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Essay

Legal evaluation of risk as a criterion for determining criminal liability of medical professionals[☆]



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ABSTRACT

Introduction: In order to determine whether a medical professional is criminally liable for reckless conduct, a judge has to use a range of criteria. In modern legal doctrine, and especially in Colombian jurisprudence, it is increasingly important to assess to what extent a medical professional's conduct falls within the permitted margin of risk.

Objective: To examine the importance for legal professionals of evaluating risk in the context of determining criminal liability pertaining to reckless conduct.

Methodology: The methodology used was the dogmatic criminal law approach; concepts embodied in the meaning of crime and that are needed to establish criminal liability of an individual were interpreted and systematized. The background material was the result of a search of national and international papers on this subject matter, and the decisions issued by the Criminal Chamber of the Supreme Court of Justice, Colombia, between 1995 and 2016 were reviewed.

Results: There is a consensus between the majority doctrine and the criminal jurisprudence about the importance of assessing the presence of risk in medical practice.

Conclusions: In cases where the medical action results in harmful consequences for the patient but there is proof that the physician performed within to the allowable parameters of risk for the particular procedure, the medical professional shall be considered exempt from any criminal liability.

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La valoración jurídica del riesgo como criterio para la determinación de la responsabilidad penal del médico

R E S U M E N

Palabras clave:

Responsabilidad penal
Asunción de riesgo
Responsabilidad legal
Cuerpo Médico de hospitales
Derecho penal

Introducción: Para determinar la existencia de la responsabilidad penal como consecuencia de un comportamiento imprudente provocado por un profesional de la salud, es preciso que el juez, parta de evaluar diferentes criterios que le permitan identificar si estamos en presencia de una conducta penal. En la doctrina moderna y en la jurisprudencia de nuestro país, se viene exigiendo precisar si la actuación del médico se hizo dentro del marco del riesgo permitido.

Objetivo: Examinar la trascendencia que para el operador jurídico tiene la valoración del riesgo a la hora de verificar la responsabilidad penal del médico por conductas imprudentes.

Metodología: La metodología aplicada fue la dogmática jurídico penal, es decir, se interpretaron y sistematizaron conceptos que hacen parte del significado del delito y que son necesarios para la determinación de la responsabilidad penal de una persona. En cuanto al material utilizado, se hizo un rastreo de obras nacionales e internacionales en torno a esta temática y se revisaron las decisiones emitidas por la Corte Suprema de Justicia-Sala Penal, Colombia, desde el año 1995 hasta el 2016.

Resultados: Existe consenso en la doctrina mayoritaria y en la jurisprudencia penal sobre la importancia de valorar la presencia del riesgo en la actividad médica.

Conclusiones: En aquellos casos en los que la actuación médica genera un resultado lesivo para el paciente, pero se comprueba que el galeno actuó bajo los parámetros del riesgo permitido propio de su actividad, se deberá eximir de responsabilidad penal al profesional de la salud.

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Basic determinants of medical recklessness under the criminal law

Usually, reckless behavior in medical practice is associated with verification of breach of the objective duty of care; however, although this a determinant criterion, it is not the only one to be evaluated by the judge, since the unjust imprudent type comprises both a subjective and objective perspective.¹

The subjective view of recklessness shall be analyzed from two different angles, one negative and one positive. The former involves the absence of deceit – awareness and will to perform the objective type, for instance the awareness and will to kill, injure, or endanger the life of the patient; the latter involves the potential to exercise caution – the possibility for the physician to foresee that his/her reckless action may cause the patient harm – and prevention; i.e., the physician's ability to prevent a poor outcome for the patient, in accordance with timeliness, modality, and place. As mentioned in a previous paper, the judge is required to make the assessment based on the criterion of the ideal average individual, in the same context as the individual who presumably acted recklessly.² For instance, if an orthopedic surgeon acted with negligence, the judge must make an analysis based on the care and diligence of a careful orthopedic surgeon under the same conditions as the physician who acted recklessly; however, what the judge

should refrain from doing is benchmarking against any surgeon or physician from a different specialty.³

With regards to the objective view, it entails what we have called the core of reckless crime – although other elements exist, this one is the most relevant.⁴ This assumes that the judge must make sure that the physician failed to use care and diligence according to the medical standards, failing to comply with his/her professional duties.² To reach this conclusion, keep in mind that care involves both the obligation to take action and to refrain from taking action,⁵ for instance when *lex artis* rule requires that a patient with pneumonia shall be treated with antibiotics; however, if the patient is allergic to antibiotics, the physician must refrain from prescribing these drugs. Therefore, emphasis must be placed on the duty of care, both in doing as in refraining from doing.

Notwithstanding the above, making sure that the physician's behavior was against the standards, regulations, guidelines, and protocols of medical practice, is not sufficient to determine the criminal liability of the physician, since there is a close relationship between the duty of care and the risk taken by the healthcare professional. Consequently, henceforth, we shall refer to the medical doctor on the basis of doctrine and jurisprudence, specifying that occasionally some doctors dispense with studying violations to the objective duty of care and consider it merely as a verification of medical actions that place the patient's health and life at risk.²

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