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The principle of comprehensive damage repair and its problems in medical liability

El principio de reparación integral del daño y su problemática en la responsabilidad médica

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ABSTRACT: This paper studies the principle of integral reparation and its problems in medical civil liability. For this purpose, a brief examination is made from the doctrine of the legal figure of the damage, both material and moral, in addition to the liability in the medical field that can be perfected before the non-observance of duties and obligations, as well as its types. Comprehensive reparation is reviewed from its concept and legal regulation in Ecuador provided for in the Constitution of the Republic. Also to link theory and practice, a case study is carried out within the results, which illustrates the application of medical liability and integral reparation in the medical context. All this through the use of a qualitative methodology, based on the application of the documentary bibliographic technique and methods such as inductive, legal exegetic, and synthetic analytical.

KEYWORDS: damages, physician, reparation, and civil liability.

RESUMEN: Este artículo estudia el principio de reparación integral y su problemática en la responsabilidad civil médica.

Para ello, se hace un breve examen desde la doctrina de la figura jurídica del daño, tanto material como moral, además de la responsabilidad en el ámbito médico que se puede perfeccionar ante el incumplimiento de deberes y obligaciones, así como sus tipos. Se revisa la reparación integral desde su concepto y regulación legal en el Ecuador prevista en la Constitución de la República. Asimismo, para vincular la teoría y la práctica, se realiza un estudio de caso dentro de los resultados, que ilustra la aplicación de la responsabilidad médica y la reparación integral en el contexto médico. Todo ello mediante el uso de una metodología cualitativa, basada en la aplicación de la técnica bibliográfica documental y de métodos como el inductivo, el exegético jurídico y el analítico sintético.

PALABRAS CLAVE: daños, médico, reparación y responsabilidad civil.

JEL CODE: D23, B25.

INTRODUCTION

In the medical field, a series of events can take place that triggers damages and lead to full reparation. To review this principle and its problems, it is important to state that the existence and determination of civil liability necessarily involve the production of damage as a fundamental element that distinguishes this type of liability from the others. Therefore, according to López (2016) the occurrence of the damage gives rise to the obligatory analysis of whether there is unlawfulness, causality, and culpability because, without damage, there is no liability whatsoever.

Damage is defined by Alessandri (2017) as that impairment or damage suffered by a person, either to his property or to himself. In the civil context, according to Barros (2013) is the detriment, the affectation that a human being may suffer as a result of an action or omission generated by another, and that affects either his rights or interests. This makes it clear that we are in the presence of this figure when the person is affected by any type of loss, no matter how minimal it may be. This can affect the person, according to Aguiar (2012) both in the present and in the future, and it is perfected, provided that it is susceptible to being repaired by any of the means, and it must also comply with the requirement of being certain.

Furthermore, it is important to say that, among the compensable damages, all those caused by the medical action must necessarily be included, whether material, corporal, including *pecuniary doloris*, i.e. the psychophysical damage that these damages cause the victim to suffer, and moral damages, which are those that affect the immaterial assets of the person, essentially the rights to personality and that do not entail any decrease in assets, of difficult valuation for this reason, but whose compensability is nowadays unanimously accepted.

It should be noted that private damage is directly related to Civil Law, responds to personal interests, and regulates forms of compensation, which makes it different from damage, treated in other areas of law, such as criminal law. For De Cupis, the following elements must be present (2015) elements such as a responsible party; the action or omission that generated the damage; consequences that give rise to the affectation; the presence of victims, and a legal rule that recognizes the obligation to repair. In short, liability for damages requires the existence of a link between the conduct of the liable party and the damage.

The Ecuadorian Civil Code (2005) recognizes in Article Art. 2214 concerning the damage that, whoever has committed a crime or quasi-delict and consequently, has caused damage to another, should compensate; regardless of the criminal sanction imposed. Damage is considered to be the detriment suffered by a person in his patrimony or his non-patrimonial assets. If the damage is to the patrimony, according to Del Bruto (2018), the damage refers to the material damage that can be emergent, which impoverishes and impairs the patrimony or loss of profit, which is directed to any impediment to obtaining profits. There is also moral damage, which affects non-property, immaterial assets, such as honor, morale, etc.

After knowing in a general way, the damage, it is necessary to go into the study of the reparation, to expose some issues associated with the civil liability of the physician, starting from the fact that in Ecuador the Constitution of the Republic, recognizes health as a right that must be guaranteed by the State. In Ecuador, the Constitution of the Republic (2008) recognizes health as a right that must be guaranteed by the State, for this reason, the services of this nature must have quality, effectiveness, and efficiency, among other qualities. Also, under Article 54 of this text, it is provided that any person or organization that provides public services will be liable in the civil, criminal, and administrative order for the deficient provision of this, as well as individuals, will assume their responsibility in case of malpractice in the exercise of their profession and especially that which may place at risk the integrity or life of people.

Along these lines, medical liability is part of professional responsibility, which, as Thompson (2011), argues is governed by the principles of non-maleficence; utility; beneficence;

autonomy, and justice. On the other hand, Calabuig (2005) conceptualizes responsibility as the obligation to respond to the acts that have been committed and that have resulted in harm to persons. Therefore, it means to correct, repair, or compensate for that damage. He also indicates that this type of liability leads to the fulfillment of the duty to correct or compensate the damage caused by the physician in the performance of his professional *practice.*

Furthermore, Calabuig (2005) adds that medical liability should be seen as the obligation of physicians to repair and satisfy the consequences of acts, omissions, and voluntary errors, even involuntary within certain limits, committed in the exercise of their profession. This can be contractual or extra-contractual in nature. The first is when the physician breaches the contract that regulates the relationship with the patient and the provision of the service. The second type occurs when a person maliciously causes damage to another without the existence of a contract and can occur due to inexperience, negligence, and imprudence.

Because of the above, the opinion of Ordoñez (2005) should be taken into account analyzes medical liability as to the obligation that these professionals and health personnel have to assume for the consequence of certain faults that may give rise to civil and criminal actions. In addition, such liability of the physician for his acts or omissions that may be guilty, for reasons of error, imprudence, carelessness, poor execution of operations, or others in which he participates as a physician. In the field of civil liability, it is manifested in the obligation to remedy the damage through compensation, which may be medical or monetary.

It should be noted that, in the practice of medicine, medical liability implies the obligation to cure and to respond before the courts for any damage caused by negligence, linked to a lack of technical knowledge. Also, imprudence saw by Bonnet (2009) as facing a certain risk without having taken precautions to prevent it and proceeding in haste without taking into account the inconveniences that may result from such action. As well as negligence, a matter incompatible with the duty that leads to non-observance of the principles of the profession.

Regarding malpractice, Lascariz (2015) considers malpractice that it is an inadequate treatment, which presents errors or is negligent whose result causes certain damage, unnecessary suffering, or the death of the patient due to ignorance, negligence, lack of skill, or non-compliance with the rules. Currently, according to this author, a medical practice is considered correct if it is medically proven, therefore, it must comply with the requirement of the *lex artis* and the patient must have been informed according to the legislation in force. However, in a professional liability claim, it is not only the result that must be evaluated but also each of the steps taken in medical practice.

In that order, the *lex artis* is for Molina (2008) a standard of normality of the medical professional's conduct in liability, it is, therefore, the criterion for determining the criminal infringement of objectively due care and is a necessary element for assessing tort liability, it also contains the rules and guidelines for the practice of medicine, they are medical and technical standards of mandatory compliance and reflect the physician's conduct. They are guidelines that govern the correct conduct of the physician before the patient, within a certain situation and clinical condition, following the latest advances in medicine.

The foregoing leads to the fact that, when a person or a health professional incurs liability, particularly medical liability, full reparation is required as an elementary principle within civil law. Rousset (2011) considers that reparation constitutes a premise that the obligations of both respect and guarantees will be reestablished to erase or at least mitigate the damage caused and prevent its repetition. Botero (2017) argues that human dignity is the legal basis of liability since the person is the basic element of the right to damages and the latter constitutes a tool to repair the victim through restitutio *in integrum of the* harm suffered.

It should be stated that comprehensive reparation, as its name indicates, is comprehensive because it includes violations of constitutional rights such as the right to health. It seeks to remedy, as far as possible, the actual results caused by the violation of a right. Article 18 of the Constitution (2008) provides that it encompasses damages, both material and immaterial, and its objective is to restore the person to the state before the violation. Reparation includes restitution of the right; compensation, whether pecuniary or economic; rehabilitation as well as satisfaction and guarantees of non-repetition. It also includes the obligation for the fact to be investigated and punished, measures of recognition, apologies in the public sphere, and the provision of public services and health care.

Along these lines, the aforementioned constitutional precept provides that the material damage is repaired through compensation for the loss or impairment of the victims' income, the expenses incurred, and any other pecuniary consequence related to the events that occurred.

On the other hand, the reparation of non-pecuniary damage includes compensation, through the payment of an amount of money or the delivery of quantifiable goods or services due to the suffering and affliction of the affected and their relatives, the affectation of very relevant values for the individuals as well as the alterations, of a non-pecuniary type, that affect the form of existence of the person who suffered the affectation and his family context. The reparation must be made according to the violation, the circumstances that took place in the case, the results of the facts, and the impairment to the life project, this issue is affected, in many cases, because of the performance in the medical field.

For this reason, within the principle of integral reparation, the role of the jurisdictional organs is highlighted, considering that in the judicial disposition issued or in the reparation agreement the obligations to be fulfilled by the person responsible for the damage must be clear and ensure that the decision is executed so that the integral reparation materializes.

According to Domínguez (2010), the principle of integral reparation means that the measure of reparation must be proportional to the damage caused. Therefore, only the damage is subject to compensation as part of the civil liability. To this end, the principle of full reparation includes the evaluation of the damage. The victim must be compensated for what he has suffered.

It should be noted that the principle of full reparation is a good attempt to protect the affected party. However, it is complex in the face of damages suffered by assets that are impossible to value, this can happen because they are suitable

for legal treatment and cannot be replaced because they are damages whose nature does not admit an objective evaluation. An example of this is those caused to personal, corporal, and moral goods, which do not have an approximate value and therefore cannot be compensated in their totality, so that the compensation cannot be valued mathematically, therefore, its reparation is far from the intended integrality.

1. METODOLOGÍCAL GUIDELINES AND THOUGHTS

To develop the research, a qualitative study is applied, which according to Hernandez, Fernandez and Baptista (2006) is based on logic and links several fields and specialties such as medical, civil, and constitutional. The research of this approach is characterized by its richness, it is deep and the information that is used is of high quality. It goes from the general to the particular, taking into account that it compiles doctrinal and legal criteria on integral reparation and its problems in the medical context.

The qualitative study allows to understand the dimension of the phenomenon, the interpretation and understanding in the practical order For Croda and Abad (2016) at the legal level, this kind of methodology, consolidates the results because it allows contrasting doctrine, regulations, and jurisprudence. This generates an opinion, interpretation, and perception about study.

On the other hand, the research is descriptive and analytical, because it studies the peculiarities of the phenomenon, specifically issues such as damage, medical liability, and integral reparation from their definitions, to know them and arrive at conclusions that contribute to the

legal field. For Hernández, Fernández, and Baptista (2006) the methodology from a descriptive approach specifies definitions and particularities of the subject of study.

The bibliographic-documentary technique is also used in the research, since for the development of the topic, doctrinal foundations found in books, journal articles, research, and essays, among others, were used. These contributed to the theoretical support and deepened the topic of study.

Likewise, the analytical-synthetic method was applied, which as Pastrana (2006) explains allows disintegrating the object of study into its main parts and revising it from the essential to reviewing it integrally. The result is the generation of new knowledge on the subject studied. From this method, the phenomenon is studied exhaustively and complemented with the synthetic activity, in such a way that both actions: analysis, and synthesis determine causes, to find the explanation and arrive at conclusions.

The inductive method is another of those applied in the research, through which integral reparation and its problems in the field of the physician's liability are reviewed, which made it possible to define particularities and legal regulation, reason, and reach conclusions. On the legal level, according to De la Puente (2005), the criteria of the doctrine, the legislator, and the norms are considered, which generates the inductive type of process from the criterion that the legal norm is not independent, it is part of the legal system.

On the other hand, the legal exegetical method was used, through which the norms are exhaustively reviewed utilizing a detailed, literal examination of each article, applicable to the subject among them, the constitutional norm. De Bartolomé

(2014) leads to casuist, which makes it possible to consider the cases that may arise in a certain area of law.

In this line, to link the theory exposed in the introduction with practice, a case study is carried out, which according to Martínez (2016) constitutes a fundamental strategy of scientific research because it places the study in unique situations and which different methods are combined to collect and reason the information in a way that allows describing and verifying the doctrine. This gives objectivity, validity, and effectiveness to the results. To review the research topic, Case 0158-2014 will be reviewed, which resulted in Ruling No. 0103-2015 of Temporary Chamber of Civil and Commercial of the National Court of Justice concerning medical liability and integral reparation.

2. LINKS BETWEEN THE PRINCIPLE OF FULL REPARATION AND MEDICAL LIABILITY

To link the doctrinal review conducted about the principle of full reparation and medical liability, it is essential to study Case 0158-2014, which led to the issuance of Ruling No. 0103-2015 of the Temporary Civil and Commercial Chamber of the National Court of Justice of Ecuador (2015), which brings to light the variables studied.

We must begin by stating the background of the case. The case goes back to an ordinary lawsuit for moral damages against Dr. A in which an appeal was filed to challenge the decision of the Second Civil, Commercial, Tenancy, and Residual Matters Chamber of the Provincial Court of Justice of Guayas, which accepted the appeal and revoked the judgment in the lower court and dismissed the lawsuit.

The facts are supported as stated in the judgment. The plaintiff intends to demonstrate that Doctor A, generated *down* syndrome and the death of her son, and for this reason, the doctor must be held responsible for the moral damage caused by not detecting that the baby, since gestation, suffered from the said syndrome, as well as for hiding the fact that he had a cytomegalovirus infection. This matter is since the treating physician failed to comply with his duty to adequately inform the patient of his illnesses or conditions. The plaintiff's claim is for an indemnity in the amount of one million United States Dollars for moral damages.

The Chamber (2015) analyzed that the legal bond between the physician and the patient must adhere to the regulations to ensure the rights of the parties, under a relationship, in this case, contractual, which obliges the physician to provide his services and in which information and consent must prevail, together with the skill, knowledge, and ability of the physician. Likewise, medical liability is based on the *lex artis,* which entails compliance with the duties and obligations that govern the actions of the physician, among which are: to provide dignified care, without discrimination, under reliability, to comply with the patient's right to information and to make his own decisions.

It is stated in the sentence that the patient must be informed of his diagnosis, treatment, and prognosis. In the event of not communicating his medical situation directly, a person representing him must be informed so that he can give his informed consent to undergo a procedure or treatment, except in the case of emergencies.

On the other hand, it was reasoned by the judge. The judge reasoned that malpractice is manifested when there is

deliberate negligence and ignorance, which did not occur in this case, since the death of the child did not occur, nor *down* syndrome or by cytomegalovirus. In addition, the detection of these diseases can be prenatal, however, the tests only reflect probability and not an accurate diagnosis, therefore this situation is not attributable to the physician.

Likewise, the Chamber (2015) analyzed the contractual liability of the physician, which must meet the following requirements: the existence of a valid contract between the parties; that this link leads to an obligation; that the obligated party does not comply with the obligation in a fraudulent or culpable manner; that, in turn, the claimant is not in default with its obligations and that as a result of the breach, real damage has been caused. In this case, the player considers that there is a valid contractual link between doctor and patient that generates between them the obligation to inform and grant freedom to the person being treated to choose the treatment. Therefore, the fact of not informing the patient of her condition perfects a culpable omission.

The damage caused, according to the judgment was caused to the mother, not to the deceased child. The mother suffered emotional damage caused by suffering and moral damage, both caused by the lack of information. The Court (2015) considered it proven that the doctor knew that the fetus suffered from cytomegalovirus. However, he did not inform the patient and mother of the child, therefore, there is a contractual liability, as he breached the duty of information, which prevented the child's mother from obtaining new treatments or preparing for the possible consequences of the disease when her child was born. Moreover, it is stated that "the transgression of the doctor's duty to inform the patient about

the disease is the cause of her suffering when she found out about the problem months later when she could no longer do anything about it" (Court, 2015, p. 8).

Also, the Court's judge (2015) affirms that the non-observance of a contract between doctor and patient produces moral damages and that it must be quantified given the affectation of the mother due to the suffered sufferings. He adds that, concerning the relationship between the baby and the doctor, it can be assessed whether there is tort liability, a question that the mother may request, as she is entitled to represent the deceased child. However, this does not proceed, as there is no causal link between the act and the damage produced, since the child does not die from the syndrome, nor the aforementioned virus.

Finally, the fact imputable to the doctor in the court decision (Court, 2015). The fact that he did not inform the pregnant mother that she suffered from cytomegalovirus, a condition that could affect the fetus, and that the fetus had *Down* syndrome. The child died within a short time after birth, not from any of these causes, but pulmonary failure. In summary, the doctor did not harm the child, but there is a medical liability for lack of information to the mother and patient.

It is stated in the sentence concerning the amount of compensation, that the economic capacity of the doctor was not demonstrated and that unrealistic amounts cannot be requested for this concept. Therefore, making use of the judge's power to determine the value of the compensation, under article 2232 of the Civil Code (2005), it is not appropriate to sentence the doctor to pay the sum of one million dollars, requested by the plaintiff, but to an amount that responds to her economic situation. However, the economic situation of the affected

party was considered, for whom it is difficult for any economic amount to compensate for her loss. The Chamber (2015) decided to accept the claim and ordered as part of the full reparation that the doctor must pay to the plaintiff, the amount of twenty-five thousand United States dollars as compensation for moral damages.

3. CASE STUDY AND CENTRAL IDEAS

The sentence under study brings to light how medical liability manifests itself, the consequence of which leads to full compensation for damages, whether material or moral. This matter is in line with the analysis of the doctrine made by authors such as Calabuig (2005) and Ordoñez (2005) who coincidentally state that liability entails the obligation to respond for the acts performed, specifically in the case seen above. From the medical point of view, the failure to inform the patient-generated damage, which as such produces the effect of full reparation.

Indisputably, in this case, the figure of the damage is present, which as Alessandri (2017) indicates generates damage to the person, in this case to himself and not to his material goods. In addition, the judges in their decision recognize moral damage, an issue that is theoretically supported according to the criteria of De Cupis (2015) and Barros (2013). Here, an immaterial good of human beings is injured through affliction, suffering, depression; in short, emotionally, causing an affectation to the rights of personality. Consequently, these are compensable, which is the reason why full reparation is appropriate in this case.

On the other hand, the requirements of this figure identified by De Cupis (2015) are present in the harm caused

to the victim and which are manifested in the existence of a responsible party, in this case, the physician. As well as the presence of an action or omission, in the case study, the doctor did not duly inform the patient about the health situation, so there is an omission of his duties and obligations, which produced the damage. The plaintiff has also been identified as a victim and legally there is a legal rule that requires the obligation to make reparations, in this case, the Ecuadorian Constitution (2008) in Article 18 and the Civil Code in Article 2214, which supports the application in the case, the integral reparation.

The applies to the medical field as seen in the case study and consequently as analyzed by Thompson (2011), Lascariz (2015), and Molina (2008) referring to the *lex artis* that was breached and caused the damage generated in the medical context. Therefore, the damage caused in the performance of his professional *practice* must be repaired or compensated.

Given the above, the judicial case is an example of the need for compliance in the medical context with the duties and obligations foreseen for this activity in the practice of the profession and the doctor-patient relationship.

Likewise, the case, exposes in the practical order, the requirements that medical liability must meet to be perfected, both in the contractual and extra-contractual order from the doctrinal criteria of Calabuig (2005) and Molina (2008).

The judicial process studied also brings to light the importance of integral reparation, which from the analyses of Rousset (2011) and Botero (2017) is a premise that allows the reestablishment of obligations. In this way, the damage caused

is mitigated and, in turn, avoids its repetition. These issues have a direct bearing on the respect for the person as a legal element of liability since it is precisely the human being, in this case, the plaintiff, who is the central element of the right to damages and consequently is the holder of restitutio *in integrum*.

Similarly, the full reparation ordered by the judges in the case is proportional to the breach of the duty to inform that the physician must observe his actions. This operates in line with the doctrinal postulates of Domínguez (2010) based on the fact that the reparation must correspond to the damage caused. The ruling outlined in the judgment under study determined the obligation to be fulfilled by the person responsible for the damage as a way of making full reparation effective.

CONCLUSIONS

The conclusions drawn from the study are that the damage is the essential basis of medical civil liability and produces as consequences the integral reparation that can be manifested through indemnification, restitution of a right, compensation, rehabilitation, as well as satisfaction and guarantees of non-repetition, provision of public services and health care.

The principle of integral reparation is an essential tool within a Constitutional State of Rights such as the Ecuadorian one because it intends to place the person in the state before the violation of a right, a matter that in the medical field is often impossible due to the good that is affected, which is the life, integrity, and health of the person, however, it is a way to satisfy the affected person directly or his relatives.

It was demonstrated through case studies that medical liability is comprehensive and must comply with certain requirements to be perfected, both in the contractual and extra-contractual order. This requires the physician to act by the law to adequately protect the rights to life, personal integrity, and health that may be affected by the non-observance of duties and obligations in the medical context. Likewise, there is concordance between the decision adopted by the jurisdictional body with the doctrine studied, regarding the damage, the civil liability of the physician, and the figure of full reparation.

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