

# Civil responsibility and its consequences for the Dermatology practice

Responsabilidade civil e suas consequências no exercício da Dermatologia

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## ABSTRACT

**Introduction:** It is estimated that in Brazil, a large number of civil responsibility lawsuits against the medical professional are in place at the courts.

**Objectives:** To analyze the rulings of Justice Tribunals of the Southeast and South regions of Brazil, involving dermatologists and their civil responsibility.

**Methods:** Definition of a research protocol on the site of the Justice Tribunals of the Southeast and South regions of Brazil.

**Results:** Forty-seven rulings were identified in the states of the Southeast and South regions. The main causes motivating civil responsibility of the dermatologist are linked to aesthetic procedures, to patient dissatisfaction regarding therapies chosen and to diagnostic error. Compensations sought in lawsuits against dermatologists were mostly for moral damage. Medical evaluation was requested by the judges in most lawsuits and in 87.2% the reports did not observe a causal relationship. Court decision were in favor of the dermatologists in 82.9% of the cases. It was not possible to see the full lawsuit, only the final report.

**Conclusion:** We can conclude that factors such as adequate training of the dermatologist, their attention to doctor-patient relationship and when filling out patient's records and documents necessary to medical practice were essential to an adequate medical evaluation, crucial to court decisions favoring dermatologists in most cases included in this study.

**Keywords:** Damage Liability; Dermatology; Legal Process

## RESUMO

**Introdução:** No Brasil estima-se que um grande número de processos de responsabilidade civil contra profissionais médicos esteja em andamento nos tribunais.

**Objetivos:** Analisar os acórdãos dos Tribunais de Justiça das regiões Sudeste e Sul do Brasil que envolvam o dermatologista e sua responsabilidade civil.

**Métodos:** Definição de protocolo de pesquisa no site dos Tribunais de Justiça dos estados da Região Sudeste e da Região Sul do Brasil.

**Resultados:** Foram identificados 47 acórdãos nesses estados. As principais causas que motivaram a responsabilidade civil do dermatologista estão ligadas aos procedimentos estéticos, à insatisfação do paciente em relação às condutas terapêuticas e ao erro diagnóstico. As indenizações solicitadas nos processos judiciais contra o dermatologista foram, em sua maioria, por danos morais. A perícia médica foi solicitada pelos juízes na maioria dos processos, e, em 87,2% das conclusões das perícias, não foi observado o nexo causal. As decisões judiciais favoráveis ao dermatologista ocorreram em 82,9% dos casos. Não foi possível conhecer na íntegra o processo judicial, mas apenas o relatório final.

**Conclusão:** Podemos concluir que fatores como a boa formação do dermatologista, sua atenção à relação médico/paciente e o cuidado ao preencher o prontuário e os documentos necessários à prática médica foram essenciais para uma perícia médica adequada e, em consequência, fundamentais para que as sentenças judiciais fossem favoráveis ao dermatologista na maioria dos casos focalizados neste estudo.

**Palavras-chave:** Dermatologia; Processo Legal; Responsabilidade Civil

## Original Articles

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## INTRODUCTION

The expression 'medical error' refers to nothing further than the civil responsibility of the physician in front of the justice, and is used when there is an error of the physician's professional conduct regarding their patient. According to the Regional Council of Medicine of the state of São Paulo (Cremesp), the use of this expression is inadequate and should be replaced by 'medical malpractice', defined as:

Inadequate conduct that supposes a technical disregard, capable of impairing life or health injury of another, through malpractice, recklessness or negligence. This is the condition and definition of a medical malpractice, highlighting that there is no error without damage or injury to the health of others.<sup>1</sup>

One of the concepts of civil responsibility of the physician comes from Forensic Medicine, defined as:<sup>1</sup>

*The civil, penal and administrative obligation to which physicians are subject in their professional practice when resulting in patient injury by malpractice, recklessness or negligence. This type of responsibility is based in the principle of guilt, in which the agent gives the cause for an injury, without the adequate care they are obliged to have, and does not avoid it for assuming this result will not occur.*

Some consider in the legal doctrine as 'medical error':<sup>1</sup>

*The negative involuntary result, from structural flaws, when work conditions and equipment are insufficient for a satisfactory care, or medical practice that damages the patient and can be characterized as malpractice, recklessness or negligence, triggering the duty of compensation.*

Court demands appeared in a growing curve against physicians as medicine evolved, with the emergence of new specialties, innovations brought about by technologies, rise in private health care, ageing of the population and the expressive increase of the number of medical schools, some created to meet business and not social demands.<sup>1,2</sup>

When 'medical error' is mentioned, we can immediately associate it to a diagnostic and/or surgical or cosmetic procedure error, to the rupture of the doctor/patient relationship, to inadequate care and, lately, to the presence of mercantilism in Medicine.<sup>1</sup> Brazil does not have an official statistic of 'medical error', but it is estimated that a large number of civil responsibility lawsuits against the medical professional are in place at the courts.<sup>3,4</sup>

In 1988, the Constitution guaranteed the Brazilian citizen could obtain information of any kind regarding themselves, including the information in their medical records. And the Code of Consumers' Rights (CDC, from the Portuguese) arrived to guarantee the right to information from the supplier of products of services, that must be released to the citizen when asked for, including medical procedures.<sup>4</sup>

We found reports in the literature of various lawsuits that revealed the behavior of the justice regarding aesthetic procedures and surgical procedures of some medical specialties. We did not observe any such similar study regarding dermatology. Therefore, the rulings (full texts) of the justice tribunals of the Southeast and South regions of Brazil regarding civil responsibility of the dermatologist were evaluated for an initial study.

## METHODS

Descriptive study based on the evaluation of lawsuits related to the civil responsibility of the dermatologist and in the research of the rulings (full texts), i.e., of lawsuits already judged, on the website of the justice tribunals of the states of the Southeast and South regions of Brazil, São Paulo, Minas Gerais, Rio de Janeiro, Espírito Santo, Rio Grande do Sul, Santa Catarina and Paraná.

The period of the research was between January 2006 and July 2015, determined according to the search on the websites of the justice tribunal under jurisprudence. The keywords used were: 'error and dermatology', 'responsibility and dermatology', 'dermatology', 'lawsuit and dermatology'.

In this study, only the court decisions related exclusively to the dermatologist in their clinical specialty, the aesthetic and surgical procedures, were included. The court decisions that involved hospitals, pathologists, health care providers, the municipality or government were not considered.

For the analysis of each ruling, a protocol with the following data was used: ruling number, year, state, damage caused, type of compensation, presence of medical expertise and judiciary ruling related to the civil responsibility of the dermatologist. After analysis of the data collected, tables with the results found were created.

For the statistical analysis the program SPSS v.13.0 (Statistical Package for Social Sciences) was used. To verify the association between expertise and ruling, Fisher's exact test was used. All other analyses were only descriptive. In the statistical test, the level of significance of 5% was adopted.

## RESULTS

The rulings or judicial decisions regarding civil responsibility of the dermatologist were obtained from the websites of the justice tribunal of each state of the Southeast and South regions.

Judicial decisions were a total of 47 rulings, and in the Southeast and South regions 37 (79.86%) and 10 (21.26%) were found, respectively. The prevalence of judicial decisions in the states of the Southeast region was of 57.44% (27 rulings) in São Paulo; 17.02% (eight rulings) in Rio de Janeiro; 5.4% (two rulings) in Minas Gerais and none in Espírito Santo. In the states of the South region we found five rulings (10.63%) both in Rio Grande do Sul and in Santa Catarina, and none in Paraná (Table 1).

The cities in which the judicial decisions of civil responsibility of the Southeast and South regions were Assis, São Paulo, Bauru, Araraquara, Campinas, Santo André, Santos, Amparo, Americana, Taubaté, São Carlos, Marília, in São Paulo; Rio de Janeiro, in Rio de Janeiro; Lavras and Belo Horizonte, in Minas Gerais; Porto Alegre, in Rio Grande do Sul; Itajaí, Florianópolis and Araranguá, in Santa Catarina.

Table 2 demonstrates the period from January 2006 to July 2015 in which judicial decisions with two peaks of increase in lawsuits in 2011 and 2014 related to the civil responsibility of the dermatologist took place, mentioned in the websites of the justice tribunal of each state of the Southeast and South regions.

The most frequent causes that motivated the patient to appeal to justice against the dermatologist, according to what is seen on table 3, were complaints in aesthetic procedures performed by dermatologists, with 46.80% (22 rulings), followed by side effects of medications (side effects) and dissatisfaction with the treatment for some dermatological conditions (acne, atopic dermatitis, viral wart, Hansen disease), with 44.57% (21 rulings), inadequate ethical conduct by the dermatologist and unidentified cases, with 4.25% of the total of rulings (two rulings).

Table 4 shows all types of aesthetic procedures involved in lawsuits according to the report of examined rulings: laser for permanent hair removal, with 14.89% (seven rulings), laser for the treatment of pigmentation, with 8.51% (four rulings), laser for wrinkles, with 4.25% (two rulings), chemical peel (freckles and pigmentation), with 6.36% (three rulings), botulinum toxin and fillers, with 4.25%, and other procedures (fillers, dermabrasion, hydrolipo and mesotherapy), with 2.12% (one ruling) each.

In table 5, medication and dermatological conditions that motivated patient complaint in lawsuits are demonstrated: vitiligo, psoriasis, actinic keratosis, warts and the drug flutamide, with 4.25% (two rulings) each. Other dermatological conditions, acne, Hansen disease, melasma, HPV, atopic dermatitis, removal of inflamed nail, systemic lupus erythematosus, herpes zoster, cryotherapy and urticaria, each with 2.12% (one ruling).

**TABLE 1: Number of cases of judicial decisions on civil responsibility and the dermatologist in the states of the Southeast and South regions of Brazil**

<b>Southeast</b>	<b>N</b>	<b>%</b>
São Paulo	27	57.44
Rio de Janeiro	8	17.02
Minas Gerais	2	5.4
Espírito Santo	-	-
<b>South</b>	<b>N</b>	<b>%</b>
Rio Grande do Sul	5	10.63
Santa Catarina	5	10.63
Paraná	-	-

**TABLE 2: Period of time when judicial decisions occurred related to civil responsibility and the dermatologist**

<b>Ano</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>
<b>N</b>	3	2	2	3	5	8	5	6	8	5

**TABLE 3: Causes for judicial decisions related to civil responsibility and the dermatologist**

<b>Causes for the lawsuits</b>	<b>N</b>	<b>%</b>
Aesthetic procedure	22	46.80
Side effects/Treatment dissatisfaction	21	44.57
Ethical conduct	2	4.25
Not identified	2	4.25

Table 6 demonstrates the medical expertise assessment for establishing the civil responsibility of the dermatologist, that happened in 83% (39 rulings). Medical experts determined in 87.2% (34 rulings) that the damage caused to the patient was related to their condition and not to the physician's practice, i.e., a causal relationship was not found. Causal relationship was confirmed in 12.8% (five rulings).

According to table 7, judicial decisions favorable to the dermatologist were in first and second instances with 80.8% (38 rulings) and 82.9% (39 rulings), respectively. Decisions unfavorable to the dermatologist in the first instance were 19.1% (nine rulings) and in second instance 17.02% (eight rulings).

**TABLE 4: Types of aesthetic procedures involved in lawsuits according to the report of the rulings of the justice tribunal of the states of the Southeast and South regions**

<b>Type of aesthetic procedure</b>	<b>N</b>	<b>%</b>
Laser hair removal	7	14.89
Laser wrinkles	2	4.25
Laser pigmentation	4	8.51
Chemical peel	3	6.36
Filler	1	2.12
Botulinum toxin + Filler	2	4.25
Dermabrasion	1	2.12
Hydrolipo	1	2.12
Mesotherapy	1	2.12
<b>Total</b>	<b>22</b>	<b>46.80</b>

**TABLE 5: Medications and dermatological conditions involved in lawsuits - according to the report of the rulings of the justice tribunal of the states of the Southeast and South regions**

<b>Medications/Dermatological conditions</b>	<b>N</b>	<b>%</b>
Vitiligo	2	4.25
Acne	1	2.12
Hansen disease	1	2.12
Melasma	1	2.12
HPV	1	2.12
Immunobiologic	1	2.12
Atopic dermatitis	1	2.12
Flutamide	2	4.25
Removal of inflamed nail	1	2.12
Psoriasis	2	4.25
Systemic lupus erythematosus	1	2.12
Herpes zoster	1	2.12
Cryotherapy	1	2.12
Actinic keratosis	2	4.25
Urticaria	1	2.12
Warts	2	4.25
<b>Total</b>	<b>21</b>	<b>44.57</b>

Data analyzed in the rulings demonstrated three types of compensation: 76.6% (36 rulings) for moral damage, 55.3% (26 rulings) material damage and 48.9% (36 rulings) for aesthetic damage (Table 8).

Judicial decisions with sentences unfavorable to the dermatologist were found in eight rulings with the amount of the compensations, that were arbitrated by the judge in five rulings (around 62.5% of unfavorable sentences) and in only three rulings (37.5% of unfavorable sentences) the amounts for compensation were not disclosed (Table 9).

## DISCUSSION

The literature indicates that the number of civil lawsuits in the medical field has increased considerably over the past 10 years and, in Brazil, according to recent statistics, there was a significant increase in lawsuits against physicians.<sup>5</sup> The prevalence of civil judicial decisions that involve dermatologists was higher, in descending order, in São Paulo, Rio de Janeiro, Minas Gerais, Rio Grande do Sul and Santa Catarina. Regarding the states of Espírito Santo and Paraná, no rulings were found. A trend to increased number of civil lawsuits in dermatology from January 2006 to July 2015 is also observed.

**TABLE 6: Presence of medical experts and report of medical experts regarding the presence of causal relationship in cases of civil responsibility and to the dermatologist according to the rulings report of the justice tribunal of the states in the Southeast and South regions**

Medical experts	N	%
Yes	39	83
No	8	17
Causal relationship	N	%
Not confirmed	34	87.2
Confirmed	5	12.8

**TABLE 7: Judicial decisions on the civil responsibility and dermatologist according to the rulings report of the justice tribunal of the states of the Southeast and South regions**

	Judicial decisions	
	Favorable	Unfavorable
	N (%)	N (%)
First instance	38 (80.8)	9 (19.10)
Second instance	39 (82.9)	8 (17.02)

**TABLE 8: Types of compensation analyzed in rulings of the justice tribunal of the states of the Southeast and South regions**

Types of compensation	N	%
Moral damage	36	76.6
Material damage	26	55.3
Aesthetic damage	23	48.9

A survey of the inquiry processes from Cremesp (Cidade) was performed to determine indication of illegal ethics in the specialties of dermatology, plastic surgery and bariatric surgery, for claims of unsuccessful result proposals. In 2000, dermatology had 17 inquiry processes and, in 2007, 74 inquiry processes, characterizing a trend of increasing civil lawsuits.<sup>5</sup>

Judicial decisions were equivalent regarding complaints on aesthetic procedures (48.93%) and clinical dermatology (side effects of drugs and treatment dissatisfaction in some dermatological conditions, 46.80%). When we take dermatology as an essentially clinical specialty, the dermatologist takes on subjective civil responsibility or duty of due care:<sup>6</sup>

A good example of a duty of due care contract is the contract of health treatment, established with the physician, for the result depends on factors that are out of the professional's control, such as the physiologic nature of the patient, their reaction to drugs, among other factors. The physician is only obliged to continue pushing for their best efforts and to apply the best techniques and tools available to them to achieve the result contracted, but is not obligated to achieve it.

However, when dermatology encompasses the areas of surgical dermatology and aesthetics, it is then considered 'aesthetic' medicine, as in 'beautifying' plastic surgery and bariatric surgery. Nowadays, there is a growing intent of considering these 'result' activities. Beautifying the patient is considered by lawyers, judges and the population an objective civil responsibility, considering that the contract between the two parties has as final goal the aesthetic result of the patient.<sup>5</sup> Lately, new concepts have become more consistent in tribunals, in view of the integration between medicine and law, and there is the understanding that aesthetic medicine is not different to curative medicine. Based on what is recommended by the World Health Organization (WHO), i.e., health is a state of complete physical, mental and social well-being, we arrive to the perception that, if the patient is uncomfortable for having facial wrinkles, they are sick. Therefore, in the field of aesthetic dermatology (cosmiatry and surgical dermatology) the principle of *Culpa Aquiliana* should be considered, i.e., the existence of negligence (omission, disregard of duties and obligations), recklessness (inattention, dangerous behavior) or malpractice (inexperience, lack of knowledge). However, there are still tribunals that consider the aesthetic procedure a relationship of result, i.e., the patient is unsatisfied with the result, and the physician is punished. The action of the professional becomes a simple contract relationship, ignoring that medicine is not an exact science and that individual features and human biology should be taken into consideration.<sup>8</sup>

In this study, we observed that the judge requested medical experts for most rulings (83%) evaluated for the determination of civil responsibility of the dermatologist. And that in the conclusion of medical experts, a causal relationship was not confirmed in 87% of the cases. The importance of medical experts is in identifying the anatomical, physiological, social or psychological causes related to the condition or to the procedure, aiming at finding a causal relationship between the events, for not always is medical conduct responsible for the lack of therapeutic

**TABLE 9: Demonstrates eight favorable sentences were the amount of the compensations for aesthetic damage, material damage and moral damage were arbitrated in the sentences according to the rulings report of the justice tribunal of each state of the Southeast and South regions**

Reason for claiming compensation unfavorable lawsuits	Aesthetic damage	Material damage	Moral damage	Amount arbitrated in the judiciary
Mesotherapy	R\$ 10,000.00	-	R\$ 15,000.00	R\$ 25,000.00
Botulinum toxin/Eyelid ptosis	-	R\$ 2,069.00	R\$ 10,000.00	R\$ 7,069.00
hair laser removal hypopigmentation	-	R\$ 3,543.91	R\$ 10,000.00	R\$ 6,830.00
HPV	-	-	500 minimum wages	R\$15,000.00
Flutamida – Acne Severe Hepatitis	-	-	R\$ 15,000.00	R\$ 30,000.00
Urticária	-	amount not specified	amount not specified	amount not specified
Dermatologist disputes medical expert	-	amount not specified	amount not specified	amount not specified
Permanent laser hair removal	-	amount not specified	amount not specified	amount not specified

success.<sup>9</sup> A well-written patient record (detailed description of the procedure and legible writing), adequate consent form and the effective doctor/patient relationship are key factors to avoid lawsuits and, consequently, the physician's emotional distress.

The medical experts will bring information necessary for the judge's verdict, for it is about a medical subject that is beyond their knowledge scope. Therefore, the medical expert that prepares the medical report should avoid subjectivity and try to stay within the specific protocols and standardizations destined to this outcome.

Judicial decisions regarding the dermatologist's civil responsibility that were tried in first and second instances were 80.8% (38 rulings) and 82.9% (39 rulings), respectively. The decisions unfavorable to the dermatologist in first instance were 19.1% (nine rulings) and in second instance 17.02% (eight rulings). The difference in percentage in cases favorable to the dermatologist was due to a case in where the professional wrote psoralen cream for psoriasis and did not instruct the patient regarding caution for sun exposure, and the patient progressed to worsening of their condition following blisters and burn. The judge arbitrated unfavorable sentence in first instance and in second instance the judges considered the sentence favorable to the dermatologist. Medical experts concluded that the medication indicated is used for the treatment of psoriasis with controlled sun exposure, and that that changes that occurred in the skin did not configure aesthetic damage. Despite the medical experts not confirming the causal relationship, the first instance magistrate judged the claim well-founded, stating that:

The blame, the lack of objective duty of care, arises in the precise moment the physician, in a condition of exceptional severity, restricts the information that the time for sun exposure is of five minutes, when it would be appropriate to make available a phototherapy machine or, in case of non-existence, simply prohibiting the patient's exposure.<sup>10</sup>

And, in second instance, the judge was favorable to the dermatologist arguing that:

An expert opinion that confirms that the doctor acted within the possibilities and used an adequate procedure. Damage remediation. Not acceptable. Obligation of means is the obligation to employ all available techniques, tools and resources,

and make all possible efforts with the aim of achieving the result contracted, regardless of this result being achieved or not. Obligation of result is the obligation to achieve the exact result contracted, regardless of the techniques and resources employed. In the obligation of means, not achieving the result contracted is a circumstance accepted in the contract and does not imply non-execution of the obligation, let alone civil responsibility. In the obligation of result, the one owing the obligation is only freed of it when the expected result is achieved, in the time and way stipulated in the contract; otherwise, they will withstand the contract's civil responsibility, if damage is a consequence of the default, of course.<sup>10</sup>

The same occurred in the sentences unfavorable to the dermatologist. In one case of laser hair removal, the judge in the first instance was favorable to the dermatologist and, in second instance, the judges were unfavorable, but there are no details of the case in the evaluated ruling.

The three types of compensation were 76.6% (36 rulings) for moral damage, 55.3% (26 rulings) for material damage, and 48.9% (36 rulings) for aesthetic damage. The amount requested for the compensations ranged from R\$2,069.00 to R\$100,000.00 or from 100 to 500 minimum wages.

The amount arbitrated by the judge in the sentences, when the Dermatologist was convicted, was not always the amount requested in the lawsuit. Some cases observed were the botulinum toxin procedure, with consequent eyelid ptosis, requesting a total amount of R\$ 12,069.00. the judge arbitrated R\$ 7,069.00. in a laser hair removal treatment, the total amount requested was R\$ 13,543.91, and the judge arbitrated the amount of R\$ 6,830.00. according to the justice:

The amount arbitrated in the case of compensation for immaterial damage should take into account the principle of proportionality, as well as the conditions of the offended, the economic capability of the offender, besides the capacity of criticizing the illicit conduct that occurred. Lastly, one must remember the compensation of damage must not turn into disproportionate gain, counting as illicit enrichment.<sup>11</sup>

In this study, it was observed that in one case of treatment with flutamida for acne with consequent severe hepatitis, the amount established for compensation in the lawsuit was

R\$ 15,000.00, and the amount arbitrated by the judge was R\$ 30,000.00.

Lawsuits generate emotional distress, besides financial losses, that can be avoided paying more attention to the doctor/patient relationship, caution in filling out necessary documents and records. According to the Code of Medical Ethics of 2009, in chapter X:

Art. 87. Refrain from creating a legible medical record for each patient.

§ 1º The medical record must contain clinical data necessary for properly directing the case, and must be filled in during each evaluation, in a chronological order with date, time, signature and number of the medical registry in the Regional Council of Medicine.

It is very important to highlight that the defense of the medical professional is based on the evolution of medical records, the signed consent form, the description of surgeries or any other document related to the medical act, that must be completed with legible writing and with no erasures.<sup>2</sup>

In the literature, we found studies of civil responsibility of the physician in one reflection on 'malpractice' and the relationship with disciplines that have affinity with the themes of civil responsibility, ethics, bioethics, and deontology in the state

of Minas Gerais. The authors conclude that there is need for a discussion during college education regarding ethical and legal issues as a means to encompass the aspects that involve the doctor/patient relationship and avoid medical error.<sup>8</sup> Other authors also agree with the approach of medico-legal issues in medical schools, that could guide the future professionals in the legal and ethical aspects that encompass the professional activity.<sup>2</sup> According to some authors, 'it is better to prevent a lawsuit than fight against one'.<sup>12</sup>

## CONCLUSIONS

The main causes that led the dermatologist to a lawsuit are related to aesthetic procedures, consultations involving complaints on side effects of drugs, dissatisfaction with the type of treatment for some dermatological conditions and inappropriate ethical conduct. The compensations requested in lawsuits against dermatologists were mainly for moral damage, followed by material and aesthetic damages. We can conclude that factors as good training of the dermatologist, good doctor/patient relationship and caution when filling out the medical record were essential for an adequate medical expert assessment and, consequently, judicial sentences favorable to the dermatologist in most cases presented in this study. ●

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