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The Loss of a Chance in Medical Law and the Jurisprudence of the Superior Court of Justice.

di Carolina Martins Uscocovich* e Romualdo Baptista dos Santos**

Abstract IT: Il contributo esamina la teoria della perdita di chance, la sua applicazione in ambito medico-sanitario e il modo in cui la questione è trattata dalla Corte Suprema di Giustizia. Avvalendosi di un metodo teorico-deduttivo, viene svolta un'analisi qualitativa del materiale bibliografico con l'obiettivo di definire i contorni giuridici di questa teoria e di analizzarne gli aspetti più controversi. Successivamente, attraverso un'analisi quantitativa e qualitativa di sentenze recenti, si conclude che la Corte Suprema ha accolto il dibattito sviluppato dalla dottrina, sostenendo l'autonomia del danno derivante dalla perdita di chance e stabilendo criteri per la sua verifica e per la quantificazione dell'importo del risarcimento.

Abstract EN: This study addresses the theory of the loss of a chance, its application in medical law and how the subject is treated by the Superior Court of Justice. By employing a theoretical deductive method, a qualitative analysis of bibliographic material is carried out aiming to establish the legal contours of this theory and to analyse its most controversial aspects. Following this, based on a quantitative and qualitative analysis of recent judgments, it concludes that the Superior Court has embraced the debate developed by the doctrine, positioning itself in favour of the autonomy of the damage resulting from the loss of a chance and establishing criteria for its verification and for quantifying the compensation amount.

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* Master's student in Law at the Federal University of Paraná (UFPR). Specialist in Medical and Health Law from PUC/PR and FMP. Member of the Health Law and Medical Enterprises Research Group. Lawyer.

** Master's and PhD in Civil Law from the University of São Paulo (USP), specialist in Contractual Law and Law of Damages (Contratos y Daños) from the University of Salamanca (USal). Postdoctoral in Human, Social, and Diffuse Rights from the University of Salamanca (USal). Member of the Brazilian Institute for Studies on Civil Liability (IBERC) and the Health Law and Medical Enterprises Research Group. Lawyer.

Introduction

The general clause of civil liability, crystallized in Article 1,382 of the *Code Napoléon*, from which it spread to nearly all 19th-century codifications, establishes that whoever causes damage is obliged to repair it. However, there are situations in which a person is on the verge of obtaining a benefit but experiences an interruption in their trajectory, preventing them from achieving their goal. In such cases, determining the nature of the damage suffered becomes difficult, as it is unclear whether the person would have achieved the desired benefit. Additionally, there is a problem of causality since it is impossible to attribute to the agent the cause of the loss of a benefit that was merely desired and not yet part of the victim's assets at the time of the act.

The purpose of this study is to examine the legal concept of the loss of a chance in legal dogmatics, highlighting its definition, characteristics, application in the field of medical law, and the approach it receives in the jurisprudence of the Superior Court of Justice. The main objective of this study is to investigate how the Superior Court of Justice addresses the issue. Secondary objectives include presenting the concept, main characteristics and peculiarities of the loss of a chance.

To achieve these objectives, a theoretical deductive method is employed, with both quantitative and qualitative approaches. This involves a bibliographic review on the analysed topic and on the jurisprudential research within the Superior Court of Justice, aiming to draw conclusions and practical applications that may be useful to legal professionals.

1.The Loss of a Chance in Legal Doctrine

The theory of the loss of a chance emerged in French law at the end of the 19th century to address situations where a person, on the verge of achieving a benefit,

suffers an interruption in their trajectory, preventing them from reaching their goal. Its application was first recognised in a decision by the French Court of Cassation in a decision issued on July 17th,1889 in which the Court accepted a claim for compensation filed by a plaintiff who lost the opportunity to win a lawsuit due to the negligence of a public official, who hindered the regular progression of the legal process[1]. Later, in the second half of the 20th century, the theory began to be applied in the field of medical law, given the uncertainty about the causal link between medical actions and the patient's death or worsening conditions. The first cases were judged by the French Court of Cassation in the 1960s[2].

Although the loss of a chance is a classical doctrine in civil law, several questions continue to arise, given the difficulty of how this theory fits within the framework of civil liability, particularly when it applies to the field of medical law.

1.1 Concept and Characteristics

In its early formulation at the dawn of modernity, civil liability dealt exclusively with the compensation for material damages that could be objectively demonstrated through comparison between the victim's current situation and their position prior to the offense[3]. As the 20th century progressed, a broader understanding emerged, acknowledging that certain damages affect values that cannot be objectively quantified, such as a person's feelings, their attributes and personality traits. This led to the distinction between material damages and non-material or moral damages in a broader sense[4].

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[1] Rocha, N. S. (2014). *A "perda de chance" como uma nova espécie de dano* 23-24. Coimbra. Carnaúba, D. A. (2013). *Responsabilidade civil pela perda de uma chance: a álea e a técnica* 79-81. Rio de Janeiro; São Paulo.

[2] Pedro, R. T. (2021). *A perda de chance na responsabilidade civil médica: uma breve visão panorâmica no fim da segunda década do século XXI*. In A. G. D. Pereira, F. M. A. Matos, J. B. Domenech, & N. Rosenvald (Coords.), *Responsabilidade civil em saúde: diálogo com o Prof. Doutor Jorge Sinde Monteiro* 413-434, especially 415. Coimbra: Instituto Jurídico da Faculdade de Direito da Universidade de Coimbra. Kfouri Neto, M. (2019). *Perda de uma chance de cura ou sobrevivência e responsabilidade civil médico-hospitalar*. In M. Kfouri Neto, *Responsabilidade civil dos hospitais: Código Civil e Código de Defesa do Consumidor* 310-312. São Paulo. Silva, R. P. da. (2009). *Responsabilidade civil pela perda de uma chance: uma análise do direito comparado e brasileiro* (2nd ed), 83-84. São Paulo. Carnaúba, D. A. (2013). *Responsabilidade civil pela perda de uma chance* 138-139. Rio de Janeiro; São Paulo.

[3] Hironaka, G. M. F. N. (2005). *Responsabilidade pressuposta* 29, 60-64. Belo Horizonte. Amaral, F. (2008). *Direito civil: introdução* (7th ed),160. Rio de Janeiro. Pereira, C. M. da S. (1989). *Responsabilidade civil* 10. Rio de Janeiro. Facchini Neto, E. (2013). *Code Civil francês: gênese e difusão de um modelo*. Revista de Informação Legislativa, 50(198), 59-88.

[4] Varela, J. M. A. (2015). *Das obrigações em geral* (10th ed., 12th reprint, Vol. 1) 600-601. Coimbra. Dias, J. de A. (1950). *Da responsabilidade civil* (2nd ed., Vol. II) 314. Rio de Janeiro. Alpa, G. (1999). *Trattato di diritto civile* (Vol. IV: La responsabilità civile, 608. Milano. Cavalieri Filho, S. (2014). *Programa de responsabilidade civil* (11th ed.), 92-93. São Paulo. Diniz, M. H. (2005). *Curso*

In the case of the loss of a chance, the harm does not directly impact the benefit the victim sought to obtain. Instead, it interrupts the person's trajectory, preventing them from reaching a position where they could have competed for that benefit. In this sense, what is lost is the possibility to attain the desired position, not the final benefit itself. As Sergio Cavalieri Filho states, "The loss of a chance is characterised by the loss of the possibility of achieving a future benefit due to another party's wrongful conduct"[5].

A typical example of loss of a chance is of a candidate who suffers an accident and is unable to reach the location where they would take an exam for a public service position. The candidate's loss is not precisely the job itself, as it is uncertain whether they would have passed but rather the loss of the opportunity to compete for the desired position. Another example is a lawyer missing the deadline to file a challenge or appeal in a legal action, causing their client to lose the opportunity to contest the legal outcome.

The key characteristic of the loss of a chance is the uncertainty regarding the goal that the victim was pursuing, raising many questions about the validity and scope of the theory. Given the uncertainty about whether the victim would have achieved the desired goal, it is not possible to establish the loss of that goal as a harm directly caused by the agent's conduct. On the other hand, even though the lost chance is not the same as the desired benefit the victim sought, it must be regarded as a serious and real chance. This means that the victim must have had the possibility to compete for and the probability of achieving that benefit, had the opportunity not been taken by the harmful action.

The loss of a chance therefore can be defined as the interruption of a trajectory that would have placed the victim in a position to compete for a future benefit, with some probability of success, though subject to uncertainty, making it impossible to determine whether the benefit would have ultimately been achieved.

1.2 Variations in Loss of a Chance

The concept of loss of a chance can vary depending on the actual perishing of the benefit the victim was pursuing. In the first scenario, after the victim's trajectory is interrupted, the desired benefit remains subject to uncertainty, as it is unclear whether it would have been attained had the harmful action not occurred. In the second scenario, after the victim's trajectory is interrupted, the random process continues and reaches its end, resulting in the loss of the intended benefit.

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de direito civil (19th ed. Vol. 7): Responsabilidade civil, 63-66, 70, and 91. São Paulo. Calvo Costa, C. A. (2005). *Daño resarcible* 81. Buenos Aires.

[5] Cavalieri Filho, S. (2014). *Programa de responsabilidade civil* 98. São Paulo.

A classic loss of a chance refers to situations where the benefit sought by the victim remains subject to uncertainty. In contrast, in cases of loss of a chance of cure or survival ("*perte d'une chance de survie ou de guérison*"), particularly relevant in medical law, the random process comes to an end with the permanent loss of the sought benefit[6].

Inspired by the lessons of François Chabas, Rafael Peteffi da Silva identifies two categories of loss of a chance. The first one considers the loss as a specific harm, independent of the ultimate benefit. The second category addresses the loss as a way of mitigating the causal link in view of the benefit lost by the victim[7].

In another approach, the legal doctrine makes a distinction between the loss of a chance to gain a benefit and the loss of a chance to avoid harm[8]. This differentiation is subtle as in both cases the interruption of the random process prevents the victim from positioning themselves to compete for a benefit, whether to achieve a gain or avoid a loss.

These distinctions are particularly significant when applying the theory of loss of a chance in the field of medical law, as in most cases, what is lost is not merely the opportunity to compete for a benefit, but the actual loss of the benefit sought by the victim.

1.3 The Autonomy of Indemnifiable Damage

Damage is considered the main prerequisite for civil liability. Without damage, there can be no obligation to repair or compensate. Damage refers to the loss experienced by the victim as a consequence of a harmful act, either due to a wrongful conduct or a risky activity[9].

In cases involving the loss of a chance, however, there is often difficulty in identifying the harm suffered by the victim as the harmful act does not directly cause the loss of the ultimate benefit sought but rather the loss of the opportunity to compete for such benefit in a random process. Regarding the example of the candidate prevented from reaching the examination site for a job competition, it cannot be said that the harmful action has caused the loss of the intended post. Therefore, the damage is not the loss of the intended position, but rather something that lies between the harmful act and the intended outcome.

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[6] Silva, R. P. da. (2009). *Responsabilidade civil pela perda de uma chance* 83-85. São Paulo. Kfouri Neto, M. (2019). *Perda de uma chance de cura ou sobrevivência e responsabilidade civil médico-hospitalar*, cit., 312. São Paulo.

[7] Silva, R. P. da. (2009). *Responsabilidade civil pela perda de uma chance* 106-107.

[8] Noronha, F. (2003). *Direito das obrigações* (Vol. 1) 671-672. São Paulo. Tepedino, G., Terra, A. M. V., & Guedes, G. S. da C. (2021). *Fundamentos do direito civil 4: responsabilidade civil* (2nd ed.), 140. Rio de Janeiro.

[9] Zannoni, E. A. (2001). *El daño en la responsabilidad civil* 1. Buenos Aires. Bueres, A. J. (2001). *Derecho de daños* 483. Buenos Aires. Dias, J. de A. (1950). *Da responsabilidade civil* 313. Rio de Janeiro.

According to Zannoni, "Chance is the possibility of a probable, future benefit that integrates the individual's capacity to act, supported by hope. Depriving them of this hope constitutes damage, because what is truly lost or frustrated is the chance, not the expected benefit"[10]. Examining this topic in the realm of medical law, Miguel Kfouri Neto observes that "The notion of chance is easily recognised as an autonomous value, distinct from the concept of harm or final advantage". The Brazilian marathon runner Vanderlei Cordeiro de Lima, for instance, was prevented from finishing first in a race due to the reckless actions of a spectator[11]. Similarly, Fernando Noronha argues that the expected advantage by the victim is uncertain and not subject to compensation, while the loss of the chance is a certain and distinct harm from the benefit that was hoped for[12].

The conclusion to be drawn is that the damage resulting from the loss of a chance should not be confused with the benefit that the victim was aiming for. After all, it cannot be guaranteed that the person would have achieved their objective if their trajectory had not been interrupted by a harmful action. However, it cannot be said that the loss of a chance is legally insignificant or that the victim did not suffer harm by being prevented from continuing their trajectory. Therefore, there is damage that must be compensated, and it is independent of the victim's ultimate goal.

Nonetheless, some respected scholars analyze the loss of a chance as a problem of partial causality between the conduct or activity and the final benefit sought by the victim, particularly in cases where the benefit is ultimately lost[13]. Under this approach, the victim is only partially compensated for the suffered harm, which undermines the principle of full compensation, as the extent of the harm cannot be entirely attributed to the conduct or activity that caused the interruption.

1.4 Concrete and Real Chance

One of the difficulties in understanding the theory of loss of chance is that the compensable damage must be certain and current, meaning it must exist as a

[10] Refer to "La chance es la posibilidad de un beneficio probable, futuro, que integra las facultades de actuar del sujeto en cuyo favor la esperanza existe. Privar de esa esperanza al sujeto, conlleva daño, porque lo perdido, lo frustrado, en realidad, es la chance e no el beneficio esperado, como tal. Zannoni, E. A. (2001). *El daño en la responsabilidad civil* 52.

[11] Kfouri Neto, M. (2019). *Perda de uma chance de cura ou sobrevivência e responsabilidade civil médico-hospitalar* 301. São Paulo.

[12] Noronha, F. (2003). *Direito das obrigações* 674. São Paulo.

[13] Rafael Peteffi carefully analyses this aspect of the loss of a chance under the perspective of parcial causality. Silva, R. P. da. (2009). *Responsabilidade civil pela perda de uma chance* 50-67. São Paulo.

phenomenon. That is why, in principle, hypothetical, potential, or merely conjectural damages are not subject to compensation[14]. In the case of loss of chance, the random process is interrupted before the victim reaches the position to compete for the intended benefit. As a result, it cannot be said that there is a loss of the benefit as it remains uncertain, possibly materializing or not. For this reason, in cases of loss of chance, one should not confuse the harm resulting from the lost opportunity with the benefit sought by the victim. The former is real and concrete, while the latter lies in the realm of hypotheses, conjectures and eventualities[15].

However, for the loss of chance to qualify as compensable damage, it is essential that the chance be concrete and real, with a probability that the victim could have obtained the final benefit had they been in a position to compete for it[16]. For instance, it is not possible to claim loss of chance if the candidate prevented from attending an exam did not meet the objective requirements to participate in the competition, such as holding the academic degree required by the examination notice.

Thus, in cases of loss of chance, the damage suffered does not coincide with the ultimate benefit sought by the victim but is limited to the loss of the opportunity to be in a position to compete for it. The autonomy of the damage resulting from the loss of chance implies recognising that the chance exists as a legally protected interest at the time of the injury, which was destroyed by the harmful action, leading to its disappearance and transforming the loss of chance into actual damage[17].

Despite its autonomy, the damage resulting from the loss of a chance is directly related to the benefit sought by the victim. This is due to the necessity of proving that there is a real and serious chance of achieving such benefit and because the value of the desired benefit serves as a parameter for determining the compensation for the loss of the chance[18].

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[14] Pereira, C.M. da S. Responsabilidade Civil, cited, 45-48; Zannoni E.A. *El daño en la responsabilidad civil*, cited, 51-52.

[15] According to Sanseverino P.T, "In the loss of a chance, there is also certain damage, not hypothetical, with certainty located in the probability of obtaining a benefit frustrated by the damaging event. One repairs the lost chance, not the final damage" (Sanseverino, P. de T. V. [2010]. *Princípio da reparação integral:* indenização no Código Civil. São Paulo, 167).

[16] In the words of Sergio Cavalieri Filho, "It is necessary, therefore, that it be a serious and real chance that provides the injured party with effective personal conditions to compete for the expected future situation. […] The reparable lost chance must characterize a material or immaterial damage resulting from a consummated fact, not hypothetical" Filho S.C. *Programa de responsabilidade civil* cited, 98.

[17] Noronha F. *Direito das obrigações*, cited, 674; Rocha N.S. *A "perda de chance" como uma nova espécie de dano*, cited, 63-64.

[18] Carnauba. D. A., *Responsabilidade civil pela perda de uma chance* cited, 128-137.

1.5 Material or Non-Material Nature

There is difficulty in classifying the loss of a chance within the traditional categories of patrimonial and extra-patrimonial damages. The issue arises as the harm caused to the victim does not align directly with the benefit sought by them, even though it is related. This complexity occurs once the harm suffered by the victim does not necessarily have material content, but the desired benefit might have material or non-material value. In general, scholars tend to agree that "the loss of a chance should represent either material or non-material damage for the victim, depending on the nature of the potential outcome that could have been achieved."[19]

In this sense, the Statement 444 from the V Civil Law Conference of the Federal Justice Council (CJF) clarifies that the loss of a chance may result in either material or non-material consequences, depending on the specific circumstances of the case:

The civil liability for the loss of a chance is not limited to non-material damages. Depending on the case, the lost chance may also be regarded as a material harm as well. The chance must be serious and real, without being restricted to preconceived percentages.

One effective way to understand the nature of the damage in loss of a chance is to focus solely on the lost opportunity, without immediately considering the benefit the victim sought. From this perspective, the harm impacts the individual in their projection toward a goal subject to uncertainty, which can be understood as an interest of non-material nature. Subsequently, once the loss of opportunity is acknowledged, the value of the benefit sought by the victim is revisited in order to determine the compensation amount.[20]

In Brazilian jurisprudence, it is well-established that compensation for the loss of a chance should be determined with reference to the value of the benefit that the victim was aiming to achieve. In the "Show do Milhão" ("Who wants to be a Millionaire?" show) case, the compensation was proportionally based on the prize money that could have been won.[21] In cases in which the outcome is entirely non-material, such as parents who miss the opportunity to participate in their daughter's wedding or a father who misses the birth of his child, the value of the lost chance aligns with the value of the desired event. In such situations, the theory of loss of a chance primarily serves as the foundation for recognizing the harm.

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[19] Carnauba D.A. *Responsabilidade civil pela perda de uma chance*, cited, 170-171; Filho S.C. *Programa de responsabilidade civil* cited 98; Tepedino G.; Terra, A.M.V; Guedes, Gisela G.S.C. *Fundamentos do direito civil* 4, cited, p. 140.

[20] Noronha, F. *Direito das obrigações,* cit., 674.

[21] STJ (2005), Quarta Turma, REsp 788.459/BA, Rel. Ministro F. Gonçalves.

The distinctive element in cases of loss of a chance lies in the uncertainty regarding the life benefit sought by the victim. However, this distinction is not always clear in situations where the intended benefit is lost. For instance, parents who were unable to board a plane and missed their daughter's wedding, or an investor whose financial advisor failed to make a planned investment, have suffered direct patrimonial or extra-patrimonial harm, as the benefits they sought were definitively lost.

In other words, both the parents who missed their daughter's wedding and the investor who was not able to invest have suffered actual damage once their intended benefits were effectively lost due to the harm. This is quite different from cases in which a candidate misses an exam, a lawyer misses a deadline, or a swimmer loses the chance to compete. In these situations, there is uncertainty as to whether the desired benefit – whether material or non-material – would have been achieved by the victim.

1.6 Loss of a Chance, Actual Damages and Lost Profits

In legal doctrine, there is a debate as to whether the damage resulting from the loss of a chance aligns more with lost profits or actual damages. According to Article 402 of the Brazilian Civil Code, losses and damages encompass what the victim effectively lost and what they reasonably failed to gain. In doctrine, this distinction is referred to as "actual damages", which immediately arise from the wrongful act, and "lost profits," which are the earnings the victim lost due to the event. A common example is that of a taxi driver whose vehicle is damaged, preventing them from working due to a traffic accident caused by a third party[22].

Both actual damages and lost profits arise from the harmful event. However, the key difference is that the extent of actual damages is immediately known, while the extent of lost profits should be estimated based on a projection of earnings the victim would have made had the damage not occurred. A proper classification of the loss of a chance requires recognising its autonomy in relation to the final benefit the victim was pursuing. Once this autonomy is acknowledged, it becomes clear that the victim already holds an interest—the chance—at the moment they are harmed. Therefore, this damage arises directly from the harmful event.

When viewed from this perspective, it becomes evident that all these types of damage arise from the harmful event. However, they differ in how the loss is materialised: in the case of direct damages, the loss occurs at the time of injury; in the case of lost profits, the loss is calculated based on a projection of what the victim would have earned had the injury not occurred; in the case of loss of a chance, the loss materialises when the chance is definitively lost.

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[22] Azevedo A.V., (2011). *Teoria geral das obrigações e responsabilidade civil.* (12.ed). São Paulo, 196-198.

The loss of a chance conceptually resembles lost profits because both involve some degree of uncertainty regarding the materialization of the loss. Misunderstandings regarding these concepts may arise if we bear in mind that in the context of loss of a chance, the benefit is sought by the victim. In the case of lost profits, the victim loses the actual benefit they sought whereas in the loss of a chance, the victim loses the opportunity to position themselves to compete for such benefit. In the first case, there is certainty regarding the loss suffered, which is a realizable and projected profit, with only its value needing to be calculated. In the second case, the damage is limited to the loss of opportunity, without certainty as to whether the final benefit could have been achieved[23].
On the other hand, if we consider the autonomy of the loss of a chance from the final benefit the victim sought, it aligns more closely with the concept of direct damage. It is worth pointing out that indemnifiable damage requires certainty and actuality, which implies that hypothetical, eventual or conjectural damages cannot be compensated[24]. Even in cases of loss of a chance, the damage is certain and actual as the injury affects an asset or interest that already exists at the moment of the injury[25]. Therefore, the loss of a chance can be understood as damage that directly emerges from the harmful act[26].

1.7 Establishing causal link

The causal link is the logical bond established between two phenomena: the damage and the negligent conduct or risky activity. While damage and cause are events that occur in time and space, the causal link is a logical construct created by legal reasoning. Within the general theory of civil liability, several theories have been developed to address this issue. The most remarkable ones are the theories of adequate causality and the equivalence of conditions. All of these

[23] Glenda Gondim notes that the difference between lost profits and loss of a chance lies in the degree of certainty: in the former, the legal asset would certainly be incorporated into the injured party's assets in the future, while in the latter, the benefit is desired but uncertain. Gondim, G. G. (2010). *A reparação civil na teoria da perda de uma chance* (Unpublished master's thesis). Universidade Federal do Paraná, 123-124.
[24] Pereira, C. M. da S. *Responsabilidade civil*, cit., 45-48; ZANNONI, E. A. *El daño en la responsabilidad civil*, cit., 51-52.
[25] Sanseverino, P. de T. V. *Princípio da reparação integral*, cit.,167.
[26] According to Nuno Rocha, "The 'chances' that preexisted in the injured party's assets were destroyed by a culpable action of the injurer, causing their disappearance at the moment the illicit act occurred, thus transforming 'the loss of a chance' into a true consequential damage" (Rocha, N. S. *A "perda de uma chance" num verdadeiro dano emergente*, cited, 63-64).

theories aim to establish the cause of the harmful event in order to determine the obligation to compensate[27].

Bringing the discussion about the loss of a chance to the field of causal link, it is observed that some scholars advocate for the theory of partial causality, suggesting that the agent did not cause the loss of the entire benefit sought by the victim. Rafael Peteffi da Silva explores some ways to mitigate the causal link, opposing the conception of loss of a chance as an autonomous indemnifiable damage[28]. He concludes that it is incorrect to consider all cases of loss of a chance as independent damages, arguing instead that "the correct systematization of the theory of loss of a chance involves two categories: one based on a specific concept independent of the damage. The second one, on the other hand, would be supported by the concept of partial causality in relation to the outcome"[29].

In a diametrically opposed view, Fernando Noronha defends the autonomy of damage caused by the loss of a chance in relation to the final benefit sought by the victim. This is because the benefit is not yet part of the victim's assets, whereas the opportunity to compete for it was already within their possession at the time of the harm. Therefore, the task for those analysing civil liability is to establish the causal link between the harmful action and the loss of the opportunity to compete for the desired outcome, by recognizing the autonomy of damage caused by the loss of a chance[30].

1.8 The Loss of a Chance and the Principle of Full Reparation

The general clause of civil liability requires that those who cause damage must fully repair it (Civil Code, Articles 186 and 187, in conjunction with Article 927 and Article 944, *caput*). The principle of full reparation is a justice-based postulate, according to which the victim has the right to full reparation for the damage suffered, by being restored to the situation they were in before the damaging event occurred[31].

The thesis that subordinates the loss of a chance to the benefit sought by the victim produces some distortions. The most remarkable distortion is that this

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[27] Noronha, F. (n.d.). *Direito das obrigações* 587, Cavalieri Filho, S. (n.d.). *Programa de responsabilidade civil* 63-69. Farias, C. C. de Rosenvald, N., & Braga Netto, F. P. (2015). *Curso de direito civil* (2nd ed., Vol. 3: *Responsabilidade civil*, 370-375. São Paulo. Cruz, G. S. da. (2005). *O problema do nexo causal na responsabilidade civil* 33-111. Rio de Janeiro. Moraes, R. D. F. de. (2014). *A causalidade alternativa e a responsabilidade civil dos múltiplos ofensores* (Master's thesis, Faculdade de Direito), Universidade de São Paulo, São Paulo,16-37.

[28] Silva, R. P. da. *Responsabilidade civil pela perda de uma chance,* cit., 50-54, 64-68, 68-72, 77-83.

[29] Silva, R. P. da. *Responsabilidade civil pela perda de uma chance*, cit., 104-106, 110.

[30] Noronha, F. (n.d.). *Direito das obrigações* 674. In the same sense, Sanseverino, P. de T. V. *Princípio da reparação integral*, cit., 167. Rocha, N. S. *A "perda de chance" como uma nova espécie de dano*, cit., 63-64.

[31] Sanseverino, P. de T. V. *Princípio da reparação integral*, cit., 34.

would imply partial causality, and consequently, partial reparation of the damage, thus undermining the principle of full reparation. This does not seem to be an appropriate approach, considering that what the victim truly loses is the chance itself, not the desired benefit. Therefore, the causal link is established between the harmful conduct or action and the lost chance.
From this perspective, the lost chance is an autonomous damage that should receive full reparation. Nonetheless, determining the indemnity amount should involve a proportionality calculation, considering the value of the benefit sought by the victim and the probability of obtaining it if the chance had not been lost.

2. Loss of a Chance in Medical Law

The theory of loss of chance is a classic theme in civil law, first recognised in a decision by the French Court of Cassation on July 17th, 1889. Over time, the theory was also applied in the field of medical law as a loss of chance for cure or survival ("perte d'une chance de survie ou de guérison"), starting with two decisions from the same court in the 1960s[32].
However, characterising loss of a chance in the field of medical law is not simple. Since medical professionals intervene in the vital processes of their patients, choosing a particular therapeutic approach necessarily involves abandoning another, which might have been more advantageous. It is worth pointing that all living beings are certainly destined to suffer illness and death, meaning that everything we do in life is essentially a negotiation with illness and death, postponing or delaying this inevitable fate[33]. Therefore, as a rule, the intervention of a medical professional in a patient's vital process is instrumental — focused on assisting them in the fight for cure or survival against the inexorable process of illness and death.
Given the instrumental nature of medical practice, Miguel Kfouri Neto argues that "since medical obligations are typically obligations of means, there is almost always a presumption in favour of the physician that the harm would have occurred regardless of the physician's intervention, triggered by factors entirely beyond their control and beyond their ability to prevent it." Neto explains that, in the event of the worsening of the disease or the patient's death, the challenge becomes proving whether the medical professional acted competently and diligently: "If the treatment was appropriate, the patient's death should be attributed to the impossibility of achieving a cure"[34].

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[32] See note 2, above.
[33] L. (2007). *Aprender a viver: filosofia para os novos tempos* 19-23. Rio de Janeiro. Ferri, L. (2007). *O homem-Deus, ou, O sentido da vida.* (3rd ed.) 9-11. Rio de Janeiro.
[34] Kfoury Neto, M. *Perda de uma chance de cura ou sobrevivência e responsabilidade civil médico-hospitalar* 304-305.

From this perspective, it is fair to affirm that: a) the failure of appropriate treatment provided by the physician does not constitute professional liability for the worsening of the disease or the patient's death; b) an excusable medical error cannot be considered as the cause of the patient's worsening of health or death, nor the loss of a chance for the patient's cure or survival; and c) only gross or intentional medical error can be considered the cause of the worsening of health or the patient's death, leading to the loss of a chance for their cure or survival.
The application of the theory of loss of chance to the field of medical law involves a conceptual change, moving from the issue of damage and its compensation to the problem of causality, to the detriment of the principle of full reparation. Addressing civil liability in the medical law context, Miguel Kfouri Neto writes:
"The loss of a chance is considered a type of damage projected into the future. This idea serves to replace compensable financial damage with a frequently uncertain loss, not clearly but rather very likely linked to the harmful event. Under these conditions, recourse to equity is required – thus distancing it from full compensation, which characterizes the reimbursement of financial harm. In loss of chance cases, the lost chance is compensated, not the final harm. The compensation is, therefore, partial. This theory was transposed to the medical field under the heading of *perte de chance de survie ou de guérison*, changing the focus from damage to causality"[35].
In an example drawn from François Chabas' work, Kfouri Neto further explains: "Stretching the causal link, despite the evident medical act and loss, it was concluded that the professional had compromised the victim's chance—hence, mitigated compensation is imposed according to the circumstances of the event"[36].
In the Portuguese law scenario, Rute Teixeira Pedro analyses the case of a patient with pneumonia symptoms, where the physician fails to order tests to confirm the diagnosis, leading to the patient death hours later from a generalized infection. The author points out that although a causal link between the diagnostic error and the patient's death cannot be established, the loss of chances of survival can still be recognised[37].
Rafael Peteffi da Silva distinguishes between the classical loss of chance and the loss of a chance in the medical field by using examples such as a lawyer missing a procedural deadline and a patient dying after undergoing incorrect medical treatment. According to Silva, shifting the issue of liability from the sphere of damage to that of causality leads judges to ask experts about the probability of

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[35] Kfoury Neto, M. *Perda de uma chance de cura ou sobrevivência e responsabilidade civil médico-hospitalar*, cit., 312.
[36] Kfoury Neto, M. (n.d.). *Perda de uma chance de cura ou sobrevivência e responsabilidade civil médico-hospitalar*, cit.,312.
[37] Pedro, R. T. *A perda de chance na responsabilidade civil médica* 418-419.

a causal link between the medical act and the final harm to grant partial compensation[38].

In a similar sense, Daniel Carnaúba explains that the reparation of chances is a technique for protecting random interests, which has been used to overcome the challenges between civil liability and the uncertainty regarding damage. Referring to two rulings issued by the French Court of Cassation in 1960 and 1965, which marked the application of this theory in medical law, Carnaúba argues that it is impossible to establish a causal link between conduct and the final advantage, which is random. As a result, there is a shift in the focus of reparation, establishing causality between the conduct and the loss of a chance, rather than between the conduct and the final random advantage. This approach also applies to cases of medical error because it is impossible to determine whether the patient would have been cured or would have avoided death, depending on the physician's intervention. Therefore, only the lost chance can be compensated[39].

The application of the loss of a chance theory in medical law, however, from the perspective of partial causality, faces consistent criticism, starting with the violation of the principle of full reparation. On the other hand, Adriano Godinho and Igor Mascarenhas base their criticism on two arguments: first, the hypothesis does not find support in Brazilian legislation; second, resorting to this theory serves to bypass the absence of one of the prerequisites for compensation liability, which is the causal link[40]. Eduardo Dantas, in turn, questions the very existence of the loss of a chance theory, which, in his view, does not fit within the rules of civil liability and represents a kind of semi-liability based on uncertainty and the possibility of a hypothetical event[41].

Although these arguments are consistent, they do not prevail because, as a rule, civil liability does not require specific legal typification but is based on a general clause of compensating for damages caused[42]. Furthermore, the argument of semi-responsibility serves only as a filter to reaffirm that the loss of a chance is not intended to compensate for hypothetical and conjectural damages but is

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[38] Silva, R. P. da. *Responsabilidade civil pela perda de uma chance* 85-86.

[39] Carnaúba, D. A. *Responsabilidade civil pela perda de uma chance*, cit.,138-141.

[40] Mascarenhas, I. de L., & Godinho, A. M. (2016). *A utópica aplicação da teoria da perda de uma chance no âmbito do direito médico: uma análise da jurisprudência do TJRS, TJPR e TJPE*. Revista Direito e Liberdade, 18(3), 159-192.

[41] Dantas, E. (2019). *Direito médico* (4th ed.) 388-389. Salvador.

[42] The general clause of civil liability, enshrined in the articles 1.382 e 1.383 of the Napoleonic Code (1804), art. 186 c/c 927, caput, from current Brazilian Civil Code. Regarding general clauses as legislative techniques, refer to: Jorge Júnior, A. G. (2004). *Cláusulas gerais no novo Código Civil* 22-23. São Paulo. Martins-Costa, J. (1998). *A boa-fé no direito privado* 276-280. São Paulo. Cordeiro, A. M. da R. e M. (2013). *Da boa-fé no direito civil* 53-67. Coimbra. Perlingieri, P. (2002). *Perfis do direito civil: introdução ao direito civil constitucional* (2nd ed.), 27-28. Rio de Janeiro.

perfectly applicable in cases where there is a "probability of obtaining a benefit that was frustrated by the harmful event"[43].

The problem seems to lie in the approach of treating the loss of a chance through the perspective of partial causality, which creates the impression of compensating for an uncertain or non-existent harm. On the other hand, it gives the sensation of only partially compensating for an actual harm suffered. To counter potential criticisms, it is preferable to consider that, even in the realm of medical law, the loss of a chance constitutes an autonomous harm, compensable on its own, in cases where there is a probability that the patient could have achieved a cure or survival.

Drawing on the teachings of Sinde Monteiro, Rute Teixeira Pedro explains that the uncertainty inherent in medical practice is precisely what reinforces the obligation of means. She emphasizes that for the characterization of the loss of a chance, there must be serious, real, and considerable chances of cure or survival that medical intervention seeks to take advantage of, as well as the existence of a medical act that forms the basis for liability for the harm caused by the loss of chance[44]. This implies that loss of chance can be perfectly understood as an autonomous harm—a lost opportunity suffered by the victim, where the assessment considers the probability of achieving the outcome originally sought. Without this probability, it is not possible to speak of loss of a chance.

It is worth mentioning that harm is the phenomenon that triggers duties of responsibility (prevention/precaution and compensation). With this consideration in mind, it is necessary to identify, in concrete cases, the occurrence of a lost chance as an event which is distinct from the benefit sought by the victim. However, to recognize it, there must be at least a probability of achieving the desired outcome. Once the chance is identified as a legally protected right, it becomes possible to consider compensating for its loss due to the unlawful act of a third party.

It makes no sense to conduct a hypothetical operation to try to establish a partial causal link in relation to the loss of the benefit sought by the victim, which was not caused by the medical act, and then to deduct a percentage from the compensation amount based on a proportionality calculation over the value of the benefit.

3. Superior Court of Justice judgments

This topic addresses the research carried out on the Superior Court of Justice *website* in Brazil, with both quantitative and qualitative analysis in order to identify the application of the loss of a chance theory in the Court's jurisprudence.

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[43] Sanseverino, P. de T. V. *Princípio da reparação integral*, cit., 167.

[44] Pedro, R. T. *A perda de chance na responsabilidade civil médica,* cit., 424-425.

The first search on the Court website, using the term "loss of a chance," covered a ten-year period from February 1st, 2013 to February 1st, 2023. The results were as follows:

Court	Superior Court of Justice
Searched Term	"Loss of a Chance"
Period	1/2//2013 – 1/2/2023
Precedents	01
Judgments	112
Monocratic decisions	2.962

A second search, this time using the combined terms "loss of a chance and medical error" during the same period, presented the following results:

Court	Superior Court of Justice
Searched Term	"Loss of a Chance and Medical Error"
Period	1/2/2013 – 1/2/2023
Precedents	00
Judgements	10
Monocratic decisions	368

This research highlights the significant presence of the "loss of a chance" theory in Brazilian Court rulings. The number of cases reaching the Superior Court is substantial, reflecting its importance. However, many cases face procedural issues, such as the lack of prior questioning and the prohibition on factual matters reviews.

3.1 Judgments on "loss of a chance"

In this section, the analysis focuses on the precedents and the first ten judgments from the search under the term "loss of a chance." Due to the large number of cases found, a sampling approach was taken. The analysis begins with Precedent 595 from the Court's Second Section, which states: "Higher education institutions are objectively liable for damages suffered by students/consumers for offering courses not recognized by the Ministry of Education in Brazil, where prior and adequate information had not been provided."

The "loss of a chance" theory appears in two judgments that led to the precedents. In both cases, the plaintiffs sought compensation for lost profits in relation to the period they were prevented to practice their respective professions because their diplomas had not been registered. In one of the cases,

the Court of origin upheld the award for lost profits, but the "loss of a chance" theory was rejected because the lower courts had not addressed the issue.[45] In the second case, the lower court had awarded compensation for lost profits based on the "loss of a chance" theory, but the Superior Court of Justice reversed the decision due to the lack of clear evidence of actual harm. Although moral damages were upheld, the compensation amount was reduced for being excessive.[46] Proceeding with the qualitative analysis, by sampling, the ten most recent rulings on "loss of a chance" were selected for further examination.

	Appeal	**Date**	**Panel**	**Reporting Justice**	**Subject**	**Outcome**
1	AgInt no AREsp 2.163.535/RJ	13/12/2022	1st	Gurgel de Faria	Prohibition from bidding	Precedent 7
2	AgInt no AREsp 1.915.389/DF	24/10/2022	3rd	Paulo de Tarso Sanseverino	Lawyer's responsibility	Precedent 7
3	REsp 1.929.450/SP	18/10/2022	3rd	Paulo de Tarso Sanseverino	Invalid donations	Precedent 7
4	AgRg no AREsp 1.955.954/PR, Rel.	18/10/2022	6th	Laurita Vaz	Criminal defense denial	Precedent 7
5	AgInt nos EDcl no AREsp 1.610.544/RJ	17/10/2022	2nd	Assusete Magalhães	Reinstated public servant	Precedent 7 Precedent 284
6	AgInt no AREsp 2.089.565/BA	26/09/2022	3rd	Moura Ribeiro	Airline/ Medical treatment	Precedent 7
7	AgInt no AREsp 2.127.702/GO	20/09/2022.	4th	Antonio Carlos Ferreira	Unjustified protest	Precedent 7

[45] Superior Tribunal de Justiça [STJ]. (2013). *REsp 1.244.685/SP*, Rep. Justice Luis Felipe Salomão, judged on 03/10/2013.
[46] Superior Tribunal de Justiça [STJ]. (2014). *REsp 1.232.773/SP*, Rep. Justice João Otávio de Noronha, judged on 18/03/2014.

8	AgInt nos Edcl no REsp 1.949.934/MG	19/09/2022	1st	Gurgel de Faria	Lawyer's responsibility/ statute of limitations	Returned
9	AgInt no AREsp 2.000.983/SC	02/08/2022	2nd	Og Fernandes	SAMU	Theory upheld
10	AgInt no AREsp 2.028.906/PR	30/05/2022	4th	Raul Araújo	Lawyer's responsibility	Precedentd 283 e 356

In the first judgment, the decision involves a claim for damages based on the loss of a chance theory filed by a law firm that was administratively sanctioned and disqualified from bidding on a public tender sought damages for the loss of its chance to participate. The firm argued that, had it not been disqualified, it could have won the tender. The lower court directly addressed the "loss of a chance" issue but denied the repair request, ruling that it was not possible to predict whether the firm would have won the bid if it had not been excluded. The Superior Court of Justice upheld this decision, citing that a review of the factual matter was not possible due to constraints of Precedent 7[47].

The second decision relates to a claim for damages for loss of a chance filed against a lawyer who failed to secure the seizure of assets in a separate legal proceeding, thereby preventing the plaintiff from recovering a debt. The lower court denied the claim, and the Superior Court of Justice rejected the special appeal because the plaintiff failed to challenge the lower court's reasoning in a detailed and objective manner and once again the Superior Court of Justice invoked Precedent 7[48].

In the third decision, the plaintiffs alleged a loss of a chance to file a lawsuit to nullify certain donations made by their deceased father because they were denied access to relevant documents in the possession of the defendant. The lower courts dismissed the case, finding that there was no strong likelihood the plaintiffs' claim would have been successful, as they failed to prove the existence of the donations. The Superior Court of Justice affirmed this decision, agreeing with the lower court's reasoning regarding the prerequisites for recognizing the

[47] Superior Tribunal de Justiça [STJ]. (2022). *AgInt no AREsp 2.163.535/RJ*, Rep. Justice Gurgel de Faria, judged on 12/12/2022.

[48] Superior Tribunal de Justiça [STJ]. (2022). *REsp 1.929.450/SP*, Rep Justice Paulo de Tarso Sanseverino, judged on 18/10/2022.

loss of a chance. The Court added that revisiting these findings would require a re-examination of evidence (SCJ, Precedent 7)[49].
The fourth ruling refers to a curious criminal case involving a claim of a loss of a chance in a criminal issue, which in fact was a claim of denial to the right to defense due to a lack of opportunity to produce a particular piece of evidence[50].
The fifth ruling concerns a case filed by a public servant against the Union, seeking both salary increases and promotion to the position of labour inspector, based on his status as a politically pardoned individual. The action was dismissed in the first instance and the plaintiff appealed, arguing that he had lost the chance to be promoted to the post. The Federal Court of Appeals rejected the claim, finding no certainty that the plaintiff would have attained the position. The Superior Court of Justice also denied the special appeal, emphasizing that the plaintiff had failed to specify which legal provisions had been violated by the lower court's decision (Precedent 284 of the Supreme Federal Court)[51].
The sixth case referenced in the research involves a lawsuit filed against an airline company which prevented the plaintiff's son from boarding a flight to São Paulo, where he was seeking medical treatment. As a result, his condition worsened, and he passed away 30 days later. The lower court ruled that the patient lost the chance to undergo medical consultations, exams, and receive immediate treatment in a specialized facility, which could have interrupted the progression of his health condition. The Superior Court of Justice upheld the decision, noting that reconsidering the lower court's decisions would violate procedural rules, specifically invoking the court's Precedent 7[52].
The seventh decision concerns a lawsuit filed by a company that lost the opportunity to close a deal with another company due to an improper protest of its name by the defendant. The Court of Appeals upheld the lower court's decision recognizing the loss of a chance - business opportunity. The Superior Court of Justice confirmed the ruling, reiterating that it could not review the factual matter to Precedent 7[53].
The eighth ruling addresses a lawsuit for damages based on the loss of a chance brought against lawyers for negligence in defending the plaintiff in labour claims. The lawsuit was initially dismissed on the grounds of a three-year statute of limitations, but the Federal Court of Appeals overturned the ruling,

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[49] Superior Tribunal de Justiça [STJ]. (2022). *AgInt no AREsp 1.915.389/DF*, Rep. Justice Paulo de Tarso Sanseverino, judged on 24/10/2022.
[50] Superior Tribunal de Justiça [STJ]. (2022). *AgRg no AREsp 1.955.954/PR*, Rep. Justice Laurita Vaz, judged on 18/10/2022.

[51] Superior Tribunal de Justiça [STJ]. (2022). *AgInt nos EDcl no AREsp 1.610.544/RJ*, Rep. Justice Assusete Magalhães, judged on 17/10/2022.
[52] Superior Tribunal de Justiça [STJ]. (2022). *AgInt no AREsp 2.089.565/BA*, Rep. Justice Moura Ribeiro, judged on 26/09/2022.
[53] Superior Tribunal de Justiça [STJ]. (2022). *AgInt no AREsp 2.127.702/GO*, Rep. Justice Antonio Carlos Ferreira, judged on 20/09/2022.

determining that since the matter involved a contractual dispute, the statute of limitations should be ten years. The Superior Court of Justice upheld this decision and returned the case to the lower court for further analysis based on the theory of loss of chance[54].

In the ninth decision, a lawsuit for damage was filed against a municipal government after emergency services (SAMU) failed to provide assistance to a heart attack victim, who subsequently died. The trial judge applied the loss of chance theory and awarded R$ 50,000 in damages, considering the probability of the victim's survival had they received timely medical assistance. The Court of Appeals reduced the compensation to R$ 25,000, again applying the loss of chance theory. However, the Superior Court of Justice, based on its jurisprudence, ruled that damages for death should range between 300 and 500 times the minimum wage, ultimately setting the compensation at R$ 60,000, equivalent to 20% of the minimum established parameters[55].

The tenth case examined involves a lawsuit for damages due to the loss of a chance filed against lawyers for alleged negligence in an adverse possession case. The lower court rejected the claim, stating that the plaintiff failed to prove that the adverse possession request would have been unsuccessful had the lawyers acted with due diligence. The Superior Court of Justice denied the appeal due to the absence of preconditions for review, as outlined in Supreme Court Precedents 282 and 256[56].

The analysis of these rulings reveals that the jurisprudence of the Superior Court of Justice is receptive to the theory of loss of a chance. In the rulings that gave rise to Precedent 595, this theory appears as a basis for substantiating compensation for lost profits. Regarding the other ten decisions analyzed, most involved the rejection of special appeals, either due to the absence of prior questioning or the fact that they involved re-examining factual matters.

3.2. Judgments on "loss of a chance" and "medical error "

A qualitative analysis was conducted on ten Superior Court of Justice rulings identified through a search on the court's website, using the combined terms "loss of a chance" and "medical error."

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[54] Superior Tribunal de Justiça [STJ]. (2022). *AgInt nos Edcl no REsp 1.949.934/MG*, Rep. Justice Gurgel de Faria, judged on 19/09/2022.

[55] Superior Tribunal de Justiça [STJ]. (2022). *AgInt no AREsp 2.000.983/SC*, Rep. Justice OG Fernandes, judged on 02/08/2022.

[56] Superior Tribunal de Justiça [STJ]. (2021). *REsp 2.028.906/PR*, Rep Justice Raul Araújo, judged on 30/05/2022.

	Appeal	Date	Panel	Reporting Justice	Subject	Outcome
1	REsp 1.844.668/RJ	14/10/2021	4th	Maria Isabel Gallotti / Antonio Carlos Ferreira	Health insurance – Reduction of damages based on loss of chance (LoC)	Maintained the application of LoC, applied Summary 7
2	AgInt no AREsp 1.380.905/ES	28/05/2019	4th	Antonio Carlos Ferreira	Liability – Health insurance	Loss of chance not applied
3	AgInt no AREsp 832.397/ES	10/04/2018	3rd	Moura Ribeiro	Medical Error Paraplegia	new arguments Summaries 283 and 356
4	REsp 1.662.338/SP	12/12/2017	3rd	Nancy Andrighi	Excusable medical error	Considered the application of LoC, but no gross error found
5	REsp 1.677.083/SP	14/11/2017	3rd	Ricardo Villas Bôas Cueva	Inexcusable medical error	Maintained the application of LoC
6	AgInt no AREsp 140.251/MS	03/08/2017	4th	Maria Isabel Gallotti	Medical negligence – Failure to hospitalize (non-admission)	Maintained the application of LoC with reservation to Summary 7
7	AgInt no AREsp 909.233/RS	16/05/2017	2nd	Assusete Magalhães	Judgment beyond the request	Maintained the application of LoC
8	REsp 1.622.538/M	21/03/2017	3rd	Nancy Andrighi	Lack of post-surgical follow-	Considered LoC, but no gross

	S				up	error found
9	AgInt no AREsp 553.104/RS	01/12/2015	4th	Marco Buzzi	Delay in treatment – Loss of vision	Maintained the application of LoC
10	REsp 1.254.141/PR	04/12/2012	3rd	Nancy Andrighi	Gross medical error – inadequate treatment	Maintained the application of LoC reducing damages proportionally

The first ruling analysed involves a claim for damages based on allegations of negligence by hospital staff and the failure of a health insurance provider to authorize treatment, which allegedly resulted in the plaintiff's daughter's death. The expert report found no causal link between the defendants' actions and the death. However, the judge rejected the expert findings and partially ruled in favour of the plaintiff, relying on the theory of loss of a chance. The lower court ruled in favour of the health insurance company and partially in favour of the plaintiff, while the Superior Court of Justice upheld the ruling against the insurance company and dismissed the request for a proportional reduction of damages due to the lack of prior questioning[57].

The second ruling involved proven negligence and incompetence by a physician from a health insurance provider who failed to follow a specific medical protocol for cardiology patients. This omission eliminated the chance of preventing a cardiac arrest, which caused severe, irreversible, and permanent damage to the patient. The local court upheld the decision, modifying only the interest calculation. The health insurance provider argued on appeal that the state court had not addressed the inapplicability of the theory of loss of a chance. However, the reporting justice stated that the theory was irrelevant, as the conviction was based on the objective liability of the insurance company due to the proven negligence and incompetence (inexcusable error) of its physician[58].

The third judgment concerns a compensation claim in which the plaintiff alleges that she became paraplegic due to medical malpractice, specifically as a result of an unnecessary surgery performed by the defendants. The lawsuit was dismissed

[57] Superior Tribunal de Justiça [STJ]. (2021). *REsp 1.844.668/RJ*, Rep. Justice Maria Isabel Gallotti, rep. Justice Antonio Carlos Ferreira, judged on 14/09/2021.

[58] Superior Tribunal de Justiça [STJ]. (2019). *AgInt no AREsp 1.380.905/ES*, Rep. Justice Antonio Carlos Ferreira, judged on 28/05/2019, v.u.

in the first instance, but the Court of Appeals reversed the decision, condemning the medical professionals to compensate for the damages caused. This decision was based on expert evidence confirming a causal link between the medical procedure and the plaintiff's paraplegia. In the special appeal, the appellant argued that the state court applied the theory of loss of chance, despite the lack of its necessary conditions. The Superior Court of Justice dismissed the appeal under Precedent 7 and added that the theory of loss of chance represented an "inadmissible appeal innovation" because the argument had not been raised in lower courts[59].

The fourth analysed judgment concerns a lawsuit filed by the parents of a patient who died, allegedly due to the negligence and incompetence of a physician. The trial court sentenced the defendant to pay moral damages equivalent to 1,000 minimum wages. However, the state court reduced the compensation to R$ 124,000. Upon reviewing the special appeals, the Superior Court of Justice determined that this case applied the theory of loss of chance since the physician's actions were not the sole and direct cause of the patient's death, but the patient lost a chance to survive. Nevertheless, considering the patient's condition, which had improved after receiving medication, the Court found that the physician's decision to discharge her and recommend a follow-up visit the next day for further tests was justified. Therefore, although the loss of chance theory was admitted, the Court understood that there was no gross error in the physician's conduct that would justify the frustration of the chance, overturning the appellate decision and dismissing the claim[60].

The fifth judgment from the analysis involves a patient who went to the hospital feeling unwell. A hemogram test was performed, and she was discharged with a two-day medical certificate, despite the test results being available within a few hours. The following day, the patient had a seizure at home, fell down the stairs, suffered a traumatic brain injury and died. The lower courts awarded R$ 50,000 in compensation, and the defendant filed a special appeal, arguing that other factors contributed to the patient's death. Based on the evidence, the Superior Court of Justice understood that "the negligent acts of the medical professionals […] deprived the patient of a real and concrete chance of having her illness properly diagnosed and treated, resulting in the loss of an opportunity to benefit from appropriate care". Regarding the amount of compensation, the Court found that the sum awarded by the lower court was reasonable, as it was intended to compensate for the loss of a chance of a correct diagnosis, not the outcome – the patient's death[61].

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[59] Superior Tribunal de Justiça [STJ]. (2018). *AgInt no AREsp 832.397/ES*, Rep. Justice Moura Ribeiro, judged on 10/04/2018, v.u.

[60] Superior Tribunal de Justiça [STJ]. (2017). *REsp 1.662.338/SP*, Rep. Justice Nancy Andrighi, judged on 12/12/2017, v.u.

[61] Superior Tribunal de Justiça [STJ]. (2017). *REsp 1.677.083/SP*, Rep. Justice Ricardo Villas Bôas Cueva, judged on 14/11/2017, v.u.

The sixth case under review concerns a claim for moral and material damages in which the plaintiff alleges she attempted to be admitted to three different hospitals on five separate occasions over the course of a single day. Despite presenting seizures, she was repeatedly advised to return home. Eventually, she was assisted by emergency services (SAMU) while already in a coma and suffering from cardiorespiratory arrest. She remained in the ICU for 15 days and in a regular hospital bed for an additional 45 days, resulting in severe physical and neurological sequelae. Upon reviewing the appeal filed by the plaintiff, the state court applied the theory of loss of a chance, stating that "the inadequate or insufficient conduct of the attending physicians on duty deprived the plaintiff of the chance to avoid or minimize the severe physical and neurological consequences". When the special appeal filed by one of the defendant hospitals was reviewed by the Superior Court of Justice, it upheld the lower court's decision, highlighting the correct application of the loss of a chance theory. Moreover, the Superior Court of Justice indicated that revising the factual premises of the lower court's decision would be barred by Precedent 7[62].

The seventh analysed decision involves a lawsuit for damages filed by a patient against physicians and a hospital, alleging medical malpractice. The state court upheld the ruling of liability but reduced the compensation amount to R$ 80,000. In the special appeal, the defendant argued that the lower court's judgment was beyond the scope of the claim (*extra petita*) by adopting the theory of loss of a chance. However, the Superior Court of Justice rejected this argument, affirming that mentioning the theory in the judgment's reasoning did not constitute an *extra petita* ruling, as the court had accepted the plaintiff's factual allegations to hold the defendants liable (judgment p 16)[63].

The eighth judgment concerns a lawsuit for damages based on a misdiagnosis that allegedly deprived the plaintiff of the chance for proper treatment and a cure. As it was mentioned in the judgement, in 2005, the plaintiff underwent surgery to remove a benign tumour in her knee, but the pain persisted. Later tests revealed a malignant tumour, which led to a second surgery in 2006 to amputate the patient's knee. The plaintiff eventually died in 2011. The lower court dismissed the claim, as the expert report did not find any fault with the medical professionals or the laboratory tests, instead suggesting that the disease had progressed between the two tests. The state appellate court overturned the ruling and ordered the defendant to pay the equivalent of 150 minimum wages in moral damages, citing the orthopedic doctor's failure to provide proper post-

[62] Superior Tribunal de Justiça [STJ]. (2017). *AgInt no AREsp 140.251/MS*, Rep. Justice Maria Isabel Gallotti, judged on 03/08/2017, v.u.

[63] Superior Tribunal de Justiça [STJ]. (2017). *AgInt no AREsp 909.233/RS*, Rep. Justice Assusete Magalhães, judged on 16/05/2017, v.u.

operative care, despite the patient's complaints of severe pain, as stated in item 4 of the judgment summary. The Superior Court of Justice ruled that the case should be analysed under the theory of loss of a chance, since the doctor's actions were not the direct cause of death but could have deprived the patient of the opportunity for a cure and longer survival. However, the court ultimately dismissed the doctor's liability, as his conduct did not amount to gross negligence, which is a requirement for the application of the "perte d'une chance de survie ou de guérison"[64].

The ninth judgment concerns a claim for moral damages against a hospital for inadequate and delayed treatment following a car accident, which ultimately resulted in the loss of vision in his right eye. The lower court relied on an expert report, concluding that negligence occurred in the outpatient care. While the severity of the accident contributed to the vision loss, the delay in proper treatment further reduced the patient's chances of recovery. Upon appeal, the Superior Court of Justice upheld this decision, noting that "the loss of a chance can be demonstrated by a delay in treatment that seems to have nullified the opportunity for the patient, upon obtaining an early diagnosis to immediately begin proper treatment to the severity of the injury" (judgment p. 6)[65].

The tenth and last judgment involves an indemnity action due to a series of medical errors in the treatment provided to the plaintiff's wife and mother, a cancer patient which culminated in the worsening of her illness and death. The lower court ruled in the plaintiffs' favour, awarding R$120,000 in moral damages and additional material damages outlined in the initial petition. On appeal, the court upheld this decision, invoking the loss of a chance theory. The Superior Court of Justice judge, referencing legal scholars Fernando Noronha and Rafael Peteffi, reasoned that this doctrine should also apply in medical field as an independent harm: "The value of this doctrine, despite all criticism it has faced, lies in the understanding that the chance, as an autonomous legal asset, was taken from the victim, establishing a direct causal link between the loss of this asset and the agent's conduct. There is no need to determine whether the final benefit (life, in this case) was taken from the victim. The fact is that the chance to live was taken from her, and this is sufficient." The challenge, therefore, becomes only to quantify this harm, that is, to determine the economic value of the lost chance" (judgment p.11). Once the applicability of the loss of a chance theory to the case was accepted, the presiding Justice proceeded to analyze, in light of the evidence, whether the medical conduct could be deemed the cause of the loss of the opportunity for the patient's cure and survival, concluding that "there is therefore the frustration of a chance and the obligation to compensate for it." Finally, once the responsibility of the medical professional for the

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[64] Superior Tribunal de Justiça [STJ]. (2017). *REsp 1.622.538/MS*, Rep. Justice Nancy Andrighi, judged on 21/03/2017, v.u.

[65] Superior Tribunal de Justiça [STJ]. (2015). *AgInt no AREsp 553.104/RS*, Rep. Justice Marco Buzzi, judged on 01/12/2015, v.u.

frustration of the chance for the patient's cure and survival was recognized, the amount of compensation was analyzed, with a 20% reduction as the initial decision had not accounted for proportional calculation based on the loss of a chance theory[66].

The analysis of these judgments reveals that the loss of a case theory is fully accepted in the jurisprudence of the superior Court of Justice. Unlike the judgments analyzed in the previous section, where the Court refrains from examining the merits due to Summary 7, cases involving medical law are openly debated, either for the admission or denial of loss of a chance, provided that the necessary requirements are met.

In this regard, it is noted that the loss of a chance is a matter of law, not of fact. Once the facts are established in the lower courts, Precedent 7 does not prevent the Superior Court from addressing their classification under the "loss of a chance" theory for purposes of defining the duty to indemnify. However, it is essential that the issue has been addressed by the lower court, under penalty of characterizing a new argument on appeal, which prevents the special appeal from being reviewed by the Superior Court of Justice (SCJ, Precedents 282 and 356).

The analysis of case law reveals the recognition of loss of a chance for cure or survival as an autonomous harm, requiring an assessment in each specific case to determine if a loss of opportunity for cure or survival occurred. Once the damage is established, the causal link must be examined between the medical conduct and the loss of chance, rather than between the conduct and the patient's death or disability. However, a key factor in establishing liability is that the error must be gross and inexcusable; otherwise, considering the instrumental nature of medical activity, the conduct cannot be considered the cause of the loss of chance for cure or survival.

It is also derived from the rulings that the use of the loss of a chance as grounds for a conviction decision does not constitute an *extra petita* judgment, even if the plaintiff did not raise this argument. It is, in fact, a theoretical framing of the facts narrated by the parties, that is, an assignment of *nomen juris* to the described facts without altering their content.

Once a physician's liability is recognized for the loss of a patient's chance of cure or survival, it is necessary to determine the compensatory amount. In one of the cases analysed, the Superior Court of Justice reduced the amount awarded by the lower courts by 20%, as the state court did not apply the loss of a chance principle to the amount awarded at the first instance.

It is important to consider that the compensation value for the loss of a chance is determined through arbitration, considering the probability level that the

[66] Superior Tribunal de Justiça [STJ]. (2012). *REsp 1.254.141/PR*, Rep. Justice Nancy Andrighi, judged on 04/12/2012, v.u.

patient had of achieving a favourable outcome, had the random process not been interrupted. The challenging task of arbitrating moral damages becomes even more complex when a proportional reduction is required based on the probability of achieving the benefit hindered by the harmful conduct. In the mentioned case, the compensation amount was set at the first instance without applying the loss of a chance theory, making the reduction applied reasonable, considering the probability factor as demonstrated by various identified failures in the physician's conduct. However, this percentage may vary from case to case, due to the variation of the probability factor.

Furthermore, the analysis of Superior Court of Justice rulings reaffirms what was argued in the first part of this study: although the loss of a chance may be regarded as an independent harm, its connection to the final benefit sought by the victim is evident, both when determining whether a real and concrete chance existed and when establishing the compensation value.

4. Conclusions

In alignment with the purposes established in the introduction of this study, a bibliographic survey and jurisprudence research were conducted, using the deductive method to outline the scope of the loss of a chance and its peculiarities applied in the realm of medical law.

From the analysis of doctrinal texts, it is concluded that loss of a chance can be defined as the interruption of a trajectory that would place the victim in a position to compete for a future benefit, with a probability of success, although subject to uncertainty. Making it impossible therefore to determine if that benefit would be attained.

There are fundamentally two types of loss of a chance: in the first, considered classical, after the interruption of the victim's trajectory, the desired benefit remains subject to uncertainty, with no clear indication whether it would be achieved; in the second, the random process continues after the interruption of the victim's trajectory, ultimately culminating in the actual loss of the objective that they intended to achieve.

Key characteristics of loss of a chance include the uncertainty surrounding the desired goal and at the same time the probability of its attainment, which makes the chance tangible, real, and not merely hypothetical or conjectural. The lost chance is intertwined with the benefit sought by the victim, relating to both the probability calculation and the moment of quantifying the compensatory amount.

There is a doctrinal debate regarding whether the loss of a chance constitutes an autonomous damage or if it is halfway to the lost benefit sought by the victim, in which case there would be partial causality and, consequently, a partial reparation of that loss. While respecting contrary positions, the most compelling

solution seems to be to regard the institute as autonomous damage, albeit related to the benefit that the victim intended to achieve and was harmed.
The theory of loss of a chance when applied to medical law takes on specific dimensions because the benefit sought by the patient is cure or survival ("perte d'une chance de survie ou de guérison"), the loss or impairment of which cannot be attributed to medical action, as these are based on means rather than results.
A quantitative analysis of the data available on the website of the Superior Court of Justice over a ten-year period, from February 1, 2013, to February 1, 2023, indicates that the argument "loss of a chance" appears in 3,075 events, comprising 2,962 single decisions, 112 judgments, and 1 precedent. When the argument "medical error" is added, there are 368 single decisions and 10 judgments in the same period. These data indicate that the theory of loss of a chance is a thesis that frequently traverses the jurisprudence of the courts, reaching the Superior Court in substantial numbers.
In qualitative analysis, disregarding the single decisions due to their large volume, ten judgments that appeared on the first page of the quantitative research on loss of a chance in general were analysed. It was observed that the Superior Court of Justice is receptive to the use of the theory by state courts but refrains from delving deeper into the topic, either due to lack of prior questioning or because it pertains to factual matters.
A different scenario arises with qualitative research on the loss of a chance applied to medical law, where the Court has engaged with the topic and absorbed the intense debate occurring in the doctrinal field, taking positions on the autonomy of damage, the necessity for the chance to be real and concrete, and the method of determining the compensatory amount in proportion to the value of the benefit that was sought by the victim.
The Superior Court has established the requirements for characterizing the loss of a chance of cure or survival ("perte d'une chance de survie ou de guérison"), which include the existence of the lost chance by the patient as an autonomous legal asset and the presence of a medical act that can be causally linked to this event.
Moreover, the Superior Court of Justice established a three-step framework for recognising the loss of a chance: first, it should be determined if the case meets the requirements to be considered under the theory of loss of a chance; second, the medical action should be analysed to determine if there was gross error or excusable error, as only in the case of gross error can the loss of chance be attributed to the professional; once the causal link between the gross error and the loss of chance of cure or survival is recognised, the calculation of the compensatory amount is conducted, which takes into account the degree of probability the victim had of achieving cure or survival.

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