

REVISTA EUROLATINOAMERICANA DE DERECHO ADMINISTRATIVO

VOL. 10 | N.1 | ENERO/JUNIO 2023 | ISSN 2362-583X



RED DOCENTE
EUROLATINOAMERICANA
DE DERECHO ADMINISTRATIVO



The loss of opportunity in the health field: the causal link and the protection of the right to compensable physical and moral integrity in Spain

La pérdida de oportunidad en el ámbito de la salud: la relación de causalidad y la protección del derecho a la integridad física y moral indemnizable en España

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Recibido el/Received: 29.03.2023 / 29 March 2023

Aprobado el/Approved: 03.09.2023 / 03 September 2023

ABSTRACT

Loss of opportunity is a term used by Spanish jurisprudence in the health field, and despite the fact that it is a widely used doctrine, it presents doubtful aspects in the requirements to grant compensation and the configuration of damage. The present study analyzes the origin and the perspectives that treat the loss of opportunity with the purpose of solving the problem that constitutes the causal relationship between the activity of a subject and the damage produced. It emphasizes the difficult treatment for the application of the loss of opportunity technique, requiring for its application the causal uncertainty together with the pre-existence of an ideal situation to obtain a benefit or advantage that has not occurred. The connection between the two will enable the application of the loss of opportunity or expectations, determining the calculation of the compensation in a motivated manner by the Courts based on the

RESUMEN

La pérdida de oportunidad es un término utilizado por la jurisprudencia española en el ámbito sanitario, y a pesar de ser una doctrina muy extendida, presenta aspectos dudosos en los requisitos para la concesión de la indemnización y en la configuración del daño. Este estudio analiza el origen y las perspectivas que abordan la pérdida de oportunidad con el fin de resolver el problema que constituye la relación de causalidad entre la actividad de un sujeto y el daño producido. Destaca la dificultad de aplicación de la técnica de la pérdida de oportunidad, que exige la incertidumbre causal unida a la preexistencia de una situación ideal para la obtención de un beneficio o ventaja que no se ha producido. La conexión entre ambas permitirá aplicar la pérdida de oportunidad o expectativa, determinando el cálculo de la indemnización de forma motivada por los Tribunales en función de la probabilidad de la oportunidad perdida. En este estudio se analizan los orígenes y perspectivas que

Como citar este artículo | *How to cite this article:* MARTÍNEZ CRISTÓBAL, Daniel. The loss of opportunity in the health field: the causal link and the protection of the right to compensable physical and moral integrity in Spain. **Revista Eurolatinoamericana de Derecho Administrativo**, Santa Fe, vol. 10, n. 1, e234, ene./jun. 2023. DOI: 10.14409/redoeda.v10i1.12566

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probability of the lost opportunity. This study analyzes the origin and the perspectives that deal with the loss of opportunity in order to solve the problem that constitutes the causal relationship between the activity of a subject and the damage produced. Different cases in which this theory is applied will be reviewed to know its importance and evolution.

abordan la pérdida de oportunidad para resolver el problema que constituye la relación de causalidad entre la actividad de un sujeto y el daño producido. Se revisarán diferentes casos en los que se aplica esta teoría para conocer su importancia y evolución.

Keywords: patrimonial responsibility; compensation; health care; loss of opportunity; Lex Artis

Palabras clave: responsabilidad civil; indemnización; asistencia médica; pérdida de oportunidad; Lex Artis

CONTENT

1. Introduction; **2.** Loss of opportunity theory; **3.** State liability; **4.** Wrongful actions; **5.** Conclusions. References.

1. INTRODUCTION

Loss of opportunity is the technique or instrument used as a judicial remedy available to individuals and the public Administration when the need arises to overcome the difficulties of proving the causal link. The starting point for this concept is the loss of a particular or real opportunity or possibility for the subject to obtain a benefit or advantage and is caused by the action or omission of a third party. To deal with the loss of opportunity, one must look at the ultimate certainty, and uncertainty of what would have happened had the action or inaction of another person not occurred.

In Spain, the reception of the loss of opportunity was gradual. Nowadays, the traditional causal model is used, which demands that the facts be proven with total certainty, based on which judges and courts base their decisions. Nevertheless, judicial praxis has admitted the impossibility of demonstrating the truth of the causal event with indisputable evidence¹, so it is considered that the accredited causality is the reasonably probable one, in which the theory of loss of opportunity has great relevance as it is an instrument to save uncertainty.

In Spain, it is not regulated in any general liability text and is only reflected in the Supreme Court case law and by the Council of State. European law regulates it in Article 163 of the European Contract Code, but it requires reasonable certainty and must be assessed according to the breach.

Although the loss of opportunity has been invoked by courts, tribunals and the Council of State since 1998, it has been moving in a struggle between the trend of the traditional all-or-nothing idea and the new conception that recognises the relativity of human knowledge to prove the causal link.

¹ MEDINA, Luis. La teoría de la pérdida de oportunidad. **Revista española de la función consultiva**, Valencia, n. 16, p. 98, 2011.



On 10 October 1998², the first Supreme Court judgement applying the theory of loss of opportunity in the healthcare field was handed down, dealing with the facts of a nurse who gave first aid to a worker who had suffered the amputation of a hand while giving instructions to a third person who considered it convenient to place the amputated limb in a white cork box outside the first-aid kit. Subsequently, the ATS observed that the packaging had been changed and delivered unopened to the health centre, considering it more appropriate. However, the amputated limb arrived in an advanced state of frostbite and could not be re-implanted³.

In 2002, the compensation for the opportunity of cure or survival was admitted for the first time in a judgement of the Audiencia Nacional. From that date, the doctrine was also accepted by the Contentious-Administrative Chambers of some High Courts of Justice.

It is essential to note the Draft Principles of European Tort Law. ⁴It was established that the patient who has suffered the harm bears the loss sustained according to the likelihood of another outcome had it not been for the act or omission.

In tort law, the common law doctrine of *Res Ipsa Loquitur* was first applied in the United States in 1863 when a citizen sued a shop owner because a barrel of flour had fallen on him from one of the shop's windows and injured him. The plaintiff did not provide sufficient evidence, but the courts upheld the claim on the grounds of negligence.

This doctrine originating in Anglo-Saxon countries, allows the courts to rule that there is a fault when the victim proves the production of weakness, even if they do not have direct evidence. In Spain, as in Anglo-Saxon countries, it is considered that the rule is not a method for assessing negligence but rather a rule of evidence or the use of presumptions.

Spanish scientific and case law doctrine requires that the event causing the damage is the consequence of a negligent activity and that the event is caused by conduct within the defendant's power, with the limitation that it is not caused by an action that corresponds to the plaintiff.

The theory of loss of opportunity in Spain is appealed in civil and contentious-administrative proceedings. It is generally invoked concerning the conduct of legal or health professionals. However, as an exception, it converges with pronouncements of the Council of State on the need to extend the doctrine to the field of employment, or

² YZQUIERDO, Mariano. 10 de octubre de 1998. Indemnización por la pérdida de una expectativa. Diferencia entre el régimen de la responsabilidad por negligencia médica y el régimen objetivo de la Ley General para la Defensa de los Consumidores y Usuarios. **Cuadernos Civitas de jurisprudencia civil**, s.l., n. 50, p. 537, 1999.

³ Sentencia del Tribunal Supremo, Sala 1ª, RC núm. 1946/1994, de 10 de octubre de 1998, RJ 1998\8371.

⁴ JEREZ, Carmen. Anexo: Definiciones. En JEREZ, Carmen (coord.). **Principios, definiciones y reglas de un Derecho Civil Europeo**: el Marco Común de Referencia (DCFR). Madrid: Boletín Oficial del Estado, p. 487, 2015.



some judgments cover innovative areas such as the negligence of an insurance broker or access to the fire brigade.

The Supreme Court has shown a changing treatment on determining the legal nature of liability in the health care field, attributing a distribution of the burden of proof in which the principle of ease of evidence was applied. Current doctrine establishes that in the area of health liability, strict liability must be ruled out, and the technique of the inversion of the burden of proof must be applied, but this disappears at present with the Civil Procedure Act, except for specific cases.

Articles 1.902 and 1.903 of the Civil Code regulate extra-contractual liability⁵. In the health field, that arises when in the application of a treatment to a patient, there has been fault or negligence on the part of the doctor who carried out the treatment, basing article 1.902 on guilt. The patient must prove the damage and the authorship, demonstrating the relationship or the nexus of causality and fault derived from the infringement of professional duties or *Lex Artis Ad Hoc*.

In medical care, the loss of opportunity tries to find the possibilities that the patient would have if they had acted according to the required standards. It is necessary to understand the context in which a patient comes to a hospital with pre-existing damage, but with expectations of cure. If an injury or even death occurs, the doctor may be held responsible for the damage caused. However, in this type of case what is demanded of the doctor is the frustration of the expectations of cure or survival and the relationship is sought between the hypothetical diligent action of the doctor that would have prevented the damage and, therefore, the loss of opportunity. This theory arises to unite uncertainty and certainty as opposed elements that coexist in this type of situation. In the study, different cases in which this theory is applied will be reviewed to find out the importance and evolution of the uncertainty of not knowing what would have happened if the patient had been adequately treated at the corresponding time and the certainty of the loss of expectations due to not have received the right treatment at the right time.

2. LOSS OF OPPORTUNITY THEORY

The theory of loss of opportunity is a technique of evidentiary scope used as a judicial remedy, available to individuals and the Public Administration. It is therefore considered a mechanism of proportional liability in which compensation is awarded to the injured party for the damage caused.

⁵ MEDINA, Luis. La teoría de la pérdida de oportunidad. **Revista española de la función consultiva**, Valencia, n. 16, p. 106, 2011.



This figure starts with the loss of a distinct and real possibility that the subject has to obtain a benefit but is not obtained by the omission or action of a third party. However, it also applies when uncertainty about whether a person could get a gift or advantage⁶.

Opportunity loss is a situation where the contradiction of certainty and uncertainty is essential. Confidence determines that if the event had not occurred, the injured party would have the hope of obtaining the benefit. However, the ultimate uncertainty manifests what could have happened if the event had not occurred. Therefore, there may be a possibility for compensation in cases where the existence of causation is not sure but reasonable⁷.

2.1. LEX ARTIS

In the healthcare field, it is required that the procedure applied, known as "Lex Artis Ad Hoc", is appropriate to the circumstances and availability of means, in which the criteria for action and the resources of the centre where the activity is being carried out must be taken into account as principles for assessing the correct medical act carried out by the professional concerning the complexity and importance of the show, and other factors such as the complexity of the case, the patient's diagnosis and medical history, deriving from this both the requirements for legitimisation and the lawful performance of the corresponding effectiveness of the services provided and the possible liability of the doctor in the result of his intervention⁸.

To comply with this duty, case law requires that all known health treatments have been used and are available to the doctor in charge of the patient's treatment and that both the patient and their relatives have been informed, following article 5 of Law 41/2002, of 14 November, which regulates patient autonomy and the rights and obligations regarding information and clinical documentation.

To consider an action following the "Lex Artis Ad hoc", it is necessary to observe that the doctor's intervention follows the normality established in the medical protocols⁹.

2.2. INFORMED CONSENT

An essential element of the "Lex Artis" is the regulation of informed consent, defined in article 3 of Law 41/2002, as the free, voluntary and conscious agreement of a

⁶ GALLARDO, María Jesús. **Administración sanitaria y responsabilidad patrimonial**. Madrid: Colex, p. 112, 2020.

⁷ ROCA, Encarna y NAVARRO, Mónica. **Derecho de daños, textos y materiales**. Valencia: Tirant lo Blanch, p. 198, 2016.

⁸ Sentencia del Tribunal Supremo de 11 de marzo de 1991. RJ 1991/2209. Fundamento Jurídico Tercero.

⁹ GALLARDO, María Jesús. Causalidad probabilística, incertidumbre causal y responsabilidad sanitaria: la doctrina de la pérdida de oportunidad. **Revista Aragonesa de Administración Pública**, Zaragoza, n. 45-46, p. 60, 2015.



patient, expressed in the full use of their faculties after receiving adequate information, for an action affecting their health to take place¹⁰. This concept is expanded in Article 8 et seq. Governing respect for patient autonomy under informed consent since any medical action requires the free and voluntary consent of the patient.

The obligation and competence to inform the patient are that of the responsible doctors and those professionals who attend to the patient. As a rule, it will be verbal except in written form when they are surgical interventions, diagnostic and therapeutic procedures, and in those in which there are foreseeable risks or inconveniences for the patient, consent being in writing and in the same way can be freely revocable¹¹.

The absence of informed consent does not imply that they should compensate the patient unless harm meets the requirements for them to incur liability. The Supreme Court establishes that in healthcare, greater emphasis is placed on the importance of specific forms, whereby the particular content of the information transmitted to the patient to obtain their consent may condition the choice or rejection of a given therapy due to its risks.

Consent differentiates according to whether it is curative medicine to the means of healing, the means to achieve a cure, or whether it is a voluntary approach to achieving practical results in one's body through transformation¹². Therefore, in curative medicine, the doctor's diligence is to use the means at his disposal to cure the patient, which is what is being sought. Sound therapy is optional since each person's will to achieve an aesthetic or functional change accentuates the obligation to inform about all the risks involved in the intervention.

Article 4 of Law 41/2002 establishes the right of all patients to obtain healthcare information that is truthful, comprehensible and appropriate to the needs of each case, except in the case of legal waivers or exceptions to healthcare information. The report's content must include, by Article 10 of the Act, the critical consequences of the intervention, the risks related to the individual patient's circumstances, the risks under normal conditions due to the state of science or the type of intervention, and the contraindications¹³.

The duty to inform is differentiated by degrees, according to the higher requirement in cases called voluntary medicine compared to necessary or curative medicine, since there is more room for the patient's decision to face the risks of medical action.

¹⁰ CADENAS, Davinia. **El consentimiento informado y la responsabilidad médica**, Madrid: Boletín Oficial del Estado, p. 357, 2018.

¹¹ CORTÉS, Julio César. **Responsabilidad Civil Médica**, Madrid: Thomson Reuters-Civitas, p. 221, 2020.

¹² CADENAS, Davinia. **El consentimiento informado y la responsabilidad médica**, Madrid: Boletín Oficial del Estado, p. 381, 2018.

¹³ GARCÍA, María Dolores. Mayor relevancia del consentimiento informado en tiempos de Covid. **Revista Aranzadi Doctrinal**, Cizur Menor (Navarra), n. 11, p. 198, December 2021.



2.3. ELEMENTS OF LOSS OF OPPORTUNITY

The complexity of proving the causal link and, with it, the loss of opportunity due to the multiple causes from which the harm suffered by the patient may originate leads to direct questioning of the existence of the causal link¹⁴. So where a causal link is absent, it is evidence that the opportunity has been recovered since the possibility never existed.

The main elements leading to the admission of loss of opportunity are the causal link between the medical action or omission and the harm to the patient, as well as the uncertainty as to whether other events would have occurred or whether the concurrent circumstances would have occurred differently¹⁵.

Uncertainty is an essential characteristic of loss of opportunity as it questions whether the patient's outcome could have been reduced or avoided. Therefore, when assessing the harm done, the natural and inevitable possibilities are considered, although the magnitude or extent of the beneficial outcome will also be considered.

Two possible interpretations of missed opportunities in the health sector are possible. Firstly, together with the figure of causal nexus, which are those cases in which there is medical negligence in which it is not possible to know for sure whether the results would have been different in the case of having acted differently, and therefore they are conducting contrary to the "Lex Artis". In these cases, compensation is paid for opportunities that would have been lost if there had been no medical negligence, but not for the entirety of the end obtained¹⁶.

The second interpretation allows for a compensatory response in cases where the breach of the Lex Artis has not occurred, being considered as an alternative figure for which there is anti-juridical damage that is a consequence of the functioning of the service.

In these cases, there is a loss of opportunity. However, the causal link between the action and the harm suffered by the patient has not been accredited because what has been produced has been unlawful harm to the patient that he should not have to bear, and that connects with the possibility that there could have been another, more favourable result for the patient¹⁷.

In situations where the patient has a natural and confident chance of cure from the moment they arrive at the medical centre. They are not in an irreversible health

¹⁴ PÉREZ, Ana María. Incertidumbre causal y cálculo probabilístico del daño por pérdida de oportunidad, *Revista Crítica de Derecho Inmobiliario*, Madrid, v. 97, n. 783, p. 657, 2021.

¹⁵ ASÚA, Clara Isabel. Incertidumbre causal y pérdida de oportunidad. Comentario a la STS de 19 de febrero de 2019 (RJ 2019, 613). *Cuadernos Civitas de jurisprudencia civil*, s.l., n. 112, p. 218, 2020.

¹⁶ PARRA SEPÚLVEDA, Darío. *La responsabilidad civil del médico en la medicina curativa*. Doctoral Thesis directed by María José Santos Morón, Universidad Carlos III, p. 210, 2014.

¹⁷ PÉREZ, Ana María. Responsabilidad médica y mecanismos correctores del rigor probatorio. *Práctica derecho daños: Revista de Responsabilidad Civil y Seguros*, Madrid, n. 110-111, p. 25, 2012.



situation or do not have too poor a prognosis in terms of cure. The lost opportunity has not been lost, as it simply never existed¹⁸.

In addition to the causal link, it is necessary to consider the omission or delay by which a health opportunity is lost and to see what percentage is lost. Omissions, errors, delays or other types of actions that result in a missed opportunity must be assessed according to the "Lex Artis Ad Hoc" and whether they have a causal link to the harm suffered by the patient.

2.4. COMPENSATION FOR LOSS OF OPPORTUNITY

Once the reasons for admitting or not admitting the figure of loss of opportunity are specified, it is necessary to determine whether an inevitable loss of opportunity can be compensated¹⁹. Since there are cases in which there is difficulty in verification that leads to an unfavourable application of the rules on proof and prevention of damages concerning the amount of compensation, the obligation to compensate when there is a loss of chance is not in respect of the totality of the damage caused, as the risks of the illnesses suffered by the patient and the case of being unable to ascertain whether the final result could have been avoided must be excluded. To determine the amount, the STSJ of Galicia of 16 January 2013 established that the compensation calculation is carried out according to the statistical percentage of the patient's chances of recovery.

The damage is not the material damage that corresponds to the event but the uncertainty as to whether the result could have been avoided so that the lost opportunity and not the final consequence must be compensated by examining whether there is uncertainty as to what the outcome would have been and the causal link²⁰.

The STS of 19 June 2012 establishes that a certain probability that the medical action could have prevented the damage is sufficient. However, it cannot be affirmed with certainty for compensation to be awarded, not for the totality of the damage suffered but to value an estimated amount that takes into account the loss of possibilities of cure that the patient suffered as a consequence of the late diagnosis of his illness²¹.

The damage to be compensated must be assessed according to the patient's chances of recovery or improvement, the extent of the injury and the likelihood that prompt

¹⁸ SEOANE, José Antonio. La lex artis como estándar de la práctica clínica. **Folia Humanística**, Barcelona, v. 2, n. 6, p. 12, 2021.

¹⁹ MACÍA, Andrea. Responsabilidad civil en el ámbito sanitario. En GREGORACI, Beatriz (coord.); VELASCO, Francisco (coord.). **Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid**. Ejemplar dedicado a: Derecho y política ante la pandemia: Reacciones y transformaciones, Tomo II, Reacciones y transformaciones en el Derecho Privado, Madrid, n. 2, p. 121, 2021.

²⁰ FERNÁNDEZ, Jesús. Responsabilidad Civil de los Profesionales sanitarios. La lex artis. Criterios jurisprudenciales. **Revista jurídica de Castilla y León**, Valladolid, n. 3, p. 189, 2004.

²¹ OYARZÚN, Felipe. Aproximaciones doctrinales a la teoría de la pérdida de oportunidad. Análisis y reflexiones del caso español. **Revista jurídica Universidad Autónoma de Madrid**, Madrid, n. 43, p. 138, 2021.



and diligent medical action could have prevented the patient's outcome. Suppose it is determined that it could have been a reparable situation. In that case, the loss of opportunity may be compensated, but lost options will always be paid less than the total amount of the damage²².

3. STATE LIABILITY

3.1. REQUIREMENTS FOR PECUNIARY LIABILITY

3.1.1. Compensable injury

Not all damage constitutes a compensable injury since the particularity of unlawfulness must be present. Concerning the effective damage, it must be economically assessable and individualised.

Anti-jurisdiction is regulated in Article 32.1 of Law 40/2015, which establishes that individuals can obtain compensation from Public Administrations when they suffer an injury to any of their property or rights, provided that the damage is a consequence of the standard or abnormal functioning of public services²³.

The doctrine of loss of chance, force majeure or damages that the private individual has to bear produces criminal damage, which becomes a compensable injury when the injured patient suffers the damage and does not have to take it. Once it is established that there is anti-juridical damage, the characteristics that it meets to be subject to compensation are observed, as typified in article 32.2 of Law 40/2015, which stipulates that the damage must be adequate, economically assessable and individualised according to a person or group of persons.

One of the fundamental characteristics for damage to be subject to compensation is that it must be effective and that the administrative activity causes real damage so that future, hypothetical injuries or those related to future profits that will not be received cannot be considered subject to compensation.

Another requirement is that the damage must be economically assessable so that all damage proven by the person claiming it will be subject to compensation. In addition to assessing pecuniary damage, all economically assessable damage will also be considered²⁴.

²² VICANDI, Arantazu. La pérdida de oportunidad en la responsabilidad civil sanitaria ¿se puede cuantificar lo incuantificable? **Revista DS: Derecho y salud**, Barcelona, v. 25, n. 2, p. 41, 2015.

²³ ESTEVE, Jorge. El mito de la responsabilidad objetiva global de la administración pública: (Pandemia por coronavirus como oportunidad para una reevaluación del sistema). **Revista Aragonesa de Administración Pública**, Zaragoza, n. 57, p. 55, 2021.

²⁴ ASÚA, Clara Isabel. Incertidumbre causal y pérdida de oportunidad. Comentario a la STS de 19 de febrero de 2019 (RJ 2019, 613). **Cuadernos Civitas de jurisprudencia civil**, s.l., n. 112, p. 220, 2020.



3.1.2. Imputation to the Administration

The imputation of the Administration's financial liability is also included in article 32.1 of Law 40/2015. It can be defined as the legal phenomenon of attributing to a specific subject the duty to repair damage and for which there are three procedures to impute an administrative action to the Administration.

The first route is a routine operation where the existence of the objective imputation reiterates the consideration of the Administration's financial liability or the presence of some irregularity in the provision of a public service considered an abnormal operation and can be due to both a subjective and objective infringement in the condition of the service²⁵.

Secondly, the creation of the risk by the Administration itself, in which the only legal cause for exoneration is force majeure, for which the Administration must respond in the event of an act of God.

Finally, unjust enrichment means that one party's assets are increased, and the other party's assets are impoverished, both parties being in a relationship of cause and effect and without a legal reason to justify it.

3.1.3. The causal relationship

It is an essential requirement, as the injured party only must prove the causal link between the act or omission and the damage caused, with the obligation of a direct, immediate and exclusive link²⁶. In this case, there is a theory although it is only currently used to consider some of the facts that produce the damage. That coexists with a restrictive approach that understands that only some of the points practised have done the final damage.

The SAN of 14 May 2002²⁷ stated that the patrimonial responsibility in the health field is not based on the simple fact that damage is caused but that it must be seen if the professionals have taken the correct actions. The chamber understood that liability would only arise when the activities of the professionals were not right or not under the protocols.

3.1.4. Absence of force majeure

The fortuitous event is the only circumstance that legally excludes the financial liability of the Administration, regulated in the Spanish Constitution in article 106.2, in

²⁵ RAMOS, Almudena. Diagnóstico tardío y pérdida de oportunidad, **Revista jurídica Universidad Autónoma de Madrid**, Madrid, n. 41, p. 62, 2020.

²⁶ MILANS DEL BOSCH, Santiago. Reflexiones en torno al nexo causal en la responsabilidad patrimonial. **Seminario de Responsabilidad Patrimonial, Fundación Democracia y Gobierno Local, Santa Cruz de Tenerife, 13 a 16 de noviembre de 2008, Fundación Democracia y Gobierno Local**, Tenerife, p. 145, 2009.

²⁷ Sentencia de la Audiencia Nacional 2948/2002, de 14 de mayo de 2002, España.



article 32.1 of Law 40/2015, in addition to article 1.105 of the Civil Code, which mentions the fortuitous event, establishing that no one will be liable for circumstances that could not have been foreseen or that were unavoidable.

The STS of 31 May 1999 makes the essential distinction between fortuitous event and force majeure since, in the case of the fortuitous event, there is indeterminacy because what produces the damage is unknown. There is interiority which is made itself by nature with an unknown cause. In force majeure, there is irresistibility so that nothing could have been done, although it could have been foreseeable. The external nature of the cause of the damage is also identified, as the reason that has provoked the damage has been outside the service²⁸.

3.2. CONTRACTUAL AND NON-CONTRACTUAL LIABILITY

Article 1.101 of the Civil Code states that contractual liability is subject to compensation for damages caused by wilful misconduct, negligence or default²⁹, and arises when there is a breach of obligations that are specified in the relationship between the doctor or health centre and the patient, whereby the clinic or hospitalisation contract is the agreement of both parties, such as the patient and the clinic, which results in the provision of different services under the stipulations. Breach of contract may result in contractual liability of the health care institution in the event of harm to the patient.

Non-contractual liability, also known as tort liability, arises when there is no prior contractual relationship between the subjects established above and is regulated in article 1,902 of the Civil Code, adapting it to the field of health and obliging anyone who by action or omission causes damage to a patient through fault or negligence to repair the damage.

In this sense, it is convenient to distinguish between private and public medicine since the former is usually contractual and results in demand for the fulfilment of the contract or its termination, its claims are regulated in the civil order, and compensation may be requested to cover the damages caused, the limitation period being five years.

Nevertheless, the contract does not always exist when, due to exceptional circumstances, the person requesting the medical services is a third party, so it becomes a non-contractual liability, just like public medicine, which is considered non-contractual and is adjusted to the contentious-administrative order. Its prescription would be one year from the moment of the establishment of the injury in the patient.

²⁸ ASÚA, Clara Isabel. **Pérdida de oportunidad en la responsabilidad sanitaria**. Madrid: Thomson Reuters Aranzadi, p. 149, 2008.

²⁹ JIMÉNEZ, Óscar. **El ejercicio de la acción de responsabilidad patrimonial por daños producidos durante la pandemia de coronavirus. Y otras responsabilidades en el ámbito civil, penal y mercantil**. Madrid: Bosch, p. 289, 2021.



3.3. OBLIGATIONS OF MEANS AND NOT OF RESULTS

It is currently considered that liability in the healthcare field is subjective, so for the claimant to be compensated, fault and breach of the *Lex Artis* must be proven, as well as the relationship between the conduct and the damage caused.

The procedure that indicates medical liability is the legal relationship between the subjects, doctor and patient. However, it does not imply the obligation of a result but rather the obligation of means, which is the work of the doctor, and it does not have to be the necessary object of curing the patient but rather the commitment of the doctor to provide all the care required under science and the *Lex Artis Ad Hoc*³⁰.

Within the obligation of means, it is possible to include the duty to use procedures known to medicine and available to the practitioner where the patient's treatment is carried out. On the other hand, it is mandatory to inform the patient or relatives of the diagnosis, the process and the risks involved, and the duty to continue treatment until the patient has been discharged, warning of the risks involved in abandoning treatment.

Both the physician's liability, the violation of *Lex Artis*, and the causal link between the act or omission and the damage caused must be proven by the injured party under rehabilitative or necessary medicine.

In the case of voluntary or voluntary medicine, such as dental treatment or cosmetic surgery, until a few years ago, it was considered to be a contractual relationship that was close to a contract for the lease of work, where the doctor would not be exonerated from his liability if he could prove that his actions were under the *Lex Artis*, but that he was also required to obtain a specific result that the patient expected³¹.

Following the STS of 3 February 2015, the Supreme Court holds that voluntary or voluntary medicine activities do not in themselves entail the guarantee of the result sought. Therefore, the existence of proof of the development of the doctor to the patient is only taken into consideration when it results from the factual narration of the contested decision.

Satisfactory medicine has traditionally been seen as encompassing cosmetic surgery, dental treatment and vasectomy. However, it has evolved into an assessment of the circumstances of each case, as it is only sometimes obliged to guarantee an outcome.

³⁰ SEOANE, José Antonio. *Lex Artis*. **Anuario de filosofía del derecho**, Madrid, n. 38, p. 287, 2022.

³¹ LÓPEZ, Alejandra. *Lex artis médica en la doctrina y la jurisprudencia*. **Revista de Derecho**, Concepción (Chile), n. 238, p. 199, 2015.



3.4. DIAGNOSTIC ERROR

The physician must perform all necessary tests effectively to reach a medical diagnosis and make appropriate decisions to prove or disprove a disease or suspicion.

An error in diagnosis will not be considered relevant if the doctor has carried out all functional tests in an appropriate manner so that liability will only be established when there is a manifestly serious error or erroneous conclusions, as well as if not all the required tests or examinations have been carried out³².

3.5. EVIDENCE AND EVIDENTIARY FACILITY

Article 217 of the Civil Procedure Act regulates the general principle of the burden of proof, whereby the plaintiff's claims will be dismissed if the court considers facts relevant to the decision to be doubtful or the defendant's claims will be rejected depending on whether the burden of proving the facts that remain uncertain and are the basis for the shares is on the plaintiff or the defendant³³.

Furthermore, both parties bear the burden of proving the certainty of the facts which would ordinarily be presumed under the rules applicable to them and which prevent, extinguish, or weaken the legal effectiveness of the points.

The principle of ease of proof means that the consequences of the lack of evidence fall on the party in a more favourable position due to the proximity to the source. It is therefore established that it would not be logical to require the injured patient to prove circumstances and causes that are beyond their control and which are only within the doctor's reach³⁴.

All citizens have the right of access to file, access and preserve their medical records. However, when it is impossible to know the facts that have occurred by other means or a document has been missing, the courts have considered that such evidence is essential and have applied the standard of ease of proof, which implies that the Administration has no means of justification for not keeping the imaging tests and clinical records since it is mandatory to keep them according to Law 41/2002 of 14 November, which regulates patient autonomy and the rights and obligations regarding clinical information and documentation³⁵.

³² ORTIZ, Manuel. El consentimiento informado de los menores de edad en el ámbito sanitario. **Revista Boliviana de Derecho**, s.l., n. 32, p. 110, 2021.

³³ VESTRI, Gabriele. Reflexiones sobre la carga de la prueba de la culpa en materia de responsabilidad patrimonial de la administración pública en situación de emergencia. **Revista Eurolatinoamericana de Derecho Administrativo**, Santa Fe (Argentina), v. 7, n. 1, p. 136, 2020.

³⁴ MORENO, Martín. La responsabilidad patrimonial de la Administración Pública, especial mención al ámbito sanitario. **Cadernos de derecho actual**, Santiago de Compostela, n. 9, p. 72, 2018.

³⁵ JIMÉNEZ, Óscar. **El ejercicio de la acción de responsabilidad patrimonial por daños producidos durante la pandemia de coronavirus. Y otras responsabilidades en el ámbito civil, penal y mercantil**. Madrid: Bosch, p. 309, 2021.



3.6. DISPROPORTIONATE DAMAGE

An explanation by the practitioner of the existence of the initial risk involved in the medical activity and the consequence or result of the medical activity is required. Disproportionate damage cannot be explained as a result of the actions of the health professional, who will be obliged to prove the circumstances in which the injury occurred and, therefore, demonstrate whether it was due to negligence or recklessness.

4. WRONGFUL ACTIONS

The origin of these actions appears in the sixties of the 20th century in the United States, where lawsuits were filed in which the children sued the paternal figure for damages if their birth was out of wedlock because they were considered illegitimate³⁶. Over the years, these actions undergo a significant shift, and the first change occurs in the target of these actions, as the defendant becomes the healthcare provider, as opposed to the father figure.

Wrongful Life and Wrongful Birth change the basis of claims due to new prenatal techniques. The parents sue the health care providers for diseases or malformations that the children may have even though they did not cause them but have omitted the information³⁷, and over the years, more and more countries have accepted these actions and types of claims.

For this reason, Wrongful Actions are legal actions that seek to obtain financial compensation from the Administration, as it is understood that the medical action was not to inform the parents of the conditions or circumstances in which the foetus was found, and this prevents them from being able to decide whether to continue with the pregnancy freely³⁸.

They are also brought to charge the health administration with financial responsibility for depriving the parents, especially the woman, of the possibility of continuing or not with the pregnancy under their decision due to the circumstances in which the foetus is present.

³⁶ GALÁN, Julio César. Sentencia del Tribunal Supremo de 6 de julio de 2007: Responsabilidad médica. Acciones de wrongful birth y wrongful life. Omisión de información sobre la conveniencia de someterse a la prueba del triple screening a gestante que no presentaba factores de riesgo relevantes. Nacimiento de niño con síndrome de Down. Daño y nexo causal. **Cuadernos Civitas de jurisprudencia civil**, Madrid, n. 76, p. 286, 2008.

³⁷ ARCOS, María Luisa. **Responsabilidad sanitaria por incumplimiento del deber de información al paciente**, Madrid: Thomson-Aranzadi, p. 178, 2007.

³⁸ MACÍA, Andrea. **La responsabilidad médica por los diagnósticos preconceptivos y prenatales (las llamadas acciones de “wrongful birth” y “wrongful life”)**. Madrid: Tirant Lo Blanch, p. 146, 2005.



4.1. WRONGFUL ACTIONS CLASSES

Different legal proceedings can be distinguished in Wrongful actions depending on the pregnancy status. The first of these actions is Wrongful conception, which is brought to claim damages caused by a medical action before fertilisation, prescribing a failed contraceptive, or by an erroneous intervention in the case of contraceptive techniques such as tubal ligation.

At a later stage is Wrongful birth, when conception has taken place, and it is the parents who take legal action because they consider that they cannot decide whether or not to continue the pregnancy, and this has caused the parents damage that is susceptible to financial compensation.

There are several negligent behaviours on the part of health professionals that can lead to the application of this action, such as the lack of information on the risks involved in the conception of a child with malformations or that the tests carried out have detected foetal anomalies and the parents are not informed of them, thus depriving them of the right to have an abortion, within the legal time limit, if this was their decision, which in Spain is fixed in the first 22 weeks of gestation if there is a severe risk to the life or health of the pregnant woman or danger of severe anomalies for the foetus³⁹, according to article 15 of Organic Law 2/2010, of 3 March, on sexual and reproductive health and the voluntary interruption of pregnancy, ratified by its reform of 2023 which maintains the time limits fixed and endorsed by the Constitutional Court. After this deadline, it will only be possible when foetal anomalies incompatible with life or a severe and incurable disease confirmed by a clinical committee are detected.

The damage caused by these actions entails financial compensation for the lack of information or an error in the report, which violated the mother's right to decide about her pregnancy. The balance is for the moral damage caused, which is the most common damage. However, it is also for the parents to meet the expenses of a child with physical or psychological difficulties.

Finally, there is Wrongful Life, in which the action is brought by the child born with a malformation or disease or by the parents with legal representation if the child is a minor. What is sought in action is financial compensation and compensation for being born⁴⁰.

³⁹ SÁNCHEZ, Beatriz. Las Wrongful actions y el consentimiento médico informado. En GONZÁLEZ-ORÚS, Martín (coord.); MIRANDA, Fernando Eduardo (coord.); SOSA, Henry (coord.); FONSECA, Haila Izaias (coord.); JIMÉNEZ, Vanessa (coord.) y VAQUERO, María José (dir.); ÁVILA, Alfredo (dir.). **Reflexiones sobre derecho privado patrimonial**, Salamanca: Ratio Legis Librería Jurídica, v. 4, p. 393, 2012.

⁴⁰ SÁNCHEZ, Margarita. El tratamiento jurisprudencial del daño en las acciones de responsabilidad por Wrongful birth. **Revista jurídica Universidad Autónoma de Madrid**, Madrid, n. 37 (Número monográfico Reproducción humana: Derecho y Ciencia), p. 470, 2018. p. 470.



In Spain, this legal process is not yet in the contentious-administrative jurisdiction. Its inclusion has been rejected in many countries. Those who accepted it debated whether a disabled life is considered *non-life*, considering that these cases and the previous ones deal with serious illnesses or malformations⁴¹.

4.2. THE ELEMENTS OF ACTIONS BY WRONGFUL BIRTH AND WRONGFUL LIFE

4.2.1. Harm

The concept of harm can be defined as the damage that a person suffers to their assets or to their physical or psychological integrity, which gives rise to the problem of which assets or rights should be protected, which evolve and change with the passing of time and the development of society, depending on the morality or ethics of each individual or organisation as a whole⁴².

The damage includes injury to the right to procreate, damage caused to the mother because her fundamental right to information has been violated by not informing her of the sequelae and being unable to decide between them, damage due to injury⁴³, and moral damage due to the lack of psychological preparation for the birth of a disabled or sick child.

In the case of Wrongful Birth, the harm caused establishes that it is the parents who can bring the claims. Some authors consider the separation of the damage with birth, as they rely on the German theory that deals with such separation⁴⁴.

Different situations can be identified in which damage can occur in these actions. First, the harm suffered by the mother in the intervention or on the power to decide about the pregnancy or her child is the most frequently used action in the contentious-administrative jurisprudence of the Supreme Court, which entails the deprivation of the right to information⁴⁵, that in this case, the patients are the parents, so they cannot decide.

⁴¹ BASTIDAS, Luis Guillermo y RUEDA, Eduardo Alfonso. La aceptabilidad de las acciones Wrongful birth en el marco de la Teoría Discursiva del Derecho de Jürgen Habermas. **Revista Estudios Socio-Jurídicos**, Bogotá, v. 22, n. 1, p. 157, 2020.

⁴² ROMERO, Aurelia María. Las acciones de "Wrongful birth" y "Wrongful life" en el Ordenamiento jurídico español. **Revista Crítica de Derecho Inmobiliario**, Madrid, v. 86, n. 722, p. 2590, 2010.

⁴³ SORIA, Esther Marina. La acción wrongful birth dentro de la responsabilidad civil. **Revista de la Asociación Española de Abogados Especializados en Responsabilidad Civil y Seguro**, s.l., n. 59, p. 37, 2016.

⁴⁴ PACHECO, María Nieves. Responsabilidad médica derivada de negligencia en el diagnóstico prenatal: acciones "wrongful birth" y "wronful life". Repercusión de la proyectada ley de protección de la vida del concebido. **Parlamento y Constitución. Anuario**, Cuenca, n. 15, p. 301, 2012-2013.

⁴⁵ PACHECO, María Nieves. Acciones "Wrongful birth y wrongful live". **Documentos de Trabajo. Seminario Permanente de Ciencias Sociales**, Cuenca, n. 6, p. 11, 2011.



These injuries can be divided into the infringement of the mother's right to decide about her pregnancy and the harm of infringing the right to information. And on the other hand, the damage is caused by not knowing the information about the state of the foetus, as there are occasions in which this situation is unknown until birth, resulting in the parents being deprived of the ability to adapt to the problem or to adapt to it psychologically. The courts award financial compensation for the moral damage of these actions commensurate with the deprivation of the right to decide on the pregnancy but as a result of an act or omission of the professionals. This non-pecuniary damage derives from violating the right to free development of personality and dignity.

The STS of 30 June 2006⁴⁶ has established financial compensation for non-pecuniary damages for not informing the parents of the test results that showed anomalies in the foetus, violating the right to information.

Considering that the deprivation of the right to decide to have an abortion or not derives from the violation of the mother's right to self-determination⁴⁷, the controversy of whether the father's right has also been violated is included, and the doctrine offers different opinions. Some authors establish that moral damages derive from other issues that would also affect the paternal figure, such as the deprivation of psychological conditioning on the assumption of having a child with a disease or the moral damage that the father may suffer due to his child's disability⁴⁸.

According to the STS of 4 November 2005, the health administration would only be condemned when there is a violation of the *Lex Artis* in diagnosing a foetus. On the contrary, the Administration must prove that the mother would not have terminated the pregnancy if she had known about the anomalies and confirm it with reliable evidence for the Administration to be exempted⁴⁹.

Dismissals tend to be when medical care has been used correctly, although the baby was born with malformations not detected by technological advances. Another reason is that the court has considered no causal link between the foetus's malformations or illness and the health administration's activity⁵⁰.

Damages in Wrongful Life actions require the exact requirements as in Wrongful Birth but differ in who has standing to bring the action, which in these cases is the child

⁴⁶ MACÍA, Andrea. El tratamiento de las acciones de Wrongful birth y Wrongful life a la luz de la nueva ley sobre interrupción voluntaria del embarazo. **Revista jurídica Universidad Autónoma de Madrid**, Madrid, n. 23, p. 92, 2011.

⁴⁷ ROMERO, Aurelia María. Las acciones de "Wrongful birth" y "Wrongful life" en el Ordenamiento jurídico español. **Revista Crítica de Derecho Inmobiliario**, Madrid, v. 86, n. 722, p. 2592, 2010.

⁴⁸ MOLINA, Lucía. Aspectos problemáticos derivados de la configuración del daño en las acciones "Wrongful birth". **Revista de derecho privado**, Bogotá, v. 105, n. 3, p. 24, 2021.

⁴⁹ BARCELÓ, Javier. Consentimiento informado y responsabilidad médica. **Actualidad jurídica iberoamericana**, Madrid, n. 8, p. 286, 2018.

⁵⁰ AGUDELO, Juan Diego. Causalidad e imputación. La coherencia interna de la teoría de la imputación objetiva en la responsabilidad civil. **Revista de Derecho Privado**, Bogotá, n. 41, p. 322, July/December 2021.



with a disease that has become a disability according to RDL 1/2013, of November 29, which approves the Consolidated Text of the General Law on the rights of people with disabilities and their social inclusion. Or malformation. Determining damage in these cases is problematic because it is a matter of valuing disabled life with *non-life*, which is why this doctrine is rejected in many countries⁵¹.

4.2.2. The causal link

The injury or damage caused is not due to the professional's actions but to a disease that could not have been prevented or ameliorated if he had intervened. It is not relevant at the judicial level, directly responsible for the damage, as teams of different medical disciplines carry out many health interventions.

The SAN 7 May 2002 recognised the abnormal functioning of the Administration's activity and awarded financial compensation to the parents since it was demonstrated that the foetal malformations could have been detected in the first weeks of gestation and prevented the mother from knowing the circumstances and being able to make a free decision about her pregnancy.

4.2.3. Compensation

It must be taken into account which damages are to be compensated, as it is necessary to distinguish between the moral damages for the loss of the decision on the pregnancy and the material damages caused by the birth of a child with malformations or a disease. There is still controversy about whether compensation should be for all the costs of the delivery or only for the costs of a child with a malformation or disease.

In the SAN of 27 June 2008, the court considered that the mother was aware at all times of the circumstances from the moment the disease was diagnosed in the foetus, which was born with several malformations and which resulted in a 75% disability, given that she was informed between the 18th and 20th week, which meant that she was within the time limit for therapeutic abortion.

The SAN of 28 February 2011 dismissed the appeal lodged by the parents of a baby who suffered from a disease that caused his death two months after birth, in which the tests carried out were the corresponding and appropriate tests for a pregnancy classified as a low risk until the 37th week. By that time, the pregnancy could no longer be terminated.

⁵¹ ATAZ, Joaquin. Las "wrongful actions" en materia de responsabilidad médica. En GARCÍA, María del Carmen (coord.); ORTI, Antonio (dir.). **La responsabilidad civil por daños causados por servicios defectuosos**: estudio de la responsabilidad civil por servicios susceptibles de provocar daños a la salud y seguridad de las personas, Madrid: Thomson Reuters Aranzadi, p. 348, 2006.



The STS of 10 May 2007 established that the Health Administration did not act under the “Lex Artis” because all the techniques were not used to carry out the corresponding tests during pregnancy, awarding financial compensation for moral damages⁵².

4.3. REQUIREMENTS

For Wrongful Birth and Wrongful Life actions, the condition of the practitioner’s act or omission in informing the parents of the state of the foetus must be given, which may be erroneous, or no information was provided.

In these situations, there are different situations, such as misinformation when interpreting the diagnosis given to the parents, the parents being informed after the deadline for abortion, or the doctor not carrying out the necessary tests. Another fundamental requirement is that the disease or malformation cannot be cured or that nothing has been found against the condition suffered by the foetus⁵³.

The SAN of 16 October 2002 ruled that a patient who underwent several ultrasound scans during pregnancy in which no foetal abnormalities were seen was not included in the at-risk pregnancy group. All the reports ruled out an error in assessing the ultrasound scans. However, it was ruled that there may have been a possibility that other means could have detected the foetal anomaly, although the forensic reports only established this as a possibility.

On the other hand, the SAN of 1 December 2004 dismissed the appeal lodged for the birth of a baby who suffered from spina bifida and had irreversible sequelae⁵⁴. It was considered that the medical protocols followed during the pregnancy were correct. Therefore it could not be established that there was a link between the harm caused to the child and the actions of the health professionals.

5. CONCLUSIONS

According to Article 32 of 40/2015, the Public Administration’s financial liability establishes that it is configured as a strict liability because it arises from the production of damage that the patient has no duty to bear. There must be adequate, economically assessable and individualised damage concerning a person or group. It is also necessary that it is an anti-juridical injury; that is, the person who suffers it does not have the duty

⁵² MACÍA, Andrea. Negligencia médica en el seguimiento del embarazo y responsabilidad por Wrongful birth: comentario a la STS (Sala 1ª) de 24 de octubre de 2008, **Revista jurídica Universidad Autónoma de Madrid**, Madrid, n. 18, p. 202, 2008.

⁵³ TORRE DE SILVA, Víctor. Responsabilidad por nacimiento evitable (“wrongful birth”) y discapacidad. **Revista de administración pública**, Madrid, n. 203, p. 115, 2017.

⁵⁴ GARIBO, Ana Paz. El derecho a la vida cuando ésta es frágil como una exigencia de justicia, **Revista persona y derecho**, Pamplona, n. 81, p. 334, July/December 2019.



to bear it. Another presupposition is that there must be a causal link between the action of the Administration and the result through a direct, immediate and exclusive link.

The theory of loss of opportunity, which in Spain had a slow reception, meant that, in the beginning, the courts were reluctant to deal with it. However, with time and increased decisions, they now refer to it directly. The loss of opportunity in the health care setting establishes that, although it is not possible to know the certainty of a medical action or omission that has caused harm to the patient, what can be learned is that if a different course of action had been taken, there could have been a distinct and real possibility of achieving a benefit.

The harm caused by loss of opportunity can be considered intermediate harm as it arises from the action or omission directly from the medical activity judged. To assess the harm, we must consider the impossibility of guaranteeing a cure or hope of survival and the risks and consequences implicit in the patient's illness.

Therefore, the loss of opportunity per se is compensated and not the final result, in a lower amount than that which would have corresponded if the causal link had been proven with certainty.

An essential element of *Lex Artis* is informed consent, the absence of which does not directly lead to compensation unless there is damage that meets the requirements for liability to take place. Informed consent shall be in writing, and the patient freely, voluntarily and consciously signs the consequences of the intervention, for example, which exempts the Administration from liability for the activities of the health care providers. Patients must be informed of the products, risks, and contraindications. However, it is also emphasised that they must be told whether the intervention is necessary or a voluntary medicine such as an aesthetic intervention.

It is concluded that there is a jurisprudential interpretation of the loss of opportunity in the healthcare field with the causal nexus where there is conduct contrary to the *Lex Artis*, which is negligence where it is not known what the accurate result would have been. On the other hand, a second interpretation affirms that the loss of opportunity is considered an alternative figure to the *Lex Artis* breach, which allows a response on compensation in cases where such a breach has not occurred, and there is anti-juridical damage.

Therefore, in addition to a causal link, it is necessary to consider the omission or delay that leads to the loss of opportunity and to see what percentage is lost. Thus, omissions, errors or delays that give rise to loss of opportunity must be assessed under the *Lex Artis Ad Hoc* and therefore see if there is a causal link concerning the harm suffered by the patient.

Concerning Wrongful Actions, it must be clarified what damage is to be compensated or who can bring such an action. According to the latter, it is carried by the child



with a disease or disability or their guardians. There is the mother's course of action in Wrongful Birth, where she has no right to decide.

Wrongful birth has had a significant development in Spain. It has been reflected in doctrine and jurisprudence, unlike Wrongful Life, which has yet to be developed in Spain since, if it were accepted, we would have to take life as harm.

Observing and classifying the damage and causal link is mandatory when imputing administrative liability. In these cases, the fault is the failure to comply with the duty to inform by not giving the necessary information or having given it incompletely or with errors.

The requirements for Wrongful Birth and Wrongful Life actions are the professional's act or omission to inform that there is no cure. There may also be a failure to interpret the diagnosis, which may result in the report being communicated to the parents after the deadline for the actions considered.

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