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Professional liability

THE LOSS OF A CHANCE THEORY IN DENTAL PROFESSIONAL LIABILITY.

A teoria da perda de uma chance na responsabilidade profissional odontológica.

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ABSTRACT

The loss of a chance theory has been increasingly used in Brazilian jurisprudence. The aim of the present study is to conceptualize the loss of a chance theory, specifically in the medical field, in order to relate it to the professional responsibility of the dentist. For that, narrative bibliographic research was carried out on the subject in question, on which topics were approached: study of the loss of a chance theory; medical professional responsibility; and, the dentist's responsibility, analyzing the theme of the application of the loss of a chance in their work routine. Concluding that the theory becomes a possibility of civil repair in cases of professional dental liability, provided that the necessary criteria are observed through technical analysis of a trained professional.

KEYWORDS

Forensic dentistry; Loss of a chance theory; Dental professional liability.

INTRODUCTION

In general, civil liability legal proceedings are a fundamental element, not only to determine the amount of the claim clearly but also to systematize the criteria that allow the most appropriate value for the case to be determined. Medical and hospital liability claims are becoming increasingly common. This increase can be attributed both to the poor quality of education and the population's greater need for and access to services, as well as to the general public's greater awareness of their rights and easier access to justice[1].

The incidence of legal complaints by patients in the field of dentistry is relatively recent. Over the past 15 years,

legal pressure from patients has become an increasingly important factor and a growing concern among professionals. It is important to be aware that being sued has become an inherent risk in the profession, as in other healthcare professions[2].

Given the increase in the number of lawsuits involving dentists and the increasing use of loss of opportunity theory in case law, discussion of this topic has become relevant. In addition, few studies in the literature address its application in professional cases within the dental field.

The purpose of this study is to define the theory of loss of a chance and to provide an understanding of its application in the civil liability of health care professionals, specifically in the medical field, in order to relate it to the dental field. For this purpose, a narrative bibliographic research was conducted.

LITERATURE REVIEW

The loss of a chance theory, which originated in the 1960s in French doctrine, is applied in cases where a wrongful act deprived the victim of the opportunity to achieve a better future result, such as career advancement, securing a better job, or appealing an unfavorable judgment, among others[1].

A concrete loss of a chance constitutes compensable harm if the other elements of civil liability are present, in particular, the fault of the agent in cases of subjective liability. In situations where future events would have occurred in the absence of the wrongful act, it is necessary to prove not only the probability of those events occurring but also that the wrongful act caused a direct link to the lost opportunity. Therefore, the success of a claim for damages depends on proving the causal link between the wrongful act and the alleged harm, as well as proving the harm itself[3].

Since there is an element of uncertainty in the existence of the opportunity - given that the realization of the opportunity is uncertain - compensating for the lost opportunity relieves the judge from having to resolve the uncertainty of the event, a task beyond human capacity. This approach incorporates uncertainty into the decision: the amount of harm corresponds to the chance of achieving a desired, uncertain benefit, rather than the benefit itself[4].

Igor de Lucena and Adriano Marteleto argue that three steps are necessary to determine compensation: identifying the total harm, identifying the lost chance, and applying a percentage to the total harm. The probability of the lost chance must be determined in advance because, without the foreseeability of the chance, the theory cannot be applied[5].

Fernando Noronha presents categories of loss of a chance. This classification distinguishes between present and future damages. The responsibility for the loss of a chance manifests in damages related to events that did not occur and could have happened in the future, or in damages that already occurred but could have been avoided (present damages)[3].

A) Loss of the chance to obtain a future advantage (classic loss of chance)

In this type, there is an interruption of a process, due to an unlawful act, that could have led to a favorable outcome, either by achieving a benefit or avoiding a future loss. It is not possible to definitively state whether the expected result would have been achieved in the future if the unlawful act had not occurred in the present.

To prove the existence of a causal link, it is necessary to demonstrate that the unlawful act interrupted the ongoing process, which could have led to the expected benefit, as long as it is not attributable to extraordinary causes. It will then be necessary to prove the existence of the damage itself and its extent, which may consist solely of the loss of the chance, a distinct harm from the expected result.

B) Loss of the chance to avoid an actual harm

The difference between this type and the classic loss of chance is that, in the latter, the unlawful act interrupted a beneficial process, and the potential damage results from this interruption. In the loss of the chance to avoid harm, the damage arises precisely because the harmful process in progress was not interrupted when it could have been.

In these cases, it is essential that the damaging process leading to the harm was already underway and could have been interrupted by a required action from the responsible party, even if there was no guarantee that the action would have prevented the harm. There would have been a possibility that the harm could have been avoided. It is known that the harm resulted from the ongoing process; the key question is whether the harm could have been avoided if certain measures had been taken to stop the process.

C) Loss of the chance due to lack of information

Similar to the previous type, this involves the loss of a chance to avoid harm that occurred. The difference between loss of a chance due to a breach of the duty to inform and loss of a chance to avoid actual harm lies in the fact that, in the former, the chance is related to the victim’s actions—the occurrence of the damage depends on the victim’s decision—while in the latter, it is beyond the victim's control.

When someone suffers harm because they did not make the best decision due to a lack of information that the responsible party failed to provide—failing to fulfill their duty to inform or advise—the theory of loss of a chance due to lack of information applies. A more informed choice could have eliminated or reduced the risk of harm.

In cases where the risk of harm would have been eliminated if the information had been properly provided, full liability applies; all damages suffered by the victim must be compensated, and there is no talk of responsibility for the loss of a chance. On the other hand, if the harm was inevitable regardless of the provision of information, there can be no liability. The

loss of chance theory only applies in cases where the risk of harm could have been reduced but not entirely avoided.

THE LOSS OF A CHANCE THEORY IN THE MEDICAL FIELD

It became known as the theory of loss of a chance of cure or survival when what determines compensation is the loss of the chance for a favorable outcome in medical treatment. In this context, the compensable fact is the loss of the chance for a cure, not the continuation of life, as the mistake was in not providing the patient with all possible chances for recovery or survival[1].

If, due to a professional error, a patient loses the possibility of being cured of a certain disease, the doctor should be held liable. For example, if a cancer patient is not diagnosed by one doctor but is later diagnosed by another, the chances of cure are significantly higher when the disease is discovered early. Therefore, the doctor's negligence resulted in the loss of the opportunity for early treatment[6]. Certainty about the existence of a probability of cure or survival must be supported by medical science, through expert testimony, and other evidence such as witnesses and documents[7].

Carlos Sardinero-García and his collaborators assessed the application of the theory of loss of a chance in Spain's public healthcare system over more than twelve years, observing an increase of over 100% in recent years[8]. The theory has been widely applied in cases related to incorrect diagnoses, the absence of preoperative tests, failure to inform patients, and lack of consent for the recommended treatment—in general, anything that could compromise the success of the treatment[7]. Refusing or delaying the referral to a specialist, delaying a diagnosis due to negligence in obtaining test results, using outdated diagnostic methods, or failing to request necessary tests that result in a misdiagnosis or delayed diagnosis, are equally negligent[6].

It is important to emphasize that doctors cannot be held liable for the inevitable choices they must make during their professional activity, but rather for choices that deviate from the standard of care supported by medical science[9]. The compensable harm is not the damage itself, but rather the expectation that the damage could have been avoided if the professional had followed the appropriate guidelines[5]. Omission also gains legal relevance when the agent must act to prevent a harmful outcome, a duty that may arise from the law, a legal agreement, or the agent's previous conduct, which created the risk of the harmful result[1].

Acceptability of the Loss of a Chance Theory of Cure or Survival

The acceptability of the Theory of Loss of a Chance in the medical field is controversial. Some French jurists argue that it is essential to determine whether the medical error was the cause or one of the causes of the harm. If it was, the responsible party should compensate for the entire damage; if it was not, then there is no causal link, and liability should not be admitted[3].

Traditional doctrine asserts that it is impossible to determine the outcome due to uncertainties regarding the disease and the patient's response to treatment. Therefore, they do not believe that damages for loss of a chance should be considered, as this would be deemed hypothetical harm. Those who adopt this view argue that compensating for this type of damage would result in unjust enrichment[7].

Fernando Noronha argues that if the cause of the patient's worsening condition is known, there is no issue, and loss of chance should not be admitted. In cases where the worsening is due solely to the natural progression of the disease, even if there was inadequate treatment, liability should not be discussed. When the worsening is due to the treatment itself, without medical error, the doctor should not be held responsible, as they are judged subjectively[3].

However, if the worsening occurred due to medical error, the professional should be held accountable, though not for the total damage suffered by the patient. The portion of the damage attributed to the pre-existing disease should be discounted. The professional can only be held responsible for the portion of the harm resulting from their actions. In cases where it is impossible to determine this proportionality, it should be presumed that the inadequate treatment and the disease contributed equally[3].

Eduardo Nunes states that when the doctor's contribution to the harm is seen as a question of causality, there is no need to resort to the loss of a chance theory. Instead, the idea of concurrent causes is applied, influencing the quantification of compensation, meaning the doctor would not be responsible for the total harm[9].

Rafael Silva argues that there is no randomness in medical cases, as the outcome—whether death or disability—is already known. The only requirement is to establish a causal relationship between the professional's failure and the final harm[10].

For Fernando Noronha, only when the cause of the patient's worsening is unknown, and the treatment was inadequate, should the loss of a chance theory be discussed. In these cases, the worsening could result from improper therapy, the disease's progression, or both simultaneously[3]. In situations where the doctor's negligent conduct did not increase the risk of harm, the doctor cannot be held responsible for the actual outcome[11].

Anna de Moraes and Paula Moura argue that the theory applies to the civil liability of doctors, given the need to ensure broad protection of the patient's dignity. They claim that loss of a chance is not characterized by future loss, but rather by real harm, albeit difficult to analyze, since it is impossible to return the victim to their prior condition. They maintain that a causal link exists between the damage and the harmful event because, considering the patient's expectation of receiving a benefit or avoiding harm, an injury did occur. Furthermore, they outline several steps that must be followed to apply the theory in the medical field: i) review the medical procedure to assess any deviation from proper medical conduct, ii) examine the patient's behavior, such as whether they followed the doctor's instructions and

prescriptions, iii) assess the possibility of recovery or cure if different treatments had been administered, iv) verify the harm suffered by the patient—what they failed to achieve due to the medical procedure, v) determine the amount of compensation[7].

Loss of a Chance Theory of Cure and Diagnostic Error

The diagnostic error has been where the theory of loss of a chance has been most applied in public health in Spain in recent years[8]. This mistake deprives the patient of treatment and cure for the disease, and therefore, the doctor can be held liable for the loss of a chance. The key point is that a different medical practice could have allowed for a different treatment, preventing the resulting harm[7].

However, it is important to differentiate between cases of diagnosis with high chances of cure and cases in which the delay in diagnosis only resulted in the loss of survival time in an incurable neoplastic process according to the current state of science. In the first case, if the doctor or hospital did not have all the necessary means for diagnosing the disease, they must be held fully liable for the damage caused. In the second case, it is not appropriate to hold the professional fully responsible based solely on a greater or lesser probability of an incurable process[12].

CONSUMER RELATIONS AND THE DUTY TO INFORM

The Consumer Protection Code (CPC) establishes rules that allow for the protection of vulnerable individuals in consumer relations, even though there is no law in Brazil specifically outlining the duty to inform[13]. The legal obligation to provide information in the CPC is not limited to contracts but also includes situations in which the consumer has an interest in acquiring a product or contracting a service (arts. 4 and 6 of the CPC). After all, the consumer's freedom of choice is subject to the information conveyed to them[13].

As highlighted by the Minister: "When the information is adequate, the consumer acts with more awareness; when the information is false, nonexistent, incomplete, or omitted, their ability to make a conscious choice is taken away"[13].

Humberto Martins explained in the judgment of REsp 1.364.915:

> "*More than an obligation arising from the law, the duty to inform is a form of cooperation, a social necessity. In the activity of promoting consumption and in the supply chain, the duty to inform has become a true proactive burden placed on suppliers (whether they are commercial partners of the consumer or not), putting an end to the old and unjust obligation that the consumer had to protect themselves (caveat emptor). The lack of adequate information about surgical risks justifies compensation for moral damages. Based on this understanding, the Fourth Panel of the Superior Court of Justice decided (REsp 1.540.580) that in the doctor-*

> *patient relationship, providing correct and sufficient information about the diagnosis, the proposed treatment, and the existing risks in any surgical procedures constitutes a right of the patient and their legal representatives*."[13].

The lack of such information represents a failure in service provision, and when combined with elements such as damage and causal link, it generates the duty to compensate for moral damages, as explained by Minister Luis Felipe Salomão in the majority opinion of the panel[13].

Additionally, the Minister stated:

> *"The duty of information will be effectively fulfilled when the clarifications specifically relate to the patient's case, as generic information is not sufficient. Likewise, to validate the information provided, the patient's consent cannot be generic (blanket consent) and must be individualized."*[13].

Medical activity is, by nature, dangerous; risk is inherent and goes hand in hand with the very nature of the service and its mode of delivery. It is impossible to perform certain treatments without some risks or potential side effects, even if the service is provided with all the recommended techniques and safety. Initially, the doctor and the hospital are not liable for these inherent risks, as doing so would make the burden unbearable and would undermine the very activity[1].

Thus, the importance of the duty to inform arises. In the absence of the required information, the doctor or hospital can be held liable for inherent risk, not due to a technical error, but due to the omission of the real risks of the treatment. This information allows the patient to be informed enough to give, or not give, consent[1]. The professional cannot omit information from the patient when such omission may lead to consequences regarding their health, nor can they deprive the patient of the ability to choose the treatment or procedure[3].

Loss of Chance Theory for Cure Due to Violation of the Duty to Inform

In cases of liability for the loss of a chance resulting from the breach of the duty to inform, the patient is prevented from opting for an alternative procedure that was also possible but unknown to them. These are situations where their more informed decision could have eliminated or reduced the risk of suffering harm. For example, in cases of possible postoperative complications, the patient should have been informed in advance to make an informed choice about whether to undergo a particular procedure[3].

The theory does not accept cases where, if the information had been properly provided, the risk of damage would have been eliminated. In such cases, there would not be a frustrated chance but rather a violation of the typical duty to act in good faith, based on the negligence of those who had the duty to inform[3].

QUANTIFICATION OF COMPENSATION

To provide reparations, projections are made about what would have happened if the unlawful act had not occurred. The assessment of the value of the damage depends on these elements that project into the future, the degree of probability of achieving the desired outcome, and conversely, the degree of probability of avoiding the damage. In cases where this degree of probability can be calculated, it will determine the amount of compensation. This probability should be expressed as a percentage of the total damage that the injured party would have had if the benefit had been realized. It is important to note that even if the compensation is granted as a percentage, it is not a partial indemnity being awarded; rather, the lost chance has a lower value than the final benefit would have had[3].

Much is debated regarding the amount of compensation to be fixed, especially in the medical field, as there are no legally established criteria. The existence of such criteria is essential to provide judges with the comfort needed to set the indemnity amount when establishing the loss of a chance for cure or survival, using equity, proportionality, and reasonableness according to the degree of fault and extent of damage[7].

Italian jurisprudence addresses the quantification of compensation for the loss of a chance by distributing the value of the expected outcome, applying the percentage of chance that the injured party had before the unlawful act. A balance of the perspectives for and against should be conducted, and from that resulting balance, the proportion of the indemnity is obtained[6].

Currently, in Spain, in cases where the duty to inform has not been respected, the traffic accident scale has been used by analogy, applying a correction factor of 50% to the total amount, thus halving the compensation resulting from the total assessed damage. For this, the presence of a specialist expert is extremely important to explain the higher percentage of survival probability if the diagnosis had been provided in a timely manner[12].

In 80.5% of the cases evaluated in Spain, the amount was equal to or less than 100,000 euros, with only 17.3% of cases claiming this amount. This occurs because when a doctor fails to offer a specific treatment to a patient who subsequently dies or suffers limiting sequelae, it is impossible to know if the damage would have occurred if another treatment or technique had been applied. Thus, the judge reduces the indemnity amount to avoid holding the physician responsible for all damages[8].

In 82.1% of the cases, the compensation awarded was a lump sum to cover moral damages, with a reduction in the claimed amount. In 9.4%, the damage was fully compensated by applying the established scale for assessing bodily injuries in traffic accidents, due to the lack of a table for health-related injuries. In 8.5% of cases, the compensation was reduced considering the percentage of possibility that the damage would not have occurred if due diligence had been applied[8].

According to Carlos Sardinero-García, the existence of different indemnity

criteria, tables, percentages, or fixed amounts, and the fact that the most commonly applied ones do not require clear and precise reasoning, is one of the main reasons for the growth of the Theory of Loss of a Chance, which has increasingly been used to achieve a reduction in the compensation amount[14].

LOSS OF A CHANCE IN DENTISTRY

The doctrine generally holds that the principles of medical liability apply to the responsibilities of dentists. The debate often centers around whether the professional's obligation is one of means or results. However, despite scientific advancements, dentists cannot always guarantee the desired outcome, as they deal with different organisms that respond variably based on their unique conditions. Therefore, an individual analysis of each specific case is the most appropriate approach[15].

Wander Pereira analyzed lawsuits against dentists and found that most cases stemmed from diagnostic failures, highlighting how professionals often neglect this critical step in treatment. Thus, similar to the growing application of the theory of loss of a chance in medical malpractice cases, it is likely to be employed in the dental field as well. This can manifest through diagnostic errors, inadequate treatment, or failures in the duty to inform[15].

For instance, if a dentist fails to diagnose a malignant lesion during a clinical or radiographic examination, they may be held liable if, at a later stage, the patient receives this diagnosis from another professional. By delaying the diagnosis, the chance for early, possibly more effective treatment with less associated morbidity is frustrated. Given any abnormalities, the professional must exhaust all necessary diagnostic means, such as various radiographic exams, computed tomography, biopsy procedures, etc., as well as interpret the results and make treatment decisions.

Similarly, if the dentist makes a correct diagnosis but chooses an ineffective treatment, the opportunity for an appropriate treatment is lost if the recommended course of action contradicts the established professional guidelines. This loss includes the costs of inadequate treatment, as well as the suffering and distress experienced by the patient. Not only has the chance for a cure been compromised but so has the possibility of a quicker and less painful recovery, resulting in the loss of a chance for improvement in the patient's clinical condition.

If the dentist lacks the technical or scientific knowledge necessary to establish the diagnosis or provide the appropriate treatment, they must inform the patient about the current condition, the importance of resolving it, and the prognosis and risks of failing to pursue further investigation for diagnosis and treatment.

The professional's duty to inform is also crucial regarding treatment options, including the pros and cons of specific procedures and their possible complications and post-operative care instructions. Failure to fulfill this duty deprives the patient of the opportunity to

make a more informed choice, which could eliminate or reduce the risk of harm.

The loss of a chance theory for a cure has emerged in jurisprudence as an alternative for cases of negligence, aiming for the fairest resolution possible for both parties—the professional and the patient. It would be unjust for the patient to be denied compensation for property and non-property damages resulting from the delay in diagnosing a particular illness. Likewise, the professional should not bear the consequences of the patient's illness but should be held accountable only for the harm caused.

It is important to emphasize that the theory of loss of a chance for a cure does not apply to difficult or delicate diagnoses, nor the choice between two procedures with distinct techniques and similar outcomes. Instead, it pertains to evident diagnoses and less complex procedures that any competent dentist, adhering to the standard dental education curriculum, would have been capable of performing.

Finally, one must not overlook articles 6, 7, 26, 27, and 357, § 3 of the Civil Procedure Code (CPC), which state that the parties involved in the process must act cooperatively and by the due constitutional process. Considering the dynamics of the procedure—information, reaction, dialogue, influence—it becomes clear that the judge cannot issue a decision regarding the organization and cleansing of the process based solely on their own experiences.

Thus, the technical evaluation by a dental expert is essential to assess the real probability that the patient would have had if the natural progression of the illness had been interrupted or if a more effective treatment had been applied. This evaluation helps determine the degree of responsibility of the dentist and provides the magistrate with the necessary elements to establish the quantum of compensation.

FINAL CONSIDERATIONS

The Loss of a Chance Theory has been applied in cases where an illicit act deprives the victim of the opportunity for a better future outcome, provided that the change is concrete and real; cases based on mere hypothesis cannot be held accountable. The quantification of damage is a subject of extensive discussion as no established criteria exist. It has been observed that the parameters vary according to local jurisprudence, and the amount of compensation cannot exceed the total value of the damage since the reparation is limited to the lost chance.

On the condition that it is proven through technical expert evaluation that the professional did not utilize all possible means for a favorable outcome and that there truly existed a possibility of cure, which was serious and real, with a causal relationship between the damage and the action of the professional, the autonomous application of the Theory of Loss of a Chance of Cure in professional dental responsibility should be recognized.

RESUMO

A teoria da perda de uma chance tem sido utilizada de maneira crescente na jurisprudência brasileira. O que se busca no presente estudo é conceituar a teoria da perda de uma chance para relacionar com a responsabilidade profissional do cirurgião-dentista. Para tanto foi realizada investigação bibliográfica narrativa sobre o assunto em tela, sobre o qual abordou-se em tópicos: estudo da teoria da perda de uma chance; a responsabilidade profissional médica; e, a responsabilidade do cirurgião-dentista, analisando a temática da aplicação da perda de uma chance na sua rotina laboral. Concluindo que a teoria se torna uma possibilidade de reparação civil nos casos de responsabilidade profissional odontológica, desde que, os critérios necessários sejam observados através de análise técnica de profissional capacitado.

PALAVRAS-CHAVE

Odontologia legal; Teoria da perda de uma chance; Responsabilidade profissional odontológica.

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