dirittoesalute
Rivista di sanità e responsabilità medica

Medical and hospital liability insurance: present and future challenges from the perspective of comparative law - Brazilian and US legal systems.

di Carolina Martins Uscocovich e Miguel Kfouri Neto*

Abstract IT: Gli operatori sanitari e le istituzioni ospedaliere svolgono attività a rischio, sia morale che materiale, che possono essere perseguite in caso di errori nell'assistenza e conseguenti danni. Per tale motivo, le compagnie assicurative offrono assicurazioni di responsabilità civile, al fine di proteggere il professionista e l'ospedale, mirando a soddisfare qualsiasi condanna senza alcuna perdita per l'attività. Questo contratto genera diversi dibattiti, che attraversano i concetti fondamentali del diritto delle assicurazioni e della responsabilità civile, che si riflette nel rapporto procedurale, nelle relazioni con i consumatori e anche in campo amministrativo. Al fine di comprendere meglio l'istituto e approfondire la ricerca, è stato effettuato uno studio comparativo tra i sistemi brasiliano e americano, dove questa modalità di assicurazione ha maggiore deferenza. Per questo, analisi dottrinale brasiliana e straniera sono stati applicati, oltre all'analisi della giurisprudenza a livello nazionale.

Abstract EN: Health professionals and hospital institutions carry out risk activities, both morally and materially speaking, which can be prosecuted in case of errors in care and consequent damage. For such reason, insurance companies offer Liability Insurances, in order to protect the professional and the hospital, aiming at complying with any convictions without any loss to the activity. This contract spawns several debates, which run through the basic concepts of insurance law and civil liability, which reflects in the procedural relationship, in consumer relations and even in the administrative field. In order to better comprehend the institute and deepen the research, a comparative study was carried out between the Brazilian and the American systems, where this modality

* Master's student in Law at UFPR e Post-Doctorate in Civil Legal Sciences at the Faculty of Law of the University of Lisbon.

of insurance has greater deference. For this, Brazilian and foreign doctrinal analysis were applied, in addition to analysis of jurisprudence at national level.

Sommario: 1. Introduction. – 2. Methodological aspects. – 3. The civil liability insurance contract in the Brazilian legal system. – 3.1. Essential concepts. – 3.2 Differences between the civil liability of doctors and hospitals. – 3.3. The unified health system (SUS) as a factor to be considered. – 4. A look at tort law and the US insurance landscape. – 5. Comparative points. Concluding remarks.

1. Introduction.

Both medical professionals and hospitals inspire trust and confidence, as they are responsible for healing. However, the growing number of civil liability claims against health professionals and hospitals, not only in Brazil but around the world[1], has drawn the attention of the population, the medical community, the media and also insurance institutions, which have started to offer civil liability insurance (CRS) against possible monetary convictions in lawsuits.

Civil liability insurance has its origins in maritime law[2], appearing in the country *"with the intensification of slavery and the slave trade"*[3] which perhaps explains the antipathy that still haunts relations between insurance institutions and society, especially in view of the high amounts charged for policies.

In order to understand the institute as a contract, as well as its pricing and its effects, the study was divided into five main sections. Firstly, aspects of methodology are discussed; then a nationwide study of the institute is constructed; then, still nationwide details of this insurance are examined in relation to doctors and hospitals; next, an understanding of the contract in the US context begins. Finally, parallels and final considerations are drawn from the data obtained.

2. Methodological Aspects.

[1] M. KFOURI NETO, *Civil liability of doctors*, cit.; M. KFOURI NETO, *Civil liability of hospitals*, cit., 259.

[2] P. P. VASCONCELOS, *The applicability of directors' and officers' civil liability insurance in the context of company management*. 2013. 148 f. Dissertation (Master of Laws) - Department of Commercial Law, University of São Paulo School of Law, São Paulo, 2013, 54.

[3] C.N. KONDER, P.G. BANDEIRA, G. TEPEDINO (org.), *Fundamentals of civil law: contracts*. Rio de Janeiro: Forense, 2020, 430.

Initially, it should be noted that the choice to carry out a comparative study meant entering into the system of what is understood as Comparative Law and its own method regimes[4].

Carrying out this type of analysis for the Brazilian legal system, given that this contract still has little demand and culture here[5], aims to *"establish the common points and existing differences (...), to understand its evolution and determine the parameters for improvement and reform"*[6], in order to enrich legal debates[7].

The methodology chosen was the so-called functionalist method of comparison, whose stages consist of choosing a problem and imagining the possible solutions, then choosing the country from which the solution will be studied and what will be used to compare it, then looking for similarities, coincidences and differences and then choosing the method of comparison used to analyze it[8], the country chosen for comparison being the USA due to the notorious use of this contractual institute in medical law, as well highlighted by Brazilian doctrine[9].

The choice of the functionalist method is due to the recognition that comparing US legislation, governed by common law, with Brazilian legislation, governed by civil law, represents an obstacle per se, which needs to be overcome in order to meet the objectives of the study[10]. This is because systems are living organisms[11], that have varied political[12], historical, philosophical and principled orientations.

As an advantage over other methods, the functionalist method allows us to seek answers to the questions being studied without necessarily contrasting the same institutes[13] or institutes at the same normative level. This made it possible to

---

[4] E. ÖRUCÜ, *Methodological aspects of comparative law,* in *European Journal of Law Reform*, The Hague: Eleven International Publishing, v. VIII, n. 1, 2007, 30.

[5] E. DANTAS, *Medical law*, 4. ed., Salvador: Juspodivm, 2019, 282.

[6] F. OVÍDIO, *Aspects of comparative law,* in *Revista da Faculdade de Direito*, Universidade de São Paulo, n. 79, 161-180. Available at: https://www.revistas.usp.br/rfdusp/article/view/67009/69619. Accessed on: May 21, 2020.

[7] J.C. REITZ, *How to do comparative law*, in *The American Journal of Comparative Law*, Oxford: Oxford University Press, vol. 46, n. 4, 1998, 623.

[8] P.M.N. CURY, *Comparative law methods: development throughout the 20th century and contemporary perspectives,* in *Journal of Constitutional Studies, Hermeneutics and Theory of Law*, São Leopoldo: Unisinos, vol. 6, n. 2, 2014, 33.

[9] M. KFOURI NETO, *Civil liability of doctors*, cit.; M. KFOURI NETO, *Civil liability of hospitals*, cit., 42; E. DANTAS, *Medical law*, cit., 290.

[10] E. ÖRUCÜ, *Methodological aspects of comparative law,* cit., 32.

[11] J. DAINOW, *The civil law and the common law: some points of comparison*, in *The American Journal of Comparative Law*, Oxford: Oxford University Press, vol. 15, n. 3, 1966-1967, 2.

[12] L.G. MARINONI, *Critical approximation between civil law and common law jurisdictions and the need to respect precedents in Brazil,* in *Revista da Faculdade de Direito UFPR*, Curitiba, PR, Brazil, 2009, 12.

[13] R. MICHAELS, *The functional method of comparative law*, in *The Oxford book of comparative law*. Available at: https://scholarship.law.duke.edu/faculty_scholarship/1249. Accessed on: Nov. 20, 2019.

compare the rules that guide the CRS at a national level - such as the Civil Code and the determinations of the Private Insurance Superintendence - with the rules, guidelines and legal and economic doctrine of that other country, without falling into the trap of importing *"institutes and figures from other countries without the necessary adaptations"*[14].

It should be noted that *"civil law and common law arose in completely different political and cultural circumstances, which naturally led to the formation of different legal traditions, defined by institutes and concepts specific to each of the systems"*[15] while the North American common law disconnected itself from English doctrine, the Brazilian system established its procedural law foundations on Romanesque doctrine[16], with the biggest difference between this system and civil law being the meaning that was attributed to the codes and the role that the judge played in considering them. In the common law, the codes have never claimed to close off spaces for the judge to think; therefore, they are not concerned with having all the rules capable of resolving conflicting cases. In common law, it was never believed, or necessary to believe, that there could be a code that eliminated the possibility of the judge interpreting the law. So, if any difference can be seen between civil law and common law, it lies in the ideology underlying the idea of a code[17].

Another major difference is seen in the application of the law. In Brazil, the Codes are applied throughout the country equally[18] and systematically[19], interpreted in accordance with the Constitution of the Republic[20].

This is due to Brazilian federalism and the need to of keeping the legal order coherent was also fundamental to, first of all, giving the Constitution the position of supreme law and conductor of the unity of the law experienced by the States, and, secondly, to give authority to a judicial "form" capable of preventing the law from assuming, in the States, contents that are at odds with the Constitution[21].

---

[14] M.L.F. BÜRGER DE MACEDO, *Reimbursement of preventive or mitigating expenses: reflections from comparative law,* in *Revista IBERC*, v. 3, n. 1, April 3, 2020, 5.

[15] L.G. MARINONI, *Critical approximation between civil law and common law jurisdictions and the need to respect precedents in Brazil,* cit., 12.

[16] J. DAINOW, *The civil law and the common law: some points of comparison*, cit., 3.

[17] L.G. MARINONI, *Critical approximation between civil law and common law jurisdictions and the need to respect precedents in Brazil,* cit.

[18] G. TEPEDINO, *Constitutional civil law and its current perspectives*, in *Themes of civil law*, Rio de Janeiro: Renovar, 2009. t. III, 30.

[19] J. DAINOW, *The civil law and the common law: some points of comparison*, cit., 3.

[20] A.D.M. TERRA, A. SCHREIBER, C.N. KONDER (coord.), *Direito civil constitucional.* São Paulo: Atlas, 2016, 15.

[21] I.W. SARLET, D. MITIDIERO, L.M. MARINONI, *Constitutional law course*, 8 ed., São Paulo: Saraiva Educação, 2019, 979.

While in the USA, since the *McCarran-Fergunson Act of* 1945, states have been allowed to regulate security activities[22], based on the federalist logic that allows each Member State to have different rules, united by the American Constitution in a peculiar way, given that state constitutions assume responsibility for dealing with the full range of problems faced in the daily flow of state life, except only in those specific respects in which the federal constitution or statutes remove the states from their competence by exercising dominance or are set aside by federal law[23].

In this sense, in countries that adopt the Anglo-Saxon system, such as the United States of America, federalism grants member states greater legislative freedom, allowing different laws to coexist within the same country across distinct states[24]. Therefore, it is emphasized that it was impossible in this work to conduct a state-by-state study, and a general analysis of the institutions was preferred, using their basic concepts to compare the interpretations.

3. The Civil Liability Insurance Contract In Brazilian Law.

Insurance is a contract whereby one of the parties (the insurer) is responsible for guaranteeing the legitimate interest of the other (the insured). The institute was included in the Brazilian legal system by Decree-Law No. 73 of 1966, and was dealt with prominently in the 1916 Code *"in forty-five articles"*[25], and appears in the current Civil Code from Art. 757.

In terms of the legal nature of the contract, the doctrine understands it as a synallagmatic, onerous and consensual contract[26], formally constituted, with continuous execution and generally signed by adhesion[27] being characterized as a bilateral and joint contract (*sic*), so that *"if a claim arises, its economic consequences will be repaired by the insurer"*[28].

Each insurance contract aims to protect a specific asset, such that motor insurance protects against possible damage to the vehicle, life insurance protects against possible illness or death, and health insurance protects against the need to use private hospitals. The CRS, on the other hand, aims to guarantee a random element, which is understood to be *"inevitable, like death: (...) it refers to*

---

[22] A.M. ANDERSON, *Insurance and antitrust law: the McCarran-Ferguson Act and Beyond, in Willliam & Mary Law Review*, vol. 25, 1983. Available at: https://scholarship.law.wm.edu/wmlr/vol25/iss1/3. Accessed on: July 8, 2020, 81.

[23] H.M. HART, *The relations between State and Federal Law,* in *Columbria Law Review*, vol. 45, n. 4, JSTOR. Available at: www.jstor.org/stable/1119546. Accessed on: Aug. 28, 2020, 492.

[24] H.M. HART, *The relations between State and Federal Law,* cit., 445.

[25] A. RIZZARDO, *Contracts*. 18 ed., Rio de Janeiro: Forense, 2018.

[26] F. TARTUCE, *Civil law: general theory of contracts and contracts in kind*, 14 ed., Rio de Janeiro: Forense, 2019. v. 3, 719.

[27] A. RIZZARDO, *Contracts*, cit., 800.

[28] J.R. ALBERTON, *The innovation of Brazilian insurance*. Curitiba: JM Editora, 1998; P. ALVIM, *The insurance contract*, 3 ed., Rio de Janeiro: Forense, 2001, 16.

when and not if"[29], which is essential for determining values, whether in the premium to be paid by the insured or reimbursed by the Insurance Institution[30]. It is called a *"substitute for civil liability"*[31], and is aimed at to avoid damage to the insured's assets, allowing him to be able to honor the possible consequences of his civil liability without compromising the activity he carries out; on the other hand, aiming to guarantee that the injured third party is compensated, without the reparation being subject to the insured's financial difficulties or even his insolvency[32].

In this way, it can be said that it is an extremely important contract for the economic system, because it acts to *"cover liabilities arising from various human activities, especially professions and businesses"*[33], making it possible to *"even imagine that it will be impossible to exercise medical activity without taking out insurance"* [34] based on the growing tendency towards the judicialization of the doctor-patient relationship and allegations of error, and there is no point in thinking about ways of protecting and safeguarding the law of the consumer if there is no way for the professional to meet the obligation to pay[35].

In this sense, the adoption by the legal system of the risk theory, which made acceptance of the contract subject to risk analysis[36], means that the civil liability insurance contract has a social function, given *that "it is an act of foresight on the part of the contracting party, resulting in a benefit for the victims"*[37] in that there is certainty of compensation. In this way, the SRC carries out the precept of art. 421 of the Civil Code, through the functionalization of the social function of the contract, aiming to find *"the practical-social purpose of legal institutes"*[38].

This analysis stems from the recognition that the Insurance Institution, as a company, aims to generate profit, which is taken into account by the functional analysis of the social function and *"cannot be done in such a way as to render useless or*

---

[29] F.C. PONTES DE MIRANDA, *Treatise on private law: law of obligations, contract of carriage: partnership contract*. Updated by Bruno Miragem, in *Private Law Treatise Collection: special part* - volume 45, São Paulo: RT, 2012.

[30] A. RIZZARDO, *Contracts*, cit., 800.

[31] M.C. PIMENTA, *Civil liability insurance*, 2009, 216.

[32] E. TZIRULNIK, *The future of civil liability insurance*, in *VI Ibero-Latin American Congress of Insurance Law - CILA 2000*. Cartagena de Indias, Colombia, 2000. Available at: http://www.ibds.com.br/artigos/OFuturodoSegurodeResponsabilidadeCivil.pdf. Accessed on: July 29, 2020, 7.

[33] M.C. PIMENTA, *Civil liability insurance*, cit., 216.

[34] M.C. PIMENTA, *Civil liability insurance*, cit.

[35] O.I. PRUX, *Civil liability of the liberal professional in the Consumer Defense Code*. Belo Horizonte: Del Rey, 1998, 348.

[36] W.A. POLIDO, *General liability insurance in brazil & international aspects*. São Paulo: Insurance Technical Manuals, 1997, 45.

[37] M.C. PIMENTA, *Civil liability insurance*, cit., 216.

[38] A.D.M. TERRA, A. SCHREIBER, C.N. KONDER (coord.), *Direito civil constitucional*, cit., 100.

reduce the role that the contract fulfills"[39], based on efficient pricing that guarantees a balance between the risk assumed and the insurer's solvency in the long term[40]; and as a function provided to the insured, it must be carried out in accordance with constitutional dictates, as well as Statement no. 3701 of the CJF/STJ, *"and cannot place the insured party at an extreme disadvantage or excessive burden"*[41].

Despite the classification based on the object, each policy can differ in terms of when the insured person notifies the insurer of the occurrence of damage. In the first type, *occurance basis* - known in Brazil as *"occurrence basis",* the Superintendence of Private Insurance (SUSEP) defines insurance in which there is reimbursement of the amount paid by the insured to the third party, if determined by court order or agreement between the parties approved by the institution. The second type, *claims-made* basis, is one in which there is reimbursement if the damage occurred during the term of the policy and the insured himself claims reimbursement from the institution. In other words, the occurrence-based policy *"largely disregards the date on which the event occurred and determines the date on which the injured third party is aware of the claim as the trigger condition for the coverage mechanism",* while the claims-made basis policy *"is based on the date on which the event occurred"*.

It covers claims made during the term of the policy, provided that the acts and facts (the occurrences) originated during the 'coverage period.' [...] The regulation subsequently establishes a complementary period for third-party claims, and, if an additional premium is paid, a supplementary period immediately following the complementary period.

This differentiation is important for doctors' and hospitals' insurance, with medical professionals being more likely to take out *claims-made* CRS, as *"this category is subject to what is known as latent risk, i.e. a considerable period of time can elapse between the act/omission of the insured and the actual occurrence of damage to the third party"*[42], with the possibility of extending the terms by the so-called complementary and supplementary term guaranteeing more distant protection; whereas in *occurrence basis* policies, the insured is only covered for the period during which the contract persists - or is presented according to the limitation periods.

3.1. Essential Concepts.

---

[39] H. THEODORO JÚNIOR, *The contract and its social function*. 4. ed. Rio de Janeiro: Forense, 2014, 123.

[40] J.A. RODRIGUES, *Actuarial risk management*. São Paulo: Saraiva, 2008, 323.

[41] M. REINA, *Health insurance contract: the abusiveness of denying cover for a surgical procedure, in Jusbrasil*, 2015. Available at: https://marianareina.jusbrasil.com.br/artigos/151861491/contrato-healthinsuranceabusiveness-in-denial-of-coverage-of-surgical-procedure.

[42] R.B. SANTOS, *Civil liability insurance and the theory of loss of a chance,* in *Revista Jurídica de Seguros*, Rio de Janeiro: CNseg, n. 4, 2016, p. 56.

In order to make it possible to understand the subject, it is worth paying attention to the terms specific to the insurance area, given the specificity of the nomenclature and the importance of each concept for the purposes of understanding the ideal contract and understanding the debate. For this reason, attention will now be paid to the definition of the terms risk, legitimate interest of the insured and premium.

First of all, the importance of the element of risk for the subject is clear. Could it simply be understood as the probability of the harmful event (or claim) occurring? Doctrine teaches that it cannot, since it is a concept used by insurers to define *"various meanings"*[43], such as the object of the insurance, the harmful event, the potential to cause damage, the insurance branch, or even the possibility of loss to the insured's assets[44] requiring a subjective interpretation by the person using the word in order to fully understand its meaning[45].

After all, it is *"against which the insured is insured"*[46] and it is the reason for contracting[47], and is therefore the component on which the interest of the insured to be protected is based and on which the amount to be charged to the contracting party is calculated, in an approximate way, based on the *"relationship between the number of cases (chances) verified and the number of possible chances"*[48], *"with uncertainty as its central element"*[49].

Once the contractual relationship has been set up, the question arises as to what is the asset that can be protected, known as the legitimate interest of the insured, which, according to the best doctrine, especially with regard to the CRS, is the risk of having to bear his assets in the event of a conviction for damages[50].

The idea *of "interest expresses not only a relationship of utility with a good, but also the intention of preserving and maintaining that same relationship"*[51].

In this way, it is not possible to speak of the contract being unlawful, as the doctrine used to think, which would result in full nullity due to the apparent protection of the unlawful act[52], which is not true, given that the end of the

---

[43] J.M.B. MARTINS, L.D.S. MARTINS, *Reinsurance: technical and legal foundations*, Rio de Janeiro, Forense, 2008, 32.

[44] J.M.B. MARTINS, L.D.S. MARTINS, *op. cit.*, 33.

[45] J.M.B. MARTINS, L.D.S. MARTINS, *op. cit.*, 32.

[46] O. GOMES, E. BRITO, R.P. BRITO, *Contracts*. 27. ed. Rio de Janeiro: Forense, 2019, 425.

[47] F. TARTUCE, *Civil law: general theory of contracts and contracts in kind*, 720.

[48] P. ALVIM, *The insurance contract*, 3 ed., Rio de Janeiro, Forense, 2001, 60.

[49] J.M.B. MARTINS, L.D.S. MARTINS, *op. cit.*, 32.

[50] F.C. PONTES DE MIRANDA, *Treatise on private law: law of obligations, contract of carriage: partnership contract*, cit., 114.

[51] M.C.B. OLIVEIRA, *Insurable interest*. 150 fl. Dissertation (Master's in Civil Law) - Faculty of Law, University of São Paulo USP, São Paulo, 2011, 19.

[52] W.A. POLIDO, *General liability insurance in brazil & international aspects*, cit., 45.

contract consists of the transfer of the *"patrimonial consequences (compensation for the damage caused)"*[53].

Next, it is necessary to comment on the concept of premium. This is understood as the amount paid in exchange for the possibility of having a large uncertain loss covered[54]. Paid by the insured to the insurer in order to *"transfer the risk provided for in the Contractual Conditions" "the former [insured] pays the latter [insurer] a periodic and determined contribution (...), in exchange for the risk that the latter assumes to indemnify"*[55], highlighting the random factor which means that the benefit is linked to a future and uncertain event assumed by the insurer, the risk[56]. It is important to note that late payment *"may result in the suspension or even cancellation of the insurance, jeopardizing the right to compensation"*[57].

3.2. Differences between the civil liability of doctors and hospitals.

Despite being semantically similar terms, Physician Liability and Hospital Liability have different connotations and affect the patient in different ways[58].

In order to understand the core of these differentiations, we begin by analyzing them from the point of view of the medical professional, starting with the concept of medical error, which is essential to the discussion. For Rui Stoco *"(...) professional error, that is, that which results from the uncertainty or perfection of the art and not from the negligence or incapacity of the person practicing it, unless it is a gross error"*[59].

It is a wrongful act for which compensation can be paid if it results in damage either because the correct treatment was not administered and the true ailment was not addressed, the situation worsened; or if, due to the diagnosis, the individual underwent ineffective or harmful treatment, it will then be necessary to investigate whether, under the circumstances, a correct and precise opinion could be demanded from them[60].

Professor Miguel Kfouri Neto states that the interpretation that medical activity generates risks leads the magistrate to ignore the assessment of medical guilt,

---

[53] M.C. PIMENTA, *Civil liability insurance*. 2009. 216 f. Dissertation (Master of Laws) - Department of Social Relations Law (Civil Law), Pontifical Catholic University of São Paulo. São Paulo, 2009, 113.

[54] J.M.B. MARTINS, *Insurance law*: *civil liability of insurers - doctrine, legislation and case law,* 4. ed. *Kindle Edition*: Amazon, 2018,

[55] A. RIZZARDO, *Contracts*, cit., 800.

[56] O.M. GOULART JÚNIOR, *The civil liability insurance contract and the reimbursement theory from the perspective of the new contractual principles*. 2006. 143 f. Dissertation (Master of Laws) - Private Law. Belo Horizonte, 2006, 24.

[57] Brazil Ministry of Finance, *SUSEP - Superintendence of Private Insurance. Presentation*. Available at: https://www.gov.br/susep/pt-br/assuntos/meu-futuro-seguro/seguros-previdencia-e-capitalizacao/ seguros/apresentacao. Accessed on: July 24, 2020.

[58] F.P. BRAGA NETTO, *New manual of civil liability*. Salvador: Juspodivm, 2019, 720.

[59] R. STOCO, *Responsabilidade civil e sua interpretação jurisdicional*: *doutrina e jurisprudência*, 44, ed. São Paulo: RT, 1999, 291.

[60] R. STOCO, *Responsabilidade civil e sua interpretação jurisdicional*, cit., 293.

based on a shallow reading of the sole paragraph of art. 927, because *"firstly, there is no law that imposes on the doctor the duty to repair the damage regardless of guilt; secondly, because medical activity (...) represents, more often than not, the hope of a cure"*[61], without, therefore, considering it in conjunction with art. 186 of the Code.

However, a correct understanding of the Code is not enough to guarantee peace of mind for medical professionals. The legal profession argues that it is necessary to choose a specific CRS to cover damages *"arising from the professional faults"* of the contractor and his employees, in order to cover errors and omissions[62]. Thus, the doctor protected by a CRS is shielded by a set of benefits (...), ranging from legal assistance in lawsuits that might be brought before the criminal, civil and administrative courts, and even contributing to the pecuniary settlement of damages in compensation cases, from a borrower's fund built up universally and compulsorily[63].

Part of the doctrine even states that *"taking out civil liability insurance is often a necessary tool for doctors to be able to work peacefully, especially if they are surgeons"*[64].

As for the hospital institution, there are differentiations when it has an employment relationship with the hospital and when it only uses the structure to care for its private patients. This is reflected in the amount charged for CRS insurance policies, due to the level of responsibility of the professional, objective when they are a service provider for the hospital and subjective when they are independent[65] because *"if the patient contracts with the hospital, and the hospital maintains a contractual relationship with the doctor, the traditional binary relationship (doctor-patient) becomes tertiary (doctor-legal person-patient)"*[66], with repercussions for consumer law, given that: *"If the doctor has an employment relationship with the hospital and is part of its medical team, the health center, as a service provider, is objectively liable, under the terms of art. 14, caput, of the Consumer Protection Code, once fault has been proven of that. However, if the professional only uses the hospital to admit their private patients, they are exclusively responsible for their mistakes, and the establishment's liability is excluded"*[67].

Therefore, it is not surprising that there are specificities in hospital CRSs, which must cover damage to contracted doctors, medical service providers, nurses, technicians, physiotherapists and other professionals, as well as possible problems with materials used, various contaminations and others, due to the

---

[61] M. KFOURI NETO, *Civil liability of hospitals*, cit., 119.

[62] W.A. POLIDO, *General liability insurance in brazil & international aspects*, cit., 334.

[63] G.V. FRANÇA, *Medical law*, 15, ed. Rio de Janeiro: Forense, 2019, 293.

[64] E. LIPPMAN, *Handbook of doctors' rights*. 2. ed. *Kindle Edition*. Campo Belo: Segmento Farma, 2018.

[65] C.R. GONÇALVES, *Brazilian civil law*: *civil liability,* 14, ed. São Paulo: Saraiva, 2019, 281.

[66] B. FUGA, A.F.D.R. J.L. TRINDADE, *Civil liability of hospitals: analysis of service provision. Jus.com.* Available at: https://jus.com.br/artigos/44047/ responsabilidade-civil-dos-hospitais-analise-sobre-a-prestacao-de-servico. Accessed on: August 20, 2019.

[67] C.R. GONÇALVES, *Brazilian civil law*: *civil liability,* cit., 281.

"wide variety of activities that go beyond the exclusively medical sphere, and which must be set out (and therefore covered) in the policy as clearly as possible"[68].

It is advisable for professionals to take out *claims-made basis* liability insurance, as *"this category is subject to what is known as latent risk, i.e. a considerable period of time can elapse between the act/omission of the insured and the actual occurrence of damage to the third party"*[69].

The CRS for doctors and hospitals, in particular, has a number of positive points: it is a better way of settling damages, it improves freedom and safety at work, it frees doctors and patients from lengthy lawsuits, it does not depend on the economic situation of the person causing the damage, among others[70]. In this logic, it is the role of insurance: *"minimize the stress level of the health professional, as they will have the backing of the insurance company's indemnity guarantee, ensuring the safety of the assets of the person responsible for the damage and making it more certain that the victims or their beneficiaries will be compensated"*[71]. Which makes the choice of adequate protection paramount[72].

Hospital insurance should cover damage to contracted doctors, medical service providers, nurses, technicians, physiotherapists and other professionals, as well as any problems with materials used, various contaminations, which for Dantas, makes hospital liability insurance more specific[73].

Of course, the relationship between the patient, doctor and hospital is special and *"if the patient contracts with the hospital, and the hospital maintains a contractual relationship with the doctor, the traditional binary relationship (doctor-patient) becomes tertiary (doctor-legal person-patient)"*[74]. Thus, the relationship between these subjects needs to be carefully assessed to give rise to an action, to which some scholars respond by arguing that *"the correct interpretation of the legislation is that the Hospital will be objectively liable, without the need for the patient to demonstrate the Hospital's fault, when the fault of the doctors is proven",* so that it should be jointly and severally liable *"for the damage caused, regardless of whether the Hospital, as a legal entity, has practiced culpable acts"*[75].

By this logic, the doctrine identifies three possibilities of liability: i) in typical hospital cases, in which the hospital provides specific hospital services, such as accommodation, nutrition, nursing and clinical examinations, where liability is objective; ii) in services provided by doctors who are not employed by or

---

[68] E. DANTAS, *Medical law*, 4, ed. Salvador: Juspodivm, 2019, 295.
[69] R.B. SANTOS, *Civil liability insurance and the theory of loss of a chance,* cit., 56.
[70] G.V. FRANÇA, *Medical law*, 15, ed. Rio de Janeiro: Forense, 2019, 378.
[71] R.B. SANTOS, *Civil liability insurance and the theory of loss of a chance,* cit., 56.
[72] E. DANTAS, *Medical law*, cit., 287.
[73] E. DANTAS, *op. cit.*, 295.
[74] B. FUGA, A.F.D.R. J.L. TRINDADE, *Civil liability of hospitals: analysis of service provision*, cit., 2019.
[75] J.P.B.D.A MARANHÃO, *Brief considerations on the civil liability of hospitals. Migalhas de Peso.* Available at: https://www.migalhas.com.br/dePeso/16,MI166490, 91041-Breves+consideracoes+sobre+a+responsabilidade+civil+dos+hospitais. Accessed on: August 20, 2019.

employed by the hospital, such as when, for example, the patient takes his trusted plastic surgeon to operate on him at hospital X, the hospital will not be liable for the professional's actions, provided that the institution is not at fault, and will only bear the cost of the surgery to the extent that it is at fault[76]; iii) doctors with employment ties to the hospital, in which the author points out the doctrinal discrepancies of the time, which pondered the issue of corporate hierarchy and labor subordination, a situation in which the doctor will act as an agent of the institution, with regressive action being possible, and making a reservation for doctors who are press executors and clinic owners, who are responsible for third party facts[77].

3.3. The unified health system (SUS) as a factor to be considered.

The doctrine states that *"there is no way to study this topic without considering the SUS",* since it is inconceivable to ignore the powerful role played by public health in Brazilian health. This allows for the realization of the Right to Health as a constitutionally protected right, which is fundamental and linked to the Right to Life and the Right to Human Dignity[78].

As such, the Unified Health System is the country's main healthcare provider[79], with private entities serving to complement the system, as Justice Nancy Andrighi decided: *"7. The complementary participation of the private sector in the execution of health actions and services is formalized under a contract or agreement with the public administration (sole paragraph of art. 24 of Law no. 8.080/1990), under the terms of Law no. 8.666/1990 (art. 5 of Ordinance no. 2.657/2016 of the Ministry of Health), using as a reference, for the purpose of remuneration, the SUS Table of Procedures (§ 6 of art. 3 of Ordinance No. 2,657/2016 of the Ministry of Health). (8) When provided directly by the State, within the scope of its hospitals or health centers, or when delegated to private initiative, by agreement or contract with the Public Administration, to provide it at the expense of the SUS, the health service constitutes a social public service. (9) The complementary participation of the private sector - whether by legal entities or by the respective professionals - in the execution of health activities is characterized as an indivisible and universal public service (uti universi), which therefore excludes the application of the rules of the CDC. 10 - A case in which art. 1-C of Law no. 9.494/97 applies, according to which the right to obtain compensation for*

[76] J.A.C. GUIMARÃES, *Medical-hospital liability in the face of consumer law*, 888.

[77] R. STOCO, *Civil liability of hospitals, sanatoriums, clinics, houses of health and the like, in light of the Consumer Defense Code*, in N. NERY JR. R.M.D.A. NERY, *Fundamental right to health*, São Paulo: RT, 2010, 816.

[78] I.W. SARLET, D. MITIDIERO, L.M. MARINONI, *Constitutional law course*, cit., 234.

[79] I.W. SARLET, M.F. FIGUEIREDO, *Some considerations on the fundamental right to health protection and promotion after 20 years of the 1988 Federal Constitution*. Available at: https://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaSaude/anexo/O_direito_a_saude_nos_20_anos_da_CF_coletanea_ TAnia_10_04_09.pdf. Accessed on: May 28, 2020.

damage caused by agents of legal entities governed by private law that provide public services shall be time-barred in five years"[80].

Thus, acting to *"contribute to the reduction, maintenance or deepening of social problems"*[81].

In this way, understanding the panorama drawn up by the form of transfer of financial resources and influence on accountability, as well as removing the incidence of the CDC, maintains the character of administrative accountability rules: *"Ab initio, it should be pointed out that in the context of Public Law, according to Article 37, § 6 of the Constitution of the Republic, "legal entities governed by public law and private law that provide public services shall be liable for damages caused by their agents in this capacity to third parties, ensuring the right of recourse against the responsible party in cases of intent or fault". The normative content of the constitutional text encompasses the subjective responsibility of the state, a hypothesis that gives rise to the state's duty to compensate the victim for the injuries caused to them, even if there is no characterization of fault, an element that makes up the institute of civil liability under private law. Thus, once the damage and the causal link arising from the action or non-action of the public agent have been demonstrated, the duty to compensate arises, and there is no need to ask about the qualification of the conduct, whether culpable or intentional, since it is sufficient that there has been a harmful action or omission"*[82].

It is worth noting that, as a rule, the right to sue lies with the municipal administration, in accordance with the dictates of Law No. 8.080/90 and art. 198 of the Federal Constitution, especially when it comes to basic care: "*Law No. 8.080/90 also stipulates that the public health actions and services and the private contracted or contracted services that make up the SUS will be developed in accordance with the guidelines set out in Article 198 of the Federal Constitution of 1988, obeying, among other things, the principle of political and administrative decentralization, with "emphasis on the decentralization of services to the municipalities (art. 7, IX, a). In this regulatory context, if the municipalities are responsible for carrying out health actions and services, as well as overseeing their provision by the private sector, the Federal Union has no civil liability for the care provided at the Hospital (...). The following excerpt from the ministerial opinion should be noted: "(...) according to the document on page 35, the municipality of (...) has full management of basic care, which, according to NOB-SUS 01/96, the municipality qualified in this condition is responsible for managing the SUS in its territory. It is responsible for contracting, controlling, auditing and paying the service providers included in the PAB - Piso Assistencial Básico (Basic Assistance Floor) - which consists of an amount of financial resources intended to cover the cost of basic assistance actions, transferred regularly and automatically to the health fund or special account of the municipalities. By delegating a typical state activity to private entities, in order to complement the Unified Health System, the government is directly and jointly liable in the event of medical error when the service is provided*

---

[80] Taken from the Judgement of the Court of Justice- REsp 1.771.169/SC.

[81] F.P. PÜSCHEL, *Civil liability and public policies: a reflection on the role of the dogmatic jurist*, in A.M.F. DUARTE, N. ROSENVALD, C.E.P. RUZYK, (coord.) *Novas fronteiras da responsabilidade civil [recurso eletrônico]*: direito comparado, Indaiatuba: Foco, 2020, 235.

[82] Civil Appeal No. 0018753- 91.2014.8.07.0018, 4.

on the premises of institutions that have signed agreements with the SUS. In this case, the theory of strict liability, set out in art. 37, § 6, of the Federal Constitution, applies, since the doctor is acting in the provision of a public health service. However, in order to establish this liability, it is necessary to have an administrative fact, damage and a causal link. In this case, there is no way of detecting a causal link between the damage and any commissive or omissive conduct on the part of the Federal Government, since the signing of contracts and agreements with entities providing private health services, as well as the function of supervising and controlling these procedures, are the responsibility of the municipal management of the SUS, in accordance with art. 18 of Law no. 8.080/90".

That said, the effects on the CRS, mainly economic, are few. Unless the agent is at fault[83]. there will be no direct liability for the professional or hospital, which should not lead to an increase in the premium charged to those who provide public services in the belief that the risk has increased.

This understanding is corroborated by STF Theme No. 940[84], which limits the personal liability of the state agent, which ultimately prevents the private doctor or hospital that provides services to SUS[85] from being considered legitimate to appear, as a general rule, in any lawsuit: *"in relation to the thesis of violation of art. 130, III, of the CPC and the respective claim to call the doctor who attended the patient at the hospital to the proceedings, the Court of origin concluded that the doctor's liability should only be determined in any regressive way, stating that, in verbis: "the lawsuit was filed against the Hospital (...), and its cause of action is damages arising from the provision of medical services in a private hospital, through the SUS. In cases where medical care is provided by the SUS, it is necessarily necessary to adopt the regime provided for in art. 37, § 6, of the Republican Constitution, which provides for the objective civil liability of the state (lato sensu) and public service providers for damages that their agents may cause to third parties" (e-STJ, fl. 195). The appellant's claim to sue the doctor who attended the patient is based on the allegation that the aggravating party only provided hotel and accommodation services, and that the medical professional was responsible for all the care provided, which is not stated in the judgment under appeal. Once again, recognizing the validity of these allegations regarding the factual situation underlying the case in question undeniably requires revisiting the facts of the case, which is forbidden in a special appeal, under the terms of Precedent No. 7 of the STJ (...).) In the case under examination, it can be seen that there was not the necessary ana- lytical comparison of the cases confronted, both in relation to the passive legitimacy of the hospital and*

---

[83] M.S.Z. DI PIETRO, *Administrative law*. 32. ed. Rio de Janeiro, Forense, 2019, 775.

[84] "*Theme No. 940. Subjective civil liability of the public agent for damages caused to third parties, in the exercise of public activity. Thesis - According to the provisions of art. 37, § 6, of the Federal Constitution, the action for damages caused by a public agent must be filed against the State or the legal entity under private law providing a public service, with the author of the act being an illegitimate party to the action, ensuring the right of recourse against the responsible party in cases of intent or fault".*

[85] It is not up to the discussion, however, to delve into questions such as minimum standards of quality and promptness of public services (I.W. SARLET, D. MITIDIERO, L.M. MARINONI, *Constitutional law course*, cit., 659).

in relation to the doctor's right to sue, due to the lack of factual similarity between the case at hand - provision of medical services by SUS in a private hospital - and those of the appeals cited as paradigms by the aggravating party, in which the liability of hospitals for services provided by private health plan doctors was discussed, which makes it impossible to know the alleged divergence in case law" (taken from the Judgment - REsp 1.827.299/MS)[86].
Thus, the illegitimacy of the health professional for personal accountability as a state agent is reiterated, whether they are working in public hospitals or in private institutions that provide SUS services, with the possibility of responding in a regressive action proposed by the State if negligence is proven.

4. A look at *tort law* and the US insurance landscape.

In the United States, the presence of civil liability insurance is of unparalleled importance for the circulation of capital, with more than 2,000 insurance institutions in 2019[87], which constitute the largest insurance companies in the world. These include *"the broader service industry, which includes banks, brokerages, loan funds, credit unions, trusts, pension funds and other similar organizations"*[88].
There, the contract is defined as a contract in which the insurer undertakes to do something to the insured in the event of the occurrence of an foreseen situation[89], it can be classified as *non-life insurance of* the *liability* or *malpractice* type depending on the insured[90] - the former referring to contracts dedicated to the owners of the medical company or the hospital and the latter to the health professional himself who is facing lawsuits that discuss fault[91]. Thus, the hospital may not be held liable for damage caused by one of its medical professionals, depending on the contract signed between them and the patient's awareness of this relationship[92].

---

[86] Here, the intervention of the medical professional in the case took place via a call to the proceedings, since in this case the doctor is understood to be a co-debtor and could have been on the side of the claim from the outset, while the denouncement of the claim presupposes the possibility of a return action that will be avoided by the application of the institute, which is not the case according to recent STF rulings, despite the doctrine understanding that, according to constitutional precepts, it should be carried out via the denouncement of the claim.

[87] A.M. BEST, *Bests guide to understanding the insurance industry,* in *Oldwick: create space independent publishing platform*, 2019, 16.

[88] A.M. BEST, *Bests guide to understanding the insurance industry,* cit., 7.

[89] *"A contract whereby one party (the insurer) undertakes to do something of value for the other party (the insured) in the event of some specific contingency; esp. an agreement whereby one party assumes the risk against payment of a premium by the other party"* (GARNER, 1999, p. 802).

[90] A.M. BEST, *Bests guide to understanding the insurance industry,* cit., 21.

[91] B.A. GARNER et al., *Black's law dictionary*. 7. ed. St. Paul: West Group, 1999, 806.

[92] Robenalt Law, *Examples of hospital negligence. Lawyers that fight for you.* Available at: https://www. lawyersthatfightforyou.com/examples-of-hospital-negligence/. Accessed on: Aug. 19, 2019.

It is valid to consider that the North American legal system does not attribute a social function to the institute, but the considerations made about the insurance contract make it possible to understand that there is a justification for signing the contract, mainly for the protection of the patient. Whether through effective compensation for damages or administrative measures at the state level, by guaranteeing compensation for damages suffered, *"insurance institutions that sell liability insurance have been and continue to be at the forefront of efforts to promote patient safety"*[93], not only to *"increase patient safety"*[94], not only to *"increase their internal operations and profitability, but because these efforts also support the patient safety movement in the medical field"*[95] using *"a variety of techniques to encourage healthcare providers to take the necessary steps"*[96], with six forms of patient safety care: *"(1) Insurers identify providers of inferior quality, so as to open up opportunities for other institutions to operate. (2) Insurers incentivize providers by the amount of premiums they charge, based on risk and refusing to insure high-risk providers. (3) Insurers store data to analyze the reasons for problems. (4) Insurers conduct damage prevention inspections at partner facilities. (5) Insurers educate servers about legal issues and measures that can be taken to manage risk. (6) Finally, insurers provide financial and human capital to patient safety organizations"*[97].

In addition, there are other alternatives to ensure patient service and safety in the country, such as *liability caps*[98] - limits on compensation for each state - and databases transformed into care and safety protocols[99].

When it comes to calculating the value of premiums, the degree of risk of the insured[100], as well as the tendency for professionals to flee due to the high costs of doing business[101], justify the possibility of selling shares and quotas on the stock exchange in order to increase the provision of funds.

---

[93] T. BAKER, C. SILVER, *How liability insurers protect patients and improve safety*, in *Faculty scholarship at penn law*, Philadelphia: Faculty Scholarship at Penn Law, 2019. 212. Available at: https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2996&context=faculty_scholarship. Accessed on: July 22, 2020.

[94] T. BAKER, C. SILVER, *How liability insurers protect patients and improve safety*, 212.

[95] T. BAKER, C. SILVER, *ivi*.

[96] *Ibidem*.

[97] *Ibidem*.

[98] B.A. GARNER, et al., *Black's law dictionary*,7, ed. St. Paul: West Group, 1999, 199.

[99] T. BAKER, C. SILVER, *How liability insurers protect patients and improve safety*, cit., 237.

[100] T. BAKER, C. SILVER, *How liability insurers protect patients and improve safety*, cit., 211.

[101] J.R. GUARDADO, *Policy research perspectives - medical professional liability insurance premiums: an overview of the market from 2009 to 2018. AMA - American Medical Association*. Available at: https://www.ama-assn.org/system/files/2019-01/policy-research-liability-premiums.pdf. Accessed on: 05 May 2020,

All of this culminates in normative restrictions imposed by the U.S. government[102], at both the federal and, primarily, state levels[103], including audits of corporate accounts *"once every five years"*[104].

It is also convenient to make an incursion into the treatment of civil liability in the United States, referred to in this Order as tort law[105]. Intrinsically linked to the concept of trespass[106] which was developed through the understanding of property rights, and which today encompasses all repairable damage[107] maintaining the influence on the way of viewing this damage from an economic analysis[108].

Thus, there are three categories of reparable damages - nominal, compensatory and punitive damages[109], which depend on proof of proximate cause for compensation[110]. Thus, the law of torts can be categorized into three categories: intentional torts6 , negligence7 and strict liability8[111], while the analysis of liability is based on the reasonable person standard[112]. Thus, the standards of medical care are understood in such a way that a professional who acts *"without observing the duty of care"* is negligent[113].

Thus, court decisions, mainly based on the *jury system* and the broad discretionary power of the magistrate[114], *"generally determine liability for damages in two stages. First, it will decide whether the defendant acted inappropriately and caused the damage suffered by*

---

[102] A.M. BEST, *Bests guide to understanding the insurance industry,* cit., 55.

[103] P. ROGAN et al., *United States,* in *The insurance and reinsurance law review*. 3. ed. Derbyshire: Encom- pass Print Solutions, 2015, 439.

[104] P. ROGAN et al., *United States,* in *The insurance and reinsurance law review*, cit., 442.

[105] A. HOVHANNISYAN, *Tort law: guide to assist in torts research. USC Gould School of Law*. Available at: https://lawlibguides.usc.edu/c.php?g=687841. Accessed on: November 1, 2020.

[106] *Trespass to the person, land and goods lecture*. Available at: https://www.lawteacher.net/modules/tort-law/trespass/lecture.php?vref=1. Accessed on: September 1, 2020.

[107] C.O. GREGORY, *Trespass to negligence to absolute liability. Virginia Law Review*, Charlottesville, v. 37, n. 3, p. 359-397, 1951. JSTOR. Available at: https://www.jstor.org/stable/1069096. Accessed on: September 1, 2020, 362.

[108] H.E. SMITH, *Modularity and morality in the law of torts* in *Journal of Tort Law*, Berkeley, Berkeley Electronic Press, v. 4, Issue 2, Article 5, 2011. Available at: http://nrs.harvard.edu/urn-3:HUL.InstRepos: 8789603. Accessed on: May 19, 2020, 29.

[109] J.A. HANDERSON JR., F.B. INGERSOLL, D.A. KYSAR, *The torts process*, 9 ed., Aspen Casebook Series. New York: Wolters Kluwer, 2017. N.P. Google Books. Available at: https://books.google.com.br/books/about/The_Torts_Process.html?id=ahffDgAAQBAJ&redir_esc=y. Accessed on: May 15, 2020.

[110] P. TESAURO, G. RECCHIA, *Origins and evolution of the torts model*, in *La responsabilià civile nei sistemi* di *Common Law - Quaderni di diritto comparato*, Padua, CEDAM, 1989, v. 1, 152.

[111] J.A. HANDERSON JR., F.B. INGERSOLL, D.A. KYSAR, *The torts process*, cit.

[112] M.A. FRANKLIN, W.J. CARDI, M.D. GREEN, *Gilbert law studies* – torts, 25, ed. St. Paul: Gilbert, 2017, 64.

[113] W.A. POLIDO, *General liability insurance in brazil & international aspects*, cit., 96.

[114] W.A. POLIDO, *op. cit.*, 95.

the plaintiff. If it decides in the affirmative, it proceeds to the second stage and decides on the amount of damages to be compensated" [115].

These analyses are most often based on the so-called *Hand Rule*, created and named after Judge Hand, who foreshadows: *"By ignoring the effect of an injurer's precaution on its own risk, American common law systematically fails to accurately analyze the problem of joint risks (...). In his words, the Hand Rule is not limited by other risks. It can encompass the plaintiff's risks to himself. Thus, the Hand Rule can be given an economic interpretation that encompasses social risks. Judges since the Hand Rule, however, have systematically ignored the injurer's risk to himself in applying the rule. Instead, judges (and scholars) systematically define "negligence" in terms of creating unreasonable risks for others"*[116].

This rule guides the interpretation of the torts regarding physical and emotional damages, leading to cost-benefit analysis, considering *"negligent if not taking precautions, by taking precautions incurs lower costs than the expected damages that would have been reduced by those precautions"* [117]. In this logic, when it is *"interpreted in such a way as to incorporate the cost-benefit assessment for precautions: due care is met if the defendant adopts all precautions that are less costly than the accidents they prevent, discounted by the probability of occurrence"*[118] so that *"the duty of care is met if the defendant adopts all precautions that are less costly than the accidents they prevent, discounted by the probability of occurrence"*[119]so that *"the damage is only compensable if the precautionary costs were less than the probability of the damage multiplied by the damage (...) Otherwise, it would be an inefficient civil liability that overshadows freedom and private initiative"*[120].

There are two other theories worth considering and which are used for accountability purposes. The *deep pocket theory* deals with joint and several liability, in which the logic of financial power justifies solidarity and *"without there being a strong concern for the degree of culpability of the person involved"*[121] since *"however insignificant their participation in the production of the damage, they may be liable for full compensation, especially when there is no other means of effectively holding another person liable"*[122]. The *drop-down* theory, which is widely used in insurance cases, means that *"American jurisprudence ends up disregarding even some contractual forms of*

---

[115] R.D. COOTER, A. PORAT, *Getting incentives right: improving torts, contracts and restitution. E-book*. Princeton: Princeton University Press, 2014, 12

[116] R.D. COOTER, A. PORAT, *op. cit.*, 35.

[117] R.D. COOTER, A. PORAT, *ivi*, 34.

[118] H.E. SMITH, *Modularity and morality in the law of torts* in *Journal of Tort Law*, cit., 18.

[119] H.E. SMITH, *ivi.*

[120] A. BONNA, *Unanswered questions in the dogma of civil liability in Brazil: a philosophical look,* in A.M.F. DUARTE, E.P.N. ROSENVALD, C.E.P. RUZYK, (coord.). *Novas fronteiras da responsabilidade civil* [recurso eletrônico]: direito comparado. Indaiatuba: Foco, 2020, 56.

[121] W.A. POLIDO, *General liability insurance in brazil & international aspects*, cit., 56.

[122] W.A. POLIDO, *op. cit.*, 101.

insurance"[123] with a smaller scope of protection *"in order to attribute liability to a higher layer (...) in the event of the insolvency of the [lower] layer"*[124].
However, it would be inappropriate to delve more deeply into the complex US legal system, given the aim of demonstrating how doctrinal issues relating to medical and hospital liability and the insurance system work in practice in the country, in order to make the comparison below.

5. Comparative points. Concluding remarks.
Finally, the peculiarities studied will now be placed side by side, materializing the comparison through the functionalist method already justifiably chosen, in order to compare the solutions found in each legal system - and not always the same institutes - for the same issues.
As a background, civil liability was necessary to understand the institutes in each legal system, since, if there is a need to insure something - in the case of civil liability, the property of the insured - there is the possibility that they will eventually have to compensate someone. In Brazil, liability in the civil sphere is generally based on fault, and is therefore subjective, and exceptionally objective; however, when thinking about the reality of public health, the debate had to be lateralized, thinking about the specific characteristics of administrative liability and the treatment of decentralized objective liability between entities, in accordance with legal and constitutional rules.
In the US, liability arises in the context of tort law and carries with it strong economic traits, expressed in theories of liability that go beyond contractual or legal guidelines, seeking to assign liability in a way that effectively guarantees payment, as demonstrated by the deep pocket and drop-down theories, as well as the logic of the hand rule.
The concepts of insurance in both legal systems are very close. While the US refers to a contract whereby one of the parties undertakes to do something *"of value for the other party*" by paying the premium, the Brazilian legal system refers to a contract whereby one party *"undertakes to guarantee, by receiving a certain amount (...) the legitimate interest of a person (insured)"*.
In terms of typology, there were also a number of similarities. The fact that it is a bilateral contract that manages risk can be seen in both jurisdictions. The same was seen with regard to the treatment given to each type of insurance: while in Brazil there is talk of damage, liability and personal insurance, in that country there are life insurances and non-life insurances, divided into property and casualty.
The treatment given to risk in both countries has proved to be of particular importance, due to the complexity of the insurance system and the socio-economic repercussions, especially in Brazil, of the contract. In the US, the

[123] W.A. POLIDO, *op. cit.*, 102.
[124] W.A. POLIDO, *ivi.*

economic tendency to view legal relationships, as we have seen, means that the treatment is entirely focused on the production of assets and liabilities.
It was also noted that in both Brazil and the US, the liability of a doctor is treated differently from that of a hospital. Both in Brazil and in the US, the administrative and labor relations between professionals and hospitals were taken into account, which affect the extent of liability for a fact.
The regulation of insurance and its market has had surprising specificities highlighted. In Brazil, the SUSEP (Superintendence of Private Insurance) is the higher body and is regulated by the CNSP (National Council of Private Insurance). In the United States, attributions are divided between the federal government and the states, based on the McCarran-Act.
Finally, the issue of the social function of the contract, which appears in the Brazilian legal system with enormous importance, at first seemed to have no correspondence in the US context. However, the US system has a cross-cutting idea of social function, given its concern for patient safety, as well as the high level of regulation of the insurance market, in order to protect its citizens' right to health.
Even with its diverse and peculiar rules, the circumstances of treatment in the North American insurance market make it possible to appreciate the possible consequences of a market that is more open to the institute, with insurance often being necessary in order to hire a medical professional.
After analyzing the data collected and the doctrinal debates, one cannot help but wonder about the future of medical and hospital liability insurance in the country.
The proposal that arises - and that justified the construction of this work - is to look at insurance in the United States today and project its reality into the national context, using a comparison methodology and checking whether they face problems similar to those in Brazil and how they solve them, in order to eventually discover different ways of resolving issues that arise for our insurance law.The analysis of the information collected, especially after it was put side by side, showed many more similarities than differences between the treatments, even though Brazil has the Unified Health System, which has no equivalent in the US, and there is a gulf between the legal systems of the two countries.
What has been shown to unite these ordinances can be summarized in three points: a) the view of liability; b) the emphasis on risk; and c) the differences between the treatment of insurance available to doctors and hospitals, since in these categories it can be seen that there is a common rationale between these two ordinances.
From everything that can be seen, the Brazilian legal system has the opportunity to debate these measures (such as the role of the insurer in overseeing the reduction of claims, state regulation of health and insurers, as well as the

advantages and disadvantages of limiting indemnities), observing the mistakes and successes of these solutions already adopted by the US system and, perhaps, conforming to the precepts and particularities, principles and distinctive objectives of the national system, taking advantage of the opportunity to improve the industry in the country.

ISSN 2532-1862