

# Civil sentencing in health care and their relation with blanket consent in rulings from the Court of Appeals of the State of São Paulo

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## INTRODUCTION

As of recently, decisions by appellate court chambers in the São Paulo Court of Appeals have been based on a special appeal judged by the Superior Court of Appeals, Special Appeal no. 1.540.580-5/DF<sup>1</sup>, 4th Panel. Presiding Justice Lázaro Guimarães, Invitee Justice of the TRF 5th Region, tried on August 2, 2018.

This seems to introduce a further concern for health care professionals who are concerned with detailed patient consent<sup>1</sup>. Even though some form of consent exists, the Justices may consider it null, through the decree of it being a generic consent, also called blanket consent<sup>2</sup>.

## OBJECTIVE

The aim of this study was to study legal cases in which there was a condemnatory decision and to verify what was common among the studied processes. In all of them, there was mention of the Special Appeal no. 1.540.580-5/DF.

## METHOD

The research was conducted in the Case Law section of the website [www.tjsp.jus.br](http://www.tjsp.jus.br), using the term blanket consent only. Therefore, the Court's search tool brought up 17 cases tried and subject to *res judicata*. The research was conducted in the second week of November 2021 by the authors themselves. As a primary requirement of inclusion, the decisions should have the express indication of the Special Appeal no. 1.540.580-5/DF. Conditions for the inclusion of the decisions in the research were as follows: (a) the consent form should be present and should be in written — cases in which there was a vocal explanation by the health professionals or lack of information were

excluded; (b) the expert evidence should be favorable to the health professionals; and (c) there should be a civil condemnation of the health professionals<sup>3</sup>.

After applying these additional inclusion filters on the 17 processes found, we analyzed 5 cases that passed the inclusive criteria.

## RESULTS

### Case 1

The plaintiff underwent a 24-h Holter monitor. When the device was removed, she noticed spots on her skin, which made her students mock her because she is a public school teacher. Expert examination ruled out malpractice in the Holter monitor. The high court Justices' decision was based on the lack of information at the time of the initial appointment since the defendant's clinic only provided a leaflet containing generic information about the use of the device. Such leaflet was deemed invalid since it did not show the plaintiff's acceptance, based on the lack of signature.

Appellate Court conviction: BRL 5,000.00 for punitive damages.

### Transcript of decision excerpt

"In this case, the defendant does not even refute that she did not present a signed document in the case records proving that the duty to provide information was required, there was no evidence of any information that should be provided to the plaintiff, whether on the possibility of formation of noticeable scars, appearance of skin spots, skin discoloration or pigmentation in the area where the electrodes are fixed, among others, hence,

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an unequivocal failure to comply with the duty to provide information (Civil Appeal no. 1014524-26.2019.8.26.0161).”

### Case 2

Plaintiff underwent a surgery for the removal of one fallopian tube. Nonetheless, during surgery, both fallopian tubes were removed. The second tube was healthy. The plaintiff has not previously consented to any intervention in the second tube. The doctor has an inexorable duty to inform. Witnesses converged on the correctness of the surgical procedure.

Appellate Court conviction: BRL 10,000.00 for punitive damages.

### Transcript of the decision’s excerpt

“What can be concluded, from all the elements compiled, is that, although correct, the procedure for removing the healthy tube was carried out without the prior and essential consent of the Plaintiff. In this case, the Plaintiff was fully aware that one of her tubes would be removed, due to a previously diagnosed ectopic pregnancy, however, she did not know that the other, healthy, would also be removed, which constitutes a violation of the duty to inform, one of the most relevant in the doctor-patient relationship (Civil Appeal no. 1017092-69.2017.8.26.0004).”

### Case 3

Plaintiff underwent plastic surgery on the eyelids and breasts for hypertrophic scars and breast asymmetry. Although the expert report indicated correctness in the surgical procedure, the judges understood that the plaintiff was not clear about the risks, dangers, and disadvantages that the procedures could cause. Two surgeries were performed with an attempt to correct the aesthetics of the breasts, but the plaintiff died from other causes unrelated to the consequences of the surgery.

Appellate Court conviction: BRL 25,000.00 for punitive damages.

### Transcript of the decision’s excerpt

“As can be seen from the medical documents attached to the case records, and in accordance with a medical expert report, the Plaintiff, on 12.16.2013, aiming at the correction of expression signs around the mouth and correction in the lower and upper eyelids, performed the surgical procedure called ‘rhytidectomy’ (pages 43 and 221 entry record; pages 223/224 medical record), in addition to being also submitted to the exchange of breast implants on 02.11.2014 (pages 43). It is undisputed, therefore, that the interventions to which the Plaintiff was submitted had a single and exclusive plastic purpose, aiming at the legitimate expectation of obtaining a

beautifying result and improving her appearance, so that the obligation assumed by the defendant plastic surgeon was characterized as an obligation of achieving a specific result. Indeed, according to the expert report produced, the facial surgery of rhytidectomy to which the Plaintiff was submitted is not risk free, as well as the complications alleged by the Plaintiff in breast surgery are likely to occur. Therefore, the lack of information by the doctor to the patient is considered to be contractually illegal, configuring the professional’s malpractice in the form of negligence (omission in the duty to inform), giving rise to compensation for punitive damages (Civil Appeal no. 0002255-87.2015.8.26.0653).”

### Case 4

Plaintiff underwent arthroplasty for placement of a total knee prosthesis. Postoperative infection caused the plaintiff’s death. The expert evidence concluded that diabetes and the plaintiff’s advanced age were complicating factors for the recovery after surgery, and due to the pathologies, they motivated the serious infection. The plaintiff passed away. Although the expert report was favorable to the doctors, the judges understood that there was a failure in the duty to provide the proper information, including the treatment of infections and partial limb amputation.

Appellate Court conviction: BRL 40,000.00 for punitive damages.

### Transcript of the decision’s excerpt

“Subsequently, he signed an ‘Informed Consent Form for Surgical Procedure’ (pages 2417), written in the following terms:

‘(...) 2) I received all the necessary information regarding the risks, benefits, treatment alternatives, as well as I was informed about the risks and benefits of not taking any therapeutic action regarding the nature of the diagnosed disease(s).

3) I understand that during exams and/or procedures: \_\_\_\_\_, in an attempt to cure or improve the aforementioned condition(s), unpredictable or fortuitous situation(s) may occur.

4) I am aware that in invasive medical procedures, such as the one mentioned above, general complications can occur, such as bleeding, infection, cardiovascular and breathing problems and others (...).

(...)

Nevertheless, despite the several therapies and treatments given to Mr. Alexandre, such as surgical debridement of the infection, removal of the prosthesis, vacuum bandage, and ‘extreme amputation at the thigh level’ on 02.22.2016 (pages 1587/2199), remained under the care of the ICU team, evolved

with several complications, dying on 03.13.2016, with ‘multiple organ failure, septic shock, soft tissue infection and renal failure’ (page 13).

Therefore, it is noted that, by the clarifications provided by the expert and by the answers given to the questions, the presence of comorbidities such as diabetes and immunological weakness, associated with the patient’s advanced age (83 years old) were factors that would have hampered the surgical evolution and motivated the infectious condition that affected Mr. Alexandre.

However, if the hospital was already fully aware of the patient’s medical history, including having undergone a preoperative clinical evaluation (pages 2454), having verified at the time the aforementioned risks mentioned here by the AACD that increase the probability of complications, the doubt whether the surgery should have been performed, as the plaintiffs pointed out.

Furthermore, it is the doctor’s obligation to clarify to his patient everything that is related to the disease and the chances of causing an unexpected effect. The diagnosis, prognosis, procedures, benefits, and adverse reactions, among other information relevant to the treatment, must be very well explained.

In this case, the clarifications contained in the ‘Informed Consent Form for Surgical Procedure’ (page 2417) were insufficient, as it describes complications similar to those that occur in other surgical procedures such as bleeding, infection, cardiovascular and respiratory problems, but the patient was not informed of the possibility of more serious complications, in the specific case of Mr. Alexandre, as he is a bearer of comorbidities, associated with advanced age, and an increased risk for postoperative infection.

For damages, the amount equivalent to BRL 40,000.00 for each of the plaintiffs is quite reasonable to make up for the damage suffered by the plaintiffs and to repress the act, without implying unjust enrichment to the recipient (Civil Appeal no. 1045020-32.2016.8.26.0100).”

## Case 5

The plaintiff underwent surgery on the female reproductive system. Diagnosis of adenomyosis and calculous cholecystopathy was performed, after which total abdominal hysterectomy surgery was indicated. The expert report concluded that there was no failure in the surgical technique.

With that, in fact, the hypothesis was that the claims for indemnity for material and moral damage based on an alleged failure to carry out the surgical procedure itself were unfounded.

Appellate Court conviction: BRL 15,000.00 for damages (expectation and punitive).

## Transcript of the decision’s excerpt

“However, the cause of action was not limited to the alleged defect in the surgical technique used to treat the Plaintiff, but also included an alleged failure in the information provided by the Defendant to the latter. In fact, in the case of a consumer relationship, the professional service provider has the duty to accurately inform the patient’s diagnosis, as well as the procedure to be performed for the treatment and related risks (art. 6th, item III, CDC).

Thus, considering the seriousness of the Defendant’s medical conduct and the extent of the damage experienced by the Plaintiff, expectation damages set at BRL 15,000.00 by the lower court judge is considered adequate, an amount that observes the principles of proportionality and reasonableness in the hypothesis, the increase intended by the Plaintiff is not justified (Civil Appeal no. 1002545-82.2017.8.26.0405).”

## DISCUSSION

In the experience of the authors in expert charges, the truly informed and prior consent given to and obtained from the patient often does not exist.

In the quantitative aspect, there are two possibilities for informing the patient and obtaining their consent – absent or present. In the qualitative aspect, although the document and the consent exist concretely, it must go through evaluation from the point of view of other logical values: generic or complete.

In the five cases evaluated by the authors, there was the production of expert evidence favorable to health professionals. In most cases in health care, expert evidence is used as sole and sufficient to judge the facts and arrive at a verdict, almost always aligned with the expert opinion.

But in these cases, despite the favorable conclusions of the expert evidence, there was no acquittal from the health professionals.

Due to the mismatch between the expert’s conclusions and the decisions, we noted a change in the *status quo* regarding the close relationship between the expert’s report and the decisions, and an added insecurity to the professionals. That is, if until then favorable expert evidence led almost inexorably to absolution, this is no longer the case.

## CONCLUSION

Although the expert evidence has not pointed out flaws in the surgical procedures, there was a civil conviction of the health care professionals. The analysis of the duty to provide clear and complete information was the responsibility of the High Court

Justices at the São Paulo Court of Appeals, who applied their interpretations on the value and the content of what would supposedly be the informed consent term. From this interpretation, they convicted the health care professionals, regardless of the conclusions of the expert reports. That is, the expert evidence was not an absolute/unique factor in the decisions of the appellate court, since in the five cases, the expert evidence pointed to the correctness of the procedures, but this did not imply an automatic acquittal of the health care professionals.

The judges of the civil courts of the São Paulo Court of Appeals ruled in accordance with the judgment of the Superior Court of Appeals, in which the foreign term blanket consent was first used; although it was not strictly noted in the decisions, its concept was certainly adopted.

A new stage in the litigations in health can be clearly seen, with the appreciation of the patient's autonomy and the duty to inform that is incumbent on professionals, no longer prevailing any conduct that, although correct from a technical point of view, fails to provide tangibility to such principles.

## AUTHORS' CONTRIBUTIONS

**FRC, AEAR, MLG:** All authors have contributed equally to this paper. Their contributions include: Conceptualization, Data curation, Formal Analysis, Funding acquisition, Investigation, Methodology, Project administration, Resources, Software, Supervision, Validation, Visualization, Writing – original draft, and Writing – review & editing.

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