The Loss of a Chance in the Field of Medical Liability

Considering the most recent case, published in all media, and in which the parents of a young girl of 13 (thirteen) years will be brought to the jury of the State of São Paulo to be tried for intentional homicide, it’s important to approach the subject in question.

It is true that besides the parents of the young girl, dead at 13 (thirteen) years of age, are Jehovah's Witnesses, belief that prohibits blood transfusions, because they understand that the blood given by God cannot be mixed with another person’s blood", the doctor who attended her also ceased to apply his best efforts in order to prolong her life.

Given the fact pictured above, although in general, the theory of loss of a chance may well be applied to the case. The question that is always made by operators of the law is, "Would have the medical professional failed to adopt any procedure, perfectly possible, and omitted to save the life of one who was placed in his care?" "Would the doctor have acted at fault, negligence or imprudence?”

In recent years, the theory of the loss of a chance has become an essential tool for authors and judges, who have started using it to analyze and to substantiate their cases, especially regarding medical liability.

The eminent professor Kfouri Neto (2002) notes that many lawyers in the United States who dedicate to medical causes and health professionals complain about the unfounded demands, which they call a kind of "legal lottery". This practice encourages litigants to seek for easy money and really contributes to the increase of actions against the medical professionals.

Although there is no such "legal lottery" in Brazil, there are some situations that seem to indicate a growing tendency to this way. However, despite there are no statistics to verify the amount of actions, what is known is that about 80% of them are unfounded, which means that the health professional has become a victim of a demand, in most cases, unjustifiable. The authors of these actions are almost always poor people who appeal to the benefit of free justice to start the actions. After the case is settled and the dismissal of the action, the search for repair caused by the process, in almost all cases is impracticable, considering the lack of resources of temerarious litigant. According to Kfouri Neto (2002):

> Reporting the slanderous denunciation - or the figure of reckless or abusive denunciation of the French law for libel or defamation - produces little practical result. In some cases, may prove effective to use a right of reply or correction. It would impose on the temerarious litigant the duty to publish a denial in the press, to a daily fine (articles 461 and 644, CCP). (Kfouri Neto, 2002, p. 182).

Assuming the doctor sign a contract with the hospital as a standalone service provider, or maintenance of an open clinical body, there will be a link between them, with some reservation:

> The hospital is responsible for the medical acts of the professionals who administer it (directors, supervisors, etc.), and the doctors who are employees. The hospital is not responsible when the doctor simply uses the facilities of the hospital for admission and treatment of their own patients. Regarding to physicians who comprise the clinical staff of the institution, not being employed, we must distinguish: if the patient was attended by a member of the clinical staff, although not employed, the hospital is responsible for the wrongful act of the physician, in solidarity with him; if the patient seeks for the doctor and he leads the patient to die in the hospital, the contract is with the doctor and the hospital is not liable for his fault, although the doctor is on its team, but only by the poor provision of hospital services that are affected (AGUIAR JR, 1997, p. 233).

About the physician-hospital relations, Camapum Junior (2001) notes that the hospital may have two types of relationship contracting with doctors: the first, continuously to provide continuous services of the hospital regardless of the classification of the contract - if employment or autonomous service -, and the second, in which the physician uses the hospital eventually, just renting the operating room for surgery. In this case the hospital will always be responsible for failure of services that are inherent, such as equipment maintenance, sterilization, among others.

In general, the doctor is liable for damages resulting from its own bad performance, as incompetence, imprudence and negligence, and the hospital will be responsible for the others. In case it is impossible to define the accountability, physician and hospital shall be jointly liable. If some injury succeeds to the patient

caused by these hotel services (supply of materials, medicines and hospital care), only the hospital will answer. If the damage is due to medical acts without any involvement from the hospital, only the medical professional will respond.

By these facts, it's worth mentioning that the new Brazilian Civil Code defines the liability of the physician as follows:

> On Title IX - "From Civil Liability" - Chapter I - "The Obligation to Indemnify" - article 927, the new Civil Code (project in the Câmara dos Deputados - 2000) provides: "Section 927. Who, in illicit act (articles 186 and 187), harm others, is obliged to repair it. *Unique Paragraph*. There will be obligation to repair the damage, regardless of fault in cases specified by law, or where the activity usually developed by the perpetrator to imply, by their nature, risk to the crimes of others." (Kfouri Neto, 2002, page 201).

The eminent professor Kfouri Neto (2002) warned that perhaps this single paragraph has led some rushed interpreter to conclude that *doctor's civil liability* would fit in line of *risk activity* and therefore would be subject to the rules of strict liability which does not require verification of guilt, which in the opinion of the jurist, it is a regrettable mistake.

The theory of loss of chance applies to subjective responsibility of the physician who, in turn, has an obligation of means and not of result. It is certain that the diagnostic error, if not crass or culpable, does not characterize medical errors since the human body is full of mysteries and, it is for the doctor to find the best way to try to provide the patient, if not the cure, the chance to survival.

Besides being serious and real, the lost chance cut the victims the chance of survival or cure, but not the opportunity for a better economic situation.

It is important to conceptualize that the "chance" must be understood as the probability of a favorable success which, in turn, differs from mere hope.