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ARTICLE REVIEW

Breach of the duty of care and criminal liability of the health professional

Infracción del deber de cuidado y responsabilidad penal del profesional de la salud

Violação do dever de cuidado e responsabilidade penal do profissional de saúde

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ABSTRACT

Introduction: legal and criminal liability of the health professionals, regardless its antiquity, at present has becoming more and more theoretical and practical relevance in which an excessive judicialization of medical activity is revealed as a mechanism for the protection of patient rights. **Objective:** systematization of the different theoretical positions that are currently identified around the judicialization process of medical activity and the likely causes that stimulate it. **Method:** a documentary study was carried out through an exhaustive bibliographic review in bibliographic search engines such as Scopus, SciELO, Google Scholar and PubMed. The argumentative and exploratory research was conducted on March 16, 2023 and of the 30 articles found concerning medical malpractice, only 11 were chosen for the study with strict selection criteria. **Development:** the theoretical positions on the judicialization of medical activity and the causes that stimulate it were systematized; in addition, the correct interpretation of the *lex artis* was presented as a mechanism of normative heterointegration of the duty of care by the medical personnel, in order to avoid excesses in the application of the criminal law in this area of professional activity. **Final considerations:** a much greater intervention of criminal law in the practice of medicine is not the most efficient policy to protect the life and integrity of the patient in the face up to the medical malpractice.

Keywords: medical malpractice; medical recklessness; medical liability; duty of care; criminal liability

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RESUMEN

Introducción: a pesar de su antigüedad la cuestión de la responsabilidad jurídico-penal del profesional de la salud adquiere cada vez mayor importancia en el orden teórico y práctico, en cuyo escenario se pone de manifiesto una excesiva judicialización de la actividad médica como mecanismo de tutela de los derechos del paciente. **Objetivo:** sistematizar las diferentes posturas teóricas que en la actualidad se aprecian en torno a la judicialización de la actividad médica y las causas que la estimulan. **Método:** se llevó a cabo un estudio de carácter documental a través de una revisión bibliográfica exhaustiva en buscadores bibliográficos como Scopus, SciELO, Google Académico y PubMed. La indagación de carácter argumentativa y exploratoria se realizó el 16 de marzo de 2023 y de los 30 artículos encontrados que abordaron la problemática de la *mala praxis* médica, solo 11 fueron elegidos para el estudio según criterios de selección. **Desarrollo:** se sistematizaron las posturas teóricas sobre la judicialización de la actividad médica y las causas que la estimulan; además se determina la correcta interpretación de la *lex artis* como mecanismo de heterointegración normativa del deber de cuidado del ejecutor de actos médicos, en aras de evitar excesos en la aplicación de la ley penal en este ámbito de actuación profesional. **Consideraciones finales:** una mayor intervención del Derecho Penal en el ejercicio de la Medicina no es el paradigma político criminal más eficiente en aras de proteger la vida e integridad del paciente frente a hechos de *mala praxis* médica.

Palabras clave: *mala praxis* médica; imprudencia médica; responsabilidad médica; deber de cuidado; responsabilidad penal

RESUMO

Introdução: apesar de sua idade, a questão da responsabilidade jurídico-penal do profissional de saúde adquire cada vez maior importância na ordem teórica e prática, cenário em que se revela uma excessiva judicialização da atividade médica como mecanismo de proteção dos direitos. do paciente. **Objetivo:** sistematizar as diferentes posições teóricas que se apreciam atualmente em torno da judicialização da atividade médica e as causas que a estimulam. **Método:** foi realizado um estudo documental por meio de revisão bibliográfica exaustiva em buscadores bibliográficos como Scopus, SciELO, Google Acadêmico e PubMed. A investigação argumentativa e exploratória foi realizada no dia 16 de março de 2023 e dos 30 artigos encontrados que abordavam o problema da imperícia médica, apenas 11 foram escolhidos para o estudo de acordo com os critérios de seleção. **Desenvolvimiento:** foram sistematizados os posicionamentos teóricos sobre a judicialização da atividade médica e as causas que a estimulam; Além disso, determina-se a correta interpretação da *lex artis* como mecanismo de heterointegração normativa do dever de cuidado do executor de atos médicos, a fim de evitar excessos na aplicação do direito penal neste campo de atuação profissional. **Considerações finais:** uma maior intervenção do Direito Penal no exercício da Medicina não é o paradigma político criminal mais eficiente a fim de proteger a vida e a integridade do paciente contra atos de imperícia médica.

Palavras-chave: imperícia médica; negligência médica; responsabilidade médica; dever de cuidar; responsabilidade criminal

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INTRODUCTION

Science and technology energize daily life through the introduction of knowledge and technological products that imply well-being and, at the same time, generate risks that increase the social feeling of insecurity. Part of the risks that threaten us today come from behaviors that other fellow citizens adopt in the handling of the growing, unstoppable and necessary technoscience in their professional sphere of action.(1)

In this scenario, there is a psychological resistance to the admission of the possibility of damage by chance and the rejection that the harmful result may not have its origin in a careless behavior of someone, with the consequent search for a guilty party.(1) What is worrying is the political-criminal option of seeking in Criminal Law, a restrictive mechanism of freedoms and the most repressive instrument of social control that the State has, the solution to the insecurity that occurs in contemporary society, called the risk society. Such a course of action, without the slightest caution, would always be an infringement of the *ultima ratio* character of this branch of Law, to the detriment of other formulas that could be less offensive to preserve human existence, to make it pleasant and peaceful.

Equally disturbing is the fact that the current social intolerance to any harm, typical of the so-called "sentimentalized" society, understood as a society governed by feelings, has already spread to the medical field. Indeed, a recurrent idea in recent scientific publications is the level reached by the judicial processes of liability initiated against health professionals, to the point of being considered a medical malpractice crisis.(2,3,4)

In the face of such manifestations, the challenge lies in formulating valid proposals in the political-criminal order, to guarantee citizens the quality of medical care without demanding glorious, magical or improbable conduct from medical professionals, according to science itself. Likewise, to ensure that the uncertainty inherent in medical practice does not result in frequent questioning of their expertise.(5)

The following reflections are based on the systematization of the different positions on the progressive judicialization of medical activity and the causes that stimulate it. As a secondary objective, the correct interpretation of the *lex artis* is analyzed as a mechanism of normative hetero-integration of the duty of care of the subject performing medical acts, in order to avoid excesses in the application of the criminal law in this field of professional activity.

METHOD

A documentary study was carried out by means of a bibliographic review in databases such as Scopus, SciELO, Google Scholar and PubMed, based on the following keywords: "medical malpractice", "medical imprudence", "medical liability", with the aim of systematizing the different theoretical positions that are currently seen in relation to the judicialization of medical activity and the causes that stimulate it.

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To focus the search, the Boolean operators OR or AND were used and language (Spanish, English) and time limits were established: (published in the last 10 years). Original articles and systematic reviews were considered, and those that were not current, relevant or did not adequately address the subject of interest were excluded. A review of the subject matter in specialized legal literature was also carried out.

The research was carried out on March 16, 2023, and of the articles dealing with the problem of the judicialization of medical practice, only 11 were chosen for the study according to the selection criteria. An outline was defined for the reasoning of the information based on the analysis of the bibliography, the instrument used was the content card; subsequently, the scientific text was written.

DEVELOPMENT

Criminal liability for medical malpractice, trends and controversies.

According to the most widespread doctrinal opinion, it is in the sphere of recklessness in which, as a general rule, the criminal liability of the health professional moves. In this professional sector, negligence is the main (only) source of criminal liability, since the intention of depriving a person of life or injuring him/her is incongruent with the purpose for which the medical services were provided. This can be deduced from the letter of the first article of the Cuban Public Health Law, which establishes that social relations in this area are aimed at "(...) the promotion of health, prevention of diseases, restoration of health, social rehabilitation of patients and social assistance".[6]

Although the above should not be taken as an unbreakable dogma, it certainly explains the reason for the exceptionality of malicious misconduct in this sector. In fact, when the health professional brings his human passions to the exercise of his profession, that is, when he takes advantage of his condition to commit a crime, his criminal liability will be the same as that of any other citizen who commits a crime. Moreover, it is likely that this circumstance will be taken into account by the judge as an aggravating factor when establishing a verdict.

Therefore, any approach to the field of criminal liability for medical malpractice implies a reference to the theoretical elaboration of imprudence as a form of conduct constituting a crime. Thus, in general terms, we can understand that criminal liability for medical negligence is the obligation of the technical-professional personnel of the health sector with specific diagnostic and therapeutic competence, to suffer the criminal-legal consequences for the infringement of a duty of care linked to the execution of a medical act resulting in an injury to the life or health of the patient.

Until the second half of the 20th century, recklessness as a dogmatic category occupied a secondary place in Criminal Law,[7,8] which until then had developed around the scheme of intentional crime. It was with the growing technification of modern society or risk society, and the dangers it posed to the life, health and property of individuals, that the practical importance of negligence increased.

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Faced with the problems characteristic of modernity, Criminal Law must adapt its technical instruments and nowadays we can see a configuration of imprudence, strengthened in its fundamental features.[7] The foregoing, regardless of the discussions that still arise, in which are interwoven problems of the theory of crime that, when transferred to the field of discussion of medical liability, take a different approach and unique characteristics.

In full contrast to what happens in other risk areas, the purposes that motivate the practice of medicine and the legal assets that may be injured at the same time, as a result of an act without due professional diligence, favor a whole range of assessments when defining criminally relevant medical negligence. Based on this, a variety of normative and jurisprudential approaches can be seen in which the positions are not at peace.

It is not difficult to understand this situation when, throughout history, the meeting points between Law and Medicine have not been entirely passive. Both fields of knowledge question each other due to the lack of an effective analysis of the problem of medical liability, with the pretension that each one provides certainty in relation to the treatment of situations which outcomes depend on the behavior of variables that have a high degree of uncertainty. The Law has demanded from Medicine the certainty in the diagnosis made and in the therapy used, as if they referred to an anodyne and unique subject, without any particularities that could directly affect the expected results. On the other hand, Medicine demands from Law a kind of immunity in its professional performance, under the assumption that if what is performed is what is medically indicated and accepted, I require you to assure me that I will not be the object of any judicial claim.[5]

In clear contrast, Medicine can only ensure that the medical procedure performed by the health professional complies with the *lex artis* established for similar cases.[5] This without ignoring the fact that compliance with the protocol does not always exclude medical imprudence, especially in those cases in which its automatic and uncritical application is not relevant to the specific clinical case which, in the view of a prudent professional, requires the adoption of a different procedure, since every patient responds differently to the same condition.[2,9,10,11] In turn, in full harmony with the above, the law can only ensure, and not with absolute certainty, that if the professional complies with the requirements of the medical *lex artis*, he should not, in principle, incur any legal liability in the event of being required in a judicial process. However, neither the one nor the other science can assure the outcome of the medical procedure or of the judicial process.[5]

The foregoing justifies that the evaluation of social positions on the demand for criminal liability of health professionals for unfortunate results ranges from advocates of a privileged, attenuated treatment, to those who demand a rigorous response. The former point out that criminal reproach should be limited to cases in which the medical negligence qualifies as gross or crude. They also base their position on the need to prevent the professional from carrying out the procedures inherent to his activity pressured by the fear of ending up in court, with the risks that this entails in relation to the effective attention and care of the patient. On the other hand, the latter emphasize the singular value of the legal assets that may be injured in this area, which is why care measures must be taken to the utmost. Consequently, for the advocates of this position, any neglect of the medical *lex artis* could give way to legal liability.[2,12]

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Given this panorama, it is understandable that the greater degree of legal suits on health professionals today has diverse origins, which Rodríguez Vázquez classifies as social, medical and regulatory.[3] In the social order, there is a new type of patient who is more aware of his health rights, who, unlike in previous years, is critical, distrustful and belligerent; he consults the Internet to see if what he was told is correct and denounces when he feels he has been harmed. This is also a patient who has found in the internet an ideal platform to carry out a process of awareness of his rights and a tool for denouncing.[13,14]

On the other hand, from the family physician, whose criteria, diligence and competence no one dared to question, we have moved on to the hospital context, in which diagnosis or treatment is generally the result of the participation of a plurality of subjects. In this scenario, there is a certain depersonalization of the medical act that causes the so-called doctor-patient relationship to cease to be the traditional encounter between trust and conscience, with the alterations and risks that this attitude can generate.

Today the doctor-patient relationship is recognized as an authentic legal relationship, seen in different countries as a contractual relationship in the framework of which new demands arise for the physician, especially in a scenario marked by the transition from the paternalistic paradigm to a paradigm that defends the principle of autonomy as an expression of the patient's right to therapeutic self-determination.[2,15,16]

Another key element is the paradox produced by publications on the internet and some media. On the one hand, they tend to spread news about medical malpractice, sometimes unproven, which gives rise to a social feeling of insecurity. At the same time, by spreading the great advances in medicine as if it were an exact and infallible science capable of solving different health problems, they create in the social imaginary the idea that healing is a right.[2,14,17] This, together with the increase in life expectancy, creates greater expectations regarding the results of medical care. Even, as Wierzba[18] refers, the fantasy about immortality floats in the popular imagination, appreciating death as a failure of medicine and physicians as responsible for such failure.

As far as medical factors are concerned, society faces a technified practice of medicine, capable of intervening in areas that were totally out of its reach. However, the transformative capacity of the technologies used today in medical practice offers greater possibilities of healing, but at the same time entails risks of proportional dimensions, first because a greater capacity for care translates into an increase in the number of medical procedures and, therefore, a greater probability of malpractice. Second, because the technification of medical practice implies the specialization of those who practice it and this can lead to problems in communication, information, coordination and/or patient treatment by a plurality of health professionals.[3,13] In fact, this new characteristic of medicine has implied the progressive abandonment of the clinical method, and with it "(...) the dehumanization of the most human of professions is spreading dangerously through different latitudes and implies the risk of this phenomenon becoming generalized".[17]

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Regulatory factors, on the other hand, are an expression of the search for a solution to the tensions generated in the doctor-patient relationship. Legal schemes are designed to favor claims in criminal courts as the most expeditious and valid way to obtain compensation. Thus, among the negative effects produced by the perception of a greater judicialization of medicine and, once in these areas, its criminalization, defensive medicine stands out.[2,13]

Some authors associate the fear of professional responsibility with the reduction in the number of physicians in those specialties that face more legal proceedings (Surgery, Anesthesiology, Gynecology).[3] Although it cannot be affirmed that the reviled defensive medicine is a generalized practice, there is no doubt that it is an expression of the actions of health professionals conditioned by the fear of legal claims. This implies that the physician focuses his attention more on how to act in order to avoid the risk of incurring any type of liability than on the best result for the patient.

It also conditions the institution of informed consent to become an expression of defensive medicine; in effect, from an instrument that ensures the patient's autonomy, it becomes an instrument by means of which to shift the risks of the medical act and all the liability deriving from it onto the patient's head. In other words, informed consent is transformed from a mechanism for protecting the patient's autonomy into a tool for medical defense against legal claims, in clear contrast to the maxim that consent to the medical act in no case covers medical malpractice.[2,15,19,20,21]

The fear of legal claims becomes a parameter that can subjugate medical action to the point of leading the professional to overdo patient care (for example: overuse of diagnostic tests and overlapping of therapies), so that no omission can be imputed to him/her (positive defensive medicine). However, these behaviors can generate risks of injury, in some cases serious and irreversible, as well as poor economic management of human and material resources. It can also lead to the rejection of more complex cases or those with a lower probability of success (negative defensive medicine).[9,13]

Finally, we must emphasize that with regard to recklessness in criminal proceedings, understood as a form of conduct and criterion of imputation, it is necessary to review the content of its premises, which has been understood as a conceptual and practical challenge.[22,23] The fundamental divergences are found in the definition of the sources of the duty of care, from whose determination derives the definition of the valid parameters for measuring the action performed by the health professional.

The objective duty of care or prudence. Observations on the *lex artis*

The duty of care, understood as a nuclear element of the reckless crime, constitutes a kind of scale against which to compare the action of a subject in order to define its criminal relevance according to its character of typical or atypical conduct, i.e.: subsumable or not in a crime figure. In the process of its concretion, it is necessary to go to the sector of activity in which the action suspected of being reckless is carried out. Once the context (time/place) has been identified, the so-called rules of care, which Roxin refers to as legal norms and traffic norms, must be specified.[7]

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There are sectors of activity that partially or totally lack strictly legal rules of care, but are ordered in order to avoid damage to legal assets, by more or less formalized written or unwritten rules.[3,14,24,25] This situation is essentially due to the progressive development occurring in these fields, which would render useless any attempt to establish in legal rules this minimum standard of behavior to control the inherent dangers. A norm containing such rules of care would quickly lack the profiles of timeliness, permanence and stability that should characterize it. To achieve this would require a prolific legislative process that cannot but be translated into terms of insecurity.

What incidence does the infringement of the rules of care have on the determination of reckless conduct? The answers to this question are contradictory. The dominant doctrine gives it a relative or limited value, i.e. indicative;[7,24] on the other hand, the minority of the authors consulted attribute an absolute value to the rules of care.[3]

Rodríguez Vázquez classifies the reasons for affirming the relative or indicative value of these rules in the determination of the criminally relevant duty of care as material and formal.[3] The former have to do with the generality and abstraction that characterize them in relation to the typical and habitual dangers that are generated in the exercise of the activities that they order. This implies that there may be situations that they do not contemplate, and even certain assumptions in which their compliance may be detrimental to the assets they seek to protect. That is why the decisional autonomy of the health professional in each medical case cannot be subordinated in an absolute and irrational way to the interest of control inherent in any attempt at standardization and normalization.[9,10]

The debate on the definition of the margins of the *lex artis* in medical activity is more heated. In this regard, the positions range from those who attribute to it an extraordinarily broad scope, with the proposition that this concept can include methods that are little or not tested at all, to those who hold a restricted idea for those who integrate only the rules of care that are accepted by the majority of the medical profession. However, both sides are open to criticism.

The probably wider point of view is that *lex artis* cannot be identified with the methods and technical rules of action that have the most followers.[3] It should not be forgotten that an inherent feature of medical science is its constant evolution. What is theoretically accepted by the majority can become obsolete with the same relative speed with which this science evolves. On the other hand, such a way of thinking would nullify the principle of freedom of method generally defended in these fields. A minority method that is recognized as valid by the scientific community, or at least not rejected by it, should be considered within the margins of compliance with the rules of care established by the medical *lex artis*.[3,9]

This does not mean that methods of unproven efficacy should be included in the *lex artis*. Those medical procedures that have not been sufficiently tested and are not supported by the scientific community should not be included under the argument of freedom of method. The health professional is free to choose the method he/she considers beneficial to the specific case, as long as this choice does not exceed the permitted risk, i.e. the duty of care he/she is obliged to observe. The margin of freedom of choice of method is determined by the duty of care rather than by the *lex artis*.[2,3]

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For criminal purposes, the *lex artis*, like any rule of care, only has an indicative value and makes it possible to identify the technical failure from a strictly medical point of view, so that the definition of its non-compliance corresponds to health professionals (forensic doctor or medical experts). However, the verification of its non-observance is not equivalent to a criminal-legal assessment of the medical act. The criminal relevance of the breach of the duty of care is a matter solely and exclusively for the judge. It is up to the court to assess, in addition to the *lex artis*, other aspects and circumstances that together make up the legal parameters with which to compare the medical conduct and conclude whether or not there has been criminally relevant negligence. In short, the *lex artis*, a rule thought of in the abstract, encounters the circumstances of each case as an obstacle that prevents its automatic identification with the criminally relevant duty of care.[3,21,24,26]

According to Rodríguez Vázquez, in criminal courts, *lex artis* becomes rules of care with a general vocation, insofar as the determination of the duty of care is the result of its own integration with other contextual and personal elements of the patient and the acting professional. While the duty of care is an evaluative concept whose determination corresponds to the jurist, it is an indicative rule of what the medical community considers correct to carry out in general when, for example, treating a certain disease.[3]

Lex artis and duty of care are autonomous concepts that should not be confused in any case. It is necessary to preserve this differentiation and to delimit the spheres of action of the physician and the jurist (the expert and the judge) in relation to the definition of the criteria for deciding whether or not the conduct of a health professional is negligent. Although the content of the *lex artis* is the exclusive responsibility of medicine in accordance with the technical and epistemological principles that govern it, the standard of care is the competence of the judge.[3]

FINAL CONSIDERATIONS

In contemporary society, it seems clear that, despite its antiquity, the question of the criminal liability of the health professional is gaining importance, both in practice and in theoretical discussion. However, everything seems to indicate that the progressive intervention of criminal law in the medical field is not the most efficient political-criminal paradigm. Proof of this is the concerns generated by the recurrent problem of the so-called defensive medicine in view of the fear of doctors of ending up in court after the execution of a medical act.

In view of this situation, the need to proactively design a model that enables a better combination of the principle of responsibility, the implementation of better conditions for the practice of medicine and the protection of the legal assets involved is pertinent, a model that favors balance, trust and respect between both ends of the doctor-patient relationship.

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