and claim it.

Any interpretation or application of this right in a manner disconnected from the attribute of effectiveness would be inadmissible, which consists in the fact that a legal norm is observed by its addressees and by those applying the Law. Insofar as, no legal norm is produced by chance, but aiming to achieve certain social results.

It is necessary to point out that the natural consequence of a law being enforced is an obligation, which emanates from one of the general characteristics of legal norms, that is, it is an imposition and not merely advice. In Brazilian law, we do not have the possibility of alleging ignorance of the law, since the Principle of Mandatory Law presupposes that no one can refrain from complying with it even under the allegation of ignorance or error of law²⁵. This absolute presumption, however, clashes with the observed reality.

Undoubtedly, the non-application of the law, which gives octogenarians such a unique right, demonstrates some aspects for possible reflection, among them: that the law has not undergone the necessary social adaptation; that the octogenarian population that makes demands on health is still a tiny part, which would result in a lack of interest in lawyers; the reflex of the situation of hypervulnerability that the old people suffer, because

even though they are holders of a right, they are still unable to enforce it.

The question is: how to ignore the rights of the fastest growing part of the population in recent years? The population has aged and continues to age progressively, but there are still few policies that lead to social protection for old people, to minimize existing inequities.

In addition, some setbacks are underway, such as the extinction or reduction of representatives of the National Council for the Rights of the Old Person, as it removes popular participation, which is a constitutional guarantee for the full exercise of citizenship^{26,27}. On the other hand, there are legislative movements aimed at establishing staggered priority in favor of old people, for decades of life (centenarians, nonagenarians, octogenarians, etc.), over the less old²⁸.

One of the limitations of the present study is that the analysis included lawsuits that were judged at least fifteen days after the publication of the special priority law for octogenarians, and the ignorance of the recent law may have negatively affected the effectiveness indicators. When a law enters into force, however, it must have immediate effects in the specific cases that fall under and knowledge of the law is mandatory, as provided for in the current legislation. In any case, all changes take time to be implemented, but the speed of this process depends on the monitoring of society.

Another limitation was the restriction of proceedings in the second instance, in which judges review the cases already analyzed by the singular judges of the first instance. This review, however, requires compliance with some assumptions (intrinsic and extrinsic), in order to be known (admissibility judgment) and on the merit provided or not (judgment on the merits), so not all claims will be subject to

appeal. In addition, it implies attorney's fees and additional procedural costs, which may inhibit the follow-up of the process to higher levels. Thus, the sample used may not correspond to reality.

Future investigations are necessary with the inclusion of lower court cases, courts in other states and extension of the study period, to subsidize society if the law will present the expected effectiveness.

CONCLUSION

The observed results indicate a precariousness of the current legal system. Bearing in mind that, every right duly conquered, especially, in this case, the right to special priority for octogenarians, should be properly applied in the legal and administrative spheres.

Each day we move further away from reflecting on how our judicial and political system will act to protect this portion of the Brazilian population. Therefore, celebrating the increase in life expectancy without assessing the scenario in which it presents itself, diminishes the significance of this achievement, which is considered one of the greatest in humanity.

And even in the face of this dramatic moment, it is hoped that the possibility of the effectiveness of the rights conquered by old people still exists. However, it is necessary to view the old person in their fullness as a human being, and must have the equality and dignity of the human person ensured.

It is hoped that the results of this study can contribute to the improvement of professionals, as well as giving greater visibility to the topic for society, since the growth of the old people population is an undisputed fact.

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