

Application of criminal mediation rules in cases involving the implementation of medical liability

تطبيق قواعد الوساطة الجنائية في القضايا المتعلقة بالمسؤولية الطبية

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Abstract:

The birth of criminal mediation as an alternative method of resolving conflicts in criminal matters opens up new perspectives regarding the implementation of medical liability for violating physical integrity; only if there is a real will to overcome certain obstacles and clarify certain legal ambiguities.

Keywords: Criminal mediation, Medical criminal liability, Personal injury.

ملخص :

نشأة الوساطة الجنائية كطريقة بديلة لحل النزاعات في المسائل الجنائية، يفتح آفاقاً جديدة فيما يتعلق بتطبيق المسؤولية الطبية عن الإضرار بالسلامة الجسدية، بشرط أن تكون هناك إرادة حقيقية في التغلب على بعض العقبات وتوضيح بعض الغموض القانوني.

الكلمات المفتاحية: الوساطة الجنائية، المسؤولية الجنائية الطبية، الضرر الجسدي

Introduction:

A doctor is required to comply with laws and regulations that govern his mission. Otherwise, he exposes himself to personal and professional liability before criminal, civil, administrative and disciplinary courts.

It is true that criminal law (penal code and supplementary criminal laws) foresees several offences that could be attributed to a doctor. But judicial and medico-legal practice recognizes that the doctor can be held criminally liable for any offence resulting in an attack on life or physical integrity¹.

This includes the offences of both unintentional and intentional assault and battery.

Whereas, the Algerian legislator, aware of the complexity of the criminal procedure and mainly with the aim of de-judicializing social life and reducing the congestion of courts²; has set up alternative procedures to resolve disputes far away from the classic criminal procedure, for instance: criminal reconciliation, transaction...etc.

Thereby, on 2015, following the promulgation of Order No. 15-02 of July 3, 2015, amending and supplementing Order No. 66-155 of June 8, 1966 relating to the Code of Criminal Procedure³, criminal mediation was born as an alternative method of resolving conflicts in criminal matters.

It turns out that this alternative procedure concerns the offences provided by Articles 264 (paragraph 1), 289 and 442 (paragraphs 1 and 2) from the Criminal Code, committed without premeditation or ambush or carrying a weapon, corresponding to the offences of intentional and unintentional assault and battery⁴.

Therefore, we raise the following questions:

- Are the provisions of criminal mediation compatible with the legal characteristics of assault and battery offences that the doctor is charged with?
- What are the potential benefits of applying this procedure in the medical field?
- What are the legal arguments put forward to exclude the application of this procedure in the medical field, and what are the solutions to be provided?

In order to address this issue, we propose a descriptive analysis of legal rules relating to the implementation of medical liability for violating the physical integrity, and of the procedural principles of criminal mediation.

As well as a comparison of the two principles to highlight the opportunity of implementing criminal mediation in this type of case, specifying the advantages and disadvantages.

1. The reality of the implementation of the doctor's criminal liability for violating the physical integrity:

Despite the recognized particularity of the medical act, which cannot be compared to an act committed by a simple offender⁵. Every doctor practicing on the Algerian territory is subject to Algerian criminal law.

The doctor is treated as a citizen, having committed an offence and who must be punished⁶. He cannot escape criminal sanction because of his professional status. In contrast, it can expose him, in certain circumstances, to severe criminal prosecution⁷.

Criminal law provides and lists several offences (wrongful acts), intentional or unintentional, resulting from an action or an omission, which may be attributed to the doctor. These include offences of assault and battery.

a. The offence of unintentional assault and battery:

Article 413 from health law⁸, specifies that any attack on the "physical integrity" or "a person's health", resulting from "negligence" or "proven professional misconduct" which causes "permanent incapacity", the "death" of the patient or endangers his life. Committed "by a health professional in the exercise or on the occasion of his duties"; is punishable in accordance with articles 288, 289 and 442 (paragraph 2) of the penal (criminal) code; except for medically justified necessity.

Traditionally, the study of the provisions set out in articles 289 and 442 (paragraph 2) of the Criminal Code, to which article 413 refers; punish the offenses of misconduct and negligence that cause: unintentional blows and injuries or illnesses resulting in total incapacity for work.

And whose constituent elements necessarily meet when there is⁹:

- A proven, qualified medical, professional error:
 - From a lack of address (a wrongful act of action) through “clumsiness” and “imprudence”;
 - From a lack of precaution (a wrongful act of omission) through “inattention” and “negligence”;
 - From non-compliance with regulations.

Contrasting with what would not have been done by a normally informed, prudent and diligent (ideal) doctor placed in the same objective situation of means and skills as the guilty agent.

- A real, specific damage, responding to an attack, even slight, on physical integrity and resulting in injuries or illnesses leading to total incapacity for work of more than or less than three months.
- A causality link between the fault and the damage, which must be direct and certain, based on sufficiently serious, precise and consistent elements.

Judicial legislations regarding the medical offence of unintentional assault and battery specifies that:

The ethical and legal principle which places on the doctor an obligation of means and not of results, cannot exclude him from criminal prosecution, when it is proven that there is qualified negligence in the execution of this obligation, and directly causing harm to the patient¹⁰.

This obligation is defined as:

"the commitment of the doctor to provide conscientious and attentive efforts, in accordance with existing circumstances and the acquired data of science, with the aim of curing the patient and improving his health situation"¹¹.

Therefore, it is established that even a diagnostic error can be a source of criminal liability when the doctor "shows ignorance and lack of knowledge,

in particular negligence in the clinical examination, or if he has performed it quickly, superficially, and in an incomplete manner"¹².

Regarding to the wrongful medical act, Supreme Court decisions incriminate several failings:

- Failure to provide medical care¹³.
- Failure to comply with the obligation of medical supervision¹⁴.
- Failure to comply with the obligation of medical precaution¹⁵.
- Failure to comply with medical regulations¹⁶.

b. The offence of intentional assault and battery:

Article 264 of the Criminal Code and its following criminalize the wrongful act of: causing injury, committing violence or assault. Whatever the means used: by direct action, bringing the culprit into contact with his victim or by using a weapon or instrument¹⁷.

The wrongful act sanctioned by articles 264 and following necessarily corresponds to a positive action.

Mendacity concerns the will to carry out the act leading to the damage and not the will to cause the damage¹⁸. The consent of the concerned person cannot erase his guilty intent.

In medical practice, a lawful act of care, requires the meeting of a medical necessity supported by the patient's consent and joining the permission of law.

The offence of intentional assault and battery may correspond in medical field to the following situations:

- Failure to comply with regulations governing the removal and transplantation of human organs, tissues or cells.
- Sterilizations without serious medical justification. The only exceptions are when there is a formal life-threatening situation or serious medical

necessity, and only after information and consent, if the patient's condition allows it.

- Transsexualism, from a criminal perspective, surgical interventions requested by transsexuals constitute the crime of voluntary violence, the crime of mutilation or castration.

c. The rules for implementing the criminal liability of the doctor:

From a procedural point of view, the establishment of the criminal liability of the doctor begins with the revelation of the offence.

This revelation is most often made, following the filing of a complaint, by the victim or his legal representatives (flagrant or denunciation situations are rare)¹⁹, motivated by the damage caused by the act attributed to the doctor.

This complaint can be brought before:

- Judicial police officers (Art. 42 CPC²⁰), who must immediately inform the territorially competent public prosecutor and begin the preliminary investigation;
- The public prosecutor (Art. 36 CPC), who monitors the preliminary investigation and decides whether to close the case or initiate public action;
- The investigating judge (Art. 72 CPC) with the civil party, who opens the investigation.

During the preliminary investigation (police phase) and before the initiation of public action, the public prosecutor "carries out or has carried out all acts necessary for the investigation and prosecution of criminal offences" (Art. 36 CPC).

Judicial police officers, acting on their own initiative in the case of a flagrant offence investigation or under the orders of the public prosecutor, may call upon any doctor to carry out medical examinations which cannot be deferred (Art. 49 CPC).

If the public prosecutor initiates public proceedings, he may decide to refer the offender directly to trial court or order the opening of an investigation, which will then be entrusted to an investigating magistrate.

The investigation stage by the indictment chamber, including the necessary medico-legal expertise, is the rule in medical matters, taking into account the complexity and technicality of medical files.

At the end of the initiated investigation, an order is issued, which may be either of a dismissal or referral to the competent court.

Regarding the jurisdiction of the courts, generally, the offences attributed to the doctor fall within the jurisdiction of the criminal court as most of the offences with which he is charged are classified as homicide or involuntary injury.

Before the trial court, the victim or their legal representatives may constitute themselves as a civil party if they have not done so during the investigation.

The trial court pronounces first whether the doctor in question is guilty or not, second, it decides the value of the indemnity owed to the victim. In the case of the doctor's condemnation, the judge will pronounce on the civil action.

In the case where the doctor is acquitted (no guilty verdict), the court declares itself incompetent with regard to the civil action. What will allow the victim to seek compensation before the civil courts.

Provision provided by Algerian law explains that "a proof of a civil fault entails civil liability, even if the accused is acquitted in the criminal action"²¹.

The judgments of courts are subject to appeal before the Court of Appeal. The appeal is said to be suspensive, and the case will be judged again by the Court of Appeal in all its elements.

The decision rendered on appeal may also be subject to an appeal cassation before the Supreme Court (this jurisdiction is called the Court of Cassation in France).

In this case, it should be noted that this is not a third examination of the merits but only a determination of whether the law was correctly applied by the trial judges, taking into account all the elements of the case.

In total,

The implementation of the criminal liability on doctor for violating the physical integrity of his patient, finds its reality in the principles of criminal law. Which expresses the will of society to repress any negligence or failure of the doctor in his moral and professional obligations.

By seeking the legality of his medical act, while respecting the dignity of the patient (requirement of information and consent) and provisions of law.

In order to resolve the social disorder resulting from his wrongful act, expressed by the damage suffered by his patient. Who seeks recognition of his status as a victim and who demands compensation (indemnity).

The victim chooses the criminal route not because he seeks the doctor's criminal sanction²², but because the rules of criminal law are attractive, due to the fact that:

- The procedural modalities of implementation are simple and inexpensive;
- The burden of proof lies with the public prosecutor.
- Criminal law allows their civil interests to be decided by the criminal judge, by filing only one complaint and following only one legal procedure. They just need to constitute themselves as a civil party; a provision guaranteed by the Code of Criminal Procedure in its third article.
- Even if the doctor is acquitted, the law allows the victim to fall back on civil proceedings, using the same evidence of damage produced by the criminal proceedings.

Which makes the doctor, a man of science, with his strong knowledge, a part of a long, complex legal procedure, of which he understands nothing.

Faced with seasoned lawyers, who are trying to highlight the various legal aspects of the wrongful act, he is accused of. Despite the desire of caring that drives his actions, and despite the recognized dangerousness of the medical act incriminated.

A dramatic situation for the doctor, who feels humiliated and suffers a blow to his professional dignity.

2. Criminal mediation, an alternative method of resolving conflicts in criminal matters:

The promulgation of Order No. 15-02 of July 23, 2015, amending and supplementing the Code of Criminal Procedure, introduced mediation as an alternative method of resolving conflicts in criminal matters.

The opportunity to use this alternative procedure is left to the discretion of the public prosecutor, before any criminal prosecution. Subject to the agreement of the victim and the accused, when this procedure is likely to put an end to the disruption resulting from the offence and to ensure compensation for the damage that has resulted.

Criminal mediation may be applied to contraventions, but also to the offences listed in Article 37 bis 2 of the aforementioned Order, these offences are:

- Offences of insults, defamation, invasion of privacy, threats, false accusation;
- Offences of abandonment of family, voluntary failure to pay alimony, the non-delivery of child (in the case of divorce) failure to produce a child;
- Offences of fraudulent appropriation of inheritance property before their division of common property or social funds, of issuing bounced checks;
- Offences of wilful damage or destruction of other people's property;

- Offenses of involuntary and voluntary assault and battery committed without premeditation, ambush or carrying a weapon;
- Offenses involving damage to real estate and agricultural crops, grazing on other people's land, and theft of food or other services.

Mediation is concluded, obligatorily, by a written agreement “a report” mentioning:

- The identity and address of the parties;
- A summary of facts, date and place of their commission;
- The content of the mediation agreement and the deadline for its execution.

This report is signed by the public prosecutor, the clerk and the parties, who may be assisted by a lawyer. A copy is given to each party.

The content of the mediation agreement covers: restoration to the original condition, financial or an in-kind compensation of the damage suffered and any other agreement concluded between the parties, not contrary to the law.

The written mediation agreement is not subject to any appeal; it constitutes an enforceable title suspending the limitation period for public action during the execution periods of the mediation agreement.

In the case of the non-execution of the mediation agreement within the set time limits, the public prosecutor shall decide on the appropriate follow-up to the procedure. The person who deliberately refuses to execute the agreed mediation agreement shall be subject to the penalties for the offence provided by in Article 147 (paragraph 2) of the Criminal Code.

3. Can criminal mediation be applied in the field of doctors’ criminal liability?

Even though, the legal cases targeted by the establishment of this alternative procedure are criminal cases involving family inheritance and marital disputes, neighbourhood disputes, cases involving attacks on honour or

memory and certain conflicts in the agricultural sector or damage to real estate or property. So, it happens that law provides the possibility of resorting this procedure in the cases of crimes and minor offences of assault and battery, committed without premeditation or ambush or carrying a weapon, provided for in Articles 264 (paragraph 1), 289 and 442 (paragraphs 1 and 2) of the Criminal Code.

Therefore, it seems appropriate for us to raise the following questions: how compatible are the provisions of the alternative criminal mediation procedure with the legal characteristics of the offences of assault and battery by which the doctor is charged?

Especially that, based on our documentary research and discussion with magistrates and lawyers, it appears that there is still no application of this procedure in the medical field yet.

At first glance, the doctrine, jurisprudence and medical logic are resist equating a doctor who is medically criminally liable with a normal criminal who has committed an offence and must be punished, because of the intention that drives him to: heal, relieve and respond to calls of physical and psychological suffering, through a medical act that is often dangerous even when it's well considered and measured, and which exposes him to criminal liability due to the legal texts in force.

This is the case, for example, of a gynecologist who facilitates the eugenic abortion of a fetus with anencephaly, to spare the mother from enduring a nine-month pregnancy and giving birth without the hope of enjoying her motherhood; or of the surgeon who, despite all the precautions taken, forgets a gauze, causes a vascular breach or a nerve injury.

In contrast, this same doctrine, jurisprudence and medical logic recognize the victim's right to compensation.

In this regard, the application of this alternative procedure makes complete sense, since it allows:

To the victim, in the event that it accepts an appeal to this procedure, to be repaired. Article 37 bis 4 provides that “The mediation agreement covers in particular: restoration to the original condition, financial or an in-kind compensation for the damage suffered, or any other agreement concluded between the parties, not contrary to the law”.

To the doctor, if he acknowledges that the damages were caused by his medial action, he aims to avoid the inconveniences and complications of a judicial procedure, which he doesn't understand.

To justice, if the public prosecutor requests to use this procedure at the end of the preliminary investigation, to close the case definitively, given that the mediation agreement thus concluded constitutes an enforceable title "Art. 37 bis 6" not subject to any appeal "Art. 37 bis 5".

Especially that, the provisions of this procedure include safety conditions for the victim: the adjudication of the public action within the time limits set for the implementation of the mediation agreement (Art. 37 bis 7), in the case where the mediation is not applied within the established time limits, the prosecutor may decide on the appropriate follow up to the procedure (Art. 37 bis 8).

As well as a clause obligating the perpetrator of the incriminated acts to execute the mediation agreement within the fixed deadline, since otherwise faces the sanction provided in Article 147 (paragraph 2) of the Criminal Code (Art. 37 bis 9).

But on the other hand, the application of this procedure in the medical field is subject to overcoming certain obstacles that may block the opportunities allowed by this procedure.

These obstacles are linked to the different parties involved in this procedure who have the power to initiate it:

The first is the public prosecutor, who must fulfill the legal obligation to verify the reality of the damage and to ensure the direct causality between the wrongful act committed by the perpetrator and the damage.

In cases of medical negligence resulting in violating the physical integrity of others, the use of medico-legal expertise is the rule; which is theoretically possible, at the preliminary investigation phase since Article 36 (paragraph 5) of the Code of Criminal Procedure stipulates that the public prosecutor "carries out or has carried out all necessary acts to investigate and prosecute violations of criminal law", but from a practical judicial point of view, in this type of case, recourse to forensic expertise is left to the investigation phase.

The second is the doctor, who, agreeing to follow this alternative path, will acknowledge his guilt without defending himself through the means allowed in the classic procedure, which will make him vulnerable, and he risks facing all the demands of the victim if not well advised, especially since the repair costs will be borne by him being.

The third is the victim who may find part of his or her compensation claim reduced since at this stage of the procedure the after-effects are not yet fully established and the category of damage are not definitively established.

In addition to these obstacles are added two legal ambiguities, the clarification of which can help to promote the use of this procedure in the medical field, namely:

The role that legal advisors can play in this procedure, since there is no mention of the role of lawyers in concluding mediation decisions, also the possibility of carrying out contradictory or even amicable expert assessments in this context.

And the fate of the civil action in the case where the public action is stopped by the criminal mediation procedure.

Conclusion:

The criminal mediation procedure finds its applications in the medical field concerning to offences that cause harm to another person's physical integrity, provided that there is a genuine will to overcome certain obstacles and to clarify certain legal ambiguities through implementing legal texts.

Notably, concerning the conditions and modalities for appointing specialized assistants of the public prosecutor's office. A function created by the same order which introduced criminal mediation, in its article 35bis, which has not yet been implemented.

These specialized assistants can play a vital role in overcoming the obstacles outlined in our discussion, when this role is supported by individuals with expertise in medical law and personal injury.

Additionally, expanding the role of lawyers, beyond assisting the parties, by allowing them to request recourse to criminal mediation. This Provision is stipulated by Article 111 of Law No. 15-12 of July 15, 2015 relating to the protection of children²³, regarding the application of criminal mediation to offenses and violations committed by minors.

This expansion of lawyers' powers will allow them to better advise their clients in order to quickly achieve their objectives and provide a certain freedom in proposing and conducting amicable expert appraisals.

In terms of damage compensation, it is essential to comply with current legal and regulatory provisions, to avoid the complainant's abusive demands.

If there are additional categories of damages after the conclusion of the mediation, a legal treatment similar to the provisions relating to the aggravation of damages can be applied according to the rules of civil and administrative procedure.

Ultimately, this article corresponds to an objective reflection, which considers the criminal mediation procedure as an interesting outline of an alternative path, which is close to the amicable methods of resolving medical conflicts.

And I hope I have drawn attention:

- Legal professionals, to this potential application, so that they can consider it;
- Lawyers, to discuss it, confirm these arguments or, why not, refute them;
- Health professionals, to ask if they find interest in this procedure.

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