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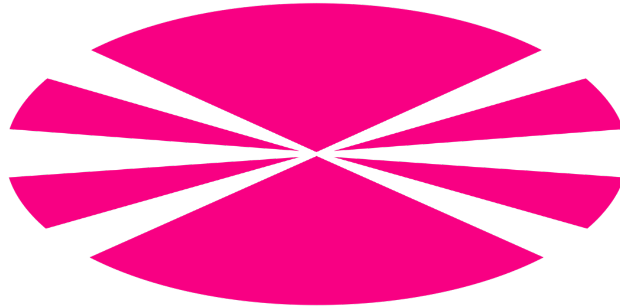

UNIVERSIDADE
DA CORUÑA

CRIMES AGAINST HEALTH, CRIMINAL LIABILITY OF HEALTHCARE PERSONNEL FOR REFUSAL OF ASSISTANCE AND OBSTETRIC VIOLENCE

DELITOS CONTRA LA SALUD, RESPONSABILIDAD PENAL DEL PERSONAL SANITARIO POR DENEGACIÓN DE ASISTENCIA Y VIOLENCIA OBSTÉTRICA

DELITOS CONTRA A SAÚDE, RESPONSABILIDADE PENAL DO PERSOAL SANITARIO POR DENEGACIÓN DE ASISTENCIA E VIOLENCIA OBSTÉTRICA

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LIST OF ABBREVIATONS

Abbreviation	English denomination	Spanish denomination
CADFUEur	Charter of Fundamental Rights of the European Union.	Carta de los Derechos Fundamentales de la Unión Europea.
CC	Civil Code.	Código Civil.
CDM	Code of Medical Ethics	Código de Deontología Médica.
CE	Spanish Constitution.	Constitución Española.
CEDH	European Convention on Human Rights.	Convención Europea de Derechos Humanos.
CBE	Spanish Bioethics Committee.	Comité de Bioética de España.
CP	Criminal Code.	Código Penal.
DUDH	Universal Declaration of Human Rights.	Declaración Universal de los Derechos Humanos.
ET	Workers' Statute.	Estatuto de los Trabajadores.
LECrim	Criminal Procedure Act.	Ley de Enjuiciamiento Criminal.
LOPJ	Judicial Power Organization Act.	Ley Orgánica del Poder Judicial.
PIDCP	International Covenant on Civil and Political Rights.	Pacto Internacional de Derechos Civiles y Políticos.
SAP	Provincial Court decision.	Sentencia de la Audiencia Provincial.
SSTJUE	Court of Justice of the European Union decision.	Sentencia del Tribunal de Justicia de la Unión Europea.
STC	Constitutional Court decision.	Sentencia del Tribunal Constitucional.
STS	Supreme Court decision.	Sentencia del Tribunal Supremo.
STSJ	High Court of Justice decision.	Sentencia del Tribunal Superior de Justicia.
TC	Constitutional Court.	Tribunal Constitucional.
TS	Supreme Court.	Tribunal Supremo.
UGT	General Workers Union	Unión General de Trabajadores.

FACTS

Elisa Fiore Giordano, 28 years old, 7-month pregnant and Italian citizen, went to the public hospital Las Flores' emergency room on December 27th 2019, with her partner Tomás Gómez Pedreira, due to the feeling of heavy pain in the abdomen. They both have their residence located in Naples, Italy, because her job so requires, but they were on Christmas vacation in A Coruña, Tomás' birthplace.

She arrives there at 22:30 hours and, after providing the corresponding and necessary clinical documentation, she has to wait around 50 minutes. She is first helped by Iago Rouco, nurse intern who was following a specialised program on obstetrics and gynaecological nursing and, without even consulting her clinical profile, he tells her they are going to provoke the labor due to the risk of foetal distress. In this moment Iago administered Elisa an intravenous medication containing 5 U.I (1ml) of oxytocin in a physiological solution.

30 minutes later, Elisa starts to feel mild contractions, but these were not enough for the needing labor induction, so the nurse injects her another oxytocin dose, containing 10 U. I (2 ml) in the same physiological solution.

At 00:00 hours, Iago's work shift ends, so from that moment doctor Marta Fiaño, specialised in gynaecology and insured by SERGAS' civil liability insurance, is going to take care of the patient.

Contractions' frequency, intensity and duration, as well as foetal heart rate must be carefully monitored during percussion and Iago did not leave any record of it, so doctor Fiaño injected oxytocin to the patient, thinking that the nurse had not done it.

After all of this, the patient started to have hyponatremia: vomiting, confusion, cephalea, and this made doctor react and consult patient's clinical profile, where it is also reflected her latex intolerance, which can be an important risk factor contributing to anaphylactic reaction after oxytocin's administration.

Suspecting that it was an allergic reaction they sought for a peripheral intravenous line to expeditiously administer Ringer's lactate solution. A high flow oxygen mask was put on Elisa and she was intramuscularly injected 5 mg of dexchlorpheniramine and 40 mg o methylprednisolone. In the gynaecological exploration it was detected amniotic fluid loss and foetal heart rate deceleration to around 60 bpm. Some minutes after the pharmacological treatment there was a minor improvement, so doctor decided to wait a little more instead of carrying out an urgent caesarean due to the risk of foetal distress and even death.

Finally, we can appreciate an absolute fall of the foetal heart rate, causing the loss of the foetus, besides negligent injuries to the patient, who reports the acts committed against her physical and psychological integrity.

Regarding the inquiry of the facts, it was discovered that UGT labour union reported irregular replacement contracts that infringed the contractual regulation through an employment agency during holiday period in order to fill licensed health job vacancies, being nurse Iago Rouco one of them.

About the doctor Fiaño's decision-making, she alleges that she did not carried out that caesarean because of ideological reasons, as she is part of a religious social group that did not allowed her making that decision objectively.

INTRODUCTION

Women's right to public medical care due to motherhood is one of the rights implicitly recognised by Article 43 CE. However, this provision regulating the right to health protection is just a mere generic approach that does not necessarily imply that everyone should have access to a public and free healthcare.[1]

According to Article 3 of the Law 16/2003, of 28 May 2003, on the cohesion and quality of the Spanish Healthcare System, the right to health protection and medical care shall be granted to everyone who is entitled that right on the ground of international agreements.

As this case is focused on an Italian woman, she has the right to guaranteed medical attention due to the Directive 2011/24/EU of the Parliament and of the Council, of 9 March 2011, on the application of patient's rights in cross-border healthcare, which was implemented in Spain through the Royal Decree 81/2014, of 7 February 2014, that regulates cross-border medical care.

Spanish domestic legislation itself recognises the right to medical care for pregnant women in other legal provisions, like Article 7(c) of the Organic Law 2/2010, of 3 March 2010, on sexual and reproductive healthcare and the voluntary interruption of pregnancy. This provision disposes that the health public services will provide quality attention to the patient during her laboºr.

Based on Article 148 CE regulating the assumption of competences by Autonomous Communities, the Galician Autonomy Act recognises the attribution of legislative development in the field of domestic healthcare. This principle was eventually developed by the Law 8/2008, of 10 July 2008, on healthcare services in Galicia. Article 4(2) of this Law prescribes that medical care is guaranteed to pregnant women.

[1] CARRIL VÁZQUEZ, X. M., 2017. *Los derechos de la mujer a la libre elección de las circunstancias del parto: un estudio comparado e internacional de la atención sanitaria por maternidad, desde la perspectiva del Derecho español.* Barcelona, Ed. Atelier.

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I. Iago and doctor Fiaño: legal implications and consequences of their actions.

The events of the case can be interpreted through three main approaches, i.e. criminal, civil and administrative. The civil law and Public Administration liability perspective will be developed in more depth in the second section of this essay.

A distinction must also be made between the analysis of Iago's actions and those of doctor Fiaño, since although they have very important points in common, their actions were differentiated both in the material and temporal scope.

At first, it is not necessary to delve into all the issues related to the obligation by the health personnel to inform their patients and ask for consent to carry out the relevant procedures because the case does not specify any conflict on this point. Therefore, it is understood that the patient was correctly informed about all the decisions taken and that she gave her consent to them.[2]

a. <u>Criminal law approach: legal categorization and legal consequences of the events</u>

i. Non-intentional abortion (Article 146 CP).

The starting point are the facts related to the foetus. In this regard, were are dealing with a non-intentional abortion, which is regulated by the CP as follows:

> "Whoever, through a serious reckless conduct, causes an abortion shall be punished with imprisonment of three to five months or a fine of six to ten months.
>
> When the abortion is committed by professional negligence, the penalty of special disqualification for profession, office or position for a period of one to three years shall also be imposed".

This provision only affects third parties, since the pregnant woman cannot be punished for this crime. This offence would apply to the case in this aggravated modality caused by the professional nature of the reckless behaviour. This aggravated offence aims to punish physicians for the violation of their specific role of protection.

With the new CP, the regulation of reckless crimes was modified, changing from the regulation of a *crimen culpae* (*numerus apertus*) to an offer a closed catalogue of *criminal culposa*. [3]

For reckless conduct to be punishable it must be serious, and this is determined, according to the TS doctrine,[4] on the basis of the degree of lack of diligence, foreseeability and seriousness of the infraction. Considering the

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[2] The TS has established that it is compulsory to inform the patient about the risks derived from the caesarean procedure because otherwise it would mean a violation of the right to informed consent (STS of 26 March 2012).

[3] LUZÓN CURESTA, J. M., LUZÓN CUESTA, A. and LUZÓN CUESTA, M., 2018. *Compendio de Derecho Penal. Parte especial*. Madrid, Ed. Dykinson.

[4] STS 211/2007, of 15 March 2007.

facts in this case, that is, the failure to record the medical data in the clinical diagnosis and to rely on diligent conduct as a consequence, a necessary caesarean section not performed and the seriousness of the medical decisions taken themselves, it can be confirmed that the case may be assessed as a serious reckless offence.

The legal good protected in this crime is the dependent human life.[5] Therefore, the passive subject of this offence is the *nasciturus*, as the holder of prenatal life. Abortion can be defined as a criminal act consisting of causing the death of a foetus.[6] In the same vein, MUÑOZ CONDE[7] offers another definition of abortion within the scope of Criminal Law, consisting of "the death of the foetus voluntarily caused either in the pregnant woman's womb or by causing its premature expulsion in conditions of extrauterine non-viability". As far as reckless behaviour is concerned, the doctrine has established a list of requirements:

1.Absence of malice or wilful misconduct by perpetrator.

2.Production of a material damage constituting a crime.

3.That the result was produced without the agent having taken due care and attention.

4.Causal relationship between the initial voluntary act and the damage caused.

5.That the initial act is lawful.

In the case under analysis, all the requirements are met, since the perpetrator did not act with malice, there was a material damage produced (the abortion itself) and the result was caused by a negligent act.[8] In addition, there is a causal relationship between the reckless action and the abortion, and the initial act of medical treatment was a lawful act.

This offence of non-intentional abortion was significantly altered with the passage of the “new” CP of 1995. Its regulation is based on the fact that it endangers human life itself and frustrates the legitimate expectations of the pregnant woman.[9]

We are dealing with this type of crime because the legal and factual requirements for it are met, including the result of the death of the foetus as the material object of the crime and the professional position of the perpetrator who acted recklessly.

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[5] Period between the nesting of the embryo in the uterus until the birth of the baby.
[6] ORTIZ SÁNCHEZ, M., PÉREZ PINOM, V., 2004. *Léxico jurídico para estudiantes*. Madrid, Ed. TECNOS.
[7] MUÑOZ CONDE, F., 2013. *Derecho Penal. Parte especial*. Valencia, Ed. Tirant lo Blanch.
[8] ORTIZ SÁNCHEZ, M., PÉREZ PINOM, V., 2004. *Léxico jurídico para estudiantes*. Madrid, Ed. TECNOS.
[9] SUANZES PÉREZ, F., “El delito de aborto. La modificación de indicaciones”, *Lecciones de derecho sanitario*, 1999, pp. 469-488.

If we continue breaking down all the components of the crime and the circumstances of the case, we come to a relevant issue, that is, the degree of participation. Doctrine kept a discussion regarding the functioning of the condition of perpetrator in non-intentional crimes, as the ground for the result was a breach of care rules. In fact, most of the scenarios in which this issue is discussed are located in the health field.

As it is a non-intentional crime and not an intentional one, the criterion of the 'control over the act' (*dominio del hecho*) is blurred, since it constitutes a subjective element incompatible with the reckless nature of the act. Here, the perpetrator has a completely different result in mind than the one that occurs and carries out the acts in pursuit of the initial purpose, so that they do not "dominate" the fact.

In any case, jurisprudence[10] has repeated on several occasions the difficulty of configuring the different forms of perpetratorship and participation depending on the intentional or non-intentional qualification of the crime. In this sense, the Provincial Court of Ceuta, in the SAP Ceuta 8/2000, of 1 February 2000, stated:

> "[...] although the intervention of several subjects in the commission of a criminal act can occur in both intentional and non-intentional crimes, however, the forms of intervention present different and important differences between one and the other".

Following the line of 'control over the act' (*dominio del hecho*), we arrive at the theory known as the unitary notion of perpetrator (*sistema unitario de autoría*), understanding that the perpetrator is the one who provides a cause for the result to be produced. This cause must consist of a reckless action, so that all contributors who make a causal contribution by infringing a rule of care would be considered non-intentional perpetrators.[11]

However, and taking into account that the CP does not lean towards a particular theory, the dominant doctrine opts for the restrictive concept of perpetrator, since they understand that it is the one that best adapts to the principle.[12] What does this mean? It means that not all persons who contribute to the result are perpetrators, something that can be proven by the existence of instigators, accomplices and abettors.

Therefore, considering the circumstances of the case, we could talk about various co-perpetrators: several individuals who jointly carry out the criminal act. However, Spanish jurisprudence[13] has reiterated the need for two requirements for this plurality of perpetrators:

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[10] STS of 30 September 2014.

[11] ROSO CAÑADILLAS, R., "Los criterios de autoría en el delito imprudente", *Derecho Penal y Criminología,* 2004, Vol. 25, no.75, pp. 227-244.

[12] RODRÍGUEZ VÁZQUEZ, V., "La coautoría con imprudencia desde la teoría de la determinación objetiva y positiva del hecho. Una interpretación del papel del acuerdo para reforzar el carácter objetivo de la teoría", *Anuario da Facultade de Dereito da Universidade da Coruña*, no.23, 2019, pp. 373-410.

[13] STS of 11 September 2000; STS of 23 February 2001.

1.The joint decision to commit the criminal act.

2.The objective contribution to the criminal act.

In this case, there is an objective contribution to the fact but there is no pact or agreement between Iago and doctor Fiaño in the realization of the fact, given that it would be incompatible with the non-intentional modality of the conduct, in which the obtained result is not pursued at any time. Therefore, in contrast to the objective aspect of this offence, its subjective requirement is missing.

In addition, RODRÍGUEZ VÁZQUEZ[14] confirms that in the healthcare activity the concurrence of several reckless conducts carried out by healthcare professionals implies the qualification of all of them as co-perpetrators of the harmful result, regardless of the seriousness of their conduct. However, as the doctrine follows the restrictive concept of perpetrator, the principle of division of labour would not be compatible with the concept of co-perpetrators.

Therefore, taking into account all of the above, the figure of participation to be applied in this case is that of accessory perpetrator, which is very common in cases of road traffic. It occurs when two or more persons, acting independently and not knowing the actions of the others, jointly produce the result prohibited by positive Law.[15]

In the case of accessory perpetrators there is no agreement between the subjects, so that the concurrence of their actions to obtain the result are the produced by the coincidence of reckless conducts by several subjects, i.e. Iago did not leave a record of the administration of oxytocin and doctor Fiaño did not perform the caesarean when the patient needed it, in addition to both administering a substance that caused an allergic reaction.

According to the dominant doctrine, this lack of agreement should lead us to immunity, but the theory of the objective and positive determination of the fact forces us to impose accessory perpetrators the same sentence than perpetrators, treating every contributor as perpetrator. This is carried out through objective imputation (*imputación objetiva*) by means of the principle of trust, one of the governing principles in the medical field: whoever acts correctly may think that others also act in the same way. However, this right is not unlimited, since the dominant of the doctrine rejects the validity of the principle for those who violate a duty of care by way of their actions.[16]

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[14] RODRÍGUEZ VÁZQUEZ, V., 2012. *Responsabilidad penal en el ejercicio de actividades médico-sanitarias.* Madrid, Ed. Marcial Pons.
[15] "Autoría en Derecho Penal", *Guías Jurídicas Wolters Kluwe*r. Retrieved from: https://guiasjuridicas.wolterskluwer.es/Content/Documento.aspx?params=H4sIAAAAAAAEAMtMSbF1jTAAAUNDM3NTtbLUouLM_DxbIwMDCwNzAwuQQGZapUt-ckhlQaptWmJOcSoATHU2WTUAAAA=WKE (accessed on 28 May 2021).
[16] RODRÍGUEZ VÁZQUEZ, V., "La coautoría con imprudencia desde la teoría de la determinación objetiva y positiva del hecho. Una interpretación del papel del acuerdo para reforzar el carácter objetivo de la teoría", *Anuario da Facultade de Dereito da Universidade da Coruña*, no.23, 2019, pp. 373-410.

This means that whoever acts recklessly cannot expect the others to act diligently. Therefore, this individual has to take into account that the others may also act in a reckless way, so that both conducts concur in the production of the result.[17] Consequently, that first individual must also be considered liable for a result that they have contributed to produce not only because of their reckless action but also because they could have foreseen a result that would come with the addition of more reckless acts.

Taking all this into account, we conclude that both Iago and doctor Fiaño are accessory perpetrators of the crime of non-intentional abortion, Iago being the first reckless perpetrator who, together with the subsequent reckless conduct of doctor Fiaño, produced the result of the death of the foetus. Moreover, there is no record of any agreement between them, so that this mode of perpetration is, taking into account the circumstances and its applicability to the case, the appropriate one for the facts.

As for the sentence related to this crime, Article 146 CP opens a range of two possibilities:

1. Sentence of imprisonment of three to five months.

2. Fine of six to ten months.

In addition, the sentence of special disqualification for profession or position for a period of one to three years is mandatory.

These sentences of imprisonment and fine are well known even among the lay population, but in order to characterize them slightly:

- The sentence of fine is defined by Article 50(1) CP as "a pecuniary penalty", where, in this case, we would follow a system of day-fine whose amount would range from 2 to 400 euros per day. Its main advantages are its gradual application, its easy reversibility in case of miscarriage of justice and its non-stigmatizing effects.[18]

- The prison sentence consists of deprivation of liberty, of continuous duration, carried out in a penitentiary establishment and under a certain regime of activities.

It is important to highlight that, taking into account the sentence to be imposed to the crime of non-intentional abortion, there is the possibility of suspension of the custodial sentence, since, in principle, the requirements of this suspension set forth in Article 80(2) CP are met:

1. First time offender.

2. That the prison sentence has a duration of less than 2 years.

[17] Ibid.

[18] JUDEL PRIETO, A., PIÑOL RODRÍGUEZ, J. R., 2020. *Manual de Derecho Penal. Tomo I. Parte General.* Cizur Menor, Ed. Aranzadi-Thomson Reuters.

3. That the civil liabilities arising are satisfied, something that will be developed later on.

Regarding the sentence of special disqualification that accompanies the crime of non-intentional abortion, Article 44 CP provides that the convicted person is deprived of the exercise of that profession during the time of the sentence. Article 56 CP regulates this penalty as an accessory sentence, however, here it is considered a principal penalty due to the direct relationship between the profession and the crime committed.

In addition, and unlike the other abortion crimes,[19] here the disqualification for profession is generic and not specific for health professions and the provision of services in clinical establishments. The reason for this is related to the case of the employer who causes the abortion of his employee due to unsafe working conditions. However, the natural field of application of this crime is in medical practice.[20] In any case, there must be a connection between the reckless action and the abortion result.

This sentence is aimed to prevent the repetition of the crime by the person who has already committed it, by carrying out professional tasks that may affect the same protected legal good.

Taking into account all of the above, the determination of the penalty would consist of the aforementioned special disqualification for profession, together with a sentence of imprisonment or fine. We are dealing with a crime of consummated non-intentional abortion, given that recklessness is incompatible with the degree of attempt (one cannot attempt a result that one does not intend to obtain) and the degree of participation would be in the condition of an accessory perpetrator, whose sentence does not vary from that of the basic modality. There is also no record of the concurrence of neither aggravating nor mitigating circumstances, nor the mixed circumstance of family bonds.

ii. Non-intentional assault (Article 152 CP).

Concerning the effects of the events on Elisa, we are dealing with a crime of non-intentional assault under Article 152 CP, which punishes injuries produced in the circumstances provided in Articles 147, 149 and 150 CP when these are committed through with recklessness.

The concept of injury is defined by the doctrine as the damage caused to the bodily integrity or to the physical or mental health of a person. The TS jurisprudence,[21] though, focuses only on physical integrity. Thus, it is currently recognized that the protected legal good in assault crimes is health, understood both in the physical and mental sphere.[22] In fact, Article 147(1)

[19] Articles 144, 145 and 145 bis CP.

[20] JUDEL PRIETO, A., PIÑOL RODRÍGUEZ, J. R., 2020. *Manual de Derecho Penal. Tomo I. Parte General.* Cizur Menor, Ed. Aranzadi-Thomson Reuters.

[21] STS of 9 June 1998.

[22] SERRANO GÓMEZ, A., SERRANO MAÍLLO, A., 2017. “Lesiones” (pp. 103-138), in *Curso de Derecho Penal. Parte especial.* Madrid, Ed. Dykinson.

CP itself recognises both physical and mental integrity of the passive subject of the crime.

The precept makes a differentiation between gross reckless assault and reckless assault. As it was done before in the crime of non-intentional abortion, taking into account the circumstances of the case, including the legal obligation of care and the role played by Iago and doctor Fiaño and the foreseeability of the facts, we are facing a case of gross reckless assault.

Regarding the participation in the crime, the situation is identical to that of the crime of non-intentional abortion, i.e. accessory perpetrator. The reckless actions of both physicians contributed in a fundamental way to the production of the result.

As for the applicability to the case of Article 152(1) CP, it is complicated to establish to which scenario the facts could be incorporated, since there is no indication of what type of injuries were produced to Elisa, only indicating that she reported the acts committed against her physical and psychological integrity. Therefore, it could be claimed that the injuries were those prohibited by Article 147, 149 or 150 CP. No clue is provided concerning whether the injuries caused by the abortion resulted in the sterility of the patient or whether they were limited to simple medical treatment.

In an attempt to be more specific, it would be appropriate to opt for the alternative of the basic type of assault of Article 147(1) CP. The reason for this decision consists in the corresponding treatment after an abortion and an allergic reaction, where not only a first medical assistance but also the follow-up of a medical treatment or even a surgical process are needed.

Medical treatment is understood as a system used to cure a disease or to try to reduce its consequences, if the disease is not curable.[23] Thus, the World Health Organization, through its essay *Medical treatment of abortion*, of 2019, indicated the need for medical treatment in order to achieve the patient's recovery. In addition, regarding the anaphylactic reaction suffered by the patient, the hyponatremia suffered requires a continuous treatment of different drugs and follow-up for her recovery.[24]

We cannot forget, in addition, the psychological injuries caused to Elisa by all the events that occurred. In fact, taking into account the magnitude of the case, she will most probably need to follow a psychological or psychiatric therapy treatment to try to overcome the events.

Taking all this into account, are dealing with a criminal offence of Article 152(1)(1º) CP, which is punished with a prison sentence of three to six months or a fine of six to eighteen months.

[23] LUZÓN CURESTA, J. M., LUZÓN CUESTA, A. and LUZÓN CUESTA, M., 2018. *Compendio de Derecho Penal. Parte especial*. Madrid, Ed. Dykinson.

[24] Goce Spasovski, et al., "Guía de práctica clínica sobre el diagnóstico y tratamiento de la hiponatremia", Nefrología*: publicación oficial de la Sociedad Española de Nefrología*, Vol. 31, no.4, 2017, pp. 357-460.

These two types of sentences are already known to us from the crime of non-intentional abortion, which will be important in matters relating to plurality of crimes.

In addition, it is essential to mention the last paragraph of Article 152(1) CP, which states:

> "If the injuries have been committed due to professional negligence, the sentence shall also include special disqualification for profession, trade or position for a period of six months to four years.".

As can be appreciated, the legislative body itself contains a specific provision for cases such as this one, where the reckless behaviour has been carried out by a professional. These professionals are required to take the greatest care in the exercise of their activity due to their capacity and experience.[25] As a consequence, a sentence of special disqualification for profession is imposed, a legal consequence that we already know.

In 2019, a modification of the legal statute was carried out, including Article 152 bis CP, that allowed Judges to aggravate, in a reasoned manner, the sentence by one degree if the facts are notoriously serious, taking into account the significance of the risk created and the duty of care infringed. This would only be the case if injuries banned by Article 152(1) CP (gross non-intentional assault) had been caused to a plurality of persons.

As in the facts the injuries were only caused to Elisa, this provision is not applicable.

Taking all of the above into account, we are facing a crime of reckless assault consummated (remembering the incompatibility between attempt and reckless liability), punished with a prison/fine sentence and special disqualification for profession. The criminal liability of the perpetrators is not modified by any circumstance and the degree of participation does not change the sentence.

iii. Plurality of crimes.

It is considered that there is a plurality of crimes when one act constitutes two or more crimes or when several acts perpetrated by the same individual constitute several crimes. Among the different types of plurality, the one applicable to the case would be ideal plurality, defined by Article 77 CP as: "a case where a single event constitutes two or more crimes".

In application to the case, a single act, the introduction of oxytocin into the patient's body, provoked two different crimes: the crime of non-intentional abortion and the crime of non-intentional assault. Although there were several administrations of oxytocin, they are condensed into a single manifestation of will, and therefore it is valid for this type of plurality.

[25] SERRANO GÓMEZ, A., SERRANO MAÍLLO, A., 2017. “Lesiones” (pp. 103-138), in *Curso de Derecho Penal. Parte especial.* Madrid, Ed. Dykinson.

In addition, the ideal plurality of the crimes of non-intentional abortion and assault has been confirmed by the jurisprudence of the TS in resolutions such as STS 3788/2018, of 14 November 2018, in resolution of the cassation appeal of SAP A Coruña 2339/2017, of 17 October 2017.

Thus, regarding the criminal treatment of the ideal plurality of crimes, Article 77(2) CP provides that "the upper half of the penalty foreseen for the most serious offense shall be applied, without exceeding the addition of the sentences that would be applicable if the offenses were punished separately.". Therefore, the punitive solution is that of absorption of the sentence corresponding to the less serious offense by the sentence to be imposed for the most serious offense.[26]

This causes a problem for the doctrine in defining what is the most serious offence, given that this is not easy to determine. The TS[27] highlighted on several occasions the need to determine the sentence for each crime separately in a concrete manner, and not in the abstract, taking that concrete perspective as the criterion to determine what crime or sentence constitutes the most serious infringement.[28]

The court must then decide on the sentence to be imposed for each specific offense and, once it has done so, apply the sentence of the most serious offense in its upper half.

b. Administrative approach: breach of legal duties and disciplinary regimes.

Administrative liability derives from the duty of the State to legally protect its citizens, acting through physicians in their consideration as public servants and sanctioning them when they fail to comply with their obligations.

The TS claims that in order to sentence the health professional it is necessary to prove their fault, that is, the breach or defective fulfilment of any of the medical duties contained in what is called *lex artis*. *Lex artis* is understood as the set of rules or principles that regulate the correct exercise of any profession.[29] In the medical sector, RODRÍGUEZ MOLINERO defines *lex artis* as a "generic directive rule of a technical nature in its application and of an ethical nature in its basis and execution, which modulates and conditions all medical action.”.[30] Furthermore, it is necessary to emphasize that the physician's obligation is based on activity, not on result, that is to say, they are not obliged to cure the patient but to act diligently in accordance with their scientific knowledge.[31]

[26] JUDEL PRIETO, A., PIÑOL RODRÍGUEZ, J. R., 2020. *Manual de Derecho Penal. Tomo I. Parte General.* Cizur Menor, Ed. Aranzadi-Thomson Reuters.
[27] STS of 4 October 1994; STS of 4 April 1995.
[28] JUDEL PRIETO, A., PIÑOL RODRÍGUEZ, J. R., 2020. *Manual de Derecho Penal. Tomo I. Parte General.* Cizur Menor, Ed. Aranzadi-Thomson Reuters.
[29] GIMÉNEZ CANDELA, T. “Lex Artis y responsabilidad médico-sanitaria”, *Revista Aranzadi de derecho patrimonial*, no.17, 2006, pp. 67-77.
[30] RODRÍGUEZ MOLINERO, M. “Perfil general del Derecho médico”, *Anuario de Filosofía del Derecho*, no.1, 1995, p. 45.
[31] STS of 13 July 1987.

Thus, in order for a medical professional to be liable, it is necessary for them to have performed some action or omission that constitutes a violation of the duties and obligations contained in medical protocols or rules. If there is no violation of the *lex artis*, no liability can be demanded.[32]

The obligations of the healthcare personnel whose violation produces administrative liability can be found in provisions such as Article 19 of Law 55/2003, of 16 December 2003, regulating the legal status of civil servants affiliated to public healthcare services. In application to the case, we should pay attention to both section b) - on the efficiency requirements and the technical and deontological principles to be observed in carrying out healthcare tasks - and section l) – on clinical records and documentation requirements – of this provision.

This first breach of these obligations would be caused by the failure of Fiaño to perform the caesarean procedure, being a necessary treatment, whilst the second infringement is based on the fact that Iago did not reflect in the clinical record all the activities he carried out. Concerning this absence in the clinical record of the monitoring of the entire medical procedure by Iago, according to Article 17(3) of Law 41/2002, of 14 November 2002, regulating the autonomy of the patient and the rights and duties regarding clinical information and records, the clinical record must reflect the most relevant data of the healthcare treatment. In other words, it is considered a legal obligation imposed on health professionals.

The clinical record must reflect all the patient's processes with the activity carried out in the hospital. Failure to comply with this legal obligation is considered "mala praxis", regardless of whether or not appropriate care was provided. In fact, Article 17(3) of Law 41/2002, provides that health professionals have the duty to cooperate in the maintenance of a sequential clinical documentation of the patient's care process. Consequently, Iago, from all these perspectives, had the obligation to write down in the clinical history all the actions he carried out.

Moreover, even assuming that Iago did not leave proof of absolutely none of the measures carried out on the patient, the case could not be excused on the basis of the principle of integrity of the clinical record proclaimed by law, since it would be absorbed by the principle of proportionality and limitation of objectives (Article 4(1) Law 3/2018, of 5 December 2018, and 8(4) Royal Decree 1720/2007), given that the data relating to the monitoring of the patient and the drugs administered are, without any doubt, pertinent and necessary.[33]

In addition, the general principles of Article 4(7)(a) of Law 44/2003, of 21 November 2003, regulating healthcare activities, provide that healthcare personnel must report their work in the clinical record of each patient they treat, a document to be shared with other professionals. In this case, since there was no clinical record completed by Iago, it could not be shared with doctor Fiaño, which constitutes an administrative offence/infringement.

[32] GARCÍA BLÁZQUEZ, M., CASTILLO CALVÍN, J. M., 2011. *Manual práctico de responsabilidad de la profesión médica (aspectos jurídicos y médico-forenses).* Granada, Ed. Comares.
[33] LOMAS HERNÁNDEZ, V., LARIOS RISCO, D., LÓPEZ DONAIRE, B., 2016. *Guía práctica de derechos de los pacientes y de los profesionales sanitarios*. Preguntas y respuestas. Cizur Menor, Ed. Aranzadi Thomson Reuters.

Another issue to be analysed in this case is Iago's status as a resident nurse. Although Article 20 (3) (d) of Law 44/2003 provides for the full integration of resident nurses in the ordinary functioning of the health centre, it establishes a progressive assumption of the functions and responsibilities and requires the constant monitoring of the healthcare intern.[34] Consequently, there is an obligation to tutor and supervise the resident healthcare professional in the actions they carry out, understanding that, although they may be held liable for their misconduct, the tutor or specialist supervising the actions of the resident healthcare professional should prevent that misconduct from taking place.[35] Therefore, it is considered that the health personnel who had the obligation to supervise Iago's actions, must be held liable. However, no information is given in the facts about the identification of Iago's tutor during his period of training as a resident.

Approaching the consequences derived from the administrative liability generated by the infringements to the legal obligations of Iago and doctor Fiaño, Law 44/2003 refers in its 8th Additional Provision to "civil, criminal, disciplinary, and deontological liability", introducing administrative liability in the sense of the last two mentioned, in relation to the administrative sanctioning regime for health professionals.[36]

The aforementioned Law 55/2003 contains different provisions related to the sanctioning procedure to be applied to healthcare professionals. It is essential to keep in mind that Article 71(2) of this Law states that disciplinary power will be exercised without prejudice to the patrimonial, civil or criminal liability that may arise from the corresponding infringements. Therefore, the criminal law analysis that has been carried out previously and the one that will be carried out later in the civil and patrimonial sphere are independent of the administrative one.

Chapter XII of this Law is devoted to the regulation of this disciplinary regime, where Article 72 classifies infringements as very serious, serious and non-serious.

Among the very serious offences, those included in paragraphs f) and h) of Article 72(2) of the Law may be applied to this case, since they punish the notorious failure of health personnel to perform their duties and the notorious lack of performance that entails inhibition in the performance of their duties, respectively.

Article 73 of the Law provides that very serious offences may be sanctioned with:

- Separation from service, which implies the loss of the status of statutory personnel. FERNÁNDEZ PANTOJA[37] points out that this sanction is harsher than the sentence of special disqualification for profession, something that was confirmed by the TS in 2007 (STS of 23 July 2007, REC. 3069/2004). This conclusion is reached in view of both the content of the

[34] GÓMEZ RIVERO, M. C., 2008. "Delitos contra la integridad física y vida (pp. 329-584)", in *La responsabilidad penal del médico*. Valencia, Ed. Tirant lo Blanch.

[35] MARCO ATIENZA, C. M., "La responsabilidad del personal sanitario en formación", *DS: Derecho y salud,* Vol. 29, no. Extra-1, 2019, pp. 220-231.

[36] GARCÍA BLÁZQUEZ, M., CASTILLO CALVÍN, J. M., 2011. *Manual práctico de responsabilidad de la profesión médica (aspectos jurídicos y médico-forenses)*. Granada, Ed. Comares.

[37] FERNÁNDEZ PANTOJA, P., 2009. "La inhabilitación especial como consecuencia jurídico penal derivada del ejercicio de la profesión médica" (pp. 241-272), in *Estudios jurídicos sobre responsabilidad penal, civil y administrativa del médico y otros agentes sanitarios*. Madrid, Ed. Dykinson.

sanction, which targets only to healthcare personnel who commit very serious offences, and its duration - 6 years from the date of the sanction.

- Forced transfer with change of locality, without the right to compensation and with temporary prohibition to participate in mobility procedures in order to return to the locality of origin.

- Suspension of functions between 2 and 6 years.

Article 73(3) of the Law establishes that the determination of the sanction will be made taking into account the degree of intentionality, carelessness and negligence of the conduct. In any case, Article 71(7) provides that there must be proportionality between the offence and the sanction, which compels to consider both the classification of Article 73 and that graduation relative to the circumstances of the conduct will lead to a balance in the punitive sense. In any case, the sanctions imposed on statutory personnel will be noted in their professional record, in accordance with Article 73(5) of the Law.

As this is a profession regulated by a professional college, the Medical Colleges themselves have their own disciplinary regime, which is also without prejudice to the responsibilities derived from other legal regimes. Since doctor Fiaño is a doctor in a hospital in A Coruña, she should be a member of the Medical College of A Coruña and, therefore, she should be subject to its disciplinary regime, which set out in Title XII of its Statutes. However, taking into account that the infractions are strictly regulated and that none of the facts of the case can be included in them, the only sanction she would receive would be due to her infringement of the Law 55/2003.

Regarding Iago, since he is a resident nurse practitioner, he is subject to the provisions of Royal Decree 1146/2006, of 6 October 2006, regulating internship and training of healthcare professionals. In this regulation the disciplinary regime is contained in Chapter III, where Article 13 classifies disciplinary breaches as non-serious, serious and very serious, with the same content as the classification made by the aforementioned Law 55/2003. The main difference with doctor Fiaño's disciplinary regime lies in the sanctions, because non-serious offences are punished with a warning, serious offences with suspension of employment and salary for up to 2 months and very serious offences with dismissal.

In any case, the behaviours of both professionals, despite being different, could fall under the same assumptions of Article 72(2) of Law 55/2003 f) and h) already mentioned. Taking into account that Iago did neither consulted the initial clinical diagnosis nor left a record in the clinical history of the entire procedure he supervised and carried out, in addition to doctor Fiaño's recklessness that caused the allergic reaction and the abortion, they were those behaviours and absence of due care what produced the results.

Thus, the actions of both health professionals should lead to administrative liability with its consequent sanctions, pursuing to the applicable disciplinary regime and based on the infringement of the duties and obligations that health professionals have as public employees at the service of the citizens.

II. Health personnel and SERGAS' civil and patrimonial liability: Analysis and procedure.

Medical-health liability claims have experienced a significant growth in recent decades, as consumers have become more and more aware of their rights. However, other factors determine as well this increase, such as the current dehumanization of the medical practice, the socialization of the profession, medical super-specialization and so on.

Regarding the claims for compensation that may arise after an event like the one analysed here, three different areas can be distinguished: the patrimonial liability of the Public Administration, the civil liability arising from the commission of a crime and the subsidiary liability of the Administration. These all types of liability differ in the procedure to be followed, in the jurisdictional order hearing the case, on whom the liability falls, etc.

a. Patrimonial liability of the Public Administration: Operation of the case and jurisprudential approach.

Spanish legislators decided to refer all claims for patrimonial liability of the Administration to the administrative jurisdiction, as stated in Article 2(e) of Law 29/1998, of 13 July 1998, regulating the administrative jurisdiction, which provides that this jurisdiction will hear "the patrimonial liability of the Public Administrations, whatever the nature of the activity or the type of relationship from which it derives, and they may not be sued for this reason before the civil or labour courts.". This principle is also regulated by Article 9(4) LOPJ. Even so, there is a whole process of unification of jurisdiction regarding the liability of the Administration, with previous case law in the four ordinary chambers of the TS on the matter.[38]

It can be stated that this type of liability is direct and objective. It is qualified as direct because it is the corresponding Administration who is liable to the injured party, rather than the civil servant who has caused the damage, a point that will be developed later on. It is understood to be objective because it dispenses with the idea of wrongfulness or fault, so that there would be an obligation to compensate even when there has not been a defective operation of the public health services.[39]

The regulation of the patrimonial liability of the Public Administrations is found in Chapter IV of Law 40/2015, of 1 October 2015, of legal regime of the state sector. This regulation prescribes that individuals have to be compensated by the Public Administration for the harms they may suffer in their property and rights as a consequence of the normal or abnormal operation of public services. If the events were to take place within the scope of a private health service, we would be dealing with a different legal regime.[40]

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[38] GALÁN CORTÉS, J. C., 2003. "Responsabilidad civil médica" (pp. 133-318), in *Cuadernos de derecho judicial*. Madrid, Ed. Consejo General del Poder Judicial.
[39] DOMÍNGUEZ LUELMO, A., 2007. *Derecho sanitario y responsabilidad médica*. Valladolid, Ed. Lex Nova.
[40] BUSTO LAGO, J. M., 2013. "La responsabilidad médica y hospitalaria" (pp. 297-327), in *Lecciones de responsabilidad civil*. Cizur Menor, Ed. Aranzadi-Thomson Reuters.

The normal or abnormal operation of public services is understood as any potentially damaging administrative action, so that the normality or abnormality of an administrative action is a factor of imputation of the damage to the Administration that caused it. In this case, we are we are dealing the abnormal functioning of the health service, more precisely professionals in the service of the Administration who carry out an unlawful conduct (qualification previously developed in the first section). In this sense, the TS has ruled on the limits and content of this type of healthcare activity.[41]

In any case, the Administration is liable for its civil servants, as stated in the aforementioned Chapter IV of Law 40/2015, of 1 October 2015. This principle is based on the fact that the professional is not acting at any time for his own interests, but pursuing the general interests served by the Administration. In addition, Article 36 of the Law establishes that the Administration, once it has compensated the injured parties, shall hold[42] the personnel in its service liable for their misconduct, which is known as "action of reimbursement". In this way, whoever compensates Elisa will later demand liability from Iago and doctor Fiaño. In order for this to occur, in accordance with the same legal provision, the harmful result, the degree of culpability, the professional liability and its relation to the production of the damage will be weighed.

It is not superfluous to confirm that both Iago and doctor Fiaño are considered civil servants and are therefore susceptible to carry out acts that may result in this type of liability. In addition, in order to enforce this liability, Elisa will demand directly from SERGAS the compensation corresponding to the damages through the corresponding procedure regulated by Law 39/2015, of 1 October 2015, of common administrative procedure of the public administration.

For the damage produced to be valid to constitute liability, it is necessary, according to Article 32(2) of the Law, that it meets three requirements: to be effective, economically measurable and individualized in relation to a person or group of persons, an idea that has been supported by the case law of the TS on several occasions.[43] Only those injuries that the individual had no duty to bear, i.e., cases which the damage is unlawful, will be compensable.[44] In this case, we are dealing with an effective damage because Elisa suffered real and certain injuries, without speculation about its production. Furthermore, the damage is quantifiable. In principle, it might be thought that damages of a moral nature cannot be compensable, but the case law[45] has reiterated its admission despite its non-pecuniary nature.[46] Concerning the requirement of individualization of the damage, this does not pose any problem at all, since Elisa is the only person injured by the non-intentional assault and the abortion. Tomás, the father, might be eventually included as an injured party, taking into account that his legitimate expectations regarding the

[41] STS of 22 December 2006.

[42] In previous versions, prior to Law 4/1999, of 13 January 1999, which amended Law 30/1992, now repealed, this action of reimbursement was considered as an option and not as an obligation.

[43] STS of 2 February 1982.

[44] STS of 7 February 1981.

[45] STS of 30 June 2006.

[46] BELLO JANEIRO, D., 2009. "Responsabilidad de la Administración sanitaria" (pp. 115-294), in *Responsabilidad civil del médico y responsabilidad patrimonial de la Administración sanitaria*. Madrid, Ed. REUS.

pregnancy were frustrated. It would not be the first time that the case law[47] concludes that both parents are affected by problems in childbirth issues, although the main injured party is the mother.

A fundamental step in the analysis of the liability of the Administration is to verify that we are dealing with a case of release from liability. This release is regulated in Article 32(1) of the Law in cases of either force majeure[48] or the assumption of the risk due to a legal duty on the part of the victim.[49] Taking into account the facts of this case, none of the exonerating factors would be applicable.

Another of the fundamental pillars of this legal liability is the existence of a causal link between the administrative action and the damage.[50] This point has been reiterated by the case law of the TS, e.g. the decision STS of 4 November 2008, where the Court claims that the fact that a child was born with Down syndrome is not, by itself, attributable to the health administration that attended the mother during pregnancy and childbirth.[51] This manifestation of objective imputation of liability can be verified by analysing the facts: the reckless conduct of Iago and doctor Fiaño caused the results of injuries and abortion, so that there is a causal link between the action, this breach of the *lex artis*, and the damage produced.

Regarding the valuation of damages, the TS[52] has reiterated that there is a diversity of valuation regimes for the same damage by different Administrations, a system that is quite common in matters involving injuries or physical sequelae. Furthermore, Article 34(1) of Law 40/2015, of 1 October 2015, provides that damages derived from circumstances that could not have been foreseen or avoided according to the state of knowledge of science at the time of their production would not be compensable either. We would not be in this case either, since current medical and scientific knowledge does not excuse the reckless actions carried out by Iago and doctor Fiaño.

Pursuant to Article 34(2) of this Law compensation shall be calculated in accordance with the valuation parameters established in tax legislation, compulsory expropriation legislation, and other applicable regulations. In addition, in the case of bodily injury or death, as in the case of Elisa, the scales set out in the current legislation on compulsory insurance and Social Security may be taken as a reference. Regarding other damages, such as moral damages, due to their subjective component, the TS[53] claims that their valuation is reserved to the prudent discretion of the Courts and Judges, provided that the criteria of economic reparability of moral damages and reasonableness in their compensation are taken into account. This is

[47] STS of 28 November 2007.
[48] STS of 11 July 2006.
[49] STS of 10 May 2005.
[50] BELLO JANEIRO, D., 2009. "Responsabilidad de la Administración sanitaria" (pp. 115-294), in *Responsabilidad civil del médico y responsabilidad patrimonial de la Administración sanitaria*. Madrid, Ed. REUS.
[51] However, in this case, the Administration was held liable for not having carried out the early detection tests for the pathology in order to be able to decide whether to legally terminate the pregnancy, which led to compensation for moral damages.
[52] STS of 26 March 1997.
[53] STS of 9 October 2001, STS 25 September 2001.

important because the injuries caused to Elisa did not only affect her bodily integrity, but also her psychological wellbeing.

Concerning the time of the valuation of the compensation, Article 34(3) of the said Law establishes that the compensation will be calculated taking as a reference the day in which the injury occurred and may be updated to the date on which the liability proceedings are finalized. In this sense, the TS[54] concluded that in the case of e.g. a compensation derived from traffic accidents, the amount of the compensation would be determined at the moment in which the definitive medical discharge of the injured party takes place, since the situation could eventually turn worse.

The claim procedure, regulated by Law 39/2015, is divided into two phases: the administrative proceeding and, when it does not succeed, the judicial procedure via the administrative jurisdictional order, which may be initiated at the request of a party or ex officio.[55] Regarding the term for filing the claim, Article 67(1) of the Law 39/2015 prescribes that this term is counted from the determination of the extent of the sequelae or the healing, in this case, of Elisa's injuries.

i. The operation and viability of the SERGAS civil liability insurance.

   The possibility that the healthcare Administration, in this case SERGAS, has contracted civil liability insurance is implicitly recognized in several provisions of Law 9/2017, of 8 November 2017, of contracts of the state sector and in Article 3(2) of Royal Decree 1098/2001, of 12 October 2001, General Regulation of the Law of contracts of Public Administrations. Consequently, the insurance company may be sued through the civil jurisdictional order, but only if this is done exclusively and not together with the Administration, as regulated in Article 76 of Law 50/1980, of 8 October 1980, of Insurance contracts.

   However, ROMERO REY[56] states that when the injured party sues both the Administration and the insurance company by virtue of this Article 76 of the Law, the administrative jurisdictional order is competent to hear the case. This same jurisdictional order will also hear claims that are directed exclusively to the Administration, as has already been explored previously.

   In fact, the general rule is that in claims against the Health Administration the existence of insurance is not taken into account and the insurance company and the Administration are not sued jointly, nor is the insurance company sued exclusively.[57] It should be borne in mind, though, that the SERGAS would always have the opportunity to directly seek compensation for the consequences of the damage. The reason for taking out civil liability insurance is not, in any way, for reasons of solvency, since this is guaranteed by state funds.

[54] STS 17 April 2007.

[55] MORENO BODES, M. "La responsabilidad patrimonial de la Administración Pública, especial mención al ámbito sanitario", *Cadernos de Dereito Actual*, no.9, 2018, pp. 61-85.

[56] ROMERO REY, C. "Modificaciones en la Ley de la Jurisdicción Contencioso-Administrativa introducidas por la LO 19/2003, de 23 de diciembre", *Actualidad Administrativa*, no.6, 2006, pp. 645-656.

[57] DOMÍNGUEZ LUELMO, A., 2007. *Derecho sanitario y responsabilidad médica*. Valladolid, Ed. Lex Nova.

According to GRIJALBA LÓPEZ,[58] the reasons why a Public Administration may take out insurance are the following:

- Its attitude before the risk, since it is preferable to pay a premium (*prima del seguro*) than to face an uncertain risk.

- For budgetary stability reasons, since paying the insurance premium avoids surprises of financial imbalances. It is better to pay a fixed amount and thus reflect it in the budget than to be faced with cost overruns every time there is a problem

- Because we are dealing with a public service sector in which – like in similar public services involving e.g. road construction, water supply, etc. - it is "usual" to cause damages.

Article 73 of Law 50/1980, of 8 October 1980, defines civil liability insurance as that in which "the insurer undertakes [...] to cover the risk of the insured becoming liable to indemnify a third party for damages caused by an event provided for in the contract for the consequences of which the insured is civilly responsible". Therefore, the insurance company is liable to pay the compensation that SERGAS will have to pay to Elisa for the actions of Iago and doctor Fiaño.

ATIENZA NAVARRO[59] affirm that the insurer is not a subject that has incurred in the production of the damage, but that it is obliged to pay the victim, in this case Elisa, the compensation for the damages produced by an event for which the insured is civilly liable.

Civil liability insurance contracts for the Administration do not differ greatly from those of a generic civil liability insurance, but they do have some special features, such as the fact that the contract is made under "tender documents" that the Administration itself draws up.[60] The policyholder (*tomador del seguro*) of the insurance is SERGAS itself, and as insured parties are both the organization and the civil servants in its service, to which Iago and doctor Fiaño are affiliated.

Concerning procedural matters, the insurance company would intervene through a Commission for Monitoring (*Comisión de Seguimiento*) the administrative file, made up of personnel from the Administration and from the company itself, in the first phase of the procedure, which would be responsible for assessing the circumstances of each claim and deciding whether or not to reach an out-of-court settlement.[61]

Regarding the obligation to have insurance at an individual level, if we understand that Iago and doctor Fiaño work only in the public sector, they would be included, as has already been developed, in the SERGAS's own insurance.

[58] GRIJALBA LÓPEZ, J. C., "La compañía aseguradora en el procedimiento de responsabilidad patrimonial", *DS: Derecho y salud*, Vol. 21, no. Extra-1, 2011, pp. 153-166.
[59] ATIENZA NAVARRO, M. L. "La responsabilidad patrimonial de las Administraciones Públicas y la jurisdicción civil", *Actualidad Civil*, no. 28, 2000, pp. 1017-1037.
[60] The insurer can introduce modifications, known as "variations" to these tender documents, if the Administration so permits, which is not usually the case.
[61] ARQUILLO COLET, B. "Seguro y responsabilidad patrimonial de la Administración Pública Sanitaria", *Indret: Revista para el Análisis del Derecho*, no. 1, 2004.

On the other hand, if they provide their services in other private health centres, they must have civil liability insurance to cover the damages they may cause in their professional field, in accordance with Article 4(8)(e) of Law 44/2003, of 21 November 2003. As nothing is provided about it in the facts, it is presumed that they perform their professional activity only in the public sphere, which does not exclude the possibility that they may take out their own individual liability insurance.

As Iago and doctor Fiaño work in the public sector, their situation would be subject to the provisions of Royal Decree 29/2000, of 14 January 2000, on new management arrangements of the National Health Institute. Article 36 of this regulation disposes that personnel working in public health services will be covered for professional liability arising from unintentional damage caused to third parties. The health centre or the National Health Institute will subscribe the corresponding civil liability policy.[62] Therefore, the SERGAS is obliged to have contracted this civil liability insurance that covers the actions of Iago and doctor Fiaño, due to their condition as workers. The insurance company, as a general rule, will assume the legal management of the case and will face the defence costs, including legal advice as well as representation and defence in court.

b. Civil liability arising from a crime and subsidiary civil liability.

The liability arising from a criminal offense, or *ex delicto* liability, can be defined as the obligation to return the property or compensate for the damages that the conduct may have caused. In this way, it consists of the compensation that Elisa is entitled to receive for the damages suffered as a victim of a crime, since there is no restitutable property.

Its civil nature is mainly reflected in Article 1092 CC, which provides that "Civil obligations arising from crimes or offenses shall be governed by the provisions of the Criminal Code". Therefore, the regulation in the criminal field can be found in Title V of the CP and in Articles 106 to 117 of the LECrim.

In addition, Article 116 of the CP prescribes that whoever is criminally liable for a crime will also be civilly liable if damages or losses are derived from the fact. In this way, Elisa can demand civil liability for the criminal conduct that was carried out against her because of the damage derived from it.

In addition, the same provision establishes that if there are two or more persons responsible for the crime, the Judge or Court will determine the amount to be paid by each one. In this case, though, as has been already mentioned, it will not be Iago and doctor Fiaño who will pay the compensation.

From this perspective, it could also be considered that Tomás, as father of the dead baby and partner of the victim, Elisa, could be the beneficiary of the compensation, according to Article 113 of the CP.

Article 37 of Law 40/2015 provides that the criminal liability in the service of the Public Administrations, as well as the civil liability arising from the crime

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[62] BUSTO LAGO, J. M., 2013. "La responsabilidad médica y hospitalaria" (pp. 297-327), in *Lecciones de responsabilidad civil*. Cizur Menor, Ed. Aranzadi-Thomson Reuters.

committed, will be demanded according to the corresponding legislation. This claim, in principle, will not suspend the proceedings for recognition of patrimonial liability, so that Elisa could go to the administrative proceedings for patrimonial liability even if the criminal proceedings have not been completed.[63]

The TS stated in its STS of 3 June 1985:

> "The patrimonial liability of the State, which is a consequence of the operation of public services, cannot be confused with the compensation for damages suffered by a person for the commission of a criminal conduct, since in this case the compensation falls on the person criminally responsible and not on the whole community".

Here a differentiation is made between two of the types of liability analysed in this section, where the fundamental distinction lies in who has to be held liable.

Moreover, from the case derives an *ex delicto* liability, rather than a non-contractual liability because the damage caused has a criminal qualification, and not only a civil one. In fact, SERRANO PÉREZ[64] states that, in practice, the civil liability deriving from a crime does not work as a type of non-contractual liability, but rather has a quite autonomous character.

The civil action can be brought jointly with the criminal action, according to Article 112 of the LECrim, although it can also be reserved to be exercised at another time before the civil jurisdiction or even waived (Article 107). Thus, Elisa would have these three options to claim the civil liability arising from the crime through the corresponding proceedings.

In matters of medical liability, together with the economic damages, it is frequent that the victim suffers moral damages as well as damages affecting their physical integrity and health - as in this case - which are very difficult to value and repair. The amount of the compensation will be established by the Court or Judge, where parameters such as the evolution of the injury, suffering, the sequels or the degree of limitation produced by the injuries will be evaluated.

It is essential, for this case, to bear in mind that Article 117 CP establishes that insurance companies may be liable for the compensation corresponding to the civil liability derived from a crime when it has been agreed.[65] Then, it would be necessary to know what is included in the policy of the contract signed by SERGAS, but the general rule in this type of insurance contracts with Public Administrations is that the civil liability insurance covers the civil liability derived from crimes.

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[63] In this sense, Article 121 CP disposes that "without prejudice to the patrimonial liability derived from the normal or abnormal operation of such services, which is enforceable in accordance with the rules of administrative procedure".

[64] SERRANO PÉREZ, I. "La responsabilidad civil derivada de la infracción penal. El valor económico del resarcimiento de la víctima", 2019 [Online]. Fundación Internacional de Ciencias Penales. Retrieved from: https://ficp.es/wp-content/uploads/2016/11/Serrano-Pérez-La-responsabilidad-civil-derivada-de-la-infracción-penal.pdf

[65] HERRERA CAMPOS, R., 2009. "Las condiciones de la acción de indemnización de daños y perjuicios" (pp. 487-519), in *Estudios jurídicos sobre responsabilidad penal, civil y administrativa del médico y otros agentes sanitarios*. Madrid, Ed. Dykinson.

c. Subsidiary liability of the Administration

In any case, it is very important to emphasize that there is the possibility, according to article 121 CP, to ask for the subsidiary civil liability *ex delicto* to the Administration, as long as we are dealing with a crime perpetrated by public servants while developing their functions. Therefore, Elisa may sue SERGAS demanding this type of liability for the criminal action of its workers, having in mind the duplicity of the compensation.

Case law[66] has recalled the compatibility of both liabilities (civil liability *ex delicto* and subsidiary civil liability of the Administration), understanding that they have a different nature. This does not exclude the impossibility of demanding the liability of the Administration together with the criminal action, which can occur with civil liability.[67]

Consequently, if the policy does not state otherwise, it is the SERGAS insurance company who is responsible for paying Elisa the civil liability compensation derived from the crimes of non-intentional abortion and non-intentional assault carried out by Iago and doctor Fiaño, as well as the subsidiary civil liability on the same grounds.

III. Jurisdictional competence of the facts: international approach.

As a starting point, Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, to which Spain is subject, should be taken as a reference. Its Article 7(2) establishes that in tort, delict or quasi-delict matters, the action should be brought before the courts of the place where the harmful event occurred.

The problem arises when this Regulation does not provide any definition of quasi-delict. The Court of Justice of the European Union[68] has stated on several occasions that quasi-delict matters should be understood as non-contractual matters, of a residual nature for what does not fall within contractual matters, in relation to claims where liability is demanded from a defendant. In this way, CEBRIÁN SALVAT[69] contends that issues relating to liabilities arising from crimes must be demanded in the courts where the crime took place, i.e. in this case, A Coruña.

a. Jurisdiction over crimes.

The application of the aforementioned can be observed in precepts such as Article 23(1) LOPJ, which provides for the jurisdictional operation of the criminal order as follows:

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[66] STS of 11 March 1996.

[67] CÀMARA MAS, R. “La responsabilidad civil *ex delicto* derivada del art. 121 del Código Penal y la responsabilidad patrimonial de las Administraciones Públicas. Breve aproximación jurisprudencial”, Revista de Derecho UNED, no. 9, 2011, pp. 61-82.

[68] SSTJUE of 27 September 1988, of 17 September 2002, of 18 July 2013.

[69] CEBRIÁN SALVAT, M. A. “Estrategia procesal y litigación internacional en la Unión Europea: distinción entre materia contractual y extracontractual”, *Cuadernos de derecho transnacional*, Vol. 6, no. 2, 2014, pp. 315-329.

> "In the criminal order, it will correspond to Spanish jurisdiction to hear cases for crimes committed in Spanish territory or committed on board of Spanish ships or aircrafts, without prejudice to the provisions of international treaties to which Spain is a party."

Several different perspectives arise from this, corresponding to the principles of territoriality, flag and primacy of the provisions of international law over domestic law, which is recognized in the Spanish Constitution (Article 96(1) SC). Regarding the territorial approach,[70] the Article provides that the Spanish courts will be competent to judge the crimes committed in Spanish territory. In application to the case, as the facts took place in A Coruña, Spanish courts are competent to judge this case.

This same idea is also supported by the LECrim in Article 10, where it establishes that the ordinary jurisdiction will be responsible for hearing criminal cases. Thus, criminal cases are to be heard by the ordinary Spanish courts.

The flag principle is not applicable in this case, taking into account that there is no intervention by any vessel or aircraft. The principle of primacy of international regulations, in turn, has a very well established jurisprudential and doctrinal background in our legal system and does not pose, in this case, any problems.

Concerning the specific Spanish court that will hear the case, it will be the Investigative Court in accordance with Article 87(1)(a) LOPJ, while prosecution will be handled by the Criminal Court, according to the jurisdiction provisions of Article 89 bis(2) LOPJ. The basis for this reasoning is that the crimes of non-intentional abortion and non-intentional assault are not punished with custodial sentences of more than five years, so that they do not fall within the competences assumed by the Provincial Court, which could be the only other jurisdictional body that raised doubts about the case.

The facts under study do not fall within the exclusive jurisdiction of a specialised court, such as the Court of Violence Against Women or the Juvenile Court. The participation of the Jury Court is also excluded.

From this point on, in the territorial jurisdiction, the *forum commissi delicti* rule is followed, that is to say, the court of the place where the criminal act took place will hear the case. Therefore, in the criminal sphere, the Investigative Court (no. 1-8) of the judicial district of A Coruña will be in charge of the investigation of the case. The prosecution will be carried out by the Criminal Court of A Coruña (no. 1-6), in the same line. All of them are located in Monforte street.

Should Elisa aim to appeal the case, this appeal would be heard by sections no. 1 or 2 of the Provincial Court of A Coruña, located in Cigarreras street, in accordance with its jurisdiction recognized by Article 82(1)(2º) LOPJ.

b. Jurisdiction over civil liability derived from a crime and civil subsidiary liability of the Administration.

[70] CHOZAS ALONSO, J. M., ÁLVAREZ DE NEYRA KAPPLER, S. I., 2015. *Los sujetos protagonistas del proceso penal.* Madrid, Ed. Dykinson.

Regarding the international perspective of jurisdiction, it should be noted that the basis of the liability arising from the crime follows the principle of territoriality proper to the criminal order,[71] that was pointed out above. This principle rules as well the case focusing on the subsidiary civil liability of the Administration, since, as in the case of *ex delicto* liability, it derives from the commission of a crime. Therefore, the doctrine, although not unanimously, concludes that the courts of the place where the criminal event took place will hear the case, in application of the provisions of the European Regulation.

From now, in the event that Elisa decides to exercise the civil action together with the criminal action, the criminal jurisdiction will be competent to hear the case and decide on the civil *ex delicto* and subsidiary civil liabilities of the Administration. In this case, the competent judicial body is the Criminal Court of A Coruña.

In this sense, therefore, SURROCA COSTA[72] claimed that when the crime is committed by a public servant, it is the criminal jurisdiction who will hear not only about the criminal liability of the employee, logically, but also about the subsidiary civil liability of the Administration.

This conclusion is based on Article 109 CP, which allows claimants to reserve the civil action and execute it independently before the civil jurisdiction, so that the competence of the criminal jurisdiction is presumed for the joint actions when this reservation does not take place.

On the other hand, if Elisa decides to reserve the civil action to ask for civil liability *ex delicto* and to exercise it independently, she may do so before the civil jurisdiction, in accordance with Article 109(2) CP. In this case, the First Instance Court of A Coruña (no. 1-14) would have jurisdiction, in accordance with Article 85 LOPJ.

In the same sense, the appeal against the sentence issued by the First Instance Court of A Coruña would be heard by sections 3, 4 or 5 of the Provincial Court of A Coruña, according to Article 82(2)(1º) LOPJ.

The problem arises when it is decided to reserve the civil action for a time after the end of the criminal proceeding, since there is a doctrinal dispute as to whether the civil or the administrative jurisdiction should hear the subsidiary civil liability of the Administration.

If we take as a reference the wording of Article 109(2) CP, there is a clear referral of the cases to the civil jurisdictional order, since the possibility of competence of the administrative jurisdiction is not foreseen.

In any case, it can be seen that the legislator wishes to attribute to the administrative jurisdiction the exclusive competence to hear the civil liability of the Administration, with the exception of those cases in which the liability derives from

[71] SEUBA TORREBLANCA, J. C., "Derecho de daños y Derecho internacional privado: algunas cuestiones sobre la legislación aplicable y la Propuesta de Reglamento 'Roma II'", *Indret: Revista para el Análisis del Derecho*, no. 1, 2005.

[72] SURROCA COSTA, A. "La responsabilidad civil subsidiaria de las Administraciones Públicas" *Anuario de Derecho Civil* (University of Girona), Vol. 69, no. 1, 2016, pp. 100-151.

the commission of a criminal offense, as specified in the Explanatory Memorandum of Law 29/1998, of 13 June 1998, regulating the administrative jurisdiction.

However, in view of the foregoing, if Elisa reserves the civil action to be brought at a later date, it will be the civil courts that will be competent to hear the civil liability *ex delicto* and the subsidiary liability of the Administration.

In case Elisa decides to waive the civil liability action, there would be no alternative.

c. Jurisdiction over patrimonial liability of the Public Administration.

Here we are dealing with a type of liability not derived from the commission of a crime, but due to a conflict with respect to the functioning of the Public Administration, so what is recognized in the other two areas would not apply, since this is an independent action.

Article 24 LOPJ makes it very clear how international jurisdictional competence works in this field:

> "In the administrative order, the Spanish jurisdiction will be competent, in any case, when the claim that is deduced refers to provisions of a general nature or to acts of the Spanish Public Administrations. Likewise, it will also hear those claims that are brought in relation to acts of the Spanish public authorities, in accordance with the provisions of the laws".

From here we derive a fundamental idea, i.e. whenever the case is about a claim against a Spanish Public Administration, it will be the Spanish courts, specifically the administrative order, who will have jurisdiction.

This makes sense if we take into account that the Italian courts would not know the functioning and regulations of the Galician health services, apart from the fact that a Spanish Public Administration is organized according to Spanish regulations.

On the other hand, and once within the national scope, Article 2(e) of Law 29/1998 provides that it will be precisely the administrative jurisdiction who will have jurisdiction to hear matters relating to the patrimonial liability of the Public Administrations, regardless of the nature of the activity.

In fact, this same precept includes the impossibility of the civil or labour jurisdictional order to hear the case, which is not a problem because in this case the civil jurisdictional order would hear the subsidiary civil liability of the Administration, not the patrimonial liability of the same.

In addition, the competence of the administrative jurisdiction is determined even when in the production of the damage there is the existence of a liability insurance, as is the case. However, if any controversy arises between Elisa and the insurance company regarding the obligation to compensate the damage caused by the workers of the Administration, the civil jurisdiction will be competent, without prior administrative proceedings or the possibility of appealing before the administrative

jurisdiction, since the Public Administration would cease to be a party and the conflict would be between Elisa and the insurance company.[73]

In this case, the Administrative Court of A Coruña (no. 1-4), located in Capitán Juan Varela street, would be competent to hear the SERGAS's liability.

IV. Legal actions regarding the irregularity of a nursing apprentice contract.

a. General overview

According to Article 3(1) of Law 44/2003, of 21 November 2003, resident nurses are those who, in order to obtain the title of specialist nurse, stay in accredited teaching units for a limited period of time aimed to tutored professional practice, with the aim of acquiring the knowledge and skills of the corresponding speciality.[74] The only way for a nurse to be in public training for their specialization is through the residency, which is the case of Iago Rouco.

In this sense, the First Additional Provision (*Disposición Adicional Primera*) of the same law, regarding the special relationship of residency, provides that residents will be considered as temporary labour personnel of the health service. Two types of contracts are derived from the facts: an interim contract and a residency contract as a nurse.

The First Additional Provision of Royal Decree 488/1998, of 27 March 1998, developing Article 11 of the ET regarding Training Contracts, provides that contracts for internships and specialized health training will be governed by Royal Decree 1146/2006, of 6 October 2006, regulating internship and training of healthcare professionals.

All this is derived from a series of special relationships included in Article 2(1) of the ET, where a set of cases are grouped together whose common factor lies in the fact that they are subject to a special regime different from that applicable to the general employment contracts. This special character is due both to the singularity of the scope of the work, the object of the contract and to other motives, such as historical or social policy reasons.[75]

The TS[76] has determined some of the limits of this special employment relationship on several occasions, stating, for example, that no three-year bonuses are accrued in the special employment relationship of residency for the training of specialists in health services, since the specific regulations have a special remuneration system in which seniority is only contemplated in relation to the experience that the training process provides the resident, which leads to the inapplicability of Article 15(6) of the ET.[77]

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[73] GÓME LIGÜERRE, C. I. "Jurisdicción competente en pleitos de responsabilidad civil extracontractual", *Indret: Revista para el Análisis del Derecho*, no.2, 2001.
[74] PÉREZ GÁLVEZ, J. F., 2006. *Régimen jurídico de las especialidades en enfermería*. Granada, Ed. Comares.
[75] CRUZ VILLALÓN, J. C., et al., 2016. *Comentarios al Estatuto de los Trabajadores.* Cizur Menor, Ed. Aranzadi-Thomson Reuters.
[76] STS of 26 October 2010.
[77] CRISTÓBAL VILLANUEVA, J. M., 2019. *Estatuto de los Trabajadores: Comentado, con jurisprudencia sistematizada y concordancias*. Madrid, Ed. Lefebvre.

On the other hand, interim contracts are also of a temporary nature and are recognized by the ET in its Article 15(1)(c). In addition, they are more specifically developed in Royal Decree 2720/1998, of 18 December 1998, which develops Article 15 of the ET regarding fixed-term contracts.

The facts of the case indicate that irregularities took place in the substitution contracts denounced by the UGT for the infringement of the contractual regulation through an employment agency during holiday period in order to fill licensed health job vacancies, which has occurred in centres such as the Valencian hospital La Fe.[78] On the other hand, the issue raised is related to irregularities in the residency contract of the nurse Iago Rouco.

It is essential to understand that Iago could not, legally, have an residency contract and an interim contract at the same time, according to Article 20(3)(a) of Law 44/2003, which states that residents will carry out the training program of the specialty on a full-time basis. This means that residency training will be incompatible with any other professional activity. Thus, Iago could not work as a resident nurse and at the same time as a substitute nurse, since, in addition, health centres can only use the role of the resident to fulfil the purposes for which it was intended and not to meet ordinary care needs.[79]

From here a range of possible irregularities can be opened, such as that Iago was working as a substitute nurse with a residency contract or that Iago's residency contract was processed as an interim one. Nevertheless, it is not specified what the problem is with the residency contract, only that within the investigation of the conflict with the UGT of interim contracts Iago's contract was involved.

Therefore, given this complex scenario, it is presumed that Iago did not sign an interim contract and a residency contract, since the answer would be given by a disciplinary sanction. However, it is understood that Iago signed a residency contract as a resident nurse and that this was processed as if it were an interim contract, i.e., Iago may be performing his activity as if he is a substitute nurse and not as a resident nurse.

In view of the above, the main problem to be analysed will be the consideration of Iago as a substitute nurse when his contract was as a resident nurse, being able to perform functions that would not correspond to him due to his condition.

b. Fraud of Law

As a context, NICOLÁS BERNARD[80] stated that an irregularity consists of anything that implies a departure from the disciplinary rules of contracting contained in the ET and in the implementing regulations.

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[78] "UGT denuncia contratos 'irregulares' de sustitución en Enfermería del Hospital la Fe" (05/07/2017), *Valenciaplaza*. Retrieved from: https://valenciaplaza.com/ugt-denuncia-contratos-irregulares-de-sustitucion-en-enfermeria-del-hospital-la-fe.

[79] BAZ RODRÍGUEZ, J., 2008. *El contrato de trabajo de los residentes sanitarios: un estudio de la relación laboral especial de residencia para la formación de especialistas en Ciencias de la Salud*. Madrid, Ed. Dykinson.

[80] NICOLÁS BERNARD, J. A., 2009. *El fraude de ley en la contratación temporal y su incidencia en el contrato de trabajo para obra o servicio determinado*. Cizur Menor, Ed. Aranzadi-Thomson Reuters.

To the applicable situation, the irregularities that arise could give rise to fraud of law. This figure is recognized by Article 6(4) CC, which provides that "the acts performed under the protection of the text of a rule that pursue a result prohibited by the legal system, or contrary to it, shall be deemed to have been performed in fraud of law and shall not prevent the due application of the rule that had been sought to be circumvented". An act in fraud of law is an attack against legal certainty (*seguridad jurídica*), enshrined in Article 9(1) CE.

Fraud of law occurs when an attempt is made to use the law in such a way as to obtain results not contemplated therein and contrary to the legal system, such as, for example, the use of temporary contracts to fill an indefinite vacancy or the use of a residency contract to carry out a substitution without an interim contract. In other words, we are talking about fraud of law when we refer to an action that is apparently regular but that evades the purpose of the rule on which it is based.[81]

In order for fraud of law to occur, the following elements must be present:

1. A fraudulent law.

2. A covering law with which the fraudulent action is intended to be legitimized.

3. A result, not being enough only with the intention, contrary to the legal system.

In application to the case, we have as a defrauded regulation the one related to interim contracts, as a covering law the provisions related to the residency contract with which it is intended that Iago works, in the eyes of the Administration, as a substitute nurse, and the result of having someone working with a contract that does not suit their situation.

Intentionality is not necessary within the fraud of law, since fraud and bad faith do not have to go together, according to the jurisprudence.[82] In other words, in order for the case to arise, it is not necessary for the entity to have processed the residency contract as a substitution contract with that aim.

Regarding the consequences of the fraud of law in the case, in accordance with the provisions of the aforementioned precept of the CC, the effect of an act that constitutes fraud of law will be the end of the protection that the covering rule provides to the act in order to subject it to the precepts of the defrauded law that it was intended to evade. In other words, the acts are subject to the regulatory regime that was intended to be avoided.

In this way, and avoiding the nullity of the contract as it had no unlawful cause, Iago's residency contract would be maintained and it would be processed and presented as such, disappearing this simulation of an interim contract that had

[81] VALENTÍN RUIZ, F. J., LÓPEZ HURTADO, M. "La contratación laboral temporal en las Administraciones Públicas", 2009. Retrieved fom: https://eprints.ucm.es/id/eprint/10221/1/Contratacion_laboral_temporal_administraciones_publicas.pdf.

[82] STSJ Canarias of 21 October 2004.

no basis. Then, Iago would go on to perform the activities corresponding to the contract that he himself signed as a resident nurse, without substituting any other professional.

The fact that, in the labour field, the fraud of law does not entail, in principle, the nullity of the contract, but the application of the circumvented rule, is based on the will to safeguard the rights and interests of the worker.

c. Legal actions against the hospital

Before starting their work activity, the resident must formalize in writing a contract with the entity that owns the teaching unit accredited to provide training, as indicated in the provisions of Chapter II of Royal Decree 1146//2006.[83]

Therefore, the employer is the health establishment where the teaching unit linked to the resident's position is located. Thus, it is the Las Flores hospital who appears as the employer in the contract, since it is the one to which Iago was linked as a nurse resident, being the establishment responsible for the management and processing of his contract.

For this fundamental reason, it is against Las Flores hospital that Iago's claim has to be directed.

Iago has different means through which to report the situation:

1. Anonymous communication: The Ministry of Labour and Social Economy offers what is known as the Mailbox of the Labour Inspection and Social Security (*Buzón de la Inspección de Trabajo y Seguridad Social*), where through the inclusion of the data of the labour infraction an anonymous communication is carried out. This procedure is performed through the Internet.

2.Formal report: The web platform of the Labour Inspection offers a procedure to report labour fraud through a formal report form. This possibility is included in Law 23/2015, of 21 July 2015, regulating Labour and Social Security Inspection System. In this case we are indeed dealing with a complaint that, according to Article 20(5) of the aforementioned law, cannot be anonymous. Thus, Iago would have to identify himself as the plaintiff, unlike the previous option.

This report can be filed in person, at the offices of the Labour and Social Security Inspectorate, through the Internet by the website of the Ministry of Labour and Social Economy, or by post, addressed to the corresponding office of the Provincial Labour and Social Security Inspectorate.

3. Jurisdictional means: Iago can report the situation before the Courts, where the labour jurisdictional order is competent, based on the provisions of Article 25(1º) LOPJ.

[83] PALOMINO SAURINA, P. "Regulación jurídica de la relación laboral de especialistas en Ciencias de la Salud", *DS: Derecho y salud*, Vol. 18, no. 2, 2009, pp. 47-58.

According to Chapter I of Title V of Law 36/2011, of 10 October 2011, regulating labour jurisdiction, it is necessary to attempt conciliation prior to the processing of the judicial procedure before the corresponding administrative service through a conciliation paper. In application to the case, we are dealing with the Mediation, Arbitration and Conciliation Service of A Coruña.

According to Article 69(1) of the aforementioned law, it will be necessary to exhaust the administrative means prior to the judicial one, since the defendant is constituted by a public hospital. The rationale behind this idea, according to the TS,[84] is to facilitate the Administration's advance knowledge of the claim, in order to allow the chance of issuing a declaration of intent to avoid the judicial procedure.[85]

Once the conciliation act has been held, if no agreement is obtained, the complaint will be filed before the Court, following the provisions of the Second Book of the law. In accordance with Article 10 of the law, the Labour Court would have jurisdiction.

Taking into account all of the above, we find ourselves before a complicated scenario that allows Iago the possibility of claiming solutions for the irregular situation through several means, both in the judicial sphere and avoiding going to Court.

V. The scope of the conscientious objection clause in the healthcare field.

a. Shaping the conscientious objection from different approaches

The ability of a health professional of being able to deny a patient the realization of a medical practice or treatment brings the conscientious objection to the table, determined as specific manifestation of the relationship between Law and morals.

Freedom of thought, conscience and religion is included in normative bodies such as the CEDH in its Article 9, the DUDH in its Article 18 and the PIDCP in its Article 18. In particular, it is so advisable to keep in mind the Article 10(2) of the CADFUEur, where it is expressly recognised the conscientious objection, whose exercise will be regulated by the domestic law dispositions of EU member states. Following this line, inside the international field it is not contemplated a general right to conscientious objection, as well as it is carried out a remission to the *interpositio legislatoris* for producing effects.[86]

BARREIRO ORTEGA[87] affirmed that freedom of conscience means the faculty of acting according to the inside ruling regarding the goodness of an action; he therefore presupposes a translation of the thought field's beliefs at a practical level, as well as it occurs in this case concerning decision making. On the other

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[84] STC of 3 June 1997.

[85] CRISTÓBAL VILLANUEVA, J. M., FERNÁNDEZ-LOMANA GARCÍA, M., 2017. *Ley Reguladora de la Jurisdicción Social: Comentado, con jurisprudencia sistematizada y concordancia.* Madrid, Ed. Lefebvre.

[86] BRAVO ESCUDERO, E., 2011. "Objeción de conciencia y sanidad" (pp. 73-101), in *Objeción de conciencia y sanidad*. Granada, Ed. Comares.

[87] BARREIRO ORTEGA, A., 2019. "Libertad y objeción de conciencia en la Carta de derechos fundamentales de la Unión Europea" (pp. 23-45), in *El estado de derecho ante el cuestionamiento ideológico de las obligaciones jurídicas*. Valencia, Ed. Tirant lo Blanch.

hand, SÁNCHEZ CARO[88] claims that the conscientious objection consists in the refusal of a person, because of conscience reasons, to subdue himself to a behaviour that, at first, would be legally enforceable.

It is not necessary to resort to doctrinal sources in order to have a definition of conscientious objection in the health field that may be used as a base for the legal collective imaginary. With the enactment of the Organic Law 3/2021, of 24 March 2021, regulating euthanasia, in its Article 3(f) this notion was shaped as the health professional's individual right to not comply with those demands of medical attention regulated in that Law that seem incompatible with their own convictions.

Therefore, in this case we are dealing with the collision of a conscience norm and the legal duties of the health personnel assumed because of their labour condition, this is to say, a conflict between the ideological/religious refusal by doctor Fiaño to the realisation of a caesarean and her obligation of carrying out a necessary medical procedure to the patient[89].

In the same vein, the CBE understands that it must be found a balance between freedom and duties, stating that scarifying the objectors' conscience would be as inacceptable as not taking care of the interests protected by the norms leading the objection act[90].

In the Spanish case, the TS doctrine concludes that the Spanish constitutional order does not recognise the conscientious objection as a whole, but some manifestations of it, as in the case of objection to the military service or, like in this case, concerning medical interventions. Then, we would be dealing with what is known as a right with constitutional ground, which is to say, that it is not expressly acknowledged by the SC, but it is derived from another fundamental right. In that case, the notion will be kind of an autonomous right, which is not a fundamental one, with an exceptional nature[91] (as far as it supposes an exception to the compliance of a general obligation).[92] In this case, the right will finds its base in the right to ideological and religious freedom of Article 16 SC, something that was already pointed out by the TS decades ago[93].

In fact, the TS, in the decision STC 53/1985[94] reflected upon and recognised the conscientious objection in the following way:

> "Conscientious objection constitutes part of the content of the fundamental right to ideological and religious freedom recognised in Article 26(1) of the Constitution and, as it was pointed out by this Court on several occasions,

[88] SÁNCHEZ CARO, J. and ABELLÁN-GARCÍA SÁNCHEZ, F. "La objeción de conciencia sanitaria", *Revista de la Escuela de Medicina Legal*, no. 15, 2010, pp. 23-29.
[89] PÉREZ ÁLVAREZ, S., 2020. *Libertad de conciencia y diversidad en la sanidad púbica española contemporánea*. Valencia, Ed. Tirant lo Blanch.
[90] *Opinión del Comité de Bioética de España sobre la objeción de conciencia en Sanidad,* Spanish Bioethics Committee, Madrid, 2010, pp. 7 ff.
[91] STC of 27 October 1987, FJ 2 and 3.
[92] SÁNCHEZ CARO, J. and ABELLÁN-GARCÍA SÁNCHEZ, F. "La objeción de conciencia…".
[93] STC of 27 October 1987 and STC of 11 April 1985.
[94] See FJ 14.

> the Constitution is directly applicable, especially in matters of fundamental rights".

Going deeper into the circumstances of the case, it has to be underlined the content of Article 19 of Law 55/2003, regulating the legal status from civil servants affiliated to public healthcare that contains the general duties and obligations of the health personnel. The essence of this provision is based on that the health worker must carry out the tasks associated with their work position in an effective way and following the corresponding deontological and ethical principles. Taking this into account, it may be understood that the caesarean should have been carried out. However, there are more approaches that have to be taken into account, given that the analysed institution actually constitutes the *último reducto de defensa de la conciencia del profesional cuando es presionado a hacer algo que, en conciencia, no puede admitir como bueno,*[95] which is a manifestation of those deontological principles.

In any case, the conscience reasons cannot justify the professional inattention,[96] especially regarding an urgency case, like the case assessed here. This idea is supported by Article 34(4) of the CDM, which disposes that although the doctor abstains themselves from practising the objected action, they are compelled of taking care of the patient, even if that attention is directly linked to that action. This could lead us to the debate concerning if there was an inattention by doctor Fiaño or not. According to the facts, there is not any clue or indication of it. Therefore, we could conclude that a number of mistakes were made throughout the procedure, but there was not a professional inattention for conscience reasons.

Concerning the possibility of allegation of ideological issues to deny the practice of a medical treatment or procedure, it has to be taken into account the determination provided by Article 4(5) of Law 44/2003, of 21 November 2003, regulating healthcare activities, which establishes that the health personnel should act at the service of the citizen's health and complying with their deontological duties.

Once all these clarifications are done, we should take into account one of the most relevant legal frameworks in this case, i.e. the legal provisions contained in Chapter VI of the CDM, relating the institution of conscientious objection.

In fact, Article 32(1) of the CDM provides its own definition of this legal institution:

> "Conscientious objection is the doctor's refusal to submit, for ethical, moral or religious convictions, to a required conduct, either legally mandated by an authority or by an administrative decision, that seriously forces their conscience.".

As it can be appreciated, the introduction to the right is exclusively limited to the definition and the development of some approaches of the right, but these do

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[95] MUÑOZ PRIEGO, B. J. La objeción de conciencia. Retrieved from: https://www.bioeticacs.org/?dst=objecionConciencia#gsc.tab=0

[96] STSJ Madrid of 23 February 2000, FJ3.

neither provide limits in its exercise, nor a procedure to follow or enough development. The procedure regarding the application of conscientious objection is based on jurisprudence and doctrine that, at the end of the day, is not uniform[97] (concerning objector's labour advantages/disadvantages, the realisation of the objected action outside the health public system…).

b. <u>The allegation of conscientious objection applied to the case and its normative future</u>

SANTIAGO SÁEZ[98] stated that conscientious objection is generated from two main elements, i.e. a mandatory rule and a personal conscience judgment which is incompatible with that norm. Keeping this in mind, we actually appreciate a mandatory rule, that is, all the precepts aforementioned provisions derived from the health personnel's duty of carrying out their medical care actuations in an appropriate way. It can be contemplated, on the other hand, an ethical obstacle constituted by doctor Fiaño's belonging to a religious group, which is what prevented her from making the decision objectively.

In turn, the CBE adds two more requirements to exercise the right to conscientious objection in the health field, which are the absence of norms regulating the specific conflict between the obligation and the conscience, and the manifestation of the conflict's subject, resulting invalid the manifestations of collective objections. It can be appreciated that these both requisites are met in this case as the individuality element is highly supported by the doctrine[99] (it also constitutes a fundamental difference with the figure of civil disobedience).

Doctor Fiaño's acts, the conscientious objection procedure and its applicability to this case they brings us to the demand of a substitute professional to carrying out the objected treatment. This demand should be part of an eventual regulation, through ordinary law, of the conscientious objection in the health sphere, which is long advocated by the health community.[100]

That need is not especially novel, having as an antecedent the WMA Statement on Medically-Indicated Termination of Pregnancy, amended by the World Medical Association in 2018, whose point 6 disposes:

> "If the physician's convictions do not allow him or her to advise or perform an abortion, he or she may withdraw while ensuring the continuity of medical care by a qualified colleague".

[97] BELTRÁN AGUIRRE, J. L. "Las objeciones de conciencia en el ámbito sanitario: últimas aportaciones judiciales", *Revista Aranzadi Doctrinal*, no. 11, 2013, pp. 63-75.
[98] SANTIAGO SÁEZ, A. *Objeción de conciencia profesional* (2019). Retrieved from: https://www.ucm.es/data/cont/docs/1653-2019-04-27-107-2017-12-06-107-2015-03-23-S6%20A.pdf
[99] BÁTIZ CANTERA, J., et al., 2012. *Manual de ética y deontología médica*. Madrid, Ed. Organización Médica Colegial de España.
[100] MARTÍNEZ LEÓN, M. M. and RABADÁN JIMÉNEZ, J. "La objeción de conciencia de los profesionales sanitarios en la ética y deontología", *Cuadernos de bioética*, Vol. 21, no. 72, 2010, pp. 199-210.

The recognition of this concept by the Spanish legal system can be found in the practical consideration no. 3 of the 2009 *Declaration on conscientious objection,* [101] pointing that:

> "The objector physician shall inform the patient of their refusal to provide the service in question in a reasoned manner. In any case, they must address the patient to the professional or institution that will provide the requested attention".

The solution for this problematic would lie in guaranteeing, by the public health system, the assurance of enough personnel for carrying out the objected practice by other health worker. If this is not done, it is opening the possibility of committing a crime against patient's life or health for not being able of providing an alternative for executing a necessary treatment when there is a current conscientious objection.[102]

This is a key point for the solution of the case: we are dealing with a situation that could even be classified as *mala praxis*,[103] given that we are managing a breach of a medical guideline, as has been explored in the first section of this essay.

An additional point deriving from the aforementioned Statement is related to the duty of the doctor to communicate their objector condition to the head of the institution they work in, as regulated in Article 33(3) of the CDM. In any case, since the facts do not refer to this omission, we should presume doctor Fiaño actually communicated her objector condition. Likewise, the Spanish legal system recognises the supervening conscientious objection (Article 34(2) of the CDM).

Keeping all of this in mind, can doctor Fiaño allege ideological issues to deny a supposedly necessary medical procedure to a patient? The answer has to be negative. To evaluate this issue, it is necessary to remind two fundamental pillars:

1. Doctor Fiaño could allege conscientious objection to avoid practising the caesarean treatment, given that the requirements of this objection are met and there is a real conflict, because there is a collision between ideological grounds and an obligation imposed by a legal norm
2. It is not possible to justify a negligent behaviour through the conscientious objection, especially when the procedure for it (although it is not formally regulated) was not followed. This objection requires to ensure that the corresponding treatment is going to be realised by other health professional, who replaces by the principal doctor.

[101] See, e.g. the conclusions of General Assembly of the Spanish General Council of Colleges of Physicians, which was held on October 24th 2009.

[102] GÓMEZ RIVERO, M. C., 2008. "La objeción de conciencia como posible límite a la responsabilidad penal del médico por los delitos contra la libertad, vida e integridad física", (pp. 593-618), in *La responsabilidad penal del médico*. Valencia, Ed. Tirant lo Blanch.

[103] According to the Royal Spanish Academy, medical mala praxis is defined as "Profesional intervention which is negligent or breaches the applicable legal provisions and duties linked to a proffesion". Retrieved from: https://dpej.rae.es/lema/mala-praxis-médica

Additionally, GÓMEZ RIVERO[104] affirmed that one of the limits that entails the denial carrying out a treatment is when the objector's conscience imposition may constitute a crime against patient's life or health, as in this case.

Then, how should doctor Fiaño have acted for the conscientious objection clause to legally justify her behaviour?

When it appears the need of performing the caesarean, doctor Fiaño (because of supervening objection or because of being previously declared as an objector) decides not to carry out the procedure grounded on ideological reasons. In this scenario, she should have informed the patient and resorted to other professional to ensure the realisation of a treatment that the patient actually needs, thereby fulfilling her professional obligations.

Although a caesarean treatment did not guarantee the foetus survival (or an uninjured patient), especially when there was a risk of foetal distress and death even when performing the procedure, this does not exclude a negligent behaviour by doctor Fiaño. In fact, concerning the mentioned guarantee, the TS[105] affirmed:

> "The liability of the Health Administration does not derive simply from the production of the damage, and that the public medical services are only obliged to provide medical resources in the fight against the disease, but not to achieve in all cases a restorative purpose, which is in no case enforceable, since the contrary would turn the Health Administration into a kind of universal insurer against all sorts of diseases".

The CDM also acknowledges the science objection in its Article 33(2), where the refusal to carry out the medical action is caused by medical technical issues, that is, the doctor considers that the procedure is not effective enough for the patient's health.[106] The result is the similar to that of conscientious objection cases, i.e. not to execute the treatment, although in this case for medical reasons, instead of ethical and ideological reasons.

The main problem of conscientious objection in the health field is its absence of regulation. As there is not any normative body that develops the procedure that must be followed, there is no systematic and harmonized way of exercising this right. An eventual regulation should include, e.g. a list of motives to base the objection – since not all motives should be valid – as well as the mentioned practical guideline.[107]

In this regard, the CBE offers from 2011 a list of recommendations for the development of a conscientious objection regulation in the health field, which emphasises the need to underline the purely individual character of the legal

[104] GÓMEZ RIVERO, M. C., 2008. "La objeción de conciencia como posible límite a la responsabilidad penal del médico por los delitos contra la libertad, vida e integridad física", *La responsabilidad penal del médico*. Valencia, Ed. Tirant lo Blanch.
[105] STS of 10 November 2005 (R. 5445/2001).
[106] APARICIO ALDANA, R. K., 2017. *Derechos a la libertad ideológica, religiosa y de conciencia en las relaciones jurídico laborales.* Cizur Menor, Ed. Aranzadi.
[107] MARTÍNEZ URIONABARRENETXEA, K. "Medicina y objeción de conciencia", *Anales del sistema sanitario de Navarra*, Vol. 30, no. 2, 2007, pp. 215-223.

figure,[108] the particular features of which is objected, the reversibility of the objection, among other aspects.[109]

In fact, this idea was complemented and supported by the statement of the Deontology Commission of the Spanish General Council of Colleges of Physicians on Conscientious Objection in Medical Issues,[110] which recommends the creation of a confidential and voluntary procedure to inform of the objection.

Through the decades, conscientious objection in the health field has been focused on the spheres of the interruption of pregnancy,[111] assisted human reproduction techniques, euthanasia and the right to dignified death and even the pharmaceutic field. These areas have been object of legal and medical controversy for many years, which has affected the conscientious objection clause, raising a debate that is still unresolved nowadays. This conversation will continue unabated until it is carried out a development of that general regulation through ordinary law,[112] which is particularly necessary in the health field.

The bottom line of this issue has to do with the widely scrutinised, agonistic relationship between law and morals. The multi-faceted tension of the right to a health protection and the right to religious freedom leads us to a conflict whose solution has been debated for many years but is still unsolved. TS jurisprudence has stated several times that any person has limited rights in a system where the requirements of some rights set the boundaries of the exercise of other rights.[113] The decision of systematizing and developing a full regulation of the conscientious objection will always be the legislator's responsibility, who will have to consider if it is worthwhile for an increasingly critical society.

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[108] BÁTIZ CANTERA, J., et al., 2012. *Manual de ética y deontología médica*. Madrid, Ed. Organización Médica Colegial de España.
[109] *Opinión del Comité de Bioética de España sobre la objeción de conciencia en Sanidad,* Spanish Bioethics Committee, Madrid, 2011.
[110] This statement was passed in the General Assembly of the General Cuncil which was held on May 31st 1997.
[111] Article 19(2) of Organic Law 2/2010.
[112] Although the conscientious objection is based on the right to ideological freedom of Article 16 SC, the TS (STC 160/2007) has established that it is not a fundamental right, but one that is related to other fundamental right, since it does not constitute a direct development of the constitutional provision.
[113] OLLERO, A., 2013. *Religión, racionalidad y política*. Granada, Ed. Comares.

FINAL CONCLUSIONS

The case constitutes a complex scenario that is composed of several perspectives. Since health law is a branch of knowledge that shows itself through different legal conflicts, diverse fields can be differentiated from a single event.

First, it can be appreciated a Criminal Law assessment through the non-intentional abortion and non-intentional assault caused to Elisa, that had as a consequence sentences established by the CP. In addition, that issue can be interpreted as a breach of *lex artis*, form an Administrative Law approach. They will be the measures foreseen for that type of infringements in the correspondent disciplinary regimes what will punish Iago and doctor Fiaño for their actions.

From another perspective, the events derived in three additional sorts of liability, i.e. *ex delicto,* subsidiary and patrimonial liabilities. In order to ask for them, there are some requirements to be met, as long as not all the damages produced to Elisa can be compensated, and in these cases all harms must be analysed on a case-by-case basis.

It is fundamental to understand that the condition of civil servants of both Iago and doctor Fiaño changes exponentially the situation, since the patrimonial and subsidiary liabilities appear, and they both see their actions covered by someone else. In here, the existence of a civil liability insurance also plays a major role.

It has to be kept in mind that the facts, as they all belong to different legal fields, have to be heard by different jurisdictional orders. Then, each feature of the case must be analysed considering the relation between legal spheres or even situations that share the same jurisdictional assessment.

As it was reflected, from that single event many different perspectives arose. On the other hand, there were two additional facts that supposed a new whole conflict, i.e. Iago's contract irregularity and doctor Fiaño's conscientious objection.

In the first situation, Iago saw himself in a context where he was capable of asking for the regularization of his position before the hospital Las Flores. He has different means through which he can give clarity and report the considerations concerning his legal status. Between those means, he can decide if he wants not only to identify himself as a plaintiff or not, but also to keep the case outside the Courts or not.

Regarding doctor Fiaño, she was in a situation for which the whole legal sphere has not an uniform answer, but different approaches and opinions. As well as it was drafted a procedure by some authors, there is not a way to follow in order to reject a health treatment, so to identify the events from this perspective is complicated.

As it has been shown, the case included many particularities and features that required a meticulous legal analysis, as far as the consequences can be so diverse for events that just lasted some hours.

From here and on, it appears a need for clarity and legal development of medical situations like the ones from the case, in order to know how to proceed in a context where not all the aspects are legally covered.

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