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ORIGINAL ARTICLE

Platform Duty of Care after the Supreme Court Ruling on the Marco Civil da Internet

Dever de Cuidado de Plataformas após a Decisão do Supremo Tribunal Federal sobre o Marco Civil da Internet

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Abstract: This paper offers a systematic survey of the Brazilian legal scholarship to examine how the duty of care has evolved across different legal fields and to illuminate how these developments can inform current debates on platform regulation and the enforcement of the Brazilian Supreme (STF) Court ruling on intermediary liability. The analysis of the duty of care across various areas of Brazilian law reveals its central role as a principle and often the basis for liability. Essentially, the duty of care imposes a diligent, attentive, and preventive conduct, aiming to avoid damages (as obligations of means), but also serves as the basis for the obligation not to cause harm (as obligations of result). When the duty of care is expressed by an obligation of means, what is required from the agent is the adoption of specific conduct: the application of their best efforts, knowledge, and techniques to achieve a desired goal, without, however, guaranteeing the final outcome. By contrast, where the duty crystallizes as an obligation of result, the legal focus is on the non-occurrence of a specified harm: responsibility is triggered by the materialization of the adverse outcome, independently of the actor's intent or the efforts undertaken. The STF recognized a preventive duty of care and identified a series of procedural obligations for digital platforms, yet it did

so within a framework that allows those preventive duties to generate liability when serious harm occurs. As Brazilian doctrine already integrates preventive and compensatory logics, it becomes clear the hybrid nature of the STF's decision and situates it within a broader legal tradition.

Keywords: Duty of Care. Platform Governance. Brazilian Supreme Court. Intermediary Liability.

Resumo: Este artigo oferece um levantamento sistemático da produção acadêmica jurídica brasileira para examinar como o dever de cuidado evoluiu em diferentes ramos do direito e para elucidar como esses desenvolvimentos podem informar os debates atuais sobre a regulação de plataformas e a aplicação da decisão do Supremo Tribunal Federal (STF) sobre a responsabilidade dos intermediários. A análise do dever de cuidado em várias áreas do direito brasileiro revela seu papel central como princípio e frequentemente como fundamento da responsabilização. Essencialmente, o dever de cuidado impõe uma conduta diligente, atenta e preventiva, visando evitar danos (como obrigações de meio), mas também serve de base para a obrigação de não causar prejuízo (como obrigações de resultado). Quando o dever de cuidado se expressa como obrigação de meio, exige-se do agente a adoção de condutas específicas: a aplicação de seus melhores esforços, conhecimentos e técnicas na busca de um determinado objetivo, sem, contudo, garantir a obtenção do resultado final. Por outro lado, quando o dever se cristaliza como obrigação de resultado, o foco jurídico está na não ocorrência de um dano específico: a responsabilidade é acionada com a materialização do resultado adverso, independentemente da intenção do agente ou dos esforços empregados. O STF reconheceu um dever de cuidado preventivo e identificou uma série de obrigações procedimentais para plataformas digitais, mas o fez num quadro em que esses deveres preventivos podem gerar responsabilidade caso ocorram danos sérios. Como a doutrina brasileira já integra lógicas preventivas e compensatórias, evidencia-se o caráter híbrido da decisão do STF e sua inserção em uma tradição jurídica mais ampla.

Palavras-chave: Dever de cuidado. Governança de plataforma. Supremo Tribunal Federal. Responsabilidade de intermediários.

1) INTRODUCTION

When, and to what extent, should online platforms be held accountable for the harms that arise from content and activity on their services? How can societies ensure such accountability without

undermining freedom of expression? In Brazil, the controversy on intermediary liability standards appeared throughout the debates on the draft of the Marco Civil and continued well after its enactment despite the clear choice by Congress to forego private notice-and--takedown. In recent years, however, another topic has made its way into the center of social media accountability discussions not only in Brazil, but abroad.

The idea of a "duty of care" shifts the focus of enforcement mechanisms away from liability for failure to remove specific content. Duty of care has been proposed in addition or substitution to liability for intermediaries. As a tool for curbing harmful or reckless decision-making by platforms, duty of care has come under the spotlight especially after the United Kingdom's *Online Harms White Paper* from 2019. This pivotal document helped pave the way for the *Online Safety Act 2023*, a law that places duty of care at the core of new framework for the regulation of online services.

In Brazil, the debate on duty of care as an approach for balancing competing interests in platform regulation has pervaded research publications and bills proposed in Congress since 2020 (Brito Cruz; Kira; Hartmann, 2025). Existing studies on duty of care and social media under Brazilian law are almost exclusively prospective in that they entertain the notion of legislators or courts imposing duties of care on social networks as a means to curb hate speech, disinformation, abusive content targeting children etc. Few – if any – studies trace the evolution of the concept of duty of care in Brazil, and none offers a systematic analysis across multiple areas of law. This paper seeks to fill that gap.

It is essential to identify the origins, scope and defining features of the duty of care as developed in Brazilian legal theory and jurisprudence over the last few decades as this concept appears in many different legal fields. Proposals to extend a duty of care to online platforms are varied, and understanding both its potential and constraints has become even more urgent following a recent

decision by the Brazilian Supreme Court (STF) recognizing that social networks must comply with a duty of care. Putting such proposals into practice requires a clear understanding of how the duty of care operates within Brazil's legal system and the forms it assumes in different legal contexts.

This paper offers a systematic survey of the Brazilian legal scholarship to examine how the duty of care has evolved across different legal fields and to illuminate how these developments can inform current debates on platform regulation. To this end, our literature review adopted a broad perspective on the institute of duty of care, considering not only the specific term but also related concepts such as diligence, precaution, and responsibility that impose on agents the obligation to adopt reasonable measures to prevent damages. We identified seven themes or areas in which discussions on duties of care and similar concepts are most developed and consolidated: (i) private law; (ii) anti-corruption law; (iii) personal data protection; (iv) protection of children, adolescents and the elderly; (v) environmental law; and (vi) consumer law.

The literature review was conducted using bibliographic sources such as Google Scholar and the CAPES (Brazilian Federal Agency for Support and Evaluation of Graduate Education) journal portal, in addition to direct searches in law journal websites and manual searches within works such as physical books. A total of 58 publications were selected for analysis. The selection criteria considered the relevance of each work's approach in relation to the research object, as well as the impact of the publications based on the number of citations and the medium of publication. As an additional criterion, the recency of the publications was also evaluated.

Our analysis reveals two main configurations of the duty of care in Brazilian law: one outcome-focused and one process-focused. The first concerns the avoidance of specific harm-producing results that, if realized, give rise to liability; the second emphasizes governable actions such as risk prevention and mitigation. These configurations

correspond to two separate groups of effects of legal effects arising from the enforcement of the duty of care. The first one connects well with a large share of the discussion in Brazil: duty of care as a basis for acknowledging the illegality of a concrete action or inaction by a platform affecting a specific party and thus leading to a court awarding damages. This resembles an obligation of outcomes typically enforced through the courts, which entails protagonism of the Judiciary. The process-focus model, in turn, links duty of care to compliance with clear, well-defined standards of conduct or best practices, the breach of which may trigger administrative or regulatory penalties. This resembles an obligation of means and does not necessarily require a finding of damages to platform users or third parties. It can certainly allow for court enforcement, but mostly recommends independent, specialized agency oversight.

The recent decision of the Brazilian Supreme Court (STF), however, blurs the distinction between these two models. Although the positive, preventive "annex duties" it imposes on platforms appear to reflect the process-focused form of the duty of care, noncompliance with these duties can nonetheless lead to civil liability; a feature associated with the outcome-focused model. Our proposed typology helps to make this overlap visible and provides a conceptual framework for understanding the hybrid nature of the STF's reasoning. More importantly, it highlights that the resulting ambiguity cannot be sustainably resolved through judicial interpretation alone. Structuring a process-based duty of care requires legislative intervention to define its content, establish its limits, and allocate supervisory authority to a competent regulatory agency.

The paper is structured as follows. Section 2 presents the literature review through which we identify the two configurations of the duty of care in Brazilian law. Section 3 briefly summarizes the STF's decision and analyzes how it employs the concept of duty of care within its reasoning. Section 4 concludes with reflections on the implications of our findings.

2) DUTY OF CARE IN BRAZILIAN LAW

This section surveys how Brazilian legal scholarship and doctrine have developed the notion of a duty of care across distinct fields of law. The discussion is organized around the main domains in which obligations of care are most clearly articulated: private law, data protection law, anticorruption law, environmental law, and consumer law.

2.1) Duty of Care in Private Law

In Brazilian private law, the concept of duty of care comes up in multiple contexts, including the principle of good faith in contractual and civil liability relationships; specific duties in business and corporate law; and rights and obligations in family law.

The principle of objective good faith is fundamental to Brazilian contract and civil liability law. It requires that parties act with loyalty and integrity throughout all steps of a legal relationship, from its inception to its execution and post-contractual obligations. This conduct requirement aims to ensure legal certainty and protect the rights of the parties involved, establishing what is expected of them and serving as a benchmark for the subsequent assessment of their actions (Martins, 2013). Scholars such as Judith Martins Costa interpret good faith as an intrinsic element of legal duties that shapes the conduct required in each context (Marthins-Costa, 2018; 2005). The Civil Code reinforces this understanding by making good faith a crucial parameter for the exercise of rights and for defining the corresponding of the parties (Tepedino; Schreiber, 2005).

Within this framework, the duty of care represents a specific manifestation of objective good faith. It establishes a process to ensure the fair fulfillment of obligations, taking into account the legitimate interests of both parties. The emphasis is less on the final outcome of the contract and more on the fair manner ("the how") in which

parties strive to behave as they fulfill their contractual obligations. Typical examples include duties of protection, loyalty, and information (Pinheiro, 2015). Objective good faith also gives rise to duties of loyalty and integrity, requiring the contracting parties to act with honesty and integrity throughout the entire duration of the contract (Neto et al, 2016). These are also obligations of means, since what is expected is ethical conduct, regardless of a specific outcome.

The expectation of good faith, combined with the social function of contracts, has led Brazilian courts to articulate specific obligations of means in a wide range of contractual relationships. These include not only real estate contracts and other property rights but also specific cases in condominiums, administrative, banking, leasing, insurance, business, legal services, and in procedural, social security, family, and tax relations (Terra et al, 2019).

In the corporate context, the duty of care is equally relevant, especially in partnership agreements. Warranty clauses, for example, are instruments used to allocate risks, set prices, and define responsibilities. The drafting of these clauses typically involves due diligence, a process that requires the seller to inform the buyer about relevant facts (duty of information), acting in accordance with their duty of loyalty. Here, what is required is an obligation of means: conducting an investigation and transparently disclosing information, rather than guaranteeing that there will be no future issues with the transaction or that the buyer will incur no losses (Mulholland, 2022). The duties of corporate managers are also directly connected to the duty of care and duty of loyalty. They require diligence and prudence in business management, aimed at safeguarding the company's best interests. This is reflected, for example, in obligations such as avoiding conflicts of interest and maintaining confidentiality (Veiga, 2014). The expectation is of cautious and loyal management, rather than a guaranteed financial or operational result for the company.

In family law, the duty of care receives specific interpretations. Marriages and civil partnerships, by their contractual nature, are

governed by the general clause of good faith and its attached duties, including the duty of care (Tartuce, 2006). In certain relationships, good faith and related duties can give rise to financial obligations, such as alimony (Schreiber, 2006). The duty to provide alimony is focused on achieving the result; acting in a way that maximizes the chances of payment is not sufficient, the actual payment is what is required.

Finally, the duty of care also plays a central role in civil liability, particularly when it is necessary to determine whether there was risk and fault. It serves as the standard to assess whether a given agent caused, directly or indirectly, harm to another and, therefore, must compensate for the damages caused.

In strict liability, which does not depend on intent or fault, the duty of care manifests as the obligation to anticipate and manage damages, directly influencing the identification of the risk undertaken by one of the agents (Frazão, 2016). On one hand, there is a duty of care focused on conduct (obligation of means): the agent is required to adopt prudent actions to manage and mitigate the risks undertaken, not to completely eliminate the possibility of harm. On the other hand, by assuming inherent risks in their activity, the agent also has an obligation of result: the duty not to cause harm. The failure to fulfill this duty—i.e., the occurrence of the harm—leads to the obligation to pay damages.

Fault-based liability requires proof of the agent's fault to establish an obligation to compensate for damages. The assessment of fault, in this context, is not psychological but legal, based on behavior standards, which include the breach of a duty of care or diligence (Moraes, 2006). In other words, fault-based liability is established when there is a culpable conduct (whether by intent or negligence) that results in harm, requiring proof of this fault as a violation of the duty of care. On one hand, the duty of care in this scenario is an obligation of means: what is assessed is whether the agent's action or omission conformed to the expected standard of diligence, i.e., whether the conduct was prudent and appropriate. Here, duty of care does not entail a guarantee that

a specific damage will not occur, but rather that the agent makes an effort to behave in a certain way. On the other hand, the duty not to cause harm is an obligation of result that governs the relationship between parties. If the agent fails to fulfill their obligation of means and, as a consequence, harm is caused, they also fail in their obligation of result, compelling the agent to restore the previous situation or to compensate the injured party (Filho, 2003).

2.2) Anti-corruption and compliance

Law No. 12,846/2023, the Brazilian Anti-Corruption Law, addresses the administrative and civil liability of legal entities for acts against the public administration and forms the basis for the requirement of anti-corruption compliance, which translates into the organization's obligation to follow and enforce internal and external rules and regulations governing its activities (Gabardo; Castella, 20015). Within this framework, the duty of care emerges as the cornerstone of anti-corruption compliant conduct. It imposes on companies the proactive responsibility to act with diligence to prevent, identify, and respond to unlawful acts through implementation of integrity mechanisms and procedures aimed at ensuring accountability, which encompasses duties of transparency and reporting (Pimenta, 2020).

Under the Anti-Corruption Law, the duty of care materializes primarily as an obligation of means. Companies are not required to guarantee the complete absence of corruption, but must adopt reasonable and necessary measures to prevent and detect illicit practices (Matias, 2021). This requirement for diligent conduct is reinforced by the principle of objective good faith, which connects compliance duties to the broader notions of managerial morality and ethical corporate responsibility. The Law thus goes beyond mere liability for acts already committed (an outcome-focused perspective) and establishes a process-oriented duty of care that compels companies to act preventively and systematically. Failure to implement integrity

measures or to operate effective compliance mechanisms constitutes a breach of this duty and may result in administrative or civil liability (Nascimento, 2016).

To fulfill this obligation of means, companies must design their compliance program tailored to their structure, culture, activities, and risk exposure, extending to controlled entities or subsidiaries (Ribeiro; Diniz, 2015). The effectiveness of these integrity mechanisms, including how robust and effective the company's compliance program is, directly influences the determination of liability and the mitigation of sanctions: the greater the company's demonstrable diligence, the stronger the justification for reduced penalties (Zanon; Cereser, 2024). Conversely, the absence or inadequacy of such preventive measures evidences an omission in fulfilling the process-based duty of care. When an unlawful act occurs, this omission also entails a breach of a complementary obligation of result, namely the duty to refrain from engaging in illegal conduct, which may lead to liability and reparation (Nascimento; Pinheiro, 2016).

2.3) Personal Data Protection, Compliance and Prevention

The General Data Protection Law (Law No. 13,709/2018 – LGPD) establishes rules regarding the collection and processing of personal data, incorporating outcomes-based as well as process-based obligations.

Article 42 of the LGPD incorporates a liability clause that imposes on data controllers the duty to compensate for damages caused. This clause, by focusing on the occurrence of the harm as the factor that gives rise to the obligation to repair, characterizes a outcomes--based obligation.

However, the LGPD system goes further. It imposes on data controllers the obligation to act proactively to prevent damages, under penalty of also being held liable, thus also characterizing a process--based obligation (Rosenvald; Faleiros Júnior, 2021). The basis of this

obligation to act proactively is composed of (i) general principles that guide the interpretation of the LGPD and (ii) specific duties of care.

Three principles are particularly relevant here, guiding the duty of care as an obligation of means: a) the principle of prevention, which indicates the need to act even before any harm is detected, focusing on the anticipation and mitigation of risks; b) the principle of accountability (responsibility and accountability), which establishes that data processing agents (such as companies or public bodies) are held accountable for failures to take preventive action; and c) the principle of good faith (Martins, 2021), which requires, as noted above, proactive conduct to prevent the performance of a contract in a manner that causes harm in the processing of personal data.

In addition to the principles, the LGPD establishes specific duties that materialize the duty of care as process-based obligation. First is the duty to produce a data protection impact assessment, which the National Data Protection Authority (ANPD) may require, if and when it deems appropriate. The data controller is then required to prepare a document containing a description of the types of data collected, the methodology used for data collection and for ensuring information security, and the controller's analysis regarding the measures, safeguards, and risk-mitigation mechanisms adopted (Marques; Lima, 2022).

The second obligation rests with the data controller, a natural person, public or private entity, who is responsible for decisions regarding the processing of personal data. This agent must demonstrate the effectiveness of the measures adopted to prevent harm throughout the entire data processing lifecycle (Guedes; Meirelles, 2021). This obligation also extends to the operator, who carries out the processing of personal data on behalf of the controller, and has duties such as keeping a record of the personal data processing operations it performs in accordance with the controller's instructions. In this context, controller and operator may share responsibilities to the extent of their activities and legal duties under the LGPD (Capanema, 2020).

The third obligation falls on the data protection officer (DPO) in a given company or public body, who acts as a communication channel between the controller, the data subjects, and the National Data Protection Authority (ANPD). This role must be performed proactively and vigilantly to identify risks and actual or potential harms (Stuart et al, 2022).

2.4) Protection of Children, Adolescents and Elderly People

The Statute of the Elderly (Law No. 10,741/2003) and the Statute of the Child and Adolescents (Law No. 8,069/1990 – *Estatuto da Criança e do Adolescente,* ECA in the acronym in Portuguese) are legal landmarks that establish special protection and social inclusion measures for groups deemed vulnerable under Brazilian law (Bastos, 2011). The duty of care toward the elderly, children, and adolescents manifests itself in various ways. It ranges from the general duty of care of families towards their members and the state's obligation to safeguard well-being to more specific matters such as liability for affective (emotional) abandonment and the obligations by foster institutions in adoption proceedings.

The family's duty of care toward its elderly, children, and adolescents is, in its essence, an obligation of means. In the case of the elderly, this duty aims to promote quality of life and legal duty rather than a discretionary act of solidarity, requiring active and diligent conduct from family members toward those in their care (Viegas, 2016). Similarly, regarding children and adolescents, the Brazilian Constitution and the ECA establish that the family must ensure, with absolute priority, the enjoyment of fundamental rights and comprehensive protection (Art. 4º), a duty that presupposes dedication and diligence (Teixeira, 2016).

When diligence fails, the duty of care may shift from an obligation of means to one of result. A lack of proper conduct, such as affective (emotional) abandonment (whether of the elderly by their

children or of children by their parents), can lead to civil or even criminal liability (Souza; Francischetto, 2021). In these cases, the focus shifts from the omission itself to its concrete consequence, such as abandonment as a tangible harm, which may entail compensation or criminal sanction.

The State and its institutions also share this duty of care toward these vulnerable groups, primarily as obligations of means. Public authorities are responsible, for example, for implementing social and economic policies aimed at reducing the risk of diseases and ensuring access to essential public health services (Duarte et al, 2018). The actions of agencies such as the Public Ministry and Public Defenders are also clear examples of this duty to provide the means for protection. What is required in these cases is diligence in the creation, implementation, and supervision of protection policies and programs. Responsibility arises from the failure to provide or act with the necessary diligence, rather than from an absolute guarantee of a specific result, such as the total absence of any risk or harm to all individuals.

2.5) Environmental Law, Prevention and Precaution

In environmental law, duties of care require individuals, companies, and the State to adopt conduct that mitigates environmental risks and harms. These duties, usually framed as obligations of means, are especially useful in scenarios where the damage is systemic, affecting entire populations as opposed to one party in a contract. Among the most significant expressions of environmental care are: (i) the precautionary principle and the preventive principle; (ii) civil liability for environmental damages.

The principles of precaution and prevention are pillars of environmental law and operate as conduct-oriented duties focusing on avoiding risks and damages (Carvalho, 2008). The preventative principle applies to known and foreseeable risks and demands the adoption of measures that anticipate and minimize negative environmental

impacts before they accrue. Instruments such as environmental impact assessments (EIAs) and their respective environmental impact reports (RIMAs) exemplify this obligation, serving as tools to predict and manage potential effects of works and projects. Another example is Law No. 7,802/89, which regulates the use of pesticides and prohibits the registration of products under conditions that may pose environmental and health risks, illustrates this principle.

The precautionary principle, in turn, is applied to risks that are not yet fully understood, as their identification and proof lie beyond the limits of current scientific knowledge. It is reserved for exceptional situations where the integrity of an entire ecosystem may be threatened by irreversible damage (Hartmann, 2022). In such cases, precaution requires the implementation of environmental protection measures, such as the creation of laws and regulations to preserve the environment before problems occur (Fortunato; Neto, 2012). Decree No. 5,300/04, which regulates the National Coastal Management Plan, is an example, as it establishes preventive or mitigation measures for environmental degradation despite scientific uncertainty (Fortunato; Neto, 2012).

Additionally, the State's administrative duty of care constitutes an obligation of means related to environmental planning and management, involving actions such as infrastructure maintenance and risk mapping (Ohlweiler, 2017). When authorities fail to act diligently (such as by neglecting flood-risk mapping or preventive maintenance) the breach of this obligation of means could result in a violation of the corresponding obligation of result: the duty not to cause harm.

A related dimension of environmental liability concerns the indirect polluter. This is the party that, without directly causing environmental harm, contributes to degradation by failing their inherent duty of care within society. For example, steel plants can be held liable for illegal tree cutting when acquiring charcoal without the Forest Origin Document (DOF) (Farias; Bim, 2017). In this scenario, the company has an obligation of means, which is the duty to verify

the legality of the product's origin. Failing to fulfill this obligation of means constitutes a breach of its obligation of result, which is the duty not to cause (even indirect) environmental harm. Here, liability does not depend on proof that the steel plant directly caused the illegal logging, but rather on the non-observance of its duty of means to verify the legality of the product's origin.

2.6) Consumer Law

Consumer law is structured around a series of duties aimed at protecting consumers against abuse. These duties serve as behavioral standards for service and product providers, essentially guided by the principle of objective good faith (Silva, 2015).

The inclusion of objective good faith in the Consumer Defense Code (CDC), Law No. 8,078/1990, has played a significant role in contract interpretation. Functioning as a general clause, objective good faith establishes several additional duties in consumer relations, such as the duties of information, safety, and commitment to the advertising disclosed (Marques, 2016). Another central principle is the existential vulnerability of the consumer, which manifests through their structural subordination to the supplier, dependence on consumption for survival, and exposure to health and safety risks in the market (Miragem, 2021).

The duty of care is embodied in various provisions of the CDC, which impose both obligations of means and obligations of result. The core of this duty of care lies in the duty of safety. Article 6, I, of the CDC, for example, guarantees as a core consumer right the protection of life, health, and safety against risks posed by dangerous or harmful products and services. This right is supported by a series of provisions that can be interpreted as obligations of means, such as Articles 8 to 10 of the CDC, which detail the risk prevention system, requiring that products and services placed on the market do not pose unexpected risks to health or safety.

Specifically, Article 9 imposes on suppliers a duty to prominently and adequately inform about the harmfulness or danger of potentially harmful products, while Article 10 prohibits marketing products that the supplier knows or should know to be highly harmful or dangerous, requiring immediate communication to authorities and consumers if the danger is discovered after the product has already been put on sale. Together, these provisions establish a continuous and proactive duty of care on the part of the supplier.

In this context, the duty of care is invoked for liability related to unlawful advertising (ALVES, 2020) and to ensure the protection of hyper-vulnerable consumers, such as the elderly, who require special duties of care and expanded information (Pasqualotto; Soares, 2017; Schmitt, 2017). This applies, for example, to genetically modified products with high risks and without scientific evidence of safety, where the precautionary principle imposes obligations of means involving comprehensive information (Hartmann, 2012).

The obligation of result primarily manifests in the context of strict liability for defective products or services placed on the market, which is based on the violation of the duty of safety (Cavalieri Filho, 2017). Articles 12 to 14 of the CDC set this liability regime, imposing on the supplier a duty of result: the duty to ensure the safety of their products and services, that is, the duty not to cause harm (Soares, 2017). This means that if there is a defect that causes harm to the consumer, the supplier will be held liable regardless of whether they acted intentionally or negligently. The occurrence of the harm, resulting from a breach of the obligation of result, creates the duty to repair it. The only way to exempt oneself from this liability is by proving one of the exclusions in Article 14, paragraph 3: the absence of a defect, or the exclusive fault of the consumer or a third party—in which case there is no causal relationship between the supplier's conduct and the damage incurred by the consumer.

Obligations of means and obligations of result can also be interconnected. An example is the liability of financial institutions for

damages to clients, including in online payment services. The failure of the bank's duty of security (a duty of means to provide a secure transactional environment) results in its strict liability (an obligation of result) based on the enterprise risk theory (Madureira, 2024).

Additionally, the CDC can be interpreted in conjunction with the LGPD to hold data processing agents accountable for failing to comply with the security duties of the CDC and the adequacy requirements of the LGPD (Bioni; Dias, 2020). In all these scenarios, the sanction or harm caused (constituting a breach of the obligation of result) is the direct consequence of non-compliance with the duty of care (the obligation of means) expected from the provider.

3) DUTY OF CARE AND INTERNET PLATFORMS

Beyond traditional legal fields, the duty of care has expanded into the digital environment, where its application to internet platforms is still being defined. In countries like the UK, it forms the backbone of online safety regulation (Kira; Mendes, 2023). In Brazil, the discussion remains fragmented, with parallel (but uncoordinated) initiatives emerging from the Executive, Legislative, and Judiciary branches.

Within the Executive branch, several regulatory bodies have incorporated the notion of diligent and preventive conduct into their oversight of digital services. The National Consumer Secretariat (Senacon), for instance, has relied on the Consumer Defense Code to require online platforms to perform systemic risk assessments of unlawful or harmful content. The agency has powers of enforcing the Code in several situations, emerging as a sectoral enforcer of "duties of care" in the digital sphere. Following episodes of school violence in 2023, Senacon issued an ordinance obliging companies to evaluate "the real or foreseeable negative effects of the dissemination of unlawful content", considering factors such as recommendation algorithms, content moderation policies, and coordinated manipulation through

inauthentic accounts.[1] The initiative led to administrative proceedings and potential fines.

However, the language present in Articles 8 and 14 of the CDC (as discussed above) poses a challenge to categorizing duties of care as obligations of means or procedures for companies that may be classified as "providers of digital services." On one hand, they derive obligations to provide adequate information about risks, which entails minimum procedural duties for assessing such risks or opening early discussions around transparency practices. On the other hand, Article 14 implies strict liability in cases of defects (i.e., "when [the service] does not provide the security that the consumer can reasonably expect"), which is enforceable in individual cases and when a consumer-provider relationship is established. In this ambiguity, what has been driving the mobilization of consumer law norms is, at times, judicial hermeneutics, and at other times, administrative activity.

Approaches based on a duty of care have been adopted by other agencies, drawing on other legal provisions. Anatel, for example, issued an order in 2024 compelling e-commerce platforms to monitor advertisements for products that violate its regulations, such as uncertified telecommunications equipment.[2] The National Data Protection Authority has also imposed "care" obligations under the Brazilian General Data Protection Law, including requirements that social media platforms adjust functionalities to protect children and adolescents. In its 2024 disciplinary process involving TikTok, the ANPD referred not only to the LGPD but also to the Statute of the

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1 BRASIL. Ministério da Justiça e Segurança Pública. Portaria do Ministro nº 351, 12 April 2023. Available at: https://www.gov.br/mj/pt-br/assuntos/noticias/mjsp-edita-portaria-com-novas-diretrizes-para-redes-sociais- apos-ataques-nas-escolas/portaria-do-ministro_plataformas.pdf

2 BRASIL. Agência Nacional de Telecomunicações. Despacho Decisório n. 5.657/2024/ORCN/SOR. Diário Oficial da União, Brasília, DF, 21 de junho de 2024, edição 118, seção 1, p. 18. Available at: https://www.in.gov.br/en/web/dou/-/despacho-decisorio-n-5.657/2024/orcn/sor-567185645.

Child and Adolescents, citing the State's duty to prevent and mitigate violations of children's rights.[3] These measures illustrate a trend toward trying to place on platforms procedural and preventive obligations rather than relying solely on traditional *ex post* liability.

At the Legislative level, the two most significant initiatives are Bill 2630 of 2020, the so-called Fake News Bill, and Bill 2628 of 2022, which was later enacted as Law 15,211 of 2025 (known as the Digital ECA). Bill 2630 proposed a detailed framework for transparency and systemic risk mitigation. Its Senate version emphasized obligations related to the disclosure of content moderation practices, prevention of inauthentic behavior, and restrictions on mass messaging. The version debated in the Chamber of Deputies expanded the proposal substantially, assigning to platforms broad obligations to detect, assess, and mitigate systemic risks to democracy and to users' fundamental rights, including those related to hate speech, disinformation, discrimination, and harm to children and vulnerable groups. However, Bill 2630/2020 has faced a political stalemate and hasn't progressed since 2023. In contrast, another legislative initiative had better progress. Bill 2628/2022, proposed by Senator Alessandro Vieira, was approved and became Law No. 15.211 in September 2025. This law, the Digital ECA, established a specific regime for services accessible to children and adolescents , imposing privacy-by-default settings, parental control tools, and prohibitions on manipulative or addictive design practices. These initiatives indicate a gradual movement toward preventive regulation, although none has clearly determined which public authority will be responsible for implementing or supervising these duties.

At the Judiciary branch, The Supreme Federal Court (STF) has recently become a key player in shaping the duty of care for online

[3] Nota Técnica nº 50/2024/FIS/CGF/ANPD. Available at https://www.gov.br/anpd/pt-br/assuntos/noticias/nota-tecnica-50_pub_0153891.pdf

platforms. In November 2025, the Court issued a landmark ruling that redefined the liability framework of the Marco Civil da Internet (MCI). In the joint adjudication of Extraordinary Appeals 1037396 (Theme 987) and 1057258 (Theme 533), the Court declared Article 19 of the MCI partially unconstitutional for offering insufficient protection to fundamental rights and to the democratic order. The majority concluded that the system of conditional liability established by Article 19, which shielded intermediaries from responsibility until a court order for content removal, was constitutionally inadequate when applied to certain categories of unlawful content.

The decision preserved the original model for crimes against honor (defamation and related offences) and for private communications (e.g. email service providers and private meeting apps) but created differentiated regimes for other types of online harm. In cases involving advertisements and sponsored content, where platforms derive direct economic benefit, the Court recognized presumed liability for the resulting harm. For most other instances of illegal content, it established a model of subjective liability upon notification, whereby responsibility arises if the provider fails to act diligently once informed of the violation. The Court also introduced a new layer of responsibility described as a duty of care in cases of massive circulation of criminal content contained in a list of especially serious crimes (such as terrorism, incitement to self-harm, incitement to discrimination, misogyny, child sexual abuse, and human trafficking). In such situations, platforms may be held accountable for systemic failure when they omit preventive or corrective measures capable of containing the large-scale dissemination of material that poses serious risks to fundamental rights or to democracy itself.

The judgment further identified a series of ancillary duties designed to operationalize this preventive rationale through self-regulatory efforts. These include publishing annual transparency reports on moderation practices, establishing accessible channels for user complaints, creating appeal mechanisms for moderation decisions, and

designating a legal representative in Brazil with full powers to respond to judicial and administrative requests. Some opinions also referred to algorithmic transparency, digital literacy initiatives, and cooperation with public authorities in emergencies involving large-scale online harm as complementary obligations arising from platforms' influence over fundamental rights.

This framework blurs the boundary between process-based and outcome-based duties. The annex duties introduced by the Court are preventive and procedural: they demand diligence, transparency, and internal mechanisms for risk management. Yet the judgment does not detail what constitutes a systemic failure in concrete cases or the level of diligence required to avoid it. The standard for non-compliance remains open, leaving unclear whether liability will depend on the scale of the harm, the recurrence of omissions, or the inadequacy of preventive systems. The decision thus establishes the existence of a duty of care but leaves unresolved the operational criteria by which it will be enforced.

Indeed, these elements cannot be settled through judicial interpretation alone. Courts may articulate constitutional principles and delineate minimum standards of diligence, but they lack both the mandate and the institutional capacity to translate these standards into a detailed framework of monitoring, enforcement, and sanction. As a result, the STF's reasoning merges preventive and compensatory logics without specifying when omission amounts to legal fault or what threshold transforms a failure of diligence into a systemic one. Clarifying these parameters and designing the corresponding mechanisms of oversight and accountability requires attention to concrete situations, legislative action and, likely, the involvement of a regulatory authority.

The judgment thus represents an important inflection point in the evolution of Brazil's platform governance regime. It signals a shift from a reactive model centered on content removal to a preventive model based on due diligence and transparency. At the same time, its

hybrid structure demonstrates the limits of judicial norm creation in areas that demand continuous supervision, technical expertise, and institutional coordination. The future coherence and effectiveness of Brazil's framework for platform accountability will depend on how these judicial principles are integrated into a legislatively defined and administratively enforceable regulatory regime.

4) CONCLUDING REMARKS

The analysis of the duty of care across various areas of Brazilian law reveals its central role as a principle and often the basis for liability. Essentially, the duty of care imposes a diligent, attentive, and preventive conduct, aiming to avoid damages (as obligations of means), but also serves as the basis for the obligation not to cause harm (as obligations of result).

When the duty of care is expressed by an obligation of means, what is required from the agent is the adoption of specific conduct: the application of their best efforts, knowledge, and techniques to achieve a desired goal, without, however, guaranteeing the final outcome. Liability in such cases arises from a failure in diligence, in taking appropriate measures, or in how the action was executed or omitted.

By contrast, where the duty crystallizes as an obligation of result, the legal focus is on the non-occurrence of a specified harm: responsibility is triggered by the materialization of the adverse outcome, independently of the actor's intent or the efforts undertaken. The survey conducted in this paper shows that Brazilian law consistently alternates between these two modalities and, in many instances, combines them: the breach of preventive duties often produces an undesirable outcome that also constitutes a breach of an outcome-based duty.

Understanding this distinction between obligations of means and obligations of result is fundamental for the forthcoming

application of the precedent set by the STF on platform liability and duty of care. The Court recognized a preventive duty of care and identified a series of procedural obligations for digital platforms, yet it did so within a framework that allows those preventive duties to generate liability when serious harm occurs. As Brazilian doctrine already integrates preventive and compensatory logics, it becomes clear the hybrid nature of the STF's decision and situates it within a broader legal tradition.

At the same time, the judgment leaves unresolved the substantive and institutional questions that would make such a duty operational. It does not define the standard of diligence expected from platforms, the threshold for systemic failure, the procedures through which compliance should be monitored, nor the authority responsible for overseeing these duties and ensuring compliance. These gaps highlight that judicial recognition of a duty of care is only the first step: its effectiveness depends on legislative action and regulatory design capable of specifying duties, defining enforcement mechanisms, and ensuring proportionality between preventive obligations and liability.

The paper's contribution lies in using Brazilian legal doctrine to interpret the STF's innovation and to identify the legislative and institutional gaps it exposes. The survey of different legal fields shows that the conceptual building blocks for a process-based duty of care already exist, but their application to platforms still requires a coherent regulatory framework. The consolidation of a process-based duty of care for digital platforms will therefore depend less on further judicial interpretation than on the legislative and administrative work required to give concrete effect to the principles now affirmed by the Court. In the meantime, the absence of clear regulatory parameters will make it difficult (and risky) for courts to determine, on a case-by-case basis, whether a platform has failed in its duty of care or experienced a systemic failure, creating the danger of inconsistent jurisprudence in an area involving fundamental rights and democratic safeguards.

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Data Availability

The authors declare that all data used in the research are publicly available in an open-access repository, in accordance with open science practices. *Sequência* encourages the sharing of research data that ensures transparency, reproducibility, and verification of published results, while respecting applicable ethical principles. Accordingly, the disclosure of information that may allow the identification of research participants or compromise their privacy is not required. Data sharing should therefore prioritize scientific integrity and the protection of sensitive data, ensuring public accessibility of results without undue exposure of participants.