



Revista Colombiana de Anestesiología

Colombian Journal of Anesthesiology

www.revcolanest.com.co



Essay

The special abilities of the healthcare professional^{☆,☆☆}



Geovana Andrea Vallejo Jiménez*

PhD in Law from León University, Spain. Tenured Professor, Universidad de San Buenaventura (Medellín Campus). Attached to the Law, Culture and City Research Group, Universidad de San Buenaventura, Medellín, Colombia

ARTICLE INFO

Article history:

Received 10 June 2014
Accepted 19 January 2015
Available online 24 February 2015

Keywords:

Imprudence
Liability, legal
Medical staff, Hospital
Aptitude
Intent

ABSTRACT

Introduction: One of the parameters used when analysing the occurrence of an offence of negligence is the so-called ideal average individual scale.¹ Thus, in order to determine whether medical negligence has occurred, the criteria that apply to the average ideal practitioner are generally used.² Nonetheless, there are situations in which healthcare professionals have abilities that are superior to those of the average ideal practitioner. This essay reflects on whether these superior individual qualities should be taken into account when analysing these situations,³ and asks whether it is possible for a physician to be held criminally liable for negligence (in cases where harm to the life or health of the patient occurs) when he or she is not using those superior individual skills but is simply acting as any other healthcare professional.

Methodology: The methodology used for this research project was the criminal dogmatic perspective, that is, a search of what criminal law has to say regarding the proposed problem, always looking to respect the principle of legality. Also, the methodological path followed throughout this research consisted mainly of three moments: an exploratory phase, a focusing phase and a concretion phase. As for the sources used, 80% of them come from the Spanish doctrine, it having dealt widely with the study of the issue at hand, and the remaining 20% consists of German work translated into Spanish, plus some limited work conducted in Colombia specifically regarding this subject in particular.

Results: There are three theories that aim to answer the aforementioned question, all of which will be analyzed in this essay, namely: the individualizing theory, the objective theory, and the intermediate or complementary theory.

© 2015 Sociedad Colombiana de Anestesiología y Reanimación. Published by Elsevier España, S.L.U. All rights reserved.

* Please cite this article as: Jiménez GAV. Las capacidades especiales del profesional de la salud. Rev Colomb Anestesiolog. 2015;43:147-150.

☆☆ This writing is the result of the doctoral dissertation entitled "Responsabilidad penal sanitaria: problemas específicos en torno a la imprudencia médica", developed within the framework of the doctoral program on "Legal liability. A Multidisciplinary perspective" of León University in Spain, presented on September 12th, 2012. This work is recorded under research projects DER2010-16558 (Spanish Ministry of Science and Innovation, partly with FEDER funding) and DER2013-47511-R (Spanish Ministry of Finance and Competitiveness) de Economía y Competitividad de España) of which Professor Dr. Miguel Díaz y García Conlledo is the principal author and of whose research team I am a member.

* Corresponding author at: Carrera 56C N° 51-110 Bello, Antioquia, Colombia.

E-mail address: geovanna.vallejo@usbmed.edu.co

Las capacidades especiales del profesional de la salud

RESUMEN

Palabras clave:

Imprudencia
Responsabilidad legal
Cuerpo Médico de hospitales
Aptitud
Dolo

Introducción: Uno de los parámetros que se emplean a la hora de analizar la existencia de un delito imprudente, es el llamado baremo del hombre medio ideal.¹ Por lo tanto, para valorar si ha existido una imprudencia médica, generalmente se utiliza el criterio del médico medio común ideal.² Sin embargo, existen situaciones en las cuales los profesionales de la salud poseen unas habilidades superiores a las del médico medio común. Este artículo busca reflexionar en torno a si esas cualidades individuales superiores deben exigirse,³ pues en caso de que el médico deje de emplearlas y simplemente actúe como otro profesional común de la salud ¿podrá incurrir en responsabilidad penal médica por imprudencia cuando se produzca una lesión en la vida o la salud del paciente?

Metodología: La metodología aplicada para esta investigación fue la dogmática jurídico penal, es decir, se trató de averiguar qué es lo que dice el Derecho penal en torno al problema planteado, siempre buscando respetar el principio de legalidad. Asimismo la ruta metodológica que se siguió en esta investigación comprendió básicamente tres momentos: exploratorio, focalización y profundización. En cuanto al material utilizado el 80% de las obras corresponde a la doctrina española, pues es allí donde se ha trabajado ampliamente el tema tratado en este escrito, y el 20% restante refiere en su gran mayoría a obras alemanas traducidas al español y algunas colombianas, pues aquí son escasas las obras sobre el tema en exclusivo.

Resultados: Existen tres teorías que pretenden dar respuesta al anterior cuestionamiento y que serán analizadas en este texto: teoría individualizadora, teoría objetiva y teoría intermedia o complementaria.

Conclusiones: Después del análisis a estas teorías se concluye que la teoría más adecuada será la teoría intermedia o complementaria.

© 2015 Sociedad Colombiana de Anestesiología y Reanimación. Publicado por Elsevier España, S.L.U. Todos los derechos reservados.

The special abilities concept

According to the Spanish doctrine under which most of the work regarding this issue has been conducted, as is the case of Romeo Casabona,¹ Paredes Castañón,² Luzón Peña,³ Feijoo Sánchez,⁴ Mir Puig,⁵ and Rodríguez Vázquez,⁶ among others, individual or special abilities are defined as those innate skills or aptitudes that enable any medical practitioner in particular to perform his or her activity. For example, some people argue that the individual abilities that enable a surgeon to practice his or her profession, must always be brought to bear in the surgical procedures in which he or she intervenes.⁷

However, it is important to note that individual, special or superior abilities cannot be mistaken for special knowledge, the latter being defined as the learning built by the practitioner through the performance and study of his or her activity, providing him or her with special knowledge about specific situations or cases.⁶ In this work, though, only individual abilities will be discussed, leaving the analysis of the applicability of special knowledge to the medical activity for a future article.

In order to determine whether the individual qualities of the physician should be assessed in the context of criminal law in the event of a charge of negligence,^{8,9} there are three theories in the legal doctrine that attempt to provide an explanation on whether it is relevant or not to include an element of subjectivity in the duty of caring, in order to identify the

special skills of the subject, that is to say, of the healthcare professional. These theories are the individualizing or subjective theory, the objective theory, and the intermediate or complementary theory.

Individualizing or subjective theory

The school¹⁰⁻¹² that advocates individualizing the behaviour proposes that, in terms of medical liability, it is not appropriate to resort to the scale for measuring the average individual but rather the one used to measure a diligent individual in the same position as that of the author. For a sector within this doctrinal position,¹³⁻¹⁶ special skills influence the determination of the type of breach of duty, because it is believed that the risk of injury cannot be known by the average individual (fortuitous case) while it may actually be known to the individual with the higher competencies (hence the offence of negligence), which means that for this latter individual the offence is avoidable.¹²

According to these subjective premises, the physician must only prevent the harm that is within his or her power to avoid.¹⁷ In other words, according to this theory, in healthcare the physician charged with an offence of negligence will be he or she who, having superior skills, does not use them. Despite having acted in accordance with the *lex artis* of the average practitioner – as any common physician would have acted – if harm comes to the patient and it is determined that

Download English Version:

<https://daneshyari.com/en/article/2755892>

Download Persian Version:

<https://daneshyari.com/article/2755892>

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