

Blood transfusion and Jehovah's Witnesses: Brazilian jurisprudence in the State and Federal Courts of Justice

Transfusão de Sangue e Testemunhas de Jeová: jurisprudência dos Tribunais Regionais Federais e Estaduais Brasileiros

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ABSTRACTS: Brazilian physicians and judges frequently have to decide whether to save the life of a Jehovah Witness patient that refuses blood transfusion or let the patient die when treatment refusal reflects their religious belief. The Penal Code condemns the physician who fails to use all the available means to save the patient. The Civil Code, contrarily, requires the professional to respect the patient's autonomy regarding their decision over an intervention with potential risk of death. The Brazilian Constitution guarantees religious freedom and the inviolability of the right to life. This article reviews the Brazilian jurisprudence on the matter through recovery of all available decisions in the Federal and State Courts' online database up to 2013. The results show that these superior courts consider that people are not allowed to let go of their own lives for religious reasons when in a state of "imminent death". However, when the patient's clinical state is qualified as "at risk of dying", physicians are requested to respect their dissent.

KEY WORDS: Blood Transfusions/ethics, Blood Transfusions/legislation and jurisprudence, Constitutional Law.

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INTRODUCTION

The Brazilian legal system is based on civil law tradition and the country's supreme law, the 1988 Federal Constitution, which explicitly protects individuals' free exercise of religion¹. The legal system reveals that there are internal and external aspects of religious liberty. One aspect relates to the freedom of belief (the freedom to choose one's beliefs), and the other to the freedom of acting according to one's religion or belief. The internal dimension would be absolute in Brazil, but the external dimension would be mostly absolute or exceptionally relative.

When Jehovah's Witness patients refuse blood transfusion or demand treatment with blood alternatives from the Federal State, they evoke their constitutional right of religious freedom that, in some circumstances, conflicts with the constitutional directive of life's inviolability¹ and demands of the Civil and Penal Codes^{2,3}.

According to the Civil Code, an ordinary law in Brazil's judicial system, no one can be constrained to undergo medical treatment or surgical intervention that carries a life threatening risk.² Illegal constraint, that is, constraint by means of violence or serious threat, is punishable by detention or fine, unless under special conditions, such as when a medical or surgical intervention is performed without the patient's consent and while there is imminent danger to life.³ In fact, under this condition, if a physician does not act, and the patient dies, he or she will be charged with manslaughter.³ There is also the possibility of civil compensation² for cases in which Jehovah's Witnesses' wishes of not receiving blood transfusions are not honored, despite the patient being followed until the he or she reached a medical state of imminent death, as supported by the Penal Code.

Jehovah's Witnesses and physicians seek to guarantee their rights under these conditions with the guidance from judicial court rulings. The former seek the right of having their constitutional right of freedom of religion guaranteed; the latter, their duty to preserve life, as well as their right of freedom (not to be condemned for homicide) and possibly, diminishing the odds of having to face liability. From a more personal perspective, Jehovah's Witnesses want to avoid being punished or banned from their congregation,⁴ and the physicians, from the National Medical Council.

The main objective of this research was to study the Brazilian Jurisprudence regarding Jehovah's Witness blood transfusion civil and criminal cases and analyze the States' Justice Tribunals and Federal Regional Tribunals (Appeal Courts) rulings in such cases.

METHODOLOGY

In this study, all the digitally available judicial

decisions involving transfusion of Jehovah Witness patients in Brazilian Regional and State Appeal Courts were recovered using their internet databanks (Table 1). The decisions, called acórdãos in Portuguese, were printed in full and then the whole content of each one was analyzed by two researchers to obtain the original litigation information, the court rulings on the matter and the legal foundation of each one. Regarding the data period, the advanced search engines from each databank were fed only one date parameter, that of the end of the search period (31/12/2013). As the initial date parameter was left blank, each databank provided documents starting from a different year, the year they became digitally available (the dates are indicated in Table 1).

The court rulings databases in Brazil are organized by two possible periods search: the date the ruling was made by the court or the date it became available to the public (publication). In this study, the searches were conducted considering the rulings dates. Some courts would provide in their search engine's manuals the year they started to offer digitalized documents, in others, when the dates were not mentioned, the authors contacted the court directly for the information or operated backwards the engine, with no keyword on the search criteria box.

When the information was not available, the search engines were operated backwards year by year, without any predetermined search term. In this way, it was possible for the authors to identify when the decisions became digitally available to the public. The database limitation

was determined by the year the court presented more than a 1000 decisions online, even though there were sporadic decisions previous to that date.

The used keywords for the research were "Jehovah Witness" and "blood transfusion" in Portuguese.

RESULTS

In total, there were 32 appeal rulings regarding Jehovah's Witness blood transfusion cases in the Brazilian judicial system (Regional and State Courts - Tribunais de Justiça Estaduais and Tribunais Regionais Federais). In Brazil, Appeal Courts are called Tribunals which have a panel of at least 3 judges (desembargadores), one of which is in charge of writing the panel's ruling. The content of dissent decisions, when they exist, are provided in full by the dissent judge to be publicized at the end of the panel's ruling. The in-text citations used the name of the Appeal Judge who wrote the decision.

In Brazil, as a constitutional ruling, judicious decisions must be publicized (article 5, LX)¹ but there are exceptions to this rule when the matter involves public or social interest, or when it is necessary to protect one's right of privacy (article 189, Federal Law 13.105)². In such cases, the search engines would let the operator

know that there are rulings in a particular matter that were not recovered due to one of the above reasons.

Three of those cases were from criminal courts (related to deaths of minors whose parents were Jehovah's Witnesses), three were civil liability cases, and eleven were related to general requests, such as demands for alternative treatments. The remaining fifteen cases were

related to collision of constitutional rights, freedom of religion in one side, and life, in the other. In all searches, none of the courts refereed that there were processes that were under secrecy, however, considering that the search engines are not clear about the subject, it is possible that there are decisions that were not recovered by the present methodology.

Table 1. Electronic addresses of the Brazilian Federal and State Tribunals decisions' databank (year the decisions became available online)

FEDERAL COURTS		SITE	
Tribunal Regional Federal 1 ^a região (≥2002)			http://www.cjf.jus.br/juris/trf1/
Tribunal Regional Federal 2 ^a região (≥1989)			http://www10.trf2.jus.br/consultas/
Tribunal Regional Federal 3 ^a região (≥1989)			http://web.trf3.jus.br/base-textual
Tribunal Regional Federal 4 ^a região (≥1993)		http://www.trt4.jus.br/portal/portal/trt4/consultas/jurisprudencia/acordaos	
Tribunal Regional Federal 5 ^a região (≥1989)			https://www4.trf5.jus.br/Jurisprudencia/

STATE COURTS		SITE	
TJ AC	http://esaj.tjac.jus.br/cjsg/consultaCompleta.do (≥2006*)	TJ PR	https://portal.tjpr.jus.br/jurisprudencia/ (≥1982*)
TJ AL	http://www2.tjal.jus.br/cjsg/consultaCompleta.do (≥2013*)	TJ PA	http://www.tjpa.jus.br/index.xml (≥2006*)
TJ AP	http://tucujuris.tjap.jus.br/tucujuris/pages/consultar-jurisprudencia/ (≥2013*)	TJ PE	http://www.tjpe.jus.br/index.asp (≥1991*)
TJ AM	http://consultasaj.tjam.jus.br/cjsg/consultaCompleta.do (≥2013*)	TJ PI	http://www.tjpi.jus.br/site/Init.mtw (≥2010*)
TJ BA	http://www5.tj.ba.gov.br/index.php (≥2007*)	TJ RS	http://www1.tjrs.jus.br/site/ (≥1965*)
TJ CE	http://www.tjce.jus.br/principal/default.asp (≥2011*)	TJ RN	http://www.tjrn.jus.br:8080/sitetj/ (≥2008*)
TJ DF	http://www.tjdf.jus.br/ (≥1971*)	TJ RJ	http://www4.tjrj.jus.br/ejuris/ConsultarJurisprudencia.aspx (≥1989*)
TJ ES	http://www.tjes.jus.br/ (≥1994*)	TJ RO	http://webapp.tjro.jus.br/juris/consulta/consultaJuris.jsf (≥2000*)
TJ MT	http://www.tjmt.jus.br/ (≥2000*)	TJ RR	http://jurisprudencia.tjrr.jus.br/juris/ (≥2008*)
TJ MS	http://www.tjms.jus.br/ (≥2001*)	TJ SC	http://www.tjsc.jus.br/ (≥1997*)
TJ MG	http://www.tjmg.jus.br/ (≥2000*)	TJ SP	http://www.tjsp.jus.br/ (≥1998*)
TJ MA	http://jurisconsult.tjma.jus.br/ (≥2000*)	TJ SE	http://www.tjse.jus.br/portal/consultas/jurisprudencia/judicial (≥2008*)
TJ GO	http://www.tjgo.jus.br/index.php/consultasjudiciais (1988)	TJ TO	http://www2.tjto.jus.br/ (≥2013*)
TJ PB	http://www.tjpb.jus.br/portal/page/portal/tj/home (≥2005*)		

* There are sporadic earlier decisions (less than 1000/year). TJ = Tribunal de Justiça

DISCUSSION

Appeal court rulings in cases involving minors

In cases involving minors, the appeal court judges were very explicit about their positions against allowing parents to dispose of their children's lives in name of religious beliefs. In Diniz and others v. Public Ministry of the State of São Paulo, a doctor from the Jehovah's

Witness Hospital Liaison Committee was charged with murder for intimidating the physicians attending to a child who died after the parents denied blood transfusion.⁵ According to the legal records, the Liaison doctor alleged he had "just suggested the attending physicians" not to perform the transfusion to spiritually save the child. The appeal judge, under the ruling, described that it was most peculiar to realize that a physician intervened on the transfusion authorization because, upon graduation,

it is expected that such a professional swear to respect human life and is not supposed to allow religious beliefs (personal or from others) to intervene in his or her duty to save lives. Judge Midolla emphasized that there was enough indication of the physician's participation in the crime so, the Liaison doctor was then sent to face the decision of the grand jury (still pending).

There was only a vote against the physician's charges, which questioned the nexus between the child's death and the physician's conduct because the attending physicians could have overridden the parental and the doctor demands. Parental dissent, as stated in the Brazilian Medical Code of Ethics,⁶ was also mentioned to strengthen the argument against the homicide charges, but the remaining judging panel considered that the right of life should have prevailed against other constitutional rights, including freedom of belief. The panel argued that the right to life is a broad concept that includes the right to be born, to remain alive, to defend one's life, and ultimately not to have the vital process interrupted, except for an inevitable and spontaneous death.⁷

In a denied appeal from the State of São Paulo,⁸ the parents of a 2-year-old child were seeking to extinguish the process that they were facing by having denied blood transfusion to their son. Instead, they sought alternative surgical treatments for his medical condition. The couple, who were Jehovah's Witnesses, and the attending physicians were held responsible for the child's death. According to the records, the parents opted for alternative surgical procedures, even after being advised that there was only one possible procedure to save the child's life, and that procedure involved blood transfusion. When the child was brought back to the hospital that offered the curative procedure (with transfusion), the doctors still had to seek a court order to treat the boy with blood transfusion because the parents denied it. However, this action was futile as the boy was already too weak to undergo surgery and died soon thereafter due to infection and excessive blood loss from the prior alternative treatments.

The pediatric intensive care chief of a hospital in the Federal District was cited in an appeal⁹ for having obtained court authorization to perform a blood transfusion in a child under his care, who was cardiopathic, anemic and under respiratory distress and who had been treated with blood transfusion alternatives unsuccessfully. The patient's parents, who were Jehovah's Witnesses, alleged that they were not abusing their parental rights by refusing the transfusion, but were actually acting on their concerns to avoid the inherent risks of using donated blood. The judge agreed with the first court ruling, which authorized the blood transfusion, and ruled that the time limit to file the appeal was exceeded, not only by means of the established judicious time limits, but also by having the appeal filed after the transfusion had occurred.

In another appeal¹⁰ (*Rodrigues v. Hospital Santa Casa de Misericordia de Belo Horizonte*), the parents tried to revoke the court order that authorized the blood transfusion in a minor that was in "danger of imminent death", according to the attending doctors. The judge voted in favor of the victim, maintaining the authorization for blood transfusion, and stressed that in situations of urgency and when death was imminent, there was no need to seek court orders to authorize medical procedures, such as a blood transfusion, sufficing the medical report requiring the procedure, especially when minors were involved. There was another case involving a Jehovah's Witness minor in Paraná (*Souza v. Public Ministry of Paraná*), but the process was extinguished as the child received blood transfusion before the ruling.¹¹

At the Federal level, there has been only one case involving a minor, *Mazzon v. Federal Union and the Federal University of Santa Maria*.¹² The parents of an 8-year-old child suffering from a disease that required chemotherapy demanded provision of an experimental drug from the Union (the Brazilian Federal Government), in order to avoid the transfusion required by the child's condition, based on their constitutional right of religious freedom and right for health. The ruling established that the State was not to provide an experimental drug with unknown efficacy to a child, especially if the drug had known serious collateral effects and the safest prescribed treatment was publicly available (transfusion of hemoderivates).

Appeal court rulings in cases involving legally competent adults

Civil liability cases

There were three liability cases in the appeal courts. The first one, from 2002, *Zanella v. Beneficent Society Hospital Santo Antonio*,¹³ refers to a case of a legally competent Jehovah's Witness patient who sued the hospital for material and moral damages after having received an unwanted blood transfusion. The patient received the transfusion while septicemic and in a situation of imminent death, after all other available alternative treatments were administered. The ruling was against the plaintiff, based on the Constitution (right to life) and the Medical Code of Ethics of 1988 (Articles 46, 56 and 57).⁶ The judge considered that life was the most valuable right among the other constitutional rights, and the patient's autonomy was only disrespected under the conditions anticipated by the medical ethical code. In addition, the court proceedings made it clear that the patient did not give any directive regarding the informed consent when entering the hospital, as she was in no condition to do so.

The second liability case was from a Jehovah's

Witness patient who asked for material damages for having had to undergo a sophisticated medical procedure not covered by her medical insurance plan, to avoid blood transfusion (*Coelho Jr. v. Medial Saude*).¹⁴ Her medical condition required a procedure, covered by her insurance, but the eligible physicians were not comfortable in guaranteeing a transfusion free surgery. With that knowledge, the patient had an alternative procedure performed elsewhere and asked for reimbursement of the invested costs. The court understood that there was no due damage, as the insurance company did not refuse payment of treatment and the celebrated contract did not foresee such a possibility, which was accepted by the plaintiff upon celebration.

The most interesting liability case was from 2007, in which a child was suing the State of Sergipe (*Araújo v. State of Sergipe*)¹⁵ for moral and material damages as her Jehovah's Witness mother died after her birth, allegedly by not having had a blood transfusion at a State Hospital. The mother's death was related to an uncontrollable hemorrhage that she has suffered during child birth, and the evidence, provided by the public hospital, indicated that the physicians respected her religious beliefs and provided alternative treatments, up to the point that she was in imminent danger of dying. When this point was reached, she was transferred to an intensive care unit and given the necessary transfusions against her family's wishes. However, despite the physicians' use of every available resource to stop the hemorrhage, the mother died soon after. The court concluded that the hospital did not act with negligence, imprudence or recklessness, therefore no damage was due to the plaintiff.

Conflict of Constitutional Rights cases

The Brazilian appeal courts have been ruling in favor of life in cases evoking constitutional rights by Jehovah's Witness patients, except for one case in 2010. The appeal judges reason that when there is no other option to treat a patient, who is in a state of imminent death, the physicians should use every available resource, including blood transfusion, to preserve the patient's life. Judge Maia da Cunha (*Dias v. Real Sociedade Portuguesa de Beneficência*),¹⁶ discussed in his rulings regarding authorizing a hospital to perform a blood transfusion in a Jehovah's Witness patient under intensive care, that the Federal Constitution, after guaranteeing equality among citizens, initiates description of the inviolable rights precisely as the right to life, as there is no greater right for a nation than the life of their citizens.

This gradation among constitutional rights, especially those listed in Article 5 of the Constitution known as petrous clauses, was emphasized by Judge Kaufmann for denying an appeal (*Paião v. Irmandade Santa Casa de Misericórdia de Limeira*)¹⁷ from a Jehovah's

Witness patient whose doctors were given the right, by the first instance court, to provide the necessary blood transfusion due to his fragile state of health and danger of dying. Judge Fagundes de Deus also established the same reasoning in his ruling authorizing a hospital to perform transfusion in a dying patient¹⁸: "It is imperative, when pondering between two rights, to give primacy and preponderance to the right of life, as the right to be born, grow and prolong existence come from this natural right, that is human inherent, being it, assuredly primary and precedent to all other rights."

Judge Monnerat, in *Bergund v. Hospital das Clinicas Nossa Senhora da Conceição*, in a similar appeal to the one mentioned above, ruled that life is the basic principle for all other rights and freedoms, since it would be pointless to claim any other right before assuring the right to life.¹⁹ In São Paulo, in 1996, Judge Marchi denied a civil appeal²⁰ claiming that by performing a transfusion in a Jehovah's Witness patient, the physicians would be acting accordingly to their strict legal duty as doctors.

In a case of a Jehovah's Witness patient with hepatitis C and head trauma, the patient did not respond well to alternative treatments to blood transfusion and was in a state of imminent death. The attending physicians sought judicial authorization to perform the necessary transfusion and, while waiting for the court ruling, they required that the patient's private physician, also a Jehovah's Witness, take responsibility over the case, but he declined to do so. After being transferred to the intensive care unit, the patient's condition improved while still under non-blood treatment, and the judge dismissed the case as it lost its original legal object. However, he reassured in the records that the right to life was inviolable and should prevail over freedom of belief.²¹

It was discussed in many of the rulings that it was not for the judicial system to interfere with the doctor-patient relationship, as it is clear, based on the Brazilian legislation^{1,2,3} and medical code^{6,22}, that the doctor has the legal and deontological obligation to perform transfusions when the patient is in imminent danger of dying. Judge Sudbrack reaffirmed this statement and added that the physicians should act independently of patient or family consent.²³ Judge Gischkow Pereira, in a similar decision, stated that only in exceptional cases or in cases involving minors should the judicial system interfere, even if it was for religious reasons.²⁴

Judges Lagrasta¹⁴, Maia da Cunha¹⁶, Kaufmann¹⁷ and Testa Marchi²⁰ stated that physicians who perform a transfusion in such circumstances are acting accordingly to their legal duty to save lives. In contrast, a Rio de Janeiro State's Attorney statement on the subject followed the opposite line of reasoning: "when the patient is a fully capable adult, and duly informed, his will should prevail over medical prescriptions, even regarding blood transfusion in a patient that is under the risk of dying."²⁵

Apparently, dying risks and being in imminent danger of death were considered the same by the magistrate who also refuted physicians' "atavistic paternalism".

The only exception among the appeal rulings was a case in which a Jehovah's Witness patient had received a blood transfusion after a first instance court ruling and had appealed to the appeal court to have his right guaranteed of not receiving another transfusion while at the hospital. Judge Maciel granted the request as he considered the patient lucid and conscious to understand the transfusion dissent. He based his rulings on the supremacy of the human dignity over all other rights. However, under the rulings he stated that, if the patient at any point of the course of the disease became unconscious and in need of blood transfusion, the procedure had to be performed because in a state of imminent death, one could change one's mind about the previous dissent and would not be able to declare the change of heart due to the state of unconsciousness.²⁶

Rio de Janeiro Judge Ibrahim used the same line of reasoning in his vote (Barbosa v. Ministério Público), understanding that the plaintiff was not under a state of imminent death, but the judge's decision was overridden as both the other panel appeal judges were in favor of the transfusion.²⁷ In his ruling, he stated that the right to life is not just related to living. He understood that it is related to "a way of living", to the "dignity of living." That "only the physicians' arrogance and the insensitivity of the jurists could despise the will of a human being regarding his own body."

CONCLUSION

It is evident through these judgments that the magistrates, when deciding between the physician's duty to save the patient's life and the patient's right to refuse treatment that involves blood transfusion for religious reasons, that is, between the right to life and the freedom of religious expression, they opt for life. Konrad Hesse's principle of practical concordance (*praktische Konkordanz*) is employed to harmonize the conflicting provisions.²⁸ The law interpreter evaluates the conflicting rights and, to avoid sacrificing one over others, seeks systematic and teleological arguments to substantiate his or her decision. It is a weighing process in which the interpreter does not try to attribute an absolute prevalent value over one another but one that tries to find compatibility between norms and simultaneous application, even if, in a concrete case, it becomes

necessary to attenuate one of them.²⁹

Human dignity, one of the Brazilian Constitution fundaments, is often referred to when the plaintiff is a patient that is consciously dissenting treatment, is an adult, and is not in imminent danger of dying. Between human dignity and the physician's duty to perform the transfusion, human dignity prevailed in the rulings. However, the magistrates sometimes used the term "under imminent danger of dying" interchangeably with "risk of dying." Risks are related to odds, which are inherent to all procedures. They are statistical in nature. Imminent danger is associated with a physical condition where the course of the disease or the disorder is unequivocally, by scientific means, death.³⁰

Advice from a Regional Council of Medicine, on diagnosing imminent death, is that the decision should be issued by a medical board comprising a specialist on the patients' disease that requires blood transfusion, a hematologist, and an intensive care specialist. The hospital ethical board should also follow the case until the patient's discharge.³¹ Disrespect of the patient's dissent would only be permissible when there is a real and unequivocal situation where death is imminent, and even then, the physician's conduct should be limited to rescuing the patient from this progress and not to conduct the patient to traditional hematometric levels.³²

The position on protecting the lives of minors was striking in all the tribunal decisions. In no situation did the courts allow refusal of blood transfusion. According to one of the decisions: "parents do not have rights over their children's lives - life is an unavailable legal asset, especially by third parties"³³. The country's Children and Adolescent Statute also guarantees the right to life and to health, as does the Constitution. The three appeals involving criminal charges were cases related to minors^{5, 8, 11}.

In summary, (i) the Brazilian jurisprudence indicates that people are not allowed to dispose of their own lives for religious beliefs when in a state of imminent death; (ii) the Medical Code emphasizes the physician's duty to the patient, despite their religious beliefs, as well as the Penal Code; (iii) parents cannot dispose of their children's lives for religious reasons by refusing medical treatment; (iv) when capable adults refuse medical treatment for religious reasons, their dissent should be respected unless they are in imminent danger of dying; and (iv) when deciding conflicts between constitutional rights, the Brazilian magistrates used the principle of practical concordance to decide their rulings.

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RESUMO: Médicos e magistrados brasileiros frequentemente têm que decidir se salvam a vida de um paciente Testemunha de Jeová que rejeita transfusão de sangue ou se permitem que o paciente morra quando da recusa do tratamento por sua crença religiosa. O Código Penal condena o médico que não usa de todos os meios disponíveis para salvar seu paciente, contrário ao Código Civil, que exige o respeito do profissional quanto à autonomia do paciente frente à sua decisão sobre uma intervenção com risco de morte. A Constituição Brasileira garante a liberdade religiosa e a inviolabilidade do direito à vida. Este trabalho analisa a jurisprudência brasileira sobre o assunto disponível nos bancos de dados online dos Tribunais Regionais Federais e Estaduais até o ano de 2013 e revela que esses tribunais superiores consideram que as pessoas não estão autorizadas a dispor de suas próprias vidas por motivos religiosos, quando em um estado de “morte iminente”. No entanto, quando o estado do paciente é qualificado como “em risco de morte”, os médicos devem respeitar sua discordância quanto ao tratamento.

DESCRITORES: Transfusão de Sangue/ética; Transfusão de Sangue/legislação & jurisprudência; Direito Constitucional.

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