Colombian Journal of Anesthesiology
Revista Colombiana de Anestesiología
www.revcolanest.com.co

ESSAY

Essay

The special abilities of the healthcare professional☆,☆☆

Geovana Andrea Vallejo Jiménez

PhD in Law from León University in Spain, Tenured Professor, Universidad de San Buenaventura, 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.

☆ Please cite this article as: Jiménez GAV. Las capacidades especiales del profesional de la salud. Rev Colomb Anestesiol. 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 Multidsciplinary perspective" of Leon 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

ESSAY

Las capacidades especiales del profesional de la salud

Palabras clave:
Imprudencia
Responsabilidad legal
Cuerpo Médico de hospitales
Aptitud
Dolo

RESUMEN

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.

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 school[10–12] 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

it was within the power of the practitioner with higher skills to prevent it from happening, that practitioner will be held liable for the outcome.

Objective theory

In contrast, there is a completely opposite thesis to the one discussed above. It is that of the objective theory, based on the assumption that all individuals are under the duty of using the care that is objectively required to avoid acting with negligence.[18–20] The judgement required from the author in identifying danger is that of a judicious person belonging to his/her own realm.[14] According to Cerezo Mir, "Consequently, the duty of care is an objective duty. Its content cannot be determined on the basis of individual competency. If every individual had only the duty to act with the care or diligence within his/her power, according to his or her ability and, with that condition, if that individual were authorized to perform any type of activity in social life, chaos would be rampant. That would bring about a serious threat to the protection of legal goods."[21]

Therefore, under this assumption, in the field of healthcare, all that would be needed is for the practitioner to use the due diligence provided by the *lex artis* to deem that he or she has fulfilled the objective duty of care. For example, a cardiologist who performs open heart surgery can only be required to act as any other diligent cardiologist would act in the same situation. Therefore, if the surgeon had special competencies to help him or her avoid the death of the patient, in accordance with the argument presented here, these superior circumstances would not be taken into consideration when making the legal assessment, considering that the surgeon behaved as any other normally trained specialist would have done.[1]

In summary, unlike the subjective theory, the objective theory views the offence of negligence from an entirely objective perspective. For that reason, the analysis of the special abilities of the subject is excluded entirely, implying that the starting point for this theory is the average ideal individual. In the case of healthcare, this individual will be a thorough diligent physician who must act in accordance with the average applied to all other practitioners, without having to include his or her superior abilities when performing an intervention. As such, the judge will not have to assess them in the event the practitioner that is endowed with them has failed to use them.

Intermediate or complementary theory

Although Luzón Peña[3] believes that the scale applied to the diligent individual must be used when dealing with the offence of negligence, this author has taken an intermediate position; and insofar as individual abilities are concerned, this position is complementary to the previous one. This is so because this author takes into consideration special knowledge together with individual abilities for the analysis. However, as stated at the beginning, in this paper we only focus on the latter, because special knowledge will be the focus of a different paper, considering that the solution is different than the one adopted in the case of individual abilities.

Luzón Peña[3] selects a complementary position from the perspective of the objective theory, based on the assumption that although the threshold for the duty of care is determined by the formula applied to the average ideal individual, the special circumstances of healthcare professionals will depend on whether these may or may not be transferred to the ideal average individual.

Consequently then, pursuant to this theory, when special or superior skills are involved, it needs to be remembered that they correspond to the specific abilities of the physician and, therefore, are considered as the individual's very personal circumstances attributable to factors that the individual has acquired as a result of his or her innate skill or of experience, and which have enabled him/her to act with increased expertise in certain areas. Therefore, they cannot be conferred upon another individual for purposes of determining whether the latter had a way to predict that his actions would result in harm to the patient's health or life.

In view of the above, when a nurse has the special skill to establish a venous access and, on a given opportunity, as a result of neglect, she simply uses the same expertise than another careful diligent nurse –ideal – would have used, she would not have failed her objective duty in the event the patient sustains damage to the tissues leading to loss of forearm mobility. This is so because her superior skill to establish a venous access, being so personal to her, cannot be transferred hypothetically by the judge at the time of the legal assessment to another nurse placed in the same situation. Consequently, it will be enough to verify that the nurse has acted in that situation as an ideal nurse would.

Conclusion

In accordance with the ideas presented so far, it needs to be said that the first two stances are in opposition, while the last one is complementary to the objective theory which, for the purpose of this work, is actually the most relevant. Let us see why.

The subjective judgement that considers only the special abilities of the individual implies a breach of the equality principle,[7] because it requires deliberate healthcare professionals to go beyond what the regulations really require. To follow one's individual judgement would hamper the willingness to adopt safety precautions which are still not mandatory across the board and would bar every attempt at developing personal skills above the average because that would lead, for example, to a physician abstaining from showing his or her skills and abilities out of fear of a conviction on the grounds of negligence.[17]

On the other hand, although the objective stance is supported by a correct assertion, I believe that this position falls short in its explanation because it attempts only to ground the theory on the scale applied to the ideal average individual, and does not consider the circumstances where special skills may be transferred,[22] which would provide a broader legal judgement to solve these situations according to the law.

In view of the above, it needs to be said that the solution adopted here is consistent with the proposal put forward by

ESSAY

Luzón Peña, it being the sounder and most convincing argument in light of certain basic principles of criminal Law, such as *ultima ratio*, which requires that this principle be applied only when absolutely necessary, and the principle of guilt, which forbids the judge to make liability judgements based on personal criteria. A physician's superior abilities – which cannot be mistaken for the special knowledge acquired through education and appraised as part of the processes of quality in education[23] – are extremely personal and individual and belong only to the physician endowed with them. Therefore, in those cases, the judge could not assess the existence of criminal liability due to negligence because of the impossibility to transmit these special skills to another physician in a hypothetical trial. If he or she were to do it, there would be a breach to the principle of criminal guilt. However, what the physician does have a duty to do is to behave at all times as a careful and diligent professional would within the realm of his or her profession, in accordance with the advances of the field and the comprehensive competencies[24] acquired through learning and professional practice.[25] Not doing so could lead to criminal liability due to negligence.

Finally, it needs to be clarified that the fact that these situations cannot be judged under the criminal jurisdiction because it would mean a breach of the principle of guilt, does not mean that other ethical or disciplinary mechanisms cannot be brought in to bear in order to impose exemplary punishment on the healthcare professional. It would also be necessary to assert that if the issue is not negligence but the deliberate decision of the physician to not use his or her superior abilities in order to harm the patient's life or health, in such a specific case, there will be criminal liability due to intentional act, and not negligence, which has been the subject of our analysis in this writing.

Funding

The authors have not received any funding for producing this article.

Conflicts of interest

The author has no conflicts of interest to declare.

REFERENCES

1. Romeo Casabona C. El médico y el Derecho penal I. La actividad curativa (Licitud y responsabilidad penal). Barcelona: Bosch; 1981.
2. Paredes Castañón J. El Riesgo permitido en Derecho penal (régimen jurídico- penal de las actividades peligrosas). Madrid: Ministerio de Justicia e Interior; 1995.
3. Luzón Peña D. Lecciones de Derecho penal general. Parte general. 2ª ed. Valencia: Tirant lo Blanch; 2012.
4. Feijoo Sánchez B. Resultado lesivo e imprudencia: estudio sobre los límites de la responsabilidad penal por imprudencia y el criterio del "fin de protección de la norma de cuidado". Barcelona: José María Bosch; 2001.
5. Mir Puig Santiago. Derecho penal. Parte General. 9ª ed. Barcelona: Reppertor; 2011.
6. Rodríguez Vázquez V. Responsabilidad penal en el ejercicio de actividades médico-sanitarias. Madrid, Barcelona, Buenos Aires, Sao Paulo: Marcial Pons; 2012.
7. Corcoy Bidasolo M. El Delito imprudente: criterios de imputación del resultado. 2ª ed. Montevideo: BdeF; 2005.
8. Montealegre Lynett E. La culpa en la actividad médica: imputación objetiva y deber de cuidado. RChD. 1987;14:260–311.
9. Vallejo Jiménez G. Aproximación al concepto de imprudencia. Nuevo Derecho. 2010;6:29–37.
10. Zugaldía Espinar J. La infracción individual del deber de cuidado en el sistema del delito culposo. ADPCP. 1986: 321–32.
11. Jakobs G. Derecho penal. Parte General. Fundamentos y Teoría de la imputación. 2nd ed Madrid: Marcial Pons; 1997.
12. Choclan Montalvo A. Deber de cuidado y delito imprudente. Barcelona: Bosch; 1998.
13. Hava García E. La imprudencia médica. Valencia: Tirant lo Blanch; 2001.
14. Jescheck H, Weigend T. Tratado de Derecho penal. Parte general. 5th ed Granada: Comares; 2002.
15. Quintero Olivares G. Parte General del Derecho penal. 4th ed Cizur Menor, Navarra: Thomson-Aranzadi; 2010.
16. García Rivas N. La imprudencia "profesional": una especie a extinguir. DS. 1999;6:79–95.
17. Serrano González de Murillo J. Teoría del delito imprudente: (doctrina general y regulación legal. Madrid: Ministerio de Justicia; 1991.
18. Torio López A. El deber de cuidado en los delitos culposos. ADPCP. 1974:25–59.
19. Gimbernat Ordeig E. Introducción a la Parte General del Derecho Penal Español. Madrid: Universidad Complutense; 1979.
20. Jorge Barreiro A. La imprudencia punible en la actividad médico-quirúrgica. Madrid: Tecnos; 1990.
21. Cerezo Mir J. Curso de Derecho penal Español. Parte General. Tomo II. 6th ed Madrid: Tecnos; 1998.
22. Blanco Cordero I. Límites a la participación delictiva. Las acciones neutrales y la cooperación en el delito. Granada: Comares; 2001.
23. Delgado-Ramírez M. Examen de Estado de la Calidad de la Educación Superior: SABER PRO ¿Qué indican sus resultados? Rev Colomb Anestesiol. 2013;41:177–8.
24. Gil F, Rodríguez V, Sepúlveda L, Rondón M, Gómez-Restrepo C. Impacto de las facultades de medicina y de los estudiantes sobre los resultados en la prueba nacional de calidad de la educación superior (SABER PRO). Rev Colomb Anestesiol. 2013;41:196–204.
25. Lynn D Martin, Sally E Rampersad, Daniel KW Low, Mark A Reed. Mejoramiento de los procesos en el quirófano mediante la aplicación de la metodología Lean de Toyota. Rev Colomb Anestesiol. 2014;42:220–8.