



ASOCIACIÓN NACIONAL
DE
MÉDICOS FORENSES

REVISTA ESPAÑOLA DE MEDICINA LEGAL

www.elsevier.es/mlegal



ORIGINAL ARTICLE

Responsibility for loss of chance in Spanish public health[☆]



Carlos Sardinero-García^{a,b}, Andrés Santiago-Sáez^{c,d}, Bernardo Perea-Pérez^d,
M. Elena Albarrán-Juan^d, Elena Labajo-González^d, Julián Benito-León^{e,f,g,*}

^a Sardinero Abogados, Leganés, Madrid, Spain

^b Departamento de Derecho Penal, Procesal e Historia del Derecho, Facultad de Ciencias Sociales y Jurídicas, Universidad Carlos III, Getafe, Madrid, Spain

^c Servicio de Medicina Legal, Hospital Universitario Clínico San Carlos, Madrid, Spain

^d Departamento de Toxicología y Legislación Sanitaria, Escuela de Medicina Legal, Facultad de Medicina, Universidad Complutense, Madrid, Spain

^e Servicio de Neurología, Hospital Universitario 12 de Octubre, Madrid, Spain

^f Departamento de Medicina, Facultad de Medicina, Universidad Complutense, Madrid, Spain

^g Centro de Investigación Biomédica en Red sobre Enfermedades Neurodegenerativas, Madrid, Spain

Received 11 April 2016; accepted 28 June 2016

Available online 27 February 2017

KEYWORDS

Health care;
Convictions;
Compensation;
Loss of chance

Abstract

Introduction: The loss of chance is a legal concept that has gained ground in recent years as a decisive criterion for the assessment of healthcare-related bodily harm. In this paper, we analyse the convictions issued by the contentious-administrative jurisdiction (public medicine), in cases in which, due to a lack of diligence by the professional, the patient lost the possibility of a diagnosis or adequate treatment.

Material and methods: We selected the sentences related to Spanish public medicine, which referred to the concept of loss of chance that were issued until May 2014.

Results: Of the 519 analysed sentences, 340 (66.5%) were due to misdiagnosis and 138 (26.6%) due to inadequate treatment. Since 2010, 351 (67.6%) sentences were passed, representing more than a 100% increase compared to 168 (32.4%) in the first 8 years of the study (2002–2009). Most patients were male (56.1%) who died (57.4%), and the conditions that most frequently led to the conviction were malignant cancer (26.4%) and neurological disorders (17.3%).

[☆] Please cite this article as: Sardinero-García C, Santiago-Sáez A, Perea-Pérez B, Albarrán-Juan ME, Labajo-González E, Benito-León J. Responsabilidad por pérdida de oportunidad asistencial en la medicina pública española. Rev Esp Med Legal. 2017;43:5–12.

* Corresponding author.

E-mail address: jbenitol67@gmail.com (J. Benito-León).

PALABRAS CLAVE

Asistencia sanitaria;
Condenas;
Indemnización;
Pérdida de
oportunidad

Conclusions: The litigation due to loss of chance in Spanish public health has significantly increased over the last few years. The convictions were mainly issued because of diagnostic error or inadequate treatment.

© 2016 Asociación Nacional de Médicos Forenses. Published by Elsevier España, S.L.U. All rights reserved.

Responsabilidad por pérdida de oportunidad asistencial en la medicina pública española

Resumen

Introducción: La pérdida de oportunidad asistencial es un concepto jurídico que se ha abierto paso en los últimos años como un criterio determinante para la valoración del daño corporal derivado de la asistencia sanitaria. En este trabajo analizamos las sentencias condenatorias dictadas por la Jurisdicción Contencioso Administrativa, en el ámbito de la medicina pública española, en los supuestos en los que, por falta de diligencia del profesional, el paciente ha perdido la posibilidad de un diagnóstico o un tratamiento adecuado.

Material y métodos: Se han seleccionado las sentencias judiciales, relacionadas con la medicina pública española, que hacían referencia al concepto de pérdida de oportunidad asistencial y que fueron dictadas hasta mayo del 2014.

Resultados: De las 519 sentencias analizadas, 340 (66,5%) fueron dictadas por error diagnóstico y 138 (26,6%) por tratamiento inadecuado. Desde el año 2010 se produjeron 351 (67,6%) sentencias, lo que supuso más del 100% de aumento con respecto a las 168 (32,4%) ocurridas en los primeros 8 años del estudio (2002 a 2009). La mayoría de los pacientes fueron varones (56,1%), que fallecieron (57,4%), siendo las patologías que más frecuentemente originaron la condena, la oncológica maligna (26,4%) y la neurológica (17,3%).

Conclusiones: La actividad litigante por pérdida de oportunidad asistencial en la medicina pública española ha aumentado significativamente estos últimos años. Las condenas fueron dictadas fundamentalmente por error diagnóstico y tratamiento inadecuado.

© 2016 Asociación Nacional de Médicos Forenses. Publicado por Elsevier España, S.L.U. Todos los derechos reservados.

Introduction

In healthcare, the loss of chance concept emerged with a view to offer a legal solution to cases in which, through the omission of due diligence, the patient was denied the possibility of being cured.¹⁻³ Saigí Ullastre et al.⁴ define the loss of chance concept as cases which present, as a common characteristic, an error or delay in the diagnosis of a medical process that ends in the injury or death of the patient. From the standpoint of medical responsibility, an omission refers to a specific action; the action that could be expected of the physician who had the obligation to act, or rather, to act in a given way, i.e. pursuant to *lex artis*.³ In these cases, the omission generates uncertainty as to what would have happened had the behaviour in question been replaced by the appropriate action, which is why it is unknown if the end result occurred in all certainty due to the medical professional's omission.¹⁻³ We do not know if the injury to the patient would have occurred in the same way if the appropriate action had been taken.¹⁻³

In effect, we are dealing with complex cases regarding proof of the causal relationship, in which we cannot know or substantiate what might have happened had the perpetrator of such behaviour acted appropriately.¹⁻³ To that end, we need to know whether, on mentally adding

the omitted behaviour, the damage would have occurred in the same way.³

This article seeks to ascertain the characteristics of the rulings issued due to loss of chance in Spanish public health, taking into account all of the variables that may have an influence, both with regard to the way the claim is handled and in the resolution of the legal process. In this sense, the results could facilitate safer medical practice for both the patient and professional, and could help to establish criteria that provide some degree of foreseeability as regards possible judicial claims arising due to loss of chance. Finally, it should be noted that there is no similar study in the medical or legal literature that makes specific reference to the loss of chance in medicine.

Methods

Origin of the material and inclusion criteria

First of all, it should be clarified that the Spanish jurisdictional hierarchy is established by its procedural function.¹ Thus, we can distinguish, on the one hand, between bodies of first instance, which resolve matters initially, and, on the other, bodies of second instance, which are used to

Download English Version:

<https://daneshyari.com/en/article/8925431>

Download Persian Version:

<https://daneshyari.com/article/8925431>

[Daneshyari.com](https://daneshyari.com)