


The teaching of Medical Law in Brasil

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SUMMARY

OBJECTIVE: *To provide a brief overview of the teaching of medical law in Brazilian law schools, proposing a syllabus if needed.*

METHODS: *Survey the curricula of the best-ranked Law Schools in the country and reference Law Schools in the USA and Europe. Analyze the disciplines offered and their relation to the actual demands of the industry.*

RESULTS: *The offer of medical law disciplines in Brasil is very scarce and concentrated in one city (São Paulo). Most of the few existing disciplines focus on bioethical issues rather than law and lawsuits.*

CONCLUSION: *There is a need to reformulate the teaching of medical law in Brasil by including new disciplines and broadening the subjects approached.*

KEYWORDS: *Legislation. Jurisprudence. Education. Malpractice.*

INTRODUCTION

Medicine is a science that is constantly improving and evolving. But despite such innovations, practical and adequate performance in Medical Sciences still depend, primarily, on the age-old relationship between doctor and patient; thus, the lack of a consistent, durable and respectful doctor-patient relationship, allied with the belief in the ability of doctors to save lives, especially with all the technological advances, has been the source of a huge increase on the number of administrative procedures and lawsuits against physicians.

In order to investigate the increase in lawsuits in the past decade, the Regional Council of Medicine of São Paulo concluded a survey on the relationship

between the medical class and the Judiciary¹, finding that there were six new lawsuits in each month of the surveyed period (the 2010s).

Subsequently, in 2018, the National Council of Justice found that claims related to medical errors totaled 70 new lawsuits per day in the country during 2017, with the caveat that the number may be higher due to methodological inconsistencies between the databases². The numbers of cases in some courts, in particular, convey the size of the trend over the years: in the Superior Court of Justice, new cases about medical errors went from 466 in 2015 to 542 in 2017. In the Court of Justice of São Paulo, the largest appeal

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court in the country, that number increased from 2,600 (2015) to 4,600 (2017).

In this scenario, adequate performance of lawyers is fundamental, as they should be able to confidently analyze the possibility of medical malpractice and the scope of civil, criminal, and/or administrative liabilities, knowing how to differentiate between medical error and the normal occurrences of the daily practice of an inherently inaccurate science.

Despite the importance of the subject and the broad scope of practice of lawyers who enter the field of medical law, undergraduate medical and law courses offer little to no teaching on the subject.

METHODS

The current scenario of Medical Law instruction in Brasil was obtained through a survey of various Brazilian law schools, selected by their prominent position in the national scenario according to the national university rankings and carried out by analyzing the curriculum and syllabus of the courses,

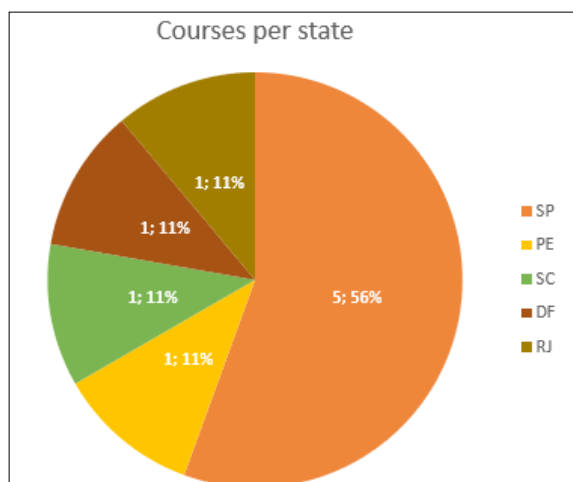
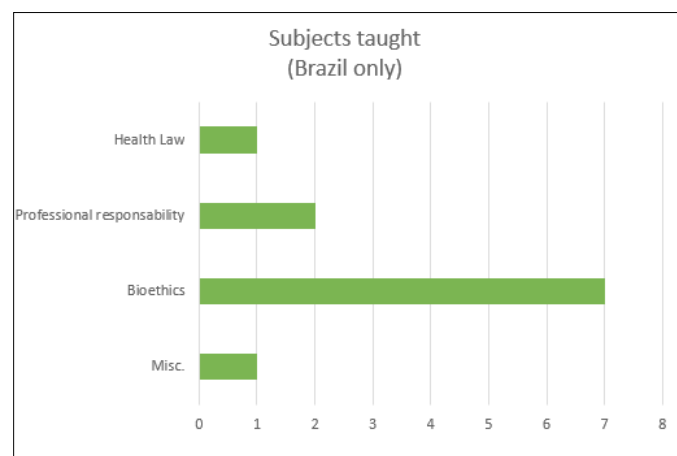
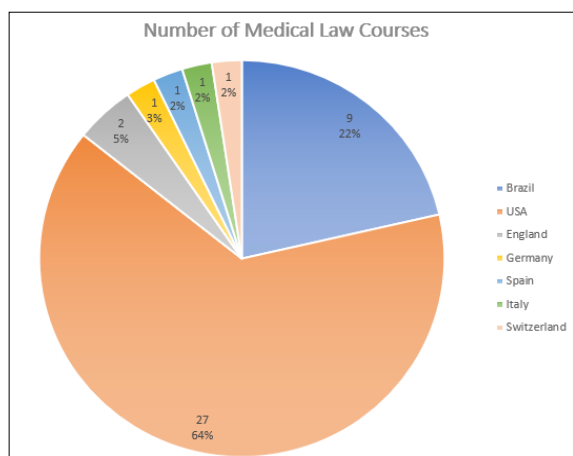
as made available on the online portal of each of the faculties. For Law Schools abroad, the same approach was used.

The results were selected and discussed under the optics of the Brazilian scenario on medical malpractice lawsuits and Brazilian law.

RESULTS

In the United States, of the 27 disciplines of Medical Law being offered, eighteen are about public policy issues on health, health care, and the national health system. There are also disciplines that deal with themes of bioethics - 08 - and technological innovation in medicine and its consequences - 07.

On the European front, the disciplines were found to be offered in only five countries - England (two), Germany, Spain, Italy, and Switzerland (one each), and the prevalent theme in the courses was bioethics. Other topics, such as public health, medical liability, forensic practice, and aspects of medical innovation, are also taught to a lesser extent.



Of these nine disciplines found in Brasil, the most covered topic is bioethics. Medical liability, including the allegation, characterization, and accountability of medical error, and confidentiality issues, are addressed in only one-third of the disciplines.

Of all the nine courses offering undergraduate medical law and/or bioethical disciplines, it is of note that five (approx. 55%) are in the state of São Paulo – two of which are in the capital, meaning that the city of São Paulo concentrates approximately 22% of all undergraduate courses that offer subjects related to the theme at hand. Of the ones that were considered adequate, 2/3 are located in the state of São Paulo.

DISCUSSION

Concerning the development of students to act in the defense of medical professionals, only three courses provide adequate subsidies: the University of São Paulo School of Law – São Paulo *campus*, Federal University of Pernambuco School of Law, and São Paulo State University School of Law – Franca *campus*.

On all nine disciplines that were considered, the topic of bioethics deals with issues such as the beginning and end of life, questions on organ transplantation and fertilization treatments, all important issues that bring controversial topics to law students, all of which can be answered in various ways from the medical point of view.

On the other hand, professional liability and health law issues are addressed in only one-third of the disciplines, a worrying scenario, since this is the main theme which lawyers will come across, as well as the one that has the greatest repercussions on the personal and professional life of medical professionals.

Another much-missed point in the legal curriculum is the specific approach to judicial and administrative proceedings. Only two undergraduate disciplines provide students with insight into the specifics of judicial proceedings in medical matters, while only one of them presents the issue of the administrative procedures involved.

Thus, it is clear that the focus of the - incipient - teaching of medical law in the country is the discussion around bioethical themes, which serves more to the creation of jurists than working lawyers. In order to verify how much this profile differs - or not - from the scenario of international medical law teaching, we present these points in other western countries.

This is a worrisome scenario, as the offer of Medical Law disciplines in undergraduate courses in Brazilian institutions is very meager, hindering the formation of qualified professionals to meet a demand constantly on the rise and which deals with rather specific issues and involves individuals who deal daily with the lives of individuals.

The lawyers' responsibility in defending a doctor is inarguably high. Not only because of the seriousness of the offenses that are often involved in the matter, including manslaughter, but also because the entire career and reputation of another professional is at stake.

Thus, as noted, professionals who choose this path, being under-served in terms of academic education at the undergraduate level, need to search for specializations or even learn the subject during the unforgiving day-to-day forensic activities.

Regarding the results around this matter in the United States, one can assume the focus found may be due to the intense debate that ensued after the 2010 approval of the *Patient Care and Affordable Care Act* and the subsequent changes to the public health system with Medicare and Medicaid. In addition, these are themes that are strongly linked to the US research and development industry, which is a center of innovation in both diagnostic technologies and pharmaceutical advances.

As occurs in Brasil, disciplines of Medical Law and medical liability in cases of error, so common in the medical and legal professional practice in the United States, have little presence - approximately 14% and 10%, respectively, despite the strong litigious culture of the country.

Interestingly, there are two subjects - one at Harvard School of Law and the other at Stanford School of Law - which are open to both medical and law students, providing an extremely healthy exchange of experiences and expectations.

In the survey of the main European Universities, it can be theorized that the scenario found is due to the fact that the curriculum in such countries follows a more traditional line, with a theory-oriented formation, in countries that do not have intense debates about access to public health, nor an exacerbated litigation scenario like the United States of America.

It is interesting to note that in Germany there is an area of Medical Law that addresses civil and criminal issues, as well as public health and bioethical issues. It is an interesting option for a more complete and

focused formation and was a unique occurrence in the present survey.

There are some points in our legislation that are worth discussing when it comes to medical law since it adds to the importance of the theme as an autonomous discipline. Students and lawyers must be equipped with knowledge in various areas since there are peculiarities to the medical profession that permeate multiple sectors of the law.

In the criminal area, for example, it is relevant to note that there is the so-called “duty of guarantor” by the medical professional - pursuant to art. 13, §2º of the Criminal Code - which generates several consequences in the field of criminal authorship and culpability, especially when acts practiced by a medical team are added to the mix.

Still in the criminal sphere, there are some crimes in the Criminal Code that are called specific, that is, can only be committed by health professionals, such as the omission of notification of disease (art. 269), the illegal exercise of medicine (art. 282), the falsehood of medical certificate (art. 302), and a specific form of violation of preventative sanitary measure (sole paragraph of art. 268).

In the civil sphere, issues regarding the definition of medical liability as contractual or non-contractual, objective or subjective should be debated. Another point of extreme importance - and which was not found in any curriculum - is the determination if the obligation of professionals is based on the use of the adequate means or the final result, a distinction that has numerous repercussions in the spheres of responsibility and probative burden, for example.

In close relation to the above theme, there is a need to discuss the framing of the medical activity as the provision of services that can be protected by the Consumer Protection Code, and the various consequences stemming from this.

Still, there is room for discussion of a recent issue, which is the field of compliance and its possible application to medical professionals, being the lawyer then able to create standards of conduct that enable the prevention of errors, distribute responsibilities appropriately, and conduct investigations and evidence production in the best possible way.

Another innovative issue is the possibility of using Mediation, which may revolutionize civil forensic practice regarding the composition of damages and the reaching of agreements.

In addition to the topics mentioned, the procedural

consequences are numerous, ranging from administrative procedures (within the scope of class bodies or public administration), which have specific rules, to legal proceedings that may involve both the Special Courts (civil or criminal) as well as, eventually, proceedings before a Jury.

In addition, and to name but a few, the need to discuss public health policies at Universities, such as access to basic health and the issue of drug addiction, should not be overlooked.

This brief exposition shows that topics are varied and go far beyond the ever-present bioethical discussions, with a wide field of professional practice to be explored in the formation of lawyers, with diverse peculiarities and unique procedural developments, including the possibility of breaking new ground - such as the use of *compliance* and mediation.

What is missing, therefore, is not the possibility or breadth of activity in the field of medical law, but a less shortsighted view of undergraduate curriculums to these possibilities.

Given the above, the question that remains is: how can the scarcity of medical law disciplines and the superficiality of the curricula be solved?

Clearly, the first step should be to broaden the range of law schools that have medical law disciplines in their curricula. Also, the disciplines dealing with medical law and bioethics, especially with regards to professional liability, must be expanded.

Such basic training is relevant not only for the defense of professionals - pre-emptively or in the course of procedures - but also for enforcing the rights of patients or their families.

In addition to the dissemination of medical law teaching in the country, it is also interesting to include some topics in the curriculum, such as the relationship between patients' demands and public health policies, the rights of consumers and doctors regarding health plans, and the application of the law on medical innovation.

Another relevant point is the constant updating of curricula, with the inclusion of topics such as mediation and *compliance*, and the discussion of political and social issues.

CONCLUSION

Given the above, we suggest a brief draft of a syllabus in medical law that provides a broad background for undergraduate students.

Block 1: Bioethics

- Principles of Bioethics
- Themes on the beginning and end of life: abortion, euthanasia, dystania, assisted suicide, etc.
- Human reproduction, fertility, and sterilization
- Research in humans and animals
- Organ donation and transplantation
- Genetic and drug patenting
- Patient autonomy and freedom of treatment
- The relationship with the pharmaceutical industry and hospitals

Block 2: Medical Responsibility

- Concept of liability: civil law, criminal law, and administrative law
- Criminal liability: duty of guarantor
- Crimes specific to health professionals
- Liability: obligation of means or of outcome?
- Medical error: main causes and consequences

Block 3: Procedures - General

- Administrative Procedures: Class Organs
- Administrative Procedures: Public Sector Inquiries
- Civil proceedings: special courts and indemnity actions
- Criminal Proceedings: From Special Courts to the Jury Court
- The state interfering with medical care: do's and don'ts
- Collaboration with authorities: police inquiries and lawsuits

Block 4: Prevention and Containment of Damage

- Medical records: concept and use as a protection tool
- Compliance: Concepts and application possibilities
- Composition through mediation

Block 5: Discussion of topics of interest

- Technological advances against the principles of bioethics
- Neuroscience and culpability: definition of free will
- Issues of public health: National Health Service, epidemics, primary medicine
- Debates about legislative changes and public policy
- The society of risk: judicialization

As can be seen, the subjects to be addressed are several, requiring a curriculum space of at least two semesters. Still, Block 5 can, at the teacher's discretion, be divided into optional subjects, enriching the undergraduate curriculum and fostering debate and the generation of ideas. This can, if applied well, put the country at the forefront in teaching and applying medical law, ensuring a healthier environment for patients and health professionals.

Notes

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Author's Contribution

All authors have contributed equally

RESUMO

OBJETIVO: Apresentar um breve panorama da situação do ensino do direito médico nas faculdades de direito brasileiras, com a proposta de uma matriz curricular, se necessário.

MÉTODO: Levantamento dos currículos das Faculdades de Direito mais bem classificadas do país e das Faculdades de Direito de referência nos EUA e Europa. Análise das disciplinas oferecidas e sua relação com as reais demandas da área.

RESULTADOS: A oferta de disciplinas de direito médico no Brasil é muito escassa e concentrada em uma cidade (São Paulo). A maioria das poucas disciplinas existentes enfoca questões bioéticas, em vez de leis e ações judiciais.

CONCLUSÃO: há necessidade de reformulação do ensino do direito médico no Brasil, com inclusão de novas disciplinas e ampliação das disciplinas abordadas.

PALAVRAS-CHAVE: Legislação. Jurisprudência. Educação. Imperícia.

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