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THE THEORY OF LOSS OF CHANCE IN MEDICAL LIABILITY APPLIED WITHIN BRAZILIAN JURISPRUDENCE

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Abstract: The loss of chance doctrine arose in order to ensure full recovery of damages for the victims of medical negligence. In the doctor-patient relationship, the doctor performance may harm the patient in many different ways, giving rise to a range of injuries of different nature, including the injury caused by loss of the chance of cure or survival, which directly affects the patients' lives and health. Although this theory is not found in any enacted Brazilian law, and despite the resistance to its implementation due to the difficulty of its measurement and the calculation of the monetary damages, a gradual advancement in the application of the concept has been observed in recent years, showing that the Right to protect the dignity of the human person has been increasingly witnessed in Brazilian Courts.

Keywords: Medical Liability; Loss of Chance; Dignity; Full Recovery of Damages; Brazilian Jurisprudence.

1. INTRODUCTION

Law has increasingly focused on the protection of human beings. Therefore it has been causing changes in the institute of liability, especially in medical liability, which deals directly with very valuable concepts for the human person: health and life.

Civil Liability's primary purpose is to compensate, in full, the damage caused by the breach of certain obligations of conduct, aiming the full recovering of the victim to the state it would be found if there had been no damage.

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The concept of damage has been suffering over the years, an extension that allows you to provide greater compensation to the victim, with an emphasis on non-pecuniary damages rephrase. When it comes to medical performance, it may harm the patient in several ways, allowing different interpretations to damages of different nature, whether pecuniary or non-pecuniary (moral damage). Even damages which are not caused by the final outcome, but by the loss of chance of cure or survival can be considered an injury to the patient as well.

The theory of loss of chance is applicable to a case when the behavior of a third party makes an individual, who is conducive to a positive result, loses the possibility of a good result or fails to prevent an injury. Therefore, in the area of medical liability, this theory serves to compensate a patient for a possible damage caused by the loss of a chance of cure or survival.

The Brazilian law does not expressly grant the loss of a chance as civil liability, however, the concept of human dignity and full recovery of damage, (Article 1, III, and 5, V and X, both the Constitution Federal/88 and Article 944 of the Civil Code), which underlines this theory, confer legitimacy on its application and has been gaining greater acceptance by the legal doctrine, especially by Brazilian Courts.

Brazilian case law plays an important role in applying the liability of the physician for the loss of a chance, especially when there is a breach of the doctor's duty to inform the patient. Consequently, this action ensures the support for protection of the dignity of the human person and keeps the law alive.

The loss of chance theory needs judicial protection when it concerns an injury to a legally protected right, as well as autonomy, the right of choice, and the free will of the patient in relation to the treatment and to his or her health.

However, this theory has given rise to several criticisms and questions about its application, since it deals with the unpredictability and uncertainty about a frustrating future event. This is due to the inherent risk of the medical performance, which goes against one of the principles of law, the legal certainty. This principle's aim is to minimize the uncertainty, which is not a guarantee in Medicine. Furthermore, when a legal practitioner analyzes the case law, there is a great difficulty in defining the injury and in quantifying the damage, i.e., the amount of money to be awarded to the victim.

The aim of this paper is to actually show how the Supreme and State courts in Brazil understand the theory of the loss of chance, as well as the progress made regarding the application of the theory in the medical field.

2. THE PROTECTION OF THE HUMAN PERSON IN MEDICAL LIABILITY

The Institute of Civil liability's aim is to repair or to fully compensate the injured party for damages arising from tort committed by an agent.

Due to the different types of legal relations that have arisen from the application of the principle of solidarity, the Civil Liability is, over the years, gaining new shades. This principle's aim is to share the risks in society, and principally to ensure the increasing concern about the protection of human dignity, which is the basic reason underlying the concept of law.

The physician's liability occurs when he or she commits a tort as a result of a tortious conduct – negligent, reckless or unskilled – in the performance of his or her professional activities which causes unjust damage to the patient (Martins-Costa, 2005: 106-131)[1].

The institute of medical liability within Brazilian law is set by the type of relationship between the doctor and the patient. If the doctor is a public agent, rules of the public law are applied, thus accusing the State objectively of being liable for the acts committed by its agents, regardless of their guilt (art. 37, § 6 of the Federal Constitution of 1988). But if the doctor is self-employed or linked to some private hospital institution, rules of the private law will be applied, namely, the Civil Code (Article 951) and the Consumer Code (Article 14, § 4). This will occur despite the prevailing disagreement of doctrine concerning the existence of a consumption ratio between doctor and patient[2,3].

1 Martins-Costa, Judith (2005) "Entendendo problemas médico-jurídicos em ginecologia e obstetrícia" Revista dos Tribunais, vol. 831, ano 94, São Paulo: Revista dos Tribunais, 106-131.

2 Superior Tribunal de Justiça (STJ), Resp. n.º 731078-SP, 3ª T, Justice Castro Filho, judgment 12.13.2005, journal entry DJ 13.02.2006; STJ, Resp 493181-SP, 1ª T, Justice Denise Arruda, judgment 12.15.2005, journal entry DJ 02.01.2006.

3 When the Consumer Code is not applied: Souza, Alex Pereira, Couto Filho, Antonio Ferreira (2008) *Responsabilidade civil médica e hospitalar* Rio de Janeiro: Lumen Juris, 44. STJ, Resp 466730-TO, 4ª T, Justice Hélio Quaglia Barbosa, Justice: Fernando Gonçalves, judgment 23.09.2008, journal entry DJ 01.12.2008. CONSELHO FEDERAL DE MEDICINA (Brasil), Resolution n.º 1.931, Aprove of the Ethics Medical Code.

Both cases assign constitutional principles and ethical standards - Medical Ethics Code and resolutions of the Federal and State Boards of Medicine, which regulate, govern and judge the medical activity through a work ethic.

Differently from the current tendency to objectify the responsibility of those who perform activity that involves risk, all those codes present the physicians' liability as subjective (Article 951 CC, Article 14, § 4, the CDC, and Article 1 of the Medical Ethics Code). However, due to the insufficiency of subjective responsibility, which is based on guilt, and due to the use of the principle of risk socialization, some jurists already defend the application of objective liability. The medical liability is objective in some cases such as: i) clinic assays (experimental studies in humans) (Barboza, 2009)[4], ii) donation of organs in cases of transplants in life; iii) patients exposed to radiation; and iv) heads of the medical team (Gonçalves, 2009)[5].

Although the self-employed doctors develop activities that can represent a health risk to the patients, by an option of legislature, they respond only if guilt is proven, eliminating the effect of Article 927, paragraph one of the Civil Code (Peluso, 2008)[6], which' as well as the subjective responsibility (Article 186 of the Civil Code), establishes the general clause[7] of objective liability derived from risk theory (Cavalieri Filho, 2004: 156)[8]. According to Article 951 of the Civil Code, which is specific to rule indemnity regarding the health professionals, these professionals respond for death of the

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Sudsection chapter I. http://www.portalmedico.org.br/resolucoes/cfm/2009/1931_2009.htm [02 may 2011].

4 Barboza, Heloisa Helena (2009) "Responsabilidade civil em face das pesquisas em seres humanos: efeitos do consentimento livre e esclarecido" in Martins-Costa, Judith; Möller, Letícia Ludwig (eds.) *Bioética e responsabilidade*. Rio de Janeiro: Forense, 205-233.

5 Gonçalves, Carla (2009) *A responsabilidade civil médica: um problema para além da culpa*. Coimbra: Coimbra Editora.

6 Peluso, Cesar (ed.) (2004) *Código Civil comentado: doutrina e jurisprudência: lei nº 10.406, de 10.01.2002: contém o código civil de 1916*. Barueri, São Paulo: Manole, 859; Cavalieri Filho, Sergio (2004) *Comentários ao novo Código Civil* vol. XIII, Rio de Janeiro: Editora Forense, 156.

7 For Rui Stoco e Flávio Tartuce there is only a general clause, the subjective responsibility. Stoco, Rui (2004) *Tratado de Responsabilidade Civil*, São Paulo: Revista dos Tribunais; Tartuce, Flávio (2005) "A Responsabilidade Civil Subjetiva como regra geral no Novo Código Civil" http://www.mundojuridico.adv.br [10 may 2010]. But according to Roberto de Abreu e Silva the rule today is the objective liability, being the guilty demand an exception. Abreu e Silva, Roberto de (2006) "A teoria da perda de uma chance em sede de responsabilidade civil" *Revista da Emerj*, vol. 9, n. 36, Rio de Janeiro: Gama Editora, 25.

8 Cavalieri Filho, Sergio (2004) *Comentários ao novo Código Civil* vol. XIII, Rio de Janeiro: Editora Forense, 156.

patient, his or her injury, letting the patient disabled for work or, when acting with negligence, recklessness, or malpractice.

The doctor has the *munus* of ensuring the dignity of the patient, which is the most fragile component, and, especially, the patient's psychophysical integrity. The duties of the physician comprise: i) providing extensive (comprehensive is better) information about the diagnosis; ii) employing all the legally allowed techniques approved by the scientific community, available for the patient's recovery,; and iii) protecting the best interest[9] of the patient in favor of his psychophysical dignity and integrity (Tepedino, 2000: 46-47)[10].

Since the doctor-debtor cannot guarantee useful results in favor of the patient-lender, the understanding that prevails in relation to medical practice is, as a rule, "the obligation of means".. The doctors are not obliged to heal, but they are committed to provide their services in accordance to the rules and methods of the profession, to use diligence, attention, caution, care, advice, and apply their technical knowledge, according to the advancements of medical science.

However, depending on the responsibility undertaken and the information provided, the "obligation of an outcome"[11] would not necessarily be excluded. Though, in both cases the classification of the medical responsibility remains subjective (Cavalieri Filho, 2008: 262)[12].

In order to characterize the duty to indemnify for damage, some elements intrinsic to the duty of indemnity should be proved: i) the medical conduct (active or omission), ii) the blame, iii) causal connection between the physician's conduct and the damage suffered by the patient (pecuniary and non-pecuniary damage).

The assessment of causation in medical liability involves a legal and scientific appreciation of the facts discussed, and the perception of the legal and medical

9 The Physicians must act in accordance with bioethical principles, namely: i) the autonomy principle; ii) charities principle; iii) no maleficence principle; and iv) the justice principle. Barreto, Vicente de Paulo (ed.) (2003) *Novos Temas de Biodireito e Bioética*. Rio de Janeiro: Renovar.

10 Tepedino, Gustavo (2000) "A responsabilidade médica na experiência brasileira contemporânea" *Revista Trimestral de Direito Civil*. vol. 02, ano 01, Rio de Janeiro: Padma, 46-47.

11 Some kinds of medical activities are understood as having the duty of an outcome. For instance: plastic surgery, laboratory examination and x-ray, blood transfusion, and an anesthetic

12 Cavalieri Filho, Sérgio (2008) *Programa de direito do consumidor*. São Paulo. Atlas, 262

causes, being both necessary to determine whether a particular medical procedure engendered injury. Due to the fact that the lawyer is able to distinguish between the different assumptions generating medical responsibility, but does not have the necessary technical knowledge, it is essential that the judges use the expert evidence to establish causation. This is indispensable, since the medical language varies according to the peculiarity of each patient and the characteristics of each disease, together with other environmental aspects.

Pecuniary damages are divided into two subspecies, namely, actual damages and speculative damages (lost profits), being the first the one in fact experienced by the victim, which can be measured by simple arithmetic calculation, and the second being what the person fairly failed to gain because of the unlawful act. (Article 402, 948-950, all of the Civil Code).

The injury suffered by the patient, in general, is the non-pecuniary damage (moral damage), which has no pecuniary elements. This kind of damage is mainly characterized by the violation of personal rights such as honor, intimacy, privacy, the "life project", the image, freedom, physical and mental health, bodily integrity, aesthetics, and others. Other damage that may affect the patient is the aesthetic one, hedonic damage, considered by some jurists as a peculiar kind of damage, while for others as being part of the non-pecuniary damage (Lopez, 2004)[13].

Despite the legal provision regarding the assumptions that lead to the physicians' duty to compensate the patient or family for damage caused by them, defining the physicians' liabilities has been a difficult task for law enforcement officers. This is due to the evolution of the institute and to the new discourse that the law has been undergoing about doctrine and legal concepts, especially concerning existential relationships like the doctor-patient's.

Furthermore, while the medical service has been progressively available to the mass, socialized, disseminated among the working class, the physician has been increasingly inserted into the consumer market, and many scientific advances, new methods and technologies are available, bringing up new legal and ethical questions aimed to resolve new conflicts.

For instance, such would be the case when using techniques of assisted human

13 Lopez, Teresa Ancona (2004) *O dano estético*: responsabilidade civil. São Paulo: Revista dos Tribunais.

reproduction, genetic information, stem cell research, new techniques to define diagnostic, and others, that sometimes they are not regulated by law. These new Themes have today been faced by a new branch of law, the so-called Biolaw.

It is important to clarify that new types of damage have arisen as a result of the medical performance, since someone can be deprived of the opportunity to gain a certain advantage, or even to avoid an injury. This can give rise to a claim for compensation for the loss of a chance or opportunity. This theory is influenced by the French experience and was developed in the 1960s. The theory of loss of chance is applicable to the civil physicians' liability and to other areas. For instance, when a lawyer prevents the case to be examined by the competent court because of his or her fault of, among others[14], not paying attention to the deadlines, or a carrier's liability for the transport of a person who is going to render a public open exam and miss the opportunity because the transport system failed. Therefore the application of the theory of loss of chance should be applied in medical liability, given the need to ensure broad protection to the patient's dignity through this new institute.

3. THE THEORY OF LIABILITY FOR THE LOSS OF A CHANCE IN THE BRAZILIAN LEGAL SYSSTEM

The application of the theory of loss of chance (*perte d'une chance*) began within the medical liability concept in France. Later, this concept has expanded to other European countries like Italy, England (*balance of probabilities*), and now it is also widely used in the U.S.

This theory prevented the damage awarded for loss of an opportunity from obtaining an advantage and not for the loss of the advantage in it. There was a distinction between the loss of an outcome and the loss of the possibility of achieving such outcome. Thus, the chance started to be a matter of importance in itself, regardless of the result.

14 STJ, Lawyers liability for loss of chance, Resp 1079185-MG, 3ª T, Justice Nancy Andrighi, jugdement. 11.11.2008, journal entry DJ 08.04.2009; STJ, Liability in relation to TV programs. Resp 788459-BA, 4ª T, Justice Fernando Gonçalves, judgment. 11.08.2005, journal entry DJ 13.03.2006; STJ, Environmental Liability , Resp nº 745363/PR, 1ª T, Justice Luiz Fux, judgment 09.20.2007, journal entry DJ 10.18.2007.

This is a recent issue that has been attracting the attention of scholars and jurists in the Brazilian law. When analyzing the articles 186, 187, 402, 927 and 949, all from the 2002 Civil Code, as well as Article 5, Sections V and X of the Federal Constitution of 1988, we conclude that although no specific device for the loss of a chance has been established by the Brazilian Law, legal officials are using an analogy criteria, to adapt the current legislation to the recorded cases, in compliance with the common proportionality and appropriateness measures. This happens because the victim has the right to have his or her loss repaired by whoever caused it (Lopes, 2008)[15].

However, despite the growth of its adoption by the Brazilian case law, it is still a controversial theory which is subject to inquiries in relation to the doctrine. This is due to the fact that there is a rooted idea that only actual damages may give rise to indemnity. Nevertheless, the same does not occur with the "hypothetical damage" caused by presumptions or probabilities. Moreover, there is a great difficulty to measure the *quantum* (the amount) to be recovered.

Part of the most traditional doctrine holds that there is no possibility to determine what the final result would be. Therefore, one cannot contemplate damages for loss of chance, since this would be considered an eventual, hypothetical damage. For those who adopt this understanding, the compensation of such damage seems to be an unjust enrichment.

However, it is essential to clarify that the loss of a chance is not characterized by a future loss. In fact, it is an actual damage, although very difficult to be analyzed, since it is not possible to bring the victim back to the same condition he or she were before the damage occurred.

There is no doubt about the damage. It is certain and there is a strong causal relationship between the damage and the fact that caused it, because, given the legitimate expectation he or she had in having the benefit of avoiding the harm, an injury has occurred to the victim.

For a long time the law ignored the possibility of blaming the agent for the damage, caused to the victim by the loss of chance he could have had or the impossibility of avoiding this loss, arguing that "what has not happened may never be used as a certain evidence for a remedy to be provided".

15 Lopes, Rosamaria Novaes Freire (2007) *Responsabilidade civil pela perda de uma chance* http://www.direitonet.com.br/artigos/x/38/61/3861/ [25 May 2008].

Just like the doctrine, the courts used to require the victim who claimed the loss of a chance, to provide an indubitable proof that he or she would have achieved the result they were expecting, had the harmful event not occurred.

Another aspect that hindered the understanding and acceptance of the theory was the fact that the victim often used to present his or her claim in a wrong way, requiring the compensation on the grounds of the loss of the expected advantage rather than on the opportunity of getting it.

Two understandings emerged to explain the loss of chance (Pedro, 2008)[16]. The first, and much more applied, refers to the type of a peculiar damage represented by missed chances. The second characterizes the loss of chance as a modifying mechanism of the rules for measuring the causal link between the fact and the damage[17]. For Sergio Savi (Savi, 2009: 05)[18], the cases of medical liability fall under the second model, because of its own characteristics.

As mentioned in item 2, there are two kinds of damage: pecuniary damage (actual damages and lost profits) and non-pecuniary (moral damage). Doctrine and jurisprudence sometimes tend to classify the damage resulting from the loss of a chance under these already existing categories: actual damages (Dias, 1999: 67)[19], lost profits and moral damage[20].

It is worth mentioning that there are actually some similarities between the lost profits and the loss of a chance; however, they are distinct. In the lost profits, the injury is certain, that is, what you were prevented from obtaining. Moreover, this value can be measured and determined. The loss of chance, on the other hand, is not recognized if the victim did effectively get the benefit.

In many cases, the loss of a chance is classified as moral damage, unduly ignoring the pecuniary damage caused by the loss of this duly attested opportunity. Therefore, there is no unanimity yet concerning the correct classification of the institute.

16 Pedro, Rute Teixeira (2008) *A responsabilidade civil do médico: reflexões sobre a noção da perda de chance a tutela do doente lesado*. Coimbra: Editora Coimbra.

17 The causal nexus in loss of chance, according to Grácia Cristina Moreira do Rosário it is especially legal and not natural, since the professional act has not caused the damage, it has not avoided the natural course of the events. Rosário, Grácia Moreira do (2009) *A perda de uma chance na responsabilidade civil médica*. Rio de Janeiro: Editora Lumen Juris.

18 Savi, Sérgio (2009) *Responsabilidade civil por perda de uma chance*. São Paulo: Atlas, 05.

19 Dias, Sérgio Novais (1999) *Responsabilidade civil do advogado: perda de uma chance*. São Paulo: LTr, 67.

20 Tribunal de Justiça de São Paulo (TJSP), Civil Appeal with Revision. 688.509-00/9, 10ª CC, Justice Jayme Queiroz Lopes, judgment 11.18.2004.

The loss of a chance is a peculiar damage (Venosa, 2005: 270)[21] (Araújo, 2006: 440)[22], that does not fit into the existing types of damage already known to the system; it differs from the loss of a final outcome and fits in the concept of the loss of chance of achieving a result. It is a loss that stems from the injury of diverse property. However, for the loss configuration it is necessary that the victim proves the existence of an injury and its causal relationship.

This new conception intended to give the public the widest and fairest protection possible to their rights and individual guarantees. It arose from the analysis of recorded cases that helped the people to understand that regardless of a final result, the action or omission by an agent who deprives others of the opportunity of achieving this result should be blamed and punished, even though this forthcoming event would not comprise absolute certainty.

In such cases, the offender is liable not for causing a direct and immediate injury to the victim, but, for having made the person lose the opportunity of obtaining the chance of a useful outcome or even for being hindered to avoid an injury. It is worth saying that probably, the result was not achieved because it was interrupted by the agent's action or omission.

We cannot forget that you need to consider the verisimilitude, knowing that it will never be possible to assert that the victim would have reached that advantage applying the hypothesis of non-occurrence of the act or fact caused by the agent which deprived him or her from the chance of getting the expected result. But the chance to achieve a useful outcome must be necessarily serious and real, since the hypothetical injury is not enough for indemnifying a victim.

Despite the disagreement over the kind of damage and how to compensate it, an advancement of this theory has been currently observed in Brazilian jurisprudence. In general, however, the judgment against the agent is grounded on non-pecuniary damages[23].

This theory was transported (transferred?) to the medical field under the rubric of *perte d'une chance survie ou guérison*, or loss of a chance of survival or

21 Venosa, Silvio de Salvo. *Direito Civil: responsabilidade civil*. São Paulo: Atlas, 270.

22 Araújo, Vaneska Donato (2006) "A perda de uma chance" in Tartuce, Flávio; Castilho, Ricardo (eds.) *Direito Civil. Direito Patrimonial e Direito Existencial. Estudo em homenagem à professora Giselda Maria Fernandes Novaes Hironaka*. São Paulo: Editora Método, 440.

23 TJSP, Civil Appeal 0117271-26.2006.8.26.0000, 10ª CC, Justice Guilherme Antini Teodoro, judgment 11.18.2010.

cure (Kfouri Neto, 2002: 97)[24].

Nevertheless, there are also controversial issues in the application of this theory in medical liability. This is due to the difficulty to establish the causal link between action and harmful result constituting the loss of chance of survival or cure, concerning the medical performance and uncertainties about the disease and patient responses to the treatment. Not to mention the definition of the *quantum debeatur*, since it is not a question of property, but non-property assets such as life, health, freedom of choice, existential individual autonomy, fundamental rights and personality (art. 5 and art of CF/88. CC 21).

4. HOW BRAZILIAN JURISPRUDENCE DEALS WITH MEDIAL LIABILITY FOR THE LOOS OF A CHANCE

The medical liability for loss of a chance of survival or cure does not differ from the institute of civil liability, regarding the need to prove its elements: conduct, causation and damage.

However, for its peculiarities, some steps must be observed[25]: i) reviewing the medical procedure, analyzing if there was any breach of dull done by the physician under concrete circumstances, ii) examining the conduct of the patient, for instance, if he followed the doctors' instructions and prescriptions; iii) investigating if there were a possibility of recovery or survival had the patient had the treatment or even if he or she had taken a certain medication or had avoided certain conduct towards his or her health, iv) checking the injury suffered by the patient, effectively what the patient did not obtain because of medical procedures, what kind of property needs legal protection; v) determining the amount of the compensation through equity (Article 4 and 5 of the LICC, Article 944, the sole paragraph of the Civil Code and Article

24 Kfouri Neto, Miguel (2002) *Culpa médica e ônus da prova*. São Paulo: Revista dos Tribunais, 97.

25 Rute Teixeira Pedro describes three criteria in order to make easier the application of the theory of loss of chance in recorded cases: 1.The existence of positive outcome in the future, which can probably happen; 2. It is necessary that, in spite of the uncertainty, the person be in a favorable situation to reach a positive outcome, because he or she has a number of requirements which implies an inquiry (a real chance to acquire what is expected); 3. It is important to verify the behavior of a third part, which can generate liability and that can eliminate completely the real possibilities of outcome. Pedro, Rute Teixeira (2008) *A responsabilidade civil do médico: reflexões sobre a noção da perda de chance a tutela do doente lesado*. Coimbra: Coimbra Editora, 198.

127 of CPC) and the criteria that has been applied to non-pecuniary damages).

The tort derives from the fact that the doctor did not give the patient every opportunity in order to cure him or her, depriving the patient of pursuing the improvement of his or her health, which also occurs when the physician fails his duty to duly inform the patient.

The lack of information eliminates the opportunity the patient had to do a particular treatment that could improve his or her quality of life and that could make the cure possible or prolong his or her lifetime. Furthermore, it prevents the patient from exercising his or her right to refuse therapy or to undergo a certain medical procedure, which could be a risk.

Loss of chance has been widely applied in cases related to misdiagnosis[26] (e.g., when doctor does not readily diagnose the existence of a cancer or does it very late)[27]; the absence of preoperative tests; the lack of medical care, information and acceptance of the indicated treatment; the absence of a skilled anesthesiologist; and others[28]. In sum, everything that can jeopardize the success of the treatment.

The grounds of liability for the loss of a chance are aimed at supporting the psychophysical integrity of the patient, his or her health and the protection necessary to human life and dignity.

The role of the physician is to ensure the preservation of human life, to attend the sick person and to use all his or her technical and scientific skills to improve the health status of the patient. Thus, the physician cannot prevent the patient from acquiring the improvement in his or her clinical situation because of the doctor's lack of diligence or prudence.

In order to assert the medical responsibility, the presence of damage is not enough there must be the presence of other elements of civil liability as well. The damage must be a direct consequence of a tort and negligence, that is, it

26 Tribunal de Justiça do Rio de Janeiro (TJRJ), Rehearing en banc 2008.005.00432, 16ª CC, Justice Mauro Dickstein, judgment 02.17.2009; TJRJ, Civil Appeal 2007.001.32061, 13ª CC, Justice Azevedo Pinto, Judgment, 10.03.2007; TJRJ, Civil Appeal 2005.001.44557, 17ª CC, Justice Edson Vasconcelos, judgment 03.29.2006.

27 TJRJ, Civil Appeal 0010941-64.2006.8.19.0205, 8ª CC, Justice Norma Suely, judment 02.02.2010.

28 TJSP, Civil Appeal 994.09.272165-3, 4ª T, Justice Ênio Santarelli Zuliani, judgment 01.13.2010.

must show the relation to causality, and be the result of an omission or action of the physician, which will depend on an accurate appraisal.

The causal relationship, *in casu*, is not natural, but strictly legal, since there is no harm in the sense today, but the loss of the possibility of someone obtaining an advantage by virtue of the conduct of others.

The certainty about the existence of a probability of cure or survival should be acquired with the support of medical science, through medical examination, and other evidence as witnesses and documents (patient records in the office or hospital records, reports provided, terms of informed consent, prescriptions).

The *legis artis* will assist with the answers about the value of the chances that the patient had to relieve their pain and get the cure or prolong survival and equivalence of this loss in percentage applicable to all the situation, but the possibility of using statistical data to assist the judge is a matter to be discussed (Pedro, 2008: 389-394)[29].

It is undeniable that all instruments are important in the pursuit of real truth, but the judge must not turn away the physician and the patient *in concrete* and get based solely on the ordinary, abstract man. Finally, the evidence of the harm suffered by the patient resulting from the loss of chance of cure or survival is unnecessary. Since we are facing here an injury to the patient's freedom of choice, self-determination and psychophysical integrity it is possible to classify it as a kind of non-pecuniary damage – moral damage[30] - *in re ipsa*[31].

However, the difficulty of quantifying such damages remains (Câmara, 2007: 241-251)[32]. Therefore, to arbitrate the value to ensure the compensation of victims without making the damage award a source of unjust enrichment, the criteria of the damage seriousness and the degree of culpability of the offender (Article 944 of the Civil Code) and the proportionality and reasonableness principles.

29 Pedro, Rute Teixeira (2008) *A responsabilidade civil do médico. reflexões sobre a noção da perda de chance a tutela do doente lesado*. Coimbra: Coimbra Editora, 389-394.

30 TJRJ, Civil Appeal 0003472-10.2002.8.19.0042, 11ª CC, Justice Jose C. Figueiredo, judgment. 12.16.2009.

31 TJRJ, Civil Appeal 0001232-73.2000.8.19.0024, 16ª CC, Justice Luisa Bottrel Souza, judgment. 10.20.2010.

32 Câmara, Alexandre Freitas (2007) "O ônus da prova e a responsabilidade civil médica" in Nigre, André Luis; Almeida, Alvaro Henrique Teixeira de (eds) *Direito e medicina, um estudo interdisciplinar*. Rio de Janeiro: Lumen Juris, 241-251.

Brazilian Supreme and State Courts have been applying this theory, even in cases involving lack of information and lack of consent obtained from the patient. This shows certain progress in the protection of the patient as a human person and contributes to the construction and systematization of the study of this theory in spite of all the difficulties presented.

It is possible to see in the analysis of the decisions involving the application of the theory of medical responsibility, that the lack of information from the physician regarding the patient's health status has generated damages. It occurs not only for preventing the patient of the opportunity of curing him or her by having access to appropriate treatment, but also for preventing him or her of survival.

An important precedent is extracted from the judgment of the Third Chamber of the Supreme Court[33] dismissing the special appeal filed by the hospital against the decision held by the Court of Justice of the State of Mato Grosso do Sul.

The reasoning of the decision was the judgment against the hospital and the condemnation to pay compensation in the amount of R$ 83,000.00 (eighty-three thousand reais) for moral damages following the death of the patient due to the negligence practiced by the doctor on duty in the emergency room while working in the hospital. It happened because the referred patient was sent to outpatient care in a health center, without identifying the context of the severe infection presented by him, without providing more specific tests and even more severe, the administration of healing drugs, which culminated in his death.

The conduct of the physician, which was very well analyzed in the respective decision, has eventually destroyed the chance of a more precise diagnosis and an efficient emergency treatment that would allow the patient's healing or survival. Wherefore, the theory of loss of a chance was applied to the case, due to the causal link between the tortious conduct of the physician, characterized by omission and the damage suffered by the family. The doctor's failure to identify the disease ruined the patient's chances to be cured.

Another important decision was held by the Ninth Civil Chamber of the Court of Rio Grande do Sul State. This decision applied the theory of loss of chance

33 STJ, Resp. 1.184.128-MS, 3ª T, Justice Sidnei Beneti, judgment. 08.06.2010, journal entry DJ 07.01.2010.

due to the lack of information caused by physicians concerning the diagnosis of a newborn suffering from a heart murmur that culminated in his death. Such a situation would require further investigation and precautions in relation to evolving symptoms.

In both cases we can emphasize that it was not certain that the treatment would have a good result such as the survival or cure of the patients, but the physician omission in giving an accurate diagnosis and the lack of information has induced the loss of chance of cure.

The diagnosis is the starting point of any medica treatment; it is by examining the signs and symptoms presented by the patients and their precedents that the nature of a disease is diagnosed. Setting a diagnosis is essential before starting any treatment, or adopting a therapeutic or surgical intervention. Therefore, the doctor will need to use all means available, although it is not always possible to reach an accurate diagnosis. That is why provisional diagnoses are often accepted and failures in the final diagnosis occur.

In accordance with Article 34 of the Medical Ethics Code, which is in consonance with the Brazilian legal system, the doctor must, subject to therapeutic privilege, inform the patient about the diagnosis, prognosis, risks and treatment objectives.

The absence of information about alternative tests to be performed on the patient in order to allow better diagnosis or even confirm it, or failure to warn the patient about possible failures in test results (e.g., false positive)[34] can set up the medical liability breach of the duty to inform.

A mistaken diagnosis, depriving the patient from his chance for a cure or to treat his ailment without further delay, sets, in this way, the physician's liability for the loss of a chance[35]. Same occurs if the diagnosis conclusion is unnecessarily delayed[36].

The main point of the theory of loss of chance is the fact that a different

34 TJRJ, Civil Appeal 2008.001.56179, 9ª CC, judgment. 10.30.2008; TJRJ, Civil Appeal 0003472-10.2002.8.19.0042, 11ª CC, Justice José C. Figueiredo, judgment 12.16.2009; TJRJ, Civil Appeal 2008.001.28159, 9ª CC, Justice Roberto de Abreu e Silva, judgment 09.30.2008.

35 TJRJ, rehearing em banc 2008.005.00432, 16ª CC, Justice Mauro Dickstein, judgment 02.17.2009.

36 TJRJ, Civil Appeal 2005.001.44557, 17ª CC, Justice Edson Vasconcelos, judgment 03.29.2006.

physician's practice could have allowed a different treatment[37], that could have prevented the resulting damage.

5. CONCLUSION

The issue of medical liability for the loss of a chance presents itself as a topic of great relevance and has already been faced by Brazilian courts. However, it still encounters some resistance t because of the uncertainties that permeate not only its classification but also the calculation of the compensation amount.

The Institute of civil liability must be understood in the light of the Constitution, its principles, with emphasis on the existential aspect, because it aims at the human being, the protection of human dignity, the basic foundation of the Federative Republic of Brazil (art. 1 of CF/88), and in the scope of medical responsibility, its aim is to guarantee the fundamental right to life, health, self-determination, autonomy and rehumanazation of the legal system.

The medical responsibility for the loss of a chance is applicable when the doctor's conduct violates his ethical and professional duties, thus causing the loss of the possibility to reach a positive outcome for the patient, who was in a conducive state to acquire it.

It is desirable that the judge, in assessing the loss of a chance in the medical field, considers the following assumptions: i) the breach of duty by the doctor who fails to exercise reasonable care; ii) the certainty of the probability of obtaining a cure or prolonging the patient's survival; iii) the causal connection between the doctor and the actual injury; and iv) the identification of the violated legal right and the need for protection. And, once the loss of chance of cure or survival is established, the compensation should be awarded. This should be done through the use of equity, proportionality and reasonableness, in accordance with the degree of guilt and the extent of damage.

37 Tribunal de Justiça do Rio Grande do Sul (TJRS), Civil Appeal 70020554275, 5ª CC, Justice Umberto Guaspari Sudbrack, judgment 11.07.2007; TJRJ, Civil Appeal 0001232-73.2000.8.19.0024, 17ª CC, Justice Luisa Bottrel Souza, judgment 10.20.2010; STJ, Appeal in Interlocutory Appeal 1222132-RS, 2ª T, Justice Eliana Calmon, judgment 01.03.2009, journal entry DJ 12.15.2009.

The application of this theory: Due to the absence of a systematized conception and the application in the medical activity, the interpreters of the law must make use of a greater argumentative effort in order to avoid the trivialization of the institute and the non-viability of the medical activity. The focus should always be on the partakers of the doctor-patient relationship, subjected to the law, and its peculiarities.