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NEGATIVE EXTERNALITIES AND RIGHT TO COMPENSATION FOR OBJECTIVE CIVIL LIABILITY AS A CONSEQUENCE OF COVID-19 IN LATIN AMERICAN HOSPITALS

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Abstract: The purpose of the study was to reveal a knowledge of the implications assumed by the States in the face of the lack of health policies in Latin America, which become Externalities and Civil Liability, resulting from poor management of COVID-19.

MATERIALS AND METHODS:A situational narrative review of qualitative design made it possible to categorize and estimate the references of the open structured and in-depth interviews. For information processing, the Atlas ti9 computer program was used. Analytical Induction and Abduction were used as methods.

Analysis: As a technique, the Documentary Analysis was used, as well as the triangulation of interviews applied to experts, which allowed us to know the importance of the regulations that require the State as a guarantor to protect the life and health of people, as an applicator of measures to manage the actions of prevention, control, diagnosis and treatment of COVID-19.

Results: The triangulation of the documentary analysis made it possible to synthesize all the information found in the review of documents, authors, and case studies.

Conclusion: The conclusions of the study rescue the praiseworthy medical work in times of health emergency, the ethical obligations of health centers towards patients, matters of civil medical liability in the legal context, the principles of responsibility, claims for damages that violate the human right to health, as well as government responsibility for the management of COVID-19 in Latin America.

Keywords: Negative Externalities; Objective Civil Liability; Management; Pandemic; COVID-19.

INTRODUCTION

On January 30, 2020, the World Health Organization (WHO) declared that the new coronavirus constituted a public health emergency of international importance. On March 11, 2020, declared the new disease as a "pandemic" [1,3,15], as it is a highly contagious virus that is transmitted by direct, indirect, or narrow contact via drops of different sizes of respiratory origin ("respiratory droplets" and "aerosols") produced by an infected person. When you cough, sneeze, speak or sing; it has caused its rapid spread in many regions of the world [21]; especially in those whose public health policies were deficient.

In this sense, COVID-19 surprised Latin America with a lack of notorious health policies for years, generating externalities and civil liability to the detriment of patients and users who have come to hospitals to treat this disease. In this sense, the profound social gaps in Latin America have been impeded because they constitute a cross-cutting problem where precarious access to drinking water and sanitation, food insecurity, situations of environmental contamination, homelessness, the usual informality labor, the socio-economic impact, and difficulty in adopting basic prevention measures against pandemics are risk factors [17] for which the compensatory regulations are deficient. This situation is not unrelated to the 13 challenges that threaten health on the planet for the new decade published by the WHO, where the deep concern of lack of investment in resources and health priorities in basic health systems is exposed [19].

Latin American regulations regarding the right to health mention that all people have the right to receive timely care in any health facility as soon as their life is in a state of danger [20]. However, overwhelming regulatory non-compliance is perceived, especially when, in the face of the health crisis and the potential danger to patients' lives, all hospital entities have to receive them to seek the improvement of their health, as part of constitutional rights related to the human person. In this sense, and as the Colombian doctrine indicates, the obligation of security in civil liability for malpractice occurs while the patient is receiving medical care; It also specifies that if it were a complication in operation due to lack of equipment or that they are in a defective state, then that damage would be related to the contractual obligation of safety that falls on the doctor, healthcare establishment and the State [16]. There will also be a breach of the safety obligation if the damage occurs while the patient is in the doctor's hands. From this, it is possible to deduce the obligation of safety in hospital matters. Indeed, hospitals have an obligation to ensure the health of the patient. In this sense, the security obligation is more clearly presented when the institution provides deficient services. In any case, if there is an omission of functions on the part of the medical staff or any act of negligence that accrues ex-post to what was not done, the burden of blame will always be on the State for not guaranteeing sufficient support or having implemented policies clear in the health sector.

Countries such as Peru, Chile, Bolivia, and Educator, aligned with the Inter-American Court of Human Rights, a judicial body that issued a Declaration entitled COVID-19 and Human Rights: Problems and challenges must be approached from a Human Rights perspective and respecting international obligations [16]; political decisions were made to stop the pandemic. However, the transmission was progressively increasing. Unfortunately, it was not possible to foresee that COVID-19 could collapse the hospital capacity of primary and intensive care in Latin America.

However, COVID-19 has put the health systems in Latin America to the test and the area's economies. Related to this, the Eleventh Final and Transitory Provision of the Peruvian Constitution, consistent with article 2.1 of the United Nations Covenant on Economic, Social and Cultural Rights, specifies that the States undertake to adopt measures up to the maximum of resources that have to progressively achieve the full effectiveness of the rights recognized in the Covenant, including the right to health [11]. In the same way, this pandemic has brought out the best of the continent's health and social assistance workforce, confirming the international covenants of civil and Political Rights (ICCPR) and Economic, social, and Cultural Rights (ICESCR) have been decisive. However, the emergency has served the Latin American rulers as justification for adopting measures beyond the scope of their respective

competencies, transgressing the constitutional framework. In this way, improvisation is appreciated that materializes the state's inability to elucidate and apply the legal instruments available for times of health emergency.

The main problematic manifestations that motivated the development of this research found support in the lack of attention by hospital staff to people who come with symptoms or patients with COVID-19. Denial of admission to hospitals with the excuse that there is no oxygen and that isolated people already have their oxygen reserve, which should return to their hospital of origin so that they can be treated, in addition to a series of negligence that generates even though the relatives tried with great effort to provide them with oxygen and medications due to the pre-existing shortage, the patient was not adequately cared for, the States' disregard for health centers, and the lack of assignment of medical personnel. Additionally, the mismanagement of the pandemic, together with social gaps; latent in most Latin American countries, causing the filing of numerous claims against the administration for damages derived from the adoption of different measures or their absence.

These claims also show the deficit in existing investments in health due to the general mismanagement of the pandemic, where many patients, to date, continue without timely help in the face of this devastating disease. Likewise, people with COVID-19 risk not seeing their human rights ensured, particularly in life and health, through the adequate provision of health or medical facilities, goods, and services. This generates responsibility for direct and collateral damages to the extent that these claims are filed against health personnel, who usually carry out their work in completely unprotected conditions.

To advance the possible answers that the courts will give to possible lawsuits, the study carried out a legal approach in Latin America regarding claims for damages suffered in cases related to the right to health as a human right, which has become a fundamental right since they are made explicit in Latin American constitutional laws and international treaties, just as the IACHR adopts Resolution 4/20 that establishes Inter-American Guidelines on the "Human Rights of people with COVID-19" [13]. The purpose of this article was to reveal a global knowledge of the implications assumed by States in the face of the lack of health policies in Latin America, which become Externalities and Civil Liability as a consequence of poor management of COVID-19; contextualized from an exhaustive review of the specialized literature that allowed access to up-to-date knowledge.

Ethical Statement

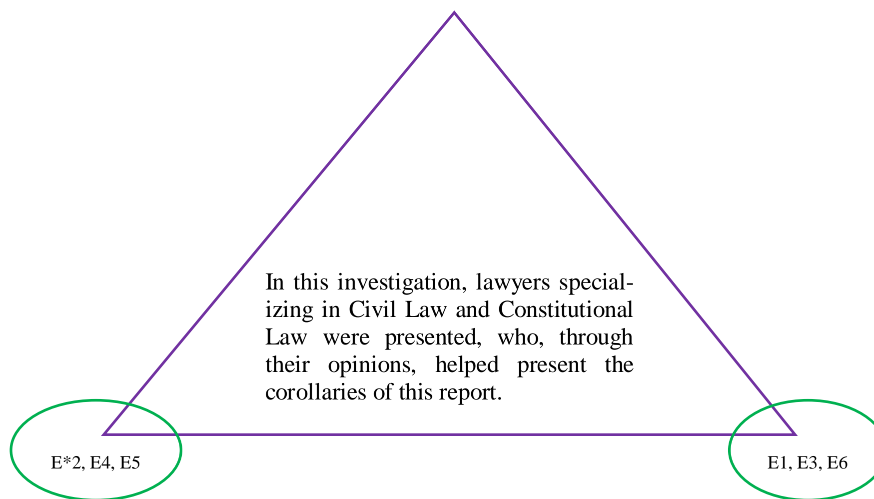
METHODOLOGY

The present research is a situational narrative review that responds to a qualitative design that categorizes and estimates the references of the structured and in-depth open interviews through instruments [8]. As methods, he used Analytical Induction and Abduction while trying to verify theories and propositions from qualitative research from the emergence of phenomena in the search to get answers from the study through data analysis and reviews of social phenomena [12]. Documentary Analysis was used; in this way, it was possible to discern the essential knowledge collected in the current legal frameworks and the scientific production published in

high-impact international databases. Also, data triangulation was used, which allowed us to contrast the collected data to have a more holistic view of the problem under study. For its part, the triangulation of interviews applied to experts on the subject allowed us to know the importance of pointing out the existence of regulations that specify the state as guarantor, the obligation to protect the life and health of people, the mandatory measures to ensure that the prevention, control, diagnosis and treatment of COVID-19 continue. At the same time, the triangulation of documentary analysis made it possible to converge and synthesize the results obtained after the review of the documentary analysis, the review of the authors' analysis, and the observation of cases. The Atlas.ti 9 computer program was used for the information processing, which made it possible to establish the natural hermeneutical relationships of the qualitative research process [2].

RESULTS

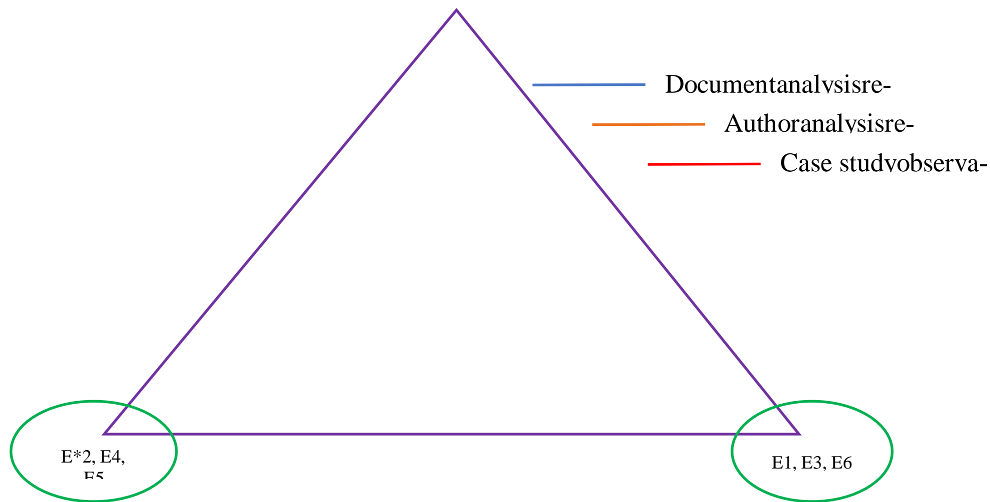
Figure 1. Triangulation of expert interviews



Note: * Experts interviewed

Figure 1 shows that, from the application of interviews with experts on the subject, it is concluded that the Latin American States have been aware of all those deficiencies that have occurred in the face of the deficient management of the pandemic. Therefore, they must assume objective responsibility in direct proportion to the patients harmed in this crisis.

Figure 2. Triangulation of documentary analysis



Note: * Experts interviewed

Figure 2 shows that, from the documentary analysis, exegesis, and hermeneutics, it is concluded that articulation and sufficient convergences have not been structured, as the criteria for normative interpretation and health policies are still poorly coordinated with communication deficiencies. These circumstances diminish the identification of damages caused by strict liability.

Figure 3. Articulationlevels

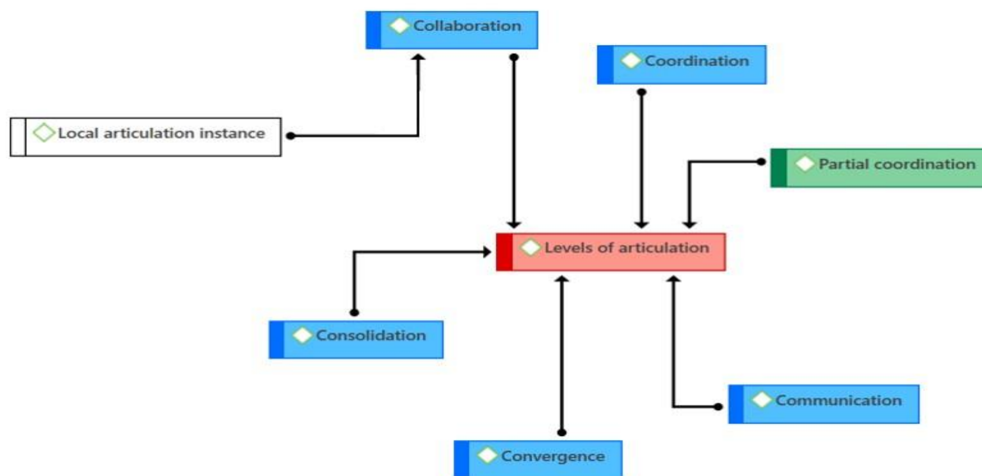


Figure 3 shows that, concerning the levels of articulation, the normative interpretation criteria and health policies are consolidated and converge with many shortcomings, communication with patients turns out to be minimal, maintaining collaboration and partial communication with control entities such as your health, the Patient Ombudsman in hospital centers, the

Ombudsman, the Medical College. Circumstances discourage the identification of damages due to strict liability caused in hospital centers due to lack of conclusive evidence. Theprovensituationsince:

1. Data of the health centers - MIDIS, interconnected with the registry of identification of damages by objective responsibility.
2. An incipient initiative of the Ministries of Health "learn healthy" without a structured baseline.

Articulation levels

Figure 4. Limiting factors of institutional articulation

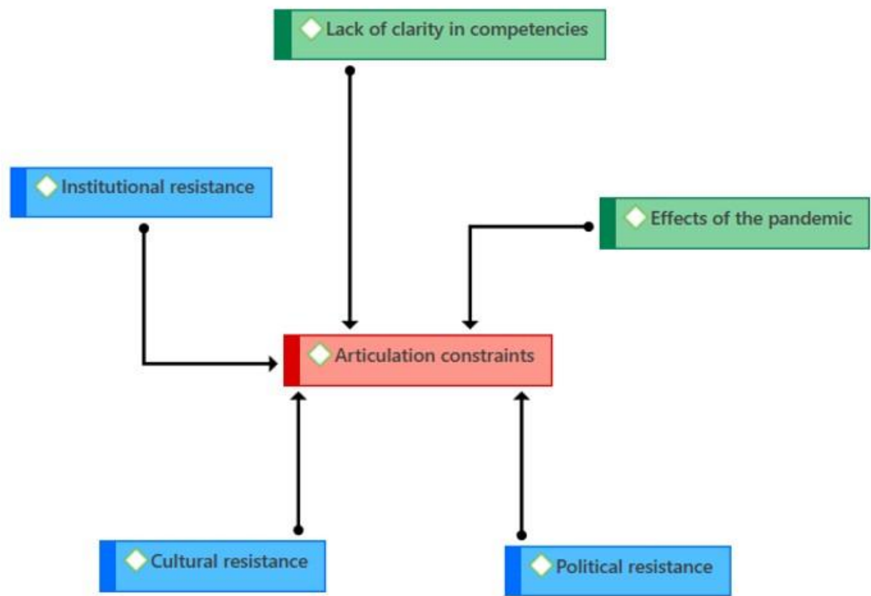


Figure 4 shows that there is a tenuous convergence of traceability in the line of synergies based on-field actions and monitoring towards the resources of basic health provision, but not the treatment or the impact of the externalities that have arisen, since the identification evidence and strategies are not the most appropriate and are easily denied; all kinds of strategies in the identification of Negative Externalities and subsequently the Objective Civil Liability generated in hospitals, due to poor management of the pandemic, are frustrated. Public sector collaboration is incipient or poorly coordinated, requiring greater articulation in state, regional, and local institutions without a structured baseline.

Limiting factors of institutional articulation

Figure 5. Sankey diagram in the studied phenomenological categorization of figure 3

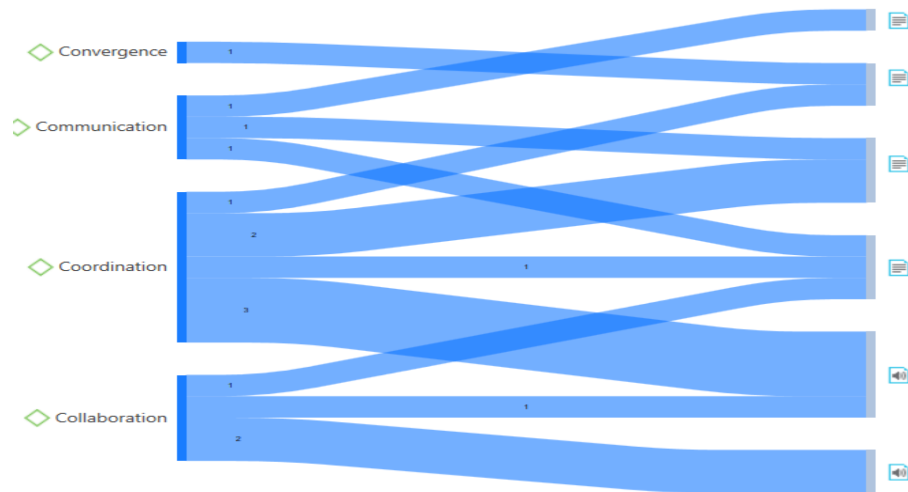
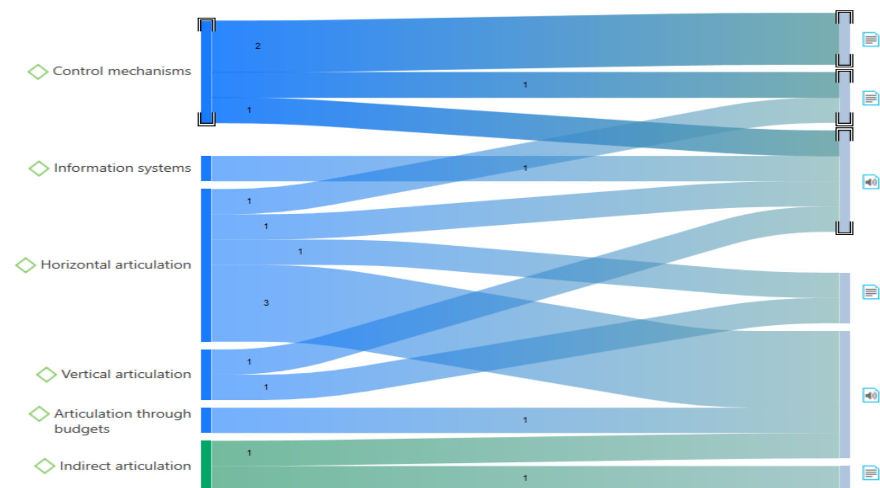


Figure 5 shows apparent limiting factors of institutional articulation from the information systems and control mechanisms due to irregularities and lack of strategies. There is no transparency or mechanisms to improve the identification of harm to patients caused by health personnel, nor are there hospital security policies to better develop health professionals who have been forced to do so on multiple occasions. Develop their health emergency work in completely unprotected conditions.

Limiting factors of institutional articulation

Figure 6. Sankey diagram in the studied phenomenological categorization of figure 4.



The vertical articulation is incipient in the context of civil liability regimes. Reading from the budgets, the principles of fault liability would prevent medical providers from being convicted

of facts or circumstances that could not have been foreseen or avoided according to the state of knowledge of science. However, a marked trend in Latin American legislation, especially in Argentina, indicates that strict liability for risk should be applied.

From an indirect articulation, a polarized debate was identified about whether doctors should receive immunity against civil and criminal negligence lawsuits and regulatory procedures arising from the treatment provided during COVID-19, which remains to be defined under its special regulations.

The purpose of the horizontal articulation tends to the "duty of care" from a systemic legal perspective at the Latin American level and a holistic perspective because of the high probability of criminal and civil proceedings related to errors committed by health professionals and policyholders—decision-making during the pandemic.

DISCUSSION

Construct 1 - Concerning the assessment of criteria warned by the States through their respective Health entities, against Externalities and Civil Liability generated in the offence of patients and users in hospitals due to poor management of COVID-19, Marked deficiencies of the public institutional sectors are reflected according to the Sankey diagram used to face this pandemic and according to the geographical scope of the research covered by this article, regarding the information from the international observatory called initiatives and SAIs in the face of COVID-19 with results of interest to the States.

It was determined that the States are the guarantors of protecting the people's health in general. This situation presents a deficiency due to a lack of investment and could lead to civil medical liability [18]. Areas, where there is no quick fix, tend to include the need to reform the clinical negligence system concerning regulatory procedures and the possibility that doctors and patients are disproportionately affected in both areas.

Along with the health crisis, notorious institutional and authority corruption acts are interspersed with devastating consequences for the public administration [9]. Corruption undermines credibility and obstructs the fulfillment of objectives; this hinders equal access to essential goods and services and affects, mainly, the life, health, and other essential rights of citizens, preferably in vulnerable situations.

Construct 2 - Regarding data triangulation, patient-centered morality needs to be weighed with ethical principles formulated from a public health perspective, including social utility, social justice, and equity, among others [7]. There is a lack of decision-making based on the principle of distributive justice to benefit those who need it most. Health institutions have collapsed and are facing an overflow in medical care and diminished resources in the current pandemic. Although achieving health equity is a difficult challenge to achieve practically worldwide, especially when today, the analysis of health equity opens up new fields of reflection and practice for bioethics focused on the population's health [7].

Bioethical and scientific criteria in decisions made in the context of scarce resources due to the pandemic are essential when making decisions in times of scarcity and resource allocation, accompanied by the decision of distributive justice, ensuring respect fordignity and the rights of patients to health and dignified death. Therefore, actions to confront the pandemic must correspond to those indicated by health policies in each Latin American country, depending on the population's health [4]. In Europe, from now on, the pandemic caused by the SARS-Cov-2 virus is one of the greatest human and health tragedies experienced by humanity in modern times. The ethical demands in the performance of health personnel are transcendent, the technical attention, the humane care of the patient, and the relationship of special trust and closeness established with them. This requires a positive and permanent effort to preserve the inherent rights to the person's dignity in the context of the pandemic, life, physical and moral integrity, security, privacy, confidentiality, and autonomy.

Construct 3 - Regarding the structured categories via ATLAS.ti 9, from a phenomenological categorization studied by levels of articulation, a convergence of traceability is observed in the line of synergies with field actions and monitoring towards resources, but not a treatment or the impact, since the collaboration is disseminated both partial and general in terms of the fight against Negative Externalities and objective civil liability generated. In this sense, clear limiting factors of institutional articulation are perceptible in the Latin American context, prevalently in the information systems and control mechanisms where there are deep flaws that, as a consequence, generate a higher incidence of liability claims for damages, filed against the personnelhealth [6]. In contrast, there is a tendency to point out that they are subject to compensation for damages caused to the patient by healthcare personnel who did not act with due diligence, requiring the existence of a prior guilt link. The prior bond refers to the existence of a contract; the normal thing is that the obligation is fulfilled, but if problems arise with more or less serious effects, it will be necessary to inquire if the element of guilt was present.

Due to what has been said so far, the nature of medical liability is complex, and to determine it, it is not enough to identify whether we are in the field of contractual or extra-contractual liability; if not also, if the doctor or the health establishment have assumed an obligation of means or results. With this last line, there is an obligation of means when the debtor is obliged to act prudently and diligently to achieve a result, but without guaranteeing it. That is to say; the debtor will not respond if the result is not reached, only if it is verified that he has not acted with the required diligence. Therefore, we can say that, in this case, we are faced with personal responsibility; since the breach will be imputed when the debtor incurs fraud or fault. On the contrary, in an obligation of results, the debtor is obliged to achieve a determined result, regardless of whether he has acted diligently or not; In this way, the way to define his responsibility will be by demonstrating an objective cause of force majeure or fortuitous event. In this case, we are facing strict liability. Because of the above, the majority doctrine coincides in pointing out that, in principle, doctors assume obligations of means because, although the objective or purpose of every doctor is to cure a patient, he cannot ensure a result, due to the factors of risks that influence its activity. However, he can commit himself to act diligently, according to the lex artis, and apply all his knowledge to reach the desired result [14].

Likewise, the Supreme Court of the Republic of Peru in Cassation No. 1258-2013-Lima, mentions what is echoed in Latin America by belonging to Civil Law:

For the rest, it is necessary to specify that the nature of the obligations derived from the medical provider is not of results, but of means (except in very exceptional cases where, for example, a cosmetic surgeon commits to a certain specific result), for which is insufficient to impute to the professional or technician responsible for the sole fact of not curing the patient or not having saved his life. However, it must be proven that he has not lavished on him the proper care of science and expertise that his care and particular treatment required [5].

The medical lex artis or law of the doctor's art is a difficult concept to establish, but that can be understood as the set of norms or criteria of an evaluative nature that allow the doctor's actions to be carried out following what medical science dictates and your progress. By this, it is possible to establish that the medical lex artis comprises medical protocols or treaties, management guidelines or guidelines, medical literature and even medical congresses. An important point to talk about the lex artis is that it is supposed to pass the test of time to demonstrate its effectiveness; However, when we are faced with COVID-19, with poor knowledge regarding the behavior and evolution of this disease, it becomes more complicated for the medical act to be effective for the treatment of this disease.

In Peru, for example, a doctor would be liable to the imputation of civil liability in the event that his performance does not conform to the established medical protocols or the constantly updated medical literature. Therefore, the doctor must remain in continuous improvement and updating of knowledge. The central problem is presented as a case of contractual civil liability, as a reference to whose shoulders the burden of proof falls on. According to article 1330 of the Civil Code, it will fall on the injured patient, even if it is perceived as unfair. Thus, article 1330 of the civil code of Peru establishes: "The proof of fraud or inexcusable guilt corresponds to the injured party by the non-performance of the obligation, or by its partial, late or defective fulfillment" [3]. Medical damages correspond to fraud or the fault of the dependents of the health structure and the lack of organizational capacity of the structure itself, which broadens the radius of action to demand compensation.

CONCLUSION

Few activities are offered as delicate and demanding in their daily exercise as the medical one. Its accentuated social character and, consequently, its unlimited projection on the human environment that it insistently requires provokes reactions called externalities in the face of supposed irregularities or failures in its practical application.

Health centers, especially private ones, that in this context have denied the care of a patient in serious condition because they do not have insurance or have not made a previous payment; they would incur strict liability because they would be violating the right to life and health of people. When presenting medical liability as a contractual liability case, the central issue turns out to be the burden of proof.

Faced with exceptional circumstances such as the current pandemic, morals centered on the patient and the dignity of the person vis-à-vis medicine, oriented towards respect for life and health egalitarian and without discrimination, is the preponderant ethical perspective of public health.

The disillusionment of the population with the health system is directly related to the inefficiency of public policies at the Latin American level, not having been able to correct the errors of yesteryear that, as a consequence, have generated deficient hospital care, lack of supplies.

The regulations given throughout the state of emergency have not managed to improve the pandemic situation, since the States, as guarantors of the life and health of people, have not managed to engineer preferential attention to the complex problems that it entails. The pandemic, acting late and unprepared.

From the documentary analysis, exegesis and hermeneutics, it is concluded that it has not been possible to structure levels of articulation and sufficient convergences in the health field to face the pandemic with poorly applied health policies. These circumstances aggravate the damages due to strict liability caused.

The collaboration of public sectors is incipient or not very coordinated, without a structured baseline. Therefore, there are clear limiting factors of institutional articulation in pursuit of the patient's health, generating a higher incidence of liability for damages filed against health personnel who develop their activities in completely unprotected conditions.

Medical civil liability must always be determined in each specific case and consider the limitations of the current context. The ignorance of this new disease caused by the coronavirus has been one of the main challenges health professionals have had and have to face; since their work has been developed based on uncertain and variable protocols or guidelines.

The principles of subjective responsibility for fault would prevent health professionals from being prosecuted for facts or circumstances that could not have been foreseen or avoided according to the state of knowledge of science.

It is essential to emphasize that today, more than ever, doctors assume responsibility for the media; since they cannot guarantee any results; Therefore, their responsibility must be judged based on the particularities of each specific case, taking into consideration the availability of resources, the complexity of the reality and the particular circumstances of the patient.

It is time for governments to look at all the obvious and common deficiencies in the health sector with humanistic and solidary criteria. According to recent scientific findings, it is necessary to promote prevention measures since what is already known is insufficient in the face of new, more deadly varieties emerging.

Ethical-legal aspects

The authors declare that they have respected what is established by the ethical regulations regulating the professional practice.

Conflict of interests

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