
Criminal legal characteristics of a medical procedure

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Abstract

The provision of healthcare is inherently linked to interventions in the physical integrity of the patient, as well as interventions in their other rights, which occur during diagnostic, therapeutic, and nursing procedures as part of healthcare delivery. From the perspective of criminal law, the lawful provision of healthcare is reflected in circumstances that exclude unlawfulness.

Key words: healthcare, crime, circumstances excluding illegality.

Introduction

The provision of healthcare is inherently associated with a high risk of breaching or endangering societal values and interests protected by criminal law norms, with the highest importance placed on human life and health.

Results and Discussion

Assumptions of criminal liability in medicine

The provision of healthcare is inherently associated with a high risk of breaching or endangering societal values and interests protected by criminal law norms, with the highest importance placed on human life and health. The most significant and simultaneously most repressive protection of these values is provided through criminal law's route of criminal liability. Criminal law serves as the ultima ratio and intervenes when legal means of other branches of law have been exhausted or in cases of conduct that poses such societal danger or harm where the mechanisms of legal responsibility within other legal branches are insufficient.

However, the application of the ultima ratio principle cannot paralyze the fundamental purpose of criminal proceedings, which is the proper identification of criminal acts and the fair punishment of the perpetrator in accordance with § 1 of the Criminal Code (compare judgment of the Supreme Court of the Czech Republic 6Tdo 1508/2010). In situations arising during the provision of healthcare where it becomes necessary to protect life and health through the means of criminal law, criminal liability comes into play with its strictly formalized process regulated by the Criminal Code (Act No. 301/2005 Coll.), wherein an independent court, based on the indictment filed by the prosecutor, decides at the end of the entire chain whether a criminal act has been committed, who committed it, and subsequently pronounces a verdict on guilt and punishment.

The basis for the onset of criminal liability is the commission of a criminal offense, which constitutes an unlawful act, the characteristics of which are outlined in a specific section of the Criminal Code (Act No. 300/2005 Coll. – Criminal Code), with reference to expressly defined criminal offenses by Law No. 91/2016 Coll. on the criminal liability of legal entities and amending certain laws. The factual nature of a criminal offense consists of a combination of subjective and objective features that must be fulfilled when committing the criminal act. The characteristics of the factual nature of a criminal offense are:

- Subject,
- Subjective aspect,

- Object, and
- Objective aspect.

The subject of a criminal offense is the perpetrator, who can be either a natural person (healthcare provider) or, in expressly defined criminal offenses, a legal entity (healthcare facility). The perpetrator must also be of sound mind and have reached the age of 14. In cases of criminal offenses committed during the provision of healthcare, the perpetrators possess specific characteristics. These are healthcare providers who, based on the nature of their profession, may only commit certain types of criminal offenses.

The subjective aspect of a criminal offense examines the culpability of the perpetrator because without culpability, there is no criminal liability. For an act to be considered criminal, intentional culpability is required, unless the factual nature of the criminal offense explicitly stipulates that culpability through negligence is sufficient. Culpability, from a psychological perspective, is understood as the internal mental relationship of the perpetrator to the committed criminal act, not only to the act itself but also to its consequences. Analyzing the subjective aspect of a criminal offense involves examining the perpetrator's motivation that led to the commission of the criminal act. The Criminal Code distinguishes between intentional culpability and culpability through negligence. For a better understanding of intentional and negligent culpability, we provide an example of conduct.

A criminal offense is committed with direct intent when the perpetrator intended to violate or endanger an interest protected by the Criminal Code (for example, a doctor knowingly administers a lethal dose of medication to a patient with the aim of euthanizing them, known as active euthanasia). Indirect intent represents a situation in which the perpetrator knows that their actions could violate or endanger an interest protected by the Criminal Code, but if it happens, they are aware of it (for instance, a doctor refuses to provide medical care to a patient in a life-threatening situation because the patient is a non-payer in the health insurance, which the doctor knew beforehand). Conscious negligence occurs when the perpetrator knew that their actions could violate or endanger an interest protected by the Criminal Code, but without adequate reasons, relied on the belief that the violation or endangerment of the protected interest would not occur (for example, during a surgical procedure, a doctor makes a mistake causing the patient to develop an acute infection, which the doctor refuses to address through urgent reoperation, relying solely on medication that proves insufficient, leading to the patient's demise). Unconscious negligence represents a situation in which the perpetrator did not know they would cause a violation or endangerment of a protected interest, but given the circumstances and their personal conditions, they should have known and could have known (for instance, a patient provides the doctor with false information about their health condition, while clinical symptoms suggest that the patient did not provide truthful information. However, the doctor did not attempt to ascertain objectively accurate information about the patient). It is noteworthy that negligence-related criminal offenses often prevail in the provision of healthcare.

The object of a criminal offense is the legally protected interest that has been violated or endangered by the unlawful actions of the perpetrator. In the provision of healthcare, these interests most commonly involve the life and health of individuals. In a minority of cases within healthcare provision, it may also concern freedom and human dignity, offenses against property, generally dangerous offenses, or offenses against public order.

The objective aspect of a criminal offense encompasses the resultant consequence and the causal relationship, known as the causal nexus. Conduct represents the manifestation of will reflected in the external world. This conduct can be either commissive (active) or omissive (passive). The Criminal Code, within its factual elements, defines the objective aspect, i.e., whether a criminal offense can be committed by active action or passive omission of action. It combines an internal mental component (volitional) with the external physical manifestation of this will. If any of these mental or physical components are lacking, it cannot be considered a criminal act.

The consequence of a criminal offense is what was caused by that act. If there is the fulfillment of the condition of conduct and consequence, a causal relationship between them must be demonstrated (for example, between the refusal of treatment and the patient's death). It must be

proven that if the particular action had not occurred, the consequence would not have ensued [1, 2, 4, 5, 7,8].

Circumstances excluding wrongfulness in medicine

The provision of healthcare intervenes in both the physical and mental integrity of the patient and may not always result in preserving their life, restoring or maintaining health, or improving their health condition. Conversely, in extreme cases, a patient's health condition may worsen or even lead to their death. For this reason, adequate mechanisms must be applied in criminal law through which the provision of healthcare is legally approved and considered “non-punishable”.

For the purposes of healthcare provision, such mechanisms excluding unlawfulness include the following circumstances:

- a) Extreme necessity (§ 24 of the Criminal Code),
- b) Permitted risk (§ 27 of the Criminal Code),
- c) Exercise of rights and duties (§ 28 Exercise of rights and duties).

When applying any of these circumstances excluding unlawfulness to an act exhibiting characteristics of a criminal offense, a situation arises in which the application of such circumstances renders such an act *ex tunc* non-punishable, meaning the circumstance excluding unlawfulness acts as a kind of “justifiable reason”. These circumstances are considered pertinent for healthcare provision.

Regarding a) Extreme necessity is defined in accordance with § 24 of the Criminal Code as: “An otherwise punishable act by which someone averts an imminent danger directly threatening an interest protected by this law is not considered a criminal offense”. In cases of extreme necessity, there is a collision between two legally protected interests. In the context of healthcare provision, these interests most commonly involve life and health, which are realistically threatened by immediate and imminent danger. A person acting under extreme necessity must choose the “lesser evil”. This situation occurs when performing urgent life-saving interventions without the patient's consent, which the patient is unable to provide, or during cardio-pulmonary resuscitation resulting in the patient's rib fracture. In another scenario, this would be assessed as a criminal offense of causing bodily harm. However, in this situation, this doesn't occur because the healthcare worker had to choose between saving a life and avoiding injury or harm to health. Preventing danger to life takes precedence over avoiding injury. The condition of subsidiarity is fulfilled as the danger could not have been averted by any other means. The condition of proportionality is met as the resultant consequence (fractured ribs) is not equally or more severe than the threatened consequence (the patient's death). In a scenario where a decision had to be made between equivalent values, such as life versus life, it couldn't qualify as extreme necessity. In an extreme scenario, the condition of proportionality could be met by sacrificing one human life to save multiple lives. It is essential to note that in extreme necessity, individuals who are obligated to tolerate a certain level of danger, such as police officers, firefighters, and healthcare workers, cannot act. A doctor cannot refuse to carry out their professional duties citing protection of their own interest because they have an obligation to perform these duties even in situations involving risk. However, it's unreasonable to demand a doctor to perform a procedure on a patient infected with a lethal infectious disease if they aren't equipped with protective gear.

Regarding b) Permitted risk is defined in accordance with § 27 of the Criminal Code as: “An otherwise punishable act is not considered a criminal offense if someone, in accordance with the attained state of knowledge, performs socially beneficial activities in the area of production and research, where the socially beneficial result expected from the act cannot be achieved without risking an interest protected by this law”. Permitted risk is a circumstance excluding unlawfulness that closely correlates with scientific and technological progress, which generally carries certain risks. In the context of healthcare provision, it involves risks associated with the application of new diagnostic and therapeutic procedures that must be validated in clinical practice. Assessing acceptable risk requires applying the subsidiarity principle, whereby the socially beneficial result cannot be achieved

otherwise, and this evaluation is always made ex ante, based on the information available to the acting healthcare provider at the time of decision-making. The patient must always be informed about and grant written consent for such procedures. Permitted risk represents a certain expansion of the standard practice since it allows the use of diagnostic and therapeutic procedures that haven't yet been scientifically verified and therefore aren't part of evidence-based medicine in the true sense. Permitted risk serves a productive purpose as its goal is to acquire new societal values. Permitted risk couldn't apply in cases of disproportionate risk or if it contradicts public interest, generally binding legal regulations, acts against the principles of humanism or good morals.

Regarding c) Exercise of rights and obligations is defined in accordance with § 28 of the Criminal Code as: “An otherwise punishable act is not considered a criminal offense if it concerns the exercise of rights and obligations arising from a generally binding legal regulation, a court decision, or another body of public authority, from performing work or other duties, or from a contract that does not contradict or circumvent a generally binding legal regulation; the manner of exercising rights and obligations must not contradict a generally binding legal regulation”. The exercise of rights and obligations stems from the principle that if a generally binding legal regulation commands or allows certain actions, then such actions cannot be unlawful and cannot fulfill the elements of a criminal offense. When exercised in accordance with the law, the exercise of rights and obligations cannot constitute a criminal offense because the element of unlawfulness is absent. This circumstance excluding unlawfulness also excludes unlawfulness in the case of committing administrative offenses. This circumstance, excluding unlawfulness, is an indispensable condition in the daily clinical practice of healthcare providers. Its necessity is reflected in the fact that providing healthcare is only possible with the informed consent of the patient, preceded by patient education. Informed consent represents a shift in healthcare provision from a paternalistic to a partnership-based approach. Simply put, it signifies the transition from a silent medicine approach to open communication between the physician and the patient through informed consent. According to § 6 paragraph 1 of Act no. 576/2004 Coll. on healthcare, services related to the provision of healthcare, and on amendments to certain laws (referred to as “ZoZS”), “A healthcare professional is obligated to inform about the purpose, nature, consequences, and risks of providing healthcare, about options for choosing proposed procedures, and the risks of refusing healthcare”. Exceptions to this obligation only include providing urgent care (applying extreme necessity), involuntary hospitalization or detention ordered by a court, institutional care for a person spreading a contagious disease endangering other, or caring for a person with a mental illness endangering themselves or others. In cases where the court orders the provision of healthcare, the court's decision replaces the patient's informed consent. If a healthcare professional were to provide healthcare to a patient without their consent, it would be an unlawful act and this circumstance excluding unlawfulness couldn't be applied because it would contradict the generally binding legal regulation, i.e. ZoZS, even if the healthcare was provided correctly and benefited the patient.

Conclusions

In the criminal prosecution for an act committed in the provision of healthcare, the essential aspect is the unlawfulness of the medical procedure performed, not just the non-lege artis procedure itself. Mechanisms enabling healthcare professionals to carry out their profession without undue threat of criminal prosecution are circumstances excluding unlawfulness. In clinical practice, the most frequently utilized mechanism is the exercise of rights and obligations, for which, except for exceptions, the informed consent of the patient is necessary. When dealing with criminal acts of healthcare providers that could arise in the provision of healthcare, it is essential to approach criminal liability particularly sensitively because excessive application of criminal law can lead to so-called defensive medicine, which prioritizes avoiding criminal responsibility over addressing the patient's health condition. Healthcare professionals should provide healthcare confidently and professionally, without merely fearing someone will attribute criminal liability to them. A healthcare worker cannot perform their profession under constant stress due to the fear of criminal prosecution.

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