THE INAPPLICABILITY OF THE LOSS OF A CHANCE THEORY IN CASES OF MEDICAL RESPONSIBILITY IN THE BRAZILIAN LEGAL SYSTEM

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Abstract: With the growth of legal demands related to medical practice in the last ten years, Loss of a Chance Theory rapidly found acceptance in Brazilian courtrooms, being used as ground for granting reparation regarding civil liability. This brief study aims to discuss the inadequacy of adopting this theory without further thinking or adaptation, since the current legal background in Brazil points out to stress the actual damage, not the presumed one, especially on an environment surrounded by unpredictability and random outcomes as the medical sciences.

Keywords: Loss of a chance. Comparative Law. Brazilian Legal System.

1. Introduction 2. The Brazilian Legal System regarding compensation and torts 3. The inadequacy of the loss of a chance theory in medical activity 4. An analysis on recent jurisprudential developments. 5. Conclusions. 6. References.

1. INTRODUCTION

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No one denies the importance of using comparative law as a means to bring new light to old problems, and as a valid way of proposing solutions to new challenges in a country´s legal system. But that can not be achieved without proper adaptation.

In general lines that´s what´s currently happening with the theory of Loss of a Chance. Developed in France and Italy, and embraced in England, United States and Spain, this theory has been recently adopted in Brazilian courtrooms, without appropriate discussions on the validity of the application of its doctrine in Brazilian Law.

The loss of a chance concept was originally discussed during a trial in the French *Cour de Cassation*, back in 1965, reviewing a case of medical responsibility, where the physician was considered guilty, because of a wrong diagnosis that prevented the patient from achieving a cure.[2]

Perhaps one of the most famous cases in French legal history, regarding the loss of a possibility in medical treatment was the Affair Perruche. In 1982, a pregnant Josette Perruche discovered symptoms of what proved to be rubella on her four-year-old daughter. She told her physician that, if she too were infected, she would have an abortion rather than run the risk of giving birth to a severely handicapped child. Her physician arranged for two blood tests with a local lab and after reading the results informed Josette that she was in fact immunized against rubella. Both physician and lab were, in varying ways, quite wrong. About a year after his birth, Nicolas Perruche began manifesting major neurological deficits: deafness, partial blindness, and severe brain damage. For their part, his parents, Josette and Christian, initiated legal action against both the physician and the testing lab that had misdiagnosed Josette's condition and effectively nullified her right to an abortion.

[2] According to BIONDI, in Teoria da perda de uma chance na responsabilidade civil.

The question was just what could they claim damages for under the terms of the 1974 law legalizing abortion? Courts were prepared to indemnify women in Josette's position for their loss of choice. But Josette and Christian Perruche went further, first seeking compensation to themselves for the medical liabilities Nicolas had suffered, and later acting for Nicolas himself in a separate suit and seeking direct compensation to their child, rather than to themselves. In choosing that course, however, they encountered a formidable juridical obstacle: the principle of "respect for the dignity of the human person."

Perruches' cause was greatly boosted in the mid-1980s when decisions of the Council of State and the Court of Cassation established the theoretical possibility of distinguishing between a child's life, which clearly could not be indemnified, and a child's handicaps, which could be. At that point, the case entered a new level of disputation.

The defendants had already conceded their liability to both Josette and Christian. But to extend that liability to Nicolas, they argued, was to stretch it beyond all reason. His deficits, after all, did not trace back to anything the physician or lab had done; both Josette and Nicolas, in fact, had contracted rubella before either the physician or the lab had even entered the picture. The real author of Nicolas' condition was, tragically but undeniably, nature. In fact, the errors of his mother's medical providers, by preventing his abortion, had (however inadvertently) saved his life. Could they possibly be penalized for this?

The final judicial act in the Perruche drama occurred in 2000, when the Court of Cassation, meeting in full plenary session, endorsed the report of Counselor Pierre Sargos and finally confirmed the defendants' civil liability to Nicolas himself for his own damages.

After the public outcry generated from this trial, in March 4th, 2002 the French Parliament passed a new legislationstating that no one is allowed to claim damages arising from

the fact of being born.

In Brazil, the loss of a chance theory made its *debut* in a case tried before the State Court of *Rio Grande do Sul*, in 1990, as a result of a Myopia correction surgery that ended up causing a 2 degree hypermetropia and blurries in the operated eye[3]. The Associate Justices decided in favour of the physician, ruling that the loss of a chance theory did not apply to that particular situation.

The point of bringing up these cases is to point the relevance of the Loss of a Chance Theory in the medical responsibility field. It´s not the purpose of this brief study to discuss other areas of applicability of the theory, but only the medical implications of it, and its relations to Brazilian Law, which does not provide for any specific concept of loss of a chance.

The loss of a chance cannot be considered pain and suffering, nor actual damage. It doesn´t fit as well in the idea of profit and loss (since here it´s necessary an objective, tangible probability that the expected result would happen if not for the damage). Instead, it presents itself as an autonomous form of compensation derived from an undeniable – yet ramdomic – loss of an opportunity, where the desirable outcome cannot be guaranteed, in spite of the damage or the inaction of a third party.

In this situation, the so called chance is the possibility of a probable future benefit that integrates the faculties of action of the subject, considering a damage even when it can be difficult to estimate its scope and range. In this competition of past and future factors, necessary and contingent, there is a current and certain consequence.

The idea of loss of a chance, then, rests closer to the concept of pecuniary damage than that of pain and suffering. And that leads to the question: is this theory capable of being used as a form of compensation under the current legal system in Brazil?

[3] As described in details by Sérgio Savi, in *Responsabilidade civil por perda de uma chance*, 2006, p. 45

Moreover: in a field as randomic as the medical sciences, is there space for the measurement of uncertain and unforeseeable probabilities?

2. THE BRAZILIAN LEGAL SYSTEM REGARDING COMPENSATION AND TORTS

Without a proper legal definition, one has to resort to the use of analogy to build a reasonable doctrine that can be suitable to medical cases. Regarding that, three are the main legal diplomas to take into consideration: the 2002 Civil Code, the Consumer´s Protection Act and the Medical Ethics Code.

Article 186[4] of the Brazilian Civil Code states that those who, by voluntary action or omission, negligence or recklessness, violates law and causes harm to another, albeit exclusively moral, commits an unlawful act.

Article 927[5] states that those who, by an unlawful act (articles 186 and 187), causes harm to another, is obliged to repair it.

Another important guideline comes from article 944[6], that directly determines that compensation is measured by the extent of the damage. Complementing that notion, article 951[7] states that "the provisions of arts. 948, 949 and 950 are also applicable in the case of compensation due from those who, in the exercise of their professional activity, by acting with negligence,

[4] *Art. 186.* Aquele que, por ação ou omissão voluntária, negligência ou imprudência, violar direito e causar dano a outrem, ainda que exclusivamente moral, comete ato ilícito.

[5] *Art. 927.* Aquele que, por ato ilícito (arts. 186 e 187), causar dano a outrem, fica obrigado a repará-lo.

[6] *Art. 944.* A indenização mede-se pela extensão do dano.

[7] *Art. 951.* O disposto nos arts. 948, 949 e 950 aplica-se ainda no caso de indenização devida por aquele que, no exercício de atividade profissional, por negligência, imprudência ou imperícia, causar a morte do paciente, agravar-lhe o mal, causar-lhe lesão, ou inabilitá-lo para o trabalho.

recklessness or malpractice, cause the death of the patient, aggravate his illness, cause him injury, or incapacitate him to work.

Consumer´s Defense Code, by its turn, establishes the general rule of objective liability, by ruling that the service provider answers, regardless of the existence of fault, to the repair of damages caused to consumers by defects in the provision of services, as well as by insufficient or inadequate information on their fruition and risks[8].

The fourth paragraph of the same article[9], however, expressly excludes the objective liability of health care providers when determining that their responsibility is personal, and will be assessed by verifying the presence of guilt, rejecting the concept of presumed harm.

Even the Medical Ethics Code, which in theory, should be concerned with the ethics of the medical profession, gives special attention to the damages caused to the patient, mixing ethics and civil law in a very confusing way, stating in its very first article[10] that it is forbidden to *cause damage* to the patient, by action or omission, characterized as malpractice, recklessness or negligence.

All things considered, the unavoidable conclusion is that the Brazilian legal system follows the classic model of tort and liability, focusing on the actual damage, caused by negligence, fault or an unlawful act, being far from accepting a theory in which compensation is based on the loss of a probability.

The very existence of the loss of a chance theory is based on a hypothetical uncertainty, which finds no place in a set of

[8] Art. 14 - O fornecedor de serviços responde, independentemente da existência de culpa, pela reparação dos danos causados aos consumidores por defeitos relativos à prestação dos serviços, bem como por informações insuficientes ou inadequadas sobre sua fruição e riscos.

[9] § 4º - A responsabilidade pessoal dos profissionais liberais será apurada mediante a verificação de culpa.

[10] É vedado ao médico: Art. 1º Causar dano ao paciente, por ação ou omissão, caracterizável como imperícia, imprudência ou negligência.

rules based on the compensation of actual damages, and specially in an activity as randomic as medicine.

3. THE INADEQUACY OF THE LOSS OF A CHANCE THEORY IN MEDICAL ACTIVITY

Accepting the idea of compensation for medical events based on a loss of a chance means accepting the idea of a partial, semi-responsibility, where compensation can be granted considering not only the degree of uncertainty, but also the possibility that the hypothetical event would happen even without interference of the physician, rather being part of a natural development of the treatment, intervention or disease.

The single element present in this kind of relation is the damage. No direct causation can be established, nor the agent can be held responsible for an event that may or may not happen. It is, therefore, an autonomous type of compensation that cannot be considered moral damage (pain and suffering), nor an indemnity for pecuniary damages.

The lost chance can be divided in two types in here: the loss of future opportunities, and a future loss of opportunities. The first one is a present treat. The second, an exercise of futurology. And here is the deadlock: if the damage is present, real, and measurable, there is no need for a compensation for a lost chance. Compensation can be calculated and determined by the real extent of the damage caused.

We are not advocating for the extinction of the loss of a chance theory. It is a valid form of conflict resolution, and even a necessary one for several situations outside the medical field. But again, one cannot deny that this is not an appropriate answer to dilemas that arise from a medical situation, naturally and intrinsecally filled with uncertainty and without any guarantee of results, no matter how soon the illness was discovered, how state-of-the art were the hospital facilities, how adequate was the

proposed treatment according to medical litterature, or how skilled the physician was.

Some might say that a loss of a chance can be measured in cases where a wrong diagnosis causes damages to a patient, making it impossible to treat a disease that has reached a point of no return, or even causing the patient´s death. Again, what needs to be considered here is the fact that a misdiagnosis can be divided in those evident and those hard to assess.

But even when the diagnosis is "easy" and evident, it is virtually impossible to predict or determine how it influenced in the outcome of the situation. Medicine is not an exact science, and even if the some damage can be measured from the misdiagnosis, it is the case to compensate for an actual damage, or pecuniary damage. If the damage is hypothetical (a chance "lost"), and there is no way to establish the nexus of causality between the physician´s fault and how the situation developed, there are no legal grounds (again, in Brazilian Law) for conviction and compensation based on the loss of a chance.

The same goes for those hypothesis where exams are delayed, or interventions postponed. If from this inaction results an actual damage, it must be compensated properly, and the legal system already has rules for it. If the damage is not measurable, or worse, there is just the possibility of a future damage, it cannot be guaranteed – given the uncertainty of the medical activity, that it will occur, and that it wouldn´t occur just the same, regardless of the physician´s inertia. Therefore, in a system that requires damage to establish compensations, there is no place for indemnizatons based on the loss of a chance theory.

Another situation is when the lack of information contributes to a bad outcome. The patient is convinced that there is no alternate possibility and agrees to undergo a certain treatment suggested by the doctor, and loses the opportunity of trying something less invasive (although more expensive) or maybe an experimental treatment that has been showing optmistic results

in other patients (although inconclusive regarding the percentage of success that could be expected).

Again, this is not the case for a conviction for loss of a chance. It´s rather a case of informational negligence, and can be examined properly under a lawsuit based on lack of (or inappropriate) information.

The Brazilian Consumer´s Defense Code states, in its article 6[11], that one of the basic consumer rights are: III - adequate and clear information on the different products and services, with a correct specification of quantity, characteristics, composition, quality, incidental taxes and price, as well as the risks they present.

The information, to be "appropriate", does NOT need to meet the doctor´s assessment of the situation, but the patient´s. All relevant data, alternatives (even those the physician thinks are not recommended to the case, based on its experience) and risks must be disclosed to the patient, in an understandable way, in order to provide sufficient elements for a decision – a choice – to be made.

A treatment or procedure can be considered successful from a clinical point of view, but later seen as inappropriate when confronted with other possible outcomes that could be expected if a different therapeutic method had been informed to – and chosen by – the patient.

This lack of information doesn´t necessarily means negligence. It may represent the expression of the physicians beliefs, based in his own experience or in the medical literature, that the proposed solution was the most adequate to the situation faced at a given moment.

The problem is that this behavior goes against ethical

[11] Art. 6º São direitos básicos do consumidor:
III - a informação adequada e clara sobre os diferentes produtos e serviços, com especificação correta de quantidade, características, composição, qualidade, tributos incidentes e preço, bem como sobre os riscos que apresentem;

principles and legal commands that consider mandatory the disclosure of all information available. Withholding information about alternatives may be considered – in a lawsuit or in a disciplinary investigation – an undue interference in treatment, thus breaching confidence and contrary to the principles of good-faith and autonomy.

In Brazil, the Superior Court of Justice (STJ) also decided in favor of the plaintiff, helding a blood bank liable for lack of proper communication of test results (REsp nº 1.071.969/PE).

In 2007, another case, involving plastic surgery (AgRg in Ag 818.144/SP) had a similar result, with the court ruling that "the physician who do not inform his patient about the risks of surgery is negligent, being liable for all damages resulting from the intervention".

In the opposite direction, a case judged in 2009 (REsp 1.051.674/RS) exempted the doctor from being considered responsible for an unexpected result, because he proved the fulfillment of the duty to inform.

Another recent case, originated from the Justice Court of the State of Minas Gerais (Civil Appeal n. 1.0223.08.246703-4/001), and ruled in 2013, help in the task of defining the consequences of informational negligence. It refers to a litigation between a patient and his dentist. The dentist was forced to pay the patient a compensation for moral damages, due to a fracture caused in the patient´s jaw, during a tooth extraction procedure. Compensation was not granted as a direct result of the fracture, which was proved to be a potential risk of that particular treatment, but because the dentist failed to fulfill his duty to inform the patient about the risks inherent to that kind of procedure.

And why is this so intrinsecally different? Regarding medical responsibility, one cannot compensate for a partial damage. It´s about another kind of damage: a lost chance. An *opportunity* that was lost, and *not* the expected benefit in itself.

Imagine, once again, the situation where a surgical procedure was delayed, an exam was not ordered, or proper information was not given at the correct time. All these can generate actual and present damages, fully capable of being compensated in court. But based on a different ground, not on the lost opportunity, simply because there is no safe way to guarantee, or even to establish that, if the surgical procedure had taken place, the exam performed, or information delivered in a timely manner, they would be responsible for an eventual success of the treatment, given a plethora of casual and unpredictable circumstances, so vivid and omnipresent in the medical practice.

In other words, no level of liability can arise from such hypothetical uncertainty. A court is not prepared to determine whether a bad outcome ocurred because of a lost opportunity or as a natural result of the illness or pathology. There are too many variables – some of them unknown to the doctor or to the patient – to place such responsibility over the healthcare provider´s shoulder.

Medical responsibility requires the existence of an unlawful act, negligence, recklessness, malpractice. And these are measurable (and punishable) by other forms of compensation in tort law. A random circumstance, the loss of a possibility of cure or chance of treatment that cannot be controlled by the physician does not constitute civil liability. A basic requirement for liability in the medical field is fault. Uncertainty and hipothetical scenarios are not enough to replace it.

Of course, not all cases can be excluded from the analysis under the loss of a chance theory, but they are related to the medical *activity*, not the medical *practice*.

Let´s take, for instance, the hipothesis of a stem cells bank, responsible for the storage of umbilical cords. For any given reason, these umbilical cords disappear, get misplaced, or useless for its purposes due to bad storage conditions.

In this case, it would be possible to establish the extent

of pecuniary damages, to calculate an adittional compensation for pain and suffering, and also determine an autonomous compensation for the loss of a chance of using the stem cells for treatment in the future, considering there is a measurable, direct causation between the opportunity lost and the negligence of the stem cells bank.

This example illustrates perfectly the point we are advocating, against the possibility of compensating chance. From the scientific point of view, the full range of stem cells use and efficacy is still unknown. And yet, an indemnization based on the chance lost will be covering something not just hypothetical, but maybe (another uncertainty here) non-existant.

Civil liability already deals with the problem, considering it a breach of contract, which has an entirely different approach, promoting damage compensation in a much more efficient way, with much clearer borders.

Another possibility takes place when medical reports or medical exams from one patient are misplaced with those from a third part, thus preventing this person from competing in a tournament, or being accepted in a job selection process, or even from starting a treatment, based on someone else´s medical history.

However, these are borderline cases. And there is no direct medical intervention in the examples above, but only poor planning and bad administrative execution, resulting in a faulty service. The fact that these situations can occur in a healthcare related environment is merely incidental, and does not invalidate the previous statements. The best efforts, expertise and due diligence of the healthcare professional will always find a natural nemesis in the limitations of science, and the unpredictability of the human body.

4. AN ANALYSIS ON RECENT JURISPRUDENTIAL DEVELOPMENTS

Some examples of what can happen when legal concepts are not properly employed in lawsuits are not hard to find. The following narrative will concentrate on how dangerous it is when judicial decisivos produce a lack of stability.

In 2003, the State Court of Rio de Janeiro[12] decided a case where the plaintiffs sued a maternitiy hospital claiming that negligence was responsible for the death of their newborn child. The boy, while still in nursery and only after 18 hours after birth, presented apnea and cardiorespiratory arrest, and was left unattended for nearly two hours before being taken to a neonatal ICU, compromising thus his chances of survival.

The court recognized that the hospital failed to deliver proper medical care, and that the baby lost his best chances of survival, and that his death could have been avoided were the medical staff more efficient and less negligent with the first response. After the loss of a chance was established, the court ruled in favour of the plaintiffs, granting an indemnization for both parents, on the grounds of moral damages and pain and suffering.

The lack of technique is evident, since loss of a chance and moral damages represent two different kinds of compensation, and one cannot be granted under the recognition of the other. That denotes a misunderstanding of the grounds for tort law.

A second case was tried at the same State Court in Rio de Janeiro[13] in 2007. After perceiving an abnormality in his right eye, a patient sought hospital care, and retinal displacement was diagnosed, requiring urgent intervention.

The public hospital did not have the necessary resources,

[12] TJRJ Embargos Infringentes n. 00446/2002 Embargantes: Valter Franco Braga e Dulce Rodrigues Ribas. Embargada: Casa de Saúde e Maternidade São José Ltda. Rio de Janeiro, 03.06.2003. Available at www.tjrj.jus.br

[13] TJRJ Apelação Cível n. 2006.001.08137. Apelantes: Guaraciaba Barbosa e Hospital do Olho. Apelados: os mesmos. Rio de Janeiro, 2007. Available at www.tjrj.jus.br

and a consultation was scheduled for two days later at another hospital. Because no doctor was available there, the appointment was scheduled again for five days later. A treatment was started, and the need for surgical intervention was recognized, but authorization for the procedure came only four months later when the patient had already lost sight of his right eye.

The court acknowledged that the delay in carrying out the procedure was responsible for rendering it ineffective, without the least possibility of success, applying, therefore, the theory of loss of a chance of cure, condemning the hospital to the payment of moral damages, but only partially, because, the court ruled, it was impossible to be certain of the success of the surgical intervention, were it performed at the appropriate time.

Again, the two institutes of civil liability were mistakenly confused, creating an indemnity based on different grounds from those demanded in the lawsuit.

In 2009, the Superior Court of Justice[14], reexamining a case from the State Court of Rio Grande do Sul, in which a patient died due to surgical complications, ruled in favour of the defendant recognizing in its decision that the loss of a chance theory applies only to cases in which the damage is real, actual and certain, within a probability analysis, and not just a mere possibility, since the potential or uncertain damage, under tort law, is not compensable[15].

Another case ruled in 2013, by the State Court of Rio

[14] STJ - REsp 1104665 RS 2008/0251457-1, Brasília, judged in 09.06.2009, by the Third Chamber, and published in DJe 04.08.2009. Available at www.stj.jus.br

[15] Extracted from the original ruling: "...III - A chamada "teoria da perda da chance", de inspiração francesa e citada em matéria de responsabilidade civil, aplica-se aos casos em que o dano seja real, atual e certo, dentro de um juízo de probabilidade, e não de mera possibilidade, porquanto o dano potencial ou incerto, no âmbito da responsabilidade civil, em regra, não é indenizável; IV - In casu, o v. acórdão recorrido concluiu haver mera possibilidade de o resultado morte ter sido evitado caso a paciente tivesse acompanhamento prévio e contínuo do médico no período pós-operatório, sendo inadmissível, pois, a responsabilização do médico com base na aplicação da ´teoria da perda da chance´."

Grande do Sul[16], analyzed the situation of a seven-year-old child who suffered a head injury after falling from a five meters height and was medicated without a proper craniectomy to determine the extent of the injury. Even though the child remained under medical observation for 17 hours, the lack of adequate treatment left the child with permanent lesions.

The court recognized the possibility of applying the theory of loss of chance, and condemned the doctors and the hospital to the payment of compensation for moral damages, in addition to treatment expenses.

One last case worth bringing up is also from 2013[17], in which the same Superior Court of Justice, paradoxically, decided to reexamine a case originating from the State Court of Paraná, and ruled that it was valid to apply the loss of a chance theory.

The case was about an inadequate oncological treatment, that reduced the possibilities of cure for the patient, and that this loss of chance constituted an autonomous damage. In spite of these conclusions, the Court acknowledged that there was uncertainty in the doctor's participation in the outcome, and that the damage might have been caused by the disease, and not by the inadequate treatment itself.

These mixed signs, and contradictory rulings do not contribute to the development of a theory adapted to the national legal framework regarding civil liability. On the contrary, they increase uncertainty by allowing each of the different state courts to develop a particular understanding, and equally dissociated from good legal technique.

5. CONCLUSIONS

[16] TJRS Apelação Cível n. 70052376779, 9th Civil Chamber, ruled in 27.02.2013. Available at www.tjrs.jus.br

[17] STJ REsp 1254.14 - PR, ruled in 04.12.2012 and published in 20.02.2013. Available at www.stj.jus.br

The conceptual idea of civil liability does not communicate with that one expressed in the theory of the loss of a chance.

In medical practice, the occurrence of an injury, a damage, and fault for malpractice, are already punishable by the existing legal framework, which are the pillars of civil liability established in federal legislation.

For all the above arguments, it is clear that the loss of a chance theory does not find shelter in this legal framework, which already has adequate forms of establishing compensation mechanisms for damages originated from the medical practice.

The courts have adopted the conceptual idea of this theory, using it in a wrong way, recognizing its existence and validity, therefore embracing it, but using it to justify condemnation in other types of indemnization, for pain and suffering, moral damages or actual damages.

Civil liability and *loss of a chance* are, therefore, contradictory elements. The first one deals with real damages, while the latter faces a greyish zone due to the uncertainty of the medical sciences, the unique characteristics of each disease, and the idiosyncrasy of each patient, which precludes the possibility of establishing any reasonable doubt, sufficiently palpable to determine whether there was competition from the medical act for the occurrence of the bad outcome or if this was only the result of mere iatrogeny.

If the Brazilian courts wish to treat Loss of a Chance as an autonomous kind of damage in the healthcare field, they must be prepared to develop sufficient, convincing arguments to recognize the existence of an autonomous condemnation, separate from moral damages, and with its own means of calculating, not a partial compensation, but the exact measure of the opportunity (the chance) that was lost.

Without these safeguards, an awkard situation will occur; one in which a foreign legal theory was adopted, but remained orphaned.

6. REFERENCES

ALCOZ, Luis Medina. *Hacia una nueva teoría general de la causalidad en la responsabilidad civil contractual (y extracontractual): La doctrina de la pérdida de oportunidades. In*, Revista de Responsabilidad Civil y Seguro, n. 30, Madrid, 2009, pp. 31-74.

BÉNÉJAT, Murielle. *L´autonomie de la responsabilité médicale pour défaut d´information (À propos de quelques arrêts rendus em 2010)*, *in* Revue Générale de Droit Médical, 38, Les Études Hopitaliéres, Bordeaux, 2011.

BIONDI, Eduardo Abreu. Teoria da perda de uma chance na responsabilidade civil. 24.06.2008. Available at http://direitonet.com.br/artigos/exibir/3988/teoria-da-perda-de-uma-chance-na-responsabilidade-civil

BRAZIL, Lei 8.078/90. Código de Defesa do Consumidor. Diário Oficial da União, 12.09.1990.

BRAZIL, Lei 10.406/02. Código Civil Brasileiro. Diário Oficial da União, 11.01.2002.

BRAZIL, STJ - REsp 1104665 RS 2008/0251457-1, Brasília, judged in 09.06.2009, by the Third Chamber, and published in DJe 04.08.2009. Available at www.stj.jus.br

BRAZIL, STJ REsp 1254.14 - PR, Brasília, ruled in 04.12.2012 and published in 20.02.2013. Available at www.stj.jus.br

BRAZIL, TJRJ Apelação Cível n. 2006.001.08137. Apelantes: Guaraciaba Barbosa e Hospital do Olho. Apelados: os mesmos. Rio de Janeiro, 2007. Available at www.tjrj.jus.br

BRAZIL, TJRJ Embargos Infringentes n. 00446/2002 Embargantes: Valter Franco Braga e Dulce Rodrigues Ribas.

Embargada: Casa de Saúde e Maternidade São José Ltda. Rio de Janeiro, 03.06.2003. Available at www.tjrj.jus.br

BRAZIL, TJRS Apelação Cível n. 70052376779, 9th Civil Chamber, ruled in 27.02.2013. Available at www.tjrs.jus.br

CARNAÚBA, Daniel Amaral. Responsabilidade civil pela perda de uma chance – A álea e a técnica. Método, São Paulo, 2013.

CONSELHO FEDERAL DE MEDICINA, Resolução CFM nº 1931/2009. Código de Ética Médica. Diário Oficial da União, 17.09.2009.

DANTAS, Eduardo. *Les différences entre le consentement informé et le choix éclairé comme causes d´exclusion de responsabilité civile dans la relation médecin-patient. L´autonomie du patient face au droit brésilien*, *in* Revue générale de droit medical, n. 29, Les Études Hospitalières, Bordeaux, pp. 125-147, 2008.

FRANCE. *L´Affair Perruche*. Cour de Cassation, Assemblée plénière, du 17 novembre 2000, 99-13.701, available at https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007041543&dateTexte=

PALLARÉS, Eduardo Asensi; CLARES, Iñigo Cid-Luna. *La evolución de la doctrina de la pérdida de oportunidade em responsabilidade médica*, *in* Revista CESCO de Derecho de Consumo, n. 8/2013, pp. 228-239, viewed at https://www.revista.uclm.es/index.php/cesco/article/viewFile/416/358.

RAPOSO, Vera Lúcia. Do ato médico ao problema jurídico. Almedina, Coimbra, 2013.

_____. *Em busca da chance perdida. O dano da perda de chance, em especial na responsabilidade médica. In,* Revista do Ministério Público, 138: Abril: Junho 2014 (pp. 09-61). Portugal.

ROCHA, Nuno Santos. A perda da chance como uma nova espécie de dano. Almedina, Coimbra, 2015.

ROSÁRIO, Grácia Cristina Moreira do. A perda da chance de cura na responsabilidade civil médica. Lúmen Juris, Rio de Janeiro, 2009.

SAVI, Sérgio. Responsabilidade civil por perda de uma chance. Atlas, São Paulo, 2006.

SILVA, Rafael Peteffi da. Responsabilidade civil pela perda de uma chance. Atlas, São Paulo, 2007.

YONG, Samuel; YONG, Camilo A. Rodríguez. *Perdida de Oportunidad, in* Revista Virtual Via Inveniendi Et Iudicandi. Edición 12, Vol. 6, n. 2, julio – diciembre, 2011