One of the topics that has gradually gained space and importance in the medical and legal milieu is the debate about the institution of civil responsibility insurance to cover damages caused by professional malpractice, also known as medical malpractice insurance.

This subject is not new, and not all that innovative. For quite a while now, it has been possible, in Brazil, for doctors and hospitals to take out specific insurance policies to cover civil responsibility.

There is no need to discuss how these policies work, since they present no significant differences from similar products already available on the market. Anyone familiar with the general terms of insurance can understand, with no difficulty, the structure and purpose of these policies.

The basic premise on which this type of insurance is based is minimizing – or socializing – individual risk, through the expansion of a base of simultaneous contributors to a common fund destined to payment of eventual compensations related to contractually pre-defined events.

Using this formula – which involves complex actuarial and financial mathematics calculations, in order to allow not only the sustainability of the product, but also profit for the insurers – it would be possible to avoid that an individual’s assets be partially or totally threatened by an unpredictable, unavoidable condemnatory event as a consequence of a professional error, a mistake which could endanger an entire life’s savings.

The gamble – based on probability studies – is that not all, or very few, of the contributors to the security fund will suffer lawsuits that lead to payments simultaneously, allowing the sum of the joint contributions to provide the financial means to deal with the indemnities.

The demand for these policies, however, has never been high, making it possible to suppose that this occurs because of a cultural aspect, that is, that the medical class does not imagine that a lawsuit is a near, palpable, or threatening reality.

These insurance policies are not the automatic solution to every evil. They expressly exclude coverage for esthetic damage, the use of experimental techniques or unauthorized medication, forbidden interventions, damage from breaches of confidentiality, and radiological and chemotherapy treatments, among others.

Contracting insurance has also caused little interest for economic reasons. The great majority of health professionals does not practice their professional activity in a liberal way, that is, in their own clinics and private offices. To the contrary, they are salaried, on call, or associated to health plans and cooperatives. There would be, in these cases, no way to pass on their costs by aggregating it to the price of services rendered.
It is important to remember that there is great variation in the amount paid out for awards, depending on which activity the doctor practices. This is justified by the greater or lesser risks assumed by practitioners of the various medical specialties.

To make insurance economically viable, an equation would have to be found that would make it obligatory. If not mandatory, only those groups of professionals that have been, historically, most in demand – obstetricians, gynecologists, anesthesiologists, and plastic surgeons – would tend to hire the product, making it more expensive exactly for being unable to count on a wide base of lower risk contributors.

There is no point in considering the hypothesis of another source of defraying the costs than the professionals themselves. The precarious – to put it lightly – conditions of the national public health system expel, more and more, those fortunate ones who can (or must) opt for the private health system. In this area – as in so many others – the Brazilian government does not honor its most basic obligations, much less any accessory ones.

In general terms, we understand that more disadvantages than advantages are brought by the adoption of malpractice insurance, for the reasons which will be expounded on further on in this text.

We must point out, however, that some authors – Genival Veloso de França and Miguel Kfouri Neto included – list, in various parts of their work, the advantages of medical malpractice insurance. In short, these would be:

- Improved modality of damage liquidation;
- Improved freedom and safety at work;
- Guarantee of social balance and public order;
- Improved form of social justice;
- Improved form of providence itself;
- Freedom, for doctor and patient, from long, drawn-out lawsuits;
- Avoidance of exploitation, bankruptcy, injustice, and iniquity;
- Independence of the economic situation of the party which caused the damage;
- Correction of the lowering of victim’s assets;
- Contribution to the system’s surplus in damage prevention programs;
- Stimulation of social solidarity;
- There are faults, but it still presents the greatest number of benefits and advantages;
- Corrects the fact that the patient is completely forgotten and the doctor falsely remembered.

These are arguments that – independent of the qualifications and intellectual importance of their defenders – do not convince us. The adoption of the insurance policy does not solve the problem. It only minimizes the consequences – maybe. It is not possible to apply to

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1 “Uno de los elementos de la individualización del riesgo está señalado por la designación de la profesión. La indicación de la profesión es esencial al contrato, pues cada actividad posee sus riesgos específicos y es ella la que exhibe la naturaleza y frecuencia de verificación de siniestros. Y sobre esa base – entre otros elementos - se establece la tarifa”. Represas, Felix A. Trigo. In El seguro contra la responsabilidad civil profesional del médico, p 54.
our society the “North American solution”, given that conditions between the two systems are totally different.

Policies of this nature would cover — theoretically — judicial expenses, including certain types of damage payments, in a previously defined amount, and provide lawyers to accompany suits moved against the insured party.

The mere existence of a policy would not eliminate judicial demands. Firstly because, to the patient who feels wronged in some way, it is of no interest whether the doctor has risk coverage or not: depending on the case, he will file a complaint with the regional medical board, and will judicially sue the professional, in either a penal or civil suit, in an attempt to get the reparations he feels he has a right to. Secondly, because it is also reasonable to believe that, despite a civil responsibility policy (or even exactly because of one), the insurance company will not promptly dole out the payment until there is a judicial decision condemning the doctor for his fault in the error in question.

Therefore, the medical professional will still be subject to the damaging effects of a sentence, with its loss of professional prestige and negative publicity, even if the economic effects of a condemnation are minimized by the policy, within its previously fixed limits and conditions.

However, once we admit the possibility (or the option) of contracting these policies, some precautions need to be taken concerning issues of a practical matter.

In this type of insurance, it is common to find policies that cover different types of responsibility, such as patronal (the doctor’s employees), exploitation (coverage for installations and equipment), or for products (v.g., medication). Such precision is more important for clinics or hospital institutions, in which there is a wide variety of activities that go beyond the exclusively medical scope, which should be spelled out (and, therefore, covered) in the policy as clearly as possible, to avoid rejection of the loss by the insurance company at a time of need, a situation which, unfortunately, is all too common.

The civil responsibility policy may or may not cover the behavior of the doctor’s auxiliaries and collaborators, but it is in the doctor’s best interests that there be no exclusions and that the policy give explicit coverage to all his or her employees and auxiliaries, to avoid contingent events not covered by the insurance.

The insured risk can cover contractual, as well as extracontractual, responsibility, and it is more convenient, professionally and economically, that the insurance cover both types of risk.

The contract can be made individually as well as collectively, but in either situation, it is necessary to insist that the policy be sufficiently clear and cover the largest number possible of occurrences.

Total or partial coverage will depend primarily on the conditions of the policy, that is, on the content of the contract, considering that there is no specific legal standard for insurance coverage.
Thus we are reminded once again of the necessity of the policy holder to carefully examine the clauses and conditions of the policy, especially those that represent coverage exclusion. As obvious as this recommendation might seem, a consultation with a specialized professional is recommended, in the same way that one should consult a doctor before using any kind of medication.

The delimitation of the risks and the scope of the coverage and guarantees, in as exact a way as possible, is a prime issue in drawing up the insurance, in which particular conditions and peculiar circumstances can be laid out as desired by the policy holder. Exactly because most of these contracts are considered of the adhesion modality, these precautions and observations are of crucial importance.

One must remember that indemnity payments will be made up to the limit contained in the contract. The insurance company will limit itself to what is contained in the policy – seeking always to excuse itself from any type of payment.

Experience in countries that have more advanced practices with this type of insurance demonstrates that the non-litigious solution is uncommon. French Professor Guy Nicolas, who teaches cardiology and legal medicine at the University of Nantes, in his book *La responsabilité médicale*², leaves no doubt about this:

“Em dehors des procédures d’ordre judiciaire, indiquons que la victime peut essayer d’obtenir une indemnité en s’adressant directement à la compagnie d’assurances qui assure le médecin, dans le cadre d’un règlement amiable. Si la responsabilité du médecin est reconnue, la transaction directe peut parfaitement se dérouler et la victime se voit alors proposer une indemnité de dédomagement. Ce mode de résolution des contentieux en matière médicale n’est pas exceptionnel, il a l’avantage d’être plus rapide, et la compagnie d’assurances Le Sou Medical, qui assure un grand nombre de médecins, estime, à la lumière de son expérience, que 16% des affaires sont ainsi réglées. De plus, la démarche ne prive pas la victime de ses droits, puisqu’en cas d’échec la voie judiciaire lui reste ouverte.”

Another important topic is the delimitation between the indemnity amount insured per loss and that limited annually. It is possible for there to be a limitation on events that produce multiple injuries, simultaneously or not, for example, in the case of a blood bank that supplies contaminated material to various patients, infecting them all from a single badly analyzed or inadequately stored sample.

For clinics and hospitals, insurance figures as a reasonable economic palliative, but for private doctors, autonomous or salaried, the situation seems different.

Among the greatest disadvantages we were able to identify about the hiring of professional responsibility insurance are the following:

As a consequence of the dissemination of the use of malpractice insurance, we may see an increase in the incidence of judicial litigation and, consequently, of convictions of doctors, using the argument that, in fact, the party that pays compensation is not the professional,

² p. 16
but an insurance company. To ignore this possibility is to underestimate the creative capacity of certain magistrates.

At the other end of the spectrum, the so-called “malpractice industry” could also be stimulated by the increase in complaints, and by the greater ease in obtaining payments up to the insured limits. We must not forget that around 20% (twenty per cent) of the awards paid by insurance companies are, in general, results of fraud. There are no indications that, in this case, the situation would be any different.

On the other hand, the doctor can never exempt himself from eventual penal responsibility as a result of his actions or omissions in the practice of his profession. This responsibility is personal and cannot be transferred, and therefore cannot be covered by any type of insurance.  

The same can be said in relation to the ethical responsibility of the professional. There is no way to avoid – via insurance – a doctor from being submitted to judgment of his or her conduct from the regional medical councils, the organs responsible for guaranteeing that the category’s rules of conduct are followed. Representations and complaints can be made to the Medical Council, which will carry out its own investigation, which can result in a simple censure or, in the most serious cases, revoking of the professional license. In this corporative instance, the directly affected sphere is not one’s wealth, so that the insurance does not have the wherewithal to minimize the damage suffered.

Another item not covered by the medical responsibility insurance policies are the jury awards for moral damages. Brazil’s Federal Constitution authorizes the accumulation of indemnity for material and moral damages that are a result of the same fact. A little over a decade ago, the requests for condemnation for moral damages began to grow exponentially. It is rare to have a lawsuit in which a request of this kind is not made. At times, the convictions from these charges are greater than the indemnity for material damages. Without coverage for these cases, the policies become useless pieces of paper, an extra expense for the convicted professional.

As mentioned before, the financing method of this type of insurance would also have the collateral effect of raising the cost of medical services, since the cost of insurance would have to be passed on to the final consumer – the patient, user of health care services which already tend to be expensive or inadequate.

Paradoxically, the insurance could also be responsible for an increase in cases of medical error. Contracting an insurance policy may give the doctor a false sense of security, an idea of asset’s protection stimulated by the apparent protections sold along with the idea of the insurance itself. This sensation, which is inherent to the product, might stimulate negligence, since the pressure to avoid error – theoretically – is smaller. Imagine a doctor who holds down various jobs in order to survive, and that happens to have a stressful series of work shifts.

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3 “Queda fuera de garantía la responsabilidad penal, dado su carácter estrictamente personal y por ende intransferible, prevista por una norma esencialmente pública y por tanto invulnerable por un negocio privado, así como también la disciplinaria o administrativa.” Represas, Felix A. Trigo. Op. Cit. p. 52.
This professional is, obviously, more subject to making mistakes – in his condition of human being and, therefore, fallible – as a result of a natural loss of reflexes and physical exhaustion. If he has insurance, he will feel more certain that he is under no risk, or that these risks are minimal.

In a comparison that is nothing out of the ordinary, the situation just described is similar to the case of truck drivers who are submitted to long, uninterrupted work shifts at the steering wheel, trying to meet their deadlines in as little time as possible, who make use of medication and/or drugs to stay awake on the road. As a rule, the accidents registered are more frequent and fatal.

Accepting the premises above as true would be the same as believing that car theft insurance should lower the incidence of this kind of crime, or that life insurance should guarantee eternal life. Insurance cannot be treated as a solution; it is only palliative. Its general adoption can even lead to the occurrence of more cases, as spelled out above.

It is hard to believe that the “doctor-patient relationship” would be reinforced by insurance. In the grand majority of situations, people go to a private doctor (we will not, in this case, consider the hypothesis of a doctor working in the public health system) because: a) he/she is well known; b) he/she has an agreement with a given health insurance plan; c) he/she is referred by people close to the patient, and/or d) he/she is inexpensive. In exceptional cases, the doctor’s specialization in a given area may be taken into consideration. In none of these cases is it plausible to suppose that the patient’s first question will be if the doctor has medical professional risk insurance or not, much less for this condition to be essential to continue treatment.

The argument that, due to a natural selectivity in how insurance is contracted, it would separate the good professionals from the bad is also fallacious. It is well known that the interest of insurance companies is to increase their client base, not restrict its field of action. The most that could happen is for the product to cost more for these “bad” professionals, to cover the risk – which would certainly simply be added to the amount charged from the patient, the final consumer of health care services.

Holding an insurance policy would not represent a “seal of professional quality”. On the contrary, it could even demonstrate the doctor’s eventual insecurity, because he would be taking a defensive stance.

Note that the correct and desirable position would be to seek to eliminate punishable medical error, and not palliative measures to avoid bankruptcy of infracting doctors who eventually come to answer for their actions or omissions. We distinguish here punishable medical error – the type due to omission, malpractice, negligence, or imprudence – from human error, which is due to the fallible condition of human beings themselves that, despite all effort and hard work, are subject to external factors and to the non-mathematical nature of medicine itself. The latter type of error is unpredictable, not to mention inevitable. The former, though, can and should be avoided, either through better qualification, or better work conditions, or better professional awareness, etc. It doesn’t matter how, but there is no justification for punishable medical error. Believing that an insurance policy is a guarantee of reparation for the error is to abstract from reality the range of human relations involved in a medical act.
A more practical, useful measure would be the maintenance, on the part of medical associations and workers’ unions, together with the regional medical councils, of juridical defense teams made up of specialized lawyers, equally able to offer preventive orientation as well as defense in lawsuits, whether civil or penal.

It is not hard to conclude – after this brief panorama provided by specialists on the subject – that professional responsibility insurance cannot, alone, be responsible for solving the grave problem of medical error. It is a palliative measure – and no more. The effective solution to the problem at hand depends on broadening the discussion. A number of conditions – economic, instrumental, and juridical – need to be created and to work together, without which one can only prescribe an analgesic, forgetting to fight the true cause of the infection.

BIBLIOGRAPHY


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