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Probatory Regime of the Liability of Medicals at the Rate of Imputation of State Liability

Analysis in the Legal Systems of Spain and Colombia

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Abstract:- The objective of this work was to examine the regulations of the evidence regimes applied within the system of State Property Liability for failure to provide the medical service in the legal systems of Spain and Colombia; the unit of analysis that was established was, Review the basis of the evidentiary burden on medical responsibility as a state responsibility based on the study of the legal systems of Spain and Colombia and the main variables they were studied: To determine the basics of the probative regime of medical responsibility in Spanish and Colombian legal systems; Establish the characteristic and distinctive elements in each of the probative regimes in the Spanish and Colombian legal systems and comparatively identify the relationship of the foundation in the Spanish and Colombian legal systems probative regime for responsibility.

Keywords:- *Medical Responsibility, State Responsibility, Objective Responsibility, Subjective Responsibility, Test Burden, Administration, Managed.*

I. INTRODUCTION

The study of medical responsibility is a theme that in the work of the law is quite recent, because, with the realization of the regime of civil liability, contractual or non-contractual, a whole range of titles of responsibility have been deployed attribution of responsibility, including that of medical responsibility. However, it is an issue that has always provoked significant controversies, one of them regarding the applicable probative regime, i.e. how the health care professional's liability for the failure of the medical service is proven.

Responsibility for medical activity may arise as indicated above on the occasion of the contractual agreement or without the existence of the contractual agreement, but within these edges, it may also be the State responsible for that activity, i.e. the State may be responsible for damages caused to the life or health of patients when, the generating event is produced by its agents, especially in Colombia, which implies then that what is studied here is, in addition to the theoretical foundations of the responsibility when it falls to the head of the State, the probation regime applicable in these circumstances.

The jurisprudence of the Colombian High Courts raises various positions in this regard, making it difficult to find unanimity in this matter, and there is also the position of comparative law, where the various ideas and notions that arise between the different legal systems are found. In view of the above, it is intended to carry out an analysis that allows us to point out the similarities between the treatment and interpretation of the medical responsibility probation regime as the title of imputation of the State's responsibility in Colombia and in Spain. Why Spain? The undeniable similarity between the structuring of both ordinances is clear, mainly if it is based on the fact that both are erected from the continental legal system, but we have also chosen the Iberian system because we understand that on the social development that has allowed medicine and its legal scope, Spain has to teach us something, due to its high degree of development in that aspect, hence interesting ideas that can be applied to the legal-procedural treatment of medical responsibility as the title of imputation of state responsibility in Colombia can be located.

The problem that gave rise to this research on medical responsibility as a title of imputation of state responsibility, has been widely studied, not only from the academy but also from jurisprudence, and although it can be framed in any of the dualities that civil liability presents , this is the contractual or extra-contractual one, this title of responsibility has its own characteristics and implications, especially when the person to whom the responsibility is adduced is to a state entity, this leads to its analysis, although it must start from the legal debate that has been presented in administrative law, cannot be foreign to the context of the practice of medical practice, and being the most common scenarios of discussion academia and jurisprudence, we believe that it is in comparative law where the basic elements of the that Colombian

administrative law means “medical responsibility” has its origin, in such a way that, in addition to identifying those elements and studying them, our main purpose is to examine this title of imputation in the light of comparative law, specifically in Spanish legislation, but why in Spanish law? With Spanish legislation we share meeting points on many legal issues, this is largely due to the fact that both legal systems are of the Germanic Roman court, however we believe that the social context of each country has implications in the forms of legislation, of such luck that it is interesting to examine the historical social development in which the regulation of medical responsibility has materialized when it falls to the State both in Colombia and in Spain.

This is because in the research that has been done with the precedence of this and that addresses this issue but from other perspectives, similarities in the form of standards and jurisprudence have been identified as problematic the social reasons that have led to the rule being arranged in one way or another, so the question arises, under what arguments in the social contexts of Colombia and Spain the regulation of medical responsibility when it falls on the State are different and in that regulatory budgets in both countries are similar?

Of course there are many elements that make up the study of medical civil liability in comparative law, so in this research we will focus specifically on analyzing the basis of the probative regime of civil liability in both systems, with the main yearning to prove the following theses:

If the burden of proof in the Colombian legal system is onerous for the party called to prove because the characteristics of the probative regime in Colombia determines this or 2.- If it is onerous because it is also so in other legal systems such as Spanish, this is due to the bases of the continental legal system that support both systems. That is why the comparative right will be a structural tool in the development and analysis of this research, because through comparison we will determine the characteristics of one and the other legal order to indicate which are the postulates that bring them closer and/or distance them.

In addition, it should be noted that in Colombia there are two main evidentiary standards, the one raised by the Supreme Court of Justice and that of the Council of State, but even within the Supreme Court of Justice itself, once we review the developments jurisprudence of the subject in it we can confirm that several positions coexist regarding the burden of proof on this type of responsibility, the intention that motivates this analysis is to clarify whether the two thesis proves is based on arguments that guarantee the general principles of the process and the founding right of the social rule of law which is access to the administration of justice.

To begin to delve into the subject, it is necessary to indicate that the term responsibility constitutes a fundamental legal concept since it encompasses several areas in which the law is exercised, such as civil, labour, contentious and even the criminal sphere. To define it, it is necessary to make an illusion of the other contexts in which it is applied and which relate to the notion of responsibility in the legal context.

The word "responsibility" comes from answering, whose meaning is: to promise, to deserve, to pay. In a restricted sense, responses (responsible) means "the one forced to answer for something or someone." (Etymological Dictionary, s.f.), but the modern use of "responsibility" in ordinary language is broader and although it is related to the original meaning of I will respond and spondere, it has another meaning and scope.

With regard to the use of the term "responsibility" in the face of the activity carried out by health professionals, being responsible involves doing the right thing and worrying about caring for patients, in legal terms, the concept of responsibility refers to the duty to respond to, compliance with or breach of an obligation. In trying to congrat the application of "responsibility" in the medical and legal context, it can be said that responsibility in this regard is a second-degree obligation; that is, it appears when the first obligation is not fulfilled, when an illicit act is committed for not being careful.

By studying medical responsibility as a title for the imputation of civil liability, whether contractual or non-contractual, a number of conceptual elements arise that cannot be invoked and studied, as they form the basis fundamental of it.

The jurisprudence of the Supreme Court of Justice has indicated that the medical responsibility is: “The medical civil responsibility, specific modality of the professional, configures a system composed of the projection and incidence of medicine in the life, health and psycho-physical integrity of the person, human dignity, the free development of personality and the fundamental rights of the subject. Health is a fundamental right linked to the life and integrity of people, an inseparable cardinal base without which the legal order would constitute a simple empty, theoretical and innocuous statement. The provision of medical service and health services constitutes an essential right of the human being with a singular and reinforced legal protection, about to be the constitutional duty of the State, the lending institutions and the professional. The protection of human life, health, dignity and freedom of the person, the principle of social solidarity, redirects the traditional guidelines of responsibility beyond the direct medical patient relationship or the intellectual, liberal and discretionary nature of the medical profession (Articles 11, 13, 44, 48, 49, 78, 95 and 366 Political Constitution; Law 23 of 1991, art. 1, “Respect for human life and the privileges of the human person constitute its spiritual essence”). (Supreme Court of Justice, 2000)

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As health professionals, civil liability can be manifested for general reasons:

- The failure to provide the service by omission attributable to the institution or the professional.
- Provision of the service late or untimely due to lack of adequate care to patients.
- For the timely provision of the service but deficient or inadequate for the patient's conditions.

These general causes may be the result of negligence (if the professional does not do what he should do), by recklessness (if doing what he should not do), for improbability (not having the knowledge he should have), or the violation of regulations or guidelines, as they may be ethical standards, good professional behavior or the standards of the Lex arts such as the protocols that experience has allowed to organize". (Martínez Rave & Martínez Tamayo, 2011, 484-485)

However, the jurisprudential treatment of medical responsibility in Colombia has been quite volatile, since it is difficult to locate a conciliation of positions between the High Courts (Supreme Court of Justice and State Council), especially with regard to the adequate probation regime to demonstrate the medical liability Despite such discrepancy, common defining elements remain in the jurisprudence in general, especially in regard to civil liability as a title that originates obligations and also regarding the types of responsibility, which regardless of the final position assumed by the Judge , such concepts are immutable and are the origin of the very jurisprudential analysis.

It is also necessary to indicate that these concepts that support the theme of medical responsibility, originate in the field of comparative law, since it is known that they are not concepts typical of Colombian administrative law, and this allows us to infer that in legal systems other than one's own Discussions are also generated regarding medical responsibility when it is the responsibility of the State and the fundamentals of the evidentiary regime valid for it, such a hypothesis is what leads us to advance this attempt to locate differences and similarities in the law compared to the treatment of the figure medical responsibility as title of imputation of state responsibility between the national legal system and in another State, which will be Spanish; This choice is not random, it is mainly because both ordinances are pure expressions of the continental legal system, and finally, because, although they are two different social and economic development contexts, this allows us to verify more than similarities the differences in the procedural legal outcome of medical liability.

Medical liability is defined by Jaramillo & Didier (2010) as "the one under which the patient -victim or his heirs may sue the doctor for pecuniary compensation for the damage caused during the exercise of the profession medical."

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II. MATERIAL AND METHOD

A. General about State Responsibility in Colombia and Spain

According to Irisarri Boada (2000) The great authors such as The Mazeaud Brothers, Planiol and Ripert, who have tried to define the notion of civil liability, end by pointing out that the obligation that arises as a manifestation of it, becomes the element the obligation to repair arises from the damage that occurs without just cause.

For the author López Herrera (2004) in our continental legal order the obligation to respond is a rule of the same, and this author expresses that, the obligation to respond is supported by the argument that the principle of justice entails the need to restore things to the state they were in before the injury caused, but it is also based on the possibility of legal sanctioning conduct that has involved harm corresponds to an ethical approach that is typical of our legal system.

The dualistic conception of civil, contractual or non-contractual liability is widely explained in the Colombian and Spanish legal systems, and as it is intuited that the one comes from the obligation in relation to a contractual relationship, where the contract is law for the parties and therefore they are obliged to comply with the agreed herein; while the other, dispenses with the contractual relationship in form, and is born with respect to an objective conception of liability, in which the duty to bear the damage in respect of the damage caused by the damage itself is assessed. But the above consideration is, in fact, a very typical consideration of the dualistic conception of civil liability, so we will then review the doctrine and jurisprudence on the subject in the Colombian legal order:

The dualistic conception of civil liability in Colombia, the Constitutional Court, has indicated in its jurisprudence, implies a differentiated treatment of one and the other, so that its regulation is different, as well as the origin of its causes and the forms of reparation, then, in Colombia, while the general theory of contractual civil responsibility is of a guilty tradition, the source of this type of obligation comes from the imperfect execution or execution of the contractual obligation, therefore, civil liability The contract is specific to private law, where only the parts of the contract are linked and that is developed only in response to the legal fact of the contractual breach. In the aforementioned constitutional jurisprudence, the source of extra-contractual civil liability is the compensation obligation generated by legal mandate, where traditionally three elements that dictate its existence must concur: the fault, the damage and the causal link between the two.

Finally, another characteristic component is the allusion to the burden of proof, which implies the duty to prove the responsibility indicated and depending on the title of imputation is that it will be determined whether between the plaintiff and the defendant, who is the call to prove it or distort it.

The line of jurisprudence that the Colombian Constitutional Court has built regarding medical responsibility at the head of the State has been broad, and generally on aspects such as the title of imputation and the burden of proof, its position has been constant, although we must stress that the new times facing the law have allowed for certain variations in the jurisprudence position, specifically on the central point that we are interested in which the probative regime is. However, in the next chapter we will deal with this aspect, in this we are interested in exposing the generalities that the Council of State, for the Colombian case and the Supreme Court of Justice in Spain, has assumed on the study of medical responsibility.

III. RESULTS

Probative health liability regimes in Colombia and Spain.

Probative regimes of medical responsibility in the jurisprudence of the Colombian State Council.

The treatment that the jurisprudence of the State Council has given to medical responsibility has been wide and deep, and that wide range of notions, figures and theories, which in the field of medical responsibility at the head of the State has built that legal corporation , has been based on the need to evolve so that the validity of the Law persists. Regarding the subject of study, there are then several elements that are configured so that the medical responsibility attributable to State agents can be discussed, from the material realization of the damage as a source of obligations, to the causal link and the action or omission of the agent, determining elements in the materialization of the liability regime that is specified (subjective or objective) and from there the appropriate imputation title. As already established in the previous chapter, the fault is a manifestation of the subjective responsibility whose title of imputation par excellence is that of the failure in the service, indicates Deik (2010) that this consists of the failure in the functions of the service that It was provided irregularly, where there are many forms of fault in medical responsibility, as this can be specified from the late provision of the service or the non-provision of the service, to inappropriate surgical or medical procedures, therefore the lex artis It stands as the measurement parameter between the correct and the incorrect practice of medicine, where of course, the second possibility gives rise to responsibility. However, the evidentiary regime that is applied to recognize medical responsibility is determined by the procedural rules that are of jurisprudential construction, this is in our opinion a general rule that can be verified with the study of the patrimonial responsibility of the State that outlines the State Council in its orders.

In our analysis of the State Council's case-law on medical responsibility, which for the purposes of this investigation has been addressed, we have identified four probate regimes that are usually applied under the title of imputation of the service failure in cases of medical responsibility, these are: that of the burden of proof based on professional guilt, which is based on the theory of the reverse burden of proof, that of the theory of the dynamic burden of proof and the probative regime of indiciary assessment.

Each of these regimes will be examined on the basis of the analysis of orders of the State Council where their main characteristics are outlined, for example, the probative regime of the burden of proof based on professional guilt, materializes from the recognition of the proven service failure, so we can also call it a proven fault regime. This probation regime is based on the principle of justice requested, a characteristic that is attributable to our legal system, where the affectation or violation, which over the rights against which the respective recognition or protection is sought, must be proven so that the judge can grant them.

In the area of medical responsibility, initially the jurisprudence of the Council of State recognized it under this evidentiary regime, which implied that it was the plaintiff who proved the fault of the medical professional or of the medical or health care services, but as Deik points out (2010) This position implied probative difficulties, which eventually led to the establishment of new probationary regimes; but before analyzing the procedural motives that drive such change, it is pertinent that the elements that are part of the proven fault regime be analyzed first.

In judgment 18224 of 2011, it was recognized that this regime declares responsibility under the title of attribution of the proven failure of the service since its legal basis is based on the accreditation by the actor of the three elements of the responsibility, such as: damage, failure of service or guilt, and causal link. However, since the original claim of this probation regime is that it is the actor who proves the fault of the doctor in the provision of the service, this represented probationary inconveniences, since the applicant-patient or his heirs did not bear medical-scientific knowledge that would allow him in light of the technicality of medicine to prove the error.

Thus, from judgment 6754 of August 24, 1992, the jurisprudential change is generated in the sense of beginning to recognize medical responsibility, not only from the proven failure but from the failure of the presumed service. In that order, the State Council indicated that in the event of the liability being presented for failure of the medical service, said failure would be presumed, since in case of materialization of the damage on the occasion of things or the development of dangerous activities, what transcends, is no longer the fault but the unlawful damage. Although in the said ruling the Third Section acknowledged that there is an exemption from the burden of proof that in principle is denied to the plaintiff, it defines the scope of such exemption by establishing that the burden of proof that implies the notion of the alleged failure is hardly relative, because even so the actor must prove the minimum assumptions that allow the operation of the presumption, such assumptions are: the provision of the

service, the date on which it was provided and the damage he suffered on the occasion of those services.

Continuing along the same lines, with judgment 6897 of 30 July 1992, the previous change of position was reiterated, arguing that while the general rule states that it is for the actor to demonstrate both the factual and legal elements he claims in the demand, it could not be known that on many occasions such a demonstration is complex because this depends on the patient testing scientific or professional technical questions with respect to the surgical procedures on which the alleged ones are structured charges of recklessness, negligence or improbity.

At another stage the jurisprudence of that legal corporation established as an evidentiary rule on medical responsibility, the theory of the reverse burden of proof, a theory that is based on the principle of iura novit curia. With the above in mind, the theory of the reverse burden of proof based on this principle seeks to weigh the degree of difficulty and scientific character of the test in the process of medical responsibility.

However, in the context of the development of the jurisprudence of the Council of State on the probation regime in cases of medical responsibility, it has been determined that in those cases in which the automatic reversal of the probation burden is not possible, specifically in the cases of cases in which the actor seeks to prove the causal relationship between the action of the agent and the damage that involves the responsibility of the professional, because the demonstration of responsibility involves the understanding of scientific and technological knowledge that are alien to the patient-victim; and that said knowledge is decisive to establish the alleged responsibility, in judgment No. 14696 (2004), the State Council indicated that the judge can base his decision on the facts that, although not supported in an irrefutable way, are perceived as the most viable or credible, so that the examination of the evidence for the establishment of the causality relationship is executed under the principle of preponderant probability of the evidence and the doctrinal concept of the degree of preponderant probability, that is, the Judge may to use the indiciary evidence, without contradicting the general probative rule that must be applied, which is that the actor must demonstrate the agent's responsibility, thus demanding compliance with the probation duty, but the causal relationship (between the fact of the defendant and the damage), can be demonstrated or proven in an indiciary way, when in the case of the particular circumstances of each case, it is difficult for the lawsuit before exposing the causal relationship in a scientific and technical way.

Since, in cases of medical responsibility, legal practice, had been demonstrating the technical and scientific difficulty faced by the plaintiff in demonstrating the failure of the service, the case-law determined the possibility that the judge "may be content with the likelihood" of the existence of the causal link between the defendant's fact and the damage from which the damages claimed are caused.

Other scenarios of acceptance of the indiciary test for the declaration of medical responsibility are in events of absence of documentary evidence that attest to the performance of surgical or medical procedures in general. Since, according to judgment no. 18232 (2011), such a lack of documentary and technical evidence precludes the exacting of the absolute certainty of the causal link between the damage and the proceedings carried out. It is important to note that the acceptance of the indiciary valuation dates back to about 2007, when the Council of State, dismissed the state's patrimonial responsibility for medical activity under the title of imputation of the proven failure, to accommodate the regime of the alleged failure.

In more recent case-law, as is the judgment No. 28487 of 2015, the jurisprudential unification that applied in the field of evidence of medical liability was reiterated, this rule of case-law is that of burden-sharing evidence, nuanced by the admission of the need for the flexibilization of this evidentiary regime indicating that in cases where this theory of dynamic distribution is not possible to study the test of responsibility, this study will be valid under the regime of the indiciary test.

IV. DISCUSSION

Probative regimes of medical responsibility in the case-law of the Spanish Supreme Court of Justice.

The Spanish legal system, the patrimonial responsibility of the Administration is based on the "objective criterion of the injury, understood as anti-legal damage or prejudice that the sufferer does not have the legal duty to bear, because if there is such a duty the administration's obligation to compensate" detains, as the foregoing, has been settled since 1994.

As for the basis of health responsibility, it outlines the judgment that, it is not based solely on the production of the damage, because with the declaration of health responsibility what is sanctioned is the improper application of means to obtain the result, which will not always be beneficial to the patient.

The specific case that was analyzed in this providence, dealt with the claim of responsibility that the actor endorsed to the hospital in which the delivery of his wife was attended, care that was not provided by doctors but by a midwife, so the first The evidentiary conclusion reached by the Court was that the Administration should prove whether the delivery had developed normally, as if the directives of the hospital determined that obstetric care for the patient was sufficient with the services of a midwife. For the determination of responsibility in this case, an expert opinion was carried out by a gynecology and obstetrics specialist, who determined that the neurological injury suffered by the newborn was due to complications at the time of delivery that could be overcome with the completion of a C-section, but such a determination could only have been interpreted by a specialist.

For the Court, the Administration did not prove that the delivery was carried out as normal as necessary to make it prudent to care for a midwife and not a specialist doctor, so that, at the time of complications, that in this case the specialist made the relevant determinations, in particular, the Court highlights because the complication presented in childbirth was foreseeable and action could be taken, hence the absence of a childbirth specialist, who developing with recognized complications, it was an exception for this to be considered as a medical malpractice since not all the necessary means were made available to prevent neurological injury in the newborn.

According to Judgment STS 6741/2008 of December 9, 2008, a ruling referenced in the appeal court, in which the Court ruled on the alleged health responsibility of a hospital for the spread of hepatitis C suffered by the applicant with occasion of several transfusions that were performed in that care center on the occasion of the leukemia he suffered. The auctioning party argued that the Administration in the first instance failed to prove that all transfusions were free of hepatitis C antibodies, however, the defendants claimed that the causal link between blood transfusions was not proven, as the origin of the Hepatitis C injury and suffering, since the blood that was to be transfused underwent studies and showed negative results.

At first instance, the applicant's claims were refused, since it was apparent from the expert opinion that the viral and serology tests for the analysis of the transfused bleed yield 100 per cent reliable results and in the specific case the results were negative, however, it was also determined by the expert evidence that between 20 and 25% of cases between 15 and 25 weeks after the transfusion the patient may have seroconversion, but the expert could not say that the transfusion be the applicant's case.

The Court concluded that the appeal was dismissed on the ground that what the appellant intended was a retrial of what was already exhausted at first instance, since that is not appropriate on the basis of appeal, since the Court argued that, even if the purpose of the statement of an objective liability (which was what the shareholder considered to be presented in this case) in order to declare patrimonial liability is necessary to prove the causal link between the normal or abnormal functioning of the public service and the harmful or harmful result.

That legal corporation recognized that financial liability may be objective in nature, but this objective character has been modulated by the case-law since it cannot be intended that the provision of the service alone would determine the Responsibility of the Administration as it cannot have the "universal insurer" of all risks or have the obligation to foresee all possible damages that those administered may suffer, so that it must be proven that the damages are the normal or abnormal functioning of the Administration and that there was no legal duty to endure.

However, the foregoing, it provides for the providence which, in the case of liability arising from medical or health action, the case-law has reiterated that only damage is sufficient for its declaration, but that the lex artis criterion, as a criterion of artis, as a how to determine whether or not the medical action was correct, regardless of the outcome in the patient's health or life.

V. CONCLUSION

Comparative analysis: points of encounter and divergence between the probative regimes of medical responsibility in the Colombian and Spanish legal systems.

In both the Colombian and Spanish legal systems, the probation regime is determined on the occasion of the liability regime under which the obligations of the Administration are framed. This is ultimately the main meeting point between the two systems and the treatment of the State's financial responsibility for the medical act, however the analysis requires a more complex annotation, because in the Colombian case the responsibility traditionally declared under the subjective regime of the service failure, which has been at one time alleged and in another proven, has involved the application of the evidence regimes that this investigation identified, are concrete for the case of the right Colombia, because in the case of Spanish law evolution has focused on a subjective regime at a certain time and on an objective regime, without the other going away but if it is lagging.

Proof of professional guilt as an individualized probative regime implies the procedural burden on the actor who claims and claims the responsibility of the physician and must prove it, this is in principle the general rule of subjective liability, under the accountability of the service failure.

The evolution of jurisprudence in the State Council of this issue of medical responsibility has gone through a variety of times, at first the application of the title of imputation of the failure of the proven service required compliance with the rule in committee, but by setting aside the application of proven guilt, which evolved to the title of alleged guilt, the reverse load, test dynamics and indiciary assessment theories begin to be applied.

The probative requirement of the guilt proven to the actor was based on the understanding that medical responsibility was accepted as an obligation of means, hence that and as can be highlighted in the judgments examined the single configuration of the damage was not an advocate for the automatic declaration of responsibility, but the fault of the health care professional or the entity in the provision of health care services had to be proved.

However, under the other three evidentiary regimes, following the application of the title of imputation of the alleged guilt, they led to the moderation of the burden of proof only referred to the applicant, in that regard the

jurisprudential criteria of the Council of State began to implement the other three probationary regimes: reverse load, dynamic load and indiciary valuation.

The reverse burden and the dynamic burden of proof are two completely different and individually individualisable probative regimes, which in our view also does not imply that one procedural party is sought over another, on the contrary, in the face of the possibility of the "perverse test" ensued with the proof of professional guilt by proven failure we consider that both theories allow the determination of responsibility with the guarantee of the principles of fairness, equality and sound criticism.

However, the possibility of burden-sharing of proof is, doctrinally, and it is therefore common for both notions to be considered to be the same, but from the case-law analysis carried out, it is concluded that the reverse charge and the dynamics expose different procedural effects in the context of the medical liability process, since in the case of reverse loading appears with the abandonment of the proven failure, i.e. when the title of imputation of the alleged failure is applied opens up the possibility of reversal of the burden of proof, imposing itself as a dominant evidentiary rule throughout the process, from filing the lawsuit to the judgment terminating it, will then always be the defendant who proves that he acted in accordance with the rules of lex artis.

While the dynamic burden is not a dominant rule under the application of the title of imputation of the alleged fault, since as the reversal of the test has already been said to apply, the dynamic burden as a probative regime can be applied in this context prior to dispatch is done to assign the burden of testing a specific feat element. That is, the dynamic burden can confer both probative duties on the plaintiff and the respondent, depending on whom in respect of a given event has better evidentiary means or evidentiary capacity.

The general rule of duty to prove responsibility rests with the plaintiff, the reverse charge raises the possibility that those with the facetic and scientific knowledge of the fact prove or undermine responsibility, in cases of medical responsibility that evidentiary capacity, in that sense has it the doctor or health professional, who is the one who knows medical science, while in the dynamic burden is not assigned the duty of evidence to any specific part, but tests the fault who is in the best condition procedural action to do so.

Currently recently dated judgments, such as judgment 31159 (2016) show that the case-law of the State Council adopted the proven failure regime again, "without prejudice to the demonstration of the nexus the parties being able to use all means legally accepted proof."

In the context of Spanish litigation law, the differences with the probative regimes of the Colombian case are marked. Especially since, as we have seen, health liability is currently decreed under objective liability regimes, especially risk theory.

Unlike the Colombian case, in Spanish there is a rule that expressly imposes a regime of objective responsibility for the declaration of responsibility of the Administration, the defined article 139 of Law 30 of 1992 that provides the principles of the responsibility, lands the characteristics of an objective liability when it is provided that the injury is a consequence of the normal or abnormal functioning of public services and imposes a burden that does not stand as a legal duty that the actor must bear .

However, it seems that the concept of objective liability under this rule differed from what is known in Colombian law as objective liability, since in the objective imputation titles for the Colombian case, the action of the Administration from which the damage originates is always legal, i.e. it is part of the normal functioning of the Administration; and that precision of "normal or abnormal operation" outlined by the Spanish standard, seems to imply that illegal actions also forge objective responsibility.

The author Luis Martín Rebollo (1994) states: According to this general regime, the Public Administrations are liable for any injury suffered by individuals in any of their property and rights that involves effective, individualized and evaluable damage economically, which is attributable to a public administration for the exercise of its activity (an imputation which may be both by the normal and abnormal functioning of public services and which may precede, both a fact and an administrative act), without any reference to the idea of guilt, provided that there is a causal link between the fact or act and the damage caused.

It should be noted that the current application of the objective regime in Spanish law is the product of legal and jurisprudential developments, since as Barbera (1994) initially states, the basis of the Government's financial responsibility is supported article 1902 of the Code. Civil and this normal, as already indicated at an earlier point in the investigation, emanated a rule of subjective responsibility, that is, its basis is the element of guilt.

Barbera (1994) points out that in Spanish litigation law the application of liability regimes has undergone an evolution of systems, this evolution takes place in three periods: one where only subjective criteria of non-contractual liability, a second period of application of objective criteria and a final and present stage in which objective interpretations of the initial phase are applied.

The judgments of the Supreme Court of Justice, which were the subject of analysis for the realization of this section, allow for the glimpse of this interpretative and application dichotomy of what in the Iberian country is known as health responsibility, but stands out mainly that in the Spanish legal system health responsibility is a responsibility currently adjusted to the parameters of objective liability, since the jurisprudential determination

that the responsibility of the administration for these facts must be determined with a view to the realization of an injury for which the sufferer is not in the duty to bear, allows us to highlight the characteristics of objective regimes.

With regard to the probative regime, the conception of an objective responsibility has meant the choice of the thesis of the reversal of the evidence and the indiciary assessment for the verification of responsibility. Barbera (1994) states that the adoption of the target regime begins to take up strong from 1943 to be abandoned and to accept the subjective regime, then in 1995 with the judgment in STS 6795/1995 of 30 December 1995, the objective criteria of risk theory were resumed, and thus three probationary criteria are taken: reversing the burden of proof, raising the level of diligence or judgment of predictability and introducing the risk criterion.

According to the author referred to, the first criterion, that of reversing the burden of proof, obliges the respondent to prove that it took all necessary measures to avoid injury; the predictability judgment seeks that the respondent proves that he has taken all the precise steps to avoid harm and the introduction of the risk criterion, based on the premise that the person who takes advantage of the profits produced by certain activities must take the risk involved, proving that I act diligently.

Thus, in the case of Spanish law, the concepts of dynamic loading and reverse loading, such as evidentiary rules, are also manifested, so the TSJ's jurisprudential analysis of the provisions, which was carried out, it is clear that if the liability is subjective it contends to the traditional rule that it will be the one who claims responsibility who is procedurally obliged to prove it, while in objective liability, as the Administration only disclaims force majeure, it must be the defendant or the doctor who proves that he acted in accordance with the rules of the lex artis.

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